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12 If Schmitt Were Alive…Adjusting Constitutional Review to Populist Rule in Serbia

Violeta Beširević[*]

12.1 Introduction

It has already been some time that populism has returned to political arena worldwide. Although populism means different things for different people, there are no doubts that populist politics reveals the growing vulnerability of constitutionalism. Thus, it is generally agreed that populists have been persistently (and successfully) eroding what Rosalyn Dixon and David Landau call "substantive 'minimum core' of democracy": commitments to free and fair elections, the separation of powers, fundamental rights and governmental accountability.[1] However, the aim of this chapter is not to join an open discussion on what populism stands for. Instead, the focus will be on the issue of whether courts can confront populism.

In conventional democracies, constitutional review is the logical companion of a constitution and competitive political system. It is established with an aspiration to secure the basic goals to which democracy is streaming: the supremacy of the constitution, human rights consciousness and alleviation of parliamentary tyranny.[2] However, the relationship between the courts and the political institutions of the representative government is always tense, due to the ever-present allegation that constitutional review deprives the constitution of its legitimization by the constituent power.[3]

This constant tension particularly escalates during the emergency crisis (whether a real or fabricated), when the populist executive tends to exclude the emergencies measures from a judicial check, claiming that the rule of law cannot govern the state of crisis. Having

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1 *See* R. Dixon, *'Populist Constitutionalism and the Democratic Minimum Core', VerfBlog,* 26 April 2017, pp. 1-2, https://verfassungsblog.de/populist-constitutionalism-and-the-democratic-minimum-core/.

2 V. Beširević, 'Constitutional Review in a Democratic Deficit Setting: The Case of the European Union', *in* M. Jovanović (Ed.), *Constitutional Review and Democracy*, Eleven Publishing International, The Hague, 2015, pp. 83-107.

3 A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, CEU Press, Budapest, 1999, p. 240.

in mind that in the emergency first to suffer are civil liberties, many, like David Cole, warn that if "extraconstitutional measures are appropriate during emergencies, and that the only real check is political, much would be lost and little gained in the protection of civil liberties".[4]

In mapping the actors available to challenge populism, some find the courts, in particular, constitutional courts, to be among the most relevant resources to oppose the populist rule.[5] The courts responded differently to this kind of a new threat, however.[6]

On one hand, constitutional courts, in cooperation with populist forces, have proven effective in undermining democratic order.[7] Some courts themselves, like the Venezuelan Supreme Tribunal or Israeli High Court of Justice, have embraced populism.[8] The US Supreme Court joined this group recently. Whether because it is currently ill-equipped to resist populism,[9] or because travel ban policy fits into security issues on which courts are generally prone to defer to the political institutions, or for other reasons, but its green light to Trump's controversial travel ban seriously questions the ability of the courts to limit the manoeuvring room for the populists.[10] On the other hand, some courts, like the US lower courts that blocked Trump's travel ban[11] or the UK Supreme Court, which made UK politicians go back to Parliament to implement the Brexit vote,[12] managed to resist the populism and defend constitutional values.

This chapter aims to advance a general question of whether the courts, in particular constitutional courts, can confront the politics of populism, by assessing the approach of the Serbian Constitutional Court to the populist politics in Serbia. Based on the Serbian example, I will show that the courts, which have never served as 'counter-majoritarian difficulty', can hardly confront the populist regime and be an alternative to resist populism.

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4 D. Cole, '*Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis', Michigan Law Review, Vol. 101, No. 8, 2003, p. 2587.*

5 *See, e.g.*, C. R. Kaltwasser, 'Populism and the Question How to Respond It', *in* C. R. Kaltwasser *et al.* (Eds.), *The Oxford Handbook of Populism*, Oxford University Press, Oxford, 2017, pp. 493-494.

6 M. Hailbronner & D. Landau, *'Introduction: Constitutional Courts and Populism', VerfBlog,* 22 April 2017, pp. 3-5, https://verfassungsblog.de/introduction-constitutional-courts-and-populism.

7 D. Landau, 'Term Limits Manipulation across Latin America – and What Constitutional Design Could Do About it', *Constitutionnet*, 21 July 2015, www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-whatconstitutional- design-could-do-about-it.

8 *Id. See also* A. Harel, '*Courts in a Populist World', VerfBlog,* 27 April 2017, p. 1, https://verfassungsblog.de/courts-in-a-populist-world.

9 Long before the Supreme Court upheld Trump's travel ban policy, Or Bassok argued that "[t]he American Supreme Court is currently ill-equipped to confront populism". *See* O. Bassok, *'Trapped in the Age of Trump: the American Supreme Court and 21st Century Populism Or', VerfBlog,* 28 April 2017, p. 1, https://verfassungsblog.de/trapped-in-the-age-of-trump-the-american-supreme-court-and-21st-centurypopulism or.

10 *See Trump, President of The United States, et al. v. Hawaii et al.*, No. 17-965, 585 *U.S.* (2018).

11 Several U.S. lower courts blocked Trump's travel ban policy. *See, e.g.*, *State v. Trump*, 265 F. Supp. 3d 1140 (2017); *International Refugee Assistance Project v. Donald Trump*, No. 17-1351 (2017); *Aziz et al v. Trump et al.,* No. 1:2017cv00116 – Document 111 (E.D. Va. 2017).

12 *R (Miller) v. Secretary of State for Exiting the European Union,* [2017] UKSC 5.

To prove that the Constitutional Court in Serbia has collaborated with the ruling populists rather than confronted them, I will assess the Court's rulings regarding Brussels Agreement, aimed at normalization of relations between Belgrade and Pristina, the government's austerity measures and the rulings concerning pre-trial detention ordered against persons accused of corruption in privatization cases.

To enter into the perspective of my view, it makes sense first to highlight the following two preliminary points: one regards the nature of post-Milošević Serbia's polity and the other relates to the position of the Serbian Constitutional Court in the constitutional framework and its role in democracy consolidation in Serbia.

12.2 A Note on Transition in Serbia[13]

Starting from the fact that the politics of populism is hostile to constitutional democracy (usually equated with liberal democracy), the first point I want to emphasize is that before a present populist administration took power in 2012, Serbia had been a state that had a constitution, but it had not practiced liberal constitutionalism. Several facts confirm this point.

The fall of the Berlin Wall in 1989 did not signal a substantial political rupture in Serbia, in the sense of liberalization from sham constitutionalism, as it did in the countries governed by the Soviet-style communism at the time. Approximately at the same time when the Central and Eastern European countries began to build their functional or semi-functional democracies, Yugoslav-style communism in Serbia was replaced by another type of authoritarian rule, installed by the adoption of the 1990 Constitution, at the peak of Milošević's rule. Besides, long delays in the transformation from communism to constitutional democracy were caused by the tragic war in the Balkans; several pressing needs to rethink the state, the territory and the people;[14] as well as an extended period of frustration with the international pressure to deal with the war legacy.

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13 This part of the chapter relies on my previous works: V. Beširević, 'Transitional Constitutionalism in Serbia: Is the Glass Half-Full or Half-Empty?', *in* V. Beširević (Ed.), *Public Law in Serbia: Twenty Years After*, European Public Law Organization & Esperia Publications Ltd, London, 2012; V. Beširević, '"Governing *Without* Judges": The Politics of the Constitutional Court in Serbia', *International Journal of Constitutional Law*, Vol. 12, No. 4, 2014, pp. 954-979.

14 Before regaining the status of an independent state in 2006, the country went through several wars and territorial remodeling. At the beginning of the Balkans conflicts in 1991, Serbia was a constitutive part of a large ex-Yugoslav federation. Following the dissolution of this original federation, Serbia emerged as a part of the Federal Republic of Yugoslavia formed by Serbia and Montenegro in 1992. To mitigate growing Montenegrin secessionist claims, and with a significant push from the EU, Serbia's political leaders compromised on the formation of the State Union of Serbia and Montenegro in 2003. This turned out to be a wrong strategy, and the short-lived Union collapsed when Montenegro declared its independence in 2006. Nor did the formation of an independent Serbian state bring political stability, since another wave of secessionist claims, this time coming from Kosovo, also proved to be successful and, in 2008, resulted in

When in the year of 2000 the Milošević regime finally collapsed, Serbia underwent what Sorensen termed a process of 'illiberal social transformation'.[15] Although some transitory arrangements pushed forward political reforms,[16] the adoption of the new Constitution in 2006 did not represent a clear departure from the authoritarian past. Thus, the Constitution reflected the tendency of the legislature, executive and judiciary to blend and overlap, instituted the mandate imperative, severely curtailing the freedom of members of parliament, and spoke incoherently on the vertical division of powers, which produced additional polarization in the Serbian society.[17]

Apart from constitutional imperfections, a lack of accountability, corruption, a weak position of courts, ombudsmen and other independent institutions, as well as naïve public support to unrestricted majoritarian democracy also posed challenges to the establishment of deeper constitutionalism in the country. Besides being patently illiberal, transitional constitutionalism in Serbia was also highly communitarian. From the very beginning of the transition, highly prioritized collective interests – retaining sovereignty over Kosovo and bolstering national loyalty – have become co-equal to, if not dominant over, rights-based liberalism. Additionally, in the aftermath of Kosovo's independence, the Constitution has been brandished as a tool of control aimed at furthering another proclaimed collective, but arguably rival, interest: the country's accession to the EU, which favours rather than constrains political liberalization.

The elections in 2012 confirmed the old thesis that 'authoritarianism is an inherent tendency of democratic regimes'.[18] The general elections held in spring 2012 brought a full-scale return of Milošević's former allies to power, for the first time since the democratic change in 2000. Thus, the leader of the Serbian Progressive Party (SNS), won in the presidential election, end ever since, the SNS, a Serbian version of a populist party, has run the country either on presidential or the governmental level or on both.[19]

Kosovo's unilateral declaration of independence and the amputation of a significant part of the country's territory. *See* Beširević, 2014, p. 958.

15 For more *see* J. S. Sorensen, 'War as Social Transformation: Wealth, Class, Power and an Illiberal Economy in Serbia', *Civil Wars*, Vol. 6, No. 4, 2003, pp. 55-82.

16 The abolition of capital punishment, the closure of military courts and the adoption of a modern Criminal Procedure Act with fair trial guarantees and defendant's rights are cases in point. In addition, the adoption of national minority rights legislation, religious communities' legislation (although not a masterpiece), and amendments to the Criminal Code, which eliminated the discriminatory approach in conceptualizing certain crimes related to sexual assaults, showed that these substantial changes were meant to protect from both totalitarianism and unfettered majoritarianism. *See* Beširević, 2014, p. 960.

17 I have explained this polarization in V. Beširević, 'Muke po Statutu: Da li će jezička dogmatizacja Ustava ukinuti političku autonomiju Vojvodine?' [Passion According to the Statute: Will the Textual Dogmatization of the Constitution Abolish the Political Autonomy of Vojvodina?], *Pravni zapisi*, No. 2, 2013, pp. 476-510.

18 For more *see* R. Pildes, 'The Inherent Authoritarianism in Democratic Regimes', *in* A. Sajó (Ed.), *Out of and into Authoritarian Law*, Kluwer Law International, The Hague, London, New York, 2003, pp. 125-149.

19 For a detailed analysis of the populist rule in Serbia, *see* the contribution of D. Spasojević in this volume.

On the whole, although there were some manifestations of emerging constitutional democracy before the ruling populist took power in 2012, Serbia closely resembled those political systems that were commonly classified as democratic but non-liberal.

12.3 A Silent Feature of the Constitutional Court

The valid Constitution (2006) clearly emphasizes the political dimension of the constitutional review. The Court, as an independent state authority, is empowered to exercise both a priori and subsequent judicial review and thus to declare invalid legislative acts adopted by the National Assembly. Besides, it is authorized to resolve conflicts of jurisdiction between horizontal and vertical branches of government, participate in the proceedings concerning impeachment of the president, resolve electoral disputes in the absence of other judicial proceedings, ban political parties, trade unions and civic organizations.[20] The Constitutional Court also serves as a last resort for an individual to file a petition claiming violation of rights by different state authorities.[21]

The Constitution stipulates the split-appointment mechanism, which minimizes, at least theoretically, the chance that any political institution makes influence over the politics of the Court. Thus, the President of the Republic appoints five judges from among 10 nominated by the Parliament; another five are elected by the Parliament, among 10 proposed by the President of the Republic; the last five judges are appointed at the general session of the Supreme Court of Cassation, among 10 candidates proposed by (arguably) independent bodies bestowed with judicial appointment powers – the High Judicial Council and the State Prosecutor Council.[22]

To impact democratic consolidation, the broad jurisdictional authority and safeguards regarding judicial independence do not suffice: the presence of the judges' willingness to

20 Art. 167 of the Serbian 2006 Constitution, which speaks on the Court's jurisdiction, reads: "The Constitutional Court shall decide on: 1. compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, 2. compliance of ratified international treaties with the Constitution, 3. compliance of other general acts with the Law, 4. compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law, 5. compliance of general acts of organizations with delegated public powers, political parties, trade unions, civic associations and collective agreements with the Constitution and the Law. The Constitutional Court shall: 1. decide on the conflict of jurisdictions between courts and state bodies, 2. decide on the conflict of jurisdictions between republic and provincial bodies or bodies of local self-government units, 3. decide on the conflict of jurisdictions between provincial bodies and bodies of local self-government units, 4. decide on electoral disputes for which the court jurisdiction has not been specified by the Law, 5. perform other duties stipulated by the Constitution and the Law. The Constitutional Court shall decide on the banning of a political party, trade union organization or civic association. The Constitutional Court shall perform other duties stipulated by the Constitution."

21 *See* Art.170 of the Constitution.

22 *See* Art.172 of the Constitution.

interfere and produce transformative jurisprudence is equally essential. This turned to be the Achilles' heel of the Serbian Constitution Court. Thus, despite the presence of highly divided politics in Serbia, which is continuously nudging the Court to intervene, the Court has not turned into 'a dog that barks and bites'. Simply put, before the present populist regime took power in 2012, the Serbian Constitutional Court had not been the relevant institution of governance. The Court had not managed to escape the communist-era legacy of dependency and distance itself from the strategy of strict deference to the ruling power, established and brought to the maximum level in the communist time.

In my previous work on the Serbian Constitutional Court, the scrutiny of the most controversial political cases capable to make changes in the public policy, including the cases concerning constitution-making, the state of emergency, judicial reform and political decentralization, confirmed the Court's proclivity to rule only when either its decisions became politically irrelevant or when the preference of the ruling majority became manifestly clear.[23]

The Court's inherent incapacity to contribute to democratic consolidation in Serbia also stemmed from its failure to build transformative 'jurisprudence' due to subjective legal-cultural perceptions of the judge-made law.[24] The production of highly technical and inconsistent rulings, the judges' subscription to a narrowly conceived positive jurisprudence, the absence of precedential authority and poor legal reasoning, substantiated the claim that constitutional review in Serbia has not amounted to an effective mechanism of governance.

In sum, the Serbian Constitutional Court never served as 'counter-majoritarian difficulty'. On the contrary, although rhetorically it has been considered as 'the guardian of the Constitution', in practice, it has rarely confronted political institutions, and instead of limiting the executive power, it adjusted constitutional review to its preferences. Its politics of strict deference to the ruling majority is all too present in the present populist rule in Serbia. Consider the following.

12.4 Constitutional Court in Populist Politics

Under the present populist rule slowly emerging constitutional democracy in Serbia has been gradually changed for Schmitt's identitarian and plebiscitary conception of democracy and populist constitutionalism. An appeal to 'the general will of the people', is used to a significant extent to erode the emerging institutions of constitutional democracy in Serbia, including separation of powers, governmental accountability and human rights protection. A shift towards 'the political guardian of the constitution' is justified by the claim that the

23 *See* Beširević, 2014, pp. 966-974.
24 *Id.*, pp. 974-978.

consent of the majority is the crucial ground of legitimation in politics. The state of emergency, reflected mostly in Kosovo's unilateral declaration of independence, the financial crisis which brought Serbia to the edge of bankruptcy, and the portrayal of the whole previous government as criminal and corrupt, gave then-prime minister and now the president, to paraphrase Schmitt:

> the opportunity to connect itself immediately with this unified political will of the Serbian people and to act, on that basis, as the guardian and the preserver of the constitutional unity and wholeness of the Serbian people.[25]

The fact that Serbia is in the 5th year of the Europeanization process, which is supposed to have a democratizing effect on candidate states during the accession period,[26] has not much changed the state of affairs. Moved predominantly by strategic reasons, instead of making the building of constitutional democracy the basis of the conditionality process of EU accession, the EU has made the stability of the Western Balkan region, including 'normalization of relations with Kosovo', a precondition of all conditions for Serbia's accession to the EU.[27]

As a result, unlike in the case of the EU accession of the Central and Eastern European countries, the very accession process has not influenced a consolidation of constitutional democracy in Serbia. On the contrary, the current ruling forces proved to be successful in cementing their authoritarian tendencies. Manipulation with the election process,[28] affirmation of draft constitutional amendments that increase rather than decrease politicization of the judiciary,[29] and progressive deterioration of media freedom well illustrate this point.

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25 Schmitt wrote: "The constitution, in particular, seeks to give to the guardian of the constitution authority of the president of the Reich the opportunity to connect itself immediately with this unified political will of the German people and to act, on that basis, as the guardian and the preserver of the constitutional unity and wholeness of the German people." *See* L. Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge University Press, Cambridge, 2015, pp. 172-173.

26 For more, *see* W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford University Press, Oxford, 2012.

27 *See* accession document, European Union Common Position: Chapter 35: Other Issues. Item 1: Normalization of Relations between Serbia and Kosovo, Brussels, 30 November 2015, AD 12/15, http://mei.gov.rs/upload/documents/pristupni_pregovori/pregovaracke_pozicije/ch35_common_position_eu.pdf.

28 Since 2012, in addition to regular elections on presidential level, parliamentary elections were three times held although ruling populists have qualified majority in the parliament.

29 In the EU accession process, the EU made it clear that no membership was possible without a thorough reform of the judiciary, including the necessary constitutional revision. The amendments to the Constitution are drafted to satisfy this obligation. Yet despite some envisaged improvements, draft constitutional amendments do not eliminate but rather reallocate the sources of political influence on the judiciary. For more see V. Beširević, '*The Draft Amendments to the Serbian Constitution: Populism before Judicial Independence', VerfBlog,* 24 April 2018, https://verfassungsblog.de/the-draft-amendments-to-the-serbian-constitution-populism-before-judicial-independence/.

In sum, the present populist rule in Serbia satisfies all three vital elements of populist constitutionalism defined by Jan Werner Muller.[30] First, there is a claim that the ruling populists speak for the will of ordinary citizens, and there is no need for mediation between the administration and the people by traditional democratic institutions, including political parties, parliament, media and courts. Second, a discourse that is critical of existing political and institutional arraignments is present. Third, the presence of anti-pluralist politics is evident.

The Serbian Constitutional Court has done nothing to prevent this undermining process. To confirm this claim, I will now turn to the Court's rulings regarding Brussels Agreement, aimed at normalization of relations between Belgrade and Pristina, the government's austerity measures and constitutionality of detention orders issued against persons accused of corruption in privatization cases.

12.4.1 Constitutional Review of Kosovo's Knot: If Schmitt Were Alive…

In Serbia, the most popular tool to mobilize public support has become a claim to retain sovereignty over Kosovo. At the time when they took power, the chances to open accession negotiations with the EU, proved a powerful enough incentive for the populists, often portrayed as hard nationalists, to refresh the process of political negotiations with Kosovo, this time as pre-accession rationality.

In 2013, after often exhausting talks pushed and supervised by the EU, Belgrade and Pristina signed in Brussels the "First Agreement on Principles Governing the Normalization of Relations".[31] The key provisions of the Agreement concern the governance of the northern part of Kosovo inhabited almost exclusively by Serbs, who rejected Kosovo's independence and have since lived in separation from the rest of Kosovo. Under the First Brussels Agreement, Belgrade and Pristina agreed that the northern part of Kosovo should come under the control of Kosovo's authorities as well, but should receive certain special self-determination prerogatives. Therefore, the agreement envisaged formation of the Association of Serb Municipalities in Kosovo.

The ink was barely dry on the First Agreement when in Belgrade, it was attacked as an evidence that Serbia recognized Kosovo. The Agreement was challenged before the Constitutional Court in Serbia by 25 MPs of the Serbian Parliament belonging to the opposition party which fanatically opposed both any negotiations with Pristina and candidacy of Serbia for EU membership.

30 For more *see* J. W. Müller, *'Populist Constitutions – A Contradiction in Terms?', VerfBlog,* 23 April 2017, https://verfassungsblog.de/populist-constitutions-a-contradiction-in-terms.

31 The Agreement was signed on 19 April 2013.

Now, there are not many situations that breach the logic of Kelsen's resistance to pure politics in the constitutional order than the situation which emerged in the aftermath of Kosovo's unilateral declaration of independence. In my view, the Brussels Agreement was not reached to allow the re-functioning of the state power on the territory of Kosovo but to protect the Serbian minority living in Kosovo and general state interests to the extent possible in the given political situation. The Constitutional Court was not equipped nor it was in a position to decide whether the establishment of the Association of Serb Municipalities as well as the organization of judicial power and police units, could have protected Serbs and general state interests in Kosovo, because this was a political question which was unjusticiable and could not be resolved by legal standards.[32] However, the Constitutional Court's ruling on the Brussels Agreement does not follow the logic of political question doctrine and its articulation by Bickel, but the Schmittian idea of legally unbounded politics. Consider the following.

From the view of the populist administration in Serbia, the amputation of a significant part of the country's territory and the trapped position of the Serbian minority in Kosovo represented the state of emergency that ultimately demanded the management through a 'primacy of the Political' in the sense of Schmitt. Therefore, the populist government first tried to postpone the Court's ruling suggesting to the Court to stay of proceedings until the adoption of the constitutional law on Kosovo's substantial autonomy.[33] I hasten here to say that the law has not yet been adopted, though it was envisaged in 2006 when the Constitution came into force.

The Court did not officially stay of proceedings, but like in other high-profile political cases, it played its well-known safe strategy, rejected to rule in a timely manner and after a two-year delay, it dismissed the challenge on jurisdictional grounds.[34] The Court found that the Brussels Agreement was neither international agreement nor any other kind of general act that could be reviewed by the Court.[35] For the purpose of this discussion, it should be stressed that the majority of the judges insisted that the engagement of the prime minister in reaching the Brussels Agreement represented his political activity within the negotiations with Kosovo's provisional institutions.[36] The fact that the government accepted the Brussels Agreement could not be understood as an approval of competent institutional authority of a particular legal act, but as a political approval of prime minister's political

32 I have developed this thesis in V. Beširević, 'A jedan razlog menja sve: kontrola ustavnosti Briselskog sporazuma u svetlu doktrine političkog pitanja' [The Reason That Changes Everything: A Judicial Review of the Brussels Agreement Under the Political Question Doctrine], *Hereticus*, Vol. 14, No. 1&2, 2016, pp. 127-151.

33 *See* the Constitutional Court's ruling from 14 December 2014, No. 247/2013, p. 3.

34 *Id.*, p. 1.

35 *Id.*, p. 29.

36 *Id.*, p. 24.

activities.[37] The Court particularly emphasized that in the approval procedure, the government was bound *neither by law nor by legal acts,* but only by political guidelines included in the Resolution of Serbian Parliament from January 2013 to serve as key principles for political negotiations with Kosovo's provisional institutions.[38]

Moreover, a significant part of the majority opinion, and in particular the part of the opinion that insisted on the idea of legally unbounded politics, was based on the *amicus curie* opinions delivered by the Legal Adviser to the Serbian Ministry of Foreign Affairs and the Serbian representative in the Venice Commission, appointed by the populist government.[39] It is yet another evidence of judicial submissiveness in politically sensitive cases even when judicial restraint should be clearly exercised.

12.4.2 Judicial Endorsement of 'Discriminatory Legalism'

As Jan-Werner Müller observes in his book *What Is Populism?,* populism goes hand in hand with unequal protection.[40] It is a usual business of populists to identify groups whether political, class-based, ethnic or racial as the enemy. What follows, according to Müller, is a form of 'discriminatory legalism' in which a group tailored as the enemy receive harsher treatment.[41] In other words, "for my friends everything; for my enemies, the law".[42]

Transposed to the Serbian context, 'discriminatory legalism' was manifested by populist administration in confronting the economic and financial crisis, when the government made differentiation in taxation policy to protect 'ordinary folk' and, at the same time, to attack middle class in Serbia, from which an 'elite' opposing the populist government usually recruited.

Facts first. In 2013, Serbia came at the edge of bankruptcy, with a public debt of 59.6%, budget deficit of 5.5% and unemployment rate of 22.1%.[43] To avoid bankruptcy, the austerity package was introduced in 2014. The measures included the so-called 'solidarity taxation', ranging from 10% to 25% on salaries and social benefits in the public sector that were approximately above 60,000 RSD (525 EURO) a month.[44] According to the populist

37 *Id*.
38 *Id*.
39 This fact was expressly mentioned in the majority opinion. *Id*., p. 24.
40 J. W. Müller, *What is Populism?*, University of Pennsylvania Press, Philadelphia, 2016, pp. 82-83.
41 *Id*., p. 83.
42 *Id*.
43 M. Prokopijević, 'Some Sensitive Issues of Serbia's Economy', 19 October 2015, https://rs.boell.org/en/2015/10/19/some-sensitive-issues-serbias-economy.
44 The law introducing solidarity taxation did not refer to taxation but to public sector pay cuts. Yet, unofficially, the Act was immediately termed 'Solidarity Tax' Act.

administration, solidarity taxation was the way to eliminate unequal pay and make possible for low-skill workers who worked in hard conditions to have decent salaries.[45]

More than 20 initiatives challenging the constitutionality of the 'Solidarity Tax' Act were logged before the Constitutional Court. Like in other high-profile cases, the Constitutional Court stuck to its play-it-safe strategy and delivered the verdict after the challenged Act became manifestly irrelevant, with an eye on the preference of the ruling populists.[46] Although in November 2014 it formally opened a review procedure, the Court ignored the case for almost 4 years. When, at the end of 2014, after 9 months of its application, the populist administration replaced the 'Solidarity Tax' Act, with the law lowering all salaries over 210 EURO in public sector by 10%,[47] the constitutional review of the 'Solidarity Tax' Act seemed losing its meaning.

However, long after public discussion of the Act died, the Constitutional Court woke up from its deep slumber, delivered the decision and validated the Act. In other words, it rejected the request to declare it unconstitutional.[48] The Court argued that the Act was 'a budgetary consolidation measure' and that its adoption was justified by the legitimate interest of the legislator to secure normal functioning of the state in 'time of crisis'.[49] To support its stance, the Court turned to constitutional decisions delivered by the constitutional courts in Greece, Croatia and Lithuania on austerity measures introduced by the governments of these countries during the recent economic crisis.[50]

Now, it is not disputable that it is a job of the government to secure economic and financial stability and propose the implementation of different austerity measures in the time of crisis. What worries here is the Constitutional Court's avoidance to examine whether the 'Solidarity Tax' Act was, in fact, a taxation measure and whether as such it was introduced on discriminatory grounds and in violation of the general Income Tax Act which in Article 1 envisaged that "income taxes shall be regulated exclusively by this Act". Instead, in the laconic matter the Court only noted that the challenged Act was a budgetary consolidation measure, and "*argumentum a contrario* […] it was not a special income tax measure[…]".[51] Therefore, it found no reason to examine whether the Act was contrary to the general income tax law and whether it was discriminatory in its nature.

To sum up: for the Serbian Constitutional Court, even in the case which involves the constitutional review of the *prima facie* discriminatory law, drafted on two pages and no

45 This is how then Deputy Prime Minister and the current President of the Republic explained the reason behind 'solidarity taxation'. *See* www.rtv.rs/sr_lat/politika/vucic-solidarni-porez-ostaje_461565.html.

46 *See* the decision of the Constitutional Court from 26 April 2018, ИУЗ-138/2016.

47 The Constitutional Court has not yet ruled about the law on reducing salaries, although many initiatives challenging its constitutionality were logged.

48 The decision ИУЗ-138/2016, p. 1.

49 *Id*., p. 5.

50 *Id*., pp. 5-6.

51 *Id*., p. 6. However, Justice Tamás Korhecz in his separate opinion strongly disagreed.

longer in force, opposing a populist administration was not an option. The Court again missed an opportunity to enhance its reputation and legitimacy by delivering decisions that would make sense of constitutional values, in a way the Hungarian Constitutional Court did when, in the middle of 1990s, it exercised a robust constitutional review and invalidated key elements of austerity package introduced to ensure financial stability of the country.[52]

The 'solidarity taxation case' testifies that the Serbian Constitutional Court has not distanced itself from its deferential ideology. This conclusion is further confirmed by the similar Court's approach in other cases regarding austerity package from 2014. At the same time when the populist administration replaced the 'Solidarity Tax' Act, with the law lowering all salaries, the legislation regarding cutting pensions above 210 EURO progressively was also introduced. After receiving 133 initiatives challenging the constitutionality of the law reducing pensions, the Court dismissed all initiatives in a procedural ruling and upheld the austerity measure of the populist government,[53] which despite savage cuts maintained its popularity, and won again in the next elections, proving thus the thesis that populism is hardly a matter of policy preferences.

12.4.3 Rights Adjudication: What Stands behind the Court's Assertiveness

The following example speaks more about the Court's resistance to the populist pressure than about its collaboration with the executive. However, the Court's approach does not reflect its institutional politics but rather its calculation strategy in cases embedded in international law.

The populist programme usually includes pressure on the fight against organized crime and corruption – in fact, due to the persistent public demand for action, especially in societies in transition, this is one of the leading populists' strategies to distance themselves from their political rivals. In countries of young democracies, the pressure to develop an effective state policy also comes from external factors, like in case of Romania and Bulgaria, where the EU Commission has persistently insisted on a decisive action in this area.[54] The same is valid for Serbia. In words of EU Commission, although Serbia has some level of preparation in the fight against corruption and the fight against organized crime,

52 For more *see* A. Sajó, 'How the Rule of Law Killed Welfare Reform', *Eastern European Constitutional Review*, Vol. 5, No. 1, 1996, pp. 44-49.

53 For more *see* J. Jerinić, 'The Easy Way Out: How the Serbian Constitutional Court Delivered its First Ruling on the Constitutionality of the Government's Austerity Measures', *European Review of Public Law*, Vol. 27, No. 4, 2015, pp. 1711-1726.

54 For more *see* D. Smilov, *Populism, Courts and the Rule of Law: Eastern European Perspectives*, The Foundation for Law, Justice and Society, Oxford, 2007.

> […] Corruption remains prevalent in many areas and continues to be a serious problem […] Serbia has yet to establish an initial track record of effective financial investigations, as well as of investigations, prosecutions and final convictions in money laundering cases. The number of convictions for the organized crime remains low.[55]

The Serbian ruling populists quickly recognized that prioritizing criminal policy in this area might be an excellent choice to mobilize public support. One of the first moves of the present populist administration was an arrest of several persons connected with 24 cases of privatization, earlier flagged by the EU as problematic.[56] Then deputy prime minister in charge of the fight against corruption and organized crime, and now the president of the Republic, in a Schmittian manner claimed: "Two things have been proven in Serbia – that nobody is protected and untouchable and that the state is stronger than any individual."[57] On several occasions, he called the first accused in privatization trials 'the enemy of the state'.[58] From that time, it became a habit for the media to announce many of the arrests before they happened and the suspects were declared guilty in the media even before they were indicted. Interestingly, none of the court cases has resulted in guilty verdicts in force. On the contrary, the first accused in privatization cases was recently declared non-guilty by the final instance court.

For the purpose of this discussion, it is important to note that many from those arrested in privatization cases challenged the constitutionality of their pre-trial detention orders before the Constitutional Court. In sharp contrast to the previously mentioned cases, the Court reacted promptly and issued several rulings finding the violation of defendants' constitutional rights.[59] The populist administration publicly labelled its rulings 'problematic' and 'unjust'.[60]

When assessing the Court's approach in these cases, one should have in mind that the Court based its decisions on the relevant jurisprudence of the European Court of Human Rights.[61] Thus, it particularly emphasized that the reasons for keeping the accused persons in pre-trial detention stand contrary to the Strasburg Court' case law.[62] The Court's approach in detention cases confirms my thesis that after the regime change in 2000, the constitutional judges have started (but have not fully managed) to enhance their legitimacy

55 European Commission, Serbia 2018 Report, Strasbourg, 17 April 2018, SWD (2018), pp. 3-4.
56 www.b92.net/info/vesti/index.php?yyyy=2012&mm=12&dd=12&nav_category=16&nav_id=668314.
57 *Id.*
58 www.slobodnaevropa.org/a/priveden-miroslav-miskovic/24796051.html.
59 *See, e.g.*, the decisions of the Constitutional Court No.УЖ-3231/2013 from 3 October 2013 and No. УЖ-3391/2013 from 18 July 2013.
60 www.vreme.com/cms/view.php?id=1143163.
61 *See, e.g.*, the decision of the Constitutional Court No.УЖ-3231/2013, pp. 13-14.
62 *Id.*

through rights adjudication, while in resolving the separation of powers disputes they have stayed strikingly inactive.[63]

For the Court to voice its opinion in rights adjudication required that it makes minimal strategic calculations since, on one hand, this action coincided with the priority of the country's political élites to promote Serbia's integration into the European Union, while, on the other, it was backed by the authority of European human rights law.[64] This approach made attacks from the political majority less severe, and the Court grew more assertive. However, as a rule, the Court has displayed a consistent tendency to deliver decisions with an eye on the political majority.

12.5 Conclusion

Ever since Marbury proclaimed that judges are authorized to adjudicate constitutional issues as part of their mandate,[65] the tensions in the relationship between political institutions and the courts have been vivid across states and ideologies. Yet, some authors have already noticed that populist administration usually more directly confronts the courts when not under their control, by instituting the impeachment of judges, limitations of their jurisdiction and packing of the courts with loyal judges.[66] The responses of the courts to populist politics could generally be schematized in the following way: they may resist populist regime, may embrace populism themselves or may turn to passivism.

This chapter attempted to theorize the approach of the Serbian Constitutional Court to the populist regime in Serbia. It started with a general reflection that in transitional Serbia, a constitutional review had been discouragingly irrelevant to the struggle for democracy consolidation. By focusing attention on the Court's decisions delivered within the mandate of the ruling populists, it showed that a constitutional review in Serbia is not an available strategy to confront the populist regime, either. On the contrary, so far the Court has endorsed most of the populists' measures aimed at undermining an already fragile democracy in Serbia.

There is little hope that the Serbian Constitutional Court would sooner rather than later start to challenge robustly populist administration. The ruling populists used the first opportunity to safeguard the Constitutional Court's deference. When in 2016 the terms in office of nine judges expired (out of 15 judges in total), the Court was quickly packed mostly by those loyal to the regime and by its followers, through a non-transparent election

63 Beširević, 2014, p. 966.

64 *Id*.

65 *Marbury v. Madison*, 5 U.S. 137 (1803).

66 J. F. G. Bertomeu, 'Working Well Is the Best Strategy: Judges under Populism', *VerfBlog,* 3 May 2017, pp. 1-2, https://verfassungsblog.de/working-well-is-the-best-strategy-judges-under-populism

procedure. The populists left no chance for the Court to become more than a rubber stamp of its programme.