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КРИМІНАЛЬНЕ ПРАВО, КРИМІНАЛЬНИЙ ПРОЦЕС ТА КРИМІНАЛІСТИКА

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INTERNATIONAL CRIMINAL COURT AND CRIMINAL LIABILITY OF THE PRESIDENT OF THE REPUBLIC IN BOHEMIA, MORAVIA AND SILESIA

The article outlines the ratio of international and domestic legislative acts on the President's responsibility for treason in several European countries. The author reflects the historical aspects of the formation of the mechanism of responsibility of the president of the republic in Bohemia, Moravia and Silesia. The scientific work describes some aspects of the responsibility of the President of the country in the International Criminal Court on the fact of committing crimes under the Rome Statute.

Keywords: *president, criminal responsibility, treason, constitution, international law, Roman statute.*

Коуделка Зденек. **Міжнародний кримінальний суд і кримінальна відповідальність президента Республіки Богемія, Моравія і Силезія**

Описується співвідношення міжнародних та внутрішньодержавних законодавчих актів про відповідальність президента за вчинення державної зради в окремих європейських країнах. Відображені історичні аспекти становлення механізму відповідальності президента республіки в Богемії, Моравії та Сілезії. Описуються окремі аспекти відповідальності президента країни у Міжнародному кримінальному суді за фактом вчинення злочинів, передбачених Римським Статутом.

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Ключові слова: *президент, кримінальна відповідальність, державна зрада, конституція, міжнародне право, Римський статут.*

Коуделка Зденек. **Международный уголовный суд и уголовная ответственность президента Республики Богемия, Моравия и Силезия**

Описывается соотношение международных и внутригосударственных законодательных актов об ответственности президента за совершение государственной измены в отдельных европейских странах. Отражены исторические аспекты становления механизма ответственности президента республики в Богемии, Моравии и Силезии. Описываются отдельные аспекты ответственности президента страны в Международном уголовном суде по факту совершения преступлений, предусмотренных Римским Уставом.

Ключевые слова: *президент, уголовная ответственность, государственная измена, конституция, международное право, Римский статут.*

The Constitution of Bohemia, Moravia and Silesia states that the president of the Republic is not liable in his function[1], however this provision shall be considered in context with other constitutional provisions. The mentioned provision is to be interpreted in that way that the president is not liable unless the Constitution states otherwise. The Constitution regulates a particular presidential liability for committing a high treason[1].

The president is usually privileged to be judged by a special court, which is either the upper house of the parliament, a special state court or a constitutional court. Such a court is not only competent for a high treason proceedings, but also for some other violation of law committed by the president on condition that the president is liable for them. This privilege is quite comprehensible because every liability of the president is necessarily of political nature[2]. Courts are more suitable for judging the president than the parliament where the members of the parliament decide primarily politically also in this matter. Especially parliaments with a strong party discipline do not decide according to the fact and legal conclusions, but according to the standpoint of the party leaders.

The president has sometimes been denied the right to his peculiar political standpoint with reference to his alleged non-liability. The

[1] Art 54/3 Constitution.

Constitution shall be interpreted as a whole while pointing at a constitutional provision dealing with the non-liab liability of the president. The president is constitutionally liable for committing a high treason and the Constitutional Court is competent to remove him from the presidential office. On the contrary, the Constitution sets forth that the government is liable because it is dependent on the majority in the Chamber of Deputies. Nevertheless, if the government acts unlawfully and disposes of obedient deputies, it will stay in function. On the contrary, if the government is even the best but loses the majority in the Chamber of Deputies, it will fall. The ministers who are deputies at the same time will be liable for unlawful conduct only provided that the government loses the majority of the deputies. Stays the government in function, the liability is out of question. Leaders of the political parties bind their deputies to support the government and they are not going to deprive one another of the legislative immunity.

It is crucial to distinguish between the political liability which is without a legal sanction and the legal liability where the possibility of a punishment occurs. In times of monarchy, each of the parliament chambers was entitled to accuse the ministers within the State Court (Art 9 of the Act № 145/1867 Coll., o užívání moci vládní a výkonné; Act № 101/1867 Coll., o odpovědnosti ministrů království a zemí v říšské radě zastoupených. The emperor could pardon a convicted minister only on proposal of the Chamber which submitted the action). In times of the Czechoslovakia during 1920-1960 the parliament was entitled to judge the members of the government, to impose a pecuniary punishment on them and to send them to prison due to its non-payment (§ 79 of Constitution introduced by Act № 121/1920 Coll. § 91 of Constitution № 150/1948 Coll. Act № 36/1934 Coll., o trestním stíhání prezidenta republiky a členů vlády). In the past, the British parliament (1805-06 was the last time when the legal liability of a minister was assumed. The action was submitted by the House of Municipalities and the House of Lords did judge) 6 did not only remove some deputies from their office and deprived them of their property, but also let them behead. Jan Svatoň states that with reference to a longstanding non-use of this right and

with reference to a legal custom as a British source of law, the legal liability of ministers ceased to exist and 1841 a political liability developed instead[3]. However, this question is still to discuss because Svatoň himself gives an example of dissolution of the House of Commons by the king in 1784 after a longstanding non-use of the institution of dissolution of the House[4]. In Belgian (Members of the government are judged by the Court of Appellation, there is a possibility to appeal to the Court of Cassation. The action is submitted by public prosecution with the consent of the Chamber of Deputies. Art. 103 of Constitution of the Kingdom of Belgium from 17.2.1994), Denmark (The ministers are judged by the High Court of the Realm on the base of an action by the king or by the Parliament. § 16 of the Constitution of Denmark from 5.6.1953), Finland (Members of the government are judged by the High Court of Impeachment which consists of the President of the Supreme Court, presiding, and the President of the Supreme Administrative Court, the three most senior-ranking Presidents of the Courts of Appeal and five members elected by the Parliament for a term of four years. § 101 of the Constitution of Finland from 11. 6. 1999), France (Members of the government are judged on the base of a charge brought by a commission of inquiry of the parliament or by the chief public prosecutor at the Court of Cassation. The Court of Justice of the Republic consists of fifteen members: twelve members of the parliament and three judges of the Court of Cassation. Art. 68-1 — 68-3 of the Constitution of France from 4. 10. 1958 in the wording of the constitutional act from 27.7.1993) or in Austria (Members of the government are judged by the Constitutional Court on the base of the charge brought by the House of Representatives. Art. 76 and 142 of the Austrian Constitution from 1.10.1920) the members of the government are judged by special courts in which sometimes the deputies do sit. The legislative immunity does not cover the legal liability of the members of the government.

In the Czech Republic there is possible to remove president from his fiction due to his unlawful conduct. The president has therefore freedom to decide how he uses his constitutional competences in order to keep his constitutional commitment and to execute his

competences in interest of the state. It is correct to leave out the constitutional provision on the non-liability of the president. Nevertheless, more important seems to enact legal liability of the members of the government for committing a high treason.

Jaroslav Krejčí holds both the political and legal liability to be a suitable measure while the presidential competences are being strengthened. Krejčí suggests that the political liability should be put into effect by the possible removal of the president by the people. Such a removal should be initiated by the parliament as it was done in the Weimar Republic (Art 43 of the Constitution of the German Realm from 11.8.1919). Should the people not accept the proposal to remove the president from his office, new function period for the president and dissolution of the House of Deputies would be the next step. This measure secures the president from obviously unjustified proposals. The same way of political liability and removal of the president from his office by the people is regulated in Slovakia (Art. 106 of the Constitution of Slovakia) and Austria (Art. 60/6 Of the Constitution of Austria in wording of the constitutional act from 7.12.1929) as well. Also the possibility of re-election is sometimes considered as a sign of political liability. A president, who wishes to be re-elected, should exercise his function considering his good expectations to re-election. Nevertheless, Jaroslav Krejčí does not consider it to be a sign of political liability. According to Krejčí, the right to remove president from his office within his election period without his acting unlawfully shall be considered as a sign of political liability.

The Rome Statute of the International Criminal Court and the Czech constitutional order

The Statute introduced an international liability for the crimes of genocide, crimes against humanity, war crimes and crime of aggression (Art. 5-8 of the Rome Statute) including a liability of a head of state (Art. 27 of the Rome Statute). The International Criminal Court in Hague, Netherlands, is competent to judge these matters. The Czech President Václav Klaus ratified the Rome Statute from 17.7.1998 on 8.7.2009, however, the consent with the

ratification of the Statute had been expressed by the former president Václav Havel. Both chambers of the Parliament approved the Rome Statute by the 3/5 majority of votes as a treaty pursuant to art. 10a and 39/4 of the Constitution. It is questionable if the treaty is not in contradiction with the Czech Constitution on the field of the immunity of the president. The government as a submitter stated in the explanatory note that an international treaty pursuant to the art. 10a of the Constitution may amend or supplement the constitutional order although formally it is not a substituent part of the constitutional order. Václav Klaus did not approve this standpoint and pointed out the first judgment of the Constitutional Court concerning the constitutionality of the Lisbon Treaty on European Union (Judgment of the Constitutional Court 446/2008 Coll.).

The standpoint of the former governments was that before the Rome Statute is ratified, a few amendments of the Constitution must be done (concerning immunities of some public officials, competences of the president to grant individual pardon and general pardon and concerning the prohibition to force the state citizens to leave the country). The standpoint of the president was right because international treaties take application priority over common acts but these are not a part of the constitutional order. International treaties do not take priority over constitutional acts but only over common acts. Due to the aforementioned fact, constitutional acts take priority over international treaties in case of a contradiction. The discussed case presents that the constitutional regulation of the immunity of the president takes priority over the commitments towards the International Criminal Court, which however applies also to other constitutional officials whose immunity is regulated on the constitutional level. This rule does not apply to the ones whose immunity is regulated by a common act; in such cases the Rome Statute would be applied.

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Jiří Malenovský holds international treaties according to art. 10a of the Constitution for acts on a constitutional level[7]. The author does not agree with this opinion because international treaties, regardless the domestic procedure of their approval, have priority only over common statutes, they do not dispose of the constitutional legal force. International treaties are not a part of the Czech constitutional order. Should international treaties have the constitutional legal force, than the Constitutional Court review according to art. 87/2 of the Constitution concerning their constitutionality would be useless. An international treaty with a constitutional legal force would indirectly amend the Constitution and no controversy would occur. The reason of the constitutional review is to prevent the ratification of an international treaty which would be in contradiction with the Constitution. This incompatibility could be put right only by an express amendment of the Constitution, an alternative is to adapt an international treaty by transforming it into the constitutional order in form of a special constitutional act.

The Constitutional Court expressly adds to this: *«In case of a clear contradiction between the Czech Constitution and the law of the European Union, than the Czech constitutional order, especially its material core, takes priority»*[8]. It is to point out that the European Union law also comprises the primary law, which are treaties ratified by the president after the consent given in a referendum or given by a constitutional majority in the Parliament according to the art. 10a of the Constitution. In spite of the fact that the author of this contribution rejects the theory of the material core of the Constitution which only serves as a tool to usurp power by the Constitutional Court[9], the standpoint is acceptable because the Constitutional Court considers the priority of the constitutional order as a whole, not only as priority of the material core. Nevertheless, there is a case of unconstitutional use of the concept of material core by the Constitutional Court when it applied the concept of material core to international treaties[10]. Jan Kysela adds to this: *«The constitutional order cannot be implicitly amended by an international treaty pursuant to the art 10a of the Constitution»*[11].

1. *Filip J.* K ústavní odpovědnosti v ČR a odpovědnosti hlavy státu zejména za velezradu // Časopis pro právní vědu a praxi. 2010. №1. P. 21-39. **2.** *Krejčí J.* Problém právního postavení hlavy státu v demokracii. Praha, 1935. P. 132; *Esmein A.* Elemente de droit constitutionnel francais et comparé 2, 8. Bordeaux, 1928. P. 227. **3.** *Svanton J.* Vládní orgán moderního státu. Brno, 1997. P. 26, 35. **4.** Ibid. P. 24. **5.** *Milsna P., Knezinek J.* Mezinárodní smlouvy v českém právu // Časopis pro právní vědu a praxi. 2010. № 4. P. 511-519. URL: https://journals.muni.cz/cpvp/article/view/6423/5792. **6.** *Filip J.* Op. cit. P. 39. **7.** *Malenovský J.* Kulečník namísto štafetového běhu v ratifikačních řízeních o integračních smlouvách v ČR // Právní rozhledy. 2009. № 4. P. 115-124. **8.** *Kněžínek J.* Několik poznámek k řízení o souladu mezinárodní smluv s ústavním pořádkem ve světle nálezu Ústavního soudu k Lisabonské smlouvě, Lisabonská smlouva a ústavní pořádek. ČR, Plzeň, 2009. P. 64. **9.** *Koudelka Z.* Zlaté tele ústavnosti // Státní zastupitelství. 2011. № 4. P. 12-16. **10.** *Judgment* of the Constitutional Court № 402/2002 Coll. (Pl.ÚS 36/01). **11.** *Kysela J.* Mezinárodní smlouvy podle čl. 10a Ústavy po «lisabonském nálezu» Ústavního soudu / Lisabonská smlouva a ústavní pořádek ČR. Plzeň, 2009. P. 53, 61.

***Koudelka Zdeněk*. International Criminal Court and Criminal Liability of the President of the Republic in Bohemia, Moravia and Silesia**

The article outlines the ratio of international and domestic legislative acts on the President's responsibility for treason in several European countries. The author reflects the historical aspects of the formation of the mechanism of responsibility of the president of the republic in Bohemia, Moravia and Silesia. The scientific work describes some aspects of the responsibility of the President of the country in the International Criminal Court on the fact of committing crimes under the Rome Statute.

An international treaty takes priority over a common act but not over a constitutional act in the legal order of Bohemia, Moravia and Silesia. Therefore, the provisions of the Rome statute on liability of public officials shall not be applied if they contradict the constitutional order. The president is liable only for committing a high treason on the base of an action of the Senate before the Constitutional Court. The Czech Republic cannot extradite the president for prosecution to the International Criminal Court. However, facts of crimes pursuant to the Rome Statute can accomplish the facts of high treason because in such a case appears conduct against a democratic order that protects fundamental rights of other persons.

Keywords: president, criminal responsibility, treason, constitution, international law, Roman statute.