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DECISION OF PRESIDENT TO GRANT AMNESTY – THEORETICAL AND PRACTICAL ISSUES IN SLOVAK REPUBLIC

The very first amnesty was granted in 403 BCE by the leader of democrats Thrasybulus after overthrowing the Thirty Tyrants[1]. It was aimed to restore harmony and unity in Athenian polis, as a mean to reconciliate adversaries in internal and external conflicts. It was introduced as an oath (*όρκος*), which was developed into agreement. The meaning of the word *αμνηστία* can be described with the notion of "forgetfulness", or "pardon"[2]. According to the one of the contemporary definitions, amnesty is a legal instrument, which authorizes a head of state to render a decision on pardon or mitigation of sentence or legal consequences for a certain generally defined class of people that satisfy conditions given in the amnesty decision[3]. Usually, an amnesty used to be granted on the notable state events, *e.g.* presidential inauguration. However, it may also serve to tone down the public after a situation of emergency.

Despite the trend to limit prerogatives of head of state, an amnesty and a clemency belong among the remaining regular presidential competence. The notions of "amnesty" and "clemency" have their significant place also in constitutional order of the Slovak republic. The original wording of the *Ústava Slovenskej republiky* (hereinafter "the Constitution") in Art. 102(1)(i) presupposed three forms of amnesty or clemency – abolition, agratiation, and rehabilitation. The abolition was intended to either prevent commencing, or to discontinue criminal prosecution; the agratiation means commutation of imposed penalty;

[1] This contribution is a part of the research project "New dimensions of legal argumentation methodology – The role of legal principles in a multi-level legal system" supported under grant VEGA n. 1/0386/19.

[2] *See* Odlišné stanovisko sudkyne Ľudmily Gajdošíkovej k odôvodneniu nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017, p. 5 .

[3] K. Klíma *et al*., *Encyklopedie ústavního práva*, Praha 2007, p. 10.

and the rehabilitation resulted in pardon after which a rehabilitated person is treated as if the conviction had never happened. We maintain that original presidential prerogative of mercy was excessive. However, it was constitutionally permitted interference of president, the executive body, with the judiciary and interference with operation of the bodies involved in criminal proceedings. The possibility of granting amnesty in form of abolition was the most criticized, since such amnesty decision constituted legally binding order to not commence or to discontinue criminal proceeding. Thus, it was impossible to deliver a ruling on guilt and sentence. Moreover, the president was the sole constitutional body which was deciding on amnesty and only based on his own discretion[4].

Constitutional changes limited presidential competence to grant amnesty and clemency. As a check against abuse of the amnesty, the constitutional act of 1999 made validity of amnesty decision conditional on countersign of the prime minister or designed minister[5]. Subsequently, the constitutional act of 2001 limited further the amnesty competence by removing constitutional faculty to grant amnesty or clemency in form of abolition[6]. Amnesty competence was further elaborated in jurisprudence of the *Ústavný súd Slovenskej republiky* (hereinafter as "the Constitutional Court"). In the decision in the case file no. I. ÚS 30/99 the Constitutional Court established that it is not possible to legally annul or withdraw a decision on amnesty. It seemed that the Constitutional Court omitted the values, which are protected by the Constitution. Therefore, it was not generally accepted solution on the issue of amnesty derogation.

Surely, amnesty is a delicate instrument, therefore it is up to the president and the government to carefully consider reasons and consequences of their decision in order to avoid major legal issues. That was not always case in Slovakia. The abovementioned constitutional changes and jurisprudence were adopted in reaction to the government decision to grant amnesty after assuming presidential powers in March 1998 (so-called "Mečiar's amnesties")[7]. Even the president

[4] See: M. Tóthová, *Hlava štátu v systéme deľby moci*, Košice 2015, p. 165.

[5] Čl. I., bod. 11 Ústavný zákon č. 9/1999 Z. z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení ústavného zákona č. 244/1998 Z. z.

[6] Čl. I, bod. 55 Ústavný zákon č. 90/2001 Z. z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

[7] The amnesty of 3 March 1998 was granted by the prime minister V. Mečiar after he legally took over some of the presidential competences because the term of office of the president Michal Kováč expired and new president was not elected yet. The wording of the Art. 5 of the amnesty decision of the 3 March 1998 read as follows, "I order, that the criminal prosecution for the offences committed in relation to preparation and process of referendum of 23 and 24 May 1997 shall not commence and if it already has, that it shall be terminated".

The decision was intended to amnesty offences related to the referendum announced by the president M. Kováč. The citizens should have been voting on the four referendum questions. First three referendum questions, which were initiated by parliament, were related to Slovak accession to the NATO. The fourth question initiated by public petition concerned direct presidential elec-

Michal Kováč used presidential power of mercy suspiciously; on 12 December 1997 by the decision no. 3573/96-72-2417 he granted clemency to his own son who was already accused in criminal case. However, I will not focus on the clemency granted by the president Kováč in this paper.

Slovak society perceived the amnesties of 1998 as an abuse of power. They were considered amoral and damned as a stain on democracy and rule of law. Although the public opinion ignited a vivid discussion and even lead to attempts to revoke amnesties, all efforts were in vain due to a fundamental lack of political will. Even the disunity of legal theory scholars was not helpful. However, we do understand problematic nature of amnesty annulment since revoking amnesty decision is not generally accepted by law, practice or prevailing legal opinion. Reserved position is preferred in this matter also in jurisprudence of the European Court of Human Rights; however, an amnesty might be annulled or revoked in extraordinary cases concerning war crimes, crimes against humanity, and the gravest violations of human rights[8].

The acts that were amnestied by Mečiar traumatized and outraged public for almost 20 years with ongoing manifestations of discontent. Finally, the *Národná rada Slovenskej republiky* (the National Council of the Slovak republic – hereinafter as "the parliament") adopted the constitutional act no. 71 of 2017[9]. The constitutional change established brand-new competence of the

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tion. However, in effort to prevent voting on the fourth question, the minister of interior ordered to print only first three referendum questions. The minister acted despite the ruling of the Constitutional Court, which held that, "Concerning announced referendum, it obliges the president and other state bodies, that the referendum has to take place. The Constitution does not allow the announced referendum to be aborted before announcing the results". The referendum was afterwards proclaimed foiled by the Central committee for referendum.

The wording of the Art. 6 of the amnesty decision of the 3 March 1998 read as follows, "I order, that the criminal prosecution for the offences committed in relation to an announcement of the abduction of Mr. Michal Kováč jr. to the outland shall not commence and if it already has, that it shall be terminated". The mentioned article prevented criminal prosecution of 12 agents of the Slovak Intelligence Agency, who had been participating on abduction of M. Kováč, jr., son of the president, to Austria.

In intend to mend his original amnesty decision, the prime minister V. Mečiar, acting as the president, granted another amnesty decision on the 7 July 1998 as follows, "Article 1. I order, that the criminal prosecution for the suspicion of offences that could have been committed in relation to preparation and process of referendum of 23 and 24 May 1997 shall not commence and if it already has, that it shall be terminated.

Article 2. I order, that the criminal prosecution for the suspicion of offences that could have been committed in relation to the announced abduction of Ing. Michal Kováč, born on 5 December 1961, to the outland, that allegedly happened on 31 August 1995, shall not commence and if it already has, that it shall be terminated".

[8] E.g. Judgment of 17 March 2009, ECtHR, Case Ould Dah v. France, App. n. 13113/03; Judgment of 13 November 2012, ECtHR, Case Marguš v. Croatia, App. n. 4455/10.

[9] Ústavný zákon č. 71/2017 Z .z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

parliament to decide by three-fifths majority on annulment of an amnesty or a clemency decision, where such decision of the president was in contrary with principles of democratic and rule-of-law state[10].

Thus, the parliament took itself the burden of revoking amnesties and clemency. It decided that this task should be accomplished in a form of generally binding resolution of parliament, which must be adopted by qualified majority and proclaimed in the same manner as the law. Although, the chosen solution was unusual and unexpected in the Slovak legislative procedure[11], the form of resolution was common form of decision-making of the parliament. Pursuit to § 12 of the act on lawmaking[12], a resolution of the parliament is categorized among "other acts" that are published in the *Zbierka zákonov Slovenskej republiky* (the official journal – the Collection of Laws of the Slovak republic, abbrev. *Z. z.*) only if the parliament decide so.

A resolution as the new form of legal act is characteristic for certain qualities of normative legal act, which are implied from the wording of the Constitution, as we already mentioned. The matter of the act is general (i.e. generally biding), and there is prescribed mean of publication – the proclamation in the *Zbierka zákonov*. It is worth mentioning that structure of resolution consists of a preamble, which is underlining exceptionality of the resolution since a preamble usually forms a part of legal acts and decisions of fundamental importance.

The change of the Constitution established in the Art. 129a the competence of the Constitutional Court to decide *ex offo* on constitutionality of a parliament resolution on annulment of an amnesty or a clemency decision. It set a constitutional decision period of 60 days[13]. The proceedings on constitutionality of the parliament resolution of 5 April 2017 n. 570 regarding Mečiar's amnesties commenced on own motion and ended with delivery of the finding of the Constitutional Court of 31 May 2017 case file n. PL. ÚS 7/2017. It was held that the examined resolution of parliament is constitutional.

In the process of decision-making, the Constitutional Court faced uneasy task. It is typical for a constitution in the continental Europe to be enacted by the constituent assembly or legislative body; the same body might even change or amend the Constitution. However, the constitutional change in question, which

[10] Čl.86 písm. i) Ústavy Slovenskej republiky.

[11] See: Odlišné stanovisko sudkyne Ľudmily Gajdošíkovej k odôvodneniu nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017, p. 5.

[12] Zákon č. 400/2015 Z. z. o tvorbe právnych predpisov a o Zbierke zákonov Slovenskej republiky a o zmene a doplnení niektorých zákonov.

[13] Pursuit to cited constitutional provisions, the Constitutional Court may in the period of 60 days rule on constitutionality. Such ruling would be in form of *nález* – "the finding of the court". If the Constitutional Court does not rule within the decision period, the proceedings will be terminated by the *uznesenie* – "the order of the court". The proceedings would be terminated even when majority of all constitutional judges was not reached.

extended competence of the parliament had the vast implication to the principle of separation of powers. The novel law transferred a competence to review executive acts from the judiciary to hands of legislative power, and the Constitutional Court was confided with a review of the new unusual legal act of the legislator.

It should be noted, that due to the specific legal character of amnesty decision, legal theory does not provide unison opinion on its classification. However, it is generally concluded that amnesty decision is legal act *sui generis*. An amnesty is addressed to indeterminate number of persons, who are specified by the type of the offence committed, fault, form of the sentence, or any other applicable criteria[14]. Afterwards, the general courts assess the applicability of the amnesty decision on specific person[15]. K. Klíma contends that amnesty is the act of application of law, which shows some normative aspects. On the other hand, other scholars classify amnesty decision among the normative legal act or legal act *sui generis* that has characteristics of the generally binding legal act[16]. The Constitutional Court considered that the amnesty decision should be treated as the act of application of law *sui generis* that contains certain elements characteristic for the normative legal act. This probably explains classification of a parliament resolution on annulment of an amnesty that was used by the Constitutional Court. Despite characteristics provided in the Constitution, it was held that the parliament resolution annulling an amnesty is in fact individual legal act *sui generis*, which was issued pursuit to the Constitution. The Constitutional Court contended that the constitutional basis of the parliament resolution in Art. 86(i) should provide high degree of legitimacy and legal authority. However, we find it difficult to subscribe to the classification of parliament resolution in the category of individual legal acts.

The principle of legal certainty enshrined in Art. 50(6) of the Constitution provides relative prohibit of retroactivity, except for the *lex mitior* principle. Analyzed constitutional change by its interim and final provision in Art. 154f(1) enabled retroactive use of parliamentary competence to annul amnesties[17]. Pursuit to the cited article the amnesty annulment also results in

– annulment of all decisions that were based on the annulled amnesty or clemency and

[14] See: K. Klíma *et al*., *Komentař k Ustavě a Listině*, Plzeň 2005, s. 324.

[15] A. Bröstl *et al*., *Teória práva*, Plzeň 2013, s. 55.

[16] *Ibidem*, s. 55; V. Pavlíček *et al*., *Ústavni pravo a statověda. II. dil.: Ustavni pravo Ceske republiky*, Praha 2011, s. 851; Odlišné stanovisko predsedu Ústavného súdu ČR Pavla Rychetského k uzneseniu Ústavného súdu Českej republiky sp.zn. Pl. ÚS 4/13 z 5. marca 2013.

[17] See: I. Macejková, *Ešte raz k nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017 o súlade uznesenia Národnej rady Slovenskej republiky o zrušení tzv. „Mečiarových amnestií" s Ústavou Slovenskej republiky* [in:] *ÚSTAVNÉ DNI, Tretie funkčné obdobie Ústavného súdu Slovenskej republiky – VII. Ústavné dni*, eds. L. Orosz, S. Grabowska, T. Majerčák, Košice 2019, s. 15–16.

– termination of all impediments in criminal prosecution that were based on the annulled amnesty or clemency; a period during which impediments lasted shall not count into the limitation period for the acts that were included in the annulled amnesty or clemency.

Plenum of the Constitutional Court certainly realized that the constitutional change was purpose-built and that there would be major critical appraisal, however it considered the reaction of legislative body to be legitimate and justified in its foundation[18].

D. Šváby aptly depicts the issue of the Mečiar's amnesties as the gravest undemocratic deed of young Slovak republic. Since one of the definitions describes the democracy as a mean to resolving the issues in a dialogue without use of violence, thus the amnesties were deemed undemocratic, since behind their core was violent act committed for political purposes. Secondary, these amnesties demonstrated a willful arbitrary act of state power that aimed to foil prosecution of political perpetrators[19]. Therefore, the generally accepted presumption that arbitrary and unlimited exercise of state power is in sheer breach of democratic and rule of law state formed one of the pillars of the Constitutional Court decision PL. ÚS 7/2017. Even the European Court of Human Rights asserts that "the authorities in question should not underestimate the importance of the message they convey to all those concerned as well as the general public when deciding whether or not to institute criminal proceedings against officials suspected of treatment contrary to Art. 3 of the Convention"[20]. The Strasbourg court specifically noted that "Under no circumstances should they give the impression that they are prepared to allow such treatment to go unpunished"[21].

The Constitutional Court in decision on constitutionality of the parliament resolution examined the potential breach of democratic and rule of law principles by annulment of amnesties. However, in relation to annulled amnesty for 1997's referendum preparation and process, the court held that while granting amnesties the prime minister acted in breach of constitutional principle of prohibition of arbitrariness, which founds categorical imperative for carrying out public function. Moreover, his action constituted inadmissible interference with popular sovereignty, which is immanent component of democratic state; therefore, the prime minister violated constitutional rights of at least those citizens who peti-

[18] J. Mazák, L. Orosz, *Quashing the decision on amnesty in the constitutional system of the Slovak Republic: Opening or closing Pandora´s box?*, „The Lawyer Quarterly" 2018, vol. 8, no. 1, p. 7.

[19] D. Šváby, *Z perspektívy zodpovednosti za výber sudcov Ústavného súdu Slovenskej republiky je rozdiel medzi Národnou radou SR a Prezidentom SR vecou odlišnosti v stupni, nie druhu* [in:] *Ústavné súdnictvo – výzvy a perspektívy: zborník príspevkov z medzinárodnej konferencie pri príležitosti 25. výročia Ústavného súdu Slovenskej republiky konanej 11. apríla 2018 v Košiciach*, ed. A. Nagyová, Košice 2018, p. 165–171.

[20] Judgment of 21 December 2000, ECtHR, Case Egmez v Cyprus, App. n. 30873/96, § 71.

[21] *Ibidem*.

tioned for referendum on direct presidential elections. It is apparent that others constitutional principles were violated as well, *i.a.* separation of powers, transparency and public control, democratic legitimacy, legal certainty and protection of trust in legal order. On the other hand, the Constitutional Court noted that there was violation of the right to legal certainty of the amnestied persons.

In the examination of the amnesty annulment in relation to the abduction of Michal Kováč jr., the Constitutional Court stated that multiple principles of democratic and rule of law state were violated by granting the amnesties, i.a. principle of prohibition of arbitrariness, legality, human rights protection, respect for international obligations, separation of powers, transparency and public control, legal certainty and protection of trust in legal order. Similarly, as in previous case, the court held that there was violation of the right to legal certainty of the amnestied persons. However, after deliberate balancing of constitutional principles the Constitutional Court concluded that legal certainty of the suspects of serious crimes should recede.

The ruling of the Constitutional Court on constitutionality of parliament resolution on Mečiar's amnesties confirmed substantive approach of the court to the protection of constitutionality. It was one of the final steps in complicated rectification process of legal status, which was direct result of abuse of power. In general, abuse of power means an action of an official, who pretends to be acting in official capacity and in accordance with law; however, in fact he is not acting in compliance with the purpose of the law or its values. Even the introductory paragraph of the Mečiar's amnesties, which justifies amnesties as a mean to reach civic reconciliation, could not conceal the fact that it was abuse of power. After all, even the Constitutional Court in the final part of the finding held that the matter at stake in this proceeding was "primarily (apparently more than ever before) deciding on question of values, that usually compose the common part of decision-making since the crucial function of the Constitutional Court is to protect constitutional values of democracy and rule of law state".

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Summary

The author deals with the regular presidential competence to grant amnesty and its constitutional regulation in the law of Slovak republic. Since revoking amnesty decision is problematic and it is not generally accepted by law, practice or prevailing legal opinion, she focuses on analysis of the "Mečiar's amnesties" annulment in Slovak republic.

Keyword: Slovak republic, presidential competence, amnesty, constitutional regulation

DECYZJE PREZYDENTA DOTYCZĄCE AMNESTII W REPUBLIKI SŁOWACKIEJ – KWESTIE TEORETYCZNE I PRAKTYCZNE

Streszczenie

Autorka zajmuje się regularnymi kompetencjami prezydenckimi do udzielania amnestii i jej konstytucyjnymi przepisami w prawie Republiki Słowackiej. Ponieważ cofnięcie decyzji o amnestii jest problematyczne i nie jest ogólnie akceptowane przez prawo, praktykę lub obowiązującą opinię prawną, skupia się na analizie stwierdzenia nieważności „amnestii Mečiara" w Republice Słowackiej.

Słowa kluczowe: Republika Słowacka, kompetencje prezydenta, amnesta, prawo konstytucyjne