Research Article

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A Populist Monster and the future of Constitutional Democracy

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Abstract: The central objective of the post-socialist European countries which are also Member States of the EU and Council of Europe, as proclaimed and enshrined in their constitutions before their official independence, is the establishment of a democracy based on the rule of law and effective legal protection of fundamental human rights and freedoms. In this article the author explains what, in his opinion, is the main problem and why these goals are still not sufficiently achieved: the ruthless simplification of the understanding of the social function and functioning of constitutional courts, which is narrow, rigid and holistically focused primarily or exclusively on the question of whether the judges of these courts are “left or right” in purely daily-political sense, and consequently, whether constitutional court decisions are taken (described, understood) as either “left or right” in purely and shallow daily-party-political sense/manner. With nothing else between and no other foundation. The author describes such rhetoric, this kind of superficial labeling/marketing, such an approach towards constitutional law-making as a matter of unbearable and unthinking simplicity, and introduces the term A Populist Monster. The reasons that have led to the problem of this kind of populism and its devastating effects on the quality and development of constitutional democracy and the rule of law are analyzed clearly and critically.

Keywords: populism; Constitutional Courts; post-socialist EU Member States; Slovenia; rule of law; “left-right” marking/labeling; constitutional democracy; A Populist Monster.

1 Introduction

In this article I will first explain my understanding of the term - and concept - “populism.” Then I will explain why I find the title problem so important that I have decided to put it at the top of the pyramid of the general social problem of populism. I will explain the main features of the title problem: the way in which the terms “left and right” are understood and used in public, their significance for the (false) understanding of the systemic role and functioning of the constitutional courts and their obvious consequence, as can be observed mostly in the post-socialist countries that are also EU Member States. I will explain why this consequence is so important for society as a whole and for the future of constitutional democracy in the long run. I will conclude the article with the declared conclusion that everything presented leads to the dominance of the absolute and all the pores of social life permeating irrationality and the lack of “real thinking.” In this way, ideal, albeit very irritating, circumstances are created to suppress and consolidate what I refer to as A Populist Monster in the article. I evaluate this problem (it could also be called “ideology”) as devastating for the development and future of constitutional democracy.

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1 Aristotle (2010) would most probably use the word “political idiocy”, as does Graeber (2017). See also Arendt 2006.
2 What I refer to as a “problem” in this article it could also be described and marked as “ideology”, according to the explanations of the “ideology” as a term and concept, offered in public appearances and books of prof. Slavoj Žižek - in the following and at the end I refer to his work on this topic.

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2 On Populism

The fundamental aim of populism and populists is not to create and maintain the gap and distance between the so-called elites (decision-makers and influencers; especially from daily politics, high economic and banking institutions) and all other people.³ Populists are always also opposed to pluralism (and this is not even a paradox, I consider it to be a matter of logical necessity): they claim that only they represent the people. For them, other political rivals are only part of a corrupt elite that the populists themselves do not represent. They talk out loud about it, especially when they have no power in their hands. Still, not only then. Paradoxically (and this is a paradox, even an oxymoron), they even say it when they come to power. And when they come to power, they do not recognize any legitimate opposition. Their basic premise is also that, as part of the “true people,” they recognize only those people as (the concept) “the people” who agree with them, vote for them in elections, show them devotion and affiliation, or even worship them passionately and fervently. The latter are their passionate and radical believers. The basic premise of populism is therefore a moralized form of anti-pluralism. Such a populist, for example when one is president of a particular party, considers himself the sole and true representative of the people, both understood in a moral, not an empirical sense. In other words, there can be no populism if there is no one who speaks on behalf of the whole people. But this is a psychological trick: the main premise of populism is to use the term “the people,” but at the same time to address only a few people - those who are fans, sympathizers, voters and staunch supporters of the populist himself. In the eyes and minds of the populist, only these people really belong to the real “we/the people.”⁴

And they are addressed morally. Those whom the populist addresses are actually ridiculed by the populist who even despises them: often as fools, even as a mob. Here comes another psychological trick: while the populist thinks of his fans, voters and believers in this way, he explicitly describes all others as not being included in the term “the people”. And when “we, the people” happens to him - as rebellion, protests, demonstrations - he expresses himself through insults and curses, which is a common occurrence and quite vulgar. He is unforgiving in his words. And he is never guilty or responsible for anything.⁵

A large number of the largest (not necessarily the most influential) and thus most problematic and dangerous (for democracy under the rule of law, basic constitutional values and the fundamental freedom of “the people”) populists are all too often pathological narcissists or even sociopaths and sometimes even psychopaths. The literature, especially the psychological one, confirms the existence of this problem as an element of the daily social and political sphere.⁶ So it is highly important to have at least a basic knowledge and informed understanding of how these people think and operate.⁷

The most publicly influential populists and pathological narcissists often cultivate the so-called cult of personality.⁸ And they usually succeed. They are successful mainly because other politicians and their biggest critics treat them exactly the way they want to be treated. Such people are dependent on the existence of “enemies” or “harsh critics” because they draw their vital life energy from them and strengthen them instead of merely maintaining an outward appearance - the appearance of a personality cult, which is reflected in people who regard them as demigods, as an escalation of emotional affection and devotion. Loyalty. As in the relationship between master and subordinate.⁹

When such people, who hold the highest positions in the social hierarchy of institutions, especially leading positions in day-to-day politics and the highest public offices, run out of artificially constructed (marked) “enemies” or (even more) “real political competitors”, they either violently create or invent new “enemies” in order to motivate, provoke or attract those people they consider potential “competitors” in whom they would no longer be bored in public

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³ See Ball Enjeti 2020. From a book-review: “Krystal and Saagar weave a poignant and righteous web of reflection of the political climate we are in. They call out the role elites of both the Democratic and Republican parties play, including the mainstream media, in propping up a rigged system that ignores the needs of the working poor and middle class. This is one of the best political books I always knew I needed. Ultimately, The Populist’s Guide to 2020 reminds us that no matter how the elites try to thwart the progress of the majority, our Rising is in our hands« (National Co-Chair Bernie 2020, Former Ohio State Senator Nina Turner). I agree. See also Varoufakis 2015.

⁴ See Muller 2016.

⁵ Muller 2016..

⁶ See Ronson 2012; Eddy 2019.

⁷ See Hall 2019; Elliott 2018; Reilly 2020.

⁸ See Dikötter 2019.

⁹ See Foucault 2019.
and day-to-day politics. For what they are primarily interested in is “political enjoyment” and overcoming intellectual challenges. They observe the world, daily politics, decision-making processes and the psychology of the masses as a testing ground for their political strategies and tactics. They see the world as a playground and daily politics as a game that has to be attractive and fun, otherwise they begin to get bored. Because they are usually above average intelligence and know how mass psychology, the psychology of “habits,” myths, political influence (read: seduction) and exploitation of entrenched habits of people work, and above all how helpless, blinded, and easily manageable people, badly informed, under-educated, and less intelligent people think and behave. By knowing that populists are aware they can do or say anything in public without losing their loyal and devoted followers, subordinates, believers. And that is enough for them: to maintain their position, to consolidate their personality cult and to ensure that they do not get bored in public life. These are the most dangerous populists.

At the same time, they continue to mark or artificially create the “external enemies,” enemies of the state, enemies of “the people,” such as refugees, migrants and seasonal workers from abroad. Their most common strategy is to create tension, even hatred and aggressive attitudes between different social groups: citizens against foreigners, cultural workers against businessmen, teachers against workers and employees in industry, the younger generation against older people, full-time workers against precarious workers, civil society organizations against state institutions, etc.

From this they draw energy, the meaning of their actions and existence, their political identity. It feeds on the belief of their voters that they are heroes and saviors; individually - a Messiah. Their greatest followers, however, have long since become passionate and fanatical believers. And the more other people try to err, the more these followers cling to their beliefs (in accordance with the findings of psychology). This problem, which is also a social fact, should not be neglected. On the contrary, it should receive more attention, both from members of the scientific community and academia and from the media.

Another and very important reason that gives this social significance a special stamp is the fact that a significant part of the political opposition not only leads against such populists and their parties that “command” them, but also uses very similar or even identical strategies and techniques of political communication and public address. At the same time, an important, all too often even the majority of the political opposition literally wants these kinds of populists and “personality cults” to stay exactly as they are and exactly where they are, because a significant part of the opposition (regardless if being right or left-winged) builds its political identity and asserts its political position through or exclusively through public and explicit opposition to such populists. Or else, to constantly confront their actions and words. And why? The reason is quite simple: because, in order to maintain their status and position in daily politics, they do not have to do much more other than constantly “stand up” against such populists. They therefore do not have to invest much effort in political programs, ideas, proposals for solutions and answers to questions of the democratic public. It is enough for them to “only” oppose qualified populists and their personality cult. In this way they contribute, usually thoughtfully and deliberately, to the fact that the entire party politics and public sphere is permeated by a “populist monster”.

10 See Chomsky 1999; Chomsky 2011; Derber 2003.
11 See Le Bon 2016.
12 See Duhigg 2015.
13 See Cialdini 2015.
14 See Heidler 2018.
15 See Kinchlow 2013.
16 See Caplan 2008.
17 See Murphy Paul 2005.
18 But, this should be noted again and not forgotten: fort them, the populists, only a particular part of the society is considered and addressed as »the people«: their believers, sympathizers, dedicated voters, media fans, PR promoters and passionate fans.
19 See Teršek in Vrabec 2020.
20 See Gilbert 2007.
21 Comp. Hill 2012; Staik 2020; Yong 2018.
22 Comp. Jones 2016; Keaveny 2016; Greenwalt 2020.
If the media are involved in this game in exactly the same way, the problem of such a policy, the *antipolitics* (such a daily politics is not a real politics - in the Aristotelian sense or in the sense of genius Hannah Arendt; it is rather and literally *antipolitics*) is insoluble. And it no longer seems solvable, at least not for the time of our lives. It leads, by different paths, to the same end: *tyranny*. In other words, in such social circumstances the fundamental characteristics of the modern populism and its monstrous dimensions lead in camouflaged, almost invisible, hidden behind the formal aspects of democracy and pseudo-pluralism, systemic and with the usual levers of democratic process and legal action insoluble *modern tyranny*. Such Populism becomes a Monster. Devastating for freedom/liberty. A path to all-encompassing authoritarianism. It is worth mentioning at this point that “authoritarianism” is not the result of a kind of “exaggeration” in decision-making, the assumption of responsibility for decision-making, but quite the opposite: it is the lack of will, the lack of ability that leads to authoritarianism. The determination and courage of those who are competent and privileged to take decisions in order to make truly responsible, decisive, principled and courageous choices. Also “constitutional choices.”

### 3 A Populist Monster

In this article I will use the term “populism” in this way. In fact, I am going to narrow it down a bit in terms of content. I usually regard it as a political and ideological concept, which, according to the definition explained in the political-philosophical literature, is primarily the problem when the daily (party) politics only apparently addresses itself “to the whole people”, but in reality only focuses on that part of the people that it declares to represent and that agrees with, supports and adheres to the ideas, positions and actions of a certain political party policy, or even more problematic, of a certain politician, party leader, the chairman of a certain political party. Since daily politics is so enormously and irritatingly *personalized* in post-socialist states, which are the EU Member States, voters do not vote on the basis of political programs, ideas, offered solutions to social problems and challenges, etc. They simply and most often vote for and elect “party leaders,” according to their popularity and almost exclusively on the basis of emotional sympathy. It is therefore quite common today for a party that was founded only a few months before the election and is even named after the first and last name of its president (could the personalization of daily politics become even more personal?!) to win the election. Such a party can form and lead a government. But it usually loses a significant part of public support

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23 Aristote 2009; Arendt 1986; Arendt 1973; Glaser 2018; Kuzmanić 1996.
24 See Stein: 2016; Judis 2016.
25 Snyder 2017.
26 See very enjoyable book Joly-Waggoner 2003.
27 Snyder 2019.
28 Applebaum 2020.
29 See Bauman 2016.
30 Alexander (1998: 14-15) very convincingly and understandably substantiates the thesis that the system needs the recognition of the existence of a kind of so-called (and fictitious) “Fred”, whose decisions are definitely decisive. “Highly authoritative”. For the Americans, “Fred” is the USA Supreme Court, for the Germans it is German Federal Constitutional Court, and for us Fred is or should be, on the one hand, the Constitutional Court of the Republic of Slovenia when it comes to questions of national constitutional order, and on the other hand, the ECtHR when it comes to the (minimal) standards of European protection of fundamental human rights and freedoms. After joining the EU, we got another Fred, embodied by the European Court of Justice (ECJ). For all these courts Fred is someone else, which does not mean that his identity is enigmatic or arbitrarily metaphysical. On the contrary, when it comes to the national Constitutional Courts, the argumentative and jurisprudential efforts of the constitutional judiciary in striving for the greatest possible legitimacy of constitutional decisions and thus for the identification of Fred are not comparable to the efforts of political power or the occasional majority of citizens to achieve a certain “particular, special and short-term gain.”
31 See Rovira Kaltwasser-Taggart-Ochoa Espejo-Ostiguy 2020.
32 A few years ago, I labelled a certain segment of this problem with the term “political entertainment” and “political machismo”. I hope such the translation from Slovene into English is close enough to what I meant. By this term I mean politicians as celebrities and media stars. See also Teršek 2005, chapter on “Personalization of politics.”
33 See Dolar 2012.
34 See Teršek 2019: “After the penultimate election was won by the SMC party and with it dr. Miro Cerar, the journalist of Mladina asked dr. Mladen Dolar on his view on the parliamentary elections in Slovenia and a sovereign philosopher said: “Cerar has shown perfectly well that in order to win the elections in Slovenia, not only do you not need a political program, but you also do not need content.”
quite quickly, it begins to break down internally, hardly enters parliament at the next election or even dissolves, ceases to exist or only functions as an extra-parliamentary interest group of a marginal party that is forgotten.\textsuperscript{35}

So populism does not mean addressing the entire public with simple and easily understandable words. Nor does it mean - merely - addressing the public with a “simple” technique, with clichés, political slogans and hackneyed phrases. No. \textit{Populism means addressing your own clearly defined voters, it means addressing your own fans, your clearly defined voters.} It means - very literally - addressing political believers - also in a religious, albeit secular sense, because of the strong and emphatic constitutional separation between state and religion, the church.

So, there are three sides to this problem of populism. First, certain political parties, or perhaps just one, operate explicitly or even exclusively through the personality cult of their president. Secondly, daily politics is extremely personalized. Thirdly, there is no real discussion of the content, programs and ideas in daily politics, but it is reduced solely to the question of who is “left” and who is “right”. Both labels, with the exception of the views of the extreme right and the extreme left on fundamental and current social issues, are hollow labels in terms of content, pure markers and day-to-day political etiquette- not even ideology, only \textit{labels}.\textsuperscript{36}

I call this three-layered phenomenon, based on the elements and characteristics listed above and resulting from them, \textbf{A Populist Monster}.

And here a paradox arises. At the same time, this paradox is a “trap” into which the public, the people, the entire population of a country is falling more and more often, more frequently and very quickly: if all political parties and their supporters, sympathizers and promoters address the public only and exclusively in this way, in such a populist way, the entire public suddenly and truly becomes the object of populism, or even an all-pervasive populism, the “populist institution”: Populism as an Institution (not merely an ideology). Every political address to the public becomes an example of political and social populism. In this way, the public sphere also becomes an unreflected “institution of populism.” The circle is closed, continuously. The cat turns in a circle and chases its own tail.

I maintain that this is exactly what is happening; in post-socialist countries, such as the EU Member States, and in Slovenia, as an example of such a state. I maintain that this is exactly the process that has been going on for a long time: all politics addresses the voters, their target population, in the same way - in such a populist way. That is why the entire public and the entire population of the country, the entire electorate, becomes a prisoner, an object, a victim of populism... And everything that represents the daily party politics means such populism. The public itself becomes “a populist.”\textsuperscript{37}

I therefore claim two cases. Firstly, this phenomenon, this problem is clearly felt in post-socialist countries and more than in other countries. Secondly, this phenomenon, this problem is most clearly reflected in the political controversies and public debates about - perhaps hard to believe, but it is true - the constitutional court. Both in the selection of candidates for the constitutional judges and in the procedures for their election.\textsuperscript{38} And finally, this is reflected in every comment on a decision of the Slovenian Constitutional Court, with – this is so annoying and irritating and unwise – almost no exception.

That is why I am making a thesis: The most obvious and socially harmful populism is precisely what is reflected in the political, media, journalistic and bourgeois rhetoric about the nature of the work of Constitutional Court and its decisions.\textsuperscript{39}

\textsuperscript{35} This phenomenon has been a fundamental feature of daily politics in Slovenia since 2008.

\textsuperscript{36} But maybe... This IS an ideologically-political problem and it only appears as it is not. Maybe the phenomena I described as being so dramatically simplified only appears to be as such. And maybe it is exactly because of its ideological nature – as ideology itself. Because it is “a product” of “lacking common European vision,” of the vast “technocracy.” Or, to be more precise, of the commitment of the EU Administration “to be seen as having no vision” in the eyes and perceptions of the citizens of EU Member States, and as such “not being able to mobilize the people.” Comp. Žižek 2012: 191. Or, as Žižek puts it: the deep “ideology...is precisely... reduction to simplified essence” by which we “forget the noise from behind” while this noise “condenses its actual meaning.” This erasure of the noise from behind “forms the core of utopian daydreaming” (: 22). And Žižek is usually more than right. We can add to this lucid viewpoint the problem of “anomy” as “a state without values,” addressed in Zupančič 2011, chapter III.

\textsuperscript{37} See and comp. Dorrien 2019; Kornai 2004; Panitch-Gindin 2019.

\textsuperscript{38} Especially when judges of the Constitutional Court are elected in the parliament; in Slovenia by an absolute majority of 46 votes out of a total 90 members of the National Assembly.

\textsuperscript{39} Slovenian constitutional democracy was established on very different grounds, totally incomparable with this kind of populism. See Jambrek 1992; Šturm 2002; Jambrek 2015; Jambrek 2015a.
4 The Constitutional Court Marking as „Left“ or “Right,“ with Nothing in Between

Public speaking and writing by professional reporters and commentators on political issues, including on the constitutional courts, especially in the Republic of Slovenia, as an example of the post-socialist state and EU Member State, may have contributed to the creation of the myth: a pronounced polarization of this court, as if it was always either (politically, ideologically, daily-political) left or right.40

Myth? It can be created by exaggerating and repeating the emphasis on what is not important and by reducing the importance of what is decisive. It can be based on a lack of knowledge about modern European constitutionalism and on an obstructive lack of knowledge about the institutional and normative framework for the functioning of constitutional court.41

4.1 Left-right marking as “fan-cheering”

When I think of myth, I do not mean to question the role and influence of a general worldview, moral compass, ideology and political philosophy in deciding those constitutional questions where reading, understanding and interpreting the constitution is an argumentative search (discourse) for compelling content; for answers to those constitutional questions that are more difficult because they have not yet been answered or because they contain specifics, accents or nuances that have not yet been answered or may need to be reconsidered. In general - to discuss the ethics of politics with the technique of constitutional law and modern constitutionalism. When I speak of “myth”, I mean the everyday political and partisan “fan cheering” by using the words “left” or “right” and marking constitutional court as such – “left or right”, without anything else in between or underneath, no other foundation. Even if nothing else is the knowledge of constitutional law, constitutionalism and constitutional decision-making (constitutional legislation).42 I repeat: unbearable and unthinking simplicity and (political, legal and general) ignorance.

5 Constitutional Legitimacy

The method of constitutional decision-making is an important element in ensuring its legitimacy.43 It is defined and limited by the network of elements. The constitutional legitimacy of the constitutional court and its power to decide on the constitutionality of sub-constitutional norms and on alleged violations of fundamental rights and freedoms (“constitutional complaints”) is directly and explicitly enshrined in the constitution44 and in the Constitutional Court Act.45 The Constitution on which Constitutional Court decisions are taken is comprehensive, diverse and fairly comprehensive, even if it is open and abstract. It deals explicitly or indirectly with all matters that can and should be Constitutional Court decided by the Constitutional Court, and the spirit and purpose of the fundamental constitutional principles extend its scope. Constitutional decision-making is also based on international law, in particular the decisions of the European Court of Human Rights (ECtHR), which decides on cases in which the Member States of the Council of Europe (this organization includes all EU Member States, but also some other European states which are not members of the EU) assert claims for violation of human rights or freedoms which are protected by the European Convention Human Rights (ECHR).46 Furthermore, all judgments of the ECtHR which interpret and specify the content

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40 For different approach to the problem of »constitutional populism« and the »vox populi« issue see Arthurs 2006: 155-179.
41 See Stone Sweet 2000.
42 See, for example, Kühn 2003; Kuhn n.d.; Lasser 2003.
43 As it is in legal writing as such. See Jambrek 2020; especially Himma 2016; also Burazin 2013.
44 Articles 160-167 of the Slovenian Constitution.
45 Act is available in English version at: <https://www.us-rs.si/legal-basis/statutes/?lang=en>
46 See ECHR, available on the website: <https://hudoc.echr.coe.int/eng#{%22documentcollectionid%22:22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}> ECtHR; <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (ECHR)
of the Convention are binding on the Member States. This means that there can be many colorful things above the Constitutional Court, but not about the so-called “open blue sky” problem.47

6 Incomparable Features

Here I would like to refer to the comparison between the United States Supreme Court, the Olympus of constitutional law-making, and the Slovenian Constitutional Court. The comparison does not fade when it comes to normative power and the methodology of decision making, even though it does not allow for any overlap.48

In the USA, constitutional jurisdiction was granted (adopted) without its explicit legitimation in the US Constitution.49 In Slovenia and other European states the constitutions explicitly lay down the judicial powers of the constitutional courts. The US Constitution is relatively short and modest in content. The spectrum of questions that are explicitly address and already answered in the constitutions of the European states is much broader: enormous in comparison to the US Constitution. Added to this are binding international law, the provisions of the ECHR, the case-law of the ECtHR and also the non-binding but still influential rulings of other European constitutional courts. Sometimes even US Supreme Court precedents are useful. This circle of already addressed and solved constitutional issues will be further improved. Very much so, in fact.

However, the work for the ECtHR and constitutional courts is not over. Far from it. The reason? Well, not a good one. Mainly the number of the same, repeated, gross violations of one and the same rights and principles by all branches of state power (legislative, executive and judicial), even if they have been repeatedly established, declared or decided in the past by (the same or different 9 judges, as the mandate is limited in time to only 9 years, with no possibility of re-election). But the difference between the field of work, the maneuverable area of the constitutional courts in Europe and the US Supreme Court is obvious and considerable. In other words, most of the main constitutional issues decided by the US Supreme Court have already been clarified/answered either in the constitutions, international law, conventions and case-law of the ECtHR (together with the numerous comments, analyzes and opinions of experts - constitutional law professors, legal researchers or former judges of the ECtHR).50

It is therefore understandable that in the USA the danger of overdetermined day-to-day political (Republicans and Democrats, liberals and conservatives), ideological or other personal or group-related world views or moral concepts or philosophies being incorporated into the decisions of the US Supreme Court is greater than with typical European constitutional court. Metaphorically speaking: if there is really only “blue sky” over US Supreme Court decisions, then in Europe it is exactly the opposite.51

7 Democratic Legitimacy

Due to the way judges of the constitutional court are selected, the problem of so-called “democratic legitimacy” and the so-called “anti-majoritarian problem” is much less serious than in the USA.52 they are elected by a full majority of the representatives of the National Assembly.

47 If the constitutional courts are still being considered as »the least dangerous branch«, and I think they should be, then the executive and legislative branches of power must be observed as »the least examined branches. See Bickel 1986; Bauman-Kahana 2006.
48 Comp. Rosenfeld 2002: 2. »The convergence between constitutional adjudication and politics is as prevalent in France and Germany as it is in the U.S.«
49 Law students in Slovenia are quite familiar with the US Supreme Court decisions in Marbury vs. Madison case. This judgement was even translated in Slovenian, in late 1999, and published in Dignitas – Human Rights Journal Available at: <http://revije.nova-uni.si/index.php/dignitas/issue/archive>
50 This is a central area of my professional and public work.
51 Comp. Visser 2015.
52 See Teršek 2017.
At the same time, it is easier to amend or supplement the Slovenian Constitution than the US Constitution.\textsuperscript{53} It is worth mentioning, however, that without the normative power of the people to demand the revision of the constitution or constitutional amendments, the voters can only “propose” changes of the Constitution and parliament “decides.” Also, the doctrine of unconstitutional constitutional amendment should be acceptable in European constitutional theory and practice.\textsuperscript{54}

8 Political Parties and Ideology

To describe the Slovenian Constitutional Court or any other European constitutional court as obvious and completely and merely “left” or “right” in the sense of daily politics (or current parliamentary-politics affairs) is nothing more than an unreflective simplicity and a blank label. It is therefore not a “difficult” political question and above all not a difficult constitutional question. Even if it is so “controversial” in public debates. Or rather public “rhetoric.”

Even among academics it is understood as a very “controversial” and important issue. And why? The answer is obvious: precisely because it is addressed as an exclusively “day-to-day political” question. And why again? Because of ignorance, the lack of legal, especially constitutional knowledge and (I will be careful here) because of the modesty of thought, the lack of insight and clarity. And last but not least – because of the \textit{Populist Monster}.

Therefore, after more than a quarter of a century since Slovenia’s independence, it would be a good idea to give a sincere answer to why so many Slovenian Constitutional Court decisions have been labeled as simple and purely “left or right”: it is because of this irritating, intolerable and (in terms of the ancient Greek understanding) idiotic obsession with “party cheer.” Or rather, not just “party cheerfulness,” but a “right or left” obsession, this kind of (I will not be careful here) political blindness and lack of intelligence, clear thinking and knowledge. And too much free time to waste.\textsuperscript{55}

The majority of the Slovenian public would argue that it is for the sake of political ideology. But how is this ideology understood? What do we (the Slovenes) or they (the Slovenian public, the people) mean by this word? I know what the answer would be: “you damned leftist” or “you damned rightist”? I call this an obvious and devastating \textit{Populist Monster}.

The oversimplified “right-left” labeling of constitutional court decisions could be a legitimate social question if appropriate research has been conducted and the legitimate question has been answered constructively: In what cases is it possible to establish the strong presence of this “right or left” dilemma? In what types of constitutional cases? Not only, which constitutional court judgments appear to be “party-political-partisan”, but above all “why”? Are there decisions which are inadmissible for the obvious reasons of arbitrary abuse of constitutional jurisdiction? Or because they were made without a substantial constitutional argument and solely on the basis of “political-party fanaticism”? What are these decisions, and how many are there?\textsuperscript{56}

\textsuperscript{53} See Section IX. of the Slovenian Constitution (“Procedure for amending the constitution”). Available at: <https://www.us-rs.si/legal-basis/constitution/?lang=en>

\textsuperscript{54} For a clear explanation of the »unconstitutional constitutional amendment doctrine« see Kommers 1997. See also Teršek 2015: 1358-1373. Slovenian Constitutional Court still refuses to recognize this doctrine as convincing and logically necessary. Without any kind of argumentation. But there is one exception: constitutional judge drh. Klemen Jaklič listed a number of arguments and literature in favour of the official acceptance of this doctrine, in his dissenting opinion to the Constitutional Court decision no. U-I-32/15. I would like to thank very much to prof. Richard Albert for his kind overview of my arguments introduced in my article (still pending in peer-review for the publication) on the unconstitutional constitutional amendment doctrine. I consider my view on this issue to be somewhat, but not markedly more in favour of this doctrine, than prof. Albert expressed it in our personal correspondence, where the professor wrote: “\textit{You make a strong case for the unconstitutional constitutional amendments doctrine, though I still believe that this doctrine is problematic and should not be applied, with perhaps a few exceptions, though only rarely, if ever.}” At the moment (August 2020) my article on the issue is under a peer-review for possible publication.

\textsuperscript{55} In this leisure activity, the so-called trolls are in the forefront. Unfortunately, more and more politicians and even representatives of the journalistic profession are among them. Comp. Vicente 2020.

\textsuperscript{56} For the only, by my opinion, methodologically comprehensive and exact analysis of the particular decision of the Slovenian Constitutional Court decision see Kristan 2008: 51-86. In terms of content, this analysis gets very close to the core of the problem I am addressing in this article. But only indirectly and conditionally. In fact, dr. Kristan proves that this concrete Constitutional Court decision is methodologically wrong. In this respect, it opens the door to the justified accusation that it was more “political” than “constitutional”. If we add to this, in good faith and with no ill intentions, the fact that some former judges who voted for this decision later became civil servants in one of the former
There is no such research on this exact issue. On the other hand, there are research papers, books and analyses by professors of constitutional law that explain theoretical, doctrinal or factual errors in too many Slovenian Constitutional Court decisions. But they seem, and this is very much the case, to be an end in themselves. They are not taken into account in the decisions of Constitutional Court, or in their statements: as an argument or as a quotation/reference.

9 Knowledge and Competence

A methodologically credible analysis of the constitutional court decision-making process, policies and results would be useful. I correct myself, that would be extremely important. The consequences would be considerable, at least in theory. Analytically observing how one’s own world view, moral compass and political philosophy are reflected in constitutional decision-making is an important contribution to understanding law and politics.

This is about something quite different from the problem of ideology: demonstrably too many constitutionally incompetent constitutional decisions along with too many unfounded, poorly explained and theoretically ignorant decisions and split opinions. And in this sense they are irresponsible. Too many of them!

Slovenian governments, we can really enter the controversial area of the possible accusation that this concrete decision was “daily-party-political”. But even with such a conclusion, we must be careful: even if the decision was methodologically wrong, this does not mean that the majority who voted for it was not convinced that they justified their decision with their constitutional convictions and not with their daily political references or sympathies. In other words, an analysis that would “prove” that certain decisions are “obvious” or “more than possible”, i.e. “quite likely”, either “daily-political left” or “daily-political right”, seems indeed to be an almost impossible challenge/project/analytical approach. A conceptual oxymoron, so to speak. For it is intended to prove that such decisions are either not based on constitutional arguments at all or that these constitutional arguments are only illusory because they are not tenable at first glance and without a detailed methodological analysis. As I said, such decisions do exist, but there is no analysis to prove the existence of such decisions. Even those decisions that critical experts accuse of the work of Constitutional Court occasionally being unconvincing in terms of content or of replacing the power of an argument with an argument of power are not due to “left-right party fanatism”, but mainly to the lack of constitutional knowledge and skills in legal argumentation. And this is one of the central elements, one of the central messages of this article. See also Kristan 2016.

My younger colleagues, professors of law, have just finished (in 2019) the first part of a research project (coordinated by prof. dr. Matej Avbelj et al.) at the European Faculty of Law, New University (Ljubljana & Nova Gorica, Slovenia). In this research project, the decision-making process of the Constitutional Court over a certain period of time was analyzed from an economic, social and authoritarian perspective. However, it notes that the Slovenian Constitutional Court is conceptually inconsistent in its constitutional review of the state’s economic measures (economic aspect) and that it assesses the constitutionality of mutual relations between legal entities (social aspect) rather than identifying violations of constitutional rights and freedoms by the state (authoritarian aspect). Even if the subject matter and analysis (problem) of this research project is not directly related to the problem I discuss in my article, it is still worth mentioning. There should be more projects and research analysis of similar constitutional issues.

See, for example, a monograph of the former constitutional judge and the vice president of the Slovenian Constitutional Court Ribičič 2010, where the former Justice highlights some of the decisions made by Constitutional Court those at a time when he himself was a judge of this court: It does not seem superfluous to point out that several decisions of Constitutional Court those he rejected as a judge and gave them a dissenting opinion are the only ones which are opposed to the majority decision, which was later annulled by the ECtHR.

If I have missed some of the Slovenian Constitutional Court decisions citing one of the critical analysis of some of the Court’s decisions, or the argumentative evaluation of a particular decision, or the decision-making policy (conceptual, philosophical, and “case-resolving policy” approach) of the Constitutional Court towards cases to be decided, in concrete or in general, I apologize in bona fide.

I have written and published constitutional analysis of this kind in late 2000, under the title “Constitutional Court and the Parliament: the doctrine on the “escalation of sanctions” of the Constitutional Court for unfulfilled constitutional judgments (2000: I-XVI). Now it is available online as a part of my e-book, titled: Vrnitev v ustavnopravno preteklost (2020). But even this analysis does not deal with the question of “left or right” marking of the Slovenian Constitutional Court decisions, but rather with the question of how the former judges of the Constitutional Court voted and (on the basis of previous votes) would very probably vote on some of the most important and controversial constitutional issues: e.g. on the “escalation of sanctions” against the legislator avoiding to implement the Court’s decision into legislation; then on “constitutional activism”: creating law by decisions of the Constitutional Court; also by filling in the so-called “legal gaps” in the Acts/Statutes; such as on the possibility of “annulment of elections” due to unconstitutionality of some parts of the electoral laws; etc. I consider this generation of judges to be the “silver generation” of Slovenian constitutional judges. Namely, I consider the first generation to be the “golden generation”: above all because they “plowed the furrow” in the establishment of Slovenian constitutional democracy. And they matured it well, successfully and with quality.

In his book Postmodern Ethics Bauman addresses the problem of “non-responsibility” among decision-makers, even or especially among civil servants and judges. In an otherwise very philosophical book, which does not mean easy reading, he deals with the problem of postmodern ethics from different angles. A book that every lawyer, and especially every judge, should read. See Bauman 2016.
However, when it comes to decisions in which political passion or constitutional ignorance takes the place of knowledge and the power of argument, or when the power of constitutional argument is replaced by naked arbitrariness, fortunately at least some of these decisions may violate the ECHR. They can be sent for an overview to another transnational institution, such as the Venice Commission or even the Court of Justice of the EU. They do not stop at the national border, like a double mirror in the “blue sky”.  

10 Legal Culture and Judicial System

The Constitution, the constitutional court judgments and the constitutional arguments are important matters for the lower courts in the USA. All courts decide on constitutional issues. Often they somehow compete with each other to provide a more convincing argument on the constitutional issue. Therefore, the US Supreme Court can afford to select the dozens or 100 cases per year. The lower court judges are interested in what has already been decided in a similar case by another judge or court. Especially by the US Supreme Court. They are assisted by the parties in proceedings that support their arguments by drawing on judicial precedents and the well-founded legal opinions of prominent judges. Judges in the USA are not forced to do this by any explicit legal provision, they simply understand why it has to be done.

It is a question of culture, intelligence, honor, duty, professional and ethical self-image - to be a judge and to try to be a THE judge, THE AUTHORITY. In Slovenia, similar to other post-socialist states, judges often act (even in their own words) “as if their hands were tied,” especially in the relation to the Constitution. But who or what constantly binds their hands? No one other than themselves. And how? With this irritating, unbearable and unreasonable rigidity of legal thinking. By following the words and sentences in paragraphs of the law, without thinking critically, without creativity, without courage, motivation and awareness to be responsible. Or, in particular, when the representatives of this honorable profession decide cases according to their own political convictions, emotional state, personal attitude or according to instructions “from above”, by fulfilling expectations or specific instructions regarding the final outcome of a legal proceeding, regardless of procedural law, substantive law and without regard to reasonable or even compelling logical reasoning based on the evidence presented.

The essence of most problems with the judicial system and within the judicial system concerns knowledge, intelligence, self-esteem, ethics, integrity and competence. To be neither “left nor right”.  

62 It is not only a question of »law« and constitutionality, it is also a question and a problem of »perverted narcissism« and “degeneration of democracy.” See Župančič 2011, chapter IV. and V.

63 “In one of its late decisions the Constitutional Court stated that a regular court is constitutionally not prevented from confronting its own views and interpretations of law and Constitution to the interpretations by the Constitutional Court. If persuasive and convincing, the arguments by the regular court may prevail. What the constitutional provision of article 22 demands is that the regular court may not simply overlook the argumentation of the Constitutional Court: it is bound to give reasons for its dissent with the Constitutional Court view and interpretation. The final Say whether the argumentation of the regular court in this respect was satisfactory, however goes to the Constitutional Court» (Testen 2003). Comp. Nunez Vaquero 2013.

64 In some of my published professional articles I have labelled this phenomenon as (in Slovene) »zakonistično prečrkarjenje in legalistični zakonizem«: or in English (as closest as I can get with the translation) »legalistic transliteration« and “legalistic legalism.”

65 But (and there usually is some »but« in legal matters), according to the Constitutional Court Act the ordinary (regular) courts have to stop the procedure if and when they tackle (recognize) a constitutional problem and address the Constitutional Court with the question what is the constitutionally correct interpretation of the particular statutory provision(s). See Article 23 of the Constitutional Court Act: “(1) A court which, in its decision, considers a statute or part of a statute to be applied by it to be unconstitutional shall suspend the proceedings and initiate proceedings with a request for a review of its constitutionality.(2) If the Secretary-General of the United Nations Supreme Court considers that a law or part of a law which he is called upon to apply is unconstitutional, he shall suspend the procedure in all cases where he is called upon to apply such a law or part of a law when deciding on appeals and shall initiate a procedure to examine the constitutionality of the law.(3) If the Supreme Court applicant has initiated proceedings to assess the constitutionality of a statute or part of a statute, the court which is to apply that statute or part of a statute in making its decision may suspend the proceedings until the final decision is made on the proceedings Constitutional Court initiated to assess the constitutionality of a statute or part of a statute.” Available at: <https://www.us-rs.si/legal-basis/statutes/?lang=en> (4.8.2020)

66 See Immanuel Wallerstein: THE UNCERTAINTIES OF KNOWLEDGE. Philadelphia, USA: Temple University Press, 2014.
Therefore, a good US judge is at the same time a good constitutional interpreter, an expert in the corpus of constitutional theory, precedents, concepts and doctrines. And it is understandable that the excellence of a judge’s career is crowned by a position on the US Supreme Court. This is a special honor, an indelible record in the history of the greatest legal figures and authorities. It is different in Slovenia. We are still discussing “differences between legal Anglo-Saxon and continental legal traditions”, between “casuistry and precedents”, between “formal and informal sources of law”, etc. Without inconvenience. Direct application of the Constitution by ordinary judges and courts is rare. Almost non-existent. Too often the Constitution is pushed aside with ridiculous cynicism. Sometimes with poignant rage. Even with phrases such as “yes, the Constitution, my young colleague, but for us, the judges of the ordinary courts, it is the Statutes/Acts that count, not the Constitution, these floating bubbles of constitutional scholars.”

All too often the decisions of the Constitutional Court are overlooked by the ordinary courts. Not as a bona fide mistake and simple negligence, but (so I claim) on purpose. Recklessly. In arrogant and arbitrary manner. In a sense of the “argument of power”: nobody can physically force the court or its senate or its judges to follow, read, analyze and implement the Constitutional Court decisions in their own judicial decisions. It is not just a matter of unprofessional negligence.

There is also a considerable ignorance of dissenting opinions and constitutional theory, and trust in unventilated post-socialist legal literature and culture. This is reflected in too many justifications for the verdicts of the ordinary courts.

The argumentative and competent handling of constitutional issues is hardly perceptible throughout the entire legal system. It is rare that a court case is stopped by ordinary judges and sent to the Constitutional Court with a question about the constitutionality of a particular law or about a constitutionally correct interpretation of the law, even if this possibility is required by law. However, most judges consider it a simple possibility rather than an obligation. Therefore, judges of ordinary courts are clearly not the best candidates for constitutional office. It is a question of verifiable competence, not a question of “left or right”. And who is most competent to make constitutional decisions? This is obvious, reasonable, logical and verifiable: excellent lawyers, excellent professors of constitutional law and a younger generation of outstanding constitutional scholars.

It is a fact: »With the great proliferation of fundamental rights after World War Two, which Kelsen did not foresee, however, it has become increasingly difficult for constitutional courts to remain purely negative legislators.« This fact - Constitutional Courts produce LAW - makes it all the more important to secure their power and reputation according to the criteria of knowledge, clarity of constitutional thinking and open-mindedness.

11 Resistance and contempt for criticism

The decisions of the Constitutional Court are published publicly and can be read and commented on. The organizational and functional structure of the Constitutional Court Constitutional Court is based on the function of professionalism of the institution. However, the quality of the constitutional decision-making process is determined (as explained above) by the personal structure of the “judges” of the Constitutional Court; with more or less professional and personal
authority. And this authority is not always based on their legal work in the past and their knowledge of constitutional law. This condition is reflected in every argument (material legitimacy) of the decisions taken and also, in the ability to formulate theories, doctrines and concepts. It is also reflected in the attitude towards professional criticism, comments on the Constitution, the constitutional commentary, analyzes of court decisions, separate opinions of other (current and former) judges, in the legal literature, judgments of comparable courts, judgments of the ECHR, previous court decisions, etc. and in their separate opinions. It is worth mentioning: Constitutional Court majority of judges in office are seriously trying to abolish separate opinions! Informally, of course.72

12 Legal education

The historically rooted way of teaching law in Slovenia is quite different from that in the USA. This means that the teaching of the constitution, constitutional theory, constitutional argumentation and constitutional decision-making and, above all, the strengthening of legal thinking and argumentation as skills and virtues is quite different in the USA than in Slovenia. In the USA, the quality of legal thinking, analysis, argumentation, the cross section of legal precedents and the persuasiveness of legal conclusions is emphasized.73

There are of course exceptions. Some of the legal scholars are exceptional and try to make curricular and pedagogical changes. Some excellent professors of the older generation and younger representatives of the academic world bring hope. One gets the impression that things are moving slowly, but at least some changes are coming. Concrete systemic results will of course have to wait.

It is a question of quality and competence, not a question of “right or left”.

13 So The „Right-Left“ Label is a Populistic Myth?

For me, these are the main reasons for the claim that the constitutional court label “right or left” has become a myth: because it is exaggerated, this label is constantly used, even when there are no real reasons for it, and the question of competence is almost completely overlooked. But competence is crucial. Constitutional competence for a seat on that constitutional court can be checked on the basis of the candidates’ previous professional and public work. The procedure and the way to obtain them is demonstrably clear: years of concentrated study of constitutionalism, constitutional law, constitutional decision-making and legal argumentation. The competences are reflected in every rejection of the constitutional application “as obviously unfounded” and in every rejection of the constitutional complaint as such - without justification/justification. The competences are also reflected in the “personal” statistics of such “rejections” from one constitutional judge to another. And these statistics differ greatly from one another.74

The label “right or left” is primarily a technique for selecting candidates for the office of constitutional judge and the rhetoric most commonly used in public. In public comments on the constitutional court decisions, this bipolar label is overwhelmingly accepted.75 It is constantly conquering public space. Even if a particular judge repeatedly addresses the public with his or her concurring or dissenting opinions, and even these are excellent constitutional essays, it is very hard, if not impossible to escape this stigmatized labeling, once it is put on a particular person/lawyer/judge.76

72 See Teršek 2020.
73 In Slovenia, students have to mainly memorize textbooks, scripts and paragraphs of statutes by heart. As in the case of the national bar exam, candidates have to learn almost the entire legal system - the statutory paragraphs - by heart. I strongly think this element, or better, this characteristic of the national legal culture and consciousness is too important to be silenced about it – and not reformed.
74 Comp. Letnar Černič 2016. Letnar Černič 2020.
75 It would take too much space to quote every or just especially chosen public statements in media of such nature and content. It is not merely about such “approaches” or “deeds”: this became an overwhelming habit. It would be quite enough to search through the media reporting on this year’s process of appointing candidates for an empty seat at the Constitutional Court of the Republic of Slovenia and on voting on the candidacy of the candidate who was finally recommended to the National Assembly by the President of the Republic of Slovenia.
76 I am thinking mainly of the two constitutional judges: a former judge, prof. emer. dr. Ciril Ribičič and currently sitting constitutional judge prof. ddr. Klemen Jaklič. Constitutional (judging and academic) works of both of them, their separate opinions, concurring or dissenting (the
This inappropriate identification with the “left-right” marking is to be understood as a degradation of human personality and professional dignity. So yes: “right-left” is a myth when it comes to the essence of constitutional legislation. It is not only highly irritating. It is also a very foolish and stupid myth. And extremely unprogressive.\(^7\)

### 14 Closure

So, I conclude with the argumentation: this kind of “populism” creates such social conditions, and on the other hand, conversely, it is precisely these social conditions that perpetuate, reinforce and deepen the problem of this kind of populism. For this reason, and above all for this reason, the concepts defined normatively as values (constitutional democracy, constitutionality, rule of law, Welfare State, etc.) remain a “dead letter on paper” most of the time.\(^7\)

For me this is the most obvious, transparent, harmful and devastating consequence of this kind of complete and pervasive populism.\(^7\)

This problem has even led to a situation in which the individual no longer has the right (de facto, not in a formal sense of course) to choose and define his or her own identity. It is imposed on him/her - from outside. The individual is forced into a “right or left” identity and accepts such a label. Through the media, most of the public and daily politics. And then people label each other as “right or left.”\(^8\)

But these two words are hollow, empty, meaningless. They only mean “forced assumption” that one is and must be biased either “left” or “right”. These labels no longer have anything to do with political philosophy and the concepts of political philosophy.\(^8\) And they are so narrow, so hollow and so intellectually poor that they cannot even be compared to what it means to be a “democrat” or a “republican” in the USA, for example.\(^8\) They are only and exclusively populist labels.

In public speaking and speaking aloud, which is something quite different from “public discourse” and “real thinking”, shrinks, so to speak, to the maximally simplified and totally simplistic, even “stupid” use of only these two words “left” and “right”, the complete and absolute absence of real, reasonable and clear political thinking (non-thinking!) can prevail alongside populism and anti-politics. And it has prevailed. Few people escape it, regardless of their profession or public social role. That is why they are constantly confronted with problems - with “terrible difficulties”, professionally, publicly and privately. And that is why they are gems, that is why they are an invaluable remnant of humanism, humanity and intellect in modern society.\(^8\)

...
From the perspective of the newly created European democracies and the new European constitution, another important fact cannot be overlooked. Prof. Smerdel explains the modern approach to understanding constitutions and “constitutional decisions.” Constitutional decisions are based on the careful selection of institutions and a careful assessment of traditions and society’s ability to accept innovations and gradually develop them in a democratic direction. Thoughtful and “sober”, perhaps not revolutionary expectations and the awareness that constitutional development depends on many elements and not only on the mere text of the constitution must be linked to constitutions.

Prof. Smerdel argues for post-communist countries that the purpose of the newly adopted constitutions was not to record the results of the democratic development already achieved, but to provide opportunities for a completely different direction of development. These countries have usually produced good constitutional texts. Some of them went even further than their Western European role models and enshrined in the constitutions guarantees for rights and freedoms and the brakes and balances of power. These include those which, due to historical tradition and actual social circumstances, cannot yet be translated into the reality of the political process, social life, economic development and the evolving rule of law. The prevailing “constitutional optimism” has therefore in some places caused very obvious and major problems in implementing the written constitutional rules, principles and guidelines. As a result, the constitutional texts are frequently amended, not only by additions but also by extensive changes in content. Their problem is not only the content, but above all the speed with which they have been implemented and the daily political purpose they are trying to achieve. Smerdel is convinced that the “fundamental constitutional decision”, which presupposes a consensual decision by the people on the basic rules and principles of common life in a politically organized community, has not yet taken place. The next step, the gradual implementation of these rules and principles of the “constitution as a living organism” in the life of the political community and thus its consolidation and further development, therefore, seems to lie in an uncertain future.86

I agree.85 Adding: so who is our Fred and when, not to say where will we find him?86

Taking all the above into a consideration, my great concern is that this Populist Monster, this simplification as an ideology in itself, 87 is devastating for the future of the rule of law and constitutional democracy, and that it will even increase over time... But the most important answer (and intellectual challenge) remains also: “To understand the Constitution.”88

Acknowledgments: I would also like to thank to prof. dr. Bruce Ackerman for his kind and motivational personal responses. I dedicate this article to esteemed scholars, former constitutional justices and more than friends prof. emer. dr. Ciril Ribičič and mag. Matevž Krvic.

References

Alec Stone Sweet: GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE. New York: Oxford University Press, 2000.
Aleksander M. Bickel: The Least Dangerous Branch. New Heaven, London: Yale University Press, 1986.
Aleksander M. Bickel: THE LEAST DANGEROUS BRANCH. New Heaven, London: Yale University Press, 1986

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84 See Smerdel 1993; Smerdel 2003: 7-8.
85 In such social realm there is a vast space for the so-called «dialogue theory», but the social reality and practice is different. See Peter 2006: 524, citing Iacobucci, Mr. Justice of the Canadian Supreme Court: «To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation... This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.» Yes, most certainly so. However, dialogue between the branches of government, especially between that Constitutional Court and Parliament, is something very different from the mere disobedience of Parliament and its arbitrary manipulation, disregard and non-implementation of Constitutional Court decisions: not because of a different understanding and reading of the Constitution, but solely because of short- and medium-term (political-party) interests and motives. This is one of the reasons why I argue the constitutional courts of the Council of Europe Member States should accept the doctrine of unconstitutional constitutional amendment.
86 Comp. Redondo 2016.
87 Žižek 2012: 22. Is it not also a (at least in Aristotelian-Žižek-Gaebler sense) “political idiocy” problem?
88 See Kristan 2014.
Donald P. Kommers: THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY. Durham and London: Duke University Press, 1997.

Drank Dikötter: HOW TO BE A DICTATOR: THE CULT OF PERSONALITY IN THE TWENTIETH CENTURY. Bloomsbury Publishing, 2019.

Duhigg Charles: MOC NAVEDE (The Poer of a Habit). UMco, Ljubljana, 2015.

ECHRcaselaw.com. Available at: <https://www.echrcaselaw.com/en/constitutional-democracy/a-critique-of-wrong-constitutional-teaching-regarding-the-concept-of-sovereignty-of-the-people-and-the-prevailing-model-of-constitutional-democracies-in-europe/>

Ed Yong: HOW PSYCHOPATHS SEE THE WORLD. IT'S NOT THAT THEY CAN'T CONSIDER OTHER PEOPLE'S PERSPECTIVES. IT'S THAT THEY DON'T DO SO AUTOMATICALLY. The Atlantic. 12.3.2018. Available at: <https://www.theatlantic.com/science/archive/2018/03/a-hidden-problem-at-the-heart-of-psychopathy/555335/> (3.8.2020).

Eliane Glaser: ANTI-POLITICS: ON THE DEMONIZATION OF IDEOLOGY, AUTHORITY AND THE STATE. Repeater, 2018.

Franc Testen: THE BINDING FORCE OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF SLOVENIA. Conference of the Venice Commission. Tirana, 28th – 29th of April 2003.

Frank Benjamin: YOU KNOW YOU’RE A REPUBLICAN/DEMOCRAT IF . . . . Sourcebooks, 3rd Edition, 2016.

Frank Dikötter: HOW TO BE A DICTATOR: THE CULT OF PERSONALITY IN THE TWENTIETH CENTURY. Bloomsbury Publishing, 2019.

Gary Dorrien: SOCIAL DEMOCRACY IN THE MAKING: POLITICAL AND RELIGIOUS ROOTS OF EUROPEAN SOCIALISM. Yale University Press, 2019

Gary Halpin & Chris Carter: THE DIFFERENCE BETWEEN DEMOCRATS AND REPUBLICANS: INTRODUCTION TO VOTING IN AMERICA. CreateSpace Independent Publishing Platform, 2011.

Glenn Greenwald: Should the Populist Left Work with the Populist Right Where They Have Common Ground, or Shun Them? The Intercept. 25.6.2020. Available at: <https://theintercept.com/2020/06/25/should-the-populist-left-work-with-the-populist-right-where-they-have-common-ground-or-shun-them/> (2.8.2020)

Hannah Arendt: VITA ACTIVA. Krtina, Ljubljana, 2006.

Hannah Arendt: THE ORIGINS OF TOTALITARIANISM. Harcourt, Brace, Jovanovich; First Edition, 1973

Hannah Arendt: VITA ACTIVA. Krtina, Ljubljana, 1986.

Harry Arthurs: VOX POPULI: POPULISM, THE LEGISLATIVE PROCESS, AND THE CANADIAN CONSTITUTION. In Richard W. Bauman & Tsvi Khana: The Least Examined Branch. The Role of Legislatures in the Constitutional State. Cambridge University Press. Printed in the USA, 2006, pp. 155-179.

Immanuel Wallerstein: THE UNCERTAINTIES OF KNOWLEDGE. Philadelphia, USA: Temple University Press, 2014.

Jon Ronson: THE PSYCHOPATH TEST: A JOURNEY THROUGH THE MADNESS INDUSTRY. Riverhead Books, 2012

Jonathan Haidt: THE RIGHTSIDE MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION. Penguin, 2013

Julie L. Hall: NARCISIST IN YOUR LIFE. Kindle Edition. Da Capo Lifelong Books, 2019

Kashmir Hill: USING TWITTER TO IDENTIFY PSYCHOPATHS. Forbes. 20.7.2012. Available at: <https://www.forbes.com/sites/kashmirhill/2012/07/20/using-twitter-to-help-expose-psychopaths/#555f97b6f82d> (3.8.2020)

Kenneth Einar Himma: Conceptual Jurisprudence. An Introduction to Conceptual Analysis and Methodology in Legal Theory. Revus, No. 26/2015, pp. 65-92.

Klemen Jaklič: CONSTITUTIONAL PLURALISM IN THE EU. Oxford University Press, 2014.

Krystal Ball, Saagar Enjeti: THE POPULIST'S GUIDE TO 2020: A NEW RIGHT AND NEW LEFT ARE RISING. Strong Arm Press, 2020.

Larry Alexander: CONSTITUTIONALISM. Cambridge: Cambridge University Press, 1998.

Le Bon Gustave: PSIHOLOGIJA MNOŽIC (Psychology of Masses). UMco, Ljubljana, 2016.

Leo Panitch, Sam Gindin: THE SOCIALIST CHALLENGE TODAY: SYRIZA, CORBYN, SANDERS – REVISED. Updated and Expanded Edition. The Merlin Press Ltd., 2019.

Lorena Ramirez Liden: Legal disagreements, A pluralist reply to Dworkin’s cchallenge. Revus. No. 28/2016, pp. 11-32.

Lovro Šturm (ed.): KOMENTAR USTAVE REPUBLIKE SLOVENIJE (Commentary on the Constitution of the Republic of Slovenia). FPDEŠ. Ljubljana (2002).

Luka Burazin: Posredno in neposredno vrednujuca teorija prava. Odgovor Julie Dickson. Revus. No. 20/2013, pp. 35-45.

Maartje de Visse: CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS (European and National Constitutional Law Series). Hart Publishing, 2015.

Michel Foucault: VEDNOST - OBLAST – SUBJEKT (Knowledge - authority – subject). Založba Krtina, Ljubljana, 2019.

Michel Rosenfeld: CONSTITUTIONAL ADJUDICATION IN COMPARATIVE PERSPECTIVE. THE EUROPEAN MODEL AS AGAINST THE AMERICAN IN TERMS OF POLITICAL LAW AND INTERPRETATION. Conference on Constitutional Law. Washington. 2002.

Mitchel Lass: ANTICIPATING THREE MODELS OF JUDICIAL CONTROL, DEBATE AND LEGITIMACY: THE EUROPEAN COURT OF JUSTICE, THE COUR DE CASSATION AND THE UNITED STATES SUPREME COURT. Jean Monnet Working Paper No. 1. New York: NYU School of Law, 2003.
Mladen Dolar: OČITNO SMO NEOLIBERALIZEM PRIPRAVLJENI KUPITI – Z NASMEŠKOM BRATUŠKOVE ALI MIRA CERARJA (Eng.: “Obviously we are ready to buy neoliberalism - with a smile from Bratuškova or Miro Cerar”). Mladina. 31st of December 2012. Available at: https://www.mladina.si/163249/dr-mladen-dolar/ (full access)

Noam Chomsky: 9-11: Was There an Alternative? Open Media Book. Seven Stories Press; Updated, Expanded, Anniversary edition, 2011

Noam Chomsky: Profit Over People: Neoliberalism & Global Order. Seven Stories Press, 1999.

Alvaro Nunez Vaquero: Five Models of Legal Science. Revus. No. 19/2013, pp. 53-81.

Owen Jones: The left needs a new populism fast. It’s clear what happens if we fail. The Guardian. 10.11.2016. Available at: <https://www.theguardian.com/commentisfree/2016/nov/10/the-left-needs-a-new-populism-fast> (2.8.2020)

P. T. Elliott: THE SOCIOPATH’S GUIDE TO GETTING AHEAD: TIPS FOR THE DARK ART OF MANIPULATION. Kindle Edition. Skyhorse, 2018

Paul Keaveny: In defence of left-wing populism. The Conversation. 29.4.2016: Available at: <https://theconversation.com/in-defence-of-left-wing-populism-55869> (2.8.2020)

Peter Jambrek (ed.): METODOLOGIJA ZNANSTVENEGA RAZISKOVANJA (Methodology of Scientific Research). Nova univerza, Nova Gorica, 2020.

Peter Jambrek: Nation’s Transitions. Evropska Pravna fakulteta, Ljubljana (2015a).

Peter Jambrek: USTAVA IN SVOBODA (Constitution and Freedom). Evropska Pravna fakulteta (2015)

Peter Jambrek: USTAVNA DEMOKRACIJA; GRADITEV SLOVENSKES DEMOKRACIJE, DRŽAVE IN USTAVE (Constitutional Democracy; building Slovenian Democracy, the State and the Constitution). Državna založba Slovenije, Ljubljana (1992)

Richard W. Bauman & Tsvi Kahana: THE LEAST EXAMINED BRANCH. THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE. Cambridge University Press, printed in the USA, 2006.

Richard W. Bauman & Tsvi Kahana: THE LEAST EXAMINED BRANCH. THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE. Cambridge University Press, printed in the USA, 2006.

Slavoj Žižek: ŽIVLJENJE V ČASU KONCA (Living in the End Times). Cankarjeva založba. Ljubljana (2012)

Teršek Andraž, Toplak Jurij: KJE V SLOVENIJI SODIŠČA KRŠIJO USTAVNE PRAVICE - KRŠITVE USTAVNIH PRAVIC PO OBMOČJIH VIŠJIH SODIŠČ (Where in Slovenia do courts violate constitutional rights - violations of constitutional rights in the areas of higher courts). Pravna praksa, no. 30-31/2017. 24.8.2017

Tonči Kuzmanić: USTVARJANJE ANTIPOLITIKE: ELEMENTI GENEALOGIJE DRUŽBOSLOVJA (In Engl.: Creating antipolitics: elements of the genealogy of the social sciences). Znanstveno in publicistično središče. Ljubljana, 1996.

Vann Vicente: WHAT IS AN INTERNET TROLL? (AND HOW TO HANDLE TROLLS). How-To Geek. 21.1.2020. Available at: <https://www.howtogeek.com/465416/what-is-an-internet-troll-and-how-to-handle-trolls/> (3.8.2020)

Will Kymlicka: CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION. Oxford University Press, 2001.

Yanis Varoufakis: THE GLOBAL MINOTAUR: AMERICA, EUROPE AND THE FUTURE OF THE GLOBAL ECONOMY. Third Edition. Zed Books, 2015.

Zdenek Kühn: FROM STALINIST ANTI-POSITIVISM TO SOCIALIST TEXTUALISM. CENTRAL EUROPEAN JUDICIAL METHODOLOGY DURING THE COLD WAR. (Unpublished version given to me by the judge of the ECHR)

Zdenek Kühn: MAKING CONSTITUTIONALISM HORIZONTAL: THREE DIFFERENT CENTRAL EUROPEAN STRATEGIES. University of Michigan & Charles University Law School Prague, 2003.

Zygmund Bauman: POSTMODERNA ETIKA (Postmodern Ethics). Znanstvena založba Filozofskе fakultete. Ljubljana (2016).
About the author

Andraž Teršek, born in 1975, graduated Constitutional Law from the Faculty of Law at the University of Ljubljana. As a legal theoretician and philosopher, but above all as a constitutional scholar, he is a representative of the legal avant-garde in Slovenia. For ten years he worked as a pedagogical assistant at the Faculty of Law of the University of Ljubljana. Since 2008 he has been a lecturer at the Faculty of Education and Humanities, at the University of Primorska (Koper) and at the Faculty of Law of the New University Nova Gorica & Ljubljana. He lectures on constitutional law, human rights and freedoms, ethics, political science, psychology, education and active critical citizenship. He is the author or co-author of a number of books, of which the books The Theory of Legitimacy and Contemporary Constitutionalism, Social Constitutional Democracy, Ethics of Politics - on Essayistic Commentary of the Constitution with a New Constitution and Freedom of Expression received the most attention. He is the author of several scientific and professional monographs, the editor of several scientific collections of papers and the author of numerous scientific, professional and popular science articles, commentaries and blogs. As an active critical citizen, he works through frequent public appearances in the form of newspaper articles, commentaries, interviews and lectures. He designed and co-founded the first Slovenian academic journal on constitutional law REVUS. In 2013 and 2016 he received the “Prometheus of Science - for outstanding achievements in science communication” award. He is a member of the unofficial list of the “Ten most influential lawyers” in Slovenia. He published a novel in 2014 and a book of philosophical poetics in 2018.

In July 2020, the President of the Republic of Slovenia proposed him as a candidate for the vacant post of judge of the Constitutional Court Republic of Slovenia to the National Assembly of Slovenia. Before the vote, the parliamentary groups publicly promised him their support and publicly announced a majority (50 guaranteed votes, out of 46 needed). During the vote itself, eight deputies cast invalid votes, with the result that he was not elected (got only 42 votes).

Shortly afterwards, he submitted an initiative for a constitutional review of the provisions in the National Assembly Proceedings Act ruling “secret ballot”, which in practice proved not to be truly “secret”. He also submitted a constitutional complaint against the actions, omissions and total silence regarding these events of the President of the Republic of Slovenia. In doing so, he has once again stirred up a lot of dust in public. A part of the media and journalists accepted his actions in good faith with understanding, and a part of the media and journalists reacted sharply and aggressively, not to say vulgar to his move. At the beginning of August 2020, when this article was submitted for peer-review, it is not yet known whether his application for meritorious consideration will be accepted at all by the Constitutional Court, nor is it known whether Dr. Teršek will insist on this role. The deadline for sending candidacies for the empty seat at the Slovenian Constitutional Court, due to a new Call for candidacies officially invoked by the President of the Republic, is set on 11th of September 2020.