Is Judicial Independence an Absolute Goal?

An Account on Difficulties
of Judicial Reforms in Countries in Transition

A Synopsis

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On June 28, 2001, the whole world published the news on the extradition of the Serbian ex-President Milošević to the Hague War Crimes Tribunal. Except in parts of the population of Serbia proper, hardly anyone was dissatisfied. In fact, Serbia itself had the best reasons to be pleased: by extraditing Milošević and five-six other suspects, it can count on about US$ 5-6 billions, either in direct financial aid, or in alleviation of external debt – which is perhaps the highest award ever paid for capturing a criminal. It is no surprise that the civilized world welcomed the news about the new inhabitant of the Hague prison – but there were strikingly few comments on how it happened. The Serbian Government expected the decision of the Constitutional Court on the legality of extradition; the very moment when Constitutional Court decided that extradition cannot take place, the Government did exactly what it was banned to do – it disrespected the court decision and sent Milošević on the first plane to the Hague. The explanation was that the country couldn't afford another embarrassment at the donors' conference that was about to begin, and that judges who had to make the decisions were incompetent and biased anyway. In this particular case, none of the usual organizations that care about democracy and respect for the rule of law complained about it. There may be good reasons for it. It may also be affirmed as the only reasonable attitude – e.g. by arguments that there is no tolerance for the enemies of tolerance. But, this may also raise at least two questions. First one is: are the efforts to impose values of Western democracies in the countries of transition (such as independence of justice and the government of the rule of law) only dependent on the favorable outcome (according to political goals of the Western democracies), or should they be obeyed as an absolute goal? The second is a bit different: are some of the values (such as independence of justice) at all applicable in their conservative form in every contemporary state, and what are the appropriate instruments of pursuing them? In this presentation I will give an example how mechanical implementation of Anglo-Saxon notions of independence of justice can be not only be ineffective, but also counter-productive. This will also raise question on the usefulness and the structure of Western programs of legal aid to countries in transition, and another, more far-reaching question: how accurate is the increasingly globalized myth of a common-law judge in the rest of the world?

I.

A standard part of the political theory of democracy is the doctrine of the separation of powers. It is largely undisputable that independent judiciary is an essential feature of this doctrine. This was, however, not always so. The founders of this doctrine, starting with Montesquieu, emphasized somewhat different concept of checks and balances. Montesquieu himself argued that judicial power is not a power in the proper sense of the word – that it is, in certain sense, void (*en quelque façon nulle*). Following such reasoning, even the present French Constitution, although it mentions executive and legislative *powers*, does not define judiciary as "power" but as "authority" (*autorité*).

II.

Contemporary concept of judicial independence is strongly affected by Anglo-Saxon tradition. Partly because of the U.S. economic expansionism, partly because of the global success of the Hollywood courtroom entertainment products, many citizens in European countries have false perceptions about their own legal systems – they impute to it American-like features (such as jury trial) and procedures (such as radical adversary procedural style) that do not exist. However, misconceptions go both ways: Anglo-American approach, when faced with judicial issues in European continental countries, regularly starts with wrong assumptions and wrong answers.

III.

American involvement in the processes of reform of the judiciary in the countries in transition is massive (not only because of complaints of American investors unsatisfied with the performance of local judiciaries). Programs of assistance to local judiciaries developed and supported by American agencies range from governmental sources aimed at improving human rights (sponsored by institutions such as the USAID), to programs of economic support by organizations such as the World Bank. A less-than-impressive result of such programs can be easily attributed to lack of understanding of local circumstances – but that would be a too easy and too simple answer. One can be tempted to ask a more fundamental question – is it at all desirable and productive to import basic values and basic principles from a system of judiciary extremely different in nature, or is this, in fact, capable of producing only new problems and worsening of the current situation?

IV.

Reform of judiciary in Croatia may be a good example for specific problems and specific needs of the countries in transition. After a decade of the rule of President Tudjman, and several decades of communist rule, judiciary is experiencing the peak of crisis – both with respect to quality and with respect to efficiency of the system. Many judges appointed in past years were clear cases of incompetent political appointees; some of them were employed to foster the policies of ethnic intolerance, or even ethnic cleansing. However, after the new democratic elections in 2000, the very protagonists among such judges now invoke principles of judicial independence and attempt to block every plan of judicial reform. In such actions, they often find allies in international organizations and Anglo-American programs of assistance to judiciaries in transition. In the meantime, poor quality and efficiency of the system of justice threatens to obstruct the political and economic reforms, impede economy and discourage foreign investments. Is “judicial independence” such a powerful goal, applicable to all states and situations, to legitimize self-destruction of the society – as in Kantian saying *fiat iustitia pereat mundus*?

V.

Empirical research in the functioning of the judicial power in Europe is scarce. It is true that many of the Ministries of Justice have extensive statistical data. However, there is no uniform methodology and no common statistical criteria, even among those countries that share similar legal traditions and have similar organizational structures. Therefore, it is very difficult to make comparisons and cross-references. One recent research that has included five European universities, conducted by Prof. Blankenburg from Amsterdam, and supported by Italian Center for Study of Judiciary in Bologna, came to conclusion that there are only a few possible indicators that may be used for reliable comparisons. However, with this very limited set of indicators, the research came to interesting conclusions.

VI.

A few simple indicators that were collected in the research are the data concerning the number of judges and other judicial personnel related to number of inhabitants in a particular state; the number of courts, and the overall expenses of the judicial machinery (related to some other factors, such as the national budget and economic power). Let us concentrate to only one of the indicators presented in this research – the number of judges related to the population of a particular state. The striking conclusion of the research is that this number varies in extreme proportions. First of all, it is largely different in common- and civil-law countries, since the nuber of judges per 100.000 inhabitants in common-law countries is about 1-3; on the other hand this number in civil law countries it is 10-30 – i.e. we have here 1:10 relation. But, even in civil-law countries this number is very different, ranging from less than 10 in some countries, like France or Netherlands, to about 25 in the other. One of the examples of countries with a high number of judges is Germany, that has about 25 judges per 100.000 inhabitants. Germany is also a textbook example of a country with a well-functioning system of justice, but with the high expenses of the over-all system of justice. The simple guess that the large number of judges and high investments in it produce efficient judiciary is, however, unfounded: in Western Europe, the Dutch system with half of the judges and half of the expenses produce almost the same indexes of efficiency as the German one. But, the comparison is even more interesting if we take a look at the

negative side – the countries with less developed and less efficient systems, in particular the countries in transition.

VII.

Although the data are often unreliable, it seems that one can encounter vast differences also among the countries in transition. Let us once again compare the number of judges and the population: according to one World Bank research, Hungary had in 1999 about 2 judges per 100.000 inhabitants – and in this respect, it was very close to Anglo-Saxon countries. But, the data about other countries – and I refer here to, for example, Croatia and Slovenia – show a completely different picture: Croatia had in 2000 about 33 judges per 100.000 inhabitants, and if we include misdemeanor judges in this statistics, it would be 42 judges. Moreover, according to official data, there are still vacant judicial posts – and if all of foreseen judicial posts would be filled in, the number of judges would go to some 50 judges per 100.000 inhabitants – about 25 times more than Hungary, and more than twice than Germany (that has one of the highest score in Western Europe). Despite the data on the number of judges, over-all assessment of the efficiency is not favorable in any of the alternatives – either with high, or with low number of judges. So, in Croatia, the opinion of objective observers is that the efficiency of the system is disastrous – there are over one million of backlogged cases, and many lawsuits last over a decade (e.g. over 10.000 cases only in Municipal Court in Zagreb). Notorious delays in court procedures create, however, a false picture: so, even the US State Department has issued in 2000 a statement (echoing local statements of various professional organizations) that one cause of the unreasonably long court proceedings in Croatia consists in the lack of judges (?!).

VIII.

What is the constitutional relevance of all these statistical data? First, one can attempt to draw conclusion with respect to possibility of judicial reform. In this area, it is false to assume that those countries that do have obviously high figures (i.e. many judges) are better of. On the contrary, even with flexible understanding of constitutional guarantees, it is always easier to hire new judges, than to fire the existent ones. We submit to your consideration a simple equation: level of guarantees divided by the number of judges equals the ability to achieve reforms in the area of judiciary. The other formula is also the product of this equation: namely the formula that says that in the situation of the surplus of judges the maximum of constitutional guarantees means the deadlock of reform.

IX.

The way in which countries have attempted to break the deadlock and resolve the judicial crisis is different, and sometimes radical. In certain Latin American countries, the allegations of the widespread corruption in the judiciary have been resolved so that in a certain moment large number of judges was in fact fired, and new judges employed. Once upon a time, even in France, general Charles de Gaulle resolved some of his problems with the judiciary in the way that he suspended constitutional guarantees for a day, during which he performed interventions necessary. After that, everything continued just as it was before. And (as in the case of extradition of Miloševi!), although principle-minded observers of such interventions (especially lawyers) criticized them, there were also a large number of those who actually thought that it was not such a bad idea.

X.

Let me now give some more detailed information about Croatian example. In the decade of the rule of President Tudjman, some 80 percent of judges were removed, by various means, and replaced by those viewed as loyal to the political regime of Tudjman's nationalist party. This happened especially in the highest ranks of the judicial hierarchy. After Tudjman's death and political democratization, the new government wanted to improve notoriously bad situation in the judicial area. A commission, constituted mainly of judges who wanted some improvements (but were very sensitive - perhaps too much - about the issues of judicial independence) made a modest proposal, that basically did not foresee any removals of the present judges, neither the procedure of their disciplinary responsibility. The only proposal that dealt with personal issues was to initiate a process of re-election of the presidents of courts, that were notorious for their political role in the times of late President Tudjman. Also, the role of court presidents was changed, partly due to the changes in the Constitution, partly to the decision of the Constitutional Court that declared that the State Judicial Council is constitutionally

not competent to appoint presidents of courts, since this is a mainly administrative function, not expressly put under jurisdiction of the SJC. The new law provided for the new procedure of appointment, and limited the term of appointment from 8 to 4 years, limiting the role of the court presidents and transferring their powers with regard to personal matters to newly formed bodies of judicial self-administration, judicial councils.

XI.

This proposal was very modest and in no way far-reaching with respect to necessary measures for the