

QUASHING THE DECISIONS ON AMNESTY IN THE CONSTITUTIONAL SYSTEM OF THE SLOVAK REPUBLIC: OPENING OR CLOSING PANDORA'S BOX?

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Abstract: *This study provides a description of the constitutional framework, based on which the National Council of the Slovak Republic adopted the Resolution on the quashing of amnesties of 2017, and subsequently, analyses the key departure points and relevant constitutional arguments leading the Constitutional court to adopt the Finding no. PL. ÚS 7/2017 that confirmed the Resolution of the National Council on the quashing of amnesties, granted in 1998 by former Prime Minister V. Mečiar.*

Keywords: *quashing of amnesties, Vladimír Mečiar, National Council of the Slovak Republic, Constitutional Court of the Slovak Republic*

INTRODUCTORY REMARKS

Based on the article 86 par i) of the Constitution of the Slovak Republic (hereinafter referred to as the “Constitution”), the National Council of the Slovak Republic (hereinafter referred to as the “National Council”) adopted the Resolution no. 570 of 5 April 2017 (hereinafter referred to as the “Resolution to quash amnesty of 2017”) to repeal the article V and article VI of the Decision of the Prime Minister of the Slovak Republic (hereinafter referred to as the “Prime Minister”) of 3 March 1998 on amnesty, published under no. 55/1998 (Collection of Laws) (hereinafter as the “Amnesty of 3 March 1998”) of the Decision of the Prime Minister of the Slovak Republic of 7 July 1998 on amnesty, published under no. 214/1998 (Collection of Laws) (hereinafter referred to as “Amnesty of 7 July 1998”, commonly referred to as “Amnesties of 1998”, or “Mečiar’s amnesties”),¹ and the Decision of

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¹ The amnesty of 3 March 1998 was declared by the then Prime Minister Vladimír Mečiar immediately after several powers of the President were delegated on him (on 2 March 1998) in compliance with the then Constitution in force (note: on 2 March 1998 the office of the President Michal Kováč terminated). The relevant articles V and VI on amnesty of 3 March 1998 read as follows:

Article V: *“I order that criminal proceedings should not be started and, if they have already been started, should be discontinued in respect of the criminal offences committed in connection with the preparation and performance of the referendum of 23 May and 24 May 1997.”*

Article VI: *“I order that criminal proceedings should not be started and, if they have already been started, should be discontinued in respect of criminal offences committed in the context of the notification of the abduction of Michal Kováč Jr abroad.”*

A short mention with regards to the amnesty for the acts connected with the preparation and performance of the referendum of May 1997, according to the Decision of the President Michal Kováč, the referendum was declared on 4 questions; the National Council initiated the first 3 questions which concerned the accession of the Slovak Republic to the NATO, and the question 4 derived from the petition which was signed by 521 580 citizens (note: under the Constitution, the declaration of the referendum requires the petition signed by the minimum of 35 000 citizens) and addressed the issue of introducing direct election of the President by the citizens. The then govern-

the President of the Slovak Republic in proceedings to grant pardon to the accused of 12 December 1997, case no. 3573/96-72-2417.² The motion to quash amnesties was adopted by the vote of 144 present MPs, 129 voting for the motion (1 MP abstaining from the vote and one MP voting against the motion). Following that, the Constitutional court of the Slovak Republic (hereinafter referred to as the “Constitutional Court”) by virtue of the power conferred on it by the Constitution (art 129a of the Constitution) in *ex offio* proceedings in its Finding of 31 May 2017 no PL. ÚS 7/2017 (hereinafter the “Finding PL. ÚS 7/2017”) ruled that the Resolution on the quashing of amnesties of 2017 is in compliance with the Constitution. The judges P. Brňák and M. Lalík attached their dissenting opinions to the holding and the reasoning (hereinafter also as the “dissenting judges”) and three judges attached their separate opinions to the reasoning of the Finding.³

The Resolution of the National Council on the quashing of amnesties of 1998 and the Finding of the Constitutional Court no. PL. ÚS 7/2017 can undoubtedly be considered as the breakthrough in the traditional approach to amnesties in the European countries and raise a wide spectre of constitutional-theoretical and constitutional-practical questions. This article attempts to give the relevant answers to some of these questions.

ment coalition, fearing the results of the direct presidential elections, intended to obstruct the referendum on question 4 and decided to instigate proceedings before the Constitutional court several days before the referendum was held, where it requested the Constitutional court to render a decision that would disallow the President to declare the referendum on the amendment to the Constitution. The Constitutional court ruled on the complaint of the Members of Parliament of the government coalition in its Resolution, case no. PL. ÚS II ÚS 31/97 of 21 May 1997 and it rejected the complaint and pronounced the following in the reasoning: *“If the referendum has already been declared, the President and other government bodies are bound to hold the referendum. The Constitution does not allow the referendum be abolished prior to its declaration. ...”*. Despite being acquainted with the Decision of the Constitutional court of the Slovak Republic, the Minister of Interior issued an instruction before the referendum was held that the ballot papers be printed with three referendum questions only. Thus, the referendum concerned three questions only (the participation was as low as 9.53% of all eligible voters), and the Central Commission for referendum in its final Minutes of 25 May 1997 declared that the referendum was thwarted. The amnesty of 3 May 1998 prevented the criminal prosecution of the Minister of Interior.

It is worth noting in connection with the article VI of the Decision on amnesty of 3 March 1998 that the son of the then President, Michal Kováč Jr was violently abducted to Austria on 31 August 1995 (at that time criminal prosecution was pursued against the named in Germany). The findings of the investigation clearly indicated that the Slovak Information Service (SIS), which was directly subordinate to the government of V. Mečiar, was involved in the unlawful surveillance and abduction of the President’s son. This unlawful act, obviously aimed to discredit the President M. Kováč, later resulted in the charge of 12 members of the SIS, however, criminal proceedings were discontinued in this case owing to amnesties.

The amnesty of 7 July 1998 consists of two paragraphs in the following wording:

Article I: *“I order that criminal proceedings should not be started and, if they have already been started, should be discontinued concerning the suspicion of criminal offences allegedly committed in connection with the preparation and performance of the referendum of 23 May and 24 May 1997.”*

Article II: *“I order that criminal proceedings should not be started and, if they have already been started, should be discontinued concerning the suspicion of criminal offences allegedly committed in the context of the reported abduction of Ing. Michal Kováč, born on 5 December 1961, abroad, which allegedly occurred on 31 August 1995.”*

The citation above clearly evidences that it concerns, in principle, the same acts as the amnesty of 3 March 1998 and it is, *suapte natura*, its “rectification” taking into account the fear of the author that it would not cover all acts intended to be amnestied. This implies that both amnesties were in the form of abolitions which the specialised literature frequently opposes with justified reservations.

² Having adopted this decision, the President Michal Kováč granted amnesty to his son. This article shall not scrutinize this decision further.

³ In their separate opinions regarding the reasoning of the Finding, the judges outlined their own preference for values which eventually conduced them to adjoin to the majority opinion of the Constitutional court.

Building on the outlined intention, this study will first provide a brief description of the constitutional framework, based on which the National Council adopted the Resolution on the quashing of amnesties of 2017, and subsequently, analyse the key departure points and relevant constitutional arguments leading the Constitutional court to adopt the Finding no. PL. ÚS 7/2017 that confirmed the Resolution of the National Council on the quashing of amnesties. The analysis of the Finding no. PL. ÚS 7/07 will also address the relevant objections of the dissenting judges. The final part of the study will attempt to analyse to what extent the specific features of the Slovak national identity influenced (could have influenced) the formulation of key constitutional departure points which led the supreme constitutional bodies of the Slovak Republic to quash the amnesties. This constitutional-theoretical construction would allow us to adopt a standpoint to the issue whether the quashing of amnesties of the acting President in 1998 would satisfy (could satisfy) the requirements of the European constitutionality, *i.e.* viewed in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “Convention”) and the constitutional law of the European Union.⁴

I. SEEKING CONSTITUTIONAL GROUNDS FOR QUASHING THE AMNESTIES

The 1998 amnesties granted by the acting President V. Mečiar were, in the view of the majority of the public, immediately perceived both as gross abuse of power and a significant interference with the essence of democracy and the rule of law. For this reason, the declaration of amnesties gave impetus to several efforts to find legal means to quash the amnesties within the scope of the Constitution of the Slovak Republic in force.

The first attempt was initiated by the new Prime Minister Mikuláš Dzurinda (appointed after the parliamentary elections held in 1998, *i.e.* several months after the declaration of amnesties in 1998).⁵ By adopting the Decision of 8 December 1998, which can be compared to the writ of *error coram nobis*, he quashed the so-called Mečiar’s amnesties.

Having interpreted the Constitution in its Resolution no PL. ÚS 30/99 of 28 June 1999, the Constitutional court pronounced that the power to declare amnesty did not comprise the power “to alter the decision on amnesty that has already been published in the *Collection of Laws of the Slovak Republic*”.⁶ This Resolution of the Constitutional court, together with its Finding no I. ÚS 48/99 of 20 December 1999,⁷ had a major impact on the Judgment of the European Court of Human Rights (hereinafter referred to as the “ECHR”) in the case

⁴ The criminal consequences of the Finding of the Constitutional court on the quashing of 1998 amnesties will not be examined in this article; this issue has actually no major constitutional significance and its closer scrutiny is the sole competence of the investigating and prosecuting authorities and the courts.

⁵ At the time the new government was formed, no new President was elected and the then new Prime Minister M. Dzurinda, similarly to his predecessor (V. Mečiar), disposed of the powers of the President, including the power to declare amnesty and give mercy.

⁶ Despite the fact that the quashing of the amnesty via quasi writ of *error coram nobis* seemed to be least complicated solution, several significant reservations can be raised in this respect, e.g. the danger of regular interventions of the newly-elected President into the decisions of his predecessor (cf. KRAJČOVIČ, M. Teoreticko-právna úvaha k možnosti zrušenia amnestie v Slovenskej republike. *Justičná revue*. 2017, Vol. 69, No. 5, pp. 701–702).

⁷ This Finding of the Constitutional court ruled on the violation of fundamental rights of the person criminally prosecuted for the acts which were subject to the Decisions on amnesty of 3 March 1998 and 7 July 1998.

of Lexa against the Slovak Republic of 2 September 2008, where the Court in Strasbourg ruled that the placement of the Applicant in preventive detention, whose acts were subject to the so-called Mečiar's amnesties, constituted the violation of the article 5 par 1 of the Convention.

The European Court of Human Rights in the reasoning of its Judgment stipulated, *inter alia*, that the Court found no “*reason to put in doubt the above interpretation (interpretation of the Constitutional Court) of the relevant provisions of the Constitution as excluding the possibility of quashing an earlier decision on amnesty*” (par 131 of the Judgment). ECHR in the obiter dictum part of the judgment refers to its case-law (*Abdülşamet Yaman v. Turkey*) stating that “... *where a state agent is charged with crimes involving torture or ill-treatment, it is the utmost importance that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.*” (par 139 of the Judgment).

Following this unsuccessful attempt to quash the “1998 amnesties”, the National Council has repeatedly (altogether 8 times) and on a long-term basis (during various parliamentary terms) sought the quashing of the so-called Mečiar's amnesties through a special Constitutional Act the constitutional review of which, based on the Constitution of the Slovak Republic, has been precluded to the present day. These attempts failed due to political reasons (the failure to attain the qualified constitutional majority),⁸ and owing to constitutional-theoretical doubts about the admissibility of the solution that would result in the quashing of amnesties without any explicit constitutional foundation based on the Parliament's decision that is primarily a “political body” and without any interference of the judicial power.⁹ Moreover, it would be disputable whether such Constitutional Act was to be considered as the act of the constitutional power.¹⁰

As a result, this solution which targeted at the quashing of the 1998 amnesties without any amendment to the Constitution in force, was abandoned.¹¹ Such opinions were gaining on weight that it was important to create special constitutional foundation directly in the basic law of the state. However, we must note here that the constitutional orders of

⁸ It should be noted, in this context, that the political party HZDS, the author of the 1998 amnesties, was a parliamentary political party until 2010 and during the parliamentary term 2006–2010 was a member of the government coalition.

⁹ The results of comparative studies reveal that flat quashing of amnesties around the world has so far occurred exclusively on the basis of the decision of the ultimate judicial authority. See the Decision of the Supreme court of Chile of 7 November 2004. In: *JSTOR* [online]. [2017]. Available at: <<http://www.jstor.org/stable/j.ct6wr9f8>>, the Decision of Supreme court of Argentina of 14 July 2005. In: *European Court of Human Rights* [online]. 2017 [2017]. Available at: <http://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf>, or the Decision of the Supreme Court of El Salvador of 13 July 2016. In: *vlex El Salvador* [online]. 13. 7. 2016 [2017]. Available at: <<http://sv.vlex.com/vid/648247501>>, and from the recent period also the Resolution of the Supreme Court of the Republic of Poland, case ref. no. I. KZP 4/17 of 31 May 2017.

¹⁰ These reservations were finally formulated in the Finding no. PL. ÚS 7/2017 of the Constitutional Court pinpointing the requirements of the necessary generality of the legal rule and the argumentation of the Constitutional Court of the Czech Republic in the Finding no. Pl. ÚS 27/2009 of 10 September 2009 (in the so-called Měščák case). The Constitutional Court raised reasonable doubts as to whether such act could be qualified as the act of the constitutional power. According to the opinion of the Constitutional Court it would “*constitute a constitutional act in terms of form, not in terms of content*”.

¹¹ Deliberations on the constitutional amendment bill to quash certain decisions on amnesty (no. 318), which was introduced in the legislative procedure in November 2015, was suspended by the National Council.

the Member States of the European Union and of the Council of Europe do not contain any constitutional rules which, in their hypothesis and disposition arrangements, subject to certain requirements, would explicitly ponder over the quashing of the decisions to grant amnesty or mercy of the President or of other constitutional body empowered to grant amnesty, as a sanction.

Until 2017 the Constitution of the Slovak Republic did not enshrine any explicit rule allowing the review of the Decision of the President of the republic to grant amnesty or mercy.

The National Council of the Slovak Republic laid down the constitutional foundation for the quashing of amnesties and mercies, with special regard to 1998 amnesties, by amending the Constitution of the Slovak Republic through the Constitutional Act no. 71/2017 (Collection of Laws) of 30 March 2017. The National Council was entrusted with the power to decide on the quashing of the Decision of the President on amnesty or individual pardon by three-fifths (constitutional) majority of all MPs “*where it contradicts the principles of democracy and rule of law*”. Such derogatory resolution of the National Council¹² under the constitutional amendment *ex constitutione* shall undergo the mandatory review by the Constitutional Court of the Slovak Republic which may rule on the compliance of the reviewed resolution of the National Council with the Constitution in its Judgment.¹³

In the Finding no PL. ÚS 7/2017, the Constitutional Court adjudicated that this constitutional amendment constitutes the “*indisputable constitutional foundation* (for the quashing of the decisions on amnesty) ..., *which guarantees its high legitimacy and legal authority.*”

In their separate opinions, the dissenting judges declared their radical disagreement with the fact that by passing the constitutional amendment, the power to resolve on the quashing of amnesty or mercy was bestowed on the National Council. According to the dissenting judges, the National Council acquired the status of “supra-constitutional body”, which can “*by virtue of the Constitutional Act (amendatory or other) confer upon itself any competence or power towards the future.*” Furthermore, the dissenting judges criticized the fact that the Constitutional Court in the Finding no. PL. ÚS 7/2017 “*established no limits to the constitutional powers of the National Council*”, i.e. they had at least indirectly pointed to the sensitive question whether the amendment to the Constitution executed in the form of the Constitutional Act no. 71/2017 (Collection of Laws) is in compliance with the Constitution.¹⁴

¹² The Constitutional Court in the Finding no PL. ÚS 7/2017 qualified the Resolution of the National Council to quash the amnesty as the act of implementation of the Constitution – an “individual sui generis legal act.”

¹³ This article disregards the procedural issues of the proceedings to quash amnesty or mercy; for details see MAZÁK, J. Konanie pred Ústavným súdom o súlade uznesenia o zrušení amnestie alebo individuálnej milosti s Ústavou: Otázniky a námety. *Bulletin slovenskej advokácie*. 2017, No. 6, passim.

¹⁴ For details see, e.g. ROZNAI, Y. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford University Press, 2017; as for a different legal culture, see also VELASCO RIVERA, M. Unconstitutional Constitutional Amendments in Mexico: The Failure of the Guardians of the Constitution and its Implications for Constitutional Hyper-Reformism. In: SSRN [online]. 15. 1. 2016 [2017]. Available at: <<https://ssrn.com/abstract=2989394>>.

In relation to the arguments of the dissenting judges, it should first be noted that pursuant to the article 72 of the Constitution, the National Council “...is the sole constitutional and legislative body of the Slovak Republic.” This constitutional status of the National Council logically indicates that the constitutional power to confer or abrogate constitutional powers from all public institutions (including itself), is *a priori* vested in it. The fact that the National Council has conferred the power to resolve on the quashing of amnesty or mercy upon itself, does not place the National Council into the position of the “supra-national body”, since it adopted this decision as the “sole constitutional body of the Slovak Republic”.

The criticism of the dissenting judges aimed at the Constitutional court’s failure to establish the “limits of the constitutional power of the National Council” presents, in its essence, a call for judicial activism of the Constitutional Court or even for *ultra vires* proceedings. This call encourages it to follow the example of the Constitutional Court of the Czech Republic in proceedings and decision-making in the so-called Mělčák case.¹⁵

In the event the Constitutional Court of the Slovak Republic in the proceedings pursued under case ref. no. PL. ÚS 7/2017 subjected the constitutional amendment adopted in the form of the Constitutional Act no. 71/2017 to constitutional review, it would, for various reasons, exercise a significantly higher degree of judicial activism than the Czech Constitutional Court and it would also act *ultra vires*.

Let us first scrutinize the formal aspect. The Constitutional Court of the Czech Republic in its Finding no. PL. ÚS 27/2009 ruled to annul the Constitutional Act on the shortening of the term of office of the Chamber of Deputies in proceedings to determine the consistency with legal regulations, whereas the Slovak Constitutional Court would approach it this way in a different type of proceedings aimed at the review of the compliance of the Resolution of the National Council to quash amnesty and mercy (as an individual *sui generis* legal act) with the Constitution.

The Constitutional Court of the Czech Republic justified its judicial activism in the “Mělčák case” primarily by the material core of the Czech Constitution (art 9 par 2) which the Slovak Constitution covers only implicitly. However, we must add that until the publication of the Finding no. PL. ÚS 7/2017, neither the Constitutional Court (nor any other public authority) has provided any authoritative definition of the material core of the Slovak Constitution, and for this reason, it could not proceed using a model of the constitutional review in the Melčák case.

The Constitutional Act was subjected to judicial review in proceedings before the Constitutional Court of the Czech Republic seeking the constitutional recognition of the political decision resulting from the political crisis in the society. This recognition proved inconsistent with the material core of the Czech Constitution. The purpose of the Constitutional Act no. 71/2017 (Collection of Laws) is diametrically opposed to this purpose. The primary aim (especially with regards to the negative experience with the so-called Mečiar’s amnesties) was to create a legitimate – constitutionally recognized legal instrument al-

¹⁵ See also the Finding of the Constitutional court of the Czech Republic no. PL. ÚS 27/2009, Melčák, CZ:US:2009:PL.US.27.09.1.

lowing the annulment of the decisions of the President on amnesties or mercies, in case they contravened the principles of democracy and rule of law. This legal instrument would be principally applicable for the future, with the exception of the so-called Mečiar's amnesties where under the explicit regulation in the Constitution (art 154f), it can be applied with retroactive effect.¹⁶

Viewed from this perspective, albeit after a longer period of time, the cited Constitutional Act openly monitors the efficient application of the principles of justice and protection of fundamental rights of victims of criminal offences which were committed with the direct or indirect involvement of the public authorities. In our opinion, such purpose would be consistent with the material core of the Constitution, had it been (explicitly) expressed by the Slovak Constitution in the same terms as in the Constitution of the Czech Republic. It must be emphasized, though, that the purpose of the Constitutional Act no. 71/2017 (Collection of Laws) is to duly fulfil the international obligations of the Slovak Republic (art 1 par 2 of the Constitution).

Taking this into account, the Constitutional Court in its Finding no. PL. ÚS 7/2011 adopted a reserved approach to the Constitutional Act no. 71/2017 (Collection of Laws) stating therein that *"its role (especially in this type of proceedings) is not to provide critical analysis, or alternatively, critical evaluation of the wording of the Constitution, where the drafting falls within the exclusive competence of the constitution-givers, but to provide its authoritative interpretation"* and, thus, *"...the amendment to the basic law of the state adopted by the constitution-givers (in respect of the range of constitutional powers taxatively delimited by the Constitution) is beyond the constitutional review."*

The refusal of the judicial activism, however, has not precluded the Constitutional Court to formulate its critical reservations as to the content of the Constitutional Act no. 71/2017 (Collection of Laws). According to the Constitutional Court: ... *"the latest amendment to the Constitution is characterised by a considerable degree of purposefulness evident especially in the provisions of the article 154f of the Constitution,¹⁷ which are apparently of retroactive nature."*¹⁸ The majority of the judges sitting in the plenary session admitted that such provisions of the Constitution in the conditions of democracy and rule of law may attract justified criticism. In spite of this, the *"reaction of the constitution-givers to the social trauma inflicted by the so-called Mečiar's amnesties can be considered to be legitimate*

¹⁶ See the Explanatory report to the government constitutional amendment bill which alters and amends the Constitution of the Slovak Republic no. 460/1992 (Collection of Laws) as amended – Parliamentary Journal No. 483. In: *Národná rada Slovenskej republiky* [online]. 15. 3. 2017 [2017]. Available at: <<https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=7&ID=483>>.

¹⁷ The National Council was, by virtue of the designated provision of the Constitution, explicitly permitted to exercise its power to quash decisions on amnesty or mercy also with regards to the so-called Mečiar's amnesties, i.e. with retroactive effect.

¹⁸ Comments as to what constitutes a serious constitutional issue can be found, e.g. in: VAGIAS, M. The Compatibility of the Revocation of Enduring Amnesties with the Principle of Legality – Jurisprudential Contestations between the Inter-American Court of Human Rights and Domestic Courts. In: *SSRN* [online]. 6. 6. 2017 [2017]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980692>. The Inter-American Court of Human Rights has not detected any problems with retroactivity and the principle of legality many years after the abolition of amnesties that resulted in the criminal prosecution, whereas several national courts expressed their opposite attitudes. The author raised valid concerns as to the fact that the Inter-American Court of Human Rights failed to give sufficiently well-considered reasoning of its decision.

and justified in its essence.” The acceptability of this conclusion can be supported by referring to the national identity of the Slovak Republic as a post-communist country, which, to the present day, has been characterised by specific sensitivity to various forms of abuse of power leading to the commission of criminal offences by public authorities (for details on national identity of the Slovak Republic see below).

II. FINDING OF THE CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC ON THE COMPLIANCE OF THE RESOLUTION OF THE NATIONAL COUNCIL OF THE SLOVAK REPUBLIC TO QUASH THE AMNESTIES OF 2017 WITH THE CONSTITUTION OF THE SLOVAK REPUBLIC: MOSAIC OF SOLUTIONS AND THE IMPORTANT CONCLUSION

Proceedings on the compliance of the Resolution of the National Council of the Slovak Republic no. 570 of 5 April 2017 to quash amnesties with the Constitution of the Slovak Republic was instigated without a motion (*ex offio*) on 6 April 2017 and terminated on 31 May 2017 with the publication of the Finding no. PL. ÚS 7/2017.

II. 1. Fundamental departure points

II. 1.1. Material conception of the rule of law

The fundamental departure point for the decision-making of the Constitutional Court in the case PL. ÚS 7/2017 was the material conception of the rule of law. The material conception of the rule of law corresponds to the material approach to the protection of constitutionality,¹⁹ which denies the proposition that such legal acts could be adopted which would have absolute immunity from the constitutional review executed by competent constitutional bodies (the Parliament and the Constitutional Court).

This departure point reflects the difference between the traditional monarchical conception of mercy, perceived as the unlimited prerogative of the Head of the State, and the material conception in the conditions of democracy and the rule of law, which *a priori* disqualifies any act of the public authority, including the decision on amnesty, to be beyond the constitutional review.²⁰ This conclusion corresponds with the dissenting opinion of Pavel Rychetský underlying the fact that the material conception of the rule of law instigated the adoption of the principle under which all acts of public authorities are subject to constitutional review, or alternatively, no such act is beyond this review completely (!).²¹

¹⁹ The analysis of the case-law of the Slovak Constitutional Court over the past 15 years indicates strong preference for the material approach to the protection of constitutionality, see e.g. the Decisions no. PL. ÚS 12/05, 16/06, 67/07, 11/2010.

²⁰ Part III 1 of the Finding no. PL. ÚS 7/2017.

²¹ See the dissenting opinion of the President of the Czech Constitutional Court Pavel Rychetský on the Resolution no. PL. ÚS 4/13 of 5 March 2013), stating therein that: “...by adopting the principles of the material conception of the rule of law ... another the principle has been established that all acts of public authorities are subject to constitutional review, or alternatively, no such act is beyond this review completely.” The validity of this opinion is supported by the Decision of the Supreme Court of the Republic of Poland, case no. KZP 4/17 of 31 May 2017 cited in the footnote no. 12.

Despite the lacking explicit regulation in the Constitution, this approach is also confirmed by the Decision of the seven-member bench of the Supreme Court of the Republic of Poland no. KZP 4/17 of 31 May 2017. The Decision in principle declared the Decision of the President of the Republic of Poland Andrzej Duda which granted mercy in the form of an individual abolition to three accused persons, null and void. This Decision is legally grounded on the conclusion that several articles of the Constitution of the Republic of Poland were infringed, *inter alia*, the principle of the rule of law (art 7) and the principle of the separation of powers (art 10).

The Supreme court of Poland did not hesitate to exercise its power to review the Decision of the President on abolition, who is, according to the Constitution of the Republic of Poland, an integral part of the executive power and to infer constitutional and legal consequences from the infringement of the cited principles (pursuant to the second holding, the decision of the President to grant mercy bears no procedural consequences in criminal proceedings).

II. 1.2. Prohibition of arbitrariness and unlimited exercise of power by the public authorities

The arbitrary and unlimited exercise of power by public authorities is in strict contradiction to the concept of democracy and the rule of law. This generally accepted opinion became the pillar of the Finding no. PL. ÚS 7/2017.

Each branch of the government, including the President of the Republic, is prevented from arbitrary and unlimited exercise of powers expressed explicitly or at least implicitly either directly in the Constitution or in the Constitutional Acts.

As for the President of the Republic, these limits on the exercise of his powers reside especially in the following:

- a) constitutional oath of office of the President (art 104 par 1 of the Constitution),²²
- b) positive constitutional obligation of the Slovak Republic and of all constitutional bodies to recognize and observe general rules of international law, international agreements to which the Slovak Republic is a Signatory and other international obligations (art 1 par 2 of the Constitution),
- c) principles of democracy and the rule of law which “*constitute the material core of the Constitution of the Slovak Republic, and as key (constitutional) constitutive values remain intact and serve as the basic criterion for the constitutional review of any decision of the government, including the decisions of the President*”.

In relation to these limits, which in their essence express prohibition of arbitrariness and unlimited exercise of presidential powers, including the decisions to grant amnesty

²² The exact wording of the article 104 par 1 of the Constitution is as follows: “I promise on my honour and conscience to be faithful to the Slovak Republic. I will dedicate my effort to the well-being of the Slovak nation and the national minorities and ethnic groups living in the Slovak Republic. I will discharge my duties in the interest of citizens and uphold and defend the Constitution and other laws.” (The established case-law of the Constitutional court comprises the legal opinion pronounced in the Resolution No. I. ÚS 61/96 of 31 October 1996, under which “... *the provision of the Constitution limiting the exercise of all constitutional powers of the President of the Slovak Republic is comprised in the oath of the office*”).

or individual mercies,²³ we must pose a question to what extent these factors influence the person who is not the duly elected President of the republic but is entrusted with the power to grant amnesty and individual mercy.

We assume that the limits, which restrain the duly appointed Head of the State in exercising his power to decide on amnesty or individual mercy, are for the person who temporarily represents the Head of the State by virtue of a constitutional rule, accompanied by **additional restraints**. These serious additional restraints include lack of democratic legitimacy (the power to grant amnesty and mercy is entrusted for a definite period of time and without proper election) and require abstention from exercising this power which is regularly reserved for the duly elected President of the Republic.²⁴

Apart from the above given limits, it seems important to add that both the Czechoslovak and the Slovak constitutional practice of the Presidents of the Republic has developed a constitutional convention, based on which amnesties were granted **exclusively upon the election of the President of the republic or at important public holidays**. Such established constitutional convention of duly elected Heads of the State also imposes a certain limit on the person, who temporarily represents the Head of the State, to decide on the granting of amnesty in accord with the constitutional convention which is to be deemed as the source of constitutional law.

The person who in 1998 decided on the granting of amnesties (V. Mečiar in the capacity of the Prime Minister), however, could not have this purpose of amnesty in the established constitutional practice in contemplation. For this reason, the degree of arbitrariness in his acts was in direct collision with the principles of democracy and the rule of law. This was a conflict that could not be resolved by mere passage of time.

II. 1.3. Power (and obligation) to review the constitutionality of the Resolution of the National Council to quash Amnesties of 2017

The power to review the constitutionality of the Resolution of the National Council to quash amnesties of 2017 in the adjudicated case raises no special questions. First, this review was commissioned by the constitutional body, and second, this review was admitted in consideration of the fact that when adopting an individual legal act, the National Council itself is to a certain degree *sui generis* bound by the Constitution (art 2 par 2).

²³ The current regulation of the Constitution (Constitutional Act no. 71/2017 (Collection of Laws) stipulates that these limits are explicitly determined by the principles of democracy and the rule of law.

²⁴ For details, see: the Constitutional Court on p. 131 of the Finding no. PL. ŤS 7/2017 noted the following: “*The unacceptability of this intervention underlies the fact that the Prime Minister V. Mečiar issued his decisions on amnesties as a substituting President, i.e. in the capacity of a constitutional official temporarily entrusted with presidential powers (until new president is elected), and this, in itself, presupposes abstention from exercising this power that arises from the fact that the constitutional official disposes of no democratic legitimacy allowing him to properly exercise these powers. It is evident that the Prime Minister failed to meet the requirement of abstention in the exercise of his power to grant amnesty or pardon, when he was in the position of a substitute President, and quite the contrary, he grossly abused this power immediately after he came into office (less than a day after the expiration of the term of office of the President Michal Kováč). For the above given reasons, the Constitutional Court maintains that the reviewed parts of the decisions of the Prime Minister on amnesties contradict the constitutional principle of separation of powers and at the same time demonstrate lack of democratic legitimacy of their author.*”

The fundamental question is, however, whether the cited Resolution of the National Council could be reviewed by the Constitutional Court without any expressed authorization granted by the Constitutional Act no. 71/2017 (Collection of Laws). The exigency of this issue is underlined by the fact that the Resolution was adopted by the constitutional majority which guaranteed a relatively high degree of legitimacy and legal authority to this Constitutional Act.

We maintain that without the authorization granted to the Constitutional Court by the Constitutional Act no. 71/2017 (Collection of Laws), the Resolution of the National Council to quash the amnesties of 2017 would not qualify for review in proceedings for compliance with legal regulations (such review could be classified as acting *ultra vires*, or alternatively, at least as improper judicial activism). The reason for such conclusion is the provision of article 125 par 1 a) to d) of the Constitution which stipulates that the Constitutional Court has no authorisation to review the resolutions of the National Council in proceedings for compliance with legal regulations, not even in case of mandatory publication of such Resolution in the Collection of Laws.²⁵

The competence of the Constitutional Court constituted by the Constitutional Act no. 71/2017 (Collection of Laws) encompasses the authorization of the Court to review the Resolutions of the National Council to quash amnesties of 2017 and also the obligation to conduct this review irrespective of the result of the proceedings.

The review of the Resolution of the National Council to quash amnesties of 2017 was and should be approached from two perspectives for the future. The first perspective is the substantive review, i.e. the review of the requirements explicitly stipulated in art 86 par i) of the Constitution²⁶ and the second perspective, the procedural review which is targeted at the observance of shall correspond to art 84 par 4 and art 88a of the Constitution, and is simultaneously linked with the procedure and deliberations of the National Council pursuant to the Act no. 350/1996 (Collection of Laws) on the Rules of Procedure of the National Council of the Slovak Republic as amended.

II. 1.4. Effects of the Constitutional Act no. 71/2017 (Collection of Laws) on the existing doctrine of the Constitutional Court in the matter of the amnesties: Overcoming and adopting a new approach

After the adoption of the Constitutional Act no. 71/2017 Collection of Acts, the legal opinions declared in the Resolutions of the Constitutional Court in the case PL. ÚS 30/99 of 28 June 1999 and the case I. ÚS 48/97 of 20 December 1999, which served as the basis for the decision-making of the European Court for Human Rights in the case of *Lexa vs*

²⁵ Pursuant to section 13 subs c) of the Act no. 400/2015 (Collection of Laws) on the creation of legal regulations and on the Collection of Laws of the Slovak Republic as amended, the Decision of the Speaker of the National Council and the Resolution of the National Council of the Slovak Republic, where a special legal regulations so requires, the Resolution of the National Council of the Slovak Republic which were ordered to be published in the Collection of Laws and the full wording of the Constitution, Constitutional Acts and Acts promulgated by the Speaker of the National Council.

²⁶ The National Council can quash the Decision of the President on amnesty or mercy “*in case it contradicts the principles of democracy and the rule of law.*”

the Slovak Republic,²⁷ have been included in the historical case-law of the Constitutional Court.

Not one of these opinions (not even in part) is applicable in the decision-making on the Resolutions of the National Council to quash amnesties or individual mercies.

In the first place, the previous legal opinions are incompatible with the current constitutional regulation which explicitly enables the Decisions of the Head of the State on amnesties and individual mercies be quashed.²⁸ Second, the new constitutional regulation *a priori* excludes the occurrence of such events which the original legal opinions concerned in 1999.

Therefore, we can conclude that the argumentation based on the legal opinions declared in the case-law of the Constitutional Court in 1999 cannot be taken into consideration in any proceedings (before the National Council, the Constitutional Court or the general courts) where the legal and factual basis for the practical application of the Constitutional Act no. 71/2017 (Collection of Laws) is to be laid down.

II. 1.5. Key conclusion: Compliance with the Constitution

The above mentioned fundamental departure points led the Constitutional Court to arrive at the unequivocal conclusion that the Resolution of the National Council to quash amnesties of 2017 is in compliance with the Constitution. This conclusion needs further clarification. It was the constitutional reasons for the review of the compliance of the Resolution of the National Council with the Constitution which were called into question, since the National Council could have adopted it upon finding that the granted amnesties were in contradiction to the principles of democracy and the rule of law (art 1 par 1 of the Constitution).

The judicial review of the constitutionality of the Resolution, as is the case of the Resolution of the National Council to quash amnesties of 2017, must legitimately be wider in its scope; judicial review cannot omit the direct or indirect review of the compliance of the Resolution of the National Council to quash amnesties of 2017 with the international

²⁷ This requires further clarification; in their separate opinions, the dissenting judges criticized the approach of the Constitutional Court as to the conclusions declared in the judgment *Lexa vs the Slovak Republic* which is considered “*overcome based on the given constitutional amendment*”, which, according to them, is “*completely absurd*.” This criticism is misleading for the reason that the Constitutional Court did not explicitly declare this conclusion in the Finding no. PL. ÚS 7/2017. However, it pinpointed the fact that “*The essence of the key legal issue requiring a meritorious approach of ... and also of the European Court of Human Rights in the Judgment in the case of Lexa vs the Slovak Republic resided in ... finding the answer to the question whether the power to quash or alter the previously issued decision on amnesty conferred on the President of the Slovak Republic (or the Prime Minister exercising some presidential powers) derived from the Constitution valid at the time. The reviewed resolution of the National Council was, however, adopted after the last constitution amendment which explicitly established the power of the National Council to quash the decision of the President of the Slovak Republic on amnesty in extraordinary situations.*” For the above given reasons, there is no doubt that, in the event the persons whose acts were originally amnestied initiated new proceedings before the European Court of Human Rights, the Court in Strasburg would be expected to settle fundamentally different issues than those resolved in the case of *Lexa vs the Slovak Republic*.

²⁸ Furthermore, it should also be noted that the constitutional amendment adopted by the Constitutional Act no. 90/2001 (Collection of Laws) quashed the power of the President of the Republic to grant amnesties or individual mercies in the form of abolition.

obligations of the Slovak Republic. After all, the duty to review the compliance is laid down by Art 1 par 2 of the Constitution. For this briefly defined reason, the Constitutional Act no. 71/2017 (Collection of the Laws) obligated the Constitutional Court to conduct judicial review at a larger-scale than was the constitutional basis for the decision-making of the National Council to quash amnesties of 1998.

In relation to the above given, this article shall further focus on the issue of the fulfilment of international obligations of the Slovak Republic with special regard to the fact that Slovakia is a Member State of the Council of Europe and of the European Union.

III. QUASHING THE DECISIONS OF THE PRESIDENT OF THE REPUBLIC ON AMNESTY OR INDIVIDUAL MERCY IN THE LIGHT OF THE CONVENTION AND EUROPEAN UNION LAW

III. 1. European Court of Human Rights and quashing the amnesties

The approach of the European Court of Human Rights (ECHR) to the issue of eventual quashing of amnesty or mercy is rather reserved. However, there is no decision of the ECHR that would explicitly preclude the judicial review of the decision on amnesty or mercy.²⁹ We believe that in this respect the States may exercise their discretionary powers which the ECHR regularly applies in its case-law.

Certain general conclusions can be drawn from the case-law of the European Court of Human Rights and the case-law of the European Commission of Human Rights as to when and under what circumstances the granting of amnesty fails to comply with the requirements of the Convention.

As soon as in 1991, the European Commission of Human Rights in the case of *Dujardin and others v France*³⁰ when reviewing the admissibility of the application stated the following:

“... even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that **a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.**”

This legal opinion of the European Commission of Human Rights can be traced again in the case of *Tarbuk v Croatia*,³¹ however, it did not directly address the issue of admissibility of amnesty as the fundamental question in reviewing the infringement of Article 2 of the Convention.

Despite this, the Judgment in the case of *Tarbuk* determines the admissibility criteria to grant amnesty, although, the decisions of the European Court of Human Rights provide for wide discretionary powers for the Member States.

²⁹ In this connection, it would be worth reviewing whether the Decision of the Supreme Court of the Republic of Poland in the case no. KZP 4/17 of 31 May 2017 cited in the footnotes no. 9 and 21 is in compliance with the requirements of the Convention.

³⁰ App. no. 16734/90; 72 D.R. 236.

³¹ *Tarbuk v Croatia* App no. 31360/10 (ECtHR, 11 December 2012), para. 50.

First, the granting of amnesty should be of extraordinary nature and cannot aim to secure impunity in the broader sense of the term. Second, the decision on amnesty cannot contravene the principles of the rule of law and impair the confidence of the public in the government. Third, amnesty should pursue legitimate aims that derive from the established constitutional practice of the President of the Republic. Fourth, the legitimate interests of the individuals must be protected, especially in case of victims. The society and the victims need to be acquainted with the truth concerning the violation of their fundamental rights and freedoms. Finally, amnesty cannot prevent the proper execution of the duties of the state to conduct effective investigation.³²

By comparing the admissibility criteria to grant amnesty encompassed in the legal opinion of the European Court of Human Rights with the reasons leading to the adoption of the Constitutional Act no. 71/2017 (Collection of Laws) and the Resolution of the National Council to quash amnesties of 2017, we may find substantial support for the legitimacy of these decisions of the Slovak Parliament.

After these general considerations about the admissibility of amnesty, we can divert our attention to the legal opinion of the European Court of Human Rights on the admissibility of amnesty in individual cases where the infringement of Article 3 of the Convention was alleged.

In the case of *Abdülsamet Yaman v Turkey*, where the Turkish police tortured a 12-year boy, the infringement of Article 3 of the Convention was confirmed. The European Court of Human Rights arrived at the decision, with regards to a hypothetical amnesty, where a state agent is accused of torture or inhuman treatment, amnesty or other pardoning may not be taken into consideration.³³

The European Court of Human Rights has taken this into account also in other cases which reviewed the infringement of Article 3 of the Convention.³⁴

We come to the conclusion that when the European Court of Humans Rights were to adjudicate whether the Constitutional Act no. 71/2017 (Collection of Laws) and the Resolutions of the National Council to quash amnesties of 2017 together with the Finding of the Constitutional court no. PL. ÚS 7/2017 infringe the Convention (presumably Articles 5 and 6), it would be forced to challenge its own legal opinions on the granting of amnesties in cases of alleged infringement of Articles 2 and 3 of the Convention.

III. 2. European Union law and quashing of amnesty

The Finding of the Constitutional Court no. PL. ÚS 7/2017 makes no mention of the fact whether this type of proceedings falls within the scope of the European Union law. Let us remind that the Constitutional Court adjudicated only on the compliance of the Resolution of the National Council to quash amnesties of 1998 with the principles of

³² For details, see MALLINDER, L. Investigations, Prosecutions and Amnesties under Articles 2 & 3 of the European Convention on Human Rights. *Transitional Justice Institute Research Paper No. 15-05*. 2015, pp. 14–16.

³³ *Abdülsamet Yaman v Turkey* App no. 32446/96 (ECtHR, 2 November 2004), para. 55. See also *Tuna v Turkey* App no. 22339/03 (ECtHR, 19 January 2010), para. 71; *Eski v Turkey* App no. 8354/04 (5 June 2012), para. 34.

³⁴ See, e.g.: *Ould Dah v France* App no. 13113/03 (ECtHR, 17 March 2009).

democracy and the rule of law. This type of proceedings is connected with the exclusive competence of the Member State to decide on quashing of amnesties; neither the Treaty on the European Union nor the Treaty on the Functioning of the European Union provide any support to the contrary conclusion.

The Constitutional Court was not concerned with the issue of the application of the EU law in spite of the fact that the application, lodged by a natural person, requested preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union. The Constitutional Court did not rule on this application, because it was filed by a person who was neither a litigant nor an intervener to the proceedings, and the Court *ex officio* found no reason to consider the request for preliminary ruling procedure.

As for this specific case, the Court adopted a materially correct decision. The factual circumstances of the 1998 amnesties occurred before the accession of the Slovak Republic to the European Union, i.e. before 1 May 2004, and the European Union law cannot be applied to these factual circumstances. Moreover, the Court of Justice of the European Union cannot exercise its jurisdiction to make a preliminary ruling in such cases;³⁵ this applies both to proceedings before the Constitutional Court and to proceedings before the general courts in the event these would request a preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union.

This conclusion remains as it stands irrespective of the fact that the quashing of 1998 amnesties was implemented after the accession of the Slovak Republic to the European Union. The amnesties of 1998 were quashed with the effect from the date of granting and at that time no means to apply the European Union law existed.

Since the Constitutional Act no. 71/2017 (Collection of Laws) provided for the admissibility to quash amnesties and mercies in general, we deem it necessary to take the applicability of the EU law into account for future cases of eventual quashing. In the event amnesty or individual mercy granted after the accession of the Slovak Republic to the European Union were to be quashed, first and foremost consideration should be given to the protection of persons concerned as guaranteed by the Charter of Fundamental Rights of the European Union (hereinafter the “Charter”).

The basic question to be posed here would be whether the quashing of the decision on amnesty or individual mercy was to be understood as the implementation of the law of the European Union pursuant to Article 51 par 1 of the Charter.³⁶ We maintain that the positive answer cannot be ruled out completely at all.³⁷

As of the entry of the Charter into effect, the Court of Justice has repeatedly stated that: *“The Court’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by*

³⁵ For details, see e.g. the Resolution of 11 May 2011, *Tony Georgiev Semerdzhiev vs Del-Pi-Krasimira Mancheva*, C-32/10, EU:C:2011:288, para 25 and 26 and the cited case-law.

³⁶ For details, see e.g. MAZÁK, J. – JÁNOŠIKOVÁ, M. – DOBROVIČOVÁ, G. – OROSZ, L. – ANGELOVIČOVÁ A. *The Charter of Fundamental Rights of the European Union in Proceedings Before Courts of the Slovak Republic*. Košice: Pavol Jozef Šafárik University in Košice, 2016, p. 19.

³⁷ We are fully aware that the doubts concerning the applicability of the Charter in this specific case could only be resolved by the Court of Justice of the European Union, especially, in the preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union.

*European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.*³⁸

The European Union law comprises two legal acts which, in case of quashing of amnesties, could be significantly influenced as for their interpretation and application also in relation to implementation of the Charter.

Pursuant to Article 10 par 1 sub d) of the EU Directive on the European protection order,³⁹ the competent authority of the executing state may refuse to recognize a European protection order where the protection derives from the execution of a penalty or a measure that, according to the law of the executing state, is covered by an amnesty and relates to an act or conduct which falls within its competence according to the law. Similarly, pursuant to article 3 par 1 of the Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between the Member States,⁴⁰ the grounds for the mandatory non-execution of the European warrant can be the case, when the offence, on which the arrest warrant is based, is covered by amnesty in the executing Member State where that State had jurisdiction to prosecute the offence under its own criminal law.

In the event the above cited legal acts were to be applied, the quashing of amnesty could encroach on the protection under the Directive 2011/99 or the mandatory non-execution of the arrest warrant. It is questionable, though, whether the effective quashing of the amnesty could have any impact on the consequences following the granting of amnesty, i.e. on the refusal to recognize the European protection order or on the mandatory non-execution of the European arrest warrant.

The Court of Justice is not competent to review the national law allowing the quashing of amnesties. Nevertheless, the interpretation of the European Union law that would address the consequences of the quashing of amnesties in relation to the above mentioned Directive and Framework Decision cannot be disregarded. We do not intend to speculate about the result of such interpretation, but once the European protection order was refused to be recognized or the European arrest warrant was not mandatorily executed by virtue of the granted amnesty, we must admit that it could favour such outcome that the quashing of amnesty should not have any impact on these consequences. It is doubtful whether such outcome would be acceptable, if, following the quashing of amnesty, for example, the European arrest warrant was reissued, which cannot be excluded.

³⁸ Judgments of the Court of Justice of 26 February 2013 in the case of Åkerberg Fransson, C-617/10, EU:C:2013:105, par 19, 20 and 22; of 30 April 2014 in the case of Pflieger and others, C-390/12, EU:C:2014:281, par 33; of 27 March 2014 in the case of Torralbo Marcos, C-265/13, EU:C:2014:187, par 29; of 6 October 2015 in the case of Delvigne, C-650/13, EU:C:2015:648, par 26 and of 26 September 2013 in the case of Texdata Software, C-418/11, EU:C:2013:588, par 71 to 73.

³⁹ The Directive of the European Parliament and the Council no 2011/99/EU of 13 December 2011 on European protection order. Official Journal of the EU, L 338, 21.12.2011, p. 2.

⁴⁰ The Framework Decision of the Council 2002/584/SVV of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States (Official Journal of the EC L 190, 18.7.2002, p. 1).

IV. PROTECTION OF NATIONAL IDENTITY AS AN EXCUSE FOR THE QUASHING THE AMNESTIES OF 1998

In connection with the Resolution of the National Council no. 570 of 5 April 2017, which quashed the amnesties of 1998, and the Finding of the Constitutional Court of 31 May 2017 no PL. ÚS 7/2017, which ruled that the Resolution to quash amnesties of 2017 is in compliance with the Constitution, it seems legitimate to question whether these decisions of the National Council and the Constitutional Court can be defended and justified by the requirements of national (constitutional) identity.⁴¹

The Finding of the Constitutional Court no. 7/2017 did not address this issue explicitly; neither the National Council put forward such argument⁴² nor it was used by interveners to the proceedings. However, the whole wording of the reasoning of the Finding no. 7/2017 is grounded on the necessity to respect and protect the national identity of the Slovak Republic.

The Constitution of the Slovak Republic makes no mention of the national identity whatsoever.⁴³ The lack of explicit delimitation of the national identity, however, does not exclude the possibility of inferring the concept of the national identity and the methods of its protection from the basic law of the State.

It should be noted in this relation that pursuant to Article 4 par 2 of the Treaty on the European Union, the Union respects the equality of all Member States before the Treaties as well as their national identity anchored in their basic political and constitutional systems, including regional and local self-governance. This wording led to the conclusion that the national identity is constituted by the national constitutions of the Member States both in form and content.⁴⁴

Our intention is to portray the Slovak national identity first by reference to the Preamble of the Constitution of the Slovak Republic. According to the Preamble, the Slovak national identity is characterized by “*experience gained through centuries of struggle for our national existence and statehood*”, together with the effort to “*implement democratic form of*

⁴¹ Our use of the terms national identity and constitutional identity is synonymous; their deeper analysis and differentiation is beyond the scope of this study; however, we can firmly state that the constitutional identity is an integral part of the national identity.

⁴² An indirect demonstration of national identity can be considered to be “...*the principle that amnesty cannot be granted to public officials, to persons acting on their behalf or in cooperation with them and to close public officials*,” which is enshrined in the reasoning of the Resolution of the National Council to quash amnesties of 2017 which the Constitutional Court in its Finding no. PL. ÚS 7/2017 evaluated as one of the fundamental departure points for its decision-making.

⁴³ Pursuant to Article 7a of the Constitution, the Slovak Republic promotes national consciousness and cultural identity of the Slovaks living abroad; it supports their institutions established to achieve this goal and their relations with the homeland. Cultural identity is, in this case, conceived as a part of the national identity, however, in such terms which are not directly connected with the subject of this article.

⁴⁴ VON BOGDANDY, A., SCHILL, S. Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty. *Common Market Law Review*. 2011, Vol. 48, No. 5, p. 11; this conclusion is also confirmed by: KONSTADINIDES, T. Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement. *Cambridge Yearbook of European Legal Studies*. 2012, Vol. 13, p. 198; similarly: PONTTHOREAU-LANDI, M. C. La Constitution comme structure identitaire. In: *Les 50 ans de la Constitution. 1958–2008*. Paris: Litec, 2008, pp. 31–42.

government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity". Following the previous periods lacking in freedom (the so-called Slovak Republic as the fascist satellite of Hitler Germany or Slovakia as a part of the authoritative Czechoslovak socialist statehood), the centuries-long fight for the democratic statehood was completed on 1 January 1993, when the Slovak Republic became an independent state. The introductory article of the Constitution (Art 1 par 1 first sentence) defines this republic as the "... *sovereign, democratic state governed by the rule of law*".⁴⁵

Independent statehood grounded on the principles of democracy and the rule of law is the keystone of the national (constitutional) identity and the highest constitutional value at the same time. We must also add here that the Constitutional Court in the Finding no PL. ÚS 7/2017 explicitly designated the principles of democracy and the rule of law as the material core of the Constitution of the Slovak Republic.

The limitation of the government in their acting and decision-making was included among the principles of democracy and the rule of law stipulated by the Constitution. Pursuant to Article 2 par 2 of the Constitution, the public authorities may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by the law. The wording of the above given Article of the Constitution precludes the exercise of public authority which, in its consequences, would be interpreted as the abuse of power of the acting constitutional official or other public authority. In this stage of evolution of independent statehood, the national identity of the Slovak Republic denotes, in our opinion, such exercise of public authority by constitutional bodies which does not weaken democracy, rule of law and protection of fundamental rights and freedoms to such degree that it would endanger their essence. So, all decisions of constitutional and state bodies abusing the delegated powers, i.e. decisions used for purposes other than those compliant with the rule of law are perceived as the substantial threat to these values.

It is indisputable that the decisions on amnesties of 1998 were of this sort. Their purpose was to prevent the investigation of the abduction of the President's son abroad, of the thwarted referendum and of the following procedures, despite the fact that the public authorities were suspected of the commission of these acts. As a consequence, the suspected persons acting as public officials enjoyed immunity from the prosecution and the victims of these acts were denied any protection of their fundamental rights and freedoms.

The protection of national identity against amnesties of 1998 could only be ensured by adopting an amendment to the Constitution in the form of the Constitutional Act no. 71/2017, the Resolution to quash amnesties of 2017 and the Finding no. 7/2017.

In this concrete case, the method of protection of national identity corresponded to the nature of violation caused by the amnesties of 1998 and to the fact that more than 19 years have passed since then. No other effective means existed that would stand the test of democracy and the rule of law and at the same time remedy the legal situation brought

⁴⁵ We should note here that history also contributes to the national identity of the Member State. It is supported by the provision 6 of the Preamble of the Treaty on the European Union which reads: DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.

by the 1998 amnesties. No alternatives existed to the legal instruments used (constitutional activity of the National Council and exercise of the power of the Constitutional Court) that would radically interfere with the legal status of persons reasonably suspected of the commission of amnestied acts, and, at the same time, would allow for the proper investigation, prosecution and eventual conviction of these perpetrators, perhaps even for the protection of the fundamental rights and freedoms of these victims.

The reasonableness of the applied decisions of the National Council and the Constitutional Court points to the full legitimacy of the adopted solutions irrespective of the consequences of criminal liability of concrete persons.⁴⁶

CONCLUSIONS AND CLOSING THE PANDORA'S BOX OF MEČIAR'S AMNESTIES

The amnesties of 1998 granted by the Prime Minister who exercised certain powers of the President of the Republic, including the power to decide on the granting of amnesty and individual mercy, were undoubtedly **legal acts of the executive power** of which the President of the Republic is an integral part.

The purpose of these amnesties was, in the conditions of democracy and the rule of law (Article 1 par 1 of the Constitution effective in 1998), to prevent the investigation of the acts which could have been qualified as criminal offences, the criminal prosecution of persons who have committed these offences in the capacity of public officials and the eventual sentencing of these perpetrators. As a result, both the victims and the general public have not learned the decisive facts that would prove or disprove the involvement of these public authorities in the acts subject to the amnesties.

The granting of amnesties of 1998 opened the so-called Pandora's box which, based on the abolition decisions of the Head of the State, could make it possible for the future to grant amnesty in the form of self-amnesty for criminal offences committed by public officials. Thus, **a non-systematic element in the exercise of governmental power** intruded into the conditions of democracy and the rule of law. It was the abuse of power of the ultimate constitutional body in deciding on amnesty in relation to the protection of the powers of government that resulted in the commission of criminal offences against their own citizens.

The statement on the abuse of power is grounded on the fact that the purpose of the amnesties granted according to the constitutional tradition and constitutional conventions applied in the Slovak Republic from 1993, partly building on the practice of the former Czechoslovakia, aimed to **reduce the impact of the exercise of the governmental power in the field of criminal justice** with regards to the offenders or convicts who committed criminal offences of lesser gravity. This non-systematic element in the exercise of public power in the field of criminal justice established a **constitution-permitted option** to use amnesty to ensure impunity or immunity from prosecution for persons acting as public officials (public authorities). The Constitutional Court of the Slovak Republic **rec-**

⁴⁶ The Constitutional court did not settle and could not consider the fulfilment of the preconditions for criminal liability. This question falls under the competence of the general courts (Article 141 par 1 and 142 par 1 of the Constitution).

ognized and strengthened this tendency in the end of 1990s. The Court in its Resolution no. PL. ÚS 30/99 of 28 June 1999 stated that the right to declare amnesty does not comprise the competence “*to alter the decision on amnesty that was published in the Collection of Laws of the Slovak Republic*”. This Resolution of the Constitutional Court served as the legal ground for the Finding no. I. ÚS 48/99 of 20 December 1999.⁴⁷ The above given decisions terminated the first attempt to close the so-called Pandora’s box of Mečiar’s amnesties.⁴⁸

Despite these circumstances that could without any obstruction serve as the basis for the granting of amnesty, like in 1998 amnesties, the adoption of the Constitutional Act no. 90/2001 (Collection of Laws), which precluded the abolition decisions, contributed to the first successful attempt that enabled the partial and valid, for the time to come, closing of the Pandora’s box of Mečiar’s amnesties.⁴⁹

The amnesties of 1998, their recognition by the Constitutional Court’s decisions on amnesty and the constitutional admissibility of implementation, albeit in the scope of pardoning, remained in force even after the adoption of the cited Constitutional Act.

The so-called Pandora’s box of Mečiar’s amnesties has been closed upon adoption of the **three sequential decisions** of the National Council and the Constitutional Court.

The National Council by making an amendment to the Constitution of the Slovak Republic through the Constitutional Act no. 71/2017 (Collection of Laws) of 30 March 2017 was empowered to quash the decision of the President on amnesty or individual mercy by three-fifths (constitutional) majority of all its MPS “*in case it contradicts the principles of democracy and the rule of law*”. Based on this, the National Council adopted the Resolution no. 570 of 5 April 2017, which, to put it simply, quashed the amnesties of 1998. The Constitutional Court of the Slovak Republic in its Finding of 31 May 2017, case no. PL. ÚS 7/2017 ruled that the Resolution to quash amnesties of 2017 is in compliance with the Constitution.

This implies that the decisions of the National Council and the Constitutional Court scrutinized in this study not only hindered the opening of the so-called Pandora’s box,⁵⁰ quite the contrary, it was **fully and unconditionally closed** in such a way that it renewed the democracy and the rule of law in the Slovak Republic in its entirety.

⁴⁷ This Finding of the Constitutional Court ruled on the infringement of the fundamental rights and freedoms of the person criminally prosecuted for the acts which were subject to the Decisions on amnesty of 3 March 1998 and of 7 July 1998.

⁴⁸ For this reason, we cannot but welcome the Finding no. PL. ÚS 7/2017 of the Constitutional Court which explicitly stipulates that the amendment to the Constitution of the Slovak Republic adopted through the Constitutional Act no. 71/2017 (Collection of Laws) and the related Resolution of the National Council on the quashing of amnesties of 2017 established a precedent, where the legal opinions declared in the Resolution of the Constitutional Court, case no. PL. ÚS 30/99 of 28 June 1999 and I. ÚS 48/97 of 20 December 1999 have been overcome.

⁴⁹ Para 55 in Article 102 sec 1 subs j) reads as follows: “j) *pardons and mitigates sentences imposed by the court in criminal proceedings and expunges convictions by granting individual pardon or amnesty*”.

⁵⁰ The separate opinion of the dissenting judges presented a completely different standpoint according to which “*This decision (note: Finding of the Constitutional Court no. PL. ÚS 7/2017) ...opened the Pandora’s box of retroactive application of the law, contravention of the principle of separation of powers and larger frustration of the dissatisfied public.*” It should also be noted that the so-called Pandora’s box was opened upon amnesties of 1998.

In the first place, the non-systematic element in the constitutional system of the Slovak Republic, based on which the amnesty was granted to criminal offenders who committed criminal offences in the capacity of public officials and the fundamental rights and freedoms of victims of these offences were infringed, has been completely removed.

Second, new constitutional foundations of significant preventive nature were laid down with regards to every attempt to grant amnesties (may it be at the level of granting mercy only) for the purposes like in 1998 amnesties.

Third, by completing this process of closing the so-called Pandora's box of Mečiar's amnesties, the Slovak Republic reverted to the unconditional observance of its international obligations (Article 1 par 2 of the Constitution).

Finally, the Constitutional Court in its Finding no. 7/2017 established a **doctrine**, under which this Court and the general courts are prevented from allowing, albeit indirectly, the political power to contravene the principles of democracy and the rule of law with the effects of impunity for persons acting as public officials, who could commit criminal offences connected with the execution or abuse of their powers.