

Outline of the paper on

*“Pour ou contre une composition mixte?”*

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1. The composition of Councils for the Judiciary is closely correlated to the role and competences which each State attribute to such a body. One factor in particular affecting the composition of Councils are the similarities or differences in terms of the legal status of judges and public prosecutors. From this standpoint, with regard to the structure of the Councils, three different solutions are seen to emerge:

- a) Councils having competence over both judges and public prosecutors, both having their own form of representation within the body (Belgium, Bosnia Herzegovina, Bulgaria, Croatia, Greece, Italy, Hungary);
- b) Councils having a limited competence over judges and thus a structure in which only judges and not public prosecutors are represented (Albania, the Netherlands, Poland, the United Kingdom, Slovenia, Spain);
- c) Simultaneously present bodies having competence over judges and over public prosecutors taking the form of: c1) two distinct sections within the Council having partially different structures (France, Romania); c2) two distinct Councils (Portugal).

2. A fundamental issue is the extent to which Councils are mixed or not, in reference to the simultaneous presence, or lack of it, of judges (or the stipendiary component) and non-judges (or the “lay” component, according to the terminology adopted in Italy).

As a rule, the composition of Councils is mixed. The only exception to this is Greece, where all members of the Council are stipendiary. In the other States, two possibilities can be noted, the former being the more common of the two:

- a) numerical majority, to a greater or lesser degree, of the stipendiary component (Albania, Croatia, Italy, the Netherlands, Poland, Romania, Slovenia, Spain, Sweden, Hungary);
- b) substantial numerical balance between the two components (Belgium, Bulgaria, France, Portugal).

It should be noted that a mixed composition is also the rule even in those States not having a Council for the Judiciary but rather a body which nonetheless represents the judiciary or is charged with certain competencies of an administrative nature (Finland, Ireland, the United Kingdom and Wales).

3. With regard to the non-stipendiary component, three possibilities arise, the last of which is somewhat uncommon:

- a) the presence of representatives from other categories of jurists, such as lawyers and professors of law (Bosnia Herzegovina, Croatia, Denmark, Italy, Romania, Slovenia, Spain);
- b) the presence of “political” members, by right or elected by representative bodies:
  - b1) the President of the Republic for the purpose of guaranteeing balance between the powers of the State (France and Italy);
  - b2) the Ministry of Justice (Albania, Bosnia Herzegovina, where a member is designated by the Council of ministers, France, Poland, Romania, Hungary); in this situation the problem arises as to the nature of relations between judicial and executive power and distinctions between the competences of the Council for the Judiciary and the Ministry of Justice;
  - b3) members of parliament (Poland, Sweden, Hungary) or elected by parliament and not calling for legal qualifications (Bulgaria, Portugal);
  - b4) figures external to both the parliament and the legal system (France, where three figures are appointed by the President of the Republic, the President of the National Assembly and the President of the Senate);
- c) the presence of non-jurist technicians (Denmark and Sweden).

4. With regard to the provenance of the stipendiary component, two possibilities arise, the first of which is the more common, according to whether the representatives of the judiciary are appointed:

- a) by judges:
  - a1) by means of direct election (Belgium, Bosnia Herzegovina, Bulgaria, France, Italy, Poland, Portugal, Slovenia);
  - a2) by means of indirect election or by more limited bodies (Hungary and Albania respectively);
  - a3) by drawing lots (Greece, carried out by judges having been in service for at least two years at the competent superior court);

- b) by non-judges: b1) by parliament on the basis of the lists resulting from the election of judges (Romania) or proposed by the Presiding Judge of the Supreme Court (Croatia) or presented by professional associations of the judiciary or by a number of judges equal to at least 2% of those in active service (Spain); in these cases (but also when the non-stipendiary component is not of parliamentary origin) the problem may arise in which agreement is sought between the majority and the opposition which might lead to a delay in the renewal of the body within the prescribed times; b2) by royal decree (the Netherlands, where the stipendiary components are appointed for life).

5. Despite such diversity in terms of the composition of the various Councils for the Judiciary, certain trends can be detected:

- a) a mixed composition (judges and non) of the Councils, deriving from the need to balance the exigency of the judiciary for self-government (and therefore autonomy) and the necessity to collaborate with other powers within the State (in order to prevent the corporative closure of the judiciary);
- b) the predominance of the stipendiary component, deriving in the main from the fundamental objective of the Councils, namely to guarantee independence to both the judiciary and individual judges;
- c) the predominance of stipendiary members being elected by other judges, ensuring both the representativeness of elected members and the democratic nature of their selection;
- d) the variation in terms of the provenance of non-stipendiary members, in which connection the solutions which would appear the most preferable are those where parliamentary bodies provide for their appointment (as a qualified majority, so as to achieve an agreement between the majority and the opposition) and where the passive electorate is assigned by jurists of proven ability (in guarantee of their contribution, also of a technical nature, to the work of the Council).

In conclusion, even with regard to its composition, a “European model” for a Council for the Judiciary is seen to emerge, based on a range of shared elements (such as its mixed structure) and additional lines of converging trends.