

DOI 10.51558/2490-3647.2021.6.3.135

UDK 35.07:578.834

Primljeno: 25. 05. 2021.

Izvorni naučni rad

Original scientific paper

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POLITICAL PRIORITIES OF PUBLIC ADMINISTRATION, WELFARE-STATE AND CONSTITUTIONAL DEMOCRACY AFTER THE 2020-2021 PANDEMIC¹

At the time of the official Coronavirus, 2020-2021 Pandemic emergency measures and general restrictions on the freedom of movement and the other fundamental human and constitutional rights and freedoms were and still are in place. The question of what kind of world will we enter after the official end of the Pandemic was quickly raised. The problem of fear intensified. This is not only a social problem but also a legal one: people have a fundamental human right to protection against fear. The absolute short-term priorities of public administration in all EU and Council of Europe Member States will have to be focused on ensuring that fear and anxiety do not become a new epidemic. Concern for the efficiency and quality of the public health system should be strengthened and improved. Including mental health care and suicide prevention, care for the well-being of the elderly and terminally ill, people with disabilities (in general and disabled workers), care for children, especially children with special needs, and care for large, diversified, and quality palliative care. Also, a need exists for a changed and improved legal policy regarding the system of education, scientific research, and employment. Last but not least, care must be taken not to take fundamental human rights and freedoms for granted. The health crisis will result in a new economic crisis. It should not be accepted as the end of the Welfare (Social) State. It is a new opportunity to defend social and economic human rights and to create the common European Welfare State. Right now, new ideas are needed –even crazy ideas. We

¹ This article was created by partial modification, rearrangement, shortening and in some places by supplementing in particular the author's two previously published articles Teršek (2020e; 2021a). In some other places, the author uses individual parts of some of his other already published articles and places them in the overall context of this article. These articles are listed in the bibliography at the end of the article.

need a kind of utopia. And faith and hope in it, which will be the driving force of active action. The experience of the Pandemic must not prevent or take this away from us.

Keywords: social challenges after the 2020-2021 Covid-19 Pandemic; short-term priorities of the public administration; urgent changes in legal policies; problem of fear; protection of fundamental rights and freedoms; public health system; realizing utopia; the need for new and “crazy” ideas

1. INTRODUCTION

We will have to build a different normality with difficulty (Žižek 2020). Can we achieve this goal? Well, we most certainly can. Having said that, it still doesn't mean we will be able or successful in achieving it. But we absolutely *have to and must* try to achieve it.

One of the important insights of psychology is that an individual should not waste time, energy, and emotional charge on communicating to those who do not want to hear him. Or they – simply – can't. The effort should be directed to other things. One should rather discover those with whom he or she can communicate with a mutual willingness to hear and learn, to examine carefully his or her views and truthfulness, and to nod gracefully to his or her error when he or she reveals himself or herself in a sympathetic and constructive conversational analysis of issues. So, it is all about the relationships between people, about the relationship of the individual to other people. Also, to (in a psychoanalytic sense) the Other (Gilbert 2013; Goleman 2010).

Concretized habits and beliefs are not just a matter of individuals. They are also a matter of “crowds.” Those “crowds,” however, are not difficult to influence. Nor to “exploit” the psychology of the crowd in pursuit of obscene and/or wrongful, particular or group goals (Cialdini 2015; Le Bon 2016).

The attitude of an individual concerning the State (let me be allowed to use the capital S, as a matter of emphasis), towards the public administration, is different. This can be called a psychological rule, though not in the legal, literal sense of the word, but rather in the sense of guidelines, even aspirations and goals. The State and its public administration must be addressed critically, but in the best faith and with the best intentions, at all times, constantly, permanently, resolutely and persistently, even if the addressee does not seem to hear or really know or care (*unwillingness*) what has been really sad or trying to communicate – by us and/or others.

This “unwillingness” is primarily determined by the *will to power*, which strikes with the “desire to be heard” (Nietzsche 2004). Nevertheless, this desire can also be described as the *will to power of hearing*, which can contradict the *will to listen, to hear and to respect* the good, the thoughtful, the noble, the useful etc. ideas and suggestions. And here comes the paradox: the less willing the public administration is to listen to, heed, and especially heed good and useful warnings and suggestions, the more one must insist on addressing the public administration with such warnings and suggestions. Sustained, determined, unwavering (Comp. Bauman 2016).

2. PAINFUL AND EXHAUSTING EXPERIENCE

At the time of the official 2020-2021 SARS-CoV-2, Coronavirus, Covid-19 pandemic, when emergency measures and a general ban on the freedom of movement and other fundamental human and constitutional rights and freedoms were in effect, questions were quickly raised in the public mind about what kind of world we would end up in after the official end of the pandemic (if this is going to happen at all during our lifetimes - this question no longer seems excessive). Philosophically minded questions posed a mental challenge as to whether we would be “awakened” or perhaps even more “dreamed” after a pandemic (which was quite quickly publicly described as “just the first wave”, followed by the second and now – March 2021 – the State is already talking about a third one)? Individuals, nations and global society. Prominent philosophers, representatives of the medical profession, and commentators on everyday social life have mused aloud, almost unanimously, that it will most likely be a slow transition to the normalization of social life, i.e., a return to daily tasks planned and set, scheduled and used. Step by step (Comp. Velasquez 2020; Najam 2021).

In this assumption, which seems reasonable and not surprising, there is a *trap*. It can be recognized as a “danger:” a return to former routines, habits, and internalized patterns of behaviour and thought (Duhigg 2015). This danger has two poles. The first is obvious: old habits, routines and internalized patterns of thinking have led to humanity being confronted with the problem and challenge of the pandemic to a not inconsiderable extent and living in “quarantine” (See Teršek 2021c).

The second became evident during the pandemic. Especially in Slovenia: Fear increased – generally. And enormously. Not only the fear of the disease and of the unpredictability of nature, which can react unforgivingly to human irresponsibility and imprudence. Fear among people, fear in the relationship between people, has also increased. Frightened people, on the other hand, comply more quickly and easily, of

their own accord and without any particular external compulsion, with “rules” (See Teršek 2020i, 2021c), even those that are less reasonable or even “made up out of thin air” (Comp. Graeber 2017).

This fear also quickly began to manifest itself in people’s rhetoric and in the behaviours with which some responded to the behaviour and conduct of other people (Comp. Teršek 2020g, 2020i; Mazzini 2020). I am thinking of rhetoric and behaviours that reflected “hostile attitudes” toward other people. Also, in general to (all) the Other. Also or mainly because of this (and I am not the only one alone) I have repeatedly emphasized publicly, at home and in articles published abroad, that fear must not become a new epidemic. But and unfortunately – more than sadly – it did.

“Fear” is not only a social problem. It is also a legal category. That is why I have long emphasized that people also have a fundamental human and constitutional right to “protection from fear” (Strah 2018).

3. SHORT-TERM PRIORITIES OF THE PUBLIC ADMINISTRATION

Prior to the Coronavirus Pandemic, mental illness and the number of suicides (*per capita* per year) were one of the major social problems according to the Slovenian *National Institute of Public Health* (NIJZ), the *World Health Organization* (WHO) (Comp. Ferlič Žgajnar 2018), and the European Commission (European Commission, 2004). So the existence of a national mental health program and the existence of the *Mental Health Act* are far from sufficient. Above all, what is already “on paper” must not only become part of social practice, but also be incorporated into the everyday life of society, legal policy and the functioning of institutions (Comp. Doljak 2020; Teršek 2020b, 2020d).

Therefore, I want to stress the concern for the mental health of the individual, the nation, the people of European countries and global society as an absolute, imperatively urgent priority of public policy and public administration – in the short and long term. Undoubtedly, the absolute priority in the coming years (given the online materials and media coverage, there does not seem to be much disagreement on this issue) will have to be increased and improved concern for the efficiency and quality of the public health system (Teršek 2020b, 2020e). Including the aforementioned care for mental health, care for the wellbeing and health of the oldest and terminally ill, people with disabilities in general and disabled workers (Comp. Teršek 2014), children - especially children with special needs, care for comprehensive, diversified and

high-quality palliative care (because this is a positive legal duty of the state that derives directly from the right to life, not just the right to health) (See Teršek 2020f). And (finally, but by no means least) a significantly improved, indeed significantly changed, legal policy concerning the system of education, scientific research and employment (*labour market*).

4. A NEW OPPORTUNITY FOR THE WELFARE STATE AND FOUNDATIONAL CONSTITUTIONAL DEMOCRACY

As members of the global society, we are facing the unprecedented test of our *democratic culture* and *social awareness*. Our political self-understanding must clearly and convincingly show that we have not forgotten the political and philosophical ideas regarding democratic, welfare (“social”) and just society (Comp. Hunt 2016; McChesney 2020). The health crisis is becoming and it will become even more an economic and social crisis as well.

This should not be accepted as the end of the Welfare (Social) State (Comp. Giddens 1999). The mysteriousness of the future of global political and legal systems and its socio-democratic quality must be once again taken as a new opportunity to realize our democratic commitments and ambitions for the highest possible standards of the Welfare (Social) State (Comp. Wallerstein 2003). In other words, we have to accept this challenge as a new opportunity to defend fundamental social and economic (human and constitutional) rights and to create the *European Welfare State* worthy of its name (Loïc 2003). The fundamental principles of modern constitutionalism (Alexander 1998; Siedentop 2000; Tuori 2015; Weiler, Wind 2003), including the principle of socio (Welfare)-liberalism and genuine Welfare state must finally be transformed from the theoretical concepts into the social reality - with more determination and more effectiveness (Joerges 2003; Armstrong 1998).

To act accordingly, it would be of greater importance than anything else to increase and reinforce social and economic rights. In the sense of policymaking and socio-political system, we should expect and demand more from the State, which claims its sociality as a political quality and one of the most important criteria for its legitimacy (Teršek 2014a). We should make a few changes in the systemic understanding of the concept and fundamental constitutional principle of the Welfare State. We should use a more aggressive and daring legal policy as a tool to realize this goal. We should especially think about using constitutional law and constitutional law-making as the institutionalized answer to political arbitrariness and unresponsiveness when social and

economic rights are concerned (Teršek 2017). This also means the time has come to finally realize the idea and concept of *governing with judges* – with more courage, determination, responsibility, ethics, authority and with more determined advocacy of its legitimacy (Stone Sweet 2000; Ewing 2009).

A reflection, even an appeal towards defending social and economic rights, requires a theoretical foundation. *Models* of constitutional democracy do matter. By *models* I especially refer to the distinction between *monistic, dualistic* and *foundational* models of constitutional democracy (Ackerman 1992). Different models of constitutional democracy established in a particular state/country often outline different starting points for addressing certain and concrete constitutional questions and quite clearly point to the right answer on a concrete and important constitutional question.

The Slovenian democracy is a *parliamentarian and representative democracy* in an organizational sense. But at least in theory, it has a deeper political and legal quality. It must be addressed as a *social* (meaning *welfare*) *constitutional democracy* (one of the three most important constitutional principles, besides the principle of “democracy” and the principle of “the rule of law”, is the principle of “social” or “welfare state”, and the Slovenian Constitution, similar to the constitutions of other EU and/or Council of Europe Member States) includes numerous social and economic rights and as an example of the model of *foundational democracy*; democracy of fundamental human rights, freedoms and constitutional principles. I claim the same goes for other EU (European Union) the Member States and Council of Europe Member States.

Since all the EU Member States are also the *Council of Europe* Member States, all of them are subordinated to the ECtHR case law and legally obliged to respect and implement the judgments of this Court: as binding *erga omnes*. (Note: except in cases where the ECtHR recognizes the so-called *margin of appreciation* concerning a particular Convention – *European Convention on Human Rights* – right or its particular segment.) For this reason and this reason alone, one could hardly argue all of the EU Member States, who are also members of the Council of Europe, can't be reasonably and logically considered to be *foundational constitutional democracies*. The minimum standards for the protection of human rights established by the ECHR and explained in more detail by ECtHR case law are also the minimum standards of *genuine democracy* and the *rule of law*; in the function of *Humanity* (Teršek 2020).

This theoretical foundation should provide necessary theoretical assumptions for convincingly justifying an appeal to a *more active constitutional policy* and a demand

for greater *positive obligations of the state* (Mowbray 2001). As an example of such a theoretical foundation, one could point out the model of modern European democracy, which is also a model of socio-liberal constitutional democracy. It is essential for this model that the modern concept of the Welfare State moves beyond classical ideas of political liberalism and the classical conception of the Welfare State (Habermas 1998; Siedentop 2000).

In this model of social (in the sense/meaning of “welfare”, not “socialism”) liberalism and constitutional democracy the fundamental human rights and liberties, as well as fundamental constitutional principles do not have only the so-called negative status. The state is not held responsible only in cases when its active practices directly interfere and violate said rights and principles. Its legitimate obligation, which is not only political, does not end by the state simply refraining itself from interfering with fundamental rights and principles, from “leaving them alone” (Akandji-Kombe 2007).

So fundamental human rights and liberties and the fundamental principles, set down by the international and constitutional law, also have the so-called *positive status*. This status is essential for the quality surplus of modern social (Welfare) liberalism and constitutionalism, in comparison with their classical beginnings (Judt 2009). It establishes a political responsibility and legal obligation of the state to undertake active measures to ensure the best quality of the legal protection of fundamental rights and principles it reasonably can, and at the same time to facilitate their effective exercise in the social practice. Among them are the social rights and the constitutional principle of the Welfare State with special importance. This practical aspect of the State’s responsibility substantiates its broad, systemic and strict liability for the quality of legal protection of the economic and social rights. It also establishes the responsibility of the state for the existence of the system which provides opportunities for the actual and effective realization of social and economic rights. Therefore, it establishes the liability of the state for the effectiveness of such a system as a whole. This aspect of the constitutional obligations of the state has the crucial importance for the quality of legal protection and systemic possibilities for the realization of social and economic rights. In other words, the state has a legally binding and legally actionable duty to do everything in its power and what can reasonably be expected of it that ensures the highest possible degree of the legal protection of these rights and principles and ensures the efficiency of their realization in social practice. This constitutional obligation of the state can be fulfilled with the implementation of proper political programs, with constitutionally correct, quality legislation and with a quality “legal policy” in general. Finally, this obligation of the state can be fulfilled with the establishment of

a whole social system of rules, authorities and institutions, which must be constitutionally correct, legally and politically proper, transparent and efficient (Comp. Mau, Veghte 2007; Gardbaum 2006).

Should we change the modern European philosophy of the Welfare state and the doctrine of its positive obligations regarding fundamental rights and freedoms, including those with social and economic nature and substance? I most strongly believe we must not. And I do not find any convincing, much less necessary reason or argument to abolish such conviction and belief calling upon the consequences of the 2020-2021 Pandemic.

However, daily-party politics is far too often out of tune with this doctrine. It has been before the beginning of the official pandemic, it remained during the 2020-2021 official Pandemic (throughout its first and second wave), and there seems to be no reason why we should not be very concerned that in the future the public political power – the State, AND the EU – will further neglect the effective political and legal (institutional and systemic) protection of these rights.

As far as the Slovene courts are concerned they have been showing little interest in acknowledging the doctrine of the positive obligations of the State, while the lawyers, both practitioners and professors of law, pay this doctrine very little attention in their professional and research endeavours. As a consequence, students of law and other social studies know very little about this doctrine or were not even aware of it during their studies. Attempts at asserting it in courts are rare, and even when this does happen, they are predominantly unsuccessful in regular courts. As far as Slovenia is concerned, this doctrine shares the fate of the Constitution and constitutional law, which also play a small role and are not given enough importance in the rulings of regular courts (The decision of the High Court in Maribor).

It is precise with social rights where the responsibility of the State is even slightly more emphasized and particular. On one hand, these rights namely have the biggest, most direct impact on citizens themselves, while on the other hand the constitutional provisions of these rights are often not only abstract but also have “program” characteristics. The Slovenian Constitution, which in Article 2 already defines the state as *social/welfare* (Article of the Constitution of the Republic of Slovenia), thus for example in Article 50 talks about the right to *social security* (the Constitution of the Republic of Slovenia), in Article 66 about *creating opportunities for work and about workplace protection*, and in Article 72 about *the state providing for health and healthy living environment protection*. There is also a special Article 67, explicitly assuring *the social function of private property*.

However, all these constitutional guarantees require concretization of their content (Teršek 2015). The positive obligation of the state in this regard means that the state needs a well-crafted political program that defines how the state will systemically ensure legal protection of the highest possible quality and the exercise of these rights and principles in practice. It must adopt legally correct and effective legislation, which regulates a particular social or economic field. It is responsible for the quality and especially for the effectiveness of the entire system of protection, control and exercise of these rights and principles.

If the state fails to do so, it similarly violates the Constitution as if it directly violated any other constitutional right of an individual. The State is objectively responsible for the establishment and quality of the system of the social/welfare State and protection of social and economic rights, as well as for its proper and efficient operation – in daily social practices. Its constitutional legal responsibility therefore, does not affect only the direct relations between individuals and the State. It is too often forgotten that the State must take responsibility for the adoption of relevant legislation and for the establishment of a system of institutions that enable the protection of constitutional rights, liberties and principles in relations between individuals (the so-called *drittewirkung* doctrine) (Macdonald, Matscherand, Petzold 1993; Mowbray 2004; Teršek 2014a: 312-325). In other words, a system of institutionalized protection of human rights and liberties must be above all *practical, of a high quality and effective* (Comp. Macdonald, Matscherand, Petzold 1993).

Under no circumstances should we allow the awareness of the importance of this legal philosophy, teachings and doctrine to diminish, or the responsibility of state policy under this title to be reduced, nor should we agree to the 2020-2021 Pandemic to be a reason to push (above explicitly mentioned and others) social and economic rights even further to the margins of legislative decision-making, legal policies and social practices of the state bodies and public institutions.

5. POLITICAL AND LEGAL RESPONSIBILITY FOR THE PEOPLE ON SOCIAL MARGIN

It does not seem superfluous to repeat what has already been written above, with special emphasis. This legal philosophy, teachings and doctrine *must be* directly linked to other current and highly important social issues. In particular, those that concern the scope of social and economic rights. The State must have, above all, an appropriate program for the protection of mental health. Even more so if there is a

well-known and traditional problem of a high rate of suicides *per capita*. The State must produce high-quality legislation in this area and establish an effective system of prevention and assistance. The same applies to the general system of health care. It must be an absolute priority (Teršek 2020b, 2020d, 2020e, 2020f).

The State should be *objectively legally responsible* – this is my strong constitutional conviction – for long waiting periods in medical institutions. It should also be legally responsible for the lack of effective procedures for determining the liability of medical staff for (professional) mistakes at work and for the damage patients suffer from the side effects of treatment, medications, or vaccines. Legal order and judiciary should reassure a quality and effective protection of the patients' rights (– as victims).²

The same applies to the legal system and regulation of issues concerning the disabled (including disabled workers), elderly, chronically or terminally ill, Roma, same-sex partners, single parents, children, especially children with special needs, young and educated people who are unemployed, young families, foreign workers, etc.

This doctrine should also be used as an effective tool for solving problems of people on the social margins of society, or people with the lowest personal income. In the case of workers in the factories, who receive low or even the lowest personal income, barely enough to survive from day to day, the State which claims to be a real Welfare State (as it is written in the second Article of the Slovenian Constitution) should be legally responsible for setting up the legal system, which effectively protects those workers in the maximum possible, while still reasonable degree. The State should ensure the effective supervision of the protection of the rights and interests of workers and the fast, simple and low-cost procedures for the exercise of their rights and to address their complaints. The State should be convincingly and provably successful in preventing mobbing at the workplace. It should ensure the effective protection of the most vulnerable groups of workers, easily actionable and quickly payable social benefits and pensions, etc. Lastly, it should also be held responsible for cases where the managers and directors are paid high severance pay, while the most deprived social workers are deprived of their minimum personal income and other statutory additions, or even get fired.

² I cannot elaborate on these points here, as it would clearly exceed the intended scope of the article. It is worth mentioning, at least alternatively, that in Slovenia during the 2020-2021 Pandemic, legislation was changed in the opposite direction, with the opposite goal: to reduce or even eliminate any liability of medical personnel for professional errors and side effects of treatment processes. Readers may be interested to know that in 2020 I submitted several petitions against all these changes to the Constitutional Court of the Republic of Slovenia in order to review the constitutionality of these changes or of the provisions that legally regulate these issues. But see Teršek (2020a). Readers can find some articles on this topic, including two extensive constitutional analyzes, on my website: <https://andraz-tersek.si>

In such cases and circumstances, the State should be legally responsible in a similar manner as in the case, for example, where it does not carry out criminal prosecution of perpetrators, or when the system does not guarantee the victims and their relatives efficient and rapid procedure for compensation, or if it does not prevent the censorship of freedom of expression in the media, or it does not ensure an effective system of conditional releases (parole) of prisoners, or if it does not respond to its responsibility and undertake a proper action to guarantee safety at the most dangerous stretches of roads, etc. The list is long, too long (Comp. Teršek 2012).

If and when the State shall take appropriate programs and enact proper legislation in this regard or when it is trying to establish a sound institutionalized system in any area of social life, then the State did not place its “goodwill”, the citizens were not “awarded” or “given gifts” from the State. Such action of the State is not the example of “over-standards” in its policy and the legislation; the State has only realized its necessary, positive and constitutionally legitimate obligation towards the people and their fundamental rights and freedoms.

So, the constitutional policy should also be used as means to achieve these goals. Constitutional judges should hesitate less when using this doctrine to decide cases involving the social and economic rights of the people/citizens/residents. In this context, slightly increased judicial activism would not seem illegitimate (Comp. Ribičič 2010).

European Court for Human Rights (ECtHR) should also be actively involved in the process of application of constitutional policy and judicial law-making with a purpose to establish a *genuine European Welfare State*, worthy of that name. Self-understanding of the social role of this Court on a global scale should be modified in the direction of accepting and using the social and economic rights as an integral part of its decision-making. Social and economic rights must become a permanent subject of the judicial law-making of this Court and its creation of minimum common standards for European society, which will be truly *social (welfare)* in its character. Separation of political and social rights is therefore not in place. There is a need for unity in the understanding of all human rights and freedoms which may be deemed to be fundamental. They have to be uniformly enforced on the transnational level. What is needed is therefore a new, possibly unique, or at least very similar constitutional and social policy. Therefore, the Strasbourg Court has to change its principled position and take the corpus of social and economic rights, as well as the *European Social Charter*, as an undoubted matter of its judicial law-making (Harris and Darcy 2001;

Comp. Roth 2004). If the ECHR does not change its principled opinion in this regard³ there will be no effective legal protection of social and economic rights for the citizens of the Member States of the Council of Europe at the supranational level. This would not seem an appropriate path to combat the global health crisis, which is undoubtedly going to resolve in an even greater economic crisis (Comp. Gopinath 2021; Jones, Palumbo, Brown 2021; Kurt 2021; Daianu 2021).

6. FUNDAMENTAL HUMAN RIGHTS MUST NOT BE TAKEN FOR GRANTED

Fundamental human rights and freedoms are too often taken for granted. And that's not good (Comp. Khan 2021; Criley 2021). I am convinced that the citizens of European countries will feel this strongly after the official end of the pandemic that has been going on for a year and a half. If we are to see its actual end at all.

Let me be allowed to mention one example that I recently wrote about (for the third or fourth time): *compulsory vaccination* (See Teršek 2020a, 2020c). In Slovenia, the atmosphere is very electrified when this, obviously very controversial topic comes up in public. The dimensions of this issue will not be discussed here in detail. Nevertheless, I will repeat the main points that are legally relevant.

Again, the legal policy of the public administration must not be directed in such a way that a new, additional problem of discrimination, stigmatization, or social isolation of people, especially children, arises from this issue or any of its consequences. In the future, awareness of this, undoubtedly, will become even more important. The SARS-CoV-2 COVID-19 Coronavirus Pandemic is accompanied by the announcement that medical science is intensively searching for an effective and safe vaccine against this disease and several companies have already introduced it and sent it out to the market. One segment of the public is applauding this vaccine. The other and by no means insignificant part of the public is confused and uncertain, even scared. Public administration must not be indifferent to this fear.⁴

³ See judgement of the ECtHR in case *Botta vs. Italy* (1998), where the ECtHR denied its general jurisdiction over social and economic rights when they cannot be directly linked with the Article 8 of the *European Convention on Human Rights* and the private or family life issues under this Article. With such principled conviction of the ECtHR the *European Social Charter* also stays without effective judicial protection and applicability. Comp. Mowbray (2004).

⁴ I believe that it is not necessary to mention the manufacturers of this vaccine, the market situation, the different responses of governments in the EU Member States and/or the Council of Europe, nor to highlight the problems that countries, medicine and the general public are already facing – because of the vaccine.

The governments of the EU and Council of Europe Member States have already introduced legal controls on the privacy and free movement of persons, justifying this on the grounds of “general health prevention” regarding the communicable disease concerned and evoking the “public interest”. It is with great concern that European states, by amending existing laws or adopting new ones, are expected to classify people into different groups according to their assessed “health-risk”: pre-existing conditions, chronic diseases, or even age. This will most likely lead to changes in terms of an increase in insurance premiums, i.e. prices for health insurance and prices for health services not included in universal health coverage under the public health system. As a consequence, it is to be expected that more medical interventions will have to be paid for – additionally. What this means legally, even constitutionally, is foreseeable: we will be faced with new, perhaps very large encroachments on fundamental human rights and freedoms, such as the right to privacy and the right to freedom of movement.

I, therefore, repeat the thought: Europe and the EU Member States will face new, unforeseen challenges and problems before the 2020-2021 Pandemic. And we may have to ‘fight’ again, so to speak, for the rights and freedoms, we have already acquired and taken for granted. Tough, unpredictable, unnerving, and changeable times are coming our way (See Teršek 2020a, 2020e, 2020i, 2021a).

7. TOWARDS A NEW REALITY – UTOPIANISM?⁵

For years, or better for more than the last two decades, political and related legal practice has been constantly and continuously unconstitutional to the extent that it prevents the development of the genuine *rule of law* as the rule of *material* legal correctness, which includes *reasonableness* and *fairness* as the quality of legally binding decisions, the exercise of the power of a rationally convincing and morally grounded argument, genuine human reason and logical thought. Consequently, and in the absence of the empathy of decision-makers, it also prevents the proper implementation of the material emphasis on the social *solidarity*, written in the constitutions of the European states and numerous international legal documents, thus it prevents the materialization of a *genuine welfare state*. It is an unreasonable feature of social reality.

This and such social reality, one could claim, is extremely unreasonable, because it would not be necessary to resort to radical changes in the social foundations, or exaggerations, revolutionary interventions in the normative principles of the political system, or even Utopias – to solve the fundamental causes of irrationality. A moderate

⁵ This chapter is a small part and slightly edited text of the already published article Teršek (2021a).

increase in the quality of social decision-making practices, the functioning of the rule of law and the social solidarity of the institutional system is not just a political fantasy, but a quickly attainable goal. To achieve it, it would suffice if, through more rational, open-hearted and vigilant behaviour on the part of influential and privileged people, the so-called “decision-makers” and “influencers”, we were to recognize what (as has already been said) the constitutional orders already determine, and if we were to remove the obstacles to the realization of what the constitutional orders already determine; which are obvious, which have long been publicly spoken about and written about and which are not difficult to understand, so that they can be quickly and easily remedied.

Among all the negative characteristics of jurisprudence and legal practice, the problem of the devotion of the vast majority of lawyers and judges to sheer *legal formalism* is probably the most disturbing, professionally unacceptable and fatal for the development of the *rule of law* – as a concept, value and *virtue*. Uncritical understanding of written law, reading acts, and statutes, and sub-statutory legal acts, and decrees *letter-by-letter*, letter-by-word, instead of understanding and realizing their *purpose, spirit, meaning, and goal*. Instead, all representatives of all legal professions should be aware of their social role and responsibility to discover the meaning and purpose of the legislation, to recognize material reasonableness and vital logic in the practical application of the law, to exercise justice in this way and thus to achieve legal correctness. Since this is not the case in practice, the social role of lawyers can rightly be attributed to greater responsibility for the errors and problems of the social system and social practices.

In the period of the 2020-2021 Pandemic, which is still ongoing, this has been reflected and expressed to an even greater extent. Especially in Slovenia, adoption of new legal regulations one after another, encroachment (gross and extensive encroachment) on fundamental constitutional rights and freedoms by executive regulations, mutual substantive contradictions of these regulations, their conceptual, textual and substantive ambiguity, and thus the inability of citizens to provide for, or to plan, to foresee legally permitted and legally prohibited actions, the passivity of the judiciary, slowness of the Constitutional Court in deciding on the constitutionality of these legal regulations, the arbitrariness of state representatives (the police, inspectors and wardens) in interpreting and implementing these regulations in social practice (in punishing people for - alleged - violations of these regulations), adoption of laws in the form of *packages* (the so-called “Anti-Corona-Acts”, with numbers from 1 to – currently – 9; in Slovenian: *PKP – Proti-Koronski-Paket*), and so on. A

detailed analysis of this situation and developments would significantly go beyond the purpose and intended scope of this article. However, I can write, or better, I have to write, that since independence in 1991, we have not witnessed such an obvious, far-reaching and astonishing political use, exploitation and abuse of *law-as-a-technique* to retain political power and subjugate, almost “enslaving” people, not only for their physical, mental, medical and financial suffering.⁶

That is the way it is, and only with conscious scepticism and ignorance can one argue that it is different. And because that is so, it is not surprising that the decisions of the ordinary courts are so often not a model example of correct, professionally sovereign and lucid, intelligent and in *bona fide* interpretation and direct application of constitutional principle, provisions, standards, doctrines and possibilities, offered by methods of persuasive legal argumentation and interpretation. Even less so are findings of legal philosophy, basic principles of constitutional law and moral foundations of the law. For this reason, the constitutional courts must continue to explain in their decisions to the judges of the ordinary courts that they must apply the constitution in their work, that they must comment on constitutional issues and that they must demand constitutional review if they have doubts about the constitutional admissibility of legal norms (Mavčič 2018).

For more than two decades the Constitutional Court has been (if I leave aside some but rare exceptions that seem to be a statistical error in the system rather than anything else) the only judicial institution that deals with questions of constitutionality and the interpretative dimension of constitutional provisions at all. Unfortunately, this institution is becoming the peak of the problem – in Slovenia. The reason for this is quite simple – and it is a daily political reason. The greatest and best experts in constitutional law, who have proved their worth through academic and public work in this field in the past, do not come to Constitutional Court. Once again, exceptions appear to be a matter of statistical error. On the other hand, lawyers who ideologically correspond to the prevailing political option or who are not problematic for anyone, because almost nothing is expected of them in the sense of knowledgeable, thinking, determine, principled, argumentatively persuasive and lucid reading, protecting and empowering of the Constitution and constitutionality (*constitutionalism in constitutionalization* of the political system and legal regime), do become constitutional judges. Some can become constitutional judges because they have good connections and acquaintances. Exceptions only confirm this rule. And it happens, in Slovenia,

⁶ At this point, I again kindly invite readers to read the articles in which I address this topic, this problem, on my website.

that the judge of the Constitutional Court becomes someone who has never in his or her life dealt with constitutional law, which he or she more than obviously does not understand, and who has never in his or her life been able to write a single article on constitutional law. And here the door for entering the “argument of power” rather than “the power of argument” opens. And it hurts, it hurts us constitutionalists, when “politically” or “ideologically” *acceptable* lawyers moralize and deceive themselves and the public. Especially when professors of constitutional law approach to decisions of the Constitutional Court with criticism, based on rich, verifiable and proven knowledge, with the “power of argument”.

That is the *reality*. This reality is already too high price to pay: the continuation and still valid of the legal rules adopted under the title and time of *Pandemic*, which clearly and strongly, unreasonably, disproportionately and therefore unconstitutionally, interfere with the constitutional rights and freedoms of our people. That is why we need a new reality, even if it seems like utopia: that such people cannot even think of being judges of the Constitutional Court (See Teršek 2021).

The deviation of political practice and legal practice from what should be understandable or even self-evident according to the text of the Constitution, the findings of the judiciary and common sense in implementing the law in force is so great that what is understandable, feasible or even self-evident seems paradoxically utopian. How harmful is that? How disturbing it is to realize that so many major and persistent social problems can be solved so easily and so quickly simply by a rethink of the legal system? I remain convinced that, to enhance the quality of the rule of law and constitutional democracy, we do not need more law students or legal professions, lawyers and notaries, legal advisers and legal rules. Even less do we need even more, lengthy and literal legislation, even more public servants, officials, services and functions, or even constitutional amendments. *We need to change the way people think about law and by law, or the prevailing legal thinking as such. The consciousness. The culture.* By changing this way of thinking, it is necessary to change the process of legal education, legislative practice, interpretation of the law, legal argumentation and legal practice as such and as a whole. In this way, it is necessary to start changing social practice as such and as a whole.

Is this really an unattainable goal? Is it unattainable because it depends directly on the people who are supposed to achieve it? Are we really prepared to accept the fact that this is an unattainable goal? Is it a utopia? Even if the problem is understandable and even if it would be reasonable to solve it because it is in itself quickly solvable?

We are dealing with a new paradox here: exactly what is understandable and therefore could reasonably be expected to be quickly achievable remains unattainable in the long run (Judt 2011). But there is also another paradox here: for what remains unattainable, it is the greatest and most enduring undertaking. This is how we keep it feasible. We need this utopia (Dilas-Rocherieux 2004).

8. EMPTY HOLES OF CIVIL LIBERTY⁷

We must not let the concept of freedom float in space. Again and again, we should address the issue of civil liberty and fundamental civil liberties. They are directly conditioned by political alternatives and the choice at every election. This segment of civil liberties poses a considerable problem. The fact that it is possible to win an election without a political program, without ideas, without *content*, without answers to questions, without a vision, even without a political program, and even only through empty and repetitive rhetoric or naked arguments with the encouragement of one of the two sides, supposedly left or supposedly right, and the space in between is empty, hollow, is not the only problem of substantive hollowness, lack of a vision of development and conceptual non-articulation in politics. Nor is the lack of the right political alternatives, i.e. the right political choice, the only problem of substantive hollowness, the lack of a development vision and conceptual non-articulation in politics. There are even more problems (Dahl 1997).

These include the research-proven finding that it is very difficult to get voters to vote for a person other than the one they normally vote for or have already voted for, once voters develop a sense of “belonging” or “attachment” to a particular political party. Or when they begin to “believe” in a particular politician and a particular political party. Even more so, if they became the believers in a cult of personality. Regardless of what a particular party or politician or party-president does, even if what it or he or she does is different from what it or he or she formally promotes. And no matter what the party leader does, how often he or she makes mistakes or lies, or violates the law, or violates the constitution. And no matter how much of what he or she promises, he or she does not keep it because he or she never intended to keep it at all (Gilbert 2013).

⁷ “People who are convinced of the opposite do not need to force unusual and alien opinions on them because they cannot influence them; you should rather go around the corners and try to present your ideas as insightfully as possible so that you can achieve that this or that, if not good, at least less bad. It is impossible for everything to be good unless all people are good, and we should not expect this to happen for many years” (More 2014: 50).

This is also explained in the book *The Righteous Mind* by Haidt (2013; Comp. Dolar 2012). Therefore, even substantively convincing, well-founded, analytically constructed, and credible substantive arguments based on verifiable factual evidence will not persuade determined voters as supporters of a particular party or its president (usually it is all about the party-leader, the party-president because the campaigns and elections are so very and irritatingly personalized!) to deny support to that political party and its leader. On the contrary, the more the object of their affiliation is attacked by critics, the more justified and the greater the indecency or irregularity in the conduct of the party or its leader, the greater the voter's sense of belonging and the less willing the follower is to follow objective truth or other justice. Belonging demonstrably increases dopamine levels, or simply put, the feeling of comfort. Therefore, on a large scale, voters cannot be persuaded to vote for someone else by detailed and substantive reasoning. Nor, therefore, with professional sovereignty or ingenuity, nor with sense and intellectuality. It is all about emotions, beliefs, prejudice, self-deception, manipulation, concretized beliefs and a habit (Gilbert 2007).

Then what is to be done? More in Utopia answers this question indirectly. He suggests, similarly to Machiavelli in *The Ruler (Il Principe)*, that a man with knowledge should still go into politics because the rulers will not listen to his wise advice, even if he is too wise for the voters. He suggests using his wit and knowledge to convince voters in a way he knows he can or will succeed. And if he is successful, he should change the social order step by step, not too abruptly and not too radically, for the better (More 2014).

I would like to believe in the existence of hope that with a non-utopian political alternative another social reality can be created and realized. It is our task to maintain this hope, to try to articulate it, and to try to realize it piece by piece. I, therefore, insist that hope exists and that it can be recognized in a paradox; is it not the case that voters cannot be sufficiently convinced by intellectuality, professionalism, demonstrable moral virtue, knowledge and intelligence, the reason for trying to constantly question, test and undermine the steadfastness of party loyal, ideologically steadfast and politically apathetic voters? How about doing this with insightful criticism, legitimate doubts, analytical disclosure, moral credibility, knowledge and professional sovereignty?⁸

⁸ It should be stressed that the universities, especially in the post-socialist EU Member States, have themselves become a problem of senseless, rampant and exploitative ultra-neo-capitalism. Instead, they should be aware of this in the first place. It is a growing problem. Also, a growing moral problem. They do not place themselves on the margins of the state, its neoliberal capitalist policies and naked market logic, but follow it. They adapt to it. They do not educate critical citizens. They do not strive to maintain the social significance of knowledge

The words of the philosopher Dolar should not be ignored or overheard: “The level of a theoretical production that is emerging today in Slovenia and around the world, a production of which I am a part is something I can believe in. I believe it has its substance, and it always emerges and reaches its own in the long run. We must trust in the power of ideas” (2012).

9. POLITICS, NOT ANTI-POLITICS

What we are experiencing today in Slovenia and Europe, locally-nationally and globally is at best “*post-politics*”. Or, in Crauch’s words, *post-democracy* (Crouch 2013). My friend, prof. Kuzmanić, published the book *Creating Antipolitics* – already in 1996: and it is *anti-politics* (Kuzmanić 1996).

In Slovenia there have been many “protests in the streets” in recent months. And, of course, as expected, nothing has been achieved. Or changed. It has only become worse. And we are still on this path – to the point of no return. I hope not, but as far as it seems from the current social reality, it could be that we have already crossed the border of no return. Which is, I want to emphasize this once again, not necessarily a bad thing – but only if we think of this problem as “there is nothing to go back for” and “we don’t want to go back”, what we want is to go straight forward without having to go back first. So, we need utopia. Crazy ideas. We need to exit the existing coordinate system. We need to think outside the box, outside the cube.

In addition to the social topicality, we should keep in mind the words of professor Žižek: “The value of protests is measured by what is left the day after, after the change in our normal everyday life” (2012). And if we also address the issue of “freedom”, which is addressed both with *systemic violence* and *violence by officials in the service of the system* and with *protests and resistance to violence*, there is also a remark: “Formal freedom is freedom of choice within the coordinates of existing power relations, and real freedom is created by changing the coordinates of the choice itself” (Ibid. 2012).

In addition to this is the rhetorical question: “Is not it the sad fact that resistance to the system cannot be articulated in the form of a realistic alternative, or at least as

as a value and to develop high-quality knowledge as a virtue and educational purpose. They produce graduates, award diplomas and justify themselves with the same neoliberal or naked market logic. This is a very particular problem, because the moral attitude of an active and critical citizen thus has no institutional systemic support. It also captivates young people as passive and politically apathetic consumers, with no educational ambitions, no motivation to study, no real aims in life, no community vision, no generational aspirations and no critical civic passion. At last no future. Comp. Galimberti (2010).

a meaningful utopian project, but only as a meaningless outburst, the sharpest reproach of our predicate? Where is the vaunted freedom of choice, if one can only choose between playing by the rules and (self)destructive violence, which is almost exclusively directed against one's own people? Hidden in outbreaks. What is most difficult to accept is precisely its extreme insignificance". And: "The ultimate difference between radical-emancipatory politics and such outbreaks of impotent violence is that authentic radical politics is active, imposing itself, imposing its vision, while outbreaks of impotent violence are fundamentally reactive, a response to a disturbing intruder" (Žižek 2007).

And then, new issues arise. Such as intrusion into the right to privacy and protection of personal data (with proposals and already enacted new laws on surveillance via mobile phones, Classification of persons into different groups according to the degree of their "risk" due to previous illnesses, a positive COVID-19 test or age), into the right to a free movement and social association (with the same reason), into personal integrity (with introducing new vaccines as compulsory, without any control, restraints and limits on legal policies of the governments), enacting a law prohibiting children to enrol into kindergartens and schools if they were not vaccinated, doing the same to the youth regarding high schools and faculties... And so discriminating, stigmatizing and socially isolating people... (Fukuyama 2003). With the political knock-down of the people and humanity: all people must wear the so-called "protective masks" at all times and in all places. Even first graders, on the first day of their first entry into the first grade of primary school. It's hard to stay reasonable. Peacefully. And thoughtful. It's hard not to go crazy. It's hard not to become furious. And take it on the street.

10. CONCLUSION

Perhaps there are never too many different theories about the organization of society, ideas about the normative framework of life in a political community and suggestions on how to institutionalize the political system. Perhaps they go out in public too early. This could also apply to those reflections on society and to those political philosophies that bear the label of utopia. There is no doubt about the importance of such human investigations of what is and what should be. And there is no doubt about the usefulness of constantly imagining what it should be. However, analytical and explanatory caution is required when the word utopia is used to suggest the utopian nature of an idea.

In other words, what looks like a utopia can already be presented to us as a provable and tangible fact, only that too many people do not perceive it for too long, and therefore it remains unfulfilled in social practice. Is this really a utopia? On the other hand, what may seem completely understandable, feasible, or even self-evident can appear extremely utopian when it comes to the normative approaches to social regulation and the conditions for achieving a “better society”. The deviation of political practice and legal practice from what should be understandable or even self-evident according to the text of the constitution and international law, the findings of jurisprudence, philosophical insights and common sense in political decision-making and the drafting and implementation of the applicable law is so great that, paradoxically, precisely that which is understandable, feasible or even self-evident appears utopian.

And how can utopianism be combined with the realization that so many major and persistent social problems can be solved so easily and quickly – even if only by rethinking the legal system and social realm? How can a human being efficiently oppose neoliberal politics and unbridled capitalist practice, the poor functioning of the rule of law, the low quality of the welfare state, the excessive threat to fundamental human rights and freedoms, the inadequate protection of social rights, the insufficient commitment to the value of solidarity and the inadequate role and weakness of morality in social practice? Can the answers to fundamental social questions and solutions to the greatest problems only be found in a real and literal utopia? I do not believe so.

I believe that *communitarianism* can be a good political alternative. Understood as social liberalism and as a social democracy based on the rule of law, morally founded on social solidarity as a fundamental value. I am convinced that the constitutions of the EU Member States and the EU legal order enable it. A strong and interventionist state is needed to realize the constitutional possibilities of a high-quality welfare state, effectively protected social rights, the realized social function of property and a society based on solidarity. Ideas are needed. Even if they seem so crazy, even if they seem utopian. In these times when the devil has taken the joke away, when people are again protesting massively in the streets, when they protest (unsuccessfully, of course), when it is difficult to know exactly what is happening and why, when more and more people are increasingly confused and frightened, when systemic violence increasingly turns into physical violence, when it is difficult to remain calm and thoughtful, when it is difficult to tame anger and rage..., *it is necessary to step out of the existing coordinate system, out of the cube*, to form and communicate ideas that seem *crazy, utopian...* Now, right now, ideas are needed, crazy ideas. We need a utopia. And faith and hope in it. Faith and hope, which will be the driving force of

active action, of striving for realization – of a *utopia*. The experience of the *Pandemic* must not prevent or take this away from us.

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POLITIČKI PRIORITETI JAVNE UPRAVE, DRŽAVE, BLAGOSTANJA I USTAVNE DEMOKRATIJE NAKON PANDEMIJE 2020-2021.

Sažetak:

U vrijeme službenih pandemijskih mjera Coronavirus 2020-2021. uvedena su opća ograničenja slobode kretanja i ostalih temeljnih ljudskih i ustavnih prava i sloboda i ona još uvijek traju. Brzo se postavilo pitanje u kakav će svijet ući nakon službenog završetka pandemije. Problem straha se intenzivirao. Ovo nije samo socijalni, već i pravni problem: ljudi imaju temeljno ljudsko pravo na zaštitu od straha. Apsolutni kratkoročni prioriteti javne uprave u svim državama članicama EU-a i Vijeća Europe morat će biti usmjereni na osiguravanje da strah i tjeskoba ne postanu nova epidemija. Brigu o efikasnosti i kvalitetu javnog zdravstvenog sistema treba ojačati i poboljšati, uključujući brigu o mentalnom zdravlju i prevenciji samoubistava, brigu o dobrobiti starijih i smrtno bolesnih, osoba sa invaliditetom (općenito i radnika s invaliditetom), brigu o djeci, posebno djeci s posebnim potrebama, i brigu o raznolikom i kvalitetnom palijativnom zbrinjavanju. Također postoji potreba za izmijenjenom i poboljšanom pravnom politikom u pogledu sistema obrazovanja, naučnog istraživanja i zapošljavanja. I na kraju, ali ne najmanje važno, mora se voditi računa da se osnovna ljudska prava i slobode ne uzimaju zdravo za gotovo. Zdravstvena kriza rezultirat će novom ekonomskom krizom. To ne bi trebalo shvatiti kao kraj socijalne države. Nova je prilika za odbranu socijalnih i ekonomskih ljudskih prava i stvaranje zajedničke evropske socijalne države. Trenutno su potrebne nove ideje – čak i lude ideje. Treba nam neka vrsta utopije. I vjera i nada u nju, koja će biti pokretačka snaga aktivnog djelovanja. Iskustvo pandemije to nam ne smije sprječiti ili oduzeti.

Ključne riječi: socijalni izazovi nakon pandemije 2020-2021; kratkoročni prioriteti javne uprave; hitne promjene u zakonskim politikama; problem straha; zaštita temeljnih prava i sloboda; javni zdravstveni sistem; ostvarenje utopije; potreba za novim i "ludim" idejama, stvaranje zajedničkog europskog socijalnog društva

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