

MATEJ AVBELJ AND JERNEJ LETNAR ČERNIČ, *THE IMPACT OF EUROPEAN INSTITUTIONS ON THE RULE OF LAW AND DEMOCRACY: SLOVENIA AND BEYOND* (HART 2020)

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I. INTRODUCTION

Since the early 2010s, the rule of law has been one of the hottest topics in the European Union (EU) – and with good reason. Viktor Orbán began dismantling Hungarian democracy in 2010 and Poland joined the illiberal party soon after. Endless scholarly ink has been spilled on the ever-deteriorating situation in these rogue, 'illiberally democratic' states.¹ Away from the spotlight, Romania and Bulgaria have also had their occasional bouts of constitutional crisis and dialogue with European institutions. But recently, a new player has emerged in the rule of law discourse: Janez Janša, one of the closest allies of Viktor Orbán, has become the Prime Minister of Slovenia. Since then, almost every major Western media outlet has reported on the attacks by the populist far-right Janša government on the rule of law.²

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¹ See, for instance, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Gabor Halmai, 'The Fall of the Rule of Law in Hungary and the Complicity of the EU' (2020) 12 *Italian Journal of Public Law* 204.

² See, for instance, Lili Bayer, 'Inside Slovenia's War on the Media' (*Politico*, 16 February 2021) <<https://www.politico.eu/article/slovenia-war-on-media-janez-jansa/>> accessed 21 September 2021; Eszter Zalan, 'EU Institutions Brace for Impact of Slovenia's Janša' (*EUobserver*, 1 April 2021) <<https://euobserver.com/democracy/151422>> accessed 21 September 2021; Valerie Hopkins, 'Slovenia's Jansa Follows Hungary down Authoritarian Path' (*Financial Times*, 23 May 2021) <<https://www.ft.com/content/100454c3-c628-40a0-af6e-392cc79a53f9>> accessed 21 September 2021; Andrew Higgins, 'Wielding Twitter, Europe's "Marshal Twito" Takes Aim at the Media' (*The New York Times*, 16 June 2021) <<https://www.nytimes.com/2021/06/16/world/europe/slovenia-jansa-press->

Many others have also expressed similar concerns, including media freedom organisations,³ European human rights institutions,⁴ international academics,⁵ and domestic constitutional scholars.⁶

Literally within days of Janša being sworn in for the third time as prime minister in March 2020, a monograph, '*The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond*' by Matej Avbelj and Jernej Letnar Čerňič, was published.⁷ The book tells a very different story to those above and provides an alternative perspective on the state of democracy and the rule of law in Slovenia. It aims to explain that rule of law problems in Slovenia are not recent, and that Slovenia should have been

freedom-twitter.html> accessed 21 September 2021; Amanda Coakley, 'In Slovenia, a Trumpian Populist Assumes a Key European Post' (Foreign Policy, 30 June 2021) <<https://foreignpolicy.com/2021/06/30/slovenia-janez-jansa-trumpian-populist-illiberal-european-council-presidency/>> accessed 20 September 2021.

³ 'Press Freedom Groups Raise Increasing Concerns over Situation in Slovenia' (International Press Institute, 16 March 2021) <<https://ipi.media/letter-press-freedom-groups-raise-increasing-concerns-over-situaiton-in-slovenia/>> accessed 21 September 2021.

⁴ Council of Europe Commissioner for Human Rights, 'Memorandum on Freedom of Expression and Media Freedom in Slovenia' CommDH (2021) 17.

⁵ Open letter from Hugh Agnew, Aleida Assmann and others to Janez Janša (10 December 2020) <<https://publiclettertoslovenia.wordpress.com>> accessed 20 September 2021.

⁶ Jaka Kukavica, '(Rule of) Law in the Time of Covid-19: Warnings from Slovenia' (Verfassungsblog, 25 March 2020) <<https://verfassungsblog.de/rule-of-law-in-the-time-of-covid-19-warnings-from-slovenia/>> accessed 20 September 2021; Samo Bardutzky, Bojan Bugarič and Saša Zagorc, 'Slovenian Constitutional Hardball' (Verfassungsblog, 1 April 2021) <<https://verfassungsblog.de/slovenian-constitutional-hardball/>> accessed 5 October 2021; Jure Vidmar, 'Slovenia's Legal Farce with the Nomination of European Delegated Prosecutors' (Verfassungsblog, 27 August 2021) <<https://verfassungsblog.de/slovenias-legal-farce/>> accessed 20 September 2021; Matija Žgur, 'Le trasformazioni del diritto al tempo del Covid-19. Il caso sloveno' (2021) 2 Rivista di Diritti Comparati 198.

⁷ Matej Avbelj and Jernej Letnar Čerňič, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart Publishing 2020).

under the strictest rule of law scrutiny by the EU ever since its accession. The authors argue that the true problems in Slovenia lie in the state capture by leftist post-communist elites that, according to the authors, have ruled and controlled nearly every aspect of Slovenian society – the economy, the judiciary, the media, higher education, and civil society – ever since its independence.

This argument is recounted critically and in detail in the section that follows. Subsequently, the review draws attention to some of the most important methodological and logical shortcomings of the argument that the authors posit. In conclusion, it highlights the parallels between the narrative forwarded by the book and the narratives that have been used elsewhere in Europe, particularly in Poland, to justify blatant encroachments upon the rule of law.

II. A SPECTRE IS HAUNTING SLOVENIA – THE SPECTRE OF (POST)COMMUNISM

The title of Avbelj and Letnar Čeranič's book is somewhat misleading; in *'The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond'*, there is little discussion of anything beyond Slovenia. A cursory glance at the table of contents makes this point clear. Of the eleven substantive chapters, eight (Chapters 2-9) discuss the pitfalls of Slovenian democracy and the alleged state capture, two (Chapters 10-11) discuss the influence of the EU and the Council of Europe (CoE) on the rule of law in Slovenia, and one (Chapter 12) explains what a resilient democracy in the EU should be – a discussion that is, though doctrinally engaging, for the most part disengaged from the remainder of the book.

At its core, the book presents a challenge to the narrative of Slovenia as a success story of post-communist transition; though often considered as a role-model liberal democracy with a free-market economy in which the respect for human rights is guaranteed, it is anything but that. Slovenia, the authors argue, is a Potemkin village – perfect when it comes to *de jure*

observance of the rule of law and democratic norms, but there is something rotten on the inside. *De facto* respect for the rule of law is nearly non-existent and democratic processes are primitive. Avbelj and Letnar Čerňič identify the architects of the Potemkin's facade as the unnamed, spectre-like "post-communist elites" who, after the fall of communism in the early 1990s, never rescinded their power but merely changed its form. The good old days of the Politburo are gone and no longer can "institutional elites" control the country overtly and shamelessly; instead, their power is now covert and exercised through "informal networks" in which all the country's economic and political leverage is monopolised. Because of the omnipresent nature of state capture by the "leftist post-socialist elites", the authors suggest that Slovenia, not Hungary or Poland, should have been the prime candidate for rule of law oversight by the EU institutions. They explain that, unlike the backsliding Hungary and Poland, 'Slovenia [...] did not have anywhere to slide backwards to. The rule of law [...] appears to have been, since the fall of the iron curtain, under attack from nouveau riche elites very much connected to the former totalitarian regimes'.⁸

It is precisely in the former communist regime that Avbelj and Letnar Čerňič begin their exploration of the causes and manifestations of state capture. They argue that 'the reason for the present deficiencies of the rule of law in Slovenia' are the 'systematic and widespread human rights violations during the former [Yugoslav] communist regime'.⁹ Slovenia has not done enough to address these historical grievances, they contend; processes of transitional justice have been neglected as the perpetrators of crimes against humanity have not been prosecuted and no (effective) lustration measures have been adopted (Chapter 3). Another historically predicated grievance is that the gradualist economic transition has been a failure; it has, in their view, permitted the old communist political elites to 'gain, accumulate and maintain the economic power within their hands and their influential circles'

⁸ Ibid 7.

⁹ Ibid 36.

and thus transform themselves into (covert) economic elites.¹⁰ Basing their claims on almost decade-old data, the authors also argue that gradualism has allowed the state to directly control the economy by maintaining a high percentage of state-owned enterprises (Chapter 4).

Fast forward to today, and the protection of human rights in Slovenia is predicated on political biases, the authors argue. Human rights institutions selectively protect only the rights that are ideologically close to unspecified "private interests". These rights include LGBT rights, socioeconomic rights, and the rights of migrants, asylum seekers, and ethnic minorities such as the Roma. In the authors' view, human rights NGOs suffer from these same ideological biases favouring "transitional elites" and the rights close to them, such as gender rights or hate speech, but ignoring the alleged unfair functioning of the judiciary and issues of transitional justice. Because these NGOs are financed through public funds, the authors suggest they have been captured and that 'they should not be considered as proper civil society organisations, but rather as an extension of government or even as part of the public administration' (Chapter 5).¹¹ Avbelj and Letnar Čerňič maintain that, in addition to the civil society, the post-communist elites have also managed to capture the media, which is not pluralistic and is constructing "parallel realities" through its reporting. According to the authors, the public media has been captured to the extent that it is 'representing the interest of political parties and informal networks, and feeding information on their behalf.'¹² Similarly, the private media, through non-transparent ownership structures and innovative concentrations of ownership, are presented as merely 'fulfil[ing] the interests of their masters by protecting the privileges of informal political, economic, and other networks' (Chapter 8).¹³

¹⁰ Ibid 70.

¹¹ Ibid 95.

¹² Ibid 163.

¹³ Ibid 166.

The Slovenian judiciary is one of the foremost culprits for this abysmal situation; the authors insist it is too inefficient at processing important cases. There are serious challenges to the independence and impartiality of courts, which are not trusted by the public and violate human rights *en masse* (Chapter 6). On a more abstract level, Slovenian democracy is on life support, as all three aspects of its legitimacy – input, throughput, and output – are in a deep crisis. The authors argue that this 'weak democratic system is a reflection of a strong informal system of power [...] under the control of the communist elite and their successors' (Chapter 7).¹⁴ Finally, Avbelj and Letnar Čerňič posit that poor compliance with the rule of law and a 'systematic failure in the exercise of constitutional democracy' have caused the welfare state to suffer.¹⁵ This is explained through a chain of causality that is strongly reminiscent of a slippery slope: weak rule of law leads to weak institutions; weak institutions lead to a poor business and investment environment; a poor business and investment environment leads to slow economic growth; and slow economic growth leads to a weak welfare state (Chapter 9).

At this point the book moves from exclusively discussing the situation in Slovenia to discussing what the title of the book would suggest it might: the impact the CoE and the EU have had on the rule of law and democracy in Slovenia (Chapters 10 and 11, respectively). On this issue, it offers a mixed conclusion: European institutions have had a positive impact on the rule of law only *de jure*. *De facto*, however, the EU should have done more to undo the capture of the Slovenian economy, whereas 'the political and institutional elites have taken up the values [of the CoE] only when they have served their agendas and their parochial interests, particularly in the

¹⁴ Ibid 147.

¹⁵ Ibid 189.

power struggles to protect and advance their private – financial – objectives.¹⁶

Though the final chapter (Chapter 12) offers a well-reasoned analysis of what a resilient democracy in Europe should be, it nonetheless brings the analysis of Slovenian democracy to a perverse conclusion: Hungary and Poland 'have still so much to do, especially with regard to subordinating the formal institutions of the state'¹⁷ to reach a level of state capture on par with the one in Slovenia. Reading this seems surreal on any given day, but these words seem particularly at odds with reality when one reads them just a couple of days after the captured Polish (un)Constitutional Tribunal has assaulted the very foundations of the EU legal order by rejecting the primacy of EU law.¹⁸

III. WHAT WOULD KARL POPPER HAVE TO SAY?

Avbelj and Letnar Čerňič's book is the first monographic treatment of the rule of law and the state of democracy in Slovenia in legal scholarship. As such, it makes a welcome contribution to the academic literature: for too long have Slovenia and its particularities been unexamined in the scholarly discourse. Lack of scrutiny can lead to complacency, or worse. Their contribution is 260 pages of well-written and easy to read prose. Though the three authors (including Gorazd Justinek, who contributed Chapter 4 of the book) nurture notably different writing and argumentative styles, this

¹⁶ Ibid 218. The only support cited for this conclusion is that Slovenia is allegedly performing particularly poorly regarding the execution of ECtHR judgments. This is empirically false. See Veronika Fikfak and Ula Kos, 'Compliance and ECtHR – Country Report: Slovenia – An Exemplary Complier with Judgments of the European Court of Human Rights?' (2021) iCourts Working Paper Series No 249 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801105> accessed 10 October 2021.

¹⁷ Avbelj and Letnar Čerňič (n 7) 247.

¹⁸ Judgment K3/21 of the Constitutional Tribunal of 7 October 2021.

does not distract the reader, nor does it diminish the overall readability of the book.

In the words of the authors, 'this book aims, first, to portray the various pathways of the backsliding of the rule of law and democracy in Slovenia, and secondly to draw parallels and lessons for the broader CEE region'.¹⁹ However, as already noted above, the book predominantly works towards reaching its first aim, while barely discussing the second one at all. The following paragraphs follow its example.

Avbelj and Letnar Čerňič's book justifiably draws attention to a number of (democratic) deficits that have been undermining the rule of law in Slovenia. For instance, the authors rightly point out the lack of respect by the legislature for the decisions of the Constitutional Court – dozens of them are still unexecuted by the legislature, demonstrating its complete contempt for the separation of powers.²⁰ They also provide a compelling analysis of some of the problems facing the judiciary: its inefficiency in processing hard cases; the troublingly legislature-dominated appointment procedure of judges; the disproportionately low remuneration of judges compared to the other two branches of government; and the many problems related to the mechanisms of internal and external oversight of the judiciary.²¹ The book also justifiably draws attention to the existence of legally dubious media concentrations, as well as untransparent ownership structures of some private media outlets.²² Additionally, the authors should be commended for accurately diagnosing and giving a name to a phenomenon that has long plagued the Slovenian legal system, that is, an extreme 'institutional attachment to a statutory-based legal positivism'.²³ Finally, as already noted, their doctrinal analysis of the concept of a resilient democracy in the EU is outstanding; the authors offer

¹⁹ Avbelj and Letnar Čerňič (n 7) 10.

²⁰ Ibid 87.

²¹ Ibid 100–11.

²² Ibid 164–65.

²³ Ibid 227.

sound recommendations as to how the EU and the CoE should approach democratic crises in their Member States and how they might effectively contribute to 'pro-constitutional democracy forces in the national political and civic environment'.²⁴

However, some words of criticism cannot be left unsaid. Above all, there is the issue of conceptual and methodological opacity that permeates the book and is manifested in different forms. First, some of the central concepts that are used in the book are never operationalised. For instance, even though the authors acknowledge that the rule of law is an essentially contested concept,²⁵ they never offer a conception of the rule of law they subscribe to, other than a one sentence definition on page 197 (!) of the book. This leaves much of their argument toothless, as the book fails to define a normative standard against which the situation in Slovenia should be measured; it leaves space for the rule of law to be moulded at will to cover any (political) grievance one might have. Or, to put this in different terms, if one of the leading arguments is that the rule of law in Slovenia is under strain, the major premise of this syllogism, i.e. a conception of what the rule of law is and what it specifically requires, is missing. The same can be said about state capture. Like the rule of law, it is one of the central concepts in the book. And yet, the argument alleging state capture by post-communist elites is made without any underlying theoretical analysis of what state capture is, how it manifests itself, and how we can go about proving it. Though the book initially promises a look behind the scenes to supplement 'an exclusive formal constitutional focus [...] by a more sociological approach',²⁶ one would be hard pressed to find any rigorous sociological methodology in the book.

The argumentative opacity of the book is also manifested in the mismatch between the concrete shortcomings related to the rule of law that the book

²⁴ Ibid 250-52.

²⁵ Ibid 5.

²⁶ Ibid 26.

diagnoses and the logically fallacious conclusions it draws from them. For example, the authors correctly note that the Slovenian judiciary is inefficient at processing complex cases. However, on this basis alone, they conclude that

lack of efficiency in the so-called hard and complex, in particular criminal cases, [...] suggests that the judicial system might be skewed in favour of influential individuals, white-collar crime, and crime with major economic and financial repercussions.²⁷

They offer no further evidence for this conclusion. This is patently a *non sequitur*. With no empirical evidence or further explication, one simply does not follow from the other. And this argumentative pattern recurs throughout the book. For any woe of Slovenian democracy, the answer that explains it is the "post-communist elites". Of course, this is not problematic in and of itself; it could well be the correct explanation. But because the book fails to identify these mythical post-communist elites and leaves them completely anonymous (with very few exceptions),²⁸ the transitional post-communist elites hypothesis becomes an unfalsifiable theory of everything. It can be used to explain anything; it is irrefutable and untestable. If the book fails to explain who the individuals in these "informal networks" are and how they exercise their influence, how can one confirm or reject that they have these omnipotent powers and that they wield them as alleged? This opaque argumentation renders any meaningful criticism of the theory impossible. Karl Popper might argue that the theory fails to meet his falsifiability criterion, which in philosophy of science serves as a demarcation mechanism between theories that are scientific and those that are not.²⁹

²⁷ Ibid 104.

²⁸ See, for instance, *ibid* 164–68, where the authors discuss in detail the ownership structures of most media outlets and discuss how the owners of these outlets might have influenced their reporting.

²⁹ Karl Popper, *The Logic of Scientific Discovery* (first published 1959, Routledge 2010).

IV. CONCLUSION

Setting aside for a moment whether the theory is scientific or not – and even whether it is true or not – it is difficult to ignore that the arguments advanced in this book might sound eerily familiar to some. For those acquainted with democratic backsliding elsewhere in the EU, many of the narratives forwarded by the authors might be easily recognisable. Avbelj and Letnar Čerňič's anonymous but omnipotent and omnipresent post-communist elites and their informal networks are highly reminiscent of what the Kaczyńskis and the Law and Justice (PiS) party in Poland have called '*układ*'. *Układ* is an inherently ambiguous concept coined and used by PiS as a central discursive device through which they have rallied support and justified their frontal assault on the rule of law. The term refers to the 'communist-era networks of patronage and power [and] a nebulous series of post-communist networks of supposed semicovert groups operating in a half-world between (mainly ex-communist) politicians and secret service officials and apparatchiks.'³⁰ Lech Kaczyński himself has described the mythical *układ* as 'a certain system of interests which stem from the old communist structures' and stated that 'above all it is about economic interests, which have a fundamental impact on events in Poland, also in a political sense.'³¹ So much like the membership of the Slovenian "post-communist elites", the membership of the Polish *układ* is shrouded in mystery. And yet they both allegedly control their respective countries from the shadows in order to protect their undefined economic interests. The resemblance is uncanny. Unfortunately, Avbelj and Letnar Čerňič miss the opportunity to differentiate their arguments from these very similar ones that are being used elsewhere in service of the erosion of the rule of law.

³⁰ Jo Harper, 'Negating Negation: Civic Platform, Law and Justice, and the Struggle over "Polishness"' (2010) 57 *Problems of Post-Communism* 16, 22.

³¹ 'Rozmowa Lecha Kaczyńskiego z Dorota Gawryluk' (Strona PiS, 12 August 2004) <<http://old.pis.org.pl/article.php?id=3225>> not accessed (password protected), cited in *ibid*.

Naturally, the mere similarity between the two discourses says nothing about the validity of Avbelj and Letnar Čerňič's argument; nor does it suggest that the authors are engaged in the same discursive project as the Kaczyńskis and PiS. These parallels do, however, raise the question of whether their arguments could be (ab)used in Slovenia in the same way as the far-right has used similar arguments in Poland, that is, to justify blatant assaults on the rule of law on the pretense of breaking up the phantasmic, omnipotent "post-communist networks" and establishing pluralism in public life. I would argue that this is already happening. The game of constitutional hardball that Janša's government has been playing since 2020 does not come as news to many.³² What might have gone unnoticed, however, is that Janša has been consistently using the same arguments and discursive devices used by both this book and the Kaczyńskis to rally support when in opposition and to justify widespread encroachments upon the rule of law when in government. In a recent interview given to the Polish Press Agency, for instance, Janša spoke of there being 'a system of protection of the privileges of the elites, which is perpetuated by the Slovenian judiciary', because no lustration measures have been adopted after the fall of communism.³³ Again, the resemblance is uncanny: *caveat emptor!*

³² Bardutzky, Bugarič and Zagorc (n 6). See also n 2 above.

³³ Blaž Čermelj, 'Janša za poljske medije kritično o vladavini prava v Sloveniji in EU' (Domovina, 5 August 2021) <<https://www.domovina.je/jansa-za-poljske-medije-kriticno-o-vladavini-prava-v-sloveniji-in-eu/>> accessed 25 October 2021.