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Separate but not Independent: The (In)Compatibility of the Judicial Culture with Judicial Self-Governance in North Macedonia

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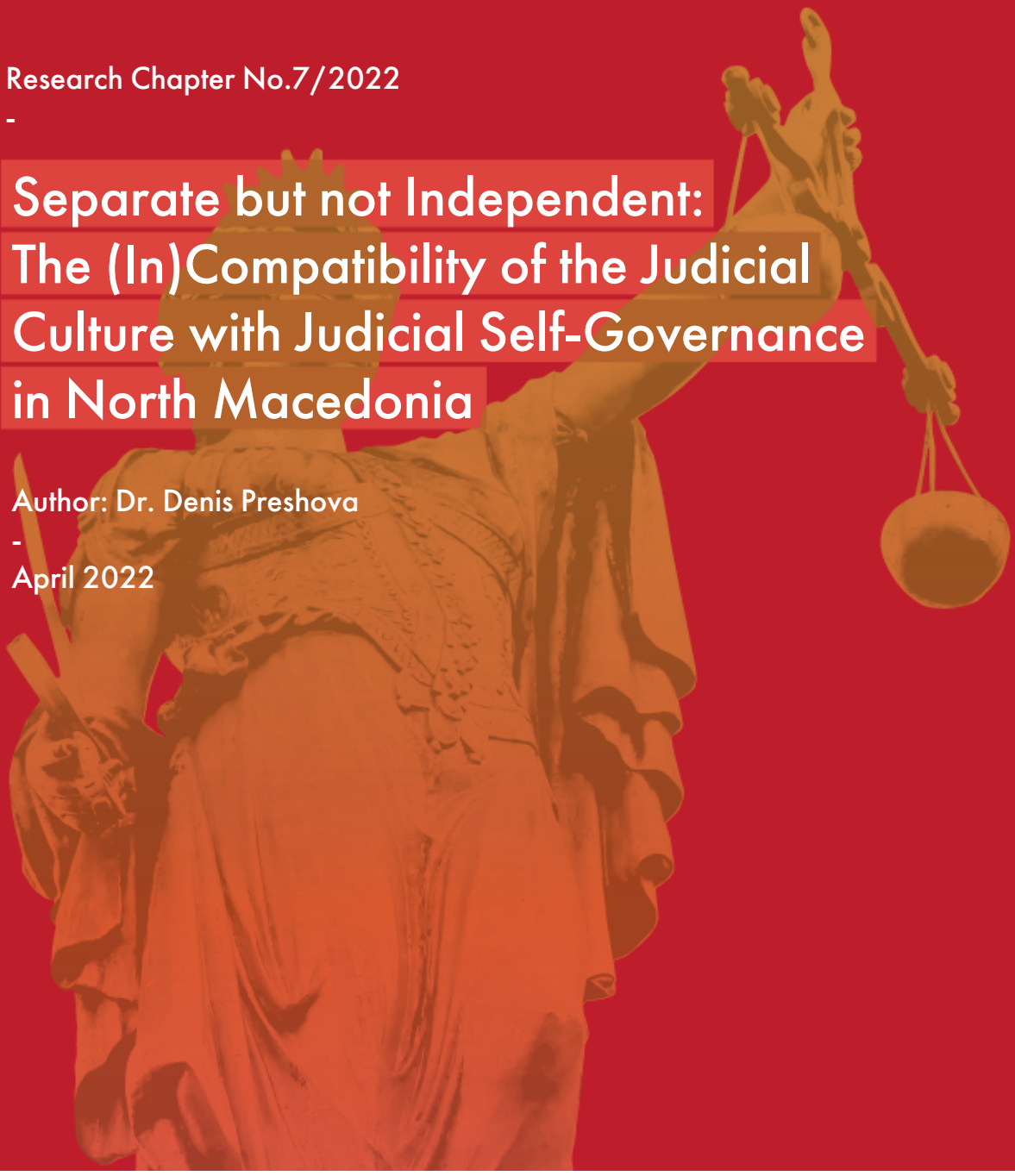

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SEPARATE BUT NOT INDEPENDENT: THE (IN) COMPATIBILITY OF THE JUDICIAL CULTURE WITH JUDICIAL SELF-GOVERNANCE IN NORTH MACEDONIA

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1. Introduction

Judicial independence has been one of the fundamental priorities of the European Union's, but also of many international organizations', transformative endeavor of ushering the former socialist countries into functioning liberal democracies.[1] Throughout the past three decades the focus within this process has predominantly been on the independence of the judiciary from the political branches of power, namely the legislative and, especially, the executive. Coming out from a long period of a government organized according to the doctrine of unity of power in these former socialist states, where the judiciary was heavily dominated by politics and the executive, it seemed intuitively sound to insist on the introduction of judicial self-governance which would secure the insulation of the judiciary from undue political influences. This has involved setting up of a specific institutional structure and an introduction of a package of formal rules aimed at securing the judicial independence. However, an important factor for securing judicial independence has been continuously neglected and that is the informal practices of the judiciary and judges as perceived through the notion of judicial culture.[2]

More specifically, the insufficient attention placed on the development of adequate conditions for the proper internalization of the values and principles of the rule of law, judicial independence being one of the most important, among judges and lawyers more broadly has been crucial for the lack of more visible success in this transformative endeavor. Structural changes and formal rules cannot remedy a situation in which a judiciary and judges are unwilling to grasp and safeguard their own independence thus remaining indifferent and focused merely on their particularistic interests instead of building resilience in the face of external and internal threats. Following Choudhry's logic politicization of the judiciary is probably a lesser concern than the indifference and self-interest of and within the judiciary[3] and the latter cannot be remedied by formal rules only. In this manner the establishment of a genuine judicial independence is possible only through a strong nexus and interaction between the formal rules and informal norms and practices within a respective state. Disappointingly, judging by the track-record, this has not been achieved yet in the Western Balkan countries aspiring for EU membership and at the same time it has cast serious doubt on the transformative power of the EU in its enlargement policy.

1 See for instance, H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Macmillan 2006); R, Coman, "Central and Eastern Europe: The EU's Struggle for the Rule of Law Pre- and Post-Accession", in Ariadna Ripoll Servent and Florian Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (London/New York, Routledge 2017) 264-265.

2 On the definition of judicial culture see J. Bell, Judiciaries in Europe (Cambridge University Press 2006) 2. 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". See also P. Čuroš, Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence (2021) 22 *German Law Journal* 1258-1259. He uses the term judicial habitus.

3 S. Choudhry, How to Save a Constitutional Democracy: A Comment by Sujit Choudhry, *Verfassungsblog*, 10.3.2019, available at: https://verfassungsblog.de/how-to-save-a-constitutional-democracy-a-comment-by-sujit-choudhry/

Taking this into consideration a serious dilemma arises over the compatibility of the judicial culture in the Western Balkans with the judicial self-governance through a strong judicial council which has been almost consensually promoted by the EU and the international organizations.[4] Is it truly viable to expect an entrenchment of judicial independence through judicial self-governance if the dominant traits of the respective judicial culture are not characterized by culture of judicial independence?

Analyzing the case of North Macedonia, a country which was the first in the region to align its constitutional and legal framework with the European standards and requirements, this paper covers the second dimension of the judicial culture,[5] namely its (in)compatibility with judicial self-governance. Basing the argumentation on the main features of the judicial culture in North Macedonia as detected in the previous round of research,[6] this paper analyzes how wide is currently the gap between the formal rules and the institutional structure, as perceived through the establishment and functioning of the Judicial Council of North Macedonia (JC) as an essential part of the so-called European model of judicial independence, and the informal practices and perceptions within the judicial culture. It will be argued, on the one hand, that the malign political influence in the judicial governance still persists, it deteriorates the already low level of trust in the overall judiciary, and it negatively affects the meritocracy in the judiciary generally discouraging and demotivating many judges. On the other hand, resulting from this, there is an existing situation in which there is a widespread fear and distrust among judges in the JC because it is perceived as safeguarding the political interests in the judiciary instead of judicial independence. This perception coupled with the low level of awareness of judicial independence and existing clientelism leads to a general apathy and passivity in the judiciary making it even more vulnerable to different forms of external and internal threats to its independence. In a nutshell, under the circumstance of the existing judicial culture in North Macedonia, judicial autonomy did not translate into judicial independence

4 See N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *The American Journal of Comparative Law* 1, 111-113; Coman (n 1) 264-274; V. Autheman and S. Elena, 'Global Practices: Judicial Councils – Lessons Learned from Europe and Latin America' (2004) *IFES Rule of Law White Paper Series;* L. Hammergren, 'Do Judicial Councils Further Judicial Reform? Lessons from Latin America' (2002) *Rule of Law Series no. 28*, Carnegie Endowment for International Peace, Washington, D.C; OSCE, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2.11.2010.

5 For more on the project "Bridging the Gap Between Formal Processes and Informal Practices that Shape Judicial Culture in the Western Balkan" and the four dimension of judicial culture covered available at: https://idscs.org.mk/en/2020/11/20/project-description-bridging-the-gap-between-formal-processes-and-informal-practices-that-shape-judicial-culture-in-the-western-balkan/

6 See more in D. Preshova, *Judicial Culture and the Role of Judges in Developing the Law in North Macedonia* (2021) Research Chapter No. 23/2021, Project Working Paper Series, available at: https://idscs.org.mk/en/2021/09/20/judicial-culture-and-role-of-judges-in-developing-the-law-in-north-macedonia/

since it is not accompanied by pertinent changes and transformation of the judicial culture.[7] Thus, the introduction of judicial self-governance has led to a situation under which the judiciary is being separated but not independent from the other branches of power resulting in a lack of genuine judicial ownership over the process of judicial governance.[8]

The argument in this paper will be developed in three subsequent sections combining a theoretical overview, comparative analysis with some of the Central and Eastern European countries (CEEC) sharing a similar legacy of judicial culture, qualitative research through elite semi-structured interviews and quantitative data. The first section will discuss the EU's approach towards judicial independence as part of the enlargement policy and detect the main shortcomings. The second section will explain the current state of the constitutional and legal framework in North Macedonia concerning judicial self-governance. The third section will analyze the gap between the formal rules and informal practices when it comes to the JC by focusing on two main aspects of this institutions. First, the constitutional mandate and status of the JC will be analyzed. Second, the election and composition of the JC will be in the focus. The paper will end with a summary of the main findings as well as recommendations for addressing and transforming judicial culture in aligning to the requirements of a genuine judicial self-governance.

7 A. Seibert-Fohr, Judicial Independence – The Normativity of an Evolving Transnational Principle in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg: Springer 2012) 1294. For more on the relationship between the issue of judicial culture or identity with the model of administering the judiciary see J. Bell, 'Judicial Cultures and Judicial Independence' (2001) *4 Cambridge Yearbook of European Legal Studies*, 47-60; or S. Boyron, 'The Independence of the Judiciary: A Question of Identity!' in G. Cavinet, M. Adenas and D. Fairgrieve (eds) *Independence, Accountability, and the Judiciary* (British Institute of International and Comparative Law 2006) 77-98.

8 Seibert-Fohr (n 7) 1344.

2. THE EUROPEAN MODEL OF JUDICIAL INDEPENDENCE AND THE JUDICIAL CULTURE

The Copenhagen criteria defined in 1993[9] and the initiation of the enlargement process with the CEEC marked the beginning of the rule of law promotion which has since continuously gained on importance and relevance as an essential part of EU's enlargement policy. From early on the EU detected that judicial reform aimed at securing judicial independence should be a priority taking into consideration the importance an independent judiciary plays in establishing the rule of law and its relevance for the future application of EU law.[10] The EU adopted a rather narrow understanding of the rule of law which was not perfectly suited to the complexity of the tasks ahead especially if one considers the remnants of the socialist legal tradition in most of these countries. The documents of the United Nations and Council of Europe (CoE), including its consultative bodies, served as bases for drawing the recommendations for candidate countries in the accession negotiations.[11]

The two pillars of the institutional structure within the judiciary promoted by the EU have been the judicial councils and the specialized bodies for training of judges. The institutionalist approach has been heavily influenced by the design provided for in the documents of the CoE, especially when it comes to judicial councils.[12] The introduction of these institutions in the respective constitutions was strongly supported by the general assumption that judicial councils would represent the magic bullet for securing judicial independence in countries without a long tradition of judicial independence.

Judicial councils represent institutions of judicial

9 European Council (1993), Presidency Conclusions, Copenhagen, 21-22 June, available at: www.consilium.europa.eu/media/21225/72921.pdf

10 For more specifically on the EU's approach to external rule of law promotion in the realm of judiciary see I. Damjanovski, C. Hillion and D. Preshova, *Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts* (2020) EU IDEA Research Paper No. 4, Istituto Affari Internazionali, 5-9; and for a more detailed account L. Louwerse, and E. Kassoti, 'Revisiting the European Commission's Approach towards the Rule of Law in Enlargement' (2019) Hague Journal on the Rule of Law, Vol. 11, No. 1 (April) 223-250.

11 See for instance United Nations, Bangalore Principles of Judicial Conduct ("Bangalore Principles"), adopted by the UN Human Rights Commission on 23 April 2003, E/CN.4/2003/65, https://www.unodc.org/pdf/corruption/bangalore_e.pdf ; United Nations, Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32, https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx . Some of the more relevant documents of the CoE and its' consultative bodies are: Council of Europe (2010), Judges: Independence, Efficiency and Responsibilities. Recommendation CM/Rec(2010)12 and Explanatory Memorandum, 17 November, https://rm.coe.int/16807096c1 ; CCJE (2010), Magna Carta of Judges (Fundamental Principles), CCJE (2010)3, 17 November, https://rm.coe.int/168063e431 ; Venice Commission (2010), Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, 16 March, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e . On the influence of the Council of Europe, see more in A. Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle' (2009) 52 *German Yearbook of International Law*, 405-436.

12 Seibert-Fohr (n 11).

self-government,[13] as one of the models of judicial governance,[14] placed between the judiciary and political branches of state power aimed at safeguarding judicial independence. In this manner they aim at insulating the judiciary from political influence, so typical of the socialist regime, thus providing a higher level of judicial autonomy. Judicial councils as administrative bodies of the judiciary centralize most of the decision-making powers related to the judicial career, including appointment, promotion, dismissal, disciplinary responsibility, evaluation of the judicial work etc. Their composition is to be mixed with at least half of the members elected from judicial ranks and non-judicial or lay members elected in most cases by the legislative.[15]

Interestingly, this externally inspired design, resulting from the initial lack of expertise of the EC, has not been based on the common understating of judicial independence among the EU member states nor the distinctive legal traditions and institutional setup. It was rather inspired by the arguably successful experience of the Italian judicial council[16] which adjusted the concept of the judicial council first established in France in the mid-nineteenth century.[17] In other words, this model of judicial governance has not been shared by the majority of EU member states,[18] nevertheless it was still recommended as part of the pre-accession conditionality. While this sort of soft conditionality through recommendations was characteristic for the CEECs and brought mixed results in terms of establishing the specific model of judicial councils, it soon evolved into a full-fledged 'European' model of judicial independence that was induced more strictly, first, in Bulgaria and Romania and then Croatia and the Western Balkan countries through the 'new approach'.[19] This new approach involved the introduction of two rule of law negotiating chapters which would be opened at the start of the negotiations and closed at the very end and in this manner tying the overall progress in the negotiations with compliance in the rule of law chapters. Additionally, the external support has been intensified and brought to a higher level of cooperation since 2016 through the "Horizontal Facility" joint-cooperation

13 It is questionable whether this model offers the highest level of judicial self-governance. For more on the different types and modes of judicial self-governance see K. Šipulová, S. Spáč, D. Kosař, T. Papoušková and V. Derka, 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary' (2022) Regulation & Governance, Wiley, available at: https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12453

14 On the different models of judicial governance see M. Bobek and D. Kosař, "Euro-products' and Institutional Reform in Central and Eastern Europe: A Critical Study in Judicial Councils' in M. Bobek (ed) *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury 2015).

15 On the features of the institutional design see D. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016) 128-129; Garoupa and Ginsburg (n 4) 119-122; European Commission for Democracy through Law (Venice Commission), Report on Judicial Appointments, 22 June 2007, CDL-AD(2007)028, paras. 29 and 32.

16 S. Benvenuti and D. Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model' (2018) 19 *German Law Journal* 7, 1642-1643.

17 Bell (n 2) 27.

18 P. Castillo-Ortiz, 'The Politics of Implementation of The Judicial Council Model in Europe' (2019) *European Political Science Review* 11, 505.

19 See on this in Damjanovski et al. (n 10) 5-9. See also Coman (n 1) 264-274.

initiative of the EU and the CoE for the Western Balkans and Turkey.[20]

The approach to judicial reforms and judicial independence taken by the EU has been defined by Nicolaidis and Kleinfeld as anatomical[21] and several crucial deficiencies have been pointed out. First, there is a strong emphasis on formal rules and institutions as the basis for reform and assessments.[22] Second, this approach creates a situation under which there is an excessive reliance on the EU and its member states, particularly the most developed ones, and their expertise as the only right way in initiating and leading judicial reform, which on the other hand, is solely concentrated on the respective state apparatus of the candidate country thus frequently omitting other stakeholders and proactive society actors.[23] Third, resulting from the previous two, under this approach the outputs seem to be far more important than the outcomes, that is, formal rules and institutions are presented as end themselves instead of being treated as means towards the end that is pursued.[24] However, it should be noted, that this institutionalist approach is far more visible and quantifiable thus making it easier for the EC to assess the level of alignment with the European standards and model of judicial independence therefore conducive for promoting its own 'success'.[25]

Nevertheless, based on the available data and academic research the track record of judicial councils in securing judicial independence is far from satisfactory. The Justice Scoreboard, for instance, could be used to rebut the assumption that judicial self-governance through strong judicial councils will inevitably lead to the entrenchment of judicial independence even among the EU member states. Looking at the Justice Scoreboard data over the last couple of years there is a certain pattern demonstrating that the member states with strong judicial councils rank lower when it comes to the perceptions of judicial independence within the respective states.[26] It is interesting to note that the odd one out from the CEECs, Czechia, a member state without a judicial council, is consistently being

20 This initiative, which ran from 2016 to 2019, has been recently extended through the Horizontal Facility II programme for the period 2019–2022. See official website: https://www.coe.int/en/web/ankara/horizontal-facility-for-the-western-balkans-and-turkey

21 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) 12

22 Nicolaïdis and Kleinfeld (n 21) 13-14.

23 Nicolaïdis and Kleinfeld (n 21) 14.

24 Nicolaïdis and Kleinfeld (n 21) 14. Also, on the weaknesses and shortcomings in the approach driven by the quantity over quality logic see Louwerse, and Kassoti (n 10) 239-245.

25 M. Bobek, 'The Fortress of Judicial Independence and The Mental Transitions of The Central European Judiciaries' (2008) 14 *European Public Law*, 101: "to check mechanically whether or not new laws are passed or whether a new judicial council is put in place is incomparably easier than to engage in complex assessment of judicial self-image, mentality, and ideology."

26 See for instance European Commission, *The 2021 EU Justice Scoreboard,* COM(2021) 389; European Commission, *The 2020 EU Justice Scoreboard*, COM(2020) 306; European Commission, *The 2019 EU Justice Scoreboard*, COM(2019) 198/2.

better ranked than Spain, Portugal, Italy, Slovakia, Croatia, Romania or Bulgaria, all of them with a strong judicial council as part of their constitutional and legal framework.[27] Furthermore, also the surveys conducted by the European Network of Councils of the Judiciary (ECNJ) in 2015 and 2019 indicate similar patterns, particularly when it comes to the trust of judges in councils for the judiciary[28] and their functioning in terms of judicial selection and promotion.[29] It could be noted from these surveys that the situation with different aspects of judicial independence is rather worse of in countries with judicial councils along the lines of what the EU is promoting in the Western Balkans currently. This, however, is not necessarily indicative that judicial councils are the ones to blame for such a situation, but it draws the attention to the fact that they cannot solely resolve the puzzle of judicial independence without being accompanied by a plethora of other reform steps at both the formal and informal level.

Besides this data, the mounting academic research[30] also leads to interesting conclusions, though rather disappointing when it comes to the contribution of judicial councils to fostering judicial independence. The general conclusions and tendencies to be drawn are leading in the direction that judicial councils could possibly improve the state of judicial independence in countries where there is already a well-functioning judiciary and high level of trust, however in the ones suffering from deficiencies judicial councils could even make things worse.[31] In these latter cases where the socio-political and socio-cultural conditions are not mature enough for the introduction of this type of judicial self-governance, the judicial councils have led to two negative consequences which are not mutually exclusive. They have created new formal and informal avenues for political influence over the judiciary and/or have further empowered judicial elites often proving detrimental for judicial independence.[32] Essentially this has been the consequence of a premature introduction of these institutions in

27 The 2021 EU Justice Scoreboard (n 26) 41-43; The 2020 EU Justice Scoreboard (n 26) 41-43; The 2019 EU Justice Scoreboard (n 26) 44-46.

28 See European Network of Council for the Judiciary (ENCJ), *Independence and Accountability of the Judiciary: ENCJ Survey on the independence of Judges 2019*; and European Network of Council for the Judiciary (ENCJ), *Independence and Accountability of the Judiciary and of the Prosecution – Performance indicators 2015: ENCJ Report 2014-2015*.

29 P. Castillo-Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe' (2017) *9 Hague Journal on the Rule of Law*, 315-336; see also Garoupa and Ginsburg (n 4) 127-130.

30 See for instance the contributions to the two special issues of the German Law Journal: Judicial Self-Governance (2018) and Judges Under Stress (2021).

31 Garoupa and Ginsburg (n 4) 130: "We also found little evidence in favor of the widespread assumption that councils increase quality or independence in the aggregate". M. Urbanikova and K. Šipulová, 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Court?' Model' (2018) 19 *German Law Journal* 7, 2135: "More concretely, when judicial councils are established with the hope to become guarantors of judicial independence in countries where independence of the judiciary has been an issue, they do not seem to fulfill these expectations, or it is a lengthy process with mixed results". For a broader perspective on the fourth branch to which judicial councils arguably belong see M. Tushnet, *The New Fourth Branch* (CUP 2021) 173: "that their performance may depend upon the overall party system within which they operate; and, troublingly, that they might work best in systems where they are least needed (those with stable competitive parties or dominant parties with stable programmatic factions) and even in those systems might actually weaken the Madisonian mechanisms of constitutional guardianship."

32 G. Gee, 'The Persistent Politics of Judicial Selection: A Comparative Analysis', in A. Seibert-Fohr (ed.) *Judicial Independence in Transition* (Heidelberg: Springer 2012), 132-133.

circumstances where the culture of independence[33] has not yet been established as a fundamental pillar of the respective judicial culture.[34] On the contrary, the remnants of judicial dependence from the previous system still linger usually in form of a subservient mentality and clientelism.[35]

The above essentially demonstrates that a success of judicial reforms needs to have a broader scope than just an institutionalist focus. This is neatly summarized by Dicosola stating that "the adoption of reforms introducing completely new rules [and institutions] without a parallel process of transformation of culture risks to be useless or, even worse, to produce adverse effect."[36] In practice this should translate into a combination of institutional reform with smaller-scale and incremental changes and transformation of the respective judicial culture thus creating a nexus between the formal rules and informal norms and practices.[37] Even though judicial self-governance through judicial councils is quite appealing in offering a vision of judges taking 'judicial matters', mainly, in their own hands, absent a judiciary and judges willing to fight for and protect their independence this vision easily turns into another disillusionment. Therefore, as David Kosař rightly points out, the success of judicial councils is determined by a combination of three elements, "flawless design, new mindset of judges and incrementalism".[38]

Whereas the EU appears to recognize the necessity of broader societal transformation,[39] particularly that of the judicial culture,[40] accompanying an

33 S. Shetreet, Creating a Culture of Judicial Independence the Practical Challenge and the Conceptual and Constitutional Infrastructure in C. F. Forsyth and S. Shetreet (eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill Nijhoff 2012) 17-50.

34 D. Preshova, I. Damjanovski, and Z. Nechev, 'The Effectiveness of the `European model` of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms' (2017) *Asser Institute CLEER Papers,* 20-21. On the manner in which these sorts of remnants remain part of the dominant judicial culture or habitus in Čuroš (n 2) 1257.

35 J. Omejec, Strengthening Confidence in the Judiciary: Appointment, Promotion and Dismissal of Judges and Ethical Standards, Speech at the Opening of the Judicial Year, Strasbourg, 25 January 2019, 11-14, available at: https://www.echr.coe.int/Documents/Speech_20190125_Omejec_JY_ENG.pdf . See at 14: "The "de-communisation" of the judiciary through the European model of judicial councils appears to have been unsuccessful in most of the CEECs and WBCs."

36 Dicosola, M., 'Judicial Independence and Impartiality in Serbia: between Law and Culture', *Diritti Comparati,* 17 December 2012, available at: https://www.dirittocomparati.it/judicial-independence-and-impartiality-in-serbia-between-law-and-culture/

37 Bobek and Kosař (n 14) 195-196; Seibert-Fohr (n 7) 1336, 1337; K. Samuels, Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt, Social Development Papers – Conflict Prevention & Reconstruction Paper No. 37/ October 2006.

38 This point was made during David Kosař's presentation which he delivered at the workshop in Belgrade as part of the MATRA regional rule of law project. For more on this workshop see at: https://idscs.org.mk/en/2021/09/28/judicial-culture-and-judicial-self-governance-discussed-at-experts-workshop-co-organised-by-idscs-and-cepris/

39 European Commission, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final, 6.2.2018, p. 4. For more on this see Louwerse and Kassoti (n 10) 247-249

40 "A slow pace of change in judicial culture continues throughout the Western Balkans region without sufficient commitment to the principle of judicial independence and respect for court decisions." European Commission, 2020 Communication on the EU enlargement policy, COM(2020) 660 final, 6.10.2020, p. 6.

institutional transformation, for strengthening of the rule of law, still the most recent practice does not support this declaration. Namely, the latest constitutional changes in Serbia brought by the government's plan to demonstrate its 'European agenda' have been heavily burdened by the EU's institutionalist approach and most probably all its shortcomings taking into consideration the state of the judicial and political culture in this country.[41] The remainder of this paper will be devoted on the actual shortcomings and the conundrum of the (in)compatibility of the judicial culture in North Macedonia with judicial self-governance analyzing the extent to which the existing gap between formal rules and informal norms and practices has served as an impediment to establishing a culture of judicial independence.

3. MACEDONIAN CONSTITUTIONAL AND LEGAL FRAMEWORK ON JUDICIAL SELF-GOVERNANCE

North Macedonia has a rather short experience with regulating and guaranteeing judicial independence taking into consideration that the country gained its independence only in 1991.[42] The first constitution of independent Macedonia, enacted on 17 November 1991, introduced for the first-time formal constitutional guarantees for judicial independence such as a permanent mandate, immunity, irremovability, and it established a new institution for administering the judiciary, the Republic Judicial Council (RJC).[43] The legal framework on the RJC was very soon completed with the enactment of the Law on the RJC in 1992.[44] As in many other parts of the Constitution, the establishment of this institution has been inspired by the provisions in the newly drafted constitutions of the other former Yugoslav republics, in this case the Constitution of Slovenia from 1991. Initially the Slovenian pattern in judicial governance was followed by forming the

41 For more details on this see the contribution of T. Marinkovic on the uniformity of application of the law in Serbia within the framework of this project available at: https://idscs.org.mk/en/2020/11/19/bridging-the-gap-between-formal-processes-and-informal-practices-that-shape-judicial-culture-in-the-western-balkan/

42 See also В. Камбовски, *Судско право* (2-ри Август – Штип, 2010) 164-169.

43 Article 99 of the Constitution of RM. This Article was amended in 2005.

44 Закон за Републички судски совет (The Law on the Republic Judicial Council) ("Службен весник на РМ" бр.80/92 од 22.12.1992).

RJC in a crucial sense, this institution did not have a decision-making power in regards of the judicial career but only a competence to recommend to the Assembly which finally decided on these matters. Interestingly, the Judicial Council of Slovenia has kept this sort of judicial governance within which the parliament makes the final decision on judicial appointments, promotions and dismissals and has not faced critics from the EU or CoE for that matter.[45] However, there was a key difference in the initial institutional design. In the case of the RCJ all members were elected by the Parliament and there were no judicial members elected by judges themselves in direct elections, different from the six judicial members of the Judicial Council of Slovenia. These two features of the constitutional design of the RJC were among the crucial reasons for the enactment of a large package of constitutional amendments on the judiciary in 2005.[46] Nevertheless, the most important reason for this reform was the alignment with the European standards on the judiciary as promoted by the EU, North Macedonia being the first country from the Western Balkans to initiate such a process.[47]

Shortly after receiving the candidate status, North Macedonia tackled the issue of judicial reforms in order to secure the start of accession negotiations with the EU by introducing, among other changes, the completely new Judicial Council with a clear constitutional status and mandate.[48] In doing this the constitutional amendments introduced new comprehensive constitutional powers of the Judicial Council (JC) and a composition that would seclude the judicial governance from the political branches of power.[49] Consequently, the main constitutional mandate of the JC is to safeguard judicial independence.[50]

When it comes to the powers and competences of the JC, there is high level of concentration of judicial governance powers concerning the judicial

45 For more on the evolution of judicial governance and the Judicial Council of Slovenia see M. Avbelj, 'Contextual Analysis of Judicial Governance in Slovenia' (2018) 19 *German Law Journal 7*, 1905-1908.

46 Reason for establishment of JC – this sort of evolution of the judicial governance and judicial reforms in general correspond to the two waves detected by Piana in D. Piana, 'The Power Knocks at the Courts' Back Door: Two Waves of Postcommunist Judicial Reforms' (2009) 42 *Comparative Political Studies 6*, 823. See also Kosar's brief overview in D. Kosař, 'Beyond judicial councils: Forms, Rationales and impact of judicial self-governance in Europe' (2018) 19 *German Law Journal 7*, 1598-1603.

47 A detailed account on the reasons behind the introduction of judicial councils in Europe see P. Castillo-Ortiz, 'The Politics of Implementation of the Judicial Council in Europe' (2019) 11 *European Political Science Research*, 503-520.

48 On this point in 2005-2006 see more in A. Fagan and I. Sircar, 'Judicial Independence in the Western Balkans: Is the EU's 'New Approach' Changing Judicial Practices?' *MAXCAP Working Paper Series, No.11*, June 2015, 19-22.

49 For more on the current legal framework on the judiciary see Д. Прешова, Структура и организација на правосудниот систем на Република Северна Македонија in *Заслепена правда: До заробена држава во Северна Македонија* (Фондација Отворено Општество – Македонија, 2020) 65-66.

50 On the different goals that judicial council are to achieve based on their constitutional mandate see D. Kosař, 'Beyond judicial councils: Forms, Rationales and impact of judicial self-governance in Europe' (2018) 19 *German Law Journal 7*, 1567–1612.

career and judicial management, with an exclusive decision-making power. Most importantly for the judicial independence, the JC has an exclusive power in judicial selection, promotion, dismissal, disciplinary procedure, and the judicial immunity as well as the evaluation of judges. Perhaps the only exception has to do with the issues related to the judicial budget that is dealt by a different body, the Judicial Budget Council. However, the President of the JC is a member and a president of this body as well. Thus, it could be argued that the status and the position of the JC is rather strong, along the lines of the European standards.

The 15 members of the Judicial Council could be categorized in three groups. The first group is consisted of eight judicial members of the JC. They are directly elected by their peers through direct elections. More specifically, one judicial member is elected from the Supreme Court, and one from each of the lists from the territory of the Appellate court in Skopje and the administrative courts, Appellate court in Shtip, Appellate court in Bitola and Appellate court in Gostivar. It should be noted that both basic court judges and appellate court judges could be candidates and get elected through these four lists. Three judges are elected to the JC from members of the ethnic communities that are not majority in the country. They are put on a separate list which is voted upon in all the courts in the country. The second group of members are five of the so-called non-judicial members of the JC. They are elected by the Assembly upon the proposal from the President of the Republic - two members - and the parliamentary Commission on the matters of elections and appointments - three members. These five non-judicial members are elected from the rank of university professors, attorneys at law, former judges of the Constitutional Court, international court judges and other distinguished jurists with due respect of the principle of equitable representation of the ethnic communities that are not majority in the country through double majority voting in the Assembly. The third group of members are the ex officio members represented by the Minister of Justice and the President of the Supreme Court. The ex officio members do not have a right to vote in the JC.

The statutory framework on the JC has been subject of numerous reforms and changes in improving the design and functioning of the institution.[51] In 2019 the Assembly adopted the new Law on the Judicial Council,[52] which among other introduced two novelties. The first one is related to the accountability of the members of the JC. It is for the first time that there are legal provisions regulating the disciplinary responsibility of the members of the JC which could eventually lead to a dismissal.[53] Interestingly, the disciplinary procedure can be initiated by a proposal from at least 20 judges or a member of the JC with a right to vote. The JC itself decides with eight votes for the dismissal of the member

51 Закон за Судскиот совет на Република Македонија (Law on the Judicial Council of Republic of Macedonia) („Службен весник на РМ" број 60/2006, 150/10, 100/11, 20/15, 61/15, 197/17 и 83/18).

52 Закон за Судскиот совет на Република Северна Македонија (Law on the Judicial Council of Republic of North Macedonia) („Службен весник на РСМ" број 102/2019).

53 Articles 34-35 of the Law on the Judicial Council of RNM (n 52).

against whom a disciplinary procedure has been initiated. The second one,[54] quite controversial among judges, has to do with the provision which regulates that the president and vice-president of the JC could be elected only from the non-judicial members of the JC which themselves are elected by the Assembly. The official justification for this provision is sought in the Opinion of the Venice Commission upon the draft version of this new law.[55] The Venice Commission reiterated a recommendation from an Opinion from 2015 in clearly favoring a solution that the president of the JC is elected from the non-judicial members.[56] However, it should be noted that other relevant consultative bodies of the CoE such as the CCJE and the consultative body of the European Commission (EC), the ENCJ have set different standards directly contradicting the ones insisted upon by the Venice Commission.[57] Such a contradiction and dissonance is even more emphasized if we take into consideration that it originates even among consultative bodies of a single international organization, the CoE. Undoubtably, this creates a confusion for the respective authorities and at the same time creates a possibility for opportunistic invocation of contradicting standards.

This brief overview of the legal framework of North Macedonia regulating the judicial governance in the country demonstrates the high level of alignment and compliance with the European standards as defined by the EU and CoE. The comments in the latest opinion of the Venice Commission on the new Law on the Judicial Council confirm this view emphasizing the need for proper implementation that would be in good faith.[58] However, the experience so far has shown that the interpretation and implementation of the legal provisions incorporating the international legal standards are strongly dependent on the informal norms and practices as part of the dominant judicial culture with a country. To which extent the judicial culture, apart from the political culture, is determining the outcome of the formal rules will be the subject of the next section.

54 Article 8(3) of the Law on the Judicial Council of RNM (n 52).

55 European Commission for Democracy through Law (Venice Commission), Opinion on the Draft Law on the Judicial Council,18 March 2019, CDL-AD(2019)008.

56 Venice Commission on North Macedonia 2019 (n 55) para. 12. See also for more general standard, European Commission for Democracy through Law (Venice Commission), Report on Judicial Appointments, 22 June 2007, CDL-AD(2007)028, para 35.

57 Consultative Council of European Judges (CCJE), Opinion no. 24 (2021), Evolution of the Councils for the Judiciary and their role in independent and impartial judicial system (Strasbourg, 5 November 2021), para. 35; CCJE, Opinion no.10 (2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (Strasbourg, November 21–23, 2007) para. 33; ENCJ, Councils for the Judiciary Report 2010–2011 para. 4.1.

58 Venice Commission on North Macedonia 2019 (n 55) para. 64.

4. JUDICIAL CULTURE AND JUDICIAL SELF-GOVERNANCE IN NORTH MACEDONIA

North Macedonia has been the first country in the region to incorporate the European and international standards when it comes to the formal rules and institutional structure in the realm of judicial governance. Since the constitutional amendments in 2005 the country has continuously improved its legal and institutional framework, however judicial independence is still not substantively integrated as part of the dominant judicial culture. It could be argued that the EU induced judicial reforms and the anatomical approach employed have not delivered the required results. Judging by the level of distrust in the JC in North Macedonia, with 50% of judges in 2019[59] and 42.4% of judges in 2021[60] are not satisfied with the level of independence and transparency of the JC, while 55.5% in 2019[61] have disagreed that the JC successfully safeguards the judicial independence, the state of judicial independence and governance in North Macedonia requires considerable improvement. This data is essentially indicative of the striking discrepancy between the formal rules aligned with the relevant standards, on the one hand, and the actual practice and reality, on the other, which reflects the importance of an institutional reform being coupled with a transformation of the respective judicial culture. Nevertheless, the quantitative data offers a limited perspective as it does not reveal the actual reasons behind the negative perceptions of judges, thus they could serve only as the starting point for qualitative research on the impediments related to the judicial culture causing this discrepancy or gap usually not addressed by the EC in its annual country reports.

Against the background of the brief comparative overview and the dispelled myth of the judicial councils as the panacea for securing judicial independence this section presents the qualitative research. It was conducted through two rounds of elite interviews, which made under the condition of anonymity, primarily with judges and members of the JC. The interviewees have been carefully selected taking into due consideration the territorial and ethnic representativeness as well as the inclusion of both judicial and non-judicial, current and former members of the JC. The first round of 11 interviews were conducted for the first dimension of judicial culture within the framework of this research[62] and they also covered the place and role of judicial independence in shaping the judicial culture in the context of judicial governance in North Macedo-

59 Г. Лажетиќ, Л. Стојкова Зафировска, Ж. Алексов, А. Гоџо, *Прв национален извештај од матрицата на индикатори за мерење на перформансите и реформите во правосудството*, Центар за правни истражувања и анализи, Скопје 2019, 93. Media representatives have a strikingly high level of dissatisfaction.

60 Г. Лажетиќ, Л. Стојкова Зафировска, Ж. Алексов, А. Гоџо, *Втор национален извештај од матрицата на индикатори за мерење на перформансите и реформите во правосудството,* Центар за правни истражувања и анализи, Скопје 2021, 77. Also, here media representatives have a strikingly high level of dissatisfaction.

61 Лажетиќ (n 59) 98. This indicator has not been included in the second report (n 60).

62 For more on the methodology see Preshova (n 6) 7-8.

nia. The second round of six interviews focused exclusively on the importance of judicial culture in securing judicial independence through judicial self-governance in North Macedonia. The latter interviews covered two major groups of issues, the constitutional status and mandate of the JC and the composition and election of the members of the JC, leaving the actual functioning of this institution through the specific procedures taking place before it for the upcoming research on the fourth dimension of the judicial culture covering the individual independence of judges.

4.1 The constitutional status and mandate of the Judicial Council

The first area of judicial self-governance in North Macedonia which is addressed here is the general constitutional status and mandate of the JC. Namely, the constitutional and legal provisions in North Macedonia define the JC as a governing or administrative body of the judiciary, placed between the judiciary and political branches of power, with a clearly determined mandate to safeguard judicial independence. This status and mandate are ascertained, formally, through broad and exclusive powers given to the JC to govern the judiciary creating, potentially, a rather strong and important role for this institution. At the same time, however, this poses a great threat for the independence of the judiciary if this status and power are exercised arbitrarily and against the general interest of the judiciary.

The overwhelming opinion of the interviewees is that the model of judicial governance is generally suitable, and it should not be abandoned or subject to drastic changes. There is a consensus that the current model provides better guarantees to judicial independence compared to the previous model through the RJC which existed until 2005. This stance is quite understandable since the European model of judicial independence is rather appealing to judges as it is well founded on the notion of preventing political influences and providing a more pronounced role to judges over judicial governance. Nevertheless, this conclusion could be based on the limited knowledge and experience with models of judicial governance often without information on various forms of combination of elements from different models of judicial governance thus leaving the impression of choosing the lesser evil from the previous and current form of judicial governance in North Macedonia.[63] Furthermore, it has been continuously emphasized that, as in most other areas, the legal framework is not a cause of concern but its implementation. We have good laws, but a poor implementation is a sort of mantra repeated constantly by the interviewees. Thus, it is exactly on the issue of implementation that the interviewees have

63 On a similar 'lesser-evil' approach in Romania see more in B. Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council' (2018) 19 *German Law Journal* 7, 1710. See also in Kosař (n 50) 1584-1585.

engaged into detecting and expressing their views on the actual role of the JC, more specifically on the constitutional mandate, status and on the external and internal influences on this institution.

4.1.1 The constitutional status of the Judicial Council

Talking about the status and character of the JC as an institution some misconceptions could be inferred from the interviews, particularly among judges not members of the JC, and in one case clearly expressed and detected. For instance, wishing to emphasize the marginalization of the JC it was claimed that the JC has transformed into a "*administrative-technical body*" or another judge that was interviewed expressed a confusion over the status of the JC by saying that: "*we do not know who governs the judiciary, is this the Judicial Council or the Supreme Court*".[64] The Constitution and the Law on the Judicial Council define the JC as "an independent and autonomous institution of the judiciary."[65] In this regard, the JC is not a court but rather a body of the judiciary. It is neither at the apex nor even part of the regular judicial structure.[66] Thus, the JC does not exercise any judicial power as the latter resides in the courts. The institutional logic and design clearly demonstrate that the JC is a governing or administrative body of the judiciary. The procedures before it have an administrative and not a judicial character. As a matter of fact, the statute which regulates the functioning and procedures of the JC is enacted by a simple majority in the parliament, different from the judicial procedures which are enacted with a qualified two-thirds majority. That such a misconception is not a pure coincidence, or a mere exception is supported by a decision of the Appellate Council that decides on appeals against the decision of the JC. Interestingly, this Council is composed predominantly of Supreme court and appellate court judges. In one of its most recent decisions for dismissal of judge,[67] it identified the procedures before the JC with a judicial procedure by applying a decree-law on the extension of deadlines in judicial procedures specifically during the state of emergency.[68]

Directly related to the status of the JC are the constitutional and statutory powers that this constitutional body has. On this point in all the interviews there was only a stance which positively assessed the powers, however the issue over how they are applied and used is a frequently raised concern. Thus, the interviewees have agreed that the constitutional and legal framework have regulated the matter in fairly good manner. Nevertheless, the interpretation and application of these rules are not perceived as done always in a good faith and not

64 See for instance how the Constitutional Court of Slovenia from early on determined the sui generis nature of the Slovenian Judicial Council in Avbelj (n 45) 1906.

65 Article 104 as amended with Amendment XXVIII of the Constitution of RNM.

66 Article 98 as amended with Amendment XXVI of the Constitution of RNM.

67 Жалбен совет при Врховниот суд на РСМ (Appellate Council at the Supreme Court of RNM), ОСЖ бр. 6/2021 from 1.7.2021

68 Уредба со законска сила за роковите во судските постапки за време на вонредната состојба и постапувањето на судовите и јавните обвинителства (Decree with the force of law on the deadlines in judicial procedures during the state of emergency and the work of courts and public prosecutor offices) („Службен весник на РСМ" број 8/20, 89/20).

rarely they are instrumentalized for different goals that compromise judicial independence. The latter point ushers us to the second aspect covered in this part.

4.1.2 The constitutional mandate of the Judicial Council

The second aspect of the institutional design and function of the JC discussed here is the constitutional mandate. Namely, the Constitution and the Law on the Judicial Council have clearly determined that the JC is entrusted "to ensure and guarantee the independence and autonomy of the judiciary."[69] Following the institutional logic of this institution generally the JC is supposed to secure that the judiciary is not exposed to political influences that is detrimental for its trust and authority and, as result, for the rule of law in the country. However, as in many other countries that have established a judicial council it has been far easier to introduce such a body into the system through the respective constitution than to significantly improve judicial independence through their functioning.[70] The same impression could be easily inferred from the interviews. Responding to the question of whether the JC has managed to safeguard judicial independence so far, the answers are going in one direction which is rather negative. More specifically, it could be argued that the JC is more concerned with safeguarding the political interests in the judiciary than judicial independence.[71] Surprisingly, this seems to be internalized as a natural part of being a member in the JC or even being a judge since in three interviews it has been clearly shown that occasional phone calls with certain 'recommendations' from political or party officials or coffee meetings are not perceived as form of influence or pressure.[72] In this manner we could observe that one of the two potential caveats, the politicization of the JC, is materializing. As one judge speaking about this problem has put it:

> *"The Judicial Council has taken over the role of executor and that causes serious concerns among judges".*[73]

69 Article 104 as amended with Amendment XXVIII of the Constitution of RNM; and Article 2 Law on Judicial Council of RNM (n 52).

70 Bobek (n 25) 105: "It is not the issue whether or not there will be a judicial council. It is not the issue of how many computers or other technical equipments are at the disposal of a court. It is the matter of self-perception and self-image of the judges and the internalisation and realisation of their personal independence." For comment about the Judicial Council of Slovenia and that it seems like its decisions are made elsewhere see Avbelj (n 45) 1910.

71 This runs against an explicit formal rule: Article 3(3) Law on the Judicial Council: "The Council through its work shall prevent the political influence in the judiciary." See for instance on the perception in Castillo-Ortiz (n 29) 334 "To start with, they questioned the matching between powerful Councils of the Judiciary and protection of judicial independence. In fact, significant groups of judges might perceive these powerful institutions as disrespectful of their independence when they are captured by political actors, interest groups and are unable to tackle corruption."

72 For judicial corruption see more in CCJE Opinion no. 21 (2018), Preventing Corruption Among Judges (Zagreb, 9 November 2018).

73 These views are reflected also in another recently published research of a smaller scale as judges only from one court were interviewed, the Skopje Criminal Court. See more in N. Petrovska and D. Avramovski, *Impact of the Merit System over the Judicial Independence and Professionalism in North Macedonia*, Coalition of Citizens' Association All for Fair Trials, Skopje 2021.

The 'execution' takes places mainly in two aspects of the work of the JC, judicial promotions and disciplinary procedures which include dismissals of judges. Thus, it should not come as a surprise that a former member of the JC, and this is also inferred from all other interviewees, has explained that the JC is perceived through its repressive function and not as being there to protect judges, but rather to sanction them.

"Judges themselves perceive the Judicial Council as a body that sanctions or as a body that presents the policies of the executive power, and not of the judiciary."

In essence the judicial promotions are seen as the basic reward for 'cooperative' judges[74] and at the same time as a sanction for the judges that are not. In most drastic cases the sanctions could take the form of a dismissal.[75] A current member of the JC was rather frank when he stated that the political influences are most visible in the process of judicial promotion:

> *"In electing judges to a higher court, even though the candidate meets the conditions still there is a certain recommendation through which, indirectly, politics is satisfied [….] In the case of dismissals, there is less political influence, only in rare cases."*

While one judge who was interviewed confirmed that this stance over the misuse or abuse of the judicial promotion procedure is rather spread among judges.

"I believe judges are quite aware that their promotion is dependent on certain political or business elites, thus they flirt with these elites in wishing to stand out in securing a higher position."

On the other hand, it could be argued that the most intensive political pressures are exercised regarding ongoing high profile court cases. (This point was made in one of the interviews, without denying the political influence in judicial promotions) However, it is through the instrumentalization of the JC that this pressure on the actual judicial work is made 'credible'.

The politicization of the JC is even an expected consequence as there is a political incentive behind its introduction in the domestic constitutional system. Of course, the general incentive is the European integration process which brings political points on its own especially when the EU's approach has been predominantly institutionalist. However, the more worrying political calculation is that judicial councils are used to preserve the status quo, meaning that political and judicial elites, which are rather intertwined, see this institution as means to

74 Gee (n 32) 134 "Political influences in a bureaucratic judiciary operate not at initial recruitment, but are channeled through the procedures for career advancement."

75 This has been noted by EU senior experts led by Reinhard Priebe in their Report in 2017. *The Former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017* (Priebe 2017), Brussels, 14 September 2017, para. 27: "judges have continued to bring pressure on their more junior colleagues through their control over the systems of appointment, evaluation, promotion, discipline, and dismissal which have been used to reward the compliant and punish those who do not conform."

preserve control over the judiciary.[76] This explains how the previous government until 2017 under the prime minister Gruevski had captured the judiciary through the JC.[77] But this also sheds light on the manner in which the current political elite, which came to power in 2017, still maintains similar practices of exerting control over the JC and judiciary, though without such a firm grasp on power. Thus, the JC is not seen as an obstacle but rather as an instrument for such agendas of the elites.[78]

Understandably this is clearly reflected in the judicial culture in North Macedonia. The stance of judges, which is recognized by the members of the JC, is based on fear, distrust and sense of alienation from the JC. Accordingly, Choudhry's caveat of judicial indifference and self-interest in the context of North Macedonia translates into a judicial culture of fear and distrust leading judges to passivity and apathy and in certain circles to clientelism.[79] This judicial culture of fear and distrust is prevailing,[80] and it is still being perpetuated by the JC,[81] despite the slight improvement in its functioning in the past five years.[82] Such a perception and culture essentially prevent the creation of circumstances within which judges would become the agents of change instead of being only subservient subjects.[83] There is no true sense of judicial ownership over the processes that is supposed to serve as the basis for judicial independence. Therefore, the general conclusions made by Seibert-Fohr, drawn from the comparative analysis in post-socialist countries, seem to be completely applicable to North Macedonia.

> *"[the] transfer of power can work only if the judiciary is able and willing to take control over itself. Implementing self-governance structurally without building the corresponding capacities was therefore insufficient."*[84]

76 Kosař (n 50) 1598. See also A. Uzelac, 'Survival of the Third Legal Tradition?' (2010) 49 Supreme Court Law Review, 394-396. The latest example is the case of Serbia and the adoption of a large package of constitutional amendments. See more on this Tanasije Marinkovic's second paper, Marinkovic (n 41).

77 European Commission, The former Yugoslav Republic of Macedonia 2016 Report, SWD(2016) 362, Brussels, 9 November 2016, 4; and Priebe 2017 (n 75) para. 27.

78 For more on this political aspect Д. Прешова, Формални и неформални начини на политичко влијание врз судството, in *Заслепена правда: До заробена држава во Северна Македонија* (Фондација Отворено Општество – Македонија, 2020) 71-81.

79 Choudhry (n 3).

80 For a rather similar state of the judicial culture in Slovenia see in J. Zobec, and J.R. Cernic, 'The Remains of the Authoritarian Mentality within the Slovene Judiciary' in M. Bobek (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury Publishing, 2015), 127

81 The previous findings of Priebe's group of senior experts are only confirmed. See Priebe 2017 (n 75) para. 13: "Mistakes of the past should not be repeated and one form of state capture must not be replaced by another."

82 These improvements have been noted in the EC reports. See for instance European Commission, North Macedonia 2019 Report, SWD(2019) 218, Brussels 29 May 2019, 16-19; and European Commission, North Macedonia 2020 Report, SWD(2020) 351, Brussels 6 October 2020, 16-21.

83 Čuroš (n 2) 1258

84 Seibert-Fohr (n 7) 1345.

In a nutshell, the judicial self-governance introduced in a context of a judicial culture of fear and distrust and without a genuine culture of independence will produce adverse effects. Taking into consideration that it would not be advisable nor viable to expect major constitutional changes that would involve a drastic change of the model of judicial governance there is an apparent need to engage in a parallel process of judicial culture transformation. While political elites will always tend to maintain or even increase the level of political control over the judiciary, the only way to neutralize and fend off these forms of control is for judges to build and demonstrate resilience and devotion to protecting their independence. This stance could be conducive to raising the level of trust in the judiciary increasing the costs for encroachments by political elites or other centers of powers.

The pro-active stance of judges in protecting their independence will make it more costly for political actors to attack and jeopardize it, and such a stance is of an utmost importance for establishing and maintaining judicial independence.[85] This would be a starting point in gaining the public trust and support for the judiciary leading to an increased legitimacy, fundamental for securing the independence. Instead, we have judges, generally speaking, who are not always serving the interests of the independence of the judiciary but rather of particularistic personal and political interests either by extending their hand to influential political elites or, in most cases, through apathy and indifference. As result, judges and the judiciary are not solely the victims of the political pressure but also an accomplice to these negative developments, occasionally presenting the justification of political influences, even when there is no clear evidence of their existence, for their position which reinforces the mentality of submissiveness.[86] Even this kind of anticipatory fear existing among judges, also those as members of the JC, is paralyzing any attempt to manifest a form of resistance and instead opt for serving their own private or professional interest. This judicial clientelism is best encapsulated in one of the responses provided in the interviews:[87]

> *"Judges want to be independent, however you should be aware that every judge has a family, they have a daughter or a son. In a state in which an employment is realized through politics, how do you except a judge is not aware that the easiest way to get a job for his or her son or daughter is through politics."*

85 G. Vanberg, 'Establishing and Maintaining Judicial Independence' in K. E. Whittington, R. D. Kelemen and G. A. Caldeira (eds) The Oxford Handbook of Law and Politics (OUP 2008) 113-115.

86 Omejec (n 35) 13.

87 There are also statements from other interviewees which confirm the existing perception on judicial clientelism.

Furthermore, this perception of the JC and the lack of authority and integrity among judges is the consequence of the two factors. The composition and the process of election of the JC members, on the one hand, and the insufficient communication capacities and transparency of this institution, on the other. Concerning the latter, the interviewees have noted certain improvements as seen through newly appointed spokesperson of the JC and regular publication on the website of minutes from the JC sessions which are public in general. Nevertheless, the transparency is more than this.[88] One of the most significant shortcomings noted in the interviews is related to the poorly reasoned decisions, which in eyes of the interviewees corroborates to the claims of external influences on the JC. In this manner, certain skepticism over the procedure and criteria for judicial appointment and promotions, concerning the disciplinary procedure is being raised. Such a skepticism is well-founded even the departure from a clear formal rule over the providing reasons for the vote on judicial selection or promotion.[89] Namely, Article 49(3) of the Law of the Judicial Council regulates that every member of the JC with a right to vote should provide reasons for voting on a judicial appointment during the public session of the JC. In practice, though, there are numerous instances in which there is departure from this rule by providing reasons once the voting has ended, and it is clear which candidate has been appointed instead of substantiating every vote given for candidates generally.[90] Even in those cases when reasoning is provided it is usually vague and formalistic.

Furthermore, it could be also noticed that the so-called working meetings closed for public taking place immediately before the official session have been subject of criticism as they are not the official form or mode of working of the JC. Once again this is a reason for doubts over the actual independence of the members of the JC. Interestingly, all the interviewed members of the JC perceive these working meetings as a normal form of functioning and only notice that maybe they should not be held right before the official sessions of the JC as this appears inappropriate. However, in their answers they indicate that much of the debate over the matters to be decided by the JC takes place in these informal settings and only if there is some disagree-

88 On the importance of the transparency see A. Torres Perez, 'Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain' (2018) *19 German Law Journal 7*, 1794-1795.

89 For more on the specific instances of lack of transparency in this respect see in Monitoring reports on the functioning of the Judicial Council of RNM during the period from June 2018 to March 2020 of the Institute for Human Rights available at: https://ihr.org.mk/mk/realizirani-proekti/akcija-za-pogolema-transparentnost-otchetnost-i-efektivnost-na-sudskiot-sovet-na-rsm

90 For the most recent examples see Petrovska and Avramovski (n 73) 30-31.

ment over a certain contentious issue it might be reflected in the official sessions through individual discussions. Lastly, in couple of interviews the lack of regular communication of the JC with judges and courts was mentioned, not only the official one related to ongoing procedures before it, indicating that this additionally creates the sense of alienation from this institution.

Apart from the transparency another factor significantly influencing the perceptions of the JC concern the composition of the JC and the manner in which members of the JC are nominated and elected. These two issues are central to the second aspect of the compatibility of judicial culture with the judicial self-governance which is covered in next sub-section.

4.2 The composition and election of the members of the Judicial Council

The second part of the analysis on the judicial culture regarding the judicial self-governance in North Macedonia, based also on the interviews, is devoted to the key factor for establishing authority and respect for the JC among judges, the composition and procedure of election of JC members. The importance of these features of the institutional design for the assessment of the judicial culture is observed through the disconnect problem between the formal rules and informal practice which is manifested through flawed and opportunistic interpretations based on formalism and textualism. Taking into consideration the importance of these aspects of the judicial governance each of them, the composition and elections of both judicial and non-judicial members of the JC, will be further analyzed below.

4.2.1 The composition of the Judicial Council

The JC is composed of 15 members which are categorized in three groups of members: eight judicial, five non-judicial or lay, and two ex officio members. This mixed composition of JC is in line with the international standards according to which majority of the members should be from judicial ranks and

that their dominance either by having exclusively this type of members or their significant majority within the JC.[91] The latter should be avoided in order to prevent the risks of judicial corporatism[92] which is equally dangerous as the politicization of this institution. There are several issues that were raised during the research and interviews which are rather indicative for the relationship between the judicial self-governance and the respective judicial culture in North Macedonia.

In general, there is an agreement expressed also in the interviews that the number of members of the JC is optimally suited for the tasks and powers that it exercises. Nevertheless, the picture gets a bit more complex once one draws in the issue of the balance between the judicial and non-judicial members. Therefore, it is interesting to note a clear tendency among judges noticed during the interviews to place certain emphasis on the notion of "judiciary for judges" when discussing the balance in the composition of the JC. Namely, almost all judges interviewed, including the judicial members of the JC, have expressed their preference to have a JC composed solely of judicial members, even in some interviews a clear preference for judicial members of higher courts. In this manner they are demonstrating a certain lack of awareness over the risks of judicial corporatism and at the same time the need for partial democratic legitimacy of the JC reflecting the spirit of the separation of powers based on the idea of mutual checks and not of total isolation of powers.[93] Coupled with the understanding of the status of the JC, these views are manifesting the necessity to pay a closer attention in clearly positioning the JC in the grand scheme of separation of powers and international standards concerning the composition as well the rationale behind them. This would enable the judges to better realize the risks of judicial corporatism that is by the way reflected through the responses given in the interview.

The next issue is touching upon a different aspect of the balance of the composition is the one of representativeness of the composition of the JC. The representativeness is basically relevant for the judicial members and sheds light on how the eight

91 On the requirement for a mixed composition of judicial councils see in Kosař (n 15) 128; CCJE, Opinion no.10 (2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (Strasbourg, November 21–23, 2007) para. 18.

92 Perhaps the most notable example of judicial corporatism is Slovakia see more in S. Spáč, K. Šipulová and from inside: The story of judicial self-governance in Slovakia' (2018) 19 *German Law Journal* 7, 1741–1768; and on Romania see Selejan-Guțan (n 63) 1710

93 It should not be forgotten that even at the peak of the judicial capture under the government of Gruevski in 2014, later confirmed by the EC in 2016 and the Report of senior experts led by Priebe in 2015, there was a proposal in the Assembly for constitutional amendments which among other things foresaw a further shift of the balance in the composition in favor of judges. For more on these draft constitutional amendments see in Venice Commission, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, (Rome, 10-11 October 2014) CDL-AD(2014)026.

spots for judicial members should be distributed.[94] The current legislative framework, besides the one judicial member elected from the Supreme Court, regulates that four members of the JC will be elected from the four territorial jurisdictions of the respective appellate courts, whereas the remaining three members will be elected on a national level from the judges belonging to the ethnic communities that are not minorities in the country.[95] In this respect several interviewed judges, curiously even basic court judges, have promoted the idea of having only judges from higher courts as members of the JC. However, the presence of only senior judges from higher courts would serve the empowerment of the judicial elite, the risk of which was stressed in the second Priebe report from 2017.[96] This would run against the international standards which promote the adequate representation of levels of the judiciary within the judicial councils.[97] Accordingly, the most numerous members of the judiciary, the judges from basic courts, would not be represented within the judicial self-governance body.

The main reason, according to the interviewees, for such a stance is that it would not be recommendable to have first instance judges assess and evaluate or decide in disciplinary procedures against higher instance judges or even Supreme Court judges. However, regarding the evaluation of the judicial work, the statutory framework from 2019 has provided that the assessments and evaluation are conducted by commissions composed of appellate court judges and Supreme court judges depending on the rank of the judge being evaluated.[98] Furthermore, the law provides even a possibility of not having any first instance judges as members of the JC since the electoral process is open for both the appellate court judges as well as basic court judges within the judicial electoral districts.[99] Thus, this would depended solely on the candidatures and votes of judges. Additionally, there are first instance judges that have a respectable experience and knowledge who have not reached the higher judicial ranks either because there are not enough spots for every exceptional or good judge from the basic courts to reach the higher courts or have not

94 Based on this criteria Ginsburg and Garoupa categorize judicial councils as hierarchical and non-hierarchical. See Garoupa and Ginsburg (n 4) 122. See for instance Selejan-Guțan (n 63) 1716: "most of the candidates come from lower courts, and to the rules of composition, according to which three out of five elected prosecutors and four out of nine elected judges represent the lowest courts/prosecutors' offices." See also over the dominance of higher court judges in the Spanish Judicial Council in Torres Perez (n 88) 1782. For more on Italy and the dominance of the Supreme Court judges in the judicial council until 1981 see Benvenuti and Paris (n 16) 1654 -1655.

95 Articles 6(1), 13(3) and 16 of the Law on the Judicial Council of RNM (n 52).

96 Priebe 2017 (n 75) para 27.

97 Kyiv Recommendations (n 4) para. 7 and see CCJE Opinion no. 24 (2021): Evolution of the Councils for the Judiciary and their Role in Independent and Impartial Judiciary (Strasbourg, 5 November 2021) para. 30 and Venice Commission, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, 5 March 2015, CDL-PI(2015)001, 76.

98 Article 81 of the Law on the Judicial Council of RNM (n 52).

99 Articles 11 and 13 of the Law on the Judicial Council of RNM (n 52).

been willing or have been discouraged to apply for judicial promotions, especially during the last two decades, because they distrust the procedure and system. Judging by such stances of some interviewed judges we could note an emphasis placed on the hierarchical mentality over the value of representativeness. The problems that this type of mentality might cause will be the subject of the next two dimensions of the judicial culture researched in the upcoming two papers.

At the end of this part discussing the composition of the JC few comments will be made concerning the role of the third category of members of the JC, the ex officio members. In past several years the status of the President of the Supreme Court and the Minister of Justice as ex officio members has been subject of legislative changes which have mainly involved the removal of their voting rights in the JC as well as the possibility to initiate disciplinary procedures against judges and the rule that they cannot be elected as president or vice-president of the JC.[100] This has been perceived as a step forward in shielding the JC from instrumentalization by either the politics or judicial elites as seen through the President of the Supreme Court.[101]

Nevertheless, a formal rule obviously cannot repel damaging external or internal influences only by diminishing the status of the ex officio members.

In the past seven years none of the ministers of justice have attended a single meeting or session of the JC, usually justifying this by referring to the GRECO country recommendation for removing the Minister of Justice from the composition of the JC.[102] Although it could be argued that the absence of the Minister of Justice has a preventive character in avoiding any possibility for direct influence or pressure by the Minister on the work of the JC, still there were comments made in the interviews that his or her presence is important in obtaining relevant information for the developments and problems in the judiciary, especially the ones which are within the competence of the ministry of justice. On the other hand, it would be false to claim that the pressure of the executive power on the JC would be materialized only through the presence of the Minister at the sessions of the JC. For instance, contrary to relevant standards the previous Minister of Justice has been the leading figure in promoting the new Methodology on the assessment and evaluation of the judicial work, which he labeled

100 Venice Commission Opinion (n 93) para. 53 et seq.; and Venice Commission, Opinion on the Law on the Disciplinary Liability and Evaluation of Judges of the FYRO Macedonia, 21 December 2015, CDL-AD(2015)042 paras. 65 and 66.

101 This resulted from the abuse of the position of MoJ in the JC during the period of Mihajlo Manevski during the period from 2006 to 2011. The President of the Supreme Court at the time was also in the middle of this scheme of abuse of power. See for instance ECtHR, Judgement, Mitrinovski v. FYRO Macedonia, App. No. 6899/12, 30.4.2015; ECtHR, Judgement, Jashkovski and Trifunovski v. FYRO Macedonia, App. No. 56381/09 and 58738/09, 7.1.2016; ECtHR, Judgement, Poposki and Duma v. FYRO Macedonia, App. No. 69916/10 and 36531/11, 7.1.2016; ECtHR, Judgement, Gerovska-Popchevska v. FYRO Macedonia, App. No. 48783/07, 7.1.2016.

102 Group of States against Corruption (GRECO), Fourth evaluation round: Corruption prevention in respect of members of parliament, judges and prosecutors, 6 December 2013, Greco Eval IV Rep (2013) 4E, para. 100.

as the Methodology for filtration or cleansing of the judicial ranks, even though this is a by-law that is supposed to be adopted by the JC and not the Ministry of Justice.[103] In this way he was essentially instilling a sense obeyance and even fear among judges as the evaluation could be another instrument for rewarding or sanctioning judges. Once again in breach of international standards, using evaluation of judges as a measure or instrument for disciplining judges is openly promoted.[104] Another serious instance, the most recent one, is the case of the Minister of Justice calling out publicly two judges, members of a criminal panel of three judges of the Skopje Appellate Court, to publicly explain why they decided to abolish the detention of a high-profile political figure of the previous governing coalition and former chief of the secret service of North Macedonia.[105] Only these two instances, although it could be argued there are some other, have certainly had their damaging effect on the judicial culture, thus perpetuating the culture of fear and distrust and perhaps proving right the opinion stated in the second Priebe report that "[m]istakes of the past should not be repeated and one form of state capture must not be replaced by another".[106] Interestingly, it was only in the latter instance that we had a public reaction, a rather mild one, through a statement of the JC without the president of this body stepping out in public.[107]

The last point worth noting regarding the composition of the JC is concerning the status of the President of the Supreme Court as an ex officio member of the JC. Namely, it was noted that the President of the Supreme Court does not attend the informal working meetings of the JC and one occasion waited alone for one such meeting to finish and take part in the official session of the JC. These and similar situations are rather indicative of the state of judicial self-governance in the country as well as the necessity of transforming the actual judicial culture burdened by a clear tendency of corporatism and presence of hierarchical mentality.

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103 See for instance the press conference of the Minister of Justice "Маричиќ: Во понеделник Советот за реформи во судството ќе ја потврди методологијата за прочистување на правосудството", 25 December 2020, available at: https://vlada.mk/node/23713 ; or the interview „Маричиќ: Во првите 100 дена ќе го имаме моделот за прочистување на судството", 11 September 2020, available at: https://360stepeni.mk/video-marichik-vo-prvite-100-dena-ke-go-imame-modelot-za-prochistuvane-na-sudstvoto/ . See also Article 82(4) Law on Judicial Council of the RNM (n 52).

104 CCJE Opinion no. 17 (2014) On the Evaluation of Judges's Work, the Quality of Justice and Respect for Judicial Independence (Strasbourg, 24 October 2014) paras. 12, 44 and 47; Venice Commission 2015 (n 100) paras. 51-55.

105 See for instance „Маричиќ „удри" по судиите што го пуштија Мијалков од притвор", 22 December 2021, available at: https://360stepeni.mk/marichik-udri-po-sudiite-shto-go-pushtija-mijalkov-od-pritvor/

106 Priebe 2017 (n 75) 3.

107 See for instance "Судскиот совет се огласи за случајот со Мијалков: Не работиме под политички притисок", 23 December 2021, available at: https://360stepeni.mk/sudskiot-sovet-se-oglasi-za-sluchajot-so-mijalkov-ne-rabotime-pod-politichki-vlijanija/ . See also Selejan-Guțan (n 63) 1723: "These actions of "defending judicial independence" influence de facto independence, i.e. may reinforce the resistance of judges against potential external pressures and attempts of intimidation."

4.2.2 Election and status of the members of the Judicial Council

It could be argued that the issue of elections of the JC members is the most revealing when it comes to the existing gap between formal rules and informal norms and practices which are shaping the judicial culture of fear and distrust in North Macedonia.[108] The elections of the of the JC members are crucial in influencing or even controlling the judiciary by the executive. Moreover, the elections are the main pathway for establishing the input legitimacy of the JC which potentially determines to a certain extent the output legitimacy, as well as the authority and respect of this institution. At the same time, it is an aspect of the JC in which the judges have a possibility for directly or indirectly influencing the whole electoral process. In this regard, this aspect of the judicial governance could be defined as one the most telling for the dominant judicial culture in the specific country. Therefore, the focus is placed on the elections of both judicial and non-judicial members and the stance of judges in their role in these processes.

4.2.2.1 Election of judicial members

One of the key features of the judicial councils in general is for them to have at least a majority of members elected directly by the judiciary. This features essentially provides a strong link between the judicial governance and the judges thus trying to instill a sense and perception of judicial self-governance. In the case of North Macedonia, while formally this link appears to be strong, the practice seems to belie this view especially if perceived through the shortcomings of the electoral practice within the judiciary due to informal practices.[109] Besides the issues related to the distribution of the judicial member spots and the representativeness, which have been addressed previously, there are several problematic aspects of electoral practice. The integrity of the electoral process within the judiciary appears to be burdened, as indicated in the interviews, by various forms of pressuring or undue influencing. The first form is through the presidents of the courts who suggest or even in one case clearly pressures the judges to vote for a specific candidate. As one of the interviewed judges stated:

> *"the elections go like this: the president of the court invites you to his/her office and tells you whom to vote for. This has happened to me personally when one of our court presidents told me that if he saw a ballot for a candidate for which it is known to be my friend, then it would be clear who gave that vote."*

108 More on the importance of the elections of judicial members for the status and authority of judicial councils see Spain Torres Perez (n 88).

109 On the positive and negative aspects of the involvement of the judicial associations in the process of electing judicial member of the judicial council in Spain and Italy see Torres Perez (n 88) 1773 et seq.; and Benvenuti and Paris (n 16) 1655-1659.

Alternatively, the decision on whom to vote for are discussed during general meetings of the court where a sort of a collective or strategic decision or a strong recommendation is made for the individual right to vote of judges. Accordingly, even though the voting is secret still many judges tend to align with such 'recommendations' revealing the level of culture of independence and indifference of judges over the negative consequences from the entrenchment of such practices.

Another issue burdening the electoral process is that most judges do not even know the candidates they vote for. There is an obvious lack of campaigning among the candidates for a post in the JC and there is no presentation whatsoever of their programs and vision for their future work and goals as members of the JC. As result there are comments that not the best candidates are elected and that many judges are discouraged to step in as candidates due to their fear from certain consequences or their distrust in the system. All in all, the electoral process appears to be compromised through all these indications leaving ample room for creating a perception that in most cases the elections are determined by political interests or interests of certain judicial elites. Three of the interviewed judges have clearly stated that some results were known prior to the elections, meaning they already knew which candidates would be elected, something that is even more emphasized when non-judicial members are concerned.

It is distressing to observe the indifference and lack of integrity as well as adequate sense of independence and integrity in a significant part particularly in an area in which they have a direct say. It appears that judges are not aware enough of the importance of choosing the most suitable members of the JC based solely on their authority and reputation since they could be a factor of change in the perception and functioning of the JC taking into consideration that judicial members represent a majority within this body. Legislative changes do not suffice in such cases as the independence of mind cannot be legislated.[110] Instead, it is through the initial and continuous judicial trainings as well as awareness raising campaigns that incremental changes could be brought.

4.2.2.2 Election of non-judicial members

The reserved spots for non-judicial members of the JC represent a feature of the institutional design of judicial councils aiming at securing certain involvement of political institutions, above all the parliaments, in the election of members of the judicial council. These members serve as a bridge between the judiciary and the society as they are intended to bring and represent different viewpoints in the society and decrease the risk of judicial corporatism.[111] In North Macedonia the non-judicial members are elected by the Assembly from rank of university professors of law, attorneys at law and other distinguished jurists. This constitutional definition is extended in the Law on the Judicial

110 Nicolaïdis and Kleinfeld (n 21) 20.
111 CCJE 2021 (n 97) para. 29; and Venice Commission Compilation (n 97) 78-80.

Council by enumerating also former judges of the Constitutional Courts and judges of international courts as possible non-judicial members. Only candidates with at least 15 years of experience in legal profession during which the candidate has distinguished herself with academic or professional work or by her public engagement are eligible for this post. Additionally, these candidates should have undisputed integrity and authority for holding the membership in the JC.[112] Such formal rules should, at least theoretically, secure that only candidates of high standing in the legal profession, truly distinguished through their careers become members of the JC providing authority to this institution. However, the practice has once again proven that formal rules are far from enough and currently the election and status of non-judicial members have been subject of significant controversies. Unfortunately, it also the constitutional provision enabling a single parliamentary majority to dominate the election of the non-judicial members that adds to these controversies since only a simple but double majority of all representatives is required for electing them.[113] Judging by the interviews and the general atmosphere around the JC it seems that the election and the status of the non-judicial members have been fueling a strong resentment among judges.

The most recent elections represent a confirmation of the deepening discontent. Namely, two judicial advisors, that is judicial clerks, have been elected as non-judicial members. The Assembly by electing these two members has basically interpreted that they are distinguished lawyers and as such are eligible for this post. Following such a 'broad' interpretation of the formal rule, stemming from a clear formalism and rigid textualism, it could be possible to have teaching assistants or legal interns from legal firms become future members of the JC. It is really troubling for every system to have such 'distinguished lawyers', if that is truly the case, occupy a post of judicial clerk for most part of their respective careers. Moreover, if such judicial clerks have never been perceived as distinguished enough to become judges, how could they be elected as member of the JC. In any case, understandably, this election has drawn significant criticism from all judges, even from one of the non-judicial members of the JC.

> *"It really disturbs me to see that we have judicial clerks as members of the Judicial Council"*

> *"I always clearly state my opinion on this issue. If you have a member from the judicial clerks, that means something is wrong. It means that you basically have elected*

112 On the conditions for candidature for a non-judicial member see Article 11 of the Law on the Judicial Council of the RNM (n 52).

113 Article 104 as amended with Amendment XXVIII to the Constitution of RNM.

someone that worked for a judge as a clerk and now overnight you place this clerk to assess judges' work and decide on the careers and accountability of judges."[114]

For things to be even more worrying the parliamentary procedure is highly untransparent without any hearing in the Assembly. Basically, the Assembly representatives are voting for candidates they have not seen and heard but only read their short biography, however nothing related to a possible program or vision for their role as future member of the JC. Paradoxically, the election procedure in the Assembly for members of institutions which do not have a constitutional status or constitutionally guaranteed independence, such as the State Commission for Prevention of Corruption[115] or the Commission for Prevention and Protection from Discrimination,[116] is far more demanding compared to the procedure of electing non-judicial members of the JC. Therefore, it should not come as a surprise that there is a certain downgrading of the status and authority of the JC in this regard and that, for instance, not a single university professor of law has ever been a member of the JC while we have had professors as ministers or Assembly representatives. It is worth noting that the revolt of judges in this respect is fueled by the fact that currently a judicial clerk with a prior political background is the President of the JC, while they would accept a renowned professor or former judge of an international court to take this position. This downgrading of the image and authority of the JC is also reflected by a clear tendency of a decreasing number of candidates applying for vacancies in the JC and those that are applying have a lower profile.[117]

The damaging practice of electing non-judicial members is a step further from what already occurred previously in 2013 when two judges from the administrative judiciary were elected by the Assembly as non-judicial members of the JC.[118] The author of this paper initiated a form of strategic litigation, aimed at testing the system, before the administrative courts by filing lawsuits for the annulment of the parliamentary decisions for their

114 This has been observed also in Petrovska and Avramovski (n 73) 33.

115 Article 12, Закон за спречување на корупцијата и судирот на интереси (Law on prevention of corruption and conflict of interest) („Службен весник на РСМ" бр. 12/2019).

116 Article 18, Закон за спречување и заштита од дискриминација (Law on prevention and protection against discrimination) („Службен весник на РСМ" бр. 258/2020)

117 For example, of the last vacancy for a post of a non-judicial member of the JC from November 2020 there were only three candidates. Two of them applied from a post of judicial adviser/clerk and one from the post of N enforcement agent. For more on the information on the three applicants see in the Предлог за избор на член на Судскиот совет на Република Северна Македонија на Комисијата за прашања на изборите и именувањата на Собранието на Република Северна Македонија бр. 16-4370/5 from 14.12.2020 година (Proposal for the election of a member of the Judicial Council of Republic of North Macedonia of the Parliamentary Committee on the issues of elections and appointments to the Assembly of the Republic of North Macedonia) available at: https://sobranie.mk/materialdetails.nspx?materialId=2be64ebb-9209-425b-a653-22354c96b377

118 Venice Commission 2014 (n 93) para. 76; and Priebe 2017 (n 75) para. 38. On a similar practice due to a lack precise provision on the election of non-judicial members in Slovakia see Spáč (n 93) 1794.

election to the JC. Strikingly, the Higher Administrative Court reasoned that these parliamentary decisions have an administrative character even though they are adopted through the votes of the Assembly representatives and by the highest legislative body in the country. As result of this court reasoning the only ones having a legal interest and standing to seek annulment, according to this court, are the Assembly itself and the candidate that was elected. This has been a first time a judicial procedure was initiated on such a matter related to the JC, and the only one so far. Even though this path has been paved, no one has filed another lawsuit asking for annulment even though there are strong reasons as explained above.

Another newly introduced provision in the Law on the Judicial Council from 2019 made these aspects of the election of non-judicial members even more controversial among judges. Namely, Article 8 regulates that both the president and vice-president of the JC must be elected from the ranks of the non-judicial members for non-renewable term of two years. Intriguingly, one of the judicial assistants was the first elected president of the JC according to this provision. This has invited a plethora of remarks in the interviews but also in the broader debates over the role and status of the JC as result of this provision and practice. Interestingly, there was a consensual view expressed in the interviews that this rule should be changed and that there should a rule which provides that the president and vice-president could be elected from both judicial and non-judicial members.

> *"In this moment I do not see any progress, on the contrary I see processes that represent a regression, like the legislative changes introducing the possibility the president of the Judicial Council to be elected from the members that were elected by the Commission for matters of election and appointments. This represents deterioration of the judicial culture by the willingness of the executive and legislative power to control the judiciary."*

These latest developments have been creating strong resentment among judges, even among the judicial members of the JC, however the passivity has remained the predominant stance and no action has been taken. Since 2017 the new government does not have such a strong hold on power, still there are no serious instances of resistance by judges and the judiciary amidst controversies and problems which once again confirms the prevailing traits of the judicial culture in North Macedonia. It is exactly the importance of building resilience of the judiciary that will be addressed in the last section.

4.3. Judicial indifference and self-interest as a feature of the judicial culture in North Macedonia

The previous two sections have discussed many contentious and problematic issues touching upon the judicial culture in respect of judicial self-governance. This has invited a further question of what have judges and their respective association or the judiciary taken as measure or activity in fending off the negative tendencies with the judicial self-governance and protecting judicial independence. There are numerous forms of activity that are at disposal for judges. From the newly introduced procedure for disciplinary accountability of the members of the JC, to initiating constitutional review procedure before the Constitutional Court, legally challenging the election of non-judicial members by the Assembly or advocate for a more transparent and competitive elections of judicial members of the JC. The comparative practice in Europe undoubtably proves that these and similar forms of pro-active stance of judges in demonstrating resistance and resilience has been instrumental and rather successful in securing and safeguarding judicial independence.[119] As Bobek argues: "Commitment to judicial independence is one of the attitude and the mind of the individual judge, the lack of which cannot be replaced by institutional (structural) safeguards."[120] Therefore, the importance of fostering and manifesting culture of independence cannot be stressed enough.

Unfortunately, so far there are no notable examples of such pro-active stance, outside of certain engagement of the Association of judges[121] regarding their salaries and few public statements over the ideas of the new government on judicial vetting.[122] There is one pending case before the Constitutional Court over the abstract constitutional review of a statutory provision regulating that only non-judicial members could be a president and vice-president of the JC, however the application was filed by an attorney at law and not by judges or the Association even though there is a strong disagreement and resentment over this provision.[123] Interestingly, during

119 For an examples of such a pro-active stance in Czechia see Z. Kühn, 'The Judiciary in Illiberal States' (2021) *22 German Law Journal 7*, 1238-1239, or for Croatia see for instance D. Aksamovic, 'Regulatory reform in Croatia: an uphill battle to enhance public confidence' in R. Devlin and A. Dodek (eds) *Regulating Judges: Beyond Independence and Accountability* (Elgar 2016) 130. Paradoxically, even in Hungary and Poland, considering the rather aggressive attacks on judicial independence, a certain level of judicial resistance could be recognized. For more on this see J. E. Moliterno and P. Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious' (2021) 22 *German Law Journal 7*, 1172-1185.

120 Bobek (n 25) 118

121 See for instance an initiative of the Association of judges in the Constitutional Court case, Уставен суд, У.бр. 57/2020-1 and У.бр.146/2020-1from 15 May 2020.

122 See for instance the interview with the President of the Association of Judges and Supreme Court judges Dzemail Saiti „360 степени: Ветингот може да се спроведе преку Антикорупциска и Судски совет", available at: https://www.youtube.com/watch?v=YfLM3uWTzok

123 See the case of the Constitutional Court of RNM, Уставен суд на РСМ, У.бр. 233/2020 from 28.04.2021

the interviews when this question arose even the most vocal and outspoken interviewees tended to change the tone and be more defensive in locating justifications for the inaction and general passivity. In essence it was a combined manifestation of indifference or distrust, and an implied self-interest resulting from an anticipatory fear. The most discouraging in this stance is the distrust of the very system they are part of. If judges themselves are not willing to engage the instruments of the legal and judicial system, then we cannot expect the broader public to trust that they will be able to have their own rights guaranteed and protected by the judiciary.

> *"Just as the Judicial Council is passive, so is the judiciary and the judges and their association is passive, except for judicial salaries. Regarding other statutory regulation, judicial appointments, the work of the Judicial Council, the position of the Association is particularly passive."*

There were even very direct and bold statements made by one interviewee concerning the passivity of judges and their respective Association:

> *"Do you really think that we have in our country an independent Association of judges? That is the most politicized body that does not have any genuine influence. Where is this Association now? ... It is even more politicized than the Judicial Council."*

While political elites will always tend to maintain or even increase the level of political control over the judiciary the only way to neutralize and fend off these forms of control is for judges to build and demonstrate resilience and devotion to protecting their independence which requires personal courage.[124] This stance could be conducive to raising the level of trust in the judiciary increasing the costs for encroachments by political elites or other centers of powers.[125] The pro-active attitude of judges and the Association could a game-changer that will eventually bring changes to the political culture and practice since outright attacks and malign influences will be politically damaging. Currently, that as result of the indifference and self-interest judges leave the impression that they are awaiting someone else to resolve their problems. The need for external pressure from the EU was alluded in several interviews.[126] The inertia from the previous system is perpetuated and just as the broader public turns towards the political elites and addresses the problems in the judiciary, so do judges themselves. In other words, judicial empowerment of a judiciary and judges not willing to safeguard their independence is doomed to failure.

> *"[the] transfer of power can work only if the judiciary is able and willing to take control over itself. Implementing self-governance structurally without building the corresponding capacities was therefore insufficient."*[127]

124 Bobek (n 25) 105.
125 Selejan-Guțan (n 63) 1723; and Vanberg (n 85) 113-115.
126 Selejan-Guțan (n 63) 1728.
127 Seibert-Fohr (n 7) 1345-1346.

The transfer has formally been perceived to be done by establishing a judicial council in North Macedonia with majority of judicial members. Even if there is a presumption that non-judicial member of the JC would have a certain political bias it should be the judicial members responsibility so secure the independent function of the JC in the interest of the judiciary. However, this research demonstrates that as result of judicial clientelism and indifference neither the judicial members demonstrate an adequate level of culture of independence nor are the judges, as the last resort, willing to act and do something about this long-standing problem.

Apart from the dominant traits of the judicial culture which are perpetuated through the professional socialization of relatively young judges entering the judiciary there is another reason that could be observed for this. Namely, the judges in North Macedonia have been missing a crucial external ally in the Constitutional Court that could have a significant impact and play a particularly constructive role in shaping and fostering a more proactive judicial culture. Based on the experience of some other countries in Europe constitutional courts were rather instrumental in establishing and securing judicial independence.[128] However, this institution is marginalized in North Macedonia and it has low standing and respect among judges.[129]

The analysis so far reveals the obvious necessity to transform the dominant judicial culture in order to establish a genuine judicial self-governance. Such an endeavor of transformation, although involving a complex set of activities, must be essentially based on legal education and training if sustainable changes are to be achieved in instilling the value of judicial independence and developing judicial resilience. While this will take some time and it will be incremental, the importance of legal education and judicial training clearly show that they need to be the starting point in setting firm foundations for judicial independence, something that is recognized and advocated in other countries as well.

> *It requires changes in education and judicial training to coach judges in resisting pressure. […] It is essential to start with this as early as during legal education, highlighting the strong personalities among judges who have stood against pressure, teaching about the importance and role of the rule of law, and providing training for establishing resilience against inappropriate pressure.*[130]

128 For the example from Italy see Benvenuti and Paris (n 16) 1651-1652; on Czechia see Kühn (n 119) 1238-1239; on Croatia see Aksamovic (n 119) 130-131, 134-135; and on Slovenia see Avbelj (n 45) 1914-1915.

129 For more on the place and role of the Constitutional Court of RNM see in D. Preshova, *The Constitutional Court Lost in the Judicial Reforms* (Konrad Adenauer Foundation and Institute for Democracy "Societas Civilis" 2018).

130 Čuroš (n 2) 1280

5. CONCLUSION AND RECOMMENDATIONS

The second paper analyzes the judicial culture in North Macedonia and its compatibility with the judicial self-governance through a strong judicial council introduced as a part of the EU induced judicial reforms since 2005. It has been demonstrated that while the institutional structure and formal rules are highly aligned with the European standards, 17 years into the process of judicial reforms there are obvious obstacles in reaching the adequate standards of judicial independence. These obstacles could be located outside of this formal institutional framework. In this sense there is a clear case of an existing gap between the formal rules and informal practices in this realm.

Choudhry's caveat on the threat to the judiciary posed by indifference and self-interest of judges in the context of North Macedonia is translated into a judicial culture characterized by fear, apathy and clientelism. It is argued that this has a detrimental effect on judicial independence and on the rule of law in general and it could be observed in different aspects of the judicial governance in North Macedonia. Informal practices such as erroneous legal interpretations, instrumentalization of the law, the existing clientelism and self-interest, apathy and passivity along with the expectation that someone else is to resolve the conundrum of judicial independence are continuously having their corroding effect. The departure from the formal rules ensuing from such practices that characterize the judicial culture makes a strong case for the claiming that without a parallel process of transformation of the judicial culture the judicial self-governance will remain just an illusion belying the actual practice. As it is shown by multiple studies, the latter only further pronounces the negative consequences, such as politicization and/or judicial corporatism, of premature introduction of strong judicial self-governance in a context of judicial mentality or habitus burdened by such perception and practices.

Several instances have been presented that are related to the constitutional mandate and status of the JC, on the one hand, and the composition and election of members of the JC. Ranging from the constitutional mandate of the JC that is overshadowed by the perception of safeguarding political interest, through the problematic aspects related to the views on the balance and representativeness of the composition, to the controversies of bending the rules on the election of non-judicial members and the dominant indifference in electing judicial members of the JC. They all confirm the rather distressing state of judicial culture in North Macedonia. Despite the outspokenness of most of the interviewees in discussing the problems related to the judicial governance in North Macedonia they were rather restrained when it came to the question of what judges could do about these negative developments. The indifference, apathy and self-interest thus took the central stage.

The centrality of informal practices and perceptions in shaping the judicial culture undoubtably leads to the conclusion that the transformation should be primarily addressed through education and training since mentality and habits cannot be changed by legislation. Therefore, this paper draws the attention to the great importance of legal education and judicial training and puts forward recommendations that are supposed to initiate the transformative process in entrenching the culture of judicial independence through formal legal education and initial and continuous judicial training. Therefore, the relevant institutions, above all the Academy of judges and prosecutor needs:

- To place stronger emphasizes on the value of judicial independence and the responsibility of judges in safeguarding it by fostering the culture of independence and developing judicial resilience going beyond formal rules and addressing the existing informal practices.

- To devise a special course on the different models of the judicial governance in Europe in comparative perspective elaborating the strengths and weakness as well as present in details the specific form of judicial self-governance established in North Macedonia.

- To develop a training program for potential candidates for judicial members of the Judicial Council in campaigning and promotional activities in the electoral process.

- To highlight the importance of judicial association with comparative overview of both the successful and less successful cases in safeguarding judicial independence.

- To introduce training programs for members of the governing bodies of the Judicial Association on advocacy and lobbying in the field of judiciary.

- To initiate a practice of offering an induction course for the newly elected members of the Judicial Council of RNM on judicial self-governance, judicial independence and judicial management.

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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Separate but not Independent: The (In)Compatibility of the Judicial Culture with Judicial Self-Governance in North Macedonia

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