REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

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Dissenting Opinion of Judge Dr Zvonko Fišer

1. This dissenting opinion refers to Point 1 of the operative provisions of the Decision, by which the Constitutional Court decided that the second paragraph of Article 62 of the Courts Act is not inconsistent with the Constitution. I voted against the majority decision as I, conversely, am of the opinion that the challenged provision is not in conformity with the Constitution, and in this separate opinion I would like to explain my position.

2. This occasion was not the first time the Constitutional Court decided on the constitutionality of the provisions of the CtsA that regulate the appointment of the presidents of courts. The suspicion that something was wrong with this regulation from the constitutional viewpoint arose already in 1996, i.e. very soon after the new judicial legislation entered into force. The amendment was challenged at that time, together with numerous other provisions, by the Judicial Council and the Supreme Court, i.e. the constitutionally determined judicial self-government authority and the highest court in the state, both of them thus being exceptionally exposed authorities in the judicial field. In the part that also interests us this time, i.e. concerning the appointment of the presidents of courts, the Judicial Council emphasised that the law puts it in a subordinate position in relation to the executive branch of power. The latter is allegedly given the possibility to interfere through “its presidents” with the independent position of judges, and to politically control the judicial power. The Supreme Court was similarly of the opinion that the disputed provision puts the Minister in a superior position in relation to the Judicial Council, as the Minister is not obliged to follow the Judicial Council's opinions with respect to the selection of candidates.

At that time, the Constitutional Court decided by a tight majority that Article 62 of the CtsA, as it read at the time of decision-making, was not inconsistent with either the principle of the separation of powers or the principle of the independence of judges, and that it was also not unclear. Therefore, it decided that it was not inconsistent with the Constitution (see also Decision No. U-I-224/96, dated 22 May 1997, which is cited a number of times in that Decision).

Judge Krivic submitted a dissenting opinion to that Decision. He underlined that the accentuated role of the Minister of Justice in appointing presidents of courts was inconsistent in particular with the principle of the separation of powers. “In the existing circumstances in which the independence of the judicial power is only now being gradually and slowly established after long decades of its subordination to politics, I view it as too dangerous to give the executive branch of power such a strong influence on the judicial power as is included in the possibility to appoint the presidents of courts,” stated

Krivic in the middle of 1997. He further stated that a proper solution to this would be that presidents of courts are appointed by the Judicial Council, although not one composed as it was at the time, but by a strengthened Judicial Council modelled on the Italian example.

3. I have always been in favour of the idea that the position of the judicial power should in general be strengthened in society, both due to its manifest deficiencies in the past and, even more so, because the judicial power is very specific and not easily comparable in all aspects with the two other branches of power. It is in particular necessary to be aware of the fact that it is substantially more sensitive and vulnerable than the other two are. Gaining the self-confidence necessary for deciding is a lengthy process that can be crucially affected already by an apparently unimportant move or event that perhaps has no connection with the concrete matter. Furthermore, it is difficult to imagine that judicial power would by itself exceed its institutional framework and become vampiric in a manner such as sometimes occurs in the other branches of power. In the vast majority of instances, the abuses of judicial power were abuses caused by others who used the judiciary primarily as a tool. If anything, it would be possible to allege, on a purely principled level, that the judiciary has not been successful in defending itself against its abusers, i.e. that it has not resisted enough. But the danger of the instrumental use, i.e. abuse, of the judiciary is unending. I do not know of any society or any state in which the other branches of power, in particular the executive (to avoid calling it the general political) branch of power, do not strive to gain, have, or maintain their influence on the judiciary. Perhaps at this moment it is no longer possible to speak as vehemently as in the past of decades of judicial power being subordinated to politics; however, despite everything, it is still better to be cautious. The establishment of judicial power that is independent in all aspects is a very demanding process that must continuously be striven for and which can never be fully achieved.

The Slovene judiciary acts in a cramped manner and under numerous pressures, due to which it cannot realise its creative potentials, irrespective of the fact that these are lesser in scope than one would wish. It does not enjoy sufficient public trust, and at the same time very little has been done to increase such trust. Society is insufficiently aware that the judiciary is only a reflection thereof, of its members, and institutions. The judiciary is continuously being criticised due to the delays, which it largely did not cause itself. Among the solutions for such and for the other problems in the judiciary, quantity criteria, instead of quality, prevail, which results in positive effects being smaller than they could be, or even in there being none at all. The structure of the judiciary is unfavourable from a number of aspects and it is even becoming worse. Moreover, the judiciary is extremely poorly paid, despite the fact that the opposite is constantly asserted.

Not that I uncritically accept everything that is happening in the judiciary and in connection therewith, and that I do not see numerous deficiencies concerning such, but the least I can say is that in our country the judiciary is treated on various levels in an incorrect manner and undervalued, and in a manner unconstructive from the viewpoint of the functioning of the state. The positive results achieved fade significantly in the face of the unresolved problems: as this matter does not concern an issue directly related to

deciding on the case at issue, I perhaps should not state that according to numerous parameters the position of the judiciary at present is not better than it was a decade ago.

If for a certain period of time it appeared that with the amendments to the Constitution and judicial legislation the judiciary would move towards a better position at the most general level, it must be underlined that this did not occur. Judges are still elected by the parliament: certainly, in connection with such we can say that in such a manner it democratically legitimises them to adjudicate in the name of the people, which is more or less a nice sounding declaration. However, judges adjudicate with no less legitimacy also where they are not elected by the parliament. Those of us who pay less importance to grandiose words say, concerning the election of judges by the parliament, that a judge whose office is professional is put in his or her position by a *par excellence* political authority. The Judicial Council indeed undoubtedly remains an important constitutional authority in the field of the judiciary, however its position has not significantly strengthened, and it is certainly far from being deemed to represent the apex of judicial self-governance.[1]

4. One element in the mosaic of regulating relations in the judiciary is the procedure for appointing presidents of courts. Perhaps it is not the most important one, but it should not under any condition be underestimated. The president of a court is the head of the judges in the authority that he or she directs, and is the one who decides on a number of matters. On the one hand, the president has an indisputable formal power of decision-making, while on the other, which is probably something that does not need to be specifically proven, the president has at his or her disposal countless levers by means of which he or she can influence the work, ambience, efficiency, professionalism, creativity, and many other aspects at the court that he or she directs. After all, it is the president whom a judge contacts when he or she simply needs – to talk. In sum, the president's influence on the operations of the court he or she directs is (or can be) formally and in reality very significant, therefore the significance of this office for the operation of the judiciary in the broadest sense possible should not in any manner be underestimated.

5. Ultimately, self-evident proof of the above statement is the indisputable fact that due to the successive changes in the judicial legislation the tasks of presidents of courts have accumulated to an extraordinary degree. With every amendment to the CtsA the competences of presidents of courts have only expanded. The legislature thus decided to react to problems in the judiciary, *inter alia*, by strengthening the office and position of presidents of courts.

The present Decision of the Constitutional Court is based on the reasoning of Decision No. U-I-224/96, wherein it compared the tasks and position of presidents of courts. It correctly established that, as already mentioned, in accordance with the existing regulation the competences and authorisations of presidents of courts are far more extensive than they were a decade ago; however, I cannot concur with the conclusion that their role is still predominantly limited to making proposals and issuing opinions.[2] The Constitutional Court established that deciding on the essential issues of a judge's position is reserved for the Judicial Council, whereas when the president of a court

decides on issues that could affect the position of judges and thereby indirectly(!) their independence, it is the CtsA that includes safeguards ensuring the independence of judges. The Constitutional Court listed the provisions of judicial legislation that fall within one or the other mentioned category,[3] and established in the end that the regulation does not give presidents of courts competences that when exercised would interfere with the independent position of judges.

Such a conclusion does not convince me. As seen above, the judiciary is a complexly structured mechanism that operates in an exceptionally sensitive field in which even the seemingly technical competences of presidents of courts may have very long-lasting consequences. Often it is impossible to carry out a precise analysis of everything an individual provision can cause in a concrete case in joint effect with other provisions. It is not necessary that, for instance, the regulation entails in itself an interference with the independent position of judges, as it can occur that this is what it results in, even unintentionally, in joint effect with other regulations. In such case it is necessary to consciously choose a solution that will not interfere or will interfere to a lesser degree with judicial self-regulation.

If one examines what has occurred in the last decade regarding the position of presidents of courts (excluding the Supreme Court, which is not relevant in the case at issue), it is first necessary to establish that development has not in any case followed the direction advocated by Krivic. After all the amendments to Article 62 of the CtsA and to numerous other provisions of that Act that regulate their tasks and competences, presidents of courts are still appointed by the Minister upon the proposal of the Judicial Council. The provisions that regulate appointment and have an influence thereon are, taken as a whole, such that in a concrete case they resulted in the largest district court in the state remaining without a president for significantly more than a year. The Constitutional Court itself recognised in the present Decision that that was not good, and suggested that such deficiency be remedied.[4] In this respect, I would be even stricter, as I am of the opinion that something like that is unacceptable and that the regulation cannot be in conformity with the Constitution already due to the fact that it can lead to a stalemate situation. The system of checks and balances is an important democratic achievement, however mutual blockages entail a disruption that is not acceptable. In my view, a regulation that results in such a consequence cannot pass constitutional review.

In brief, all of this means that the regulation of the appointment of presidents of courts currently in force is, in my opinion, inconsistent with Articles 3 and 125 of the Constitution. Therefore, I could not vote in favour of Point 1 of the operative provisions of the Decision.

6. The efforts of the state to make the judiciary work more effectively and efficiently are legitimate, even necessary; however, the increasingly detailed regulation of all possible situations and the strengthening of the competences of presidents of courts, which is consistently shown to be one of the critical points where the executive power can interfere with the judiciary, is not the right way forward. No matter how unusual, not to say heretical, it may sound at the moment, I am convinced that concerning the first part [of the

reasoning], the path of internal judicial self-regulation with a strengthened role (and of course also responsibility) of the Judicial Council should have been pursued.

On the other hand, as regards the regulation of the competences of presidents of courts, with some poetic freedom I would characterise their position in the initial text of the CtsA as idealised and somewhat naïve. Since then [i.e. since the adoption of the original CtsA], the entire development has gone very decisively in the direction of emphasising the office of presidents of courts, which is leading them – if it has not yet led – towards the position of managers. This is where I see a further significant difference between the position of presidents of a court that they enjoyed at the time when the Constitutional Court decided on this matter for the first time, and the position that they enjoy today.

In other words, as long as the office of the president of a court remains within the limits of the tasks and competences that are traditional in our legal environment, then a decision on the appointment thereof should in terms of substance be made by the Judicial Council. However, if in the meantime the substance of such office has essentially changed – and I am increasingly inclined to consider that it has – then the matter at issue concerns a completely different position that should be regulated differently and assessed anew. This is then a type of head of a court that does not exist in our legal environment, let alone is familiar. Such regulation is indeed possible and recognised in comparative law; certainly it has its advantages and disadvantages. I am not going to adopt a position thereon at this time; however, I would like to warn against intermediate solutions. As Slovenes like to state robustly, such are neither fish nor fowl.

7. Although the key principled questions regarding the appointment of presidents of courts were completely the same also this time as those during the first decision-making [by the Constitutional Court on this issue], the present decision-making was accompanied by certain new aspects. Among such, particularly notable was the fact that the Constitutional Court was at the same time deciding on the constitutionality of a law on the basis of the petition of an individual as well as on his constitutional complaints. Due to such, it is impossible to avoid the impression that that part of the decision-making, which was extremely important for the complainant, at least partially diverted attention from the principled questions that I have discussed above. While I certainly do not claim that the Constitutional Court did not consider them very thoroughly, there was, nonetheless, at the same time a great deal of attention dedicated to various procedural aspects of decision-making in the procedure for appointing presidents of courts. For such reason, it appears that by its Decision the Constitutional Court attempted to establish a kind of balance between the problems of a principled nature and deciding on concrete violations that negatively affected the complainant. I am not convinced by the Decision also from this perspective.

Judge
Dr Zvonko Fišer

Endnotes:

[1] Concerning the Judicial Council and its role in the Slovene legal system, from the perspective of comparative law, and *de lege ferenda,* see also Z. Fišer, *Sodni svet ali pravosodni svet* [The Judicial Council or the Justice System Council], in: *Normativne spremembe na področju sodstva v Republiki Sloveniji* [Normative Changes in the Field of the Judiciary in the Republic of Slovenia], pp. 10–24, Slovensko sodniško društvo, Ljubljana 2001.

[2] See Para. 29 of the reasoning of the Decision.

[3] See, in particular, notes 13–15 in Para. 29 of the reasoning of the Decision.

[4] See, in particular, Para. 28 of the reasoning of the Decision.