October 21, 2023

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To: The Group of Independent Lawyers and Democracy Index - Georgia

Re: Online Discussion: **The Role of Private Lawyers and Lawyer Associations in Judicial Reform** (October 11, 2023)

Introduction and Background

This Issue and Session in Context

Since its beginning, INJR has hosted online discussions of various issues relating to judicial reform. The sessions have addressed a range of subtopics, focusing especially on ideas and proposals for system-reforms such as composition of judicial councils, judicial selection criteria and procedures, and reform guidance for regulation of judicial councils. The sessions have been excellent vehicles for sharing of ideas and discussions of what works, what fails, and why. For the most part, the sessions have focused on ideas that would find their fruition in legislative or regulatory changes.

In contrast, this session was conceived of not much with legislative change in mind. Instead, it would focus on one category of person (advocat/private lawyer) and their associations, and the role they might play in judicial reform and selection. As a result, the session was less about law and more about the functions and attitudes of people, at this one category of person. It is less about rule and more about role. One of our presenters quoted the familiar phrase: "It is better to have a good lawyer and a bad law than a bad lawyer and a good law."

The presenters sought to provide the group with experience and data about their reform activities for the purpose of sharing best practices for the role that private lawyers can serve in judicial reform.

Experience with Bar Associations and Judicial Reform

The experience with bar associations and judicial reform has been uneven and usually frustrating. In general, bar associations tend toward resisting change and as such are disinclined toward pushing for reform.

Bar associations have dual nature. There are divided between two different and quite distinct roles.

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On one hand, they are public bodies, delegated power (usually) by legislative act of the parliament, a law on advocats in the civil law world. In this public role, service is the mission. They are charged with the public responsibility of managing processes as relate to the legal profession, usually including admission of new lawyers and discipline of misbehaving lawyers. In this capacity, they are in search of the public good: protection of the public from bad lawyers and the general furtherence of the quality of the justice system.

On the other hand, they often function as trade associations for lawyers themselves, placing the interests of either the legal profession itself or sometimes individual lawyers above other interests, as is proper for a trade union or association. In this role, the public interest is of little or no concern. In some countries, this placement of fellow-lawyer above public takes explicit form in code of conduct provisions. For example, a code might demand that a lawyer who is approached by a possible client who says they were aggrieved by dishonest conduct of a fellow lawyer, must refer the matter to the bar association and not bring the issue in the form a claim against the misbehaving lawyer on behalf of the client.

It appears that in some Central and Eastern Europe (CEE) jurisdictions, the trade association personally is deeply ensconsed and thoroughly dominates. In others, there seems to be a wavering back and forth between the two personalities. For example, bar associations have organized or facilitated or at least participated in protest marches on behalf of a judiciary under attack from government. Yet even such bar assocations may then go into periods of eerie quiet while judicial corruption is rampant and unchecked. It appears that changes in bar association leadership may explain this inconsistent behavior.

We can say that when the public service personality of bar associations prevails, they can be powerful forces for judicial reform. When the trade association personality prevails, they will be servants of the status quo and of protection of its members.

Issues Relating to Individual Private Lawyers and their Possible Roles on Judicial Councils or in Judicial Selection Processes

In some jurisdictions in CEE, private lawyers may serve on judicial councils as nominees of parliament, the president, or through other authorized means. In others, there is no technical path for private lawyers to serve on judicial councils. In still others, while it is legally possible for a private lawyer to serve on a judicial council, there are significant, practical obstacles. In particular, if a private lawyer is obliged to give up their practice in exchange for a pro bono appointment to a judicial council, only lawyers with sufficient family wealth or income would have the capacity to undertake the judicial council appointment.

When it is possible for private lawyers to sit on judicial councils, several phenomena can exist. First, as pointed out in European Network of Judicial Councils Standard VI, non-judge members of judicial councils add legitimacy to the council, they can provide a “mirror” in which the judges themselves may see the judiciary, and they can form “a connecting bridge

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between the judiciary and the society." As well, the non-judge members are not constrained by membership in the group being regulated.

The private lawyer, in particular, may have more freedom to express views about judge candidates, judicial discipline cases, and issues of the judiciary generally. This freedom brings outside views into the discussions of the judicial council.

The amount of such freedom may depend on the life of the private lawyer outside the judicial council. A lawyer who leads a justice-NGO and who does not practice in court to any great degree, may have more of this freedom than the private lawyer whose livelihood is made before the judges in courts. The latter lawyer may fear alienating judges generally or some judges in particular before whom the lawyer is likely to appear. By contrast, the NGO-oriented lawyer has little or no fear of retribution from judges. Even the lawyer who regularly practices in court, if he or she is of strong character, can provide outside perspectives and accept whatever retaliation may occur from judges as the cost of doing important public service.

The private lawyer who practices in court also has an advantage over other non-judge members of a judicial council. It cannot fairly be argued that such a private lawyer does not understand the procedures and happenings in courts. So, for example, when the demeanor of a judge candidate comes into question, the court-practicing lawyer can more credibly than anyone else, including judge members, say how such harsh demeanor by judges affects litigants themselves. Such a lawyer has personally interacted with clients in such situations. Neither judges nor academics nor NGO lawyers have done so.

For these reasons, there are advantages to allowing and facilitating private lawyer membership on judicial councils and selection committees.

Main outputs of the discussion of October 11, 2023

Three speakers from different but overlapping backgrounds discussed the issues and the participants made comments and asked questions. Together, the speakers represented multiple combinations of lawyers connected with judicial reform. Collectively, they have been purely private lawyers either serving on judicial councils or leading justice-reform NGOs, they have served on judicial selection committees, they have brought lawyer skills from both inside and outside the formal justice system, and they have worked for bodies independent of the state itself (e.g., the US Embassy Bratislava). The speakers were:

- **Vitezslav Dohnal**, a private lawyer from Czech Republic who has founded and led law reform NGOs for more than 25 years,
- **Andrej Majernik,** a private lawyer from Slovakia who sits on the Slovak Judicial Council and judicial selection committees, and is active with the Slovak NGO, Via Iuris,

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- **Pavol Zilincik,** a reformer who has worn many hats in both Slovakia and Czech Republic; he founded the Via Iuris NGO, he worked on judicial reform issues at the US Embassy (Bratislava) and with both the Czech and Slovak Ombudman's Offices; he served as a member of the Slovak Judicial Council and continues to sit on judicial selection committees; and he teaches ethics topics to judges through the Slovak Judicial Academy.

Jim Moliterno, an expert from the US, moderated the discussion. He is a scholar and professor of lawyer and judicial ethics issues and has long experience in judicial, lawyer, and prosecutor ethics reform in many countries in CEE, including Georgia, Slovakia, and Czech Republic. He made brief introductory comments and comments about the nature of bar associations during the presentation.

Vitezslav Dohnal

Vitezslav described his approach as a lawyer as "active citizenship," though he said his critics have at times used the word "extremist" to describe his human rights/ethics reform work.

He focuses more on lawyers than judges, and especially young lawyers and even law students. He engages many strategies for raising human rights awareness and skill among young lawyers and students, especially. He organizes, along with law faculty members, training in ethics teaching for professors, human rights awareness trainings, and lawyer ethics workshops.

He outlined several principles that guide him.

-Encourage participants in the training to walk in the shoes of the huamn rights victim, sometimes by partnering with human rights NGOS and sometimes by bringing in victims to speak, and sometimes by using (as he does in all his trainings) experiential techniques (using real stories and examples to engage the participants.

-Work with young people/professionals. Jim Moliterno contributed that this is the way in which Vitezslav's work is judicial reform: some of the young professionals will be future judges or lawyers of influence and the work in shaping young minds is essential to reforming people's attitudes about the public service mission of judges and courts.

-Make friends; At any event, find someone who can help advance your cause and work with them or those they may lead you to.

It was commented that these principles can also be effective for working on judicial ethics reform.

Andrej Majernik

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Andrej took some time to explain the powers and responsibilities of the Slovak Judicial Council to provide context. He told of examples when his input as a private lawyer was meaningful and unique. For example, in a judge selection/promotion interview, the candidate acknowledged that she sometimes raises her voice toward litigants in court. When an academic member of the selection panel asked if she was working to correct that, a judge criticized the academic for not understanding that there are times during court proceedings when a judge needs to raise his or her voice to control the lawyers or parties. Andrej injected his experience saying that such outbursts by judges, if not controlled and absolutely necessary, can have a seriously harmful effect on the litigants and their confidence in the measured decision-making of judges. His input could not be dismissed as was the academic's because it arose from his actual experience with clients and court hearings.

He suggested that he can provide inputs from outside the "judge-club." From an outsider, he is not part of the "protecting our own" attaitude of judges regarding fellow judge. He did acknowledge that he has probably made some enemies of certain judges and this may have consequences for his court practice in the future. He said he had observed other private lawyer members of the judicial council or selection committees who tried to curry favor with the judges and restrain themselves from any negative comments about judges. When this happens, the presence of a private lawyer on the council would actually be a negative regarding judicial reform and honest selection processes.

He was asked if lawyers want to be judges (as opposed to members of judicial councils, as was the topic he was addressing). He responded that mostly they do not wish to be judges, but made an exception for a recently completed process of filling a new high administrative court in Slovakia, on which a few provate lawyers were successful competitors.

Pavol Zilincik

Pavol described his experience as a lawyer on the Slovak Judicial Council, described his various other roles in the US Embassy and in Ombudsman's offices, and then asked a few questions that he hoped would spark discussion.

For his role as a lawyer, he echoed some of Andrej's remarks, but noted (and Andrej agreed) that from Pavol's position as a career reformer rather than a lawyer who is in private practice for his livelihood, he has had more freedom to challenge judges and accepted ways of conducting the council's business.

He suggested that it is valuable to refrain from thinking in binary terms. In other words, the members of a judicial council (or selection committee) are not simply on two opposing teams. Instead, he has found that if he persists in making arguments for serving the public interest, on some issues, even some of the judges that could be seen as "enemies" or "the other side" can sometimes be persuaded and agree with him. So, he suggested, instead of assuming there are two teams, he suggested making the right arguments and trying to persuade

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whoever can be persuaded. In this regard, he frequently used aspects of the European Network of Judicial Councils Standards in his arguments, explaining in particular the role and value of non-judge members such as himself.

He told a story of a cartoon about a new law graduate being told that his credential is the best for plundering the society. When this was published, the Slovak Bar Association reacted with fury, denouncing the cartoonist in the harshest possible terms. Yet, Pavol said, when the judiciary was in its darkest, most corrupt days about 10-15 years ago, the Bar Association said nothing. It seems that the Bar Association is unconcerned about rampant judicial corruption, but can rise to action when it's members are accused. This is the dual nature of bar associations, which act often as trade associations for the protection of lawyers and their profession, but not so often for the protection of the public interest against corruption in courts.

He asked if it is fair to expect bar associations to care about corruption in the justice system. Partcipants (and he) answered that it is fair and if we can motivate bar associations to prioritize the public entity, public service "personality," then we should expect that bar associations would use their considerable power to press for judicial reform.

Recommended Follow-up

1. Survey to learn more broadly where and under what circumstances private lawyers are/may be members of JCs and selection committees

2. Create a best practices document for private lawyers in such roles

3. Connect lawyers who are in such roles across borders into our and their own discussion groups

4. Survey CEE bar associations regarding judicial reform activities actually undertaken (last ten years? Since 1990? Since post-communist bar association creation?) and publish the results

5. Connect CEE bar association leadership in a subgroup of CCBE

6. Offer training to bar associations on their public service role

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