***CRCE*** Briefing Paper

***The Failed Transition of the Slovene Judicial Branch:***

**A Commentary on**

**Judge Jan Zobec's Critique**

by

# Keith Miles OBE

**April 2021**

**The Failed Transition of the Slovene Judicial Branch:**

**A Commentary on Judge Jan Zobec’s Critique**

Introduction

Jan Zobec is a Supreme Court Judge in Slovenia and served as a judge on the Constitutional Court from 2008 until 2017. As a graduate of Ljubljana University Law Faculty in 1978 he worked through the ranks from a judge of the Basic Court in Koper Slovenia, to the High Court in Koper and to the High Court in Ljubljana.

Apart from participating in many international meetings and seminars he has also written extensively, lectured, and been a member of the examination commission on civil law.

Therefore this critique is by a judge who is highly qualified and very experienced

Background

 The text was published in 2019 in the liber amicorum in honour of Professor Jambrek and the full text can be accessed in

<https://www.academia.edu/40569100/The_Failed_Transition_of_the_Third_Branch_the_Case_of_Slovenia>

The text was also published in the book:

<http://www.buca.si/index.php?nav1=knjigarna&nav2=izdelek&id=7240>

Of great importance and significance is that Judge Zobec has experience of the socialist law system and the transition to a normal system.

In 2018 CRCE published the results of research that it carried out into the background of Slovene judges. This was called ‘How communist is the judiciary in Slovenia?’ The introduction to this survey noted that

 *‘There have been indications that the judiciary has not transformed as quickly as expected and this is a blow to democracy and the rule of law. The drive during the transition of former communist states was focussed on constitutional matters, institutional development, and economic changes.*

*The rule of law is very important to both foci and quicker and better success could only have been achieved if this had been at the forefront.*

*Independence of judges is vital to the process and it appears that weeding out of judges who not only took part in but subscribed to totalitarian regimes should have been more vigorous.*

*It may be noted that the EBRD (European Bank for Reconstruction and Development) in a working paper in 1999 stated that ‘it is a priori not clear whether legislative reforms produce the desired effect in the absence of far-reaching reforms to legal institutions and the judicial process’. Additionally The World Bank made similar comments in its 2005 report Judicial Systems in Transition Economies and says that organisational changes to make courts work well were not included in reform efforts.’*

In addition Keith Miles OBE FCA FRSA MA in the course of research work on transition carried out a survey of attitudes amongst key people in 2019 covering mainly Slovenia that showed that 90 per cent of respondents did not think that the courts are independent, and 96 per cent thought that crimes against humanity and normal law had not been prosecuted.

The EU recently published a report on the Rule of Law in member countries and this seems at the very least shallow and more critically completely inadequate. See ‘How communist is the judiciary in Slovenia?’

The critique

It is with this background that the paper prepared by Judge Zobec is extremely valuable because it has been prepared by a practitioner with real on the ground experience.

The paper has the following main features

1. Attention is drawn to the concept of judicial independence being not just an institutional matter but must have ‘individual, decisional or ‘micro-independence’’ in its core``
2. A detailed quotation from Martin Krygier, the Australian law professor, which makes the point that former communist judges were made independent after the fall of communism and so were ‘freed from dependence on the state’. Judges invoking their independence also defend(ed) their allies. They can thus defend not only their privileges and but also the interests of the old regime allies.
3. Attention is also drawn to The Bangalore Principles which under United Nations auspices were published in 1988. ( Note:These set out the principles for judicial independence and were probably a response to the decline of totalitarian regimes throughout the world. They are comprehensive as far as guidance is concerned but lack any sort of concrete examples. However they direct that the principles should be adopted by member countries.)
4. The paper considers the issue of too much independence so that suddenly judges from former communist countries could hid behind the principle.
5. The paper gives a snapshot of the former judicial system in Slovenia under communism and draws attention to the the fact that the law served the elite (I.e. the Communist Party and its members) and notes that the fear of decision making stems from this background era. The judiciary were merely state bureaucrats and therefore truly important cases were not decided by the courts but by the party.
6. A key statement is that in communist times it was the ‘Rule of Men’ rather than the ‘Rule of Law’.
7. The transition took place with the old personnel who were never properly subject to a lustration process. The clause that was inserted in the Judicial Service Act was easily ‘by-passed’ or ignored by the old judge nomenclature.
8. A series of anecdotes that all illustrate that the ‘continuing’ judiciary at the top never made the transition to a normal system and retained old attitudes
9. A concern that the new younger elites owe their position to the older unreformed elites and so have adopted many of the attitudes and ways of those old judges. Thus a fading away of the past by death or retirement will not mean a normalisation of behaviour. This comes from the problem of the old elites controlling by supervision the newer judges coming through
10. The main conclusions regarding proposals for change include better legal education, full transparency of administration, and hearings of the Judicial Council open to the public.

The extensive list of references to the critique by Judge Zobec gives great intellectual support to his conclusion that the transition substantially has failed as stated in the title

The EU Report on the Rule of Law and other observations

It is to be noted that the recent EU report on the operation of the Rule of Law in the transition countries,  for Slovenia only appears to have operated through the state bureaucracies and therefore is toothless despite the fact that both the World Bank and The European Bank for Reconstruction and Development had previously made negative comments. It does not seem very aware of the local habit in Slovenia of writing rules and regulations perfectly but actual practise is often at great variance.

A key concept that is covered by the Bangalore Principles in a general way but not explicitly is that of ‘Conflict of Interest’. In commercial life it is important that anyone who has a conflict of interest and where there could be a potential conflict of interest  it should firstly be openly stated and secondly recorded. The same should be for members of the judiciary in any trial to avoid a situation where  a court case may be found to be flawed because of a non disclosure. It is also worth mentioning that in Anglo-Saxon systems the oath sworn by Jury members universally includes the phrase that they must come to a verdict ‘according to the evidence’. The anecdotes described by Judge Zobec show that this is not quite so clear in Slovenia when verdicts are given.

Conclusions

 The lack of trust by the public in the Slovene courts should be a matter of deep concern for the European Union and any democratic parliament. The Union will know as stated in Judge Zobec’s critique that a huge number of judgements in Slovenia that were appealed to the European Court of Human Rights (329 out of 393 at end 2017) were considered by the European Court of Human Rights as violations.

It is to be recommended that Slovene MEPs request information about the EU Rule of Law report and enquire if this critique by Judge Zobec has been considered and indeed if also the CRCE Judiciary Survey has been examined.