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Judicial Culture and the Role of Judges in Developing the Law in North Macedonia

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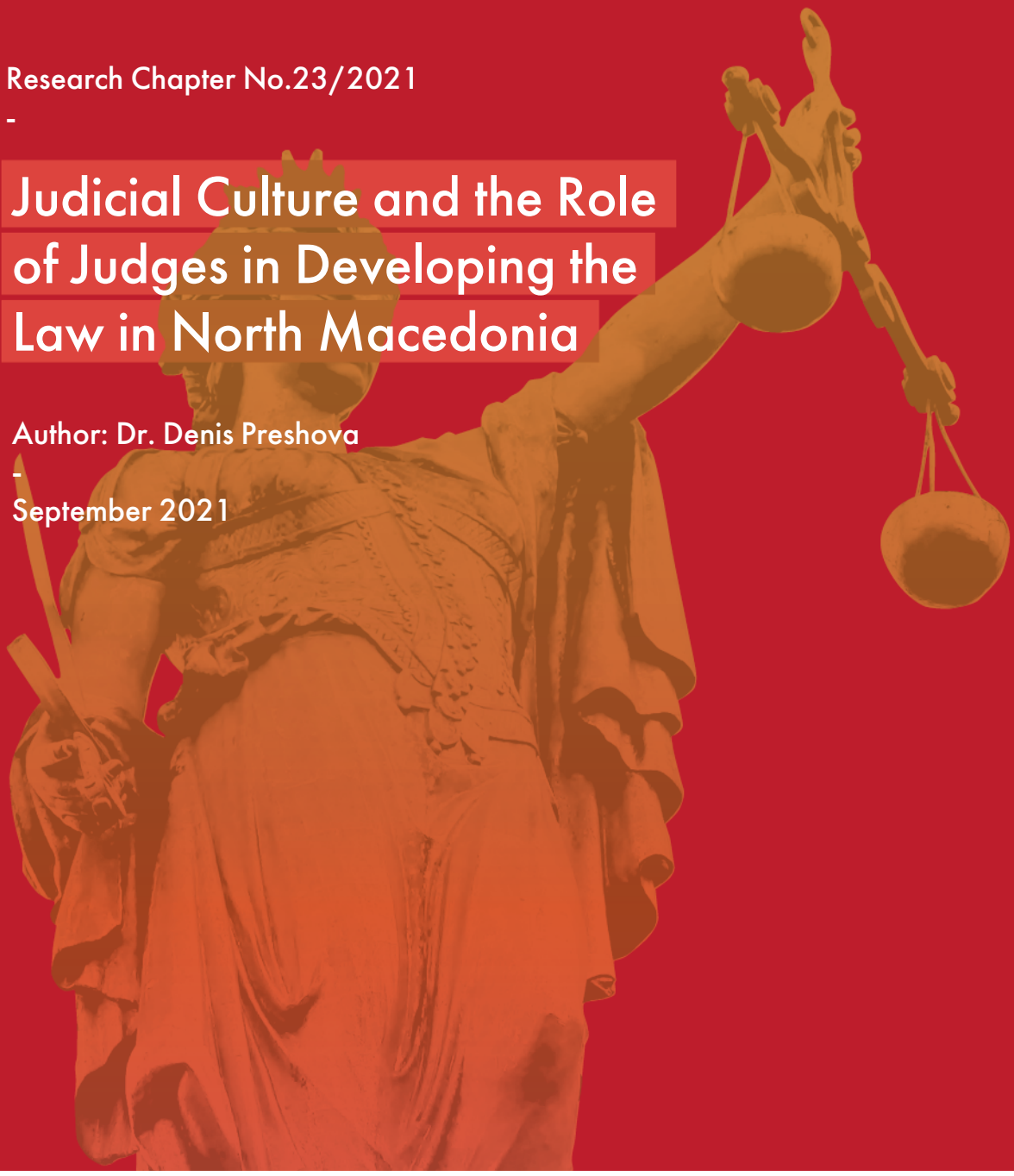

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JUDICIAL CULTURE AND THE ROLE OF JUDGES IN DEVELOPING THE LAW IN NORTH MACEDONIA

Author: Dr. Denis Preshova*

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"Thus, the greatest risk posed by courts may not be partisan capture, but indifference and self-interest."

Sujit Choudry

1. INTRODUCTION

In the past 30 years, since North Macedonia gained its independence, one term is most frequently associated and related to the judiciary. Unfortunately, this term is neither independence nor impartiality, but rather reform. Judicial reform is an omnipresent phrase that has dominated the discourse related to this area throughout the years. The country has been in a constant process of reforms often induced and led by the 'rule of law industry' and frequently conducted for the sake of reforms thus rarely leading to groundbreaking changes. The EU has a leading role, among many international stakeholders, in this process of judicial reforms since the judiciary has crucial importance for the consolidation of the democratic rule of law but also because of the significance of national courts through their 'European mandate'[1] in the effective and uniform application and interpretation of EU law in the national legal order especially after the accession to the EU. Thus, these reforms are induced within the endeavor for the Europeanization of law as part of the broader European integration process of the region of Western Balkans. Nevertheless, the acclaimed transformative power of the EU,[2] particularly through its conditionality within the enlargement policy, has not proven to be as effective in the specific realm of the judiciary, as could also be observed in the cases of some of the member states from Central and Eastern Europe.

North Macedonia was one of the first countries of the region to initiate broad judicial reforms already in 2005 as one of the crucial requirements on its path towards EU accession. The success and track record of these reforms, though, has been rather questionable and often labeled as reforms without

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1 For this phrase see more in Monica Claes, *The National Court's Mandate in the European Constitution* (Hart 2006) 385ff.
2 See for instance, H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Macmillan 2006).

change. It could not be denied that certain progress has been achieved from all these processes. However, if we assess by the level of trust in the judiciary and, by extension, in justice being served, then the general perception is rather disappointing. For instance, in one of the most recent opinion polls administered by the International Republican Institute (IRI) from 2021, the trust in the judiciary is at staggering 3% and somewhat trust is at 21%[3] which is the lowest among all institutions. There is a common perception that all formal institutions and rules required by the EU have been put in place, however, the problem lies in their proper implementation and application. Therefore, serious dilemmas are raised over the comprehensiveness and sustainability of judicial reforms and whether they are covering all necessary aspects.

One of these aspects is certainly the transformation of the judicial culture or mentality. On the one hand, it is somehow omitted in all these reform efforts, while on the other hand, even when tangentially addressed, the dominant judicial culture seems to resist the process of Europeanization. The transformation of the judicial culture, particularly the one which is characterized by the remnants of the socialist legal tradition, is vital to the process of internalizing common values and standards of legal adjudication necessary to sustain the Europeanization of law.

Taking this into consideration, the main goal of this research is to examine and analyze the nexus between the formal and informal rules and practices in North Macedonia as one of the key determinants and factors for the success and sustainability of judicial reforms. In doing so, one needs to start by determining the main traits and features of the judicial culture in North Macedonia in order to later analyze the specific aspects. These general features are the subject of this paper and they will be further discussed in three subsequent sections after the brief presentation of the research framework and methodology.

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[3] *Public Opinion Poll: Residents of North Macedonia, March 4 – April 6, 2021*, Center for Insights in Survey Research, A project of the International Republican Institute, p. 45.

2. RESEARCH FRAMEWORK AND METHODOLOGY

Over the past few decades, the EU's role in promoting the rule of law in its external relations has been rapidly developing especially since the early 1990s and the initiation of the accession process with the former socialist countries of Central and Eastern Europe. While the methods employed to promote the rule of law in the accession process negotiations have been further developed throughout the years, the adoption of the "newest" methodology being the latest stage, the EU's approach has still not been prone to substantive change. As a matter of fact, the so-called 'anatomical approach'[4] solely focusing on formal rules and institutions has led to circumstances under which frequently the outputs matter more than the outcomes and the means are more important than the ends, thus resulting in a lack of sustainability of judicial reforms.[5]

However, as of recently the European Commission has come to recognize this reality and weakness of its approach and addressed it in important documents by stating that strengthening the rule of law is not only an institutional issue, but it also requires societal transformation.[6] As a matter of fact, the EC in its Communication on the EU enlargement policy in 2020 for the first time emphasized the importance of judicial culture and its transformation.[7] As much as formal rules and institutions are highly significant, the sought after societal transformation has equally important informal rules and practices at its core. The latter becomes clearer if one takes into consideration that "[e]ven in the most carefully designed judicial systems, the informal norms and attitudes of judges may counteract or undercut formal protections and guarantees written into the judiciary's formal institutional rules."[8] Therefore, for such transformation to be successful it needs to be adequately contextualized, something that the EC's approach seems to be still lacking.

Incited by the current state of the judicial reforms and inspired by the notion that "a credible assessment of the state of the "Rule of Law" in a country must ultimately be informed by an investigation of cultural patterns as reflected both in general beliefs and in specific behaviour.",[9] this paper will focus on the role of judges in developing the law in North Macedonia. This represents the first dimension of judicial culture from the four dimensions that will be covered in the subsequent

4 K. Nicolaïdis and R. Kleinfeld, 'Rethinking Europe's `Rule of Law` and Enlargement Agenda: The Fundamental Dilemma', *SIGMA Papers* No 49 (Paris: OECD Publishing 2012) p. 12-15.
5 Nicolaïdis and Kleinfeld (n. 5) p. 14-15.
6 European Commission, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final, 6.2.2018, p. 4.
7 European Commission, 2020 Communication on the EU enlargement policy, COM(2020) 660 final, 6.10.2020, p. 6.
8 D. Beers, 'A Tale of Two Transitions: Exploring the Origins of Post-Communist Judicial Culture in Romania and Czech Republic' (2010) Demokratizatsiya 18, no. 1, p. 32.
9 Nicolaïdis and Kleinfeld (n. 5) p. 23.

three papers. The first paper examines and discusses the perception of judges over their role in the legal system and in developing the law and how different institutions and sources of law are influencing the judicial culture in the country.

The research is placed against the background of absence of any autochthonous tradition of judicial independence or experience with organizing or governing the judiciary in North Macedonia before 1945, or better said before 1991 when the country gained its independence and enacted its new liberal-democratic constitution which introduced the separation of powers and constitutional judicial independence guarantees.

The findings in this paper are based on the combination of information obtained from four sources of analysis: (1) elite interviews; (2) the review of the respective curricula of the law faculty and academies as well as above all the review of the leading textbooks on constitutional law and introduction to law; (3) the literature review on CEE countries and the manner with which they coped and still cope with the remnants of the previous regime; and (4) the limited number of case law.

The qualitative interview methodology served as the primary basis of the research. The semi-structured elite interviews enabled the research to delve deeper into the judicial culture and provide adequate insight into informal practices and perceptions, something that cannot be obtained from the other sources. This was crucial as self-perception and self-understanding are fundamental in shaping the judicial culture. The flexibility of the approach as well as the anonymization of the interviews secured an atmosphere in which the interviewees were more comfortable and willing to comprehensively respond to the questions and give not only their personal perception but also extensively discuss the dominant perceptions within the judiciary.

A total of eleven elite interviews have been conducted. The majority of the interviews – six interviews with judges and one with a judicial clerk – has been conducted mainly with representatives of the judiciary covering all three instances and taking into consideration territorial diversity. The remaining interviews have been made with one representative from the legal academia, civil society, public prosecution, and an attorney at law. The substantial amount of information gathered from the interviews, eight to ten pages of notes per interview, will also be used in the subsequent papers.

The interview questions were grouped in three main lines of inquiry: (1) General views and understanding of judicial culture as well as its main features in North Macedonia; (2) The role of judges in developing the law; and (3) The role of the constitutional court and international law in shaping and developing the judicial culture.

The following sections will present the main findings related to the three parts and line of inquiry of the interviews. The findings are drawn by combining the information from all four sources of analysis while a certain emphasis is placed on the elite interviews.

3. GENERAL VIEWS ON THE JUDICIAL CULTURE IN NORTH MACEDONIA

Judicial culture represents a relatively new and under-researched notion that has caught the attention of scholars in the recent period. It has been mainly employed in the efforts of determining main features and perceptions over the judicial functioning and organization developed in the respective judicial practice and theory. John Bell's definition of judicial culture has been referred to most frequently. He defines the judicial culture as "features that shape the way in which the work of a judge is performed and valued within particular legal systems"[10] Different from a more general and familiar notion of legal culture, judicial culture is focused on a specific community and its 'mental software' in conducting its judicial function. Thus, the emphasis is placed on the specific internal aspects and features of legal culture as informal rules and norms in specific legal institutions.[11] In this sense, at the core of the notion of judicial culture lies the self-understanding and self-perception of judges over the role and place in the system.[12] As it is frequently observed, these features of judicial culture, which could relate to the ethical, legal or institutional dimensions[13] or to judicial autonomy, integrity and satisfaction and commitment,[14] are established, developed, and perpetuated through two main vectors: judicial practice and legal scholarship or legal education.

The emphasis in this research is placed on detecting the general traits of the specific judicial culture as the point of departure for further analysis of the different aspects of this type of culture. The general view on the judicial culture and how this form of culture is manifested in North Macedonia are the focus of the first part of the research and accordingly the interviews. Here we attempt to detect to which extent the judicial culture and mentality in North Macedonia are still trapped in the old patterns of thought and judicial practice heavily influenced by the doctrine of the unity of powers and the subordinated role of the judiciary.

Judicial culture in North Macedonia, based on the interviews as well as the legal scholarship, is strongly identified and related to two of its main aspects, judicial independence and judicial

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[10] J. Bell, *Judiciaries in Europe* (Cambridge University Press 2006) p. 2. For more on this E. Mak, N. Graaf and E. Jackson, The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of 'Judicial Culture' (2018) 34 *Utrecht Journal of International and Europan Law* 1 p. 24-44.

[11] Beers (n. 9) p. 31.

[12] I. Griss, Judicial Culture and European Integration in M. Gutan and B. Selejan Gutan (eds) *Europeanization and Judicial Culture in Contemporary Democracies* (Editura Hamangiu 2014) p. 26.

[13] Mak, Graf and Jackson (n 11) p. 31ff.

[14] Beers (n. 9) p. 31-34.

integrity. The former manifests the perception of the judges and other interviewees that the judiciary is one of the three branches of state power. Several of the interviewed judges emphasized this point stating that they are not merely the third branch of power, thus insisting on being perceived as co-equal to the other two branches. In this manner, they manifest awareness about their place within the system, at least abstractly and structurally, as being separate and independent from the legislative and executive power. Nevertheless, it could be noticed that they do not live up to this self-perception, especially not individually. In other words, this perception of independence boils down to a rather normative level while the reality is different regardless of certain improvements in the past period. One of the main reasons for this perception is the fact that North Macedonia has no autochthonous tradition of judicial independence and, as opposed to several post-socialist countries of CEE, there was no possibility of developing a rhetoric of "return to Europe"[15] which could have possibly played a positive role in (re)establishing judicial independence based on the previous practice or tradition. North Macedonia has only initiated the establishment of a tradition of judicial independence since the 1990s while prior to this it was either the socialist legal tradition within former Yugoslavia, mainly dictated from Belgrade, or the previous rulers over this territory, above all the Ottomans, that have deterred any possible development of judicial independence.[16]

All responses have pointed that the influence of different centers of power, predominantly political, has taken its toll structurally in the judiciary, but also at the level of individual judges. While respondents are aware of their independence, or at least of how it should be, at the same time they are quite aware of who has the greatest influence in their election, promotion, material resources, or evaluation of their work, the political elites, and the executive. These negative influences, particularly in the cases of judicial promotions, which frequently are not based on merits but rather on other criteria, result in loss of enthusiasm and motivation even among proactive and progressive judges who end up being led by the notion of adapt or perish. To put it bluntly, fear and intimidation are far more dominant than the sense of independence among judges. The criticism expressed over the role of the Association of judges as well as the fear from the Judicial Council is only further supporting this perception.

Because of these perceptions, judges and the judiciary cannot serve the purpose of putting checks on the legislative and executive power, which is a crucial part of their more general social responsibility. The judiciary has difficulties protecting

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[15] See more on this rhetoric in R. Manko, Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law in R. Manko, C. Cercel and A. Sulikowski (eds) *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress 2016) p. 68-73.

[16] For more on the tradition of judicial independence see in В. Камбовски, *Судско право* (2-ри Август 2010) p. 164-169.

its independence from both external and internal influences and as a result the responsibility is collective, thus diluted, while the rewards, mainly in the form of promotion and influence, are sought after individually. In their attempts to avoid or evade this sort of responsibility, it seems like the judges are even intentionally decontextualizing the law and their judicial decision-making by sticking to legal formalism and excessive positivism or textualism. Based on the responses in the interviews, it could be inferred that both judges and other legal professionals are quite conscious of these processes and tendencies, nevertheless, they seem to be paralyzed by fear of negative repercussions from their potential actions. In this manner, judges cannot be perceived as any agents of change, but they rath2er incline more to a position of agents of centers of power or, in other words, political obedience which is perceived as beneficial to their individual position and interests. Thus, although they state that to a large extent judges themselves have a fair share of responsibility for the status, position, and role of the judiciary, nevertheless, there is neither a genuine willingness nor readiness for a proactive approach.

Exactly this last point ushers us to the second important aspect of judicial culture in North Macedonia which has been identified, namely judicial integrity and impartiality. Very often judicial independence is perceived as an instrument or status that could secure a better or less inferior position in the clientelist relationship with political or business elites in furthering particular interests. This causes degradation of integrity and impartiality and results in a low level of trust in the judiciary. It is true that this cannot be generalized for the judiciary at large and it is, in fact, limited to a part of the judicial elite, represented mainly but not exclusively at the higher judicial instances or positions of court presidents, which actively engages in this sort of relationship which also involves swift adaptation to shifts of power and change of political elites. Still, the consequences could be frequently observed on the integrity and impartiality of the rest of the judiciary as a result of the hierarchical mentality that is internalized through a different set of formal rules in court procedures or judicial evaluations as well as established judicial practice. This is manifested by a tendency among judges at lower instances to pay substantial attention to the stance of the appellate courts at the expense of their own assessment and evaluation of facts and evidence in deciding cases. Consequently, there are rare instances for 'constructive disagreement' with higher court decisions which essentially demonstrates the level and state of mental independence and integrity of judges.[17]

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[17] This is identified as common feature among judge in CEE countries by M. Bobek, The Fortress of Judicial Independence and the Mental Transition of the Central European Judiciaries (2008) 14 *European Public Law* 1 p. 108. See also P. H. Solomon, Jr. The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability in A. Seibert-Fohr (ed.) *Judicial Independence in Transition* (Springer 2012) p. 931.

Regarding both aspects of judicial culture, two observations could be taken out from the interviews. First, most of the respondents stressed the existence of a generational gap among judges, which is reflected in their perception of the role, status, and place of judges in the legal and political system, their approach to law in general and international law in particular, their willingness, or lack thereof, to upgrade their knowledge and skills. More senior judges tend to preserve the traditional judicial practice burdened with the remnants of the socialist legal tradition and influence their younger colleagues while maintaining them through different forms of mentorship.[18]

However, it is interesting to note that almost all respondents, when asked about the socialist legacy, commented that during the socialist period judges were far more respected and their position brought prestige in the society and that during those times the appointments and promotions were mostly merit-based. Interestingly, even respondents that have experienced socialism only during their childhood share these views.

Only three interviewees brought up formalism and textualism as well as the concept of limited law as features that are part of the socialist legacy. Actually such a stance seems to confirm the perception of the judiciary among the general population during socialism, as stated by Uzelac, but at the same time such a perception ignores the rather marginal role played by the judiciary during socialism as well as the confined independence as exemplified through their limited terms.[19] It could also imply a willingness of the interviewees to identify with this aspect of socialism concerning the status of judges while the approach to law is not emphasized as it has to a large extent remained unchanged. However, for firmer conclusions one needs to further research these findings as the literature does not provide concrete answers.

Secondly, it could be observed from the interviews that the interviewees who are not judges tend to have a more negative perception of the judiciary. Such a conclusion should not be surprising as this is also reflected in the research conducted in the region as well as surveys in North Macedonia.[20]

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[18] A. Bodnar and L. Bojarski, Judicial Independence in Poland in A. Seibert-Fohr (ed.) *Judicial Independence in Transition* (Springer 2012) p. 734-735; and Z. Kühn, Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned in A. Seibert-Fohr (ed.) *Judicial Independence in Transition* (Springer 2012) p. 615.

[19] A. Uzelac, Survival of the Third Legal Tradition? (2010) 49 *Supreme Court Law Review* (2d) p. 386-387.

[20] Центар за правни истражувања, Втор национален извештај од матрицата на индикатори за мерење на преформансите и реформите во правосудството (2021) p. 72. For the same in Croatia and Serbia see in M. Mrakovčić and D. Vuković, "Unutarnja" kriza pravosuđa? Stavovi pripadnika pravničkih profesija o pravosuđu u Hrvatskoj i Srbiji (2019) 56 *Politička misao* 1 p. 96-99.

Lastly, the issue of legal education and judicial training as vectors of establishment and development of judicial cultures was raised. Generally, there was a reserved stance towards legal education in the country especially due to the lack of more practical education and the strong emphasis on the theory which is perceived as being detached from the practice. It could be argued that this is the reason for a widespread opinion, regardless of how absurd it might sound, among legal practitioners that the theory is one thing whereas the practice is another, often used as justification for judicial practice departing from theory. As result, there is hardly any referencing of legal scholarship in the judicial reasoning.[21] This coincides with the role of legal education and legal academia in the previous system. Namely, as Rodin argues:

"[l]egal scholarship was not expected to be critical but descriptive and apologetic, while the function of education was understood as transmission of the uncontested ultimate truth from teachers to disciples: magister dixit, discipulus scripsit."[22]

Looking at the legal scholarship and the existing textbooks at the faculties of law in North Macedonia, it could be noticed that there is still a tendency of dogmatizing knowledge. There is a continuous practice of professors having their own textbooks from which students should learn the subject without providing contrasting views and arguments. Such a practice discourages creative or critical thinking which is crucial for the development of the law and entrenchment of the rule of law.[23] Furthermore, legal methodology, reasoning, and writing are not taught anymore at the faculties of law, which is causing a certain knowledge vacuum that is later filled through the established judicial practice which is burdened by the remnants of the previous legal tradition. These deficiencies of legal education find their reflection in every single aspect of the legal system, starting with such fundamental issues as the approach to law and defining the role of judges and judiciary within the system.

On the other hand, the role of the Academy of judges and prosecutors is evaluated as positive,

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[21] Z Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011) p. 212-215.

[22] S. Rodin, Discourse and Authority in European and Post-Communist Legal Culture (2005) 1 *Croatian Yearbook of European Law and Policy* 1, p. 6.

[23] S. Bogojevic, 'Europeanisation' of the Judiciary in Southeast Europe in S. Rodin and T. Perisin (eds) *Judicial Application of International Law in Southeast Europe* (Springer 2015) p. 77.

being able to solidly balance theory and practice by involving experienced professors and legal practitioners, such as judges and public prosecutors.[24] More than half of the respondents commented on the difference that could be noticed between judges who have finished the initial program of the Academy and the rest of the judges. The former are perceived as more progressive and open to acquiring new knowledge and skills. However, based on the responses, there is some room for improvement in both the initial and continuous training. Additionally, analyzing the program and curriculum of the initial training of judges and prosecutors, truly little attention is paid to the methodology of law and the role and place of judges within the legal and political system, which are crucial in building or transforming the underlying features of the judicial culture.[25] Another point worth noting in this context is that the most common compulsory and basic 'literature' which the candidates use to prepare for their exams is actually statutes, thus still following a well-known notion within the socialist legal tradition of objectivity of law[26] and that "the laws already contain the verdict or judgement; the role of the judge is only to extract it from the law."[27]

4. THE ROLE OF JUDGES IN DEVELOPING THE LAW

Perhaps the most common features of the 'socialist legal tradition' were the deeply rooted formalism and textualism employed by judges as well as the strong limitations on the 'creativity' within the judiciary.[28] This essentially meant deeper entrenchment of judicial restraint through confining the role of judges only to mere application of the law without employing any form of interpretation. As a matter of fact, within the context of the unity of powers, as the underlying principle of organization of state power within socialist political systems, the judiciary was perceived as subservient and instrumental to the dominant legislature as the highest state power. In this manner, the possibilities for any type of creative input by the judiciary in determining or developing the law were rather inconceivable in a system that was characterized by an authoritarian, instead of a rational discourse.[29] Under such a discourse, the law was perceived "objectively" which means that there is a single and universal truth and thus one right

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[24] This finding is confirmed is also by a recent analysis, М. Најчевска, Н. Габер-Дамјановска, Б. Наумовска and Љ. Имери, *Академија за судии и јавни обвинители „Павел Шатев": Анализа на актуелното системско позиционирање на институцијата и нејзината улога во обуката на правосудниот кадар* (ОБСЕ, Скопје 2020) p. 32-38.

[25] Програма за почетна обука во Академијата за судии и јавни обвинители „Павел Шатев", Теоретска настава 2020/2021 година, Бр.02-210/5, 21.07.2021.

[26] Rodin (n. 23) p. 6.

[27] Р. Маркович, *Уставно право и политичке институције* (ИПД ЈУСТИНИЈАН 2006) p. 613, citing Slobodan Jovanovic. See also Rodin (n. 23) p. 12.

[28] For the dual meaning of formalism see P. Cserne, Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case? in M. Bobek (ed) *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015) p. 23-42.

[29] See for instance on this in Slovenia in J. Zobec and L. Cernic, Authoritarian Mentality in Slovenia in M. Bobek (ed) *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015) p. 143. See also Kühn (n. 22) p. 151-153.

answer that needs to be extracted from the law.[30] Therefore it was the exclusive role of the legislature to determine what law is and leave it to the judiciary through its instrumental approach to law to abide by this meaning of the law and implement the policies set by the legislative, something that is referred to as legislative optimism.[31] In turn, this adherence to parliamentary sovereignty brought about or furthered another negative tendency of overregulation within the legal system.

Alas, these are also the features that represent the most resilient remnants of this type of understanding of the law and the role of the judiciary that have survived the transition to democracy mainly because they are not ideologically imbued. Essentially, this type of continuity exists due to the fact that these features of the dominant judicial culture and ideology in the socialist period were not so much determined by the socialist ideology as they were ideologically neutral.[32] This explains how despite the total regime change the judicial practice and legal scholarship have remained partly immune to the transition in this sense and preserved, to a large extent, the features of this understanding of the law and the role of the judiciary within the system. In essence, it turned out to be a repackaging exercise, retaining some of the old views and practices under the guise of a new liberal democratic rhetoric. However, while the legal systems and judiciaries in Central and Eastern Europe have managed to initiate the transformation of these remnants of the socialist legal tradition, particularly in the context of the Europeanization of their respective legal orders, the countries of the Western Balkans seem like they are still lagging behind in this process. The case of North Macedonia seems to confirm this conclusion.

Taking this into consideration, the second part of the research and interviews is devoted to providing an insight into the self-perception of judges over their role in the legal system and the development of law. The questions aimed at getting a clearer perspective on the extent to which the remnants of the socialist legal tradition are still present in North Macedonia concerning the understanding of the role of the judiciary, the methodology of interpretation of the law, the rigid abidance to written law, etc. The reflections provided in this part of the interviews as well as the analysis of the leading textbooks on the theory of law and constitutional law demonstrate

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[30] Rodin (n. 23) p. 6. Cf. M. Van Hoecke, *Law as Communication* (Hart 2002) p. 176: "The essential starting point here is that law is not something which is (completely) made at some point in time, and afterwards simply "applied" by officials, by citizens and by judges to concrete cases. Law is constantly made, adapted and developed in legal practice, and most prominently by judges."

[31] Z. Kühn, Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement (2004) 52 *The American Journal of Comparative Law 3*, p. 546 and Kühn (n. 22) p. 140.

[32] Uzelac (n. 19) 380.

that despite minor changes in the judicial practice the dominant perception is still aligned with the features of the previous legal tradition.

More specifically, the dominant self-perception of judges in North Macedonia is that their only role is to merely apply the law. In this sense, the law is understood rather narrowly representing, above all, statutes, while constitutional provisions and treaties are not seen as primary sources and soft law is not taken into consideration. Judges and legal professionals still adhere to the conception of limited law and mechanical jurisprudence.[33] Under such perception there is no space for creativity or development of the law through legal interpretations, however paradoxically this might sound since practical application of the law does include a certain type of interpretation. Most judges do not see themselves as the ones that are supposed to develop the law and seem to perceive a bottom-up development and construction of law as inconceivable.[34] Simply put, Montesquieu's understanding of the role of judges as the mouthpiece of law is still prevailing among the judges in North Macedonia although in Western Europe and France itself this view and formalism have been long abandoned and perceived as outdated.[35] According to this perception, the adjudication process is consisted of applying the rules to the facts of the case through a legal syllogism and deductive reasoning. Evidently, this sort of understanding of the law and the role of judges within the legal system is necessarily accompanied by formalism and rigid textualism or textual positivism which are abided by regardless of the outcome. Judges tend to rigidly stick to the letter of the law, rarely going outside its bounds, for instance taking principles and values into consideration, without concern that it might lead to absurd results.[36] The priority of adjudication does not seem to be adequate dispute resolution or delivering justice but the sole application of legal rules.

Even though a certain generational gap could be recognized in the sense that some of the younger judges are prone to a "more open form of judicial thinking",[37] still, the general views are largely reflected through the abovementioned features. However, even the judges who conceive their role as including interpretation and development of the law, are not well acquainted with the different methods of interpretation. In most of the responses of judges on the question of methods of interpretation of law, they were identifying sources of law with the methods

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[33] See for instance *Strezovski and others v. North Macedonia*, App. nos. 14460/16 and 7 others, ECHR 2020 and the numerous other cases within the country involving the same issue. See also on CEEC Kühn (n. 22) p. 199, 209.
[34] On this point in the context of socialist ultra-formalism see Kühn (n. 22) p. 153.
[35] "But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour." Charles de Secondat, Baron de Montesquieu, The Spirit of Laws (Batoche 2011) book XII chapter 6, p 180. See also Rodin (n. 23) p. 10.
[36] Kühn (n. 32) p. 565 and Emmert (n. 42) 406.
[37] Kühn (n. 32) p. 538.

of interpretation. For instance, when asked about the methods they employ in interpretation they answered that they referred to the ECHR and used commentaries to determine the meaning of legal provisions. There were also comments made in three interviews by judges that they used commentaries and rarely legal scholarship however without referring to it in the judicial reasoning, as stated by one higher instance judge, most probably because such a decision might be remanded by appellate courts because it lacks clarity and it is burdened by theory.[38] Basically, none of the respondents mentioned anything about the teleological, systemic, or functional interpretation of the law or even went into discussing the specific approach of the ECtHR to the interpretation of the ECHR or invocation of different principles and the manner in which this is done by this court. Thus, consistent with the narrow understanding of the role of judges, textualism and normativism are obviously the most common, and arguably the only, methods of interpretation and through them judges are manifesting a great deal of legislative deferral.

On the other hand, searching for the original intent, purpose or aim of the legislator in the legislative act is simply not part of the judicial practice and reasoning.[39] Therefore, none of the interviewees were familiar with any example of determining the legislative intent by referring to the legislative history and *travaux preparatoire*. Only in three interviews, there was a mention of unsuccessful attempts of individual judges to research these types of documents. This just follows an established way of reasoning that the judge should not step out of the bounds of the text of the provisions and the purpose and intent should be clear from what is written in them, otherwise, it is for the legislator to clarify this by enacting legislative amendments.[40] The judge is not the one to engage in such an interpretation, this is supposed to be the duty of the legislator as the one who enacted the legislative act in the first place. However, the legislative procedure, either in the pre-parliamentary or parliamentary phase, does not do a favor to a potential teleological interpretation of the law based on legislative intent, as the documents within these phases are of poor quality and rarely useful for such an interpretative endeavor.

In the context of legal interpretation, one view expressed by a legal scholar who was interviewed is particularly telling. Namely, he stated that we should be wary of providing too much freedom to judges as such practice would be prone to abuse in the sense

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[38] See also on this relationship between judges and academia in Kühn (n. 22) p. 212 -215.
[39] Cf. R. de Lange, Judicial Independence in Netherlands in A. Seibert-Fohr (ed.) Judicial Independence in Transition (Springer 2012) p. 263, discussing the judicial practice of consulting legislative history.
[40] Kühn (n. 32) p. 544.

that under the banner of free evaluation of facts and evidence judges will enter the realm of arbitrary decision making. This reflects a view that basically anything, but a textual interpretation, is too loose and it might lead to boundless decision making by judges, thereby not comprehending the rules and limits of legal interpretation which are supposed to be defined in theory and judicial practice. Essentially, this view is very representative of the overall state of play in both the legal academia and the judiciary when it comes to legal interpretation and the rather unaltered notion of the role of judges.[41]

When it comes to the legislator's role in the interpretation of the law, the instrument of authentic interpretation draws significant attention. Authentic interpretation represents one of the constitutional powers of the legislator, The Assembly of North Macedonia,[42] to provide interpretation to statutes upon a request of a limited number of institutions or office holders in cases in which the application of the statutory provision has raised questions over the proper interpretation and application of the statute.[43] The logic behind this form of interpretation is that the legislator, as the institution which enacted the statute, is best placed to provide the most accurate, thus authentic, interpretation of the meaning, purpose and intent of statutes. Such interpretations which are given in documents different from statutes, have a legal force from the moment of the statutory enactment, thus retroactively, except for cases of *res judicata*.[44] The authentic interpretation is most commonly found in the former socialist systems as a relict of the unity of state powers principle and the dominance of the legislator.[45] Some authors argue that it is not compatible with the separation of powers as well as the circular nature and character of law as it influences the regular process of application and interpretation of the law, directly intervenes in ongoing court cases and it is used for lawmaking under the guise of interpretation.[46] As a consequence, this instrument further discourages the judges from entering into legal interpretation

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41 "Judges do not need to listen to precedents, legal writings, the intention of the legislature, the rationally reconstructed purpose of the law; they must stick only to the letter of the law, and where the letter of law does not offer any easy solution, pure arbitrariness and unpredictability often enters the scene." Kühn (n. 22) p. 558. See also F. Emmert, The Independence of Judges a Concept Often Misunderstood in Central and Eastern Europe (2002) 3 *European Journal of Law Reform* 4, 405.

42 While in most of the countries this power is provided the internal act of the parliament in North Macedonia it is foreseen with Article 68 of the Constitution of Republic of North Macedonia.

43 The procedure on the authentic interpretation is regulated with Articles 175 and 176 of the Rule of Porcedure of the Assembly of Republic of North Macedonia.

44 С. Шкарић и Г. Силјановска-Давкова, Уставно право (Правен факултет „Јустинијан Први" 2009) p. 644-645. See also T. Antić, Vjerodostojno tumačenje zakona (2015) 36 *Zb. Prav. fak. Sveuč. Rij.* (1991) br. 1, p. 619-644 and G. Struić, Postupak za autentično (vjerodostojno) tumačenje zakona u hrvatskom, makedonskom, slovenskom i srbijanskom parlamentarnom pravu i praksi (2016) 32 *Pravni vjesnik* 3-4, p. 133-155.

45 A specific form of authentic interpretation could also be found in Italy, Greece, and Belgium. On this see more in Antić (n. 45) p. 624, 627-630 and Struić (n. 45) p. 134-135.

46 Saša Zagorc, Avtentična razlaga zakona (2013) *Zbornik znanstvenih razprav* – LXXII, p. 251-268 and Antić (n. 45) p. 637-638.

especially in legal systems in which the judicial culture is based on the narrow understanding of the role of judges within the system, thus they find other reason and justification for this practice.

Against this background on the authentic interpretation, it could be observed based on the responses given to the question in the interview related to these issues that this form of interpretation is internalized to some extent in the judicial culture in North Macedonia.[47] However, the relationship is somehow ambiguous. On the one hand, the interviewees, even though it could be observed that not all of them are appropriately familiarized with all the aspects, have a favorable view on authentic interpretation in the sense that they see it as an adequate form of interpretation or as one first instance judge has answered, "it is the safest and securest way" to determine the meaning of the provisions. This stance could come as a surprise taking into consideration instances of serious intervention in four ongoing criminal cases, so-called Hague cases,[48] with authentic interpretation in 2011, almost ten years after the enactment, of the Amnesty Act from 2002.[49] In this manner, it is demonstrated that legal interpretation is perceived more as the realm of the legislator than the judiciary, thus ignoring the arguments on the separation of powers and circularity of law. On the other hand, there is total passivity by judges concerning the submittal of initiatives to the Supreme Court to send an official request to the Assembly for authentic interpretation. None of the interviewees have ever heard about either an initiative sent to the Supreme Court or an official request sent by the highest judicial instance on this matter. The official data also confirms this perception as there are no such initiatives or requests recorded in the functioning of the Supreme Court.[50]

However, these perceptions stemming from the interviews should not come as a total surprise. Two reasons could be recognized for this situation. First, the outdated legal education which does not provide future lawyers and judges with a proper set of knowledge regarding the place and role of the judiciary within the separation of powers doctrine, properly understood, nor does it offer any developed legal methodology that students should closely follow. Not only do leading textbooks at faculties of law on constitutional law and theory of law lack any serious discussion and elaboration of the role of the judiciary within the constitutional and legal system, but they also devote only a disappointingly small part of their content to the

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47 Compared to all former republics of Yugoslavia the Assembly of RNM has the highest number of authentic interpretations, in total 52 since 1991. On this see also Struić (n. 45).

48 For more on the Hague cases see I. Zdravkovska and B. Volchevska, *Analysis of the Hague cases in North Macedonia*, BIRN 2020.

49 Автентично толкување на членот 1 од Законот за амнестија, "Службен весник на Република Македонија" број 18/2002", "Службен весник на Република Македонија број 99/2011".

50 Information obtained through a request for free access to public information to the Supreme Court of the Republic of North Macedonia and the received order of the Supreme Court of the Republic of North Macedonia, СПИ.бр.19/2021 from 20.05.2021.

issues related to the judiciary.[51] The discussion and elaboration of this topic is confined to the very basic information on the principles and general aspects of the organization, governance and functioning of the judiciary. Moreover, there is no course on legal methodology, reasoning and writing whereas methods of legal interpretation are not taken seriously. When the latter is concerned, it is rarely covered and usually different forms of interpretation are discussed rather abstractly while devoting substantial attention to the textual, also known as grammatical, interpretation.[52] These shortcomings of legal education are also reflected in the initial and continuous training programs at the Academy of judges and prosecutors.

Secondly, this understanding of the law and the role of judges is conducive to the need manifested by judges through their work to avoid responsibility and accountability amidst an existing fear and intimidation that a more creative approach of law could be sanctioned. The expectation of the judges is to have everything written down and regulated in the legislative acts in order to not be faced with any form of legal lacunae that might require a more creative judicial role in legal interpretation.[53] Formalism and the narrow definition of the role of judges provide an escape route that further entrenches the judicial restraint, particularly if the large workload faced by the judges is taken into consideration.[54] Therefore, the remnants of the previous legal tradition have survived not because of ideology but rather because of mere pragmatism of securing their position by reducing judicial accountability while enjoying the new liberal-democratic standards on judicial independence. Judges are simply not really interested in having the "revolt against formalism"[55] and developing a "transformative view of law".[56]

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[51] See for instance P. Тренеска Дескоска, M. Ристовска and J. Трајковска-Христовска *Уставно право* (Просветно дело 2021) п. 665-673; С. Шкарић and Г. Силјановска-Давкова *Уставно право* (Правен факултет „Јустинијан Први" 2007) p. 795-805; С. Климовски, Р. Дескоска and Т. Каракамишева, Уставно право (Просветно дело 2009) p. 453-475; Д. Бајалџиев, *Вовед во правото*, (Правен факултет „Јустинијан Први", 2007) p. 214-215. Perhaps the only exception is Kambovski (n. 17).

[52] Бајалџиев (n. 52) p. 446-474; Д. Бајалџиев, *Вовед во правото: Право*, Книга втора, (Македонска ризница 1999) p. 267-315. See a very similar situation in Czechia in Kühn (n. 22) p. 135 – 138, 200.

[53] The examples with the legally binding Guidelines on determining criminal sanctions (Правилникот за начинот на одмерување на казните, „Службен весник на Република Македонија" број 64/2014)) and later the Act regulating these issues (Законот за одредување на видот и одмерување на висината на казната, „Службен весник на Република Македонија" број 199/2014) were enacted in 2014. It was only in 2017 that the Constitutional Court (У.бр 169/2017 from 16.11.2017) repealed the statute on the basis of its unconstitutionality as a result of the breach of judicial independence.

[54] Uzelac (n. 19) p. 383-384 and Zobec and Cernic (n. 30) p. 140.

[55] M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford Clarendon Press 1989) p. 9-11.

[56] J. C. Reitz, Politics, Executive Dominance and Transformative Law in Culture of Judicial Independence (2008) 5 *U. St. Thomas L.J.*, p. 743 ff.

5. THE ROLE OF THE CONSTITUTIONAL COURT AND INTERNATIONAL LAW IN THE JUDICIAL CULTURE

Constitutional courts have played a particularly important role in developing and shaping the judicial culture of the ordinary judiciary. This role of constitutional courts has been even more pronounced in the endeavor of countries to tackle their authoritarian past and build a functional democracy based on the rule of law and respect for fundamental rights. It is through different procedures before the constitutional courts - abstract review and entrenchment of the principle of judicial independence, different forms of the constitutional complaint, or direct influence on the manner in which law is approached, interpreted, and applied by ordinary judges in the procedure of concrete control through preliminary questions on constitutionality - that these institutions have frequently intervened on the way judicial power is exercised in the respective countries and have had a constructive role in the development of judicial culture. Constitutional courts have proven to be instrumental in this specific sense starting in Germany and Italy, continuing with Spain and Portugal, and lastly in the case of post-socialist countries. More specifically, in the case of the latter, progressive constitutional courts, especially the ones in the Czech Republic, Poland, and Hungary, have had a great impact on judicial culture and in some cases they still do. They have been continually active in promoting and advocating changes in the judicial culture by attempting to transform the dominant legal reasoning based on formalism, textualism, and the avoidance of authoritative decision-making as well as providing additional guarantees to judicial independence.[57] Furthermore, constitutional courts have continuously demonstrated their EU law and international law friendliness, especially in the pre-accession phase, in their case law through which they established doctrines for their application and their authority in interpreting domestic law.[58]

Since this potentially constructive role for the development and transformation of judicial culture could be easily recognized, the third part of this research and interviews was devoted to this topic

[57] Reitz (n. 57) p. 55-56.

[58] For more on this see Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union' (2008) 14(1) *European Law Journal,* p. 4; A. F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Kluwer 2013); and J. Rideau, 'The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model" in A. Saiz Arnaiz and C. Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) p. 243ff.

and aspect of judicial culture. Namely, to which extent the Constitutional Court of North Macedonia has influenced the dominant judicial culture in the country and has it managed to develop and entrench clear doctrines on direct application of constitutional norms and on the status and role of international law in the domestic legal order. Thus, we wanted to assess the overall attitude of the ordinary judiciary towards the Constitutional Court and its role in the domestic legal order.

While the constitutional courts in the above-mentioned countries have been characterized by a relatively high level of trust and authority, the situation in North Macedonia is not relatable. More specifically, the Constitutional Court is the least reformed and a rather insignificant institution in the country which has not managed to profile itself as the true guardian of constitutionality, rule of law, and fundamental rights. Even though the constitutional court was first established in North Macedonia as early as 1963, this tradition has neither found fruitful ground for development in the legal system nor has it ever been perceived as an important aspect of the transition to democracy and protection of the rule of law.[59] As a result, this institution has a disappointingly low authority and trust, which is clearly reflected in literally all the interviews.

Reflecting on the role of the Constitutional Court in shaping and developing the rule of law in North Macedonia, all the interviewees have contemptuously denied any meaningful or significant role of this institution, thus confirming the research conducted in this area. Even though they are quite aware of the potential influence that a constitutional court could have, they still do not see any grounds for such claims as this institution in the country does not have the required authority. Consequently, neither judges nor lawyers, in general, have any particular interest in the work or case law of the Constitutional Court. It could be argued that this is the result of the composition of this court within which there are persons whose professional capacity and knowledge is not widely regarded or respected as well as the constitutional powers[60] which provide only an extremely limited jurisdiction in the realm of fundamental rights protection. Accordingly, the meeting points between the Constitutional Court and ordinary judiciary in North Macedonia are extremely limited.[61]

Furthermore, the Courts Act in North Macedonia prescribes that ordinary judges may stay an ongoing case and send a preliminary question of constitutionality to the Constitutional court concerning a statute or a particular statutory provision that is supposed to be applied in the

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[59] For more on the state of play with constitutional review in North Macedonia see D. Preshova, *The Constitutional Court Lost in the Judicial Reforms* (Konrad Adenauer Foundation and Institute for Democracy "Societas Civilis" 2018).
[60] Article 110 of the Constitution of the RNM.
[61] The first instance in which a judicial decision was sacked by the Consttitutional Court for breaching constitutional rights, more precisely the freedom of expression of attorneys in a court proceeding, dates from 2018. See У. Бр. 57/2019 from 29.05.2019.

specific case at hand.[62] This could be done under the condition that a constitutional provision could not be applied directly instead of a statutory provision, meaning an ordinary court could disapply a statute for a directly applicable constitutional provision, thus regulating an exception of unconstitutionality.[63] Through this provision of the Courts Act, the legislator has provided firm statutory grounds for direct application of constitutional norms as well as a concrete constitutional review of statutes, thus establishing a mixed model of constitutional review. Astonishingly, even though this provision providing the possibility of referring preliminary questions of constitutionality to the Constitutional Court dates back from 1995,[64] it has never been used by the judges. As a matter of fact, most of the interviewees are not aware that such a possibility exists, nor have they heard of anyone from the judiciary taking this opportunity. Thus, it should not come as a surprise that there is not a single instance in which a judge has used this procedure to resolve a potential incompatibility of constitutional and legislative norms, which was also confirmed by the Supreme court of RNM.[65] In this sense, a mixed type of constitutional review exists only theoretically, which is quite telling for the status and role of the Constitutional Court of RNM. Besides the lack of appropriate awareness, the possible reason for such a situation with concrete constitutional review might have to do with the fact that judges are overburdened with work and sending such a reference would considerably prolong the resolution of the court case which might have negative repercussions on the evaluation note.

Besides this disappointing fact that there has been absolutely no practice of referring preliminary questions of constitutionality for more than 20 years, it is depressing that direct application of constitutional norms is also not taken seriously. While the ongoing debate over the process of constitutionalization of the legal orders in Europe - a process characterized by direct application of constitutional norms, particularly the ones regulating fundamental rights,[66] and the accompanying feature of permeation of constitutional law in legal realms previously governed solely by statutes and by this playing a very important role in the decision-making of ordinary judges – has found a fruitful ground and entrenchment in more developed legal orders, it has obviously circumvented the legal order of North Macedonia. Namely, the answers to the question in the interviews on the direct application of constitutional norms demonstrate that there are no developed doctrines on this matter, either by the Constitutional Court or by the highest judicial instances in North Macedonia, nor is there awareness on the manner in which a constitutional

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[62] Article 18 para. 1, Закон за судови, "Службен весник на Република Македонија број 58/2006... 96/19" (Courts Act).
[63] Article 18 para. 2, Courts Act (n. 62).
[64] See Article 12, Закон за судови, "Службен весник на Република Македонија број 36/95, 45/95 and 64/2003"
[65] Information obtained through a request for free access to public information to the Supreme Court of the Republic of North Macedonia and the received order of the Supreme Court of the Republic of North Macedonia, СПИ.бр.19/2021 from 20.05.2021.
[66] For more on the constitutionalization of the legal order in Europe in A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) p. 114-126.

norm should be directly applied.[67] Even though both the Constitution and the Courts Act provide that courts decide according to the Constitution, laws, and ratified treaties, judges still struggle with actually applying constitutional norms instead of merely referring to them in the same, textual and formalistic, manner as they do with statutes.[68] This clearly negates the noticeable differences between constitutional and ordinary legality.[69] The most recent instances of such an approach towards constitutional provisions and the respective case law of the Constitutional Court could be observed through the court cases involving the presidential pardons provided to 56 persons that were later abolished.[70] This is just another manifestation of the omnipresent judicial restraint which characterizes the judiciary and it seems rather detrimental for the entire system.

Ironically, judges more frequently refer to the ECHR in cases where they need to deal with fundamental rights and do not invoke constitutional provisions although the same fundamental right is protected and guaranteed with the Constitution itself. Even if there is an invocation of constitutional provisions, this is done in a formalistic way without any referral to the case-law of the Constitutional Court,[71] which essentially is not that developed and often not particularly useful, and without the employment of any constitutional doctrines or specific methods of constitutional interpretation. As a matter of fact, neither do textbooks on constitutional law provide any guidance on direct application of constitutional provisions nor do they meticulously analyze the relevant case-law of the Constitutional Court. Therefore, the reasons for this lack of constitutionalization of the domestic legal order could be searched in both the outdated legal education as well as the work of the Constitutional Court which has not developed any clear doctrines and guidance for direct application of constitutional provisions. This explains why despite the clear provisions of the Courts Act concerning the direct application of constitutional norms and the possibility of conducting a concrete constitutional review or referring preliminary question of constitutionality to the Constitutional Court, there is absolutely no practice concerning these specific powers of the judiciary through which it could develop the law.

The situation with international law is only slightly brighter, though not particularly positive. The interviewees have recognized the great importance

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67 Disappointingly the first judgments determining discrimination date only since 2012.
68 Article 98 of the Constitution of the Republic of North Macedonia as amended with Amendment XXV; and Article 2 para. 1 Courts Act (n. 63).
69 See for instance Frank I. Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 278-297.
70 For more on this as well as the nine cases against North Macedonia pending before the ECtHR concerning a possible violation of human rights as result of the abolition of the presidential pardons see D. Preshova, Presidential pardons at the mercy of law (2020) 60 *Political thought*, p. 17-34.
71 This mirrors the situation in most of the CEE countries. See for instance Z. Fleck, Judicial Independence in Hungary in A. Seibert-Fohr (ed.) *Judicial Independence in Transition* (Springer 2012) p. 820.

of international law. However, they have confirmed the impression that it does not play a significant role in the judicial decision-making in North Macedonia.[72] Among the different sources of international law, treaties are by far the most important. Even though there are differences based on the type of court cases, in criminal or civil law matters, in the use of international law - the civil law judges being arguably more opened towards the application of this external source of law- still a general conclusion could be drawn for the judiciary overall.

Firstly, there is a certain generational gap which is reflected in the use and application of international law, the younger generations of judges being more opened as opposed to some of the more senior judges. Secondly, there is no clear awareness that international law could be used as a primary source and not only as a supportive and secondary authority in deciding cases.[73] This also demonstrates certain selectivity in the use of international law by the judges depending on the argument or interpretation that needs to be 'supported'.[74] Thirdly, under international law judges predominantly understand the ECHR, meaning this is the most frequently invoked source of international law mainly as result of numerous projects and resources invested in the application of the ECHR in the region generally. However, the invocation of these treaty provisions or European Court of Human Rights' (ECtHR) case law is usually flawed and fails to respect the clear rules of referral either by not citing case law of the ECHR or by selective invocation of the case law.[75] Regarding the EU law, there is a clearly expressed view that it is not applied by the ordinary judiciary and four from the six interviewed judges stated that EU law is not applicable in the national legal order. These responses are particularly surprising considering the obligations stemming from the Stabilization and Association Agreement which was signed back in 2001 as well as several instances in which domestic statutory provision refers to direct application of certain parts of EU law and the case-law of the CJEU.[76] While it is quite legitimate to claim that EU law, as such, does not have legal force and cannot be applied in the national legal order of non-member states, nevertheless the continuous alignment of this legal order with EU law as part of the long-lasting integration process certainly creates a general obligation for national institutions, primarily the courts, to interpret national law in conformity with EU law, besides the instances of the statutory obligation of direct application.[77]

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[72] Kühn (n. 32) p. 562.
[73] Emmert (n. 42) 407.
[74] "If one searches carefully and patiently through the shelves, everybody eventually finds something useful for themselves – something that will fir their specific legal interest." Zobec and Cernic (n. 30) p. 145.
[75] Ј. Ристиќ, З. Треневска и В. Деловски, *Анализа на степенот на користење и цитирање на судската пракса од страна на националните судови* (Центар за правни истражувања, март 2020) p. 84-85.
[76] For the level and instances of referral to EU law in North Macedonia see S. Georgievski, I. Cenevska and D. Preshova, Application of the Law of the European Union in the Republic of Macedonia in European Union Law Application by the National Courts of the EU-Membership Aspirant Countries from South-East Europe, (SEELS 2014) p. 99-130.
[77] For more on this see for instance A. Lazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (Springer 2010).

When it comes to the doctrines on the status and application of international law there is a low level of awareness or knowledge. Quite a few interviewees were somewhat acquainted with them. The appropriate knowledge of these doctrines is particularly important amidst the confusion surrounding the issue of the status of international law in the legal order of North Macedonia with totally dissonant stances of crucial institutions. The constitutional provision in Article 118 sets the constitutional bases for a monistic approach to treaties, while the long-standing case-law of the Constitutional Court clearly adopts a dualist vision by identifying treaties with the respective statutes on ratification.[78] At the same time, the Courts Act provides clear primacy to directly applicable treaty provisions in cases of contradicting statutory provision, thus incorporating the exception of unconventionality.[79] However, the practice of the judiciary is still not in line with the direct application of treaty provision. As it could be noticed, and it is demonstrated by the answers of the interviewees, there are no clear doctrines on the status and application of treaties. Even though there is a slight improvement in this sense, manifested by the latest changes in the composition of the Supreme court and the improved practice of referral to international law, the situation is still far from satisfactory. As a matter of fact, there is also no case law developing the doctrines on self-executing treaty provision thus the direct application of treaties seems like uncharted territory.

6. CONCLUSION AND RECOMMENDATIONS

This first paper, within a series of four research papers, has discussed the general traits of the dominant judicial culture in North Macedonia. The findings presented leave an ample room to convincingly argue that securing sustainable judicial reforms require not only the introduction of formal rule and institutions, but also the adequate adaptation and transformation of equally important informal norms and practices. Namely, if strengthening the rule of law requires a societal transformation, then this needs to start with the respective judicial culture. The case of North Macedonia proves this notion right. While the legal and institutional framework is to a large extent aligned with the European standards, the judiciary is still struggling to reach the required standards on judicial independence, demonstrating high level of legislative deferral and political obedience, and depart from the norms, perceptions, and practices of the so-called socialist legal tradition. The research has demonstrated that the existing issues in North Macedonia are generally the same as the ones that were and in certain cases still are faced by CEEC. More specifically, even though there is some awareness, there is still no genuine culture of judicial independence that will enable the judiciary to fend off negative external and internal influences.

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[78] See for instance decisions of the Constitutional Court of RNM: У.бр. 230/1996 from 20.11.1996, У.бр. 39/2004 and 59/2004 from 21.04.2004 and other subsequent decisions which have confirmed this stance.
[79] Article 18 para. 4 Courts Act (n.62).

Furthermore, there is a dominant perception and understanding of a rather limited role of the judiciary in developing the law, confining it to a mere application of law with a relatively low knowledge of legal methodology and interpretation. Additionally, the dominant judicial culture is characterized with a sporadic invocation of international law, above all ECHR, which is also the result of the underdeveloped doctrines on the status and effect of international law within the domestic legal order. Moreover, there is a total absence of any practice of direct invocation and application of constitutional norms with the Constitutional Court playing a highly marginal role in shaping and developing the judicial culture. The judges are hardly aware of statutory rights and obligations regarding direct application of constitutional norms and international law or the possibility of initiating a procedure of concrete constitutional review before the Constitutional Court.

Taking into consideration that legal education and judicial training are the main vectors for introducing changes to the judicial culture, the following recommendations are addressed primarily to institutions providing legal education and judicial training, above all the Academy for judges and prosecutors:

- To design courses and draft syllabi in formal legal education and judicial training with the aim of encouraging creative and critical thinking and abandoning the tendency of dogmatizing knowledge.
- To extensively focalize the place and role of the judiciary within the separation of powers with a particular emphasis on the true meaning of judicial independence in the legal education and judicial training.
- To reintroduce legal methodology in the specific curricula on legal education and judicial training that will include instructions on legal reasoning, writing and research and the different methods of legal interpretation.
- To apply vigilance and ensure selection of instructors from the rank of judges in judicial training who are not heavily influenced and professionally socialized under the socialist legal tradition.
- To provide more pronounced place to specific aspects of constitutional interpretation, doctrine of direct application of constitutional norms, the importance of constitutional values and identity.
- To include issues related to doctrines on the status and effect of different sources of international law, the indirect application of EU law as well as principles of the relationship between different legal orders in the respective curricula and syllabi.

Information about the project

The underlying objective of this project is to ***complement the European Commission's process of vertical judicial Europeanization with an internal, horizontal, initiative that would combine an academic and practical approach in detecting and noting the main shortcomings of our judicial culture,*** and through consultations with international and regional experts, outline recommendations for future steps in the Europeanization of judicial culture.

The project is coordinated by the **Institute for Democracy "Societas Civilis" Skopje (IDSCS)** from North Macedonia, in cooperation with **T.M.C. Asser Instituut** from the Netherlands, the **Judicial Research Center (CEPRIS)** from Serbia, and the **Albanian Legal and Territorial Research Initiative (ALTRI)**, and supported by the **Dutch Fund for Regional Partnership (NFRP)/Matra**. The project will be carried out and have impact in **Skopje (North Macedonia)**, **Belgrade (Serbia)** and **Tirana (Albania)**.

Information about IDSCS

IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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Judicial culture and the role of judges in developing the law in North Macedonia

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