Pl. ÚS 4/13 of 5 March, 2013
"Amnesty of the President of the Republic"

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

Much like individual pardons according to Article 62 clause g) of the Constitution [cf. Resolution file No. II. ÚS 137/2000, dated 16 May 2000 (U 16/18 SbNU 421)], declaration of amnesty according to Article 63 paragraph 1 clause k) of the same is a prerogative, a privilege of the President of the Republic, which is directed towards the domain of judicial power. These constitutional prerogatives (sometimes generally called "clemency"), conceptually resulting from monarchist ideology, allow "the head of the state to grant, to the benefit of those convicted (amnesty, commutation), possibly those accused (abolition), an exception to the statutory or court-declared consequences of a criminal act". Through these, effects or consequences of a completed or ongoing criminal prosecution are removed, but not in the form of an act of legislative power, but in the form of a decision by the head of the state. Under the conditions of the Czech constitutional order, an amnesty may be materially defined as a constitutional prerogative of the President of the Republic, whereby punishments (or their consequences), imposed on a certain range of perpetrators of criminal acts, are forgiven or commuted *en bloc*, or whereby it is ordered not to commence or to discontinue criminal prosecution of such perpetrators; it is clear from the very nature of amnesty that the same may contain elements of abolition, commutation and rehabilitation [cf. Article 62 clause g), Article 63 paragraph 1 clause j) and Article 63 paragraph 1 clause k) of the Constitution].

When the Constitutional Court inferred, in Judgment file No. Pl. ÚS 52/03, dated 20 October 2004 (N 152/35 SbNU 117; 568/2004 Coll.), that "when evaluating the scope and content of the powers of individual state bodies from constitutional law viewpoints, it is always necessary to measure them using the system of checks and balances" then a typical example in the issue of separation of powers, or checks and balances between the executive power and the judicial power, is the actual constitutional institute of amnesty. The purpose of amnesty in the controls of checks and balances, being incorporated in the separation of powers, is not to inhibit proper execution of judicial power, but to modify the effects or consequences of a completed or an ongoing criminal prosecution for the purpose of achieving (through applying social mercy, forgiving or forgetting) common good (when such has been necessarily subjectively defined by the executive power), possibly as a response, taking into account political and criminally political aspects of conditions in the country, to possible dysfunctions of the judicial power in attaining the same. By confiding this extraordinary entitlement to the executive power, the constitutional framer decided to structurally limit the execution of constituted powers, i.e. the execution of judicial power, this by balancing the same out in the form of the prerogative of the head of the state to make certain exception to the proper order of law in criminal cases. The institute of amnesty itself, from the nature of the matter, cannot thus be subjected to such checks of balancing and concurring the separation of power, which are otherwise to secure that mistakes of executive power may be corrected by the decision-making of courts [cf. similarly in relation to individual pardons, Resolution of the German Federal Constitutional Court, dated 23 April 1969, file No. 2 BvR 552/63 (BverfGE 25, 352 ff)]; it would logically be contradictory if the "balanced" judicial power could remove an action against itself by simply "annulling" the given act. The provisions of Article 63 paragraph 1 clause k) of the Constitution, on one hand, establish power on the part of the executive to declare amnesty, but on the other hand, provide

the executive (with respect to the nature of the act as a prerogative) with protection from the interventions of other branches of power. Judicial interventions in the case of determining the scope of powers and competencies represent constitutional-law risks, as they could actually lead even to distortion or factual shifts in the field of separation of power.

VERDICT

The Plenum of the Constitutional Court, composed of Stanislav Balík, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka (Justice Rapporteur), Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný and Michaela Židlická, decided on a petition from a group of Senators of the Senate of Parliament of the Czech Republic, represented by JUDr. Hana Marvanová, an attorney-at-law with a registered office at Újezd 19, 110 00 Prague 1; for annulment of Article II of Decision No. 1/2013 Coll. on Amnesty, dated 1 January 2013; with participation by the President of the Czech Republic, Prof. Ing. Václav Klaus CSc., and the Municipal Court in Prague as the secondary party; as follows:

The petition for annulment of the provisions of Article II of the Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013, filed by a group of Senators of the Senate of Parliament of the Czech Republic, shall be rejected.

REASONING

I.
Recapitulation of the petition

1. Through a submission delivered to the Constitutional Court on 14 January 2013, a group of Senators of the Senate of Parliament of the Czech Republic (hereinafter referred to only as the "Petitioners") proposed that the Constitutional Court annul Article II of the Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013 (hereinafter referred to only as "decision on amnesty"), since in their opinion the same contravenes the values of a democratic law-based state pursuant to Article 1 of the Constitution of the Czech Republic (hereinafter referred to only as the "Constitution") as well as of the principle expressed by Article 2 paragraph 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to only as the "Charter"), as a result of which the fundamental rights guaranteed in Articles 11, 36 and 38 of the Charter and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the "Convention") and Article 1 of the Additional Protocol to said Convention are allegedly violated. Alternatively, the Petitioners require that the "Constitutional Court declare through its judgment that Article II of the decision on amnesty contravenes the values of a democratic law-based state and contravenes the constitutional order, and should thus declare its unconstitutionality".

2. The group of Senators infers the admissibility of the petition from the fact that a decision by the President of the Republic on amnesty is, according to doctrine, a normative act of a derivative nature and contains elements typical of the contents of a legal regulation, i.e. exhibiting a binding nature, formal definiteness, generality of subject and parties as well as enforceability; they refer also to Judgment file No. Pl. ÚS 27/09, dated 10 September 2009 (N 199/54 SbNU (Collection of Judgments and Rulings) 445; 318/2009 Coll.); in respect to this decision it is their belief that the Constitutional Court arrived at a similar conclusion. Therefore, they consider the decision by the President on amnesty to be reviewable by the Constitutional Court according to the provisions of § 64 paragraph 2 clause b) of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter referred to only as the "Act on the Constitutional Court").

3. Furthermore, the Petitioners object that, in a democratic law-based state, even the sovereign powers of the President cannot be exercised in contravention of the constitutional order, moreover without any possibility of review, which they support with references to various decisions by international

institutions. They believe that the possibility to review a decision of executive power (i.e. including the decision by the President on amnesty) is a necessary counterbalance without which it is practically possible to negate decisions of judicial power, when Article 36 paragraph 2 of the Charter also provides that review of decisions regarding fundamental rights and basic freedoms must not be removed from the jurisdiction of courts.

4. According to the Petitioners, the incompatibility of the contested provisions with the constitutional order arises in particular from the same ordering that criminal prosecution be discontinued also in cases of the gravest organised financial criminal activity, whereby courts have been prevented from declaring that a criminal act has been committed and from enabling an injured party to obtain compensation for loss. The Petitioners infer, from such injured parties being actually unable to obtain compensation in separate civil proceedings (for example, due to necessity to repeat evidence, due to the transfer of the burden of evidence to the injured parties and due to the considerable costs of proceedings), in contrast with the fact that the perpetrators granted amnesty shall be able to retain the assets they wrongfully gained wrongfully, that the right of the injured parties to a fair trial, as well as their right to own property in connection with legitimate expectation of acquisition of the same, have been violated.

5. According to the Petitioners, the argument declared as the reason for abolition – the inappropriate length of hitherto criminal proceedings – cannot stand since such length must always be evaluated individually, in a specific case, not globally. Yet, not even an inappropriate length of proceedings can represent (also according to the European Court of Human Rights) a reason to relinquish the obligation to compensate for loss caused by a criminal act. The right of the defendants to have their case heard within an appropriate period of time was, from the viewpoint of the Petitioners, unproportionally and unreasonably promoted at the expense of the equal right of the injured parties, who actually found themselves once more at the commencement of the process of exercising their claims to compensation for loss.

6. Finally, with respect to the fact that as a result of abolition, revenues from criminal activities have actually been legalised in cases affected by such abolition, the Petitioners also believe that the contested provisions undermine the fundamental principles of the law-based state, as well as the trust of citizens in law and in democratic law-based state, and they refer, in this connection, also to a decision of the Constitutional Court, file No. III. ÚS 431/09, dated 10 September 2009 (not published in Collection of Judgments and Rulings of the Constitutional Court, available at http://nalus.usoud.cz).

II.
Submission from a secondary party
7. On 21 January 2013, a petition from the Municipal Court in Prague (signed by the Chairperson of a panel, JUDr. Kamil Kydalka) was delivered to the Constitutional Court for annulment of the same Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013, and "alternatively" for annulment of Article II of the same. With respect to the fact that the Constitutional Court, with regard to the case currently heard, processes a petition which is partly identical, said petition was – through Resolution file No. Pl. ÚS 7/13, dated 12 February 2013, as one filed later within the scope defined in the proposed verdict by Article II of the decision on amnesty – rejected as inadmissible due to impediment of a pending trial pursuant to § 35 paragraph 2 of the Act on the Constitutional Court (the Municipal Court in Prague was granted the position of a secondary party), and the remaining part of same was rejected as well, here for the lack of active standing of the Petitioner pursuant to § 43 paragraph 1 clause c) of the same Act.

III.
Wording of the contested provisions of the decision on amnesty
8. The contested Article II of the decision on amnesty declares (under the marginal heading of discontinuance of criminal prosecution): "I order that such criminal prosecution which has not been completed with finally legally binding effect be discontinued, where, as of 1 January

2013, more than 8 years had passed since initiating such prosecution, of criminal acts for which the Criminal Code prescribes penalty of imprisonment not exceeding ten years, with the exception of criminal prosecution against a fugitive."

9. The decision on amnesty was co-signed, pursuant to Article 63 paragraph 3 of the Constitution, by the Prime Minister; said decision was, according to the provisions of § 2 paragraph 1 clause d) of Act No. 309/1999 Coll. on the Collection of Laws and on Collection of International Treaties, as amended by Act No. 114/2003 Coll., promulgated properly in the Collection of Laws. Through a submission delivered to the Constitutional Court on 4 March 2013, the Petitioners did question the signature of the Prime Minister (on the basis of data contained in the reasoning of the decision of the Director of the Office of the Government, dated 4 January 2013 ref. No. 1016/2013- KVÚ, that the decision on amnesty had not passed through said Office); however, the copy of a petition from the Office of the President of the Republic dated 31 December 2012 addressed to the Ministry of the Interior, the Department for Publication of the Collection of Laws and Collection of International Treaties, or an appendix thereto, actually shows that "the Decision of the President of the Republic on Amnesty dated 1 January 2013" contains both decisive signatures, including one by the Prime Minister.

IV.
Preconditions for active standing and evaluation by the Constitutional Court

10. Before the Constitutional Court approaches the subject-matter examination of the petition filed according to Article 87 paragraph 1 clause b) of the Constitution, the Court is obliged to examine whether the petition meets all the requirements specified and whether conditions are established for subject-matter consideration of the same determined by the Act on the Constitutional Court, specifically whether such consideration is not prevented by obstacles formulated in the provisions of § 43 paragraph 1 of the Act on the Constitutional Court.

11. Delimitation of powers and jurisdiction of the Constitutional Court, as the fundamental procedural conditions for the proceedings, is a reflection of the basic structural rule for the exercise of power in a law-based state, which is given in Article 2 paragraph 2 of the Charter and Article 2 paragraph 3 of the Constitution, according to which state power may be exercised only in cases and within boundaries determined by law. In cases of reviewing legal regulations, jurisdiction of the Constitutional Court is defined in particular by the very subject matter of the proceedings; the Constitutional Court cannot review legal acts which do not constitute legal regulation (not even "other" legal regulation) from the viewpoint of their form (name, procedure, publication in the given publication body), content (the same do not contain legal norms) or function (the same are not intended to regulate behaviour) (cf. Filip, Jan, Holländer, Pavel, Šimíček, Vojtěch. Zákon o Ústavním soudu. Komentář. Praha: C. H. Beck [Filip, Jan, Holländer, Pavel, Šimíček, Vojtěch. Act on the Constitutional Court. Commentary. Prague: C. H. Beck], 2007, p. 224).

12. There is no unambiguous harmony prevailing in legal doctrine as well as in case law regarding the formal definition of the term "decision on amnesty". However, as shall be clear from the following text, such a definition is not necessarily inevitable in the process of assessing the petition filed by the Petitioners.

IV. A
Regarding "other legal regulation"

13. The Petitioners primarily call attention to the issue of the nature of the decision on amnesty; omitting the possibility of subsuming such a decision to an "act", they aim at "other legal regulation" pursuant to Article 87 paragraph 1 clause b) of the Constitution, or the provisions of § 64 paragraph 2 of the Act on the Constitutional Court; the Petitioners conclude that the decision on amnesty actually forms such "other legal regulation" (the point being that otherwise the Constitutional Court would not have the jurisdiction to consider their petition). In this, they establish support for such a conclusion in various references to authoritative legal sources. With some degree of licence, however, it may be assumed that such references frequently omit decisive interrelations, or refer to opinions pronounced

beyond the scope of the decision on amnesty, that being the relation to the above-mentioned provisions of the Constitution and the Act on the Constitutional Court.

14. As previously indicated, no consensus exists in legal science: for example, Karel Klíma, in his Commentary on the Provisions of § 63 paragraph 1 clause j) of the Constitution, states that "amnesty is an act of application of law which shows certain normative elements" (cf. Klíma, Karel a kol. Komentář k Ústavě a Listině. Praha: Plzeň [Klíma, Karel *et al*. Commentary on the Constitution and the Charter. Prague: Pilsen], 2005. p. 324; see also Kantoříková, Jana: „Amnestie". In: Encyklopedie ústavního práva. Ed. Karel Klíma. Praha: ASPI [Kantoříková, Jana: "Amnesty". In: Encyclopaedia of Constitutional Law. Editor Karel Klíma. Prague: ASPI], 2007, p. 10). According to this concept, it is an individual legal act *sui generis*, possessing certain general consequences. Another concept of the decision on amnesty is, to the contrary, based on a premise that a decision on amnesty is in the nature of a normative legal act (*sui generis*) [the doctrine states that "the decision of the President is of the nature of a special regulation" (see, for example, Bahýľová, Lenka a kol. Ústava České republiky. Komentář. Praha: Linde [Bahýľová, Lenka *et al*. The Constitution of the Czech Republic. Commentary. Prague: Linde], 2010, p. 776), or that "…amnesty is not directed at an individual, but to groups of individuals or to certain types of criminal acts. Therefore, it is in the nature of a normative legal act." (Pavlíček, Václav a kol. Ústavní právo a státověda. II. díl. Ústavní právo České republiky. Praha: Leges [Pavlíček, Václav *et al*. Constitutional Law and Political Science. Volume II. Constitutional Law of the Czech Republic. Prague: Leges], 2011, p. 851)].

15. As noted by František Weyr, "the antinomy of general and specific norms is necessarily merely relative, i.e. the same norm may seem to be general (this compared to another, more specific) and specific in the view of another one (more general)" (cf. Weyr, František. Teorie práva. Brno-Praha: Orbis [Weyr, František. Theory of Law. Brno-Prague: Orbis], 1936, p. 43). This corresponds with the fact that interpretational problems take place on the scale from "legal regulation" (pure) to "legal regulation *sui generis*" to "act of application of law *sui generis*" and to "act of application of law (pure)"; the transition points, in particular between the second and third option, may be seen as discrete ones and such that depend to a large degree on what the interpreter intends to achieve.

16. The opinion that the decision on amnesty represents a normative legal act may be to some degree supported by Judgment file No. Pl. ÚS 24/99, dated 23 May 2000 (N 73/18 SbNU 135; 167/2000 Coll.) in which the Constitutional Court defined the term "legal regulation" (normative legal act) through its contentual elements; the Constitutional Court considered it was crucial that the act by a state body is general, i.e. it possesses legally normative content, while "the degree of generality inherent to a legal norm is then defined by the fact that the legal norm denotes its subject and entities as classes through defining attributes, not by determining (enumerating) their elements". The Constitutional Court has abided by this opinion also in other instances of case law, in particular in Judgment file No. Pl. ÚS 27/09, dated 10 September 2009 (N 199/54 SbNU 445; 318/2009 Coll.), in which the Constitutional Court explicitly stated that "the Constitutional Court declared with complete unambiguity the subject-matter view of the examination of sources of law also in Judgment file No. Pl. ÚS 24/99, dated 23 May 2000 (N 73/18 SbNU 135; 167/2000 Coll.) … according to which the classification of sources of law must be initially derived from the contents of the legal norm".

17. However, it is impossible to omit the specific nature of the decision on amnesty, which consists of the fact that, compared to a (standard) legal regulation, it does not possess all the contentual elements, if the same does not contain a repeatable rule (if it is, to the contrary, of single application); and yet it is the permanence which is a significant attribute of a general norm (if a norm is fulfilled, it is valid further in future cases of the given type), which is not true in the case of the decision on amnesty, and therefore, it is not at any time interchangeable with a later general norm according to the principle "*lex posterior derogat priori*". A difference is seen also at a formal level (the name indicates a decision) as well as functional level, as the same does not fulfil the role of a legal regulation, but an exception to it. If a decision on amnesty may also be considered a "norm-measure", for which legal fact can no longer arise in the future, not even hypothetically, which would bring about consequences anticipated by the legal norm, then its assessment is, in its nature, retroactive and fundamentally exceeds the powers of

the Constitutional Court [cf. Resolution file No. Pl. ÚS 5/98, dated 22 April 1999 (U 32/14 SbNU 309)].

18. The opinion that the decision on amnesty is not a legal regulation may be supported also through reference to a recent case law of the Constitutional Court, specifically to conclusions expressed in connection with the decision of the President on announcing elections for the Chamber of Deputies, examined in the "Melčák Case" (Judgment file No. Pl. ÚS 27/09 and decisions related thereto), to which the Petitioners (paradoxically) appeal as to a decisive argument. Here, however, they interpret to their benefit such points as evidently do not support the Petitioners' stand; even though they quote from the final decision adopted in this case, they completely disregard points which the Constitutional Court specified in Resolution file No. Pl. ÚS 24/09, dated 1 September 2009 (U 16/54 SbNU 607; 312/2009 Coll.) (whereby the Constitutional Court postponed the enforceability of Decision of the President of the Republic No. 207/2009 Coll. on Declaring Elections for the Chamber of Deputies of Parliament of the Czech Republic), i.e. that "…however, the same also contains elements of a normative legal act", the decision of the President determining the date for holding the elections must be "considered to be an act of application of the above-specified constitutional act…" (the same was repeated by the Constitutional Court in another resolution one day later, whereby the Constitutional Court suspended proceedings on the constitutional complaint from complainant M. Melčák and submitted the petition – related to the constitutional complainant – for annulment of Constitutional Act No. 195/2009 Coll. on Curtailment of the Fifth Election Term of the Chamber of Deputies to be decided by the Plenum). The quotation used by the Petitioners comes from the judgment issued in this case on 10 September 2009 (file No. Pl. ÚS 27/09), which, however, does not aim at anything else than (as is actually implied from such) to create, by pointing at "normative elements", a basis for appealing to the provisions of § 70 paragraph 3 of the Act on the Constitutional Court and, on its basis, to declare that the decision of the President "ceases to be valid".

19. From the fact that, in proceedings administered under file No. Pl. ÚS 27/09, the contested decision of the President was subjected to review by the Constitutional Court according to Article 63 paragraph 1 clause f) of the Constitution, the Petitioners infer that the same occurred "because of elements of a normative act", and if the decision of the President according to the same Article 63 paragraph 1 clause k) is of a similar nature, then not only must such "elements" be given here, but also crucial designation of such an act as a normative one, or as ("other") legal regulation. However, they fail to see that Judgment file No. Pl. ÚS 27/09 was based on an individual constitutional complaint which, in order to succeed, logically needed to prove that said complaint is directed against a "decision", not a legal regulation (of any kind, including "other" regulation or a regulation *sui generis*), which would naturally "be impossible", and similarly, enforceability of the President's decision "could not" be postponed if it had formed such actual regulation. If the Petitioners cannot be, in the given case, the holders of authority expressable through constitutional complainant, then referring to the Melčák case is obviously contrary to their interest; when the require that the Constitutional Court treats their case as a case administered under file No. Pl. ÚS 27/09, they would logically have to accept the fact that the decision on amnesty of the President is an act of application of law, not a legal regulation. If then, in Judgment file No. Pl. ÚS 27/09 the Constitutional Court stated that the President's decision according to Article 63 paragraph 1 clause f) of the Constitution is an "act of application … of a constitutional act", then there is no reason, when it is a similar "constitutional regulation" (including normative elements of the President's decision based on such), to qualify the decision on amnesty differently.

20. Should such a conclusion be determinant for evaluation of the legal nature of the decision on amnesty, then the qualification of "other legal regulation" supported by the Petitioners could not be used, and proceedings according to the provisions of § 64 paragraph 2 of the Act on the Constitutional Court would thus not be reviewable; the regular consequence of this is then the fact that the Constitutional Court declares that according to § 43 paragraph 1 clause d) of the Act on the Constitutional Court, the Constitutional Court does not have jurisdiction to consider the petition.

IV. B

Regarding "reviewability by the Constitutional Court"

21. If, on the contrary, the opinion would be accepted that it is actually a legal regulation (most likely one "*sui generis"* – see clauses 14 and 16), it does not automatically mean that the decision on amnesty, if such was declared, may be rescinded, including by the Constitutional Court. The point is that the long-held opinion that a decision on amnesty "cannot be annulled" (see Pavlíček, Václav, Hřebejk, Jiří. Ústava a ústavní řád České republiky. Komentář. 1. díl. Ústavní systém. Praha: Linde [Pavlíček, Václav, Hřebejk, Jiří. The Constitution and the Constitutional Order of the Czech Republic. Commentary, 1st volume. Constitutional System. Prague: Linde], 1998, p. 235; or Pavlíček, Václav a kol. Ústavní právo a státověda. II. díl. Ústavní právo České republiky. Praha: Leges [Pavlíček, Václav *et al*. Constitutional Law and Political Science. 2nd volume. Constitutional Law of the Czech Republic. Prague: Leges], 2011, p. 851), or that it "cannot be annulled by any statutory procedure" (Klíma, Karel a kol. Komentář k Ústavě a Listině. Praha: Plzeň [Klíma, Karel *et al*. Commentary on the Constitution and the Charter. Prague: Pilsen], 2005, p. 324). Such conclusions may be inferred from the contentual (material) definition of amnesty as a prerogative of the executive, and are established by the following.

22. Much like individual pardons according to Article 62 clause g) of the Constitution [cf. Resolution file No. II. ÚS 137/2000, dated 16 May 2000 (U 16/18 SbNU 421)], declaration of amnesty according to Article 63 paragraph 1 clause k) of the same is a prerogative, a privilege of the President of the Republic (similarly see Pavlíček, Václav. O české státnosti. 3. Demokratický a laický stát. Praha: Karolinum 2009 [Pavlíček, Václav. On Czech Statehood. 3. Democratic and Secular State. Prague: Karolinum], 2009, p. 319), which is directed towards the domain of judicial power. These constitutional prerogatives (sometimes generally called "clemency"), conceptually resulting from monarchist ideology, allow "the head of the state to grant, to the benefit of those convicted (amnesty, commutation), possibly those accused (abolition), an exception to the statutory or court-declared consequences of a criminal act" (cf. Neubauer, Zdeněk. Státověda a teorie politiky. Praha: SLON [Neubauer, Zdeněk. Political Science and Theory of Politics. Prague: SLON], 2006, p. 212). Through these, effects or consequences of a completed or ongoing criminal prosecution are removed, but not in the form of an act of legislative power, but in the form of a decision by the head of the state. Under the conditions of the Czech constitutional order, an amnesty may be materially defined as a constitutional prerogative of the President of the Republic, whereby punishments (or their consequences), imposed on a certain range of perpetrators of criminal acts, are forgiven or commuted *en bloc*, or whereby it is ordered not to commence or to discontinue criminal prosecution of such perpetrators; it is clear from the very nature of amnesty that the same may contain elements of abolition, commutation and rehabilitation [cf. Article 62 clause g), Article 63 paragraph 1 clause j) and Article 63 paragraph 1 clause k) of the Constitution].

23. When the Constitutional Court inferred, in Judgment file No. Pl. ÚS 52/03, dated 20 October 2004 (N 152/35 SbNU 117; 568/2004 Coll.), that "when evaluating the scope and content of the powers of individual state bodies from constitutional law viewpoints, it is always necessary to measure them using the system of checks and balances" then a typical example in the issue of separation of powers, or checks and balances between the executive power and the judicial power, is the actual constitutional institute of amnesty. The purpose of amnesty in the controls of checks and balances, being incorporated in the separation of powers, is not to inhibit proper execution of judicial power, but to modify the effects or consequences of a completed or an ongoing criminal prosecution for the purpose of achieving (through applying social mercy, forgiving or forgetting) common good (when such has been necessarily subjectively defined by the executive power), possibly as a response, taking into account political and criminally political aspects of conditions in the country, to possible dysfunctions of the judicial power in attaining the same. By confiding this extraordinary entitlement to the executive power, the constitutional framer decided to structurally limit the execution of constituted powers, i.e. the execution of judicial power, this by balancing the same out in the form of the prerogative of the head of the state to make certain exception to the proper order of law in criminal cases. The institute of amnesty itself, from the nature of the matter, cannot thus be subjected to such checks of balancing and concurring the separation of power, which are otherwise to secure that mistakes of executive power may be corrected by the decision-making of courts [cf. similarly in

relation to individual pardons, Resolution of the German Federal Constitutional Court, dated 23 April 1969, file No. 2 BvR 552/63 (BverfGE 25, 352 ff)]; it would logically be contradictory if the "balanced" judicial power could remove an action against itself by simply "annulling" the given act. The provisions of Article 63 paragraph 1 clause k) of the Constitution, on one hand, establish power on the part of the executive to declare amnesty, but on the other hand, provide the executive (with respect to the nature of the act as a prerogative) with protection from the interventions of other branches of power. Judicial interventions in the case of determining the scope of powers and competencies represent constitutional-law risks, as they could actually lead even to distortion or factual shifts in the field of separation of power.

24. Identical to this was the effect of the circumstance of extraordinary specificity of the decision on amnesty, established particularly by identifying the entity legitimated for the same (the head of the state whose personal prerogative is concerned, even though under the condition of the countersignature by the Prime Minister or a member of the government authorised by the Prime Minister), the historic tradition (monarchist residua – a sovereign monarch, endowed with authority to dispense from harshness of the application of law), its own determination in terms of contents (social mercy, forgiveness or forgetting – *a contrario* law or justice), and finally also foundations based on regulation of supreme legal strength, i.e. in the Constitution, whereby, in the conditions of systems based on the sovereignty of (formerly) the Parliament, or (today) the people, this originally extra-constitutional entitlement has been constitutionalised.

25. It is in particular the aforementioned attributes of "mercy", "forgiveness", "forgetting", absence of law or legal entitlement (see Resolution file No. II. ÚS 137/2000 *per analogiam*) and absence of "justification" (what is decisive is the person that makes the decision, not the criteria according to which said person makes such decision, since no such criteria are principally established) which make it impossible for the decision on amnesty to be subjected to a review, similarly as has actually happened in the past with other acts of the President [cf., for example, Judgment file No. II. ÚS 53/06, dated 12 September 2006 (N 159/42 SbNU 305), Judgment file No. Pl. ÚS 87/06, dated 12 September 2007 (N 139/46 SbNU 313), Judgment file No. Pl. ÚS 27/09 (see above)], or with respect to which legal theory considers this.

26. Besides, the provisions of the Constitution establish no constitutional-law standard for reviewing such a decision on amnesty which could be applied; since the constitutional framer has not established such a standard, it is not appropriate for the Constitutional Court (application of classical constitutional-law instrument the test of proportionality is precluded with respect to the specific milieu) to create such a standard in the Court's application practice.

27. Therefore, it may be concluded that, in harmony with the opinions indicated above (see clause 21), the decision on amnesty – as an act of discretion of the executive established in the manner described above – is principally excluded from legal (judicial) control, therefore, it must be considered irrevocable, including by the judicial power (merely political responsibility is available). Similarly see Pavlíček, Václav. On Czech Statehood. 3. Democratic and Secular State. Prague: Karolinum 2009, p. 319, where it is mentioned that the prerogatives of the head of state (that is both individual pardons and amnesty) "are not subjected to judicial review, not even review by the Constitutional Court".

28. The fact that the decision on amnesty is non-removable may be derived also from the judgment of the European Court of Human Rights in the case Lexa v. Slovak Republic dated 23 September 2008, Application No. 54334/00, and when the Petitioners themselves appeal to the same, they are clearly beyond any decisive context. Section 131 of the judgment, for example, states that "in these circumstances, the Court finds no reason to put in doubt the above interpretation of the relevant provision of the Constitution as excluding the possibility of quashing an earlier decision on amnesty. It further notes that the quashing of unconditional measures regarding granting the acts of mercy has generally not been accepted by the law, practice and prevailing legal opinion in other Contracting States to the Convention". Here, the European Court of Human Rights refers also to § 95 of its judgment, in which they summarise "law, practice and legal opinions in other states" and which notes

that "with regard to amnesties, their retroactive revocation is generally not allowed, as they are adopted in the form of a legislative act and their revocation would be contrary to the principle of legal certainty and to the principle of non-retroactivity of criminal law". Identical is the output of the preceding Resolution file No. I. ÚS 30/99, dated 28 June 1999, whereby the Constitutional Court of the Slovak Republic interpreted Article 102 paragraph 1 clause i) of the Constitution of the Slovak Republic in such a way that the right of the President to grant amnesty does not comprise their entitlement to "change in any way the decision on amnesty already published in the Collection of Laws of the Slovak Republic", and the same is indirectly implied also from the decision of the Supreme Court of Argentina dated 13 July 2007 in the case Mazzeo and others, when the admissibility of the contrary was derived under a completely exceptional political and historic situation for pardons granted by the presidential decree to some military representatives of the state from the period of dictatorship between 1976 and 1983, with the reasoning that they prevented penalisation of "crimes against humanity" which, "with respect to international commitment", had to be investigated and punished in the given situation (similarly see the judgment of the European Court of Human Rights dated 13 November 2012 in the case Marguš v. Croatia, Application No. 4455/10).

29. Finally, it is worth mentioning that the effects of the decision on amnesty come into being on the date of the same being promulgated or published in the Collection of Laws, and subsequent judicial decisions on who, and to what scope, participates in the amnesty, are in essence merely declaratory decisions, and thus cannot have consequences other than *ex tunc*. If such effects, including those of abolition, have already occurred (to the benefit of defendants or convicts), they cannot be overruled in any way, if only for the reason that the principle *ne bis in idem* would be violated and thus also the prohibition of retroactivity, which is almost absolute in criminal law [the Convention contains an exclusion of retroactivity merely with respect to acts considered to be punishable according to general legal principles acknowledged by civilised nations (see its Article 7 paragraph 2), otherwise the prohibition of retroactivity in criminal law is generally established wherever it would generate unfavourable consequences for the defendants; cf. Wagnerová, Eliška a kol. Listina základních práv a svobod. Komentář. Praha: ASPI [Wagnerová, Eliška *et al*. Charter of Fundamental Rights and Basic Freedoms. Commentary. Prague: ASPI], 2012, p. 823; see also Judgment file No. IV. ÚS 98/97, dated 30 June 1997 (N 88/8 SbNU 305)].

30. So even if the contested decision on amnesty were qualifiable as "other legal regulation", the Constitutional Court is not competent [§ 43 paragraph 1 clause d) of the Act on the Constitutional Court] to consider the petition by the Petitioners – as well as in the case of qualification as an act of application of law (see section IV.A above).

31. The same is naturally (*implicite*) true also for the ("alternative") petition formulated by the Petitioners, that the Constitutional Court (without annulling the decision on amnesty) declare that the decision on amnesty "is in contravention of the values of democratic law-based state…", or that it is unconstitutional (see clause 1). If the Constitutional Court is not competent at all to consider the petition filed according to § 64 paragraph 2 of the Act on the Constitutional Court, then it is logically not appropriate for the Constitutional Court to give opinion to partial issues ("preliminary references") associated with the same.

32. Speculations of the Petitioners in the issue of substantive or (merely) procedural consequences of the decision on amnesty are then completely inappropriate ("it would be irrational to interpret legislation granting an amnesty as permitting detention on remand in respect of persons against whom all criminal proceedings must be stopped by virtue of such legislation" – see the European Court of Human Rights in judgment Gusinsky v. Russia, quoted from judgment in the case Lexa v. Slovak Republic, § 121). Deliberations presented by the Petitioners in sections II. b), c), d) and e), entitled "Reviewability of constitutional and administrative acts of the President of the Republic", "Boundaries given by values of a democratic law-based state", "Boundaries of the right of the President of the Republic to grant amnesty" and "Review of decisions which interfere with fundamental rights and freedoms", respectively, similarly distinguish themselves by being worthless regarding the issue of amnesty concerned, as they are not related to such, are reflected either at a general level or a level

which is specific but irrelevant, as they are based particularly on commentaries of the conflict between the President of the Republic and the President of the Supreme Court, and possibly judicial trainees [see Judgment file No. II. ÚS 53/06, dated 12 September 2006 (N 159/42 SbNU 305) and Judgment of the Supreme Administrative Court ref. No. 4 Aps 3/2005-35, dated 27 April 2006]. When the Petitioners refer also to Article 36 paragraph 2 of the Charter, they do so in contravention of the objective they are pursuing since by that they anticipate the foothold that the "review" they claim is aimed against a "decision by a body of public administration".

V. Conclusion

33. By combining partial conclusions expressed in the previous sections IV.A and IV.B, the verdict of the resolution issued by the Constitutional Court is justified. The final formal definition of the decision on amnesty (as was announced above in clause 12) is not decisive for such a result.

34. It is not necessary to justify in any further detail as it is evident that the same conclusions apply also in relation to the petition of the secondary party in the section aimed additionally against Article II of the decision on amnesty, which has already been contested by the Petitioners. Therefore, it was not inevitable to deal (thoroughly) with the issue whether the Municipal Court in Prague is truly legitimated to file such a petition (see the condition that the petition must be aimed against "enactment", established in the provisions of § 64 paragraph 3 of the Act on the Constitutional Court), and the same applies also to the objection regarding defect in procedure in the act of countersignature pursuant to the lack of consideration by the Government.

VI.

"Beyond the decisive framework"

35. The Petitioners principally identify incompatibility of Article II of the decision on amnesty with the constitutional order with violation of property rights of the injured parties in criminal proceedings, which have been discontinued by the abolition (section III of the petition); they infer that the "decision of the President of the Republic on amnesty made the courts unable to provide protection to the rights of the injured parties and declare that particularly serious criminal acts have been committed, due to which the injured parties at present do not have any real possibility to assert their property claims".

36. Even this statement, if its evaluation could be open for review, cannot be accepted. The point is that there actually exists no constitutionally guaranteed subjective right of a natural person or legal entity that another person be criminally prosecuted [cf., for example, Resolution file No. I. ÚS 84/99, dated 8 April 1999 (U 29/14 SbNU 291) or Resolution file No. I. ÚS 249/2000, dated 27 September 2000 (U 34/19 SbNU 303), even granted that the Constitutional Court does not ignore case-law developments based on the case law of the European Court of Human Rights in relation to proceedings to which victims of violation of Articles 2 and 3 of the Convention are parties]; an indirect consequence of this is that even the hypertrophy of the position of the parties injured in terms of property in criminal proceedings (section III.b of the petition), accentuated by the Petitioners, is not formally acceptable. Moreover, the "legitimate expectation" according to Article 1 of the Additional Protocol cannot be clearly associated with the very administration of accessory proceedings and, even when abolition noticeably and necessarily – from the nature of the matter – affects the rights of the injured parties (participants in the accessory proceedings), or has procedurally unfavourable effects, abolition as such cannot be considered to be unconstitutional, if it represents a constitutional exception to the standard course of criminal proceedings. The effects emphasised by the Petitioners come into being at all times with any abolition and the number of the injured parties or the value of their claims cannot be vital.

37. As for the issue of *denegationis iustitiae* it is not possible to ignore that the injured parties always have – generally speaking – the possibility to exercise their claims in civil proceedings (without there being any special risk of limitation – see § 112 of the Civil Code), this as any other entity aggrieved in terms of property, whether they were a party to the accessory proceedings (and referred to such proceedings by a decision of a court) or not, since their detriment did not originate by an action qualified as a criminal act; so far, the position of the injured parties referred to by the Petitioners is similar to other injured parties, or is otherwise standard. Naturally, it is not appropriate to disparage in

any way the change in the procedural position of the injured parties, consisting of the discontinuance of hitherto running accessory proceedings, but at least as for cessation of the hitherto securing measures it must be noted that instruments of preliminary injunctions [cf. § 76 paragraph 1 clause e), or clause f), § 102 paragraph 1 of the Civil Procedure Code] are also similarly applicable for subsequent civil proceedings.

38. Furthermore, the concept of the Petitioners will not stand – in its generality – that if loss was caused by a criminal act, the "injured party cannot bear the burden of evidence"; and the discrepancy (claimed by the Petitioners) with the "principle of equality" is clearly also not justifiable upon a closer look (equality in relationship to whom). As for the burden of evidence, the injured parties see their condition as unfavourable, in particular due to the fact that for the future – as compared to the accessory proceedings – their position is found to fall outside the support of activities of bodies involved in criminal proceedings (see above).

39. Argumentation using the point of "interference with the fundamental principles of a law-based state" is based on opinions expressed by the Constitutional Court only in proceedings in which the ordinary courts considered discontinuing criminal prosecution due to the fact that such criminal prosecution had lasted an inadequately long period, and to emphasise the inadmissibility of such a course from the viewpoint of a criminal trial. In the case of applying the constitutional prerogative of the executive power, the situation is obviously different. The fact that an "inappropriate length of criminal prosecution" should be measured in individual proceedings – from the viewpoint of Article 38 paragraph 2 of the Charter (!) – "specifically" (as emphasised by the Petitioners), logically does not mean at all that, within the scope of amnesty (discretion) entitlement, a certain duration of criminal prosecution could not be determined as one of the decisive criteria "generally" [see, for example, Federal Act dated 9 May 1985 on Amnesty (BGBl. Nr. 204/1985), issued on the occasion of the 40th anniversary of the declaration of independence of Austria and on the occasion of the 30th anniversary of signing the State Treaty, which contained also a section on abolition which, in addition to other points, declared that criminal prosecution would not be commenced or, if such had been commenced, would be discontinued, if said criminal action was committed before 15 May 1975 and if a sentence longer than three years of imprisonment cannot be given].

40. Even though it was not important for assessment of the given case, it is worth noticing – by summarising what was told above and merely as an explanation for the Petitioners – that it is impossible to reliably arrive at the recognition that the contested decision on amnesty is "unconstitutional" (as they claim). However, it is necessary to emphasise that this conclusion lies exclusively at the level of constitutionality and is an expression of abstract opposition against the Petitioners and the argumentation presented by them; to the contrary, if the injured parties in the individual proceedings (affected by the abolition included in the amnesty) understand such a decision as specifically controversial, procedurally burdening or even endangering their subjective "trust in law", the Constitutional Court has sympathy for such a position.

VII.
Obiter dictum
41. The opinions presented and conclusions educed relate, from the nature of the matter, to the petition filed by the Petitioners and the specific decision on amnesty contested by said petition; these very items are finally those reflected by the Constitutional Court.

42. Nevertheless, there is no reason to ignore that the evolution of the concept of a modern state, gradually developing the attributes of a law-based state, elimination of arbitrariness, and, as a result of this, limitation or even suppression of any space for "non-reviewable" acts of public power, strengthens concurrent tendencies to enforce the opinion that not even the decision on amnesty, in spite of its (traditional) prerogatives (in particular the abolition decision), must be excepted from effective criticism forever (naturally it is true that even the President is, when exercising entitlement to grant amnesty, bound by the constitutional framework, including its definition in terms of values). However, on the other hand, it is adequate to believe that the currently achieved legal and political

standard is such that external intervention is conceivable only in situations abnormally extreme, or extraordinary deviations from the fundamental principles of the legal order, if the executive finds itself, when exercising its powers, in conflict with the essential values which the Constitution in its Article 9 paragraph 2 declares to be inviolable [cf. Judgment file No. Pl. ÚS 19/93, dated 21 December 1993 (N 1/1 SbNU 1; 14/1994 Coll.)]; in other words, restriction of a body of the executive power in promulgation of the decision on amnesty may be given merely by fundamental values forming the material core of the Constitution, when any interference with such could represent a threat to the constitutional state as such. Even though it was educed that judicial review of the decision on amnesty is (as a contradiction of its kind) ruled out (so that amnesty may retain its principal conceptual attributes), for the future it may be acknowledged (even though with evident reserve) that, in such an entirely excessive situation (should the same take place), it would be the Constitutional Court that would, in some form as the "last instance", take charge of protecting these very values which are fundamental by the constitutional definition (with full respect to risks resulting from possible collision "with the principle of legal certainty and the principle of a prohibition of retroactivity in criminal law" – see quotation from the judgment of the European Court of Human Rights in the Lexa case in clause 28 above).

43. It is surely unnecessary to particularly highlight that these deliberations, conceived outside the framework of the given case and the decision-making reasons attached to possible future and hypothetical events, cannot, from the nature of the matter, in any way unsettle the conclusion arrived at above, that the Constitutional Court is not competent to consider the petition by a group of Senators aimed at the given decision on amnesty.

44. The means to prevent the entitlement of the President from being abused is traditionally represented by the countersignature by the Prime Minister and application of constitutional responsibility of the Government as a whole (Article 63 paragraph 4 of the Constitution). Should it be proven that such constitutional-law safeguards are not really effective, it is completely in the hands of the constitutional framer to restrict the power of the President to grant amnesty (see, for example, an amendment to the Constitution of the Slovak of the Republic implemented by Constitutional Act No. 90/2001 Coll., including the explanatory report for the same) and, for example, to remove from such power (the very) section on abolition, which is, from the viewpoint of principles of a law-based state, in particular the separation of powers, obviously the most controversial and most often criticised by the doctrine, or possibly to entrust this power to an enactment or the legislature.

45. It may also be considered whether the interest pursued by the Petitioners could not be met also by the ordinary courts in proceedings on who and how participates in the contested amnesty (in its section on abolition). Logically, a restrictive interpretation comes into consideration, hence, for example, in the case of defendants who, as fugitives, evaded criminal prosecution, it could be deliberated whether the decisive period of criminal prosecution (eight years) should exclude such a period of time. Similarly, an issue of interpretation is present regarding whether it should be adequately proceeded also in relation to those who (provably), by evident obstructive conduct in the proceedings, solely caused relevant prolongation of their criminal prosecution, since also here, doubts could be cast on the very reason for the decision on abolition ("good" pursuant to clauses 23 and 25 above) which is necessarily vested in that "inappropriate" length of criminal prosecution, which can be attributed to the public power. Moreover, it is apparently impossible to rule out that such proceedings weigh up the possible conflict between the real (specific) impact of the decision on amnesty and the "international treaties" (cf. clause 28 above) also referred to by the Petitioners in such a way that the ordinary court prefers Article 1 paragraph 2 of the Constitution over its Article 63 paragraph 1 clause k) of the Constitution (cf. also the aforementioned judgment of the European Court of Human Rights dated 13 November 2012 in Marguš v. Croatia, Application No. 4455/10). It would be appropriate to proceed in line with this – and specifically – in cases when the decision on amnesty would, *in concreto*, influence criminal proceedings in which the injured parties are "qualified" victims of violation of the aforesaid (clause 36) Article 2 and Article 3 of the Convention (cf. Kmec, Jiří, Kosař, David, Kratochvíl, Jan, Bobek, Michal. Evropská úmluva o lidských právech. Komentář. Praha. C. H. Beck [Kmec, Jiří,

Kosař, David, Kratochvíl, Jan, Bobek, Michal. European Convention on Human Rights. Commentary. Prague. C. H. Beck], 2012, p. 377).

Note: Appeal against a resolution of the Constitutional Court is not admissible.

In Brno on 5 March 2013

Dissenting opinion of Justice Pavel Rychetský on Resolution of the Plenum file No. Pl. ÚS 4/13 dated 5 March 2013

The dissenting opinion which I present, according to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as subsequently amended, is aimed at the Resolution of the Plenum, whereby the petition by a group of Senators for annulment of Article II of the Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013, was rejected.

1. I believe that, with respect to the petition by a group of Senators for annulment of the decision of the President of the Republic, the Plenum should have first of all unambiguously evaluated the issue whether they really deem it possible that state power in a "democratic law-based state" (Article 1 paragraph 1 of the Constitution) could issue a decision which is excluded from any review, in particular when such a decision has an immediate impact on the rights of a whole group of citizens and on international commitments which the Czech Republic adopted and bound itself to abide by them both in international treaties and in Article 1 paragraph 2 of the Constitution. I believe that by adopting the principles of a material concept of a law-based state, expressed by the Constitutional Court in a number of its judgments, a principle was expressed that all acts of public power are subject to control of constitutionality, or that no such act may evade such control completely. The absence of a specific constitutional or legal arrangement defining material or local jurisdiction (power) of the body authorised to undertake such control cannot in itself eliminate the possibility of the given entity to claim protection against an act of the public power, which, according to their statement, infringed their subjective rights. In the given case, however, the petition has been filed by a group of Senators and thus it is impossible to avoid an analysis of the nature of the contested decision from the viewpoint of its nature as a legal regulation. If the adopted petition of a rejecting resolution infers that the constitutional act of the President of the Republic must be seen as "constitutional prerogative of the President of the Republic", then such assessment does not rule out in any way – if mass amnesty is concerned, rather than individual pardon according to Article 62 of the Constitution – its being evaluated concurrently as one of the sources of law. The very term "prerogative" expresses nothing else than one of the forms of authorisation – be it authorisation to issue an individual (or general) legal act. The contested decision may be evaluated according to the material perspective (which the Constitutional Court cannot avoid and resort only to the formal method) – even though the same was issued in the form of "constitutional prerogative" – as a legal regulation *sui generis* which is of the nature of a generally binding legal act, because such regulation creates a rule of conduct defined in advance, in this case addressed to state bodies (in the case of Article II to bodies involved in criminal proceedings), which however has direct impact on rights and obligations of the natural persons concerned, who may call upon the consequences anticipated by such regulation. It is a specific, yet indubitably binding, normative and relatively general source of law. This conclusion also does not rule out the judgment that the one-off "consummation" of the contested act removes from the same the nature of a legal norm, since, as is generally known, the legal order contains a number of generally binding legal regulations which, upon fulfilling their purpose or upon expiry of some period of time, lose their effectiveness but not validity (for example act on state budget). Besides, if the Constitutional Court cancelled such acts adopted in the form of an enactment, the Constitutional Court would do so *prima facie* for reasons of violation of the constitutional principle of separation of powers [see weirs on the Elbe river – Judgment file No. Pl. ÚS 24/04, dated 28 June 2005 (N 130/37 SbNU 641; 327/2005 Coll.) or runway at the Ruzyně Airport – Judgment file No. Pl. ÚS 24/08, dated 17 March 2009 (N 56/52 SbNU 555; 124/2009 Coll.)].

2. When making the decision today, the Constitutional Court faced the evaluation of two – in this case, two opposing – constitutional-law paradigms. The first is the requirement that the Constitutional Court does not permit and does not formulate the conclusion that in a democratic law-based state, the state power may issue a decision which nobody can either review or annul. The second is the constitutional principle according to which "state authority … may be asserted only in cases, within the bounds, and in the manner provided for by law" (Article 2 paragraph 3 of the Constitution). In the discussion of the Plenum I held the opinion that in this case, the Constitutional Court should have preferred the first option and proceed to the substantive review of the contested act of the President of the Republic and the Prime Minister (indubitably with the risk of being accused of judicial activism). Majority of my colleagues supported the second option and I regret that they have not resorted even to a minimal manner within which they had the opportunity to declare that such condition is, in a democratic law-based state, unacceptable in the long term; and to proceed to assessing the objected infringements of the rights protected by the Constitution, without reflecting their conclusions in the verdict and restricted themselves only to declaring them within the scope of the reasoning. Such deliberations, however, should have been expressed in the form of a judgment (be it dismissive one), for which the petition filed by a group of Senators provided extensive and high-quality argumentation support.

3. However, both options presupposed that the Constitutional Court would deal with the petition using a proper procedure, within which the Court would ask the parties to provide their opinions, administer evidence from which the Court reliably ascertains the conditions under which the proposal of the decision on amnesty was created, when a how it was countersigned by the Prime Minister, and then would decide by judgment with generally binding effect, containing also deliberations on extreme situations requiring an action by the Constitutional Court, as well as deliberations *de constitutione ferenda*, including relevant comparative sections. In this connection I point out an alternative petition by a group of Senators, with which, in my opinion, the resolution did not deal satisfactorily; instead the resolution expressed "sympathy" with an onerous legal position of the aggrieved parties from the viewpoint of the civil way of exercising the rights which they lost within the scope of accessory proceedings discontinued as a result of amnesty. In this connection, I have in mind not only the change in the procedural position, but mainly the material change upon cessation of securing measures imposed on property of persons granted amnesty, connected with almost absolute loss of hope that their claims for compensation would be met.

4. As a result of rejection of the petition by a group of Senators, the Constitutional Court has completely avoided the review of constitutionality of the contested decision on amnesty, even when the Court, at the academic level as part of the *obiter dictum* (section VII), admitted that they exceptionally would accomplish such review in the case of such a prominent excess in terms of amnesty as would actually mean a violation of the constitutional dictate on inalterability of essential elements of a democratic law-based state according to Article 9 paragraph 2 of the Constitution. In the resolution adopted, against which I raise objection with this dissent, however, the majority has not even tried to find arguments that this was not such a case. Moreover I am convinced that in the case of a review of the contested decision on amnesty, the provisions of Article 1 paragraph 2 of the Constitution, according to which the Czech Republic is obliged to comply with its international commitments, should have been used as the basic reference criterion. I am convinced that this command is valid without exception also for the President of the Republic and their decision on amnesty in its section on abolition. At least according to Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and according to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed on behalf of the Czech Republic in Strasbourg on 18 December 1995, our country has committed itself to criminally persecute certain crimes and to prevent legalisation of proceeds from criminal activity. The Constitutional Court should have evaluated the contested Article II of the decision on amnesty from the viewpoint of the constitutional commitment to respect the above-specified international treaties which are binding on the Czech Republic. Had the Constitutional Court ascertained that Article II of the decision on amnesty applies also to the acts to whose prosecution the Czech Republic has bound itself, and to the seized property which the Czech Republic has bound itself to confiscate, the

Constitutional Court itself should have, in relation to these criminal proceedings, partially annulled Article II of the decision of the President of the Republic. I surely cannot accept the opinion contained in clause 45 of the resolution, according to which Article 1 paragraph 2 of the Constitution, on priority of international commitments, should be applied by the ordinary courts themselves and that such courts, within the proceedings, should reject to grant participation in the amnesty according to Article II, even thought the very Constitutional Court has not had the courage to take such step.

In Brno on 5 March 2013

Dissenting opinion of Justice Ivana Janů according to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (regarding the verdict as well as the reasoning).

Iustitia sine misericordia crudelitas est, misericordia sine iustitia mater est dissolutionis. Justice without mercy is cruelty, and mercy without justice is the mother of dissolution. St. Thomas Aquinas, *Super Matthaeum, Caput V, Lectio 2*

The majority opinion concluded, in procedural evaluation of the petition, that the decision on amnesty is not a legal regulation (section IV.A with a partial conclusion in clause 20) and that is rather forms an act which is "unreviewable" by the Constitutional Court, as the Constitution of the Czech Republic (hereinafter referred to only as the "Constitution") does not prescribe any boundaries for such an act (section IV.B with a partial conclusion in clause 27).

I am presenting merely an outline of my dubitations and reservations, since first of all I believe that the petition should have been heard in terms of merits within proper proceedings. Subject-matter consideration has not taken place as the Constitutional Court found they do not have powers to consider the petition, and therefore the Constitutional Court, thus even myself, does not know the opinions of the parties to the proceedings or other possible data for subject-matter consideration. Since the majority of the Plenum has rejected to deal with the petition in terms of subject-matter consideration, they principally restricted the Constitutional Court for the future in terms of reviewing any future amnesty.

I. Initial reflections

At the introduction of my dissenting argumentation, I would like to state that I support the instrument of amnesty and its effective application, including the fact that the amnesty should remain one of the powers of the President of the Republic. I do not doubt that this very case under consideration, including dissenting opinions, but in particular the public discussion which did not stop at the surface of the problem, will contribute to a greater precaution and smaller number of errors in granting amnesty, and not to restriction or even non-use of the same. In my opinion, it is eminently important constitutional instrument for the life of the society and individuals, not only such an individual who found themself within the machinery of the punitive mechanism of justice, be it rightfully or not, but of us all. Surely nobody can remain inert whether a women who gave birth in prison while in custody would be able, due to intervention by the President, to live with her child in standard conditions, provided that the degree of dangerousness of the suspicion falling upon her makes it at least little possible; or must a terminally ill person, a dying person, undergo the whole criminal proceedings when it is more than likely that that they will not live to see the judgment? Every president should have the courage to take up the responsibility, including criticism which they will surely always receive from a part of the population but in particular from the media, and experience what we judges, in abundance, receive after almost every case we decided and, often, what we receive rightly. I will conclude this introduction with a quote from a book entitled Milosti [Pardons] by Lenka Marečková (published by Academia in 2007) which is devoted to the issue of amnesties: "In the present system of

criminal justice, the instrument of a pardon must have its proper place. Same as forgiveness and compassion and hope must have their place in our lives – unless we want to stop being humans". Forgiveness is a personal decision, often a very long and painful process, accomplished by effacing the wrong which has fallen upon me, and vindicate, often only for myself, the person who has hurt me. The President, with his constitutional pardon, and the Prime Minister, with his countersignature, act, speaking with certain hyperbole, "vicariously" in the name of us all. And if only for that, therefore, such decision should be well-judged, sensible and approvable from the viewpoint of justice, a decision which will bring pardon to one person or a group, but will not worsen the position of the victim and the aggrieved parties. This brings me the problematic nature of Article II of the decision of the President on amnesty, which represents a mass-scale abolition and will be discussed separately in section V of this dissenting opinion.

II. Decision on amnesty as a legal regulation

I claim that the decision on amnesty is a normative act, a legal regulation, an enactment in the material sense. This opinion is based on the contentual definition of a legal regulation as was presented in Judgment file No. Pl. ÚS 24/99, dated 23 May 2000 (N 73/18 SbNU 135; 167/2000 Coll.). As the Petitioners (a group of Senators), I additionally refer to Judgment file No. Pl. ÚS 27/09, dated 10 September 2009 (N 199/54 SbNU 445; 318/2009 Coll.), which, however, was ingeniously turned by the majority opinion against the Petitioners themselves (clauses 18–19).

I believe that the Plenum of the Constitutional Court, in proceedings file No. Pl. ÚS 24/09 and file No. Pl. ÚS 27/09, from the beginning proceeded, in the case of the decision of the President of the Republic on declaration of elections, from the concurrent existence of both normative and individual elements of such an act. In no stage of the proceedings at that time was it declared that, in the case of the then contested act of the President, exclusively normative act or exclusively individual act were concerned, but merely for the purposes of admissibility of the constitutional complaint, the individual elements of the act were emphasised [in Resolution file No. Pl. ÚS 24/09, dated 1 September 2009 (U 16/54 SbNU 607; 312/2009 Coll.)].

Resolution on postponement of enforceability dated 1 September 2009, file No. Pl. ÚS 24/09, stated that the decision of the President "contains elements of a normative legal act, however, it must be considered an act of application of the above constitutional act…". This in no way disproves the above-stated conclusion on a mixed nature of the act. In the main Judgment file No. Pl. ÚS 27/09, the Plenum openly confirmed the normative (mixed) nature of the decision of the President and then annulled it as such according to § 70 paragraph 3 of Act No. 182/1993 Coll. on the Constitutional Court, which falls exclusively upon "implementing regulations": "elements of a normative legal act (an implementing one) that are contained in this Decision of the President of the Republic are grounds for the procedure under the cited § 70 para. 3 of Act No. 182/1993 Coll."

This transferred to the current proceedings, I believe that the majority opinion wrongs the Petitioners, since its reproaches them for incomprehension of the then argumentation of the Constitutional Court. The Petitioners, however, refer to these very deliberations which are contained in the above-specified quotation, this, in my opinion, perfectly appropriately. The Constitutional Court, in Judgment file No. Pl. ÚS 27/09, dated 10 September 2009, annulled the decision of the President on declaration of elections, which the Constitutional Court explicitly considered to be "legal regulation", and the more so Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013 must be a legal regulation, since the content of this decision shows even more typical normative features (general normative content determined for a generally defined group of addressees under generally defined conditions, application of which towards such addressees takes place only through a subsequent individual act).

As for the very contentual attributes, the majority opinion differentiates the decision on amnesty from a legal regulation (clause 17). The decisive differentiating criteria allegedly are one-off nature of such regulation, formal designation as "decision", and exercise of the function of an exception to a legal

rule. I am convinced that the same properties can be had also by a legal regulation, without losing the nature of a legal regulation, that is, the above description is truthful, but it does not bring about the required argumentative point. Besides, not even Resolution file No. Pl. ÚS 5/98, dated 22 April 1999 (U 32/14 SbNU 309) arrived at the conclusion that Government Order No. 55/1954 Coll. on the Protected Area of the Prague Castle (on the basis of which the St. Vitus Cathedral was expropriated by a single action) would not form a legal regulation.

Merely regarding qualification of the decision on amnesty as "other legal regulation" I wish to add that I consider it to be a legal regulation with legal force of an act, since only an act (a norm of a greater legal force) may change effects of another act, in this case the Criminal Code.

Briefly speaking, I believe that the decision on amnesty in general as well as the contested Article II shows sufficient amount of contentual normative attributes (relative generality, binding nature, enforceability, capability of bearing a rule of behaviour and suchlike; from a formal aspect, publication in the Collection of Laws and suchlike), so that the same might be a legal regulation. In this respect, it is a constitutionally admitted breakthrough of the executive into the legislative power (norm-forming competition).

Until now, the logic of the majority opinion is clear: if the amnesty is not a legal regulation, it is not possible to take decision on it within proceedings according to § 64 *et seq.* of the Act on the Constitutional Court, and the Constitutional Court does not have jurisdiction to consider such a petition (and any content of the amnesty cannot change this in any way).

The greater then is my lack of understanding regarding the majority opinion, according to which (in the subsequent *obiter dicto*) – surprisingly, in the context of the whole resolution –review of a decision on amnesty was admitted in situations which would be "abnormally extreme" (clause 42). However, the contentual collision of possible future extreme amnesty with Article 9 paragraph 2 of the Constitution, in my opinion, cannot guarantee that it would "become" a legal regulation in such case only. Now I omit the fact that if the issue of the collision with Article 9 paragraph 2 of the Constitution should be a necessary part of deliberations on procedural admissibility and possibility to consider the petition, as indicated by *obiter dictum*, there would be nothing left to handle in the review in terms of merits. Section IV.A of the reasoning of the majority opinion, formulated as without exception, clearly rules out any abstract review of constitutionality of even the "most extreme" amnesty; if the Constitutional Court does not have jurisdiction for proceedings on such petition once, then its jurisdiction cannot be established in the future through any deliberation in the style of "now this is an amnesty we really should abolish". With respect to the fact that the Act on the Constitutional Court contains rather limited enumeration of "types" of proceedings held before the Constitutional Court, it is not clear in what kind of "some form" (clause 42), a review of amnesty may be rationally conceived.

III. Constitutional boundaries for amnesty

I believe that another irremovable internal incompatibility of the majority opinion is contained also in the second crucial part of reasoning IV.B regarding "reviewability" of the decision on amnesty.
The majority opinion states that formulation of the decision on amnesty is not governed by any "substantive-law criteria" (clause 25), "no provisions of the Constitution" establish any standard for constitutional-law review (clause 26), decision is excluded from "legal (judicial)" control and is "irrevocable" (clause 27).

It was to no effect when I tried to find in the Czech constitutional order and the twenty-year long history of case law of the Constitutional Court a substantiation for interpretation of amnesty as a "monarchist residuum" and a reflection of "sovereignty of a monarch" as a principal argument which overrides all principles, fundamentals, doctrines, measures and maxims, which the Constitutional Court until now carefully weighted and used in the protection of a law-based state against arbitrariness

of the public power. I doubt that the constitutional framer wilfully in Article 63 paragraph 1 clause k) of the Constitution created an experimental laboratory for "monarchism", as did the majority opinion. The Constitution from 1993 is in this sense a modern constitution rather than a legal regulation adopted from Austria-Hungary; therefore, the suggested analogies with an absolutist monarch will not stand. If the majority of the Plenum had the aim of creating an argumentation abbreviation "when a monarch could proceed arbitrarily, the same may be done by a president", I cannot agree with that. If the President should henceforth be, in execution of their powers, be it a single one of them, a monarch "above the Constitution", then the majority of the Plenum should have, at the same time, also emphasised the demand for personal qualities of such a "ruler": self-restrained, moderate, humble. When a mere sense of ruling "by the grace of God" was to be sufficient for the monarch in the past, the majority of the Plenum failed to see the present essential change of the paradigm, when the public power is often exercised in an activist manner at the very boundaries of constitutional powers, until prevented by a constitutional control mechanism (check). The point is that only such a politician–constitutional representative is generally acknowledged with appreciation as "powerful".

No constitutional instrument besides amnesty received an absolute constitutional protection, no other constitutional instrument (act, step, inactivity of a body of the public power) has the privilege to be always and under all circumstances only constitutional.

I strictly refuse the notion that the Constitution allows that the powers, or even one of them, of a constitutional body, were so conceived as "absolutely" unlimited. To the contrary, execution of the public power generally as well as conduct of all constitutional bodies are always limited at least by internal constitutional boundaries and principles of a law-based and constitutional state (separation of powers, protection of fundamental rights, legal certainty, prohibition of arbitrariness, compliance with international commitments and suchlike). These constitutional-law limits may be ranked at least into three groups (which may overlap):

The first group of constitutional boundaries for a decision on amnesty is formed by Article 9 paragraph 2 of the Constitution, according to which a change to material qualities of a democratic law-based state is inadmissible. The case law of the Constitutional Court and the legal doctrine describes this as a material core of the Constitution.

The second group of the constitutional boundaries for a decision on amnesty is formed by (an international) commitment to prosecute the most serious crimes against humanity (for example torture or similar cruel, inhuman or degrading treatment, arbitrary deprivation of life, violent disappearance), as is shown, in international cases studies, by decision of the Supreme Court of Argentina dated 13 July 2007 in Mazzeo and other; or judgment of the European Court of Human Rights (hereinafter referred to only as the "ECHR"), dated 13 November 2012 in Marguš v. Croatia, Application No. 4455/10.

The third group of the constitutional boundaries for a decision on amnesty is represented by the obligation of the state to protect the fundamental rights of persons (particularly) in such cases when the only form of effective protection is the very criminal repression [*obiter dictum* to Judgment file No. Pl. ÚS 17/10, dated 28 June 2011 (N 123/61 SbNU 767; 232/2011 Coll.), clause 61]: "It does not depend on free discretion of the state whether and in what way they will prosecute criminality. The Constitutional Court insists on the doctrine that criminal proceedings represent merely a relationship between the perpetrator and the state, that is that the right of a third party (a person who informs the given body, the aggrieved party) that another person be prosecuted and sentenced is not constitutionally guaranteed. However, it is impossible to omit that it is the state's explicit obligation to secure protection to the fundamental rights, including the rights guaranteed by the Convention, this even through effective criminal proceedings, or that, under certain conditions, effective protection (of victims) may be provided only through the means of the criminal law. Failure of the state in discharging this duty may represent, depending on circumstances, typically a violation of Article 2 paragraph 1, Article 3 or Article 8 of the Convention [X and Y vs. the Netherlands, judgment dated 26 March 1989, No. 8978/80, § 27: 'This is a case where fundamental values and essential aspects of

private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions (...)'; M. C. vs. Bulgaria, judgment dated 4 December 2003, No. 39272/98, § 150–153; Assenov and others vs. Bulgaria, judgment dated 28 October 1998, No. 24760/94, § 102; Osman vs. the United Kingdom, judgment dated 28 October 1998, No. 23452/94, § 115–116; and others]."

The majority opinion supports its viewpoint that the decision on amnesty cannot be removed also with judgment of the ECHR in Lexa v. Slovak Republic dated 23 September 2008 No. 54334/00. In the given case, however, the ECHR dealt with the issue of admissibility of the complainant's criminal prosecution according to domestic law after promulgation of amnesty by the head of the state, where such amnesty was thereafter (allegedly) abolished, and its conclusion on its "non-removability" was expressed in relation to a legal situation which was predominant in the Slovak Republic in the period in question. In this, they found support in interpretation arrived at by the Slovak Constitutional Court, besides other sources, in judgment file No. I. ÚS 30/99, to which the majority opinion also refers. Here however I must remark that in the given case the Slovak Constitutional Court dealt with a completely different issue, that is whether the president may, through their legal act, cancel amnesty which has been promulgated earlier; the Czech Constitutional Court now does not face any such consideration.

Not this, and actually nothing else, indicates that the ECHR itself would hold the opinion of some absolute prohibition of annulment of pardon or amnesty by a national constitutional court. I infer this from the fact that the ECHR did refer to the principle of legal certainty (and the prohibition of retroactivity resulting therefrom), which is an argument against such course of action, but at the same time pointed out the possibility of a collision of the promulgated amnesty, or the above-specified principle, with international law (see clauses 96 to 99), as well as the fundamental human rights; in this they stated that if an employee of the state is charged with criminal acts involving torture or ill-treatment, it is utterly important that the criminal proceedings and declaration of the judgment are not limited in time and that granting amnesty or pardon is not admissible (see clause 139). Therefore I hold the opinion that the ECHR kept the issue of possible annulment of the decision on amnesty open, and let the solution of the same depend on specific circumstances of the case.

Without claiming completeness or accuracy, I therefore consider the existence of specific constitutional limits for generation of a decision on amnesty to be evident. In such a case, the conclusion of the majority of the Plenum, that is that the constitutional-law review of the decision on amnesty, due to the absence of constitutional reference criteria, is conceptually ruled out, is incorrect. The fact that deliberations on relevance of Article 2 and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (clause 36) or persecution of crimes against humanity (clause 28) are included in the majority opinion, unfortunately again as mere *obiter dictum*, is irrelevant for such a conclusion. The internal inconsistency of the majority opinion is again found in particular in the fact that the crucial section of the reasoning unconditionally eliminates any criteria for review, however, in no time then suggests some after all, probably under the impression of international comparison. However, it is impossible to advocate both positions: if the constitutional boundaries, even though mentioned only marginally, were meant seriously, then within the current logic of the majority of the Plenum, only indubitable proof of their violation would allow to make procedural (!) conclusion of jurisdiction of the Constitutional Court pursuant to § 43 paragraph 1 clause d) of the Act on the Constitutional Court. If the Constitutional Court found (however exceptional) unconstitutionality of amnesty, then only such finding would establish procedural jurisdiction of the Constitutional Court. Which issue would then be left for the Court for review in terms of merits? Assessment of procedural conditions of the proceedings (now the issue whether to reject the petition received for lack of jurisdiction) is thus made dependent on the result of the subject-matter review, and the argumentation thus necessarily moves in a circle.

IV. Control of excess of powers

This less important level (in this context) of the problem is formed by functional relationships among the supreme constitutional bodies.

The instrument of a decision on amnesty, constitutionally much stronger – than was thought until now – is ranked under Article 63 paragraph 1 clause k) of the Constitution, in a relation to Article 63 paragraph 3 of the Constitution, according to which validity of granting amnesty requires co-signature of the Prime Minister or a member of the government appointed by the Prime Minister. In practice, the concept of countersignature may be considered to be a check.

The present wording of the Constitution allows such conclusion that the body deciding on the amnesty is not (merely) the President of the Republic (alone), but an *ad hoc* body comprising two persons, that is the President and the Prime Minister, each of whom has the "fate" of the amnesty fully in their hands; this is due to the fact that each of them has full authority to block such possible amnesty (not to decide on the same/not to countersign the same). In this sense, in particular the Prime Minister is not inferior to the President of the Republic, in particular when, with such countersignature, the Prime Minister burdens the whole government with responsibility for the decision on amnesty (Article 63 paragraph 4 of the Constitution).

As in any branch of human activities, also in the execution of the constitutional powers it must be admitted that the function of a constitutional check may remain not completely discharged. The majority opinion does not consider at all the possibility that the President of the Republic and the Prime Minister may, in the execution of their powers, proceed *ultra vires*, that is to exceed their powers. A rational constitutional framer, in my opinion, would not incorporate into the Constitution such an instrument which makes it possible for the executive power (or actually mere two persons) – without any (constitutional) judicial control – to completely eliminate from the functioning of the state the system of criminal judiciary, this for example by repeated mass-scale abolitions. Yet, the majority opinion provides free passage to such a course of action.

V. Abolition

The purpose of the amnesty, according to the majority opinion, is not to prevent proper exercise of the judicial power, but to modify the effects or consequences of a completed or ongoing criminal prosecution for the purpose of achieving common good (through applying social mercy, forgiving or forgetting). These are situations when a case does not reach the stage of decision-making on guilt by a criminal court of justice.

Special attention must be paid to the nature of a mass-scale abolition, which applies especially to the contested Article II of the decision on amnesty.

The majority of the Plenum began at the point that in the case of an amnesty the case is the possibility of *en masse* forgiving or mitigating punishments (or consequences of the same) imposed to a certain circle of perpetrators of criminal acts; or ordering to not initiate or to discontinue their criminal prosecution; the very nature of the amnesty indicates that it may contain elements of abolition, commutation as well as rehabilitation [cf. Article 62 clause g), Article 63 paragraph 1 clauses j) and k) of the Constitution]. I am leaving aside now that the mass-scale and, as stated above – also unlimited – abolition does not necessarily need to result from Article 63 paragraph 1 clause k) of the Constitution, this for example taking into account the international comparison.

I believe that in a situation when the instrument of amnesty is found to be in clear competition (not necessarily counterposition) to the meaning of public prosecution and the purpose of criminal law, the decision on amnesty cannot be an expression of arbitrariness, but exclusively of certain deliberation on justice (rectification of dysfunction of criminal repression, elimination of harshness). When mercy is mentioned in connection with amnesty, then it is in the very context of criminal repression: guilt and punishment. Only in this context the act of mercy possesses its internal logic. If there is no guilt, if there is not punishment, mercy then becomes an empty gesture which remain misunderstood and unappreciated by all parties concerned (by the recipient of the mercy and by the entire society).

The above is true in particular in the case of a mass-scale abolition, when criminal prosecutions are discontinued (or are not initiated). Mass discontinuance of criminal prosecutions, if no other criminal and political reasons shared by the society are present (change of social and public circumstances, weakening of the perception of dangerousness of criminal actions by the society, naturally existence of individual circumstances on the part of the defendants and suchlike), then may not be and act of mercy but a mere resignation to seeking and finding the truth, resignation to a decision on guilt, thus also betraying one of the basic functions of the state (criminal repression to the benefit of the victims), this featuring disintegrating societal consequences. In serious cases, the state must not relinquish taking decisions on guilt, as that would be betrayal of the key task with which the state has been entrusted, and the state would withhold from the society the integrating sense of purification, catharsis, apart from other functions of the criminal proceedings (discouraging effects for potential perpetrators and suchlike).

VI. Conclusion
For the reasons specified above I believe that the petition should have been procedurally admitted to be considered by the Constitutional Court in terms of subject matter.

5 March 2013

Dissenting opinion of Justice Vojen Güttler on Resolution of the Constitutional Court dated 5 March 2013 file No. Pl. ÚS 4/13 on Petition by a group of Senators of Parliament of the Czech Republic for annulment of the provisions of Article II of the Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013

In the above case, I present the following dissenting opinion:
A) I. As for the verdict of the resolution

1) I disagree with the verdict whereby the filed petition is rejected for lack of jurisdiction of the Constitutional Court (cf. also clause 23 of the resolution). In this point, I refer to the dissenting opinion of JUDr. Pavel Rychetský, which is convincing.

2) I believe that the Constitutional Court should have dismissed the petition (even though not for factual reasons). This only due to the fact that it is necessary to eliminate the effects of an *ex tunc* judgment, and with respect to the principal prohibition of genuine retroactivity in law.

3) Additionally, the Constitutional Court should have considered – should the petition have been dismissed – the use of an "academic verdict". The case law of the Constitutional Court recognises such verdict, even though in practice it is not a completely equal legal condition [cf. for example Judgment file No. Pl. ÚS 20/05, dated 28 February 2006 (N 47/40 SbNU 389; 252/2006 Coll.), clause I of the verdict, and others]. The academic verdict could be framed as follows: Article II of the Decision of the President of the Republic No. 1/2013 Coll. on Amnesty, dated 1 January 2013 is in contravention of Article 1 of the Constitution of the Czech Republic, which presents (also) the principle of trust in law and the principle of legitimate expectation (pursuant to Article 1 paragraph 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms).

For the sake of completeness it may be added that the academic verdict could have been – *in eventum* – a certain guideline for criminal courts of justice making decisions on whether abolition is applicable to any given specific case, or possibly for civil courts of justice making decisions on lawsuits of victims for compensation for loss against those who were affected by the amnesty in the form of abolition.

Here I prefer such academic verdict, even though it is possible that its content together with the relevant arguments could be included (merely) in the reasoning of the resolution.

II. As for reasoning of the resolution and in support of the academic verdict

1) The argumentation of the resolution is convincing at first glance, perhaps refined to details, strictly responding to the reasons presented by the Petitioners, and purely juristical. And yet – or perhaps because of this – it cannot be accepted, when the case is considered from a wider perspective.

2) To certain degree, amnesty is a relict of the past. This is true in particular for abolition, where the bodies involved in criminal proceedings had no chance to pronounce the final conclusion. Even for this reason it is appropriate to apply abolition in a very restrictive fashion.

3) Wider perspective has led me – similarly as the Petitioners – to a notion that the rights of the aggrieved parties, that is victims of actions of a number of defendants who were granted amnesty, were almost irretrievably infringed. The objection that they may file civil lawsuits sounds like mockery rather than anything else. Besides, a public discussion has been held for many years that sufficient protection should be provided not only to defendants or perpetrators but also their victims.

4) The resolution also refers to the fact that there is no constitutionally guaranteed fundamental right that a third party be criminally prosecuted (clause 36). Such an imperative conclusion, however, does not – in its meaning – fully render the case law of the European Court of Human Rights, even though the same explicitly speaks about Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to life) and about Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (protection against inhuman or degrading treatment). It is necessary to consider whether this case law may be – adequately – applied even outside the framework of Article 2 and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom. In the given case, Article 1 paragraph 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms might be eligible; from this, legitimate expectation is inferred in relation to the right of peaceful utilisation of one's property. The scope of such Article (probably) includes also persons afflicted by actions of persons who were granted amnesty; the aggrieved parties (victims) legitimately expected that the bodies involved in criminal proceedings would properly investigate actions by persons who were later granted amnesty and that – according to the results of the proceedings – the aggrieved parties would be able to enforce their property rights through accessory proceedings. (Here we cannot fail to see that with some defendants, judgment has been already passes, even though not one of a finally legally binding nature.) However, this was prevented by the amnesty (abolition). Trough this – in consequence – also the constitutional principle of trust in law, which may be inferred from Article 1 of the Constitution of the Czech Republic, was violated. Such trust was shaken not only with persons who were directly aggrieved, but also in general public. This is a common knowledge which does not need to be proven. In this connection it is proper to remark that discussion has been held for 20 years – not only in professional circles – regarding the fact that while the rights of defendants are protected relatively strongly, the very opposite is often true with victims of criminal acts.

5) The resolution also says that amnesty is a typical aspect of the principle of "balancing" state powers, that is legislative power, executive power and judicial power (clause 23). This argument could (perhaps) be acceptable in relation to other types of amnesty or individual pardons, but not to abolition; with abolition, as was stated above, the bodies involved in criminal proceedings had no chance at all – save for the cases of judgments which did not become finally legally binding – to sufficiently examine the case, since this very task was prevented by the abolition.

6) I believe that the resolution failed to sufficiently deal with inspiring opinions of German justices presenting their dissenting opinion in relation to judgment of the Federal Constitutional Court of Germany, dated 23 April 1969 file No. 2 BvR 552/63. They referred to Article 19 paragraph 4 of the Basic Act, according to which, if someone's rights were harmed by the public power, may employ the

course of judicial establishment of law. These justices believe that it would be absurd if ongoing criminal proceedings were disturbed by a pardon.
In the case under examination in the Czech Republic, the point is not an individual pardon but abolition which does not exist in Germany at all. Here it would be appropriate to consider whether it would be admissible to infer a legal possibility to review abolition also on the basis of Article 36 paragraph 2 of the Charter of Fundamental Rights and Basic Freedoms which reads to some degree comparably with the above-quoted Article 19 paragraph 4 of the Basic Act of Germany; I do not think that the terminological difference "public power" (Germany) – "public administration" (Czech Republic) is so important that it could not be reconciled by interpretation.

At this point I would like to remark, however, that such argumentation (sub 6) – as is specified above – is in principle related to the issue of the actual jurisdiction of the Constitutional Court to take a decision in this matter. Through this, I return – in a circle – to clause I paragraph 1 of this dissenting opinion.

B) At the end of this dissenting opinion, I present the following general reflections.

In its activities, the Constitutional Court has many times identified itself with principles which the Court expressed in its very first judgment [file No. Pl. ÚS 19/93, dated 21 December 1993 (N 1/1 SbNU 1; 14/1994 Coll.)]: "Our new Constitution is not founded on neutrality with regard to values… but … law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values". The point of this is not such conduct of any body of a law-based state, which is in conformity merely with regulations of formal law, but such conduct which is also materially in accord with the Constitution and the basic principles of the supreme legal force; they provide legal regulations and acts adopted (in accordance with them) with the necessary legitimacy. The aim is human dignity, freedom and justice as the supreme values in society, whose protection and observance are the fundamental obligations of a democratic law-based state (Articles 1 and 4 of the Constitution of the Czech Republic).

The principle of separation of powers gives rise also to a command for stability, mutual calculability and foreseeability of behaviour of bodies of power. In a democratic law-based state, balancing of powers cannot – from the nature of the matter – occur where a specific part of the power of one body is conceived as absolute, ultimate and non-reviewable. To this, in this specific case, the odd – to put it mildly – way of countersigning the decision on amnesty was linked; members of the government had been clearly not informed of the amnesty at all, let alone of its scope; and the Prime Minister was convinced that he cannot choose but countersign such a decision.

In a republican system of a democratic state, each body of public power is bound by the Constitution and laws, nobody stands above the law (the principle of "*princeps legibus solutus*" does not apply), privileges are ruled out; instead, as widely conceived principle of proportionality as possible is in place, as an expression of ancient principle "let no man transgress the good measure". Each excess in this area is a basis for a dangerous precedent for the future, the more so, if it were possible to *a priori* designate also *ultra vires* conduct to be irremediable and unchangeable.

The principle of legal certainty includes a justified degree of foreseeability of behaviour of bodies of public power and in particular protection of trust of citizens in law. For example, in Judgment file No. Pl. ÚS 33/97, dated 17 December 1997 (N 163/9 SbNU 399, 407; 30/1998 Coll.), the Constitutional Court declared that a modern constitution of a democratic law-based state "cannot exist outside a context of values, notions of justice, as well as notions and sense, purpose and way of functioning of democratic institution, which would be all accepted by the public". Each opinion, however well legally justified, which denies the possibility of any attempt at a remedy of a conduct of a body of public power, justly considered by the public as inadequate and unjust, generates distinct negative consequences for perception of law, which in addition is, in our society, strongly damaged by the totalitarian regimes governing in the past. Thus, in a simplified fashion, one of the points is that the citizens do not resign but be strengthened, not only by the theory but also practice of bodies of the

Czech state, in their conviction that the old sentence "*summum ius, summa (semper) iniuria*" does not belong to a democratic law-based state.

In Brno on 5 March 2013

Dissenting opinion of Justice Miloslav Výborný regarding reasoning for Resolution file No. Pl. ÚS 4/13

1. I agree with the verdict of the resolution adopted, as I do not feel any need to principally oppose the basic points by which such decision is supported.

2. However, this does not change my reservations which I express below regarding reasons for which the petition was rejected, this while certainly many people– and I myself am not far from agreeing with their conviction – will unconditionally support the juristic power of the Court's conclusions included in the reasoning.

3. Yet, I cannot identify myself with the sharp assessment of the legal conclusions of the Petitioners, as is included for example in clause 32 of the resolution adopted. I do not share the opinion that the deliberations presented by the Petitioners were mere inappropriate speculations characterised by being basically valueless with respect to the issue of amnesty being considered. To the contrary, I believe that the Petitioners submitted argumentation *prima facie* not irrational, not irrelevant or erroneous; therefore, irrespective of the fact that I do not share such argumentation, I do not believe it right to simply deprive their deliberations of the attention which they, in my opinion, deserved.

4. The reasoning of the adopted resolution also states (clause 27) that the decision on amnesty is principally excluded from legal (judicial) control, therefore, it must be considered irrevocable, including by the judicial power"; and that only political responsibility is available. Such a resolute conclusion apparently cannot stand unconditionally. Besides, a moment later this is admitted, rather decently, by the very resolution by its using the phrase "principally" and in particular through what is stated as *obiter dictum* (clause 41 *et seq.*). Here I completely agree with what is stated in clause 42, i.e. that not even the decision on amnesty "must be excepted from effective criticism forever", that "even the President is, when exercising entitlement to grant amnesty, bound by the constitutional framework, including its definition in terms of values", or that, under excessive conditions, protection of the fundamental values forming the material core of the Constitution through reviewing amnesty by the Constitutional Court is conceivable. However, an issue is posted whether supporting the rejecting verdict with the same being manifestly unfounded rather than lack of the powers to review (or "jurisdiction", using the words of the Act on the Constitutional Court) of the Constitutional Court would not represent a more accurate point of such conclusions.

5. Regarding considerations on responsibility for the content of the decision on amnesty: in addition, the reasoning of the resolution adopted, in my opinion, insufficiently reflects the constitutionally indisputable fact that the party responsible for the act of amnesty is not the President but the Government. By countersigning the President's decision, the Prime Minister announced in the name of the Government the Government's approval of everything included in the amnesty. Therefore it would be appropriate to remark and point out that the President's will, expressed in the contested article of the amnesty, is subject to control, that is control based on countersignature. And not conceptions of the President, but rather conceptions of the Prime Minister should have taken into account all consequences linked with the abolition decision on amnesty, as well as all consequences which may be brought about by such decision (for example also for its inevitable impact on the separation of powers or to fundamental rights of the aggrieved parties). Subsequent transfer of responsibility for such notions, whether they were absent or whether consequences inferred therefrom were considered to be in accord with the principles of a democratic law-based state, from the Government to the Constitutional Court is not acceptable not only for reasons specified in the resolution adopted, but also

due to the fact that such transfer would *de facto* negate the importance of constitutional necessity of countersigning the decision on amnesty. Besides, only a subsequent control of consequences of amnesty by the Constitutional Court lacks effectiveness.

In Brno on 5 March 2013