A. The rule of law and constitutional justice in the modern world

I. Different approaches to the rule of law

Article 1.1 of the Constitution of the Slovak Republic[1] ("the Constitution") defines the Slovak Republic as a democratic state governed by the rule of law and not bound by any ideology or religion. Another provision of great importance connected to the rule of law is contained in Art. 134.4 of the Constitution, which stipulates that the judges of the Constitutional Court take an oath that in exercising their judicial office they shall among other things uphold the principles of the rule of law.

If we consider the fact that the Constitution itself does not define in any detail the term "rule of law" or the principles of the rule of law, it becomes evident that it must be the case law of the Constitutional Court of the Slovak Republic ("the Constitutional Court" or "Court") which gives them specific meaning. When examining the Court's case law, it must be borne in mind that the Slovak Republic was established as a successor state to the one-time common state with the Czech Republic, which was ruled by a totalitarian regime from 1948 to 1989. After 1989, however, as in the rest of the countries of the former Eastern Bloc, changes were introduced leading to the democratisation of public life, and it was also the case law of the then Constitutional Court which put these legislative changes into practice. An important decision in this regard was the finding of the Constitutional Court of the Czech and Slovak Federative Republic ref. PL. ÚS 1/92:

"Unlike the totalitarian regime, which was based on an immediate purpose and was never bound by legal principles, much less so by constitutional principles, a democratic state is based on completely different values and criteria. ...

Legal certainty as one of the core concepts and requirements of a state governed by rule of law must therefore entail certainty in its substantive values. At the same time, a new state based on rule of law that stems from value discontinuity with the totalitarian regime cannot assume criteria that stem from any set of values different from the rule of law. Respect for continuity with the set of values of the preceding legal system therefore would not be a guarantee of legal certainty, but rather it would challenge the new values, threaten legal certainty in society, and shake citizens' trust in the credibility of the democratic system."

The conclusion presented above contains evident endorsement of a value orientation that runs counter to the neutral observance of positive law and is a reaction to the period of oppression, during which it was through the legal system that the state would assert its despotism and restrictions on the freedoms of its citizens.

The value orientation embodied in the case law of the former Federal Constitutional Court was subsequently endorsed unambiguously by the Constitutional Court of the Slovak Republic, which would then refine this idea even further:

"No modern constitution, including the Constitution of the Slovak Republic, is value-neutral, but is instead based on a relatively integrated system of values that the state upholds, respects and protects through public authorities. These values have an objective character

[1] Available in English at: http://www.nrsr.sk/web/default.aspx?SectionId=124 (in the English version of the website).

and are the expression of a socially recognised universal "good" and are usually of a nonmaterial nature. ***According to the conclusions of the current jurisprudence, unlike standard legal rules (rules of conduct), the state cannot create objective values, but can only recognise and respect them or rely on them and, if appropriate, highlight the importance of certain values at the expense of or in relation to other values*** *... . When a certain objective value is explicitly expressed in the Constitution, it acquires the character of a constitutional value, which enjoys constitutional protection. ...*

The Constitution guarantees protection in different forms and of varying intensity to those objective values that are explicitly expressed in the Constitution. ***Fundamental constitutional values like liberty, equality or human dignity acquire through the manner of constitutional expression (see Art. 2 sec. or Art. 12 sec. 1 of the Constitution) the character of general constitutional principles as the most abstract rules of conduct, which in a concentrated form express the most general aims of the law and together form a system of core values on which the constitutional system of the state is based*** (our emphases)*."*

The above conclusions assume **the existence of objective values not controlled by the state, but which the state merely recognises, and it is the Constitutional Court itself which is ultimately the guardian for compliance with those values. This idea found its expression in the case law of the Constitutional Court in the conception of material rule of law**, which is the opposite of formal rule of law:

"The Constitutional Court has repeatedly emphasised in its previous case-law that the protection granted by the provision of Art. 1 sec. 2 of the Constitution extends to constitutional principles and democratic values that, taken as a whole, form the concept of the material rule of law. …

The material rule of law is not based on apparent observance of the law or on formal respect for its content in a way that feigns compatibility of legally relevant facts with the law. ***The essence of the material rule of law lies in placing the applicable law into conformity with the core values of a democratically organised society, and subsequently in consistent application of the law in force without exceptions based on purposive reasons*** *(our emphasis)."* (PL. ÚS 17/08).

In fact, according to the case law of the Constitutional Court, the principle of rule of law is the fundamental pillar of the existence of the Slovak Republic:

"The general principle of rule of law is a key principle on which the whole legal system as well as the whole system of the functioning of our state is founded. This means that this principle is reflected without exception in all areas of social life." (PL. ÚS 12/05).

Based on the above it can further be stated that the **universal principle of the rule of law is applied in all areas of law** as a rule according to which one must always strive for justice and protect fundamental social values when applying the law. In other words, every application of the law must aim at protecting those values.

The very notion of material rule of law is then seen by the Constitutional Court in its decisions as composed of a number of further constitutional principles and values:

"Constitutional principles and democratic values, which taken as a whole form the concept of the material rule of law (Art. 1 sec. 1 first sentence of the Constitution), stress the requirement to respect constitutionality and legality, legal certainty as well as the requirement of effective and accessible protection of fundamental rights and freedoms." (PL. ÚS 2/2013).

This decision clearly shows that the many principles which together form the concept of material rule of law also include the principle of legality:

*"**In a state governed by the rule of law any act of public authority must be authorised by the law. A state governed by the rule of law is a state bound by the law.** As concerns limitations on the fundamental rights, according to Art. 13 sec. 2 of the Constitution, they must be laid down by law … . The said principle of legality is again emphasised with regard to property in Art. 20 sec. 4 of the Constitution."* (PL. ÚS 3/00).

Legal theory builds in this regard on the case law of the Constitutional Court and divides constitutional principles based on the criterion of their generality into fundamental (general) constitutional principles and subordinate (partial) principles, which reflect the individual components of the fundamental principles.[2] An example of this division can be found in the literature in connection with the general constitutional principle of rule of law, which manifests itself in several partial principles, which include a) guarantees of fundamental rights and freedoms, b) legality and legitimacy, c) sovereignty of the people, d) separation of powers and checks and balances, e) supremacy of the constitution and the law, f) legal certainty and g) the principle of proportionality.[3]

Legal theory then distinguishes between two basic models of the rule of law: the Anglo-Saxon "rule of law" and the continental European "Rechtsstaat". In the Slovak Republic, one can speak of **the existence of a continental model of rule of law with the modifiers "material" and even "social" rule of law**.[4]

In addition to the **text of the Constitution and the case law of the Constitutional Court, which are relevant sources of law implementing the principle of rule of law in the legal system of the Slovak Republic**, the notion of the rule of law can be understood also by drawing on legal theory. However, one must not forget the decisions and practice of other public authorities, which we shall briefly refer to in part III of this report.

International law is also of major importance for the evolution of the concept of the rule of law, since under Art. 7.5 of the Constitution international treaties on human rights and fundamental freedoms, international treaties whose execution does not require a law and international treaties which directly establish rights or obligations of individuals and legal entities and which have been ratified and promulgated in the manner laid down by law have primacy over domestic laws.

At the same time, the Constitutional Court also has the power to decide on the compatibility of law with international treaties to which the National Council of the Slovak

[2] When outlining this classification of constitutional principles, we use as our source the Czech legal theory, whose conclusions are also applicable to the Slovak Republic, cf. Filip, J.; Ústavní právo 1, Základní pojmy a instituty, Ústavní základy ČR, Doplněk, 1999, p.178 .
[3] Bröstl, A. et al.; Ústavné právo Slovenskej republiky, Aleš Čeněk, Plzeň 2010, p. 57 .
[4] Drgonec, J., Ústava Slovenskej republiky. Teória a prax., C.H. Beck, 2015, pp. 231 and 232 .

Republic ("National Council") has given its consent and which have been ratified and promulgated in the manner laid down by law (Art. 125.1 of the Constitution) as well as on complaints by individuals and legal entities in which they claim violation of their fundamental rights or freedoms, or human rights and fundamental freedoms arising from international treaties ratified by the Slovak Republic and promulgated in the manner laid down by law, provided that no other court has the power to decide on them (Art. 127.1 of the Constitution). It follows that international treaties which are part of the legal system of the Slovak Republic are rules of reference in proceedings before the Constitutional Court. The Court applies these treaties directly, citing at the same time decisions of relevant international judicial authorities, mainly the decisions of the European Court of Human Rights ("ECHR") and the Court of Justice of the European Union ("CJEU").

One example of the use of the case law of international courts could be Constitutional Court decision ref. PL. ÚS 106/2011, which concerned the principle of proportionality, i.e. one of the partial principles of the principle of rule of law, in relation to the right to private life. In this case, the Court examined the constitutionality of legislation regulating data collection in electronic communication:

"The criterion of the proportionality of interference requires that balance be maintained between individuals' right to privacy and the choice of means available to the state when pursuing a legitimate aim. The state's choice is limited by the fact that interference with the right to privacy is only possible if it is necessary, and its exercise must respect the requirements applying in a democratic society. The European Court of Human Rights stressed in its case law that pursuant to the Convention, in cases of interference with the right to privacy, the state may not invoke merely some sort of "general necessity". Moreover, ECHR is of the opinion that the term "necessary" is not so flexible as that it can be interpreted as "useful", "proportionate" or "desirable", but must be linked to the existence of "an urgent social need" to perform the interference. On the other hand, ECHR considers its connection with pluralism, tolerance and intellectual freedom as important for the interpretation of the term "democratic society"." (PL. ÚS 10/2014).

II. New challenges for the rule of law

As follows from the first part of this report, a key challenge for the Slovak Republic and its Constitutional Court was the transition from totalitarian to democratic society. Despite the fact that more than 20 years have passed since the fall of the totalitarian regime, Slovak Republic can still be referred to as so-called transitional or perhaps post-transitional democracy, as stated by the Constitutional Court in decision Ref. No. PL. ÚS 102/2011 of 7 May 2014:

"However, we still find ourselves in a transitional or post-transitional democracy, since we are still building and rebuilding the institutional system of public authorities. ...

It is the task of the legislative power to adopt the legal framework for the institutional structure in which public authority shall be exercised. The executive's task is among other things to implement the legislative framework regulating the institutional structure. It is especially in times of social changes such as transition to democracy that even more profound, more revolutionary interference so to speak of the legislative and executive powers into the judicial powers can be tolerated from the point of view of constitutionality. Of course,

the time for revolutionary changes in the newly emerging constitutionalism in the period shortly after the regime change expired in the 1990s. … Be that as it may, in times of post-transitional democracy it must be acknowledged that the legislator still seeks the optimal model of public authorities by identifying and correcting the shortcomings of the previous one… .

The nature of the matter allows for the anticipation of increasingly frequent conceptual legislative changes. In times like these, the Constitutional Court must in a way exercise more self-restraint in interfering with the powers of the legislative assembly from its position of a negative legislator (even more so when the Court acts in the position of a positive legislator). This does not mean that the Court should renounce its role of the guardian of constitutionality; it merely means that the Court should in a sense be more prudent. However, the Court must at the same time remain very cautious of the natural tendencies of the different branches of state power to concentrate power in their hands.

Since the legislation in question regulates relationships within the judiciary and between the judiciary and other branches of state power, it should likewise be pointed out that while judges of the Constitutional Court themselves are part of the judicial power and as experts they must surely have some idea about what kind of regulation would be desirable, it is not their task to assert their ideas of optimal regulation of the judiciary, but merely to review the constitutionality of the statutory regulation adopted by the legislator. The scope of review powers of the Constitutional Court is also related to this."

In addition to the establishment of the institutional structure of the rule-of-law state, the case law of the Constitutional Court on the protection of fundamental rights and freedoms is equally important. As an example could serve decision Ref. No. PL. ÚS 24/2014, which concerned ex ante constitutionality review of an optional referendum called on the basis of a citizens' petition under Art. 95.2 of the Constitution. In the case of this referendum there might have been a collision of fundamental principles, namely the principles of democracy and of sovereignty of the people manifested in the citizens' right to initiate referenda and to vote in them on the one hand, and on the other the principle of the rule of law, which does not allow for a public voting on important questions concerning the very essence of the existence of the Slovak Republic as a state governed by the rule of law. The principle of the rule of law, which includes inter alia the requirement of effective protection of fundamental rights and freedoms, is expressed in Art. 93.3 of the Constitution, according to which fundamental rights and freedoms may not be the subject of a referendum. The Constitutional Court struck balance between the conflicting principles in the decision on the merits in the following way:

"However, it is not advisable to dismiss every question with content even minimally related to one of the fundamental rights or freedoms. Otherwise, this would negate the importance and purpose of referendums, which was obviously not the intention of the framers of the Constitution when incorporating the institution of referendum into it (our emphasis). This general wording must be translated by the Constitutional Court into decisions on contested referendum subjects in specific cases also by examining the consequences of the proposals which might be adopted in an upcoming referendum for the addressees of the legal rules which, pursuant to Art. 98 of the Constitution, are to result from the referendum if it is successful.

Should the adoption of a proposal contained in the referendum question submitted to the Constitutional Court for examination lead to a widening of the standard of a specific

fundamental right or freedom in relation to its level pursuant to its regulation in international law and national constitutional law and the related decision-making practice of international courts as well as the Constitutional Court, then the room for possible Constitutional Court intervention is largely limited and will always depend on thorough examination of each individual referendum question. However, the Constitutional Court must always take care that the potential widening of the standard of a specific fundamental right or freedom does not lead to the lowering of the standard of another fundamental right or freedom."

As regards other challenges for the rule of law which consist in finding the solutions to complex problems of mass migration and terrorism, it must be noted that the Slovak Republic is only marginally affected by these phenomena and in the case of terrorism only indirectly as a member state of the European Union and an ally of countries in which terrorist attacks do occur. Notwithstanding this observation, the question of terrorism has recently prompted amendment of Art. 17.3 of the Constitution when with effect from 1 January 2016, in addition to the general time limit of 48 hours, a special time limit of 96 hours was introduced for crimes of terrorism, in which the suspect must be interrogated and either released or taken before the court. This constitutional amendment did not lead to any major controversy and is not considered as problematic. On the other hand, the Court found unconstitutional legislation laying down the obligation for internet and telecommunication service providers to retain for some time all traffic data on the communication which had taken place, as well as location data and data on the communicating parties, in case state bodies need them. In the decision on the merits of this case (Ref. No. PL. ÚS 10/2014), the Court held that the challenged provisions of the Law on Electronic Communication could not be considered as necessary for attaining the objective pursued by it, even if the objective itself was legitimate. The fight against serious crime and ultimately public safety can be achieved by other means which constitute a less intensive interference with the right to privacy when compared with the preventive and systematic retention of the data. The Court's decision thus requires the National Council to be more prudent in finding the necessary balance between security and citizens' freedoms.

As pointed out in the first part of this report with regard to the cases of collision of national law with international law, international treaties specified in Art. 7.5 of the Constitution take precedence over ordinary laws and serve as rules of reference in proceedings before the Constitutional Court. The manner in which the Court resolves potential collision of international law with the national law may be demonstrated on the relation to the law of the European Union:

"From the beginning of its work, the Constitutional Court has always adjudicated in line with the principle of pacta sunt servanda that fundamental rights and freedoms laid down in the Constitution must be interpreted and applied in line with international treaties on human rights and fundamental freedoms … . ***Unless the wording of the Constitution prevented it, the Constitutional Court would thus always take into account the text of those treaties and case law adopted on their basis when defining the scope of fundamental rights and freedoms laid down in the Constitution … .*** *While the Charter of the Fundamental Rights of the European Union was not adopted as an international treaty, following the adoption of the Lisbon Treaty it became a legally binding part of the primary law of the European Union with the same legal force as the Treaties of the European Union (Art. 6.1 of the Treaty on European Union as amended by the Lisbon Treaty)."* (PL. ÚS 10/2014).

It follows from the above decision that provisions of ordinary laws must always be interpreted in line with international treaties binding for the Slovak Republic and these provisions must not contradict the said treaties.

The situation is different though when it comes to the Constitution itself, which according to the quoted decision takes precedence over international treaties. Moreover, the Court has the power under Art. 125a of the Constitution to decide on the constitutionality of concluded international treaties which require the consent of the National Council. A motion can be filed by the President of the Slovak Republic and by the Government before submitting the concluded international treaty to the National Council of the Slovak Republic. If the Constitutional Court holds in its decision that an international treaty is incompatible with the Constitution or with a constitutional law, such a treaty cannot be ratified (this is another case of ex ante constitutionality review). It must be added though that no motion for constitutionality review of an international treaty has so far been filed and the Constitution itself generally meets the requirements stemming from international conventions. In addition to the Convention on the protection of human rights and fundamental freedoms and the Charter of Fundamental Rights of European Union, the case law of the Constitutional Court uses a whole number of other international treaties on human rights and freedoms as rules of reference.

The Constitution and the case law of the Court also address the issue of potential collision of national law with the EU secondary law. Pursuant to Art. 7.2 of the Constitution, the Slovak Republic may transfer the exercise of a part of its powers to the European Communities and European Union by an international treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty. Legally binding acts of the European Communities and European Union have primacy over the laws of the Slovak Republic. The Court expanded on these provisions in constitutionality review proceedings:

"According to Art. 124 of the Constitution, the Constitutional Court is an independent judicial authority for the protection of constitutionality. Therefore, even after the accession of the Slovak Republic to the European Union, the legal rules of the constitutional system of the Slovak Republic still remain the referential framework for any review carried out by the Constitutional Court. (NB: the provisions of the EU secondary law do not belong to these rules) ***However, the Constitutional Court cannot ignore the impact the EU law has on the drafting, application and interpretation of the national law in areas of regulation whose adoption, effect and purpose originate in the EU law … . The law of the European Union has this impact on the national law if the national regulation falls within the scope of force of the law of the European Union."***

In other words, in case of a collision, the national law must always be interpreted in line with the secondary law of the European Union, or else it should not be used:

"If there is a conflict between the Community law and a legal rule on the national level, the authority applying the law is obliged to interpret the national law in line with the Community law (so-called "euro-conforming" interpretation). If a member state's legal rule does not allow for this type of interpretation, the authority applying the law is obliged to refrain from using this rule if it contradicts the Community law." (III. ÚS 260/2012).

In relation to the impact of international law it is not without significance that according to an amendment to the Constitution and to Law no. 38/1993 Coll. on the

organisation of the Constitutional Court of the Slovak Republic, on the proceedings before it and on the status of its judges ("the Law on the Constitutional Court"), since 1 September 2014 it has been possible to apply for a reopening of the proceedings before the Constitutional Court if the obligation to reopen the proceedings follows from a decision of an authority of an international organisation established for the purpose of implementing an international treaty which is binding for the Slovak Republic (e.g. from the decision of ECHR).

The Constitutional Court has also stated in its decisions (ref. IV. ÚS 206/08 and PL. ÚS 3/09) that in some case it can be obliged to refer a case to the CJEU to obtain a decision on a preliminary question under Art. 267 of the Treaty on the Functioning of the European Union. However, this has not happened yet.

III. Law and state

It already follows from the preceding parts of the present report that the Constitutional Court belongs among the constitutional courts of "the Kelsenian type", i.e. it is a centralised body standing outside the system of general courts and its role is the exercise of constitutionality review and protection of constitutionality.[5] In the Slovak Republic, the Constitutional Court exercises constitutionality review on two fundamental levels (for the sake of being concise, we will not address the other powers of the Court).

On the first level, acting as so-called negative legislator in the context of abstract constitutional review, the Court examines the conformity of legal regulations with the Constitution and international treaties and in some cases also the conformity of lower-level legal regulations with laws. If the Court finds incompatibility of the examined legal regulations with the aforementioned rules of reference, it issues a decision on the basis of which those legal regulations lose effect and if they are not harmonised with the rule of reference, the examined legal regulations lose validity as well (Art. 123.3 of the Constitution).

When exercising this power, the Court naturally defines the constitutional limits of the legislative assembly's activities, while at the same time the Court is prudent when assuming the role of the negative legislator and intervenes in the work of the legislative assembly solely when it is absolutely necessary:

"If the legislator adopts a legal rule which is not formulated in a clear manner, it leads to legal uncertainty. The extent of legal uncertainty differs. It can be sometimes eliminated using legal interpretation in accordance with the general principle of interpretation and application of law laid down in Art. 152.4 of the Constitution. At other times, legal uncertainty concerning the conduct required by a certain legal rule cannot be eliminated even by using Art. 152.4 of the Constitution.

When a legal rule can be understood in two ways and one interpretation is in line with the Constitution and international conventions under Art. 11 of the Constitution while the other contradicts them, there is no constitutional reason for abrogating that legal rule. In that case, all state bodies have the constitutional duty to apply the legal rule in line with the Constitution (Art. 152.4 of the Constitution)."

[5] Tom Ginsburg & Nuno Garoupa, "Building Reputation in Constitutional Courts: Political and Judicial Audiences ," 28 Arizona, Journal of International and Comparative Law 539 (2011), available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2441&context=journal_articles .

This means that in accordance with the principle of legal certainty, which is a partial principle of material rule of law, a law can be declared unconstitutional only if there is no possibility of a constitutionally conforming interpretation (and application) of that law. It can be said that this sets the minimum standards for the drafting of ordinary laws.

However, in case ref. PL. ÚS 48/03 the Constitutional Court also ruled on minimum procedural standards for the adoption of laws: *"… in cases of gross and arbitrary failure to comply with the rules governing the legislative procedure, violation of the rules of the constitutional procedure before the National Council may result in the adopted law being incompatible with the Constitution."*

In addition to the aforementioned criteria for the adoption of laws stemming from the general principle of rule of law, the Constitutional Court would also address in its decisions partial constitutional principles which have an immediate impact on law-making, e.g. the principle *"nulla poena sine lege"*:

"The punishment as society's reaction to a committed crime, which is a form of injustice, should remedy the injustice caused by the crime and not multiply it even further. A disproportionate punishment can never be considered just and only a proportionate punishment can ever be just. …

It is then apparent that an essential prerequisite for the respect of the requirement of the proportionality of punishment by an ordinary court on an individual level is the respect of this requirement by the legislator on a general level, since according to the principle of nulla poena sine lege, courts are bound by the law when deciding on the punishment. For that reason, if a court's duty to impose a disproportionate punishment has already been laid down by the legislator directly in the law, that court has no other option in an individual case than to sentence the perpetrator to a punishment which is not proportionate." (PL. ÚS 106/2011).

On the second level, the Court decides on complaints by individuals and legal entities who claim violation of their constitutional rights by public authorities' actions, i.e. in cases concerning the individual application of law. According to Art. 127 of the Constitution, the Court has the power to examine decisions by general courts and may even examine decisions by other public authorities, provided that no other court has jurisdiction to decide on the protection of rights. The principle of subsidiary jurisdiction of the Constitutional Court is thus characteristic of decisions on constitutional rights within the scope of individual application of law:

"It is in the first place the general courts that are responsible for the interpretation and application of the laws as well as the observance of fundamental rights and freedoms. The interpretation of the legislative text of a legal rule and its application by general courts must be in conformity with the Constitution (Art. 144 sec. 1 and Art. 152 sec. 4 of the Constitution) and the Constitutional Court merely assesses whether the relevant interpretation of the legal rule applied under specific circumstances of the case is constitutionally acceptable or whether this interpretation is a negation of the purpose, essence and meaning of the legal rule." (IV. ÚS 123/08).

Since all public authorities are obliged to act in line with the Constitution and the principles contained in it, their decisions are another way of understanding the concept of material rule of law.

If the Constitutional Court finds that there has been a violation of constitutional rights in an individual case, it annuls the challenged decision and refers the case back to the relevant body for further proceedings (if the violation lies in failure to act, the Court orders that body to act). The decisions of the Court issued following individual constitutional complaints are binding for the concerned bodies in individual cases, as follows from Section 56 of the Law on the Constitutional Court. Hence, while from the formal point of view the decisions of the Court on individual complaints are binding inter partes, in practice, however, they are respected and observed even in analogous cases.

The only exception so far was the decision in case ref. I. ÚS 223/09, in which the Constitutional Court annulled a decision by the Supreme Court of the Slovak Republic ("Supreme Court") and referred the case back for further proceedings. Subsequently, the Supreme Court filed a preliminary question with the CJEU.[6] The interesting thing about this case was the fact that one of the parties to the proceedings in question then claimed before the Constitutional Court that the Supreme Court had violated his right to fair trial by referring the case to the CJEU. This complaint was nonetheless rejected by the Constitutional Court (ref. II. ÚS 128/2011). The Court found that the Supreme Court acted in line with the EU law in that case.[7] Not even in this case can one speak of any fundamental conflict between the Constitutional Court and ordinary courts.

In other words, there are generally no conflicts in the Slovak Republic between ordinary courts and the Constitutional Court and it can be stated that the case law of the Court defines constitutional criteria for the application of law not only for ordinary courts, but also for all other public authorities.

In fact, we can also include among public authorities private entities to which the state has transferred part of its power:

"According to well-established case law of the Constitutional Court, it follows from Art. 127 of the Constitution in combination with Art. 2.2 and Art. 3 of the Constitution and most recently also from Section 51.1 of the Law on the Constitutional Court that a complaint under Art. 127.1 of the Constitution can be used to seek protection of fundamental rights and freedoms against a decision, measure or other intervention by a body having the attributes of public power through which this body has interfered with the legal sphere of the complainant from a position of authority. Should the complainant challenge actions or decisions by an entity not exercising public authority, Art. 127 of the Constitution cannot be applied to his/her complaint without acting ultra vires (ref. I. ÚS 76/02, ref. I. ÚS 139/04, ref. I. ÚS 57/04, ref. IV. ÚS 459/2011)."

This conclusion can be found in the statement of reasons to the decision in case ref. PLz. ÚS 5/2015, in which the Court ruled that it does not have the power to review the

[6] CJEU decision in that case is available in English at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5e1dd7f8f210349c1b39ae6b5d14eedcf.e34KaxiLc3eQc40LaxqMbN4Pa3qRe0?text=&docid=132341&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=641525 .

[7] The Constitutional Court was referring here to CJEU decision in case C-210/06 Cartesio.

decisions by arbitration tribunals because they do not have the nature of public authorities.[8] With respect to private entities whose actions do have the attributes of public authority, we point out that their procedure falls within the scope of review by ordinary courts (Section 4.c and 4.d of Law No. 162/2015 Code of Administrative Judicial Procedure). For that reason, the Court must observe the principle of subsidiarity in these cases and decide on potential violations of constitutional rights solely after an ordinary court has decided.

As regards the liability of public officials in Slovakia, some of them have so-called non-accountability, i.e. they cannot be prosecuted for acts directly related to the performance of their public office. Pursuant to Art. 78 of the Constitution, a Member of Parliament may not be prosecuted for his voting in the National Council of the Slovak Republic, or its bodies; this applies also after the termination of his/her mandate. Likewise, judges of the Constitutional Court (Art. 136.1 of the Constitution) and ordinary court judges (Art. 148.4 of the Constitution) may not be prosecuted for their decisions, which again also applies after the termination of their mandate. This non-accountability protects the independence and proper performance of the parliamentary as well as judicial mandates.

It should be added though that in the past some public officials also had so-called "inviolability", which meant that they could be prosecuted for crimes only with the consent of the body having the jurisdiction to grant the consent. The public officials mentioned in the preceding paragraph were also included in this category and they were thus protected not only by non-accountability, but in cases not related to the performance of their office, they were also protected by inviolability. This category also included the Prosecutor General, who was, however, protected only by inviolability. In the case of parliamentary deputies, the body competent to grant the consent was the National Council; in the case of ordinary court judges, Constitutional Court judges and the Prosecutor General, the competent body was the Constitutional Court. The Court's case law from that period concerning criminal prosecution of ordinary court judges, which defined the boundary between non-accountability and inviolability, i.e. the limits of conduct falling within the scope of judges' decision making for which they cannot be held criminally liable, remains relevant even today. In its decision ref. PL. ÚS 15/2010, the Court held that non-accountability covers not only decision making itself, but also *"acts directly connected to or immediately preceding the judge's decision making"*. It can be concluded that judicial non-accountability concerns all lawful procedural acts leading to a decision in a particular case.

The President has special status among the public authorities as he has full non-accountability with the exception of wilful violation of the Constitution and high treason. The President may then be impeached for these acts by the National Council and is subsequently tried by the Plenum of the Constitutional Court. If the Court finds him guilty, he loses the presidential office and eligibility. As of yet, there has been no case of impeachment in the history of the Slovak Republic.

In cases not covered by non-accountability, all public officials are responsible for crimes of abuse of their authority under Section 326 of the Criminal Code and obstructing the performance of duties by a public official under Sections 327 and 327a of the Criminal Code.

Related to responsibility for the exercise of public office is the question of compensation for damage which can be incurred as a result of wrongful conduct or decision

[8] In the Slovak legal system, the jurisdiction of an arbitration tribunal may be established solely under a private agreement of the persons concerned.

by a public authority. This issue is regulated by Law no. 514/2003 Coll. on liability for damage caused in the exercise of public authority, according to which the state has the right to claim back damages paid from a public official who has issued an unlawful decision or participated in wrongful procedure when exercising public authority entrusted to him by the law. This law then also contains special provisions on the right to recourse against ordinary court judges and employees of public authorities.

The performance of a public office may nonetheless see cases of unwanted collisions of public and private interests, which are described primarily in Constitutional Law no. 357/2004 Coll. on the protection of public interest in the performance of public office. For each public official, this law defines cases of incompatibility of the performance of their office with other positions, activities or employment, as well as specifying financial sanctions for cases when there is a collision of public and private interests. Repeated violation of this law may, however, entail loss of the public office even for public officials elected directly by the citizens of the Slovak Republic. According to the applicable legislation, the final instance deciding on sanctions imposed on public officials is the Constitutional Court. Other possible cases of incompatibility of public offices are described in individual laws (e.g. Law no. 400/2009 Coll. on civil service).

IV. Law and individuals

We may begin this part of the report by a reference to Constitutional Court decision in case ref. II. ÚS 153/2013, in which the complainant was a Slovak national who claimed that Constitutional Law no. 333/2011 Coll. on the reduction of the term of office of the National Council of the Slovak Republic (and ad hoc constitutional law having the purpose of resolving a political crisis by means of having early parliamentary elections before the end of the constitutionally-defined four-year parliamentary term) violated his right to participate in the administration of public affairs under Art. 30.1 of the Constitution.[9] The Court concluded as follows:

"The Constitutional Court observes that it is generally not possible to challenge normative legal acts in proceedings on constitutional complaint and holds the position that basically it should respect the form of legal acts. ...

Even at the beginning of its activity, the Constitutional Court held (in fact in the very first decision published in the Collection of Findings and Rulings) that proceedings on the petition from individuals and legal entities (the precursor to constitutional complaints) claiming violation of their rights pursuant to Art. 130 sec. 3 of the Constitution cannot be commenced and violation of the constitutional right cannot be found if these proceedings have to be preceded by proceedings on constitutional compatibility of laws and the initiator does not have the standing to initiate such proceedings."

The Constitutional Court then pointed out that it *"is quite possibly the only constitutional court before which proceedings on constitutional complaint and proceedings on the constitutional conformity of legislation are not explicitly interconnected."*

[9] The complaint was to some extent inspired by a similar case in the Czech Republic. For more details in the English language, see: http://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1/ .

It follows from the above that public entities may not challenge (directly or indirectly) generally binding legal regulations before the Constitutional Court; it is exclusively public authorities listed in Art. 130.1.a to 130.1.g of the Constitution which have this possibility.

Individuals and legal entities can thus only file individual complaints and it follows from the principle of subsidiarity that they can only do so after using all the other legal remedies. As already stated, the decisions of ordinary courts can also be challenged through individual complaints. In connection with these cases the Court has developed extensive case law concerning violations of the fundamental right to access to court and to judicial protection under Art. 46 of the Constitution, in which it addressed various issues regarding the access to court (including the issues of court fees, of legal representation in judicial proceedings, and of procedural time limits) and fair trial.

It can be stated that the most frequently occurring serious violation of this fundamental right by ordinary courts lies in failure to provide sufficient reasons for their decisions. An example of this is case ref. I. ÚS 290/2015:

"16. The Constitutional Court decided that justification of judicial decisions belongs to guarantees of the right to fair trial under Art. 46.1 of the Constitution and that this right implies the corresponding duty of courts to provide reasons for their decisions. The requirement of justification of judicial decisions is neither an end in itself nor a pure formality. When a court provides reasons for its decision, it can be verified if the court has taken into account all the relevant factual and legal elements of the dispute and if their evaluation by the court is consistent with the legal provisions according to which the court has decided the case. Providing reasons for a decision is a guarantee that administration of justice is not arbitrary. It is a prerequisite for the parties to be able to exercise their right to legal remedy effectively. Finally, it is a prerequisite for public scrutiny of administration of justice, which is the only way available of monitoring judiciary where, for reasons of preserving its independence, its decisions are not subject to review by another form of public authority separate from the judiciary. ...

17. The Constitutional Court held: "The Constitutional Court acknowledges that the fundamental right to fair trial under Art. 46.1, Art. 48.2 of the Constitution and Art. 6.1 of the Convention also includes the right to a statement of reasons for the judicial decisions which gives answers in a clear and comprehensible manner to all the relevant legal and factual questions related to the object of judicial protection, i.e. the pursuit of and protection against claims". ... The Court has repeated this opinion several times.

18. A court fails to fulfil its obligation implied in the Constitution if it completely neglects to provide reasons for its assessment of legally relevant circumstances .... A court also fails to fulfil its obligation implied in the Constitution if the reasons provided are not sufficient."

However, the Court does take into account in its decisions that the right to access to court also has its limits, i.e. that the legislator may set specific conditions which must be met if this constitutional right is to be exercised. Those limits include the obligation to pay court fees:

"42. Imposing court fees in civil proceedings cannot in itself be considered as contrary to the right to access to court under. Art. 46.1 of the Constitution or Art. 6.1 of the Convention .... The fact that the exercise of this fundamental right may be subject to limitations derives

indeed from the very nature of that right. In fact, its exercise requires the state to create an effective system of judicial protection of individuals' rights, since the state's ability to fulfil its role will always be at least de facto limited. Moreover, none of the aforementioned provisions guarantees the right to court proceedings ex gratia ….

43. ... However, if a particular court fee is to be considered as acceptable interference with the fundamental right to judicial protection, it must not only pursue a legitimate aim, but also respect the constitutionally defined limitations deriving from the principle of proportionality. Any particular measure limiting an individual's right to access to court must be proportionate to the aim pursued ….

44. In accordance with Art. 13.4 of the Constitution, as one of material limitations related to court fees should also be considered the obligation to take into account their essence and purpose. The applied measures must not limit the individual's access to court to such extent or in such manner that the very essence of this fundamental right is impaired ….” (PL. ÚS 109/2011).

It should be noted at this point that the Slovak Republic is one of the few countries in which even proceedings before the Constitutional Court are subject to court fees, even if only in the special cases of so-called "recurrent submissions" concerning factually and legally analogous matters which has already been decided by the Court and in which the petitioner was unsuccessful. Subject to court fees is, however, only the eleventh and every subsequent complaint filed in an analogous matter by the same petitioner with the Court in the same calendar year. The reason for this amendment was the high number of recurrent constitutional complaints in identical matters which comprised a large part of the total number of submissions filed with the Court. The number of these submissions is indeed remarkable, e.g. in 2015 they amounted to 16,847 and this year the number of cases decided by the Court has so far been 15,266.

A substantial part of submissions filed with the Court consist of constitutional complaints by individuals and legal entities, i.e. cases of claimed violations of constitutional rights in the individual application of law. When deciding on these complaints, the principle of rule of law is applied as an interpretational guideline, even if solely in connection with other, more concrete constitutional provisions. The application of constitutional principles in proceedings on individual complaints can be demonstrated on the decision in case ref. II. ÚS 596/2014, which concerned the principles of equality, legality and proportionality of interference with constitutional rights (these principles can be described as partial principles of the general principle of rule of law):

"The provisions of Art. 12 and Art. 13 of the Constitution constitute a gateway into the constitutional regulation of fundamental rights and freedoms and have the nature of a constitutional principle which all public authorities are obliged to observe when interpreting and applying the Constitution. These constitutional provisions are always an implicit part of the decision-making of the Constitutional Court, i.e. also its decision-making on infringements upon fundamental rights and freedoms guaranteed by Art. 127 of the Constitution ….

The provisions of Art. 12 and Art. 13 of the Constitution do not, however, have the nature of a fundamental right or freedom whose protection could in principle be claimed separately before the Constitutional Court. Their application in individual complaints is

connected with the violation of an individually determined fundamental right or freedom of the complainant and therefore the request to find a violation of Art. 12 sec. 1 and 2 and Art. 13 sec. 3 of the Constitution without connection to a specific fundamental right or freedom of the complainant is manifestly unfounded ….”

This approach, however, does not apply in proceedings on the compatibility of legal regulations, where the principle of rule of law can be used not only in connection with other, more concrete constitutional provisions, but also separately, as follows from decision ref. PL. ÚS 17/08:

“In the proceedings on the conformity of legal regulations with the Constitution and with qualified international treaties (Art. 125 of the Constitution), the assessment of the conformity of the challenged legal regulation with Art. 1 sec. 1 of the Constitution generally is of subsidiary (supportive, supplementary) importance. In cases where the challenged legal regulation is declared incompatible with the constitutional system, the finding that the law or other examined generally binding legal regulation is incompatible also with other constitutional rules or with agreed international treaties takes precedence. This does not, however, exclude the situation where the breach of the principles of material rule of law is so serious that in itself it must lead to a decision on nonconformity of the law with the Constitution. The establishment of a state body that by its nature lies outside the standard organization of public authorities in the state, without there being any compelling reason justifying the establishment of such a state body, in itself seriously threatens the essence of the material rule of law. For that reason the establishment of such a body is incompatible with the protection guaranteed by Art. 1 sec. 1 of the Constitution within the scope of the principles of the rule of law….”