REVIVAL OF A CANCELLED LEGAL REGULATION IN BOHEMIA, MORAVIA AND SILESIA AND IN SLOVAKIA

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The article deals with the revival of a legal regulation that was cancelled by a legal regulation that was subsequently cancelled by the Constitutional Court. It points out to the divergent approach to the solution. The authors of the article use the principles that unless the law explicitly stipulates otherwise, the cancelled legal regulation cannot be revived by cancelling the regulation that had cancelled it.

The basic method used in the article is the comparison between the Czech Republic (Bohemia, Moravia, Silesia) and the Slovak Republic. The timeliness of the article is framed by the fact that there is no uniform opinion on the solution of the problem and different solutions are adopted in individual cases. This undermines and weakens the principle of legal certainty.

The revival of a cancelled legal regulation is possible if the constitution and the law explicitly stipulate so, which is not the case of the legal system in Bohemia, Moravia and Silesia. The cancelation effects of a judgment of the constitutional court are for the future, not the past, otherwise it would be unconstitutional retroactivity. In Slovakia, the issue is solved by a legal directive regulating differently the consequences of derogation of a legal regulation (no revival) and its mere amendments or completions (revival). Unless the positive law states otherwise, there is no reason to adopt a different attitude to the consequences of the cancelation of a legal regulation by a legislator or by the constitutional court. Yet, it must be reminded that the constitutional court is not a positive law-maker and the revival of a legal regulation alone represents law-making.

Keywords: Constitution, cancellation of the legal regulation, revival of the legal regulation, Constitutional Court, law-making, revival of legal regulations.

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In the case of a situation, in which the Constitutional Court cancels a legal regulation also cancelling, or amending, other legal regulations, the following issues come to question:

1. **Is or is not the entire originally cancelled legal regulation revived?**
2. **Is or is not the original provision revived in an amended legal regulation?**

The solution to these issues varies depending on a specific legal system. Jurisprudence does not take a unanimous standpoint to the issue. The argument that if a legal regulation had been cancelled, the legal status from the moment of enforceability of the judgment of the Constitutional Court should return to the status before the issuance of the defective legal regulation, can be accepted. This approach is supported by the fact that in the opposite case the given area of social relations remains unregulated by law.[2] The second approach is that a legal regulation once cancelled is not automatically revived provided that the regulation having cancelled it is cancelled. For even a legal regulation cancelled by the Constitutional Court as defective was forceful and effective until its cancellation (cancelling judgment valid ex nunc).[3] The revival of a legal regulation also represents law-making. Upon the revival of a legal regulation the Constitutional Court becomes a positive law-maker, to which the Constitutional Court must be constitutionally entitled, and the Constitutional Court in Brno has no such entitlement.

A problem occurs, when the cancelled legal regulation had not explicitly cancelled another one, but only amended some of its provisions. If we accede to the new version being cancelled by the Constitutional Court and to the original one not being revived, the emerged gap in the legal regulation may make the original legal regulation an unusable logical non-sense. Such jeopardy may be prevented by the law-maker, or even better by the constitution-maker, by explicit acknowledgement of the revival of the original version that had been amended by a later legal regulation subsequently cancelled by the Constitutional

[2]This approach is partially used in Slovakia in relation to amended acts and in Austria, where pursuant to Section 140(6) of the Constitution of the Austrian Republic, the cancellation of an unconstitutional act gives rise to the new effectiveness of legal regulations canceled by an act proclaimed as canceled by the Constitutional Court.

[3]This approach is partially used in Slovakia in the case that an entire legal regulation has been repealed. Section 41a(3) of Act No. 38/1993 Coll. on organization of the Constitutional Court of the Slovak Republic, on proceedings before it and on the status of its judges, as amended by Act No. 293/1995 Coll., whereas the force of the entire originally canceled act is not revived, but in the case of partial changes the original version of the regulations amended by the legal regulation proclaimed by the Slovak Constitutional Court as unconstitutional or unlawful is revived.

This approach is also used in Italy and Germany. It is supported by Filip J. Vybrané kapitoly z ústavního práva. 1st edition Brno 1997, ISBN 80-210-1569-1. S. 334 and 2nd edition Brno 2001, ISBN 80-210-2592-1. P. 427, and Šimíček V. Ústavní stížnost. 1st edition Praha 1999, ISBN 80-7201-160-X. P. 106-108. The opinion that the cancellation of an unconstitutional regulation does not result in the revival of a former regulation canceled or amended by the unconstitutional legal regulation is expressed for the first time in Judgment No. 14/2002, Collection of Judgments and Resolutions of the Constitutional Court (95/2002, Pl.ÚS21/01), Šimíček V. Článek 42 Ústavy podle Ústavního soudu – důsledky pro legislativní činnost. Právní zpravodaj 4/2002. P. 27 s. 9. This opinion, albeit pointing out to certain reservations in our country, is also expressed by Vedral J. K právním účinkům derogačního nálezu ÚS. Právní zpravodaj 8/2005, ISSN 1212-8694. P. 12-15.

Court.[4] The Constitutional Court may avoid problems by utilizing a suspended enforcement of its judgment cancelling the legal regulation and by providing the legislator with time to adopt the new legislation.

A different situation occurs for legal regulations that were not directly cancelled (abrogated) by the legal regulation cancelled by the Constitutional Court but resulted from the usage (obrogated) based on the rule of interpretation that a younger regulation of the same legal power prevails over an older regulation (and that a special regulation prevails over a general regulation). Such provisions in legal regulations did not formally cease to be the part of a legal system and their usage can be revived.[5] Although it is often stated that a younger legal regulation repeals an older one, it is not actual repealing, but an application preference.

1 Prevention

There may often be disputes. Hence it is better if law preventively avoids these disputes. The first prevention is that the Constitutional Court cancels the derogative legal regulation during its force, however not effectiveness, so the cancelling provisions of the cancelled legal regulation were not legally binding. Owing to the short periods between the force and the effect of laws in our country and owing to the length of the proceedings by the Constitutional Court it is an improbable option.

Another preventive measure is the strict observance of the principle that an amendment to a legal regulation has no independent existence and becomes a part of the amended legal regulation. So, the petition for cancelation must be directed against the amended, not the amending legal regulation. The Constitutional Court originally fully accepted this principle.[6] But later it adopted a different legal opinion on the grounds that the unconstitutionality emerged during the process of adopting an amending legal regulation, and therefore it is necessary to only cancel that regulation, not the relevant provisions in the original amended regulation.[7] Not even a defect in the process of adopting an amending regulation hinders the Constitutional Court from cancelling the amended parts of the original legal regulation and not only the defectively adopted amending regulation.

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[4] It is applied in Slovakia. Section 41a(3) of Act No. 38/1993 Coll. on organization of the Constitutional Court of the Slovak Republic, on proceedings before it and on the status of its judges, as amended by Act No. 293/1995 Coll.

[5] A similar legal opinion is present in the judgments of the Supreme Administrative Court – points 43-46 in the judgment from 17th April 2009, ref. No.: 2 Afs 131/2008 – 137, point 23 of the reasoning of the judgment of the Supreme Administrative Court from 14th May 2009, 1 Afs 26/2009 – 113.

[6] The original idea to contest the amended legal regulation – judgments Pl.ÚS 5/96 and 33/01, resolutions Pl.ÚS 25/2000. Filip J. Vybrané kapitoly z ústavního práva. 2nd edition Brno 2001, ISBN 80-210-2592-1. P. 427; Wagnerová E., Dostál M., Langášek T., Pospíšil I. Zákon o Ústavním soudu s komentářem. Praha 2007, ISBN 978-80-7357-305-8, Section 68(2)(8). P. 270-271.

[7] Judgment No. 476/2002 Coll. cancelling Act No. 501/2001 Coll. amending the Commercial Code, the Civil Code and some other acts. The Constitutional Court founded the text of the act was passed through the Chamber of Deputies to the Senate in an incorrect version, whereas according to the Constitutional Court the procedure the Chamber of Deputies, which revoked the original resolution to adopt one amending motion, cannot be accepted.

2 Legal Options of Solution

2.1 Explicit Directive in the Legal System

If the legal system (constitution, constitutional court act) stipulates a solution to the given situation, it must be obeyed. Our legal system lacks such explicit directive in the positive legal system.

2.2 Assessment of the Nature of Effect of a Constitutional Court Judgment

The issue of revival of the cancelled legal regulation may be solved differently according to the effects of the judgment of the Constitutional Court.

2.2.1 Effects of the Judgment of the Constitutional Court ex tunc

Retrospective force of the judgment of the Constitutional Court may be admitted, if we consider the pronounced legal regulations as acts, the force of which is conditioned by the constitutionality and which only have mere presumption of correctness (constitutionality for acts and lawfulness for subordinate legislation in addition). If their defectiveness and incorrectness is subsequently authoritatively proclaimed, they lose this presumption. Since it is only a rebuttable presumption that has been rebutted it is possible to refer the effects of the authoritative judgment of the incorrectness of the legal regulation to the regulation retrospectively (ex tunc). In such a case there was no new legal regulation de iure, thus had no legal effects cancelling or amending the preceding legislation. In such a case, however it is not a revival, but only not taking into account of something that de iure did not exist.

In his report of 19th May 1938 in the case of constitutionality of act amending enabling acts the Czechoslovakian constitutional judge František Zikán insisted that the judgment of the Czechoslovakian Constitutional Court was a declaratory act of force of a specific regulation, because the constitutionality of an act is the condition of its force, whereas until the pronouncement of a judgment of the Constitutional Court the presumption of legal correctness and force of the act is given: *"until the pronouncement of a judgment of the Constitutional Court it must be presumed that it is the objectively forceful legal regulation, however this presumption of its constitutional force, binding for the law-making bodies, government, all authorities and courts, cease to exist as soon as in the Collection of Laws and Regulations is promulgated a judgment that the regulation is in contradiction with a constitutional act and therefore void".*[8]

Judgment of the Constitutional Court No. 283/2005 Coll. canceling Act No. 96/2005 Coll. amending the Conflict of Interests Act. The reason for the cancelation was that according to the Constitutional Court the amendment should have been adopted by the Senate as an election act pursuant to Article 40 of Constitution No. 1/1993 Coll., since it also included the changes in the election act. Yet the Constitutional Court did not minimize the settlement of the case to the cancelation of the part relating to the changes in the election act but enforced a maximalist solution – the cancelation of the whole amendment.

Also e.g. judgment No. 80/2011 Coll. (Pl.ÚS 55/10) repealing Act No. 347/2010 Coll. amending some acts in relation with economical measures within the activities of the Ministry of Labor and Social Affairs.

[8]Langášek T. Ústavní soud Československé republiky a jeho osudy v letech 1920-1948. Praha 2011, ISBN 978-80-7380-347-6. P. 188.

In this case Zikán followed in the legal opinions of the first secretary and the second chairman of the Constitutional Court, Jaroslav Krejčí,[9] who with reference to the introductory act[10] to the Constitutional Chart stated that the constitutionality was the condition of the force of the act, and if the Constitutional Court authoritatively stated its unconstitutionality, the consequence is mere nullity of the act with effects ex tunc. The problem was that some legal theoreticians[11] referred to Section 20 of Act on the Constitutional Court to proclaim the destructibility of such act only and its cancellation by a judgment of the Constitutional Court with effects for the future ex nunc.[12] Such interpretation of Section 20 of the ordinary act on the Constitutional Court is, according to Krejčí, unconstitutional and thus void.[13] Krejčí points out that not only the Constitutional Court, but for the reasons of defective promulgation each court may proclaim the act null and void also with effects ex tunc: *"Should the judge proclaim the act (perhaps only for the reasons of a defective promulgation) or regulation as void, it means that he or she dispose of the act or regulation as if it had never been issued, i.e. it is considered as ineffective".*[14]

Although from the viewpoint of the principle of ban of the real retroactivity in the legal system, which are also the effects ex tunc toward the legal regulations, unless the constitution or at least the law explicitly state otherwise, it needs to be stated that today´s legal system valid in Bohemia, Moravia and Silesia does not stipulate the effects of the judgment of the Constitutional Court on the cancelation of the legal regulation ex tunc. Therefore, the revival of the legislation cancelled by the legal regulation cancelled by the Constitutional Court cannot be deduced.

2.2.2 Effects of Judgment of the Constitutional Court ex nunc

The consequences of the judgment of the Constitutional Court in Bohemia, Moravia and Silesia cancelling the legal regulation have effects for the future (ex nunc), not retrospectively (ex tunc). So the legal regulation, albeit defective, was in force and as a rule in effect before the judgement of the Constitutional Court, hence to the day of its effectiveness it cancelled, or changed the former legal regulations amended thereby.[15] The judgment of the Constitutional

[9]Krejčí J. Principy soudcovského zkoumání zákonů v právu československém. Praha 1932. P. 85-98.

[10]Acts opposing the constitutional chart, its parts and amending or completing acts are void. Article I, Section I of the introductory act to the Constitutional Instrument No. 121/1920.

[11]Hoetzl J. Ústavní listina Československé republiky. Zvláštní otisk ze Slovníku národohospodářského, sociálního a politického, Praha 1928, p. 6. Weyr F., Neubauer Z.: Ústavní listina Československé republiky. Praha, Brno 1931, p. 10. Sander F. Zur Frage der Verfassungsgerichtsbarkeit in d. Tchechoslowakischen Republik. Prager Juristische Zeitschrift 7-8/1930. S. 279.

[12]The publication of the judgment in the Collection of Laws and Regulation has such effect that from the moment of the publication the law-making bodies, the government, all authorities and courts are bound by the judgment. Section 20 of Act No. 162/1920 on the Constitutional Court.

[13]Section 102 of the Constitutional Chart introduced by Act No. 121/1920 Coll., Krejčí J. Principy soudcovského zkoumání zákonů v právu československém, Praha 1932. P. 93-98.

[14]Krejčí J. Principy soudcovského zkoumání zákonů v právu československém. Praha 1932. P. 91.

[15]Judgment No. 14/2002 of the Collection of Judgments and Resolutions of the Constitutional Court. P. 109-110 (95/2002 Coll., Pl.ÚS.21/01). This opinion was confirmed by the Constitutional Court also in Judgment No. 35/2004 of the Collection of Judgments and Resolutions of the Constitutional Court, p. 344 (278/2004 Coll., Pl.ÚS.2/02), but unfortunately in the same breath an exception was admitted in a specific case. That was reasoned by referring to the former judgment No. 59/1994 of the Collection of Judgments and Resolutions of the Constitutional Court (8/1995 Coll., Pl.ÚS. 5/94) in the case of Section 342 of the Code of Criminal Procedure No. 141/1961 Coll.

Court cancelling the legal regulation has the same effects as if the former legal regulation was cancelled by another legal regulation – e.g. an act by an act. Only if the legal regulation amending or cancelling other legal regulation is cancelled after its force, but before effect, the preceding regulations remain unprejudiced.

The judgment in the case of a motion to cancel the legal regulation is published in the Collection of Laws. The legal regulation is cancelled as to the day determined in the judgment (usually the day of publishing in the Collection of Laws). The Constitutional Court may defer the enforcement of the judgment and provide the legislator with time to regulate again a certain social area with law in the case that the immediate cancelation, albeit of a defective legislation, shows undesired. The principles of legal certainty and ban of retroactivity show that the Constitutional Court may not cancel a legal regulation retrospectively, but only from the moment of announcement of a judgment.[16] For the reasons of a request for publishing and awareness of the law the judgment needs to be published in the Collection of Laws. Although in some cases the Constitutional Court determined the day of cancelation of the legal regulation to be the day of the oral announcement of the judgment.[17] It is a denial of the old principle that the law must be formally published including of the legal acts cancelling the legal regulations in force. The Constitutional Court is attempting at introducing the fact that the state bodies should announce this issue through the TV and radio news, or through a text published on the Constitutional Court websites, which however have no offcial publishing competence. That is only acceptable for the announcement of special acts during wartime or a comet fall in our territory. If the Constitutional Court had a real interest in accelerated publication, it could agree with the editorial board of the Collection of Laws on the preferential publication of the judgment in the Collection of Laws.

It should be reminded that such serious act[18] for state economy on the separation of the currency from the common Czechoslovakian crown in 1993 was duly published in a preferentially issued part of the Collection of Laws in one day. Also, the act on the transfer of the Trauma Hospital in Brno was after its signing by the President on 29th December 2008 signed by the Prime Minister on 30th December 2008[19] and published on the following day on 31st December 2008. The act came into effect on the first day of the calendar month following the day of its announcement. The purpose of the accelerated publication was to simplify financial flows within

[16]Mikule S. Může Ústavní soud zrušit ústavní zákon? Jurisprudence 1/2010, ISSN 1212-9909. P. 23.

[17]The Constitutional Court did so in judgment No. 283/2005 Coll. (127/2005 Collection of Judgments and Resolutions of the Constitutional Court, Pl.ÚS 13/05) repealing Act No. 96/2005 Coll. amending Act No. 238/1992 Coll. on the conflict of interests. Judgment No. 483/2006 Coll. (Pl.ÚS 51/06) canceling a part of Act No. 245/2006 Coll. on public non-profit institutional health facilities. Judgment No. 318/2009 Sb. canceling constitutional act No. 195/2009 on shortening of the fifth term of office of the Chamber of Deputies. Critical standpoint to the procedure of the Constitutional Court in Vedral J. K právním účinkům derogačního nálezu ÚS. Právní zpravodaj 8/2005. P. 13.

[18]Act No. 60/1993 Coll. on separation of the currency. Approved on 2nd February1993 and published in the Collection of Laws on 3rd February 1993.

[19]Act No. 485/2008 Coll. on the transfer of the Trauma Hospital in Brno published in part 155 of the Collection of Laws distributed on 31st December 2008. URL: http://www.psp.cz/sqw/historie.sqw?o=5&T=373

the entire budget year. Yet, the act was adopted mainly by oppositional deputies, it was not a governmental motion. The Senate had not discuss it in the period of 30 days and the President took almost all 15 days to decide on the signing of the act, since he received the bill on 15th December 2008. Nevertheless, the issuer of the Collection of Laws issued the relevant part in preference. It would be understandable to refer the enforcement to the oral announcement of the judgment of the Constitutional Court, if the issuer of the Collection of Laws makes obstructions. If it is not the case, failing to respect the principle that the legal regulations of the state and the cancelation thereof should be formally published in the offcial collection of legal regulations before effectiveness (enforcement) the Constitutional Court breaches the generally binding principles of a legal state.

Should the effects of the judgment be ex nunc and there is no explicit legal regulation stipulating something else, the cancelation of the derogative legislation does not result in the revival of the cancelled legal regulation in its entirety, or the amended or completed parts thereof. That applies both for the legislators and for the Constitutional Court, who is a mere negative legislator. If it revives the original amendments of acts based on its will without being authorized to do so by law, it becomes a positive law-maker, in the position of which it is not based on the constitutional provisions. The Supreme Administrative Court put it in the following words: *"A mere cancelation of a derogative provision without an expressly performed manifestation of a law-maker's will may not lead to a new force and effect of formerly derogated legislation. This procedure could not even be considered as "law-making", or a legislative process, but rather a hybrid process of "reincarnation" completely inadmissible in the field of legislation".*[20] Nonetheless the Supreme Administrative Court sees a difference between the cancelation of a legal regulation by a legislator and between the cancelation by the Constitutional Court.[21] However that applies only in the case of effects of the judgment of the Constitutional Court ex tunc. According to the legal system in force in Bohemia, Moravia and Silesia it is not the case.

It is possible that the inactivity of a law-maker may be unconstitutional, when the constitution presupposes a certain legislation and it is not fulfilled without reasons. So after the cancelation of a defective amendment a new legal regulation required by the constitution is not adopted in a constitutionally correct form. However, such inactivity of a law-maker may be corrected by courts by means of a direct interpretation and application of constitutional regulations. It is then up to the law-maker whether they let court creativity be free or adopt the rules by themselves. Such procedure was chosen by the Constitutional Court in Brno by encouraging to solve the absence of the law to increase regulated rent with the decisions of general courts.[22]

[20]Point 43 of the reasoning for the judgment of the Supreme Administrative Court from 17th April 2009, ref. No. 2 Afs 131/2008 – 137 and point 23 of the reasoning for the judgment of the Supreme Administrative Court from 14th May 2009, 1 Afs 26/2009 – 113.

[21]Point 25 of Part IV.C of the reasoning for the judgment of the Supreme Administrative Court from 14th May 2009, 1 Afs 26/2009 – 114.

[22] With the judgment from 28th February 2006 with ref. No. Pl. ÚS 20/05 (252/2006 Coll.) the Constitutional Court emphasized that the long-term inactivity of the Parliament of the Czech Republic, stemming in the non-adoption of a special legal regulation defining the cases, in which the lessor is unilaterally entitled to increase the rent, compensation for the services provided in relation with the use of the apartment, and amend other conditions of the lease contract, was unconstitutional and breached Article 4, Section 3 and Article 11 of the Charter and Article 1, Section 1 of the Additional Protocol No. 1 to the European Convention on Human Rights. In the reasoning for the afore-mentioned judgment, the Constitutional Court also stated that general courts, despite the absence of a specific legal regulation, had to decide on the possible increase in the rent depending on the local conditions.

3 Examples of Disunited Practice

3.1 Transformation of a right to the permanent use of a land to ownership and decision on transferring a prisoner in prison according to the Code of Criminal Procedure

In judgment No. 35/2004 of the Collection of Judgments and Resolutions of the Constitutional Court (278/2004 Coll., Pl. ÚS 2/02) the Constitutional Court stated: "*In the proceedings to control legislations the Constitutional Court is represented as the so-called negative law-maker authorized merely to derogate the inflicted legal regulation in the case of granting of the claim (see Judgment from 12th December 2002, ref. No. Pl. ÚS 21/01, announced under No. 95/2002 Sb. and published in the Collection of Judgments, coll. 25, judgment No. 14). Therefore, the cancelation of the inflicted regulation may lead exclusively to its "exclusion" from the legal system of the Czech Republic and not to the factual constitution of a new legislation in form of a "revival" of the regulation formerly cancelled.*

Yet, in the specific case it is the cancelation of the derogative provision of Act No. 229/2001 Coll. In this relation the Constitutional Court points out to its judgment from 30th November 1994, ref. No. Pl. ÚS 5/94, announced under No. 8/1995 Coll. and published in the Collection of Judgments, coll. 2, judgment No. 59. In the stated judgment the Constitution Court cancelled point 198 of Act No. 292/1993 Coll. amending and completing Act No. 141/1961 Coll. on Criminal Procedure (Code of Criminal Procedure). Point 198 of the stated act omitted from the Code of Criminal Procedure the provisions of Section 324 regulating the decision-making process on the change in the method of the sentence. The described derogation of the derogative provisions of point 198 of Act No. 292/1993 Coll. resulted in the "rehabilitation" of the provisions of section 324 of the Code of Criminal Procedure, which has been a part thereof to this day. So, the claimant´s opinion that by cancelling the second part of Article II of Act No. 229/2001 Coll. the status established by the provisions of Sections 879c, 879d and 879e of the Civil Code is revived can be agreed with.

Yet, this fact would lead to the occurrence of a significant legal uncertainty not only in the right of entities to which the provisions of Sections 879c to 879e of the Civil Code refers, but also in the right of third persons. Hence the Constitutional Court deferred the cancelation of the inflicted provisions of Act No. 229/2001 Coll. until 31st December 2004 in order of providing the Parliament of the Czech Republic with a sufficiently long period to adopt an adequate legislation."

However, it needs to be pointed out here that the legal practice failed to accept the alleged revival of the original version of Section 342 of the Code of Criminal Procedure asserted by the Constitutional Court after the cancelation of the derogative change by Act No. 292/1993 Coll. That is proven by the time changes in Section 324 of the Code of Criminal Procedure in the ASPI (Automated legal information system). The law-maker promptly adopted the new version of Section 324 in Act No. 152/1995 Coll. If the words of the Constitutional Court regarding the revival of the original version of Section 324 of the Code of Criminal Procedure were valid, it would not be necessary.

In relation with the transformation of the right to the permanent use of the lands the law-maker did not accept the new regulation, although the Constitutional Court provided them

with period to do so until 31st December 2004. The Supreme Court judicated[23] that by cancelling the derogative provision the legal status cancelled by the derogative provision was revived, but the case was not suffciently reasoned, and jurisprudence does not generally accept that. In addition, it judicated when applying the judgment of the Constitutional Court No. 278/2004 that independently doubted the option of reviving the cancelled regulation and solved the case by deferring the enforcement of the cancelation of the unconstitutional act in order of the law-maker to be able to accept the new legislation, which had not happened. The state represented by the Office for Government Representation in Property Affairs filed complaints against the judgments resulting from the legal opinion of the Supreme Court on the revival of the preceding legal regulation, which were rejected, since the Constitutional Court confirmed that opinion.[24]

3.2 Act on Austerity Measures

In its judgment, the enforcement of which was deferred, and which cancelled Act No. 347/2010 Coll. amending several laws in relation with austerity measures adopted by the Ministry of Labour and Social Affairs, that amended another act, the Constitutional Court in Brno stated: *"... in the case that until the moment of effectiveness of the derogative verdict of this judgment a new legislation is not adopted, the legislation contained in the rules of law before the day of effectiveness of Act No. 347/2010 Coll. cancelled by this judgment will be revived on 1st January 2012".*[25] In the given case the law-maker adopted a new legislation,[26] so there was no revival. The Constitutional Court made a standpoint to the issue that was not the purpose of the procedure without reasoning its statement in any way. The Constitutional Court played God to resurrect not a man, but a cancelled legal regulation or its part.

3.3 Act on the Conflict of Interests

The judgment of the Constitutional Court No. 283/2005 Coll. in the case of cancelling of Act No. 96/2005 Coll. amending the Act on the Conflict of Interests cancelled this act. The reasons for the cancelation was that the amendment according to the Constitutional Court should be pursuant to Article 40 of the Constitution No. 1/993 Coll. adopted by the Senate as an election act, since it also contained the amendment to an act on elections for local authorities. The Constitutional Court did not reduce the solution to the case only to the cancelation of the part relating to the amendment of the election act but maximized it to repeal the whole act. The original act on the conflict of interests became mostly unusable, since the Constitutional Court or the legal practice failed to state the revival of the preceding version of the act on the conflict of interests.

[23] Judgment of the Supreme Court from 28th August 2006, 22Cdo 2205/2005.

[24] Resolutions of the Constitutional Court from 3rd December 2007 No. IV.ÚS 914/07, from 20th November 2007 No. II.ÚS 755/06 and other.

[25] Point 107 of Part VII of the Operative part of the judgment and the deferment of enforcement of the reasoning for judgment No. 80/2011 Coll. (Pl.ÚS 55/10).

[26] Act No. 364/2011 amending some acts in relation with austerity measures in the competence of the Ministry of Labor and Social Affairs.

3.4 Payment Act

The judgment of the Constitutional Court No. 181/2012 Coll. cancelled the reduction in the salaries base for constitutional bodies and judges from a triple of the average income in the non-business sphere to a 2.5multiple.[27] However, the Constitutional Court failed to state the revival of the original triple and deferred the enforcement until the end of 2012. Furthermore, the Chairman of the Constitutional Court, Pavel Rychetský, publicly expressed that the Constitutional Court hat not stated the salaries base amount: "*I admit that our judgment created a tight deadline for the law-makers, but by the end of the year it has to have solved the payment issues for judges of general courts, since otherwise the judges would have no payments from 1st January, which is unacceptable".*[28] If the principle of the revival of the original legislation applied, on 1st January 2013 the original legislation would have been automatically revived. Its amount was obvious in the moment of issuance of the judgment and factually determined by the Constitutional Court. The government did not insist on the standpoint of the revival of the original legislation, either, and proposed an amendment to the payment act. The deputies did not accept the original government bill, but an act was subsequently promptly adopted until the end of 2012 determining the salaries base to a 2.75multiple. In the explanatory memorandum the Government explicitly stated that after 31st December 2012 the given provisions of the act would *"become inapplicable",*[29] therefore the Government did not insist on the standpoint of the revival of the preceding legislation.

4 Situation in Slovakia

In Slovakia, the effect of the cancelation of a legislation to the acts cancelled or amended thereby is amended directly in the Act on the Constitutional Court. It states that the loss of force and effect of a legislation based on the judgment of the Constitutional Court does not result in the revival of force of legal regulations cancelled by the legislation repealed by the Slovak Constitutional Court. But as regards the amendment or completion, the legislation before the amendment made by the cancelled legislation is in force.[30] Hence the solution is given by the legal directive.

[27] Section 3(3) of Act No. 236/1995 Coll. on the pay and other benefits connected with the office of state authorities and certain state bodies and judges and European Parliament representatives, as amended by Act No. 425/2010 Coll.

[28] Before elections deputies are afraid of discussing the payments, judges will be probably left empty-handed. Právo, 20th September 2012, ISSN 1211-2119. P. 4.

[29] Explanatory memorandum to the government bill amending the act on the pay of some state representatives, general part. P. 5; the press of the Chamber of Deputies 880, 6th election period, URL: http://www.-psp.cz/sqw/text/tiskt.sqw?O=6&CT=880&CT1=0

[30] Section 41a(3) of Act No. 38/1993 Coll. on the organization of the Constitutional Court of the Slovak Republic, on the proceedings before it and on the position of its judges as amended by Act No. 293/1995 Coll.

4.1 Derogative Regulation Review

An issue occurred in Slovakia questioning whether it is possible to revive the cancelled regulation by cancelling a derogative provision. It happened in the case, when the Constitutional Court adopted the proposal of the first deputy of the general prosecutor[31] to cancel an act[32] amending the act on courts. Above others, the claimant proposed reviewing the cancelation of Section 85 of act on courts and judges providing automatic increase in the payments of judges depending on the increase in the wages in national economics. This provision was omitted from the legal system without replacement. It is a question whether the Constitutional Court may revive the original legislation, when the new legislation from the regulation assessed by the Constitutional Court cannot be unconstitutional on its own, since the original version was not replaced by a new positive legislation, during the assessment of which unconstitutionality could be stated. The original provision was replaced by NOTHING. NOTHING has no contents or quality. So, it is doubtful to abstractly state its unconstitutionality. Yet, the Constitutional Court of the Slovak Republic adopted the proposal for substantive decisions.[33] It considers NOTHING created by a law-maker to be different from a NOTHING created by the Constitutional Court. But that is conceptually incorrect, since NOTHING cannot be distinguished from another NOTHING. NOTHING has no contents or quality, and if distinguished, we attribute some contents or quality to it. Or was the status before the adoption of a valorisation provision in the legal system unconstitutional in Slovakia? Such provision cannot be found in many legal systems.

The judgment of the Constitutional Court of the Slovak Republic from 21st September 2011 No. Pl.ÚS 103/2011: "*During a usual review, the revival ex off pursuant to the provisions of Section 41a(3) of the act on the constitutional court may be problematic, since it has to do with the revival of a regulation preceding (!) the reviewed regulation and explicitly derogated by a law-maker, or a regulation may be revived, which is in dispute with the constitutional law (compared to the situation in point II.1 of the Judgment with ref. No. PL. ÚS 10/04). If such unwanted revivals may be problem, during the substantive review of constitutionality of the derogative legal regulation may aim at the revival, it may be a desired one, since the legislative derogation of the original regulation means an unconstitutional status.*

An important fact is that the decisions performed so far by the constitutional court dealt with derogative regulations too, although it never granted the claim for their cancelation (compared to judgments No. PL. ÚS 33/95, PL. ÚS 30/95, PL. ÚS 8/96 part XI and No. PL. ÚS 6/01).

However, the constitutional court must also state that the review of the derogative regulation is regarded as an exception that needs to be applied carefully. For the reasons of

[31] According to the constitution the proposal can be made by the general prosecutors, but in that time the position was not taken. The Constitutional Court admitted that in such a situation the constitutional right of the general prosecutors was passed to its deputy. The resolution of the Constitutional Court of the Slovak Republic from 15th June 2011, No. PL.ÚS 95/2011-15.

[32] Act No. 500/2010 Coll.

[33] Resolution of the Constitutional Court from 21st September 2011, No. PL.ÚS 103/2011. Judge Ľudmila Gajdošíková expressed a different standpoint.

protection of constitutionality, especially of the fundamental freedoms, the constitutional court could not fully renounce the review of the derogative regulation for substantive reasons, although it is aware of the issues of the possible (automatic) revival of the legal regulations both from the viewpoint of legal certainty and from the viewpoint of the minimization infringements in the law-making powers of the National Council of the Slovak Republic. In this relation it can be implied that the construction of Section 41a(3) of the act on the constitutional court cannot be perceived as problem-free from the specified viewpoints and from the viewpoint of its interconnection with the relevant legal regulation".

4.2 The suspension of efectiveness of legislation and the revival of legal regulations

The Slovak legislation knows the institute of suspension of effectiveness of legal regulations, if the unlawfulness or unconstitutionality thereof is challenged before the Constitutional Court.[34] This was also used in the case of challenging the method of election of a candidate for the position of the general prosecutor in the National Council, when the private election was changed to public.[35] The Constitutional Court suspended the effectiveness of the new legislation introducing the public election, whereas it was explicitly stated: "*The legitimacy of the decision to suspend the effectiveness is not understood as the revival of the force of the preceding legal regulation, since the suspension of the effectiveness of the inflicted provisions does not result in the loss of their force, which is a conditio sine qua non for the revival of the force of the later (derogated) legal regulation, i.e. the part thereof".*[36] Hence the Constitutional Court in Košice deduces that the suspension of effectiveness has no impact on the amending effects toward the preceding legal regulation. However, it is then not really a suspension of effectiveness, but some of its effects. But the Slovak constitution does not presume such classification of effects between suspended and unsuspended.

The afore-mentioned standpoint is especially remarkable in respect of the fact that in Slovakia the Constitutional Court does not directly cancel the legal regulation, but with its judgment of its unconstitutionality the legal regulation loses its effectiveness and after 6 months it loses its force.[37] If we use the afore-mentioned opinion of the most of the constitutional judges, the revival of the original versions in the amended legal regulation would occur not in the moment of the judgment of the Constitutional Court, when the defective legal regulation loses only its effectiveness, but after 6 months, when the unconstitutional legal regulation loses its force. It is an illogical interpretation, since there would be a legal

[34]Article 125 of Section 2 of the Constitution of the Slovak Republic No. 460/1992 Coll. as amended by the constitutional act No. 90/2001 Coll.

[35]The law newly determined a public election, unless the constitution determined a private election or unless a private election was approved by the National Council against a proposal of at least 15 deputies. The change also concerned the chairman and vice-chairman of the Supreme Audit Office. Sections 39, 39a, 110(2), Section 115(1), Section123(3), Section 124(2) of Act No. 350/1996 Coll., on the rules of procedure of the National Council as amended and as amended by Act No. 153/2011 Coll.

[36]Point 11 of the reasoning for the judgment of the Constitutional Court from 15th June 2011, No. PL.ÚS 95/2011-15. Different standpoints were given by Ladislav Orosz, Ján Luby, Lajos Mészáros, Juraj Horvát.

[37]Article 125 of Section 3 of the Constitution of the Slovak Republic No. 460/1992.

vacuum, because the new legislation could not be used for the loss of its effectiveness whereas the original one has not yet been revived, since the new legislation already authoritatively pronounced as unconstitutional, is still in force for 6 months, albeit not effective.

The National Council then made a private election, whereas it failed to respect the legal opinion of the Constitutional Court contained in the reasoning, not in the verdict, so it was not binding.[38] In additional, it happened in the time, when the resolution of the Constitutional Court had not yet been published in the Collection of Laws,[39] in spite of being well aware of its contents. On 17th June 2011, Jozef Čentéš was elected the candidate for the general prosecutor. However, President I. Gašparovič refused to appoint him and the National Council subsequently selected another candidate Jaromíř Čižnář appointed by the President.

5 Conclusion

The revival of a cancelled legal regulation is possible, if the constitution and the law explicitly stipulate so, which is not the case of the legal system in Bohemia, Moravia and Silesia. The cancellation effects of a judgment of the constitutional court are for the future, not the past, otherwise it would be unconstitutional retroactivity. In Slovakia, the issue is solved by a legal directive regulating differently the consequences of derogation of a legal regulation (no revival) and its mere amendments or completions (revival). Unless the positive law states otherwise, there is no reason to adopt a different attitude to the consequences of the cancellation of a legal regulation by a legislator or by the constitutional court. Yet, it must be reminded that the constitutional court is not a positive law-maker and the revival of a legal regulation alone represents law-making.

Зденек Коуделка, Алеш Ваня: Чехия, Моравия, Силезия және Словакияда заңнаманы қалпына келтіру.

Мақала заңнамамен күші жойылған, ал кейіннен Конституциялық сот күшін жойған заңнаманы қайта жаңғырту мәселесіне арналады. Бұл болса, шешімде қайшылықты ұстанымның болғанын көрсетеді. Мақала авторлары, егер заңмен өзгеше көзделмесе, қайтып алынған заң оның күшін жойған қаулының күшін жою арқылы қалпына келтірілмейді деген принципке негізделеді.

Мақалада қолданылған негізгі әдіс – Чех Республикасы (Богемия, Моравия, Силезия) мен Словакия Республикасын салыстыру. Мақаланың уақтылылығы мәселені шешу жөнінде пікір бірлігінің жоқтығымен және жекелеген жағдайларда түрлі шешімдер қабылдануымен айқындалады. Бұл болса, құқықтық анықтық принципін шайқалтады және әлсіретеді.

Күші жойылған құқықтық реттеудің күшін жоюға болады, егер бұл Конституциямен немесе заңмен тура көзделген болса, өкінішке орай, Богемия, Моравия, Силезияда қолданылатын құқықтық жүйеде олай емес.

Конституциялық сот шешімінің күшін жоюшылық салдарлары өтіп кеткенге емес, тек қана болашаққа бағытталады, керісінше болған жағдайларда, авторлардың пікірінше, бұл

[38] Koudelka Z. Právní předpisy samosprávy. 2nd edition, Praha 2008, ISBN 978-80-7201-690-7. S. 203-205.
[39] Published under No. 191/2011 Coll. on 29th June 2011.

конституциялық емес кері күш болып табылады. Словакияда құқықтық директива құқықтық реттеудің күшін жоюдың (қалпына келтіру орын алмайды) және оны жай өзгерту мен толықтырудың (қалпына келтіру орын алады) салдарларын реттейді. Авторлар, егер жағымды заңда басқаша көзделмесе, құқықтық реттеудің күшін жоюдың салдарларына заңшығарушы мен Конституциялық соттың түрліше қарауының негіздері жоқ деп пайымдайды. Сонымен қатар, Конституциялық соттың позитивті заңшығарушы болып табылмайтынын және құқықтық реттеуді қабылдау өздігінен заң жасау болып табылатынын есте ұстау қажет.

Тірек сөздер: Конституция, құқықтық реттеуді жою, құқықтық реттеудің жандануы, Конституциялық сот, құқықшығармашылық, құқық нормаларын қалпына келтіру.

Зденек Коуделка, Алеш Ваня: Возрождение законодательства в Чехии, Моравии, Силезии и Словакии.

Статья касается возрождения законодательства, которое было отменено законодательством, которое впоследствии было отменено Конституционным судом. Это указывает на противоречивый подход к решению. Авторы статьи основываются на принципе, что, если законом прямо не предусмотрено иное, отозванный закон не будет восстановлен путем отмены постановления, отменившего его.

Основным методом, использованным в статье, является сравнение между Чешской Республикой (Богемия, Моравия, Силезия) и Словацкой Республикой. Своевременность статьи определяется тем, что нет единого мнения о решении проблемы, и в отдельных случаях принимаются разные решения. Это подрывает и ослабляет принцип правовой определенности.

Можно отменить отмененное правовое регулирование, если это прямо предусмотрено Конституцией или законом, чего не происходит в правовой системе, применяемой в Богемии, Моравии и Силезии. Отменяющие последствия решения Конституционного Суда относятся только к будущему, а не к прошедшему, в противном случае это будет, по мнению авторов, неконституционной обратной силой. В Словакии правовая директива регулирует последствия отмены правового регулирования (возрождения не происходит) и его простых изменений или дополнений (возрождение происходит). Авторы полагают, что если в положительном законе не предусмотрено иное, нет оснований подходить к последствиям отмены правового регулирования законодателем или Конституционным судом поразному. В то же время следует помнить, что Конституционный суд не является позитивным законодателем и что принятие правового регулирования само по себе является созданием закона.

Ключевые слова: Конституция, отмена правового регулирования, оживление правового регулирования, Конституционный суд, правотворчество, возрождение правовых норм.

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