

# Can Elections be Held under Unconstitutional Electoral Law?

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On Wednesday 29 of January the Parliament of the Republic of Slovenia formally acknowledged the resignation of Prime minister, Marjan Šarec. The youngest head of government in Slovenian history, who won his popularity as a comedian imitating peasants and politicians, was forced out as his government was facing an imminent collapse due to the resignation of a number of ministers. The final trigger was a resignation of the minister of finance who, in order to protect the constitutional fiscal integrity of a budget, stepped down, protesting an attempt of imposing on the budget unforeseeable financial obligations stemming from the health insurance system. The government, continuing its nationalization drive that has marked its entire term, namely wanted, by all means, to abolish the private health insurance system that currently in small part supplements the mandatory public one and hence ensures the viability of the shaky Slovenian health system.

The attempt has failed, which has eventually nailed the fate of this government. The latter has, however, been unprecedented in another important sense. It was the first minority government in Slovenian history, composed of political parties, which in a classical meaning of the term, other than the Social Democrats and the Left, do not deserve that name. The coalition was formed of so-called political lists, which stand for personified political groups, carrying the name of their leaders, typically without a political program or representing a specific social group (the pensioners), and many of them came into being, either in this or in the previous electoral term, just weeks before the elections. It was a very diverse coalition, with many conflicting interests, incompatible and incompetent personalities, who were drawn together by a normal political desire to be in power, and in particular, to prevent the party of Janez Janša, which won the election, to form the government. This political calculus, amidst many scandals, indeed at time amusingly banal, and for that reason a maybe even more dangerous mode of governance, eventually failed to succeed.

## A partly unconstitutional electoral law

However, the implosion of the Slovenian political system, which has been in place for the last decade, would make little news for (more formalist, and less sociological prone) constitutionalists, if the future snap election would not need to be carried out on the basis of an electoral law that the Constitutional Court declared partly unconstitutional. Namely, in its decision [U-I-32/15](#), the Constitutional Court adopted a declaratory ruling, finding that the areas of the electoral districts no longer correspond to the criteria for their formation: an equal number of inhabitants, geographical completeness, and the highest possible integrity of municipalities. The Court observed that “the difference in the size of the biggest electoral district to the smallest electoral district has a ratio of 1:3.73. Furthermore, the territories of

the electoral districts are not harmonised with the borders of the new municipalities and no longer fulfil the requirement of geographical completeness.” As a result, the Constitutional Court held that the degree of the identified inconsistency was incompatible with the rule of law requirements stipulated in Article 2 of the Slovenian Constitution.

The Court, eventually, mandated the legislature to remove this form of unconstitutionality in two years. However, as the above described political parties have so far failed to unite on the appropriate constitutional solution and as this requires a qualified majority in the Parliament, which is hard, if not impossible to obtain, the ruling has still not been complied with. While the statute of limitation expires in November this year, the snap election ought to take place in mid-April, on the basis of an unconstitutional electoral law. Does that pose a constitutional problem that could throw the very constitutionality of the snap election into question?

According to the prevailing constitutional opinion, to which I subscribe as well, it does not. The law is still formally valid. At the time of the elections the two year statute of limitation, in which the Parliament needs to implement the ruling of the Constitutional Court, will not have passed yet, and formally speaking the Parliament – and hence the election itself – will not yet find itself in the breach of a Constitution. Of course, the inaction of the Slovenian political parties and their incapacity, unwillingness to amend the electoral system in accordance with the Constitution as soon as possible, cannot be described as an example of good constitutional practice, but this will not, because it legally cannot, take away the aura of constitutionality from the snap election.

Provided, that this takes place at all. After the resignation of the Prime Minister, informal talks have quickly been initiated in the Parliament that could lead to a new coalition. This time around, unlike a year and a half ago, the above described personified political lists with the exception of that of Marjan Šarec, the Social Democrats and the Left, appear to be willing – also in order to preserve their very political existence – to form a coalition with Janez Janša. The latter, who has in extremely politically unfavorable circumstances, which included not just media character assassination but even [unconstitutional imprisonment](#) as a leader of the opposition, eventually become an unlikely supporter of Victor Orban, might thus come back in power and repeat his 2008, at the time very successful, presidency of Slovenia to the Council of the European Union in 2021. If that happens, that might cause a lot of political and even academic outcry of Slovenia too now joining the CEE constitutional-backsliding group. Unfortunately, that outcry will not be justified, as a country can simply not join something that has been its modus operandi from the very beginning and from which Orbán, Kaczyński and the likes could learn more than a lot. The explanation for and the understanding of this go, however, way beyond the scope of this post and have required an entire [book](#).

