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The Legal Status of the Judicial Council of Montenegro as One of the Determinants of the Process of Accession to the European Union: A Theoretical and Legal Analysis

Abstract

By defining priorities and setting requirements for judicial independence, the EU strengthens democratic governance mechanisms. This is demonstrated by the EU's requirement to ensure the independence of the judiciary, which involves delineating the proper position of the Judicial Council. This is a key element in the evolution of the institutional relationship between political power and the body that aims to act as guarantor of the rule of law and controller of the supreme authority's powers. In this paper, the author analyses the provisions of the Constitution and ordinary legislation that define the Judicial Council's constitutional position within Montenegro's political system. Particular attention is paid to the manner in which the council's members are elected in the context of Montenegro's European aspirations. The paper focuses on demonstrating the council's legal status, highlighting its composition and competences, and the status of its members – factors that are crucial for establishing the council's independence guarantees. Additionally, the author attempts to answer the question of whether Montenegrin normative solutions meet European standards within the scope of the research. The Judicial Council of Montenegro is a specialised body with wide-ranging competences in the judiciary, though changes to the composition of the council and the mode of election of its members are required.

KEYWORDS: judiciary, judicial council, judicial independence, Montenegro

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1 | Introduction

The judiciary plays a fundamental role as the third power in a democratic state under the rule of law. The need to create appropriate institutions and regulations to guarantee the independence of the judiciary is a fundamental task of modern democratic states. In European legal systems, the upholding of judicial independence and the independence of judges is increasingly being entrusted to specialised bodies, which are usually the judicial councils. These councils act as intermediaries, as it were, between the executive and the judiciary in order to guarantee the independence of the judiciary.^[1] Their creation in individual countries is due to a number of factors; even today, the objectives of their creation still vary, the most important being the separation of judicial appointments from political influence. The proper names of such councils, their legal status, organisation, and competences found in different countries are quite diverse. A counterpart to judicial councils in other European countries, although specific in terms of their remit is the Judicial Administration found in Denmark and Sweden. Judicial councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process, while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline.^[2] The creation of judicial councils is not a *sine qua non* for the existence of an independent judiciary and judicial independence, but in principle they are functioning in all so-called new democracies.^[3]

In the EU accession process, the EU bodies take a number of documents and rulings of various European institutions and bodies as a basis for assessing the legal arrangements for the alignment of the candidate

¹ Violaine Autheman, Sandra Elena, *Global Best Practices: Judicial Councils. Lessons Learned from Europe and Latin America* (IFES Rule of Law White Paper Series, 2004), 1-5. https://pdf.usaid.gov/pdf_docs/PBAAB590.pdf. [accessed: 22.11.2024].

² Nuno Garoupa, Tom Ginsburg, „Guarding the Guardians: Judicial Councils and Judicial Independence” *American Journal of Comparative Law*, No. 1 (2009): 106. <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1425&context=facscholar>. [accessed: 22.11.2024].

³ Hanna Suchocka, „About European Standards Concerning the Appointment of Judges of Common Courts (Based on the Experience of the Venice Commission)” *Toruńskie Studia Polsko-Włoskie*, No. XIV (2018): 48. <https://doi.org/10.12775/TSP-W.2018.003>. [accessed: 22.11.2024].

country's law with European standards in the aspect of justice. There is a wide variety of solutions with regard to judicial councils, but when referring to European standards for the appointment of members of judicial councils and the functioning of the councils, a few key issues should be articulated.^[4] Firstly, the majority of the members of such councils should be judges elected by their own communities at all levels of the judiciary, respecting pluralism within the judiciary. Secondly, the representation of political representatives should be minimised. Thirdly, the judiciary should have a significant say in the selection of members of the judicial council. Fourthly, members of the judicial councils who are not judges should not be appointed by the executive. Fifth, the judiciary council's powers over judicial appointment procedures must be precisely defined in law. Sixth, the council should have broad powers to select and promote judges, and these should be exercised by the council under conditions of absolute independence to the legislature and the executive.

The purpose of this article is to analyse the legal status of the Judicial Council as formed under the 2007 Constitution, as one of the determinants of Montenegro's accession to the EU, in the context of the best standards so far developed in Europe regarding the composition and election of members of the Judicial Councils, as well as their competences and organisation. Due to the limitations arising from the narrow research area and the volume of this small study, it does not include references to the constitutional practice, judicial decisions and current problems of the judiciary in Montenegro, as they do not affect the legal status of Judicial Council and are not its subject matter.

⁴ These standards are set out in, inter alia: Consultative Council of European Judges, On the independence, efficiency and role of judges. <https://rm.coe.int/1680747830>. [accessed: 10.11.2024]; Council of Europe, European Charter on the Statute of Judges. <https://rm.coe.int/16807473ef> [accessed: 10.11.2024]; Consultative Council of European Judges, Opinion No. 10 on the Council for the Judiciary at the Service of Society 23 November 2007. <https://rm.coe.int/168074779b> [accessed: 10.11.2024]; Consultative Council of European Judges, Magna Carta of Judges Fundamental Principles. <https://rm.coe.int/16807482c6> [accessed: 10.11.2024]. Council of Europe Committee of Ministers, Recommendation CM/Rec (2010)12 on Judges: Independence, Efficiency and Responsibilities". <https://www.icj.org/wp-content/uploads/2014/06/CMRec201012E.pdf> [accessed: 10.11.2024]; Inter-American Commission on Human Rights, Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas. <https://www.oas.org/es/cidh/defensores/docs/pdf/justice-operators-2013.pdf> [accessed: 10.11.2024].

2 | Composition of the Council

The regulation dedicated to the Judicial Council was included in chapter five, in part ten, of the Constitution of Montenegro (Articles 126-128).^[5] Detailed regulations on the council were included in the Law on the Judicial Council and Judges. The establishment of the council as a constitutional body was intended to strengthen its constitutional position as the body responsible for ensuring the independence of the courts and the independence of judges.

The composition of the council and the manner in which its members are elected is crucial in determining the legal status of the Judicial Council. The council consists of ten members. Ex officio, the council is composed of two virile members – the President of the Supreme Court and the minister responsible for the judiciary. Four members of the council are judges, elected and removed by the Conference of Judges, with equal representation of courts and judges. Three members who are judges are elected from among the judges of the Supreme Court of Montenegro, the Appellate Court of Montenegro, the Administrative Court of Montenegro, the High Misdemeanour Court of Montenegro, the Commercial Court of Montenegro and High Courts. One member who is a judge is elected from among the judges of the Basic Courts and the Misdemeanour Courts. The other four members are elected and dismissed by the Parliament from among eminent lawyers. The President of the Judicial Council comes from among the “prominent lawyers” and has a casting vote if the vote is tied, five to five (“a golden vote”). This arrangement significantly undermines the autonomy of the Judicial Council from the viewpoint of judicial independence and autonomy.^[6]

It is also worth noting that, according to Article 127(6) of the Constitution of Montenegro, the composition of the Judicial Council is announced by the President of Montenegro. This provision imposes an obligation on the President to announce the composition of the council without delay. Adopting a different view, granting the Head of State discretion to decide whether or not to announce the composition of the Council selected by the authorized bodies, would mean creating a legal norm that would make the President an additional body with the right to decide on the staffing of the Judicial

⁵ The Constitution of the Republic of Montenegro (SU-SK Ref. No. 01-514/12).

⁶ Slobodan Orlović, „Constitutional Issues of the Judicial Career in Western Balkan States (Serbia, Montenegro, Bosnia and Herzegovina, North Macedonia)” *Central European Journal of Comparative Law*, Vol. II (2021): 2. <https://ojs3.mtak.hu/index.php/cejcl/article/view/6037/4719>. [accessed: 29.11.2024].

Council. The announcement of the composition of the council cannot be seen as belonging to the possible discretion of the head of state. The President is obliged to announce the composition of the council. In this respect, he/she is not in a position to make an independent assessment, either of the legal basis of the choice made or of the correctness of the procedure. This type of solution must be considered unnecessary and, under certain political conditions, may be used against the “spirit of the Constitution.”

An analysis of the provisions of the Constitution and the Law on the Judicial Council and Judges^[7] leads to the conclusion that the modes of election of council members are separate for candidates who are judges (judicial procedure) and for candidates elected by parliament (parliamentary procedure). The judicial procedure starts three months before the end of the council’s term of office. The procedure for drawing up lists of candidates and the procedure for appointing members to the council is carried out by the Nomination Committee, which consists of a chairman and two members who are elected from among the judges by an enlarged session of the Supreme Court, on the proposal of the assembly of judges of all courts. In the first stage, the extraordinary meeting of the judges of the Supreme Court selects two candidates. Extraordinary meetings of judges of the individual courts (High Misdemeanour Court of Montenegro, Commercial Court of Montenegro and High Courts report one candidate each. In order to select candidates from among the judges of the basic and misdemeanour courts, the Presidents of these courts shall nominate two candidates. The lists with the candidates shall be forwarded to the Nomination Committee. In the second stage, the President of the Supreme Court, in order to elect the members of the Judicial Council, convenes the Conference of Judges, consisting of all judges and presidents of courts in Montenegro. The Conference selects three members who are judges, who shall be elected from among judges of the Supreme Court of Montenegro, the Appellate Court of Montenegro, the Administrative Court of Montenegro, the High Misdemeanour Court of Montenegro, the Commercial Court of Montenegro and High Courts, with at least ten years of judicial service.

The Parliamentary Committee on the Political System, Judiciary and Administration is initiating the procedure for the election of non-judicial members of the council – from among eminent lawyers. The legislator has set additional requirements for the candidates, meaning that the candidate

⁷ Zakon o Sudskom Savjetu i Sudijama (Objavljen u “Sl. listu Crne Gore,” br. 11 od 12. marta 2015, 28/15).

must, in particular: have at least 15 years of legal professional experience and have a good personal and professional reputation.^[8] The law on the council as well as the parliamentary rules of procedure do not specify the entities entitled to propose candidates for council members. In addition, the law does not stipulate a requirement for candidates to have no political affiliation. The committee announces the competition in the Official Gazette of Montenegro, on the website of the parliament and in at least one of the printed dailies. After the deadline for the announcement of the vacancy, the committee verifies the candidates for formalities and interviews each candidate meeting the competition requirements. The committee draws up a proposal with the candidates for submission to Parliament. Parliament elects the members of the Judicial Council with a two-thirds majority of the total number of Members in the first vote, and a three-fifths majority of the total number of Members in the second vote. The second vote may not be held before a month has elapsed.

3 | Competence and Organisation of the Council

The essential constitutional function of the Judicial Council remains to ensure the independence of the courts and the independence of judges. It performs this function through its competences, which can be broadly divided into several areas. Firstly, the council has competences concerning personnel matters of judges: it elects and dismisses judges, elects and dismisses court presidents and jurors, considers reports on the work of the courts, as well as motions and complaints concerning the work of the courts. In addition, the council declares the retirement of judges, determines the number of judges and jurors, rulings on disciplinary matters of judges, jurors and court presidents, transfers judges to other courts, declares vacancies for judicial positions, and gives permission for the temporary arrest of a judge. The second area of the council's powers is its creative powers. The council appoints and dismisses the President of the Supreme Court,

⁸ Mladen Vukčević, Miloš Bošković, "Judicial System in Montenegro (Historical Development, Basic Principles, and Organisation)" *Law&Justice*, No. 13 (2016): 19-20. <https://lawandjustice.taa.gov.tr/dergiler/law-and-justice/law-13> [accessed: 30.11.2024].

the Disciplinary Ombudsman of Judges (his deputies), appoints the Judges' Evaluation Commission, and declares the expiry of the mandates of a judge, court presidents, a member of the Judicial Council, and the President of the Supreme Court. The third area of competence concerns the management of the judicial administration and ensuring the smooth functioning of the courts. Within this group of competences, the council recommends to the government the amount of financial resources for the operation of the courts, gives opinions on draft legislation concerning the judiciary, and issues opinions on whether certain activities constitute activities incompatible with the performance of the office of judge. Additionally, it should be pointed out that the council has legislative competences in the aspect of the functioning of the judiciary. In this respect, the council enacts legislation regulating, *inter alia*, the methodology for preparing reports on the work of the courts and the annual work schedule of the court.

The term of office for council members is four years. The Constitution is silent on the possibility of re-election, but the Judicial Council and Courts Act introduces the possibility of re-election four years after the expiry of the membership of the previous term on the council. The legal status of council members is distinguished by certain specificities. In principle, the mandate for this body is of a differentiated nature. Council members who are not judges have the right to be absent from work while performing their duties on the council with pay. Council members who are judges may, based on an applicable decision of the council, work up to 70% of their working hours in the council, at the same time, the performance of their duties as judges is reduced accordingly. Council members who are judges during their term of office may not be appointed to the position of court president. On the other hand, council members who are not judges during their term of office cannot be appointed as a judge. The term of office of a council member expires before the end of the term for which he or she was appointed in the event of: loss of the status on which the appointment to the council is based, resignation or conviction to absolute imprisonment, as well as in the event of dismissal. The dismissal of a council member is permissible if the member performs his or her duties unreliably or unprofessionally (contrary to the statutory powers), or has been convicted of a crime prosecuted by public indictment, for which there is a penalty of imprisonment. In addition, a council member who is a judge may be dismissed if convicted by a disciplinary court. The primary influence on the dismissal of a council member remains with the Judicial Council for the reason that it is the council that presents the proposal for his or her

dismissal to the body that appointed him or her. The law also provides for the right of appeal to the Supreme Court.

The legal status of council members is also influenced by their remuneration system, which shapes their material status. The remuneration system for council members has not been linked to the remuneration system for judges. Members of the council are entitled to remuneration for work in the amount of up to 80% of the average gross remuneration in force in the previous year. In addition, council members who are members of committees (created within the Judicial Council) are entitled to a remuneration of up to 40% of the average gross remuneration in force in the previous year.

According to the provisions of the Constitution of Montenegro, the Chairman of the Judicial Council is elected by the council from among its members who do not hold the office of judge. The election is carried out by a qualified majority of 2/3 of the council members. In addition, the Constitution prohibits the election of the Minister for Judicial Affairs as the chairman of the council. The President represents the council externally, chairs its meetings, approves its agenda, is responsible for the effective and timely work of the council, and submits an annual report on the council's activities to parliament. The Judicial Council, on the proposal of the President, appoints a deputy president from among the members of the council elected by parliament. The acts and decisions of the council are taken collectively. According to the provisions of the Constitution, the council adopts resolutions by a majority vote of all members, except in cases provided for in the Constitution. In addition, the Constitution requires that the Minister for the Judiciary be excluded from voting in disciplinary cases against judges.

4 | Conclusions

Protecting the independence of the judiciary can be done in various ways, including through dedicated bodies, such as judicial councils. Judicial councils should have an appropriate legal status through which they can guarantee the independence of the judiciary and the independence of judges. Therefore, vague declarations regarding the independence of the council – even when they are included in the constitution – are insufficient. Adequate legal solutions are needed to guarantee the appropriate legal

status of the judicial councils. These are now very relevant issues in the context of EU accession processes.

In this type of body, the issue of the composition of the council and the procedure for electing its members remains fundamental, as these are essential elements to ensure the council's independence and autonomy from political factors. In my opinion, Montenegro's constitutional solutions regarding the Judicial Council require certain corrections in the context of the standards developed so far in Europe. A fundamental shortcoming is the composition of the council, which does not guarantee the judges a majority in the council, which the Consultative Council of European Judges already pointed out in its opinion in 2018.^[9] Also, with regard to the person of the chairperson of the council, the solutions adopted in Montenegro do not meet the recommendations of the Consultative Council of European Judges, which state that it should be a non-partisan person and without links to political parties. It accepts two models for the selection of the chairperson of the council, either entrusting this function to the President of the Supreme Court *ex officio*, or selecting him/her by the council itself from among its members who are judges. Meanwhile, the Constitution of Montenegro stipulates that the President of the Council is selected from among its members, but from among non-judge members.

Judicial councils can be composed exclusively of judges, as well as be of a mixed nature when the council is composed of non-judges, which even protects the council from the accusation of possible corporatism. Permissible variations in the procedure for the selection of members of the judicial councils must consider the fundamental objective of ensuring the independence of the courts and the independence of judges. With regard to the issue concerning the election of the members of the council from outside the judges, it should be considered that the solution of the election of these members by the parliament is acceptable, however, the law should guarantee the maximum "depoliticization" of the whole process, e.g. the formation of a special procedure, the essence of which would be the granting of the exclusive right to propose candidates to the parliament not by political groups, but exclusively by legal or academic circles. In this respect, the current solutions in Montenegro are not sufficient.

⁹ Consultative Council of European Judges, Opinion of the CCJE Bureau Following a Request by the Association of Judges of Montenegro as Regards the Judicial Council of Montenegro. <https://rm.coe.int/ccje-bu-2018-7rev-opinion-montenegro-29-august-2018/16808dooca>. [accessed: 30.11.2024].

The analysis carried out showed that the Montenegrin legislation does not require candidates for council members who are not judges to be apolitical, even in a general way. It would be recommended to exclude from the competition procedure persons who were members of political parties, held governmental positions with the determination of an appropriate time census. Under the current legislation, the final assessment of the requirements for candidates who are not judges, i.e. their professional qualifications and good personal and professional reputation, is left entirely to the political factor – the parliament. Also the membership of the council by virtue of the constitution of the minister responsible for the judiciary seems to be redundant and it is difficult to answer how it would specifically contribute to the council's constitutional functions.

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