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International Round Table

SHAPING JUDICIAL COUNCILS
TO MEET CONTEMPORARY CHALLENGES

University *La Sapienza,* Rome

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(Hybrid format)

PRESENTATION
by

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On February 9th this year, the National Assembly of the Republic of Serbia promulgated the Act regarding amendments of the Constitution of Republic of Serbia and the Constitutional Law for its implementation. This act introducedchanges in the sections related to judiciary. Among other changes, the composition of the Judicial Council has changed. According to the Act regarding amendments of the Constitution of the Republic of Serbia, the Judicial Council – High Judicial Council consists of 11 members:

- six judges elected by judges,
- four prominent lawyers elected by the National Assembly by two-thirds majority vote of all deputies and
- the President of the Supreme Court, who is a member by position.

As in many European countries, a judicial council has been established in the Republic of Serbia, in order to be a mediator between the political authorities and the judiciary. Historically, the first judicial councils were established in France and Italy in the second half of the 20th century, and then the same councils were established in Spain and Portugal, after the breakdown of the authoritarian system, as an important constitutional guarantee made to strengthen rule of law.

The establishment of the Judicial Council is a strongguarantee of the judicial independence and the basis for its institutional reform, as it protects the basic features of the separation of powers:

1) the balance, which should be achieved between the legislative and executive power, should preclude their excessive influence in the domain of the independent judiciary;

2) responsibility in the functional division, which is applicable for all three branches of powers, including the judiciary power.

However, the place of the judicial council in the system of separation of powers depends on its composition, as well as the rules for election of its members. The composition of the Judicial Council is important for the participation of various constitutional factors in the election of members, with or without setting conditions regarding the professional qualities of members, which excludes the voluntarism of political authorities. Also, the composition affects the procedure of discussion and decision-making in the Judicial Council, and therefore different models of election or appointment of members of the Judicial Council are combined, either with participation of political authorities or on the basis of position postings with professional conditions which should be met.

Therefore, the Republic of Serbia acted in line with the recommendations given in the opinions of the Consultative Council of European Judges, the Venice Commission and the Council of Europe Group of States against Corruption in the process of drafting of the Act regarding amendments of the Constitution of the Republic of Serbia, fulfilling the highest international standards in this area at the same time. We were guided by the recommendation that the Judicial Council should have a mixed composition in which the majority of members will be judges elected by judges, taking into account the widest possible representation of the judiciary at all levels. This way, independence of the council is guaranteed and efficient exercise of council's responsibilities is enabled which are primarily related to the election and career of judges.

The mixed composition of the Judicial Council, in which a significant majority of members are judges elected by judges, aims to prevent undue influence on the judiciary branch of power.

This composition of the Judicial Council prevents the representation of personal interests and the election of judges who could be influenced by political branches of authorities (legislative and executive), but also reflects different views of society, which is providing the judiciary with an additional strengthening of legitimacy. This composition of the Judicial Council prevents the subordination of its members to the influence of political parties, thus protecting the basic principles of justice. The"depoliticization" of the Judicial Council is also in the interest of the citizens, who will, in this way, have a guarantee that decisions regarding their rights in court will be made by an impartial judge who is independent of political influence. Therefore, the procedure of electing members of the Judicial Council, in whose jurisdiction is the election of judges, shouldprevent violation of the citizens' trust in the judicial system.

We were also led by the premise that judicial and non- judicial members are appointed on the basis of the necessary competencies and experience. In that sense, it is necessary to prescribe in the constitution the term "prominent", i.e. "reputable lawyer" for the election of non-judicial members ofjudicial councils. This legal standard, primarily considered as the precondition for the election of a judge of the Constitutional Court, is represented not only in the Constitution of the Republic of Serbia but also in the constitutions of Spain, Poland, Croatia and Montenegro. The terms "reputable" or "prominent lawyer", which are often used as synonyms, raise several questions. The essential question that arises is who can, or more precisely, who should beconsidered a "prominent lawyer" in the context of election toa particular position, which is in our case the position of a member of the Judicial Council. This question is in correlationwith the question of what are the criteria that determine the "prominent lawyer" and how closely they can be set so that this legal standard would not lose its meaning and at the same time be protected from abuse?

The answer to this question depends on how the term "prominent lawyer" is interpreted. Interpretation can be narrow and broad, subjective or objective.

On one hand, "prominent lawyer" can be interpreted exclusively in the field of law and professional achievements, and it could be a lawyer with high legal qualifications, titles, and particular work experience. What is perhaps the biggest challenge in specifying this term is finding adequate additional criteria. Taking the practice into account, it can be the number of published scientific papers, participation in relevant professional gatherings or major international projects, passing the bar exam or acquiring a scientific title. However, this is where the challenge arises. Such "tangible" additional criteria, which are then logically quite uniform, are not suitable in this case. For example, it is very likely that certain judge can be a excellent law expert and an excellent judge, deeply committed to his/hers judicial work, without ever engaging in scientific work, writing of scientific papers and activities not related to judiciary. Why would that betaken as a disadvantage, if he is among the most respected professionals in his work? Conversely, a law professor may not be able to meet criteria which are related solely to practise. Thus, it becomes clear that an excessive narrowing of the legal standard for the term "prominent lawyer" would unjustifiably lead to the fact that individuals who deserve to be in this group, would be prevented from being part of it. In other words, there would be a danger that the form would distort the essence. However, what is indisputable in this narrow interpretation is that it is necessary that this individual has high reputation within the profession and for whom, among legal professionals, there is a general agreement that he/she stands among others for their professional qualities in knowledge and implementation of law. This could be called a subjective interpretation, which in this case is inevitable, but objectively, again, it is difficult to measure.

The Constitution of Poland, for example, specifies that this legal standard is measured through the level of knowledgeof law. In that way, the Constitution itself has already given guidance for further interpretation, but it is necessary to determine again which criteria will be relevant for determining the level of legal knowledge.

On the other hand, the legal standard "prominent lawyer"can be interpreted more broadly, outside the legal profession and formal achievements. In that case, in addition to the fact that someone is an exquisite legal expert, it is necessary that he has certain personal qualities that set him apart from his peers.It is necessary that this individual stands out in moral qualities, to possess integrity, autonomy, as well as socialskills. But above all, it is necessary that he has a high reputation in society.

Venice Commission also endorses this broader and more comprehensive interpretation, based on the Urgent Opinion onthe Election and Appointment of Judges of the Supreme Courtin Georgia, Opinion no. 949/2019 of April 2019, which states that it is important that the definition of "specialists with exceptional qualifications in the field of law" is not unjustifiably restrictive in terms of eligibility of non-judge candidates and that it ideally refers to a lawyer with a highreputation.

Also, this follows from the Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia where it is stated that: "The Draft Law sets an additionalcondition which it is not in the Constitution, and that is thatthe candidate must have high professional and moral qualities.This is positive. Furthermore, the candidate must provide a documented evidence regarding his or her knowledge of the Armenian language. The criterion of "high professional qualities", as prescribed in the Constitution, and not further explained in the draft law, can be difficult to determine precisely in practice, but it is still adequate. The aim of this definition is to ensure that judges of the Constitutional Court have special, "higher" legal knowledge. These types of provisions also exist in other countries."

The term of "prominent lawyer" for the election of members of the Judicial and Prosecutorial Council was introduced into the legal order of the Republic of Serbia through changes to the Constitution in the area regulating the judiciary. This term was previously used only for the election of Constitutional court judges, where, based on current experience, it was proven to be adequately applied. If a prominent lawyer, as a member of the Judicial Council, is elected by the legislative authority, a qualified majority should be prescribed for his election, which will include the participation of the parliamentary opposition in his election. Such a way of election will ensure that diversity of opinion is represented in the composition of the Judicial Council, which should reflect all the differences in society.

However, it is sometimes difficult to reach a qualified majority for the election of members of the Judicial Council in parliament, so it is necessary to prescribe a mechanism to prevent the blocking of its work (i.e. anti-deadlock mechanisms). Thus, for example, in the Republic of Serbia it is prescribed that if the members of the Judicial Council are not elected by parliament by a qualified majority of votes, members from prominent lawyers are elected by the Commission consisting of representatives institutions which are constitutional category: President of the National Assembly, President of the Constitutional Court, Supreme Public Prosecutor and Protector of Citizens. This composition of the commission is envisaged because it represents a body that should replace the competence of the parliament when parliament is not able to make a decision on the election of prominent lawyers.

There are two reasons for prescribing such anti-dead-lock mechanisms:

1) First one is that the five-member commission is abody that should substitute the competence of the National Assembly when the National Assembly is not able to make a decision on the election of prominent lawyers by qualified majority, and therefore it is most appropriate that it consists ofholders of the highest public functions which are also a constitutional category.

2) Secondly, majority of the five-member commission are prominent lawyers (President of the Constitutional Court, President of the Supreme Court, Supreme Public Prosecutor and Protector of Citizens), plus the President of the National Assembly, who represents the National Assembly. Therefore, it is most appropriate that prominent lawyers who are to be members of the Judicial Council are elected by prominentlawyers together with the President of the National Assembly,who in the constitutional system of

Serbia is not only a representative of the National Assembly, but also a holder of certain independent powers.

In addition, I would like to point out that the mixedmodel of the Judicial-Prosecutorial Council, which would be competent for the election of judges and public prosecutors, has numerous shortcomings because the judiciary and the public prosecutor's office cannot be equated. I believe that there is an essential difference between the judiciary and the public prosecutor's office in their constitutional position and role. The judiciary is the third branch of authority, and the public prosecutor's office is not. Therefore, the judiciary is characterized by independence, and the public prosecutor'soffice by autonomy, and such a distinction is supported by theVenice Commission's Opinion on the Act regarding amendments of the Constitution of the Republic of Serbiafrom October last year. I believe that the judiciary and the public prosecutor's office can be equated wherever possible in order to achieve maximum independence, efficiency and accountability. However, this principle is far from absolute, and when prescribing the conditions for election of judges andpublic prosecutors, it is not even possible. If that were the case, it is most likely that special provisions on the public prosecutor's office in the Constitution would not be necessary,because the provisions on the judiciary would be consistently applied to the prosecutor's office or at least *mutatis mutandis*, which is practically impossible.