



Fondacija Centar za javno pravo
Stiftung Kompetenzzentrum für Öffentliches Recht
Foundation Public Law Centre



Stabilitätsakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany

The Chairman of CJP
prof.dr.habil. Edin Šarčević

Election of judges of the Constitutional Court - Recommendations

One day conference on the issue of election of judges of constitutional courts was held in Sarajevo on the 2nd November 2012 organized by the Foundation Public Law Center (CJP). Consultation was organized as a regional scientific conference with 57 participants. Among the participants there were lawyers from the state institutions, the constitutional and supreme courts, and the Court of Bosnia and Herzegovina, and university professors, lawyers, representatives of embassies, international organizations, non-governmental organizations and foundations. Concerning representatives from the region, the conference was attended by experts from Montenegro, Croatia, Macedonia, Serbia and Bosnia and Herzegovina. Conference was held on the basis of 14 research papers which discussed the issue of election of judges of the constitutional courts in the regional context with focus on Bosnia and Herzegovina.

After several hours debate, the participants have agreed that there are serious weaknesses in the procedures and criteria for the election of judges of constitutional courts, and that in Bosnia and Herzegovina after the controversial appointments to the Constitutional Court of Bosnia and Herzegovina, election of professional and morale lawyers was compensated through election of political cadre.

Such practice represents a mocking of the constitutional standards as well as the role of the constitutional court as a such. In Bosnia and Herzegovina, it is problematic in several ways because of the asymmetric legal system, dysfunctional parliamentary system and the ethnic tensions that are directly reflected in the legislative procedures and jurisprudence.

As a summary of the results of this consultations, allow me on behalf of CJP to forward you the following



Stabilitätsakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany

Conclusions and recommendations:

1. Existing models of election of judges of constitutional courts must be improved through regulation of this field by particular regulation which should be in the range of the constitutional law.
2. The goal is not depoliticisation of the election procedures but depoliticisation of the candidates for the judges of the constitutional courts and election of professional and neutral judges. Political parties and political coalitions or “policy” cannot be excluded as the dominant factor in the procedure of election of judges for constitutional courts, but criteria can be established which would introduce professional and apolitical candidates into the procedure.
3. The concrete regulation would precisely define factual preconditions for “prominent jurist” but also for “high moral reputation”. The rationale behind this is to stop the election of candidates who would come to the position of the judges of the constitutional courts from high party or political functions i.e. from executive functions in political parties and state bodies appointed through politics. There has to be the regulation stating that prior to their candidacy for judges of the constitutional courts, candidates should not have had any political functions.
4. The criterion of “prominent jurist” must be objectified so that the post of judge of the Constitutional Court should require:
 - passed bar exam (alternatively, PhD in legal sciences),
 - published papers of legal opinion in referenced legal review,
 - work experience that is complemented by expertise published about open legal issues, and which represent the contribution of the theory and practice,
 - generally recognized expertise in at least one area of law, proved by legal expertise, successful and recognized legal experience,
 - mandatory disclose professional biographies of the candidates, and
 - implementation of public interviews, respectively, public hearings of candidates.
5. “Morality” can be used only as disputable presumption on the side of each candidate.
6. Academic titles and professorship do not represent in themselves a safe basis for moral or prominent lawyers.



Stabilitätspakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany

7. The age: it is necessary to determine the minimum age for election (we recommended: from forty years of age) and the maximum age for the termination of judicial functions (we recommend: with a beginning of calendar year in which the judge turned seventy years of age). Those restrictions are needed to maintain general vitality of judges and their performance.
8. Length of the mandate: the mandate must be limited (suggested time limit of eight or nine years, for example, modeled on the European Court of Human Rights / Strasbourg) without the possibility of re-election. This solution is in order to maintain competence, independence and flexible approach to judicial function of lawyers who introduce new legal experience and ensure the actual communication with the European framework.
9. Income of judges of Constitutional Court must be higher than incomes of judges of all other courts in Bosnia and Herzegovina in order to preserve the independence of judges and interest in the position of a judge.
10. Election of judges would have to be decided in the parliament because it is a state authority.
11. *Majority for elections*: we recommend qualified majority. This should ensure a broad consensus on the candidates and raise the level of legality of the judges. At the same time the risk of using political suitability of the candidates should be minimized.
12. The structure and election of judges of the Constitutional Court of Bosnia and Herzegovina should express trifurcate structure (legislative, executive and judicial) of authorities at the state level, as well as the entity structure of the country. We recommend the following:
 - six judges should be elected by the House of Representatives of the - Parliamentary Assembly of Bosnia and Herzegovina, according to the following model: two of them should be elected on the suggestion of this body, another two should be elected on the proposal of the Presidency of Bosnia and Herzegovina and the last two of them should be elected on the proposal of the High Judicial and Prosecutorial Council (HJPC),
 - two judges elected by the House of Representatives of the Federation of Bosnia and Herzegovina, and
 - one by the National Assembly of the Republika Srpska,
 - authorized proponents would have to propose at least twice the number of candidates than elected.
13. HJPC of Bosnia and Herzegovina has neither the legal expertise nor the scientific components to make independent decision about the suitable candidates for judges of the Constitutional Court of Bosnia and Herzegovina. Considering the



Stabilitätspakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany

existing model, the participants and *ad hoc* commissions including recognized experts in constitutional law, members of judiciary and professors of positive law disciplines in law schools in the country. The proposal of the Commission would obligate the HJPC to determinate the final nomination of the election.

The CJP emphasizes the specifics and importance of constitutional adjudication process in Bosnia and Herzegovina and recommends that the competent ministry and parliamentary commission should start the initiative concerning regulation of selection of judges of the Constitutional Court of Bosnia and Herzegovina. The first step must be to diagnose the weaknesses of existing model and establish the criteria for optimizing of selection of judges of Constitutional Court.

Information about conference

Organizer: Public Law Center

Present: 57 persons

- *State institutions:* 12 (BiH Court, High Juridical and Prosecutor Council of Bosnia and Herzegovina, Parliamentary Assembly of Bosnia and Herzegovina, Office of the representatives of Ministry Council of Bosnia and Herzegovina to European Court for Human rights, Ministry of Justice of Bosnia and Herzegovina, Constitutional Court of Bosnia and Herzegovina, Institution of Human Rights Ombudsman of Bosnia and Herzegovina, Constitutional Court of Republic of Serbia, Constitutional Court of Republic of Croatia, Constitutional Court of Bavaria),
- *Entity / canton institutions:* 9 (Constitutional Court of Republika Srpska, Constitutional Court of FBiH, Supreme Court of FBiH, Office of Deputy President of FBiH, City of Mostar, CEST FBiH, Ministry of Justice of RS),
- *Academic community:* 17 (Law Faculty of University „Džemal Bijedić”, Law Faculty of University in Banja Luka, Law Faculty of University in Sarajevo, Law Faculty of University „Vitez-Travnik”, Law Faculty Kiseljak, Law Faculty of University in Tuzla, Law Faculty in Zenica, Law Faculty in Belgrade, Law Faculty Leipzig, Criminal and Police Academy Belgrade, Law Faculty of University “Mediterranean” ANUBiH),
- *Lawyer offices:* 4,
- *Representatives of international community:* 1 (OSCE Mission to Bosnia and Herzegovina),
- *Representatives of embassy:* 1 (Embassy of Germany),



Stabilitätspakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany

- *Associates of CJP, NGO, companies:* 14 (KAS BiH, ASA d.o.o, BBM d.o.o),
- *Media:* 8 (FTV, TV Pink BiH, Face TV, FENA, TV1, SRNA, BHT1, Oslobođenje).



Stabilitätspakt für Südosteuropa
Gefördert durch Deutschland
Stability Pact for South Eastern Europe
Sponsored by Germany