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## ***Evolving Justice:***

# ***The Constitutional Relationship Between The Ministry Of Justice And The Judiciary And A Short Overview Of Recent Developments In The Area Of Court Management In The Republic Of Slovenia***

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## **I. INTRODUCTION**

Slovenia in 1995 embarked on a road of reforming its judiciary using a model that harked back to history but proved outlived. We learned the hard way that in terms of court management diffusion of responsibility breeds complacency, defeatism and indifference especially if it is combined with courts of inadequate size and capacity for effective delivery of justice. The most prominent feature of the reform was the reorganization of the courts of the first instance where the jurisdiction of the former monolithic Basic Courts was divided between new Local and District Courts. This resulted in that inter alia the most senior and experienced judges were delegated to District Courts. The reorganization also divided the caseload unevenly between the Local and District Courts. As a consequence the Local Courts were left with mostly inexperienced judges that had to deal with the bulk of the overall caseload of the courts of the first instance. The consequences were thus obvious. The motivation of the judges fell significantly which led to the overall performance especially in Local Courts to decrease substantially. This in turn led to a steady increase of unresolved cases which in time proved the main cause for considerable court backlogs that in the end culminated in the *Lukenda v. Slovenia* decision of the European Court of Human Rights in Strasbourg<sup>1</sup>.

Even before that fateful decision of the Strasbourg Court efforts have been made in Slovenia how to improve the efficiency of the court system without sacrificing any aspect of the independence of adjudication. These efforts culminated in the Act Amending the Courts Act of 2009<sup>2</sup>, enacted with the 1<sup>st</sup> of January 2010, which main – but not exclusive – achievement was a reinvigoration of the court management principles in courts of the first instance and thereby in the judiciary in general.

The purpose of this paper is to demonstrate not only the basic outlines of the reorganization of courts of 2010, the most important of which is the answer to the question how to reorganize a court system without the abolition of individual courts, but to delve deeper into the constitutional relationship between justice administration and court management as one of the basic functions of a democratic state in Slovenia. Because only a true grasp of this relationship can provide answers on how to avoid past mistakes and exact reforms in the judiciary that can truly work in practice.

## **II. AN OVERVIEW OF THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE MINISTRY OF JUSTICE AND THE JUDICIARY IN THE REPUBLIC OF SLOVENIA**

### **1. SEPARATION OF POWERS IN THE REPUBLIC OF SLOVENIA<sup>3</sup>**

The Constitution of the Republic of Slovenia (hereinafter: the Constitution)<sup>4</sup> in the second sentence of its Article 3 holds that power in the Republic of Slovenia is vested in (and henceforth emanates from) *the people*<sup>5</sup>. Citizens exercise this

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<sup>1</sup> App. no. 23032/02, 6<sup>th</sup> of October 2005.

<sup>2</sup> Official Gazette RS, No. 96/09. The Act was drafted and published in 2009 and entered into force with the 1<sup>st</sup> of January 2010.

<sup>3</sup> This section and most of the subsequent section, unless otherwise noted, are derived and modified from the Decision of the Constitutional Court of the Republic of Slovenia No. U-I-159/08, dated 11<sup>th</sup> of December 2008, Official Gazette RS, No. 120/2008 and OdlUS XVII, 71, paras. 23-27.

<sup>4</sup> Official Gazette RS, Nos. 33/91-I, 42/97, 66/00, 24/03, 69/04 and 68/06.

<sup>5</sup> Provisions of a similar nature were from 1945 onwards found in almost all of the different permutations of the Federal Constitution and the constitutions of federal entities that regulated the constitutional order of what was in its final form from 1963 until 1991 the Socialist Federal Republic of Yugoslavia and the Socialist Republic of Slovenia as its federal entity. However the aforementioned constitutional order was also based on the principle of the unity of the powers (also known under the comparable synonym: “fusion of powers”) that did not support or enable democratic structures of the pluralist kind. The Courts (with the prominent exception of the so-called “political trials” after the Second World War) had at least nominal independence in this system. See Breznik, J., *Predpisi o sodstvu in državnem tožilstvu z uvodnimi pojasnili* (Regulations on the Judiciary and the Public Prosecution: Introductory Remarks), ČZ Uradni list RS, Ljubljana 1994, p. 10-11. This was true mostly for the system of regular courts as opposed to the military courts, the Courts of Associated Labor and minor offence judges, the latter in some professional circles not even being considered “proper” judges

power directly and through elections, consistent with the fundamental principle of the separation of legislative, executive, and judicial powers. As this is one of the fundamental principles of the Slovenian constitutional order its full effect, especially from the viewpoint of the position and functions of the judicial power, must and should be understood in connection with other fundamental constitutional principles such as the principle of democracy and the principle of a state governed by the rule of law.

The modern perception of the principle of the separation of powers entails that various bearers of fundamental functions of state power – be it legislative, executive or judicial – are relatively independent and autonomous in relation to other such authorities but always in such a manner that none of them prevails exclusively over the other. This is usually ensured thru a rather complicated system of mutual constraint, supervision, controls, balance and, what is often neglected, co-dependence and cooperation<sup>6</sup>. The concept of state power, limited by law, is and has to be the basis and the starting point of every review of the constitutional consistency of relations between the bearers of different offices of the state power in Slovenia. This is especially true for the relevant bearers of the executive (i.e. the Ministry of Justice) and the judicial power.

The Constitutional Court of the Republic of Slovenia in one of its leading decisions<sup>7</sup> held that the principle of separation of powers contains two fundamental elements: the separation of individual functions of state power and the existence (and exercise) of checks and balances between them. The first element requires the legislative, executive, and judicial branches to be separated. This entails that bearers of these individual branches of power have to be separated also. But this principle cannot be implemented in its absolute sense in a modern pluralistic society as this would not only entail that the bearers of individual branches of power would appoint (and be therefore accountable only to) themselves. Furthermore, this would also entail that they themselves would exclusively determine their own competences. Such strict separation of powers can be achieved but always at the cost of democracy, legitimacy and transparency of proceedings. So to counter this effect a true understanding of the principle of separation of powers mandates that a second element of this principle is introduced. Namely a system of control, balance *and cohabitation*, according to which each of the separate branches of power has the competence (and duty) to influence and constrain the other two but always in a transparent manner, bound by law.

However there must always be *cooperation* between the various branches, based on mutual trust, as otherwise the functioning of the system of state power can hardly be imagined in practice. Therefore it is crucial to understand that the separation of state power in Slovenia *in concreto* between the legislative, the executive and the judiciary should not entail relationships of superiority or subordination. It should on the other hand strive to achieve a relationship of constraint and constant cooperation between branches of power of equal stature in a way that each functions within the framework of its own position and competence. Therefore all regulation concerning various mechanisms concerning checks and balances between the branches has to be drafted in a manner that guarantees their constitutional equality<sup>8</sup> and ensures continuing co-existence and cooperation between them<sup>9</sup>.

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at all. However the independence of judges was greatly hampered by the fact that they did not have a permanent term of office. They were up for reelection every 6 or 8 years in the three houses of the then-Assembly ("Skupščina"), which did not constitute a parliament in the modern sense but was more a conglomeration of representatives of various socio-political entities. But it is important to note that Slovenian judges in the former Yugoslavia from 1954 until 1965 did enjoy a brief period when their term of office was not limited by law. Nevertheless in 1971 the Slovenian Association of Judges was founded as a professional, non-political, voluntary and non-profit organization and grouping of individual Slovene judges. This was a unique situation not only among the other federal entities but also for the wider vicinity of near-by states to the East. The Association one year later also adopted a Code of Judicial Ethics that was at that time the very first of its kind in this part of Europe. See: Kodeks sodniške etike (Code of Judicial Ethics of Slovenian Judges), 1979, Republiški sekretariat za pravosodje, organizacijo uprave in proračun SRS, ČZ Uradni list SRS, Ljubljana.

<sup>6</sup> See: L. Šturm, Omejitev oblasti: ustavna izhodišča javnega prava, (Limitation of Power: Constitutional Origins of Public Law), Nova revija, Ljubljana 1998, p. 13.

<sup>7</sup> Decision No. U-I-83/94, dated 14<sup>th</sup> of July 1994, Official Gazette RS, No. 48/94 and OdlUS III, 89.

<sup>8</sup> So that the independence and integrity of an individual branch of power in performing its basic functions are not endangered or in any way substantially compromised. As Chief Justice Burger of the Supreme Court of the USA colorfully stated in the Opinion of the Court in the case of Immigration and Naturalization Service v. Chadha (462 U.S. 919, 951 (1983)): "*The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.*" See *inter alia*: C. R. Ducat, Constitutional Interpretation: Powers of government, Ninth Edition – Volume 1, Wadsworth Publishing, Boston 2009, p. 136. For a Slovenian perspective on the relationship between the judicial branch and the other two branches see Breznik, J., p.10. (The author is a former State Secretary for Legislation and Justice Administration at the Ministry of Justice, a former Supreme Court Justice and was until recently the President of the Administrative Court of the Republic of Slovenia).

<sup>9</sup> The Supreme Court of the USA emphasized the equality of the three branches of power when in the case of Touby v. United States (500 U.S. 160, 168 (1991)) it wrote that the principle of the separation of powers focuses on the distribution of powers among **the three coequal branches**. See: L. H. Tribe, American Constitutional Law, Third Edition – Volume 1, The Foundation Press, New York 2000, p. 124.

This is best evidenced in the relationship between justice administration and the court management<sup>10</sup> in Slovenia. As the Ministry of Justice is part of the executive, its competences vis-à-vis the judiciary in the field of justice administration have to be separated from and be balanced with those stemming from the field of court management, embodied by Presidents and Directors of Courts, Personnel Councils and the Judicial Council as a *sui generis* body of the state, “lingering” in-between the executive, the legislative and the judiciary<sup>11</sup>.

## 2. THE RELATIONSHIP BETWEEN COURT MANAGEMENT AND JUSTICE ADMINISTRATION IN THE REPUBLIC OF SLOVENIA: CONSTITUTIONALLY LIMITED SUPERVISORY AND/OR MONITORING POWERS OF THE EXECUTIVE BRANCH VIS-À-VIS THE JUDICIAL BRANCH

A fundamental function of the judiciary *au general* is *adjudication*. This entails that the integral competence of judges as bearers of judicial power is to interpret and apply the law in individual cases, to decide on individuals' civil rights and obligations and *inter alia* to establish the responsibility and impose sentences for criminal offences committed. From the perspective of the separation of powers in a functional sense the judicial power in Slovenia is completely independent in this, while other authorities must accept and respect judicial decisions and, when necessary, also ensure their implementation.

Furthermore, the judicial power has a special position in the system of the separation of powers as established by the Constitution of the Republic of Slovenia. This is foremost because it is clear from the numerous provisions of the Constitution that the judiciary *has a strongly emphasized role of supervision*, especially over the executive<sup>12</sup>. The fourth paragraph of Article 15 of the Constitution determines that judicial protection of human rights and fundamental freedoms and the right to obtain redress for a violation of these rights is guaranteed. Furthermore the first paragraph of Article 23 gives everyone the right to judicial protection before an independent and impartial court. This independence of the courts

<sup>10</sup> For the purposes of this paper the terms encompassing in their essence the various emanations of judicial administrative governance and administrative self-government – “court management” and “court administration” – are synonymous. However as “court management” is a term more and more widely used in relevant professional circles dealing with this issue, I shall use this term exclusively unless otherwise noted.

<sup>11</sup> The question whether the Judicial Council because of its position outside (and independent of) the three established branches of power in Slovenia can or should be considered a part of court management is a subject for debate. Some hold that court management as an essential administrative function and safeguard of the judiciary should be present and emanate from within the organizational structure of the judiciary. However it is this author's firm belief that the competences of the Slovenian Judicial Council vis-à-vis the judiciary and the Ministry of Justice (especially concerning the new competence of appointment and dismissal of Presidents of Courts) reveal that its position can and should be considered as part of court management at least in the widest sense. Historically, the institute of court management has been introduced as a safeguard and guarantor of independence of the judicial branch of power against the pretensions of the other two branches, especially the executive. Therefore the administrative duties and responsibilities in courts have to be in the hand of the representatives of the judiciary to set them apart from public administration especially considering the fact that as far as the middle of the 19<sup>th</sup> century the courts and the public administration in old Austria shared common ground (for a historical perspective on this matter see: “*Verordnung der Minister des Innern, der Justiz und der Finanzen womit die Allerhöchsten Entschlüsse über die Einrichtung und Amtswirksamkeit der Bezirksämter, Kreisbehörden und Statthaltereien, über die Einrichtung der Gerichtsstellen und das Schema der systemisirten Gehalte und Diätenclassen, sowie über die Ausführung der Organisierung für die Kronländer kundgemacht werden*” of 19<sup>th</sup> of January 1853; RGBl. Nr. 10/1853). See also: Vilfan, S., *Pravna zgodovina Slovencev* (Law History of the Slovenes), Slovenska matica, Ljubljana 1996. The Slovenian model of the Judicial Council as a body that is independent of all the branches of government does in no extent violate this maxim. The separation of powers as a concept was invented and evolved with the basic aim to prevent collusion of powers of the State whereby a few could govern the many without legitimacy, restrain or accountability. The position of the judiciary with its accentuated role of supervision over the decisions of the other two branches therefore necessitates firmly established foundations for the independence of its organization and adjudication – the most important of them being court management. Therefore the principal bearers of court management cannot be representatives of the other branches of power. However judicial independence is not infringed or in any way compromised if one of the principle bearers is an independent – and impartial – institution where adequate representation of the judiciary is safeguarded. This can also be seen as an element of checks and balances between the various branches of government, enacted by an independent outside body – the Council, where six of its eleven members are appointed from the rank of the judiciary. Therefore it is not unreasonable to claim (especially *in lieu* of the recent expanded competences awarded to the Council with the Act Amending the Courts Act of 2009; see *infra*) that the Judicial Council by its competences vis-à-vis the judiciary is not only one of the principal bearers of court management but is also on the way to being the *de facto* guarantor of its excellence in Slovenia.

<sup>12</sup> An essential competence of Slovenian courts is also that they may initiate the procedure for the review of the constitutionality of a law or other regulation when it deems a point of law which it should apply when deciding in a case to be unconstitutional (Article 156 of the Constitution). It is also important to note that the courts are, in accordance with an explicit provision of the Constitution, bound only by the Constitution and laws (Article 125 of the Constitution). This entails that they are not obliged to apply a regulation of the executive branch of power if they deem it to be inconsistent either with a law or the Constitution (*exceptio illegalis*). The judiciary furthermore has the competence to review the legality of individual acts and actions of administrative authorities (Article 157 of the Constitution). Finally, the judiciary also plays the role of an adjudicator in all disputes in which one of the parties is the State.

and impartiality of adjudication is thus safeguarded first and foremost, as we shall see, by the limited prerogatives the Ministry of Justice has in the field of justice administration<sup>13</sup> as opposed to almost entirely judicial court management<sup>14</sup>.

The Constitutional Court in one of its prominent decisions<sup>15</sup> held that *in lieu* of ensuring mutual cohabitation between the judiciary and the executive a sort of **sybiotic relationship** has to exist between the relevant bearers of justice administration and of court management. The Minister of Justice as the bearer of justice administration is therefore responsible for providing general conditions for the successful exercising of judicial authority. This *inter alia* entails the drafting of laws and secondary regulation in the field of organization and operation of the courts, care for the education and professional training of judges and judicial personnel, publishing of professional literature, the providing for personnel, material, technical and conditions for premises of the courts, international legal aid activities, the enforcement of penal sanctions, statistical and other research into the operations of courts and other administrative tasks, determined by law<sup>16</sup>. Justice administration therefore encompasses all supporting responsibilities and specific-but-limited monitoring powers of the executive pertaining to the operations and overall functioning of the judicial system as a whole or in particular. However these functions of the executive have to be enacted in a way that does not compromise (or even attempt to compromise) the independent standing of the judiciary in the institutional, functional and internal sense.

But this cannot be efficiently carried out without a successful cooperation with the Presidents of Courts as the most prominent bearers of *judicial administrative governance* (court management *stricto sensu*) in a particular court<sup>17</sup>. Court management as a legal institution *par excellence* means that the President of a Court has administrative decision-making and management competences involving personnel, technical and overall administrative operations of the court. The President in his capacity *inter alia* deals first-hand with various matters related to the position or rights of judges thereby always keeping in mind on the one hand the timeliness of judicial decision-making *in concreto* and on the other hand safeguarding the independence and impartiality of adjudication.

The successful securing of the conditions for the work of courts and the safeguarding the position, rights and responsibilities of judges is thus possible only given proper cooperation between Presidents of Courts and the Ministry of Justice which is also an emanation of the principle of checks and balances. Only true collaboration between the bearers of

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<sup>13</sup> In Slovene: “pravosodna uprava”.

<sup>14</sup> In Slovene: “sodna uprava”, which in its direct translation means: “court administration”. As stated *supra* the term “court management” can be considered a synonym as it encompasses various activities of judicial administrative governance and judicial self-government pertaining to different bearers in the judiciary (Presidents of the Courts, Personnel Councils, to a lesser degree Directors of the Courts) and outside (the Judicial Council as a constitutional body *sui generis*) and it should not be confused with the term “justice administration” that appears in Chapter 10 and Article 74 of the Courts Act that is, as we have already established, in the exclusive provenience of the Ministry of Justice. Court management is also an emanation of independent judicial authority in the sense of Article 23, paragraph 1 of the Slovenian Constitution and Article 6, paragraph 1 of the European Convention on Human Rights. In a Ruling of the Civil Law Department of the Supreme Court of the Republic of Slovenia (3<sup>rd</sup> of April 1997, No. II Ips 612/95) there is an attempt to define the full extent of the term as such: “The term of court [management] is wide - as regarding the subjects that perform it (Presidents of the Courts - Article 61, paragraph 1 of the Courts Act, Judicial Council - Articles 28 and 95 of the Courts Act, Personnel Council - Articles 30, 69 and 71 of the Courts Act) and as well as regarding its objects (which are frequently related to the position or rights of judges).” An imperfect and greatly simplified definition of the term would be that court management encompasses all the activities in a court that do not constitute adjudication *stricto sensu*. However this definition is too narrow and ignores the fact that court management also includes administrative decision-making activities (usually concerning the status, rights and responsibilities of judges) that are close to or even equal to adjudication. As we have seen in the example of the Slovenian Judicial Council it is also not always essential for court management to emanate from within the judiciary if it is safeguarded that it still has adequate say in the matter. Therefore court management in Slovenia as an essential function of the State encompasses all the different activities, duties and responsibilities of various actors in the field of judicial administrative governance (Presidents and the Directors of Courts, the Judicial Council) and the field of judicial administrative self-government (Personnel Councils) that pertain to the rights, duties and responsibilities of judges and the effective governing of courts in a way that the judicial independence in an institutional and functional sense on one hand and impartiality of adjudication *in concreto* on the other are safeguarded while at the same time conditions for all relevant proceedings to be concluded within a reasonable timeframe and without undue delay are upheld and provided.

<sup>15</sup> Decision of the Constitutional Court of the Republic of Slovenia No. Up-679/06, U-I-20/07, dated 10<sup>th</sup> of October 2007, para. 19 (published in Official Gazette RS, No. 101/07 and OdlUS XVI, 109).

<sup>16</sup> Article 74 of the Courts Act (Official Gazette RS, Nos. 94/07 – official consolidated text, 45/08, 96/09, 86/10-ZJNepS and 33/11).

<sup>17</sup> For a critical view of the role of the President of the Court see E. Pristavec Tratar, *Pravosodna uprava v razmerju do sodne uprave* (The Relationship between Justice Administration and Court Management), Conference on Court Management, 14th and 15th of May 2007, Bled, pp. 46-48. The author is the current Deputy Director General of the Directorate for Justice Administration of the Ministry of Justice and a respected professional among her peers in her field of expertise.



court management and justice administration on various levels based on mutual trust and always respective of constitutional boundaries ensures proper and efficient delivery of justice<sup>18</sup>.

As a matter of fact one might go so far to suggest that justice administration and court management are two faces of a distorted mirror, two shadows on a curved wall coming from a the same source of light, sometimes diverging greatly, sometimes intertwining slightly. As such the exact delimitation between them is not always fixed to the extent it to be immovable. In professional circles this relationship of balance and counterbalance was equated to that of a gymnast traversing a tightrope, always trying to find equilibrium in any given situation<sup>19</sup>. This principle is evident also in the recent events in court management brought by the Act Amending the Courts Act of 2009 concerning the appointment and dismissal of the Presidents of Courts. If this competence until the 1<sup>st</sup> of January 2010 was in the hands of the Minister of Justice and was therefore a part of justice administration in its widest sense it is now in the hands of the Judicial Council and therefore a matter of court management (also in its widest sense). This makes sense if we compare the definitions of justice administration and court management inferred *supra* as both of them include the caveat of safeguarding the independence of the courts and impartiality of adjudication. This is true evidence of their symbiosis: if any of the bearers of one goes over the line the relevant bearer of the other is bound to respond and in doing so evokes true collaboration<sup>20</sup>.

This relationship is most evident when we consider the inner workings of justice administration and court management in the case of one of the most severe measures concerning the performance and the quality of work of a judge: the measure of "service supervision" of judge's work<sup>21</sup>. Service supervision is comprised of all measures necessary for determining the fulfillment of judicial duties and for eliminating the causes of inappropriate performance, quality and expertise of a judge's work<sup>22</sup>.

Service supervision is conducted by the President of the Court and judges of the immediately superior court, specially assigned to this duty. It is initiated *inter alia* on the basis of a substantiated proposal of the Minister of Justice. However if the President of the Court holds that a proposal for service supervision issued by the Minister is not sufficiently substantiated he can request the Judicial Council for a final ruling on whether this proposal is well-founded or not. This is justified by the fact that this instrument if left unchecked in the hands of the executive has the potential to significantly infringe upon the independence of judges and the judiciary as a whole therefore the final decision is reserved for an independent and impartial institution - the Judicial Council.

Finally it is also important to note, that the independence of courts and the impartiality of adjudication is safeguarded by the prescribed form of interaction between the judiciary and the Ministry of Justice when matters of justice administration are concerned. All official communication has to go through the channels of court management: the relevant Presidents and Directors of Courts or the Secretary-General of the Supreme Court. Direct interaction of the Ministry with a particular judge is allowed only in matters concerned with international legal aid or if this is explicitly permitted by law or the Court Rules.

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<sup>18</sup> For a for some controversial but on the other hand also succinctly apt views on the relationship between the Ministry and the judiciary see comments of Norman Doukoff, a higher judge at the Oberlandesgericht in München and adviser in accession of Slovenia to the European Union in B. Ivanc (ed.), *Modernizacija pravosodnega sistema Republike Slovenije, Projekt tesnega medinstitucionalnega sodelovanja – Twinning projekt Slovenija (SI02/IB/JH02)* (The Modernization of the Justice System of the Republic of Slovenia – Twinning project Slovenia (SI02/IB/JH02)), Ministrstvo za pravosodje, Ljubljana 2006, p. 401.

<sup>19</sup> See for further detail see: *E. Pristavec Tratar*, pp. 44-54..

<sup>20</sup> However it has to be understood, that the courts as primary institutions of the judiciary in the end will always have the upper hand: their final decisions have to be upheld by all relevant parties.

<sup>21</sup> As regulated in Articles 79.a to 79.c of the Judicial Service Act (Official Gazette RS, Nos. 94/07 – official consolidated text, 91/09 and 33/11).

<sup>22</sup> These measures include a thorough inspection of files of all assigned cases and all cases in which a final ruling has already been issued. Furthermore other relevant information on a judge's work is collected and disseminated, after which the judge concerned is interviewed considering the preliminary findings of the supervision. However it has to be understood that within the framework of service supervision it is not permissible to prejudice or compromise in any way the independence of the judge's adjudication *in concreto*. The measure of service supervision therefore is not meant to check or monitor if a judge in a particular case has adjudicated correctly in accordance with the relevant law (this is the purpose of the appeals process within the court system) as this would be considered a direct violation of the principle of the independence of the judiciary. Official minutes are kept on the findings and measures of service supervision, and are delivered to the initiator or proposer, the judge concerned, the President of the Court and the relevant Personnel Council. A copy of these minutes is also filed in the judge's personal file, as these findings also form a basis for reviewing a judge's performance when he or she is in line for promotion.

### 3. THE JUDICIAL COUNCIL AS A STATE BODY *SUI GENERIS* AND ONE OF THE BASIC BEARERS OF COURT MANAGEMENT IN THE SLOVENIAN LEGAL SYSTEM

As already discussed in detail *supra* the principle of the separation of powers in Slovenia does not allow for absolute autonomy of individual branches of power as it recognizes that a mutual dependency has to exist and thrive between them. This is especially important when we consider the position of judges and the judiciary. Judges are bearers of power for which there is no direct responsibility to the voters. Therefore it falls within the requirement of the mutual (co)dependency of the bearers of various offices of state authority that the legislative and executive branches should participate in the appointment of judges and Presidents of Courts. The Slovenian Judicial Council is an example of such a solution at the constitutional level. From its eleven members The National Assembly (the legislative) elects five members on the proposal of the President of the Republic (the executive) from among university professors of law, attorneys and other lawyers. The judges on the other hand elect six members from among their own number in such a manner that all of the instances of the court organization are represented adequately<sup>23</sup>. The members of the Council select a President from among their own number. The involvement of the National Assembly and the President of the Republic in appointment of its members is especially pertinent if we consider the fact that in Slovenia both are elected by general popular elections. The Slovenian model of the Judicial Council is closer to the French and Italian solution, but not the German "*Richterra*" whose competences are much closer to Slovenian Personnel Councils – basically performing the function of a committee for the selection of judges<sup>24</sup>.

In Article 130 the Constitution determines that judges are elected by the National Assembly on the proposal of the Judicial Council. Under the provisions of the second paragraph of Article 132 of the Constitution, the National Assembly may dismiss a judge on the proposal of the Judicial Council, if in performing the judicial function he violates the Constitution or seriously violates the law. Further competences are issued to the Judicial Council by the Courts Act and the Judicial Service Act. Thus the Judicial Council in general terms has the competence to decide on all questions which affect the legal position of judges. This entails various issues concerning judicial promotion, the incompatibility of a judicial office, on the transfer and distribution of judges and, as we have seen, at the request of the President of the Court delivers a final ruling on whether a proposal for service supervision over a judge's work is well-founded or not. It also provides the National Assembly with an opinion on the proposed budget for the judiciary and an opinion on laws which regulate the position, rights and obligations of judges and court personnel. All the cited competences enable the Judicial Council to be characterized as one of the guarantors of judicial independence in practice, as it constitutes a body where judges have adequate representation. Its remaining composition of five external legal experts on the other hand also enables it to employ and cultivate strict professional criteria in deciding on questions that determine the position, rights and duties of judges and the position of the judiciary as a whole.

The Judicial Council is not only an authority that is intended to safeguard the independence of the judicial branch of power, but with regard to its power to make proposals it is also the authority which directs personnel policies regarding individuals assuming judicial positions. As of 1<sup>st</sup> of January 2010 the Judicial Council is essentially solely responsible for appointing and dismissing the Presidents of all the courts except the President and the Vice-President of the Supreme Court of the Republic of Slovenia.

However it would be inaccurate and incorrect to consider the Judicial Council to be a body of judicial authority. Judges who are members of the Council in doing so do not adjudicate *stricto sensu* but share in the decision-making process on the rights and obligations of judges. The Judicial Council, even if it does perform a specific role in constituting judicial power and other important tasks concerning the legal position of judges, is thus not a representative of the judicial branch of power. From the point of view of the organization of state power and the Constitution the Judicial Council is a state body *sui generis* which cannot be classified into any of the three established branches of power<sup>25</sup>.

The role, various competences and nature of the Judicial Council has already been discussed in the various preceding paragraphs. Suffice to say that under the Slovenian system the Judicial Council<sup>26</sup> in its decision-making competences is and remains totally independent of either the Ministry of Justice or the judiciary. Its opinions and decisions can (and often do) differ from the opinions and decisions of the Ministry of Justice and the Supreme Court for that matter.

<sup>23</sup> See Article 131 of the Constitution. Provisions of Articles 18 to 29 of the Courts Act regulate in more detail the manner of proposing and electing members of the Judicial Council and the duration of their term of office. All judges who on the day of election perform a judicial function and are inscribed in the permanent judicial register have the right to elect members of the Judicial Council, and any judge – even a President of the Court – may be elected a member of the Judicial Council.

<sup>24</sup> See Breznik, J., pp 16-17.

<sup>25</sup> For a critical view of the role of the Judicial Council before the reform of 2009 see: E. Pristavec Tratar, pp. 51-53.

<sup>26</sup> Even if it *prima facie* might seem that the fact that the slim majority of its members is voted in by judges of various instances carries it over to the judicial side of the fence.



### III. REFORMING COURT MANAGEMENT ACCORDING TO THE ACT AMENDING THE COURTS ACT 2009

#### 1. COURT MANAGEMENT CONCENTRATED: THE NEW ROLE OF DISTRICT COURTS

##### 1.1 ORDINARY COURTS ACT<sup>27</sup> OF 1977

In 1979 the then Socialist Republic of Slovenia (hereinafter: the SRS) implemented a judicial system of regular courts<sup>28</sup>, unique among all the six federal republics and two autonomous provinces of what was until 1991 the former Socialist Federal Republic of Yugoslavia. Namely each of the aforementioned federal entities had separate systems of regular courts with their own permutations of first instance courts, appellate and supreme courts. Slovenia at that time abolished the combination of Local and District Courts on the lower instance level that more or less prevailed in other federal entities and put in its place a system of the so-called Basic Courts<sup>29</sup>. This was a radical departure from the established perception of court organization in more ways than one. Going back so far as the latter part of the 19<sup>th</sup> century on the territory of what is now considered the Republic of Slovenia the established system of courts of the lower instance in one way or the other almost always consisted of Local and District Courts with a varying degree of mutual co-dependency<sup>30</sup>. This was especially evident from the fact that before the establishment of Higher Courts (also in 1979) the District Courts in Slovenia in one time or the other even had substantial appellate jurisdiction over the decisions of Local Courts in their district.

In 1979 with the implementation of the Ordinary Courts Act of the SRS the network of former District Courts was transformed into a network of 8 Basic Courts and the independent legal status of Local Courts was in effect abolished. However the Act provided that the former Local Courts on the territory of a newly established Basic Court became external organizational units of the relevant Basic Court thereby ensuring continual access to justice in the territorial sense.

In summation: between the 1<sup>st</sup> of January 1979 and the 1<sup>st</sup> of January 1995 the network of regular courts in Slovenia consisted in the first instance of 8 Basic Courts and their 42 (territorial) units, 4 Higher or appellate courts and the Supreme Court. The legal and institutional status of the units could in modern terms be compared to a department in a court. As indicated previously these units were by no means independent as the court management was in the hands of the President of the relevant Basic Court, the Head of the unit only had limited, mostly logistical competences. This meant that in that time in effect there were 8 courts of first instance.

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<sup>27</sup> Official Gazette SRS, No. 10/77. The Act was drafted and published in 1977 and came into force with the 1<sup>st</sup> of January 1979.

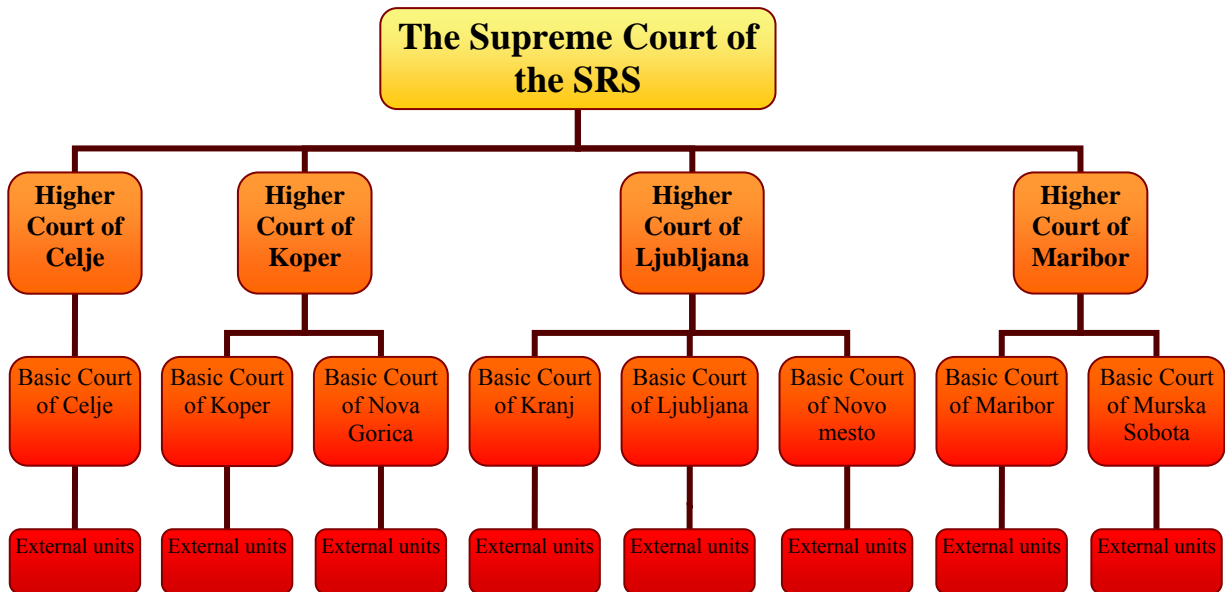
<sup>28</sup> As opposed to the military courts that were separated from the system of regular courts and regulated by special regulation. The same can be said for the so-called Courts of Associated Labor that dealt with what were in its essence labor disputes and minor offence judges, the latter being usually linked to what were then local communities and municipalities.

<sup>29</sup> In Slovene: »Temeljna sodišča«.

<sup>30</sup> This concept was developed and implemented from the latter part of the 19<sup>th</sup> century in what was then the Austrian Empire (from 1867 onwards the Austro-Hungarian monarchy) and survived more or less intact two World Wars, the establishment of what was before the Second World War in its final form the Kingdom of Yugoslavia, and after the war the establishment of the Federal People's Republic of Yugoslavia, later in 1963 renamed the Socialist Federal Republic of Yugoslavia.



The organizational structure of the Slovenian system of regular courts in the terms of court management from the 1<sup>st</sup> of January 1979 until 1<sup>st</sup> of January 1995:



## 1.2 COURTS ACT<sup>31</sup> OF 1994

After the Republic of Slovenia gained its independence in 1991 the courts system remained essentially the same<sup>32</sup> until 1995 when a new Courts Act was implemented. This Act abolished Basic Courts and their units and (re)established in their place a new network of regular courts of the first instance: 11 District Courts<sup>33</sup> and 44 Local Courts<sup>34</sup>. The concept of District and Local Courts was (re)introduced according to the old Austrian system ("Bezirks-" and "Kreisgerichte") that, as we have seen, has more or less prevailed up until 1979. But there was one important difference. Before 1979 the District Courts at least in some aspects did retain a certain degree of supervisory competences over the Local Courts in their district. This also extended to a certain degree to court management. So as opposed to the relationship between the Basic Court and its units there was only a nominal but no effective connection between the District Courts and Local Courts "in its district" in terms of court management duties and responsibilities. Every President of the Court – be it District or Local – was as a rule the sole bearer of court management for his or her court. This meant that there were in fact 55 courts of first instance for a population of about two million.

The general overview was (and in essence still is but, as we shall see, not in terms of court management of courts of the first instance) thus such. Courts of general jurisdiction include:

- 44 Local Courts – first instance courts with jurisdiction over civil cases concerning claims for damages or property rights up to a certain value, disturbance of possession, tenancy relations etc.;
- 11 District Courts – first instance courts dealing with civil cases which exceed the jurisdiction of Local Courts, commercial disputes, copyright cases and cases involving intellectual property disputes, confirmation of rulings of a foreign court etc.;
- 4 Higher Courts as courts of appellate jurisdiction which determine appeals against decisions of the first instance courts and
- The Supreme Court of the Republic of Slovenia as the highest appellate court of third instance, limited to issues of substantive law and to the most severe breaches of procedure<sup>35</sup>.

<sup>31</sup> Official Gazette RS, No. 19/94. The Act was drafted and published in 1994 and entered into force with the 1<sup>st</sup> of January 1995.

<sup>32</sup> With the exception of the *de facto* abolishment of military courts under the explicit provision of the second sentence of Article 126 of the Constitution which prohibits the establishment of military courts in the peacetime. This meant that when the former federal army left Slovenia in 1991 there was no hand-over of files and archives' pertaining to the activity of military courts on the territory of what was until then the former Socialist Republic of Slovenia and they were transferred to the former federal capital of Belgrade.

<sup>33</sup> Eight former Basic Courts and three new District Courts: Krško, Ptuj and Slovenj Gradec.

<sup>34</sup> Most of them were previous external units of Basic Courts.

<sup>35</sup> Added to this but not relevant to the issue at hand: specialized courts in Slovenia are comprised of 3 Labor Courts and one Labor and Social Court (all with the status of a District Court) which rule on labor-related disputes, a Higher Labor and Social Court as an appellate court, and finally the Administrative Court, which provides legal protection in administrative affairs and has the status of a

This created a disproportional situation where in Slovenia there were courts of the first instance that had on one hand up to 30 or even 70 judges, on the other micro-courts with 5 or even less judges. The reform of 1995 had also created difficulties in effective implementation where for some months it was not entirely clear which cases were to be adjudicated by District and which by Local Courts<sup>36</sup>. Also most of the experienced judges of the former Basic Courts either left the judiciary or were assigned to the new District Courts leaving the mostly inexperienced and novice judges to deal with the ever more considerable caseload of especially larger Local Courts. This also had a profound effect on the day-to-day operation of their Presidents of Courts as they were in general more interested with achieving better statistical results in terms of overall cases solved. However this often led the judges to disregard the order of assigned cases and solve the least complicated cases first thereby often leaving the complex and difficult cases on their desks. Also the criteria for the promotion of judges mostly favoured statistical data on quantity and not enough on the difficulty and complexity of solved cases. This in turn gradually caused the cabinets in courts to fill up with ever older unresolved files, the core of which was constituted from the most difficult and extensive cases<sup>37</sup>. As was indicated earlier, this constituted one of the prevalent causes that lay the foundation for the considerable court backlog in the later years, culminating in the *Lukenda v. Slovenia* decision of the European Court of Human Rights in Strasbourg<sup>38</sup>.

Additionally the reform also caused a stir in the formerly streamlined structure of court management, where the role of the President of the Court was substantially diminished in favour of the newly established Personnel Councils as a form of judicial self-government. The President lost some important management levers intended for caseload optimization – the most important being the right to form and issue the annual schedule of judges which remained in the hands of the Personnel Councils up until the end of 2006<sup>39</sup>. This in turn also caused substantial difficulties in the relationship between the Presidents of the Courts and the Ministry as the Presidents more often than not proclaimed that they do not have any official capacity or capability to intervene when an issue of importance was raised (i.e. when a Personnel Council had taken an unreasonably long time to form an opinion on a candidate for a judicial post)<sup>40</sup>. As the Ministry or any other external body (i.e. the Judicial Council) had no significant part to play in appointing the Personnel Councils<sup>41</sup>, their effective accountability to the Ministry was limited. Consequently many managerial tasks and responsibilities within court management were usually never used to its full extent because of the diffusion of competences between the President and the Personnel Council. This was later rectified with amendments to the Courts Act. However in the interim the damage has been done: the number of older unresolved cases mounted, especially in the period from 1994 to 1998<sup>42</sup>.

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Higher Court. The courts specializing with labor disputes were with the Labor and Social Courts Act (Official Gazette RS, No. 19/94) reestablished as a part of the courts of general jurisdiction. Until that time this function was essentially carried out by special Courts of Associated Labor, which could be at best be considered quasi-judicial in nature. In 1998 the Administrative Court was established also as a part of courts of general jurisdiction, taking on a jurisdiction from the Administrative Department of the Supreme Court.

<sup>36</sup> For first indication of this issue see *Breznik, J.*, pp. 23-24.

<sup>37</sup> For a perspective of an experienced President of the Court on this issue see: J. Potočar, *Pristojnosti sodne uprave oziroma predsednikov sodišč v zvezi z Zakonom o varstvu pravice do sojenja brez nepotrebnega odlašanja* (The Competences of Court Management and the Presidents of Courts according to the Act on the Protection of the Right to a Trial without Undue Delay), *Pravosodni bilten* 1/2008, Ljubljana 2008, pp. 1-6. The author, a long-standing President of the largest higher court in Slovenia, goes even further and states that: “*The occurrence of court backlog is not just the responsibility of the judge assigned to the case but is in the same way, in some cases even to a greater degree, the responsibility of the President of the relevant court – of Court Management.*”

<sup>38</sup> For a further overview of the negative effects of the new judicial legislation, enacted in 1995, see I. Bizjak, *Die Justizreform in Slowenien* (The Judicial Reform in Slovenia), in Schroeder, F.-C., *Justizreform in Osteuropa* (The Judicial Reform in Eastern Europe), Peter Lang GmbH, Frankfurt am Main 2004, especially pp. 247-248, (the author was at that time the Minister of Justice in Slovenia and is also a former Director General of Justice and Home Affairs at the Council of the European Union). See also M. Deisinger, *Organization des Gerichtswesens und die Position der Richter in Slowenien* (The Organization of the Judiciary and the Position of Judges in Slovenia) in the same volume, especially p. 170, (the author was the then President of the Supreme Court of the Republic of Slovenia and is now a judge at the national Constitutional Court). Both papers refer to a study of the Ministry of Justice: “*Sodni zaostanki v Republiki Sloveniji – analiza vzrokov in predlogi za zmanjšanje in odpravo*” (Court Backlogs in the Republic of Slovenia – An Analysis of the Causes and Suggestions for their Reduction and Elimination), conducted in 2001 by the Ministry of Justice and the Supreme Court of the Republic of Slovenia and which still published on the official web-page of the Ministry: [http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/statistika/sodni\\_zaoostanki.pdf](http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/statistika/sodni_zaoostanki.pdf). The study established that the main cause for the judicial backlog in Slovenia stemmed from the reorganization of the court system in 1994. See the study, pp. 22-24.

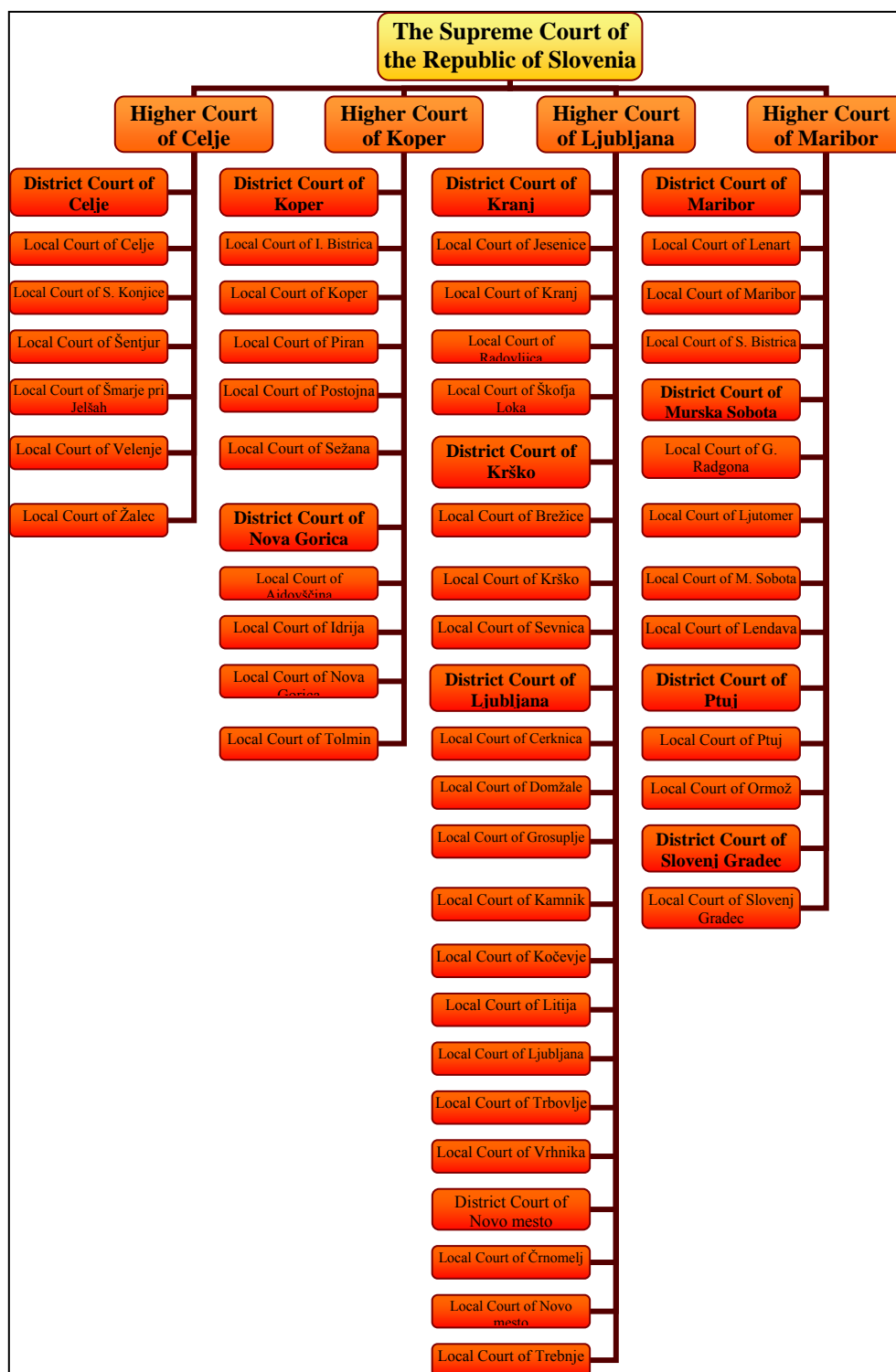
<sup>39</sup> This important competence was transferred back to the President of the Court with the Act Amending the Courts Act of 2006 (Official Gazette RS, No. 127/06).

<sup>40</sup> The role of the Personnel Councils is further discussed and problematized in J. Potočar, p. 5 and E. Pristavec Tratar, pp. 53-54.

<sup>41</sup> The Personnel Councils are appointed by the judges of relevant courts within the structure of the judiciary.

<sup>42</sup> See the study, pp. 22-24.

The organizational structure of the Slovenian system of Courts of general jurisdiction in the terms of court management from 1<sup>st</sup> of January 1995 until 1<sup>st</sup> of January 2010:



### 1.3 ACT AMENDING THE COURTS ACT OF 2009

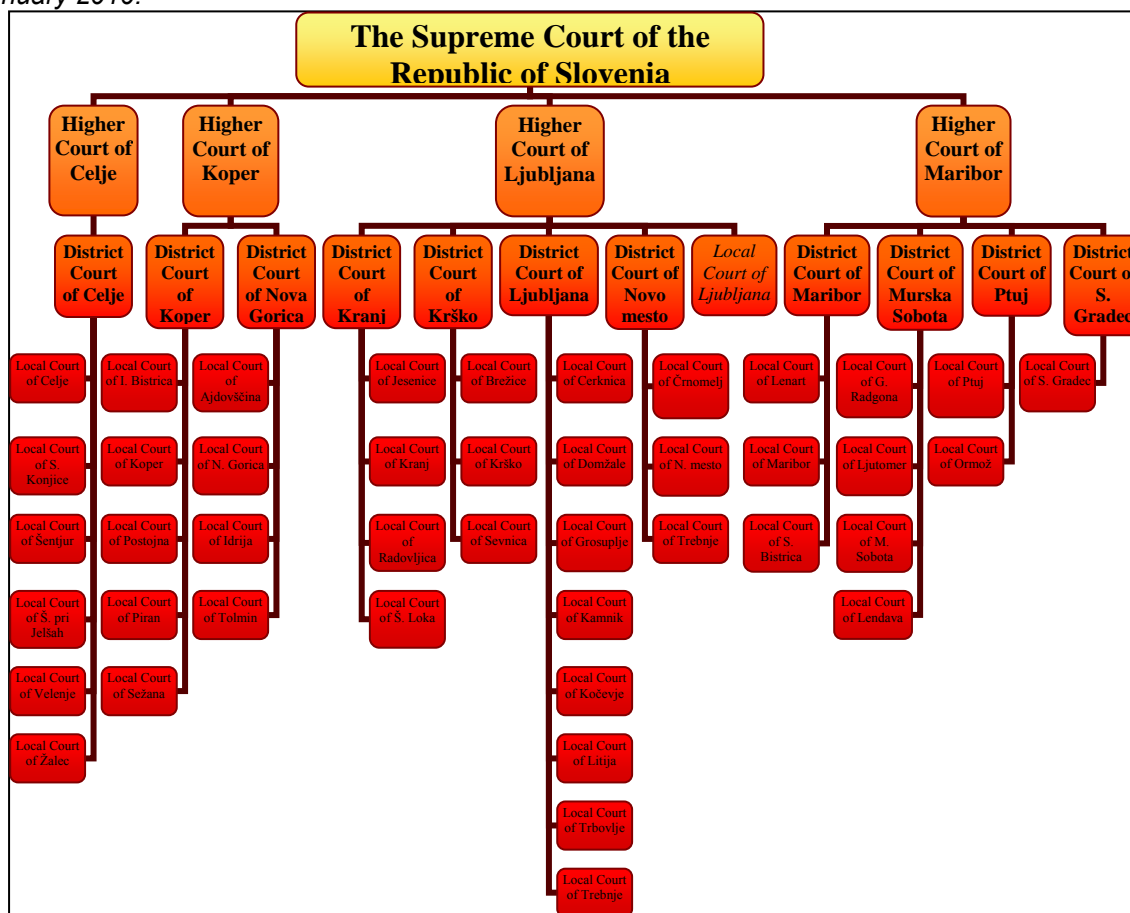
The organizational structure of the courts of first instance in Slovenia before the reform enacted in 2010 was too cumbersome and inflexible to be able to quickly and flexibly react and adjust to changing situations. Reason mandates that the most effective form of court management is found in medium-sized courts. Larger courts because of their size are too inflexible and cumbersome in their response to changes in the environment. But on the other hand small courts as a

rule are considerably more affected by unforeseen absences of judges as their inner reserves can be depleted more easily. Also an unprecedented influx of cases can effectively block the work of such courts for a considerable amount of time. This is not a new finding. Similar recommendations were made by various German experts who took part in pre-accession twinning project in Slovenia from 2002 to 2004<sup>43</sup>.

To achieve this objective the reform transferred most of the relevant levers of court management in Local Courts into the hands of the Presidents of relevant District Courts (and its Directors). Before the reform this was not so, as each court of the first instance, be it District or Local, had its own (atomized) court management, embodied by its President, in most matters separate and independent from the court management of “higher” courts. The challenge we faced in the Ministry drafting this reform was how to reform the network of the courts of the first instance (44 Local and 11 District) without reducing the number of existing courts (opposition of local interests in the National Assembly<sup>44</sup>) or repeating the mistakes committed during the first reform in 1995.

The Act Amending the Courts Act 2009 therefore foresaw a different path for ensuring medium-sized courts: through concentration and transfer of essential court management competences and responsibilities from the Local Courts to the relevant District Courts. It also took into account certain specificities of the largest court in the State – the Local Court in Ljubljana with over 100 judges and 500 judicial staff – by retaining its independent status in terms of court management. The new second paragraph of Article 114 of the Courts Act therefore explicitly states that *all Local Courts are organizational units of the relevant District Court* except for the Local Court of Ljubljana which in terms of its court management remains independent and separate of the District Court of Ljubljana and its President.

*The organizational structure of the Slovenian system of Courts of general jurisdiction in the terms of court management from 1<sup>st</sup> of January 2010:*



<sup>43</sup> See B. Ivanc, pp. 187-191.

<sup>44</sup> Until recently it was possible under Slovenian law for a mayor of a municipality to be at the same time a deputy of the National Assembly (the Parliament). This meant that almost in all terms of office of the Slovenian Parliament after independence of all the 90 deputies there were at least 20 to 25 mayors. As having a seat of a court in a municipality is considered as evidence of prestige of such a municipality it was considered that no mayor/deputy would vote for abolition of a court as that meant that next time a court in his or her municipality could be next.

Under the new regulation the President of the District Court has the competence to, after acquiring the opinion of the Presidents of the relevant Local Courts thereto, set the annual schedule of all the local judges in his or hers district covering specific areas of relevant law. The purpose of this regulation is to ensure even distribution of the caseload in all of the Local Courts in the District and to afford greater specialization of individual judges. The amended Courts Act also provides for the possibility of redeployment of judges of Local Courts within the area of the District, since as we know small courts are very sensitive to the absence of staff and judges. District Court judges can be redeployed in a similar manner as well.

Under the new provisions of Courts Act the President of that District Court can also delegate a part of this competence in terms of court management for the whole District to one or more Presidents of the Local Courts in his jurisdiction if he or she deems this appropriate. This provision explicitly states that court management in the whole District is the sole responsibility of the President of the District Court<sup>45</sup>, who can delegate certain competences to others but will be held accountable for their actions.

In effect the current organizational paradigm in its essence harks back to the system that was in place before the judicial reform in 1995, where court management (and responsibility) in the courts of first instance is divided between a relatively few number of holders thereby especially strengthening the position (and responsibility) of Presidents of District Courts.

## 2. COURT MANAGEMENT REDEFINED: THE ABOLITION OF THE OFFICE OF VICE-PRESIDENT OF A LOCAL COURT AND THE INTRODUCTION OF THE NEW POSITION OF THE DIRECTOR OF THE COURT

One of the immediate consequences of the judicial reorganization in 1995 was also the proliferation of administrative positions in courts concerned with court management. If before the reform there were relatively few offices of Presidents of Courts available in the judiciary – a total of 13 in the system of regular courts<sup>46</sup> - this number was inflated to 60 in 1995 if we take into consideration only courts of general jurisdiction<sup>47</sup>. If we add to that the offices of Vice-Presidents of Courts this figure potentially doubles<sup>48</sup>. This led to a further diffusion of responsibility in terms of court management in the Slovenian judiciary.

The Act Amending the Courts Act 2009 therefore also abolished the office of the Vice-President for all Local Courts except the Local Court of Ljubljana, which because of its special status as the largest court in Slovenia retained its three Vice-Presidents<sup>49</sup>. The abolition of the office of Vice-President of a Local Court was introduced not only as a cost-saving measure but also to streamline the court management in Local Courts. This is especially relevant as important tasks in Local Courts, previously performed by Vice-Presidents, were transferred to the President of the competent District Court and the newly-founded post of the Director of the (District) Court. This enabled the former Vice-Presidents to devote their time to adjudication as full-time judges, the eventual need for substitution of the President of the Court being met by the annual schedule of judges.

As already indicated an important further innovation concerning court management as of 2010 is that all matters concerning court management are no longer in the exclusive provenience of Presidents of the Courts. Some of these are now a shared responsibility of Presidents and the newly-appointed Directors of the Courts<sup>50</sup>.

District Courts, Higher Courts and the Ljubljana Local Court may have the position of a Director of the Court for performing matters pertaining to the business side of court management. An individual District Court may have a Director for lower courts on the territory of this District Court. A Director of the Court has the competence to independently perform tasks of court management for the whole area of the Ljubljana Local Court, District or Higher Court or for the branch offices of that court. These tasks and competences are usually related to the material, technical and financial operations of the court. Furthermore he or she is entrusted with conducting public procurement procedures, decision-making in court staffing matters, matters concerning court security, with monitoring, analysing and updating of business processes. The

<sup>45</sup> With some reservations that concern the status of the Presidents of the Local Courts as such.

<sup>46</sup> President of the Supreme Court, 4 Presidents of Higher Courts and 8 Presidents of Basic Courts.

<sup>47</sup> If we add to this also the specialized courts concerned with labor and social related issues (Higher Labor and Social Court, 3 Labor Courts and the Labor and Social Court of Ljubljana) and the Administrative Court established in 1998 this number is escalated to 66 posts of Presidents of Courts.

<sup>48</sup> The provisions of the fifth paragraph of Article 61 of the Courts Act provide that a court can also have more Vice-Presidents if the number of presiding judges warrants this: »A court in which at least fifty judges exercise judicial office may have two Vice-Presidents and a court in which more than hundred judges exercise judicial office may have three Vice-Presidents.«

<sup>49</sup> *Ibid.*

<sup>50</sup> According to the new first paragraph of Article 61 of the Courts Act.



Director can also conduct other tasks of court management, delegated to him or her by the relevant President of the Court, with the exception of tasks related to exercising the judicial service. If a particular court has no Director tasks falling within his or her competence are to be performed by the President of this court.

The post of a Director of a Court is explicitly defined as a position of a civil servant as he has the highest position among the court staff. However the Supreme Court of the Republic of Slovenia has retained a position of Secretary-General, who is **an official**<sup>51</sup> that performs tasks of a Director of the Court but on a much larger scale.

The Director of a Court is appointed and dismissed by the Minister of Justice on the proposal of the President of the Court. The position is assigned by a decision on appointment for a five-year period with the possibility of reappointment. This act of the Minister has only the nature of a confirmation of meeting formal demands, as the minister appoints the Director only on the substantiated proposal of the President of the Court. In order to acquire the position of Director of the Court a candidate must fulfil conditions for appointment to a title in the first career class, stipulated by the act regulating the status of civil servants. A call for applications for a vacant position of Director is published by the President of the Court, who then has interviews with the candidates meeting the formal conditions. The President of the Court then selects and submits a reasoned proposal for the most suitable candidate, taking into consideration the knowledge, experience, recommendations and achievements of candidates in relevant areas. The Minister of Justice indicates the reasons for appointment in the decision on appointment and, prior to appointment, may have an interview with the candidate. In a case of non-selection of a candidate, the Minister must indicate the reasons for the non-selection.

However to ensure that a chosen candidate for a Director has the necessary competences to run what is essentially the business side of court management, proper training and knowledge is required. Therefore all Directors have to attend special classes on *inter alia* court staffing and management, building good working relations, the creation of organizational structure, and the use of innovative strategies, court budget management, public relations and other special knowledge. Failure to successfully complete this professional training programme within six months after the appointment to the post results in his or her termination as Director.

The introduction of the post of the Director of the Court means a transfer of those aspects of court management that do not constitute the exercise of judicial service from the President to the Director. Director of the District Court performs the tasks of court management for the entire District, with the noted exception of the Local Court in Ljubljana, which in line with its special status has a Director exclusively for this court. Directors of the Courts, including the Secretary General of the Supreme Court, are in charge of the business operations of a court, namely, the functions of financial management, personnel matters, security of court personnel and the court as a whole. At the same time the Directors and the General Secretary of the Supreme Court can be engaged in other tasks of court management under the explicit authority of the President of the competent court, unless the law provides otherwise.

### 3. COURT MANAGEMENT EXTENDED: THE NEW ROLE OF THE JUDICIAL COUNCIL

As mentioned above, the Judicial Council's former role of a basically glorified expert advisory body<sup>52</sup> has been strengthened considerably to give it *inter alia* the power of appointing (and dismissing) Presidents of the Courts which previously has been the responsibility of the Minister of Justice. The Council has also been tasked with monitoring the work of courts and preparing annual reports on the performance of the judiciary as a whole. If we would try to recapitulate and add up all the new competences and combine them with the ones already in place, we would see, that the Judicial Council is on the way to effectively becoming a watchdog for measuring and, if need be, correcting the performance of the courts<sup>53</sup>.

The Constitutional Court has in the past ruled that appointment and dismissal of Presidents of the Courts by the Minister of Justice, following a proposal of the Judicial Council, was a constitutionally sound solution<sup>54</sup>. However in the judiciary

<sup>51</sup> Secretary-General of the Supreme Court has a status of a state functionary akin to the status of the Secretary-General of the Government of the Republic of Slovenia. He or she therefore does not need to be a judge by title. However the current Secretary-General of the Supreme Court holds the title of a higher judge.

<sup>52</sup> Before the reform the basic substantive competence of the Council was relegated to giving its opinion on candidates for judges and Presidents of the Courts.

<sup>53</sup> »Correction« means of course the dismissal of the accountable President of the Court.

<sup>54</sup> The Constitutional Court has ruled on this issue two times, first in 1997 (Decision No. U-I-224/96, dated 22<sup>nd</sup> of May 1997, published in Official Gazette RS, no. 36/97 and OdlUS VI, 65) and then again ten years later (Decision No. Up-679/06, U-I-20/07, dated 10<sup>th</sup> of October 2007, published in Official Gazette RS, No. 101/07 and OdlUS XVI, 109) and decided that regulation according to which the President of the Court is appointed by the executive branch of power is not inconsistent with the principle of the independence of judges determined in Article 125 of the Constitution.

this solution in some cases considerably lessened the necessary authority and the overall position of the so chosen Presidents of the Courts. Moreover, a major effect of the new Courts Act of 1994 was also the fact that the legal position of the President of the Court as the principal bearer of the judicial administrative governance part of court management was weakened in favour of the bearers of judicial self-government, principally the Personnel Councils<sup>55</sup>. This combined with the inadequate size of individual courts and organization of the judiciary *inter alia* contributed substantially to a comparatively poor performance of the Slovenian courts after the reorganization of the judiciary in 1995. This situation concerning the status (and the responsibilities) of the President of the Court was improved gradually *in lieu of* the subsequent changes to the Courts Act and the Judicial Service Act. However this gradual strengthening of the role of the President of the Court slowly started to threaten the constitutional equilibrium between court management and justice administration established with the Courts Act of 1994. This rising emphasis in court management on judicial administrative governance (the President) as opposed to the diminished role of judicial self-government did not bode well for a fair and balanced approach to court management, even if it did improve its overall efficiency. This would prove especially true if the Minister of Justice as a part of the executive continued to have basically the sole competence in appointing and dismissing Presidents of Courts in Slovenia. Already there were some instances in the recent past when a Minister on several occasions refused to appoint a competent candidate for the post of President despite him or her having been recommended by the Judicial Council. Often this resulted in public speculation about the alleged “political unsuitability” of the rejected candidates for office. Additionally as candidacy proceedings for the office of President tend to be time consuming such non-appointment meant that the relevant Court had to settle for a temporary President with limited competences, sometimes for years on end. When the new competences of Presidents were proposed in drafting the Act of 2009 this issues were thoroughly discussed by the noted representatives of the judiciary and the Ministry<sup>56</sup>.

Additionally such transfer of competence was warranted by the already elaborated introduction of the new post of the Director of the Court. This represented a new concept of court management as a significant part of the administrative operations of the courts was handed over to the Director, leaving the President with other tasks, pertaining to the rights and duties of judges. As the Director is appointed by the Minister<sup>57</sup>, it would be unreasonable for him or her to also have appointing powers for the President as well<sup>58</sup>. However it is suitable for the Minister to retain a significant stake the business side of court management and also to ensure proper training in this area.

To counter-act these developments the Act consequently transferred this competence to the Judicial Council. This still ensures external control in the selection of the highest dignitaries of the judiciary. However this also eliminated the threat – real or imagined – of appointment of only those candidates for office of a President who appeared the most “politically suited”.

According to provisions brought by the Act Amending the Courts Act 2009 all Presidents (and Vice-Presidents) of the Courts, other than the President (and Vice-President) of the Supreme Court of the Republic of Slovenia, are appointed for a term of six years with the possibility of a reappointment by a Judicial Council decision on the basis of a prior opinions brought by the Minister of Justice and the President of an immediately superior court<sup>59</sup>. This more than any other is the most obvious indicator of strengthening of the position of the Judicial Council in relation to the executive power. The Minister as such has on the other hand a new competence in appointing and the dismissal of the Directors of the Courts, but both only at the proposal of the President of the same court, since the new legislation transferred many functions that fell within the scope of court management from the President to the Director of the Court. Minister of Justice is, however, included in the procedures for candidate selection, because he or she will present his or her opinion on the candidate to the Judicial Council that will be formulated following a hearing, conducted by the Council. At the hearing the Minister has the right to participate and pose questions to the candidate. The candidate for the post of the President of the Court will have to present a strategic plan of action at the hearing together with a six-year strategic program.

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<sup>55</sup> For a detailed criticism of the relationship between the President of the Court and the Personnel Councils in the wake of the Courts Act of 1994 see: J. Potočar, p. 3; himself a long-standing President of the largest higher court in Slovenia – The Higher Court of Ljubljana. See in this context also E. Pristavec Tratar, pp. 53-54.

<sup>56</sup> The official reasoning for the transfer of this competence to the Judicial Council given in the Draft Act Amending the Courts Act of 2009 was, that this solution: “*will strengthen the independent standing of the judicial branch of power.*” See Draft of the Act Amending the Courts Act (Predlog Zakona o spremembah in dopolnitvah Zakona o sodiščih (ZS-I) prva obravnava – EPA 551-V), Poročevalec Državnega zbora Republike Slovenije št. 109/XXXV, 2<sup>nd</sup> of September 2009, p. 2.

<sup>57</sup> A departure from the former Secretaries of Courts which performed the basic tasks and duties of the now-Directors and were as such appointed within the judiciary.

<sup>58</sup> See *Draft of the Act Amending the Courts Act 2009*, pp. 5, 9 and 10.

<sup>59</sup> This means the President of the relevant Higher Court for a candidate for the position of a President of a District Court or the President of the relevant District Court for a candidate for the position of a President of a Local Court.

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Upon appointment of a candidate to the post of President the Judicial Council will have to give reasons for its decision. Where there will be more candidates that meet the formal requirements, the Judicial Council will have to list the reasons one candidate was chosen over the others. When there are more equally competent candidates, the decision will be vested on the fact which of the six-year strategic programs is more convincing and which candidate did best at the hearing.

The President of the Supreme Court on the other hand is still appointed - and can be dismissed - by the National Assembly at the proposal of the Minister of Justice after his or her receiving prior opinion of the Judicial Council and the Supreme Court en banc. His or her dismissal as, however, has no bearing on the status, rights, duties and accountability which he or she has as a judge. The appointment and dismissal of the Vice-President of the Supreme Court is regulated in the same way. Some hold the opinion that such a manner of appointment, when the Supreme Court President must pass the parliamentary procedure three times (upon election to judicial office, upon appointment to the position of Supreme Court Judge and upon appointment as President of the Supreme Court), represents an obsolete remnant of the old assembly system<sup>60</sup>.

The redefinition of the position and competences of the Judicial Council however at the same time also requires it to measure, evaluate and if needed correct the efficiency and effectiveness a court's performance thereby balancing its new competences with adequate responsibilities. Therefore the Judicial Council also prepares *an annual report of effectiveness and efficiency of the judiciary* which *inter alia* also assesses the adequacy of the number of judicial posts and the number of court staff in each court.

As mentioned previously court management as one of the basic functions of the judicial branch of government among other matters also includes monitoring, assessing and analyzing the effectiveness of judicial performance. To this end the amended Courts Act 2009 defined a new business category, *an annual plan of work of the court*, which has to be prepared by the President of each court for the next year. The annual plan of work of the court is an integral part of the justification of the financial plan, that is the precondition for allocating and planning of funds for that court from the state budget. The annual plan of work also includes a business plan with a projection of the trend for resolving cases in the next year. If a President of the Court does not meet the goals set out in this business plan for unjustifiable reasons for two years straight, the Judicial Council has him or her dismissed from office of the President.

However aside from this issue the current position of the Judicial Council in the Republic of Slovenia together with the competences of the immediately superior Presidents of the Courts is, as we have seen, slowly but steadily evolving to the post of the *de facto* guarantor of the excellence of the performance of the courts – of the excellence of court management.

#### IV. CONCLUSION

The relationship between court management and justice administration in Slovenia is a complex and intricate one. But as such it always will be if we have to combine such opposing concepts and functions as supervision and monitoring on the one side with independence and impartiality on the other. It is difficult to strike up a system where no one function will prevail exclusively but at the same time still ensure timely delivery of justice. One might go so far to suggest that there actually is no clear organic separation between these two functions of the State. There is only good governance which mandates continuing effort from both sides of the imaginary fence.

Efforts have been made and continue to this day to optimize their relationship thereby ensuring mutual cohabitation and collaboration between these two basic but often neglected functions of the judiciary and the executive. But collaboration can only exist between equal partners. If justice administration is allowed too wide a range it, as we have seen indicated supra, by its nature as a part of the executive will develop a tendency to dominate the judiciary. Maybe this will not develop immediately but with time this will become inevitability<sup>61</sup>. Also the results of the judicial reform in 1994 teach us that court management, if it is effectively left more or less unchecked and without proper managerial levers and tools, cannot prevent elements of complacency and self-containment to take hold in the judiciary. The consequences of such

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<sup>60</sup> See Grgurevič-Alčin. M., Strengthening of judicial independence and impartiality in the framework of the fight against judicial corruption, Campus Trieste Seminar: "The independence of judges and prosecutors: perspectives and challenges", Trieste, Italy, European Commission for democracy through law (Venice Commission); CDL-UDT(2011)005, page 4. The author is the Director General of the Directorate for Justice Administration at the Ministry of Justice in Slovenia.

<sup>61</sup> This development can be stifled if there is a strong democratic and a long-lasting pluralistic tradition in place in a society. In new democracies this however as a rule cannot be achieved as it comes, as already stated, with tradition.

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action (or inaction) combined with other factors (increasing annual influx of cases, constant changes in legislation, working conditions) inevitably lead to backlog. Therefore a balance – akin to a gymnast on a tightrope to borrow a phrase – has to be achieved and maintained.

With this in mind any reform of the judiciary that influences their competences vis-à-vis each other cannot be taken lightly. But as we have seen demonstrated with the recent reform of the judiciary in 2009 effective solutions that at the same time respect the constitutional margin of appreciation can be found.

This is most evidenced in the ever greater efficiency of the courts of the first instance after the reform in terms of not only solving great quantities of cases each year but also ensuring that with each year the number of older unresolved cases is further diminished. Still there is a lot of work left to be done.

However the reform of 2009 has also raised quite a few interesting challenges for the future. The Judicial Council is in my opinion not yet quite ready to effectively assume its assigned role to its full capacity. The reasons for this are many fold. First of all its capacity building capabilities of the Council have not come full circle. The new competences also threaten to stifle some of the good practices that have been established within previous bearers of the transferred competences – be it the Ministry or the Supreme Court. Also despite clear legal provisions its position and standing will have to be further secured, maintained and strengthened with time vis-à-vis the more traditional bearers of State power.

There is also the potential question about the clear demarcation of competences between the President and a Director of a court. The legal provisions do provide a rough framework that could be the basis for further regulation and clarification of this question. However all efforts of the Ministry to clarify this issue have been met with the answers from various judicial representatives, that despite wildly differing practices the concept as such works well in practice. Only time will tell if this remains the case.

If one would want to offer a universal solution to the conflict, inherent in the relationship between justice administration and court management in Slovenia, it would be: established ways of communication on all levels within the judiciary and the Ministry of Justice. With that in mind the Act of 2009 also established periodical round tables between the Minister, the President of the Judicial Council and the President of the Supreme Court where the main issues concerning the functioning of the judicial system are discussed in detail. Also meetings with all Presidents of courts are organized at least twice in a year, where the topic of discussion usually revolves around the realization of the annual plan of work. These discussions if maintained and implemented further will serve as constant forums for the exchange of ideas, good practices and providing solutions for everyday problems of the judiciary and the Ministry. With this and other, more standard instruments, the main goal will be achieved: cohabitation, collaboration and mutual trust.

As to the issue of micro-courts with isolated court management the Slovenian experience demonstrates that exclusive autonomy in terms of court management in Local Courts that have 5 judges or less is very hard to justify in the long run. The Slovenian model implemented might seem as a half-way solution – the middle road between abolition of micro-courts and the de facto almost absolute independence in terms of court management of all types of courts in the first instance that prevailed from 1995 until the “soft” reform in 2010. However it has shown first signs of improving the performance of Slovenian courts, even in the face of the current economic crisis that still prevails.

But as with all reforms involving such complex and inflexible systems as the judiciary change never comes easy and never fast. Therefore the methods applied have to be of evolutionary, never of revolutionary nature. In my opinion only such reforms take a hold in the long run. The alternative is the stacking of reform upon a reform, thereby ignoring past mistakes and making new ones.

Therefore it is better to take notice of the old adage that states that wisdom is learning from the mistakes of others, even if “the mistakes of others” as we have seen in our present case means “the mistakes we ourselves made in the past”<sup>62</sup>.

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<sup>62</sup> A final example of history going full circle: in 2010 Kosovo as one of the former autonomous provinces of what was until 1991 the Socialist Federal Republic of Yugoslavia enacted a new Law on Courts, whereby adopting essentially the same stricture of courts of the first instance that was in force in Slovenia in the period from 1979 to 1995: 7 Basic Courts and 20 external units (the Law identifies them as “branches”).



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