

Slovakia Tackles Its Constitutional Skeleton in the Closet

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On 31 May 2017, six days before a parliament imposed deadline and 19 years after the fact, the Constitutional Court of the Slovak Republic (CC) upheld constitutional changes which annulled amnesties introduced by the former strongman prime minister and acting president Vladimír Mečiar ('Mečiar's amnesties'). The amnesties shielded from criminal prosecution multiple persons allegedly involved in the abduction of the son of the first Slovak president (Michal Kováč Jr.) in 1995 and in the obstruction of a referendum on direct elections of the president and Slovak accession to NATO in 1997. Making things more complicated was a prior amnesty decision of the first president, Michal Kováč, which halted the investigation of his own son in a fraud case.

The factual circumstances and procedural history make for fascinating (and bewildering) reading – the most important events were recounted in English by the ECtHR in *Lexa v Slovakia* (Application nos. 54334/00 and 34761/03) concerning the discontinued trials against the former Slovak intelligence chief implicated in the abduction and a related murder of a witness (an abridged version can be found in [my previous blog post on this issue](#)).

The important part of the story is that none of the previous seven attempts at annulling the amnesties had been successful. The first annulment by presidential decree was thwarted on legal grounds by the CC which made all subsequent attempts at finding a political consensus in conjunction with a legally acceptable solution much more difficult. Between 1998 and today, the issue gradually attained the status of a permanent stain in Slovakia's transformation to a liberal democracy. The constitutional skeleton was also kept largely dormant by political elites; only intermittently, and in any event with no results (until now), were parliamentarians interested in wriggling some bones out of the proverbial closet.

Constitutional amendment No 71/2017

Civic engagement and the release of a film depicting the abduction of the president's son resuscitated public calls for annulment of the amnesties in 2016 and 2017. Coupled with the formation of a new coalition government, these mutually reinforcing processes paved the way for a broadly supported agreement on a constitutional amendment.

However, in the chosen (and controversial) legal solution to the conundrum of how to annul a formally legal but morally corrupt presidential amnesty, the passage of constitutional amendment No 71/2017 represented only the first step. The amendment essentially vested the parliament, officially known as the National Council, with the power to annul amnesty decisions of the president if they contravene the principles of a democratic *Rechtsstaat* (Article 86(i) of the Constitution as amended). An act of parliament adopted – by at least three fifths of all MPs – on the basis of this article is applicable *erga omnes*.

Concurrently, the parliament amended the competences of the CC. The CC has been given the responsibility of reviewing acts of parliament annulling amnesties and it has been obliged to do so within 60 days of the publication of the act. If the time elapses or if the CC, sitting as full court, cannot reach a majority decision, the proceedings are stopped and the act stands.

Following the constitutional amendments, the parliament adopted an act (No 570) on 5 April 2017 which annulled both Mečiar's and Kováč's amnesties. Among other sources, the parliament in its actions took note of the International Convention for the Protection of All Persons from Enforced Disappearance and a Declaration to the same effect adopted by the UN General Assembly in 1992.

Decision of the Court

The CC held, eight to two, that the act was in accordance with the Constitution. The Court was in a somewhat precarious position, given that it had already ruled on the issue in 1999 with the result of upholding the now-annulled amnesties. Nonetheless, it now referred extensively to democratic and rule of law principles and the change in circumstances brought about by the constitutional amendment adopted two months prior. By distinguishing the situation, the CC also explicitly found that the circumstances that gave rise to the judgment of the ECtHR in *Lexa v Slovakia* had been fundamentally altered by the constitutional changes. In that judgment, the ECtHR recognized the preclusive effect on criminal proceedings of the CC's 1999 decision which held that amnesties could only be granted but not quashed by the president, as was attempted by Mečiar's successor, Mikuláš Dzurinda.

In any event, in the new judgment the Court stated that no decision of a constitutional authority (here the president), including amnesties, can stand outside the scope of constitutional review. Moreover, the president is limited in the exercise of his powers by his constitutional pledge, Slovakia's international commitments and the 'untouchable' principles of the democratic state based on the rule of law. The CC still had to balance the violations of legal certainty of the individuals covered by the amnesties against the objectives of the annulments, but it found strongly in favour of the latter in light of the arbitrariness of the amnesties. In this regard, the pardon granted by the first president to his son, while recognising that the abuse of power in that case was of a lesser degree, was also annulled on the basis of treating both presidents' amnesties equally.

What now?

Upon the publication of the CC's decision, the Bratislava III district court previously seized of the case resumed the criminal proceedings which had been stopped as a consequence of the application of the 1999 CC decision upholding the amnesties. 13 suspects had been indicted then but the key person of interest will be former intelligence chief Ivan Lexa who had been pursued by Interpol as an international fugitive in 2000 (captured in and extradited from South Africa in 2002). His lawyer already confirmed that the renewed proceedings too will likely end with an application to Strasbourg (Mr. Lexa won on both previous attempts).

As for Mr. Kováč Jr.'s fraud indictment, he stood trial in Bavaria where Landgericht München I dismissed the case in 2000 after six years of prosecution. It seems presently unlikely that German or Slovak prosecutors are keen on reopening the case, as doing so would require, among others, arguing against the principles of *ne bis in idem* and *res judicata*.

In any event, the uplifting upshot of this saga is that persistence and civic engagement can still pay dividends for Central European democracies. The Slovak experience is an apt reminder of the importance of civil society for the survival of constitutional values of liberal democracies at a time when other regimes in the region are openly subverting them.

In this case justice delayed is not justice denied – most of all for the surviving mother of the witness murdered as part of state crimes that European countries must hope they have confined to history. But when the time is right, unjust laws can be undone.

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