

# Anamnesis of a certain candidature, diagnosis and therapy



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Justus Lipsius who lived in the 16<sup>th</sup> century was a famous Flemish philologist, philosopher, humanist, professor and writer. He revived antic stoicism and adapted it to Christianity. The majestic building in Brussels that once hosted meetings of Council of the European Union and European council carries his name, and is now a home for administrative staff. However, it still hosts various conferences, sessions, meetings and grotesque hearings.

Should I ever have any cheerful memories of this sombre building it will be of the corner obelisk where the first lines of Prešeren's anthem are written in all 24 languages, marking the Slovenian presidency of the EU. *God's blessing on all nations*, it starts, and I yearn for "that bright day when o'er earth's habitations no war, no strife shall hold its swaythe".

Friday June 7<sup>th</sup> 2019, 8.55 AM, a few steps away from the entry to Justus Lipsius at Rue Froissart 108, no more than ten minutes' walk away from NH Brussels EU Berlaymont hotel. A hug and a kiss to my dearest Ester and then off and away towards grim looking security personnel. While walking, I turn around a couple of times and we wave to each other, like we are used to, this time perhaps a bit more superstitiously. Soon my hardest hour of dehumanization will start, marked by the clock, set off already 14 months ago. So, let us start at the beginning of this story of metaphoric justification of a Slovenian jurist in order to facilitate the younger generation their European or international adventures. I don't want to lament like Aesop's fox at sour grapes, I only want MY TRUTH (copyright of Janez Drnovšek, Ph.D.) to be heard. It is left to you to judge who's right, what went wrong, am I an incompetent loser, a greedy ambitious person or perhaps the victim of a staged manipulation.

## **The call for applications and the duality of the Court of Justice of the European Union**

Last April the Ministry of Justice, based on the Act on nomination of candidates from the Republic of Slovenia for judges at international courts (Ur. l. RS, no. 64/01 and 59/02), has published a call for applications for two candidates for a judge at the General Court of the EU

in Luxemburg. Let me briefly explain how the renewed euro-judicial system works since it is not well known even to a major part of the expert community, let alone the general public. ... (Not translated: Competency of the Court, the General Court and excellent results of the Court of Justice of the EU in 2018).

Rules to apply for an international (European) judge are the same as for a Supreme or Constitutional Court judge. This is a novelty and has opened the door to the most prestigious judicial functions also to those (unfortunately) without the state bar exam. The candidates should have active knowledge of one of the official languages of the international court in question and since the *lingua franca* of the General Court is French those candidates that have knowledge of French should be given preference. According to the recital 11 of the Regulation (EU, Euratom) 2015/2422 *it is of high importance to ensure gender balance within the General Court*. The complete applications that, in volume, resemble diploma papers are submitted by the Ministry of Justice to the President of the Republic who then, based on the opinion of the State Judicial Council and the Government proposes to the National Assembly the required number of candidates, or more.

We have been ten candidates; eight male and unfortunately only two female colleagues, of which one later withdrew her candidature. All applications had to be submitted in early May, on June 3<sup>rd</sup> 2018 Slovenia held early parliamentary elections and later that month the Ministry informed the President about the candidates. After the new National Assembly was formed, I wrote – at the most useful advice of former professor, my friend and long standing judge at the Court of Justice of the EU, Marko Ilešič, Ph.D. – to the leaders of the parliamentary political groups expressing my readiness to present myself to them personally as a candidate for the position of the European judge.

I have received reply from almost all of them; some quickly, other after several months. Almost all of the meetings were dignified, to the point and kind; only one junior advisor to a parliamentary group and her colleague treated me as a brat at an exam or a delinquent, probably to impress their leader that was mainly quiet.

### **The quartet of the Judicial Council, President of the Republic, Government and the National Assembly**

The first dice has been cast on November 8<sup>th</sup> at the session of the Judicial Council. This constitutional authority showed utmost professionalism, however I may be biased since they elected me into the narrow selection. It must be stated that my knowledge of European law was tested among others by Professor Verica Trstenjak, Ph.D., a former judge at the General Court and Advocate General at the Court. She was asking relevant and in-depth questions about the European law not only to me but also to the other candidates.

Almost unanimously, with one member sustained, following decision was adopted:

*"The Judicial Council has reviewed candidatures of 10 candidates for two open positions for judges at General Court of the European Union in Luxemburg (call for applications published in Ur. l. RS, no. 23 of 6. 4. 2018) and has decided, firstly, that it supports the candidatures of,*

*in no preferential order, candidates **Miro Prek, Ph.D., and Professor Marko Pavliha, Ph.D.**; secondly, also in no preferential order, supports the candidates Associate professor Klemen Podobnik, Ph.D., and Saša Sever, MS. The Judicial Council sees other candidates suitable for the position of the judge at the General Court of the European Union in Luxemburg.”*

Quickly, the opportunistic understanding of this decision spread, saying that the first two candidates have been selected for *Prek's* position (namely, his second term as a judge ends in August 2019) and the other two for the second position, given to Slovenia, as to other member states, after the reform of the institution. Reading simply grammatically, the decision says firstly not for the first position, and the names of the candidates in bold letters were joined by AND, not by OR, and reading into the meaning, even a lay person would see that such an explanation was wrong. Judicial Council has clarified its views of the candidates in the letter to the President of the Republic. One of the disappointed candidates has even filed a lawsuit to dispute the decision of the Judicial Council together with application for interim measures but it was dismissed in the Supreme Court. He didn't succeed in the Constitutional Court either.

The Judicial Council may perhaps be outdated but it remains the only authority to verify the competence of candidates for Slovenian and foreign judicial positions. A suggestion of the Constitutional Court judge, lawyer and psychologist Katja Šugman Stubbs, Ph.D., needs special attention as she suggests objective testing of the abilities of state attorneys and judges.

The Slovenian Government diplomatically stated that all of the candidates are suitable for the open positions.

Intense lobbying followed that resembled a hockey game on thin ice with a puck filled with political envy and hatred. When my wife and I decided I should apply for the position we promised ourselves not to go down that path but it was unavoidable. Sincere thanks to all who believed in me and helped us, from politicians, experts and friends. For their own “safety” I will not name them.

After consulting the parliamentary groups, the President selected Judge Prek and me. The media, with some exceptions mentioning my past political career, reported objectively. Some of them stated that the President selected Marko Pavliha, “the lawyer”. This is totally illogical since only a lawyer can become a judge; a physicist, medical doctor or a priest, for example cannot be elected. Further, they reported how a standing judge Marko Ilešič did not apply for the position. He is serving his third mandate at the Court and not at the General Court and will probably retire afterwards but it would also be highly unusual for a judge of a “higher” court to apply for a position at a “lower” one. In addition, there were some inaccuracies in the media with the nomenclature, among others marking the General Court a division of the Court.

On the eve of the presentation in the Presidential Palace the Slovenian national television shocked everyone with the abominable accusations against Miro Prek that were more than obviously staged and lanced at “ideal” time. Sadly, in Slovenia only I raised the voice in his support and in Luxemburg his main legal advisor; alas, the lynching could not be stopped.

The members of the Parliament have elected only me with an absolute majority of 55 votes whereas the standing judge with international reputation came only a couple of votes short. For me, the day of the martyrs was a year long but to my relief it ended on International Women's day. However, this was only the calm before my own storm.

Gandhi said: "I judge others by their good deeds and since I'm not perfect either I don't search for the mistakes in others." Holy Bible teaches the same (John 8):

*"Jesus went to the Mount of Olives. Early in the morning he came again to the temple. All the people came to him, and he sat down and taught them. The scribes and the Pharisees brought a woman who had been caught in adultery, and placing her in the midst they said to him, "Teacher, this woman has been caught in the act of adultery. Now in the Law, Moses commanded us to stone such women. So what do you say?" This they said to test him, that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. And as they continued to ask him, he stood up and said to them, "Let him who is without sin among you be the first to throw a stone at her." And once more he bent down and wrote on the ground. But when they heard it, they went away one by one, beginning with the older ones, and Jesus was left alone with the woman standing before him. Jesus stood up and said to her, "Woman, where are they? Has no one condemned you?" She said, "No one, Lord." And Jesus said, "Neither do I condemn you; go, and from now on sin no more."*

The mob always believes what is worse: *vulgus ad deteriora promptum*.

### **The execution in Brussels: incompetence of the candidate or conspiracy?**

After the premature congratulations to the election by many of the relatives, friends, and *ad hoc* fans I didn't quite know what follows apart from the next step, an interview with a special panel based on the Lisbon Treaty i.e. Article 255 of the Treaty on the Functioning of the European Union. So called Panel 255 comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament (currently from Netherlands, Germany, Portugal, Spain, Malta, Ireland and Poland). I asked the Office for international cooperation and international legal aid at the Ministry of Justice for help. They kindly explained that the Permanent Representation of the Republic of Slovenia to the EU in Brussels was informed about my election and they forwarded the material to the General Secretariat of the Council of the European Union. The boiling point reached its peak and beyond while waiting for their answer which I finally received on May 6<sup>th</sup> with instructions about the last stage. I had to provide a letter of motivation, list of published EU work and some "delicate" legal cases in my praxis. Done, and after I have been studying EU law intensively for over a year and perfecting my French, it was time for the grand finale on June 7<sup>th</sup>.

Then, the world fell apart for me and Ester. On Wednesday May 29<sup>th</sup> I received a formal letter in French from the General Secretariat asking me to comment attached anonymous slandering sent from the email address of one Wilhelm Kroll (the conspirators were hiding

behind the name of the German classical philologist, born in the town of Frankenstein!), written in poor English and signed *Group of EU citizens*. I was so astounded that I printed the anonymous letter and took it from my study straight to my wife, white as a chalk. This is the end! I uttered. Surprisingly quickly I was back again in my study, calmly composing a reply, *sine ira et studio*. My wife and my daughter perfected it and in the morning I sent it to Brussels both as a letter and as an email. They also asked the Republic of Slovenia to comment on it and the international office of the Ministry of Justice wrote a letter in my support, signed also by our ambassador at the Permanent Representation of the Republic of Slovenia to the EU.

The anonymous author(s) reproach(es) me, among other things, the lack of personal integrity because I had, at the presentation in the Presidential Palace, allegedly lied about my past and current political affiliation and economical and lecturing experiences regarding the areas of work of the General Court. There were also charges of my “radical” statements regarding Republic of Croatia, that were supposedly to cause numerous conflicts between myself and the Croats working at the General Court; on top of that, Croatia was said not to respect any of the judgements I would be involved in. The loving letter ends by saying that I’m not a suitable candidate for a judge at the General Court, despite being best man at the wedding of Marko Ilešič, Ph.D., acting judge at the Court of Justice.

What more can a man wish ahead of a vital hearing?!

Those in the know think that the author of these slanders and lies is most probably someone who desperately, even at the cost of walking over death bodies, wants to achieve the position of the European judge, or is either my arch enemy, or some intelligence agency or politicians on the other side of Dragonja, Mura or Kolpa border rivers. The methodology resembles that one used against the Judge Prek; devastating discreditation in the last moment. An individual cannot fight against such sinister sociopathic or political wind mills, even though I bear some resemblance with Don Quixote. However, this was not just a harmless provocation or extremely dishonest move but rather a criminal offence of defamation or insult to the Republic of Slovenia. Therefore I hope the competent authorities have already rolled up their sleeves and have some leads on the perpetrator so that the justice can prevail over injustice.

Can you even for a second imagine the agony of the painful attack on me and my country that has chosen me as the most suitable candidate for a judge through a complex and transparent procedure? Somehow I gritted the teeth in order to continue my intense studies during the last week but the wounds were burning too deeply; after all, I am not a robot or a psychopath.

So, when I entered the aforementioned building on June 7<sup>th</sup> I was at first puzzled by an unusual half hour delay, apparently the members of the Panel 255 had to consult “on something”, I assume on my contamination caused by this anonymous sewerage. When I was finally brought to the indecently oversized conference room of Anna Lindh, totally inappropriate for such events, I was met by six gloomy faces of the panel members (the president of the German Constitutional court was unfortunately absent), by two associate

members and the interpreting team, hidden behind a glass balcony. I felt like the accused or even convicted man, almost *a piece of shit*; instead of being offered the courtesy of some basic kindness. I was nevertheless the official candidate of the Republic of Slovenia. They sat me at a gigantic table in a form of a horse shoe which has not brought me luck. I will not dig into the details of the one hour long hearing, filled with various expert topics and nit-picking questions but I can with a clear conscience admit that due to the anonymous blow and (as a consequence?) humiliating treatment I felt badly because nowhere near could I use my presentation skills. Despite the bitter aftertaste I would still award me the note 7 (good) or at worst 6 (passable), in no case I should “fail” since this was not supposed to be an exam but rather a civilized interview.

But, the Panel has decided differently. Later on, when I was at the Charleroi airport with Ester, our ministry informed me that it was unfortunately not enough ...

That was Friday afternoon and already on Saturday morning I received a call from the national television, although not many knew about the panel outcome. Would they report also if I were confirmed? Probably not, since only the bad news sell. I didn't want to comment, let the competent authorities investigate the criminal offence. However, my soul felt the bloodthirstiness again of certain media that intentionally ignored the anonymous accusations and claimed that the true reason was my incompetence and inappropriateness since the Court of Justice of EU couldn't be bothered by anonymous accusations. Interesting, perhaps I wrote the letter myself and sent it to the Brussels Big Brothers and Sisters to insure myself an alibi in case I failed the exam?

Out of inevitable subjectivity I will, instead of these emotional outbursts, pose some questions that you can ponder on. Wasn't the Panel 255 conceived as a mere formality or at most a filter to catch politically assigned or other candidates with inadequate personalities, and not as a supreme inquisitor and judge? Is it normal that already four Slovakian candidates were refused, following a series of extremely distinguished experts from other countries, for instance from Italy, Sweden, Austria, Malta or Slovakia? Aren't its arbitrary acquired competences exactly that which is the most disturbing in the Union, namely the centralised ignoring of the smaller member states? Shouldn't it go without saying that the members of the panel be also perfectly bilingual if they demand sound knowledge of French and English from the candidates? How is it at all possible that such a “serious” body is at all giving weight to anonymous letters that bear all signs of a criminal offence?

In these dark times, Professor Emeritus Janez Kranjc, Ph.D., cheerfully reminded me of the saying *Sine auctore propositi libelli in nullo crimine locum habere debent* from Trajan's letter to Pliny the Younger, found in professor's excellent book *The Forgotten Latin*. The Emperor refused the possibility to rule against a religious group based on anonymous accusations since these were opposed to the spirit of his absolute monarchy (more than 2000 years ago!). As Professor Kranjc points out, such anonymous letters are nowadays accepted as something normal and even useful, instead of asking ourselves “what happened to the core values of our society, where is our republican conscience and our sense of responsibility, justice and freedom”; and who is the real author of these writings, because that would

expose that “the anonymous letters are only a pretext and an alibi to fight your various (political) enemies”.

The official explanation by the panel, that remains confidential, naturally says that I am not appropriate to be the judge at the General Court, and I have no legal remedy against such a decision.

On July 4<sup>th</sup> the representatives of the governments of the member states will appoint new judges. In the past they have always followed the decision of the panel and have never unanimously appointed a candidate with a negative note. My rhetorical question is if the representative of Republic of Slovenia will be brave enough to point out the suspicious circumstances about my hearing and the panel itself thus, together with other discontent countries, contribute to a positive change of this pitiful practice. Will he support Slovakia in its effort to clip the wings of the panel? Will it bravely fight for the common pawn or will it sacrifice it for the good of the almighty King and Queen?

A new call for applications already answers these questions.

### **A handful of suggestions and epilogue**

To conclude this saga, let me write some benevolent thoughts regarding the procedure of international candidacies for judicial positions and possible legislative changes. Patience is God’s ointment, as we say in Slovenia, and I felt it more than needed at my own skin while waiting in uncertainty and finally squeezing through all the political and bureaucratic cracks, except the last one. But every pot is once full of the ointment and it can be also melted. *Act on nomination of candidates from the Republic of Slovenia for judges at international courts* does not define who is the chief administrator of the candidacy procedure: The Ministry of Justice, President of the Republic or the National Assembly. Therefore it is the best for the candidates themselves to watch over the procedure. This will require numerous notes, reminders and various incentives for the officials and also politicians to do their work. The candidates must be at all time proactive but still intuitively careful that they don’t cross a point of saturation with their lobbying. In case of questionable personal or professional adequacy of a candidate, the President of the Republic should have the right to appoint them or not; this is the case with the judges of the Constitutional Court. This opens a question if it shouldn’t be the President himself responsible to choose the candidate based on the expert opinion of the Judicial Council and political decision of the Government. As it is the case with the Constitutional Court Act, the international judges should have also the opportunity to return to their previous post.

I have been writing about this topic for a long time and trying to come up with a suitable reform, firstly when I was a candidate for a judge at the International Tribunal for the Law of the Sea in Hamburg in 2002. There are two scenarios: when Slovenia is automatically entitled to one or more judicial posts (e.g. European Court of Human Rights and Court of Justice of EU) and secondly, when its candidate competes for the position with other candidates and is chosen by an international body, as within the United Nations. The latter requires additional time for lobbying and is affected by the lengthiness of the procedure, even though the Committee of Ministers of the Council of Europe has deemed the Slovenian

sector-specific act as an example of good practice. Now I understand that the politics cannot and should not be excluded from the selection procedure (I also realised that the European commissioners are also and foremost politicians, but it would not hurt for them to be experts as well, chosen in a democratic and transparent procedure), because a Slovenian candidate can become an European or international judge only by the decision of the native country and is also its honourable ambassador; all this respecting the principles of independency and impartiality. It would suffice if the political role would be upon the Government instead of the National Assembly; this would speed up the process but lessen the chances of the opposition. Hopefully some of the suggestions for improvements that are in the making at the ministry will be adopted.

And finally, don't worry about me, I will survive this defeat. There is something good in everything and as two old Slovenian sayings go: Man proposes, God disposes; and What goes around, comes around, the longer it goes, the harder it strikes.