Rapport national / National report / Landesbericht / национальный доклад

RÉPUBLIQUE SLOVAQUE / SLOVAK REPUBLIC / SLOWAKISCHE REPUBLIK / СЛОВАЦКАЯ РЕСПУБЛИКА

The Constitutional Court of the Slovak Republic
Ústavný súd Slovenskej republiky

Anglais / English / Englisch / английский

I. The role of the Constitutional Court in defining and applying explicit/implicit constitutional principles

1. The status of the constitutional principles in the legal system of the Slovak Republic

The Constitution of the Slovak Republic[1] (hereinafter referred to as the "Constitution") does not contain any provision that would contain a coherent and comprehensive positive list or definition of constitutional principles. The Constitution does not even have any explicit provisions that expressly define any of the constitutional principles as cornerstones of the constitutional order. In spite of this fact it is, however, clear from the very wording of the Constitution (e.g. Art. 1, Art. 2, Art. 12 sec. 1 and 2, Art. 13, Art. 31, Art. 55 or Art. 141 of the constitution) that it recognises the existence and importance of these principles. This follows also from Art. 134 sec. 4 of the Constitution, which reads as follows:

A judge of the Constitutional Court shall take the following oath before the President of the Slovak Republic:
"I swear on my honour and conscience that I will ***protect the inviolability of natural human rights and rights of a citizen, the principles of rule of law***(our emphasis), *uphold the Constitution, constitutional laws and international treaties that were ratified by the Slovak Republic and were promulgated in the manner laid down by law and decide cases to the best of my abilities and conscience independently and impartially."*

This article of the Constitution thus obliges the judges of the Constitutional Court and at the same time encourages them to take into account also the principles of the rule of law in their decision-making. It is therefore evident that the case-law of the Constitutional Court plays an important role in their definition. This conclusion is also emphasised by the historical context since 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 this period (referred to as "the period of oppression", see for example Law No. 553/2002 Coll. on the Nation's Memory), changes were introduced in the constitutional order that were supposed to emphasise the democratic character of the then still common state of Czechs and Slovaks (for more details on the dissolution of the common state, see part II. of this report). In the period after the fall of the totalitarian regime, it was also the decision-making of the Constitutional Court that put these legislative changes into practice and helped define the foundations of a democratic society. An important decision from this viewpoint was the finding of the then Constitutional Court of the Czech and Slovak Federative Republic in the case Ref. No. PL ÚS 1/92. We quote from the reasoning of this decision:

"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 the value discontinuity with the totalitarian regime cannot assume criteria that stem from any set of values different from the rule of law. Respect

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

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 the society, and shake the citizens' trust in the credibility of the democratic system."

The conclusion presented above contains evident endorsementof 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 massive restrictions on the freedom of its citizens. Emphasis on this value orientation then paves the way for the application of (constitutional) principles,since these are defined in the legal theory also as rules of a relatively high degree of abstractness which are explicitly or implicitly inherent in the given legal system[2], andwhich can be understood as the bearers of the fundamental social values, which they are closely linked to, but which they cannot be equated with.[3]

These conclusions are also confirmed by the case-law of the Constitutional Court of the Slovak Republic ("Constitutional Court"):

"As a result of a shift in the way constitutional principles are viewed there has also been a shift away from a formal understanding of rule of law towards its material understanding, which the Constitutional Court clearly endorses in its case-law."(PL. ÚS 3/2012).

For this reason, there are clear tendencies in the case-law of the Constitutional Court for the protection and even precedence of fundamental social values (constitutional principles):

"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 an apparent observance of the law or on the formal respect of 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).

This concept of the material rule of law relies directly on the application of constitutional principles, whereby their task is to harmonise the applicable law with the core values of a democratic society. This part of the reasoning of the decision of the Constitutional Court is almost identical to the definition of the role of legal principles in the legal literature, according to which legal principles "fulfil the role of general regulatory ideas and normative

[2] For more details, see: Boguszak, J.; Pojetí, druhy a významprávníchprincipů, In: Právnyobzor 3, ročník 2003, p. 241.
[3] For more details, see: Večeřa, M.; Povaha a zdrojeprávníchprincipů, In.: Princípy v práve, Zborníkpríspevkov z medzinárodnejvedeckejkonferencie, SAP, 2015, p. 49.

guidelines that are intermediaries between the operating extrajuridical factors and the legal rule and thus transform general considerations into legal form".[4]

This conclusion can also be demonstrated in the decision of the Constitutional Court Ref. No. PL. ÚS 12/01 (**available in CODICES**):

"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 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 emphasis)."

Given this specific importance of legal principles, it can be stated that they reflect society's core values and are an inherent part of the constitutional system of the Slovak Republic or even its foundation. In its decision Ref. No. PL. ÚS 12/05 the Constitutional Court stated with regard to the constitutional principle of rule of law:

"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."

In its case-law the Constitutional Court has also defined the normative nature and binding force of constitutional principles:

"The precepts of the constitutional rules contained in the individual articles of the Constitution (i.e. also the general principle of rule of law and the principle of separation of powers) must also be observed in the adoption of every law of the National Council of the Slovak Republic, irrespective of whether this concerns a law that regulates certain social relations for the first time or a law amending or supplementing an already existing statutory regulation of certain social relations."(PL. ÚS 25/00)

And in another decision:

"Art. 55 sets forth the principles of the economic policy of the Slovak Republic, which include the support and protection of the competitive economic environment and the creation

[4] Cf. Večeřa, M.; Právníprincipy, přirozenéprávo a hlediskaspravedlnosti, In: Právnyobzor 3, ročník 2003, p. 248.

of legal remedies and safeguards against any restriction of competition which the law defines as illegal. The principles of economic policy belong among the fundamental constitutional principles and through them the constitutional protection of legal entities is ensured. …

The Constitution is the basic law of a state governed by the rule of law in the material sense and therefore its provisions are legal rules with legally relevant contents and the capacity to produce legal effects. They cannot be interpreted and applied as mere phrases, slogans or witticisms without any legal meaning." (PL. ÚS 14/2014).

The importance and binding force of constitutional principles then naturally raise the question of theirknowability or more precisely of the sources from which these principles are inferred. As already indicated, the Constitution does not contain a full list of the principles. Their existence, however, can be inferred from the wording of several provisions of the Constitution (e.g. Art. 1, Art. 2, Art. 12 sec. 1 and 2, Art. 13, Art. 31, Art. 55 or Art. 141 of the Constitution), while their content and legal effect are explained in the case-law of the Constitutional Court.

The case law of the Constitutional Court and the related jurisprudence thus remain the primary sources of knowledge of constitutional principles.In the case law of the Constitutional Court we can find references toa wide range of constitutional principles, which can be divided 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.[5]An example of this division can be found in the literature in connection withthe 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.[6]The division of the principles according to their degree is not unambiguous, as some of the above-mentioned partial principles are considered by some legal scholars as general principles (e.g. the principle of the sovereignty of the people[7]).

The above enumeration of constitutional principles is not exhaustive, although it is sufficient to show clearly which provisions of the Constitution are their sources. This means primarily Chapter One, General Provisions, which are characterized by a high degree of generality and in which the fundamental features of the constitutional system of the Slovak Republic are enshrined. Among the examples are Art. 1 sec. 1 of the Constitution, according to which the Slovak Republic is a democratic state governed by the rule of law, or Art.2 sec. 1 of the Constitution, which stipulates that the state power derives from the citizens (the principles of the sovereignty of the people).Constitutional principles are also found in the provisions of the Second Chapter in the Constitution, which sets out the fundamental rights and freedoms, where for example in Art. 13 sec. 3 the constitutional principle of equality is embodied ("Legal restrictions on fundamental rights and freedoms shall be applied equally in all cases fulfilling the specified conditions."). This provision could also be used as an example of identifying constitutional principles in the case-law of the Constitutional Court. In its decision Ref. No. PL. ÚS 12/2014, the Constitutional Court stated:

[5] When classifying constitutional principles, we follow the Czech legal theory, whose conclusions are applicable in the Slovak Republic as well, cf. Filip, J.; Ústavníprávo 1, Základnípojmy a inštitúty, Ústavnízáklady ČR, Doplněk, 1999, p.178

[6] Cf. Bröstl, A. et al.; ÚstavnéprávoSlovenskejrepubliky, AlešČeněk, Plzeň 2010, p. 57

[7] Cf. Filip, J.; Ústavníprávo 1, Základnípojmy a instituty, Ústavnízáklady ČR, Doplněk, 1999, p. 183

"The constitutional principle of equality is expressed in the legislature as well as in the application of law asby its very nature it represents the equality of all before the law, thus ultimately being the basis for protection against discrimination

The provision of Art. 13 sec. 3 of the Constitution contains the principle according to which the statutory limitations on the fundamental rights and freedoms are possible only under the condition that they shall apply equally to all cases that meet the specified conditions.

In case Ref. No. PL. ÚS 10/02,the Constitutional Court stated that statutory regulation which favours a certain group of people cannot be solely for that reason declared as infringing upon the principle of equality. However, the legislator must consider whether there are grounds for such favourable treatment, what its aims are, and there must be a relationship of proportionality between these aims and the favourable treatment provided in the law.

In decision Ref. No. II. ÚS 5/03 the Constitutional Court stated that there is always a breach of the principle of equality if one group of addressees of the legal rules is treated differently from another group despite the fact that between the two groups there are no differences of the type and severity which would justify such a difference of treatment. There is, however, no breach of the principle of equality if it is proved that different groups of subjects are treated differently. Such treatment cannot be considered as discriminatory."

Constitutional principles are, however, also inferred from other articles of the Constitution that are of a lower degree of generality. As an example we can cite Art. 141 sec. 1, according to which the judiciary in the Slovak Republic is administered by independent and impartial courts:

"It is undisputed that the principle of judicial independence is one of the essential elements of a democratic state governed by the rule of law (Art. 1 sec. 1 of the Constitution), stemming from the neutrality of judges as a guarantee of fair, impartial and objective court proceedings. This principle contains a number of aspects which together create the conditions enabling the courts to perform their tasks and duties primarily in protecting the fundamental rights and freedoms of citizens. It is based on the independence of the courts (Art. 141 sec. 1 of the Constitution) and the independence of judges (Art. 144 sec. 1 of the Constitution). The independence of judges in a broader sense, however, must also be understood their material independence."(PL. ÚS 12/05).

Jurists see legal principles even in the very Preamble to the Constitution, which combines the national principle (*We, the Slovak Nation…*) with the civil principle (*…Together with members of national minorities and ethnic groups living on the territory of the Slovak Republic…Thus we, the citizens of the Slovak Republic…*)[8]. However, as one of the former judges of the Constitutional Court points out in his commentary on the Constitution, basing his argument on the case-law of the Constitutional Court, the preamble itself is not, unlike the rest of the text of the Constitution, a source of law. In this conclusion he refers to the decision in case Ref. No. I. ÚS 30/1999, in which the Constitutional Court stated:

[8] Cf. Chovanec, J.; Desaťrokovodúčinnostiústavy SR (Demokraticképrincípyústavy), available in Slovak at: http://www.dotyky.net/?p=1653

"Preambles are not an essential requisite of any normative act and have no legal importance when assessing its normative content." [9]

It can therefore be concluded at this point that constitutional principles are general legal rules enshrined in the Constitution and reflecting fundamental social values. According to the case-law of the Constitutional Court, the abovementioned legal principles form the foundations of the constitutional system of the Slovak Republic.

2. Application of constitutional principles

As follows from the already cited decision of the Constitutional Court in case Ref. No. PL. ÚS 12/04, constitutional principles are employed as much in the adoption of laws as in their application in specific cases. From the point of the view of the Constitutional Court, which as a so-called negative legislator decides on the conformity of legal regulations with the Constitution and thus ultimately on their validity and force (Art. 125 of the Constitution), as well as on individual complaints claiming breach of subjective constitutional rights (Art. 127 Constitutional), both levels of application of constitutional principles are relevant.

In cases concerning the individual application of the law, the Constitutional Court recognises its subsidiary position, which can be demonstrated for example using the decision in case Ref. No. IV. ÚS 123/08:

"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."

Thus, according to this decision it is in the first place all the state authorities which are obliged to apply the law in accordance with the Constitution[10]and the principles enshrined therein, whereas the Constitutional Court only monitors the observance of this constitutional level of the application of law. Moreover, according to the constituent case-law of the Constitutional Court, constitutional principles cannot be used in decision-making on individual complaints independently as these principlesdo not have the nature of individual rights, but always and only in connection with another specific constitutionally guaranteed right:

"A condition for the implementation of any constitutional principle, and therefore also the constitutional principle of the sovereignty of citizens, is its transformation into specific individual rights of citizens and the associated obligations of the entities guaranteeing these rights. One of the fundamental rights of citizens that express the constitutional principle of their sovereignty in the state (Art. 2 sec. 1 of the Constitution) is the right to "participate in

[9] Cf. Drgonec, J.: ÚstavaSlovenskejrepubliky. Komentár, Heuréka 2004, p. 24.
[10] Art. 152 sec. 4 of the Constitution: „Constitutional laws, laws and other generally binding legal regulations shall be interpreted and applied in conformity with this Constitution."

the administration of public affairs directly or through freely elected representatives" provided for in Art. 30 sec. 1 of the Constitution. ..." (I. ÚS 76/97).

Or in another decision:

"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 ... ."(II. ÚS 596/2014).

The legal theory which reflects this case-law concludes that in individual cases of application of law constitutional principles play the role of an interpretative guideline in clarifying the meaning and content of a constitutional rule.[11]

However, the application of constitutional principles in the case-law of the Constitutional Court dealing with the conformity of legal regulations with the Constitution is different. Namely, general constitutional principles can be used individually on the one handor on the other together with (in support of) other, more concrete constitutional rules:

"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 withthe 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 (accordingly e.g. PL. ÚS 6/04)."(PL. ÚS 17/08).

Thus, in the actual application of legal principles in any kind of proceedings the Constitutional Court underlines the material nature of the rule of law:

[11]Dobrovičová, G., Kanárik, I.; VplyvdoktrínÚstavnéhosúdu SR naprávneprincípy, In: Právnyobzor 3, 2003, p. 255.

"In the formal understanding of the rule of law, constitutional principles are applied within the limits of constitutional textsinterpretedusing grammatical and logicalmethods which identify the content of the legal regulation.This approach means that unless a constitutional text for example explicitly provides that certain claims are inalienable, i.e. they are guaranteed as if "only" by statutory guarantees, any state intervention can then be "legalised". The material understanding of the rule of law rules out such an approach." (PL. ÚS 3/2012).

It can be inferred from the above decision that, with regard to constitutional principles, the Constitutional Court does not limit itself to a literal interpretation of the text of the Constitution, but bases its argumentation mainly on its purpose(functional interpretation). This follows also from the aforementioned decision concerning Art. 55 of the Constitution:

"For that reason,commercial competition, according to Art. 55 sec. 2 of the Constitution, does not have propagandist or political significance, although it may also have such an impact.
The Slovak Republic, in accordance with Art. 55 sec. 2 of the Constitution, does not protect perfect or absolute commercial competition as such competition does not exist as a legal institution. The whole market economy of the state is fragmented into the relevant markets. The purpose of protecting commercial competition is the protection of economically significant activities in the relevant markets among competitors who really compete, performing similar and thus comparable activities, by means of which they seek to maximise their profits from subjects of lawwhich needthe products of those activities."(PL. ÚS 14/2014).

3. The principle of the rule of law

If we were to indicate which of the constitutional principles is most frequently referred to by the Constitutional Court in its decision-making, we could point to the principle of the rule of law. Nonetheless,some legal scholars do not consider the rule of law itself as a legal principle in the strict sense since the modifier "of law" merely refers to the qualities that a democratic state must have.[12]

The Constitutional Court has nevertheless recognised this principle in its caselaw and underlined its importance as the central pillar of the whole constitutional system. In addition to the aforementioned decisions (PL. ÚS 17P08, PL. ÚS 12/05), this conclusion also follows from other decisions of the Constitutional Court. The following examples can be cited:

"The principle of rule of law proclaimed in Art. 1 of the Constitution is the fundamental constitutional principle in the Slovak Republic." (PL. ÚS 19/98)

"The general principle of the 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 built." (PL. ÚS 3/09)

The latter decision also confirms the generality of the said principle, which includes a series of component principles:

[12]Ibid., p. 255 – 256.

"Legitimate expectation must also be viewed in the context of the general principle of the rule of law enshrined in Art. 1 sec. 1 of the Constitution, an integral part of which is also the principle of legal certainty and of the protection of the trust of all the subjects of law in the legal system. ...

This is one of a number of specific expressions of the principle of the rule of law where all the bearers of public authority, including Parliament, are subordinate to the Constitution and its principles."(PL. ÚS 3/09)

In addition to the principle of legal certainty, the principle of proportionality can also be considered part of the general principle of the rule of law:

"For the intervention to be constitutionally acceptable, in changing the protected legal status,the legislator must also respect the principle of proportionality, which is inherent in the rule of law. This principle implies primarily a reasonable balance between the aim (purpose) pursued by the state and the means employed. In this context, the law confirms that the aim (purpose) pursued by the state may be pursued; the means that the state intends to employ may be employed; the employment of the means to achieve the purpose is appropriate; the employment of the means to achieve the purpose is necessary and indispensable." (PL. ÚS 3/00)

Or for example also 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, they must be, according to Art. 13 sec. 2 of the Constitution laid downby 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)

Given the nature of the rule of law, this principle is often applied in proceedings on the conformity of legal regulations before the Constitutional Court together with other principles or articles of the Constitution. In the proceedings conducted under Ref. No. PL. ÚS 6/09, the Constitutional Court ruled among other things on the constitutional conformity of a statutory regulation according to which the serving of a sentence for whatever crime was an obstacle to the right to vote in the elections to the National Council of the Slovak Republic.[13]The Constitutional Court stated in the decision:

"With regard to the Prosecutor General's motion, the Constitutional Court emphasised that in a democratic state governed by the rule of law it is unacceptable for however large a group of citizens or even for a single citizen to be excluded from voting in elections without substantial public interest and to be denied for a specific period the exercise of one of their constitutionally guaranteed rights,unless there is a legitimate aim justifying such a measure and at the same time no other important public interests are threatened by its potential removal. Since the Constitutional Court found no such circumstances in the case in question, it held that Sec. 2.2.b of the Law on the Elections to the National Council is not compatible with Art. 1 sec. 1 first sentence of the Constitution. Likewise, the Constitutional

[13]At present, this obstacle is only the prison sentence for an especially serious felony. Even these provisions are being examined for constitutionality in the pending proceedings administered at the Constitutional Court under Ref. No. PL. ÚS 2/2016.

Court declared the challenged provision of the Law on the elections to the National Council contrary to Art. 30 sec. 1 first sentence, Art. 30 sec. 3 first sentence as well as Art. 2 sec. 1 of the Constitution.In doing so, the Constitutional Court started with the idea that Art. 30 sec. 1 first sentence and Art. 30 sec. 3 first sentenceform the point of departure and the core of the constitutional regulation of the right to vote. Therefore, any disproportionate denial of the right to vote also constitutes a breach of the said articles. The aforementioned provisions of the Constitution organically build on the constitutional principle of the sovereignty of the people expressed in Art. 2 sec. 1 of the Constitution, which is inseparable from the essence of the democratic state, which is why the Constitutional Court held that the challengedprovision of the Law on the Elections to the National Council is incompatible with Art.2 sec. 1 of the Constitution, wherebythe Constitutional Court expressed its organic link with Art.30 sec. 1 and 3 of the Constitution when formulating the statement of decision."

At a more general level also in the decision Ref. No. PL. ÚS 12/97:

"In other proceedings on the compatibility of laws or their parts with the Constitution, the Constitutional Court has already expressed the legal opinion that the legislative body did not act in accordance with the Constitution when it adopted a law that violated specific constitutional provisions (e.g. PL. ÚS 43/95, PL. ÚS 11/96, PL. ÚS 4/97 etc.). The principle of the rule of law proclaimed in Art. 1 of the Constitution is the fundamental constitutional principle of the Slovak Republic. If the legislative body does not act in accordance with the Constitution and its provisions, it also violates the principle emanating from Art. 1 of the Constitution. The legislative body as well as the other public authorities of the Slovak Republic (Art. 2 sec. 2 of the Constitution) are bound by the constitutional criteria."

However, the principle of the rule of law can also be used independently in this type of proceedings, which also follows for instance from the decision in the case Ref. No. PL. ÚS 19/98, in which the Constitutional Courtexamined among other issues the legal regulation of the electoral campaign in municipal elections, according to which campaigning through radio or television broadcasting was prohibited with the exception of local radio or television broadcasting. The Constitutional Court stated that:

"It is not clear from the content of the challenged provision of Sec. 30.2 of Law No. 233/1998 Coll. or from the content of related legislation, what in this case is to be considered as "local radio or television broadcasting". These terms are not defined in the law. Neither is itclear therefore which kind of broadcastingthe legislator tolerates foran electoral campaign. This creates a condition that allows diverse and purposive interpretation of that provision, which gives rise to legal uncertainty. Even when using the general interpretation rule set out in Art. 152 sec. 4 of the Constitution, it is not possible in the given case to create a state of legal certainty for the addressees of the abovementioned legal rule concerning the type of behaviour by which they would not violate the contents of that legal rule.

The content of Sec. 30.2 of Law No. 233/1998 Coll. is not compatible with the content of the principle of rule of law expressed in Art. 1 of the Constitution of the Slovak Republic.The legal rule contained in this provision of the law is not formulated in a clear manner or in a manner comprehensible for its addressees. This shortcoming cannot be removed even by interpretation using Art. 152 sec. 4 of the Constitution. For that reason, the Constitutional Court found its incompatibility with Art. 1 of the Constitution of the Slovak Republic."

As regards proceedings on individual complaints, in compliance with the general conclusions on constitutional principles, the principle of rule of law is applied solely in connection with other, more specific constitutional rules and has the nature of an interpretational rule:

"According to the opinion of the Constitutional Court, requirements which result from the right to judicial protection under Art. 46.1 of the Constitution are also imposed when issuing a court decision on the suspension of enforceability of an administrative decision. This means that such a decision must for instance have legal basis (Art. 2.2 of the Constitution) and cannot be arbitrary (Art. 1.1 of the Constitution), (i.e. it cannot contradict the principle of rule of law, which includes the prohibition of arbitrary decisions). ...

Due to the fact thatthrough the contested resolution the regional court suspended the enforceability of a final decision granting a construction permit to the complainants, which allowed them to carry out additions and alterations to their family home, the regional court undoubtedly interfered with the ownership rights regarding their unfinished buildingwhich they inhabited. ...

... even though according to the law the complainants were not parties to the proceedings, the said provision did not prohibit the regional court, in view of the specific circumstances of the case, from involving other persons who, while not parties to the proceedings, might have their constitutionally guaranteed rights violated. The regional court should have interpreted the quoted provision of Section 250c of the Code of Civil Procedure in such a way that it would not exclude the complaints from the proceedings and that it would not, in view of the objective pursued and of all the circumstances of the case, interfere with the essence of the complainants' rights to judicial protection. The fact that the Code of Civil Procedure does not expressly identify someone as a party to proceedings does not mean that the acting court cannot when necessary involve them if the effects of the court's action and decision making concern the fundamental rights that the Constitution or in an international treaty guarantee to this person.

For these reasons there has been a violation of the complainants' rights according to Art. 46 sec. 1 in connection with Art.1 sec. 1 and Art.2 sec. 2 of the Constitution."

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Constitutional principles as higher norms and their hierarchy

Building upon the conclusions of Part I of this report, it can be stated that constitutional principles are "constitutional commands" with a normative and binding character, which is reflected in the adoption as well as the application of regulations of lower legal force, which have to be in line with constitutional principles. It is possible to speak also of the principle of constitutionality, according to which the Constitution stands at the top of

the pyramid of the legal system and becomes an inspiration and a criterion for the whole legal system.[14]

The constitutional principles embodied in various articles of the Constitution have the same legal force and are applied in combination:

"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).

For these reasons it is impossible to speak of a hierarchy of constitutional principles from the point of view of legal force, so the focus becomes the question of how a potential collision can be resolved. The Constitutional Court already addressed this issue (as well as the issue of the mutual relationship of constitutional principles, values and fundamental rights) in the abovementioned decision Ref. No. PL. ÚS 12/01, the subject of which was assessment of the constitutionality of the legislation on abortion:

"The weighing of conflicting constitutional rights, principles and values is guided by the principles of so-called practical concordance, the essence of which lies according to the Federal Constitutional Court of Germany in "the harmonisation of the relevant constitutional values and in maintaining their creative tension". The obligation to weigh conflicting constitutional rights, principles and values follows also from the fact that the rights and freedoms contained in Chapter II of the Constitution have, on the face of it, equal value.The hierarchisationof these rights and freedoms does not rely on some kind of doctrinal predetermination, but rather is a function of the specific context and circumstances under which the rights, principles and values in question find themselves in conflict with one another.In the imaginary hierarchy of constitutional rights, principles and values, the value associated with the protection of unborn human life therefore does not and, with regard to the form of its constitutional expression, cannot stand a priori above other constitutional rights, principles or values associated with the issue of abortion, i.e. with the right to privacy in its holistic understanding. The content and normative implications of the constitutional obligation to protect unborn human life are therefore to a significant extent also a question of the content and normative implications of the right of the pregnant woman to privacy. ...

At the same time, it follows from the requirement for the finding of balance of the rights, principles and values in the case under consideration that the absolutisation of one or the other – e.g. the absolute prohibition of abortion or vice versa the abolition of any of its limitations – is ruled out. Their balancing therefore presupposes the determination of the scope of protection of which unborn human life is worthy on the one hand, and on the other the extent and effects of the woman's right to self-determination and control over her own body and fate, as well as the determination of the mutual relationship of these two sides. Even though this balancing is in the powers of the legislator, it is within the jurisdiction of the Constitutional Court to assess whether a particular result of the balancing on the part of the legislator corresponds to the relationship between the constitutional value specified in Art. 15 sec. 1 second sentence of the Constitution on the one hand, and the rights, principles and values specified in Art. 16, Art.19 and Art.2 sec. 2 of the Constitution on the other."

[14]Cf. BreichováLapčáková, M.; Ústavaaústavnézákony, Kalligram, Bratislava 2013, p. 205.

Based on the above we may conclude that when faced with a collision of constitutional principles it is the task of the Constitutional Court to harmonise them by way of balancing them. Constitutional Court decision Ref. No. PL. ÚS10/2013 (available in CODICES) can be cited as an example of this kind of balancing. In these proceedings the Constitutional Court addressed, among other things, the issue of two conflicting constitutionally protected interests. The conclusions there presented can be equally applied to constitutional principles:

"In the abovementioned case, resulting from both protected interests (right to privacy vs. the public interest in the protection of the lives and health of the population by preventing the development and spread of fatal infectious diseases), it is objectively impossible to preserve both protected interests at the same time without somehow limiting one of them, i.e. to preserve the absolute maximum of both of them…"

The Constitutional Court therefore applied in this situation the so-called Alexy's weight formula:

"The weight formula works with a three-level scale of values: "low", "medium" and "high". The intensity of interference with one fundamental right is put into proportion with the degree of satisfaction of the other right in collision, whereby the intensity of interference and the degree of satisfaction acquire one of the values "low", "medium" or "high". ...

In the issue under discussion the intensity of interference with the right to privacy is at first sight high since there is an intervention in the physical integrity of a person (primarily the child) by introducing a pharmaceutical substance.

However, this intervention is not necessary under all circumstances, since the legislation on compulsory vaccination obliges the physician to carry out medical examination of the person to be vaccinated before performing the vaccination. The legislation further obliges the physician to take into account any medical contraindications and to inform the person to be vaccinated about every aspect of the vaccination and its possible impacts on health. ...

Thus, the intensity of interference with the right to privacy is between medium and high. ...

The degree of satisfaction of the public interest in the protection of lives and health of the population by preventing the development and spread of fatal infectious diseases is high for compulsory vaccination, since it is the most effective procedure not only for directly preventing the development and spread of fatal infectious diseases, but also for allowing the complete eradication of fatal infectious diseases (the example of smallpox). There is no equally effective way of preventing the development and spread of fatal infectious diseases to be used in case of the abolition of compulsory vaccination.

This means that the high degree of satisfaction of the public interest in the protection of lives and health of the population by preventing the development and spread of fatal infectious diseases prevails over the medium to high interest in the protection of the right to privacy of individuals, and for that reason it is necessary to give priority to the public interest in the protection of lives and health of the population by preventing the development and spread of fatal infectious diseases by means of compulsory vaccination."

It can be inferred from this decision of the Constitutional Court that in cases of collision of constitutional principles with the impossibility of fully observing both principles at the same time, the decision will depend on the balancing of the degree of intensity of interference with the constitutional principles or the values they protect. We will briefly return to this question in connection with possible constitutional amendments or rather in connection with the inalterability of some part of the Constitution though a referendum.

2. The adoption of the Constitution of the Slovak Republic, constitutional system and constitutional amendments in the Slovak Republic

The Constitution of the Slovak Republic[15] was adopted on 1 September 1992, at which time the present-day Czech and Slovak republics were still part of the common federal state. However, after the fundamental social changes in 1989, which as in other countries of Central and Eastern Europe brought about the collapse of the totalitarian regime and the beginning of the process of democratisation, tendencies seeking the division of the federal state began to appear. These tendencies were apparent even in the Constitution itself, which was essentially conceived as the constitution of a sovereign state, and later culminated in the adoption of the federal constitutional law on the dissolution of the federation. The outcome of this process was the establishment of the independent Slovak Republic on 1 January 1993.

From the formal point of view, the adoption of the Constitution of the Slovak Republic was in conformity with the constitutional law on the establishment of the Czechoslovak federation (Law No. 143/1968 Coll.), which in addition to the federal constitution envisaged also the existence of the constitutions of the federated republics. The present Constitution was adopted by the Slovak National Council[16], i.e. the parliament of the federated Slovak Republic, with a three-fifths majority of all deputies (based on Art. 109 sec. 3 of Law No. 143/1968 Coll.).[17]

The Constitution of the Slovak Republic stipulates in its continuity provision (Art. 152 sec. 1) that existing constitutional laws, laws and other generally binding regulations remained valid in the Slovak Republic provided they were in conformity with the Constitution. Pursuant to that provision, the Charter of Fundamental Rights and Freedoms, adopted by the federal state through Constitutional Law No. 23/1991 Coll., is also part of the constitutional system of the Slovak Republic. Other constitutional laws with the same legal force as the Constitution, which stand outside the Constitution and were adopted by the National Council of the Slovak Republic after the establishment of the Slovak Republic, are part of the constitutional system as well.They are Constitutional Law No. 227/2002 Coll. on national security in the time of war, state of war, exceptional state and state of emergency; Constitutional Law No. 357/2004 Coll. on the protection of public interestin the performance of the dutiesby public officials; Constitutional Law No. 397/2004 Coll. on the cooperation of the National Council of the Slovak Republic with the Government of the Slovak Republic in matters of the European Union; Constitutional Law No. 254/2006 Coll. on the establishment and operation of the Committee of the National Council of the Slovak Republic for the review of decisions by National Security Office;Constitutional Law No. 493/2011 Coll. on fiscal

[15]Available in English at http://www.nrsr.sk/web/default.aspx?SectionId=124 (in the English-language version of the website).
[16]Predecessor to today's National Council of the Slovak Republic.
[17]114 out of 150 deputies of the Slovak National Council voted for the adoption of the Constitution.

responsibility, and constitutional laws regulating the state borders. This form of constitutional system is also referred to in legal theory as "a polylegal constitutional system".

We make particular reference in connection with constitutional laws to Constitutional Law No. 254/2006 Coll., the adoption of which was an immediate response to Constitutional Court decision Ref. No. PL. ÚS 6/04. In these proceedings,the Constitutional Court examined the constitutionality of several provisions of Law No. 215/2004 Coll. on the protection of classified information. The Constitutional Court also examined Section 30 of the contested law, on the basis of which a special commission was established, composed of members of the National Council of the Slovak Republic. The commission's duty was to decide on appeals in matters relating to security clearance. The Constitutional Court declared those provisions unconstitutional, stating:

"… According to the opinion of the Constitutional Court there is no reason, even when considering the specific nature of the decision, for the National Council as a body with precisely defined constitutional powers (Art. 86 of the Constitution) to establish such an administrative body (i.e. the commission, ed.)*, which may have its powers defined in a law, but falls outside the scope of Art. 86 of the Constitution. …*

Therefore, the commission established pursuant to Section 30 of the law cannot be classified as a body under Art. 92 sec. 1 of the Constitution, established for the purposes of exercising the powers of the National Council specified in Art. 86 of the Constitution.That is to say, the task of the commission is neither the exercise of the supervisory powers of the National Council in relation to bodies of the executive power, nor the balancing of the different types of power (the system of checks and balances, on which is based the separation of powers into legislative, executive and judiciary), and for that reason cannot fulfil any of the abovementioned functions. …

The status of the commission, its position in the system of the bodies of the National Council and risks connected with its decision making, but above all the inappropriate analogy using the principles of separation of powers stemming from the context of the contested provisions justifying the existence of such a body, have led the Constitutional Court to the conclusion that Section 30 par. 4 to 7 of the law are contrary to the principles of the rule of law pursuant to Art. 1 sec. 1 first sentence of the Constitution.In the opinion of the Constitutional Court, this body therefore cannot be legitimate, which results in the incompatibility of the contested decisions with Art. 2 sec. 2 as well as Art.46 sec. 1 of the Constitution."

In reaction to this decision, the National Council of the Slovak Republic adopted Constitutional Law No. 254/2006 Coll., which established a special committee of the National Council of the Slovak Republic essentially identical to the commission as previously regulated in the unconstitutional provisions of Law No. 215/2004 Coll. It is expressly stated in the explanatory memorandum of this constitutional law that it was adopted as a result of decision of the Constitutional Court Ref. No. PL. ÚS 6/04. Nevertheless, neither the explanatory memorandum nor the constitutional law itself in any way addressed the abovementioned argumentation of the Constitutional Court.This leads to the conclusion that the objective of this constitutional law was to bypass the decision of the Constitutional Court and this constitutional law is thus considered by legal scholars as a serious violation of the constitutional system.[18]

[18]Cf. BreichováLapčáková, M.; Ústava a ústavnézákony, Kalligram, Bratislava 2013, p. 81; and alsoĽalík, T., Ústavnýsúd a parlament v konštitučnejdemokracii, Wolters Kluwer, 2015, p. 186

Another special category is ad-hoc constitutional legislation, e.g. constitutional laws No. 70/1994 Coll., No. 82/2006 Coll. and No. 333/2011 Coll., which on several occasions shortened the constitutionally defined four-year parliamentary term as a means of addressing political crises. A contrasting case is Constitutional Law No. 332/1998 Coll., which prolonged the electoral period of self-government bodies elected in 1994. The reason was the practical need to ensure the proper election administration, since immediately before the elections were to take place, Constitutional Court decision Ref. No. PL. ÚS 19/98 was published, which declared several provisions of the law on elections in question unconstitutional.

The issue of constitutional amendments is inherently linked to the adoption of constitutional laws. The Constitution lacks a more detailed regulation of the legislative process for amending the Constitution, since Art. 84 sec. 4 only relatively briefly indicates that the adoption of a constitution, constitutional amendment or constitutional law requires the consent of at least three-fifths of all members of the National Council of the Slovak Republic. Although the Constitution clearly distinguishes between "constitutional amendments" and "the adoption of constitutional laws", the fact remains that the very text of the Constitution has on several occasions been amended precisely by means of constitutional laws. The legal literature comments on this situation by stating that "it is a constitutional custom which does not formally correspond with the text of the Constitution, but should nevertheless be respected".[19]

In addition to the possibility for the National Council of the Slovak Republic to amend the Constitution, the Constitutional Court has also dealt in its decision making with the question of whether it is also possible to amend the Constitution by way of a referendum. The constitutional regulation of this question is not clear, since in addition to the obligatory referendum which serves to confirm a constitutional law on entering or leaving a union with other states, Art. 93 of the Constitution also contains provisions on a facultative referendum, which is announced by the President of the Slovak Republic on the basis of a petition signed by at least 350 000 citizens or of a resolution by the National Council of the Slovak Republic (Art. 95 sec. 1 of the Constitution).

This facultative referendum "can also decide on other important questions in the public interest", which could also include constitutional amendments, especially if we take into account the principle of sovereignty of the people (Art. 2 sec. 1 of the Constitution, according to which "state power originates from the citizens, who exercise it either through their elected representatives, or directly"). On the other hand, account must also be taken of Article 72 of the Constitution, according to which the National Council of the Slovak Republic is the sole constitution-making and legislative authority of the Slovak Republic.

The mutual relationship of these provisions was clarified by the Constitutional Court in the proceedings on the interpretation of the Constitution in decision Ref. No. II. ÚS 31/97, which concerned a proposal for a referendum on a constitutional amendment regarding presidential election, seeking to have the President of the Slovak Republic elected directly by the citizens (**available in CODICES**). The Constitutional Court held in the operative part of the decision:

[19]Orosz, L., KonštituovaniepolylegálnehoústavnéhosystémuSlovenskejrepubliky, p. 69, In: Orosz, L. a kol.,ÚstavnýsystémSlovenskejrepubliky (doterajšívývoj, aktuálnystav, perspektívy), UPJŠ Košice, 2009.

"Legislative power in the Slovak Republic is regulated in two different ways;it is exercised not only by the National Council of the Slovak Republic, but also directly by the citizens. The Constitution of the Slovak Republic does not exclude in any way the possibility that the referendum under Art. 93 sec. 2 of the Constitution could concern a question on amending the Constitution or one of its parts."

From the reasoning of this decision:

"There is no provision in the Constitution prohibiting the citizens from amending the Constitution if necessary. The question is, however, whether they can do so in a referendum or solely through their representatives, i.e.the members of the National Council of the Slovak Republic. ...

The Constitutional Court is of the opinion that, in a democratic parliamentary system, the citizens accept that their original power is limited by the Constitution, which was adopted by the constitution-making authority to which they have delegated their power. The members of the representative body adopt laws in the name of the citizens, which are binding not only for the citizens themselves but also the representative body. As regards the exercising of original power by the citizens in the legislative field, this is manifested in any referendum they initiate and the President announces. ...

It is not possible to amend the Constitution directly on the basis of the outcome of a referendum.The adoption of the proposal in the referendum has constitutional relevance in the sense that the citizens who participate in the voting bid parliament amend that part of the Constitution which was the subject of the referendumin accordance with the proposal adopted in the referendum. The Constitution nevertheless does not contain a provision allowing citizens to vote directly for a particular wording of the proposed constitutional amendment."

The abovementioned reasoning of the decision by the Constitutional Court, however, led some legal scholars to an interpretation which in effect questioned the binding force of the referendum and "devalued" it to a mere consultative instrument of direct democracy. "Under this interpretation, given the concept of representative (free) parliamentary mandate laid down in Art. 73 sec. 2 of the Constitution[20], the members of the National Councilare not bound by anyone's orders, i.e. not even by orders of citizens expressed in referendum, and for that reason nobody can make them amend a given law or the Constitution in accordance with the result of a referendum."[21]

The answer to this opinion was the reasoning of Constitutional Court decision Ref. No. PL. ÚS 24/2014 (available in CODICES), which concerned preliminary review of constitutionality of a facultative referendum on the basis of a citizens' petition pursuant to Art. 95 sec. 2 of the Constitution (according to which, before announcing a referendum,the President of the Slovak Republic mayfile with the Constitutional Court of the Slovak Republic a motion seeking a decision whether the subject of the referendum to be announced on the basis of the citizens' petition or a resolution of the National Council of the Slovak Republic is in conformity with the Constitution or with constitutional laws) in connection with Art. 93 sec. 3 of the Constitution ("Fundamental rights and freedoms, taxes, levies and

[20]"Members of Parliament are representatives of citizens. They execute their mandate personally according to their conscience and conviction and are not bound by orders."

[21]Quoted from the dissenting opinion of Constitutional Court Judge Orosz to Constitutional Court decision Ref. No. PL. ÚS 24/2014.

the state budget may not be the subject of a referendum."). The Constitutional Court stated in the decision:

"In the opinion of the Constitutional Court, the legal effects of a referendum can be considered as a rather problematic topic. The constitutional conception of a referendum supports the existence of those effects. The Constitution prescribes strict conditions to be met so that a particular referendum can be announced (Art. 96 sec. 1 of the Constitution) and so that it is subsequently valid and successful (Art. 98 sec. 1 of the Constitution).This implies a high degree of legitimacy of the result of a valid referendum, which is also confirmed by Art. 99 sec. 1 and 2 of the Constitution (the result of a referendum can be changed or abrogated by the National Council only after three years from its entry into force, and a referendum on the same issue can be repeated only after three years from the date when it was held). The material background of the referendum results thus testifies clearly in favour of its legal effects. After all, proposals adopted in a referendum are promulgated by the National Council in the same way as laws (Art. 98 sec. 2 of the Constitution). In this regard,should the possibility arise of a collision between the legal effects of a referendum and Article 72 of the Constitution, according to which the National Council is the sole constitution-making and legislative authority of the Slovak Republic, it must be stated that there is no question that it follows from this article of the Constitution that the National Council is the sole constitution-making and legislative authority in the system of all state bodies. ***This does not, however, rule out other means of adopting generally binding rules of conduct with the force of laws, possibly constitutional laws, for example by citizens in a referendum*** (our emphasis).

The Constitutional Court does not, however, ignore the possibility of a conflict between results of a facultative referendum, which may (but need not), depending on the precise wording used, require further action by the National Council, and the representative character of the mandate of members of the National Council (Art. 73 sec. 2 second sentence of the Constitution). It is therefore not possible to infer from the Constitution any duty of the deputies to vote so as to aid the transformation of the proposal adopted in a referendum into an adequate form of legislative text. There is no legal sanction which could be applied against a member of the National Council who might vote against the will of the citizens declared in a valid referendum.Thus, any consequences that this situation could have are merely in the sphere of political accountability."

It follows from the above that the Constitution of the Slovak Republic allows for adoption of a regulation with the legal force of a constitutional law directly by the citizens in a referendum. One of the judges of the Constitutional Court even stated in his concurring opinion to this decision that he considers this part of the reasoning to be the "most significant contribution" of the decision and he elaborated on the argumentation of the Constitutional Court in the following way:

"It follows from the abovementioned ratio decidendi that the result of a referendum, which usually has the form of prohibition or permission, has immediate and at the same time generally binding legal effects which arise just after the proposal adopted in the referendum has been promulgated in the Collection of Laws of the Slovak Republic in the same way as laws (Art. 98 sec. 2 of the Constitution), regardless of whether the National Council subsequently adopts a law (amends the Constitution) in line with the precept inferable from the valid result of a referendum. In this context I bring to your attention at least the fact that the referendum result which the National Council does not translate into laws or constitutional amendments after its promulgation in the Collection of Laws of the Slovak

Republic shall acquire the quality of a reference criterion which the Constitutional Court will have to take into account and apply in its decision making, especially in a proceedings on the conformity of legal regulations pursuant to Art. 125 sec. 1 of the Constitution."

Based on the above it can be inferred from the case law of the Constitutional Court that a constitutional amendment is possible even directly by way of a referendum or, to be more precise, that the result of this referendum has legal force equal to the constitution as far as constitutional regulation is concerned.

3. "Eternity clause" and judicial review of constitutional amendments in the Slovak Republic

The constitutional amendments discussed earlier in the text are also closely linked to the question whether the Constitution contains certain provisions which due to their particular relevance for the rule of law cannot be subject to change and to the question whether the Constitutional Court can review the constitutionality of constitutional amendments.

The Constitution of the Slovak Republic does not expressly prohibit the amending of certain constitutional provisions (principles), but the existence of such a prohibition in the Constitution has been confirmed in the case law of the Constitutional Court, in particular in the abovementioned decision Ref. No. PL. ÚS 24/2014. We quote from the reasoning of this decision:

"Regarding the fundamental rights and freedoms under Art. 93 sec. 3 of the Constitution, the Constitutional Court adds that these define the attitude of a democratic state governed by rule of law towards the individual, showing respect for the value of human being and readiness to provide protection. Elimination of the catalogue of fundamental rights and freedoms in its standard form could lead to gradual erosion of democracy and pluralism in favour of totalitarianism and dictatorship. Since the Second World War, democratic states in Europe have been based on respecting fundamental rights and freedoms, and in order to guarantee this commitment the European constitutional systems use various constitutional instruments. One typical example is the so-called eternity clause, which appears in Art. 79 sec. 3 of the Basic Law of the Federal Republic of Germany, in Art.9 sec. 2 of the Constitution of the Czech Republic, in Art.110 sec. 1 of the Constitution of the Greek Republic or in Art.288 of the Constitution of the Republic of Portugal.

In the Slovak Republic the inalterability of the articles of the Constitution which guarantee fundamental rights and freedoms is protected principally by Art. 12 sec. 1 second sentence of the Constitution, but there is no doubt that Art. 93 sec. 3 of the Constitution is also one of the provisions having this purpose. Even when deciding on presidential motions under Art. 125b sec. 2 of the Constitution, the Constitutional Court tends therefore to be in favour of the solution according to which Art. 93 sec. 3 of the Constitution prevents referendums on questions which, if successful, would eventually shake the whole concept of fundamental rights and freedoms by lowering their standard,set by both international and national law, to a degree threatening the essence of the rule of law. 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."

It follows from this part of the reasoning of the Constitutional Court that the "eternity clauses" in the Constitution of the Slovak Republic include Art. 12 of the Constitution ("People are free and equal in dignity and in rights. Basic rights and freedoms are inviolable, inalienable, imprescriptible, and indefeasible.") and to the extent that it relates to fundamental rights also Art. 93. sec. 3 of the Constitution. These provisions prohibit constitutional amendments which would lead to a lowering of the standard of any fundamental right in relation to its present state. At this point, we may speak of a collision of constitutional principles, namely the principles of the rule of law on the one hand, and on the other the principles of democracy and sovereignty of the people, which in the aforementioned case could not be fully preserved. In this decision, the Constitutional Court found a balance between these principle,whereby the principles of democracy and sovereignty of the people remained, with some restrictions, preserved.These restrictions would be less severe than interference with the principle of rule of law in case of the possibility of narrowing the scope of fundamental rights and freedoms by means of a referendum.

However, attention should also be drawn to another aspect of this decision which, given the use of the word "mainly" in relation to the abovementioned articles of the Constitution, allows for the supposition that the Constitutional Court also considers some other parts of the Constitution as inalterable, or at least contemplates the possibility that the Constitution contains further "eternity clauses".At this point, we also refer to an earlier decision of the Constitutional Court Ref. No. PL. ÚS 16/95, in which the Constitutional Court stated:

"There is no doubt that even the legislator is bound by the Constitution and its principles, which the Constitution does not allow to be changed because they are of constitutive significance for the democratic character of the Slovak Republic as declared in Art. 1 of the Constitution."

It must, however, be borne in mind that this decision concerned the conformity of an ordinary law with the Constitution, i.e. the Constitutional Court was not commenting on constitutional amendments and their limits. Nevertheless, the conclusion on the inalterability of Art. 1 sec. 1 of the Constitution is supported by legal scholars, some of whom consider this

conclusion undisputed[22], pointing above all to the importance of the constitutional principle of the rule of law, which is discussed in Part I of this report. In this context the principle of the rule of law is referred to in the legal literature as the core and foundation of the Constitution.

There is another important conclusion concerning the Constitutional Court's power to examine the constitutionality of constitutional amendments which can be drawn from the decisions relating to the subject of a referendum. If it is possible to amend the Constitution through a referendum and at the same time the Constitutional Court performs an a priori examination of the admissibility of such an amendment, it is clear that the process of amending the Constitution through a referendum is subject to review by the Constitutional Court. While the case law of the Constitutional Court expressly deals with constitutionality review in relation to fundamental rights and freedoms, the question still remains how the Constitutional Court would decide when reviewing a referendum concerning other important constitutional principles. Another important fact is that a prerequisite for any such decision of the Constitutional Court is always a motion submitted by the President. It can be added at this point that in case the Constitution Court finds during preliminary review that the proposed subject of the referendum is unconstitutional, the referendum cannot be announced (Art. 125b sec. 3 of the Constitution).

If we take into account that the direct exercise and indirect exercise (through representatives) of the sovereign power of the people are equal (Art. 2 sec. 2 of the Constitution), it is then striking that while judicial constitutionality review is laid down in the Constitution in the case of direct democracy, such review does not expressly concern constitutional amendments adopted by the National Council of the Slovak Republic as the constitution-making assembly. In fact, according to Art. 125 sec. 1 subs. a) of the Constitution, the Constitutional Court decides solely on the compatibility of laws with the Constitution, constitutional law and international treaties to which the National Council of the Slovak Republic has given its consent and which have been ratified and promulgated in the manner laid down by law (further provisions of Art. 125 concern the constitutionality review of lower-level normative legal acts). In addition, a motion for commencement of proceedings on the constitutional conformity of laws can only be filed by public authorities (or by a group of members of the National Council of the Slovak Republic) listed in Art. 130 sec. 1 subs. a) to g) of the Constitution.

Despite this fact the compatibility of a constitutional law with the Constitution has already been the subject of review by the Constitutional Court, namely in proceedings under Art. 127 upon a complaint by individual, who claimed violation of his constitutional rights violated as a result of the adoption of a constitutional law by the National Council of the Slovak Republic. The complaint concerned Constitutional Law No. 333/2001 Coll. on the shortening of the term of office of the National Council of the Slovak Republic (one of the ad-hoc constitutional laws) and the complainant was a citizen of the Slovak Republic who claimed that this constitutional law had violated his right to participate in the administration of public affairs under Art. 30 sec. 1 of the Constitution.

These proceedingsbefore the Constitutional Court were assigned Ref. No. II. ÚS 153/2013 and had some traits in common with the very important and (at least in our legal

[22]Cf. Slašťan, M., Možnostivyužitianálezu PL. ÚS 27/09 v podmienkachústavnéhoporiadkuSlovenskejrepubliky, available in Slovak at:http://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/mezin_smlouvy/Slastan_Miroslav.pdf , orBreichováLapčáková, M.; Ústava a ústavnézákony, Kalligram, Bratislava 2013, p. 195

area) much discussed decision of the Constitutional Court of the Czech Republic in the case Melčák.[23]This decision followed a complaint by a member of the parliament and abolished an ad-hoc constitution law shortening the parliamentary term. Working with the "eternity clause" contained in Art. 9 sec. 2 of the Constitution of the Czech Republic (according to which any change in the essential characteristics of a democratic state governed by rule of law is inadmissible), the Constitutional Court of the Czech Republic was inspired by the case law of the Federal Constitutional Court of Germany and the Constitutional Court of Austria and used extensive interpretation of Art. 87 sec. 1 subs. a) of the Constitution of the Czech Republic, which in a way similar to the Constitution of the Slovak Republic lays down jurisdiction over constitutionality review of laws. Under this extensive interpretation then the term "law" also comes to mean "constitutional law", provided that this constitutional law changes the essential characteristics of a democratic state governed by rule of law. The Constitutional Court of the Czech Republic stated among other things that ad-hoc legislation having the character of an individual act is inadmissible even if this legislation is formally a constitutional law. Given the similar wording of the Constitution and similar legal culture, in the proceedings before the Constitutional Court of the Slovak Republic, the complainantreferred to precisely this decision of the Constitutional Court of the Czech Republic.

However, the Constitutional Court of the Slovak Republic rejected the constitutional complaint in case Ref. No. II. ÚS 153/2013, basing its argument mainly on the lack of locus standi of the complainant to file a motion seeking to have legislation declared unconstitutional. We quote from the decision:

"The Constitutional Court observes that itisgenerallynot 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 petitionfrom 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 proceedingshave 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."*Moreover, in the opinion of the Constitutional Court, laws adopted by the National Council of the Slovak Republic cannot be considered as individual acts or as individual interference in the complainant's fundamental rights which can be examined in proceedings pursuant to Art. 127 of the Constitution. In fact, the Constitution contains an exhaustive list of subjects of law eligible to file a motion to commence proceedings on the constitutional conformity of laws and this list cannot be expanded through extensive interpretation. According to the Constitution, any individualor legal entity whose rights have been violated by a normative act may thus require that these subjects of law file a motion for the commencement of proceedings on the constitutional conformity of the legislation in question.

[23]For details in English, 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/

As regards the possibility of derogation of constitutional laws on the basis of their nonconformity with the Constitution, the senate of the Constitutional Court deciding in this case pointed out that considerations in this regard belong to the plenum of the Constitutional Court. However, it also made reference to the discussion led on this issue by constitutional scholars, who suggestedusing so-called Plaumann test[24], previously used by the Court of Justice of the European Union, as a point of reference in the debate on the relationship between the inalterability of constitutional laws and the necessity to protect individual freedoms(Procházka R., Ľud a sudcovia v konštitučnejdemokracii. Plzeň, AlešČeněk, 2011).In the opinion of the Constitutional Court, since in the given case the complainant was not directly affected (he was not theholder of the constitutional right to a guaranteed electoral term), the requirements for the use of this test were not metand the Constitutional Court refrained from commenting on the possibility of its use in other cases.

Based on the above it can be concluded that under the case law of the Constitutional Court it is not possible to examine the constitutionality of constitutional amendments (constitutional laws) on the basis of individual constitutional complaints byindividuals and legal entities due to their lacking the locus standi to initiate this type of proceedings.

What remains unanswered is the question of how the Constitutional Court would decide if a subject of law having the locus standi were to file a motion for constitutional review of a constitutional amendment (constitutional law), since no such a motion has so far been filed. However, some legal scholars claim that the Constitutional Court does not have the power to perform this type of constitutional review, referring to the case law of the Constitutional Court, according to which *"the Constitutional Court does not review the compatibility of legislation with equal legal force"* (PL. ÚS 14/2000)[25]. On the other hand, opinions appear which state that the Constitutional Court does have this power in cases where the adopted amendment would concern the very foundations of the constitutional system, basing their argument on the Constitutional Court's raison d'être, which is the protection of constitutionality.[26]

Finally, we would like to add that the previously mentioned decisions of the Constitutional Court concerned constitutional review from the material perspective, but in relation to the constitutional review of ordinary laws, the case law of the Constitutional Court also contains conclusions according to which even serious violation of the rules of legislative procedure may result in the unconstitutionality of a law. In decision Ref. No. PL. ÚS 48/03, the Constitutional Court stated that *"violation of the rules of the constitutional process before the National Council is, in cases of gross and arbitrary breach of the rules of legislative procedure,generally liable to result in the nonconformity of the adopted law with the Constitution."* Thus, should the Constitutional Court agreeto perform constitutionality review in cases of the National Council of the Slovak Republic amending the Constitution, the procedure for adopting the challenged legislation would be included in this review.

[24]Decision on the merits available at:
http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=25-62&td=ALL#
[25]Procházka, R.; Ľud a sudcovia v konštitučnejdemokracii, AlešČeněk, Plzeň 2011, p. 39.
[26]Cf.Ľalík, T., Ústavnýsúd a parlament v konštitučnejdemokracii, Wolters Kluwer, 2015, p. 92 and 93.