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CONSTITUTIONALIZATION OF THE JUDICIAL COUNCIL IN NORTH MACEDONIA AND SERBIA – CAN WE LEARN FROM EACH OTHER?

Summary

North Macedonia and Serbia constitutionalized their judicial councils around the same time. From the perspective of the European model of the judicial council, North Macedonia adhered more closely in implementing their sample model, whilst Serbia foresaw constitutional provisions which had not eliminated the channels of political influence over the judiciary. It was clear, immediately following the adoption of the 2006 Constitution, that Serbia had to amend it if it wished to tie its future to the European integration process. Although that process did not unravel quickly and easily, the constitutional amendments which constitute the improved model of the Judicial Council were adopted in 2022. What is characteristic for modelling of the new Judicial Council is the fact that the amendments were based exclusively on the abstract criticisms of the constitutional provisions from 2006 and the recommendations of the Venice Commission that are necessary to adhere to the European model of the Judicial Council. It is paradoxical that the European model of the judicial council is considered the best solution for post-socialist states, without consideration for concrete socio-economic circumstances in individual states, nor the suppositions for successful functioning of this body. After all, neither the concept of the judicial council has been accepted in all member states of Western Europe, nor all post-socialist states have implemented their institutional reforms in that direction. Some of those states had decided to follow their own, authentic road to the independence of the judiciary. This leads to the question: why the

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European institutions are insisting on the reform of the judiciary that involves the establishment of a pure variation of the so-called European model of the judicial council when it is not a generally accepted model? Furthermore, it is questionable as to whether it has a universal value. Precisely for that reason, the goal of this paper is to present the specific nature of judicial councils in North Macedonia and Serbia. In light of the 2022 constitutional reform in Serbia, an analysis of the extent these two countries could utilize each other's experiences, seeing as they have a mutual historical heritage and similar level of development of their democratic and legal culture, could be an enlightening one.

Keywords: judge, judicial independence, judicial council, constitution, Venice Commission.

KONSTITUCIONALIZOVANJE PRAVOSUDNOG SAVETA U SEVERNOJ MAKEDONIJI I SRBIJI – MOŽEMO LI UČITI JEDNI OD DRUGIH?

Sažetak

Severna Makedonija i Srbija, približno u isto vreme, konstitucionalizovale su pravosudne savete. Sagledano iz perspektive evropskog modela pravosudnog saveta, Severna Makedonija se više približila tom uzornom modelu, dok je Srbija predvidela ustavna rešenja koja nisu eliminisala kanale za politički uticaj na pravosuđe. Otuda, odmah posle donošenja Ustava 2006. godine, bilo je jasno da će Srbija morati da promeni svoj ustav u delu o pravosuđu ukoliko svoju budućnost želi da veže za evropske integracione procese. Premda se taj proces nije odvijao brzo i jednostavno, ustavni amandmani koji konstituišu unapređeni model Visokog saveta sudstva usvojeni su 2022. godine. Međutim, ono što je karakteristično za ustavno modeliranje novog Visokog saveta sudstva, jeste činjenica da je promenu Ustava u delu o pravosuđu Srbija zasnovala isključivo na apstraktnoj kritici ustavnih rešenja iz 2006. godine i na preporukama Venecijanske komisije da je neophodno dosledno koncipirati evropski model sudskog saveta. Bez obzira na to što se Ustav primenjivao približno petnaest godina, nije bilo analize koja bi trebala da utvrdi ocenu rada Visokog saveta sudstva. Da je rad tog tela, kojim slučajem, ocenjen negativno, onda je trebalo da sledeći korak bude identifikovanje razloga za taj neuspeh. Osim

toga, budući da je Severna Makedonija takođe imala već značajno iskustvo sa sudskim savetom koji je bio više usaglašen sa evropskim standardima, rezultati koje je to telo ostvarilo u praksi mogli su da budu korisni. Dakle, bez obzira na već značajno iskustvo tih dveju država, ali i iskustvo drugih država postsocijalizma, ustavna reforma pravosuđa u Srbiji sprovedena je bez ozbiljnije empirijske analize, već isključivo na osnovu apstraktne ideje da je evropski model sudskog saveta optimalno rešenje i da ga treba nekritički preuzeti.

Ključne reči: sudija, nezavisnost sudstva, pravosudni savet, ustav, Venecijanska komisija.

1. Introduction

Although, comparatively speaking, it has not come close to achieving the expected results in terms of securing the independence of the judiciary, the model of a strong judicial council has become one that the European institutions have promoted with full force. Namely, from the states that are in the process of joining the European Union it is expected that they will establish a judicial council whose main task is to secure the self-governance of the judiciary.[1] Seeing as it ensures a high level of self-governance, this model is naturally supported by the representatives of the judiciary. It also has the full support of scholars and non-governmental agencies. The constitutionalization of a strong judicial council has become a symbol of progress and democratization of a state.

Seeing as the judiciary is in its nature weaker in relation to the political branches of government, the formation of a judicial council should contribute to the maximization of judicial independence, which is central to the idea of rule of law (Castillo-Ortiz, 2017, p. 316). Therefore, in essence, the idea of a Judicial Council is good, because that body should be a defense mechanism from the politicization of the judiciary. The judicial council as an institution is not novel. It originated in France in 1883, with the intent of protecting judges from being removed in instances where it was motivated by political reasons (Bell, 2006, p. 27). Portugal and Spain adopted this solution, however until the end of WW2 there was no significant headway made by these institutions. Following the war, the model was implemented in France from 1946 and Italy from 1948, due to the increasing demand for protecting the judiciary from political influence (Bell, 2006, p. 27).

[1] "The message sent from the European institutions in this respect was quite clear: If you wish to join the 'Euro club', you ought to introduce (at least some features of) self-government of the judiciary" (Bobek & Kosař, 2014, p. 1276). See also Kosař & Vineze, 2022.

Despite France being its cradle, Italy achieved better results with the implementation of this institution, hence its Judicial Council became the exemplary model for post-socialist states. Thus, the Italian concept of the judicial council, due to its high efficacy in practice, has become the foundation of the so-called European model of the judicial council.

It is paradoxical that the European model of the judicial council is considered the best solution for post-socialist states, without consideration of concrete socio-economic circumstances in individual states, or suppositions for successful functioning of this body. After all, neither that concept of the judicial council has bee accepted in all member states of Western Europe, nor all post-socialist states have implemented their institutional reforms in that direction. Some of those states had decided to follow their own, authentic road to the independence of the judiciary (Czech Republic, Poland). This leads to the question: why the European institutions are insisting on the reform of the judiciary that involves the establishment of a pure variation of the so-called European model of the judicial council when it is not a generally accepted model? Furthermore, it is questionable as to whether it has universal value. As has been commented in theory, the forcing of this model through European institutions "yet again confirms the fact that, as in the business, the product that sells in the end is not necessarily the best one in terms of quality, but the product that has the better marketing" (Bobek & Kosař, 2014, p. 1277). This product was also served to the former Yugoslavian republics, hence Serbia and North Macedonia are not an exception. Precisely for that reason, the goal of this paper is to present the specific nature of the judicial council in these two countries. In light of the constitutional reform of 2022 in Serbia, an analysis of the extent these two countries could utilize each other's experiences, seeing as they have a mutual historical heritage and similar level of development of their democratic and legal culture, could be an enlightening one.

2. In Search of a Unique "European Model" of the Judicial Council

Seeing as the European institutions promote an exclusive model of court administration, it is logical to assume that all members of the European Union have at least a similar model in that area. However, that is a false assumption. According to Bobek and Kosar, we could discuss five different models of court administration in Europe: (1) The Ministry of Justice model, (2) the Judicial Council model, (3) the courts service model, (4) hybrid models, and (5) the socialist model (2014, pp. 1265-1267). The first model involves a key role of the Ministry of Justice in matters pertaining to the appointment and promotion of judges,

as well as the administration of the judiciary. However, that model in practice does not function in such a way where the Ministry of Justice has full control and arbitrary power in executing its powers. Although nominally, those powers are exercised by the Ministry of Justice in cooperation with the presidents of the courts. Such models exist in Germany, Austria, the Czech Republic, and Finland, among others. The second model is characterized by the existence of an independent body positioned between the judiciary, on the one hand, and political branches of government, on the other. The judicial council has been provided with two groups of powers. The first being those related to the appointment and promotion of judges and/or to exercising disciplinary powers vis-à-vis judges, whilst the other related to the administration of the judiciary and its financing. This group includes the following countries: Belgium, Bulgaria, France, Hungary (until 2011), Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. Worthy of mention is the fact that this category of states is not monolithic, because the judicial council in some of those states do not fulfil the standards of the so-called European model of the judicial council. The third, court service model, is founded on the limited role of an independent body whose primary role lies in the area of administration, court management, and budgeting the courts. On the other hand, contrary to the judicial council model, the court service model has significantly limited powers in terms of the legal status of judges. In addition, there are other bodies that are responsible for the appointment, promotion and disciplinary responsibility of judges. The court service model exists in Denmark, Ireland, Norway and Sweden. The fourth category is made up of hybrid models, which combine characteristics of the previously discussed models. These are specific systems which cannot be generalized, seeing as they are all very different. Hybrid models exist in England and Wales, Estonia, Hungary, Iceland, and Switzerland. Finally, the socialist model, which no longer exists in its pure form in Europe, involved the implementation of full control of courts and judges by the communist party.

Although this is only one of the possible classifications of the European model of court administration, it is a sufficiently illustrative one to show the general differences between the European states in that area. Aside from that, the states which are classified within the framework of the same model do not have an entirely same solution. For example, when discussing the states that are implementing the judicial council model, the judicial councils differ in the way they are formed and regarding the guarantees of independence, as well as the scope of their powers. The mere existence of the judicial council with significant powers in the sphere of court administration does not simultaneously mean that this body fulfills all current European standards which relate to the legal position of that body.

It is illustrative to mention the classification of W. Voermans and P. Aleber who speak, in essence, of the existence of two types of judicial councils in Europe: The Southern European model and the Northern European model (2003, p. 10). The Southern European model is characterized by the judicial council whose primary responsibility is to safeguard the judicial independence which is effectuated by way of the functions of appointment and dismissal of members of the judiciary. That model of judicial council is to be found in France, Italy, Spain and Portugal. The Northern European model involved a judicial council with only certain limited powers with regard to judicial appointments and dismissal and extensive powers in the administration of the judiciary. Sweden, Ireland, and Denmark are examples of countries with this type of the judicial council. This classification is becoming outdated because it significantly simplifies the diversity of solutions in European comparative constitutional law. In addition, that classification, despite recognizing amongst them a qualitative difference, places the Southern European model and the Northern European model on the same plane. Namely, the Northern European model is based on the limited role of the judicial council whose primary role lies in the areas of administration, court management and budgeting the courts. This model of judicial council does not have institutional guarantees, nor does it fulfil standards that are recommended by the European Institutions with respect to the status and function of the judicial council.

From a comparative point of view, there are significant differences in all elements of the legal position of the judicial council. With respect to the number of members, judicial councils can be classified as small (the Netherlands - 5 members), medium (Spain – 20 members), large (Italy – 27 members) and extremely large (Belgium – 44 members) (Simović & Petrov, 2018, p. 292). Certain judicial councils have *ex officio* members (president of the Republic – Italy; minister of justice – in Poland and Romania; President of the Supreme Court – Spain, or court presidents – in Poland, Bulgaria; and state prosecutors – in Italy and Bulgaria) (Simović & Petrov, 2018, p. 292). According to the membership and manner of appointment of the members of the council, four models are possible: 1) the judicial council is exclusively composed of judges who are elected from amongst themselves (such a solution is exceptional and exists in France in accordance with the Law from 1883); 2) a mixed membership with three variances: a) majority judges and minority members who are not judges (Italy, the minority is made up of professors or law and law professionals; Poland – the minority is made up of parliamentarians), b) minority judges (France, in accordance with the Constitution from 1946), c) equal number of members who are judges and members who are not (Belgium, according to the Constitution from 1999); 3) the judicial council members are exclusively judges who are appointed by the parliament (Spain,

according to Organic law from 1985); 4) political composition of the council – members of the council are elected by parliament or appointed by the government (Simović & Petrov, 2018, p. 292).

According to the Venice Commission's view, an independent judicial council is the most appropriate method for guaranteeing the independence of the judiciary by having decisive influence on decisions on the appointment and career of judges. Seeing as there is no single model which applies to all countries, "the Venice Commission recommends that states which have not yet done so, consider the establishment of an independent Judicial Council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers" (Venice Commission, 2010, para. 32).

Finally, it is possible to isolate five key characteristics of the European model of judicial Council from the plethora of documents adopted under the auspices of the European Union and the Council of Europe: 1) A judicial council should have constitutional status; 2) at least 50% of the members of the judicial council must be judges and these judicial members must be selected by their peers; 3) a judicial council ought to be vested with decision making and not merely advisory powers; 4) a judicial council should have substantial competences in all matters concerning the career of a judge; 5) judicial council must be chaired either by the president or chief justice of the highest court or the head of state (Bobek & Kosař, 2014, p. 1263).

3. The European standards and the Judicial Council in North Macedonia

In 2005, North Macedonia was among the first state in the region to initiate the judicial reform by following the assistance and recommendations of the European Union (Preshova, Damjanovski & Nechev, 2017, p. 22; see also Akimovska Maletić, 2017). At the time, eleven constitutional amendments directed at the judiciary were adopted, whereby emphasis was placed on the creation of a Judicial Council, as an independent institution established in order to ensure the independence of the judiciary (Venice Commission, 2005). However, those constitutional amendments were not sufficient for concluding the process of judicial reform. In fact, it was only the necessary first step, which was to be followed by the process of adopting laws in the sphere of the judiciary. That process has not been concluded to date, which is evident in the Law on the Judicial Council from 2019, aimed at improving the legal position of this body and which confirms that

the search continues for an optimal solution (Venice Commission, 2019). Since adopting the constitutional amendments, North Macedonia has followed the recommendations of the Venice Commission multiple times during the implementation of partial reforms to the judiciary.[2] In that sense, North Macedonia has fairly consistently aimed at the implementation of European standards, however the question remains as to whether the Judicial Council has effectuated the expected results in practice.

According to the Constitution, the Judicial Council of North Macedonia is an independent and autonomous institution, established in order to ensure and guarantee the independence and the autonomy of the judiciary. From the perspective of comparative law, primarily with respect to the states in the region, it can be concluded that the Judicial Council is a larger body seeing as it has fifteen members. Taking into consideration the total number of judges in North Macedonia, comparatively speaking, that body has one of the largest number of members. Its size can be considered both an advantage and disadvantage. On the one hand, such a large Judicial Council secures a higher degree of legitimacy of that body and allows for dispersion of the way its members are selected. Such a large number of members within the Judicial Council should contribute to a higher level of efficiency, its greater competency, but it should also ensure a balanced membership on multiple basis. On the other hand, a smaller number of members would imply that the bodies who propose and elect them must be much more cautious, because their mistakes will be more prominent. A larger body creates the danger that aside from eminent legal professionals of high moral standards, members may also be elected though their professional life to date is not deserving it. Simultaneously, a smaller membership gives an impression of an exclusive body whose members should be the legal elite of a society. In addition, the smaller the body is, the more significant its members are and, in such circumstances, they have an obligation to act more conscientiously.

[2] See Venice Commission, CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones; Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia"; Venice Commission, CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on the Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection; Venice Commission, CDL-AD(2018)022, Opinion on the Laws amending the Law on the Judicial Council and the Law on Courts of "the former Yugoslav Republic of Macedonia"; Venice Commission, CDL-AD(2018)033, Opinion on the draft amendments to the Law on Courts of "the former Yugoslav Republic of Macedonia".

The Judicial Council is made up of two categories of members, elected and *ex officio* members. Aside from the President of the Supreme Court of North Macedonia and the Justice Minister who are *ex officio* members of the Judicial Council, this body consists of eight more judges and five eminent legal professionals. Member judges are elected by judges. Three of them shall belong to the communities that are not majority in the North Macedonia, ensuring that equitable representation of citizens belonging to all communities shall be observed. The other five members are not elected in the same manner. Three members of the Council are elected by the Assembly of North Macedonia with majority votes of the total number of MPs, and with majority votes from the total number of MPs who belong to the communities that are not majority in North Macedonia. Two members of the Council are proposed by the President of the Republic of North Macedonia and are elected by the Assembly of North Macedonia, and one of them shall belong to the communities that are not majority in North Macedonia. The members of the Council elected by the Assembly of North Macedonia, on a proposal of the President of the Republic of North Macedonia, shall be from among university law professors, lawyers and other prominent jurists.

A diversified procedure for forming a Judicial Council should secure a balanced membership on multiple basis. The various criteria which should be taken into consideration should decrease the possibility of politization of the selection of members for the Judicial Council. That is in essence a positive aspect of this complex way of forming such an institution. However, the option that the Minister of Justice is foreseen to be a member of the Judicial Council can be criticized. Even though the majority of members of the Judicial Council are judges, the Minister of Justice with his authority and influence on other members of the council can be a channel of politicization of the work of that body. In order to minimize this possibility, the Law on the Judicial Council prescribes that *ex officio* members of the Council participate in the work of the Council without voting rights, whereas they do not at all participate in the meetings in which discussions and decisions are taking place regarding the selection, dismissal and disciplinary accountability of the judges.

The members of the Council are elected for a term of six years, with the right to one re-election. On the one hand, a mandate of six years should secure a higher degree of independence of the members of the Council from the parliamentary majority. On the other hand, the possibility of re-election can be considered a bad solution, because there is a concern that in that way the elected members of the Council, with their cooperation, shall strive to secure another mandate. This concern is especially justified in the group of younger members, who have a long period of time following the conclusion of their mandate until their old age pension begins.

The office of a member of the Council is incompatible with membership in political parties, however, seeing as that disallowance is relatively easy to get around by resigning from the political party, the Law on the Judicial Council also prescribes that a member of this body also cannot have been a member of parliament, member of Government, or held function within a political party in the last four years. In this way, the law narrows down the possibility of this body being politicized.

The legal position of the Judicial Council not only prescribes the manner in which it is formed but also the scope of its competencies. Even in that aspect North Macedonia has followed the European standards. The Judicial Council is a body which possesses powers which are necessary to secure the independence of the judiciary. Namely, Judicial Council has extensive powers related to judicial appointments, promotions and dismissals, as well as in determining disciplinary responsibility of judges.

Considering the analysis thus far, it can be concluded that North Macedonia has followed the recommendations and standards of the EU in establishing the institutional framework of the Judicial Council. After all, that was also confirmed by the Venice Commission whence adopting the constitutional amendments: "The proposed reform is to be welcomed as providing for a depolitisation of the appointment and removal of the Judiciary. In particular, the presence of a judicial majority on the Council is to be welcomed as are the provisions concerning representatives of the non-majority communities" (Venice Commission, 2005, para. 40). However, regardless of the fact that North Macedonia has followed the European standards fairly consistently, it has become clear that for achieving the judicial independence is not enough to change the Constitution and laws. As some of North Macedonian authors have concluded: "it is rather evident that the judiciary was not ready for the high level of self-government", and that the "judicial independence could not be imposed without a proper awareness among judges and their will to obtain it" (Preshova, Damjanovski & Nechev, 2017, p. 22). As an illustration of the assertion that the Judicial Council is under strong political control in North Macedonia, we look at the so-called wiretapping scandal from 2015, when it became evident that there is „an extensive informal mechanism of governmental and party control over the processes of recruitment, promotion and dismissal of judges, as well as governmental influence over high profile court verdicts" (Preshova, Damjanovski & Nechev, 2017, p. 22). Therefore, regardless of the fact that the European model of the judicial council has been implemented over the course of ten years, this body has not significantly contributed to the improvement of the independence of the judiciary. Accordingly, the experiences of North Macedonia bear witness to the fact that adopting the European model of

the judicial council is not a sufficient guarantee that the politization of the court could be prevented. The difference is that that body makes the political influence less evident, which is simultaneously the negative aspect to the existence of the judicial council.

4. Constitutional Reform of the Judicial Council in Serbia

Serbia adopted its second, post-socialist Constitution in 2006, which was just after the constitutional reform of the judiciary had taken place in North Macedonia. Seeing that the 1990 Constitution of Serbia did not foresee any form of judicial council, the constitutionalization of the High Judicial Council in the new Constitution was its attempt to adhere to the European standard. The High Judicial Council has been constituted as an independent and autonomous body which guarantees independence and autonomy of courts and judges. However, serious objections could be directed to the manner in which the High Judicial Council has been constituted, as well as the scope of its powers.

The High Judicial Council had 11 members and that number could be considered as an appropriate one. Its members were the President of the Supreme Court of Cassation, the Minister of Justice, and the President of the competent committee of the National Assembly, in addition to *ex officio* members and eight elected members elected by the National Assembly. The elected members were six judges with a permanent judicial role, and two eminent and prominent jurists with at least 15 years of experience in the field, one of which was a lawyer and the other a professor of law. The mandate for the members of the High Judicial Council is five years, except for the *ex officio* members. However, some procedures pertaining to the formation of the High Judicial Council were controversial. First, the quality of the constitutional guarantee of the independence of this body could be questioned because the formation of this Council, directly or indirectly depends on the political will of the parliamentary majority. Eight of the elected members of the Council are selected by the National Assembly, and its influence significantly stretches across three members within their functions: the Minister, selected by the Parliament, the President of the competent committee of the National Assembly, who is at the same time a Member of Parliament, and the President of the Supreme Court of Cassation, who is also elected by National Assembly. Therefore, the parliamentary majority dominates over this body, hence there could not be an independent judicial council. In addition, there is the European standard regarding the need to establish a guarantee that the Judicial Council must have member judge representatives from all levels and types of courts.

Furthermore, the number of eminent jurists that are elected by Parliament can also be criticized. Also, amongst eminent jurists, advantage has been given to the lawyers. Undoubtedly, the election of eminent jurists should not have been limited only to the legal professions, which included professors and lawyers.

Taking into consideration the definition that the High Judicial Council guarantees independence and autonomy of courts and judges, it can be stated that the competencies of this body has not be adequately defined. The competence of electing judges has been divided between the High Judicial Council and the National Assembly. The Constitution of Serbia has prescribed two categories of judges that are elected in different ways. First, at the proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time. Tenure of office of a judge elected to the post of judge shall last three years. The High Judicial Council shall elect judges to the posts of permanent judges, in that or in other court. This can lead to the conclusion that this process allows for political influence during the election of judges, because the initial election of each judge is based on the decision of the parliamentary majority.

Domestic scholars, as well as the Venice Commission, have recognized a series of weaknesses in the Constitution that related to the judiciary. Those weaknesses have raised questions regarding the possibility of achieving the independence of the judiciary as one of the fundamental principles of the rule of law. The major flaw pertains to the potential politization of the judiciary due to significant competences of the Parliament. The Venice Commission has expressed particular disapproval of the fact that the Parliament plays two roles in the process of judge selection; specifically, as the body that selects the members of the High Judicial Council and the one that elects judges for their first tenure. The need to amend the Constitution was identified by the state itself back in 2013, within the scope of the National Strategy of Reform of the Judiciary, for the purpose of strengthening the independence of the judiciary by eliminating the influence of the legislative and executive powers on the process of election and dismissal of judges and presidents of the courts, as well as the elected members of the Judicial Council. However, the process of amending the constitution is not that quick. Constitutional amendments were only adopted at the referendum which took place in January 2022. Their preparation took place with the active and open consultation of the Venice Commission, which supported the constitutional reform of the judiciary. At first glance, in essence, the constitutional amendments pertaining to the judiciary were improved. The probationary tenure of judges was eliminated, whilst the manner of formation and the function of the High Judicial Council were significantly improved and advanced.[3]

[3] About High Prosecutorial Council see Orlović & Rajić, 2023, pp. 150-156.

The High Judicial Council shall have 11 members, however its membership has been significantly changed. It is now to include: six judges elected by the judges, president of the Supreme Court and four prominent lawyers elected by the National Assembly. The National Assembly shall elect members of the High Judicial Council among prominent lawyers with at least 10 years of experience in legal practice, among eight candidates proposed by the competent committee of the National Assembly, after having conducted public competition, by a two-thirds majority vote of all deputies. If the National Assembly does not elect all the four members within deadline stipulated by the law, the remaining members upon the expiry of the deadline shall be elected from among the candidates who meet the criteria for election, by a commission composed of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Ombudsman, by majority vote.

The mandate of the High Judicial Council has also been broadened. The body shall elect judges and decide on the cessation of their tenure, elect the president of the Supreme Court and presidents of other courts and decide on their dismissal, decide on the transfer and temporary relocation of judges, determine the necessary number of judges, and decide on other issues related to the status of judges. Therefore, the High Judicial Council has gained powers that enable the protection of the independence of judges and courts. With respect to the members of the High Judicial Council, the European standard has been accepted whereby the majority of them are judges, and the Minister of Justice and President of the competent committee of the National Assembly are no longer members of the Council. In order to secure the most objective and depoliticized election, it is foreseen that eminent jurists will be elected by way of a two third majority vote in parliament, which means a broad consensus during their election. It is clear that observable channels of possible politization of the judiciary have been eliminated, however new channels for their covert existence have been created instead.

Regardless of the fact that eminent jurists are selected by way of a two-third majority vote in the Parliament, the competent committee of the Parliament has been given a key role in that election process. Namely, following the public competition process, the competent committee of the National Assembly completes a preliminary election process by proposing eight candidates from those nominated. Specifically, it's a triage of candidates which can gain the character of political filter. Seeing as the parliamentary majority as a rule dominates in the most important parliamentary committees, it is clear that will be a channel of strong political influence. In that way, the competent parliamentary committee has the opportunity to eliminate candidates who are not favorable to the parliamentary majority and to prejudice their final selection. That preliminary election

may result in the creation of a list of bad and unacceptable candidates, whereby the election of eminent jurists would transfer to a special body which would be formed for that purpose. Therefore, although the basic idea for the election of jurists is founded on a broader agreement and the votes of oppositional political parties so as to achieve a two-third majority of members of parliament, a decisive role is played by the parliamentary majority by way of representation of its members in the competent parliamentary committee.

Following the triage of candidates which takes places within the competent parliamentary committee, in the second phase National Assembly elects four eminent jurists from the eight proposed candidates by way of a two-third vote. However, the Constitution does not define the time period within which the election of eminent jurists must take place, as that issue must be regulated by law. In that way, seeing as there is an alternative method for electing eminent jurists, one of the important questions regarding the procedure for their election has been left up to the parliamentary majority. Hence, the law can prescribe, on the one hand, an inappropriately long period of time or an extremely short one, on the other, for the election of eminent jurists. In the first case, if an inappropriate period of time is prescribed for concluding the election process, the parliamentary majority can tendentiously obstruct the election of eminent jurists and drag out the fulfillment of the membership of the High Judicial Council and in that way block its future work. In the second case, if the period of time is too short to conclude the election of eminent jurists, it may hinder the achievement of compromise and the formation of a two-third majority necessary for the election of eminent jurists and thus displace their election outside the Parliament. Therefore, seeing as there is an alternative method to their election, the period of time during which the National Assembly should elect eminent jurists is an important element of those proceedings and it should undoubtedly be defined by the Constitution.

The election of eminent jurists by a two-third majority should contribute to the election of the best candidates, however, looking at the constitutional provisions as a whole and the political reality the prescribed process is erroneous due to multiple reasons. If we disregard the current political circumstances and absolute dominance of one political party, the Serbian political scene is characterized by high fragmentation and instability. Hence, it can be expected that in the very near future a two-third majority will be very hard to achieve. In that sense, the alternative method of deciding shall most likely become the rule and base method for electing eminent jurists. Furthermore, the two-third majority is not a guarantee that the election of eminent jurists shall be depoliticized and free of foreign influence. To clarify, during the election of eminent jurists, political parties who form that necessary two-thirds majority can enter into an agreement on quotas, which most often happens in political practice.

Seeing as it is hard to achieve a two-third majority in multiparty systems, the constitutional amendments foresee an anti-deadlock mechanism. However, the logic and point of the anti-deadlock mechanism were completely missed (Simović, 2022, pp. 111-112). Namely, the basic idea behind the existence of this alternative mechanism is to motivate initial subjects in the decision-making process to decide, because in the alternative there will be an unfavorable circumstance or sanction. Nevertheless, with respect to the anti-deadlock mechanism in the process of deciding on the eminent jurists, the parliamentary majority is motivated by such constitutional mechanisms to obstruct the initial process of electing four members of the High Judicial Council so that that election would be completed by way of the alternative method, in which it can have significant influence. Therefore, instead of the election of eminent jurists to be completed within the Parliament as the default process, it is not unlikely that that main process for election shall become the exception, and the alternative process to become the rule. Specifically, the process foreseen in the event that the Parliament does not elect all four members within the time period prescribed by law is disputable and unusual. It states that following the expiry of the time period prescribed by law, the remaining members shall be selected from among all the candidates who fulfill the requirements for election by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman. Hence, a special commission is created to take over the mandate of the selecting eminent jurists from the parliament, seeing as it was not able to do so within the statutory limitation period. In principle, with the exception of the President of the National Assembly who is *par excellence* politician, the remaining members of this commission should be independent of political powers. However, political reality is different. In the post-socialist experiences to date, the Constitutional Court has always been on the wavelength of current political majority. It has not with any one of its decisions regarding politically sensitive and significant topics, contradicted the expectations of the Government (See Simović, 2016, pp. 51-64). In addition, the constitutional guarantees of independence of the Constitutional Court have significant deficiencies, and the possibility of reelecting judges of the Constitutional Court makes them vulnerable in relation to the parliamentary majority. Consequently, it can be expected of the President of the Constitutional Court to be sensible to the expectations of the parliamentary majority in view of the election of eminent jurists. The Ombudsman is elected by the parliamentary majority, and although in essence the independence of this state body is guaranteed, the Constitution also foresees that it is accountable to the National Assembly. Therefore, even with respect to the Ombudsman it

cannot be concluded that there may be influence of the parliamentary majority. After all, this institution has not shown to be a reliable and consistent protector of citizens' rights, and since the election of the current Ombudsman in 2017 it has become even more marginalized. In accordance with the amended constitutional provisions, the President of the Supreme Court is elected by the High Judicial Council, whilst the Supreme Public Prosecutor is elected by the National Assembly, at the proposal of the High Judicial Council, with three fifths vote of all members of Parliament, hence these two public officers should be outside the scope of the parliamentary majority. Still, consideration should be given to the Constitutional Law for the implementation of Amendments which foresees that the President of the Supreme Court of Cassation and the Supreme Public Prosecutor who have been elected prior to the constitutional amendments coming into force, shall continue to fulfill their role until the expiry of their term for which they have been elected. Seeing as that according to the original constitutional provisions the President of the Supreme Court of Cassation and the Supreme Public Prosecutor were elected by Parliament, and that they started their term of office in 2021, it is practically guaranteed that they will be channels by way of which the current parliamentary majority can influence over the election of eminent jurists.

In addition to the discussed suspicion that those will be the channel of politization of the election of eminent jurists, the membership of the commission has been thoughtlessly conceived considering its corruptive potential. Namely, the President of the Constitutional Court participates in the election of members of the High Judicial Council, and that body participates in the proposal of candidates for the election of judges of the Constitutional Court, which is the mandate of the Supreme Court. Furthermore, the President of the Supreme Court also participates in the selection of the members of the High Judicial Council, and that body, amongst other things, decides on the dismissal. Therefore, the prescribed constitutional provision represents an inadequate mechanism against the blockade in deciding and a hidden channel of politization of the election of eminent jurists.

As it can be concluded, at first glance a model of a Judicial Council that for the most part adheres to the European Standards has been established. However, a more detailed analysis of the constitutional framework of the Judicial Council shows that, obviously tendentiously, hidden mechanisms for the politicization of the judiciary have been left in place. That is one confirmation that the establishment of the European model of the judicial council is not a sufficient guarantee for securing the independence of the judiciary, despite the positive evaluation of the Venice Commission.

5. Conclusion

North Macedonia and Serbia have around the same time constitutionalized their judicial councils. From the perspective of the European model of the judicial council North Macedonia was closer in implementing their sample model, whilst Serbia foresaw constitutional provisions which did not eliminate the channels of political influence over the judiciary. Hence, immediately following the adoption of the 2006 Constitution it was clear that Serbia had to amend its constitution in the part dealing with the judiciary if it wished to tie its future to the European integration process. Although that process did not unwind quickly and easily, the constitutional amendments which constitute the improved model of the judicial council were adopted in 2022. However, what is characteristic for modeling of the new Judicial Council is the fact that the amendments to the part on the judiciary of Serbia was based exclusively on the abstract criticisms of the constitutional provisions from 2006 and the recommendations of the Venice Commission that it was necessary to adhere to the European model of the judicial council. Despite the fact that the Constitution was in force for almost fifteen years, there was no analysis which would evaluate the work of the High Judicial Council. In the event that the work of that body was evaluated negatively, then the next step would be to identify the reasons for that failure. Aside from that, seeing as North Macedonia also had significant experience with the Judicial Council that was more harmonized with the European standards, the results achieved by that body in practice could have been of great value. Therefore, regardless of the significant experiences of these two states, but also the experiences of other post-socialist states, the constitutional reform of the judiciary in Serbia was implemented without serious empirical analysis, but exclusively on the basis of the abstract idea that the European model of the judicial council was optimal solutions and that it should be adopted without criticism.

It would seem that the experience and practice of the North Macedonian Judicial Council can be didactical. The European model of the judicial council, which centralizes the mandates which pertain to all the matters pertaining to the careers of judges and gives judges control over this body is founded on the assumption that the judges are reliable and adequate actors who are aware of their obligations and competent to fulfill them (Bobek & Kosař, 2014, p. 1268). However, consideration is not given to the fact that such a Judicial Council in which the majority is made up of judges can only have independence and authority in a politically mature society. Comparative experiences have shown, as a stronger Judicial Council is being established, its exposure to the impact of the political branches of government increases (Kosař, 2018, p. 1591). Politicians are always in

a position to find a judge who is willing to cooperate with them and who becomes a channel of politization of the work of that body (Kosař, 2018, p. 1593). That was also evident in the experiences of North Macedonia despite the fact that the constitutional provisions adhered to the European standards to a great extent. In that sense, establishing a European model of the judicial council is not sufficient, and surely not a necessary condition for ensuring the judicial independence. That model is promoted as ideal and it is expected, without criticism, that it shall achieve positive results in each and every state, with almost full disregard for tradition and achieved level of legal and democratic culture. Aside from the complete undermining of the socio-political assumptions for its implementation, the European model of the judicial council falls short in other areas as well. The key criticism directed at the European model of the judicial council is the lack of democratic legitimacy. Leaving the judiciary without any control by external factors in states without democratic traditions and culture could lead to corruption and exclusion of accountability. After all, the Italian model of the judicial council, which is closest to the European model, is continually being criticized due to corporatism, lack of accountability of judges and lack of efficiency (Bobek & Kosař, 2014, p. 1291).

Regardless of all of its imperfections, the European model of the judicial council should not be dismissed. However, post-socialist states, amongst which are Serbia and North Macedonia, should be much more careful whilst accepting this model and instead search for their own authentic models, and not uncritically accepting the ready "magic recipe" which supposedly guarantees success. The experiences of North Macedonia whose model of the judicial council initially was more in line with the European standards, did not even come close to having satisfactory results in practice. However, instead of thoroughly analyzing the practice of its Judicial Council with consideration of the experiences of other states, Serbia is implementing constitutional reforms of the judiciary in which it is inertly and without criticism following the so-called European standard. In that sense, especially taking into consideration the experiences of North Macedonia, it would seem that the constitutional reform of Serbia shall not result in the improvement in the independence of the judiciary, especially seeing as the basic channels of its politicization have not been identified. The unsatisfactory level of independence of the judiciary is undoubtedly not the consequence of weakness in the constitutional framework of the judicial council, but instead a result of issue that go much deeper. Ignoring those key reasons only means that Serbia, despite its constitutional reforms, is still equally far from achieving independence of the judiciary as it was prior to them.

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