

INDEPENDENCE OF JUDICIARY IN SLOVENIA: ECONOMIC AND HISTORIC PERSPECTIVE

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ABSTRACT

The article examines the independence of judiciary in Slovenia since its secession from Yugoslavia and communist regime in 1991. Using the theory on the independence of judiciary and the Landes – Posner model of judicial independence the article concludes that there are two possible conclusions as to why the legislative and executive branches were encroaching the independence of judiciary via wages. One is the lack of political competition which gives the other two branches the chance to control judiciary and the other one is that the encroachment of judiciary independence via wages was not intentional and does not have any negative impact on Slovene judiciary, which needs to be further examined empirically in the future work.

Key words: independence, judges, judiciary, wages, political competition, Slovenia

L'INDIPENDEZA GUIDIZIARIA IN SLOVENIA: UNA PROSPETTIVA ECONOMICA E STORICA

SINTESI

Il presente articolo prende in esame l'indipendenza della magistratura slovena a partire dal 1991, anno in cui la Slovenia si separò dalla Jugoslavia, abbandonando il regime comunista. Nell'attività di analisi, utilizzando la teoria dell'indipendenza della magistratura e il modello di indipendenza dell'indipendenza giudiziaria Landes – Posner, l'autore giunge alla conclusione che l'interferenza da parte del potere esecutivo e legislativo sull'indipendenza di quello giudiziario, riducendo gli stipendi dei magistrati a livello incostituzionale, può essere dovuta alla mancanza di un'effettiva competizione politica oppure risulta per caso e non porta alcuna incidenza sull'indipendenza della magistratura, fatto che dovrà essere ulteriormente esaminato.

Parole chiave: indipendenza, giudici, magistratura, salari, Slovenia, competizione politica

1. INTRODUCTION¹

Judiciaries around the world allegedly face backlogs or slow disposition time and dishonest judges (Gallanter, 1994).² Slowness not only affects the economic growth as already documented but also affects the poor the most (Djankov et al., 2003 and citations therein and Buscaglia et al., 2005). Over the years, many millions of dollars and knowledge were poured into judiciary reforms, some with more, some with less success in order to improve transparency, accessibility, independence and efficiency of judges.³

This article focuses solely on judicial independence in Slovenia, a country that declared independence in June 1991 and started to build up its institutions among them also judicial independence as one of the cornerstones of the democracies. The question arises whether Slovenia succeeded with securing the independency of the judiciary in the quest to become a democracy.

The article is structured as follows. After introduction, a theory of judicial independence is presented. The third part of the article discusses the Slovenian judiciary together with empirical data and the encroachment of the independence of the Slovenian judiciary by the executive and judiciary branch. Conclusion follows.

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- 1 This article was written while the author was a Fulbright scholar at Washington and Lee University Law School in the Fall 2013. The author is a member of the Judicial Council of the Republic of Slovenia. The views expressed in the article do not represent the views of the Judicial Council of the Republic of Slovenia but author's own views. The author would like to thank Janja Roblek, Jaša Vrabec and anonymous referee for helpful comments and suggestions.
 - 2 The judiciary is broadly defined as: »*The institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behavior; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions.*» (see Reiling, 2007) In organizational terms, a justice system may span all three branches of government and multiple non-state actors, including: the courts, the police, prosecutors' offices, public defenders, state and civil society legal aid providers, alternative dispute resolution mechanisms, administrative adjudication and enforcement mechanisms, customary and community-based institutions, anticorruption and human rights commissions, ombudsman offices, and property and commercial registries (The World bank, *New Directions in Justice Reform*, 2012, 2).
 - 3 For the overview of the not successful project, see The World Bank, *Law, Equity & Development*, Volume 2, 2006, which cites the following: "Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge," in Thomas Carothers, *Critical Mission: Essays in Democracy Promotion*, 131–44 (Washington, DC: Carnegie Endowment for International Peace, 2004); Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006); Julio Faundez, *Good Governance and Law: Legal and Institutional Reform in Developing Countries* (New York: St. Martin's Press, 1997); Poonam Gupta, Rachel Kleinfeld, and Gonzalo Salinas, "Legal and Judicial Reform in Europe and Central Asia," *Working Paper*, no. 27811, Operations Evaluation Department, World Bank, Washington, DC, 2002; Linn Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (Boulder: Westview Press, 1998); *Lawyers Committee for Human Rights, Halfway to Reform: The World Bank and the Venezuelan Justice System* (New York: Lawyers Committee for Human Rights, 1996); Carol V. Rose, "The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study," *Law and Society Review* 32, no. 1 (1998): 93–140; Frank Upham, "Myth Making in the Rule of Law Orthodoxy," *Carnegie Endowment Working Papers, Rule of Law Series, Democracy and Rule of Law Project*, no. 30 (September 2002), Carnegie Endowment, Washington, DC; and USAID,..."

2. INDEPENDENCE OF JUDICIARY

Judicial independence refers to the existence of judges, who are not manipulated for political gain, who are impartial towards parties of a dispute, and who form a judicial branch, which has the power as an institution to regulate the legality of government behavior, enact “neutral” justice, and determine significant constitutional and legal values (Larkins, 1996).

It is claimed that the independence of judges is one of the corner stones of democracy, promoting checks and balances among the three branches of government and a necessary condition for markets to work (Hayek, 1960; Persson and Tabellini, 2000), which is confirmed by numerous empirical studies, for example Barro (1991), Havrylyshyn and van Rooden (2000), and Svejnar (2002).⁴ Independency promotes both, economic and political freedom (La Porta et al., 2004), by constraining everybody, including the government, to take private property and by constitutional review, resisting the attempts of the government and/or parliament to suppress dissent.

A number of data sets, for example Doing Business of the World Bank dataset and their governance indicators demonstrate a positive correlation between the rule of law and economic development as does The Business Environment and Enterprise Performance Survey (BEEPS)—developed jointly by the World Bank and the European Bank for Reconstruction and Development, which indicates that crime, complex regulations and judicial performance hinder the efficiency of the economy (Initiatives in justice sector 1992 – 2012, 2–3). Therefore some institutional safeguards are embedded in the rules that help judiciary accomplish should be present.^{5,6} However, there is another view on the judiciary, claiming that the independence of judges is not contingent on the constitutional rules or constraints that are put on the judiciary, but is the outcome of the political competition. As Ramseyer (1994) puts it: “*Despite most of what we teach in schools, I suggest, judicial independence has had less to do with constitutional texts. It has had more to do with elections* (Ramseyer, 1994).” There are two possible outcomes with respect to the independency or dependency of the judiciary, according to the view held by Ramseyer (1994) and to a large degree also by the Public Choice movement, which rest on the assumption of existence of competition between the political parties and whether there is likelihood of continued democratic elections. As Hellman (1998) showed, in transition economies the most consistent and welfare enhancing reforms were in countries where elections were competitive, the government turn – over was frequent and where there were broad coalition governments. Hellman (1998) claims that the main challenge to reforms in general were not from losers of the initial reforms, but from the “elites,” which

4 For an excellent overview of the impact of rule of law on economic growth see Haggard and Tiede (2010).

5 Hayek (1960) saw independent judiciary as one of the ways in which judicial checks and balances are established.

6 See La Porta et al (2004), which present empirical data by examining judicial independence and constitution review in 71 countries, that the independence of judges and constitutional review matter for economic and political freedom.

benefited from initial reforms and were resisting further reforms, because the partial reform generated high rents for them and imposed high costs on the rest of the population.⁷ If there is no competition between the political parties “spoils” of the reforms end up in the hands of interest groups that are not seeking growth, but are trying to preserve the status quo. Political competition, on the other hand, brings up the growth seeking interest groups, which benefit from the reforms, but so does the whole economy.

When there is competition among political parties, when there are competitive elections, where government turnover is frequent and where broad political coalitions are formed, and where there is a view that democratic elections will continue indefinitely, then we can get the Landes – Posner equilibrium of independent judiciary. Landes and Posner claim that the independence of judges increases the ex ante price that legislators can extract from the interest groups buying the legislation and therefore independence of judges is valuable to all politicians.⁸ According to this view, competition among politicians delivers efficient equilibrium since it is in the interest of politicians to make or leave judiciary independent.⁹

Despite the proclaimed judicial independence, there is a wealth of evidence, at least in the US and some in Japan, which supports the view that the judiciary is not as independent as theory would like it to be in order to perform its role in the story of checks and balances.¹⁰ Therefore, if there is lack of competition or the competition among political parties is non-existent and it is not certain whether democratic elections will continue in the future, the outcome of the political process might not be Pareto superior, such as Landes – Posner model predicts, but we might end up with dependent judiciary or the judiciary that might be susceptible to the influences of executive or legislative branch, despite the rules guarding judicial independence (Ramseyer, 1994).

These two possible outcomes, Pareto superior with independence of judiciary and Pareto inferior with the lack of independent judiciary might answer the famous question that Epstein (1990) posed as to why do we have so many checks and balances that provide for judicial independence, if we get a “good” outcome as the product of political process. It could be that checks and balances are in place just for such a case, when we are stuck in Pareto inferior equilibrium with lack of political competition, even though it has to be pointed out that the rules might not help much such circumstances. However, if enforced, they do increase the transaction costs to whoever wants to influence the judiciary.

7 »... the most frequently mentined obstacles to the progress of economic reform in post – communist transitions have come from a very different sources: from enterprise insiders who have become new owners only to strip their firms’s assets; from commercial bankers who have opposed macroeconomic stabilization to preserve theor enormously profitable arbitrage opportunities on distorted financial markets; from local officials who have prevented market entry in their regions to protect thier share of local monopoly rents; and from super-rich »mafiosi« who have undermined the creation of stable legal foundation for the market economy.« (Hellman, 1998, 204). “As those in power attempt to stay in power, they help themselves and their supporters through excessive dictatorship. State ownership becomes a mechanism for dispending patronage and for maintaining political support for the incumbent politicians.” (Shleifer & Vishny, 1994).

8 They claim that »the independent judiciary is not only consistent with, but essential to, the interest group theory of government.«

9 See also McCubbins and Schwartz (1984).

10 See also Stephenson (2003) for the empirical evidence on the independence of judges.

What does empirical evidence tell us about the two outcomes that were outlined above? Ramseyer (1994) gave three examples of his theory, the independence of courts in modern Japan, the United States and Imperial Japan. All three stories are consistent with his theory, namely that since one of the political parties was in power in Japan for so many years, they had no incentives to have independent judiciary and they influenced either by job assignments or promotions of judges in order to control them. In the US, for example, politics play a role at the stage of appointment, at least at the federal level, and later on, as he claims, politicians follows a hands off politics.¹¹ His theory was also validated by Hanssen (2004). He claims that, in line with the Landes – Posner model, by establishing an independent court, costs for future regime of changing the policy are higher.¹² However, at the same time, independence gives judges the freedom to pursue their own “political” goals and therefore might become unpredictable for the politicians. He tested his hypothesis on state-level data in the United States judicial institutions. He found that independence is the product of competition between political parties and moreover so, if the political parties have vastly different platforms.

Despite proclaimed independence on paper, it seems that political competition determines to a large degree whether judges are independent or not.¹³

2.1. What rules make judges independent

According to Posner (1994) judges’ utility function consists mainly of the following variables: income, leisure, judicial voting, reputation and promotion. Judges are treated as rational maximizers and are therefore, susceptible to influences to some degree.¹⁴ How do rules or institutions make them less susceptible to undue influence?

For example, Buscaglia et al. (1995) claim that what makes judiciary independent is budget autonomy, uniform and stable jobs for judges, salaries that cannot be changed but in certain circumstances¹⁵ and retirement systems that motivate judges to retire when they are ready. Also, appointment of judges should be credible and transparent. Judges should have access to education. What they point out as important are disciplinary procedures, which make them more accountable. Lastly, they are in favor of judicial councils

11 For a good overview of the discussion of the judicial independence in the United States, see Burbank (1999).

12 For a similar argument in other situations see Glazer (1989), Persson and Svensson (1989), Alessino and Tabellini (1990), Tabellini and Alessina (1990), to mention just a few.

13 See also Feld and Voight (2003), who found that »de facto« judicial independence and not »de iure« independence affects growth in economies.

14 I am not claiming that all judges are corrupt and susceptible to influence. I would just like to point out, in line with the empirical literature, that there is some room for influencing them and that they might be susceptible for corruption. For a good discussion on how judges decide case see Aranson (1990), who claims that there are three modes of decision making: 1) rule governed behavior, 2) efficiency enhancing allocation based on calculation (law and economics approach) and redistributive rent – provision (public choice approach).

15 On the discussion of the salaries of the judges see Choi, Gulati and Posner (2009), who claim that increase in wages will influence the quality of judging under two conditions: if judges can be sanctioned for performing inadequately or if the appointment process reliably screens out low-ability candidates.

and their role in selection and promotion of judges.¹⁶ Cabrillo and Fitzpatrick (2008) also mention the above characteristics of independent judiciary. They add proper judicial infrastructure so judges can have proper working conditions, the strength of media in the country, which can expose undue influence and certain benefits that can be either bestowed or withheld from judges, such as “promotion” to the periphery or nicer offices and similar, the number of times and length of time in the office. Not only appointments, and the appointed or elective system, but also the possibility and ease of impeachment are important for judicial independency as well as the ease of regulating the size of the judiciary, especially at the top of the hierarchy, legislative resistance to judicial decisions and jurisdiction stripping (Burbank, 1999).

3. SLOVENIA

3.1. History of judiciary

Slovenia is a small country, which gained independence from Yugoslavia in 1991, joined the EU in 2004 and adopted the Euro in 2007.¹⁷ It adopted its Constitution on December 23, 1991, in which it is expressly stated that judiciary is an independent branch of government and that all matters pertaining to judges and judicial work are to be prescribed by law. Based on the new Constitution, three acts legislating judiciary were enacted in 1994, namely the Constitutional Court Act, the Judicial Services Act and the Judiciary Act, which were amended many times throughout the years.¹⁸

Even when Slovenia was part of Yugoslavia, its judicial system was struggling with backlogs. Backlogs and unresolved cases in Slovenia are not a recent occurrence. Already in the 80s and 90s backlogs started to pile up. For example, in 1992, there were 199.893 unresolved cases and “important” cases represented 100.049 cases at first instance courts.¹⁹ 40% of the unresolved cases were commercial cases, half of them commercial enforcement procedures (Zajc, 2012). The matters got worse after the reorganization of the judiciary in 1995. On January 1, 1995, after the judicial reform and a brake from the “socialist” judiciary organization, 44 local courts and 11 district courts with general jurisdiction, four appellate courts with general jurisdiction, a Supreme court and four Social and labor courts were set up.²⁰

16 However, see Voight and Bialy (2013), which found empirical evidence for European countries that resolution rates in courts are negatively – and very robustly – correlated with the presence of judicial councils. Even though judicial councils might positively affect the independence of courts, they might negatively affect the efficiency of judges.

17 Slovenia has 2 million people, its BDP is around 35 billion EUR (91% of EU average) and it measures 20.273 km² (http://www.slovenia.info/en/spoznajte-slovenijo.htm?spoznajte_slovenijo=0&lng=2).

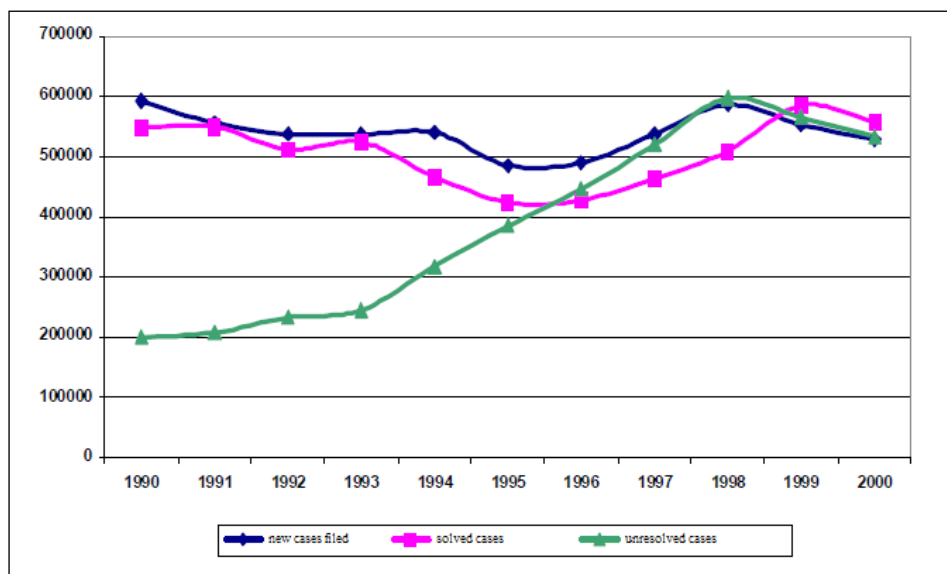
18 Official Gazette of the Republic of Slovenia, No. 15, 1994 and No. 19, 1994. It should be noted that Slovenia had Constitutional court from 1963 onwards, one of the few in the region. However, the jurisdiction of the court was very different than it is today (Zajc, 2012; Brzezinski, 1993).

19 Important cases are cases that can only be decided by a judge. For less important cases the rules allow that the cases can be decided, with or without the supervision of the judge, by either paralegals or court personnel.

20 The Administrative court was established as late as 1998.

As the graphs below show, the matters got worse up until 1998 when the judiciary was faced with 597.587 unresolved cases at the end of the year, 213.559 of them “important” cases, an almost a three fold increase from the year 1990, when there were 199.893 unresolved cases (Graph 1).²¹ After 1998 the number of unresolved cases and backlogs started to abate, even though it should be pointed out that the number of cases filed each year even during the 90s was decreasing steadily.²² Matters got better after 1999. The number of unresolved cases and backlogs were steadily decreasing as was the inflow of new cases.. However, enforcement cases and land registry were still plagued with huge backlogs.²³

Graph 1: Solved, unresolved and filed cases: 1990 – 2000



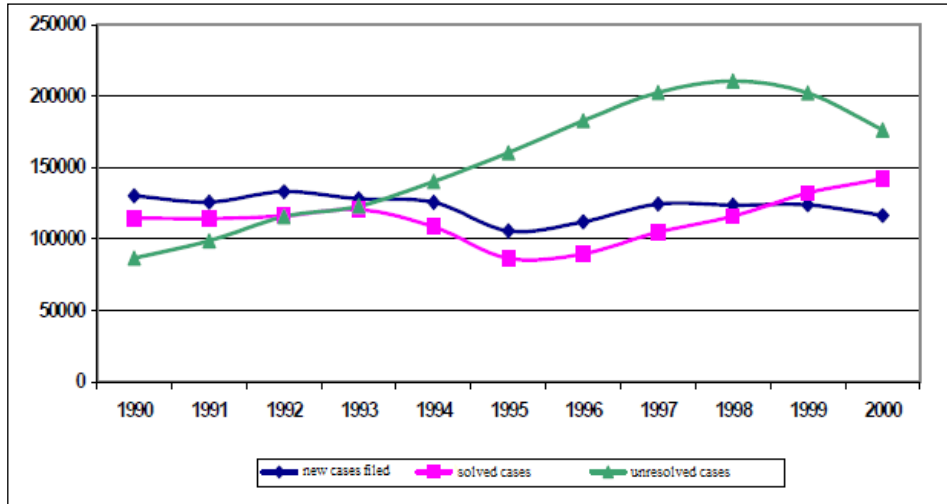
Source: Report 2002, 9

21 Backlogs in Slovenia, analysis of the causes and the recommendation for remedies, Report prepared by the Supreme Court and the Ministry of Justice, 2002.

22 It is interesting to point out that the normative for judges was again instituted in 1997, with a try-out in December 1996 and coincides with the increased number of cases per judge.

23 Ibidem.

Graph 2: Solved, unresolved and filed important cases: 1990 – 2000

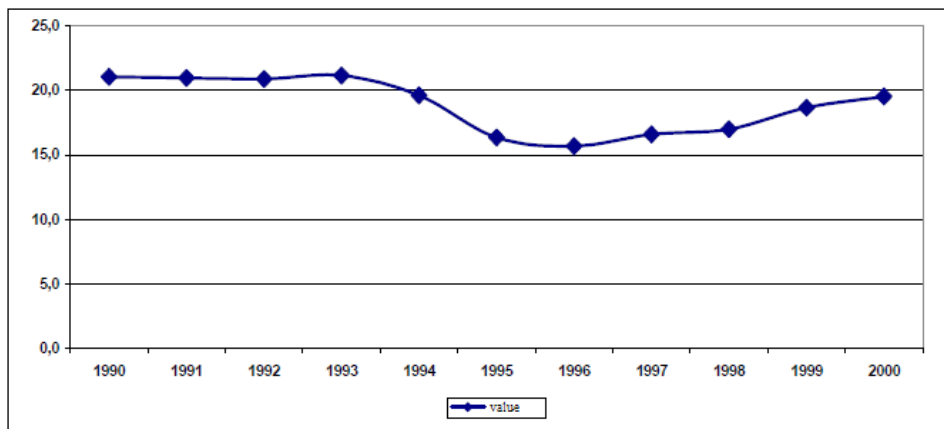


Source: Report 2002, 10

By the end of the 90s, the Supreme Court and the Ministry of Justice got worried by the deteriorating situation in judiciary. Together they prepared a report about the causes and remedies for the state of the judiciary (hereinafter: Report 2002). Their conclusion was that the most important factor in the declining state of the judiciary in the 90s was the decline in the productivity of judges, as can be seen from the graph below.²⁴

24 It should be pointed out that the Supreme Court, who is in »charge« of all the courts did not have a president from 1995 until end of 1997: <http://www.sodisce.si/vsrs/predstavitev/2010112509152870/>.

Graph 3: Productivity of judges – important cases



Source: Report 2002, 11

According to the Report 2002 the reasons for the deteriorating productivity of judges were manifold. The first among the mentioned was the transition from the communist to capitalist system (and therefore all the accompanied changes of the legislation and additional legislation needed for the functioning of the capitalist system and legislation which was enacted in order to remedy all the injustices of the communist regime), the implementation of the judiciary reform in 1994–1995, which disrupted the flow of work, negligence in following the statistical data and therefore lack of any reaction to the deteriorating situation, lack of experienced judges, lack of interest in becoming a judge since the option for lawyers increased by making private sector jobs more lucrative and changes in the society which consequently resulted in more complex cases.²⁵ Furthermore, the report found that judges were burdened with administrative work, that the procedural legislation in civil (including enforcement procedure) and criminal matters, despite many improvements, is to a large degree still inefficient. The Report 2002 criticized the under-regulation of the duties of judges as per the quantity and quality of the work that is required, the same goes for promotion of judges.²⁶

They proposed that the number of personnel increases to unburden the judges of administrative work and that the number of judges decreases. They stressed that the management of courts should be improved, since presidents of courts have sufficient supervisory power, but they are not executing it to their fullest degree and that procedural laws should be amended in order to improve the efficiency of procedures. The report concluded that courts had sufficient funds in order to function properly and that the legal status of judges

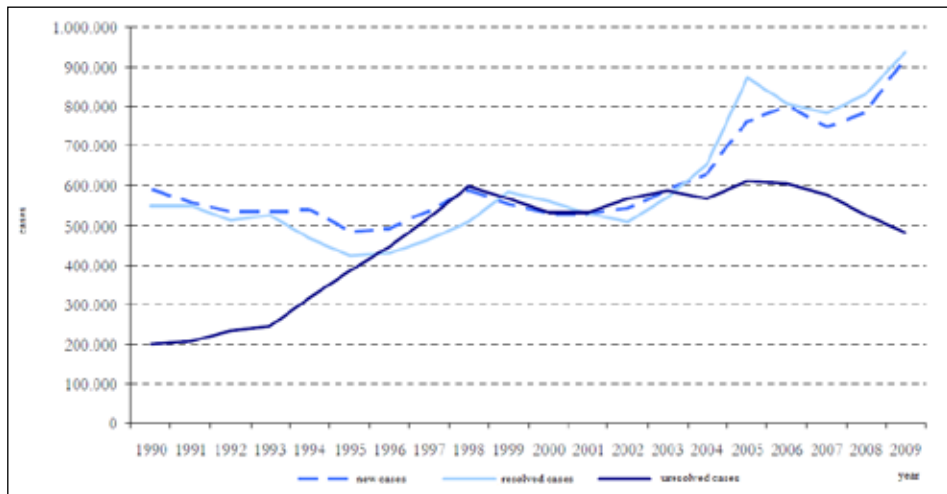
25 A lot of senior judges decided to pursue more lucrative careers, such as joining the bar, becoming notary publics or joining commercial companies to head their legal departments.

26 It could be a coincidence but the Report claims that the imposition of the norms on the judges coincided with the resolution of more cases.

and courts should not be a cause of low productivity of judges, since the legal framework guarantees them independence as executive and legislative branch do not have, except in small part in the judicial administration, no influence on the judiciary.²⁷

Even though matters got slightly better in the following years after 2000, they are still far from perfect as can be seen from the below graph.

Graph 4: All cases in all courts from 1990 to 2009



Source: Audit Court Report, 2011, 14

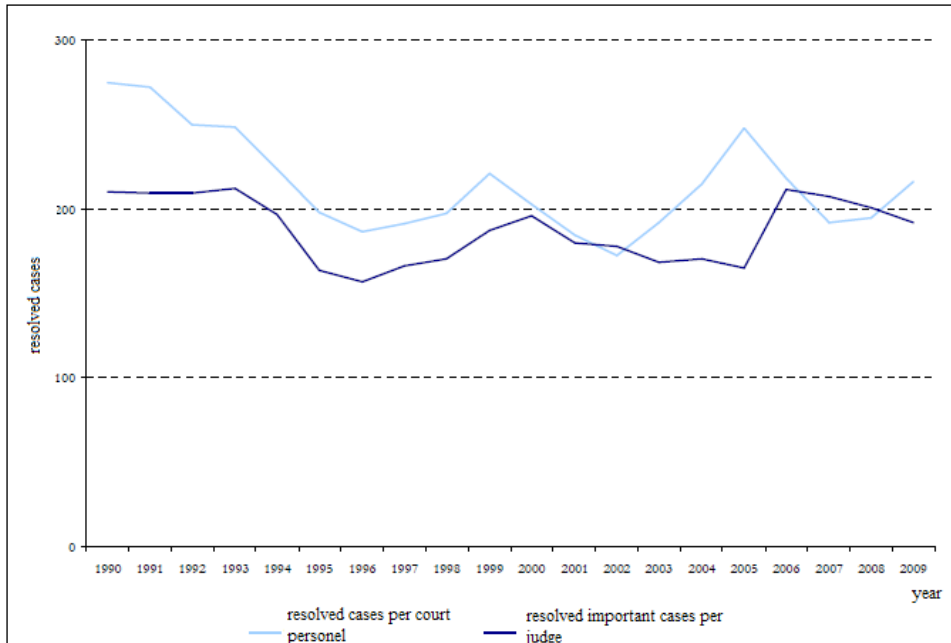
Even though the influx of new cases decreased in the late 1990s, it started to slightly increase after the year 2000 but in the last years the influx of cases, at least important cases, which influence the productivity of judges, is declining again. Productivity of judges slightly increased after the year 2000, with a sharp drop in 2006 and some years after but it never reached the productivity of judges before 1995. It should be pointed out that the matters are improving in the Slovene judiciary, and the number of the unresolved cases is decreasing over time. Also, courts manage the new influx of the cases and solve more than they get to adjudicate and the time to dispose cases is decreasing steadily.²⁸ However what we should see is the improvement in the productivity of judges, which is still not at the desired level or improving a lot.²⁹

27 The number of funds available to the judiciary increased for 210% in real terms between 1993 and 2002. Similar conclusions were reached by Vehovar (2000).

28 See Otvoritev sodnega leta 2014 and the Yearly report on judiciary made by the Judicial Council for the year 2013.

29 At the end of 2012 Slovenia had 982 judges and 3.608 court personnel, the highest number per capita in

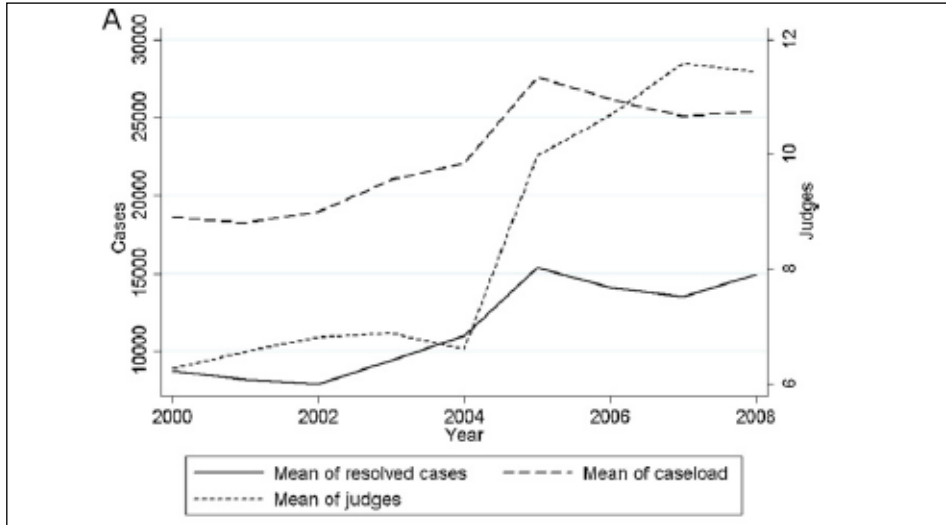
Graph 5: Productivity of judges and all employees in the period 1990 – 2009



Source: Audit Court Report 2011, 18

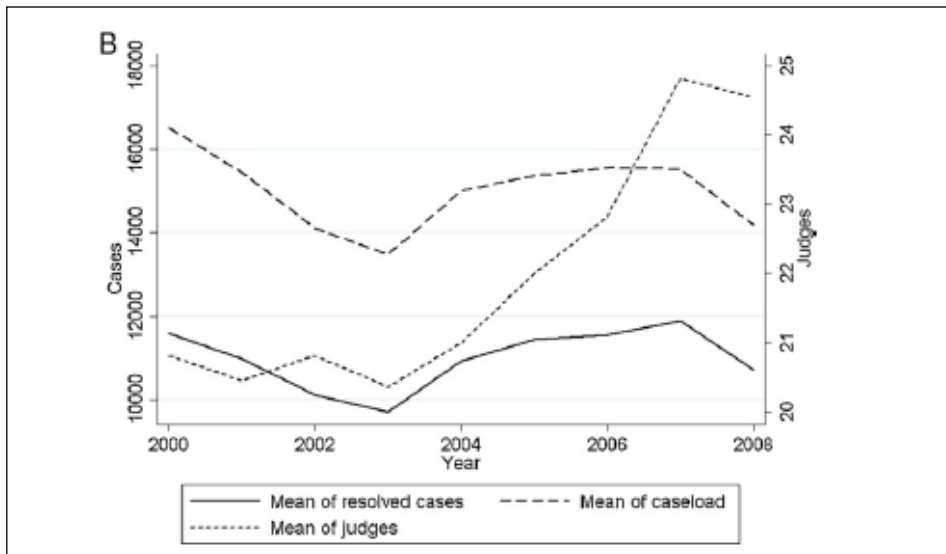
Europe. There were 1,128.246 cases filed at all courts in 2012, with the exception of the Constitutional Court, and courts disposed of 1.198.428 cases. The judiciary ended the year 2012 with 358.110 unresolved cases. The influx of “important” cases was 167.563 and judges solved 186.441 important cases in 2012. For example, the courts ended the year 2012 with 119.034 unresolved important cases, which is almost as much as in 1992 when the year ended with 100.049 unresolved “important” cases. As long as the number of the influx of cases is decreasing, and the judges handle all the new cases and some small amount of backlogs, the number of unresolved cases overall will decrease, even though the productivity of judges does not improve. In ideal world, bot should happen, the number of influx should decrease and the productivity of judges should increase.

Graph 6: Mean of resolved cases, mean of caseload and mean of judges 2000–2008, Local courts



Source: Dimitrova-Grajzl, 2012a

Graph 7: Mean of resolved cases, mean of caseload and mean of judges 2000–2008, District Courts



Source: Dimitrova-Grajzl, 2012a

3.3. Independence of slovene judiciary

Before 1991, courts in Slovenia were not independent, but part of the one-branch government. However, as the new Slovene Constitution was passed in Parliament in 1991, judiciary became an independent branch of government. Theory predicts that judiciary is independent, apart from when there is political competition, when it has budget autonomy, when stable and uniform jobs with guaranteed wages are secured for judges together with retirement, when appointment process is credible, transparent and keeps judges in office for a prolonged time if not for life, when credible and transparent procedures for disciplinary procedures, including the impeachment are in place, and when regulating the judiciary is not very easy. Additionally, the more there is competition among political parties, the better the chances that the judiciary is independent. Has Slovenia achieved all these?

Slovenia legislated the independence of judges in Article 125 of the Slovenian Constitution that was published in the Official Gazette of the Republic of Slovenia in 1991.³⁰ The Constitution also determined life-tenure for judges and the impeachment possibility. The Constitution mandated that all matters pertaining to judges or judicial services need to be prescribed by law and not regulated by other means. The budget of the judiciary is determined by the budget of the Republic of Slovenia, which is passed by Parliament. Judges are elected by the Parliament and proposed by the Judicial Council of the Republic of Slovenia, which reviews information on judges based on public tender information and recommendation of the presidents of the respective courts. Mandatory retirement age for judges is 70 years. They are (or not, if the evaluation states that they are not eligible) promoted every 3 years, based on the evaluation of the Personnel Committees at the respective courts. Judicial Council promotes judges based on the evaluation of judges by the personnel committees at the respective courts and based on the criteria defined in the Judiciary Services Act. There are 3 levels of promotion, regular, “fast” and “exceptional” and there is an option to gain a title of “senior” judge when judges reach a certain age and have a good track record.

On paper judges in Slovenia gained strong independence. They have life tenure, they are elected in a transparent and credible fashion, promotions are guaranteed, if their evaluations are up to the standards, their salaries cannot be changed but with the passage of the law and they have a mandatory retirement age at age 70. Judges are also accountable since they face either impeachment or disciplinary procedures.^{31, 32} What about in practice?

30 Official Gazette of the Republic of Slovenia, No. 33/1991 and further changes and amendments.

31 Eight judges were impeached in the last 13 years according to the information received from the Judicial Council of Slovenia.

32 For example, in 2011 three disciplinary procedures were completed, with one judge reprimanded and two judges got suspension of promotion for one year period. In 2012 one reprimand was issued (data on file with the Supreme Court of the Republic of Slovenia).

3.3.1. War on wages

In 2002 the Public Sector Salary System Act (hereinafter: Act)³³ was passed and judges claimed that the Act infringed on their (material) independence with regard to the new system by which the wages of judges were determined.³⁴ The matter went to the Constitutional Court. The Court decided that the Act infringes on the independence of judges:³⁵

“Firstly, it found that in accordance with the principle of the independence of judges (Article 125 of the Constitution), it is appropriate that judges’ salaries be regulated only by law. Therefore, the challenged provisions of the Judicial Service Act and the Public Sector Salary System Act, 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 a regulation, are inconsistent with the aforementioned constitutional principle.

Secondly, since the government did not state convincing reasons for the alleged disproportion 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 the second paragraph of Article 3 of the Constitution.

Finally, it is inconsistent with the constitutional principle of the independence of judges if the legislature ensures judges only protection against a reduction in the 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 additional allowance for years of employment or due to a temporary reduction in judges’ basic salary in the event of a change in grades is inconsistent with the aforementioned constitutional principle.”³⁶

The Constitutional Court mandated the Parliament to incorporate the changes in the Act. The executive branch prepared the change of the Act in 2007 and 2008. However, judges claimed that even the changed Act still infringes on their independence. In the period between 09.06.2008 and 11.06.2008 there were approximately 78,3% of judges on a three – day strike. Since the executive branch and the legislative branch did not react by

33 The Act was published in the Official Gazette of the Republic of Slovenia, No. 56/2002, but went into effect on March 1, 2006. However, the Constitutional Courts withheld the Law for judges and decided that the wages should be calculated based on the Law that was in effect before 2006 (Constitutional Court decision U-I-60/06–12).

34 Official Gazette of the Republic of Slovenia, No. 56/2002 and further changes and amendments.

35 Constitutional Court decision No. U-I-60/06.

36 See memorandum (on file with the author) prepared by Jaša Vrabec, Judicial Councillor in the President’s Office at the Supreme Court of Slovenia, October 2011.

starting to initiate the changes of the Act, approximately 70% of judges went on a “white” strike which ended 142 days after and culminated in an agreement between the executive branch and judges in how the legislation regarding the wages should be changed.³⁷ In the meantime, it was again for the Constitutional Court to decide whether the provisions on the remuneration of the judges were constitutional. It again decided that the wages of the judicial branch were not comparable to the executive and judicial branch and found them unconstitutional, because they encroached judicial independence and ordered the Parliament to change the Act.³⁸

*“Firstly, the placement of judges just one salary class higher did not remedy the unconstitutionality of the provisions regarding the salaries and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution), as it did not ensure judges remuneration which would be comparable with the remuneration of the officials of the other two branches of power.”*³⁹

Secondly, the prohibition of only the reduction of a judge’s basic salary is unconstitutional, as it follows already from decision U-I-60/06 that the prohibition against a reduction should not refer only to the basic salary.

Thirdly, the regulation of the amount of the bonus for years of service, inasmuch as it refers to judges, is inconsistent with the principles of judicial independence and of the protection of acquired rights, due to the fact that the reasons for the reduction are not consistent with the constitutional requirements for the reduction of judges’ salaries.

37 See article in newspaper Dnevnik, July 1st, 2008. <http://www.dnevnik.si/clanek/330390>.

38 Constitutional Court decision No. U-I-159/08.

39 Decision U-I-159/08, paragraphs 28 and 29: 28. The constitutional equality of the judicial power in comparison with the legislative and executive powers, *inter alia*, requires that the position of the judicial power and judges as bearers of this power is treated and regulated in an appropriately comparable manner as the other two branches of power, such that judicial independence as well as the integrity and dignity of the judicial branch of power are ensured. The Constitutional Court has already stated in Decision No. U-I-60/06 that the requirement of the equality of the individual branches of power, which follows from the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution, also presumes a comparable remuneration of the officials of the different branches of power whose statuses are comparable. The three branches of power must namely be equal also regarding the economic status of their officials. 29. By the challenged regulation, in comparison with the former regulation, the legislature placed the offices of senior Supreme Court judge, senior higher court judge, senior local court judge, higher court judge, and local court judge one salary bracket higher. The legislature did not change the placement of other judicial offices. Moreover, the salary brackets of deputies and ministers did not change either. The above-mentioned entails that differences between the lowest placed office of a local-court judge and the lowest placed office of a deputy or a minister are still 15 or 22 salary brackets. Such differences are still unacceptable from the viewpoint of the constitutional requirement that all three branches of power must be constitutionally equal, which must also be reflected in the relative comparability of the amount of the remuneration of their officials. Furthermore, it is not admissible from the viewpoint of the second paragraph of Article 3 of the Constitution that the salary bracket of the office of Supreme Court judge is (still) the same as the salary bracket of the office of the lowest classified deputy.

Fourthly, the Court found that the provisions concerning regular work performance and work performance due to an increased workload are defined in enough detail and are therefore not unconstitutional."⁴⁰

Again, the legislative branch (in the middle of June 2009) introduced some changes in the Act in order to align the provisions with the Constitutional Court decision and to protect the independence of judges.⁴¹ However, the opposition wanted to have a referendum on the proposed changes, but the Constitutional Court decided that a referendum on the issue of judges' salaries would have unconstitutional consequences.⁴²

"The Constitutional Court decided that constitutional values which would be violated because of the rejection of laws at a referendum must be given priority over the right to a referendum. Maintaining the unconstitutional state of affairs which would be caused by the rejection of a law at a referendum would be intolerable from the constitutional point of view, and particularly from the point of view of the role which the judiciary plays in a state governed by the rule of law and especially in protecting human rights and fundamental freedoms."

Due to the financial crisis, Parliament passed the Act on balancing the public finances in Spring 2012,⁴³ which went into effect on June 1st 2012.⁴⁴ The wages of judges were harmonized with wages of other two branches of the government and the Constitutional Court requests were finally satisfied.

3.3.2. Possible causes and consequences of the "war on wages"

Was there political competition in Slovenia? After many years of one-party system, a competition among parties started to arise in 1988. The first free elections in Slovenia were held in April 1990, before Slovenia declared independence on June 25th, 1991 and seceded from Yugoslavia.⁴⁵ A center-right coalition of six parties called DEMOS won the first elections with 52.9% majority and Mr. Janez Peterle became the first Prime Minister of the independent Slovenia. In April 1992 the DEMOS government fell and a new coalition of center and left parties was formed and new elections were held in December 1992 (Pleskovič and Sachs, 1994). The LDS⁴⁶ party under the Prime Minister Mr. Janez Drnovšek formed a coalition with mostly left and some right parties, among them SDS,

40 See memorandum (on file with the author) prepared by Jaša Vrabec, Judicial Councillor in the President's Office at the Supreme Court of Slovenia, October 2011.

41 Official Gazette of the Republic of Slovenia, No. 48/09.

42 Constitutional Court decision U-II-2/09.

43 Official Gazette of the Republic of Slovenia, No. 40/2012.

44 See memorandum (on file with the author) prepared by Jaša Vrabec, Judicial Councillor in the President's Office at the Supreme Court of Slovenia, October 2011..

45 Slovenia was recognized a sovereign and independent country by EU on January 15th 1992.

46 Liberalna demokracija Slovenije – Liberal Democracy of Slovenia.

the biggest rival of the LDS in the years to come.⁴⁷ However, SDS left the coalition in 1994 after Mr. Janez Janša, the defense Minister at the time, was forced to resign from his position as a Defense Minister. In 1997 LDS again was able to form a coalition, even though it was with only one vote that defected from the right positioned parties. However, the LDS government held on until April 2000, when it was voted out and on April 2000 a new government from the center – right parties was formed. It lasted only 6 months. In November 2002, LDS, again with Prime Minister Mr. Janez Drnovšek, was able to form a government that lasted up to 2004. In 2004 a new center – right government was formed with Mr. Janez Janša as a Prime Minister. In 2008 a left government was formed but was voted out of power in the middle of 2011 and the government again was in the hands of the left wing parties. In the last twenty years, the left wing parties held power most of the time, except half a year in 2000 and then from 2004 until 2008. There were interpellations and some tight moments for the left position parties during the period that they stayed in power, and the opposition was pretty fierce, but they held power for most of the time. Even though there were some times when the left wing parties were challenged by the opposition, the political competition in Slovenia could be termed as was pretty weak as opposed to the competition in other Eastern European Countries (Gryzmała-Busse, 2007). Based on this evidence we could conclude that there was a fertile ground for encroachment on the judiciary by the executive and legislative branch of the government, however the extent of the political competition in Slovenia needs to be examined further.

What about the consequences of encroachment on the independency of judges by lowering their wages in a described fashion? Independency of judges has many faces and material independence is one of them. By making judges' salaries fixed or at least rigid downward other two branches of the government are prevented to either bribe or punish the judges for their work. However, beside the consequences of influenced or bribed judges, which are adjudication in order to please the wage increasers or to punish the wage decreaseers, there are also the secondary effects on their productivity. In line with the judges' utility function (Posner, 1994), judges will on average work less when wages decrease and work more if wages increase.⁴⁸ Empirical results show that the productivity of judges did indeed steeply decrease in the middle of 2006 when the Act went into effect for judges. Could the decrease in wages be the cause? There was a white strike going on as mentioned above for at least 142 days and should have some effect on the productivity of judges. Also, all the uncertainty about the setting of the wages and ping – pong between the legislative branch of the government and the Constitutional Court might help the fact that the productivity of judges was low in 2008 and 2009 and further on. However, not all judges were on strike in 2006 and there are also other causes of the decreases judges productivity, such as implementation of new legislation, to mention just one of them. Also, as empirical results show (Dimitrova-Grajzl et al., 2012a) that judges tend to work less when more judges are appointed and the Lukenda project that started in 2004 appointed

47 Slovenia has a parliamentary system.

48 When wages change the quantity of labor supplied changes. The increase in wages increases the quality of labor supplied and the decrease of wages decreases the amount of work supplied (Bajt & Štiblar, 2004).

many judges in the following years. However, beside increase in the number of judges, there were no major legislative changes or additions going on in Slovenia. The majority of regime changing laws were enacted together with the required legislative changes in order to join the EU in 2004. Whether or not the sharp decline in the productivity of judges is indeed the consequence of the “war on wages” needs to be examined further to rule out coincidence.

4. CONCLUSION

The independence of judiciary is the cornerstone of democracy. It upholds private agreements and makes promises credible and at the same time keeps in balance all three branches of the government. Literature claims that there are two ways to reach judicial independence, either by bargaining among political parties or by imposing rules. The latter seems to be less effective. Since new democracies around the world are building their institutions, it makes sense to explore whether judiciaries are independent and to what degree.

Slovenia is a young country, which is still building institutions, among them the independence of judiciary. It seems that all the caveats (legal rules) that the literature requires are in place in Slovenia and that was confirmed by the report prepared by the Supreme Court of Slovenia and the Ministry of Justice in 2002. However, the situation changed after 2002, when the Public Sector Salary System Act was passed. The situation was remedied in the middle of 2012 with the passage of the Act on balancing public finances. The literature claims that independence of judges increases the *ex ante* price that legislators can extract from the interest groups buying the legislation and therefore the independence of judges is valuable to politicians. One of the possible conclusions for Slovenia is that there was lack of political competition in Slovenia, which puts the three branches in disequilibrium and decreased the rule of law by decreasing the independence of the judiciary and also decreased the productivity of judges. Another conclusion is that the encroachment of the independence was not intentional and the sharp drop in productivity should be the consequence of other forces at work and not encroachment on the independence of judges. Both of the conclusions needs to be further tested empirically. However, the fact remains that at least for six years legislative and executive branch encroached the independence of the judicial branch.

NEODVISNOST SODSTVA V SLOVENIJI: EKONOMSKA IN ZGODOVINSKA PERSPEKTIVA

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POVZETEK

Članek analizira neodvisnost slovenskega sodstva po odcepitvi od Jugoslavije in spremembi družbenega režima po letu 1991. Postavi se vprašanje ali je Slovenija vzpostavila neodvisnost sodstva kot enega temeljev pravne države. Za analizo neodvisnosti sodstva je uporabljen Landes – Posner model neodvisnosti pravosodja ter teorija neodvisnega sodstva. Članek zaključí, v skladu z ugotovitvami Vlade in Vrhovnega sodišča iz leta 2001, da je slovensko sodstvo po črki zakona neodvisno. Dogodki povezani s sprejetjem Zakona o sistemu plač v javnem sektorju ter drugih predpisov, skupaj s tremi odločitvami Ustavnega sodišča, pa puščajo dvom o neodvisnosti slovenskega sodstva v letih 2006–2012. Članek zaključí, da je morebitni poseg v materialno neodvisnost sodstva mogoče razložiti na dva načina. Poseg je lahko posledica šibke politične konkurence v Sloveniji, kar daje izvršilni in zakonodajni oblasti motivacijo za poseg v neodvisnost sodstva. Po drugi strani pa je lahko poseg v neodvisnost sodstva v Sloveniji naključen in nima negativnih posledic, kar pa je potrebno še preučiti z nadaljnjo empirično analizo.

Ključne besede: neodvisnost, sodniki, sodstvo, place, politična konkurenca, Slovenija

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