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PERSPECTIVES AND CHALLENGES”**

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**STRENGTHENING OF JUDICIAL INDEPENDENCE
AND IMPARTIALITY IN THE FRAMEWORK
OF THE FIGHT AGAINST JUDICIAL CORRUPTION**

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“Ubi nil timetur, quod timeatur nascitur,” was said by the ancient Latins. Publius’ thought: “when nothing is feared, it gives rise to something fearful” is maybe even more valid today. Today’s workshop is oriented towards the question of how to establish institutes and mechanisms that will, to the greatest extent possible, function so as to prevent corruption in the judiciary and the justice system. We will try to answer the question of whether judicial independence and impartiality are institutes that can prevent or limit corruption in the judiciary. The fundamental questions are: for whom and why should judges be independent and from whom should they be independent? The answer to these questions may sound like a cliché, but it is clear: judicial independence does not present a privilege, but belongs among the general human rights of each individual¹. The concept of judicial independence is broader than the concept of judicial immunity, since it not only applies to the relationship with government bodies, but also to relationships with other holders of authority as well as relationships within the judiciary itself. The Consultative Council of European Judges (CCJE) concludes that the assurances of judicial independence are the most efficient means to prevent corruption in the judiciary.

JUDICIAL IMPARTIALITY

In a country in which we want to establish the rule of law, we must never forget that law is, first and foremost, a promise of impartiality. It not only involves actual impartiality, but also the preservation of an appearance of impartiality. It is the latter that is the best warranty for existence of trust in the judiciary and a lawful state. Impartial proceedings for citizens may only be provided by courts and judges that are legally, functionally and financially independent – not only from other holders of authority and different lobby groups, but also within the judiciary. In practice, judicial impartiality is realised through numerous instruments, including the random allocation of cases to judges (principle of natural judge) and the rules for exclusion of a judge. The rules for allocating cases must be defined in advance and the principle of a “natural judge” must be considered, otherwise there could be pressures from clients demanding that a case be resolved by a judge whose world view is known to them or who has resolved similar cases in a specific way, and similar. In Slovenia, this principle was completely realised by the computerisation of all registers kept by the courts. Annual work schedules of all courts are published on the Slovenian judiciary website, while the publicly accessible and completely computerised registers guarantee that no one influences the random allocation of cases. There is a visible tendency indicating that the increase of computerisation has also increased public trust in the proper allocation of cases, and the clients have almost completely ceased claiming the violation of this principle.

In order to protect the appearance of impartiality, it is of utmost importance that there be unity and harmonisation of judicial practice, which, in Slovenia, falls under the responsibility of the Supreme Court. Whether the courts are making comparable decisions in comparable cases is important, along with any eventual deviations from the established practices being especially well-founded. In the opposite case, an impression of a corrupt court or judge who makes his or her decisions excessively using “the framework” may arise in the public.

The thought that judges are only people who are a part of normal everyday life sometimes almost seems somewhat disputable. Namely, a judge is also subjected to a series of restrictions during his or her leisure time, which to a certain extent also affect his or her life and leisure time. In addition to the improper behaviour, they also include the request, which in Slovenia is enacted in the Judicial Service Act, providing that a judge may not accept any work or employment that could compromise his or her appearance of impartiality. Namely, a judge may not accept any employment or work that would hinder him or her in the execution of his or her job, compromise the reputation of judicial service or incite an impression that he or she is not impartial in the performance of his or her job. Any intended acceptance of work must be previously presented to the chairman of the court, who then notifies the chairman of the higher court. If the chairman believes that it is not appropriate to accept the work, the decision on this issue is made by the Judicial Council. As a young judge, I have also experienced the strictness

¹ Aleš Zalar: Taking Judicial Corruption Seriously; The European Judges Perspective

of such decisions and I felt that I had been wronged. I had a chance to sing in a choir with the Slovenian Philharmonic Society and when inquired with the then chairman of the Judicial Council about whether they would allow it, she said: "Naturally, but you must give the money to charity." Considering that the obligations for the choir took place almost every day as well as the fact that at that time judges had rather low salaries, I naturally regretted it. However, I respected the decision without further ado. Today, I completely understand her. From the viewpoint of preserving the appearance of impartiality and not being corrupt, it is important to mention the opinion of the Ethics Council at the Slovenian Judicial Society, which, in one of its opinions, stated that it is not appropriate for judges to be members of any exclusive club (Lions, Rotary), since the activity of these clubs is oriented towards the acquisition of benefits for club members.

When discussing independence, it is also necessary to especially address the issue of the membership of judges in political parties and their bodies. Article 133 of the Slovenian Constitution already includes a provision that a judge may not be a member of political party bodies, and I believe that it is completely inappropriate for a judge to politically expose him or herself. Such is also the opinion of CCJE. However, the Judicial Service Act includes problematic provisions stating that a judicial function of a Member of Parliament, minister and state secretary must be suspended, while this is not the case with a general director, for example, who performs solely professional tasks.

Let me also add something about "internal impartiality" and "intimate corruption". I almost never hear it mentioned but it seems more important than all the other obviously recognisable situations, when someone may be associated with corrupt conduct. In this regard, Slovenia is in a peculiar situation – we live in a country in which we all know each other well. However, we all know that law may be interpreted in numerous ways and that we can all be exceptionally creative when it involves the defence or assertion of our rights or legally protected benefits. In Slovenia, there are many courts in small towns where all the inhabitants are neighbours, schoolmates, acquaintances, etc. These are the situations when a judge may, due to the existence of certain circumstances, make a different decision than otherwise, or may not exclude him or herself even though this is what should be done, and similar. From this viewpoint, it seems that the decision of the last amendment of the Judicial Service Act is very appropriate, since it has, to a great extent, transferred the cases of judicial administration from the local court chairmen to the district court chairmen. And at the very end, there is also a final and internalised test: are we aware of our own prejudices, limits and fears and how do we react to them?

JUDICIAL INDEPENDENCE

The majority of European countries, including Slovenia, have included judicial independence in their highest legal documents – the constitution (Article 125 of the Constitution of the Republic of Slovenia: "Judges are independent in the performance of judicial functions. They are bound to the constitution and law"; Article 126: "The regulation and competences of the courts are defined by law. Establishing extraordinary courts or martial courts during peace is not allowed".) At first glance, the fact that the provision on the establishment of courts is included in the highest legal document may seem exaggerated, but there are quite a few reasons in favour of such a regulation. First of all, the constitution is a document that is, in the majority of countries, substantially more static than any other document and is much more difficult to be amended. In addition, such a provision prevents the establishment of ad hoc courts, which certain individual holders of authority could use in their attempt to protect or assert their interests. In the fundamental principles of the Magna Carta of Judges, the independence of the judiciary and judges was again defined by the Consultative Council of European Judges (CCJE) on 19 November 2010. CCJE also recommends that independence be provided "by national rules at the highest level". An independent position of judges has numerous aspects, from the appointment of judges, duration of judicial office and immovability of judges, to the manners for

dismissal of judges and related immunity, financial independence (remuneration of judges) and so on.

APPOINTMENT OF JUDGES

In Slovenia, judges are appointed and relieved by the Parliament at the proposal of the judicial council. Otherwise, this regulation is rare in Europe, since, in addition to Slovenia, it is only in force in a few countries. However, such a regulation is not entirely without risk, as shown by some appointments or, to be more precise, non-appointments of Supreme Court Judges in the last 15 years. Namely, despite the permanence of judicial office, the decision on the appointment of a Supreme Court Judge is again made by the Parliament at the proposal of the Judicial Council. Thus, the Parliament has in some cases refused several professionally excellent candidates who gained full support of their peer judges and the Judicial Council, but their candidacy had incited discussions regarding their world view, value system and even individual decisions that they had made, mostly even as members of Judicial Councils. In light of such considerations, it seems that the system of appointing Supreme Court Judges is also inappropriate and incompatible with the Magna Carta of Judges. Namely, the President of the Supreme Court (Chief Judge) is also appointed by the Parliament at the proposal of the Minister of Justice, who has to obtain the opinions of a plenary session of the Supreme Court and the Judicial Council (which do not bind the Minister) prior to the preparation of the proposal. Such a manner of appointment, when the Supreme Court president must pass the parliamentary procedure three times (upon election to judicial office, upon appointment to the position of Supreme Court Judge and upon appointment as President of the Supreme Court), represents a remnant of the old assembly system. It is hard to imagine that any constitution of Parliament shall show the political will to waive its powerful competences. In an ideal state, the judicial branch of government should be completely unstained by politics in order to execute its constitutional function, while the system should be designed so as to prevent any political influence on the appointment of the highest holders of judicial authority in the state. A judge should go through a parliamentary procedure (if we had to decide that the Parliament is the body that appoints the judges), but only once: upon election to permanent office, while afterwards he or she should be promoted solely on the basis of professional and other criteria stipulated by the Judicial Service Act, including election to the highest positions. Such a regulation would comply with CCJE recommendations, according to which the decisions regarding the choice, appointment and professional career of a judge should be made by a body that is independent from the legislative and executive branches of government. Slovenia has such a body in the form of a Judicial Council, a *sui generis* body consisting of 11 members, six of which are judges. With the last amendment of the Judicial Service Act, the Judicial Council obtained numerous new powers, while some powers (e.g. appointing and relieving of court presidents) were transferred to the Judicial Council from the Minister of Justice, which seems to be the right decision in light of increasing judicial independence.

PROMOTION OF JUDGES

As I have already said, the criteria for the appointment and promotion of judges are precisely defined in Article 29 of the Judicial Service Act and are binding to both the Judicial Council, which decides on the majority of rights and obligations of judges, and the Personal Councils, which prepare the assessment of judicial service for their peers. The Personal Councils, which exclusively consist of judges, operate at higher courts and prepare assessments of judicial service for all judges of first level courts from the field of their jurisdiction, while the Personal Council of the Supreme Court prepares assessments for higher court judges and Supreme Court Judges, as well as judges assigned to work at the Supreme, Constitutional or Higher Courts and the Ministry of Justice. Practice shows that Personal Councils and the Judicial Council are increasingly more uniformly using and interpreting the criteria stipulated by the Judicial Service Act, while recently there has been an increase in the number of poor

assessments and assessments stating that a judge is not competent to perform judicial service, which is why his or her judicial office is terminated (following the confirmation of the Judicial Council). At a normative level, the self-regulatory mechanisms within the judiciary were established several years ago; however, it seems that the awareness of the necessity for regulating the conditions within our own ranks in the judiciary has been strengthening recently, perhaps also as a result of tense economic and social conditions. Judicial independence is a value that cannot exist without a high level of accountability of the holders of this value on the other side.

ACCOUNTABILITY OF JUDGES

Judicial obligations are precisely stated and elaborated in the Judicial Service Act, while Article 39 of this Act also includes an anti-corruption provision related to the prohibition of receipt of gifts or any other benefits in connection with judicial service. There is also a very precise and detailed disciplinary procedure, which is also an instrument that has been more frequently used in the last few years. An initiative for the institution of disciplinary proceedings may be submitted to the disciplinary bodies, which consist exclusively of judges, by the president of court, the president of directly superior court, the Judicial Council or the Minister of Justice. Unfortunately (or luckily), two criminal proceedings are currently taking place in Slovenia against a judge (who has already been suspended). A final indictment has been filed against them due to the suspicion that they executed certain criminal acts through abuse of judicial office.

PERMANENCE OF JUDICIAL OFFICE

Anyone who has ever experienced the system of re-election of judges (that we experienced in Slovenia, when it was a part of former Yugoslavia) is well aware of what value and what added value for judicial office is provided by permanent judicial term of office. Since I was too young a lawyer at that time to really have good knowledge of the conditions in the judiciary, I may only say that some judges, at least towards the end of their term of office and at least in some politically sensitive cases, were passing their judgements "carefully" under the influence of fear that they might not be re-elected. However, any such influence on a trial suits the definition of corruption in judiciary ranks.

JUDICIAL IMMUNITY

Some countries (including Slovenia in Article 134) have included the provisions on judicial immunity in their constitutions. No one who participates in a trial, may be held accountable for any opinion issued in his or her rulings (material immunity). The provisions on process immunity are rarely included in constitutions; however, they are included in the Slovenian Constitution (in case of suspicion of a criminal act during the execution of judicial office, the Parliament has to give consent prior to detention or the start of criminal proceedings against a judge). In this regard, it is also worth mentioning the issue of judge immunity regarding civil accountability for any damage that may arise due to errors or omissions in court proceedings. In principle, the majority of legal orders permit some very limited form of civil accountability of a judge in case of the most gross and inadmissible error, but only in cases defined by law. Any other regulation would widely open the door to corruption, since the judges might fear potential financial consequences and thus pass their judgments in a partial manner and in favour of economically more powerful clients.

PUBLIC TRIAL

The provisions, which, in principle, stipulate that the main proceedings and other hearings in front of the court should be public, prevent all kinds of “silent abuse”, influences, pressures, restrictions, interferences or even threats that might arise in the proceeding, which would be conducted behind closely shut doors. A public main proceeding prevents corrupt conduct by the judge, while increasing the judge’s reputation and public trust in the judiciary. In 2010, we installed recording devices into all the courtrooms in all the courts in Slovenia, thus establishing the conditions for audio recording of all hearings. The courts make use of the new technology to varying extents. However, the courts that first started using the recording devices report of very good experiences, improved process discipline and substantially shorter proceedings. In addition to the mentioned effects, the audio recording also has an added anti-corruption value, because the judge no longer summarises the proceedings using his or her own words, since it is recorded directly to the audio medium.

ECONOMIC INDEPENDENCE OF JUDGES

The Magna Carta of Judges especially discusses the issue of financial independence of judges. An appropriate salary, which not only provides for the survival of the judge and his or her family, but also brings a certain social status, is one of the basic prerequisites preventing the potential corrupt conduct of judges. Due to the provisions on the incompatibility of additional activities with judicial service, poorly paid judges represent a high risk for the country, which the country cannot afford – but it does. The judges in Slovenia felt this substantially, although we can say that, in spite of this, the awareness regarding the importance of judicial work and moral values of judges was on an enviable level. In Slovenia, judges’ salaries had been regulated by the Judicial Service Act before the Public Sector Salary System Act, which caused great discontent in all occupational groups, while judges’ salaries were also classified according to this system (naturally, on too low a level, which has also been established several times by the Constitutional Court). By adopting this Act, the attempt to introduce a pay system according to actually performed work was made, while completely ignoring the risks which such a system brings without the exceptionally carefully and precisely elaborated additional criteria, defining what the term “actually performed work” means. The resolution of old cases, which have perhaps already been repealed at an instance court and which take a lot of time, energy and require a lot of effort from the judge, is certainly more important for citizens than the resolution of new and simple cases. In my opinion, the introduction of such systems brings the risk of corruption occurrence. Slovenia has abandoned this model and returned to the fixed salaries of judges, while also increasingly introducing quality criteria for the evaluation of judicial work in addition to the quantitative criteria.

INTEGRITY AND PREVENTION OF CORRUPTION ACT

Slovenia has had its Corruption Prevention Commission for approximately seven years, and the Integrity and Prevention of Corruption Act contains a series of provisions that must be abided by all government functionaries, especially including judges. The first requirement includes the disclosure of data about financial status. Each functionary must, at the beginning of his or her term of office and periodically afterwards, disclose all data about his or her financial status, including data about assumed financial obligations, loans, and similar. I remember that several years ago one Slovenian bank offered very favourable loans to judges of certain courts, which naturally had to be refused by the judges. It would be nice if such an offer came from the government, as it would thus express the government’s thanks to those who perform a part of its functions. The second group of provisions includes the restrictions and prohibitions related to the receipt and giving of gifts, defines the indicative values of official and protocol gifts and introduces a list in which gifts should be recorded. It is hard to estimate when an ordinary gift

might become a bribe, especially upon big holidays and anniversaries, which is why the general regulation, as we know it, is suitable and appropriate. Naturally, the Judicial Service Act contains a prohibition on receipt of gifts and benefits related to the execution of judicial office.

CONCLUSIONS

Last but not least, let me also add the following: namely, such a short and superficial overview as this can show us how many different dilemmas and traps are hidden in every notion that we address. On the other hand, the independence and impartiality of courts and judges must have a counterweight – accountability. There are only a few people who are suitable for judicial service and, in addition to a high level of professional knowledge, also have undisputed humane and moral qualities. These are people who are aware that being a judge is more a responsibility than a privilege. It rests on the government to provide for the conditions and thus, on a normative and actual level, generate a general atmosphere, which shall convince such people that being a judge presents an honour for which it is worth applying. And since I began with the ancient Romans, let me also conclude with them, as they knew that with everything you do, it is always necessary to keep the final goal and the whole picture in mind: “*Quidquid agis, prudenter agas, et respice finem.*”

Ljubljana, February 2011