

SVK-2017-2-002

a) Slovakia / b) [Constitutional Court](#) / c) Plenum / d) 31-05-2017 / e) PL. ÚS 7/2017 / f) / g) / h) CODICES ([Slovak](#)).

Keywords of the Systematic Thesaurus:

[03.04](#) General Principles - **Separation of powers.**

[03.09](#) General Principles - **Rule of law.**

[03.10](#) General Principles - **Certainty of the law.**

[03.22](#) General Principles - **Prohibition of arbitrariness.**

[04.04](#) Institutions - **Head of State.**

[05.03.38](#) Fundamental Rights - Civil and political rights - **Non-retrospective effect of law.**

Keywords of the alphabetical index:

[Amnesty](#), annulment / [Pardon](#), annulment.

Headnotes:

In exercising the power to issue amnesties and grant pardons, the President of the Republic must respect the principles of democracy and rule of law, otherwise the amnesties and pardons may be annulled, if the violation of those principles is more severe than the violation of the legal certainty of those who benefited from them.

Summary:

I. This case concerns the annulment of three clemency decisions – two amnesty decisions issued in 1998 by the then Prime Minister acting as President of the Republic and one pardon granted by the then President of the Republic in late 1997.

The 1990s in Slovakia were known for fierce political conflicts between the Prime Minister and the President.

In 1994, Interpol issued an international arrest warrant against the President's son, who was suspected of having participated in a large-scale fraud. The criminal proceedings fell within the jurisdiction of the German authorities. In 1995, the President's son was kidnapped in a small town near Bratislava and found the next morning in front of a police station across the border in Austria, intoxicated and seriously beaten. The subsequent investigation showed possible involvement of the Slovak Information Service, an intelligence agency of the State.

In 1997 there was a referendum on four questions. Three were submitted by the National Council. The fourth was based on a petition filed by citizens. The Government ordered the Minister for the Interior not to deliver referendum ballots containing the fourth question to the electoral precincts. In fact, neither the Minister nor the Government were allowed to do so; the presidential decision announcing the referendum with all four questions was already in force. This resulted in the referendum being thwarted.

In 1997 the President of the Republic granted his son a pardon for the fraud in which he was suspected of having been involved. Under this pardon, any criminal proceedings in the Slovak Republic against him had to be terminated.

When the President's term of office ended, the National Council was unable to elect a new President. Under the Constitution, the presidential powers then had to be exercised by the Government. The Constitution allowed the Government to authorise the Prime Minister to exercise those powers on its behalf. In March 1998, on the first day of his office as acting President, the Prime Minister issued an amnesty in both the case of the kidnapping of the President's son and that of the thwarted referendum.

Many attempts were subsequently made to annul the clemency decisions. They all failed. Opinion was divided as to whether it was possible to annul them at all. When the parliamentary term ended in 1998, a new coalition was formed and the new Prime Minister, now also the acting President, tried to annul the amnesties issued by his predecessor. However, the Constitutional Court declared this move unconstitutional, stating that the President was not authorised by the Constitution to annul clemency decisions already issued.

However, in March 2017 the National Council adopted a constitutional amendment which expressly allowed for the annulment of presidential amnesties and pardons. It even allowed for the three clemency decisions to be annulled retroactively. Under the amendment, the National Council had the authority to annul a decision by a three-fifths majority of all its members, if it was incompatible with the principles of democracy and rule of law. The constitutionality of such resolutions was then subject to scrutiny by the Constitutional Court.

On 5 April 2017 the National Council adopted a resolution annulling all three clemency decisions. The Constitutional Court had 60 days to decide on the constitutionality of this resolution.

II. The Court noted that when democracy and the rule of law are understood in their material sense (which the Court has done for the past few years having abandoned the formal approach to the understanding of democracy and the rule of law) in principle no decision by any of the constitutional bodies is exempt from constitutionality review. Furthermore, the exercise of public power may not be unlimited or arbitrary. Even the presidential power to issue amnesties and grant pardons is limited by the presidential oath (Article 104.1 of the Constitution), Slovakia's obligation to respect and uphold the rules of international law, international treaties by which it is bound along with its other international obligations, and the principles of democracy and the rule of law, which form the «material core» of the Constitution and are key constitutional values, are thus intangible.

The Court acknowledged the constitutional basis of the National Council's resolution, which gave it democratic legitimacy as well as legal authority. The Court noted that the resolution met both the formal and material constitutional requirements. The Court observed that it followed from the case-law of various international courts that among the reasons which could «justify» the annulment of an amnesty are the severity of the crime (in terms of its negative impact on human rights or other values of similar importance) and the identity of the perpetrator (especially if the perpetrator was acting on behalf of the state, in cases of «self-amnesty».) The Court also noted that following the recent constitutional amendment, which expressly allowed for annulling amnesties and pardons, many of the arguments presented in

the Court's earlier decisions regarding amnesties along with some of those presented by the European Court of Human Rights in *Lexa v. Slovakia* had been rendered obsolete.

The Court proceeded to assess the compatibility of the three clemency decisions with the principles of democracy and the rule of law and whether it was constitutionally acceptable for them to have been annulled. It examined each decision separately, starting with the question of the compliance of the first amnesty decision about the thwarted referendum with the principles of non-arbitrariness, sovereignty of the people, protection of human rights, separation of powers, democratic legitimacy, transparency and public accountability of government, legal certainty and the protection of public trust in the legal system, and the principle of justice. In the Court's opinion, the Prime Minister's amnesty decision violated all these principles. The Minister of the Interior had clearly acted without legal basis when he ordered the ballots to be printed with three questions on them instead of four. The thwarting of the referendum constituted a violation of the principle of sovereignty of the people; referendums are the most important tool of direct democracy. This in turn violated the constitutional rights of, at a minimum, the 500,000 citizens who had signed the petition calling for a referendum. All this must have been known to the Prime Minister when he issued the amnesty. Given that the Minister of Interior was both politically and functionally subordinate to the Prime Minister, this «self-amnesty» also constituted a breach of the principle of separation of powers.

The Court conceded that there were arguments against annulling this amnesty, notably the principles of legality and non-retroactivity. In terms of legality, the Court stated that while from a formal perspective, the Prime Minister did issue the amnesty legally (he had the power to grant the amnesty and none of the Constitutional principles contained any material limits on issuing amnesties), the argument lost its persuasiveness when viewed with a material understanding of the rule of law and democracy. Having balanced the two groups of principles, the Court concluded that the severity of violation of the first group of principles was much greater and it decided to uphold the annulment of this amnesty.

Regarding the second amnesty decision about the kidnapping of the President's son, the Court noted that the Prime Minister issued this amnesty at a time when reasonable suspicion existed that the President's son had been kidnapped unlawfully by members of the Slovak Information Service, a state agency whose director was both politically and functionally subordinate to the Prime Minister. The Prime Minister must have known about this suspicion. He must have been aware that only an independent criminal investigation could have rebutted it and that it would have been in the public interest to have the matter thoroughly investigated. The Court also noted that this particular crime met the defining elements of torture and inhuman treatment, which is absolutely prohibited under European Court of Human Rights case-law. The Court emphasised that by issuing this amnesty, the Prime Minister seriously undermined public trust in Slovak democracy, then just developing, and the future functioning of the state and greatly contributed to the discrediting of Slovakia's international reputation. Thus, in the Court's opinion, this amnesty was issued in violation of the principles of non-arbitrariness, legality, protection of human rights and respecting international obligations, separation of powers, transparency and public accountability of government, legal certainty, and protection of public trust in the legal system. As a result of the annulment of this amnesty the legal certainty of persons who had benefited from it was retroactively violated. However, the Court, referring to the reasoning put forward regarding the first amnesty, concluded that this violation was considerably less severe than that committed by issuing the amnesty in the

first place. It therefore resolved that in this part as well the National Council's resolution was in line with the Constitution.

As regards the pardon granted by the President to his son while the former was still in office, the Court acknowledged the existence of clear elements of arbitrariness (the President apparently gave priority to subjective over objective criteria.) Nonetheless, this arbitrariness could not be compared in its severity with that of the amnesties issued by the Prime Minister and could not be considered as a true self-amnesty. The pardon could not be viewed as violation of the principle of equality since the President granted it to all those charged in the fraud case. However, the Court noted that the common factor in all three clemency decisions was the political conflict between the then Prime Minister and the then President and stressed the need to apply the same criteria to them all. It accordingly also upheld the annulment of the pardon.

Cross-references:

European Court of Human Rights:

- *Lexa v. Slovakia*, no. 54334/00, 23.09.2008.