

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



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The article deals with the responsibility of the head of state in Bohemia, Moravia and Silesia in relation to the authority of the Roman Statute of the International Criminal Court. 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 the liability of public officials shall not be applied if they contradict the constitutional order. The president is liable only for committing high treason on the base of action of the Senate before the Constitutional Court. The Czech Republic cannot extradite the president for the prosecution to the International Criminal Court.

Keywords: President of the Republic, International Criminal Court, Roman Statute.

The Constitution of Bohemia, Moravia and Silesia states that the president of the Republic is not liable in his function²,

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 high treason.³

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 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.⁴ 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

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²Art 54/3 Constitution No 1/1993 Coll.

³JAN FILIP: K ústavní odpovědnosti v ČR a odpovědnosti hlavy státu zejména za velezradu, *Časopis pro právní vědu a praxi* 1/2010, p. 21-39.

⁴JAROSLAV KREJČÍ: Problém právního postavení hlavy státu v demokracii, Praha 1935, p. 132. ADHÉMAR ESMEIN: *Elemente de droit constitutionnel francais et comparé* 2, 8. edition Bordeaux 1928, p. 227.

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 Constitution shall be interpreted as a whole while pointing at a constitutional provision dealing with the non-liability of the president. The president is constitutionally liable for committing 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 the 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 punishment occurs. In times of monarchy, each of the parliament chambers was entitled to accuse the ministers within the State Court.⁵ In times of 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.⁶ In the past, the British parliament⁷ 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.⁸ However, this question is still to discuss because Svatoň himself gives an example of the dissolution of the House of Commons by the king in 1784 after a longstanding non-use of the institution of dissolution

⁵Art 9 of the Act No 145/1867 Coll., o užívání moci vládní a výkonné. Act No 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.

⁶§ 79 of Constitution introduced by Act No. 121/1920 Coll. § 91 of Constitution No. 150/1948 Coll. Act No. 36/1934 Coll., o trestním stíhání prezidenta republiky a členů vlády.

⁷1805-06 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. BOHUMIL BAXA: Parlament a parlamentarismus, Praha 1924, p. 38. JAN SVATOŇ: Vládní orgán moderního státu, Brno 1997, ISBN 80-85765-89-6, p. 26 n. 65, p. 35 n. 89. Also Emil Sobota holds the legal liability of English ministers for anachronism. EMIL SOBOTA, JAROSLAV VOREL, RUDOLF KŘOVÁK, ANTONÍN SCHENK: Československý prezident republiky, Praha 1934, p. 35.

⁸JAN SVATOŇ: Vládní orgán moderního státu, Brno 1997, ISBN 80-85765-89-6, p. 29, p. 35 n. 89. REINHOLD ZIPPELIUS: Allgemeine Staatslehre, 10. edition München 1988, ISBN 3-406-33045-2, p. 396-397.

⁹JAN SVATOŇ: Vládní orgán moderního státu, Brno 1997, ISBN 80-85765-89-6, p. 24.

¹⁰Members 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.

of the House.⁹ In Belgium,¹⁰ Denmark,¹¹ Finland,¹² France¹³ or in Austria¹⁴ 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 the president from his office due to his unlawful conduct. The president has, therefore, the freedom to decide how he uses his constitutional competences in order to keep his constitutional commitment and to execute his competences in the 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 the legal liability of the members of the government for committing 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 political liability should be put into effect by the possible removal of the president by the people. Such removal should be initiated by the parliament as it was done in the Weimar Republic.¹⁵ Should the people not accept the proposal to remove the president from his office, the 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.¹⁶ The same way of political liability and removal of the president from his office by the people is regulated in Slovakia¹⁷ and Austria¹⁸ 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 the president from his office within his election period without his acting unlawfully shall be considered as a sign of political liability.¹⁹

¹¹The 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.

¹²Members 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.

¹³Members 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 No. 93-952.

¹⁴Members 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.

¹⁵Art 43 of the Constitution of the German Realm from 11. 8. 1919.

¹⁶JAROSLAV KREJČÍ: Problém právního postavení hlavy státu v demokracii, Praha 1935, p. 17, 42-43, 67-68, 134. Emil Sobota did not agree with the theory of Krejčí on conjunction between the position and liability of the president - EMIL SOBOTA, JAROSLAV VOREL, RUDOLF KŘOVÁK, ANTONÍN SCHENK: Československý prezident republiky, Praha 1934, p. 33.

¹⁷Art. 106 of the Constitution of Slovakia No. 460/1992 Coll. in wording of the constitutional act No. 9/1999 Coll.

¹⁸Art. 60/6 Of the Constitution of Austria in wording of the constitutional act from 7. 12. 1929, Coll. No. 392/1929.

¹⁹JAROSLAV KREJČÍ: Problém právního postavení hlavy státu v demokracii, Praha 1935, p. 129.

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

The Statute introduced international liability for the crimes of genocide, crimes against humanity, war crimes and crime of aggression²⁰ including liability of a head of state.²¹ 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.²² 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.²³

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).²⁴ 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;²⁵ in such cases, the Rome Statute would be applied.

²⁰ Art. 5-8 of the Rome Statute No. 84/2009 Coll.

²¹ Art. 27 of the Rome Statute.

²² The government submitted the Rome Statute to both Chambers of the Parliament on 18. 2. 1998. The Senate expressed its consent on 16. 7. 2008 (Senate press 188, 6th election period) and the Chamber of Deputies on 29. 10. 2008 (Chamber of deputies press 423, 5th election period).

²³ Judgment of the Constitutional Court 446/2008 Coll.

²⁴ A governmental proposal of constitutional amendments was repeatedly not approved – press of Chamber of Deputies No. 541 and 1112, 3rd election period. The French did experience the same as the French Constitutional Council declared on 22. 1. 1999 by its decision No. 98-408DC the Rome Statute for incompatible with the Constitution due to the immunity of the president. This issue had to be dealt by a constitutional amendment of the art. 54b of the Constitution of France. JAN FILIP: K ústavní odpovědnosti v ČR a odpovědnosti hlavy státu zejména za velezradu, Časopis pro právní vědu a praxi 1/2010, p. 39.

²⁵ Ombudsman pursuant to § 7/1 of the act No. 349/1999 Coll., o veřejném ochránci práv.

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Jiří Malenovský holds international treaties according to art. 10a of the Constitution for acts on a constitutional level.³⁰ The author does not agree with this opinion because international treaties, regardless of 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, then the Constitutional Court review according to Art. 87/2 of the Constitution concerning their constitutionality would be useless. An international

²⁶The government submitted the Rome Statute to both chambers of the Parliament on 18. 2. 2008. The Senate expressed consent with it on 16.7. 2008 (press of the Senate No 188, 6th electoral period) and the Chamber of Deputies did so on 29. 10. 2008 (press of the Chamber of Deputies No 423, 5th electoral period).

²⁷See art III point 17 and art. VI point 63 (standpoint of the president of the republic who refuses priority of an international treaty over a constitutional norm), art. V point 49 (standpoint of the government which refuses priority of an international treaty over the material core of the Constitution) of the reasoning of the judgment of the Constitutional Court No. 446/2008 Coll. (Pl.ÚS 19/08). For both the arguments for and against see PETR MLŠNA, JAN KNĚŽÍNEK: *Mezinárodní smlouvy v českém právu*, Praha 2009, ISBN 978-80-7201-783-6, p. 511-519. Kysela states that: „The constitutional order cannot be implicitly amended by an international treaty pursuant to the art 10a of the Constitution.”

²⁸A governmental proposal of constitutional amendments was repeatedly not approved – presses of the Chamber of Deputies No. 541 and 1112, 3rd electoral period of the Chamber of Deputies. The French did experience the same as the French Constitutional Council declared on 22. 1. 1999 by its decision No. 98-408DC the Rome Statute for incompatible with the Constitution due to the immunity of the president. This issue had to be dealt by a constitutional amendment of the art. 54b of the Constitution of France. JAN FILIP: *K ústavní odpovědnosti v ČR a odpovědnosti hlavy státu zejména za velezradu*, Časopis pro právní vědu a praxi 1/2010, p. 39.

²⁹<http://www.hrad.cz/cs/pro-media/informace-soudnim-sporum/5.shtml>.

³⁰JIRÍ MALENOVSKÝ: *Kulečník namísto štafetového běhu v ratifikačních řízeních o integračních smlouvách v ČR*, Právní rozhledy 4/2009, p. 115-124.

treaty with a constitutional legal force would indirectly amend the Constitution and no controversy would occur. The reason for 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 the 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, then the Czech constitutional order, especially its material core, takes priority.*“³¹ 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,³² 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 the material core by the Constitutional Court when it applied the concept of the material core to international treaties.³³ Jan Kyselá adds to this: „*The constitutional order cannot be implicitly amended by an international treaty pursuant to part 10a of the Constitution.*“³⁴

Conclusion

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 the liability of public officials shall not be applied if they contradict the constitutional order. The president is liable only for committing high treason on the base of action of the Senate before the Constitutional Court. The Czech Republic cannot extradite the president for the 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 the fundamental rights of other persons.

Зденек Коуделка: Халықаралық қылмыстық сот және Чехия, Моравия мен Силезиядағы республика президентінің қылмыстық жауаптылығы.

Мәтінде Халықаралық қылмыстық соттың Рим статуты бойынша Чехия, Мора-

³¹ Art. IX point 85 of the reasoning of the judgment of the Constitutional Court No. 446/2008 Coll., Pl.ÚS 19/08, the first judgment concerning the Lisbon Treaty. JAN KNĚŽINEK: 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, ISBN 978-80-7380-192-2, p. 64.

³² ZDENĚK KOUDELKA: Zlaté tele ústavnosti, Státní zastupitelství 4/2011, ISSN 1214-3758, p. 12-16.

³³ Judgment of the Constitutional Court No. 402/2002 Coll. (Pl.ÚS 36/01).

³⁴ JAN KYSELA: Mezinárodní smlouvy podle čl. 10a Ústavy po „lisabonském nálezu“ Ústavního soudu, Lisabonská smlouva a ústavní pořádek ČR, Plzeň 2009, ISBN 978-80-7380-192-2, p. 53, 61.

вия және Силезиядағы (Чех Республикасы) мемлекет басшысының жауаптылығы жайлы айтылады. Халықаралық шарт жалпы актімен салыстырғанда басым күшке ие, бірақ Чехия, Моравия және Силезия құқықтық тәртібінде конституциялық акт болып табылмайды. Сондықтан, Рим статутының ережелері, егер олар конституциялық тәртіпке қайшы келсе, мемлекеттік қызметшілерге қатысты қолданылмайды. Президент тек қана Сенаттың айыптауы бойынша Конституциялық Соттың алдында жауап береді. Чех Республикасы Президентті соттық қудалау үшін Халықаралық қылмыстық сотқа экстрадициялай алмайды.

Тірек сөздер: президент, Халықаралық қылмыстық сот, Рим статуты.

Зденек Коуделка: Международный уголовный суд и уголовная ответственность Президента Республики в Чехии, Моравии и Силезии.

В тексте говорится об ответственности главы государства в Чехии, Моравии и Силезии (Чешская Республика) по Римскому статуту Международного уголовного суда. Международный договор имеет преимущественную силу по сравнению с общим актом, но не является конституционным актом в правовом порядке Чехии, Моравии и Силезии. Поэтому положения Римского статута в отношении государственных служащих не применяются, если они противоречат конституционному порядку. Президент несет ответственность только на основании обвинения Сената перед Конституционным Судом. Чешская республика не может экстрадировать Президента для судебного преследования в Международный уголовный суд.

Ключевые слова: президент, Международный уголовный суд, Римский статут.

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