

THE JUDGE'S TENURE A HISTORICAL AND CONTEMPORARY OVERVIEW

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ABSTRACT

In this article, using comparative and historical methods, we analyze and present some historical and contemporary legal issues related to the tenure of Judges. We present historical roots of life tenure in the USA and pillars of independent judiciary in USA constitutional tradition. Further we present European legal tradition on this field and related international and EU legal documents. The case of Slovenia, as a post transition country, historical, constitutional and other legal aspects of life judge's tenure is elaborated in the context of current political initiatives for abolition of judge's tenure. The question we try to answer is, if public expression of dissatisfaction with the court decision (judgment) is a convict's human right, even when he or she is an influential politician who uses party machinery for discrediting of judiciary, and at what circumstances such behavior affects judicial independence.

Key words: independent judiciary, judicial tenure, appointment and election of judges, removal of judges, Constitution of U.S.A., permanent mandate, abolition of life tenure, constitutional changes

IL MANDATO DEL GIUDICE. IL QUADRO STORICO E CONTEMPORANEO

SINTESI

Nell'articolo, utilizzando metodi comparativi e storiografici, analizziamo e presentiamo alcune questioni giuridiche, storiche e attuali legate alla permanenza in carica dei giudici. Presentiamo le radici storiche del mandato permanente negli Stati Uniti e i pilastri della magistratura indipendente nella tradizione costituzionale statunitense, inoltre la tradizione giuridica europea in questo campo, i documenti internazionali e quelli giuridici comunitari. Nel caso della Slovenia – paese nella fase della post-transizione – gli aspetti storici, costituzionali e quelli giuridici del mandato permanente del giudice vengono elaborati nel contesto delle attuali iniziative politiche per la sua abolizione. La domanda alla quale proviamo a dare una risposta è se l'espressione pubblica di insoddisfazione per la decisione del giudice (sentenza) sia un diritto umano di un condannato,

anche quando quest'ultimo è un politico influente che usa dei metodi per screditare il potere giudiziario, e in quali circostanze tale comportamento influisce sull'indipendenza giudiziaria.

Parole chiave: sistema giudiziario indipendente, termine del mandato dei giudici, la nomina e l'elezione dei giudici, il richiamo dei giudici, la Costituzione degli Stati Uniti, un mandato permanente, emendamenti costituzionali

HISTORICAL ROOTS OF LIFE TENURE IN THE USA

Article III, §1, of the Constitution of the U.S.A. provides that the judicial power of the United States, is vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The Supreme Court of the United States was created on September 24, 1789.

The Supreme Court of the U.S.A. consists of the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. The number of Associate Justices is currently fixed at eight (U.S.A. Constitution, §1). Power to nominate the Justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate.

Article III, §1, of the U.S.A. Constitution further provides that the judges, both of the supreme and inferior courts, hold their offices during good behavior, and receive for their services, a compensation, which may not be diminished during their office. No time limitation of judges' tenure is therefore stipulated in U.S.A. Constitution.

According to Martha Andes Ziskind (1969), the representatives of the several States meeting to revise the Articles of Confederation in May, 1786, agreed on the importance of an independent judiciary, but they differed on the degree of this independence and on whether the judiciary were to be ultimately responsible to the executive, to the legislature, or only to the people themselves. Arguments over the length of judicial tenure and the method of removal essentially concerned this fundamental issue.

The Constitutional Convention settled the provisions for the new federal judiciary, stipulating, that the judicial power of the United States is vested in one Supreme Court, and in a number of inferior courts (defined by the Congress). It was ultimately decided at that time, that the judges (both of the supreme and inferior courts), shall have life tenure; they shall hold their offices during, so called, good behavior. This decision became Article III. Section 1 of the U.S.A. Constitution.

At the same time the method for **removing judges**, was defined. The Article II, § 4, provides that the President, Vice President and all civil officers of the United States, are removed from office on **impeachment** for conviction of treason, bribery, or other high crimes and misdemeanors. Article I, § 2, gives the House of Representatives the sole power of impeachment. Judges are considered to be Civil Officers of the United States, therefore, the way of removal them from the office is impeachment.

For much of **England's history**, judges held their offices **during the king's pleasure**. The dismissal of Sir Edward Coke by King James in 1616 is the most famous example of judicial displacement by the Crown. To remove judges from just political pressure, Parliament provided in the Act of Settlement in 1701 that upon address of both houses of parliament, judges may be **removed by impeachment** by the commons in parliament. During the colonial period, for the most part, judges held their offices during the pleasure of the royal governor (Ziskind, 1969).

APPOINTMENT OF JUDGES AND LIFE TENURE IN SOME STATES OF THE USA

According to Ziskind (1969), great majority of the States' Constitutions with some exceptions, provide for judges to be appointed by the Assembly and/or President or Governor, having tenure during good behavior and to be removed on impeachment when found guilty of misbehavior only.

Delaware Constitution empowered the governor and the general assembly to appoint three justices; the tenure of all judges was to be during good behavior. They could be removed on impeachment by the house of assembly, if offending against the state by maladministration, corruption, or other means, on conviction of misbehavior at common law, or upon address of the general assembly.

In **New Jersey**, the judges of the state supreme court were appointed **for seven-year** terms by the governor and assembly. Judges could be removed before the expiration of their term of office when found guilty of misbehavior by the council or on impeachment by the assembly.

New York, on the other hand, provides tenure during good behavior or until age sixty for the chancellor, the judges of the Supreme Court, and for the judges of the county courts.

According to the **Pennsylvania** Constitution of 1776 judges were appointed by the president and five council men for seven-year terms. Reappointment was possible and so was removal for maladministration.

The **Virginia** constitution as adopted in 1776 the stipulated that legislature appoints by joint ballot of the two houses, Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behavior.

The **Massachusetts** constitution of 1780 stipulated tenure during good behavior for all judges, but the governor, with the consent of the council, could remove them upon the address of both houses of the legislature.

INDEPENDENT JUDICIARY IN U.S. CONSTITUTIONAL TRADITION

Secure tenure for judges was in the U.S. history not essential just to the maintenance of political freedom. It was essential to the **preservation of the rights of every individual**, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges, as

free, impartial and independent, as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, and of every citizen, that judges hold their offices as long as they behave themselves well (See: Herron, Randazzo, 2002 and Di Tullio, Schochet, 2004).

Tenure during good behavior was during the history unacceptable to many, due to the vagueness of the term “good behavior.” It was pointed out, that it could be carried out applying preferential treatment of those expecting good behavior and discrimination to others. Many preferred direct election of justices by the people for a fixed term. They objected to tenure during good behavior arguing judges were made independent both of the legislature and of the people. But **critics of life tenure in the U.S. constitutional history never prevailed.**

Life tenure was for Founding Fathers, of the US Constitution (specifically Alexander Hamilton) essential to assuring the absolute independence of the judiciary from the influence of the political branches¹.

Of course, there were other opinions. According to Powe (1995), long term life tenure (such as eighteen years) will generally avoid problems, while still maintaining sufficient independence and expertise.

As it is generally known, the Twenty-Second Amendment to the Constitution of the USA, limits presidents of the USA to two terms in office. Critics of the life tenure offer this limitation as an argument for limiting the term of office of members of the Supreme Court also to a specified number of years.

There is a common understanding of all critics of life tenure for judges, that experiences deriving from life tenure could be addressed only if the solution does not endanger judicial independence. There were several attempts in the history to cope with this problem.

A number of proposals through the years, particularly since President Franklin Roosevelt's ill-fated 1937 Court-packing plan, have sought to end life tenure on the Supreme Court. From proposals advocating a mandatory retirement age to others that recommend expanding the Court's membership or appointing justices to fixed terms, etc. The best way to address these three problems without sacrificing judicial independence was considered to replace life tenure on the Supreme Court with a system of staggered, nonrenewable eighteen-year (Carrington, 1999, 397, 453–57).

According to Shugerman (2003, n. 281), in 2002 a constitutional amendment which would limit Supreme Court justices to eighteen-year, nonrenewable terms, with one term expiring every two years was proposed. Under the proposed amendment, each justice would be appointed to a particular term, and one term would expire every two years, on January 3 of each even-numbered year. The Court's entire membership would be replaced over an eighteen-year cycle. Unlike proposals for shorter, renewable terms, the proposed amendment would preserve the Court's independence

1 Article III of the United States Constitution states that “Judges, both of the supreme and inferior Courts, shall hold their Offices during Good Behavior.

LIFE TENURE OF JUDGES, SOME EU COUTRIES EXPIRIENCE

Tenure of Judges as a Component of Judicial Power

As defined in Herron and Randazzo (2002), judicial independence is the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law). Development of an independent judiciary can be constrained by a weak institutional legacy, limited training and support for judges, and the strength of other political actors.

According to Smithey and Ishiyama (2000) index, the nature of judges' terms and conditions for judicial removal are two of the six components of judicial power, in addition to the following: whether decisions can be overturned, the presence of a priori review, number of actors involved in judicial selection, establishment of court procedures.

The Smithey and Ishiyama (2000) analysis demonstrates that the political power of the executive branch directly influences the exercise of judicial review in post-communist states. Strong presidents impose substantial constraints on judicial behavior, and courts may be affected by presidential power in two ways. On one hand, judges are less likely to invalidate legislation or governmental actions in countries possessing strong presidents. Additionally, if the president appears before the court as an appellant, courts may be more likely to acquiesce to executive authority (Herron, Randazzo, 2002).

Countries in transition (post socialist and communist countries) are confronting with the challenges of this kind provoked by law maturity and understanding of pillars of democracy like independence of judges and independence of judiciary are.

Independence of the Judiciary, International Prospective

The independence of the judiciary is a prerequisite for correct and lawful implementation of rights and freedoms. It is *condicio sine qua non* of the right of an individual to have his/her rights and freedoms determined by an independent judge.

Like the Universal Declaration of Human Rights, 1948² (Article 10) declares, everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Basic Principles on the Independence of the Judiciary, United Nations General Assembly, 1985 state, that the independence of the judiciary must be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2 The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948

The Bangalore Principles of Judicial Conduct of 2002 (Value 1: INDEPENDENCE) declare that Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial³.

Independence of the Judiciary, European Prospective

Also at the European level there exist a large number of texts on the independence of the judiciary; the right to an independent and impartial tribunal is first of all guaranteed by Article 6 of the European Convention on Human Rights, 1950 (everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...). In addition, the following are essential (Venice Commission Report 2010):

- Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges;
- Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges;
- Consultative Council of European Judges (CCJE) Opinion no. 6 on Fair Trial within a Reasonable Time, no. 10 on the “Council for the Judiciary in the Service of Society”
- Consultative Council of European Judges (CCJE) Opinion no. 11 on the Quality of Judicial Decisions;
- European Charter on the Statute of Judges (Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998).

According to Venice Commission Report 2010 the independence of the judiciary is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people. The Venice Commission strongly supports the approach, that basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts, like it is the case in many countries including Slovenia.

Venice Commission Report 2010 provides that Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office, considering in addition, that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.

The Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence (Venice Commission Report, 2010, par. 38).

The **EU Court of Justice** is an exception as far as the tenure is concerned. The reason for limited tenure lies in the mission and jurisdiction of the Court and the specificity

3 It is further said that 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; a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

referring to the procedure on the appointment of EU Court judges. Namely, main jurisdiction of the EU Court of Justice is to interpret EU law and to make sure it is applied in the same way in all EU countries and to settle legal disputes between EU governments and EU institutions, individuals and companies. EU Court of Justice is composed by one judge from each EU country. Each judge and advocate-general is appointed **for a term of six years**, which can be renewed. The governments of EU countries agree on whom they want to appoint.

The judges of The **European Court of Human Rights** are for the same reason appointed for the limited period of time. The European Court of Human Rights is a supranational or international court established by the European Convention on Human Rights. The Convention was adopted by Council of Europe on the basis of Article 19 of the European Convention on Human Rights, and all of its 47 member states are contracting parties to the Convention. Protocol 14 (1 June 2010) amended the Convention, so that judges would be elected **for a non-renewable term of nine years**, whereas previously (before the Amendment), judges served a six year term with the option of renewal.

Tenure of Judges in some EU Countries

There is no uniform concept on the length of tenure and the way of appointment and removal of judges in EU countries. No harmonization of EU legislation takes place in this field. Despite, life tenure is applied in the **majority of EU countries**. Obviously life tenure has become as one of the generally accepted principle of EU law, being applied in the majority of EU countries Constitutions and as such became a part of EU primary legislation.

Analyzed EU countries follow the principle of judicial independence guaranteed by secured tenure of judges. In addition in most of the countries legislation are very sensitive to the principles of division of powers in governance the state, applying the rule of appointment of judges by professional and politically neutral bodies.

There are several combinations in the respective national legislations depending on the conditions that must be fulfilled by the candidate for judge in order to be appointed in life tenure like probation period, appraisal, experience, appointment and retirement age, etc, and depending on the body responsible and the procedure to appoint and remove judges.

Judges in **Bulgaria**⁴ are according to European e-justice, Legal Profession and Justice Networks, appointed, promoted and demoted, transferred and relieved of office by decision of the Supreme Judicial Council. Subject to a positive comprehensive appraisal of their performance, judges acquire tenure by decision of the Supreme Judicial Council after five years in office.

Judges in **Czech**⁵ are appointed by the President of the Republic and take office. Appointment as a judge is not limited in time, but judges may be released from their duties temporarily by the Minister of Justice. Judges' tenure ends at the close of the year in which they reach the age of 70. Preparation to become a judge involves three years' service as a

4 https://e-justice.europa.eu/content_legal_professions-29-BG-sl.do?clang=en

5 https://e-justice.europa.eu/content_legal_professions-29-CZ-sl.do?clang=en

trainee judge in the courts. On completion of their preparatory service, trainees sit a special judicial examination (European e-justice, Legal Profession and Justice Networks).

In England and Wales, judges of differing judicial status (also in terms of tenure) in both full-time and part-time posts sit in the various courts and tribunals. The Judicial Appointments Commission (JAC) is an independent commission that selects candidates for judicial office in courts and tribunals. Part-time judges are usually appointed for a period of not less than five years, subject to the relevant upper age limit (European e-justice, Legal Profession and Justice Networks)⁶.

In **Estonia**, judges are appointed to office for life. The Minister for Justice has no right of command or disciplinary authority over judges. A judge can be removed from office only on the basis of a court judgment that has entered into force. Judges may serve until the age of 67, but this may be extended (European e-justice, Legal Profession and Justice Networks)⁷.

In **Finland**, judges are members of an independent judiciary. They hold office in the Supreme Court, courts of appeal and district courts, the Supreme Administrative Court and administrative courts, as well as the Insurance Court, the Labor Court and the Market Court. Judges are state officials and cannot be removed from office. A judge may not be suspended from office, except by a judgment of a court of law. In addition, a judge cannot be transferred to another office without his or her consent. According to the law, the provisions governing leave of absence, admonition, termination of employment and temporary dismissal of other civil servants do not apply to judges. According to the State Civil Servants Act, a judge is obliged to resign from office once he reaches the statutory retirement age (for judges this is 68), or upon becoming permanently incapacitated (European e-justice, Legal Profession and Justice Networks)⁸.

Professional judges in **France** (*magistrats*) are **career judges**, and are divided into **adjudicating judges**, who try law cases, and the **law officers who work for the State Counsel's Office** (*ministère public* or *parquet*). Adjudicating judges are not subject to instructions from any higher authority, and enjoy security of tenure, in that they cannot be given a new posting without their consent. The Supreme Council of the Judiciary puts forward nominations for the posts of adjudicating judges at the Court of Cassation, first presidents of the courts of appeal (*cours d'appel*), and presidents of the regional courts (*tribunaux de grande instance*). Other adjudicating judges can be appointed only with its **assent**. In France the judges of the local courts (*juges de proximité*) were introduced by the Justice System Framework and Planning Act (*loi d'orientation et de justice*) of 9 September 2002, supplemented by Act No 200547 of 26 January 2005; they are appointed by order (*décret*), with the assent of the Supreme Council of the Judiciary, for a term of seven years, which may not be renewed (European e-justice, Legal Profession and Justice Networks)⁹.

6 https://e-justice.europa.eu/content_legal_professions-29-EW-sl.do?clang=en

7 https://e-justice.europa.eu/content_legal_professions-29-EE-sl.do?clang=en

8 https://e-justice.europa.eu/content_legal_professions-29-FI-sl.do?clang=en

9 https://e-justice.europa.eu/content_legal_professions-29-FR-sl.do?clang=en

According to Seibert-Fohr (2012) in **Germany**, one aspect of personal independence of judges is the appointment for life until retirement which is usually at the age of 65. As a general rule, judges should be full-time and in a permanent position. There are exceptions: Temporary appointment is allowed on the basis of a legal act and only for functions specified by law. Judges on a tenure track are appointed on probation for at least three years and need to be appointed for life after five years in office. Specific rules apply to the Federal Constitutional Court: The term of office of the judges of this court is twelve years without the possibility of re-election. In any case, the term ends when a judge reaches the age of 68.

The Constitution of **Hungary** (European e-justice, Legal Profession and Justice Networks)¹⁰ stipulates that judges are independent; they make decisions on the basis of the law and in harmony with their convictions, and they may not be influenced and directed in making their judgments. The right to appoint judges lies with the President of Hungary (köztársasági elnök). Candidates for judges must have at least one year's experience as a court clerk (bírószági titkár) or district attorney clerk (ügyészségi titkár), or as a constitutional court judge, military judge, prosecutor, notary public, attorney at law or legal counsel, or in a position at a central administrative agency (központi közigazgatási szerv) for which a bar examination is required.

The Judicial Appointments Advisory Board in **Ireland** identifies and informs the Government of the suitability of persons for appointment to judicial office. The Judicial Appointments Advisory Board (JAAB) was established pursuant to the Court and Courts Officers Act 1995. Judges are appointed from the legal professions of qualified solicitors or barristers with certain years of practicing experience (not research). For the District Court, Section 29(2) of the Courts (Supplemental Provisions) Act 1961 provides that a person who is a practicing barrister or solicitor of not less than ten years' standing is qualified for appointment as a judge of the District Court. Under the Constitution, Judges of the High Court and Supreme Court can only be removed from office for stated misbehavior or incapacity after resolutions have been passed through both houses of the Oireachtas (Irish for Parliament). The Courts of Justice Act 1924 and Courts of Justice (District Court) Act 1946 provide similar statutory provisions for judges of the Circuit and District Courts (European e-justice, Legal Profession and Justice Networks).¹¹

The Constitution of **Luxemburg** guarantees the political independence of adjudicating judges. Their appointment is permanent. An adjudicating judge can be deprived of his or her position or suspended only by a court judgment. Moreover, an adjudicating judge can be transferred only by appointing him or her to a new position and only with his or her consent. Nevertheless, in the event of disability or misconduct, adjudicating judges can be suspended, dismissed or transferred, in accordance with the conditions laid down by the law (European e-justice, Legal Profession and Justice Networks).

Judges and Magistrates in **Malta** are appointed by the President of the Republic. They are independent of the executive and enjoy security of tenure. They can be removed

10 https://e-justice.europa.eu/content_legal_professions-29-HU-sl.do?clang=en

11 https://e-justice.europa.eu/content_legal_professions-29-IE-sl.do?clang=en

from office by the President in the event of proven inability to perform the functions of their office (whether arising from infirmity of body or mind or from any other cause) or proven misbehavior, upon an address by the House of Representatives supported by the votes of not less than two-thirds of all members thereof (European e-justice, Legal Profession and Justice Networks)¹².

Permanent judges (*ordinarie domare*) in Sweden are appointed by the Government on recommendation by an independent state advisory body, the Judges Proposals Board (*Domarnämnden*). In principle, a judge cannot be dismissed other than in cases set out in the constitutional document known as the Instrument of Government (*regeringsformen*). Most permanent judges work as district court or administrative court judges, or as judges at courts of appeal or administrative courts of appeal (European e-justice, Legal Profession and Justice Networks).¹³

THE CASE OF SLOVENIA

Historical Overview on Appointment of Judges in Former Yugoslavia

Although it the principle of separation of government powers was not strictly established in the former Yugoslavia, the Constitutional Law of 1954 sets out the powers of the Federal Assembly to appoint judges of the Federal Court. The Law on Federal Courts followed that constitutional rule. According to Constitution of Yugoslavia of 1963 and its amendment of 1958, all the courts (except Federal Court and military courts) were under the jurisdictions of republics. Additional steps in this direction were made by the Constitution of Yugoslavia 1974, when the rules and principles of election by parliamentary power, of autonomy and independence, including the immunity of judges were consistently set out by the Constitution rather than implemented in real life.

Judges of all kinds of courts (regular courts, courts of associated labor, self-management courts etc.) in former Yugoslavia were appointed by the assembly of the respective socio political communities (on municipal, republic and federal level).

According to the Law on Regular Courts, judges in former Yugoslavia were appointed on a proposal made by Judicial Council, followed by the public tender, organized by the ministry responsible for justice.

Judges in former Yugoslavia were appointed for limited period of time, namely for the period of eight years, with the right to be reappointed. Judges could be removed from the office for serious violation of legislation or ethics.

It is important to add that the described rules on appointment of judges by the parliament were applied in the political context of monoparty political system. The influence of the sole party monopoly power, evidently could have not been avoided.

12 https://e-justice.europa.eu/content_legal_professions-29-MT-sl.do?clang=en

13 https://e-justice.europa.eu/content_legal_professions-29-SE-sl.do?clang=en

The Tenure of Judges in the Constitution of Slovenia

According to article 2 of the Constitution of the Republic of Slovenia (herein after RS Constitution), Slovenia is a state governed by **the rule of law**.

The principle of the separation of legislative, executive and judicial powers is introduced in Slovenia. As it is declared in the article 3 of the RS Constitution, in Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive and judicial powers.

There are other constitutional rules related to the rule of law principle and judiciary independence, like:

- **Equality before the Law**; In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance. All are equal before the law (Article 14.)

- **Exercise and Limitation of Right**; Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed (Article 15).

- **Equal Protection of Rights**; Everyone shall be guaranteed equal protection of rights in any proceeding before a court and before other state authorities, local community authorities and bearers of public authority that decide on his rights, duties or legal interests (Article 22).

- **Right to Judicial Protection**; Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law (Article 23).

- **Right to Legal Remedies**; Everyone shall be guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other state authorities, local community authorities and bearers of public authority by which his rights, duties or legal interests are determined (Article 25).

As for the Judiciary, the Constitution of the RS explicitly declares independence of Judges: Judges shall be independent in the performance of the judicial function. They shall be bound by the Constitution and laws (Article 125).

Permanence of Judicial Office is one of the most important tools of independence of Judges in the Constitution of RS. It is stipulated in the RS Constitution, that the office of a judge is permanent. The age requirement and other conditions for election are determined by law. The retirement age of judges is also determined by law. It is therefore constitutionally permitted to define by law the issues related to judge tenure like age requirement and retirement age and in addition other possible condition for judge's position (Article 129).

Constitution also defines several issues related to the status and tenure of the judges in the Republic of Slovenia, as follows: the way judges are elected, the way of termination and dismissal from judicial office, incompatibility of judicial office and immunity of judges (Article 130, Article 131, Article 132, Article 133, Article 134 of the RS Constitution).

As for **election of Judges**, it is stipulated, that judges are elected by the National Assembly on the proposal of the Judicial Council. The Judicial Council is composed of eleven members. The National Assembly elects five members on the proposal of the President of the Republic from among university professors of law.

A judge **ceases to hold judicial office** where circumstances arise as provided by law. If in the performance of the judicial office a judge violates the Constitution or seriously violates the law, the National Assembly may dismiss such judge on the proposal of the Judicial Council. If a judge is found by a final judgment to have deliberately committed a criminal offence through the abuse of the judicial office, the National Assembly dismisses such judge.

According to the RS Constitution, **judicial office is not compatible** with office in other state bodies, in local self-government bodies and in bodies of political parties, and with other offices and activities as provided by law.

Immunity of judges is based on the principle that no one who participates in making judicial decisions may be held accountable for an opinion expressed during decision-making in court. But, if a judge is suspected of a criminal offence in the performance of judicial office, he or she may not be detained nor may criminal proceedings be initiated against him without the consent of the National Assembly.

In addition to the articles 125 to 134 of the Constitution of the RS, the status of **judges** is in more details governed by the Judicial Service Act (*Zakon o sodniški službi*). Judges are officials who are elected by the National Assembly (*Državni zbor*) on the basis of a proposal from the Judicial Council (*Sodni svet*). The office of judge is permanent, and the age limit and conditions for election are laid down by law. Atwo-thirds majority vote of all Judicial Council members is required for decisions on proposals concerning the election of judges, appeals against the decision to transfer or appoint to a judicial position, to a judicial function or to the position of senior judge and the dismissal of judges;

Political Initiatives on Abolition of Judges tenure in Slovenia¹⁴

Political parties in Slovenia have, provoked by daily political interests and events, been rather active in discussing the issue of permanent judge's tenure.

The most explicit and persistent in requiring the abolition of the permanent tenure for judges have been Slovene Democratic Party (SDS) whose leader was recently finally convicted for corruption and the Slovene National Party (SNS) whose leader and visible members have also found themselves in different court trials; one of their member of parliament was sent to prison for bribery.

The SDS has recently, stimulated by court conviction of their party president for crime, proposed in the parliament the general discussion on the situation in judiciary, which would certainly be taken as a provocation and political pressure on judges' independency.

14 Positions of political parties of Slovenia are taken from the minutes of the discussion on the Session of Constitutional committee, while having the debate on constitutional's amendments to Constitution of the Republic of Slovenia in regular parliamentary procedure, 17. 10. 2011.

Those two parties have constantly underlined that permanent judge's term of office is the main culprit for the alleged critical state of the judiciary. The parties have also previously been repeatedly proposing limited mandate, since as for SNS, judges are the sole appointed officials who are appointed for life.

The Citizens List (DL), the party to which minister of justice belongs, proposes sort of renewable and experimental judge's term of office. By the amendment of the Constitution, DL proposes to introduce so called experimental term; only after the successful completion of the probation period, the judge would be appointed to the permanent tenure.

The Slovene Peoples Party (SLS) explains that the first instance judges could operate more effectively if their mandate would be renewable: The judges will be re-elected to the judges' mandate while meeting the technical requirements, performance and other criteria. The judges will still be elected by the National Assembly on the proposal of the Judicial Council, but only for the first appointment. For further election judicial council, which will be composed of the members appointed by Parliament, and judges themselves, will only be competent.

The idea of a trial term of office for judges, which was already filed in constitutional's amendment procedure has not received a sufficient number (2/3) of deputies' votes, but serious discussion is going on in all political parties.

In the Democratic party of Pensioners (Desus), they support the phasing in of judges life tenure; that would mean that a young judge should prove himself to be a conscientious, professional and moral judge who is worthy of trust of the public and only then could get a permanent tenure. They propose a trial period of five years, during which the judge demonstrates that he or she is qualified to perform the duties of judge in an ongoing mandate. However, it should be tightened criteria for waiver of the permanent judges of the mandate, if it turns out that the judge is unable to judge fairly, honestly and in accordance with the Constitution and laws.

In the New Slovenia Party (NSI) they support the probationary period for judges too. Their position is, that only after successful expiry of this period the judge may candidate for the permanent tenure.

Other parties like Social Democrats (SD), and other left wing oriented parties and movements strongly oppose the abolition of the permanent judge's tenure as the one of the pillars of the judge's independence. According to their positions, permanent judge's tenure protects judges against political pressure and interference and against the judge's temptation to make decisions that are expected of those who are to grant the continuation of the judicial mandate.

Political Initiatives on abolition of judges tenure in Slovenia have to do with current judicial adventures of some political leaders. Judicial independency is certainly threatened if the highest political leaders publicly express contempt and distrust in judiciary, due to personnel involvement in a judicial process and finally convicted to prison. Is the public expression of dissatisfaction with the court decision (judgment) a convict's human right, even he or she is a public opinion maker and influential politician?

CONCLUSIONS

There is general agreement today among scholars and even politicians on the importance of an **independent judiciary**; but the differences soon break out on the degree, ways and key tools of judicial independence. As well, there are also differences on whether and to what extent the judiciary is to be ultimately responsible to the executive, and/or to the legislative power of governance, and to what extent directly to the people themselves and how does this relationship influences the judiciary position. Arguments over the length, conditions, limitations and/or permanency of **judicial tenure** and the method of removal of judges, essentially concerns this fundamental issues.

Permanent tenure is one of the elements of the independence of the judiciary and precondition for the independence of judges. Abolition would open up the possibility of political interference in the trial of the cases and disciplining judges.

However, to the fact that judges are elected by the parliamentary branch is further discussable. This, by no means exposes judges to actual party coalition pressures and interference, that could be avoided if they would rather be appointed by the President of the Republic instead.

Deep historical roots and long democratic tradition of Life tenure in USA and European legal civilization show how important pillar of the rule of law this democratic tool is. Constitutional changes of this kind, provoked by individual's personnel experience even or because of the fact that this is a politician's personnel experience, are contrary to interest of nation and the state and as such unsuitable and unacceptable.

Permanent tenure is a »fuse» from political abuse of the judicial branch of government, so it should be carefully guarded. It protects judges primarily against politics. But at the same time it protects citizens against politically influenced judicial decisions.

Abolition of permanent mandate could be recognized as a serious and highly non democratic interference in the independence of judges and expose judges to political pressure. Political pressure against the permanent tenure is an unacceptable intervention to basic democratic principle of judiciary independence based on division of powers as one of the most important achievement of modern civilization; when it is caused by daily political interests it shows lack of statesmanship wisdom of the involved factors.

Judges must be independent of the current policy. Poor quality of work, non-transparency and low productivity are not enough good arguments for abolition of life tenure. Instead, other measures to overcome bad performance should rather be taken. Abolition of life tenure in the framework of the efforts to improve the quality and speed of judicial decision-making of justice, is the wrong choice and wrong path.

Understanding the permanent Judges mandate as one of the fundamental acquisition of a democratic society, of course, should not result in the failure to recognize the reality that the judges also are fallible; they are only human beings with all human characteristics and weaknesses. Therefore, the introduction of the institution of permanent Judge's mandate should be accompanied by systemic correctives to prevent, eliminate, or at least mitigate this type of errors and deviations. Not only through effective supervision system over the quality of functioning of appeal and review instances in judiciary related to the

ordinary and extraordinary remedies, but also in other areas. For example, a profound reflection on entry threshold of the permanent judges' mandate related to necessary acquired knowledge and experience is needed. In addition a constant concern for comprehensive development of human resources in the judiciary, which includes not only the continuous updating of legal knowledge, but also the components of professional ethical stance and elemental fairness should be a part of that.

To conclude, permanent tenure is one of the most important acquisitions of the human progress in the judiciary. The independence of the judge would become an empty principle if the judge should behave the way to overcome the process of re-election.

SODNIŠKI MANDAT. ZGODOVINSKI IN SODOBNI PREGLED

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POVZETEK

O pomenu neodvisnega sodstva se strinja tako stroka kot tudi politika. Vendar do razhajanj pride kaj kmalu glede vprašanj o stopnji in o načinih zagotavljanja in ključnih orodjih neodvisnosti.

Zgodovinske okoliščine trajnega sodniškega mandata so močno povezane z zgodovino prava ZDA. Teoretični sklepi, povezani z neodvisnostjo sodstva in trajnim mandatom sodnikov v precejšnji meri temeljijo na številnih primerih in študijah Ameriškega Vrhovnega Sodišča, ki ustvarjajo temeljne vire ustavnega prava ZDA. Ustava ZDA določa, da je sodna oblast v ZDA, v rokah enega vrhovnega sodišča s sodniki s trajnim mandatom. Prav tako je v večini držav za sodnike določen trajni mandat. Velika večina ustav držav ZDA z nekaterimi izjemami, določa, da sodnike imenuje parlament in/ali predsednik ali guverner, z mandatom za čas lepega vedenja in da so lahko odpoklicani z ustavno obtožbo, ko so spoznani za krive za kaznivo dejanje.

Danes lahko govorimo o tem, da je trajni mandat sodnikov civilizacijska pridobitev demokratičnih držav. V državah članicah EU sicer ni enotnega koncepta o dolžini mandata ter načinu imenovanja in odpoklica sodnikov. Kljub temu se v večini držav EU uporablja trajni mandat.

Politične pobude o odpravi trajnega sodniškega mandata v Sloveniji imajo na žalost svoje vzroke tudi v tem, da so se nekateri aktualni politični voditelji sami znašli v sodnih postopkih. Če najvišji politični voditelji javno izražajo prezir in nezaupanje v sodstvo, zaradi lastne vpletenosti v sodni postopek in pravnomočne obsojenosti na zaporno kazen, je to nedvomno poseg v neodvisnost sodstva. Javno izražanje nezadovoljstva z odločitvijo sodišča (sodbe) je sicer človekova pravica obsojenca, toda, če je obsojenec visok politični voditelj, ima takšno obnašanje elemente pritiska na neodvisnost sodstva.

Ukinitev trajnega mandata bi se v takšnih okoliščinah lahko štelo kot ne demokratično vmešavanje v neodvisnost sodnikov in izpostavljanje sodnikov političnemu pritisku.

Ključne besede: neodvisno sodstvo, sodniški mandat, imenovanje in volitev sodnikov, odpoklic sodnikov, ustava ZDA, trajni mandat, ustavne spremembe

SOURCES AND BIBLIOGRAPHY

- Carrington, P. D. (1999):** Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court. *Alabama Law Review*, 50, 2, 397–463.
- Di Tullio, J. E. & J. B. Schochet (2004):** Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms. *Virginia Law Review*, 90, 1093–1149.
- Herron, E. S. & K. A. Randazzo (2002):** University of Kentucky, The Relationship Between Independence and Judicial Review in Post-Communist Courts. *The Journal of Politics*, 65, 2, 422–438.
- Powe, L.A. Jr (1995):** Old People and Good Behavior. *Constitutional Comment*, 12. University of Minnesota, 195–197.
- Seibert-Fohr, A. (2012):** Constitutional Guarantees of Judicial Independence in Germany. 267–287: http://www.mpil.de/files/pdf3/constguarantjudindep_germany.pdf
- Shugerman, J. (2003):** A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court. *Georgia Law Review*, 37, 893–936.
- Smithey, S. & J. Ishiyama (2000):** Judicious Choices: Designing Courts in Post-Communist Politics. *Communist and Post-Communist Studies*, 33, 163–182.
- Ziskind, M. A. (1969):** Judicial Tenure in the American constitution: English and American Precedents. *The Supreme Court Review*, 1969, 135–152.

Documents

- Basic Principles on the Independence of the Judiciary, United Nations General Assembly, 1985:** Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- European Convention on Human Rights, 1950:** European Convention on Human Rights, and Fundamental Freedoms, Rome, 4.XI. 1950, as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.
- The Bangalore Principles of Judicial Conduct of 2002:** The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002.
- U.S.A. Constitution:** The Constitution of the United States of America. A Transcription: http://www.archives.gov/exhibits/charters/constitution_transcript.html
- Universal Declaration of Human Rights, 1948:** <http://www.un.org/en/documents/udhr/>
- Venice Commission Report, 2010:** Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010).

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