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## Constitutional Issues of the Judicial Career in Western Balkan States (Serbia, Montenegro, Bosnia and Herzegovina, North Macedonia)

- **ABSTRACT:** *In all four states analysed in this study, the judiciary and judicial career have been undergoing years-long legislative changes, with this 'reform', however, still pending finalisation. Another common feature is the effort to take judicial career decision-making away from political factors and entrust it to independent authorities wherein judges have the final word. It is considered the attainment of the principles of independence and autonomy of the judicial branch of power. However, the adoption of legal acts over the past decade was not sufficient to achieve entirely objective elections and decisions on the promotion of judges. The reality in these states reveals that there are strong and, in numerous cases, decisive informal (political and interest) influences on judicial career development decisions. The author's basic assumption is that for the full effect of the adopted regulations to occur, it will take more time for the constitutional institutions to be strengthened, and the political awareness of citizens will increase.*
- **KEYWORDS:** judicial power, judicial career, Constitution, Serbia, Montenegro, Bosnia and Herzegovina, Macedonia.

### 1. Introduction

The system of government of present-day states is, in the significant majority, based on the division of power. Amongst the highest branches of power lies, besides the legislative and the executive, judicial power. It is, organisationally and functionally, separated from political powers, legislative, and executive. This means that courts are organised separately from the government, parliament, and public administration, and that their operations cannot be influenced externally. The basis of this status of courts is in the

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constitutional principles of independence and autonomy, which guarantee that courts are functionally independent and organisationally autonomous.<sup>2</sup> Every legal state presumes the functioning of an independent judiciary, which excludes any influence and pressure from the political branch.<sup>3</sup>

Besides the principles of independence and autonomy, constitutions also usually provide for other guarantees for the independent operation of courts and judges, such as the legal basis for trial (constitution, law, international treaty...), the publicity of trial, two-instance procedure, permanency of courts and of the judicial function, non-transferability and immunity of judges, and material security. Constitutions make no provisions for the organisation (network) of courts – except for the Supreme Court; rather, they provide a constitutional-legal basis upon which to build (institutionalise) the judiciary, which includes the prosecution. Apart from the said principles and provisions governing the highest court, there are provisions on the manner of election and dismissal of judges, on authorities electing and dismissing judges, the prohibition of courts-martial, and others. Other issues in the judicial branch are a matter of law.

Legal regulation of the judicial career involves more than a few issues: election and term of office of judges, eligibility requirements and criteria for the promotion of judges to higher instance courts, and termination of judicial office. While key aspects of the judicial career, such as election and termination of office, are regulated by the constitution and elaborated by law, professional advancement requirements for judges are enshrined in the law, and standards and criteria of career development made a matter of by-laws (usually the rulebooks).

The study addresses a few issues related to the status of the judge, namely, the manner of election of judges and the role of autonomous judicial bodies in the election and dismissal procedures, as well as the composition of those judicial bodies, which can be crucial.<sup>4</sup> Furthermore, it outlines the methods of evaluating the quality and effi-

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2 Judicial independence comprises: the essential (substantive) independence of the judge, which means that judges rule based on their knowledge, bound by law, and beyond external influence; and personal independence of the judge; thus, judges have a permanent and protected position and they rule objectively and free from bias. Ljubanović, 2013, p. 127.

3 Pejić, 2013, p. 113.

4 According to comparative experience, judicial council can comprise three types of members: representatives of the judiciary – judges, representatives of the legislative and/or executive branch, and representatives of the legal profession, in some states even of the unions. Ibid, p. 118. For autonomous decision-making by that body, it is crucial who comprises it and who elects its members, but there is no uniform model. Different solutions are offered: judicial council solely comprising judges elected by judges (excellent solution, existed in France under the law from 1883); Judicial Council of mixed composition with three variants: Council comprising a majority of judges and a minority of non-judges (In Italy, the minority is made up of law professors and law practitioners; in Poland, they are members of Parliament), Council comprising a minority of judges (France, under 1946 Constitution), or one with equal number of judges and non-judges (Belgium, under 1999 Constitution); judicial council comprising solely judges elected by the Parliament (in Spain, under the Organic law of 1985); council composition is political, members are elected by the Parliament or the Government. Petrov, 2013, p. 44.

ciency of judges and their impact on career advancement, the possibilities for electing as judges legal professionals from outside the judiciary, and the possible participation in trials by persons being legal professionals but not elected as judges.

The comparative study includes four states of the 'Western Balkans': Serbia, Montenegro, Macedonia, and Bosnia and Herzegovina. From the analysis of the constitutional and other provisions regulating the above issues, accompanied by a presentation of the theoretical basis of positive law solutions, a picture will be grasped of whether the constitutional-legal status of judges and their professional development in the respective states are appropriate. Moreover, whether they form part of the 'European standards' regarding the judicial branch of power.

## 2. Judicial career in Serbia

The parliamentary system in the Republic of Serbia is based on the separation of powers into the legislative, executive, and judicial, where judicial power is independent (Art. 4 of the Constitution).<sup>5</sup> The Constitution, regarding the judicial career, makes provisions only for the election and term of office of judges and for their legal status (immunity, non-transferability) that protect them against external influences. The questions of who can become a judge and what criteria they must satisfy for the first and higher instance courts are regulated by law. By-laws lay down the criteria for the professional advancement of judges and the manner of assessing their performance.

### ■ 2.1. *Judicial election procedure and role of autonomous bodies in judicial career*

In Serbia, judges are elected in two ways. The first concerns the election of a novice judge to a term of office for three years, following the end of which they can be elected to a permanent function.<sup>6</sup> Formal eligibility requirements for applying for the position of a judge at any court include that the candidate must be a citizen of the country, meet general conditions for employment in public authorities,<sup>7</sup> have graduated from the Faculty of Law, have passed the bar exam, and have law-related work experience. Experience in the judiciary means that the candidate has passed the training

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5 The constitutional provision of the same Article that 'the relationship among the three branches of power shall be based on balance and mutual control' is not acceptable in view of the nature and manner of operation of the judicial branch, nor is it consistent with another constitutional provision that 'court decisions may not be a subject of extrajudicial control' (Art. 145, para. 3).

6 This solution is not alone in the comparative constitutionalism. France, Greece, the Netherlands, Germany, and Austria are some of the states with probationary period for judges that makes it possible 'to eliminate from the judiciary the persons unworthy of the judicial calling'. Simović, 2013, pp. 96-97.

7 Not having been convicted to a prison sentence of at least six months and other requirements from Art. 45 of the Civil Servants Act (2005).

programme, the so-called mentoring training system.<sup>8</sup> In addition to these criteria, the candidate must also meet the requirements of expertise, competence, and worthiness. The required experience is that of law (potentially also from outside the judiciary) gained upon passing the bar exam. It varies depending on the court applied for – from two years for a judge of the Misdemeanour Court to 12 years for a judge of the Supreme Court of Cassation. A judge of the Court of Appeal must have at least 10 years of post-bar exam experience.

The requirement for expertise and competence means possessing theoretical and practical knowledge, which is verified by the quality of passed judgements for judges applying for a higher court or for a permanent judicial function. For novice judges, the proof of expertise refers to the passed professional exam organised by an independent authority (autonomous body), the High Judicial Council, or the final mark from the Judicial Academy training assigned to its trainee. The requirement for worthiness concerns the moral traits of the judge, such as honesty, conscientiousness, dignity, and others, and is evaluated by the High Judicial Council.

The High Judicial Council is a body of constitutional category, independent and autonomous, with its major responsibility being to elect all judges, except for those to be elected for the first time. Its composition, members' status, and powers are regulated by the Constitution, with more specific provisions being enshrined in the High Judicial Council Act (2008). Judges comprise the majority of this body, with a total of seven members (besides the President of the Supreme Court of Cassation, SCC), while other elected members include law professors and law practitioners (solicitors). Members by function, besides the SCC President, are the Minister of Justice<sup>9</sup> and the Chairperson of the Parliamentary Judiciary Committee. All eight elected members were selected by the National Assembly for a five-year term. Apart from deciding on the election and dismissal of judges, the SCC makes proposals to the National Assembly for judges for the first election and presidents of courts, participates in the procedure for the termination of office of court presidents, and performs other duties as required by law. These powers of the Council allow it to act as a guarantor of the independence and autonomy of courts and judges. However, for it to be so, there are views, it must be granted full power over the process of election and dismissal of all court presidents and judges, and particularly those elected for the first time, but for no fixed term of office.<sup>10</sup>

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8 “The European continental system generally features three models of lawyers’ training for the exercise of judicial duties: mentoring training system (Austria, Germany, Serbia), training system within a training institution – academy (France, Spain, Portugal) and a combined system (the Netherlands, Italy) where training is a combination of the mentoring system and seminars held within training centres”. Boljević et al, 2019, p. 40. In the process of formation of a judge, there must be a uniform training programme wherein stakeholder institutions (Faculty of Law, courts, Judicial Academy, High Judicial Council) will cooperate with one another. *Ibid.*, p. 63.

9 The experience with previous ‘reform’ (*cited by S.O*) of judiciary in Serbia (2008-12) implies that the Minister’s membership in this body should be discontinued. Marković, 2017, p. 211.

10 Petrović Škero, 2020, p. 37.

A candidate who is elected to the judicial office for the first time is finally decided by the National Assembly, by a majority vote of the total number of members (absolute majority). The public vacancy announcement is followed by the verification and evaluation of election eligibility requirements. It involves a judicial entrance exam – a testing of theoretical and practical knowledge (expertise) and skills of applying the acquired knowledge (competence), for which an appropriate mark is assigned.<sup>11</sup> The examination is not required for candidates who have graduated from the Judicial Academy, and this practice has been subject to criticism by professional circles.<sup>12</sup> Although the Academy no longer holds a monopoly over the election of new judges, as a ‘recruitment centre’, it has still been under the considerable influence of politics.<sup>13</sup> The High Judicial Council will, for each judicial post, propose one candidate for the National Assembly. The Assembly can only choose those specific candidates rather than other, non-proposed and qualifying candidates. The election of the first-time judge on a limited-term basis is, in fact, a kind of probation.

Judges with permanent tenure are elected from among the candidates responding to public vacancy announcements. The High Judicial Council verifies and assesses their fulfilment of general and specific election requirements, conducts interviews (through its Committee), and makes a final decision on the election of a judge. The High Judicial Council decides on the termination of the judicial function, particularly on the dismissal that may be subject to the right of appeal.<sup>14</sup>

Performance assessment is a key step for the promotion of judges. The aspects evaluated were quality and quantity of work.<sup>15</sup> A regulation passed by the High Judi-

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11 „Правилник о програму и начину полагања испита на коме се оцењује стручност и оспособљеност кандидата за судију који се први пут бира“, 2018. (*‘Rulebook on the programme and manner of taking the exam assessing the expertise and competence of judicial candidates being elected for the first time’*)

12 Its trainees take the final exam at the Academy. ‘(...) by no means can we speak of autonomy of the Public Prosecutorial Council and High Judicial Council with respect to determining candidates for the first election to the judicial function, given that the said legislative solutions prevent them from testing the expertise and competence of candidates coming from the Judicial Academy, that is, when, as autonomous and independent bodies, they have one more time been bound by the final grade from the initial training at the Judicial Academy, having to accept it as a pre-determined one’. Lazović, 2018, p. 10.

13 What gives rise to concern is the fact that the Ministry of Justice has a substantial influence on the Academy’s composition: three of nine members of the Managing Board are nominated by Government directly, including one officer from the respective Ministry. The Ministry is also responsible for supervising the Academy’s overall performance. Fagan and Dimitrova, 2019, p. 229.

14 On the procedure for the dismissal of judges, see Spasojević, 2016, pp. 44-61. Importantly, the protection of judges’ rights in the decision-making on the termination of the judicial office, or the dismissal of the judge, has retained the status of a constitutional matter, namely through the institution of appeal to the Constitutional Court. Pajvančić, 2011, p. 19.

15 Spasojević, 2015, pp. 49-56

cial Council sets out the means for judicial performance assessment.<sup>16</sup> This rulebook should establish objective criteria and standards for the assessment of eligibility for the election and promotion of judges with permanent tenure: expertise, competence, and worthiness (the latter is assumed). It is crucial for the promotion requirements not to be such as to make judges feel the internal pressure to focus their work on deciding as many cases as possible in a short time, which, eventually, makes it impossible to make quality decisions.<sup>17</sup>

The judicial branch is not closed for lawyers who have gained experience in other social fields. Although most of the novice judges are elected from the judiciary, from among former trainees and expert associates, a person from another social field, the economy or finance, for example, can be elected as a judge if he/she meets general and specific requirements for election. Candidates from the judiciary are not formally preferred to other candidates, although at the interview, they can be valued as an advantage.

There are no obstacles to choosing a lawyer from outside the judiciary even as a judge in a higher court, all to the Supreme Court of Cassation, provided that, career-wise, he/she had already performed the judicial function (left the court once and now reapplies for a judge). If this requirement is not satisfied, then in a higher court as well, the candidate must first be elected to a three-year term of office (as a person who is being elected for the first time), and only after that to a permanent tenure. While legally possible, there have been no cases in practice, since the formation of the judicial council of electing novice judges to higher courts; instead, the judicial career commenced with election to the first-instance courts.

Judicial vocation is performed professionally, and the Constitution forbids performing, along with the judicial, of any other functions and duties as an occupation or those incompatible with judicial ones. What functions, activities, or private interests are incompatible with judicial duties regulated by law? The Constitution explicitly prohibits 'political activity of judges' (Art. 152). What in a trial represents the 'citizens' voice' – final judgements are passed 'in the name of the people' is the participation therein of lay judges. In the jury system of Serbia, lay judges form the majority in the trial court panel (sometimes, cases are tried by a single judge, a professional one), and this practice, as explained, prevents the seclusion of courts as public authorities that would comprise professional judges alone (as some kind of 'coterie'). Lay judges constitute a layman element of the trial panel and one that influences the passing of not only lawful but also fair judgements. Participation in a trial is not made possible for other legal professionals, such as professors of law, who concurrently exercise judicial function (it is only possible within the Constitutional Court).

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16 „Правилник о критеријумима и мерилима за оцену стручности, оспособљености и достојности за избор судије на сталној судијској функцији у други или виши суд и о критеријумима за предлагање кандидата за председника суда“, 2016. (*The Rulebook on the criteria and standards for the evaluation of expertise, competence, and worthiness for the election of judges with permanent tenure to another or higher court and on the criteria for proposing candidates for court presidents*)

17 Boljević, 2017, p. 90.

### 3. Judicial career in Montenegro

In Montenegro, the basis of the parliamentary system is the division of power into three branches: legislative (parliament), executive (government), and judicial. There is the exact same provision as in the Serbian Constitution that ‘the relationship of powers shall be based on balance and mutual control’ (Art. 11, para. 3). Therefore, the same criticism stands that the judiciary cannot be independent and, at the same time, controlled by the parliament and the government. A rule of a legal state resulting from the division of power is that court decisions can be reviewed solely by a higher court directly. The Constitution contains principles on the judiciary (independence and autonomy, collective trial, publicity, permanence, immunity, and incompatibility of functions), several provisions on the election and dismissal of judges, the Supreme Court, and, thoroughly, on an autonomous body responsible for electing judges, the Judicial Council.<sup>18</sup> The issues of eligibility and evaluation of candidates for judges and the election procedure itself are a matter of law.<sup>19</sup> Sub-legal level norms also exist: the Judicial Council adopted a regulation concerning the standards for the development of the career of a judge, ‘Rules for the Assessment of Judges and Court Presidents’ (2015).<sup>20</sup> The fact that the Constitution fails to proclaim that the establishment, organisation, powers, and composition of the judiciary be regulated by law made it possible to regulate all these issues by by-laws, which increases the influence of the executive branch on the independence of the judiciary.<sup>21</sup>

#### ■ 3.1. *Judicial election procedure and role of autonomous bodies in the judicial career*

The manner of election of judges (and presidents of courts) is determined by the Constitution and the election procedure, more precisely, by the Act on the Judicial Council and Judges (2015). Unlike in Serbia, there is no mention of a time-limited judicial term of office in Montenegro; rather, the judicial function is permanent. All judges are elected by an autonomous body, the Judicial Council, as an ‘independent and autonomous body that ensures the independence and autonomy of courts and judges’ (Art. 126 of the Constitution). Under the Act, the Judicial Council is ‘perceived as a key actor of the judiciary expected to exercise its powers entirely transparently, responsibly, and efficiently’.<sup>22</sup> It also decides on the termination of the judicial office, including the dismissal. The Judicial Council conducts a procedure wherein the qualification

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18 A special body in charge of human resources in the judiciary was introduced already by the Act on Courts of 1991, since the point of which, its composition and powers have been subject to continual revisions. Vukčević and Bošković, 2016, p. 22.

19 For details on the judicial election body, criteria, performance evaluation, and accountability of judges, see. *ibid.*, pp. 18-25.

20 The new matter of measuring the productivity of judges was considered a basis for the judicial system in Montenegro to take a step closer to the standards of EU members. *Ibid.*, p. 18.

21 Čupić, 2011, p. 7.

22 Vukčević and Bošković, 2016, p. 19.

of judges for promotion is evaluated (performance assessment, interview) and passes decisions on judicial promotions, i.e., election to a higher instance court. Therefore, the entire judicial career, from the first election to office, through promotion, up to the termination of office is 'covered' and decided by the Judicial Council.

While the Judicial Council is constitutionally proclaimed as an independent and autonomous body entrusted with all essential authorities within the judicial system, its composition reveals that it is not immune to the influence of political power. This influence can even become dominant in decision-making because representatives of judicial power can potentially remain in the minority. Despite recommendations for making judges comprise a majority in this body and for revoking the Justice Minister's membership by function, these constitutional changes have never become a reality.<sup>23</sup> In the composition of 10 members, the judiciary is represented by the President of the Supreme Court and four judges elected by the Conference of Judges. They suspend exercising their judicial duties during this mandate, which is what the theory in fact required.<sup>24</sup> 'Representatives' of the political power are four 'prominent lawyers' elected by the Parliament, and as the fifth, the Minister responsible for the judiciary.<sup>25</sup> The President of the Judicial Council comes from among the 'prominent lawyers' and has a casting vote if the vote is tied, five to five ('a golden vote'). This arrangement significantly undermines the autonomy of the Judicial Council from the viewpoint of judicial independence and autonomy.

Upon the public vacancy announcement, a judge is elected from persons who meet general requirements for employment in public authorities (citizenship, fitness for work, non-conviction, etc.), who have graduated from the Faculty of Law and passed the bar exam. Specific requirements concern the law-related experience gained before and after the bar exam. The required experience ranges from at least two years of post-bar exam experience for a judge of the Misdemeanour Court to at least 15 years, as needed for a judge of the Supreme Court.

Notably, for the process of election of judges of first-instance courts (Misdemeanour, Basic, Agricultural, Administrative), the Act distinguishes between candidates who have been gaining experience in the judiciary and those engaging in other law-related activities. The latter need to have twice as long working experience. The respective institutions provided opinions on candidates from both groups. As judges at higher

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23 In 2015, the Council of Europe's Group of States against Corruption (*Groupe d'Etats contre la corruption* – GRECO) recommended that Montenegro take additional measures to strengthen the independence of the Judicial Council against undue political influence. It was also recommended to abolish the membership by function held by the Minister of Justice in the Council, that half of the members be judges, and that the function of the President of the Council be entrusted to a member from the ranks of judges, as well as to establish the objective and measurable criteria for the election of non judicial Council members. Gorjanc Prelević, 2019, p. 8.

24 Bogičević, 2014, p. 83.

25 In practice, with the criteria being political and non-legal, it is difficult to elect 'prominent lawyers' for members of the Judicial Council. Even the Act on the Judicial Council and Judges was changed in a way that allows the extension of the expired mandate of the existing members until new members are elected (virtually for an indefinite period). Beharović, 2021.



courts (Higher Misdemeanour, High, Appellate, and the Supreme Court), only those candidates who have previously served as judges or public prosecutors. As an exception, candidates for judges at the Supreme Court can also be lawyers from outside the judiciary, with at least 20 years of working experience.

Additional requirements for candidates for judges at the Basic Court include grades from the written test and the interview,<sup>26</sup> Also, all candidates must pass the 'initial training' (18 months) at the Basic Court in Podgorica.<sup>27</sup> The written test, interview, and initial training (of varied duration) also apply to the election of judges of the Misdemeanour Court, the Administrative Court, and the Agricultural Court. The law makes separate provisions for the requirements (criteria) for the election of the Supreme Court judges and judicial promotion requirements. A candidate for a judge of the Supreme Court, besides knowledge and skills, needs to meet a range of 'sub-criteria': professional development, scientific and professional work, working experience, performance quantity and quality, motivation, communication skills, competence, and understanding of the role of a judge in society (Arts. 66-71 of the Act).

The prevalence of 'non judicial' members in the decision-making in the Judicial Council is mitigated by the fact that the Commission for compliance assessment with judicial promotion requirements comprises, among Council members, four judges (including the President of the Supreme Court) and one prominent lawyer. The Commission assesses candidates on a proposal of the judicial deciding panel (president of the court from which the respective candidate comes from and four judges from higher instance courts). Besides performance, a contributing factor to the candidate's overall assessment necessary for election to a higher instance court is the interview.

The assessment of judges is regulated by law (Arts. 87-101), and more precisely defined in a regulation ('The Rules for Evaluating Judges and Presidents of Courts' 2015). The law governs the following issues: grades (excellent, good, and unsatisfactory), assessment criteria (professional knowledge and general competence), and many sub-criteria for measuring professional knowledge and general competence. In the procedure, a judge undergoing assessment is also making his/her case. Material sources for the assessment of professional knowledge and general competence of a judge include a selection of cases adjudicated by the given judge, statistical reports, supervision records, and judicial training reports. The ratings 'excellent' and 'good' mean a possibility for advancement, while the ratings 'satisfactory' and 'unsatisfactory' indicate that it is not possible to advance and a referral of a judge for (continuous) judicial training.<sup>28</sup>

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26 The interview is led by the President of the Judicial Council and conducted following the Interview Guidelines, adopted by the Council in 2016. Gorjanc Prelević, 2019, p. 25.

27 In 2017 and 2018, cumulatively, a total of four candidates completed the initial training and were subsequently elected as judges. *Ibid.*, p. 29.

28 This Montenegrin system of assessment (still in the draft form) was seen by the Venice Commission as detailed and of good technical quality. However, it was also stressed that such a system properly implemented will take a lot of time, personal and economic resources to produce long-term results. Hirschfeldt, 2014, p. 13.

#### 4. Judicial career in North Macedonia

One of the fundamental values of the parliamentary system of the Republic of North Macedonia (RNM) is the division of state power into legislative, executive, and judicial powers (Art. 8 of the Constitution of 1991). This Constitution makes no provision, to which we agree, for the mutual control of powers (in contrast to Serbia and Montenegro) – one that would relate to all three branches of power and made even the courts subject to the control of the political powers (legislative and judicial). Other constitutional provisions on the judiciary are grouped under a special chapter ('Judiciary', Arts. 98-105) and revised by amendments XX-XXX (2005).

The Constitution regulates the grounds for the independence and autonomy of the judicial branch, while more specific provisions are found in the law. The Constitution provides for the manner of election and the conditions for termination of the judicial function, judicial immunity, the principles of publicity of trial and adjudication by a panel of judges, and the incompatibility and permanency of the function. The Constitution proclaims that the Supreme Court is the highest court in North Macedonia, while the organisation (network) of courts is regulated by law. The most prevalent constitutional provisions are those concerning the Judicial Council of the RNM, namely the legal status of its members and their powers.

The amendments to the 2005 Constitution brought numerous changes in the organisation of the judicial system, aimed at increasing its independence and autonomy. Judges have no longer been elected by the Parliament (Собрање), but by an autonomous judicial body, the Judicial Council. Dismissal was separated from other forms of termination of the judicial office. The composition of the Judicial Council and the manner of election of its members were completely changed and its powers defined in greater detail.

More specific provisions on the judicial branch and certain issues relevant to the judicial career are found in the Act on Courts (Закон за судовите, 2006),<sup>29</sup> Act on the Judicial Council of RNM (Закон за Судскиот совет на РСМ, 2019), and Act on the Academy for Judges and Public Prosecutors (Закон за Академијата за обука на судии и јавни обвинители, 2015). Regulations applicable to the judicial career include the Rulebook on the ranking of candidates for election as judges at higher instance courts (Правилник за начинот на рангирање на кандидатите за избор на судија во повисок суд, 2020) adopted by the Judicial Council, while of relevance to novice judges are those passed by the Academy for Judges and Public Prosecutors on the entrance exam and initial training.

The years-long reform of judiciary in the RNM<sup>30</sup> was only in the EU Progress Report of 2018 assessed as 'good progress (...) towards the beginning of the restoration

<sup>29</sup> Apasijev, 2019, pp. 1-43.

<sup>30</sup> See Lance, 2000, pp. 34-36, Radovanovik, 2012, pp. 1-10.

of independence of the judiciary', and one noted indicator of its independence and impartiality is the permanent tenure of judges.<sup>31</sup>

#### ■ 4.1. *Judicial election procedure and role of autonomous bodies in the judicial career*

The manner of election of judges and termination of judicial office are defined by the Constitution and, more specifically, by the Act on the Judicial Council of RNM (Arts. 38-64).<sup>32</sup> RNM is another state without a probationary period for judges of a specified length; instead, all judges are elected to a permanent function. Judges are no longer elected by the Parliament but, since the amendments in 2006, by an autonomous authority, the **Judicial Council** of RNM, 'an independent and autonomous body of the judiciary' (Amendment XXVIII), from among the candidates who meet general and specific requirements for judges (Arts. 45-46 of the Act on Courts). The Council also elects court presidents and lay judges. The Judicial Council 'ensures and guarantees the autonomy and independence of the judicial authority by exercising its competences in accordance with the Constitution and law' (Art. 2 of the Judicial Council Act). The Council is responsible for deciding on the termination of judicial office, and the dismissal of judges – if a judge is unworthy, incompetent, or neglectful in the exercise of duties or commits a serious disciplinary offence (Arts. 74-76 of the Act on Courts). It is thoroughly described what is considered a neglectful and unprofessional exercise of function. According to the Constitution, the Council monitors and assesses the performance of judges, and the laws stipulate that the election to the basic and courts of higher instance requires a positive assessment of the candidate by the Judicial Council.

It follows that all steps in the judicial career – election, promotion, and termination of function fall within the remit of the Judicial Council, which, if that body is genuinely autonomous, truly is a guarantee of independence and autonomy of the judge and the entire judicial branch. Nevertheless, in its operation to date, the Judicial Council has on several occasions confirmed that 'the focus of political influence is on the judiciary'.<sup>33</sup> It is still considered that the Judicial Council is only formally an independent and autonomous authority, failing *de facto* to free itself from political influence.<sup>34</sup> On the other hand, the mere insisting on the strong Judicial Council being the key to the independence of judges is not a thorough approach to the problem because even the judicial 'self-isolation' can make way to informal influences by the legislative

31 Veljanoska and Dukoski, 2020, p. 213.

32 Thus, there is a 'dual' legal regulation, overlapping in one part. Nevertheless, the provisions of the Judicial Council Act are more 'procedural' in nature, determining the Council's conduct in electing and dismissing judges, while there are also ones 'substantive' in nature, like those in the Act on Courts.

33 Preshova, 2020, p. 76.

34 Veljanoska and Dukoski, 2020, 210. Judicial Council has constantly been in the focus of the reports of international organisations, including the EU, where RNM is assessed in a negative context. *Ibid.*

and executive branches on the judiciary (example of a ‘notepad’ in RNM as a path to judicial appointment).<sup>35</sup>

Whether the Judicial Council of the RNM will manage its staff-related authorities within the judiciary as an independent and autonomous body largely depends on its composition.<sup>36</sup> A crucial question is the extent to which its 15 members stand free from the influence of the political arm of the government? To provide an effective response, one should be aware of the politically sensitive nature of the moment of election of Council members, or the fact that they select them and how. The majority of this body consists of judges (eight) elected by judges themselves. If we add the President of the Supreme Court of RNM, this majority becomes overwhelming (three-fifths) and clear compared to other members elected by the political authorities. These five members of the Judicial Council are prominent lawyers – professors, solicitors, and others elected by the Parliament, with two of them being proposed by the President of the Republic (one from the minority community). The remaining member is the Minister of Justice.

Upon the public announcement of the vacant post, a person to be elected as a judge must meet numerous general requirements (under the Act on Courts): the possession of citizenship, knowledge of the Macedonian language, fitness for work and health, a law school degree and a passed bar exam, knowledge of a foreign language (English, French, or German), proof of not having been convicted of a crime, computer knowledge, and integrity and social skills (tested by exams). ‘Specific requirements’ for elections differ in the required years of service for a particular type and level of the court being applied for (Basic, Appellate, Supreme Court, Administrative, and Higher Administrative Court). The higher the court, the longer the service required. A common requirement for all, except for Basic Court candidates with a completed Academy training, is the positive assessment of their previous performance by the Judicial Council.

As for the Supreme Court, election to the post of a judge is not necessarily made solely from the ranks of career judges; it is also possible to elect a full or associate university professor with more than 10 years of experience teaching a subject related to judicial practice. This is the only way that makes it possible to elect to the court of higher or the highest instance a candidate without previous professional experience as a judge (the same applies in Montenegro).

Both laws (on the Judicial Council and on courts) stipulate ‘specific’ eligibility requirements for election to a higher instance court for the promotion of a judge. Promotion criteria are set out in a regulation, the Rulebook on the Ranking of Candidates for Election as Judges at Higher Courts – Appellate, Administrative, Higher Administrative, and Supreme Court (Art. 3 and further). The Candidate Ranking Committee (comprised

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<sup>35</sup> Preshova, 2018, p. 17.

<sup>36</sup> Already in 2016, in a public survey asking the citizens whether they consider the Judicial Council as an independent and autonomous body, they almost unanimously, over 90 % of them, answered ‘no’. See. Caca Nikolovska, Koco, Aleksijevski, 2016, p. 35.

of three members of the Judicial Council), in compiling the ranking list, uses six criteria on the basis of which it assigns points, following detailed formulas (the maximum score is 100 points): professional knowledge and specialisation (maximum 40 points) and training (maximum five points); positive performance assessment (maximum 20 points); written and oral expression skills (maximum five points); additional work on resolving case backlogs (maximum five points); additional work through mentorship, education, and other activities (maximum five points), and years of service (maximum 20 points). Based on the ranking list and upon completion of the process of deciding complaints against the (preliminary) ranking list, the Judicial Council determines the final list for election to the court of a higher instance.

## 5. Judicial career in Bosnia and Herzegovina

The political system of Bosnia and Herzegovina (BiH) is distinctive because the BiH Constitution (1995, Annex to the Dayton Agreement) makes no provisions on the judicial branch of government. This omission is not typical of the political systems founded on the principle of separation of powers, nor the states with the federal system of government to which that of BiH is closest.<sup>37</sup> Nevertheless, BiH has a special constitutional-legal order, based on the equality of the three constituent peoples and two entities (plus the District of Brčko), which means that the government operates on the principle of parity of nations and entities. The same applies to judicial institutions.

Judicial power at the state level was established subsequently (formerly exercised by the entities: Republic of Srpska, Federation of BiH, and the District of Brčko), namely, in an unusual way, first with the decision of the High Representative for BiH, and then with laws of the Parliament (parliamentary assembly).

Despite the absence of the constitutional principle of the separation of powers that would contain the first and foremost characteristic of the judiciary – independence, the existence of a guarantee of independence is implied by other principles, including the election and dismissal of judges by an independent (autonomous) authority, which is also responsible for determining judicial promotion requirements, the permanency of the judicial function, and the immunity of judges.

The first step in the formation of judicial power at the state level was the passing of the Act on the Court of Bosnia and Herzegovina by the High Representative for BiH in 2000, which the Parliamentary Assembly of BiH adopted as its own law in 2002 (the new law was enacted in 2009). The Court of BiH (in operation since 2007) exercises criminal jurisdiction over certain criminal offences (first and second instance), administrative, appellate, and jurisdiction of an electoral court.<sup>38</sup> The constitutional matter on the

37 Marković, 2012, p. 253.

38 Initially, it included foreigners, only to subsequently be composed solely of judges who were domestic citizens, leaving thus the Constitutional Court of BiH as the only judicial institution to retain a ‘foreign dimension’. Schwartz, 2019, p. 7.

judiciary is also enshrined in the Act on the High Judicial and Prosecutorial Council, passed by the Parliament in 2004 (amended in 2005 and 2007).

The condition of entities retaining their own court organisation systems created dual regulation of the judiciary: courts and judges belong to the entities, while their election requirements and other status-related issues are subject to regulation by the state. The state has thus assumed the regulation of fundamental issues of the judiciary and set up a council that, by way of its powers, should establish an efficient justice system throughout the state. It is this 'court fragmentation' as viewed by some authors, which impedes the judiciary from developing strong power over the political branches.<sup>39</sup>

However, even after the establishment of the Council, a conflict continued between the judicial and the executive branch due to misunderstanding by both sides of the principle of independence, which also means non-interference in specific court cases. It has been disregarded that independence is the citizen's right to an independent court rather than a privilege of the courts.<sup>40</sup> Concurrently with establishing judicial power at the state level, measures were taken to strengthen the courts, whereas the appointment of judicial office holders was one of the systemic problems.<sup>41</sup> The situation improved with the establishment of the High Judicial and Prosecutorial Council (HJPC).

### ■ 5.1. *Judicial election procedure and role of autonomous bodies in the judicial career*

Although the organisation of courts was regulated at the substate, entity level (courts, except the Court of BiH, are bodies of the entities rather than of the state), BiH has a uniform procedure for the election of judges, laid down by the Act on the High Judicial and Prosecutorial Council. This law also uniformly regulates disciplinary liability, promotion criteria, and the supervision of judges.

The manner of election (the Act states 'appointment') of judges, as well as the presidents of courts, prosecutors, and lay judges, is regulated by the Act on the High Judicial and Prosecutorial Council. All judges, upon the announced vacancy, are elected by the HJPC to a permanent term of office. This practice, given the non-political composition of the Council, attests to judicial independence on the one hand, but on the other hand, can be criticised for being exclusive of the connection with popular sovereignty. The latter is evident from the fact that directly elected bodies of the legislative and executive (the BiH Presidency) branches take no part, not even formally, in the election of judges.

The powers of the Council to autonomously elect judges, decide on their promotion, accountability, and dismissal, shows that this body has the greatest influence on the judicial branch. However, whether the HJPC is up to the task of establishing an independent and well-functioning judiciary depends in many respects on its

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39 Bonifati, p. 11. 'Judicialisation of politics' like in other democratic states is impossible. Ibid.

40 Perić, 2019, p. 26

41 Murret, 2008, p. 305.

members. The HJPC consists of 15 members, elected for four years, with a significant majority being members of the judiciary (in the broadest sense). Only two members are elected by the political authorities – one is elected by the House of Representatives (lower house) of the Parliament and another by the Council of Ministers of BiH (the Government). Judges at courts of different levels elect five or six members of the Council (depending on whether the Brčko District chooses a judge or a prosecutor), prosecutors from different prosecutorial offices also choose five or six members, one member (a judge or a prosecutor) is elected by the Judicial Committee of the Brčko District, and one member – a solicitor, each by the Bar Association of Republika Srpska and that of the Federation of BiH (Art. 4 of the Act on HJPC). Membership requirements concerning personal qualities are contained in a general (unquantifiable) formulation to be ‘persons of high moral standing and professional impartiality, with a reputation for efficiency, competence, and professional impartiality’ (Art. 4, para. 2 of the Act).

Although there are 13 ‘non-political’ of the 15 members of the Council, we cannot safely claim that this body is a guarantor of judicial independence. Judges are always the least represented group (five or six) in the Council, and only when joined together with prosecutors or solicitors can they make up the majority. However, courts and prosecutors’ offices are separate authorities, differing in their status and responsibilities, let alone that law practice represents something completely different within the judiciary. Hence, the only solution would be to split this body into two separate ones – one for judges and another for prosecutors (like in Serbia, Montenegro, and North Macedonia).<sup>42</sup> In such a judicial council that elects and dismisses judges and decides on their promotion, judges could or would have to constitute a majority.

Within the Council, there are four sub-councils (formed by the Council members) that propose judges to the four tiers of government (BiH, the entities, and the District of Brčko), whereby Council members from the Republic of Srpska and those from the Federation of BiH are at the same time members of two sub-councils that propose judges in those ‘own’ entities. On proposals from the sub-councils, the Council decides if it has a quorum of at least 11 members, by the majority vote of members present and voting (double criterion, Art. 14 of the Act).

To qualify for election or promotion, judges must meet the following general requirements: citizenship of BiH, intellectual and physical capacity to perform the judicial function, a degree from the Faculty of Law in BiH (or in SFR Yugoslavia, or abroad, with diploma being lawfully validated), a passed bar exam in BiH (or in SFR Yugoslavia or, exceptionally, in the former Yugoslav republics). Besides these, there are special election requirements, also common in other legal systems, and they refer to the working experience in courts, prosecutors’ offices, law-practicing firms, or in other relevant fields after passing the bar exam. The required experience varies from three years (for judges at basic courts in the Republic of Srpska, municipal courts in

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<sup>42</sup> From 2001 to 2006, Serbia had a similar body in operation, the High Council of the Judiciary, as a predecessor of today’s High Judicial Council, which was responsible for the election of both judges and public prosecutors.

the Federation of BiH, and those at the Basic Court of the Brčko District), five years (for judges at district courts in the Republic of Srpska and those at cantonal courts in the Federation of BiH), to a minimum of eight years (for judges at the Court of BiH, the entities' Supreme Court, and those at the Appellate Court of the Brčko District).

If candidates meet these requirements, they can be elected under legal criteria that measure the following: professional knowledge, experience, and performance; published scientific works and other professional activities; professional competence and development training; ability to analyse legal problems; impartiality, conscientiousness, diligence, determination, responsibility, communication skills, collegiality, conduct outside the office, and reputation (Art. 43 of the HJPC Act).<sup>43</sup> In the selection of candidates, the account is taken of national representation and gender equality. Interviews with candidates are mandatory, with the possibility of conducting a qualifying exam to test the knowledge of positive law.

The procedure for the election and promotion of judges is more specifically regulated by the Rules of Procedure of the HJPC (2013) and the Rulebook on the Qualification and Written Testing Candidates. The Rules of Procedure govern issues related to public vacancy announcements, candidate interview committees, ranking criteria, testing, interviews, candidate interview scoring, competence scoring, ranking, nomination, and appointment. The competence of candidates entering the judiciary for the first time is determined based on qualification and written testing. As for candidates from the judiciary, the criteria<sup>44</sup> for the promotion were verified based on their performance rating in the past three years.<sup>45</sup> The performance assessment has been thus criticised that, as 'a statistical cult, it turned into absurd that made the assessment pointless'.<sup>46</sup>

Improvement in the way in which judges are elected still seems insufficient for the judicial branch to be considered independent and efficient. There are many reasons for these ideals continuing to be unfulfilled, including lengthy proceedings, high case backlogs, lack of judges, underpaid judges, low information technology level, poor communication between the media and the judiciary, and rarely invoked disciplinary proceedings.<sup>47</sup> What is noted as a systemic shortcoming is a discrepancy between formal (written) and informal rules (influences) in the recruitment of judges, where the

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43 However, standards that fall under personal integrity, morality, and professionalism are difficult to recognise, and even more difficult to compare and measure. Muhamerović, 2013, p. 5.

44 In 2018, the HJPC adopted the existing Criteria for assessing the performance of judges in BiH. One professional criticism is that this by-law unconstitutionally and unlawfully establishes the obligation on judges of higher courts to assess and monitor the operation of judges of lower courts. It can be imposed only by a law. Blagojević, 2019.

45 In 2019, there were four public announcements for a total of 117 vacant posts in the judiciary (courts and prosecutor's offices); there were 1191 applications, 779 applicants, 154 candidates were invited for qualification testing, while the written test was taken by 79 candidates. Tegeltija, 2020, pp. 35-36.

46 Perić, 2019, p. 16. Monitoring and assessing the performance of judges (and prosecutors) has adverse effects on the justice system because the primary motivation is focused on meeting the monthly caseload quota rather than on quality and most complex cases. *Ibid.*

47 Purić and Savić Božić, 2016, p. 89.



informal rules can virtually annul the written. The institutionalisation of the election and promotion of judges in terms of the procedure itself is still inadequate, which is evident from the conduct (decision-making) of members of the HJPC.<sup>48</sup>

## 6. Conclusion

Legal frameworks governing the status of judges and the development of the judicial career in the analysed states of the Western Balkans, including Serbia, Montenegro, BiH, and N. Macedonia, show significant similarities. In some respects, there are even identical legal solutions, but we also find legal differences. One notable characteristic that these legal systems have in common is the intent to ensure the independence and autonomy of courts and judges through constitutional, legislative, and regulatory rules. They did so by setting out objective and measurable criteria for the election and career advancement of judges. The presented overview of the judicial careers in the respective four states makes it possible to draw certain conclusions.

Judges in Montenegro, Bosnia and Herzegovina, and North Macedonia are elected to a permanent term of office regardless of the court they are applying to and whether it concerns the first or another election to office. In Serbia, the first election to the judicial office is of limited tenure; the term of office is three years. This solution has positive sides but is also deficient, which makes the opinions on the probationary term of office divided. On a positive note, during the probation, judges demonstrate their actual possession of the required judicial knowledge. If a judge, however, fails to demonstrate that knowledge – many repealed decisions—for example, his/her term of office ceases after three years. Thus, the judiciary will be freed from low-quality judges in a simple way. The negative side of the probation is its potential to make a judge more susceptible to external (political, interest) influences and therefore non-independent in the exercise of his/her duties. A judge with a limited term of office is aware that election to a permanent tenure is yet to come and that this election can be affected by various lobbying. To this lobbying, they can simply adapt through their judgements. By contrast, in Serbia, the post-probation election to a permanent term of office was reduced to a mere form – all judges, upon expiration of three years, are, by automation, elected to a permanent term of office. Another distinct feature of Serbia is the solution by which the first term of office judges is elected by the National Assembly. Although the Assembly acts on proposals of an autonomous authority, the High Judicial Council, it has been criticised because of the general consideration that a political body should not elect non-political government officials, as judges are.

In all four states, an autonomous body, the Judicial Council, plays a central role in decision-making regarding judicial careers. It makes decisions on the election and promotion of judges and the termination of judicial function. The Judicial Council is

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48 Fagan and Dimitrova, 2019, pp. 232-233.

in those states empowered with decisions with respect to judges alone, except in BiH, where there exists a Judicial and Prosecutorial Council, which is also responsible for the prosecutorial office holders. Since the functions of judges and prosecutors are separated, we find it a better solution to have two co-existing authorities – one in charge of judges and the other for prosecutors.

We believe that the composition of this body contributes in many respects to the possibility that it is both a guarantor of judges' independence and impartial in making decisions on the election, promotion, or termination of the judicial office. A crucial question, therefore, is who has the required majority – judges or other members? In all councils, members from the judiciary constitute the majority, and virtually, they alone can make decisions, except in Montenegro. In Montenegro, half of the Council members come from the ranks of judges, and they may be in the minority in the case of a split vote, five to five. Then, a casting vote is that of the Council President, who is not from the ranks of judges. Justification for this solution lies in the apprehension that the judicial branch, if judges had a majority in the Council, could, in time, alienate itself from the popular sovereignty, retreat into isolation, and lose its legitimacy. Nevertheless, lawmakers in the other three states do not share this opinion, as the composition of the autonomous body shows that its presently being dominated by judges is considered a guarantor of independence and impartial decision-making. The exceptional situation with the composition is in BiH, where judges are always in the minority, and it is so because a single body is responsible for both judges and prosecutors. Joined with prosecutors, judges in the Council of BiH have the majority (11 out of 15 members).

The analysis of the status of judges across these states has also shown that higher instance courts are virtually inaccessible to lawyers not coming from the judiciary. Although no formal prohibition exists for nonjudicial lawyers to be elected, the Appellate Court in Serbia, for example, it has not become a practice. In the courts of higher instance, all to the Supreme Court, the election is virtually made exclusive to previous judges, possibly also for prosecutors. This practice speaks that judges in higher instance courts are, in fact, always career judges who have advanced within the judicial branch. It can be criticised as a form of closure of the judiciary within itself, which may lead to the judicial branch being distanced from the surrounding reality. The practice of not electing as judge lawyers from other fields undoubtedly contributes to this.

Also observable in all four states is that criteria for the election of judges, and particularly those for career advancement, are sought to be objectivised as much as possible. Different standards, credit accumulation, and the assessment, specified in regulations, not only serve the purpose of visibility ('transparency') with respect to career advancement, but also bring some degree of certainty. If a judge achieves successful results capable of being measured precisely, he or she will advance in his/her career. However, it also entails some disadvantages if a judge focuses solely on achieving as many statistically solved cases as possible to gain better prospects for promotion. It is of general interest for a judge to make a greater and more sustained

effort in high-quality decision-making on the most complex cases, even if doing so means deferring the final decision.

While statutory standards and criteria for progression in the judicial career, as well as the evaluation of compliance with the requirements for the first election to office, can be assessed as legally good, the influence of non-legal factors is still present. In the previous practice of election and promotion of judges across all four states, intervention by informal factors has not always been negligible. These factors may come from the political sphere, the government, or the ministry, which is most often the case, or from other centres of unwritten power. To fully eliminate them, it is not adequate to have just quality laws in place; also, there is a higher political culture in that society in general. It is only then that progress in the career of the judge will be entirely fair.

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