

CONFERENCE REPORT ON THE ROLE OF DISTINGUISHED LEGAL PROFESSIONALS IN JUDICIAL COUNCILS



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CONFERENCE REPORT ON THE ROLE OF DISTINGUISHED LEGAL PROFESSIONALS IN JUDICIAL COUNCILS

Miloš Stanić

June 2022

Serbian edition:
*Izveštaj sa konferencije o
ulozi istaknutih pravnika
u pravosudnim savetima*

Miloš Stanić

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Conference on the role of distinguished legal professionals in judicial councils

■ **Organiser:** Common project of the European Union and the Council of Europe “Support for the Judicial Reform”, in partnership with the Judges’ Association of Serbia

■ **Venue:** Faculty of Law of Belgrade University

■ **Date:** 3 June 2022, 10.00 – 14.00

■ **Speakers:**

- Nadia Ćuk – Deputy Head of the Belgrade Council of Europe Office
- Dirk Lorenz – Head of Political, EU Delegation to Serbia
- Snežana Bjelogrić – President of the Judges’ Association of Serbia
- Prof. Zoran Mirković, PhD – Dean, Faculty of Law, Belgrade University
- Jasmina Vasović – President of the Supreme Court of Cassation and President of the High Court Council
- Prof. Vladan Petrov, PhD – Judge of the Constitutional Court; Faculty of Law, Belgrade University; Member of the Venice Commission
- Prof. Mladen Vukčević, PhD – Professor of Constitutional Law, former President of the Constitutional Court of Montenegro, former President of the Judicial Council of Montenegro
- Prof. Tanasije Marinković PhD – Faculty of Law, Belgrade University
- Đuro Sessa – Expert of the Council of Europe, President of the European Association of Judges and former President of the Consultative Council of the European Judges (CCJE)
- Gerhard Reissner – Expert of the Council of Europe, former President of the European Association of Judges and the International Association of Judges, member of the Consultative Council of the European Judges (CCJE)
- Dragana Boljević, Judge of the Supreme Court of Cassation, Moderator

■ **Participants in discussion:** Janja Roblek – long-time President of the Slovenian Association of Judges and member of the Judicial Council; Miroslav Đorđević, PhD – research fellow, Institute of Comparative Law; Miloš Stanić, PhD – research fellow, Institute of Comparative Law; Damir Kontrec – Judge of the Supreme Court of Croatia, President of the Croatian Judges’ Association; Maja Prelić Simović – Deputy Director of the Judicial Academy and Deputy Member of the Venice Commission; Dragana Lukić – Legal Expert Consultant on the European Union project; Marija Vesković – NGO Human Rights Action, Montenegro; Omer Hadžiomerović – Judges’ Association of Serbia; Đorđe Marković – Faculty of Law of Belgrade University; Marija Vuksanović – Council of Europe Programme Office in Podgorica; Valerija Dabetić – Faculty of Law of Belgrade University.

Report

1. Introduction

The condition in the judiciary and strengthening the independence of the judiciary is one of the key challenges in the process of joining the European Union. In this regard, the first significant step in the judiciary reform was made by the adoption of amendments to the Constitution of the Republic of Serbia, which entered into force in February 2022 after a successful constitutional referendum that took place on 16 January 2022. The referendum, actually its outcome, was welcomed within the European Union and the Council of Europe institutions. However, it was emphasised that this was the first step, and the process had not ended therewith but it was necessary to further act cautiously. In that entire process, the Council of Europe provides continuing support to the Republic of Serbia with a view of the latter's fulfilling the key standards in the area of judiciary. In that context, the "Support for the Judicial Reform" project supports production of a roadmap of the forthcoming judicial reforms following the adoption of the above amendments. The Conference on the Role of Distinguished Legal Professionals was organised on 3 June 2022 at the Faculty of Law of Belgrade University, within the above project in partnership with the Judges' Association of Serbia, with a purpose of considering the role of distinguished legal professionals in judicial councils, which is one of the key novelties introduced with the amendments to the Constitution. For instance, an urgent opinion of the Venice Commission¹ explicitly deals with this concept, which causes a need to pay special attention to preparation of criteria and procedures for their selection in order to ensure independence of the judicial councils.

■ The conference gathered representatives of state authorities as well as relevant domestic and international experts. The goal was to give contribution to developing a roadmap for production of new laws in the judiciary through a fruitful and focused discussion, especially in the part related to distinguished legal professionals and their role in the judiciary councils. More specifically, the distinguished legal professionals theme requires attentive, effective and innovative solutions, whose implementation in practice will have an effect on the functioning of those bodies, and this conference is one of the means to achieve this.

¹ Serbia – Urgent opinion on draft constitutional amendments on the judiciary, adopted on the 129th plenary session of the Venice Commission of 10-11 December 2021, CDL-AD(2021)048-e, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)048-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)048-e)

2. Background and legal nature of judicial councils

Independence of the judicial branch of government is an undisputable principle, a precondition for protection of the right to fair trial and existence of a legal state and the rule of law. What is considered and discussed is seeking ways compliant with international standards and appropriate to the legal traditions, social culture and possibilities of a respective country, based on which the independence of the judiciary would be increasingly achieved and constantly strengthened. From the comparative legal perspective, judicial councils are one of the means of strengthening the independence of the judiciary, which has been recognised by numerous constitution makers and legislators across the European continent. The first councils of the magistracy² emerged in France (1946) and Italy (1947). The reason for seeking solutions was constant insecurity, or breakages occurring after any change of the constitutional regime, when as a rule, judges were removed and new ones elected. The idea that the judicial professional branch of government should be managed by itself first and foremost was then developed in the Romance-speaking states. With the fall of the Berlin Wall, it spread in countries that had left the socialist constitutionalism accepting liberal and democratic values. Judicial councils within them were designated as bodies that would protect and strengthen the independence of the judiciary in an accelerated manner. Practically, judicial councils became widespread across the European continent (they exist in 35 member states of the Council of Europe), so Article 1 of the European Charter on the Statute of Judges³ recommends establishment of a special body independent from the executive and legislative branches, with the membership where at least a half will be judges elected by their peers, in a manner that guarantees the broadest representation of the judiciary. Nevertheless, there is no uniform model when it comes to the competences of this body. The scope of competences is wide, so there are councils that only deal with organisation of the judicial system, such as the case in the Netherlands; those that have limited jurisdiction, such as in Croatia; and those dealing with all the issues of relevance for the functioning of the judiciary (in Italy and Spain).

Judicial Councils are sui generis bodies. Their function is multi-dimensional, i.e. judicial when they perform disciplinary competences, administrative when they organise the operation of courts, and legislative when they propose laws related to the judiciary, the judicial budget, and adopt by-laws in the area of their jurisdiction. Councils are not bodies of the judiciary authority other than bodies of judiciary (self)government, and their fundamental function is to “defend” judges and courts from those that can threaten the independence of judges, while removing political influence as well as personal interests and cronyism. Besides this, councils are also a bridge between the judiciary, citizens and media. In direct proportion to the scope of jurisdiction they are entrusted, a mixed composition of councils is recommended,⁴ i.e. it is recommended that they are composed not only of holders of the judge function, but they should also have members who are not judges, who ensure representation of various social groups, diminish the risk of corporatism, perception of the judiciary only as “a judiciary affair” and thus strengthen the legitimacy of councils and trust of citizens in the service of justice.

² In Romance-speaking states, magistrates denote the unique body of judges and prosecutors.

³ Since 1998 when the European Charter on the Statute of Judges was adopted, the position on the composition of judicial councils has evolved to it being recommended that judges make their majority – CCJE Opinion no. 10(2007) – Judiciary at the service of society, position 18, Magna Carta of Judges 2010, position 13, CCJE Opinion no. 24(2021) Evolution of the Councils of Judiciary and their role in independent and impartial judicial systems, position 30.

⁴ See CCJE Opinion no. 24(2021) Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, positions 29 and 27, and Distillation of ENCJ Principles, Recommendations and Guidelines 2004–2017, item 13.

3. Relevant standards on judicial councils

The necessity for future legal solutions in the area of the judiciary to be harmonised with opinions and standards of the Council of Europe and the European Union is clear. In this regard, there are a lot of sources for inspiration, starting from rulings of the European Court of Human Rights, Committee of Ministers of the Council of Europe, opinions and recommendations of the Venice Commission, Group of States against Corruption GRECO, Consultative Council of European Judges (CCJE), Consultative Council of European Prosecutors (CCPE), Court of Justice in Luxembourg, European Network of Councils for the Judiciary. Certainly, this is about recommendations, guidelines, not pre-prepared and instantly applicable solutions.

■ The most complete source of standards is CCJE Opinions on the Councils for the Judiciary no. 10 of 2007 and no. 24 of 2021, adopted because the role of judicial councils is reconsidered. The Consultative Council of European Judges, with its Opinion no. 24, strengthened its previous Opinion of 2007 and complemented it in relation to issues of accountability of councils and their composition, staying at recommendations from the previously adopted opinion. Two aspects of the Opinion 24 are especially important. Firstly, when it comes to responsibility of a council, it is explicated that its decisions are subject to judiciary control, and its members have criminal responsibility (they should adhere to ethical and professional standards, subject to disciplinary and criminal responsibility), i.e. responsibility to work transparently, publicly and explain thoroughly the decisions they adopt. Secondly, concerning the composition and method of selection of the council, the ex officio membership and membership representing the legislative and executive branches in the council is considered unacceptable. The President, who should be from the ranks of judges, should be elected by members of the council, and the majority of members should be made up of judges, while avoiding the non-judicial members being elected or appointed by the executive branch. If they are elected by political authorities, adoption of the decision on election should be made by a qualified majority, with the introduction of a mechanism to prevent blockade.

How to come to a distinguished legal professional?

It is in citizens' interests to be tried by professional and independent judges of integrity. The legislator has stipulated that citizens take part in the selection of judges in a way that the body electing judges will consist of four representatives of society, i.e. four distinguished legal professionals. The role of distinguished legal professionals in judicial councils is not disputable, however it is not clear who a distinguished legal professional is. There are many dilemmas concerning how to come reliably to criteria based on which this legal standard will be assessed.

Firstly, there is a possibility for stipulating substantial prerequisites – criteria that a candidate should meet. Some criteria that should be undoubtful are mentioned. That is recognition within the legal community where the candidate has developed their career, because different legal professions apply different valuations. International standards speak of a need for representation of different professions. An eliminating requirement is that the candidate has not violated legal or ethical norms during their career, and does not have a conflict of interest, especially political. It could be required for the representatives of the profession to possess teaching titles, e.g. the status of a full-time professor, an enviable biography, engagement in education of legal professionals, and participation in projects dealing with organisation of the judiciary authority. When it is about other areas of work of legal professionals, participation in production of various legal acts, comments on regulations, receiving awards for scientific work, experience in protection of human rights, participation in the government bodies of professional law associations, work of legal clinics, performance of responsible duties in the management, assistance to citizens in protection of rights, experience in work of arbitrations, mediation, could be taken into account. It was stated that the problem of such an approach is in that this list is not final, and the question is whether it can and should become final.

It seems that the view that the distinguished legal professional term cannot be fully shaped is a more correct position, since it is about a legal standard. Put otherwise, a distinguished legal professional is easier to describe than to prescribe. In line with that, they feature broadness of views, multidimensionality, which cannot be restricted or scored. Those are people that a legal norm cannot "catch" in full, but not in order to give them a field for arbitrary action but to offer them a manoeuvring space in order to express their individuality, all the time doing that in the function of the collective and the collective well-being. Still, it is not only sufficient to be a superb legal expert of a notable legal repute.

A distinguished legal professional must have a wider view that does not derive from sometimes false reputation in a democratically immature society. They need to possess expertise, experience, to know the judiciary and have experience in advocating for the independence of the judiciary, should meet high ethical requirements (professional broadness, integrity, objectivity, accountability, openness, decency), and have the ability to take part in discussion.

A distinguished legal professional is "a legal aristocrat with a democratic view". That notion has a legal, sociological and cultural aspect. Those are people able to find a solution through talk, and to put interests of the judiciary to the fore, which must be their guiding idea all the time. Such requirements are in line with the European standards that place protection of independence of the judiciary and contribution to the efficient judiciary to the fore. These enlisted circumstances would be assessed in the context of previous action of those being elected, with a note that it is not about assessment of actions within the profession alone other than one's wider action as a social individual. Pluralism is desirable, necessary, and acts of the international public law⁵ plead for diversity in compositions of councils.

Ukoliko se usudimo da se supstancijalno približimo pojmu, te da sve navedene argumente sublimiramo, prvo bismo morali da kažemo da se radi o po dobru priznatom pravniku, koji uživa ugled i to, pre svega, u okviru pravničke zajednice, a ne šire, političke javnosti. Neophodno je da ga njegove kolege poštuju zbog stručnosti i angažovanja u okviru pravničke profesije. Međutim, pored toga što se radi

⁵ See the European Charter on Statute of Judges, para. 1.3, when it comes to the widest representation within the judiciary itself, and position 19 of the Opinion 10 of the Consultative Council of European Judges, which relates to desirability of pluralism in compositions of councils.

5. Potential legal solutions and guidelines

Legally qualitative regulation of the composition of judicial councils is an important basis for the evolution and functioning of a quality judiciary that citizens have trust in, although there is no guarantee that detailed legal solutions prescribing content requirements based on which distinguished legal professionals would be elected will be achieved in practice. It has been emphasised that there is fear that the deadline for adoption of a set of judiciary laws has been set as too short.

■ Three groups of opinions on prescribing the requirements for distinguished legal professionals have been surveyed. According to the first one, material criteria, which a legal professional would have to meet in order to be considered distinguished, should be determined in an extensive normative manner. In this context, there is similar consideration that so-called excluding criteria through which one could determine who is not a distinguished legal professional should be specified. According to the second one, this issue should remain a legal standard, along with the stipulation of eligibility and incompatibility criteria in line with the international standards. The third opinion recommends that certain substantive provisions, along with a precise election procedure, is included in the law.

■ It is with regard of the process where one can say that there is consonance. It has been stressed that the whole procedure of election of distinguished legal professionals must be regulated by law in a punctual, meticulous manner in order to introduce meritocratic pluralism in the composition of the High Council of the Judiciary. It is a must to avoid legal loops, arbitrariness as in case of the procedure for election of judges of the Constitutional Court, because in that way, we will discourage distinguished legal professionals. Well-conceived procedures will discourage those subjects who have interest in “eligible” candidates being elected. It is also necessary to institute a clear principle of transparency, i.e. publicity, so that information on the very procedure and candidates is made available to citizens. Concerning direct transmission of interviews with candidates, a position has been put forth that one should be cautious with this because insincerity has been noticed with live airing of interviews with both members of the body conducting election and the candidates themselves. It is undisputable that decisions must be published and explained in detail, and it has been proposed that they are subject to control of the Constitutional Court, as it is the case in countries in the region.

o pravnom stručnjaku, koji uživa ugled u okviru struke, potrebno je i da je istovremeno u stanju da ispuni one zadatke koji se postavljaju pred sudski savet kao organ sui generis. Pored kriterijuma za izbor istaknutih pravnika, od posebnog je značaja da se propišu detaljna proceduralna pravila za izbor istaknutih pravnika, a naročito za rad petočlane komisije propisane kao sredstvo deblokade za situaciju da u Narodnoj skupštini ne bude postignuta dvotrećinska većina prilikom izbora istaknutih pravnika.

■ It has been pointed out that with election at the National Assembly, the Constitution prescribes that the competent Assembly board makes a proposal of eight candidates for election of four distinguished legal professionals in the judicial council, but it does not mention that anybody makes a proposal when election is decided by a five-member commission. Therefore, it could be possible to prescribe by law that the board, before making a proposal, obtain opinion of certain entities, firstly those that have autonomous status, such as a bar association or university, or deans of faculties of law. Since for the election by a five-member commission (deblocking phase, which ensues when the National Assembly does not reach a two-third majority for election of distinguished legal professionals), the Constitution does not specify who makes the proposal, in that case, a proposal could be made by the bar association assembly, deans of faculties of law or other entities. Depending on what the composition of the judicial council would be, it would depend on who would give opinion, i.e. proposal. In that regard, the speakers stated proposals in different versions. For example, one of four distinguished legal professionals could be a prosecutor from the republic ranks, whether active or retired, who would be given an explicated opinion, i.e. explicated proposal by the High Prosecution Council. Another member could be a lawyer, who would be given an explicated opinion, i.e. explicated proposal by the Bar Association of Serbia, whereas full-time professors of legal faculties, who might be retired, could be given an explicated opinion, i.e. proposal by a session of Deans of faculties of law. Then, given the constitutional guarantee of the autonomy of universities (Article 72 of the Constitution), an idea was proposed that all four members be from the ranks of full-time professors, for whom an explicated proposal would be given by a session of Deans of faculties of law.

■ In this regard, a question was posed whether it is opportune to narrow the perhaps already narrow “reservoir” from which distinguished legal professional would be “captured”. It has been proposed that legal professionals from the civil society were elected among others as distinguished legal professionals. Having in mind pluralism of areas the legal professionals deal with, it is important not to narrow the circle of potential candidates for distinguished legal professionals to individual groups.

■ In order to remove the impression of possible political influence on the work of the five-member commission and for its unbiased work, it was proposed that a procedure is regulated in detail and precisely based on which that commission would work and make decisions, which must be based on public and transparent work, with direct transmission of interviews with the candidates, at the required quorum for work, by secret vote, after public consideration of all candidates, thorough explanation of the election (by giving reasons for a decision on election among several candidates), by determining mandatory reasons for exemption of a member of the commission, and for potential conflict of interest, duty of obtaining mandatory proposals, or consultative opinions of entities from which the candidates come, by determining the way in which the interview with candidates would be structured and standardised, etc.

■ It has been proposed that deadlines for action during election on both the level of the Parliament and the level of the five-member commission are prescribed. In this context, it is considered to be useful to standardise inclusion of the Constitutional Court in case of omission of deadlines in the election process, in the manner that the Constitutional Court would be authorised to warn and remind other authorities that they are obliged to carry out the procedure provided for by law. It has been mentioned that there is a public call in many countries, and adequate forms are also filled in some countries where the candidate has to confirm that they meet all the requirements, and information is released online.

6. Influence of politics and legal culture on the positive legal solutions

When it comes to judicial councils, there are four myths that are repeated in public. First, a claim that judges in these bodies are unique, they create a monolithic block. Actually, it is obvious that they are also a part of the society, and that certain social divisions and views of the world in which we live are reflected within the ranks of judges. Second, it is a myth that non-judicial members will disrupt the uniqueness of the judicial members of the council because non-judicial members of the council are not unique. They enter the council in order to enable a balance, for the councils not to be closed in themselves but to hear the external voice, with a purpose of enabling their efficient functioning. Third, the dilemma is also a trap, whether it can be enabled that the non-judicial members are apolitical, because politics often hides behind the apolitics. There is also a question whether it is possible to completely eliminate political pressures in practice? Fourth, it is unjustified to determine distinguished legal professionals as people of politics only because they are elected by the National Assembly, the representative of the sovereign.

■ For the whole mechanism, however devised, to function, existence of an element, the creation of which requires time, is necessary. That is an appropriate law culture, which law can encourage. Law and law culture must go hand in hand because ideas of imagined norms cannot be embodied without law culture. The constitutional and legal optimism is prevalent in these areas, so it is considered that it is sufficient to prescribe something for it to be accomplished, and actually we have made, if not the first one, then one of the first steps. The next step, or steps, is construction of law culture.

7. Conclusions

1. The judiciary and other branches of power, politicians, media and the civil society must cooperate in the long-term endeavour to strengthen the expertise, transparency and ethics in the judiciary, so that the culture of respect of independence of the judiciary and rule of law does not become a dead letter.
2. The role of judicial councils is to guarantee and ensure independence of the judiciary and autonomy of the prosecution, therefore it would be necessary that the criteria and procedure for election of distinguished legal professionals further strengthen independence, or autonomy, of judicial councils.
3. It seems that the distinguished legal professional term cannot be fully defined since it is about a legal standard. That term requires effective and innovative solutions whose use will enable strengthening of the role of judicial councils.
4. Recommendations of international organisations offer standards and guidelines, not ready-made solutions. It is about a recognised legal professional who has not violated the legal profession and possesses expertise, experience, knows the judiciary and has experience in advocating for the independence of the judiciary, meets high ethical requirements (professional broadness, integrity, objectivity, accountability, openness, decency), and has the ability to take part in discussion.
5. It is necessary to precisely regulate by law the procedure for election of distinguished legal professionals by both the National Assembly and the five-member commission, without leaving legal loops.
6. It is especially necessary to regulate by law the issues of deadlines for timely election, transparency of procedure in all the phases, the manner in which an interview with candidates would be structured and led, and issues of conflict of interests and reasons for mandatory exclusion of a member of the commission, obligation of secret vote of the commission members, and thorough explanation and disclosure of the adopted decision, on reasons for election made among a number of candidates.
7. It is necessary to provide for by law the competence of an Assembly board to obtain opinion from certain professional institutions and entities for each candidate, and of the commission to obtain a proposal of proposers for distinguished legal professionals, when the election is made by the five-member commission.
8. The proposed sketch of a distinguished legal professional as “a legal aristocrat with a democratic view” should be complemented with criteria that confirm superb professional action in a corresponding area and the democratic views of candidates expressed with previous actions in practice, with confirmation/reference by a professional association and/or institution.
9. It is necessary to define precise procedures that define criteria of eligibility and incompatibility from which it is clearly derived who a distinguished legal professional is.
10. True results will be seen by attentive monitoring of the implementation of new judiciary laws and by-laws and further improvement of the law culture.

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