NOVA UNIVERZA

DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

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Article information:
To cite this document:
Avbelj, M. (2014). Failed Democracy: The Slovenian Patria Case – (Non)Law in Context, Dignitas, št. 61/62, str. 59-84.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/61/62-4

Created on: 16. 06. 2019
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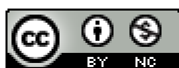

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Failed Democracy: The Slovenian Patria Case – (Non)Law in Context

Matej Avbelj[1*]

ABSTRACT

The paper discusses the role played by the Slovenian judiciary and its legal academic counterparts in the notorious Slovenian 'Patria affair'. The affair led to the incarceration of the leader of the main Slovenian opposition party just three weeks before the parliamentary elections, turning the latter into an unfair and illegitimate event rather than an exercise in democracy. Due to the overall legal and political context of the affair, there is growing evidence to substantiate the belief that right from the outset the affair was politically motivated and used to instrumentalise, even abuse, the institutions of the rule of law for political purposes. With a special focus on the role of the Constitutional Court in this matter, the paper demonstrates the severity of the crisis of the rule of law in Slovenia, a country that is inevitably drifting into the group of de facto failed constitutional democracies.

Keywords: rule of law, democracy, fair elections, constitutional adjudication, fair trial, Patria case

Spodletela demokracija: zadeva Patria - (ne)pravo v kontekstu

POVZETEK

Prispevek analizira vlogo slovenskega sodstva in akademske pravne stroke pri razvpiti zadevi Patria. Ta je privedla do zaprtja

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vodje opozicije samo tri tedne pred državnozborskimi volitvami, ki so se tako iz praznika demokracije spremenile v dogodek z okrnjeno poštenostjo in legitimnostjo. Upoštevaje celotni pravni in politični kontekst, v katerem se je v zadnjih 8 letih odvijala zadeva Patria, vse bolj kaže na to, da je proces vseskozi politično motiviran in da so v ta namen instrumentalizirane, celo zlorabljene institucije pravne države. S posebnim ozirom na vlogo Ustavnega sodišča v tej zadevi prispevek izpostavlja hudo krizo slovenske pravne države, ki Slovenijo neizbežno uvršča v skupino neuspelih ustavnih demokracij.

Ključne besede: Vladavina prava, demokracija, poštene volitve, ustavno sodstvo, pošteno sojenje, zadeva Patria

I. Prologue

This paper discusses the role the Slovenian judiciary and their legal academic counterparts have played in the notorious Slovenian Patria affair.[2] The affair has led to the incarceration of the leader of the Slovenian opposition, Mr. Janez Janša, just three weeks before the parliamentary elections. Due to the overall legal and political context in which the affair has been conducted, there is a growing number of evidence that fuel the belief that right from the beginning the affair has been politically motivated and has been used to instrumentalize, even abuse the institutions of the rule of law for political purposes. First to tarnish the reputation of the leader of the opposition and then to eliminate him from the political life.

The affair started in 2008, a few weeks before the general parliamentary elections, 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 Mr. Janša, but for a Croatian businessman Mr. Jerković.

Nevertheless, a huge political controversy understandably broke loose. The political scandal made Mr. Janša finish second

[2] The prologue draws on Matej Avbelj, Will Slovenia Join Hungary and Romania as Examples of Constitutional Back-sliding?, VerfBlog, 14.06.2014, http://www.verfassungsblog.de/slovenia-bound-jail-opposition-leader-electoral-period-2/.

in that parliamentary election and resulted in the establishment of the government controlled by the political left. 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 reign of the communist regime in the late 1980s.

The indictment accused Mr. Janša and others involved in the case for 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

The decision of the High Court appeared to be vitiated by a number of patent violations of constitutional rights and principles. 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. 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 defend-

ant. Finally, the High Court at times even appeared to be shifting the burden of proof on the defendant, who has thus been forced to acquit himself from the indictment, which has, as phrased, effectively disabled him to present any alibi or to prepare a meaningful defense.

As a result, the defendant Mr. Janša sought a direct relief at the Constitutional Court by filing a constitutional complaint prior exhausting the extraordinary legal remedy at the Supreme Court. In what follows, the paper describes and critically analyzes the decision of the Constitutional Court and the events that followed thereafter. The events that, unfortunately, demonstrate severe rule of law problems in Slovenia and which push this country into the group of the *de facto* failed constitutional democracies.

II. Introduction

On June 11 2014 the Constitutional Court of Slovenia ruled 6:3 to reject the constitutional complaint lodged by Janez Janša, the first indicted and convicted by final judgement in the Patria case. The decision Up-373/14-22[3] led not only to unprecedentedly critical dissenting opinions from the three judges who voted against it, but also spurred criticism from the most prominent lawyers in the country, former justices of the Constitutional Court known in the public for their varied world views. The severity of this internal and external critique alone would call for a detailed analysis. The need for such an analysis is, however, further strengthened by the complexity of the entire context of the Patria case. For almost 8 years this case has burdened Slovenian public space, in media-political, and therefore democratic, terms; and in legal terms for almost half this period.

This leads me to undertake the analysis of the decision and of the whole trial through the prism of the *law in context* approach. This long-established conceptual approach to understanding law is professed in particular, yet not exclusively, by *law-and-society* scholarship. One of its core tenets is that law is conditioned by its widest social context; the latter, in turn, is simultaneously conditioned by law.[4] Selznick thus writes:

[3] There is no official translation of the decision as the Court, allegedly, decided not to produce one.
[4] For a short overview, *see* Philip Selznick, 'Law in Context' Revisited, Journal of Law and Society, Vol. 30, No. 2, 2003, p. 177-186.

> "*If positive law shades into a broader realm of enabling or limiting conditions, the character of the legal order as a whole – positive law plus its premises, institutions, and its sustaining culture – is also framed by and implicated in a particular social and historical context.*"[5]

We have to keep this context in mind for it is with awareness of, or even with fidelity to, context that we can avoid legal formalism. [6] Plain legal formalism, as we shall see, not only means poor implementation of law, it can also become lawlessness itself. The conduct of the Slovenian judiciary in the Patria case, crowned by the passive permissiveness of the Constitutional Court, has pushed us to the very margins of the Slovenian Radbruch formula.[7]

To substantiate this alarming thesis, I shall commence with a description of the Constitutional Court's controversial decision. I shall then critically examine it: starting from its own premises; then investigating these premises against the case referred to as a precedent in the decision of the Court; and finally in light of the exceptionally critical dissenting opinions. Lastly, I intend to set the decision of the majority at the Constitutional Court in the wider context of the Patria case: the impact on democracy in the Republic of Slovenia and the increasingly revealing picture of the state of the rule of law in Slovenia as constituted (in a legal sense) by all judicial actors, in particular judges, and, of course, the academic legal profession.

III. The Decision of the Constitutional Court

In this case the Constitutional Court was requested to consider a constitutional complaint lodged before all other legal remedies were exhausted. The legal basis for such exceptional action is stipulated in the second paragraph of Article 51 of the Constitutional Court Act (CCA). This reads:

> "*Before all extraordinary legal remedies have been exhausted, the Constitutional Court may exceptionally decide on*

[5] Id., at 179.
[6] Id., at 181.
[7] On Radbruch's formula see: Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristenzeitung (1946), p. 107.

a constitutional complaint if the alleged violation is manifest and if irreparable consequences for the complainant would result from the implementation of a certain act."

The petitioner alleged "manifest (*prima facies*)" violations of the rights from Article 22, the first paragraph of Article 23, Article 27, the first paragraph of Article 28 and Article 29 of the Constitution, as well as Article 6 of the European Convention on Human Rights. He went on to concretize these violations.[8] He also proposed withholding of the execution of the judgment of the ordinary courts, referring to the irreparable consequences of imprisonment for his personal freedom as well as for the exercise of his passive electoral right in light of the forthcoming parliamentary elections. [9]

The Constitutional Court rejected the complaint on the basis that the conditions from the second paragraph of Article 51 of the CCA were not met. The rejection of the complaint consists of several arguments; however, they all seem to create the impression (intentionally or unintentionally) that the majority of the Court strove to find ways to avoid (or postpone) the admission of the constitutional complaint.

In its first argument the Constitutional Court dwells at length on the constitutionally defined inter-institutional relationship between the Constitutional Court and the Supreme Court. This relationship is distilled down to the importance of mutual respect between legal institutions, preventing one institution from assuming the tasks of another on the basis of a presumption of distrust.[10] The rejection of the constitutional complaint is thus founded primarily on trust in the Supreme Court,[11] along with the need to respect the division of jurisdiction and in pursuit of the best possible constitutional reasoning. To achieve the latter, the Constitutional Court's knowledge of the positions and the practices of the ordinary courts, in particular the highest court in the country, are of decisive importance. [12] It is for these constitutionally-structural reasons that the majority of the judges think that the Constitutional Court should exercise restraint

[8] Decision Up-373/14-22, par. 2-6.
[9] Id., par. 7.
[10] Id., par. 12.
[11] Id.
[12] Id., par. 12.

in regard to application of the exception from Article 51 of the CCA.

In the second argument, the Constitutional Court seeks reasons for restraint in the wording of Article 51 of the CCA itself, interpreting it very restrictively.[13] This restrictive reading of the concept of exceptionality is later re-applied by the Court in its attempt to interpret the notion of manifest violations. The Court refers to the precedent case Up-62/96 dated April 11 1996, where the notion of manifest violation was defined as

> "*such that it cannot be disproved or »undermined« even after comprehensive examination, since all circumstances, common sense and experience, without evidencing and with no possibility of counter-arguing, exclude any possibility of a different conclusion.*" [14]

The Court then announces the application of the above defined judicial test to the concrete case of the asserted violations of human rights. It concludes that "*the constitutional complaint contains serious allegations of violations of the petitioner's human rights, which require careful, accurate and thorough analysis*,"[15] however this seriousness does not meet the required standard for manifest violation.[16]

The reasoning? A judgment based exclusively on circumstantial evidence is in itself not a manifest violation, because "*the Constitutional Court has hitherto not yet established constitutional standards, against which the justification of the alleged violation could be assessed*." [17] If however the Constitutional Court were to conclude that such a judgment complies with the law, this would

> "*engender additional questions* [which, as the Constitutional Court readily admits, the petitioner is explicitly asking anyway] *as to in how far a particular judgment can be based on circumstantial evidence (only); what the description of a criminal act should entail in such cases; and how concretized those conclu-*

[13] Id., par. 14.
[14] Id., par. 15.
[15] Id., par. 21.
[16] Id.
[17] Id., par. 22.

sions should be which the Court has deduced from proven facts, after eliminating all other possible logical conclusions."[18]

The Constitutional Court claims that "*all of this has to be subjected to a serious and thorough constitutional review in order for clear answers to be formed and in order for clear constitutional standards in respect of these human rights to be established*." [19] However, the Supreme Court has to have the first say, as these questions pertain to both criminal and constitutional law. [20] The Constitutional Court draws similar conclusions with regard to other alleged violations: it either rejects them as not manifest or else restates that it has hitherto not yet passed a judgement on the relevant constitutional question and that this should be done by the Supreme Court.[21] Since the standard for manifest violation of human rights therefore is not met, the Constitutional Court does not even proceed to assess the potentially irreparable consequences for the petitioner. Instead, it simply rejects the constitutional complaint.[22]

IV. Critical Analysis of the Decision of the Constitutional Court

The decision presented above is unconvincing even on its own premises. As seen above, it is founded primarily on the principle of inter-institutional trust towards the Supreme Court; the latter has, at least to date, failed to justify this trust. Even though the Constitutional Court cautions that the allegations of human rights violations are serious and although it explicitly quotes the provision from Article 423 of the Criminal Procedure Act which gives the Supreme Court the legal power to withhold or suspend the execution of a criminal sanction (depending on the content of the request lodged for protection of legality) and thus to guarantee effectiveness of the extraordinary legal remedy, the Supreme Court has so far failed to do so. On the contrary, according to media reports, the Supreme Court has also washed its hands, referring the petitioner to the District Court for a decision on withholding criminal sanction, in the meantime the judge-rapporteur would

[18] Id.
[19] Id.
[20] Id., par. 23.
[21] Id., par. 24.-25.
[22] Id., par. 26.

be on holiday![23] The rejection of the constitutional complaint and the consequent inaction of the Supreme Court left the petitioner *de facto* without an available effective legal remedy to defend his personal liberty and passive electoral right. This renders the supporting reason for rejecting the constitutional complaint void, while Slovenia evidently risks sanction by the European Court of Human Right under Article 6 of the ECHR.

In light of the above, the efforts of the Constitutional Court to interpret the wording of Article 51 of the CCA as restrictively as possible are also completely unconvincing. The Constitutional Court performs an act of a genuinely conservative semantic acrobatics by linguistically enhancing the exceptionality of the procedure stipulated in Article 51 of the CCA. It achieves this by underlining that the Act uses the discretionary term "can, with emphasis on exceptionally."[24] Since a constitutional complaint is a subsidiary legal remedy, the powers from the above mentioned article can only be used "really exceptionally."[25] The Constitutional Court further insists on "how exceptional" a decision on a constitutional complaint under this article should be by listing its jurisprudence.[26] It is not entirely clear what purpose these linguistic bravura serve, other than informing us in several places that exceptional is truly and so very exceptional, and by no means only exceptional. Their purpose is even less clear given the Constitutional Court anyway relies on its own standard for "manifest" human rights violation, whereas this standard is, as we shall see later, so restrictive in its substance that it is legally-logically untenable.

The standard for manifest violation is derived from the above mentioned precedent Up-62/96 dated April 11 1996 which, although asserted differently, has only been selectively followed by the majority at the Constitutional Court. The decision indeed reiterates the standard for manifest violation; however, unlike the precedent case the majority this time does not actually apply the standard, with the exception of point 24. Unlike the decision Up-62/96[27] the decision Up-373/14-22 does not contain a first-hand explanation as to why the alleged violations are not manifest. All

[23] Id., par. 26.
[24] Id., par. 14.
[25] Id.
[26] Id., par. 18.
[27] Decision Up-62/96, par. 11.

we learn is that the "*allegations of violations are serious*"[28] and "*that they must be the subject to a serious constitutional review in order for clear constitutional standards to be established.*"[29] Ultimately, however, the allegations are not reviewed, because "*the Constitutional Court has not to date established such constitutional standards against which it would be possible to assess the merits of the alleged violation.*"[30] Take note: the fact that the Constitutional Court has not yet established jurisprudence in areas where difficult issues of criminal and constitutional law are raised has nothing of course to do with the question of whether the human rights violations are manifest or not. The two issues are completely independent. If the violation is manifest, the Court has to decide upon it; even more so if the constitutional standards supposedly do not yet exist. In particular if the petitioner is in prison. Under no circumstances should it be possible to deny that a violation is manifest because constitutional standards have not yet been established. And just because the Constitutional Court cannot or even does not know how to decide in the matter, should the ordinary courts indeed try first?

As the Constitutional Court points out how unfavorable its position is due to the lack of clearly developed constitutional standards, I cannot but criticize isolationism. What about the comparative constitutional view? The Slovenian Constitutional Court is hardly the first in the world facing these questions. In many previous cases it managed to establish exemplary cooperation in judicial dialogue and in the practice of migration of constitutional standards in the era of so called new constitutionalism. Not this time though, although it would not need to search far. It would suffice to look into the separate opinion of Justice Peter Jambrek in the precedent Up-62/96, in which he compares Article 51 of the CCA with German regulation.[31] The latter probably served as a model for the Slovenian one in the first place. Last but not least, even if the Constitutional Court of Slovenia had been the first in the world facing such a case, it would be expected - at least from the examples of the prominent highest courts abroad which wish to leave their imprint on the development of constitutional law -

[28] Decision Up-373/14, par. 21.
[29] Id.
[30] Id. at 22.
[31] Decision Up-62/96, dissenting opinion by Peter Jambrek.

that the Court would seize such a case with both hands in order to establish the missing constitutional standards.

Regardless of all the above, it is especially significant that the Constitutional Court majority overlooks that the standard for manifest violation from the decision Up-62/96 is obviously logically untenable. Not only is this clearly pointed out in the dissenting opinion of Justice Ernest Petrič, [32] it also derives from the dissenting opinion of Justice Boštjan M. Zupančič on the precedent decision to which the majority of the Constitutional Court clings so firmly, yet obviously selectively:

> "[...] *the majority refused to decide upon the content of a first-rate constitutional matter on a formality, as if the law (the CCA) prevents them from doing so. They thus neglected the distinction between a prescriptive and an instrumental norm and harnessed the cart in front of the horse, which should be pulling the cart*." [33]

In both cases the Constitutional Court majority interpreted the procedural requirement for manifest violation alike: in order to be allowed early admission to constitutional review the constitutional complaint must fulfil such a standard of violation that there wouldn't be much for the Constitutional Court to do at the actual constitutional review itself. If a manifest violation of human rights satisfies the procedural requirement for admission of the constitutional complaint solely when

> "*it cannot be disproved or 'undermined' even after comprehensive examination, since all circumstances, common sense and experience, without evidencing and with no possibility of counter-arguing, exclude any possibility of a different conclusion*",[34]

then this procedural requirement automatically pre-determines the decision on substance. This is the very putting the cart in front of the horse, which is logically absurd and as such indicates a misinterpretation of Article 51 of the CCA.

[32] Decision Up-373/14, dissenting opinion by Ernest Petrič, par 9.
[33] Decision Up-62/96, dissenting opinion by Boštjan M. Zupančič.
[34] Id.

In addition, it is worth pointing out that the precedent Up-62/96 itself stands on very shaky constitutional foundations. Namely inherent to the case is an extremely questionable constitutional maneuver: after the three-member senate decided that the Court would hear the constitutional complaint, and after this decision was already made public, the Constitutional Court majority in plenum decided to reject the already admitted constitutional complaint. This happened even though the substantive decision-making of the Constitutional Court in full composition should only lead either to rejection or acceptance of the (substance of) the constitutional complaint.[35]

To sum up: the decision on rejection of the constitutional complaint faces a whole lot of troubles. The Constitutional Court rejects the constitutional complaint because it trusts in the Supreme Court and even instructs it to effectively protect the rights of the petitioner. This does not happen, however. The Constitutional Court justifies its decision with reference to precedent, a case controversial in itself. In doing so the Court takes on the standard for manifest violation and enhances it so far that practically no early constitutional complaint could fulfil it - as indeed in the last nine years, no constitutional complaint has. This is not surprising because such a standard is logically-legally untenable. On top of everything the Constitutional Court does not even actually apply this unfulfillable standard in its decision: there is no case by case reasoning as to why the alleged violations of human rights are not manifest. Also, the Constitutional Court, unlike in the precedent, despite or due to the unfulfilled condition for manifest violation, does not examine the requirement of the irreparable consequences which might justify a truly extraordinary exceptionality of this case. Such analysis can (only) be found in the dissenting opinions.

V. Dissenting Opinions: Common Sense and Experience

Dissenting opinions were written by Justices Jan Zobec, Mitja Deisinger and Ernest Petrič. They were united in the view that the

[35] See Decision Up-62/96, in particular dissenting opinions by Justices Tone Jerovšek, Lovro Šturm, Peter Jambrek and Boštjan M. Zupančič.

Constitutional Court should admit the constitutional complaint, regardless of its insistence on the judicial test of the standard for manifest violation. Justice Zobec was the clearest in his claim that all three requirements are fulfilled: the manifestly violated human rights, irreparable consequences as well as the exceptionality of the case as an additional condition.[36]

The fulfilment of the second requirement is the simplest to ascertain since imprisonment always represents irreparable damage for the complainant.[37] All three dissenting opinions also see the required standard for manifest violation met on a number of levels, most evidently from the aspect of the principle of legality as defined in the first paragraph of Article 28 of the Constitution, as well as from the consequently related right to effective defence as stipulated in Article 29 of the Constitution.

The Prosecution, the District Court and the Higher Court were all aware of the fact, notorious from the beginning of proceedings and reiterated in the assertions of the complainant as well as in cautions from some quarters of the legal profession, that the complainant was first indicted and then sentenced for a criminal act that remains un-individualized, un-concretized and even abstract when it comes to how it was committed. This was confirmed fully by the three dissenting opinions. Justice Deisinger writes that a careful examination of the contested rulings shows that the court "*took the prosecutor's place and transformed itself into a double (unconstitutional) role of court and prosecution*."[38]As was most clearly pointed out by former constitutional Justice Franc Testen, this was a case of violation of the most fundamental, civilizational procedural principle: no plaintiff, no judge. This was further affirmed by another former constitutional Justice Matevž Krivic, when he publicly cautioned that Mr. Janša's sentence is based on proceeding with "*a flaw so severe, although visible only to the most skilled lawyers' eyes, that it only has to make it to the Supreme Court - and the sentence will fall.*"[39] It is a case of a violation so grave that the indictment proposal should have been rejected and the proceedings on such basis should never have been started in the first place. It calls for replacing the sentence of the District

[36] Dissenting Opinion by Jan Zobec, par. 4.
[37] Id. par. 3; also dissenting opinions by Justice Petrič, par 7. and Justice Deisinger, par. 7.
[38] Id. This point has also been raised by the complainant, see the Decision Up-373/14, par. 6.
[39] Matevž Krivic, as reported at http://www.rtvslo.si/slovenija/nekdanji-ustavni-sodniki-kriticni-do-odlocbe-ustavnega-sodisca-o-jansevi-pritozbi/339647.

Court with an acquittal. [40] This violation is "clear, obvious and flagrant." [41]

Furthermore, the alleged violation is also logically completely untenable. As Justice Zobec writes most insightfully, if the crucial element of a criminal act is neither recounted nor proven and it remains on an abstract level only, which is explicitly affirmed by the attempt of the Higher Court to help out the District Court which ruled verbatim that the crime: the acceptance of the promise of a reward was committed through 'unidentified means of communication', [42]

> "*then the fundamental legal logical operation, the one that leads to sentencing and simultaneously means conclusion of the principle of legality in criminal law, becomes impossible. A subsumption of a concrete act under an abstract legal provision, a combination of both aspects of the principle of legality - that pertaining to the lawmaker (...) as well as that pertaining to the prosecution and consequently the judge (concretization and individualization of a criminal act).*"[43]

Justice Zobec proceeds by adding a passage which undoubtedly constitutes a classic of Slovenian constitutional law and theory, in particular of legal practice and reasoning:

> "*It is evident to anybody that the subsumption of the abstract under the abstract is a logical nonsense for the same cannot be subsumed under the same, it can merely be equated (tautology); for a syllogism is not a tautology. And it is clear to anybody that it is impossible to defend oneself against an abstract allegation. From the aspect of constitutional process law (the safeguard from Article 28 of the Constitution) this means that a person can only be sentenced for a concretely committed act.*"[44]

Justice Zobec concludes that this is something so self-evident that it also renders the condition for exceptionality fulfilled and thus allows the Constitutional Court to decide immediately, with-

[40] Dissenting Opinion by Jan Zobec, par. 10.
[41] Id. par. 16.
[42] Judgment of the High Court in Ljubljana Patria, II Kp 2457/2010, par. 21.
[43] Dissenting Opinion by Jan Zobec, par. 13.
[44] Id.

out waiting for the Supreme Court.[45] This is of particular importance when the sentence of imprisonment is ruled in "*flagrantly unfair trial*" against the leader of the biggest opposition party, his imprisonment three weeks before elections fundamentally affecting the democratic process in the country as well as the legitimacy of the election outcome. [46] Justice Deisinger goes even a step further in his conclusion when he justifiably questions the very possibility of ensuring an impartial and hence a just trial for the complainant. This question has since been further validated with the recent address of the President of the Supreme Court at the annual event 'Days of Judiciary', where he shared the stage with the very same supreme public prosecutor who represented the indictment against the complainant. This took place after the constitutional complaint was lodged and before the request for protection of legality was filed.[47]

All of the above already moves us towards the wider context of the Patria case. However, before I focus on it, I should touch upon the reasons behind such a big discrepancy between the positions of the Constitutional Court's minority and that of the majority. Since I am neither sociologist nor psychologist, I cannot provide a definite answer to this question. It seems to me though that the answer is hidden somewhere in the definition of the judicial test for manifest violation which the Constitutional Court chose to apply. There, among other things, it is stated that the perception of manifest violations of human rights depends also on "common sense and experience."

VI. Law in Context

One of the most noticeable differences between the Constitutional Court majority and the minority in this case is the degree to which they recognize and highlight the wider context of the Patria case. As we have seen, the majority founds its decision on semantic assumptions of Article 51 of the CCA, on its past jurisprudence as well as on trust in the ordinary courts and division of labour between them. They do not deliberate on the consequences of their decision, at least not in the text itself. Nor do they

[45] Id., par. 17.
[46] Id., par. 18.
[47] Dissenting opinion by Justice Deisinger, at 7.

define their point of view towards the consequences, although the petitioner refers to their irreparable nature. They fail to do so notwithstanding awareness of the fact that we are in the middle of an election campaign, three weeks before the election and that physical removal of the petitioner, the leader of the opposition, cannot remain without effect on the fair conduct of elections, and on the legitimacy of the outcome. For where else in Europe are opposition leaders imprisoned just before the election?

It is evident that the majority at the Constitutional Court was not interested in these kinds of issues in this instance; just as, interestingly enough, another majority had not been interested in similar issues back in 1997 in the case that served as precedent in the case at hand. Back then, Justice Zupančic warned strongly in his separate opinion that the Constitutional Court avoided its jurisdiction and thus its responsibility in a case of capital importance out of legally-technical reasons, or more accurately because it assessed the "procedural requirements" too strictly.[48] Instead of demonstrating the breadth of constitutional review, intended as the "main antidote to formalistic legal reasoning," the Constitutional Court did just the opposite.[49] Back then as well as today. The only difference is that the capital importance of today's case is redoubled from the aspect of constitutional law. The majority at the Constitutional Court today assumes both responsibility for the loss of personal freedom of an individual, as well as responsibility for the unfairness of elections and their potential illegitimacy. Of course, such a risk (of responsibility) is always present. However, it becomes most obvious when there are not only circumstantial but also direct evidence (in the form of almost consensus from those legal professionals who spoke out in the Patria case) that the trial, which has been suspect from the very start, was concluded as a flagrantly unfair one, and that it should never even have started in the first place.

The chronology of the Patria case is rather long and complex, yet without it we cannot understand the controversy of the conduct of the Constitutional Court, the ordinary courts, the prosecution and those most pertinent experts in criminal law who should have been the first to raise their voices to stop the trial as it was developing with disrespect to legal standards. The Patria case was launched, and has developed ever since, as a sensational media

[48] Decision Up-62/96, dissenting opinion by Boštjan M. Zupančič.
[49] Id.

story and an explosive political affair. It has always gained momentum before elections, then temporarily subsided only to be reignited time and time again. It has been an instrument of political struggle which, on the one hand, would not be that unusual even for a democracy of the western type. On the other hand, in such a democracy with a plural media space, the case would have come to a rightful conclusion much earlier. In Slovenia, the case is still dragging on even though it has been clear for a long time that the letter J from the Finnish TV documentary does not mean 'Janša', but some Croatian businessman 'Jerković'.

The case started to interest lawyers only once it acquired legal dimensions. This happened when the indictment was filed. It was filed by the wife of the former communist secret police agent who 25 years ago pursued and arrested the first-indicted in the Patria case. The content of the indictment was unprecedented for the wider public: it contained an unknown time, place and means. At least to me, it was clear from the very start that such an indictment should not and cannot become part of established practice (unless we are bringing about a Kafkaesque reality).[50] I introduced this opinion at an event of the Academic Lawyers' Association at the University of Ljubljana which was almost cancelled due to pressure from unnamed, but supposedly very respected Slovenian lawyers. The stakes were obviously high. This is further confirmed by the conduct of the parties of the trial. The prosecution took up work at full steam. According to the latest claims of the defence (which were contested by the prosecution) it went so far as hand-picking mainly incriminating documents. Should these claims be confirmed, it would be a clear case of a breach of the principle of equality of arms. The indicted and his party on the other hand took a defensive stance, combined with periodical verbally sharp and symbolic attacks on the judiciary. The latter has defended itself in an auto-poetic and self-sufficient way and has tried to hide their faces from the public. Occasionally, however, this defensive pose was interrupted by some excesses. Since these were already comprehensively documented by Vlad Perju from Boston College, [51] I do not intend to repeat them here.

[50] Matej Avbelj, Ubi Patria, Ibi Victoria, Ius-info kolumna, 30.9. 2011, http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?Id=72935.

[51] Vlad Perju, Independent Legal Opinion in the Patria Case, http://www.ijpucnik.si/media/Independent%20Legal%20Opinion%20Patria%20Case%20-%20Vlad%20Perju.pdf.

However, it is worth singling out the example of a Higher Court judge who publicly congratulated the District Court judge for the courageous sentencing (then not yet legally binding); and who likened the protest of the supporters of the sentenced in front of the court to the hysterical reactions of North Korean children at the visits of Kim Jong Un.[52] It goes without saying that such behavior from a judge of the Higher Court does not contribute to the appearance of impartiality of the judiciary, one of the postulates of a fair trial. The appearance of impartiality was compromised even more directly with the thunderous performance of the President of the Supreme Court in front of a crowd of judges gathered at the annual event »Days of Judiciary«. He used that occasion for tirades against both the defendant, who at the time had an open deadline for a request for extraordinary legal remedy at the Supreme Court, as well as against one of the constitutional judges. In addition, the very same supreme public prosecutor who achieved the final sentence in the Patria case and is also likely to be involved in the extraordinary legal remedy proceedings also took part at the event.[53] Justice Deisinger is thus right to point out that all of the above casts strong doubt on whether the complainant's right to a fair trial can actually be guaranteed under these circumstances. This doubt is reaffirmed in the above mentioned independent opinion of Vlad Perju. It is also echoed in cautions coming from some Slovenian professional organizations.[54]

Such opinions did not find expression in the main Slovenian media outlets: the latter reported on the Patria case practically in terms of the presumption of guilt. Despite the fact that the process has been suspect and conducted in a legally unusual manner from its very beginning, and despite warnings from prominent legal experts including self-professed political opponents of the accused, a different narrative prevailed in the media. That this is a case of corruption where direct evidence is by the very nature of things impossible; and that the judiciary should be trusted and respected even when it delivers a sentence exclusively on the ba-

[52] Vesna Rakočević Bergant, Zakaj meni nihče ne piše sodb v Murglah?, Pravna praksa 23/2013, at 33.

[53] See, the official report from the event, at http://www.sodisce.si/vsrs/objave/2014060616053789/

[54] Izjava društva Evropska Slovenija, Ustavnopravno in etično sporno ravnanje predsednika Vrhovnega sodišča, http://evropskaslovenija.si/ustavnopravno-in-eticno-sporno-ravnanje-predsednika-vrhovnega-sodisca/.

sis of circumstantial evidence and even when the sentence relates to a criminal act, committed in a way that does not even require description, since it has been sufficiently defined in the abstract legal provision of a Penal Code. [55] In a number of instances an impression (by the media at least) was created that all of the above, as unusual as it might appear, is permissible - in regard to this very convict at any rate. According to prevailing public opinion, perpetuated among others by influential opinion leaders and intellectuals, he should probably have been put behind bars long ago, at least for the alleged, but never proven, arms deals during the Slovenian independence war.

To sum up, the legal and political dimensions of the Patria case have been intertwined all along. This was also achieved in part by the extreme restraint of the academic legal profession. In my opinion, the latter has traditionally proven to be sterile and practically silent, be it in cases of momentous decisions of the courts or else in other seismic legal developments in Slovenian society. The Patria case is an example of such a paradigmatic case which, according to the unwritten rule established by the profession, is not to be discussed. Due to the circumstances of the case, those of us who did talk about it are labelled as *a priori* political, supposedly "right-wing" lawyers, as "the black ones" and due to the person in the trial as "janšist". The label is attached regardless of the substance of our analyses - truth be told, they were not all equally convincing. On the other hand the "left-wing" lawyers seem not to exist, nor are there any "left-wing" academics. The latter are publicly presented as neutral, although, as it transpires later on, the nature of their employment puts them in an open conflict of interests. All of these, along with the silent majority of the academic legal profession, are and remain neutral, non-political and therefore professional.[56]

Such labels are insincere and unfounded. It is perfectly clear that every personally mature individual, in particular a lawyer, does not only have his own worldview but also his political convictions. Every legal expert, in particular a university professor who educates future generations of students, should also have his own professional academic integrity, which obliges him to overcome

[55] Judgment of the High Court in Ljubljana in the Patria case II Kp 2457/2010, par. 21.
[56] Matej Avbelj, (Vodo)tesnost slovenske pravniške stroke, http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?Id=117892.

his political views and to uphold what is right. Without this, if society lacks an intellectual nucleus, especially among lawyers, to coherently champion values and principles and what is right (as derived at least from the Constitution), if morality and ethics were made obsolete in the spirit of positivism, then truly anything is permissible and possible in such a society, especially if you are in the minority or in opposition. Thus it is also possible that nobody is particularly upset when three constitutional judges and some of their former colleagues describe the proceedings in the Patria case as flagrantly unfair. Nobody is particularly troubled when the majority at the Constitutional Court rejects a constitutional complaint out of trust that the Supreme Court will guarantee effective legal protection anyway. The latter, however, does practically nothing, quoting holidays (sic!) among other reasons. It publicly rebukes the convict, already imprisoned, that this is his own fault since he did not use another legal remedy (at the District Court) for withholding the imprisonment.[57]

This entire farce would not have taken place had the pertinent distinguished legal experts, especially university professors from the areas related to the Patria case, explained publicly at the very outset what Justice Zobec has written:

"*In our country (as well as elsewhere in the normal, civilized world) nobody should be sentenced for an abstract act. In our country, someone could only be sentenced for their actual actions. This is something so self-evident* [...]"[58]

Instead, the process, which according to the opinion of distinguished legal experts should not have been initiated to begin with, has taken a full four years, moving from one instance of jurisdiction to another, and it is still not finished. It is at least and indeed extremely unusual that even the Constitutional Court doesn't realise what irreparable consequences might affect the petitioner, an eminent politician (mostly in opposition), who goes from election to election encumbered by the weight of a "legally non-existing" process. As the former constitutional Justice Krivic wrote, it is not only the prerogative of Janša's voters but also the right of his opponents to know the truth about the legal untenability of this process.[59] Otherwise, in particular in the context of the un-

[57] http://www.rtvslo.si/slovenija/foto-jansa-ni-podal-zahtevka-za-zadrzanje-kazni/339864

[58] Dissenting opinion by Jan Zobec, par. 17.

[59] Matevž Krivic in his public statement, available at: http://www.rtvslo.si/slovenija/nekdanji-ustavni-

balanced media presentation, the process has a fatal impact on voting preferences, it distorts them and in fact distorts the legitimacy of the democratic process. This consequently deforms the parliamentary political process, founded on fair elections and the outcomes of such process. In the last instance, democracy itself is distorted.[60]

It is therefore in everybody's interest that the Patria case comes to a legally binding conclusion with a substantive decision. It is also in everybody's interest to dissolve any doubts as to whether the complainant has or has not committed the criminal act. It is in everybody's interest to eliminate any suspicion that the Patria case might be a politically motivated trial. Given all the circumstances of the case it is not unusual for a reasonable person to share the concern of our most prominent writer Drago Jančar, who writes apprehensively:

> "*There is every indication that this is a case of political trial. Beyond circumstantial evidence, there is unambiguous direct evidence for this. It is hard to believe that this is possible in a democratic country.*"[61]

I still try to believe that it is not possible and I share the view of Justice Deisinger that this suspicion will be refuted by the Slovenian judiciary itself:

> "*The decision of the Court in regard to withholding or the suspension of the imprisonment will in itself demonstrate on an empirical level whether the position of the Constitutional Court on effective legal remedy with the request for the protection of legality is confirmed or refuted. The later the pronouncement of the breach of the Constitution or the European Convention on Human Rights – be it at a particular instance of the proceedings, constitutional review or through the European Court of Human Rights decision - the harder the consequences will be for the whole judiciary. What if the entire criminal proceedings against the complainant from the filing of the indictment on-*

sodniki-kriticni-do-odlocbe-ustavnega-sodisca-o-jansevi-pritozbi/339647

[60] Matej Avbelj, Ubi Patria, Ibi Victoria, Ius-info kolumna, 30.9. 2011, http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?Id=72935.

[61] Drago Jančar, O pogumu in indicih, http://www.ijpucnik.si/default.cfm?Jezik=Sl&Kat=0102&Bes=301.

wards transpires to have been illegal, in contradiction with the Constitution and the European Convention on Human Rights, along with violating human rights? An impartial judiciary should keep this fallout in mind when it makes decision." [62]

VII. Vestiges of the Past – Burdens for the Present

An impartial and independent judiciary in a well-ordered, normal, constitutional democracy should also be aware that its quality depends first and foremost upon itself and its corrective mechanisms. The judiciary should not be subjected to just any criticism, especially if it is vacuously rude or inexact. But it can be a subject to well-argued criticism. Albeit supposedly the weakest branch, judiciary is a form of power too. However, historic cases, when human rights were grossly violated on Slovenian soil with the support of or even through the judiciary, are not rare. This part of our recent history remains unresolved and it is still painful and traumatic to many. Representatives of the judiciary should thus avoid rehashing and reviving it with, at the minimum, irresponsible if not un-constitutional behavior, such as dressing up as Tito's pioneers and dancing with the flag of the former Yugoslavia.[63] The same also applies to presumed personal or at least ideological continuity with the former regime - something that a significant proportion of the public is strongly convinced about - and not unjustifiably. The most honorable and virtuous solution to this challenge was proposed by Silvij Šikovec, the judge who in the former regime convicted two priests for blessing a memorial to "national traitors." This is what he said when parts of the public criticized the appointment of the Head of the Slovenian Prosecution Zvonko Fišer, who brought the indictment in that case:

"*Even at this time, after 31 years, I do not want to comment on my decision at all. It was made in a particular time and place and founded on different legislation. It speaks, however, as any other decision, also about me, the judge who was deciding in this case. We cannot change the past, but we can learn*

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[62] Dissenting opinion by Justice Deisinger, at 7-8.

[63] The President of the District Court of Ljubljana took part in a concert dressed up as a Tito's pioneer, wearing a red communist star and waving with a Yugoslav communist flag. The Judicial Council's reaction to her behavior was extremely lukewarm, issuing no more than a public warning that judges should protect their independence.

from it. In this sense I find lacking, even in times after the democratic change, a serious and thorough discussion about human rights violations. The discussion should take place within the judiciary in particular, with no political divisions."

According to media reports, he also concluded:

"*On a symbolic level, especially from the perspective of those affected, the feeling that nothing has really changed is growing stronger. Twenty years after the change of the system, I personally don't see the need for those of us who held high judicial offices in the former system to run for such offices now. Especially if this triggers reactions which could raise doubts about the functioning of the rule of law and protection of human rights.*"[64]

Were this actually to be the case, the throwing around of terms such as "Murgle trials"[65] in the public space could be stopped as well as suspicions about the (im)partiality of the judiciary that reappear time and time again from this or the other side. It would enable us to publicly acknowledge that what was evidently an inadequate break with the past, along with extremely high retention rates of elites, led to the current situation in which our judiciary, as well as practically the entire state and in fact civil-society apparatus, are filled with people who are directly or indirectly in different ways, most often even through family relations, connected with the personnel of the old political set.[66] This should be publicly acknowledged as a challenge which needs an adequate, organic and constitutional solution. The Slovenian judiciary would thus improve its reputation on the symbolic level itself, something that would probably be reaffirmed through judicial statistics – an area that causes concern due to figures both from home courts and the courts abroad.[67]

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[64] http://www.rtvslo.si/slovenija/fiser-zrtve-komunisticnega-nasilja-oznacil-za-narodne-izdajalce/249361.

[65] Murgle is a quartier in Ljubljana where many influential members of the Slovenian elite reside, in particular the former president of the Republic of Slovenia and the last Chief of the Slovenian Communist Party, Mr. Milan Kučan.

[66] See, also, Bojan Bugarič, Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-between" Democracy and Authoritarianism (unpublished article, on-file with the author), at 13.

[67] See, the reports of the Council of Europe, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf and http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf, str 7/60.

Until this actually happens, the state of the Slovenian judiciary is probably very close to the depiction from the Op-ed "Mehki trebuh" by Justice Zobec. [68]As the old saying goes: don't kill the messenger. He or she cannot be guilty for bringing the news about a given situation and going at him will change nothing. What is needed instead is a well-argued, self-reflective, and above all self-critical discussion about the assertions from this article. Such discussion could be very sharp, but it has to be conducted in good faith in order to allow the forming of such a legal order, both in theory and in practice, as required by the Slovenian Constitution.

The onus is on all of us: in particular the lawyers holding key offices at institutions of state and those at our universities. It is our duty to assure that legal proceedings are not exploited or even misused for political objectives, such as the elimination of a political opponent which increasingly appears to be the case in the Patria case. It is also our duty to guarantee effective and lawful prosecution of crimes, especially in the economy and politics, holding everybody who has been legally proven guilty accountable for their actions. It is imperative to relieve Slovenia of the burden of a hijacked state.[69]

This is the context within which the Patria case took place. It includes the Constitutional Court, which (due to the above mentioned reasons and thanks to six of its members) failed to complete its task as required by the best understanding of the constitutional law in the Slovenian context. The onus, on the basis of explicit trust of the Constitutional Court, is now upon the Supreme Court. However, at the time of writing, which is more than two months after the incarceration, the Supreme Court has literally done nothing in the case. The judge rapporteur has been appointed, but she has so far failed to bring the case to the Court for a deliberation. This has, understandably, sparked popular protests in front of the Supreme Court as well as serious, but still isolated critique from the legal academia.

All in all, Slovenia appears to be in a serious peril of reaching such levels of unfairness and legal untenability in regard to the personal freedom of the imprisoned individual as well as in re-

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[68] Jan Zobec, Mehki trebuh slovenskega sodstva, http://www.delo.si/mnenja/gostujoce-pero/mehki-trebuh-slovenskega-sodstva.html.

[69] See, also, Bojan Bugarič, Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-between" Democracy and Authoritarianism (unpublished article, on-file with the author), at. 2

gard to the respect of rule of law, that in a metaphorical sense the Slovenian Rubicon of the Radbruch formula could even be transgressed. Given the already too-high levels of unfairness and legal untenability, Slovenia is beginning to be talked and reported about as the only EU Member State with a political prisoner, we should not allow ourselves any further slipping downwards.