SVK
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a) Slovakia / **b)** Constitutional Court / **c)** First Senate / **d)** 06-12-2017 / **e)** I. ÚS 549/2015 / **f)** / **g)** / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

04.04.03.01	Institutions - Head of State - Powers - **Relations with legislative bodies.**
04.07.04.01.02	Institutions - Judicial bodies - Organisation - Members - **Appointment.**
05.03.29	Fundamental Rights - Civil and political rights - **Right to participate in public affairs.**

Keywords of the alphabetical index:

Judge, Constitutional Court, appointment by President.

Headnotes:

When appointing judges to the Constitutional Court, the President is bound by the pre-selection made by Parliament and may not dismiss a candidate by introducing criteria other than those expressly specified in the Constitution for that position.

Summary:

I. Various constitutional complaints had been filed against the President of the Republic by candidates who had been unsuccessful in their application for the position of judges of the Constitutional Court.

The crux of the matter was the scope of appreciation the President of the Republic enjoys when appointing judges to the Constitutional Court.

When constitutional judges are being appointed, Parliament selects a pool of candidates, with two candidates for each vacancy. The President then chooses the required number of judges from this pool. It was undisputed that the President was unlimited in his choice between the two candidates for each position. However, the President and Parliament disagreed on whether the President had the right to dismiss more than half of the candidates and require new ones from the Parliament if he deemed that those put forward were insufficiently qualified.

The dispute had arisen from the Court's decision PL. ÚS 4/2012, where the Court delivered a binding interpretation of Article 150 of the Constitution, which merely stated that the President of the Republic appoints and recalls the Prosecutor General upon Parliament's proposal. It was not clear from the wording, and from the present imperfective verb form used, whether the President was obliged to appoint the candidate selected by Parliament. The Court decided that for certain serious reasons (defined more precisely in the operative part of that decision) the President did indeed have the right to dismiss a candidate and require a new one.

Article 134.3 of the Constitution sets out the requirements for the position of a judge of the Constitutional Court, namely Slovak nationality, at least forty years old, parliamentary eligibility, a university degree in law, and at least fifteen years of work experience in a legal profession.

The President had taken the view that decision PL. ÚS 4/2012 was fully applicable to the case of constitutional judges (which would broaden his margin of appreciation considerably) Parliament had the opposite opinion. The applicability of this decision was pivotal to the case before the court.

In July 2014, the terms of office of three constitutional judges ended and Parliament selected six candidates for those vacancies. However, the President only appointed one judge and claimed that the other five candidates were not competent enough, referring to the *rationes decidendi* of decision PL. ÚS 4/2012. The rejected candidates filed complaints at the Constitutional Court.

The complaints by three of those candidates were decided jointly by the Third Senate in decision III. ÚS 571/2014, in which the candidates' fundamental right to access to public offices under equal conditions was found to have been breached. The complaints by the other two candidates were admitted for further proceedings in rulings II. ÚS 718/2014 and II. ÚS 719/2014 but they subsequently withdrew their complaints.

Following these decisions, the President asked the Court to deliver a binding interpretation of the relevant articles of the Constitution, which resulted in decision PL. ÚS 45/2015. In it, the Court stated that the *rationes decidendi* found in decision PL. ÚS 4/2012 were not applicable to the case of constitutional judges and that all five complainants from the previous proceedings remained candidates for constitutional judges.

In February 2016, the term of office of another judge ended and Parliament selected two candidates for this vacancy. The President did not appoint either of them. He did not appoint the previous five candidates either.

In September 2016, five of the now seven candidates filed complaints. The other two did not. Thus, the present proceedings commenced.

Section 6 of the Law on the Constitutional Court stipulates that if a Senate of the Court arrives at a conclusion that differs from one pronounced by another Senate, that Senate is bound to submit this preliminary question to the Plenum to be settled and for the conflicting opinions to be harmonised. The President requested that the Senate submit a preliminary question to the Plenum concerning the applicability of *rationes decidendi* pronounced in decision PL. ÚS 4/2012, and justified this request on these grounds:

1. The Second Senate had expressed the opinion in decisions II. ÚS 718/2014 and II. ÚS 719/2014 that those *rationes decidendi* were applicable to the present case.

2. The First Senate had expressed a similar opinion in decision I. ÚS 397/2014, which concerned a complaint by a candidate rejected for the office of Prosecutor General, namely that the aforesaid *rationes decidendi* also applied to the President's other powers of appointment.

3. The Third Senate expressed the same opinion on the applicability of the aforesaid *rationes decidendi* in March 2015, when pronouncing decision III. ÚS 571/2014 at the public hearing. Furthermore, when the written version of this decision was delivered in May 2015, the reasoning was different in that the applicability of the aforesaid *rationes decidendi* was excluded.

4. Decision PL. ÚS 45/2015 was not a decision on the merits and therefore not binding.

II. The Court responded as follows to the President's arguments:

1. The Second Senate did not state in decisions II. ÚS 718/2014 and II. ÚS 719/2014 that the *rationes decidendi* in question applied to the case of constitutional judges. It merely stated that conclusions contained in decision PL. ÚS 4/2012 were «relevant from the point of view of the applicability to the complainant's case» and that «they may be of great importance for the decision on the merits». It did not consider the complaints (in the parts where they claimed non-applicability of the above *rationes decidendi*) as manifestly unfounded, as the President claimed. Moreover, these were procedural decisions which did not contain any argument over the merits of the case. Therefore they did not have the effects of a precedent.

2. Decision I. ÚS 397/2014 is based on decision PL. ÚS 4/2012 and therefore the applicability of the former depends on the applicability of the latter.

3. Following the adoption of decision PL. ÚS 45/2015 there may be no doubt that the aforesaid *rationes decidendi* are not applicable to this case.

4. While decision PL. ÚS 45/2015 is formally not a decision on the merits, it is a «quasi-meritorial» decision and therefore binding on both the President and the Constitutional Court.

For these reasons, the Court found no reason to file the preliminary question with the Plenum. The Court fully accepted the conclusions of decisions III. ÚS 571/2014 and PL. ÚS 45/2015 and reiterated that the *rationes decidendi* found in decision PL. ÚS 4/2012 were not applicable to the present case.

Having established the inapplicability of the *rationes decidendi*, the Court divided further argumentation among three groups of candidates, since these three groups were formally in different positions, although, as the Court recalled, their material situation remained essentially the same.

1. The first group consisted of three of the candidates selected in 2014, whose rights had been found to have been breached in decision III. ÚS 571/2014, and one new candidate selected in late 2015, all of whom filed complaints in September 2016.

The Court noted that the President may not stand above the Constitution and must abide by it as any other state body. The Court's decisions are also binding on the President. It went on to say that it did not follow from any of the President's decisions in this case that he would contest the fact that all the candidates fulfilled the requirements stipulated in Article 134.3 of the Constitution.

The Court observed that in its previous decisions (most notably PL. ÚS 45/2015) it had concluded on the inapplicability of the *rationes decidendi* found in decision PL. ÚS 4/2012

and that by applying these to the present case, the President had acted ultra vires. The Court emphasised that the President was bound by Parliament's pre-selection of candidates and that he was only allowed to select the judges from among those candidates.

2. The second group consisted of one of the candidates who had withdrawn their complaints in 2015. This candidate was formally in a different situation since the President's 2014 decision not to appoint him had never formally been annulled.

The Court stated that the President's decision was, due to his having acted ultra vires when issuing it, null and void. It added that the rule of law understood in the material sense required that protection be afforded also to this candidate and the only way to afford this protection was to find violation of this candidate's fundamental right to access to public offices under equal conditions and to order the President to consider this applicant as a candidate for the position of constitutional judge.

3. The third group consisted of the other of the two candidates selected in 2014 who had withdrawn their complaints and of one new candidate selected in late 2015. However, neither of these two candidates filed a complaint in 2016 and therefore they were not formally a party to these proceedings.

The Court recognised the existence of a conflict between the subjective and objective levels. It recalled that this situation with judicial nominations concerned the whole Court as an institution and had a negative effect on its functioning. Disruption of the Court's functioning could signal «the beginning of the end of the rule of law». It reiterated that all other attempts to resolve this situation had failed and that in this exceptional case the objective factors outweighed the individual interests of those candidates who had chosen not to file a complaint. The Court therefore decided also to extend the effects of its decision to those two candidates who had not filed a complaint.

By doing so, the number of candidates remained seven, which was a sufficient number for the President to be able to choose three Constitutional Court judges from among them. The Court ordered the President to decide again and to consider all seven as candidates for the three judicial vacancies. The President was not allowed to apply the *rationes decidendi* found in decision PL.ÚS 4/2012 when appointing the judges.