REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Up-679/06

U-I-20/07

10 October 2007

DECISION

At a session held on 10 October 2007 in proceedings to examine the petition and in proceedings to review constitutionality initiated upon the petition of Aleš Zalar, Ljubljana, and in proceedings to examine the constitutional complaint and in proceedings to decide upon the constitutional complaint of Aleš Zalar, Ljubljana, the Constitutional Court

decided as follows:

1. The second paragraph of Article 62 of the Courts Act (Official Gazette RS, Nos. 19/94, 45/95, 38/99, 28/2000, 73/04, 23/05 – official consolidated text, 72/05, 100/05 – official consolidated text, 127/06, 27/07 – official consolidated text, and 67/07) is not inconsistent with the Constitution.

2. The petition for the initiation of proceedings to review the constitutionality of the second sentence of the third paragraph of Article 321 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, 36/04 – official consolidated text, 52/07, and 73/07 – official consolidated text) is dismissed.

3. By Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, the complainant's right to an impartial judge determined by the first paragraph of Article 23 of the Constitution was violated.

4. The constitutional complaint against the Judgment referred to in the preceding Point is rejected in the part relating to the violation of the right to a trial without undue delay.

5. The constitutional complaint against Supreme Court Order No. VII Ips 1/2006, dated 14 November 2006, in relation to Supreme Court Order No. VI Ips 4/2006, dated 17 May 2006, is rejected.

REASONING

A

1. The Judicial Council proposed to the Minister of Justice (hereinafter referred to as the Minister) that the complainant, as the only candidate, be appointed to the office of the president of the Ljubljana District Court. The Minister rejected the Judicial Council's proposal and decided not to appoint the complainant to that office. In the proceedings for the judicial review of administrative acts, the court of first instance granted the action of the complainant, annulled the decision of the Minister, and remanded the case to the Minister for a new procedure. Both the complainant and the Minister appealed against the mentioned decision of the Administrative Court. By the challenged Judgment, No. I Up 143/2006, dated 29 March 2006, the Supreme Court dismissed the complainant's appeal and granted the Minister's appeal, and modified the Administrative Court Judgment so as to dismiss the complainant's action against the decision of the Minister. It adopted the position that in conformity with the second paragraph of Article 62 of the Courts Act (hereinafter referred to as the CtsA), in the procedure for appointing the president of a district court the Minister has the right to select a candidate even when the Judicial Council proposes only one candidate to the Minister (regardless of how many candidates responded to the call for applications); i.e. that in such an event the Minister can reject the proposal of the Judicial Council and not select the proposed candidate and thereby not appoint such candidate president of a court.

2. The complainant filed a constitutional complaint against Supreme Court Judgment No. I Up 143/2006 and proposed that until its final decision is adopted the Constitutional Court suspend the legal consequences of the challenged Judgment. In the complaint he alleges a violation of the right to equality before the law determined by the second paragraph of Article 14 of the Constitution and the right to the equal protection of rights determined by Article 22 of the Constitution, the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, the right to the public pronouncement of a judgment determined by Article 24 of the Constitution, the right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution, the right to an effective legal remedy determined by Article 25 of the Constitution, and the right to equal access to every position of employment under equal conditions determined by the third paragraph of Article 49 of the Constitution. According to the complainant, the interpretation of the provision of the second paragraph of Article 62 of the CtsA adopted by the Supreme Court in Judgment No. I Up 143/2006 is manifestly erroneous in view of the established methods of interpretation of legal regulations. The complainant substantiates in great detail why on the basis of linguistic, systematic, teleological, and historical interpretations the only possible interpretation that is in conformity with the Constitution is the one that he supports. Furthermore, he challenges the Supreme Court Judgment for its alleged lack of sound reasoning. The [Supreme] Court allegedly did not state arguments for the adopted position, and the reference to Decision of the

Constitutional Court No. U-I-224/96, dated 22 May 1997 (Official Gazette RS, No. 36/97, and OdlUS VI, 65), was allegedly too general. The challenged Judgment was allegedly also contrary to the established case law of the Supreme Court and the Administrative Court in comparable cases regarding the application of the provision on the appointment of presidents of courts. The complainant refers to Supreme Court Judgments No. I Uv 39/95, dated 11 September 1997; No. U 28/98, dated 28 May 1999; and No. U 36/99, dated 22 October 1999. He alleges that these cases are essentially similar to the case at issue and that the Supreme Court did not state reasons for its departure from the established case law. In addition, the complainant is of the opinion that the Supreme Court should have publicly pronounced the Judgment. Since it did not do so, it allegedly interfered with his constitutionally guaranteed right to a publicly pronounced judgment. Moreover, the complainant alleges that a judge participated in the decision-making of the Supreme Court who, in his opinion, should have been disqualified, as allegedly there existed circumstances that raised doubt regarding his impartiality. He alleges that he requested his disqualification, however the President of the Supreme Court rejected his request by reasoning that the matter had already been decided on at the panel session held on 29 March 2006. The complainant emphasises that judges are qualified to request their own recusal when circumstances exist that could raise doubt regarding their impartiality. Since on 3 May 2006 the decision of the [Supreme] Court became known, the complainant filed, with respect to the violation of the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, a request for a retrial against the Supreme Court Judgment in conformity with point 4 of the first paragraph of Article 85 of the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 50/97, etc. – hereinafter referred to as the AJRAA).

3. During the procedure for examining the constitutional complaint against Supreme Court Judgment No. I Up 143/2006, by Order No. VII 1/2006, dated 14 November 2006, the Supreme Court dismissed the appeal and upheld the first instance Supreme Court order by which the complainant's request to reopen the proceedings that had been concluded by Supreme Court Judgment No. I Up 143/2006 was rejected. On 29 November 2006 the complainant filed a constitutional complaint also against the mentioned two orders of the Supreme Court. In that constitutional complaint he claims the violation of Article 22, the first and second paragraphs of Article 23, and Article 25 of the Constitution. He alleges that the Supreme Court did not adopt a position with regard to his statements concerning the interpretation of the first paragraph of Article 86 and the third paragraph of Article 85 of the AJRAA, the duty of the court to ensure its own impartiality, his reference to the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), and motions for evidence for establishing circumstances when grounds for disqualification can be invoked. From the viewpoint of the constitutional right to an impartial court determined by the first paragraph of Article 23 of the Constitution, the reasoning of the Supreme Court is allegedly manifestly erroneous.

4. The complainant also filed (already in the framework of the first constitutional complaint) a petition for the review of the constitutionality of the second paragraph of

Article 62 of the CtsA and the second sentence of the third paragraph of Article 321 of the Civil Procedure Act (hereinafter referred to as the CPA). In the petition he alleges that due to the nature and content of the second paragraph of Article 62 of the CtsA, competent authorities can assign different meanings to the wording of that provision. He states that in the case at issue the Minister, the Administrative Court, and the Supreme Court adopted different interpretations of the mentioned provision. He advocates the fourth interpretation (which allegedly was also predominantly adopted by the Administrative Court), which at the same time in his opinion is the only one that on the basis of the established methods of interpretation is constitutionally admissible. He proposes that the Constitutional Court adopt a so-called interpretative decision by which it should establish that the second paragraph of Article 62 of the CtsA is not inconsistent with the Constitution if it is interpreted (applied) in a manner such that the Minister may not reject the proposal of the Judicial Council regarding the appointment of the president of a court when the Judicial Council proposes only one candidate for appointment. From the petitioner's extensive statements it follows that in his opinion only such interpretation of the second paragraph of Article 62 of the CtsA enables the Judicial Council to be in a constitutional position that is equivalent to the Minister's and ensures that only objective criteria are taken into account in the appointment of a candidate for the president of a court, and thereby the independence of judges in the performance of judicial office is ensured (the second paragraph of Article 3 and Article 125 of the Constitution). In his petition he refers to various international acts, the recommendation of the Committee of Ministers of the Council of Europe, the position of the Commission for Democracy through Law (the Venice Commission), and encloses with the file the conclusions of the First Study Commission of the International Association of Judges on the appointment and role of presidents of courts, as well as two judgments of the Constitutional Court of Italy. The petitioner emphasises that his petition primarily relies on the argument that the challenged provision is unconstitutional from the viewpoint of the principle of legal foreseeability (the rule of law) determined by Article 2 of the Constitution and the right to an effective legal remedy (Article 25 of the Constitution) in relation to the right determined by the third paragraph of Article 49 of the Constitution as a special provision regarding the right to the equal protection of rights determined by Article 22 of the Constitution.

5. In the opinion of the petitioner, the legislature expressly conferred on the Judicial Council the power to select a candidate only when a number of candidates who fulfil the conditions for appointment have applied. If, however, only one candidate responds to a call for applications and the Judicial Council finds that he or she fulfils the conditions for appointment, in the opinion of the petitioner, the Judicial Council does not have the option to make a selection but must propose that the Minister appoint such candidate. In the petitioner's opinion, the constitutional right determined by the third paragraph of Article 49 of the Constitution is guaranteed only if in a candidature procedure an effective legal remedy is available to the party in order to ensure that in proceedings for the judicial review of administrative acts the legality and correctness of the application of substantive (statutory conditions and those of the call for applications) and procedural rules are examined. The interpretation provided by the Supreme Court allegedly does not ensure

equal conditions of access to a position of employment, as in accordance with such interpretation the Minister can determine in each case which criterion will be decisive in appointing the president of a court. The complainant is convinced that, in the case at issue, the act on the appointment of the president of a court can only have so-called notarial effect. This allegedly entails that the Minister only examines the legality of the proposal of the Judicial Council, which includes an assessment whether the Judicial Council used its discretion in the selection without manifest errors, whereas he or she does not have the power of discretion regarding the assessment of the appropriateness of the candidate. In the complainant's assessment, the Minister would only have such power if the matter concerned an appointment to a predominantly political position. The petitioner draws attention to the fact that candidates who fulfil formal conditions are only ensured judicial protection against the appointment act issued by the Minister (the eighth paragraph of Article 62 of the CtsA). Since supervision over the legality of decision-making begins only at that stage, it is allegedly logical that also during the appointment the Minister is obliged to assess the formal and substantive criteria for the selection of candidates, which had to be fulfilled during the entire candidature procedure, and not that at that level the Minister carries out the selection or appointment on the basis of a criterion that prior to that phase had not been applicable in the candidature procedure. In such an event, the candidate is not familiar in advance with the criteria decisive for the selection, therefore an action initiating a judicial review of administrative acts cannot entail an effective legal remedy (Article 25 of the Constitution). In addition, according to the petitioner, a legitimate goal of candidature procedures must also be the filling of vacant judicial posts, i.e. the continuity of the presidency of Slovene courts. The petitioner refers to the position of the Constitutional Court in a similar case,[1] according to which the duty of the Judicial Council to propose for election to the position of judge the only candidate who fulfils all the statutory conditions is in conformity with the public interest that all judicial posts be filled. In the petitioner's opinion, if the Minister had such autonomy in comparison to the role of the Judicial Council, the aim of filling judicial posts and ensuring the continuity of the leadership of Slovene courts could not be achieved, as there is no safeguard against arbitrary decision-making by the Minister.

6. On 1 June 2007, the petitioner supplemented his petition and submitted to the Constitutional Court also the texts of two international documents that refer to the manner of and procedure for appointing judges and to the implementation of the principle of the independence of the judiciary. He adds to his allegations regarding the unconstitutionality of the second paragraph of Article 62 of the CtsA that, in view of Article 3 of the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 105/06 – hereinafter referred to as the AJRAA-1), it follows from Order of the Constitutional Court No. Up-1679/07, dated 29 March 2007,[2] that in deciding whether to appoint a proposed candidate the Minister cannot be entirely autonomous and that such issue is thus not a matter left to his political discretion.

7. The petitioner also challenges the second sentence of the third paragraph of Article 321 of the CPA, which is allegedly inconsistent with Article 24 of the Constitution insofar

as it relates to the judicial review of administrative acts. In the judicial review of administrative acts all cases that interest the public are, as a general rule, more complex, therefore the mentioned provision allegedly not only entails an interference with the right determined by Article 24 of the Constitution and its limitations, but actually a complete revocation of this right in all of the most important disputes between bearers of public authority and private entities, and those cases in which the public is interested.

8. By Order No. Up-679/06, dated 25 May 2006, the Constitutional Court accepted for consideration the constitutional complaint against Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, and suspended, until the adoption and finality of the decision of the Supreme Court on the request to reopen the proceedings concluded by Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, the procedure for appointing the president of the Ljubljana District Court, initiated on the basis of the Order of the Judicial Council dated 24 November 2005 (Official Gazette RS, No. 109/05). After the finality of the decision of the Supreme Court on the request for a retrial (Order No. VII 1/2006, dated 14 November 2006), the Constitutional Court dismissed, by Order No. Up-679/06, U-I-20/07, the (repeated) proposal of the complainant to suspend, until the final decision is adopted, the legal consequences of Supreme Court Judgment No. I Up 143/2006 and the implementation of the second paragraph of Article 62 of the CtsA. Due to the concrete circumstances of the case, the Constitutional Court also assessed in that Order whether it would be necessary to determine a new manner of the implementation of the Order on the acceptance of the constitutional complaint dated 25 May 2006. It decided that it was no longer possible to substantiate the continuation of the temporary suspension of the procedure for appointing the president of the Ljubljana District Court. It namely established that the harmful consequences that could occur if the largest district court in the state was to remain without a president (given the fact that such an unacceptable state of affairs had already existed for more than one year) would be far greater than those that might occur to the complainant if a person other than him was appointed president of the Court.

9. In conformity with Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94), the Constitutional Court sent the accepted constitutional complaint to the Supreme Court and, pursuant to Article 22 of the Constitution, also to the Minister, and enabled the two of them to reply thereto. The Minister responded to the call of the Constitutional Court. In his reply, he rejects the complainant's allegations as unfounded. According to the Minister, the challenged Judgment cannot be considered to be “manifestly erroneous” or “without sound reasoning”, because the reasoning and interpretation of the second paragraph of Article 62 of the CtsA originate from constitutional and statutory provisions (i.e. of the CtsA), which is stated in a detailed manner in the reasoning. If the complainant understands this Act differently, this does not entail that the decision lacks sound reasoning, therefore the allegations regarding a violation of Article 22 of the Constitution are allegedly unfounded. The Minister was not able to discern from the constitutional complaint the reason why Article 25 of the Constitution was allegedly violated. Furthermore, the allegations of the complainant

regarding the departure of the Supreme Court from the established case law is also allegedly unfounded. Namely, from the cases cited by the complainant it allegedly follows that the Supreme Court had not yet adopted a position on the interpretation of the second paragraph of Article 62 of the CtsA, as the cited cases refer to procedures before the Judicial Council. Similarly, the allegations regarding the violation of the third paragraph of Article 49 of the Constitution are also allegedly unfounded. In the opinion of the Minister, the interpretation in accordance with which the term “appointment” also includes the right to choose cannot be inconsistent, already by the nature of the matter, with the mentioned constitutional right, which only guarantees the right to equal access and equal treatment, but not the right to be selected. The reply of the Minister was sent to the complainant, who responded that the reply did not necessitate additional argumentation of the constitutional complaint.

10. The petition was sent to the National Assembly for a reply thereto. In its reply the National Assembly dismisses the allegations regarding the unconstitutionality of the second paragraph of Article 62 of the CtsA and of the second sentence of the third paragraph of Article 321 of the CPA. According to the National Assembly, the mere fact that the Supreme Court attributed to the term “appointment” a clear meaning despite the perhaps ambiguous character of the challenged provision proves that the allegation of the violation of Article 2 of the Constitution is unfounded. Likewise, the content of the challenged provision as follows from the interpretation of the Supreme Court is not inconsistent with the third paragraph of Article 49 of the Constitution, as the latter only guarantees equal treatment, and not the right to a position of employment. According to the National Assembly, the challenged provision does not by itself enable unequal treatment. Any possible violation of access under equal conditions to any position of employment is subject to judicial protection that is expressly ensured the eighth paragraph of Article 62 of the CtsA, therefore, in the opinion of the National Assembly, the challenged provision cannot be inconsistent with Article 25 of the Constitution. With regard to the allegations of the petitioner concerning the inconsistency with Articles 3 and 125 of the Constitution, the National Assembly draws attention to Decision of the Constitutional Court No. U-I-224/96, in which the Constitutional Court adopted the position that the statutory provision that envisages the participation of the Minister in the procedure for appointing the president of a court is not inconsistent with the principle of the separation of powers. In the opinion of the National Assembly, the interpretation advocated by the petitioner would exclude the Minister from the appointment procedure and would entail that the Judicial Council alone appoints the president. According to the National Assembly, such procedure would be inconsistent with the principle of the separation of powers. In the opinion of the National Assembly, the content of the challenged provision as follows from the interpretation of the Supreme Court also does not interfere with the principle of the independence of a judge. The National Assembly enclosed the opinion of the Government and stated that it agrees therewith in its entirety.

11. In its opinion on the allegations in the petition, the Government emphasises that an essential element in the interpretation of the second paragraph of Article 62 of the CtsA is

the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution. In the procedure determined by the second paragraph of Article 62 of the CtsA, in accordance with which the appointment of a holder of a judicial-administrative office within the judicial branch of power is decided upon, the Minister, as part of the executive branch of power, and the Judicial Council, as a *sui generis* constitutional authority, cooperate. In the opinion of the Government, the circumstance that the manner of the appointment of presidents of courts is not determined by the Constitution points to the fact that the manner of the appointment of presidents of courts leaves the legislature a wide margin of appreciation, provided, of course, that the fundamental constitutional values and the specificities of judicial office are taken into account, which also include the protection of the personal and substantive independence of judges. With respect to the provisions of the Constitution (the second paragraph of Article 3 and Articles 23, 125, and 129), the Government assesses that the condition of an “independent court” is fulfilled if a judge with life tenure is appointed president of a court. From the fact that in accordance with Article 7 of the CtsA the president of a court manages the operations of the court, i.e. directs court management, it follows that what is at issue is a typical administrative-executive office. Therefore, in the Government's opinion, it is in conformity with the Constitution that the executive branch of power has a greater degree of influence in relation to the manner of or procedure for the appointment of the president of a court. The regulation allowing the Minister to decide independently whether to appoint the proposed candidate president or not is, in the opinion of the Government, in conformity with the Constitution also due to the fact that, on the basis of the principle of the separation of powers, the Minister and the Government (the executive branch of power), and not the president of a court, are accountable for the functioning of the judiciary as a whole to the National Assembly (the legislative branch of power). Undoubtedly, selection among several candidates (independent judges) proposed by the Judicial Council also includes the possibility to refuse the appointment of the only candidate. From the viewpoint of the system of checks and balances, the second paragraph of Article 62 of the CtsA provides an appropriate guarantee of the protection of the independence of judges, as the Minister may not appoint a president of a court without the formal proposal of such by the Judicial Council. Concerning such, the Government draws attention to the fact that this function of the Judicial Council is not stated in the Constitution, therefore the legislature could also have selected some other autonomous and independent authority to propose candidates (e.g. the plenary session of the Supreme Court), and the judicial and executive branches of power would still be appropriately balanced. With respect to the challenged provision of the second sentence of the third paragraph of Article 321 of the CPA, the Government is of the opinion that this provision determines an exception from the public pronouncement of judgments, in conformity with the authorisation determined by the third sentence of Article 24 of the Constitution. In the Government's opinion, the challenged exception concerning the public pronouncement of judgments (when deciding in a complex case, courts may decide to issue the judgment in writing) already due to the nature of the matter applies to an even greater degree to the Supreme Court, which, in accordance with Article 127 of the Constitution, decides, as the highest court in the state, in particular on complex legal

issues raised on the basis of filed extraordinary or ordinary legal remedies, with regard to which the principle of public proceedings does not apply to internal sessions. According to the Government, the regulation determined by the second sentence of the third paragraph of Article 321 of the CPA is not disproportionate from the viewpoint of the position of the Supreme Court, as it applies to the highest court in the state.

12. The Judicial Council also submitted its position regarding the allegations in the petition. In its opinion it states that the CtsA does not contain special provisions on the criteria that the president of a court must fulfil (except that he or she must be a judge), therefore the Judicial Council and the Minister are relatively free in making appointments; however, the cooperation of both the executive branch of power and the Judicial Council is necessary for an appointment. It stated that the Judicial Council as a specific intermediary authority in the system of the separation of powers carries out the first evaluation of a candidate's professional work, his or her organisational experience, and his or her submitted work programme, while the final selection rests with the Minister, who is not bound by the opinion of the Judicial Council. According to the position of the Judicial Council, in the event that the Judicial Council proposes only one candidate to the Minister, the Minister primarily assesses the elements stated in the law, as well as whether the Judicial Council's decision is well founded and acceptable. Thus, the Minister may also reject the candidate if he or she assesses that the candidate is not suitable.

13. In connection with the Government's position, the petitioner emphasises that the office of the president of a court is not administrative-executive but judicial-administrative in nature. Within the framework of such office, the conditions for the regular exercise of judicial power, and not executive-administrative power, are ensured. It is also due to this significant difference that, in the petitioner's opinion, each attempt by the executive power to exert influence on the appointment of presidents of courts must be expressly based on law. He draws attention to the fact that matters of justice administration are determined by Article 74 of the CtsA and are distinguished from matters of court management, which are determined in a general manner by Article 60. The only area where the matters of justice administration and court administration overlap is allegedly connected with the Minister's competence to supervise the performance of matters of court administration, with regard to which the Minister is allegedly not the only supervisory authority. Therefore, the Government allegedly refers in an unsubstantiated manner to the argument that the Minister is responsible for matters falling within the justice administration, due to which the Minister allegedly has the competence to reject the only proposed candidate.

14. The petitioner also does not agree with the position of the Judicial Council that the CtsA does not determine the criteria for the selection of presidents of courts. In connection with the position of the Judicial Council that the Minister and the Judicial Council interpret the content of the term “professional work” differently, the petitioner draws attention to the fact that the term “professional work” entails a statutory category determined by Article 29 of the Judicial Office Act (Official Gazette RS, Nos. 19/94, etc. – hereinafter referred to as the JOA). He alleges that in the case at issue he enclosed with

his candidature application the evaluation of his work performance in judicial office that was adopted with finality, from which it followed that he fulfilled the conditions for faster promotion. He stresses that the reason for the fact that in the procedure for appointment the Judicial Council is included as the authority that carries out the selection is precisely that it is entrusted with the task of evaluating the professional qualifications of candidates. In such a manner, the legislature allegedly wished to prevent political criteria from being applied during recruitments. In the petitioner's opinion, the position of the Judicial Council that both the Judicial Council and the Minister allegedly have equal possibilities to select from among the candidates is not based on any constitutional provision, nor is it based on any established legal method of the interpretation of regulations.

B – I

15. The Constitutional Court accepted the petition for the initiation of proceedings to review the constitutionality of the second paragraph of Article 62 of the CtsA. As the conditions determined by the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) were fulfilled, it proceeded to decide on the merits of the case. During the preliminary procedure, the question was raised whether the eighth paragraph of Article 62 of the CtsA, which regulates judicial protection in the procedure for the appointment of the president of a court, was in such mutual connection with the challenged provision that a review of the constitutionality of this paragraph was necessary to resolve the case. The Constitutional Court assessed that the review of the constitutionality of the eighth paragraph of Article 62 of the CtsA was not necessary to resolve the case, therefore it did not initiate proceedings to review its constitutionality.

The Second Paragraph of Article 62 of the CtsA

16. Article 62 of the CtsA regulates the appointment of presidents of courts. The second paragraph of this Article reads as follows:
“(2) The presidents of other courts are appointed by the Minister of Justice on the proposal of the Judicial Council for a term of six years with the possibility of reappointment.”

The Review of Conformity with Article 2 of the Constitution

17. One of the principles of a state governed by the rule of law (Article 2 of the Constitution) requires that regulations be clear and precise so that the content and purpose of a norm can be determined with certainty. The requirement of the clarity and precision of regulations does not mean that regulations must be such that they would not need to be interpreted. From the viewpoint of legal certainty, which is one of the principles of a state governed by the rule of law, as determined by Article 2 of the Constitution, a regulation becomes disputable when by means of the rules of the interpretation of legal

norms the clear content of the regulation cannot be established (Decision No. U-I-32/00, dated 10 July 2003, Official Gazette RS, No. 73/03, and OdlUS XII, 71).

18. The petitioner alleges that the linguistic framework of the challenged second paragraph of Article 62 of the CtsA allows for different interpretations. However, in accordance with the linguistic interpretation and considering also other methods of interpretation (the teleological, historical, and logical methods),[3] the second paragraph of Article 62 of the CtsA can only be interpreted in a manner such that the power of the Minister to appoint the president of a court also encompasses the right to select [a candidate], and at the same time entails that the Minister has the right to not appoint a proposed candidate. The meaning of linguistic expressions must namely be interpreted above all in accordance with the purpose that a certain provision has. From the legislative material entitled The Proposal for Adopting the Courts Act[4] it follows that the purpose of the adoption of such a regulation under which the president of a court is appointed by the Minister of Justice on the proposal of the Judicial Council was to ensure that the executive branch of power is given a certain influence on the organisation of court operations.

19. The Minister is competent for matters of justice administration, which include ensuring general conditions for the successful exercise of judicial power, in particular the preparation of laws and other regulations from the field of the organisation and operations of courts, providing education and professional training for judges and other personnel, the publication of professional literature, ensuring the necessary personnel, material, technical, and spatial conditions, international legal aid activities, the enforcement of criminal sanctions, statistical and other research on the operations of courts, and other administrative tasks determined by law (Article 74 of the CtsA). The Minister cannot carry out such function without successfully cooperating with the presidents of courts. The presidents manage the operations of courts (Article 7 of the CtsA). Their competence extends to matters of court management (the first paragraph of Article 61 of the CtsA), which include decision-making and other tasks by which the conditions for the regular exercise of judicial power are ensured on the basis of law, judicial order, and other regulations. The successful provision of the conditions for the functioning of courts is thus only possible if the presidents of courts and the competent Minister cooperate appropriately.

20. If the purpose of the challenged provision is to enable the Minister to have an influence on the appointment of presidents of courts, then it is logical that the Minister is ensured influence only if his or her competence also includes the possibility that he or she does not appoint any of the candidates (independently of whether only one candidate or several candidates were proposed for appointment). Otherwise the inclusion of the Minister in the procedure for appointing presidents of courts would have no meaning.

21. It follows from the above that the allegation of the petitioner regarding the inconsistency of the challenged provision with Article 2 of the Constitution is unfounded.

22. Next, the petitioner proposes that, after reviewing the conformity with Article 2 of the Constitution, the Constitutional Court first review the conformity of the challenged provision with the third paragraph of Article 49 of the Constitution in conjunction with Article 25 of the Constitution. However, in view of the content of the challenged statutory provision, it was first necessary to review its constitutionality from the viewpoint of conformity with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) and with the principle of the independence of judges (Article 125 of the Constitution).

The Review of Conformity with the Second Paragraph of Article 3 of the Constitution

23. The second paragraph of Article 3 of the Constitution reads as follows: “In Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers.” In its decisions, the Constitutional Court has a number of times defined the content of the principle of the separation of powers.[5] In Decision No. U-I-224/96, upon the request of the Supreme Court, it reviewed precisely Article 62 of the CtsA.[6] The provision of Article 62 of the CtsA has been amended several times since the mentioned Decision of the Constitutional Court was adopted; however, the matter now regulated by the second paragraph of Article 62 of the CtsA was at the time of the adoption of Decision No. U-I-224/06 regulated by the first paragraph of that Article.[7] In the mentioned Decision, the Constitutional Court established that the regulation in accordance with which the presidents of courts are appointed by the Minister on the proposal of the Judicial Council was not inconsistent with the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution. It emphasised that this principle does not allow for the autonomy of individual branches of power but establishes mutual dependency between them, and ensures that each of them exercises functions that are executive, legislative, and judicial in nature, and that the system of checks and balances is an essential component of the principle of the separation of powers from both the functional and organisational points of view. Therefore, from the organisational point of view of this principle, it holds true that, as a general rule, office holders in individual branches of power are not appointed to such positions by the branches themselves, but are appointed to such positions directly (deputies, for instance, through elections) or indirectly by the people (representatives from other branches of power with various competences participate in the procedure for appointing individuals to positions of power). The judicial branch of power is functionally much more independent than the other two branches of power, although even this independence is not absolute (namely, the judiciary does not determine its competences by itself, and judges are bound by law). However, such independence can be lesser in scope when the organisational aspect of the separation of powers is concerned. Since judges are bearers of power regarding whom direct responsibility to voters is not established, it is in conformity with the requirement of the mutual dependency of holders of different offices of state power

that the legislative and executive branches cooperate in the appointment of judges and presidents of courts.

24. By Decision No. U-I-224/96, the Constitutional Court also explained that the concrete implementation of the principle of the separation of powers in individual states differs to such an extent that no general rule can be determined with regard to questions such as the regulation of the appointment of judges or presidents of courts. There are no generally valid patterns for establishing the balance between individual branches of power. This depends on every individual state and its specific constitutional regulation, which is created and exists in specific historical and social circumstances. Therefore, various organisational layouts are possible and indeed also exist regarding how the principle of the horizontal, vertical, and functional separation of powers is carried out in accordance with the specific historical and cultural circumstances of a concrete adaptable and active constitutional regulation. Therefore, the petitioner cannot substantiate the alleged inconsistency by referring to various international documents and two judgments of the Constitutional Court of Italy.

25. The challenged second paragraph of Article 62 of the CtsA only determines that presidents of courts are appointed by the Minister on the proposal of the Judicial Council for a term of six years with the possibility of reappointment. The selection procedure and the conditions for holding the position of president of a court are not determined in detail in the CtsA. The only express condition determined by the Act is that only a judge of a court of equal or higher rank may be appointed president of a court (the third paragraph of Article 62 of the CtsA). In addition to this condition, it also determines that the candidates must enclose with their application their *curriculum vitae* with a description of their professional work and organisational experience after election to judicial office, and the [proposed] work programme of the court (the fifth paragraph of Article 62 of the CtsA). From the seventh paragraph of Article 62 of the CtsA, which regulates the procedure relating to the proposal of the Judicial Council, it follows that if more than one candidate applies for a vacant position, the Judicial Council selects from among the candidates that fulfil the conditions the candidate(s) whom it will propose to the Minister for appointment. The proposal must be reasoned (such that each candidate can understand on the basis of which information and criteria the Judicial Council established whether he or she fulfils the conditions), whereas the Judicial Council may state to which candidate it gives priority and reason such preference. The criteria are not determined in more detail in the Act.

26. The Judicial Council is not only an authority intended to implement the independence of the judicial branch of power,[8] but it is also, with respect to its power to make proposals, the authority that directs personnel policies in filling both vacancies in judicial offices as well as vacancies regarding the office of presidents of courts. Therefore, in the event that only one candidate who fulfils the conditions responds to a call for applications, the Judicial Council is not obliged to propose him or her to the Minister for appointment if it assesses that despite fulfilling the formal conditions, the candidate is not appropriate for performing the office of president of a court. Otherwise this power of selection by the

Judicial Council would be hollowed out. The wording of the seventh paragraph of Article 62 of the CtsA does allow for such (literal) interpretation. Systematic interpretation supports this. The JOA, which determines the procedure for the election or appointment of judges in more detail, namely expressly determines that the Judicial Council is not obliged to select a candidate who fulfils the formal conditions for the occupation of a vacant judicial post (the fifth paragraph of Article 18 the JOA). It is not apparent why in the event of the appointment and proposal of the president of a court this would be any different.[9] Therefore, the competence to make a substantive selection among the candidates is reserved for the Judicial Council as the proposer of (a) candidate(s) for president of a court. The Minister may namely only appoint as president one of the candidates proposed by the Judicial Council. A constitutionally consistent balance is thereby established that prevents excessive influence by the executive branch of power on the appointment of the presidents of courts.

27. Hence, in conformity with the second paragraph of Article 3 of the Constitution, the challenged regulation only enables the appointment of the president of a court if both authorities concur on the appropriateness of the candidate, with regard to which the challenged regulation assumes that each of them will act responsibly. Therefore, the petitioner's position that if the Minister has the right to reject a proposed candidate, the Minister is superior to the Judicial Council, is erroneous. As the Constitutional Court already stated in Decision No. U-I-224/96, what is at issue is not a relation of superiority or inferiority, but a relation of mutual restriction. Each of the two authorities namely acts within the framework of its own position and competences. It is exclusively within the competence of the Judicial Council to establish which candidates fulfil both formal and substantive conditions, and which from among several candidates are, in its assessment, from the viewpoint of professional qualifications, organisational capacities, and their ability to perform the leadership tasks, more appropriate to manage a court. The Minister cannot assess the qualification of candidates to perform the office of president of a court from the aspects that fall within the exclusive competence of the Judicial Council, and even less may he or she assess their “political appropriateness” for performing such office. The Minister[10] has the right to select the candidate from either only one or several candidates proposed by the Judicial Council, or to not appoint any of the proposed candidates. The responsible conduct of the Minister in the exercise of this right presupposes that – in the event he or she does not appoint any of the candidates whom the Judicial Council established are professionally qualified to perform the office of president of a court – the Minister will explain the reasons for such decision. Only in such a manner can the Minister demonstrate that in adopting (any of) the proposed candidate(s) he or she was led by reasons in the public interest. In the reasoning of his or her decision, the Minister must strictly limit the reasons to those that fall within his or her competences, and must not address aspects that fall within the powers of the Judicial Council.

28. It follows from the above that the second paragraph of Article 62 of the CtsA is not inconsistent with the second paragraph of Article 3 of the Constitution. With respect

thereto, the Constitutional Court stresses that in order to adopt a decision in the case at issue, in reviewing the challenged provision it did not have to address the question of whether, in the event of a disagreement between the Judicial Council and the Minister, the regulation ensures the appointment of the president of a court in the shortest time possible. Irrespective of the fact that the Constitutional Court cannot review the appropriateness of the regulation, it does call upon the legislature to assess whether a situation in which, due to a disagreement between the Judicial Council and the Minister, the president of a court is not appointed for a longer period of time calls for legislative regulation. The Constitutional Court already drew attention to the role of the president of a court in the uninterrupted exercise of judicial power, and thereby in ensuring effective judicial protection, in its Order dated 18 January 2007, by which it decided on the proposal of the petitioner to suspend, until the adoption of the final decision in the case at issue, the new procedure for the appointment of the president of the court. Precisely in order to ensure effective exercise of power, such regulation is, for instance, determined already by the Constitution itself in the second paragraph of Article 165[11] relating to the exercise of the office of a Constitutional Court judge.

The Review of Conformity with Article 125 of the Constitution

29. By Decision No. U-I-224/96, the Constitutional Court also decided that the regulation according to which the president of a court is appointed by the executive branch of power is not inconsistent with the principle of the independence of judges determined by Article 125 of the Constitution. Due to the fact that the CtsA and the JOA have been amended a number of times since the mentioned Decision was adopted, the Constitutional Court assessed anew whether the challenged regulation enables the Minister to indirectly interfere with the independent position of judges due to his or her power to appoint the presidents of courts. In comparison with the regulation in force at the time,[12] under the regulation currently in force in the CtsA and the JOA, the powers and competences of the president of a court relating to the operation of courts are indeed significantly more extensive; however, the president's role is still predominantly limited to making proposals and giving opinions. In those cases, however, where the president's powers refer to decision-making that could affect the position of judges and thereby indirectly their independence,[13] the Act contains safeguards that ensure the independence of judges.[14] The Act expressly determines that within the framework of matters relating to court management and supervision over such, interfering with the independent position of a judge in deciding on cases that were assigned to such judge is not allowed (the second paragraph of Article 60 of the CtsA). In accordance with point 2 of the first paragraph of Article 64 of the CtsA, all such attempts by the president of a court are also sanctioned by dismissing him or her from the office. Deciding on essential matters concerning the position of a judge is still reserved for the Judicial Council.[15] Therefore, in the assessment of the Constitutional Court, under the regulation in force at the time of this review, the president of a court does not have such powers that by exercising them he or she could possibly interfere with the independent position of judges. However, in reviewing the possible inconsistency of the challenged regulation from the viewpoint of

Article 125 of the Constitution, in addition to the above, it is also and in particular necessary to take into consideration the fact that no one but a judge of a court of an equal or higher rank can be appointed president of a court (the third paragraph of Article 62 of the CtsA). Hence, the Minister only makes a selection from among the already elected judges, who, in accordance with the Constitution, are ensured life tenure and who in the performance of their judicial office must be independent and bound only by the Constitution and laws. Therefore, the challenged regulation is not inconsistent with Article 125 of the Constitution.

30. However, as regards the independence of the president of a court as a judge, already in Decision No. U-I-224/96 the Constitutional Court adopted the position that the president of a court must enjoy such independence as pertains to a judge. The Act has certain safeguards that ensure this. In accordance with Article 65 of the CtsA, the dismissal of the president of a court does not affect the position, rights, duties, and responsibilities that pertain to the dismissed president as a judge. If his or her judicial position is protected even in the event of early dismissal, then, in accordance with Article 63 of the CtsA, it is even more protected in the event of the termination of office of the president of a court due to the expiry of the term of office to which he or she has been appointed. In view of the above, the judicial position of the president of a court is not violated by the challenged regulation, and thereby also the principle of judicial independence determined by Article 125 of the Constitution is not violated.

The Review of Conformity with the Third Paragraph of Article 49 of the Constitution in Conjunction with the First Paragraph of Article 23 of the Constitution

31. The petitioner links the exercise of the right of a candidate for the office of president of a court to compete with other candidates under equal conditions with Article 25 of the Constitution, which ensures the right to appeal or to any other legal remedy against the decisions of courts and other state authorities. The focal point of this human right is to ensure appellate decision-making concerning the deciding of state authorities. Therefore, in the case at issue the matter does not concern the question of a possible inconsistency with Article 25 of the Constitution, but of a possible inconsistency with the first paragraph of Article 23 of the Constitution,[16] which ensures candidates effective judicial protection. The Constitutional Court emphasises that it only carried out the review in the framework of the petitioner's legal interest, i.e. only from the viewpoint of whether a candidate proposed by the Judicial Council to the Minister for appointment who is not selected by the Minister is ensured effective judicial protection.

32. The third paragraph of Article 49 of the Constitution ensures that everyone has access under equal conditions to any position or employment.[17] In Decision No. U-I-198/03, dated 14 April 2005 (Official Gazette RS, No. 47/05, and OdlUS XIV, 22), the Constitutional Court stressed in particular “that in the event of applying for office in state authorities, including judicial office, individuals do not have a statutorily or even constitutionally protected right to occupy such a position. Such persons only have the

right to compete for such position with others under equal conditions.” With respect to the above, also as regards applying for the office of president of a court, the candidates cannot be entitled to anything more than the right to compete for such position with others under equal conditions. Consequently, the regulation in accordance with which the Minister is free to not appoint a candidate proposed by the Judicial Council president of a court cannot in itself be inconsistent with the third paragraph of Article 49 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution.

33. With regard to the above, the Constitutional Court decided that the second paragraph of Article 62 of the CtsA is not inconsistent with Article 2, the second paragraph of Article 3, Article 125, or the third paragraph of Article 49 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution (Point 1 of the operative provisions).

B – II

The Second Sentence of the Third Paragraph of Article 321 of the CPA

34. The petitioner alleges that the second sentence of the third paragraph of Article 321 of the CPA is inconsistent with Article 24 of the Constitution insofar as it refers to proceedings for the judicial review of administrative acts, as all the cases subject to these proceedings in which the public is interested are allegedly, as a general rule, more complex. Therefore, the mentioned provision allegedly entails the withdrawal of the right determined by Article 24 of the Constitution in all of the most important disputes, as well as in those interesting to the public, between bearers of public authority and private entities.

35. The AJRAA, which was in force at the time of the filing of the petition, and the AJRAA-1 do not contain special provisions on the public pronouncement of judgments. Therefore, in conformity with Article 16 of the AJRAA and Article 22 of the AJRAA-1,[18] the provisions of the CPA apply appropriately (*mutatis mutandis*) with regard to the public pronouncement of judgments in proceedings for the judicial review of administrative acts. Article 321 thereof regulates the issuance and pronouncement of judgments. It determines that judgments are issued and pronounced in the name of the people (the first paragraph of Article 321) and that in the event a main hearing is held before a panel, the panel immediately issues a judgment upon the conclusion of the main hearing, which is pronounced by the president of the panel (the second paragraph of Article 321). The third paragraph of Article 321 of the CPA then determines that: “In more complex cases, courts may decide to issue the judgment in writing. In such event, the judgment is not pronounced but is served on the parties within thirty days from the day when the main hearing was concluded.” This provision also applies *mutatis mutandis* to the question of the pronouncement of judgments before the Supreme Court.

36. Article 24 of the Constitution (Public Nature of Court Proceedings) determines: “Court hearings shall be public. Judgements shall be pronounced publicly. Exceptions shall be provided by law.” The cited constitutional provision, which regulates the right to a public trial as a human right, includes a statutory reservation. It gives the legislature the authorisation to regulate exceptions, i.e. to limit the mentioned human right. In addition, by the second paragraph of Article 15 of the Constitution, the legislature is authorised to regulate by law the manner in which human rights are exercised also in cases where this is not already envisaged by the Constitution itself, but is necessary due to the nature of an individual right or freedom.

37. The right to the public pronouncement of judgments is primarily intended for the exercise of the right to a fair trial, which is, as a human right, also protected by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[19] It is necessary to concur with the petitioner that the public pronouncement of judgments is an integral part of the right to a fair trial, an instrument of democratic public oversight regarding the functioning of courts, and an instrument for creating trust in the law. However, the right to the public pronouncement of judgments determined by Article 24 of the Constitution is one of the human rights that cannot be exercised directly on the basis of the Constitution. This means that the legislature must prescribe the manner of the exercise of this right, i.e. it must determine the form or manner of the public pronouncement of judgments with respect to the nature and requirements of different judicial proceedings. In the assessment of the Constitutional Court, the challenged provision, in accordance with which in more complex cases courts may decide to issue a judgment in writing, without orally pronouncing such, is part of the statutory regulation of the manner of the exercise of the right to the public pronouncement of judgments. A constitutional review of a statutory regulation that in terms of substance does not limit an individual human right, but only determines the manner of its exercise (the second paragraph of Article 15) must necessarily be self-restrained.[20] In such framework, as a general rule, the Constitutional Court only assesses whether the legislature had reasonable grounds for determining the manner of the exercise of that right. According to the Constitutional Court, the provision in accordance with which in more complex cases courts decide to issue the judgment in writing, which entails that in such cases the judgment is not pronounced, cannot be viewed as unreasonable. This in particular applies to the decision-making of the Supreme Court, which as the highest court in the state (Article 127 of the Constitution) decides on ordinary and extraordinary legal remedies (as a general rule) at non-public sessions, at which it resolves (generally) more complex legal issues. The petitioner proceeds from the erroneous supposition that the public pronouncement of judgments is only ensured by the oral pronouncement of judgments. Conversely, the right to the public pronouncement of judgments guarantees the public nature of the operative provisions of judgments, but not necessarily also the oral pronouncement of judgments. The requirement that the pronouncement of judgments be public is ensured already by enabling the public to consult the operative provisions. If, however, a judgment is pronounced orally, its operative provisions must always be read

in public, even if the presence of the public is partially or entirely excluded during the oral statement of the reasons of the judgment.

38. It follows from the above that the petitioner's allegation regarding the inconsistency of the second sentence of the third paragraph of Article 321 of the CPA insofar as it refers to proceedings for the judicial review of administrative acts with the right to the public pronouncement of judgments determined by Article 24 of the Constitution is unfounded.

39. Consequently, in this part the Constitutional Court dismissed the petition (Point 2 of the operative provisions).

B – III

The Constitutional Complaint against Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006

40. The subject of decision-making in the constitutional complaint at issue is whether the complainant's human rights were violated by the challenged Supreme Court Judgment. The complainant alleges, *inter alia*, that the Supreme Court Judgment violated his right to an impartial court determined by the first paragraph of Article 23 of the Constitution. Regarding such, he alleges that in the decision-making of the Supreme Court a judge participated who should have been disqualified, as there were circumstances raising doubt regarding his impartiality.

41. From the right to an impartial judge there follows, *inter alia*, the requirement that a judge must not be associated with a party or the disputed issue in such a manner that could possibly cause or at least raise a justified suspicion that, concerning the dispute, the judge can no longer decide objectively, impartially, and by considering exclusively legal criteria. As the statutory provisions on the disqualification of a judge are directly intended to ensure the exercise of the human right to an impartial judge, on the basis of a constitutional complaint possible violations related thereto can also be reviewed by the Constitutional Court (this is stated in, e.g., Decision No. Up-52/99, dated 21 November 2002, Official Gazette RS, No. 105/02, and OdlUS XI, 285).

42. In accordance with the position of the ECtHR, for the existence of an impartial judge both subjective and objective criteria are important; the former concerns a determination of the personal beliefs of a judge who is deciding in a concrete case, while the latter concerns a review of whether in the proceedings the judge ensured the implementation of procedural safeguards in such a manner that any justified doubt concerning his or her impartiality is excluded.[21] In the exercise of the right to an impartial judge it is not only important that the impartiality of the trial is in fact ensured, but also that such is expressed outwardly. This refers to the so-called appearance of an impartial judge.[22] Hence, what is important is that in proceedings in a concrete case courts create and preserve the

appearance of impartiality. Otherwise, both the trust of the public in the impartiality of courts in general and the trust of the parties in the impartiality of a trial in a concrete case can be jeopardised.[23] The ECtHR reiterated the mentioned positions also in *Švarc and Kavnik v.* Slovenia, dated 8 February 2007.

43. One of the most important procedural statutory institutes that serve to guarantee the human right to an impartial judge is the institute of the disqualification of a judge under civil procedure (Article 70 of the CPA). Since the AJRAA does not determine the reasons for disqualification, concerning this issue, in proceedings for the judicial review of administrative acts, the provisions of the CPA apply appropriately, in conformity with Article 16 of the AJRAA. The reasons due to which a judge cannot participate in deciding in a concrete dispute can be classified into two core groups: the disqualifying reasons *(judex inhabilis)* determined by points 1 through 5 of Article 70 of the CPA, and the reasons for suspicion of partiality *(judex suspectus)* determined by point 6 of Article 70 of the CPA. The latter are not exhaustively enumerated in the Act but are defined by a general clause, i.e. if other circumstances exist due to which doubt arises regarding a judge's impartiality. A party must require the disqualification of a judge as soon as he or she learns that there exists a reason for disqualification, however at the latest by the end of the main hearing before the competent court, or, if no main hearing was held, by the issuance of the decision (the second paragraph of Article 72 of the CPA). A party can request the disqualification of a judge of a higher court until the issuance of the appellate decision, which means until the moment when the court sends a written copy of the judgment to a party. It is the president of the court who decides on the request of a party for the disqualification of a judge. When the concerned judge learns that his or her disqualification has been requested, he or she must immediately cease to perform any activity related to that case, unless the matter concerns disqualification under the sixth paragraph of Article 70 of the CPA, in accordance with which he or she may perform further activities (Article 74 of the CPA). If a judge is disqualified for the reason determined by the sixth paragraph of Article 70 of the CPA, the activities related to civil proceedings that he or she performed after the party filed the request for his or her disqualification for the mentioned disqualifying reason do not have legal effects (as stated by the Constitutional Court in Decision No. Up-365/05, dated 6 July 2006, Official Gazette RS, No. 76/06, and OdlUS XV, 93).

44. In that specific case, on 5 April 2006, after having learnt from a newspaper that Supreme Court Judge Vasilij Polič, with whom he had been in a dispute concerning a fundamental question regarding judicial ethics, had participated in the adjudication of the specific case, the complainant submitted to the Supreme Court a motion for his disqualification. It follows from the allegations in the constitutional complaint that the mentioned Supreme Court Judge had promoted a book he had authored in the hall of the court without the permission of the President of the Ljubljana District Court (i.e. the complainant). Since, in the opinion of the complainant, the graphic image of the posters involved was extremely inappropriate from the viewpoint of the protection of the dignity and reputation of the court, the complainant criticised his actions severely. The

complainant encloses a letter, dated 26 August 2005, in which he suggested to the Slovene Judges Association that it adopt a position on whether by posting such posters and by his statements made in an interview for the Mladina weekly, the Supreme Court Judge had observed the Code of Judicial Ethics and acted in conformity with the rules of the Judges Association. He also sent a copy of the mentioned letter to the President of the Supreme Court. The Supreme Court Judge allegedly publicly declared in the interview for the mentioned weekly that he and the complainant had been in a dispute concerning a fundamental question regarding judicial ethics in relation to the concrete out-of-court activity of the Supreme Court Judge. According to the complainant, the mentioned circumstances objectively justify doubt regarding the Judge's impartiality. The objectively justified conviction regarding the partiality of the mentioned Supreme Court Judge is allegedly additionally substantiated by the fact that the same Supreme Court Judge is deciding in case No. I Up 537/2003, in which the complainant is a party to proceedings, and that the Judge had not submitted the case for resolution when it was due. The complainant alleges that already on 15 December 2004 he proposed priority consideration of that case, but never received a reply to his proposal. When filing the constitutional complaint, his case had not yet been resolved, despite the fact that, according to the information given by the President of the Supreme Court, the time for the resolution of cases by the Administrative Division is considerably shorter than three years.

45. By Order No. Su 29/2006, dated 18 April 2006, the President of the Supreme Court rejected the complainant's request for the disqualification of the Judge (as being too late) by reasoning that the case had already been decided on at the panel session held on 29 March 2006. He then called on the complainant, by a special letter dated 18 April 2006, to make a statement whether his submission dated 4 April 2006 was to be considered as a request for a retrial even prior to the decision of the court becoming known. As on 3 May 2006 the challenged Judgment was served on the complainant, the complainant proposed that the Supreme Court decide on the request for a retrial. Contrary to the position of the Constitutional Court in Decision No. Up-365/05, the President of the Supreme Court deemed that the appellate proceedings concluded with the decision of the appellate panel dated 29 March 2006, and not with the issuance of the appellate decision. However, in his constitutional complaint the complainant does not challenge the Order of the President of the Supreme Court. By emphasising that judges are qualified to recuse themselves from adjudication when circumstances exist that could raise doubt regarding their impartiality, the complainant alleges that the Supreme Court Judge and the members of the appellate panel violated the first paragraph of Article 23 of the Constitution.

46. In the event that circumstances exist that could raise doubt regarding a judge's impartiality (the rejecting reason determined by the sixth paragraph of Article 70 of the CPA), the second paragraph of Article 71 of the CPA imposes on the concerned judge the duty to notify the president of the court thereof, who then decides on his or her disqualification. However, when a panel decides on a case, the members of the panel are

also obliged to consider any disqualifying reasons concerning the other members of the panel. The duty determined by the second paragraph of Article 71 as an individual judge's duty, which only concerns the reasons that are related to the individual judge personally, is, in the event of panel decision-making, a somewhat “collective” duty of the members of the panel, each of whom must individually also have regard to disqualifying reasons that refer to the other members of the panel. In the considered case, the mentioned circumstances were undoubtedly known to the Supreme Court Judge even before the appellate panel issued its decision. Furthermore, prior to the final decision on the case (i.e. even before the court sent a written copy of the judgment to the parties to proceedings) also at least two members of the appellate panel had been aware of these circumstances. From the Order of the President of the Supreme Court on the rejection of the request for the disqualification of the Judge, it namely follows that on the same day when the request was filed (i.e. on 5 April 2006), the President of the Supreme Court informed the head of the Administrative Division of the Supreme Court and the president and a member of the appellate panel thereof.

47. In the case at issue, the decision of the Constitutional Court does not depend on answering the question of whether the Supreme Court Judge was in fact partial, but on the question of whether as regards the Supreme Court Judge there are any circumstances that would arouse justified doubt regarding his impartiality in a reasonable person rationally considering all the circumstances of the case. As was already mentioned, from the right to an impartial judge there also follows the requirement that in proceedings in a concrete case the court creates and maintains the appearance of impartiality. According to the Constitutional Court, the circumstances of the concrete case stated in Para. 44 of the reasoning are such that in a reasonable person they arouse serious doubt regarding the impartiality of the Supreme Court Judge, and such that they allow for doubt concerning the impartiality of the Court, not only in the eyes of the complainant but also objectively.[24] The Supreme Court Judge and the members of the appellate panel who knew of the mentioned circumstances could have proposed his disqualification, by which in the concrete case they could have ensured the appearance of the impartiality of the trial, however they did not do so. It follows from the above that the Court did not ensure the appearance of the impartiality of the trial, which means that in the concrete case the Court did not fulfil the requirements regarding such that follow from the right to an impartial judge. With regard to the above, the complainant’s right determined by the first paragraph of Article 23 of the Constitution was violated by the challenged Judgment.

48. During the proceedings for deciding on this constitutional complaint, on the basis of a new procedure to appoint the president of the Ljubljana District Court, initiated on the basis of the Judicial Council Order dated 26 April 2007 (Official Gazette RS, No. 41/07), by Decision of the Minister of Justice No. 700-22/2005, dated 30 June 2007, a different person was appointed to the office of the president of the Ljubljana District Court. Legal interest is one of the procedural prerequisites for any proceedings, including constitutional complaint proceedings. As a general rule, the Constitutional Court deems that in

constitutional complaint proceedings legal interest is demonstrated if the complainant demonstrates with a sufficient degree of probability that the granting of his constitutional complaint would entail a certain benefit for him or her (the improvement of his or her legal position) that he or she could not achieve without such. Legal interest must be demonstrated when the constitutional complaint is filed and the Constitutional Court must *ex officio* monitor whether this condition remains fulfilled throughout the proceedings. Although the office of the president of the Ljubljana District Court is occupied at the time of the adoption of this Decision, due to the specific circumstances of the case at issue the Constitutional Court did not decide to reject the constitutional complaint, *inter alia* also because in its Order dated 18 January 2007, by which it decided on the motion for suspension, due to the function of the president of the court it gave priority to the uninterrupted exercise of judicial power, whereby it enabled the appointment of the new president of the Court. Therefore, the Constitutional Court decided to assess whether in the proceedings before the Supreme Court the complainant's human rights and freedoms were violated. By taking into consideration the specific circumstances of the case and by applying the provisions of Article 47 in conjunction with Article 49 of the CCA, in its decision-making the Constitutional Court limited itself to establishing that there was a violation of the human right determined by the first paragraph of Article 23 of the Constitution (Point 3 of the operative provisions).

49. From the statements made in the constitutional complaint there also follows the allegation that the trial was unreasonably lengthy (the first paragraph of Article 23 of the Constitution). The Constitutional Court does not have jurisdiction to review possible violations of human rights that directly result from the conduct of a court or the failure of a court to perform due conduct. From 1 January 2007, the protection of the right to a trial without undue delay has been regulated by the Protection of the Right to a Trial without Undue Delay Act (Official Gazette RS, No. 49/06). With regard to the above, the constitutional complaint had to be rejected in this part (Point 4 of the operative provisions).

B – IV

The Constitutional Complaint against Supreme Court Order No. VII Ips 1/2006, dated 14 November 2006, in Conjunction with Supreme Court Order No. VI Ips 4/2006, dated 17 May 2006

50. In relation to the violation of the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, in addition to the above-considered constitutional complaint, the complainant also filed a motion for a retrial against Supreme Court Judgment No. I Up 143/2006 on the basis of point 4 of the first paragraph of Article 85 of the AJRAA. Since the Supreme Court had dismissed his appeal by Order No. VII 1/2006, dated 14 November 2006, and upheld the first instance Supreme Court order that

had rejected the complainant's motion for a retrial, the complainant also filed a constitutional complaint against the mentioned Supreme Court Orders.

51. In accordance with the first paragraph of Article 50 of the CCA, under the conditions determined by this Act, any person may file a constitutional complaint before the Constitutional Court if he or she considers that one of his or her human rights or fundamental freedoms was violated by an individual act of a state authority, local community authority, or a bearer of public authority. Anyone who requests judicial protection of his or her rights and legal interests must demonstrate a legal interest. He or she must demonstrate with a sufficient degree of probability that the granting of his or her request would entail for him or her a certain legal benefit that he or she could not otherwise gain. A legal interest must also be demonstrated in order to file a constitutional complaint. The Constitutional Court must *ex officio* monitor whether legal interest exists throughout the proceedings.

52. Since the Constitutional Court established a violation of the first paragraph of Article 23 of the Constitution already when assessing the constitutional complaint against Judgment No. I Up 143/2006, according to the Constitutional Court the complainant no longer demonstrates a legal interest for the continuation of these constitutional complaint proceedings. Therefore, the Constitutional Court rejected it (Point 5 of the operative provisions).

C

53. The Constitutional Court adopted this Decision on the basis of Article 21, the second paragraph of Article 26, Article 47 in conjunction with the first paragraph of Article 49, and the first and second indents of the first paragraph of Article 55b of the CCA, and the second indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Dr Franc Grad, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, and Jože Tratnik. Point 1 of the operative provisions was reached by seven votes against one. Judge Fišer voted against and submitted a dissenting opinion. Points 2 through 5 of the operative provisions were reached unanimously.

Dr Janez Čebulj
President

Endnotes:

[1] Decision of the Constitutional Court No. Up-134/96, dated 14 March 1996 (OdlUS V, 62).

[2] By this Order the Constitutional Court rejected as too early the complainant's constitutional complaint against Decision of the Minister of Justice No. 700-22/2005, dated 25 April 2007, by which in the new procedure the Minister again rejected the proposal of the Judicial Council to appoint the complainant to the office of the president of the Ljubljana District Court.
[3] For more on the methods of interpretation, see M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], 2nd revised edition, Cankarjeva založba, Ljubljana 2004, pp. 57 *et seq*.
[4] Gazette of the National Assembly, No. 18/93, p. 19.
[5] Its key positions were adopted in Decisions No. U-I-83/94, dated 14 July 1994 (Official Gazette RS, No. 48/94, and OdlUS III, 89), No. U-I-158/94, dated 9 March 1995 (Official Gazette RS, No. 18/95, and OdlUS IV, 20), and No. U-I-224/96, dated 22 May 1997 (Official Gazette RS, No. 36/97, and OdlUS VI, 65).
[6] The Supreme Court claimed that the competence of the Judicial Council to select and propose candidates for the offices of presidents of courts in comparison with the competences of the Minister of Justice in the procedure for the appointment of the president of a court, as determined by the then Article 62 of the CtsA, did not ensure implementation of the principle of the separation of powers. In conformity with the role of the Judicial Council emphasised in the Constitution, in the opinion of the Supreme Court, the appointment of presidents of lower courts should be entrusted to the Judicial Council.
[7] By Decision No. U-I-224/96, the Constitutional Court assessed the first paragraph of Article 62 of the Courts Act (Official Gazette RS, Nos. 19/94 and 45/95), which then read as follows: “The president of a court is appointed by the Minister of Justice from among three candidates that are proposed by the Judicial Council, for a term of six years with the possibility of reappointment.”
[8] For more details, see Decision No. U-I-224/96, Paras. 10 and 11 of the reasoning.
[9] The petitioner refers to the position of the Constitutional Court in Decision No. Up-134/96, in which it decided on the constitutional complaint of (the only) candidate for a judicial office whom the Judicial Council had not proposed to the National Assembly for election. In Decision No. Up-134/96, the Constitutional Court indeed adopted the position that “if there are several candidates that fulfil all the conditions, the Judicial Council may select from among them – on the other hand, if there is only one candidate, in accordance with the provisions of the first paragraph of Article 19 and Article 33 of the JOA, it must propose that candidate for election, which is also in conformity with the public interest that all judicial posts be filled.” However, it must be taken into consideration that the mentioned decision was adopted on the basis of the then in force special transitional regulation of the procedure for the election and appointment of judges with limited tenure to the office of judge with life tenure.
[10] On the basis of Article 110 and the first paragraph of Article 114 of the Constitution, the Minister is responsible for the work of the Ministry, within the broader framework of which different activities related to the performance of judicial office fall, including the justice administration. The Minister is politically accountable to the National Assembly for the state of affairs in the judiciary.

[11] The second paragraph of Article 165 of the Constitution reads as follows: “Upon the expiry of the term for which a Constitutional Court judge has been elected, he continues to perform his office until the election of a new judge.”
[12] The CtsA (Official Gazette RS, Nos. 19/94 and 45/95) and the JOA (Official Gazette RS, Nos. 19/94 and 8/96).
[13] For instance: decision-making on regular advancement to a higher salary grade and promotion to the rank of a senior judge (the third paragraph of Article 24 of the CtsA), decision-making on the assignment of judges [to other courts] (Article 69 of the JOA), the determination of an annual list assigning judges to certain legal fields (the first paragraph of Article 71 of the CtsA), the appointment of the head of an organisational unit (Article 69 of the CtsA), decision-making on granting leave of absence (the third paragraph of Article 59 of the JOA), deciding on approving a leave due to educational training (the fifth paragraph of Article 63 of the JOA), requesting information and the inspection of a file also in cases not yet concluded with finality (the third paragraph of Article 12 of the CtsA and Article 6 of the Protection of the Right to a Trial Without Undue Delay Act, Official Gazette RS, No. 49/06).
[14] If a judge assigned to a certain legal field by a decision of the president of a court appeals against such decision, the personnel council of the next higher court decides on the appeal (the second paragraph of Article 71 of the CtsA). If a judge appeals against a decision on assignment, the Judicial Council decides on the appeal (the fourth paragraph of Article 69 of the JOA). If a judge believes that his or her statutory rights, his or her independent position, or the independence of the judiciary have been violated in any manner, he or she may file an appeal before the Judicial Council (the sixth indent of Article 28 of the CtsA).
[15] The Judicial Council is the authority empowered to select from among several candidates and to propose a candidate for election to a judicial office, as well as to propose that the National Assembly dismiss a judge. In accordance with Article 28 of the CtsA, the Judicial Council is empowered to decide on the incompatibility of judicial office with other offices; to give its opinion on a budget proposal for courts, and to provide the National Assembly with an opinion on laws regulating the status, rights, and duties of judges, as well as judicial personnel; to adopt the criteria for the minimum expected quantity of work for judges and the criteria for evaluating the quality of work performed by judges in office, and to decide whether an appeal of a judge who claims that his or her statutory rights, his or her independent position, or the independence of the judiciary were violated is well founded. In accordance with the JOA, the Judicial Council decides on the cessation of a judicial office (Article 33) by upholding the negative evaluation of the performance of judicial office; on promotion to a higher judicial rank, on faster advancement to a higher salary grade, on faster promotion to the rank of a senior judge or to a higher judicial post; and on extraordinary promotion to a higher judicial post (the third paragraph of Article 24); it decides on the transfer and allocation of judges to other courts (Articles 66, 68, 69, and 71); it decides on the incompatibility of judicial office with other offices and with the performance of other work (the third paragraph of Article 43); it decides on the granting of judicial scholarships (the second paragraph of Article 63); at the request of the president of a court, it adopts the final decision on whether a proposal

for professional supervision is well founded (Article 79b); it submits proposals for the initiation of disciplinary procedures (the second paragraph of Article 91); it enforces certain disciplinary sanctions (the sixth paragraph of Article 83); and decides on the suspension of the president of the Supreme Court, as well as on appeals against decisions of the president of the Supreme Court on the suspension of other judges (the third paragraph of Article 95 and the first paragraph of Article 96).

[16] The first paragraph of Article 23 of the Constitution reads as follows: “Everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law."

[17] Concerning the right determined by the third paragraph of Article 49 of the Constitution, see Decision No. Up-134/96, dated 14 March 1996 (OdlUS V, 62); Decision No. U-I-321/96, dated 10 October 1996 (Official Gazette RS, No. 61/96, and OdlUS V, 133); Decision No. U-I-344/94, dated 1 June 1995 (Official Gazette RS, No. 41/95, and OdlUS IV, 54); Decision U-I-371/98, dated 24 May 2001 (Official Gazette RS, No. 48/01, and OdlUS X, 104); and Decision No. U-I-202/99, dated 21 November 2002 (Official Gazette RS, No. 105/02, and OdlUS XI, 236).

[18] The first paragraph of Article 22 of the AJRAA-1 reads as follows: “The provisions of the Civil Procedure Act apply *mutatis mutandis* to procedural issues that are not regulated by this Act (Official Gazette RS, 36/04 – official consolidated text).”

[19] Official Gazette RS, Nos. 33/94, MP, and No. 7/94 – hereinafter referred to as the ECHR.

[20] See Decision of the Constitutional Court No. U-I-240/04, dated 8 December 2005, Official Gazette RS, No. 117/05, and OdlUS XIV, 90.

[21] *Cf.* the Judgment of the ECtHR in *Saraiva de Carvalho v. Portugal*, dated 22 April 1994, Para. 33.

[22] This requirement is best illustrated by the English legal saying “justice must not only be done, it must also be seen to be done.” Cited according to A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedural Law], GV Založba, Ljubljana 2004, p. 413.

[23] *Cf.* the Judgment of the ECtHR in *Coeme et al. v. Belgium*, dated 22 June 2000, Para. 121.

[24] *Cf.* the Judgment of the ECtHR in *Švarc and Kavnik v. Slovenia*.