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Date: 15 March 2012

Guarantees of Independence of the Judiciary: the Slovenian Experience

(The International Judicial Reform Symposium 2-3 April 2012, Ankara, Turkey)

Summary: 1. Introduction. – 2. Organization and jurisdiction of the courts. – 3. Judges. – 3.1. The judicial appointment. – 3.2 The permanence of the office of judge. – 3.3. Judicial immunity. – 3.4.

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Incompatibility of judicial office. – 4. The independence of judges. – 5. Constitutional case-law regarding the independence of judges.

1. - The position of the judiciary as an independent branch results from the basic principle of the separation of powers which was introduced by the Slovenian Constitution when Slovenia made a transition from the position of a formally federal, but actually administrative unit of the Yugoslav Federation, into an independent, internationally recognized State. The advantage of this type of transition from the old to the new system was its relative smoothness.² As such, with regard to its activities the judiciary is bound by laws passed by the National Assembly as the holder of legislative power. However, the judiciary has wide room to maneuver concerning the application of a law in particular cases. In addition, the judiciary may also influence the legislative branch, because if, when adjudicating a case, the judiciary concludes that a law it is required to apply is unconstitutional, it must stay the proceedings and refer the issue of the constitutional validity of the law to the Constitutional Court³. The judiciary also has certain powers in relation to the executive branch, because it may review the legality of acts issued by the bodies of the executive branch⁴. The principle of the independence of judges is based on the principle of the separation of powers into the legislative, executive, and judicial branches of power⁵. The principle of the separation of powers contains two important elements, i.e. the separation of individual functions of such power and the existence of checks and balances between them. The first element requires that the legislative, executive, and judicial branches of power are separated, which also entails that authorities or bearers of these individual branches of power are separated, i.e. that they are not the same. The second element of this principle requires that between the individual branches of power there must exist a system of checks and balances according to which each of these branches of power influences and constrains the other two, however, to a certain extent there must also exist cooperation, as otherwise the functioning of the system of state power as a whole cannot be imagined.

2. - The organization and jurisdiction of the courts are determined by law⁶. Extraordinary courts may not be established in Slovenia. Further, military tribunals may not be established in peacetime⁷. In principle, judicial decisions are binding on the courts and on all other state bodies, and therefore also on the legislative and executive branches. Final decisions of the judicial branch must be taken into consideration by every natural person and legal entity in the Republic of Slovenia⁸.

The exercise of judicial power may be organized only through the courts as special state bodies, and not through individuals. Their jurisdiction is determined by law. The courts are divided into courts of general jurisdiction (ordinary courts) and specialized courts⁹.

In Slovenia, the ordinary Courts are organized on four levels¹⁰:

² Mavčič, Arne. The Republic of Slovenia, in Kortmann, C. A. J. M. (ur.), Fleuren, J. W. A. (ur.), Voermans, Wim (ur.), Kindlova, Miluše. Constitutional law of 10 EU Member States: the 2004 Enlargement. Deventer: Kluwer, 2006, p. X/1-X/60. Also derived from Jambreč, Peter, Razvoj in izhodišča nove slovenske ustavnosti in Nova ustavna ureditev Slovenije, Zbornik razprav, Ljubljana, ZP Uradni list, 1992, p. 7.

³ Art. 156, Constitution, Official Gazette RS, Nos. 33/91, 42/97, 66/00, 24/03, 69/04 and 68/06. Constitution of the Republic of Slovenia, Official Translation (Cerar Miro, Grad Franc, Mavčič Arne, Šinkovec Borut, Lidija Šega, Barlič Nina, Metcalfe Roger, De Vos Dean, Uradni list Republike Slovenije, Ljubljana 2001.

⁴ Art. 120(3) and Art. 157, Constitution.

⁵ Art. 3(2) of the Constitution.

⁶ Art. 126(1), Constitution.

⁷ Art. 126(2), Constitution.

⁸ Art. 2, Courts Act, Official Gazette RS, No. 19/94, amended.

⁹ Mavčič Arne: The Constitutional Law of Slovenia (International Encyclopedia of Laws), The Hague, London, Boston, 1998, p. 39-264.

- the first instance: the district courts (empowered to hear and decide on less important cases, where proceedings are conducted and the decision is made by an individual judge); the circuit courts, empowered to hear and decide on more important cases (decided in principle by an individual judge, but in more important cases by a chamber of three members – a professional judge and two members of the jury, and only in exceptional cases by a chamber of five members).
- the second instance: the high courts. High court decisions are reached by chambers, except where in particular cases it is otherwise stipulated and an individual judge has to decide.
- the third instance: the Supreme Court of the Republic of Slovenia as the highest court in the state¹¹. The Supreme Court is empowered to pass judgment on ordinary legal remedies in the third instance as well as on extraordinary legal remedies, on disputes regarding administrative matters and on jurisdictional disputes between lower courts¹². The Supreme Court decides in a chamber of five members, but in less important cases in a chamber of three judges. In more important cases, however, the Supreme Court passes judgment in a chamber of seven members.

The right to legal remedies and/or the principle of stages of appeal as a constitutional principle declares that everyone is to be guaranteed the right to appeal or to any other legal remedy against the decisions of courts by which his rights, duties or legal interests are determined¹³. The principle of stages of appeal also emanates from the constitutional provision that the Supreme Court is the highest court in the state that is a court of appellate jurisdiction, deciding in the last instance on ordinary and extraordinary legal remedies following the decision of any Court¹⁴.

We have also some Specialized Courts, which have jurisdiction only in their respective legal field. Under the Labor and Social Courts Act¹⁵, these courts are:

- labor courts: empowered to decide on individual labor disputes (concerning the gaining of employment, termination of employment, economic and other individual rights which are based on employment, between employers and employees concerning inventions and other industrial property rights, contracts for work and labor, grants, etc.) and on collective labor disputes (concerning collective agreements, the legality of strikes, the participation of employees in management, the powers of trade unions as regards employment, the representative character of trade unions, etc.).
- social courts: the social court of first instance is empowered to decide on disputes concerning pension and disability insurance, health insurance, unemployment insurance, as well as family and social support benefits. As regards the cases mentioned, the social court is empowered to decide on disputes concerning damage settlements owed to an insured person by an insurance institution, or concerning damage settlements to an insurance institution in connection with an insurance policy.

The higher labor and social courts (presided over by three judges) adjudicate matters relating to complaints against decisions taken by the labor courts and the social court of first instance. A specialized court may be a court of first instance or of second instance. A court of first instance is equal to a district court, but the courts of second instance are equal to high courts.

Finally, under the Administrative Dispute Act¹⁶ there are also four administrative courts for the judicial territories of high courts; these are courts of first instance. In addition, in particular judicial matters the Supreme Court decides on appeals against decisions given in an administrative dispute at first instance.

3. - The system based on the 1991 Constitution, as regards the constitutional and legal regulation of the judiciary, covers some of the most important principles of the judiciary (the Principle of Independence, the Principle of Legality), the Principle of the Impartiality of the Court and/or judges,

¹⁰ Mavčič, Arne, *The Republic of Slovenia, in Law and Judicial Systems of Nations: Covering 193 Nations*. 4th revised ed. Washington: The World Peace through Law Center, 2002, p. 487-490.

¹¹ Art. 127(1), Constitution.

¹² Art. 127(2), Constitution.

¹³ Art. 25, Constitution.

¹⁴ Art. 127, Constitution.

¹⁵ Official Gazette RS, No. 2/04, amended.

¹⁶ Art. 9 of the Administrative Dispute Act, Official Gazette RS, Nos. 105/2006 and 62/2010.

the Principle of the Permanence of the Office of Judges, the Principle of Non-Transferability, the Principle of the Incompatibilities of the Judicial Office with other offices and activities and judicial immunities). For the functioning of the judiciary, the Principle of Public Court Proceedings and the Principle of a Lay Judiciary are also very important¹⁷. The exercisers of the judicial branch are judges¹⁸, who administer justice in court. Pursuant to the Slovenian constitutional system, judges are not appointed, but elected by the National Assembly on the proposal of the Judicial Council¹⁹. Judges hold office permanently until their retirement²⁰, and may be dismissed only if they violate the Constitution or commit a major breach of the law in the discharge of the duties and functions of their office²¹. Due to its significance, the judicial position contains a series of special rights and duties. Judges preside over and decide cases in the exercise of their judicial function, bound only by the Constitution and statute as well as by the general principles of international law and ratified and published international agreements, as derived from Art. 8 of the Constitution²². Judges are elected. The conditions for the office of judge are as follows²³: citizenship of the Republic of Slovenia, active knowledge of the Slovenian language, contractual capacity and good state of health, no less than 30 years of age, a bachelor's degree in law and a passing mark in the State examination for lawyers (State Legal Exam Act), and personal suitability for exercise of the judicial office.

3.1. - In Slovenia the National Assembly elects judges upon the recommendation of the Judicial Council²⁴, which assures the consideration of professional criteria as regards their election. The Judicial Council is a special body with the constitutional power to propose to the National Assembly the election and dismissal of judges²⁵. It is composed of eleven members, elected for a term of five years. Five members are elected by the National Assembly on the nomination of the President of the Republic from amongst practicing attorneys, professors of law and other lawyers. Six members are elected from amongst judges holding permanent judicial office. The members of the Judicial Council choose one of their number as president of the Council²⁶.

The Judicial Council is the demonstrator of the autonomy of the judiciary. Its role in safeguarding the independence of the judiciary is particularly important, because Slovenia decided for the election to appoint judges. It is a special body with the constitutional power to propose to the National Assembly the election and dismissal of judges²⁷. The basic function of the Judicial Council is the proposing of candidates for election to judicial office and the proposing of the dismissal of judges. In addition, the Judicial Council also carries out other duties: deciding on the incompatibilities of the judicial office; submitting opinions on the draft budget of courts; submitting opinions to the National Assembly on statutes regulating the position, rights and duties of judges and judicial clerks; deciding on the appointment and promotion of judges; determining the number of judicial posts of a particular court; deciding on the assignment of scholarships; deciding on the transference or allocation of judges; issuing a declaratory decision on the termination of judicial office, etc. The Judicial Council decides on advancement to a higher judicial position and advancement in the pay scale. This body also makes a proposal to the National Assembly for relieving a judge of his/her judicial office if, in the performance of his/her duties, he/she violates the Constitution or seriously violates the law or if he/she deliberately commits a criminal offence through the abuse of his/her judicial office.

¹⁷ See Grad, Franc, Kaučič, Igor, Ribičič, Ciril, Kristan, Ivan, Državna ureditev Slovenije, Ljubljana, ZP Uradni list, 1996, p. 431.

¹⁸ Art. 36 of the Judiciary Act.

¹⁹ Art. 130 of the Constitution.

²⁰ Art. 129 of the Constitution.

²¹ Art. 132 of the Constitution.

²² Art. 3 of the Judiciary Act.

²³ Art. 8 of the Judiciary Office Act.

²⁴ Art. 130, Constitution.

²⁵ Arts. 132(2) and 132(3), Constitution.

²⁶ Art. 131, Constitution.

²⁷ Arts. 18-29 of the Judiciary Act.

In addition to the Judicial Council, statute provides²⁸ that for district, district and high courts, personnel councils be established which are empowered to issue opinions on candidates, evaluate judicial work, and to carry out other functions concerning the personnel matters of judges.

Disciplinary courts decide autonomously in disciplinary proceedings against a judge charged with a breach of duties or the disorderly exercise of judicial office²⁹.

3.2. - The office of a judge is permanent. The age requirement and other conditions for election are determined by law³⁰. As regards the termination and dismissal from office of a judge, the circumstances under which a judge may no longer hold office are specified by law³¹. Namely, the Constitution does not provide a mandatory age of retirement for judges, but referred the respective matter to regulation by statute³². When a judge violates the Constitution or commits a major breach of the law in the discharge of the duties and functions of his office, the National Assembly may, upon the recommendation of the Judicial Council, dismiss him³³. When a judge is found by a duly constituted court to have intentionally committed a criminal offence in the discharge of the duties and functions of his office, and thereby to have abused that office, he is dismissed from such office by the National Assembly³⁴. The office of a judge may terminate also in other cases provided by statute³⁵, reasons which do not concern special reasons for termination from judicial office, but general reasons regarding his/her employment.

3.3. - Judicial independence is bound up with judicial immunity: no person who participates in making any judicial decision may be called on to account for any opinion expressed in court in the course of reaching that decision³⁶. When a judge is suspected of criminal activity in the discharge of his judicial duties and functions, he may only be detained and proceedings may only be instituted against him with the consent of the National Assembly³⁷. The purpose of the constitutional provision on the immunity of judges is not to protect judges as individuals but its purpose is the same as with deputy immunity, i.e. to prevent the other two branches of the Government to impose limitations on the work of the judiciary. Immunity is one of the crucial elements of the independence of the judiciary³⁸. At the outset it must be underlined that the constitutional principle of the independence of judges, the bearers of which are judges, cannot be regarded as their privilege, but foremost as an essential element for ensuring the protection of the rights of persons who are parties to judicial proceedings. Ensuring the right to judicial protection and within this framework also the right to an independent judge can entail an essential element of the possibility to exercise all other rights. The implementation of the principle of the independence of the judiciary is thus not intended (only) for judges as such, but especially for those who need judicial protection of their rights. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and thereby for the credibility of the judiciary as well as the trust of the public in its work³⁹.

3.4. - The principle of incompatibility of judicial office is of great importance⁴⁰. The office of judge is incompatible with office in any other state body, local government body and any organ of any political

²⁸ Arts. 30-35 of the Judiciary Act.

²⁹ Arts. 86-89 of the Judiciary Office Act.

³⁰ Art. 129, Constitution.

³¹ Art. 132(1), Constitution.

³² Art. 74(1)(1) of the Judiciary Office Act.

³³ Art. 132(2) of the Constitution.

³⁴ Art. 132(3) of the Constitution, Arts. 77-79 of the Judiciary Office Act.

³⁵ Art. 132(1) of the Constitution; Arts. 74(1)(2)-(7) of the Judiciary Office Act.

³⁶ Art. 134(1), Constitution.

³⁷ Art. 134(2), Constitution.

³⁸ Decision of the Constitutional Court No. U-I-319/97 of 2 April 1998, published in OdlUS VII, 61.

³⁹ Decision of the Constitutional Court Nos. U-I-60/06, U-I-214/06, U-I-228/06 of 7 December 2006, Official Gazette RS, No. 1/2007 and OdlUS XV, 84.

⁴⁰ Art. 133, Constitution.

party, as well as with any other office or activity specified by law⁴¹. If this principle is violated, the Judicial Council decides on termination of the judicial office.

4. - Judges independently exercise their duties and functions in accordance with the Constitution and with the law⁴². Determining the independence of judges, the Constitution proceeds from Art. 3(2) regarding the principle of separation of powers to the legislative, executive and judicial power. Art. 23 of the Constitution declares the principles of independence, impartiality (in connection with the constitutional principle of equality in the protection of rights before a court)⁴³, and the principle of legality, as well as the right to be judged only by a judge duly appointed pursuant to principles established by statute and in accordance with normal judicial practices⁴⁴. The only condition for the performance of the judicial office is that judges shall be bound by the Constitution and laws⁴⁵. The judicial independence means a presumption that the constitutional right to the judicial protection shall be guaranteed to anyone. The principle of judicial independence is connected with the following constitutional provisions: permanence of judicial office under Art. 120, election of judges under Art. 130, incompatibility of judicial office under Art. 133 and immunity of judges under Art. 134. In general, the independent and autonomous judiciary shall be an element of democracy which holders are just judges. Accordingly, several provisions of the Courts Act impose an obligation upon judges – performing their judicial office – to protect the impartiality and independence of adjudication at any time and to promote the reputation of judicial office⁴⁶. Furthermore, judges can not perform any post or activity which is not compatible with the judicial office⁴⁷, e.g. office in other state bodies, in local self-government bodies and in bodies of political parties, and with other offices and activities as provided by law⁴⁸. Additionally, in case of doubt of the candidate honesty and conscientiousness, he/she could not be elected judge⁴⁹.

The principle of the independence of judges can be viewed from different perspectives. On one hand, it is the principle according to which when deciding judges can be bound only by the Constitution and laws. From this perspective, anything or anyone can be the source of a threat to judicial independence, *inter alia*, also parties to proceedings, the mass media, the public, civil society, different pressure groups, and even the judiciary itself. On the other hand, the principle of the independence of judges is based on the principle of the separation of powers into the legislative, executive, and judicial branches of power⁵⁰. The principle of the separation of powers contains two important elements, i.e. the separation of individual functions of such power and the existence of checks and balances between them. The first element requires that the legislative, executive, and judicial branches of power are separated, which also entails that authorities or bearers of these individual branches of power are separated, i.e. that they are not the same. The second element of this principle requires that between the individual branches of power there must exist a system of checks and balances according to which each of these branches of power influences and constrains the other two, however, to a certain extent there must also exist cooperation, as otherwise the functioning of the system of state power as a whole cannot be imagined⁵¹.

⁴¹ Art. 133, Constitution.

⁴² Art. 125 of the Constitution; Art. 3 of the Courts Act.

⁴³ See also Art.1(1) of the Courts Act and Art. 2 of the Judiciary Office Act, Official Gazette RS, No. 19/94, amended.

⁴⁴ See also Arts. 14-17 of the Courts Act.

⁴⁵ Art. 125 of the Constitution.

⁴⁶ Art. 2 of the Courts Act.

⁴⁷ Art. 3 of the Courts Act.

⁴⁸ Art. 133 of the Constitution.

⁴⁹ Art. 8 of the Judiciary Office Act.

⁵⁰ Art. 3(2) of the Constitution.

⁵¹ See also the Constitutional Court Decision No. U-I-83/94, dated 14 July 1994, Official Gazette RS, No. 48/94.

A prerequisite for the judiciary to efficiently perform its role is that independence in relation to the other two branches of power is ensured. Art. 125 of the Constitution regarding the independence of judges does not explicitly determine the substance of this principle. In filling the substance of the constitutional principle of the independence of judges, various international instruments whose subject is the concretisation of the substance of the principle of the independence of judges, can be applied as an aid.

The independent judiciary has several aspects. In addition to the independence of individual judges, also the independence of the judiciary as a whole must be ensured (i.e. collective independence), in view of the fact that interferences with the independence of the judiciary as a whole are necessarily also reflected in the independence of individual judges. The collective independence of the judiciary refers to, e.g. questions with reference to the possibility of participation in deciding on the determination of the means for the operations of courts, in adopting decisions with reference to auxiliary personnel at courts, with reference to the technical equipment of courts and the maintenance of judicial buildings, as well as in deciding on the accountability of its members. The internal independence of judges must be mentioned as a special aspect of the independence of judges. This concerns the independence of an individual judge in relation to other judges or superiors. In connection with the independence of judges as individuals, not only functional but also organisational independence is important. While the functional aspect refers to the independence of judges in adjudicating, the organisational aspect entails the appropriate protection of judicial office and the regulation of the conditions for performing the judicial office. Ensuring the aforementioned aspects of judicial independence is attempted in various ways. It is worth mentioning the rules regarding the appointment and dismissal of judges, regarding the permanence of judicial office, the immunity of judges, and the incompatibility of judicial office. In addition, the independence of judges is significantly influenced by the system of education and remuneration of judges. As regards the latter, we can speak of the economic independence of judges⁵².

Generally speaking, a judge is not a subject of an employment contract; however he/she is a holder of judicial office (in relation to the State – the Republic of Slovenia). However, the judicial office itself demands from the judge the whole responsibility, which can in case of violations or unskilled work result in the termination of the judicial office or in the respective disciplinary measures.

5. – Finally, we can analyze some constitutional decisions related with the judicial independence⁵³.

The constitutional case-law underlines the independence in exercising of judicial function⁵⁴: The independence of the judge in exercising his duties and functions⁵⁵ also implies his obligation to abide by the Constitution and law, and, consequently, his responsibility in any case of infringing the Constitution, any major breach of the law or abuse of his judicial office⁵⁶. Pursuant to Art. 125 of the Constitution, a judge is independent in the exercise of his duties and functions. He is bound by the Constitution and statutes. In applying statutes, he must not violate constitutional provisions. If he concludes that a statute is inconsistent with the Constitution, he must, according to Art. 156 of the Constitution stay the proceeding and request a decision by the Constitutional Court. A judge must directly apply the provisions on human rights and fundamental freedoms in the Constitution⁵⁷.

⁵² See also Constitutional Court Decision No. U-I-60/06, U-I-214/06 and U-I-228/06, dated 7 December 2006, Official Gazette RS, No. 1/07.

⁵³ Šturm Lovro (ur.): *Komentar Ustave Republike Slovenije* (Commentary to the Constitution of the Republic of Slovenia), Ljubljana, 2002, p. 902-908. See also www.us-rs.si

⁵⁴ Decision No. U-I-60/92 of 17 Jun 1993, published in the Constitutional Court Digest II, 54). Decision No. Up-155/95 of 5 December 1996, published in the Constitutional Court Digest V, 190.

⁵⁵ Art. 125 of the Constitution.

⁵⁶ Art. 132(2) and Art. 132(3) of the Constitution.

⁵⁷ Art. 15(1) of the Constitution.

Some of Constitutional Court decisions related to the independence of judges from the point of view of their status:

Accordingly the Constitutional Court stated that the Courts Act and the Court Rules provide that a court assistant (and other court personnel) may take up other offices or perform other activities only if these being compatible with the independence and honor of the court. President of the court decides on compatibility and legal remedies are provided against such a decision. The mentioned restrictions derive from the character of the work of the judiciary and do not violate Arts. 2, 35, 49 and 74 of the Constitution, for the constitutional principle of proportionality is satisfied in this regard⁵⁸.

Furthermore, such a restriction does not violate the freedom of science and art, because the matter of these cases does not concern the activities or offices which could ruin the honor of the court, or cast doubt on its independence. Such an establishment also does not entail an unconstitutional gap in the law. The challenged Courts Act, because of the mentioned restriction, does not envisage any special remuneration (allowances) for court assistants and other court personnel.

Since age as a general requirement and working experiences as a special requirement for the election of a judge (the Judicial Service Act) are not mutually connected, the comparison between the candidates concerning the extent of their working experiences or judicial practice, given that all prescribed requirements for an election to judicial office are fulfilled, is groundless. Therefore, it is evident that the statutory prescribed requirement of age is not unconstitutional, for such a requirement may entail a difference in the extent of working experiences or judicial practice between the candidates prior to their election to judicial office. Given that the requirement of age is equally prescribed, the matter does not concern discrimination between the sexes.

Additionally, the Constitutional Court underlined that the Constitution determines in Art. 125 the principle of the independence of judges. This principle has its function already in the manner itself of appointing judges to posts. It has a decisive role after a judge has already obtained a mandate for exercising judicial authority. It is also possible to look at this principle, similar to the principle of the division of power, from the organisational and functional point of view⁵⁹.

While the functional aspect ensures that nobody may interfere in a trial, and an important part of the organisational aspect is precisely in the question of who, and under what conditions, decides on the legal position of a judge during the exercise of his function. Under the statutory arrangement, the president of a court does not have such jurisdictions that he could encroach on the independence of a judge. This applies both in relation to the possibilities of encroaching on a trial, as well as the possibilities of encroaching on a judge's position. There is a general prohibition on his encroaching on an individual judge's trial process - thus on deciding in individual cases. Under the provisions of Art. 64(1)(2) of the Courts Act, there are sanctions against all such attempts. If the president of a court violates regulations or otherwise offends the principle of the independence of judges in trial, this is a reason for his dismissal. The influence of a president of a court in deciding on the legal position of judges is evident from his jurisdictions.

These jurisdictions are not such that a president of a court can, on their bases, encroach on a judge's independence. As concerns the independence of a president of a court as a judge, it must be found that the Law has an inbuilt safeguard that guarantees this. Under the provisions of Art. 65 of the Courts Act, the dismissal of the president of a court does not effect the position, rights, duties and obligations that the dismissed person has as a judge. If his judicial position is even protected in the case of his premature dismissal, then in relation to the provisions of Art. 63 of the Courts Act, it is even more protected in the case of ceasing the function of president of a court because of the expiry of term of office to which he was appointed. So the judicial position of a president of a court is not threatened by

⁵⁸ Decision No. U-I-144/95 of 20 May 1999, published in the Official Gazette RS, No. 45/99.

⁵⁹ Decision No. U-I-224 /96 of 22 May 1997, published in the Official Gazette RS, No. 36/97.

the impugned arrangement, and thus the principle of judicial independence determined by Art. 125 of the Constitution is also not violated.

The only Constitutional Court decision related to the lustration in the Slovenian judiciary system⁶⁰. The negative condition introduced and specified in Art. 8(3) of the Judiciary Office Act⁶¹ was one of the general conditions which must be fulfilled for the election of a judge. In the Constitutional Court opinion, the components, bases and criteria for preparing an expert opinion concerning the work of a judge for the purposes of candidature referred to in the Art. 101(1) and Art. 103 of the Judiciary Office Act are also subject to this negative conditions, and must be prepared in accordance with the criteria of Art. 29 of the Judiciary Office Act.

The Constitutional Court stated that the disputed negative condition should be verified and evaluated in the same way and in accordance with the same procedure as all other conditions. This is why the law-giver has been justified, from the point of view of the state governed by the rule of law, in transitional period to have also set this condition for the performance of judicial functions, provided, however, that it can only be applied in accordance with the constitutionally admissible interpretation arising from the principle of the state governed by the rule of law, that is:

- a) The negative condition of Art. 8(3) of the Judiciary Office Act shall not apply to judicial error.
- b) It is possible and necessary to establish the relation of cause and effect between the proceedings and the ruling with which human rights are claimed to have been violated.
- c) The candidate for the office of a judge shall be given a chance of providing counter-evidence and opinion with a view to disputing the assessment having been made in connection with his performance of judicial functions.
- d) Special attention shall be paid to judicial proceedings during the former non-democratic system, involving the prosecution and sentencing of persons in violation of the principles of the state governed by the rule of law for political and ideological reasons.

The legal regulation which allows, in as far as the assessment of criminal liability is concerned, that the evaluation of prescribed conditions for judicial office may be carried out by the bodies which do not make part of judicial authorities, because such influence of protagonists of the other two divisions of powers in the procedure of appointing a judge is in accordance with the principle of sovereign power of the people and the requirement for the existence of restricting and balancing factors as essential parts of the principle of separation of powers, is not in conflict with the said principle of separation of powers.

The legal regulation demands from a person who has already performed the office of judge to have performed such a function successfully. That means, in accordance with professional standards, independently and without bias. This should be a basis for assuming that independent and unbiased adjudication in the service of human rights and fundamental freedoms will be made in the future. In the Constitutional Court opinion, such legal regulation is not in conflict with the principle of equality before the law.

The legal provision which regulates one of the conditions which must be, or are not allowed to be given in connection with the election of a judge does not interfere with professional immunity of the judge in the material sense and does not imply retrospective effect of a legislative measure, because it does not encroach upon the rights deriving from the performance of the function on a professional basis, due to the fact that these are linked with the term of office relating to the exercising of the judicial powers and are extinguished upon its expiration.

During the last period, the Constitutional Court issued some decisions related the financial basis for exercising of judicial function (judges' salaries):

⁶⁰ Decision No. U-I-83/94 of 14 July 1994, published in the Official Gazette RS, No. 48/94.

⁶¹ Official Gazette RS, No. 19/94.

In accordance with the principle of the independence of judges⁶², it is appropriate that judges' salaries be regulated only by a law. Therefore, the challenged provisions of the Judicial Service Act and the Salary System in the Public Sector Act⁶³, which determine that judges' salaries be regulated by an ordinance of the National Assembly, the collective agreement for the public sector, and a Government decree, as well as the provisions of the Ordinance on Officials' Salaries, which regulates judges' salaries as an executive regulation, are inconsistent with the aforementioned constitutional principle⁶⁴. As the opposing party did not state convincing reasons for the alleged disparities between the officials' salaries in the individual branches of power, the Ordinance on Officials' Salaries can also be found to be inconsistent with the principle of the separation of powers determined in Art 3(2) of the Constitution.

It is inconsistent with the constitutional principle of the independence of judges if the legislature ensures judges only protection against a reduction in their basic salary and if it allows that additional instances of a reduction of judges' salaries be determined by an ordinance of the National Assembly. Furthermore, the statutory regulation according to which judges' salaries may be reduced during their term of office due to a reduction in the bonus for years of service or due to a temporary reduction in judges' basic salaries upon the readjustment of salaries is inconsistent with the aforementioned constitutional principle.

A statutory regulation regarding the judges' payment for (additional) work performance and regarding the placement of judges into salary brackets in the transitional period is vague and as such inconsistent with the principle of the clarity of legal norms⁶⁵.

Statutory provisions which determine that state prosecutors' and state attorneys' salaries be regulated by an ordinance of the National Assembly, which is an executive regulation, and the provisions of the Ordinance on Officials' Salaries which entail the implementation of such statutory authorization are not inconsistent with Arts. 2, 87, 135, and 136 and Art. 153(3) of the Constitution.

Statutory provisions which determine that state prosecutors' salaries be regulated by the collective agreement for the public sector are inconsistent with the principles of a state governed by the rule of law⁶⁶, as state prosecutors do not participate in the process of negotiating the aforementioned collective agreement. Statutory provisions which determine that state prosecutors' salaries be regulated by a decree of the Government are inconsistent with the principles of legality⁶⁷.

It is inconsistent with the principle of the protection of trust in the law⁶⁸ if the legislature does not ensure, in amending the regulation on salaries such that the state prosecutors' and state attorneys' salaries are reduced, that such reduction is gradual.

A statutory regulation on the placement of state prosecutors into salary brackets in the transitional period is vague and as such inconsistent with the principle of the clarity of legal norms.

The Ordinance on Officials' Salaries⁶⁹ is inconsistent with the principle of equality⁷⁰, as it differentiates without a sound basis between the office of Deputy State Attorney General and other similar offices in determining a nominal value of the official's basic salary considered upon the readjustment of salaries.

In its second decision (related to the judges' salaries, the Constitutional Court stated that the constitutional equality of the judiciary in comparison with the legislative and executive branches of power, *inter alia*, requires that the position of the judiciary and judges as bearers of judicial power is treated and regulated in a comparable manner as the other two branches of power so that the independence of judges as well as the integrity and dignity of the judiciary are ensured. The regulation of the placement of judicial offices into salary brackets, which establishes a significant disproportion

⁶² Art. 125 of the Constitution.

⁶³ Official Gazette RS, No. 56/02.

⁶⁴ Decision No. 60/06, U-I-214/06 and U-I-228/06 of 7 December 2006, published in the Official Gazette No. 1/07.

⁶⁵ Art. 2 of the Constitution.

⁶⁶ Art. 2 of the Constitution.

⁶⁷ Art. 120(2) of the Constitution.

⁶⁸ Art. 2 of the Constitution.

⁶⁹ Official Gazette RS, No. 14/06.

⁷⁰ Art. 14(2) of the Constitution.

between the salary brackets of judicial offices in comparison with the offices of deputies and ministers, is inconsistent with the principle of the separation of powers within the meaning of Art. 3(2) of the Constitution⁷¹.

It is inconsistent with the constitutional principle of the independence of judges determined in Art. 125 of the Constitution for the legislature to ensure judges only protection against a reduction in their basic salaries. Moreover, the statutory regulation which does not ensure judges such regulation of the adjustment of their salaries which would protect them against a significant factual reduction in their salaries is also inconsistent with the above-mentioned constitutional principle. The same applies to the statutory amendment of a bonus for years of service, which may cause a significant factual reduction in judges' salaries.

Due to the fact that the extra payment to compensate for the incompatibility of their office with performing other offices or activities is included in the basic salaries of judges, the abolishment of this special extra payment to compensate for the incompatibility of their office is not inconsistent with Art. 125 of the Constitution. The statutory regulation on the payment of judges for regular work performance and for work performance for having an additional workload is not inconsistent with the Constitution, as the criteria for evaluating such work performance are determined in sufficient detail in the regulation and allow that in addition to the number of concluded cases, also their complexity and the quality of the judge's work are taken into consideration.

If the legislature does not implement a decision of the Constitutional Court, it violates the principles of a state governed by the rule of law (Art. 2 of the Constitution) and the principle of the separation of powers (Art. 3(2) of the Constitution). If the legislature does implement a decision of the Constitutional Court which is binding on the legislature, and possible new inconsistencies with the Constitution arise due to the new statutory regulation, this does not in and of itself entail a violation of the above-mentioned principles, however the new statutory regulation is then subject to a new constitutional review.

The allegations of the applicant regarding the unclear nature of the regulation of the procedure for issuing individual decisions on salaries which were issued to judges during the transitional period are not substantiated. The same applies for the applicant's allegation that, on the basis of the challenged regulation, judicial protection with reference to salaries is ensured only to civil servants. Therefore, the challenged regulation is in this part not inconsistent with the Constitution.

REFERENCES

Constitution of the Republic of Slovenia, Official Translation (Cerar Miro, Grad Franc, Mavčič Arne, Šinkovec Borut, Lidija Šega, Barlič Nina, Metcalfe Roger, De Vos Dean, Uradni list Republike Slovenije, Ljubljana 2001

Mavčič Arne: *The Constitutional Law of Slovenia* (International Encyclopedia of Laws), The Hague, London, Boston, 1998.

MAVČIČ, Arne, *The Republic of Slovenia*, in Law and Judicial Systems of Nations: Covering 193 Nations. 4th revised ed. Washington: The World Peace through Law Center, 2002, p. 487-490.

MAVČIČ, Arne. *The Republic of Slovenia*, in KORTMANN, C. A. J. M. (ur.), FLEUREN, J. W. A. (ur.), VOERMANS, Wim (ur.), KINDLOVÁ, Miluše. Constitutional law of 10 EU Member States: the 2004 Enlargement. Deventer: Kluwer, 2006, p. X/1-X/60.

⁷¹ Decision No. 159/08 of 11 December 2008, published in the Official Gazette No. 120/08).

Šturm Lovro (ur.): *Komentar Ustave Republike Slovenije* (Commentary to the Constitution of the Republic of Slovenia), Ljubljana, 2002, p. 902-908.

Official site of the Slovenian Constitutional Court – www.us-rs.si (translations into English made by the Court)