How Long is the Long Shadow of the Authoritarian Past – The Case of Slovenian Judiciary

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ABSTRACT

The state of the Slovene judiciary, eighteen years after joining the EU and over thirty years after the fall of communism and Slovenia's independence, is still in transition. The Slovenian judiciary could serve as a textbook example of an institutionally independent judiciary composed of dependent individual judges within their branch, led by a handful of independent and unaccountable judicial oligarchs. I will illustrate the Slovenian judicial story through seven anecdotes, forming an arch from the old communist regime to the current state of the Slovenian judiciary. These anecdotes will highlight some of the most significant features of the Slovenian judiciary, collectively pointing to serious deficiencies contributing to a widespread rule of law crisis. While these may seem like a list of isolated facts or 'selected issues,' they are not only interconnected but also share a common origin. I believe this origin lies in the legacy of the past and the lack of relevant professional (and policy) will within the judicial elites and oligarchies that control the judiciary to implement necessary changes, not only in the judicial system but, more importantly, in the mindset of the judiciary.

First, I will provide a brief overview of the state and condition of the Slovenian judiciary at the time of the collapse of the Yugoslav communist regime. Then I will continue with anecdotes that describe the characteristic traits of the judicial mentality and expose some of the most critical moments in the history of the

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Slovenian judiciary. Following that, I will evaluate the messages conveyed by these anecdotes, emphasizing the existence of a vicious circle that perpetuates these narratives. The presentation will then unveil the lessons that can be gleaned from the Slovenian experience and attempt to identify the main reasons for these flaws. Instead of presenting final conclusions, this discussion will propose some rudimentary and tentative solutions to address the disheartening situation.

Keywords: judicial independence, judicial selfgovernment, corporatism, judicial habitus, powers of court presidents

Kako dolga je dolga senca avtoritarne preteklosti – primer slovenskega pravosodja

POVZETEK

Slovensko sodstvo je osemnajst let po vstopu v EU in več kot trideset let po padcu komunizma in osamosvojitvi Slovenije še vedno v tranziciji. Slovensko sodstvo bi lahko služilo kot šolski primer institucionalno neodvisnega sodstva, ki ga sestavljajo odvisni posamezni sodniki znotraj sodne veje oblasti, vodi pa ga peščica neodvisnih in neodgovornih sodnih oligarhov. Slovensko sodno zgodbo bom ponazoril s sedmimi anekdotami, ki tvorijo lok od starega komunističnega režima do sedanjega stanja slovenskega sodstva. Te anekdote bodo izpostavile nekatere najpomembnejše značilnosti slovenskega sodstva in skupaj pokazale na resne pomanjkljivosti, ki prispevajo k vsesplošni krizi pravne države. Čeprav se morda zdi, da gre za seznam izoliranih dejstev ali „izbranih vprašanj“, niso le medsebojno povezana, temveč imajo tudi skupen izvor. Menim, da je ta izvor v dediščini preteklosti in pomanjkanju ustrezne strokov-ne (in politične) volje v sodniških elitah in oligarhijah, ki obvladujejo sodstvo, za izvedbo potrebnih sprememb, ne le v sodnem sistemu, temveč, kar je še pomembneje, v miselnosti sodnikov.

Najprej bom podal kratek pregled stanja in razmer v slovenskem sodstvu ob razpadu jugoslovanskega komunističnega režima.Nato bom nadaljeval z anekdotami, ki opisujejo značilne poteze sodniške miselnosti in izpostavljajo nekatere najbolj

kritične trenutke v zgodovini slovenskega sodstva. Nato bom ovrednotil sporočila, ki jih posredujejo te anekdote, in poudaril obstoj začaranega kroga, ki utrjuje te pripovedi. Predstavitev bo nato razkrila lekcije, ki jih je mogoče potegniti iz slovenskih izkušenj in poskušala opredeliti glavne razloge za te pomanjkljivosti. Namesto da bi predstavila končne sklepe, bo razprava predlagala nekaj osnovnih in okvirnih rešitev za odpravo razočaranja vzbujajočega stanja.

Ključne besede: sodniška neodvisnost, sodniška samouprava, korporativizem, sodniški habitus, pooblastila predsednikov sodišč

1. Introduction

The aim of this contribution is to outline the systemic deficiencies in post-communist and post-dictatorship countries. These deficiencies have often been underestimated by the mainstream, primarily Western and international institutional, ideology. This ideology can be summarized as follows: the judiciary, as a branch of government, must be fully independent. Therefore, the first step in reshaping governmental institutions and bodies must be to ensure the independence of the judiciary as an institution and branch of government.

After the collapse of the Central and Eastern European totalitarian regimes and during the pre-accession period, significant attention was paid to the institutional or structural independence of the judiciary as a whole. Unfortunately, this focus entirely overshadowed, and, as explained below, even suppressed the concept of individual, decisional, or 'micro-independence' of individual judges. This micro-independence is at the core of judicial independence and simply means that judges should reach their decisions without undue influence, whether from outside or within the institution to which they belong.[11] In positive terms, independent judges have the freedom to interpret the law and decide cases according to the substantive legal commitments embodied in the rules they apply (Zoldan, 2021, p. 539). An independent judiciary composed of dependent individual judges is, in essence, an oxymoron.

[1] For a comprehensive study, see Ferejohn, 1999, p. 353-384.

Judicial independence, as Zoldan has pointed out, is easy to praise but difficult to define(Zoldan, 2021, p. 538). It is not only hydralike but also a multifaceted phenomenon. However, for the purpose of this article, I will focus on internal independence, which has long been overshadowed by structural or institutional (external) independence. The latter is often referred to as *de jure* independence, encompassing the formal arrangements that shape and protect the independence of the judiciary as a necessary safeguard against the legislative and executive branches. This includes the mode of appointing judges and the existence of constitutional guarantees of independence (van Dijk, 2021, pp. 8–9).[2]

On the other hand, internal independence requires that individual judges be free from improper and undue instructions or pressures from their fellow judges and superiors.[3] While it is reflected in some formal arrangements regulating case allocation, reassignment, and judge relocation, the most challenging aspect of it is *de facto* internal independence, which is the 'state of mind' that must be a part of a judge's self-understanding at all times (Sunnqvist, 2024, pp. 3, 4, 6).

[2] For the definition settled in the CJEU case-law, see judgment no. C-64/16, dated Feb. 27, 2018, par. 44, where the Court stated: "The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C503/15, EU:C:2017:126, paragraph 37 and the case-law cited)."

[3] See the judgment of the European Court of Human Rights in the case *Khrykin v. Russia*, par. 29; *Baturlova v. Russia*, par. 29. See also *Sutyagin v Russia*, No. 30024/02, par. 178 et seq.. However, it appears that the Court has blurred distinctions between the concept of internal independence and impartiality. The same holds true for other cases, such as *Parlov-Tkalčić v Croatia*, 22 December 2009, No. 24810/06, par. 86 and also for the CJEU jurisprudence. In its judgment no. C-619/18, dated June 24, 2019, the Luxembourg Court defined the internal dimension of independence as being "for its part linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law." (para. 73). For a comprehensive elaboration of the said concept in the light of the jurisprudence of the ECtHR see J. Sillen, The concept of 'internal judicial independence' in the case law of the European Court of Human Right, European Constitutional Law Review, 15: 104–133, 2019 with further references; O. M. Fiss, The Limits of Judicial Independence, The University of Miami Inter-American Law review, Vol. 25, No. 1, pp. 57-76, p. 58. For the soft law postulating *expresis verbis* the requirement of internal independence see The Resolution 1685 (2009) entitled *Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states* adopted on September 30, 2009, wherein the Parliamentary Assembly of the Council of Europe (henceforth: CoE) stressed the fundamental importance, for the rule of law and the protection of individual freedom, of shielding criminal justice systems throughout Europe from politically motivated interference. It held that "[t]rue independence of judges also requires a number of legal and practical safeguards, including [...] the independence of judges *vis-à-vis* court chairpersons (3.1.4.)".

This *de facto* internal independence of an individual judge, even in the presence of peers who may not always be as virtuous as ideally required (a common occurrence in post-socialist judiciaries), is an aspect that has not received enough attention from the highest European courts (Avbelj, 2019).

In most post-communist countries, the phrase "judicial independence" has gained such an aura that its mere mention can suffice to end discussions about it. No debate is met with the possibility of there being too much judicial independence (Moliterno et al., 2018, p. 484). Institutional independence, as the focal point of attention, has primarily been viewed as the isolation of the judiciary from pressure or other forms of undue influence from other branches. In this context, judicial self-government has become the crucial mechanism for achieving, providing, and securing structural independence, with the judicial council as the primary guardian of judicial independence. It has almost become an imperative modeled after the so-called 'Euro-model' of the Judicial Council, following the Italian example, *Consiglio Superiore della Magistratura*, based on the assumption that "one size fits all".

Challenging this prevailing concept, which is gaining support, even in the jurisprudence of the European Court of Human Rights (henceforth: ECtHR), by translating non-binding soft-law (such as the views of the Venice Commission and the Commissioner for Human Rights, European Charter on the Status of Judges) into (at least *de facto*) binding living law (*dritto vivente*),[4] I will take as a starting point, and as an inspiration and main foundation for my argument, Professor Krygier's caution to newly established democracies. Allow me to quote the entire passage, which goes as follows:

"Judicial independence is not of itself necessarily and certainly, it is not adequate to what we want from the rule of law. Sometimes it is contradictory to the rule of law, which is a counterintuitive claim, but I think it's absolutely true, if you look at post-dictatorship, say post-communist dictatorship. A lot of them, some for good motives, said, the first thing we do is render the judiciary, which was always valuable, always just an instrument of communist government, independent, we give them statutory self-organization – and then, a week later you discover in this last

[4] See e.g. ECtHR, *Volkov v. Ukraine*, no. 21722/11, dated Jan. 9, 2013, par. 109, 112. For a critical analysis of this judgment and other ECtHR case law see Kosař, Nudging, 2017, p. 119 et seq..

forever that all that, all these crooks and thugs and incompetents and victims or and beneficiaries of negative selection, who are put there for that reason in the courts, are irremovable. Sometimes you discover, and this is true for Bulgaria and for a lot of post-communist states, where the ex-communist parties won the first election, but weren't sure that they were going to win the second election, so what to do. One thing to do is to make sure that 'my guys' are in power, so we decree judicial independence. Very often in a failed state or in ex-despotism courts, judges are in a position which a friend of mine called autistic corporatism, that is, they have been freed from dependence on the state, they defend their privileges and their own without reference either, certainly, not on the law, but to anything much outside themselves and they defend this privilege in liberal ideology which we know so well of judicial independence" (Krygier, 2013).

The cited passage encapsulates the fundamental contradiction within institutional judicial independence. This contradiction has been meticulously and analytically examined by a new generation of exceptional Central and Eastern European (henceforth: CEE) academics and theorists. Notable scholars in this field, listed alphabetically, include Avbelj, Bobek, Čuroš, Kosař, Kühn, Letnar Černič, Mańko, Parau, Rodin, Spáč, and Uzelac, to name just a few. Therefore, my findings are further substantiated by the compelling research conducted by this emerging group of CEE scholars. Their work is grounded in empirical experiences and the outcomes of their investigations into court management in post-communist countries.

The importance of judicial independence for the foundation of the rule of law, upon which constitutional democracy is built, cannot be overstated. Therefore, Čuroš astutely observes that "[i]t serves liberal constitutionalism as the Lacanian *objet petit a*, which is impossible to attain, as there will always be another way to amend and improve it" (Čuroš, 2023) The Bangalore Principles, which aim to encompass the full scope of the concept of judicial independence, begin with a bold paragraph (paragraph 1.1): »A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats, or interference, direct or indirect, from any quarter or for any reason.« This provision,

which could be seen as a comprehensive definition of judicial independence, doesn't even mention the words »accountability« or »corruption.« Therefore, Bobek and Kosař convincingly argue that, when taken in its entirety, this definition represents an antithesis of judicial accountability (Bobek, Kosař, 2014, p. 1260).

The Bangalore definition of judicial independence is grounded in the idea that it is an individual judge, a single person, who should be free from both formal and informal institutional pressures. The Slovenian judiciary, however, serves as a prime example of an institutionally independent judiciary that is composed of individual judges who are highly dependent within their branch. This branch is led by a small group of independent and unaccountable judicial oligarchs. In the following sections, I will illustrate the Slovenian judicial landscape through seven anecdotes, each with its empirical power, highlighting the fundamental characteristics of the post-communist transition of the third branch.

First, I will provide a brief overview of the state and condition of the Slovenian judiciary during the collapse of the Yugoslav communist regime. For this purpose, I will draw upon the seminal study by the renowned Croatian scholar Uzelac titled »Survival of the Third Legal Tradition« (Uzelac, 2010, p. 377). In this study, Uzelac outlined the key sociological features of the Croatian judiciary both before and after the introduction of nominal democracy and its legal framework, which serves as the first precondition for the rule of law. Given that both neighboring countries share the same legal tradition, experienced the same Yugoslav totalitarian regime, and underwent a comparable process of transition, the findings and conclusions of Professor Uzelac are highly relevant to the Slovenian judiciary (Kühn, 2011; Moliterno et al., 2018, p. 505 et seq.).[5] The commonalities between both judicial systems make them suitable for joint consideration and study.

2. An outline of the main traits of Slovenian socialist judiciary

In both Croatia and Slovenia, as in other communist countries, it was widely understood that the law and the entire legal system,

[5] However, in general there are not many differences between judiciaries of different communist states..

including its institutions, existed to serve and protect the ruling elites and their ideologies (Uzelac, 2010, p. 382). Lawyers from various professional backgrounds were expected to be skillful technicians capable of finding the appropriate legal form and justification for the desired (and predetermined) outcome (Uzelac, 2010, p. 382).[6]

Legal education was lacking and followed an outdated, non-discursive approach. In most communist states, legal studies were designed to be affirmative, apologetic, descriptive, and repetitive; in short, memory exercise. A good lawyer was considered one who had memorized and, therefore, knew the law (and could apply simple, static, and mechanical interpretations of the law, often using basic syllogistic reasoning). Critical thinking, argumentation, and questioning were discouraged (Rodin, 2009, p. 381; Kühn, 2011, p. 133 et seq.), and it was believed that law was a field of study for those who struggled with mathematics.

The third characteristic of the Croatian (and Slovenian) judiciary arises from a fear of decision-making. This fear stems from the uncomfortable situation in which a decision that was once desirable could become undesirable.[7] Judges often chose the safest path, which was to make no decision at all, or at least not a decision that would definitively settle the issue in question (Uzelac, 2010, pp. 383, 391–393). This tendency to resort to hyper-positivism (formalism) as a way to evade responsibility for decision-making is based on the logic that by strictly adhering to the black letter of the law, it is the legislator, not the judge, who should be held accountable for the decision, as the legislator made that decision when enacting the legal provision. Alternatively, as Professor Henderson (1991, p. 407) has put it, "submission to authority became a functional way to abdicate moral responsibility and choice."[8]

Furthermore, this mechanical understanding of the law, char-

[6] In this way predictability, as one of the requests of the state governed by law, was fulfilled. However, it was predictability based on political speculations, rather than on reliance on law – and hence it was an example of legal insecurity.

[7] Well known is the famous saying of Tito, the leader of Yugoslav nations, that lawyer (*a fortiori* judge) must not hold onto the law like a drunkard to a picket fence. See P. Popović, Yugoslav Crisis in the Context of the II Cold War (1980-1990), doctoral thesis, Faculty of Social Sciences, University Ljubljana, Ljubljana 2011, p. 163.

[8] The author referenced to Robin West's observations in: Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner« (1985). Georgetown Law Faculty Publications and Other Works. 489, p. 424.

acteristic of socialist judiciaries, was rooted in the concept of the unity of power. The judiciary was not recognized as a distinct and independent branch of power. Power was concentrated in the hands of the leadership of the Communist Party, seen as the embodiment of the »dictatorship of the proletariat,« and the legislative branch was perceived as a natural extension of this power (Rodin, 2009, p. 385; Kühn, 2011, p. 64). As a result, "judges were supposed to follow, not to interpret, the will of the legislature not only and not primarily because of the hierarchical structure of the legal system, but because of authoritarian nature of political system" (Rodin, 2009, p. 385; Kühn, 2011, p. 64).

All these factors combined to shape the professional character of the average judge in the socialist era. A socialist judge tended to be timid, timorous, and fearful, often reluctant to take on responsibilities and apprehensive about potential retribution. Such a judge preferred to stay on the sidelines and remain inconspicuous, even anonymous. Therefore, socialist judges were often inclined to delay making decisions and relied on logical legalism as a way to avoid forming substantive decisions that would require authoritative decision-making.

This approach allowed them to escape the responsibility of making decisions that carried real weight. A socialist judge acted and behaved more like a bureaucrat, seeking protection from authority figures—though not the authority of sound legal reasoning, but the protection of powerful political or semi-political figures, whether they were within or outside the judiciary. This bureaucratic, administrative style of decision-making did not entail authoritative decision-making, as the judge who saw themselves in this light viewed themselves as a mere mechanical extension of a greater, real power, similar to a police officer or a government official behind a counter.[9]

[9] The issue is a difference in the mentality. In common law systems, becoming a judge is seen as a reward, a "kind of crowning achievement" (Spáč, 2018a, p. 2083; Kühn, 2021, p. 1239,1240). As a result,a common-law-judge is an individual with a strong professional and moral personality, a person enjoying high esteem and trust among general public and within professional circles, and is an emanating power persona. Someone who becomes a judge after a long and successful career in a profession or politics is likely to expect a greater measure of individual autonomy than the person who moves through the ranks of a professional corps (O. M. Fiss, The Limits, p. 59). In contrast to this the socialist judge is (was) more of an official and therefore more susceptible to pleasing the political power than respecting the law. Legal formalism, therefore, also refers more to a blind obedience of power and disrespect for the law, than a blind obedience to the law itself. See Kühn, The Judiciary, 2011, p. 147. Excessive formalism is also characteristic of Roman systems, such as the Italian judiciary, in which, similarly to the post-socialist Slovenian and Croatian judiciary systems, a bureaucratic culture was established without the tradition of striving for excellence and hard work (ibid., p . 173).

Another characteristic of the socialist Croatian (and Slovenian) judiciary is related to its social status. In short, it was low but relatively comfortable. These characteristics were, to some extent, logical consequences of the judiciary's bureaucratic position, which reduced the significance of judges' work and diminished their social standing. Cases of genuine importance rarely came before the courts; they were typically decided or settled elsewhere, often within closed political (Party) circles. Even under the doctrine of workers' self-management and social ownership, which, despite being based on Marxism, gave more autonomy to economic players, political elites propagated agreed solutions, often silently mediated by the Communist Party (Uzelac, 2010, pp. 385–386).

In the realm of civil law, courts primarily handled minor cases, such as private property disputes, neighborhood conflicts, tort cases, and family law matters. Judges were appointed by the National Assembly (Supreme Court judges and judges of courts of second instance) or (first instance judges) by the so-called Municipal Assembly (after the Socialist Association of Toiling People—an organization strictly under the control and tutelage of the Communist Party—provided its opinion on the »moral-political« suitability of the candidate) for eight-year terms and could be reelected. Their salaries were modest and comparable to the earnings of many other state or municipal bureaucrats. Nonetheless, for those who could adapt to the requirements, a judicial job was not uncomfortable. In both countries, the legal profession often functioned as a family business, with the judicial position typically reserved for the family member who managed the household and cared for the children, while the breadwinning spouse worked as a private lawyer. This dynamic contributed to the feminization of the judiciary (Uzelac, 2010, pp. 386–387).

The social context in which the judiciary operated at the advent of democracy, as outlined above, should be distinguished from the socialist legal context from which the former was derived. The socialist legal context was based more on the rule of men (i.e., the Communist Party, or more precisely, the arbitrary state) than on the rule of law. It rested on the assumption of the unity of power or the united power of the »toiling people« (proletariat), rather than on the separation of powers. The model of united power, also known as the »dictatorship of the proletariat,«

was swiftly replaced by the system of separation of powers, and the judiciary was elevated to a separate branch of power and granted independence almost overnight.[10]

However, this transformation is only part of the story. Under the new conditions of a market economy and private initiative, which constituted the new social and political context (with the pluralization of political life and the marketization of the economy), courts, unprepared for such a tectonic shift, found themselves handling important, high-profile, yet challenging and complex cases. Suddenly, the judiciary was thrust into a position of power and influence, becoming a significant player in arenas where important social, economic, or political interests collided. As social life became increasingly judicialized, the courts' social role, influence, and power expanded (Ferejohn, 2002, pp. 41–68). Judges began to wield significant power through their decisions, they began, in Austin's terms, "doing things with words", even though most of them were not fully aware of the extent of their influence.

A significant portion of the Slovenian judiciary was initially created as a mass organization, where individual judges held little importance, and this structure remained largely unchanged. Slovenia, like most other post-communist countries, could not rely on "colonization" of the judicial sector.[11] Unlike some post-communist countries, it did not have a democratic region (akin to »Western« Slovenia) from which legal professionals could be readily transferred to support the newly established democracy.[12] While it is relatively easy to remove »socialist« labels and »communist« symbols, and it can be done overnight, adopting a new constitution and establishing a fresh legal framework, albeit taking a year or more, is still relatively straightforward. However, it is a far more complex and time-consuming process to change the social context, particularly the mindset of the people. This challenge is not unique to the judiciary but extends to all state institutions since they are composed of hu-

[10] Constitution of the Republic of Slovenia 1991, Art. 3.
[11] The term »colonization« of the judicial sector belongs to Uzelac, 2010, p. 389.
[12] The situation was completely different in Germany, where after the collapse of communism and the fall of the Berlin Wall, the »Eastern« legal system had figuratively drowned in the »Western« system and where the positions of judges and prosecutors were occupied by the personnel from the »West«. In 1994, in the »Eastern« states (*Länder*) only 9.2% of judges had already held a judicial office in 1989. Those who left the judiciary were almost entirely replaced by the »Westerners«. See Kühn, The Judiciary, 2011, p. 163.

man beings who have been shaped by their historical experiences.[13]

The transition to a liberal democracy based on the rule of law took place with the existing personnel, many of whom were born, raised, and trained in the totalitarian regime (Zobec, Letnar Černič, 2015, pp. 125–136; Avbelj, Letnar Černič, 2020, p. 6). The unity of power within the totalitarian system, particularly the unity of the working class (the avant-garde, i.e., the Party), significantly influenced and deformed the soul of lawyers. This effect was a common characteristic of all totalitarian regimes. The socialist legal formalism was not merely about following the legal text blindly; it was primarily about servitude and submission to power and authority. In totalitarian societies, the separation of law from a judge's ethical essence, which is intrinsic to human beings, was starkly evident.

As Bučar, a prominent Slovenian lawyer and dissident, suggests, lawyers were the first and perhaps greatest victims of the division between ethics and positive law in socialism. If this assertion holds true, it prompts the question of what a judge was during the era of communism, or any other totalitarian system, where the gap between the law and ethics was insurmountable in various legal domains.

Assessing the state of mind of the post-totalitarian judiciary, one cannot ignore the fact that the transition to a liberal democracy based on the rule of law occurred with the existing personnel who had been raised in a socialist environment. Bučar argues that lawyers, with their often unnecessary or excessive docility, inadvertently strengthened the totalitarian system by providing at least the legitimation of its acceptability, if not legitimacy itself. Their conduct and adaptability unwillingly affirmed the system's righteousness, granted absolution for violations of fundamental human rights, and inadvertently bestowed legitimacy on the regime (Bučar, 2004, p. 6). This context is essential to understanding the mindset of the post-totalitarian judiciary.

3. Anecdotes

I have had the privilege of observing the judiciary from two different perspectives. One is that of an insider, as an ordinary

[13] For more on this topic see Gudkov, "Soviet Man", 2008, p. 6.

(Supreme Court) judge, and the other belongs to the perspective of a judge of the Constitutional Court (henceforth: CC). The former is my current position and hence seems to be more accurate. Besides, if you are a part of the system being observed, you have access to information that is otherwise hidden or less visible to ordinary observers, contributing significantly to the understanding of the essence of the observed object. As for my observation from the viewpoint of a constitutional judge, the outlook is broader, and the view of the object is clearer and more discerning when you are not a part of it. This perspective offers a view of the whole forest, not just some particular trees.

From the outset, I could only agree with the old truth that the sub-system, as the judiciary obviously is, cannot be detached from the system to which it belongs and of which it is a part. Therefore, if the system suffers from a lack of democracy and the rule of law, as the Slovenian system certainly does, the current situation is even deteriorating,[14] then, the judiciary, as its sub-system, could hardly be significantly different. In my opinion, the most characteristic and striking feature of the Slovenian judiciary belongs to the authoritarian culture and corporatist, illiberal mentality. Both are intertwined and generate each other. Both derive from the past - authoritarian culture is most often expressed through the way of communication, as an authoritarian discourse that entails the proclamation and imposition of one truth as universal and final (Rodin, 2005). Such a culture requires an appropriate societal environment, an environment that fits one way of communication and corresponds to the prevailing and governing mindset within the professional population. Certainly, it is not liberal thought; indeed, it is a corporatist mentality based on the principle that the individual is nothing while the collective is all and above everything. It corresponds to bureaucratic hierarchical organization as an antipode to the coordinative and discursive model of organization. The distinction between these two concepts can be expressed through the observation: „In the Continental system, the basic premise is that decisions are not made by individuals, but by the institution itself. In the American system, on the other hand, the court in itself is not considered an institution. The judge is the institution" (Vogel, 2022, p. 749)

[14] For thorough analysis: Avbelj, Letnar Černič, 2020; Avbelj, 2017d, p.43 *et seq*.

So what are the features of authoritarian legal thought? Most of them are survivals of the socialist mindset; however, the most persistent is one that demands and values a powerful president of the highest court, heading a rigid and monolithic body of judges. Let me share anecdotes that illustrate, depict, explain, and support my assumptions about the failure of the transition of the third branch.

3.1. The First Anecdote

I vividly recall the well-established and highly respected president of the Supreme Court (henceforth: SC) in the 1980s. She was renowned and valued not primarily for her legal acumen but rather for her political influence derived from her membership in the highest body of the Communist Party, the Central Committee. This prominent position and her close ties with the highest communist authorities endowed her with the ability to control the judiciary effectively. Consequently, the prevailing perception of her role was as follows: she was a commendable leader who could offer protection and support, but the consequences of falling out of her favor were to be dreaded.

So here comes the first anecdote: In May 1989, the general meeting of the Association of Judges took place in Postojna. One of the retired judges asked for the floor, and since the dawn of liberal democracy was already in the air, new political parties began emerging, and political pluralism was deemed imminent, he frankly exposed the question of compatibility of judicial service with the membership of the then emerging new political parties. He gave an example taken from the so-called old Yugoslav law, which provided for incompatibility of judicial function with the membership of political parties. And he stood for that solution. However, the president of the then Supreme Court immediately and suddenly intervened, took the floor (uninvited), and fiercely opposed him, claiming that nobody ever had done so much for the respect and protection of judicial independence as the Communist party had.

She was right. Since the majority of judges felt committed to following communist ideology and the politics of the Communist Party, the latter didn't need to make any effort to secure its influence over the judiciary and retain it in the long run. That's why the Communist Party seemed to be such a keen supporter of ju-

dicial independence. It protected a compact body of the judiciary from any interference from the outside, i.e., legislative and executive branches, which were, at least in the first years of democratization, deemed to be less likely under the solid and stable control of the old regime forces.

3.2. The Second Anecdote

A year and a couple of months later, when the newly elected government assumed power, the Vice President of the National Assembly (Parliament) Mr. Vitodrag Pukl and the then Minister of Justice Mr. Rajko Pirnat dropped a hint that the still influential lady should consider resigning from the highest judicial post (for "healthy reasons") (Valič Zver, 2012, p. 332). It happened during the summer when most judges and court staff were on vacation. Nonetheless, the leadership of the Association of Judges (on the initiative of several colleagues) called for a general protest against the attempt (just a hint) of the Vice President of the National Assembly and the Minister of Justice – the latter was, in the eyes of the majority of judges, perceived as a harsh political attack on the judiciary and interference with their independence. Judges were even called to interrupt their vacations, return to work, and strike against the attempted removal.

3.3. The Third Anecdote

This anecdote occurred four or five years later. I was a member of the civil panel at the Appellate Court of Ljubljana, dealing with a case where the crux of the matter lay in a dilemma: which of the divorcing parents should be entrusted with custody over their child? All the facts and circumstances of the case clearly favored the father, indicating that he should be given priority. However, the majority came to the opposite conclusion with the following explanation: Since the father was a devoted Catholic, while the dominant state politics openly favored atheism (at that time led by the left-wing LDS, successor of the League of Socialist Youth of Slovenia, controlled and conducted by the Communist Party), the state's atheistic policy must be respected, and the outcome of the decision must be coherent with that.[15]

[15] *Cf.* Bengoetxea's observations of the stressful situation if judge did not sympathize with the "ideology" of the regime. J. Bengoetxea, Courts Managing Stress through Judicial Dialogues.

Even though I cast my vote for the father's custody and remained in the minority, from a pragmatic perspective nowadays, considering the child's ability to integrate well into contemporary Slovene society (inclining towards anti-Catholicism), it might turn out that I was wrong and my two colleagues were right.

3.4. The Fourth Anecdote

The fourth story requires a short introduction and an explanation of the formal transition of (the old) judicial cadre to the new democratic system. The move to a permanent term in office, however, was not automatic. The judges could only transition from a limited to a permanent term after a professional evaluation of their judicial work, which was required by the already established Judicial Council (Sodni svet) (henceforth: JC). However, the evaluation of the judges of courts of first instance was carried out by the competent Higher Courts, the evaluation of the judges of Higher Courts by the SC, and the evaluation of the judges of the SC by this very Court at a plenary session. The final decision on the appointment of judges was (and still is) reserved for the National Assembly, but on the proposal of the JC.

The new regulation of judicial service envisaged the so-called *Pučnik's amendment.*[16] In the third paragraph of Article 8 of the Judicial Service Act, this amendment determines, as one of the general conditions for the election to a function of a judge, that judges who adjudicated or adopted a decision in an investigation or judicial proceedings in which human rights and fundamental freedoms were violated by a judgment do not fulfill the conditions for re-election to a judicial function after the expiry of their term in office. This general condition referred – in contrast to other general conditions for the election of a judge – only to those judges who, at the time when the Judicial Service Act entered into force, exercised their function of a judge at regular courts and had the right, before and after the expiry of their term in office, to apply for the position of a judge under the terms of this Act. On one hand, one of the characteristics of the socialist judiciary was the above-mentioned limited term in office of a judge (limited to

[16] It is named after the amendment's proposer, Jože Pučnik, a key figure in Slovenia's fight for independence from totalitarian state power. He was an outspoken victim of the oppresive regime and devoted his life to the causes of democracy and Slovene independence.

eight years), and on the other hand, one of the first transitional measures in the judiciary was the introduction of the permanent term in office.

The *Pučnik's* lustration provision was challenged before the CC from the viewpoint of various constitutional aspects and it survived the constitutional review (Decision U-I-83/94). However, that review revealed not only the deficiency of the lustration provision but also the naivety of the legislature, which is confirmed when we look at the inception of the lustration provision from a distance of more than thirty years. The lustration clause is naive since it is redundant, as some of the judges of the CC correctly stressed in their separate opinions. »Lustration« considerations are included in every normal evaluation of the work of a particular judge. In any case, it should be impossible to overlook, during the evaluation of his/her work, which is the basis for his/her election to a permanent term in office, that a judge, under the communist regime, submitted to political criteria and violated human rights during trials. Such a judge should not be reinstated to the position he/she occupies. The expiry of the term in office and the need to renew it are connected with the assessment of whether the judge whose term in office expired fulfills the conditions for a new (this time permanent) term in office. The lustration could only be avoided by an automatic transformation of the term in office of limited duration to a permanent one. Therefore, the provision constitutes nothing more than a mere moral promise, which the National Assembly gave to itself. However, when electing judges, the National Assembly was bound by the expert evaluation of judges' work done by judges themselves – where, as usually, loyalty and mutual solidarity prevailed over commitment to the integrity of the judicial profession and constitutional values.[17] As a general rule, the National Assembly did not have any other information on each individual candidate. The fact that none of the judges was refused a permanent term in office proves that the lustration clause was a shot in the dark.

The situation in the Slovene judiciary after twenty years of transition irrefutably demonstrates the naivety of the lustration

[17] In this respect I dare to refer to the term "dirty togetherness", coined by Polish sociologist Adam Podgórecki, when referring to cliquishness and close-knit networks in the context of scarcity and distrust of the state, which was endemic to the communist system. Dirty togetherness despite being common survival practice essentially eroded ethical standards and deepened the gap between the law and morality (Wedel, 2003, pp. 141,142).

clause. The candidature procedure in which the president of the SC, Mr. Branko Masleša (his presidential term expired in November 2016), was appointed proves that the lustration clause was virtually inefficient (an expert evaluation of the judges' work was decisive for the granting of a permanent term in office, which means that the judges evaluated themselves).[18] According to the Judicial Service Act, the president of the highest judicial body (of general jurisdiction) is appointed by the National Assembly on the proposal of the minister competent for justice administration and after a preliminary opinion of the JC and the SC *en banc* is adopted.

The candidate (Mr. Masleša) was a highly controversial political and legal figure, local communist functionary and ardent supporter of the Yugoslav People's Army (Avbelj, 2018, p. 1916f). His appointment was then proposed by the minister, and supported by both the SC *en banc* and the JC – despite the fact that he was the last judge in the Socialist Republic of Slovenia (prior to Slovenian independence) to have sentenced somebody to death (the convict was even found to be partially insane and later moreover fully insane and sent to psychiatric treatment) and despite the charges against him, corroborated by the judge of CC and two SC judges that the candidate in his previous life in the times of undemocratic regime participated at verifications of a killing of renegades on the Yugoslav - Italy border.[19] In addition, all of the former Slovenian Presidents of the SC had either academic titles or were renowned judicial experts. On the other hand, the nominated president's set of scientific and expert publications shows his weakness in the expert area and lack of reasonable reputation in the judiciary circles. What is even more paradoxical in this situ-

[18] As concludes professor Uzelac: »The integrity of those who are "lustrating" can be warranted if they are impeccable; if they are not, the vicious circle of "lustrating lustrators" appears, as one of the fundamental paradoxes that are related to the personal element of the lustration practices« (Uzelac, 2007, pp. 57, 58).

[19] It is meaningful that at the dawn of Slovene democracy (in March 1990), which from the nowadays perspective seems to be the climax of the Slovene democracy, a young and ambitious lawyer published an article entitled »Shootings Dead on the Border – an Attempt of Denouncement« (Cerar, 1990, pp. 7-9) in which he indignantly argued that killings of renegades lacked any legal basis and should be treated as murders - the same as shootings in the Berlin war. Therefore, he openly claimed criminal prosecutions for all those who had been involved in the killings. Paradoxically, twenty years later he, as a renown and well-established legal scholar presides the session of the JC (as a vice president of that body) which has given support to the above-mentioned candidate. Later he even publicly supported him and strongly condemned public revelation of the candidate's past in the times of the totalitarian regime during the candidacy procedure. In 2014, few weeks before parliamentary elections he set up the party, named after him (the Miro Cerar Party, which was later, renamed in the Modern Centre Party), won these elections, and became the Prime minister.

ation is the fact that the General Assembly of the SC previously opined against the previous candidate for the same vacancy, who had a history of a straight and upright decisions in the times of socialism and who is well known for the fight for judicial independence in that time, most of all for the right to natural judge. In addition, he has published extensively and his professional biography and personal reputation were (and still are) incomparable with the winner's. This is an example of how the body of professional autonomy and independence of the judiciary plays its role in the post-communist context.[20] And it also confirms Kühn's finding, "the higher one goes in the structure of the judiciary, the higher the percentage of ex-communists" (Kühn, 2016, p. 181).

Consequently, the question arises of how should the public then trust the judiciary and believe that it will successfully (impartially) carry out its task to rectify the injustices incurred during the totalitarian period?[21] What is then the message of the SC plenum that supports such a candidate? The personality of the president of the SC also carries significant symbolic meaning. In the eyes of a reasonable observer, the president of the SC appears as the best of the judiciary - "*crème de la crème*". He represents a personification of professional and personal qualities of a judge – with his professional and personal integrity he is an example for all other judges in the state, the epitome of judicial ethics. When the SC plenum supports a candidate for the president of the SC it sends a message to the judiciary and the public that this is the judge that should be regarded as an example.

3.5. The Fifth Anecdote

The following anecdote demonstrates a perception of judicial independence, revealing, on one hand, what counts for promotion within the judicial system, and on the other, how Slovenian judicial oligarchs treat critical views of their colleagues on deficiencies in the transition of the judiciary.

At the end of 2012, I published a short paper titled „The Soft Belly of the Slovene Judiciary" (Zobec, 2012) addressing the state

[20] For more of this issue see Avbelj, Judicial Self-Government, 2017c. For a similar experience in Croatian judiciary see: Uzelac, (In)Surpassable, 2007, p. 59.

[21] According to Dvořáková and Halmai, transitional justice deals with two fundamental aspects: the rehabilitation of the victims of the regime and the punishment of those responsible for the crimes that occurred during the non-democratic regime. See: Dvořáková, Introduction, 2007, p. 13; Halmai, Lustration, 2007, p. 21.

of the Slovenian judiciary and focusing on the deficiencies of judicial independence. I pointed out the collectivist and corporatist mentality of the Slovene judiciary and highlighted some features of such a mindset. I then concluded, among other things, that the paramount problem of the Slovene judiciary is the judiciary itself - and the politics embedded in it. I maintained, and I still do, the old truth (as exposed by Sajo and Losonci and many others as far back as 20 years ago) that the introduction of judicial „self-government" in a situation of transition does not entail anything other than the preservation of the judiciary as it was established by the undemocratic communist regime (Sajo, Losonci, 1993, p. 322). I claimed that an authoritarian legal culture and the corresponding ethics of obedience (which is reflected in submissiveness, political opportunism, political correctness, and, consequently, in judges' self-censorship) were (and still are) preserved in the impenitent thought patterns of the old regime as a heritage of the totalitarian period, and in the collectivist and corporatist mentality. It is preserved there (as one of the forms of a parallel, covert, or, if you prefer, deep state, or hijacked state) and, in an autopoietic manner, it feeds and fertilizes itself mentally, with values and ideological points of view through the very institutionally closed nature and self-sufficiency. In a normal state with a democratic tradition and legal culture, such preservation would have a positive effect - to maintain that which already exists, i.e., an internally, mentally independent judiciary. However, I explained further, even in states in transition (and Slovenia is, at least regarding the judiciary, still deeply in transition), what is maintained is what already exists - and that, however, is anything but an intellectually autonomous and independent judiciary. Hence, I concluded that the crucial problem lies in the lack of individual, personal, and mental independence, and it is certainly not a problem of institutional structural judicial independence.

The critique not only fell on stony ground but also provoked a broadside attack on the one who dared to criticize the judiciary, thereby undermining its esteem, authority, and public trust in it. The then president of the SC, Mr. Masleša, publicly condemned the author for opening the Pandora's Box of discrediting the Slovenian judiciary (Masleša, 2014). The focus of the discourse shifted from the subject matter (judiciary) to the person expressing their views on the judiciary—a demonstration of the idea: »Kill

the messenger.« Interestingly, one of the repeated reproaches directed at the critic was regarding their ingratitude. In this case, the critic (myself) was accused of ingratitude because, having achieved »all« that is possible within the judicial system, they were expected to show loyalty and remain silent.

3.6. The Sixth Anecdote – The Patria Case

With the exception of the periods 2004-08, 2011-12, and 2020-22, Slovenia has mostly been governed by the transformed old regime parties and their satellites. The leader of the opposition, Mr. Janša, who also served as Prime Minister during the mentioned periods, has been perceived and treated as »public enemy no. 1« by the ruling political establishment. This perception stems from his commitment to disentangle public and official politics, including the state's government and its subsystems (such as media, education, and the banking sector), from the deep-state's interest groups. These interest groups, largely controlled by members of the old regime cadres and former members of the communist secret police who have adapted to new democratic and free-market conditions, have maintained significant influence. In Slovenia, as in Croatia, high-ranking officials of the former nomenclature who were involved in human rights violations, including the prosecution and killing of political opponents for so-called »contra-revolutionary activities,« have remained untouched and unpunished. Furthermore, they continue to hold high-ranking positions in various sectors, including the secret police, army, companies, media, universities, and diplomacy, effectively becoming the »old figures in the new context« (Milardović, 2007, p. 93)[22] They have managed to turn their ideological-political defeat into a political-economic victory, characterized as a "legalized robbery of the century" (Wedel, 2003, pp. 142 et seq.).

In 2008, the Patria affair came to light just 20 days before parliamentary elections in Slovenia. On September 1, 2008, the Finn-

[22] The author then continues, referencing to the observations of Linz and Stepan observations: "In the sphere of motivation, communists (or ex-communists) from the former nomenclature, after being defeated in the free and transparent elections, will continue to occupy many significant positions in the state apparatus, especially in state institutions. Through their nets of directors, management and even secret intelligence, the members of the nomenclature can safely keep their privileged positions in the emerging capitalist economy and, by that, a significant political influence. However, they will primarily act in their own interest. In the majority of post-communist countries, former officials don't intend to overthrow the regime, or directly establish the new one, but they only want to make profit out of it." (Linz, Stepan, 1996).

ish Broadcasting Company YLE aired a documentary that accused The Prime Minister Janša of receiving an award from the Finnish company Patria. The documentary primarily featured accusations from political opponents of Mr. Janša. This documentary had a significant impact on the upcoming elections, as all polls had predicted a convincing victory for Janša's party (SDS) until the documentary aired.

Less than two years later, a criminal charge was filed against Janša, who was the leader of the opposition at that time. The charge was brought by a state prosecutor who happened to be the wife of an agent of the communist secret police that had arrested Mr. Janša as a political dissident during the communist regime in the late 1980s. The timing of these events was again highly convenient, occurring less than three months before local elections.

The indictment itself was unusual and controversial. It alleged that Janša had committed a criminal offense (Art. 269 of the Slovenian Penal Code) by accepting a promise of an unknown award at an unspecified time, place, and through an undetermined mode of communication, with the intention to use his influence as Prime Minister to secure a military contract for the Finnish company Patria.[23]

Throughout the trial before the Ljubljana District Court, numerous witnesses were heard in over 50 hearings conducted during the two years of proceedings. Despite the vague and arbitrary nature of the criminal charge, which made it nearly impossible for the defendant to mount a proper defense, thereby constituting a violation of fundamental human rights related to defense and a fair trial, Janša was found guilty and sentenced to two years in prison.[24] This ruling was upheld by the Ljubljana Higher Court,

[23] For a thorough analysis of the whole case, see Avbelj, 2015a; Avbelj, Slovenia: a *de facto* failed, 2014b; Avbelj, 2014a; Avbelj, 2015b; Avbelj, 2014c.

[24] It is worth to be mentioned that judge Vesna Bergant Rakočević (henceforth: VBR) of the High Court, the same court that was to decide the case on appeal, wrote an article in the Slovenia's main legal newspaper (Pravna praksa). In this article (VBR, 2013, p. 33) she directly compared the people that had gathered before the court (supporters of Mr. Janša, among whom were public intellectuals, people from civic society, legal scholars and members of his defense team, as well as masses of ordinary people) with the "undernourished North Korean schoolchildren" who, "grimaced in their hysterical cry of worship", experience a visit by their "well-fed leader". (At the peak of the event Mr. Janša and his defense team came out of the court building and appeared before the crowd.) There is a straightforward metaphor that runs through the article and speaks of, on the other hand, "the darkness in your head, which is smoothing that your imaginations fills with stories that have nothing to do with the actual darkness around you", and the actual truth on the other hand, which comes from the light represented by "our [ie. judicial] hard work by examining the facts, reading long legal commentaries and case law, sometimes even foreign, making comparisons and assessments, interpretations and engaging in discussions". While thus comparing the event to the "visit of the North Korean leader Kim

and Mr. Janša, the leader of the center-right opposition, was sent to prison just three weeks before a snap election. The outcome of the Patria case and the sight of the opposition leader going to prison shortly before the election raised concerns about the legitimacy of the election and led to it being seen as an »Alamo« moment for the opposition. [25]

During the period when the convict still had an open deadline for an extraordinary legal remedy at the SC, a significant event took place—the annual meeting of judges organized and sponsored by the Slovenian Judges' Association, known as the »Days of Judiciary.« The keynote speaker for this event was Mr. Masleša, who was the president of the SC at that time. He delivered a passionate speech before a gathering of Slovenian judges, with his fellow SC judges seated in the front row.

In his speech, Mr. Masleša launched an unusually harsh verbal attack against the convict and accused him, along with the SDS, of posing the gravest threat to the constitutional and democratic order. He called on judges to close ranks against this perceived threat. Mr. Masleša's speech received a resounding round of applause from the audience at the event (Masleša, 2014). Furthermore, during the »Days of Judiciary« event, the prosecutor in the Patria case at that time, Mr. Andrej Ferlinc, was granted the opportunity to address the audience, and he seized the opportunity to share his perspective on the case. This was an instance of an *ex-parte* performance, with Mr. Ferlinc presenting his side of the story. His speech, like Mr. Masleša's, was met with loud applause

It's worth noting that only two individuals out of the entire body of judges at the event voiced their protest against Mr. Masleša's passionate speech. Later, one of them chose to withdraw her membership from the Judges' Association as a result of this incident.[26]

Jong Un and his wife in one of the North Korean high schools" the judge also remarked that she "did not think she would ever see in reality, and even so soon," how, "because of a politician", some would burst in a "hysterical [...] North Korean cry". The article concludes in a straightforward sarcastic sense that of course it was the people in front of the court who knew the truth and justice in this case, and "not us (the corrupted judicial gang) who caused this injustice/suffering"..."Goodbye light, welcome darkness," she added. The article ended with a P.S.: "Barbara, wholehearted congratulations for the courage". ("Barbara" was the judge of the Court of First Instance who convicted Janša). Judge VBR was later elected as the chief of the Slovenian Association of Judges.

[25] For a more detailed insight and evaluation of the impact of the Patria case on the democracy in Slovenia and its political landscape see. M. Avbelj, J. Letnar Černič, 2020, pp. 134*ff.*

[26] See at: https://www.rtvslo.si/slovenija/vrhovni-sodnik-sorli-maslesa-ne-more-pregnati-senc-ki-so-nad-njim/340892.

The situation of judicial impropriety did not end there. It took a further turn for the worse when Mr. Masleša, despite the extraordinary legal remedy being on its way to the SC, made a decision to preside over all sessions of the criminal law panel until the end of 2014. This decision was unusual and unprecedented. He effectively nominated himself to the panel responsible for deciding the Patria case, which ran contrary to the right to a natural judge.[27] In response, the defendant requested the disqualification of Mr. Masleša from the case, citing at least objective partiality on his part. As a result, the SC was presented with a final opportunity to rectify the abuses perpetrated by its president.

Nevertheless, a significant majority of judges, gathered *en banc* during the plenary session, voted to deny the disqualification, insisting that they „trust their President." In doing so, they inadvertently paved the way for further human rights violations and a continued erosion of the highest Court's authority and reputation. Consequently, the SC rejected Mr. Janša's extraordinary appeal against his conviction. In response, Mr. Janša sought recourse at the CC for a review of his case just three weeks later.

Ultimately, the CC quashed the entire legal process, leading to Mr. Janša's release from incarceration after 176 days. The CC identified two constitutional violations, either of which would have sufficed to uphold the constitutional complaint. First, all levels of the judiciary had violated the constitutional principle of legality in criminal law by failing to specify the essential element of the alleged criminal act: the manner in which the crime was committed. This amounted to a violation of the principles of *lex certa*, *lex scripta*, and *lex stricta* in criminal law. The second violation pertained to the President of the SC himself, who had publicly accused the petitioner and his political party of pressuring the judiciary. Furthermore, while the case was already pending at the SC, he appointed himself as the president of the ruling panel, violating the right to a fair trial.[28]

Despite the flagrant and serious violations of the human rights of the opposition leader, which subsequently distorted the democratic process and cast doubt on the legitimacy of the parliamentary elections, the Slovenian judiciary displayed a complete lack of

[27] The Art. 23 (2) of the Constitution stipulates: »Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may« adjudicate.
[28] Decision no. Up-879/14, dated April 20, 2015.

self-reflection and a refusal to accept responsibility for the identified violations. Notably, the President of the SC, a central figure in the Patria scandal, remained resolute in refusing to consider stepping down. He consistently reiterated that he would make the same decision again, even though he had been personally held responsible for violating the defendant's right to a fair trial.

3.7. The Seventh Anecdote

The final account primarily revolves around the appointment of the next President of the SC and the manner in which the JC conducted the nomination procedure. This narrative serves to support the conclusions of Kosař and Bobek that the EU-model of a JC, such as the Slovenian one, is well-suited for undermining judicial independence (Bobek, Kosař, 2014, pp. 1283,1289,1290).

After Masleša's presidential term expired, two SC judges contested for the vacancy,[29] with Judge Štravs standing out for his commitment to liberal and democratic values, seen as representing a break from the undemocratic legacy. The SC supported both candidates but gave priority to Mr. Štravs. However, when the matter reached the JC, the procedure took a farcical turn as the SC's opinion was rejected without explanation. This sparked strong protests from some academics and one of the SC judges (Zobec, B., 2016; Avbelj, 2016a, 2016b). However, the Minister decided not to appoint the candidate who was given support by the SC, but not by JC.

A new call was issued, and Mr. Štravs decided to run again. This time the SC, while still supporting him, gave its preference to another candidate, who, in his program, exposed his commitment to stability and preservation of the *status quo*. However, the JC, sitting in the same composition, backed the previously rejected candidate. The Minister of Justice then proposed the candidate preferred by the SC to the National Assembly, even though, just a few months before he had declined the candidate who had been backed by the same body. Moreover, the entire procedure lacked transparency, with no reasons provided for or against the candidates.[30]

[29] Mr. Masleša could have run again, however, presumably due to numerous scandals occurring during his presidency (also telephone justice among them, which was revealed in the judgment of the SC no. I Ips 32088/2011, dated Oct. 6, 2016; see also: Zobec, Telefonska, 2018a), he declined.

[30] All sessions of the JC take place behind the firmly closed door and the names of the candidates (except for the candidates for the president of the SC) are not accessible to the public.

In agreement with Avbelj's conclusion, this process displayed significant arbitrariness and left a negative impact on the JC and the elected President of the SC, tarnishing their authority (Avbelj, 2017c). Barbara Zobec, a SC Judge, publicly protested, citing David Kosar's analysis of the Slovak JC, asserting that this incident indicated that the JC in Slovenia had been "created to be hijacked" (Avbelj, 2017c; Zobec, B., 2016; Kosař, 2016, p. 409).

The newly appointed president of the SC quickly confirmed fears of following in his predecessor's footsteps. His initial move as President was an attempt to discipline judges who were perceived as unruly or too critical of the judiciary's practices. These judges had dared to publicly speak out about issues related to the recruitment and promotion of judges and had asserted their right to freedom of expression in criticizing the leadership of the judiciary (Zobec, B., 2018,p. 248 et seq.).

However, the President did not gain support from the SC sitting *en banc*, and his proposal was subsequently withdrawn. Despite this setback, he pursued other avenues to sanction or remove critical voices. For instance, he falsely accused some judges of disturbing the peace by not adhering to unwritten rules when entering the Court building. This accusation stemmed from their protests against physical searches of SC judges by the police and instances of police intrusion when entering the Court (Zobec, 2018c).

Additionally, the President initiated manifestly unfounded procedures before the Commission for Ethics and Integrity (henceforth: CEI), a body attached to the JC. The CEI, composed of only five members, could be more easily controlled than the plenary session of the SC (Zobec, 2019a, 2019b).Through these actions, the new President demonstrated his loyalty to those who had installed him as a figure of continuity and »stability« within the judiciary (Avbelj, 2017b).

Simultaneously, new additional »presidential« powers were introduced through amendments to the Judicial Service Act. These amendments further expanded the authority of the SC President, who should no longer be considered *primus inter pares*.[31]

The President of the SC now holds more than just a supervisory role, as if sitting in the inspector's lodge equipped with a

[31] Slovenia ranks high on the scale of the Court President's Power Index (Blisa, Kosař, 2018, pp. 2058–2059).

dashboard containing business data and monthly fresh data on judicial statistics. The President also has the authority to subject judges to disciplinary mechanisms. This includes initiating proceedings against a particular judge before the CEI or, later in the process, lodging an initiative with the disciplinary prosecutor to initiate disciplinary proceedings.

In addition to these powers, there are other prerogatives vested in the President of the SC, which will be discussed in the following sections.

4. The Message of the Anecdotes

These anecdotes speak for themselves and require no further explanation. However, the message they convey can be distilled as follows: the state of affairs within the Slovenian judiciary illustrates the enduring impact of the totalitarian regime's mental and cultural legacy, which cannot be dismantled overnight. It underscores that democracy cannot be simply introduced through formal legal frameworks and by transplanting institutional structures from Western models (Moliterno et al., 2018, p. 534).[32] Instead, it takes decades and generations to overcome the deep-rooted deficiencies stemming from the past, which have shaped the psychosociological profile of an average member of the (post)communist society (Avbelj, 2017d, p. 53, 2017a; Fleck, 2021, pp. 1298).[33]

Despite the constitutional break with the totalitarian past and the notable differences between the former communist judicial system and today's judiciary, which formally operates within a modern constitutional democratic framework, the legacy of the past still lingers in informal, extralegal, or meta-legal practices. As Čuroš has aptly stated, » Somewhat, the heritage of the past is hidden in informal practice—the habitus of the agents or members of the judiciary. This habitus may be unconscious yet defining for the behavior of the agents« (Čuroš, 2021, p. 1250; Mańko, 2013, pp. 207–233).[34] It is not surprising, then, that members of

[32] It can be unanimously agreed upon that the pivotal change lies not in the formal institutional reforms that established independence but in the shift in judges' attitude, a newfound courage to embrace independence and accountability.

[33] Avbelj paraphrasing Gudkov's *homo Sovieticus*, refers to *homo Slovenicus*.;

[34] The findings by Tsereteli regarding the Georgian judiciary are similar. The author observes and warns that pre-existing behavioral patterns can compete with and, ultimately, undermine or distort new formal rules (Tsereteli, 2022, p. 185).

the judicial elite often emphasize that most of the current judicial corps have been educated and trained after the period of state socialism. The emphasis on this fact suggests a desire to create a facade of being untethered to the totalitarian past and committed to democratic values and principles.

Slovenia's situation illustrates two significant negative effects related to the input legitimacy of the judiciary. The first is a common feature in post-communist societies, characterized by a lack of institutional and societal mentality based on the internalization of constitutional democratic values (Avbelj, Letnar Černič, 2020, p. 86). The second negative effect relates to the fact that even the relatively mild form of lustration provided for in the Judicial Service Act has not been effectively carried out (Kosec, 2018). As a result, not only did the old judicial corporatist mentality persist and transfer into the new democratic context, but also individuals from the old regime who were involved in serious abuses of judicial service and human rights during the totalitarian era ended up in high judicial positions in the new system. In this regard, the statement by former Czech Supreme Court President Eliška Wagnerová, »The higher, the worse« (Spáč, 2013, p. 38), continues to hold relevance in the context of the Slovenian judiciary.

The most paradoxical aspect here is the fact that the majority of examples of miscarriages of the rule of law, as described above (pertaining to output legitimacy), were made possible precisely due to the strongly protected institutional independence of the judiciary and its self-government on the synergetic axis of the JC and the President(s) of the Court(s). Samuel Spáč's observations, which suggest that the transfer of powers regarding the professional careers of judges from politicians to judges themselves is not a guarantee of judicial independence, also apply to Slovenia (Spáč, 2020, p. 42). As the author rightfully states, judges, just like any other actors in power, may be willing to use this competence to influence the outcomes of judicial proceedings(Spáč, 2020, p. 42).[35]

What undermines the judicial independence of Slovenian judges is not external politics but rather the politics within the judiciary itself, particularly its oligarchies, which skillfully integrate

[35] The author indicates that many post-communist judiciaries, including those in Romania, Bulgaria, Ukraine, and Slovakia, have faced significant problems, even after transferring considerable powers in judicial governance to judges themselves (Spáč, 2020, p. 41).

themselves into structures of political power (Uzelac, 2010, p. 395; Flack, 2003, p. 129; Bobek, 2008, p. 12 et seq.).[36] In Slovenia, as in most other post-communist countries, there were simply no other elites besides the communists who possessed the knowledge and necessary networks to manage the country. This, in turn, led to 'long-term malignant effects, including the establishment of monopolies and rent-seeking behavior" (Bugarič, Kuhelj, 2015, p. 274).[37]

However, it also applies to the Slovenian judiciary what Popova observes about the Russian counterparts: "In legal areas with low political salience, either because they are politically inconsequential or because there is broad political consensus over how such cases should be adjudicated, [...] judiciary functions reasonably well. Freed from direct external interference or from the burden of trying to guess the preferences of politically powerful actors, judges decide cases in accordance with their *bona fide* interpretation of the law" (Popova, 2017, p. 68).

What also characterizes the Slovenian socio-political judicial landscape is the fact that the left-wing parties, mostly direct or indirect successors of the ex-Communist Party (Association of Communists – *Zveza komunistov*), represent the political force that ardently comes to the defense of the judiciary whenever it is criticized or attacked and firmly advocates its (structural) independence, reputation, and trustworthiness. Meanwhile, on the other hand, the position of the duty critic of the judiciary belongs to the right-wing political option. Thus, this confirms the thesis that political and economic 'winners,' which in the Slovenian context are those who belong to the left-wing political option (mostly

[36] I can only agree with Szente who claims that "the most effective way of informally influencing the courts is undoubtedly to capture the judicial leadership by appointing people loyal to the government to the most important judicial posts" (Szente, 2021, p. 1325). On court presidents as "transmission belts" see Blisa, Kosař, 2018, pp. 2049, 2074.

[37] Authors have referenced to Adam, Kristan, Tomšič, Varieties of capitalism in Eastern Europe (with special emphasis on Estonia and Slovenia), Communist and Post-Communist Stud. 42, 78. Bobek and Kosař powerfully argue that "[t]his may even amount to "hijacking" the new institution by the communist-era judicial elites, and sealing it off behind a veil of judicial independence." See Bobek, Kosař, , 2014, p. 1283. See also Avbelj, Letnar Černič, 2020, pp. 30 *ff.* The authors rightfully argue that Slovenia's model of *de facto* political and economic continuity with the pre-democratic system has allowed its elites to maintain control of the country without displaying any openly authoritarian tendencies, capturing the state or backsliding on constitutional principles. The authors then continue: "Unlike Hungary and Poland, where the political elite had to engage in an overt attack on the constitutional and legal framework of the state in order to ensure that their loyalists penetrated the essential institutions and gained control over the economy, in Slovenia those loyalists and this control of the economy, perfectly legally on the basis of state ownership, have existed for decades" (Avbelj, Letnar Černič, 2020 pp. 30–31).

derived from the old regime political organizations), have greater confidence in the judiciary than 'losers,' irrespective of the degree of independence (van Dijk, 2021, p. 18). Given this, it may turn out that there is more than an intimate alliance between the judiciary taken as a whole (predominantly its leadership) and the aforementioned political option (Avbelj, Letnar Černič, 2020, pp. 107–108). However, it is not about ideology, nor is it about the issue of particular political options (be they left or right, progressive or conservative, liberal or populist). It is simply about the power over the third branch, which has been given strong and deeply entrenched structural independence. Therefore, the parallel with Djilas's New Class could be drawn.[38]

Professor Avbelj rightly observes that the Slovenian justice system failed to prevent or at least sanction the economic criminal activities, which in the process of transition imposed huge costs on the previous social property and now on the taxpayers (Avbelj, 2018c, p. 1915).[39] Given that the most prominent actors in the crony capitalist transition were the members of the former communist elite (Avbelj, Letnar Černič, 2020, pp. 146–147), a widespread sentiment has grown in the population, fueled by the center-right post-communist political parties, that the judiciary is under the influence of the former communist nomenclature, indeed its part and in service of its interests (Avbelj, 2018c, p. 1915ff; Avbelj, Letnar Černič, 2020, p. 120). It became anecdotal when the mayor of Ljubljana, deeply ingrained in the old regime structures, one of the most influential figures of the winning left-wing political opinion, also involved in numerous scandals (abuse of power, money laundering, tax evasion, trading sex for influence), in an interview on the Croatian national TV, when being asked if he was worried that one day he would be convicted and sent to prison, he frankly replied: »Not at all, for in all those years I have been, so to speak, the biggest opponent of Janez Janša's politics in this executive branch.« [40] During the whole transition period, with the only exemption of 7 years (2004-08, 2011-12, and 2021-2022), the Slove-

[38] In his masterpiece The New Class—An Analysis of the Communist System, Praeger, 1957, M- Djilas dismantled mythology of the new Yugo-communist order where the new rulers sit in their villas and banquet halls, while Djilas from prison denounces them in the name of the hungry and the underprivileged. See A. V. Sherman, The New Class by Milovan Djilas, Commentary, Dec 1957, available: https://www.commentary.org/articles/a-sherman/the-new-class-by-milovan-djilas.

[39] For further empirical examples of the said alliance between the old regime elites and judiciary see p. 1916 *ff.*

[40] Zakaj Zoran Janković ni nikoli obsojen? - YouTube.

nian government remained firmly in the hands of direct successors of the old regime Party (Communist Party and its satellites) and under the patronage and tutelage of the underworld politics, mostly composed of former members of the secret police aligned with organized crime. Most of Slovenia's subsystems remained under the control of the ancient regime: media, academia, education, justice, banking system, health system. [41]

5. Vicious Circle of the Continuation of Anecdotes

5.1. Growing Powers of Court Presidents

Anyway, the disquieting stories of the Slovenian judiciary don't stop here. Situation has exacerbated further. After the last Amendment of the Judicial Service Act the position of the presidents of the courts has been enhanced even further, as their prerogatives expanded, most of all the position and influence of the president of the SC Avbelj, Letnar Černič, 2020, p. 109). Currently he is the one, who adopts a Schedule of Jurisdiction which determines not only the specific jurisdiction of the individual panels but also assignment of judges to the panels (that task was previously also reserved to the Court, sitting *en banc*). Within the power to adopt "the work schedule", he appoints the heads of divisions (among other privileges this a position also entails higher salary and some benefits), and in so doing, he might, as a recent practice has shown, ignore even unanimous opinion of the judges - members of particular division (what was previously done by the Court sitting *en banc*).[42] Previously, it was a well-established custom that the position of the head of a particular chamber automatically belonged to the judge with the longest term in office. In this way the will and influence of an individual judge on the composition of the senates had been dispersed and consequently reduced. However, the said amendment not only strengthened the power

[41] For the comprehensive elaboration on this issue see Avbelj, Letnar Černič, 2020.

[42] What is the most telling is the President's brief explanation of why the judge, who enjoys unanimous support from all the members of the Civil Chamber of the SC and should, according to the long-standing unwritten customary rule of seniority, be nominated as the head of that Chamber, and who is held in high esteem in academic and professional circles, doesn't deserve his nomination: "He is not compatible with the lading structure of the Court". This leaves one to wonder what the term "leading structure of the Court" actually means. See the President's response to judges, members of the Civil Chamber, dated May 8, 2018.

of the court president and enhanced the influence of his own discretional will on composition of panels, but also to the same extent weakened the institution of the natural judge.[43] He is now the one who allocates and disposes with the influential power of particular judges.

He, further chairs the Personal Council of the SC, composed of other influential judges, where decisions on promotion of judges are actually made (Avbelj, 2018c, p. 1911), and renders an opinion on the candidates for the SC judges, wherein he may again ignore the opinion of the chamber affected (even though its members have the hands-on experience with individual candidates). All this strengthens the bureaucratic and oligarchic structure of judiciary, which, in turn, becomes also susceptible to, especially informal and disguised political influences. Court presidents indeed cannot sit on the JC. Yet, the President of the SC still has several ways to control JC indirectly, especially by his power to give an opinion on the candidates for the certain judicial post or for promotion, or, as Kosař rightly observes, he can suggest his preferred nominees to the JC to other judges and push them through with his authority, and he can sometimes even install his marionettes to the leadership of the JC (Kosař, 2016, p. 401).[44]

The president of the SC is well equipped with tools for implementing a carrot-and-stick policy, providing special bonuses for loyal judges (chairing over panels and Chambers, accompanying him on his international meetings, conferences and excursions around the globe) and enforcing repressive measures by initiating proceedings before the CEI or before the Disciplinary Commission for their criticism or publicly expressed opinions and statements. These measures include depriving certain judges of their right to participate in legal conferences and symposiums,[45] hindering their promotion, interfering with their right to privacy at the workplace, and, in some extreme cases, even overt bullying, for disloyalty and criticism(Avbelj, 2019). All those powers have been abused against unruly judges who had criticized the leading

[43] The right to a natural judge, denoting random case assignment (in terms of the Constitution, the right to a legal judge) and composition of senates (panels), is constitutionally guaranteed by Art. 23 (2) of the Slovenian Constitution; see note 57.
[44] The influence of court presidents, whether formal or informal, on judicial career decisions remains a hallmark of post-communist judiciaries (Tsereteli, 2022, p.169).
[45] The right outlined in Art 64 of the Judicial Service Act is considered an integral aspect of internal judicial independence (Statement of the JC, no. Su 293/2022-20, dated Oct. 28, 2022).

structure or had publicly warned against abuses of the president's powers.[46] Such a practice is symptomatic of a judiciary that was freed form the oppression of political power but became a slave to new masters (Čuroš, 2021, p. 1273). The parallel with Orwell's Animal Farm is self-explanatory here.

5.2. Autopoietic Renewal of Judicial Habitus

One may speculate that gradually, through generational turnover, the holders of the old mentality will be replaced with a new, fresh, and (post)modern liberal-minded generation, leading to the inevitable disappearance of the deep state. While it's true that members of the old communist guard are leaving the scene due to chronological and biological reasons, they often use their economic and political power to enlist much younger cadres who then work in their interests. As a result, these new, younger elites owe their existence and loyalty to the older elites, making generational change less impactful than it may seem based solely on the structure of current cadres in power (Bugarič, Kuhelj, 2015, p. 275). This dynamic applies to the judiciary as well, as it renews itself as an autopoietic organism.

If anywhere, the laws of autopoiesis apply to institutions like the judiciary. To paraphrase Maturana and Varela, autopoietic entities are organized as networks of processes for producing, transforming, and destroying components. These components, through their interactions and transformations, continuously regenerate and realize the network of processes that produced them (Maturana, Varela,1980, p. 78–79). Autopoietic systems are self-contained, self-determining, self-maintaining, self-reproductive, and self-referring.

The judiciary follows the law of social reproduction, which dictates that every social formation must simultaneously produce and reproduce the conditions of its production (Althusser, 1976, p. 68). In other words, the judiciary's functioning depends on its ability to maintain and replicate its own structure and values. Bourdieu's concept of habitus, which represents a system of acquired dispositions guiding perception, assessment, and action

[46] The Slovenian judicial system, like Kosař, Kühn and Blisa suggest, is no exception in demonstrating that the strong position of court presidents is the Achilles's heel of judicial independence in the continental legal system. See Kühn, 2021, p. 1239; Blisa, Kosař, 2018, 2031-2075; P. Čuroš, 2021, pp. 1272,1273.

(Bourdieu, 1990a, pp. 12–13), [47] denoting „the product of structure, producer of practice, and the reproducer of structure“ (Wacquant, 1998, p. 268) plays a crucial role. Habitual behaviors within the judiciary are driven by pragmatism and self-interest, where individuals seek to advance through loyalty and subservience rather than meritocracy. The ambitious young jurists and candidates for judicial service soon recognize and learn “the rules of the game”.[48] Sooner or later, they meet their goals based on their loyalty and subservience, rather than meritocracy, hence serving as an example for the new coming members of the legal profession.[49] This behavior sets an example for newcomers to the legal profession, perpetuating the judicial habitus.

The judicial habitus manifests as corporatism, which refers to a closed, hierarchical professional group with privileges and limited external oversight. In this context, the protection of the institution often takes precedence over the institution’s actual goals and purposes, such as safeguarding human rights.[50] Thus, the judicial corps, particularly the ruling judicial cadre or judicial oligarchies, becomes the highest value in itself, overshadowing the goals it should serve. Corporatism remains a significant challenge within the Slovenian judiciary.[51]

[47] Elsewhere he defines habitus as »embodied history, internalized as a second nature and so forgotten as history – [...] the active presence of the whole past of which it is the product” (Bourdieu, 1990b, p. 56).

[48] The leadership of the Slovenian Association of Judges appears to function as a training ground for young, ambitious individuals looking to advance in their careers. The current president of the association, Judge VBR, is an example of this trend.

[49] The situation in the Slovenian judiciary has similarities with the judiciary in Slovakia as well (Čuroš, 2021, p. 1247-1281, p. 1254 et seq., p.1274). Even in well-ordered democracies (*e.g.* Netherlands) judiciaries are not immune for the risk of so-called »cultural reproduction« (the process by which recruiters within organizations, consciously or unconsciously, are inclined to select like-minded people in order to create a pleasant working environment in which social and ethical norms can easily be passed on). For the Netherlands’ experience with the cultural reproduction and homogeneity of judicial corps and how it affects decision-making and the appearance of impartiality (Holvast, Doornbos, 2015, p. 60).

[50] Characteristic of such an approach is the recent policy of reducing the number of reversals in higher instances. The CS even called for the dialogue with the CC, in which the relationship between the two courts should be reassessed. In particular, the CC should have been more careful in applying its verdicts of arbitrariness or patent wrongfulness to the decisions of the SC, as it risks compromising its own jurisprudence by potentially committing arbitrariness. According to the SC’s Working Group, the latter poses a much greater threat to legal certainty than an ocasional incorrect decision of the SC. See Avbelj,. Letnar Černič, 2020, p. 118; Vrhovno sodišče, “Poročilo o odločbah Ustavnega sodišča, s katerimi so bile razveljavljene odločbe Vrhovnega sodišča”, Vrhovno sodišče objavilo poročilo o odločbah Ustavnega sodišča (sodisce.si).

[51] The same pattern can be observed in the Croatian judiciary as well. Professor Zlata Đurđević, an unsuccessful candidate for the president of the SC of Croatia, has expressed her belief that the primary reason for judicial corporatism lies in the fact that two-thirds of the State Judicial Council (henceforth: SJC) members are judges, and that external excellence criteria in the appointment of judges are often disregarded. She has also raised concerns that “There is no public discussion about the candidates,

5.3. Nourishing the Culture of Submission

One prominent feature of the Slovenian judiciary is the continuous control and supervision of rank-and-file judges by higher courts and senior judges. This oversight limits the degree of »positive« deviation from the judicial mainstream. It goes beyond the typical control mechanisms inherent in any judicial system, such as the supervision of higher courts through legal remedies. Instead, the Slovenian judicial system includes parallel and unofficial channels for control, influence, and the impact of senior judges on their younger colleagues.

Selection, promotion, and training within the Slovenian judiciary are conducted exclusively within the judicial system, allowing presidents of the courts and heads of chambers to maintain control over personnel policies. Some influential judges may even feel entitled to insert false or fabricated remarks into the personal files of particular judges who are considered »unruly,« overly critical, courageous, or otherwise disruptive. This practice is arbitrary, secretive, and typically without notification to the affected judge, potentially harming their career and promotion prospects.[52]

To facilitate the integration of newly appointed judges and to ensure the ongoing process of judicial self-regulation, the SC initiated a special EU-funded project in 2017 called »Let's Judge Together« (*Sodimo skupaj*). This project, with its meaningful name,[53] aimed to introduce a mentoring system where experienced judges would guide and supervise junior judges, providing them with guidance and advice.

The judge mentor not only assists the newcomer in learning the practical aspects of their profession but also introduces them to the informal rules of professional conduct, the existing values within the judicial community, and the key characteristics of the judicial habitus. This mentorship is intended to quickly and effectively familiarize the younger judge with the unwritten rules of

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voting is secret but the SJC president knows how SJC members have voted." See at: https://n1info.hr/english/news/jurist-zlata-djurdjevic-corporatism-is-the-main-problem-of-croatias-judiciary/.

[52] In his response to the judge who accidentally discovered false remarks secretly placed in her personal file, the President of the Ljubljana High Court inadvertently revealed the commonness of such a practice. See: Zahteva za umik predloga z dne 28. 6. 2018 iz osebnega spisa sodnice, no. Su 110/2017, dated Sept 17, 2018.

[53] The title is a clever wordplay. In the Slovenian language, the expression »*Sodimo skupuaj*« carries double meaning: "Let›s judge together" and "We belong together".

the profession (Avbelj, Letnar Černič, 2020, p. 110; 2018c, p.1913; Čuroš, 2021, p. 1258). However, these elements of habitus can potentially, through "the silent unconscious working and weaving of the spirit", altogether erode the mental independence of the young judge, leading them to conform to established norms and practices. This is encapsulated in the old Slovenian saying: »What the little Johnny has learned, the grown-up John knows«.

Further, in June 2013 the then Prime minister, the President of the SC and the Minister for Justice signed the joint declaration, called "Commitment to citizens" (*Zaveza državljanom*),. In this declaration, representing the unified government, they pledged to reduce the duration of all judicial proceedings.[54] Following this declaration, the President of the SC initiated visits to the first-instance courts, urging the acceleration of judicial procedures and the reduction of case backlogs. In criminal cases, there was also a push to avoid acquittals, all with the goal of improving the efficiency of the criminal justice system.

The pressure on Slovenian judges to handle a high volume of cases and prioritize quantity over quality remains a significant issue. Judges, regardless of their court level, often experience stress and pressure, not only from external sources like society and politics but also from their superiors, particularly the President of the SC. There is a constant demand for judges to resolve cases quickly, with an emphasis on quantity rather than the quality of their adjudication.[55]

Historically, the evaluation of a judge's performance was based mainly on quantified criteria, known as the »judicial norm.« This approach continued until 2015 when the JC adopted new criteria that placed more emphasis on the quality of judicial decisions (Avbelj, 2018c, p. 1923). However, court presidents still monitor the number of cases resolved by judges and use tools like the president's dashboard to track this data. This strict control and management of judges by their superiors create an atmosphere where judges often work under fear and subservience, as described by Čuroš, drawing a parallel to Bentham's panopticon (Čuroš, 2021).

[54] See for instance, Delo, dated June 4 2013, available: https://www.delo.si/novice/politika/vlada-in-sodstvo-podpisala-zavezo-drzavljanom.html.

[55] See for instance the Annual Report of the Supreme Court for the year 2017 (*Letno poročilo Vrhovenga sodišča za leto 2017*), where all what matters are statistical data. Critically see Zobec J., Dva svetova, 2018b.

Despite the recent amendment of the Civil Procedure Act (ZPP-E), which transitioned from the cassation model to the leave to appeal system as the primary means of unifying case law, [56] the »leading structure« of the SC (composed of the Court's President, Vice-president, their advisors, and heads of chambers) continues to prioritize informal consultations among judges from various courts, discussions, and debates between heads of chambers as the main instrument for unifying case law.[57]

Additionally, there is still a legal remnant from the socialist era, as described by Rafał Mańko, referred to as »normative legal survival.« This remnant is a special supervisory power of the SC to issue legal opinions and legal opinions of principle, similar to »guidelines« in other socialist jurisdictions (Mańko, 2013, p.217; Bobek, 2009). These legal opinions are adopted by the SC sitting *en banc* during its general sessions. They serve as the sole mechanism for unifying case law at the horizontal level. This power could be exercised, in some cases, completely *in abstracto* with no relation whatsoever to an individual pending case (Bobek, 2009, p. 45; Zobec, Letnar Černič, 2015, pp. 141ff). In these situations, the SC plays a role that falls somewhere between that of a legislature and a legal scholar (Galič, Ude, 2002, p. 1584), and these legal opinions remain binding on all senates of the Supreme Court.[58]

5.4. Some Basic Statistics

The overall picture of the Slovenian judiciary completes the data as revealed by the research "Public satisfaction with the administration of courts in the Republic of Slovenia – 2021", Justice Scoreboard and Eurobarometer. These data show, on the one hand, that public trust in judiciary is beyond the European average,[59] yet on the other hand, they reveal that public expendi-

[56] Before the amendment, there were two tiers of access to the SC existed. One was the so-called direct revision, which was based on "objective" criteria, while the other was inspired by the appeal model, where granting permission (or leave) depended on the importance and novelty of the legal issue involved in the case, going beyond the interest of the individual applicant seeking another review of their case. See Bobek, 2009, pp. 34, 41 *et seq*.; Galič, 2014.

[57] See *Otvoritev sodnega leta 2018, Vrhovno sodišče RS,* 14. 2. 2018, p. 33, available: http://sodisce.si/mma_bin2.php?nid=20180214141910 90&static_id=20180214133528

[58] Art. 110 of the Courts Act.

[59] According to the research "Public satisfaction with the administration of courts in the Republic of Slovenia – 2021" (Republika Slovenija, Vrhovno sodišče, Ljubljana 2022) the reputation of Slovenian judiciary, as evaluated by state prosecutors and attorneys scores only 3,5 out of 10 (state prosecutors) or 4 out of 10 (attorneys), while trust in judiciary is slightly higher – it scores 4,5 out of 10 (state

ture is one of the highest among the EU member-states.[60] Besides, the ECtHR has so far decided that Slovenia violated the ECHR in 342 cases (finding at least one violation) out of 373 judgments delivered by the end of 2021.[61] Those numbers are worrying, even more, when considering the number of population (2 million). High is also the number of violations of human rights, as found by the Constitutional Court. In the year 2022 at least one violation of human rights was found in 33 cases.[62] Another factor contributing to the low quality of adjudication is Slovenia's second-place ranking in the number of "ful-time working" judges per 1000.000 inhabitants (41).[63] Due to the very nature of the natural law of limited resources which holds also for human resources, the country of only 2 million population simply cannot produce more than 800 of good judges. In the past, the problem of systemic and chronic backlogs, which led to the pilot judgment in the famous *Lukenda* case (Judgment No. 23032/02), one of the adopted measures aiming to reduce backlogs and to speed-up proceedings, was also the increase of the number of judges. However, such a measure is a double-edged sword. With the increase of the number of judges usually comes the decline of the quality – as it is the case with adding water to wine.

6. Lessons From Slovenia

The Slovenian judiciary represents an example of a bureaucratic model, grounded in the marriage between two legacies. One belongs to the hierarchical Austrian and German interwar model of judiciary, [64] while the other consists of remnants from the long rule of the communist regime, detached from the Western moves

prosecutors) or 5,4 out of 10 (attorneys). Ibid. p. 34; The 2023 EU Justice Scoreboard, p. 41, available: THE 2023 EU JUSTICE SCOREBOARD (europa.eu) ; Eurobarometer 2023, available: Perceived_independence_national_justice_systems_EU_among_general_public_fl519_2023_SI_en.pdf

[60] The 2023 EU Justice Scoreboard, pp. 28f.

[61] Overview 1959 – 2021, European Court of Human Rights, February 2021, available at: Overview 1959 - 2021 (coe.int).

[62] Annual Report for 2022, pp. 108, 109, available: USRS_Letno-Porocilo_2022.pdf (us-rs.si). In 2017, at least one violation of human rights was found in 82 cases, representing the highest number in the last decade. One factor that influenced the higher success rate in 2017 was the fact that the Constitutional Court adopted 32 so-called panel decisions in cases of the same type. See Annual Report for 2017, p. 74, available: rsus_letnoporocilo_2017_web.pdf.

[63] The 2023 EU Justice Scoreboard, p. 30.

[64] It's no surprise that Kafka's "The Trial" is deeply rooted in the soul, or perhaps the subconscious, of the Austro-Hungarian legal tradition. If Kafka had lived in a common law jurisdiction, the world's literary heritage might have been deprived of his novel.

toward a more coordinated ideal (Kosař, 2016, p. 400). These bureaucratic and hierarchically structured institutions foster an authoritarian mindset, based on the assumption that »there is law only where there is power,«[65] prevailing and rendering a very limited and tightly controlled space for individual (professional and personal) independence of its members. The individual judicial independence of an average Slovenian judge and his/her impartiality are not only left unprotected but could also become easy prey for their formal or even informal superiors and members of judicial oligarchies. The serious drawbacks and flaws of the Slovenian justice system, as outlined above, can be distilled into some key inferences.

The first point confirms the relatively old truth that the independence of the judiciary, especially when concentrated in small bodies where judges have a majority vote (as is the case with the EU model of a JC), or predominantly when »judicial self-government« rests in the hands of the presidents of courts, the independence of individual (rank-and-file) judges is very likely to become captive to more or less informal judicial groups, networks, and oligarchies.[66] The ideal of judicial independence, in its bare form, is a contested and internally contradictory concept. When court presidents, notably the president of the SC, exert significant control over judicial independence, there is very little of it left for the rank-and-file judges who perform judicial service on the ground. The key problem, therefore, lies in *de facto* independence, which often resides in the deep shadow of *de jure* independence. Avbelj's warning is justifiable: ‚The dependence of judges can also be generated intra-systemically, when the judicial system is structured bureaucratically and controlled by a strong and politically connected ruling judicial class that uses informal collegial as well as formal means to control and, if necessary, also silence those judges who do not conform to the system" (Avbelj, 2019).

Secondly, as mentioned earlier, these groups and oligarchies (which may not necessarily be comprised solely of judges, but also of high-ranking public servants in court administration, such as the Secretary-General of the SC, the head of the PR service, and cer-

[65] The prevailing perception of law seems to be based on an ideology captured in the First Minute of the Radhruch's Five Minutes of Legal Philosophy (Radbruch, 2006, pp. 13-15).
[66] For similar observations see Moliterno et al, 2018, p. 535-537; Čuroš, 2021; Spáč, 2020; Tsereteli, 2022, p. 191 ff.

tain administrators within the SC) adeptly integrate themselves into structures of political power. They align themselves with formal, informal (underground), political, semi-political, economic, and financial power holders, thereby becoming the backbone of the »deep state.« Or, at the very least, they subject the judiciary to the control of political (executive) power and other interest groups.[67] This effectively allows the invisible long arm of politics and influential interest groups to penetrate the judiciary through the back door.

Thirdly, it appears highly probable that the absence of lustration not only preserved the old regime's corporatist mindset but also contributed to the retention of the most detrimental judicial cadres. These individuals, supported by the majority of ordinary members of the judiciary and governed by a corporatist mentality, gradually built their careers and occupied senior positions within the judicial hierarchy. Even after their retirement, which is mandatory at the age of 70 for judges, their cultural and mental legacy persists. The most trustworthy individuals had been rewarded with appointments to the Office for Supervision of Court Management (established within the Ministry of Justice and led by a judge designated to the post by the JC) and to the CEI upon the expiration of their judicial service, pending a ruling by the Constitutional Court that found this to be unconstitutional.[68]

Although the law stipulates that membership in the commission ceases upon the termination of judicial service,[69] until recently, two of the five members of CEI have been retired judges, both over seventy years of age.[70] These individuals could be described, in Bourdieu's terms, as »yesterday men«—individuals whose past significantly outweighs their present due to the long period of the past that has shaped their current form (Bourdieu, 1990b,

[67] The former occurred recently by appointing the self-proclaimed "highly professional, the most neutral and politically independent" public servant, who, at that moment served as the head of the PR of the SC on the position of the Secretary of State, i.e. the Vice-Minister of Justice. What is most striking here, is the fact that he was installed from the Socialist Party (which is successor of the previous Communist Party) quota. However, the farce doesn't stop here. The then acting secretary of state was simultaneously moved to his previous office, they just switched their posts. Professor Avbelj commented on the described cadre-castling in the following: "Kaczinski in Orban are green with envy. [...] Courts are those which apolitically set up their figures on ministries" (Avbelj, 2018a; Avbelj, 2019).
[68] Decision U-I-159/19.
[69] Art. 51 (1) of the Judicial Council Act.
[70] These two members resigned, as they stated in their resignation statement, due to their commitment to protecting the integrity of the CEI). This decision was made immediately after the CC found the provisions of the Judicial Service Act, allowing retired judges to carry out official supervision of a judge's work, to carry out tasks of court management and to manage the office for the Supervision of the Management of the Court as assigned judges at the Ministry of Justice to be unconstitutional (Decision U-I-159/19).

p. 56; Durkheim, 1977, p. 11 .[71] The »old guard members« within CEI have been acting as guardians of the existing (past) corporatist habitus, which, as explained earlier, is anything but a habitus of courageous, independent, and principled individuals. Therefore, it is not surprising that the victims of CEI are predominantly those free-thinking, independent judges who openly speak out against the malpractices of the governing structures of the judiciary. These judges challenge the *status quo* and the prevailing sense of »dirty togetherness«.

Despite the fact that CEI was established on the recommendation of GRECO (the Council of Europe anti-corruption body) as a body within the JC to prevent corruption, primarily through issuing principled opinions on violations of ethical codes and providing recommendations and guidelines on upholding ethical and integrity standards, conflicts of interest, and situations involving (former) judges and prosecutors transitioning to the private sector,[72] it is being used to silence critics of the malpractices of judicial oligarchies. In this context, the utilization of CEI, designed as part of the judiciary's immune system, to suppress critics of judicial misconduct resembles a symptom of autoimmune disease.

Fourth, the optimistic scenario, which relies on the natural evolutionary cycles leading to the gradual disappearance of post-totalitarian mindsets, habits, and power structures as explained earlier, currently lacks empirical evidence. Additionally, members of the new, young, and fresh generation who graduated after the collapse of the communist regime often exhibit behavior akin to »*homo economicus*.« Some of them, acting as rational maximizers, succumb to the demands of existing power structures and adopt similar methods. Others, in the era of a globalized postmodern world, choose to leave the country and seek personal and professional fulfillment elsewhere. This phenomenon amounts to a form of negative selection that is eroding the institutional landscape in Slovenia.

[71] The Durkheim then continues: »It is just that we do not directly feel the influence of these past selves precisely because they are so deeply rooted in us. They constitute the unconscious part of ourselves. Consequently, we have a strong tendency not to recognize their existence and to ignore their legitimate demands. By contrast, with the most recent acquisitions of civilization we are vividly aware of them just because they are recent and consequently have not had time to be assimilated into our collective unconscious« (Durkheim, 1977, p. 11).

[72] Fourth Evaluation Round - Corruption prevention in respect of members of parliament, judges, and prosecutors: Fourth Evaluation Round, Compliance Report – Slovenia, adopted 12 December 2014, published 18. March 2015, Council of Europe: Group of States Against Corruption (GRECO), available: https://www.refworld.org/docid/5a1ff5954.html.

Fifth, it is now too late to break the vicious circle. This should have been addressed at the very beginning of the transition, possibly through a process of lustration. However, even in that case, Slovenia could not have relied on the »colonization« of the judicial sector, as it lacked a Western counterpart from which legal professionals could have been imported. The situation in Slovenia is quite similar to that in most other post-communist countries, as noted by Bobek and Kosař, where »the number of judges from the communist era is particularly high at the upper echelons of the CEE judiciaries« (Bobek, Kosař, 2014, p. 1281) They also rightly argue that "[i]t is hard to imagine communist-era judges turning overnight into independent and responsible judicial managers, who are willing to put the good of the justice system before their own" (Bobek, Kosař, 2014, p. 1281).

Sixth, the Slovenian judiciary is, therefore, a subtype of transitional judiciaries. Kosař makes a compelling argument that the introduction of judicial self-government has ensured structural independence, which means it has secured independence from politicians but has neglected the independence of individual judges (Kosař, 2016, pp. 406ff). From a formal legal perspective, this situation may appear acceptable or even exciting.[73] However, upon closer examination of the actual functioning of this system in practice, especially in the context of transitional judiciaries, it becomes evident that the judiciary is indeed independent from external political forces but has been captured from within. This results in a situation where there is »a system of dependent judges within an independent judiciary composed of internally dependent judges« (Kosař, 2016, p. 407)[74] Since an independent judiciary made up of dependent judges is inherently contradictory, the vicious circle is complete.

Eventually, we may agree with Professor Avbelj's observation, that orchestrated institutional decay, a widespread system of negative selection, based on loyalty instead of meritocracy, combined with the lack of institutional tradition and the lack of liberal mind-

[73] For a brief outline of the regulation of independence of judges see: Zajc, 2014, p. 753. For the more detailed insight see Avbelj, Letnar Černič, 2020, pp. 105 *ff*.

[74] Slovenian formal judicial landscape resembles the opening sequence of the David Lynch's masterpiece Blue Velvet, which depicts the small, idealistic town of Lumbertown. The mise-en-scène of the town provides a sense of order and security, showing a waving fireman and dalmatian driving down the road on a firetruck. However, this setting also raises a fundamental question that pervades the film: Is any of this reality, or is at all a façade hiding a darker truth beneath the surface?

set among typical Slovenian citizens are the main factors inhibiting the development of constitutional democracy (Avbelj, 2017d, p. 53). Does this mean that the rule of law in Slovenia and its judiciary are doomed to failure?

7. Concluding Remarks – Or Rather Some Tentative Proposals

The respect for the rule of law and the proper functioning of the rule of law primarily and foremost depend on the judiciary. The authoritarian culture within the judiciary and semi-formal networks, as well as the hierarchical structure based on loyalty and subservience to judicial oligarchies, represent the main sources of institutional malaise within the third branch and, consequently, the primary problem of the rule of law in Slovenia. Three pillars of authoritarianism in the Slovenian judiciary are key: a) the strong formal powers of the presidents, especially the president of the SC, b) the weakness of the JC, and c) the prevailing corporatist mentality - the habitus of submissiveness of the overwhelming majority of judges. Authoritarianism needs subservience to flourish. They both are the flip sides of the same coin – as a sadist needs a masochist, and vice versa.

Due to organizational and technical weaknesses, the power of the JC, which is designed as the key and essential guardian of judicial independence, remains more in the books than in action (Avbelj, 2018c, p. 1910f).The weaker the JC, the more space opens up for other players, mostly for the presidents of the courts.[75] Therefore, a question may arise: whether the gradual strengthening of the formal powers of the already *de facto* influential court presidents might not even be intentional - because it is easier to exercise control over the courts through bodies that are easy to manage. The fewer the members of the bodies, especially if that body is composed of one person only, the better for the ruling political elite (and influential crony groups) to advance their agenda through the one-man-band "transmission belts".[76]

[75] For the same observations see Avbelj, 2018c, p. 1911ff.
[76] On the metaphor of court presidents as transmission belt see Blisa, Kosař, 2018, p.2049, 2074. Authors convincingly warn against the danger of "outsourcing" judicial interference to court presidents (Blisa, Kosař, 2018, p.2049, 2074).

The weakness of the JC (also in terms of submissiveness to authoritarian strongmen and holders of informal power within judicial oligarchies) could be well illustrated through a recent anecdote: In the winter 2021/22, a new scandal broke out, once again involving Mr. Masleša. For more than two months, the Slovenian public was rocked by the non-existence of Mr. Masleša's diploma. During this time, several different copies of the controversial diploma appeared in the public eye, differing from each other and also from diplomas issued at that time (in the mid-70s of the last century) by the Faculty of Law in Sarajevo, where Mr. Masleša was supposed to have graduated. Doubts raised by investigative journalists still linger as to whether the aforementioned judge even has proof of the required legal education. However, Mr. Masleša claimed that he keeps his diploma carefully but declined to show it to the public. Different versions of his diploma that have since appeared in the public had flaws that were already visible from the outside, casting doubts on their authenticity.

As time passed, public doubt grew, and the reputation and trust in the judiciary, especially in the SC, declined. For that reason, the JC suggested that he publicly display this document, thereby halting the further decline of the judiciary's reputation. However, Mr. Masleša turned down the SC's proposal with indignation. Furthermore, the SC even threatened journalists with lawsuits from its official Twitter profile. The PR department of the SC wrote on his behalf that the issue of the existence of a judge's diploma, considering the legally prescribed election procedure in which the fulfillment of the conditions for holding a judicial position is assessed, is superfluous. "The Supreme Court judge will file a lawsuit regarding the published untruths. The amount of compensation will be donated to charity," they announced, indicating their confidence in the lawsuit's outcome in advance. Later, the CEI (a body at the JC) declared that his conduct was not contrary to judicial ethics. Furthermore, the CEI opined that in doing so, Mr. Masleša had defended the reputation of the Slovenian judiciary and its public respect.[77]

Instead of final conclusions, I will propose some rudimentary and tentative solutions to address the discouraging situation de-

[77] *Načelno mnenje Komisije za etiko in integriteto pri Sodnem svetu, no. Su Ek 8/2022*, dated June 8, 2022. Eventually, Mr. Masleša revealed his diploma – which differed from the previously displayed copies. Hence doubts about its authenticity still exist.

scribed and dispel the long shadow of the past. One well-known Slovenian legal scholar's suggestion (expressed informally but candidly) was brief: Close all Slovenian law schools and replace all Slovenian judges. However, let's set jokes aside.

This suggestion, nonetheless, encapsulates two major sources of judicial decay and can serve as a starting point. The concept of the rule of law is not so much a legal phenomenon as it is an ethical and moral one, and it cannot be created or prescribed solely through legislation. The problem does not primarily reside in the formal structure of Slovenian institutions; rather, it pertains to their substance. The substance is composed of people, specifically judges, and more precisely, their moral capabilities and personal integrity (Avbelj, Prenova).

Therefore, the crucial question is how to establish and safeguard the pillars of judicial independence: courage, morality, knowledge, and accountability. This would enable judges to act in a transparent, fair, and equitable manner.[78] The ultimate goal is to dismantle the authoritarian, corporatist habitus and transform the monolithic judiciary into a community of personally independent judges.

The first step should be directed towards reforming legal education, as it offers a window into society's legal system and shapes fundamental attitudes about the law: what the law represents, the roles of legal professionals, how the legal system operates, and how it should operate (Merryman, 1975, p. 859). Existing legal education needs to undergo a transformation to produce jurists who not only memorize legal principles but also understand them deeply. This calls for students who are knowledgeable, hardworking, reflective, creative, and possess critical thinking skills.[79]

Quality legal education is not only vital for equipping a judicial body with the technical capacity to deliver justice as a tribunal

[78] In this regard I can only agree with the position of Čuroš, who claims that "[t]he goal is to create an independent habitus of judges who are aware of their role in delivering justice", and who further argues, to be "essential to start with this as early as during legal education, highlighting the strong personalities among judges who have stood against pressure, teaching about the importance and role of the rule of law, and providing training for establishing resilience against inappropriate pressure" (Čuroš, 2021, p. 1280).

[79] *Cf.* in the note 5 mentioned Resolution wherein the Parliamentary Assembly of the CoE [noting that the Russian Federation court chairpersons have disproportionate power over other judges and hence] called the Russian Federation, *inter alia,* to promote the development of a spirit of independence and critical analysis in legal education in general and in initial and continued training of judges and prosecutors in particular, and to robustly sanction any local, regional or federal officials that continue to try to give instructions to judges, as well as any judges who seek to obtain such instructions (5.5.4.).

but also plays a critical role in ensuring public confidence in the judiciary. It serves as an additional safeguard for judges' personal independence (Judgment No. 26374/18). Therefore, legal education should be elevated to an elite level, with access to law schools limited to the most talented individuals selected through rigorous criteria, including a law school admission test.

Academic faculties should be comprised of the most distinguished national and international legal scholars. Legal studies should be conducted in collaboration with top Slovenian law schools and respected American or EU law schools.

Furthermore, the education for judges should undergo a fundamental transformation and modernization. A Judicial Academy should be established to serve as a professionally managed institution for continuous and mandatory judicial training and education, providing judges with the highest level of up-to-date knowledge. Lecturers should be drawn from the ranks of the best domestic and international legal theorists and practitioners.

Additionally, the national judiciary exam should be fundamentally reformed and updated. If we maintain the career model for the judicial profession, the training for future judges should follow the successful completion of the bar exam, with the judicial exam also including assessments of social and emotional intelligence.

In many ways, constitutional democracy also relies on the active engagement of professionals within the legal field, especially legal academics. They, in accordance with their academic ethical commitment, play a crucial role in commenting on and critiquing judicial decisions, as well as shaping legal discourse. Legal academics bear a responsibility not only for their comments and criticisms of judicial opinions but also for their silence on critical issues. The ongoing discourse among legal experts, and consequently in society as a whole, is essential for the functioning of constitutional democracy. This can only occur if the judiciary remains subject to constant public scrutiny.

To achieve this, it is imperative to ensure the transparency of the judicial decision-making process. The administration of justice should be clear, open, and accessible for interaction with the general public, on whose behalf judges render their judgments. The high quality of judicial service also depends on systemic checks and balances at both internal and external levels.

The latter is extensively carried out by academics, theorists, and other legal professionals.

In terms of Čuroš›s allegory of the panopticon, it is crucial to consider who occupies the inspector's lodge. The primary position should be reserved for the public, including both academic and the general public.

In any case, the supporting role of doctrinal scholarship appears to be crucial. This can be explained by the determinacy paradox, which is pervasive in legal theory and also applies to the judiciary at large. Judges are assumed to engage in self-interested behavior or, at best, to vote in accordance with their concept of sound argumentation in their opinions. As Professor Vermeule has put it: "To make sense of doctrinal scholarship, one must assume either that the Justices are directly interested in creating good law, or else that the Justices are indirectly interested in doing so, because they care about their reputation with (among others) the law professors who care about good law. In the latter case, the Justices are a real audience for doctrinal scholarship because law professors are a real audience for the Justices' opinions" (Vermeule, 2007, p. 397).[80]

Anyways, law professors are among the audiences that reputation-minded judges aim to impress or please (Posner, 1993, p. 20). They also constitute one of the pillars of constitutional democracy, particularly in supplementing or building and maintaining the legitimacy of the administration of justice and the judge-made law. Constitutional democracy presupposes a culture of deliberative democracy. Furthermore, academics can play an important role in helping judges resist undue influence. They can serve as strong and trustworthy partners who will defend their independence and protect them from succumbing to undue influences and pressures (Spáč, 2020, p. 42).[81]

Therefore, transparency is essential for public and professional scrutiny and the latter is crucial for the proper functioning of the judiciary. Without transparency, there can be no accountability. Transparency ensures that information is readily available, and only reliable information can be used to assess the performance

[80] In the same vein Rodin, 2009, p. 380,381.

[81] Halliday writes of the efficacy of a coalition between judges and lawyers, which can be enhanced by a moral economy that binds them together – and of normative economy between bar and bench (Halliday, 2024). In the same vein legal, academics and public intellectuals may add to the legal complex in strengthening judiciary and giving support to the resisting judges.

of authorities and guard against potential abuses of power. Lack of transparency erodes trust in those who hold power. In the absence of transparency and accountability, trust between the government and its citizens is compromised. Within the system, the prevailing 'dirty togetherness,' a legacy of the past and the country's small size and population, should give way to a culture of professional accountability. Full transparency in the administration of justice and court management is essential for external oversight.

The JC should follow the example of the Slovakian JC by opening its doors to the public (Spáč et al., 2018b, p. 1763). This means not only publishing its decisions but also making audio recordings of its meetings available to the public.[82] Hearings for candidates seeking judicial positions or promotions before the JC should be conducted in an open manner, with the names of the candidates and their backgrounds disclosed. Additionally, asset disclosures of all judges should be made public, including information about any family members working within the judicial system or in organizations under the Ministry's jurisdiction, or in the field of advocacy. Furthermore, the bios, educational certificates, and details of the state examination for the legal profession should also be published.[83] If the adoption of [judicial] appointment decisions should be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once

[82] ECtHR plays a significant role in evolving the fairness and transparency in the appointment procedure and merit-based selection criteria for judicial posts this is viewed as a crucial component of the right to a "tribunal established by law", which is recognized as a stand-alone right under Article 6(1) of the ECHR (Rizcallah, Davio, 2021, p. 587). In this context, it's worth noting that not only the ECtHR cases against Poland and Hungary but also the case *Ástráðsson* and *Tsanova-Gecheva v. Bulgaria* (judgment, no. 43800/12, dated Sept. 15 2015) support the efforts of those advocating for transparency and accountability in the selection and appointment of judges. The *Tsanova-Gecheva* case is particularly instructive, as the transcript of the audio recording of deliberations among members of the Bulgarian Supreme Judicial Council (henceforth: CSM) played a significant role in compensating for the lack of reasons provided for the CSM's decision. See para. 101, 102; Fajdiga, 2021, p. 74. The author therefore urges the JC to start writing the record of deliberations (Fajdiga, 2021, p. 77).

[83] At the end of 2021 and the beginning of 2022, Slovenia was embroiled in the aforementioned affair regarding the diploma of Mr. Masleša. It came to light that he had not passed the state legal profession exam (judiciary exam) in Slovenia, rendering his appointment unlawful. According to existing case law, he lacks the capacity to represent himself before the SC, despite serving as a judge at the very same court. This raises the question of how he could act as a SC Judge when he is not even allowed to represent himself before the very Court he serves on. One of the SC Judges who brought up this issue in an interview with one of the online portals was later "found guilty" by the CEI of violating the Code of Judicial Ethics (*Načelno mnenje Komisije za etiko in integriteto, No. Su Ek 10/2022,* dated 25 August, 2022).

appointed as judges,[84] then it is necessary that the appointment procedures are transparent and amenable to public oversight.

The reformed JC should consist of a committee of legal experts of the highest esteem. I concur with Professor Avbelj's proposal for its composition: three law professors, two former CC judges, two former members of international courts, one representative from the ordinary judiciary, and one from other sectors of the legal profession (Avbelj, Prenova).

Furthermore, the powers of the presidents of courts, including the President of the SC, should be significantly reduced and transferred to other bodies of judicial self-government (plenary sessions, the Court chambers, and their heads). This should position them as *primi inter pares*, akin to the system in Germany, rather than acting as superiors to their peers (Kosař, 2016, p. 396; Blisa, Kosař, 2018, p. 2056ff). Additionally, the SC should be relieved of all administrative, technical, and organizational tasks that currently blur the lines between the judicial and executive branches, creating a fertile ground for corruption.[85] All such responsibilities and associated personnel should be transferred to the Ministry of Justice. The SC must be allowed to focus exclusively on its primary role, which is creating and unifying case law. Finally, the PR service should be redefined as a bridge between the Court and the general public, primarily by issuing public releases, especially in high-profile cases, rather than serving as a propagandistic mechanism for judicial oligarchies.

Post Scriptum

Mr. Janša, along with two other falsely accused and subsequently sentenced co-convicts in the failed Patria proceedings, filed a lawsuit against Mr. Masleša, seeking compensation. The court of first instance rejected the claim for damages, and none of the plaintiffs appealed this ruling. What is interesting here, *inter alia*, is the fact that until recently, Mr. Masleša's appointed attorney held the position of a member of the JC.

[84] The CJEU judgment in Joined Cases C-585/18, C-624/18 and C-625/18 dated 19 November, 2019, para. 134.

[85] How likely is it that members of the »leading structure« of the Supreme Court may succumb to temptation to misuse their positions for personal financial gain, see Toplak, Sovdat, 2019; Toplak, 2019.

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