

Slovenia constitutionally reloaded, but still failing

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Some time ago this blog has lent itself as a platform for an intense debate on a systemic rule of law and democracy defiance in several EU Member States, most notably in Hungary. In that context, I contributed [a short post](#) on what I then called the *de facto* failed Slovenian democracy. I described a judicial process against the leader of the opposition, who was accused and convicted with the force of *res judicata* exclusively on the basis of circumstantial evidence for having accepted a promise of an unknown award at a vaguely determined time, at an undetermined place and by an undetermined mode of communication to use his influence, then as a Prime Minister, to have a military contract awarded to the Finnish company Patria. The ruling was confirmed by the Supreme Court and then appealed to the Constitutional Court. Two days ago the latter quashed the entire process.

The Constitutional Court has thus compensated for its inertness a year ago, when it refused to accept the petitioner's constitutional complaint before the exhaustion of all other legal remedies, which is possible if an alleged violation is sufficiently grave. [Back then](#) the Court refused to recognize such gravity, despite the awareness that the petitioner in his role of a leader of the opposition had to go to jail three weeks before the general parliamentary election. However, what was not grave enough a year ago to merit the constitutional review, now sufficed for the invalidation of the entire process. The fact that the petitioner and others involved in the trial had to spend a few months in an unconstitutional incarceration appears not to have touched neither hearts nor minds of the Slovenian judges.

Be that as it may, this time around the Constitutional Court has engaged in a substantive review of the constitutional complaint and has identified two violations of the Slovenian constitution. First, the courts on all instances have violated the constitutional principle of legality in criminal law by failing to concretize the essential element of the alleged criminal act: the way the crime has been committed. In short, the petitioner has been convicted for an abstractly committed criminal act. The Court has also stressed that the judges on all instances, furthermore, violated the principles of *lex certa*, *lex scripta* and *lex stricta* in criminal law.

Even though the identification of this violation alone would have sufficed for the success of the constitutional complaint, the Constitutional Court felt compelled to stress another violation: that of the right to a fair trial. The latter was committed by the President of the Supreme Court himself. He had, first, publicly intervened in the case to accuse the petitioner and his political party for putting pressure on the judiciary and then, while the case was already pending at the Supreme Court, appointed himself as the president of the ruling chamber. The petitioner filed a motion for recusal of the President of the Supreme Court due to his, at least objective, partiality, but it was denied twice by the Supreme Court sitting *en banc*, insisting that the judges "trust their President." The Constitutional Court has now ruled that the actions of the President of the Supreme Court of Slovenia clearly amount to a violation of the right to a fair trial.

Having said that, one might be tempted in drawing a conclusion that justice has been done and that Slovenia, while admittedly coming across as a [slightly odd case of transitional democracy](#), after all and eventually has a functional judiciary, so that any talk about the systemic defiance and failed democracy is simply unnecessary. However, such a conclusion would be both premature and unwarranted at least for two reasons. First, since the Patria case is not over yet. The Constitutional Court ordered a new trial as it believes that it is not competent to quash the indictment, which can be only done by the district court ruling in the criminal case. It remains to be seen if that actually takes place. And secondly, due to a broader context in which this case has been situated.

The case of Patria has been thoroughly politicized. This is not necessarily to suggest that the case itself has been politically motivated, which certainly cannot be excluded either, rather that the case has caused huge political turbulences, essentially influencing – and as the latest development in the case confirms – distorting the voters' preferences in at least three parliamentary elections in the last decade. Basically, the public sphere in Slovenia in the last ten years has literally been pre-empted by the Patria affair, which has now melted into air.

Or maybe not, especially if we take into account the reception of the Constitutional Court's decision by the ordinary judiciary. The President of the Supreme Court and the President of the Ljubljana District Court in their public statements refused even to see any violation being committed on any instance in the Patria case, suggesting instead that the Constitutional Court has created new constitutional standards in criminal law that will, essentially, make the persecution of corruption almost impossible. Their comments even went as far as suggesting that the Constitutional Court has not read a single page of 22.000 pages long judicial file and has simply followed merely the allegations made by the petitioner. Once the heads of judiciary argue that the fundamental principle of legality in criminal proceedings is a new constitutional standard and simultaneously seem to be ignorant of the fact that constitutional courts do not review the facts but deal with questions of constitutionality, this casts a strong doubt on the professional integrity of such institutional actors. This is even more so since the described attitude of the two leading figures of the Slovenian judiciary demonstrates a complete lack of self-reflexivity and willingness to accept the responsibility for the identified violations. The President of the Supreme Court, for example, despite being found personally responsible for the violation of the right to a fair trial has already excluded any possibility of stepping down.

If we add to this, by way of an exemplary anecdotal overview, that the Head of the Slovenian Prosecutorial Office (together with the former Minister of Justice) has been found guilty of corruption by the Anti-Corruption Commission, but stays in the office; that the incumbent Minister of Justice has been found to have violated the constitutional rights of the opposition leader in his former capacity of the Head of the Anti-Corruption Commission, but stays in the office; that the prosecution has started a new round of cases against the opposition leader; that the media already report that he will never be able to prove his innocence (sic!) as the continuation of the Patria case will be precluded by the statute of limitation in August this year; and that the overall political culture has declined enormously in this obsessed circumstances, Slovenia unfortunately continues to remain a *de facto* failed democracy, exhibiting structural problems in the rule of law that run deep and which will not be, because they simply cannot be, undone easily.

Should this be of a concern to the European (constitutional) audience? I am convinced so. This should be so not only to satisfy our curiosity by looking anecdotally at yet another transitional and slightly obscure member state, but to remind ourselves, as it has often been done at this blog, that national structural democratic and rule of law deficiencies are also our common European problems. They at least call for the EU's attention, if the solution itself, as [I believe to be the case](#), ultimately remains in the hands of national polities, with all their strengths and weaknesses. Shall we neglect this fact, we risk creating negative legal, political and economic externalities that might, as the economic crisis has demonstrated, imperil the European project as a whole.

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