

Slovenia, Constitutional Court, U-I-60/06, U-I-214/06, U-I-228/06, constitutional, 7 December 2006, ECLI:SI:USRS:2006:U.I.60.06

Member State

 Slovenia

Topic

Independence (salaries of magistrates)

Deciding Court Original Language

Ustavno sodišče Republike Slovenije

Deciding Court English translation

Constitutional Court of the Republic of Slovenia

Registration N

U-I-60/06, U-I-214/06, U-I-228/06

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EU legal sources and CJEU jurisprudence

Article II-107 (2) Treaty Establishing the Constitution for Europe

Subject Matter

The CC determined the requirements of the constitution for the regulation of salaries of judges, state prosecutors and state attorneys in a case, where the legislator adopted a new regime of salaries for the whole public sector, which was partly determined by statute (zakon) and partly by inferior acts, such as governmental decrees, parliamentary ordinances, collective agreements etc.

Legal issue(s)

The case primarily relates to independence of judges, but concerns state prosecutors and state attorneys.

The new system of salaries for the whole public sector, which included the judges, state prosecutors and state attorneys, whose remuneration was previously determined by a specific regime, raised many intriguing questions, that had to be determined by the CC in the case at hand:

- does the constitution allow that the salary is (partly) prescribed by inferior acts or should it exclusively be prescribed by statute (zakon);
 - what circumstances justify the reduction of the salaries;
 - is the supplemental payment for work performance consistent to the constitution etc.
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National Law Sources

Articles 2, 3, 14(2), 87, 125, 135, 136 of the Constitution

Facts of the case

In 2006, the national assembly adopted a new salary system for the whole public sector. The aim was to remedy the problem of wage disparity in the public sector that was a consequence of “sectorial” regulation of wages, where every field/profession (education, health, justice, administration etc.) had its own regulation. Accordingly, judges, state prosecutors and state attorneys were now included in the new system. The government maintained that the budget for salaries will remain intact. What changed though were certain supplements (supplement for incompatibility was abolished and included into the salary in the narrow sense, the supplement for seniority was lowered and the new supplement for working performance was adopted), legal basis, which determined the salaries and the individual salaries, which would in fact be lower for some and higher for others, but not to a significant extent. The negotiations of the government were difficult and broadly covered by the media.

The CC received 137 petitions for review of constitutionality of the new regime. The first petitioner was the president of the district court of Ljubljana, the petition was also filled by the Slovene Judicial Association, the State Prosecutor General, the State Attorney General and 133 other judges, state prosecutors and state attorneys. The CC decided to temporarily suspend the legislation and held a public hearing (which is rare and used only in the cases with important socio-political implications).

It is important to note that the regulation governing the salaries of state prosecutors and state attorneys referred to the provisions regulating the judicial salaries and that thus many of the

impugned provisions were applicable to all three groups.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

Reasoning concerning judges

In the beginning of its reasoning, the CC held that the principle of judicial independence, enshrined in Article 125, in conjunction with Articles 129, 130, 131, 132, 133, and 134 of the Constitution, is at the heart of the dispute. It then developed the foundations for understanding the principle of judicial independence in Slovenia. It explained that it cannot be regarded as a privilege of judges, but foremost as an essential element for ensuring the protection of the rights of persons who are parties to judicial proceedings. Ensuring the right to judicial protection and within this framework also the right to an independent judge can entail an essential element of the possibility to exercise all other rights. According to the CC, the implementation of the principle of judicial independence is thus not intended (only) for judges as such, but especially for those who need judicial protection of their rights. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and thereby for the credibility of the judiciary as well as the trust of the public in its work.

The CC continued that the right to an independent judge has an important position in the catalogue of human rights and fundamental freedoms in modern constitutions and numerous international instruments. It invoked the Universal Declaration of Human Rights, ICCPR, ECHR, and even the Treaty Establishing the Constitution for Europe, and quoted the relevant provisions thereof.

Further, the CC held that the principle of judicial independence is based on the principle of the separation of powers (Article 3(2) of the Constitution), whose essence is in its fundamental function of protecting individuals in relation to the state. It highlighted the key role the judiciary plays in ensuring the protection of the position of every person against the possible arbitrary interferences of the other two branches of power, which is always at expense of the people or individuals' rights. Then, the Court described different mechanisms of judicial exercise of checks and balances and held that prerequisite for the judiciary to efficiently perform its role is that independence in relation to the other two branches of power is ensured.

It went on to recognize, that the Constitution merely prescribes certain prerequisites for judicial independence, but does not define it. The CC then held that various international instruments, can be applied as an aid in filling the substance of the constitutional principle of the independence of judges. According to the CC, these instruments can serve as a tool for interpretation regardless of their soft-law nature.

The Court then referred to different aspects of judicial independence: individual, collective, institutional, internal, external, functional and material. It held that material independence is at the core of the dispute at hand. It explained that “[j]udges, whose incomes do not reach an amount sufficient to satisfy their personal and family needs will to a greater extent be exposed to various political pressures and to corruption. Regarding the limitations arising from incompatibility of their office as one of the elements for ensuring judicial independence, the options for additional sources of income are namely very limited in the case of judges. Not only the amount of judges' salaries but also their relative stability play a key role in ensuring judicial independence. [...] Finally, an appropriate system of remuneration for judges is important also from the viewpoint of ensuring the appearance of the independence of judges. If judges were paid so poorly that they could be regarded as susceptible to political pressures and corruption, the public trust in the independence of the judiciary could be undermined.”

The CC then applied the above principles to the impugned legislation. It first held that the judicial salary may only be prescribed by statute (zakon) and not by inferior acts. This is because safeguards against expeditious changes (multiphase legislative procedure, veto of the national committee (upper house of the Slovene parliament) and a referendum) are not in place in relation to inferior acts. The CC noted that such requirement is enshrined in international instruments (item 11 of the United Nations Basic Principles, item 1.2 of the European Charter on the Statute for Judges). The CC added that representatives of the judiciary must always be ensured the opportunity to take part in the process of the adoption of any regulation which refers to the position of the judiciary and judges. In the case at hand, the JSA only provided legal basis for placement of judges into salary brackets on which the actual salary depended, but other aspects were prescribed by a decree of the national assembly (lower house of the Slovene parliament), in the adoption of which, the representatives of the judiciary were not consulted. The CC thus found a violation of Article 125 of the Constitution.

Second, the CC turned to the allegation that the legislation reduced the judicial salaries. The CC held that determining the amount of the salaries of judges falls within the field of discretion of the legislature and that the CC would find a violation of Article 125 of the Constitution only if the amount of such remuneration had been determined manifestly inappropriately. However, the CC held that the principle of separation of powers requires that the salaries of all three branches of power are balanced and that in fact, the judicial salaries were lower than salaries of the legislature or the executive branch. It thus found the impugned legislation incompatible with Article 3(2) of the Constitution.

Third, the CC reviewed Article 44 (4) of the JSA, which provided that “[t]he basic salary of a judge may not be reduced during his term of office except in cases determined by this act”. The CC found the scope of protection of the salary against reduction was insufficient from the perspective of Article 125, since it covered only the basic salary, but not other payments to which judges are entitled on the basis of performing judicial function. Moreover, it found that the purpose of the legislation, i. e. to remedy the problem of wage disparity for the whole public sector, cannot justify the reduction of individual judges' salaries. The CC thus found the actual reduction to be

incompatible with Article 125 of the Constitution.

Forth, concerning the supplemental payment of judges for work performance, the CC expressed concern for judicial independence if the supplemental payment is intended only or foremost for encouraging the productivity of judges (in the sense of the number of closed cases as the only or key criterion for evaluating their work performance). In the words of the CC, such system can give the impression to parties to proceedings or to the general public that judges give priority to financial motives before the fundamental principle on which adjudication must be based, i.e. deciding on the basis of the Constitution and laws. This can have a negative effect on the appearance of the impartiality of judges and can in fact cause that when deciding, an excessive strain is put on judges to meet expectations as regards the planned amount of work performed, which can influence the course of court proceedings. This especially holds true if performance is evaluated in a period of time that is too short. Despite these serious doubts, the CC did not find a violation of Article 125, since it held that the provisions concerning the supplemental payment and their effects were unclear and thus did not enable the CC to review them with respect to Article 125. Nevertheless, precisely because of the lack of clarity, the CC found a violation of Article 2 (legal certainty, predictability, subprinciples of the principle of state, governed by law).

Reasoning concerning state prosecutors

The CC first differentiated the position of the state prosecutors from the position of judges. It found that the Constitution prescribes only the incompatibility of office, the fundamental function of state prosecutors (i.e. the prosecution of criminal offenders) and requires the statute to determine other powers and organization of the state prosecutors' offices, but not the position of individual state prosecutors. The CC as a result refuted the allegation of the state prosecutors that their position is comparable to the one of judges.

The CC however highlighted that this does not mean that the state prosecutors can be made subordinate to the executive branch of power. To the contrary, independent performance of their duties must be ensured and it must be prevented that they would decide in accordance with the wishes of the other branches of power, especially the executive. Nevertheless, the state prosecutors are not a part of judicial branch of power but only a part of judiciary in the broader sense and thus do not benefit from the protection guaranteed by the principle of separation of powers (Article 3(2)), which is the the grounding principle for the judicial independence, as explained above.

Due to this altered perspective, the CC reviewed the allegations of the state prosecutors not from the perspective of Article 125, but by reference to other constitutional provisions. First, due to fact that the higher protection of material independence from Article 125 was found inapplicable to the state prosecutors, the CC reviewed the allegation that the salaries have to be prescribed by statute from the perspective of Article 87, which requires that rights and obligations of individuals

are prescribed only by statute. It held that the legislature may leave a more detailed regulation of the rights and obligations of individuals to ordinances, whereby it must in advance regulate the foundations of the regulation and determine the framework and guidelines for its more detailed executive regulation so that legal subjects are aware of their position or can anticipate it already on the basis of the law. In the case at issue, the CC found no violation of the Constitution with respect to aspect regulated by the national assembly's ordinance, since these guidelines were respected. However, it found that regulation of state prosecutors' salaries by the collective agreement for the public sector and by the government decree to be inconsistent with the principles of a state governed by law determined in Article 2 of the Constitution. The first instrument was inappropriate due to the fact that state prosecutors do not participate in the process of negotiating the collective agreement, which entails that their interests are not represented, whereas the second was in principle possible, but was found unconstitutional due to the unfettered authorization given by the statute to the government.

Second, with respect to reduction of salaries, the CC held that the incompatibility of office (Article 136 of the Constitution) only guarantees an appropriate salary, but does not entail that every reduction in state prosecutors' salaries is inconsistent with the Constitution. The CC found that the salary of the state prosecutors is protected from reduction on the basis of Article 2 (the principle of trust in the law), which has general application, and that unlike the judicial salary, that is safeguarded under Article 125, and can only be lowered in exceptional cases, the salary of the state prosecutors may be reduced in pursuit of a sound reason that is justified in the prevailing public interest (not arbitrarily) and with an adequate transition period in order for the individuals affected to gradually adapt to the new regulation. Such (lower) requirements were not met. As a result the CC found a violation of Article 2 of the Constitution.

Reasoning concerning state attorneys

The CC seemed to have treated the state attorneys equally to the state prosecutors, since it did not develop its reasoning but merely invoked the parts of its decision with respect to state prosecutors and since it found a violation of Article 14(2) of the Constitution (equality before law) because according to the new legislation, the deputy state attorney general was not entitled to an extra payment for leadership position, which was prescribed for the deputy state attorney general.

Relation of the case to the EU Charter

In 2006, when the decision at hand was adopted, the CFREU was not yet binding EU law. It is therefore no surprise, that the CC did not invoke it. However, the case concerns the reduction of judicial (state prosecutorial and state attorney) salary, and thus resembles to the ASJP case, where the CJEU referred to Article 19(1) TEU and Article 47 CFREU.

Use of Judicial Interaction technique(s)

Comparative reasoning with foreign legislation and foreign case-law as well as supranational soft-law and binding instruments - see horizontal judicial interaction patterns and vertical judicial

interaction patterns bellow.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The CC invoked the supra-national instruments in order to strengthen its argumentation in many parts of its decision. First when ruling that the judicial salary may only be prescribed by statute (zakon), it rejected the government's argument, that item 11 of the United Nations Basic Principles prescribes that adequate remuneration of judges shall be adequately secured by law, which implies that the salaries must be prescribed by the legislator, who is however not required to use the statute (zakon). The CC explained that the government ignored the French version of the text, which in the same paragraph uses the word "loi" (and not "droit"), which in French means statute (zakon).

Second, the CC used item 1.8. of the European Charter on the Statute for Judges as an additional argument which lead it to the conclusion that the representatives of the judiciary must always be consulted and enabled effective participation in the process of the adoption of any regulation which refers to the position of the judiciary and judges.

Third, with respect to the amount of salary, the CC explained that only manifestly inappropriate salary would merit the intervention of the CC. However, it referred to the Recommendation on the Independence, Efficiency and Role of Judges, Principle III(1)(b), and European Charter on the Statute for Judges, item 6.1 when it held that the salary must nevertheless protect judges against pressures which could influence their adjudication, and be adequate with regard to the role of judges and their responsibilities.

Forth, when the CC dealt with Article 44(4) JSA (reduction of judicial salaries), it comparatively analyzed the regulation of other countries. It found that a prohibition against a reduction of judges' salaries is contained in the legal systems of numerous countries: in certain countries it is included in the constitution (see, e.g. the constitutions of the USA, 33 Brazil, India, Ireland, Israel, Japan, Malta, and New Zealand) and in others in the statute (such is the case in e.g. the Russian Federation, Lithuania, and Ukraine). It further referred to provisions of international instruments that protect the judicial salary from reduction: Opinion No. 1 of the Consultative Council of the European Judges, item 62, The Judges' Charter in Europe, item 8, and The Universal Charter of the Judge, Article 13. Nevertheless, the CC held that in exceptional cases, the remuneration of judges can be reduced. It found that such exceptional case is for example reduction as a disciplinary sanction. It even invoked several decisions of foreign constitutional courts, to show in what situations might qualify as exceptional and justify the reduction:

- Decision PL. US 52/99 of 4 July 2000 where the Slovak constitutional court found that the constitution does not prohibit the adjustment of salaries based on the state of the nationaleconomy;

- Decision No. K 12/03 of 18 February 2004, where the Polish constitutional court underlined that the only exception from the prohibition against a reduction in judges' salaries can be in a case in which the national debt exceeds three fifths of the value of the annual gross domestic income;

- Decision Pl. US 16/2000 of 3 July 2000, where the constitutional court of the Czech Republic adopted the position that a reduction in judges' salaries is exceptionally admissible on the basis of serious reasons and in connection with the regulation of salaries in the entire public sector.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The CC referred to the Universal Declaration of Human Rights, ICCPR, ECHR, and even to the Treaty Establishing the Constitution for Europe, and quoted the relevant provisions thereof, in order to highlight the importance ascribed to judicial independence by the international instruments of constitutional rank.

Strategic use of judicial interaction technique (purpose aimed by the national court)

In an arguably strategic move, the CC intentionally invoked the Treaty Establishing the Constitution for Europe. Only two years after the accession of Slovenia to the EU, the EU *acquis* still had a prominent place in the mind of the legislator, especially since the first Slovene presidency to the Council of EU in January 2008 was approaching.

Connected national caselaw / templates

Constitutional Court, Decision U-I-159/08 of 11 December 2008

Other

The legislature responded to the decision of the CC with the amendment of the legislation. However, certain aspects were ignored or not given enough attention. Consequently, a high court judge, who felt that failure to comply with the decision of the CC adversely affected her legal position, brought the case before the Administrative Court, which suspended the proceedings and referred the case to the CC.

In decision U-I-159/08, the CC confirmed and strengthened its previous decision U-I-60/06, U-I-214/06, U-I-228/06. In certain respects, the CC merely repeated the reasoning used in its previous

case, whereas in others it further developed its arguments.

The most pertinent part of its decision concerns level of judicial salaries compared to salaries of the other two branches of power. The CC once more highlighted that the three branches should be balanced with respect to the remuneration. It found that the increase of the salary by one salary bracket of only some judicial functions is insufficient to remedy the unconstitutional lack of balance, found in decision U-I-60/06. The Court explained that differences between the lowest placed office of a local-court judge and the lowest placed office of a MP or a minister are still 15 or 22 salary brackets and that the salary bracket of the office of Supreme Court judge is (still) the same as the salary bracket of the office of the lowest classified MP. This was found contrary to the principle of separation of powers (Article 3(2) of the Constitution). The government's allegations that such inconsistencies were justified by the leadership element, were rejected. The CC explained that this argument has some merit only with respect to ministers but not to MPs. However, in any case, the leadership element itself cannot justify such great inconsistencies in remuneration. This is also why, in the words of the CC, the differences between the starting salary brackets of the judges of individual courts in comparison with the salary brackets of the presidents of these courts (between 10 and 15 salary brackets) and the differences between the starting salary brackets of judges in comparison with the salary brackets of the vice presidents of courts (between 10 and 13 salary brackets, except at the Supreme Court, where the difference is 5 salary brackets) are incompatible with Article 3(2) of the Constitution.

[\(Link to\) full text](#)

<http://odlocitve.us-rs.si/en/odlocitev/AN02941?q=U-I-60%2F06%2C+U-I-214%2F06%2C+U-I-228%2F06> (english translation)

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[History of the case: \(please note the chronological order of the summarised/referred national judgments.\)](#)

Constitutional Court, U-I-60/06, U-I-214/06, U-I-228/06 of 7 December 2006
