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 verfassungsblog.de/slovenia-bound-jail-opposition-leader-electoral-period-2/

Slovenia is heading for a snap election on July 13, 2014, the second in less than three years. However, this time around there is a very high risk that the election is going to take place contrary to the standards anticipated in a liberal constitutional democracy based on the rule of law. The leader of the centre-right opposition, Mr. Janez Janša, chairman of the Slovenian democrats, appears to be ousted from the political battle as he is to start serving his 2-year prison sentence on June, 20, just three weeks before the election.

Of course, while we are used that politicians go to jail, even if infrequently, but often on corruption charges, it is less usual, at least for so-called Western Europe, to see leaders of the opposition jailed literally just days before the election. Such cases are per se suspicious for a potential abuse or at least instrumentalization of the judiciary by the ruling powers against their potential political opponents. The Slovenian case, briefly presented in what follows, shows with full force that such use of the judiciary is possible even in a formally well-ordered and law-abiding EU Member State.

It all publicly started in 2008, a few weeks before the general parliamentary election, when the Slovenian national TV showed a Finnish documentary claiming that the then Slovenian Prime Minister Janez Janša was bribed by the Finnish arms-selling corporation Patria, which was consequently and as a result awarded the contract with the Slovenian government. The documentary identified the recipient of a bribe exclusively with the letter J, that a couple of years later turned out to stand not for Janša but for a Croatian businessman Jerković.

Nevertheless, a huge political controversy understandably broke loose. The political scandal made Janša finish second in the parliamentary election and resulted in the establishment of the political left government. It was only two years later that a direct indictment was brought against Mr. Janša by a state prosecutor who is a wife of an agent of the Slovenian communist secret-service police that arrested Mr. Janša as a political dissident during the communist period in the late 1980s.

The indictment accused Mr. Janša and others of having committed a crime of accepting gifts for illegal intermediation pursuant to Art. 269 of the Slovenian Penal Code. However, the indictment raised a lot of controversy as the criminal offence was literally alleged to have been committed on an undetermined date, at an undetermined place and through an undetermined method of communication. This patently constitutionally flawed indictment nevertheless led to a trial at the local court of Ljubljana which after a number of months (in between local and another parliamentary election) found the defendants guilty. The case was then appealed to the High Court of Ljubljana on all counts, but the High Court confirmed the ruling of the local court as it stood.

Mr. Janša has thus been 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. Space precludes an in-depth analysis of all constitutional violations internal and external to the case. They have been faithfully documented and analyzed by Vlad Perju of Boston College in his [independent opinion](#) delivered just recently.

It suffices to say that the High Court itself committed manifest violations of *lex certa* as a principle of rule of law and several violations of the right to a fair trial. The High Court openly stated that neither the time nor the place of the alleged criminal offence are constitutive of the crime, since they merely contribute to the individualization and concretization of the crime. The High Court went even further by ruling that the fact that the crime was allegedly committed through an undetermined method of communication is unproblematic, as the act of accepting the award is sufficiently defined in the abstract provision contained in the Penal Code (sic!). Moreover, the High Court stressed a number of times that the wording of Art. 269 of the Slovenian Penal Code was open-textured, but instead of construing it narrowly in line with the requirements of *lex certa*, the Court used it as a way of attributing the criminal act to the defendant. Finally, in clear violation of the criminal procedural law, the High Court at times even appears to be shifting the burden of proof on the defendant, who has thus been forced to

acquit himself from the indictment, which, as phrased, has effectively disabled him to present any alibi or to prepare a meaningful defense.

According to this brief analysis, it appears clear that the judgment of the High Court of Ljubljana is vitiated by so many flagrant violations of human rights and constitutional principles, that the defendant could have a direct access to the Constitutional Court by way of a constitutional complaint. According to Art. 51 of the Constitutional Court Act the Constitutional Court can accept the constitutional complaint even prior to the exhaustion of all other remedies. It can do so, if the complainant demonstrates a manifest violation of his constitutional rights and if this is necessary to prevent irreparable consequences for the complainant resulting from the implementation of the contested judgment.

The Constitutional Court is expected to deliver its judgment on the admissibility of the constitutional complaint and potential suspension of the execution of the prison sentence in the beginning of the next week. That is just a few days before Mr. Janša is to start serving his prison sentence. If the Court turns his constitutional complaint down on procedural grounds for the failure of not having exhausted all legal remedies, Slovenia will find itself in an unprecedented constitutional regression, whereby the leader of the opposition will be jailed in the middle of the electoral period for a crime that has been attributed to him following a trial that falls short of any standard of minimum fairness. If so, the case of Slovenia will join the notorious Hungarian and Romanian examples of apparent constitutional back-sliding and will call for an appropriate reaction by the international academia. Especially since the Slovenian academia, with few notable exceptions, has remained, for the reasons inherent to post-socialist frail democracies, more or less silent.

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