A Conceptual Framework and an Empirical Methodology for Measuring Judicial Ideology – the Case of the Slovenian Constitutional Court

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I. Introduction

How ideological are our (national and transnational) courts? This is a question that lawyers, including legal scholars, are typically not really comfortable with. In some jurisdictions, including Slovenia, which this paper is concerned with, such a question is perceived as a provocation, as a means of delegitimizing the judiciary, as a (political) instrument of encroachment on the difficulty won judicial impartiality and independence. True, the question of judicial ideology is a divisive and a provocative one. It disturbs the conventional legal mind-set, but this does not mean that it should be shied away from. To the contrary, the fact that a particular epistemic community reacts forcefully, at times even emotionally, to certain questions speaks in favor of their importance and therefore calls for more rather than less research attention.

Section two of the paper will, however, demonstrate that the research on judicial ideology is still at its early stage. Two main reasons can be identified for that. The first is a methodological one. The identification and measurement of judicial ideology requires a more or less shared understanding of the very notion of judicial ideology and calls for an empirical research approach to law and judiciary. However, the concept of judicial ideology remains (essentially) contested and the empirical approach to law has traditionally been alien, especially, to the continental European legal studies. On the other hand, for the judicial ideology to be measured empirically, it must be observable and therefore expressed first. Section three of the paper will show that several legal systems, national and transnational, prevent the expression of judicial ideology through the requirement of unanimous, sometimes even anonymous judicial decisions.

It will be argued in section four of the paper that this normative choice to conceal judicial ideology is informed by a deeper, underlying conceptual understanding of law. It will be suggested that on the basis of the theoretical and practical attitudes toward judicial ideology three different conceptions of law can be identified: the objectivist, the discursive and the subjectivist conception. It will become apparent that raising the question of judicial ideology only makes sense within the realm of some conceptions of law, while it is irrelevant on the premises of another.

The rest of the paper explains how the notion of judicial ideology was operationalised and empirically investigated in an on-going research on the Slovenian Constitutional Court.¹ The Slovenian legal system is a paradigmatic embodiment of an objectivist conception of law. In

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departing from this deeply entrenched, but equally flawed understanding of law, section five of the paper introduces a multidimensional definition of judicial ideology used in our research. Finally, sections six and seven present the empirical methodology and preliminary results of this first-ever empirical research of ideology on the Slovenian Constitutional Court. It should be said that the focus of this paper is not on the empirical results, which are currently still based on a small sample of Constitutional Court decisions, but rather on the conceptual framework and the empirical methodology.

II. Researching Ideology in National and Transnational Courts

A comparative review of the leading literature on judicial ideology shows that, with the exception of the US, legal scholarly focus on the ideology in courts is only at the initial stage of its development. There are significant differences between the US, where the empirical approach to law, which is required when examining the role of judicial ideology, has been well-developed already for a while, and Europe and other parts of the world where it only started emerging in the 1990s. An even closer look at the literature reveals a fundamental division along the line between the Anglo-Saxon common law systems and the European continental system with its derivations around the world. As Nuno Garoupa demonstrates, the basic difference runs along the different type of courts. Courts in common law systems, particularly in the US, but also in the UK, Canada and Australia, have been subject to thorough empirical research about the influence of ideology on judicial decisions, while the opposite is true for analyses of the so-called Kelsenian courts.

In the US, extensive theoretical and empirical research has been conducted about ideology in the courts, its influence on court decisions and different approaches to measure this influence. Modelled on the research in the US, similar research started emerging in Canada.

3 Ibid.
Quite extensive research, also modelled on the American example, can also be found in relation to the work of British courts.\textsuperscript{7} Already in the early 1980s, David Robertson empirically studied the influence of ideology on decisions in the House of Lords,\textsuperscript{8} and later developed an elaborated theoretical notion of judges as political theorists.\textsuperscript{9} Similar research is less frequent in Australia,\textsuperscript{10} and even more of a rarity in Europe. Garoupa thus lists\textsuperscript{11} only a handful of authors conducting empirical research on the work of courts in Germany,\textsuperscript{12} Belgium,\textsuperscript{13} Bulgaria,\textsuperscript{14} Poland\textsuperscript{15} and Norway.\textsuperscript{16} On the other hand, there has been quite some research in this area since 2000, first in France,\textsuperscript{17} Spain\textsuperscript{18} and especially Italy,\textsuperscript{19} as well as in


\textsuperscript{9} David Robertson, The Judge as Political Theorist (Princeton University Press, 2010).


\textsuperscript{13} Lucia Dalla Pellegrina, Jef De Mot, Michael Faure and Nuno Garoupa, Litigating Federalism: An Empirical Analysis of the Belgian Constitutional Court Decisions (2016).

\textsuperscript{14} Chris Hanretty, The Bulgarian Constitutional Court as an Additional Legislative Chamber, East European Politics and Societies 28 (2014), 540–558.


The reviewed empirical research pursued a diverse set of objectives: determining the level of independence of individual judges and courts; determining the influence of the (political) appointment procedure on judges’ decisions; determining the decision-making dynamics in the courts with respect to the composition of their senates, or the influence of the presiding justice and/or judge-rapporteur. Empirical research thus analyses the sociological, psychological, situational and other circumstances affecting judges’ decision making, but only few analyses focus precisely on determining the worldview, eg ideological orientation of judges and measuring its impact on the decisions they make. Although the example of the US has led to more empirical analyses also in Europe and other parts of the world since 2000, their number remains low.

This conclusion is accentuated further when extended to the research in transnational judiciary, eg to the courts working beyond the state either on the international, regional or supranational plane. The research is rather limited and to the extent it does exist, it has not focused on the question of judicial ideology *stricto sensu*, but rather on the judges’ actual capacity to carry out their judicial role in an independent and impartial manner. This is, in particular, true of the scholarship focusing on the International Court of Justice (ICJ), which has mostly examined to what an extent nationally appointed judges as members of the international court continue to exhibit their national biases.21

Similar approach has also been adopted with regard to the Court of Justice of the European Union (ECJ). Here too the researchers have mostly measured the impact of the member states on judges’ decision-making, focusing on the judges’ choice to either support more integration (Europhilia) on the one end or the interests of member states (Euroscepticism) on the other.22 However, in contrast with the ICJ where judges are permitted to publish their dissenting opinions, at the ECJ they are not. This has made studies of individual judge’s positions, let alone of their ideological views, much more cumbersome. Malecki has thus, for example, tried to identify the individual judges’ policy preferences on the basis of the analysis of the decisions of chambers composed of different judges. He has found that there is almost no correlation between judge’s voting behavior and the ideological orientation of his government.23 The presence or absence of judge’s state of domicile in an actual case is a weak, almost irrelevant factor.24 However, what seems to make a difference is the number of observations submitted by member states against the observations of the Commission in a trial. The Court has, apparently, been cognizant of the importance of implementation of its rulings and has therefore tried to address the concerns of its audience, composed, in

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23 Ibid.

24 Ibid.
particular, of the member states. The research by Carrubba, Gabel and Hankla corroborates this conclusion by finding that “small shifts in the number of governments aligned on one side of a legal issue or another have large substantive effects on the ECJ’s likely decision.”

On the other hand, the research on ECtHR has gone somewhat deeper and has moved beyond the questions of independence and impartiality, which are usually related to the nationality of a judge and his or her relationship to the appointing state. Also due to a different nature of the ECtHR which, as a human rights court, does not (typically) rule on the international disputes between states, the question of bias here, unlike in the case of the ICJ, has approached more closely the issue of judicial ideology, querying into the individual judge’s normative orientation in favor of human rights or state interests. The research on ECtHR has demonstrated that legal culture and geopolitics are not important sources of bias among the ECtHR judges. National bias, however, tends to have some influence in politically sensitive issues. On the other hand, there is much more evidence that, not unlike the national judges, the ECtHR judges too are “political actors in the sense that they have policy preferences that shape their choices.” The empirical work on ECtHR has thus shown that neither legal culture nor geopolitics, but the ideology of judges bears the most influence on their actual decision-making. This, as Voeten has observed, permits relying on methods and theories developed for the study of national judiciary, also in the transnational realm.

III. Expression and Observability of Judicial Ideology

The ideology, to be measured, has to be observable. As argued by Fischman, “with the tools and data that currently exist, there is simply no way for researchers to observe directly a judge’s actual state of mind.” This means that judicial ideology to be observed and measured must be, in that or another way, expressed through the judges’ actual behavior. While this can be empirically studied in many different ways, either directly or indirectly, the most beneficial platform that the individual judge’s ideological profile can be inferred from is the practice of judges writing separately, eg in form of either concurring or dissenting

27 For an example of such research see Jurij Toplak, Judicial Behavior on the European Court of Human Rights, ECPR General Conference, Prague, September 7-10, 2016.
29 Ibid.
30 Ibid, 418.
31 Ibid, 431.
opinions. It is there, in their separate opinions, that judges present their specific individual takes on the case and in so doing, intentionally or not, also reveal their ideological perspective on the questions raised. In the absence of separate opinions, when the court rules per curiam, not even listing judges’ names, let alone those who have voted in favor and against the ruling, it is impossible to determine the individual judge’s legal and ideological position on the of basis the observation of a judge’s actual conduct.  

However, the practice of judges writing separately varies around the world. As noted by Ginsburg, roughly three distinct historical models of (in)existence of separate opinions can be distinguished. In the British system, there is no opinion of the court and each judge is writing separately. The US system, which proceeded from the British model, has since developed autonomously so that there is an opinion of the court, while the judges are entitled to write separately. By contrast, the continental European system has traditionally not allowed for separate opinions. In the most conservative manner, epitomized by the judiciary in France, the courts are conceived of and function as faceless, unanimous units, whose rulings are drafted in cryptic language and the individual judges are entirely subsumed under the institution of the court, so that their opinions are blended into what the law as such is found to require. However, since the 1970s, with the German Federal Constitutional Court acting as an avant-garde, the continental European model has undergone significant internal differentiation with respect to separate opinions, to the extent that the historically relatively clean line between common law and civil law jurisdictions has been more or less blurred. The French model thus today increasingly occupies an extreme position. A study by the European Parliament has found that only seven national jurisdictions in the EU do not allow for separate opinions. In all other EU national jurisdictions, the judges at the constitutional courts, but sometimes also in the ordinary judiciary, are permitted to issue separate opinions. A similar trend has been present among transnational courts, where most of them practice separate opinions, the ECJ being a notable exception.

While the trend has thus clearly been in favor of separate opinions, several jurisdictions, in particular the ECJ, as well as scholars insist that there remain potent arguments against them. Two central legal values in particular have been promoted as an argument against separate opinions: legal certainty and judicial independence. Bricker thus observes that the traditional absence of dissenting opinions, judicial secrecy, attempts at creating a faceless, unanimous courts in continental Europe, in the so called civil law legal systems, has been motivated with an ambition of preserving legal certainty as one of the cornerstone values of the law. Separate opinions, in particular the dissenting ones, would send a message that the law is not settled, that the question of the right legal answer is contested, which could, taken

33 To compensate for this, the literature has developed other methodological approaches to measure judicial ideology, not based on observation of judge's actual behaviour. The two other, most frequently used approaches have been the statistical coding methods and the use of the so-called »proxy variables«. For an overview see Joshua B. Fischman and David S. Law, What is Judicial Ideology, and How do we Measure it?, Washington Journal of Law and Policy 29 (2009), at 154-155.
35 Ibid.
36 Bicker
38 Ibid: Belgium, France, Italy, Luxembourg, Malta, The Netherlands and Austria.
39 Ibid.
40 Dunoff
together, result in less persuasive and therefore also less legitimate judicial rulings. The authority of the courts would thereby be affected, which might result in the judicial rulings not being followed uniformly or even not being followed at all. In this way, the integrity of the legal system as a whole would be undermined. To prevent that, however, not just the authority of the courts has to be preserved, but also the latter’s independence. As described by Dunoff and Pollack, limiting dissent in some continental European jurisdictions has been presented as being in service of judicial independence.\(^4\) Judges writing separately may be exposed to retaliation or award by the political branch or the electorate,\(^4\) especially when they are not tenured and face re-election. Finally, it has been submitted that separate opinions increase the likelihood of damaging the collegiality among judges, if and when their disagreements are publicly disclosed.\(^5\) These and other arguments against separate opinions and the fact of diverging practices around the world has led Ginsburg to conclude that: “what is right for one system and society may not be right for another.”\(^6\)

However, this conclusion is as unpersuasive as all the arguments against the separate opinions are unconvincing. It is an unobjectionable fact that everywhere around the globe judges are still human beings,\(^7\) made of flesh and blood, in possession of, typically, well developed and well thought-through worldviews with which they, in a subjective manner, as persons, approach and take part in their judicial roles. Laws that judges are called upon to apply in concrete cases always require construction. Judging thus involves a judge’s personality as a whole: her professional dimension as a knowledgeable lawyer as well as the other dimension of an accomplished ethical person with an established worldview. The meaning of law is thus socially constructed. It is not pre-given, rather it is a product of law-making activities of authorized individuals: legislators, executives and judges. The meaning of law is thus always determined intersubjectively and it is therefore never settled for good. Reasonable people, even those with sharpest minds and highest integrity, have reasonably disagreed about the meaning of law in general, but especially so in hard cases. For judges have “have preferences and vote on case outcomes consistent with those preferences.”\(^8\) This has been and remains a universal fact, one that cannot be denied by falling back on the particularist conclusion à la Ginsburg, nor can it be persuasively hidden in the name of preserving legal certainty, independence, legitimacy, authority and collegiality of judges. What is more, this fact should not be hidden,\(^9\) as it is by way of hiding it – by way of denying something that has always been part and parcel of law and judicial law-making – that the values of legal certainty, independence, legitimacy and authority of courts are actually threatened. That certain jurisdictions and scholars continue to downplay this fact, or even deny it – and therefore also negate any value of the existence, measuring and importance of judicial ideology - does not (necessarily) mean that they are doing that out of some fraudulent motive or for some negative purpose. Most likely they are just sticking to a different concept of law. The one that provides no room for individual judge’s contribution to law and hence also excludes the relevance of raising a question of judge’s ideological profile in the first place.

\(^{44}\) Ibid.
\(^{45}\) Ibid.
\(^{47}\) The introduction of artificial intelligence might change that.
\(^{48}\) Malecki
\(^{49}\) Malecki argues that institutional independence, in whose name the ECJ is one of the most non-transparent judicial institutions in Europe, provides a cover for the Court and its judges that do not share uniform preferences. Michael Malecki, Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgment of chambers, Journal of European Public Policy, 2011.
IV. Judicial Ideology and Three Conceptions of Law

In light of the preceding discussion this section argues that legal systems’ and scholars’ differing attitudes to the questions of judges writing separately as one of the means of expressing and, therefore, observing judicial ideology can be explained by the fact that they are based on three different conceptions of law. These are the objectivist conception; the discursive conception and the subjectivist conception of law. The first conceives of law as an objectivist and positivist system, which draws its authority from its form. The second comprehends law as an argumentative and discursive practice, whereby the authority of law and, particularly of the courts, is based on how persuasive the arguments underlying the rulings are. Whereas the third conception sees law as entirely subjective, as an outcome of political, even purely personal preferences of judges dressing up as law, as legal language. In what follows, each of the three conceptions is described in some more detail.

Law as an objectivist and positivist system draws its authority from its form. According to this conception, court rulings need to be respected because they are made by institutions consisting exclusively of legal experts who have no preference in terms of values, or their own values in no way affect their rulings. This is also reflected in the traditional appearance of the judiciary: judges wear special robes and in some cases wigs to hide their faces from the public, and show that they are different from ordinary people, that they have authority and are consecrated for making judicial decisions. The principal author of this approach to law – at least in theory if not necessarily in practice – was Hans Kelsen.51 According to his theoretical views, law is a system of hierarchically organised legal rules in which higher-ranking rules determine the content and procedure for the creation of lower-ranking legal norms. The highest formal legal act is the constitution, which determines all other, lower-ranking legal acts and it is itself not derived from any formal legal act, but rather a meta-norm that is the logical precondition for the entire legal system.

Law thus creates and recreates itself and is completely separate from other normative systems: morality, religion and politics. This is the essence of its purity. Law is pure science with no other social and value-related components, so these cannot be used to judge its (in)validity or the (in)appropriateness of legal regulations. Morality, let alone politics, is outside the realm of legal science. And therefore also cannot affect lawyers as such. Lawyers are seen as objective and capable of searching for and finding the material truth because, in their core, they are dedicated to pure law and cannot be influenced by morality and politics. Therefore, also the scope of law, according to Kelsen, is very narrow, and definitely strictly separate from politics and other social, value and worldview-related elements. The role of courts pursuant to the objectivist conception of law is to determine the material truth based on legal norms with an objective meaning. Any sign that judges have based their decision on their own

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50 Bricker’s research demonstrates that the number of dissenting opinion in constitutional courts grows in cases brought with political elements (brought by members of parliament); complex cases and by judges with an academic background who are not concerned just by a concrete dispute resolution, but involve their own theories in judicial decision-making, eg are more reflexive and have a more in-depth understanding of a value and policy based problematique surrounding a particular case.

51 Hans Kelsen, Reine Rechtslehre (1960).

52 This is the view of strict legal positivists like Joseph Raz and Brian Leiter. See: Matej Avbelj, Pravo in integriteta, in Avbelj (ed.). Izzivi moderne države (FDŠ, 2012).
beliefs is therefore seen as a deviation from the legal ideal and a reason for criticism. The same logic implies that court rulings, supposedly reflecting objectively found material facts, should not be subject to public or political debate. In short, in the objectivist conception of law there is no room for judicial ideology.

A different approach comes from the understanding of law as an argumentative and discursive practice. This discursive conception of law is embodied on the global level in Dworkin’s approach to law as an interpretative practice, while the biggest contribution in the European context comes from Alexy’s legal theory and the philosophical, sociological and political-science approach of Habermas. Dworkin has been stressing since the 1980s that law – and all legal decisions – essentially reflect the political morality of a particular political community. Contrary to what Dworkin’s contemporary H.L.A. Hart claimed – at least at first – law is not only a comprehensive and hermetically sealed system of legal rules and principles. Through decision makers in the society, particularly judges, the values and worldviews of these decision makers always penetrate the system. Therefore, their task is to present persuasive arguments for their decisions in the light of prior legal decisions and, what is particularly important, in the light of their best understanding of their community.

Law and morality – regarded as two separate normative worlds by many objectivist and positivist approaches to law, especially in the works of Hans Kelsen, Joseph Raz and others – are seen by Dworkin as inextricably bound and mutually enriching, and a toned-down version of this view is even supported by some legal positivists (e.g. MacCormick).

Robert Alexy uses a similar basis in his famous work A Theory of Constitutional Rights, where he clearly shows that rights are principles, and principles are demands for optimisation. As such, rights are always – but especially when different rights clash – subject to a proportionality test, which is again affected by the decision maker’s value-based worldview, both when determining whether an objective is constitutionally acceptable and even more when determining whether the selected means is appropriate, necessary and proportional. Jürgen Habermas contributes a more philosophical, sociological and political science-related perspective to the discursive approach to law, particularly in his treatises on the need for legitimacy in law, which he finds in the greatest possible inclusion of different people in the discussion, which they, again, inevitably enter with their own different worldviews.

From the perspective of the discursive conception of law, the authority of law and particularly of the courts is therefore based on how convincing the arguments underlying their decisions are. It is thus not about the form or creating an appearance – with wigs or by stressing that not

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53 Ronald Dworkin, Law’s Empire (HUP, 1986).
55 Jürgen Habermas, Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy (MIT Press, 1996).
63 Ibid.
64 Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law (MIT Press, 1998).
everyone can wear a judge’s robe –, but rather about content and arguments that will convince the parties involved and the general public why it was right that one particular party lost and the other one won.\(^{65}\) If law is an argumentative and discursive practice and court senates comprise several different judges, it is clear that these judges will often support different legal opinions and provide different arguments for them. This is not only self-evident but it is right as well, because only the existence of different views can guarantee a fair and objective trial, objective in the sense of ensuring the broadest possible intersubjectivity.

Law as a discursive and argumentative practice, limited by specific legal and institutional rules of legal discourse,\(^{66}\) moves the focus from the legal form to the legal subject – the lawyer, who makes the decision. Between a legal regulation and a practical legal issue, there is always a person\(^{67}\) – the lawyer, who must always make the decision by him or herself and must also take a responsibility for it. Law is therefore not something objective, but a product of lawyers, who are people made of flesh and blood, and who have a well-defined ideological profile, as is expected of an adult, mature person and a legal expert. The discursive conception of law thus acknowledges that judicial ideology is an inevitable part of judge’s decision-making. As such, it must not only be recognized, but it must be made transparent, measured and researched. In this way it is ensured that judicial ideology, its role, remains within the boundaries prescribed by the legal discourse, so that it is the judicial ideology which is in function of the law, rather than the law being purely a product of (judicial) ideology.

The latter is essentially what the subjectivist conception of law stands for. The subjectivist conception grows out of the movement that flourished in the US especially in the 1920s and 1930s and has since been known as legal realism.\(^{68}\) Developed against the objectivist conception of law, taking the form of legal formalism,\(^{69}\) the US legal realists, especially Oliver Wendell Holmes, Roscoe Pound and Benjamin Cardozo, stressed that law always contains parts that are undefined, that it is full of contradictions and exceptions, and that almost every legal rule or principle allows for several explanations.\(^{70}\) However, legal realism was not limited to the US. It also emerged in Europe, where Swedish and Danish philosophers Hägerström and Ross established the so-called Scandinavian legal realism.\(^{71}\) The American and the Scandinavian legal realism pursue different goals because the objects of their criticism are different. As Alexander clearly shows, the former stresses that law is inevitably political, while the latter rejects an objectivist nature of law as something metaphysical and the idea that legal theory is above democratic political decision making.\(^{72}\) While both approaches are critical of the notion of law as a pure legal science, completely independent from the people deciding on concrete cases, the American brand of legal realism goes further

\(^{65}\) This has always been at the heart of the concept and practice of judiciary in the US. See, for example, Michel Rosenfeld, Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court, International Journal of Constitutional Law, Volume 4, Issue 4, 1 October 2006, p. 618–651.


\(^{67}\) This is also stressed by Marjan Pavčnik, Argumentacija v pravu (GV Založba, 2013).

\(^{68}\) See especially Brian Z. Tamanaha, Beyond the Realist-Formalist Divide: The Role of Politics in Judging (Princeton University Press, 2009).


\(^{70}\) Ibid., p. 6, referring to Tamanaha, supra note 19, p. 1.


by concluding that judges rule simply on the basis of their personal preferences, and then choose and adapt their legal arguments accordingly.\textsuperscript{73} In this way the law is entirely subjective.\textsuperscript{74} All that matters is judicial ideology. The role of law is purely instrumentalist. It merely provides a form for articulating particular ideological goals by institutional actors in power, in our case judges. In the most extreme version of the subjectivist conception of law it is even argued that judicial decisions are entirely random, admittedly packed in a legal form, but they have more to do with what judges ate for breakfast and how long and well they slept\textsuperscript{75} than with the alleged judicial expertise and constraints inherent to the legal discourse. As judicial ideology is thus pervasive in the subjectivist conception of law, it is everywhere, it consequently makes little sense to research it and to measure its influence on legal decision of judges, when these decisions are, in effect, not legal at all (but purely ideological).

V. A Multidimensional Definition of Judicial Ideology

In the preceding sections we have analyzed to what extent the question of judicial ideology has been addressed in the literature on domestic and transnational judicial decision-making, how judicial ideology is allowed to be expressed in different legal systems and how that goes back to the differences between the three basic conceptions of law. However, our discussion has fallen short of defining the main concept of this research, namely the concept of judicial ideology itself. This has been, partly at least, a deliberate choice, since the notion of judicial ideology is a concept that escapes a straightforward definition. Ideology has meant different things to different authors and continues to divide opinions sharply.\textsuperscript{76} Normally it comes with a negative connotation, associated with politics \textit{stricto sensu}, that is with the political conflicts for power that are conducted in an ideological manner or for ideological purposes, or both. Within this understanding, ideology is conceived of as a means of doing (party) politics in two ways that approximate closely what Mannheim has described as cant mentality or purposeful lie. According to the former, politicians, their supporters and pundits “distort and misrepresent the reality for certain pragmatic or vital-emotional reasons.”\textsuperscript{77} According to the latter, the power-wielding subjects engage in “purposeful deception of others”.\textsuperscript{78} In either way, this deeply negative, ideological political practice is in function of the preservation of the dominant class, of its interests that no longer correspond to the actual reality out there.\textsuperscript{79}

However, according to Mannheim, there is also a third, less negative model of ideology, which he has labelled as a »good-intentioned mentality«. Accordingly, the social actors, as captives of ideology, are prevented to see the reality by the whole body of concepts and axioms stemming from their historically and socially determined thought.\textsuperscript{80} Their normative mental frameworks have been surpassed by the existing empirical developments, which they can no longer

\textsuperscript{73} Ibid., p. 6, referring to Tamanaha, \textit{supra} note 19, p. 14.
\textsuperscript{74} In political science this subjectivist approach to law has also been captured through the language of attitudinal model of law or through the behavioralist approaches to law.
\textsuperscript{76} See, for example, Joshua B. Fischman, What is Judicial Ideology, and How Should We Measure It?, 29 Wash. U.J.L. &Pol'y 33 (2009), 137, referring to David W. Minar, Ideology and Political Behavior, 5 Midwest J. Pol. Sci. 317, who has analyzed the most typical ways in which ideology has been used by social scientists.
\textsuperscript{77} Karl Mannheim, Ideology and Utopia
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
comprehend and account for on their chosen normative premises. Therefore they neglect, downplay, misrepresent, in short: distort, but mostly unintentionally so, the elements of reality that do not fit into their ideological framework. Finally, as Mannheim has famously argued, utopia is just a mirror image of ideology. Differently than ideology, it is “practiced” by the ascending class and distorts the existing reality, in a more or less negative way, not in order to preserve the past or the inexistendent present, but to ensure at present the future that is yet to come.  

For the purposes of this research, however, the notion of ideology is not used in Mannheim’s way, attributing a negative, let alone a pejorative connotation to it. Ideology is rather understood in a more neutral way and is synonymous with a worldview of a person, a judge in our case. Accordingly, writing about judicial ideology and defining a judge’s ideological profile means addressing a comprehensive system of values, beliefs and views through which, as through a normatively colored lens, a person observes, sees and, when taking action, partakes of creating the social world around herself. Judicial ideology as used here, therefore, covers political views in the broadest sense of the term: politics as everything related to public matters, but not in the narrowest party politics sense.

The ideological views understood in this way are multidimensional and cannot, as it is still quite common, simply be divided in binary terms between liberal and conservative attitudes. To the contrary, any (judicial) ideology has at least three dimensions: economic, social and political.

For the purposes of research into judicial ideology, we have operationalized the three ideological dimensions as follows: The economic dimension measures the judges’ preferences on a continuum between the two opposite ends of unrestrained economic freedom of an individual and total state economic intervention. The social dimension evaluates the judge’s preferences for the rights of individuals or minorities against the collective interests of the various majorities in a society or against the rights of other individuals. Whereas the political dimension is, for the purposes of this research, defined in terms of "authoritarianism" and is spread between the preferences to protect the rights and freedoms of the individuals on the one end and the protection of state interests (its organs and their monopoly of power) on the other end.

Having defined the notion of judicial ideology as used in this paper and having presented at least three of its many possible dimensions, the next challenge, as attested by the comparative literature, is how to measure the ideology of judges and evaluate its actual or potential impact on their decision-making.

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81 Ibid.
82 In this vein our definition of judicial ideology corresponds to the following definition of ideology in Oxford English Dictionary, according to which ideology stands for »a systematic scheme of ideas, […] relating to politics or society, or to the conduct of a class or group, and regarded as justifying actions, especially one that is held implicitly or adopted as a whole and maintained regardless of the course of events.«
83 Authors that use multidimensional conceptions of ideology often define the economic dimension in terms of attitudes towards the distribution of income and wealth in a society, following Milton Rokeach, The nature of human values (Free Press NY, 1973). This aspect is integrated in our definition since any involuntary redistribution of income and wealth requires state intervention in the economy.
VI. The Empirical Methodology for Measuring Judicial Ideology

This section explains the empirical methodology used for measuring ideology of the Slovenian Constitutional Court judges. The Slovenian legal system (and most of legal theory) is based on seeing law as an objectivist, positivist system. The role of courts is to determine the material truth based on objective legal norms. Any sign that judges have based their decision on their own beliefs is therefore seen as a deviation from the legal ideal and a reason for criticism. The same logic implies that court rulings, supposedly reflecting objectively found material facts, should not be subject to public or political debate. Such, in our view, unrealistic understanding of law and the role of judges leads to unrealistic expectations of members of the judiciary, and consequently to constant disappointment with their decisions, which erodes the social legitimacy of their judicial decisions.

However, with the establishment of a new, independent Constitutional Court in 1991 the legal grounds were laid for a gradual departure from the objectivist conception of law in the practice of Slovenian judiciary (and therefore gradually also in theory). The Constitutional Court was established as a notably different institution than the rest of the judiciary. It differs from the ordinary judiciary by its composition, duration of term, constitutional mandate and, most importantly, by its modus operandi. The Court is composed of nine judges, elected for a fixed term of nine years. They rule in the cases of legality and constitutionality as well as in cases involving the protection of human rights. This makes the Slovenian Constitutional Court the ultimate arbiter of constitutionality and human rights protection. Since the Court has, traditionally, been composed also of the members of the legal academia and not solely of the established judicial class, its rulings follow a different judicial style, which approximates much closely the discursive conception of law. This conclusion is reaffirmed by the fact that, unlike the rest of the Slovenian judiciary, the Constitutional Court justices are authorized to write separately. They have, indeed, done so frequently in the past and have, by so doing, opened up a possibility for an empirical legal research in the ideological pedigree of the Slovenian Constitutional Court.

Positions along ideological dimensions. In our research on ideology in the Constitutional Court, we use the three ideological dimensions (economic, social, and authoritarian) as defined in the previous section. A court's decision or a judge's opinion can take one of possible five positions along each dimension. For the social and authoritarian dimensions, position 1 denotes the strongest preference for the rights and freedoms of individuals, whereas, following the usual convention in the literature, position 1 on the economic dimension marks a strong preference for state intervention (and equality). This way position 1 in all dimensions corresponds to what is usually labelled as progressive or left-wing values and position 5 corresponds to conservative or right-wing values. This of course does not imply that positions necessarily match across dimensions or issues; for example, a person can be socially conservative and economically liberal at the same time, or take a liberal stance on one issue and a conservative one on another.

The sample of decisions. The evidence to be used for empirically measuring judges' ideology is a sample of Constitutional Court decisions and related separate opinions from 1991 to 2016. The target size of the sample is at least 20 decisions from each year in this period. This will result in a sample of around 500 decisions for the Court and around 180 decision for each
judge who served a full 9-year term. Criteria for including a decision in the sample are as follows: decisions that the Court itself has declared as important in its Annual Reports; decisions related to important legal and social issues (e.g., human rights, individual and political freedoms); decisions of a precedential nature or with important social consequences; decisions not taken unanimously and with affirmative or dissenting separate opinions; decisions related to highly controversial issues in the political and public discussions. The resulting sample is thus neither random nor representative of the whole body of Constitutional Court decisions; rather, it is compiled with the purpose of including salient (important) decisions and those that are likely to be influenced by judges' ideological positions.

**Assessment of ideological positions.** We chose to read and hand-code the decisions rather than using an automated procedure because of the deeper insight into the reasoning of judges that we gain by reading the decisions and separate opinions which will be helpful for the interpretation of results. Furthermore, we expected the Court's writings to use a rather dry professional vocabulary avoiding ideology-laden terms which could make an automated procedure potentially inaccurate. The analysis proceeds in the following way. First we establish which ideological dimensions are relevant for a particular decision; that is, we consider whether the subject matter of the decision is related to the extent of state intervention or distributional issues, to the conflict between the rights of different individuals or social groups, or to the conflict between individual rights and the authority of the state. Then we establish the ideological position of the decision along all relevant dimensions. This is done by taking into consideration the decision itself, the key arguments used in the explanation of the decision, the remedies required or instituted by the court, and, when relevant, also the auxiliary arguments or issues discussed by the court. In the same way, we establish ideological positions of any separate opinions related to the decision. Finally, we also determine the ideological position of a hypothetical counter-decision, which is needed for positioning of judges that voted against the decision. A counter decision is the hypothetical opposite of the decision that was taken; for example, when the court declared a particular piece of legislation to be unconstitutional, or found that the constitutional rights of an individual were violated, a counter decision would have found the legislation not to be in conflict with the constitution or the rights not to be violated.

Obviously there is a degree of subjectivity in any assessment of ideology. To limit the subjective bias and prevalence of a particular viewpoint, the research team is intentionally mixed in terms of professional backgrounds and career paths (including lawyers, political scientists and economists with experience from academia, public institutions and the private sector). Each decision is analysed independently by at least two members of the research team. When their assessments differ, the issues are discussed at regular meetings of the entire team and the final assessment is reached in a consensual way. Assessments of decisions are documented and justified in writing on a unified template and will be made available for professional peer-review. The methodology now applied was developed in a step-wise manner, by first testing it on a pilot sample of decisions and then improving the definitions of the dimensions and the reasoning applied in the assessment of positions.

**Scoring of judges's ideological positions.** The final step is positioning of individual judges based on their votes in favour or against the decision and, when written, their separate opinions. We apply a specific scoring (weighing) system to reflect the level of certainty at which a judges ideological position can be established in a relation to a particular decision.
First, for judges who have written or joined a separate opinion, we assume that the position of the separate opinion reveals their true ideological position (in relation to the particular subject matter of the decision). They receive two points for this ideological position. For example, if the separate opinion was assessed as reflecting position 2 on the economic and position 4 on the social dimension, the subscribing judges receive 2 points for positions "economic 2" and "social 4".

For judges who voted for the decision, but did not write a separate opinion, we cannot know whether their true ideological position (in this particular case) is the same or only close to the position of the decision. Therefore, they are scored a point for the position of the decision and for the two neighbouring positions. For example, if the position of the decision along the social dimension was assessed as 2, the judges who voted in favour receive a point for positions 1, 2, and 3 on the social dimension. The same scoring method is applied for judges who voted against the decision without writing or subscribing to a dissenting opinion, only that in this case they are scored a point for the position of the hypothetical counter-decision and the neighbouring two positions.

There are two corrections to this general scoring rule. When a neighbouring position to a decision (counter-decision) is taken by a separate opinion, judges who voted in favour (against) the decision receive only half a point for this position. This is done so because if this was their true position, they would have likely (but not necessarily) subscribed to the separate opinion. The lower weighing (0.5 point instead of 1 point) thus reflects the lesser probability that the judge's true position matches with the position of a separate opinion to which she didn't subscribe.

The second correction is that, for positions that are exactly in the middle between positions of the decision and counter-decision, judges receive only half a point. The rationale for this is that for a judge who voted in favour (against) the decision, it is more likely that his true position is closer to the decision's (counter-decision's) position rather than lying right in the middle between the decision and counter-decision.

**The database.** The result of this procedure is a database which provides information, for each decision in the sample, on the ideological positions of the Constitutional Court along all relevant dimensions, and on positions taken by each voting judge, scored as described. The next section discusses possible methodological approaches to analysis of these data and provides some preliminary examples of results.

In addition to ideological positions, we also determine for each decision and separate opinion to what extent it refers to international and foreign law and judicial practice (eg international conventions, EU directives, decisions by the ECtHR or foreign constitutional courts), and whether and to what extent it is in line with the government's and the parliament's position on the case. Namely, when deciding on constitutionality of laws and bylaws, the Constitutional Court invites the parliament and the government to submit their opinion and summarizes them in the explanation of the decision. Data on what we call the "international dimension" and the "pro-government" orientation of Courts' decisions are also entered into the database.
VII. Preliminary Empirical Results for the Slovenian Constitutional Court

The database currently includes information on 103 court decisions from the period 2002-2006. The composition of the court, consisting of nine judges, did change only marginally during this period (i.e., 2 judges, Krisper Kramberger and Tratnik, did not vote on the first 15 decisions in the sample as they were appointed on May 25, 2002). Out of 103 decisions in the sample, 58 (56.3%) were approved unanimously. Judges wrote in total 28 dissenting and 23 affirmative separate opinions. We were able to determine the ideological position along the authoritarian dimension for most (100) decisions in the sample, while the social ideology was assessed for 48 decisions and the economic dimension for 36 decisions in the sample. This of course reflects the subject matters that were decided on by the court.

The preliminary results reported in the following are intended to illustrate the methodology used, to facilitate discussion on its validity and other possible ways of exploring the data, and to offer some preliminary conclusion.

Ideological profiles. Ideological profiles of the Constitutional Court and judges are obtained by summing up points received for each position along a dimension and then calculating their relative frequencies. Relative frequencies may be interpreted as an indicator of the intensity of preferences for a particular ideological position. Figure 1 illustrates this by the ideological profile for the Court. We can see that the Court, in the salient decisions taken in the observed period, had a strong preference for social liberalism, and a weaker preference for political liberalism. Put differently, it more strongly protected the rights and liberties of an individual against other individuals and social groups than it did protect individual rights against the authority of the state. On the other hand, the profile for the economic dimension is rather flat, implying that ideological preferences on this dimension are not very strong, or, as is actually the case, that judges and the court took very different positions at individual decisions.

Figure 1. Ideological profile of the Constitutional Court

![Diagram of ideological profile](image)

Note: The horizontal axis plots ideological positions along the dimension, the vertical axis measures the intensity of preference (relative frequencies) for each position. The red vertical line and the number present the ideological ideal points as explained below.

Sample size – economic dimension: 36 decisions, social: 48, authoritarian: 100.

Ideological ideal points. To facilitate analysis of differences among judges and apply models of decision-making, such as the median voter theorem, ideological profiles need to be transformed into a single numerical variable, the so called ideal point. A straightforward
solution would be to take as the ideal point of a judge the ideological position with the highest relative frequency (the most preferred position). However, as apparent from Figure 1, this would misrepresent the real variety of positions judges and the court took at decisions in our sample.

There are two other possibilities. One is to calculate the weighted average position, using relative frequencies as weights. This method, which is often used in analysis of surveys based on Likert scales, assumes that the distances between positions are the same. That is a strong assumption which may jeopardize the validity of results. Another method, which does not require this assumption, is to calculate the so called "balance", that is the difference between the sum of relative frequencies for positions on one side of the centre (4 and 5 in our case) and for positions on the other side (1 and 2). However, this method suffers from the loss of information as the result (the "balance") is independent of the relative frequency of the centre position (3).

We calculated both weighted average positions and balances for all judges and the court for all three dimensions. The correlations between weighted positions and balances were higher than 0.95 in all three dimension. From this we imply that, at least in this particular sample, the implied assumption of equal distances among positions does not prohibit calculation and use of weighted average positions as approximations of ideal points.

Figure 2 shows the ideal points of all nine judges, the median of their ideal points, and the ideal point of the Court's decisions for all three dimension. Based on the median-voter theorem, the ideological position (ideal point) of the Court's decisions should roughly correspond to the median of judges' ideal points, which is the case in our sample as well.

**Figure 2. Distribution of judges' ideal points**

![Distribution of judges' ideal points](image)

**Note:** Points represent ideal points of judges along the dimension (horizontal axis) and their interpolated relative frequency (vertical axis). The vertical lines show the median of judges' ideal points (M) and the ideal point of the Constitutional Court (CC).

**Sample size** – for the Court as in Figure 1; for individual judges, there are 30-36 observations for the economic dimension, 38-47 for the social dimension, and 88-99 for the authoritarian one. For judges coded 4 and 8, who were appointed later, there are 26 and 30 observations for the economic dimension, 36 and 42 for the social one, and 76 and 79 for the authoritarian dimension.

Coding of judges follows the alphabetical order and is the same in all charts and tables: 1-Čebulj, 2-Fišer, 3-Janko, 4-Krisper Kramberger, 5-Modričan, 6-Ribičič, 7-Škrk, 8-Tratnik, 9-Wedam Lukić.
Unanimous versus contested decisions – ideal points. Ideal points of judges in Figure 2, calculated on the whole sample, are all very close to the median and to each other. This is not surprising, given that more than a half of decisions were taken unanimously and that in unanimous decisions all judges receive the same position and scores, unless they write an affirmative dissenting opinion or do not vote on the decision. Furthermore, if consensus seeking is an important motive in judges voting behaviour, unanimous decisions will conceal the true ideological diversity, regardless of the decision's subject matter and salience.

To take this considerations in account, we recalculated ideal points of judges separately for unanimous and contested decision. Contested decisions are defined as those where at least one judge voted against the entire decision or a certain part of it.

Figure 3 shows judges' ideal points based on contested decisions alone, as well as the Court's ideal point separately for unanimous and contested decisions. The distances among judges' positions are, as expected, wider in contested decisions than in the whole sample. For the economic dimension, however, there is not much change to the general impression that judges cluster around the central position (3) but with a low intensity of preference.

The results are much more interesting for the social and authoritarian dimension. In both dimensions, the Court's position in unanimous decision is considerably more liberal (closer to 2) than it is in contested decisions (closer to 3). Moreover, ideal points of all judges in contested decisions are less liberal than in unanimous decisions. Figure 3: Distribution of judges' ideal points based on contested decision.

Note: Points represent ideal points of judges along the dimension (horizontal axis) and their estimated relative frequency (vertical axis), calculated from the sub-sample of contested decisions. The vertical lines show the ideal point of the Court separately for unanimous decision (Unam) and contested decisions (Cont).

Sample size for the Court – economic dimension: 18 unanimous and 18 contested decisions; social: 30 unanimous, 18 contested; authoritarian: 56 unanimous, 44 contested.

Sample size for the judges in contested decisions – economic dimension: 13-18, social: 12-18, authoritarian: 36-44; for the 2 judges appointed later, economic: 13 for both, social: 14 and 16, authoritarian: 31 for both.

In addition, we calculated ideal points of judges in those decisions where the judge in question voted against the Court's decision. On the authoritarian dimension, for which we have 6 to 13 observations per judge, their ideal points are even more to the authoritarian side, being higher than 3 for all except 2 judges (Ribičič and Fišer). A similar picture, but with even less observations, appears for the social dimension.

Overall, these results show that when judges do reach unanimity, they do so on a rather liberal social and political position. As a rule, judges dissent when their position on the case is
considerably less liberal than the ideal position of unanimous decisions. Interestingly, when some judges dissent, the position of the decision taken by the majority is also somewhat less liberal than in the unanimous decisions.

**Unanimous versus contested decisions – international dimension and pro-government orientation.** In addition to ideological differences, two other factors that we observe may influence whether a case will be decided unanimously or not. We would expect to see more unanimity when decisions are (partly) justified by references to the international law (eg EU legislation, international conventions) or decisions of international and foreign courts (eg ECHR, German Constitutional Court). Figure 4, which compares our scores for the international dimension between unanimous and contested decisions, confirms that the relative share of unanimous decision is higher among decisions based on the international body of law (Code 3 and 4) and lower in decisions with no reference to international law (Code 1). However, there is no difference in ideal points between decisions with a strong international dimension compared to those with no international dimension.

**Figure 4.** Contested and unanimous decisions: the international dimension and pro-government orientation

<table>
<thead>
<tr>
<th>International dimension</th>
<th>Pro-government orientation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the decision of the Court refer to the international or foreign law or legal practice:</td>
<td></td>
</tr>
<tr>
<td>1 – does not refer.</td>
<td></td>
</tr>
<tr>
<td>2 – does refer, but only marginally.</td>
<td></td>
</tr>
<tr>
<td>3 – does refer, but not as the main justification of the decision.</td>
<td></td>
</tr>
<tr>
<td>4 – does refer as the main justification for the decision.</td>
<td></td>
</tr>
<tr>
<td>Is the decision of the Court in line with the government’s opinion on the case:</td>
<td></td>
</tr>
<tr>
<td>1 – the decision is opposed to the government’s position.</td>
<td></td>
</tr>
<tr>
<td>2 – the decision is partly opposed and partly in line.</td>
<td></td>
</tr>
<tr>
<td>3 – the decision is in line with the government’s position but with a different justification.</td>
<td></td>
</tr>
<tr>
<td>4 – the decision is fully in line with the government.</td>
<td></td>
</tr>
</tbody>
</table>

Note: Relative frequencies of decisions coded as 1, 2, 3, or 4. Sample size – full sample (100 decisions) for the international dimension; for pro-government orientation: 66 decisions. The government and the parliament are asked for an opinion only in cases related to constitutionality of pieces of legislation or proposed referenda, but not in other cases which mainly refer to (alleged) human rights violations by courts, law enforcement agencies or other individuals and groups. The positions of the government and the parliament usually coincide. When they don’t, the coding refers to the government’s opinion. When government did not submit an opinion, but the parliament did, the coding refers to the parliament’s opinion.
Statistical significance – the share of unanimous decisions is significantly higher among decisions with international dimension (Code 3 and 4) than among those with no reference to international law (Code 1) at 10% significance level (p=0.097). The share of unanimous decisions is significantly higher among decisions opposing the government's position (Code 1) than among those in line with the government's position (Code 3 and 4) at 10% significance level (p=0.095).

Another factor that may contribute to unanimity or dissent is the pro-government orientation of the Court and individual judges. Figure 4 thus includes the results for the pro-government orientation of the Court. First let us note that the overall share of Court decisions in the sample that are directly opposed to the government's position on the case (Code 1) is rather high, 52%. Since the government's opinions mostly endorse existing legislation, this indicates a considerable activism on the part of the Court.

The share of decisions opposing the government's position is even higher in anonymous decision, suggesting that judges who might oppose the majority on the legal merits of the case, hesitate to dissent openly as that could be interpreted as their endorsement for the government. Put differently, consensus has a higher value when the Court opposes rather than endorses the government.

On the other hand, the relative share of Court's decisions that are in line with the government's opinion (Code 3 and 4) is higher in contested decisions, indicating that judges who disagree with both the majority in the Court and the government are prone to making their dissent public.

The finding that disagreement with the government is a strong incentive for dissent is confirmed by looking at individual votes. There are 26 cases when a judge cast a dissenting vote on a matter for which there was a government's (or parliament's) opinion. Out of these 26 cases, 21 votes were coded as opposing the government's position (Code 1), 2 as partly opposing (Code 2) and only 3 as being in line with the government's position (Code 3 and 4; these votes were cast by judges Čebulj and Ribičić).

**Evolution of the Court's ideal point through time.** The ideal points presented so far were calculated across the entire sample, implicitly assuming no or little variation over time. Here (in Figure 5) we present the evolution of the Court's position along the timeline. We do this for the two dimensions for which we have the most observations: the authoritarian dimension and the pro-government orientation.

The figure shows considerable variation in the authoritarian dimension over time. Although Court's position from all decisions was less than 3, there was a period (in and around 2004) when the Court's position tended to be higher than 3 (that is, conservative rather than liberal). The Court also seems to have become more and more opposed to the government with time.
Diversity among the judges: vote correlations and clustering. The distances between judges' ideal points appear to be rather small compared to the range of possible positions from 1 to 5. Indeed these distances very likely underestimate the true diversity of judges' ideological positions. To see why, consider a simple case where, in one decision, judge A takes position 2 and judge B takes position 4, whereas in another decision judge A takes 4 and judge B is on 2. The average position of both judges in this case would be the same, that is 3, although they have taken exactly the opposite positions on both decisions. With rather flat ideological profiles, as they are in our sample, such a situation is not unlikely to occur and may seriously undermine the information value of ideal points calculated as averages across all decisions.

To get around this problem, we first calculated simple regression coefficients among judges' positions on individual decisions for all pairs of judges and between judges and the Court. Table 1 reports the correlation coefficients. It is apparent that the diversity of ideological positions among the judges is indeed much higher than it would appear from considering ideal points alone and that it is highest for the social dimension and lowest for the economic one.
The finding that correlation of ideological position is high for some pairs of judges and low for some other pairs hints at possible existence of distinct ideological groupings and potential voting coalitions among the judges. For example, for the authoritarian dimension, there is a pair of judges (7 and 9) with a very high correlation of ideological positions. In the social
dimension, there is a high correlation between judges 3, 4 and 8, while there is even negative correlation between some other pairs of judges.

To analyse the groupings further, and possibly get a first insight into the internal decision-making dynamic in the court, we clustered the judges based on their positions on individual decisions. Unfortunately, since there must be no missing values for clustering, we were only able to use decisions on which all 9 judges voted. This considerably reduced the number of observation, which is why Figure 6 shows dendograms only for the social and the authorian dimension.

It appears there are two separate groups with very similar membership for both dimensions. One includes judges Čebulj, Janko, Krisper Kramberger and Ribičič, while the other group consists of judges Fišer, Modrijan, Škrk and Tratnik. Judge Wedam Lukić is with the first group on the social dimension and with the other group on the authoritarian dimension.

Figure 6. Clustering of judges based on their positions on individual decisions

Interdependence between ideological positions and pro-government orientation. It could be argued that judges' ideological positions simply reflect their political affiliations. A related questions is whether the three ideological dimension that we use, which are clearly distinct from each other by their theoretical definition, are indeed separable empirically.

The first issue we explore is a possible interdependence between ideological dimension. If the judges' ideology simply follows the traditional political divide between liberals and conservatives, then we would expect to see a strong positive correlation between dimensions. That is, in a stylized left-wing political ideology, social and political liberalism would coincide with favouring income redistribution and strong economic regulation (and vice versa for the political right-wing). If that was the case, than we would be measuring the same underlying ideology with all three dimension and it would not make sense to use the multidimension approach. Table 2 reports the relevant correlation coefficients, calculated from ideological positions on individual decisions.
**Table 2. Correlations between ideological dimensions**

<table>
<thead>
<tr>
<th></th>
<th>Court 1</th>
<th>Court 2</th>
<th>Court 3</th>
<th>Court 4</th>
<th>Court 5</th>
<th>Court 6</th>
<th>Court 7</th>
<th>Court 8</th>
<th>Court 9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social / Authoritarian</td>
<td>0.41</td>
<td>0.55</td>
<td>0.48</td>
<td>0.48</td>
<td>0.37</td>
<td>0.35</td>
<td>0.43</td>
<td>0.32</td>
<td>0.42</td>
</tr>
<tr>
<td>(45)</td>
<td>(44)</td>
<td>(41)</td>
<td>(43)</td>
<td>(34)</td>
<td>(44)</td>
<td>(41)</td>
<td>(36)</td>
<td>(39)</td>
<td>(43)</td>
</tr>
<tr>
<td>Social / Economic</td>
<td>0.33</td>
<td>0.12</td>
<td>0.22</td>
<td>0.21</td>
<td>0.16</td>
<td>0.05</td>
<td>-0.11</td>
<td>-0.22</td>
<td>-0.11</td>
</tr>
<tr>
<td>Authoritarian / Economic</td>
<td>-0.30</td>
<td>-0.49</td>
<td>-0.28</td>
<td>-0.28</td>
<td>-0.42</td>
<td>-0.33</td>
<td>-0.37</td>
<td>-0.53</td>
<td>-0.41</td>
</tr>
</tbody>
</table>

Note: Numbers in the heading are the codes for individual judges (see note to Figure 1). Number of observations reported in parenthesis.

Colour code – coefficients in shaded boxes are not significantly different from zero at the 95% significance level, based on pairwise two-sided p-values. Coefficients in red have the opposite sign as would be expected in stylized left and right wing political ideologies.

The correlation between the social and authoritarian dimension is positive and mostly significant, as would be expected, meaning that judges are either more liberal or less liberal on both dimensions. Nevertheless the coefficient values are not very high, implying that the two dimensions do capture distinct elements of ideology. This holds even more for the social and economic dimensions among which there is no significant correlation and coefficient values are very small.

The correlation between the authoritarian and economic dimension has the unexpected negative sign and most coefficients are significant, although not very high. The negative sign means that judges who are less in favour of individual rights in relation to the authority of the state are also more in favour of the state intervention in the economy and income distribution. This per se is not an inconsistent position, but does not match with conventionally understood left and right political ideologies.

Next we look at the pro-government orientation in some more detail. A common approach would assign political affiliation to judges based on who appointed them and then check whether they voted in line with the political ideology and interests of the appointing government or political party. There are two complications to this. First, establishing judges' affiliation from their appointment record is not straightforward. Nominations of candidates for the Constitutional Court may be submitted by anyone following a public call by the President of the Republic. In practice this means that nominations are often not submitted or openly backed by political parties. The President may choose any number of candidates from among the nominees and submit them to the Parliament for approval. In practice this means that nominations are often not submitted or openly backed by political parties. The President may choose any number of candidates from among the nominees and submit them to the Parliament for approval. In practice, presidents have often proposed judges that were considered to be close to them in their ideological views, but some Presidents chose to propose a more balanced set of candidates. The Parliament votes on the proposal received from the President; a majority of all members of the Parliament is required for a judge to be appointed. This often leads to complicated log-rolling (vote exchange) among the coalition parties of different ideological backgrounds. The voting deals are of course not public but sometimes they are apparent from the discussions in the parliamentary committee or other indirect evidence. Furthermore, most judges so far were selected from the academic ranks and only a few of them held other politically appointed positions before or after their term at the Court.

The second complications is that, given the lenght of procedures at the Court and the judges' term (9 years), the government that submits a formal opinion on a case is often no longer the
one who was in power at the time of the judge's appointment neither the one that approved the piece of legislation under the constitutional review.

For these reasons, assigning political affiliations to individual judges and exploring whether it affected their voting would require a careful and detailed analysis which we at this time leave for further research. Here we look at the matter in a more simplistic way and only at the level of the Court and not individual judges.

Table 3 reports the ideal points of ideological positions of those Court's decisions that were recognised as clearly opposed to the government's opinion (Code 1), and compares this with ideal points of all, unanimous and contested decisions. Due to lack of observations, ideal points for decisions that were in line with the government's opinion (Code 3 and 4) are not calculated. There are only 8 such decisions in the sample and they do not all include all three ideological dimensions.

Table 3. Ideal points of Court's decisions opposing the government's opinion

<table>
<thead>
<tr>
<th></th>
<th>Decisions opposing the government</th>
<th>Unanimous decision</th>
<th>Contested decisions</th>
<th>All decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic dimension</td>
<td>3.1 (20)</td>
<td>3.1 (48)</td>
<td>2.9 (18)</td>
<td>3.0 (36)</td>
</tr>
<tr>
<td>Social dimension</td>
<td>2.1 (24)</td>
<td>1.9 (30)</td>
<td>2.4 (18)</td>
<td>2.1 (48)</td>
</tr>
<tr>
<td>Authoritarian dimension</td>
<td>2.4 (45)</td>
<td>2.2 (56)</td>
<td>2.8 (44)</td>
<td>2.5 (100)</td>
</tr>
</tbody>
</table>

Note: Number of observations reported in parenthesis.

We see that the ideological position of decisions opposing the government's opinion is almost the same as the position of all decisions in the sample and closer to the position of unanimous rather than contested decisions. This implies that even if the majority of judges were appointed because their ideology was similar to the ideology of the appointing political majority, this did not prevent them from deciding contrary to the government's opinion even from the very same ideological position.

VIII. Conclusions

The paper presented the conceptual framework and the empirical methodology of an on-going research on the role of ideology in the decisions of the Slovenian Constitution Court. The literature review demonstrated that research on judicial ideology in the courts of European countries and international courts is still rare. It was proposed that this lack of research on ideology can be explained by the objectivist conception of law which largely prevails among legal scholars and practitioners in the legal systems based on civil law, as opposed to common law systems. Furthermore, the negative attitude towards judicial dissent and the prohibition of dissenting opinions still in force in several countries both seriously constrain the expression and consequently the observation and analysis of judicial ideology.
The research of the Slovenian Constitutional Court benefits from public availability of all court decisions, including information on voting by individual judges, as well as from publication of all affirmative and dissenting separate opinions. The conceptual framework of the ongoing research is based on a multidimensional conception of ideology which is empirically operationalised along the economic, social and authoritarian dimension with five possible ideological position on each dimension. It was empirically confirmed that the three dimensions do indeed capture distinct elements of ideology that are not overly correlated with each other.

The empirical methodology for assessing ideological positions of the Court's decisions and of individual judges, based on their voting and separate opinions, was described in detail. Using the first sample of 103 decisions, methods of exploring the available data were tested and preliminary results presented. The key methodological findings are as follows: the best method for calculating ideal points is the weighted average of ideological position; due to rather flat ideological profiles ideal points conceal the extent of ideological differences between judges which are revealed through pair-wise correlations between judges and by analysing the sub-sample of contested decisions; there is considerable variation in ideological positions across time; methods such as clustering may shed some light on the interpersonal dynamics of decision-making in the Constitutional Court.

Given the preliminary nature of the empirical research and the sample being limited to only a part of one term of the Court, any final conclusions in terms of ideological diversity and its implications would be premature. That said, we may highlight some interesting findings that will need to be tested on a wider sample of decisions from different periods.

Overall, the Constitutional Court in the salient decisions taken in the observed period, had a strong preference for social liberalism, and a weaker preference for political liberalism, while no strong preference was revealed for the economic dimension. Put differently, the Court more strongly protected the rights and liberties of an individual against other individuals and social groups than it did protect individual rights against the authority of the state.

These results are further refined by comparing unanimous with contested decisions. It appears that when judges do reach unanimity, they do so on a rather liberal social and political position. As a rule, judges dissent when their position on the case is considerably less liberal than the ideal position of unanimous decisions. Interestingly, when some judges dissent, the position of the decision taken by the majority is also slightly less liberal.

Further exploration of factors that may influence unanimity and dissent showed that unanimity is more likely when decisions are based on the international body of law. Unanimity also seems to have a higher intrinsic value for the judges when the Court's decision opposes the government's position on the case. On the other hand, judges who disagree with both the majority in the Court and the government at the same time are prone to making their dissent public. The finding that disagreement with the government is a strong incentive for dissent was confirmed by analysis of individual dissenting votes.

Looking at correlations between positions on different dimensions, the correlation between the social and authoritarian dimension was found positive and mostly significant, meaning that judges tend to be either more liberal or less liberal on both dimensions at the same time. The correlation between the authoritarian and economic dimension has the unexpected
negative sign. The negative sign means that judges who are less in favour of individual rights in relation to the authority of the state are also more in favour of the state intervention in the economy and income distribution. This per se is not an inconsistent position, but does not match with conventionally understood left and right political ideologies. This confirms that (judges') ideology is a complex multidimensional set of values and convictions that can not be reduced to simply equating ideology with (possible) political affiliations.