

## **On Truth and Justice: the Trial of Janez Janša**

In the Slovenian *Patria* trial the case specifically against Janez Janša has, legally speaking, never existed. I claim that the one who explains or even decides that it has does not make one's ruling on the basis of law. One either does not understand the very essence of the constitutional requirement that everyone is to be treated in accordance with »due process of law«. Or, is driven by motives that are external to the law and aim at one, and one goal alone: conviction, because this particular person must be convicted. Personally and professionally, legal scholars must feel the strongest moral obligation to object and fight against this kind of travesty, as opposed to administration, of justice. This must be so anywhere and regardless of who the victim might be. Names must not matter to us.

Legally speaking, the case against Janez Janša is imaginary not only because, as several leading Slovenian legal scholars have already publicly explained, the unidentified facts do not match the elements of the criminal act as defined by Article 269 of the Slovenian Criminal Code. It is a forced fabrication also due to so many identified acts that represent a direct breach of the basic constitutional requirement that everyone is to be treated non-arbitrarily, according to due process of law. The following are just four (out of many) examples in illustration.

Firstly, in addition to international jurisprudence there is also an unequivocal judgment by the Slovenian Supreme Court, nr. 153/2012, from May 1, 2012, elaborating in a similar case one of the basic legal standards for prosecution and trial based on due process of law as opposed to mere arbitrary persecution. The Supreme Court stated the following: »The charges are general and without a touch with specific individual acts. As such they do not allow for the defendant to defend himself. No special justification and analysis are needed to conclude that, clearly, a defendant can only defend himself against charges that he committed a specifically described criminal act, and not that he committed the act at an unidentified time, against unidentified persons, in an unidentified manner, and the like...Each of the charges against a specific act needs to be based on a matrix of data determining the individual act as defined by the identified necessary components«. Whoever ignores a precedent of this clarity (the prosecution explicitly used phrases like “at an unidentified time” at an “unidentified location”, through an “unidentified method of communication”, etc) and does not even respond to its ruling – neither at the prosecution nor the trial stage – acts in direct contradiction with the constitutional requirement of fair treatment according to due process of law. Among others, those are the requirements of Article 2 of the Slovenian Constitution and of Article 6 of the European Convention on Human Rights.

Secondly, the prosecutor who filed the charge to the court knew that she was in direct conflict of interest guarded against by the Constitution. Legally, it is a serious issue that the prosecutor's husband and the accused have been, as it is publicly known, in significant and continuous conflict ever since that person was involved in the arrest and interrogation of the dissident Janez Janša during the events that led to Slovenia's

independence some twenty years ago. Clearly, either the particular prosecutor should have withdrawn herself from such a case, or the prosecutors' office should have done that. That should have been done especially since the replacement was easily possible, which means that the impartiality of treatment could have been easily secured. There are explicit common European standards against such conflict of interest elaborated by the Council of Europe in this area (and those are necessarily part of the Slovenian Constitution as well) that the prosecution has thereby directly violated. Whoever simply ignores such a requirement does not however only violate the common European standards and thus the Slovenian Constitution, but also makes it clear that – willingly or not – he/she is acting arbitrarily, according to measures and motives outside of law.

Thirdly, the prosecution filed their charge through the so-called indictment proposal, not through the regular indictment. Unlike the second, the first is a simplified version of a charge that is not checked for sufficient justification by an independent judge and instead leads directly to a trial. To the extent that this legislation also permits persecution of political leaders without any chance of a preliminary judicial check (when such a check would easily be possible without any harm to the effectiveness of a justified prosecution), it is almost surely unconstitutional. Among others, it violates the constitutional rights of every citizen to free and fair elections. When it is possible to involve a leading politician into a trial based on wholly unchecked indictment proposals, this presents a grave danger of severely distorting a political process. Such an interference can in effect even abolish the whole institute of free, fair, and equal elections. Yet this goes against a clear line of constitutional case-law requiring from the legislature to use milder means (i.e. milder for the constitutional rights involved) whenever those milder means achieve the desired ends (administration of justice through justified prosecution) just as effectively, or almost as effectively, as the means that are more restrictive of the constitutional rights. This is the so-called principle of proportionality as applied by constitutional scrutiny that is especially strict when the rights to free, fair, and equal elections are at stake. In the case at hand it is obvious that such a milder, but equally effective means, clearly does exist: any criminal charge against a political leader (e.g. Prime Minister or Opposition Leader) could be prosecuted through the regular indictment that does include a preliminary judicial check as to its justifiability. The trial judge was aware of these serious doubts. They were publicly expressed by the country's several leading constitutional scholars (including two former Chief Justices of the Constitutional Court). She nonetheless chose to ignore and never address those concerns. However, according to the explicit provision of the Slovenian Constitution (Article 156), any trial judge who encounters a law that is likely unconstitutional has an express duty to temporarily discontinue the trial and send the issue to the Constitutional Court. The trial judge can continue with the trial only after, and in accordance with, the Constitutional Court's ruling on the issue. Whoever chooses to ignore such an explicit provision of the Constitution chooses to act in direct contradiction to the law. Willingly or not, one gives the impression that one is led by something outside of law, something that is arbitrary.

Fourthly, an equally fatal stain on the legality of the case is also the issue concerning the inadmissibility of »evidence« acquired abroad in a way that directly

violates the requirements of the Slovenian Constitution because representing violations of human rights. Is it necessary for the legality of the process that such »evidence« be excluded as inadmissible? Whoever chooses to ignore such a preeminent constitutional dilemma (the clash of two or three distinct constitutions) in such a delicate case (trial against an opposition leader), and does not temporarily adjourn the trial for sending the issue to the Constitutional Court (the explicit requirement of Article 156 of the Constitution), truly does appear to act according to something outside of law. The case against Janez Janša is legally destroyed. It has an irremovable stain of arbitrariness. Whatever comes out of such a process is not law. The main victims of such an approach to – disregard of – law are primarily we the citizens who will come closer neither to justice nor truth, whatever those might be in this case. Legal institutions are supposed to exist in order to act according to law, and law alone. This is the only way in which they could be delivering us justice and truth. Those will not follow from the process as ruined as this one. The prosecution and trial against Janez Janša are a legal scandal of the highest rank.

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