



Problem statement

National councils for judiciary, functioning in number of countries, play an important role in the tri-partition of powers and judicial governance. The status and role of particular councils, their composition and competences vary, but they have also common features, hence the significance of the comparative approach, learning from other experiences, monitoring the standardization attempts.

One of the important elements affecting the role and importance of councils is who the members of this body are. Discussion has been going on for years about the role of non-judge members. Should non-judges be members of councils, in what proportion to other members, what backgrounds should they come from, how should they be elected/appointed, what competences should they have? And what does this mean in practice, do the adopted legislative and organizational solutions allow non-judges to have a real influence on the actions and decisions of the council?

In Georgia, out of 15 members of the Council, nine are judges and six are non-judges. How non-judges are selected, what competences they have, and, above all, whether in practice they have an impact on the actions and decisions of the Council, is the subject of discussion and controversy.

On February 16th, 2023 with the support of USAID Rule of Law Program, the Group of Independent Lawyers and Democracy Index – Georgia hosted an online discussion: “The Role of Lay Members of Judicial Councils in Making the Judiciary Independent and Accountable”.

Presenters from Norway/Poland, Chechia and Slovakia focused on both, the theoretical framework and standarisisation attempts, as well as shared the experience on the situation existing in their countries. Presentations were followed by q&a and discussion.

The seminar was part of the activity of the International Network of Judicial Reformers (INJR). INJR is a voluntary platform of experts and organizations dedicated to the reform of the judiciary. It unifies more than 50 persons and organizations from 16 countries and is currently coordinated by Group of Independent Lawyers and Democracy Index Georgia.

Main findings

There are different judicial councils in the world practise, with different roles and different competences.¹ Their character (but also their perception) varies. Are they a constitutional body, a state body, a judicial body? Is there a separate body of Judicial Council or rather Judicial administration (Denmark) or Court Service (Ireland)? Are councils representing judges (like a trade union maybe, sometimes judges tend to treat it as ‘their’ body) or public good and interest?

Competences fo councils most often include: safeguarding the judicial independence; career of judges and prosecutors (appointment, promotion, transfer); judicial training; discipline – ethics – complaints mechnism; legislation/opinions; external control on the functioning of the judiciary; decisionmaking – status of decisions (binding or not, subject to review or not).

The European Network of Councils of the Judiciary (ENCJ), developed in 2016 a special document - *ENCJ Minimum standards VI – Non-judicial members in judicial governance*.² It is important because it is the work of representatives of various judicial councils associated in the ENCJ and is short and clear.

Also, prior to the work of the standards the working group elaborated a questionaite filled by representatives of 20 countries. Even it was not a academic research exercise but rather compilation of information, still it is a valuable source for those interested in different solutions undertaken in relation to non-judicial members. Part of the information is available.³

The developed *ENCJ Standards VI* are recommendations that individual countries should take into account while adopting their own solutions.

ENCJ Standards define “**Non-judicial members**” as: individuals, who are not judges or prosecutors, participating in Judicial Councils and other relevant bodies, and define “**Judicial Governance**” as participation of non-judicial members in activities of Judicial Councils and other relevant bodies, including activities concerning judicial appointments and promotion as well as complaint and disciplinary procedures.

The adopted standards are divided into 5 thematic groups.

1. Composition

¹ The following findings are based on the presentation: *The role of non-judicial members in judicial councils - comparative experiences. Judicial independence, accountability, corporatism and social control. ENCJ Minimum standards VI - Non-judicial members in judicial governance*, Lukasz Bojarski, Doctoral research fellow, University of Oslo; Project: Judges Under Stress – The Breaking Point Of Judicial Institutions.

² See Standards VI: Non-judicial Members in Judicial Governance. ENCJ Report 2015-2016, at: https://www.ency.eu/images/stories/pdf/workinggroups/ency_standards_vi_2015_2016_adopcted_ga_warsaw.docx.pdf.

³ See Standards VI: Non-Judicial Members in Judicial Governance Questionnaire and replies. Annex to the ENCJ Report 2015-2016, at: https://www.ency.eu/images/stories/pdf/workinggroups/ency_pt_standards_vi_non_judicial_members_annex.pdf.

(1) The composition of Judicial Councils and other relevant bodies should include non-judicial members.

(2) The composition of such bodies should reflect the diversity of the society, including gender diversity.

(3) The exact number and proportions of judicial and non-judicial members depends on the type of body. In particular:

- In Judicial Councils, judges should constitute a majority, but not more than 2/3 of members. Therefore, non-judicial members should constitute at least 1/3 of members.

- In other relevant bodies, non-judicial members should participate in any selection procedure regarding the appointment and promotion of judges (and prosecutors if applicable) at all levels of seniority.

2. Selection/appointment

(1) The process of selection, election or appointment of non-judicial members should be merit based and transparent.

(2) Civil society should be involved in one or more of the above mentioned stages (selection, election or appointment), including the possibility to propose appropriate candidates for consideration.

(3) Where non-judicial members are appointed by parliamentary bodies, it is desirable that their selection be subject to the achievement of particular qualified majorities in order to avoid political influence.

3. Personal qualities, competences and political relationships

(1) Non-judicial members should be persons of high moral standing who bring to Judicial Governance acknowledged skills and experience from outside the judiciary. Their conduct is expected to meet the high standards [...].

(2) It follows that persons with a range of backgrounds and experience should be considered for appointment as non-judicial members. Possible categories of non-judicial members include: lawyers, academics, and other professionals like sociologists, psychologists, economists, specialists in human resources and representatives of Civil Society Organizations.

(3) In order to secure the voice of civil society, non-judicial members should not be politicians or persons with political affiliations.

(4) In order to respect the separation of powers, the Minister of Justice should not be a member of the Judicial Council or other relevant body.

(5) Additionally, non-judicial members of Judicial Councils and other relevant bodies should not be involved in politics for a reasonable period of time before and after their mandate as member of a Judicial Council or other relevant body.

(6) Certain persons should always be ineligible for appointment as non-judicial members. In particular:

- Judges, even if retired,

- Persons who have been convicted of criminal offences, who are or have been bankrupt, or who are otherwise disqualified from public office,

- Members of Parliament (including former Members), and

- Members of governments (including previous governments).

4. Status

(1) Non-judicial members should have the same rights and obligations as judicial members.

(2) Judicial and non-judicial members should be involved in the decision making process. In order to ensure effective participation of non-judicial members it is recommended that

adequate quorum for the composition of the bodies and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration.

(3) Non-judicial members must have the same voting rights and should be involved in the work of all relevant bodies, including presiding committees, working groups and subcommittees created by Judicial Councils. For that reason, they should have the same access as judicial members to support staff and technical assistance, to documents and resources.

(4) Non-judicial members should receive the same remuneration/per diem as judicial members for their activities on Judicial Councils and other relevant bodies.

5. Conduct

(1) Non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.

(2) In drafting rules of conduct for Judicial Councils and other relevant bodies, account should be taken of the presence on such bodies of non-judicial members.

(3) In particular the rules of conduct developed should deal with the following matters (depending on the competences of the particular body): confidentiality in respect of all matters; honesty; objectivity and impartiality; obligation to attend meetings; obligation to fulfil tasks; and obligation to recuse oneself in the case of conflict of interest.

(4) In default of such rules of conduct, the conduct of non-judicial members may be guided by reference to the “Seven Principles of Public Life” or other similar rules.

According to results of the research of David Kosar⁴, non-judges may play different role in the councils depending on the model of the council.

Partisan models	Interbranch model	Postbranchmodel
Bystanders Rubberstamper Legitimizers Agents Brokers (if super majority)	Brokers	Trustees Have independent will Key decision-makers

The reasons why we want non-judges on councils are different. Those reasons are also linked to the types of persons that could play this role:

Democratic legitimacy (democratic accountability check)

- Politicians (“radiating effect” among other politicians)

Professional accountability check

- Other legal professions
- Law professors

Civil Society check

- NGOs
- Civil society

Fourth branch input

- Audit Office, Ombudsperson, anti-corruption bodies, human rights bodies

Expertise (recall dimensions of judicial governance)

- HR specialists, IT specialists

⁴ The following findings are based on the presentation: *Non-Judges on Judicial Councils: (Self-)Perception Matters*, David Kosar, Head of the Constitutional Law Department, Masaryk University Faculty of Law.

- Economists, sociologists, information officers, managers, education specialists, psychologists, media specialists etc.

When on the council, non-judges face four major challenges:

1. Politicization

- Even if politicians do not have representatives on JCs
- Even if politicians do not select judges (SPA, POL) or other members => channels of politicization just change (e.g. judicial associations in ITA or court presidents in SVK)

2. Corporativism

No need to explain (SVK, GEO etc.)

3. Gridlock

- Paralyzed/ineffective JC
- Supermajorities can make it even more likely

4. Diversity (so far sidelined)

- Gender representation, intersectionality

The to first presenters but especially the final presenter⁵ also shared some inputs stemming from practical experience, including their own (L. Bojarski and P. Zilincik were members of the judicial councils in Poland and Slovakia). P. Zilincik tackled the dynamics when non-judicial members enter the Council filled with corporatist judges, protecting their self-interest and their "rule over the judiciary". He focused on different interests and motives behind the actions of judicial and non-judicial members, that can be both legitimate and non-legitimate as well as mentioned various forms used to eliminate the impact of non-judicial members, and responses that can be used in response.

Issues raised by the audience

Major problem for us and not only for Georgia is corporatism and the very limited role non-judges play in the Council. At one glance we have laws that are in line with European standards, 6 non-judges against 9 judge members, but due to judges being in a majority, the vote of only one non-judge member is enough to make any major decision. This raises concerns of corporatism. Usually, if not always, votes are split between judge and non-judge members, it is never a mix. So it is important to discuss practical aspects of the work of non-judge members, how they influence if they do, or maybe "judges in majority" is a wrong rule?

Since participation of non judges in decision making is minimal there were suggestions to introduce a so called double 2/3 majority rule which means that to make a decision the council needs 2/3 support of judge members and 2/3 of non judge members.

There is a possibility of secret alliance of judges and non-judge to control decisions (in GE you need 9 votes), risk of members being loyal to judicial klan.

Or maybe the solution is in reforming selection and accountability rules for non-judge members, rather than play with the numbers, or maybe both. We have non-judge members

⁵ *Tension between the judicial and non-judicial members (Slovak experience)*, Pavol Zilincik, Comenius University, Political Science, Former Member of the Judicial Council of the Slovak Republic.

nobody in society or in the profession knew before, who they are, where they come from. And there is no accountability, discipline or anything like that for non-judges.

Additional problem in Georgia is that there are currently 5 vacancies in the JC, for about a year, and there is lack of political consensus in the Parliament to reach qualified majority in order to elect them.

This situation with 5 vacancies raises the problem of legitimacy of actions of the body that is inadequately staffed.

But there is no single 'best model' of composition and decision making procedures that could be simply duplicated. Any institution and procedure may be manipulated or corrupted. What counts is good legislation and procedures but also legal culture and culture of dialogue, providing feedback, focusing on common good/interest and not on misinterpreted corporate interests.

Transparency of works of JC is crucial and conditions the accountability.

There is also a need to differentiate two border situations (to simplify). In Slovakia, as described, we faced 'revolutionary situation', JC was misused, was a corporate body and non-judges members were trying to undertake relevant reforms. The revolutionary situation causes that relations between members of the council resemble a kind of fight.

In a mature democracy where accountability is not a joke - non-judges are real partners and decision makers, they are of assistance and help for judges members, they might play a role of mediator in between judiciary and society, defender of independence, provider of feedback.

In such a situation the traditional isolation of judiciary changes, judiciary is seen not just as power but also as a public service provider and the voice of 'clients' becomes important. Identifying and collaborating with judges that understand these processes and can introduce changes - to build adequate legal and judicial culture is of the essence.

Summary of Findings

There are 4 types of judicial councils (politician-centered, judge-centered, interbranch and post-branch) and non-judges play a different role in each of them (bystanders, rubberstamps, legitimizers, brokers, agents, trustees, etc.).

It is not only about number of non-judges, but also who they are, who selects them, whom they represent, to whom they are accountable, and why do we have them at JCs at the first place (democratic legitimacy, expertise, input of other legal professions etc.).

In the practice of different countries, different solutions are adopted regarding the participation of non-judges in the composition and work of judicial councils.

Standardization efforts are aimed at emphasizing the real (and not only symbolic, formal) participation and importance of these members in the work of the council.

Non judges on councils are not a panacea and they do not necessarily temper corporativism. There is a danger of politicization of non judges members and even entire legal professions.

Non-judges can be combined with other mechanisms (such as supermajority rules), but we must be careful (as there is a danger of gridlock).

Supermajorities designed to bring more consensus in reality may lead to a gridlock. There are no easy anti-gridlock mechanisms. What is essential is plurality of appointing bodies and involvement of opposition.

Crucial element when it comes to non-judges members is their self-perception as “impartial thirds”.

Main recommendations

When shaping the composition of the council as well as the status and competences of non-judge members, international standards should be taken into account, including ENCJ Standards VI.

Non-judicial members should be competent and politically independent. The process of their selection and appointment should be transparent and merit based.

Non-judges should, in principle, have the same powers as judges, the same status, the same access to human and material resources available to council members (cf. ENCJ Standards VI).

The adopted organizational solutions should ensure the real influence of non-judges on the actions and decisions taken by a council (cf. ENCJ Standards VI).

Further reading – other relevant sources

ENCJ Compendium on Councils for the Judiciary, adopted 29 October 2021 (plus list of other sources at the end of the document: for instance Compilation of Venice Commission opinions and reports concerning Courts and Judges).

CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems (5 Nov. 2021).