UDC/УДК 342.565.2:347.962.2
ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

Full Professor Goran Marković, LL.D.

Faculty of Law, University of East Sarajevo

ON THE METHODS OF SELECTION OF JUDGES OF CONSTITUTIONAL COURTS

The purpose of this work is to analyze different methods of selection of judges of constitutional courts. The author analyzes three main methods: election by parliament, nomination by head of state, and mixed method which means that three institutions elect and appoint a third of judges each.

Each method of selection is only a part of a wider system of selection of judges, since the latter also includes issues such as: term of office, possibility of re-election, professional qualifications, and procedure for election/appointment. However, due to methodological reasons, the author decided to explore only one of elements of these systems.

Using legal and comparative methods as well as general theoretical approach to basic constitutional principles, such as popular sovereignty, democratic legitimacy, accountability and merit, the author analyzes both positive and negative aspects of all three methods of selection.

He also advocates one of these – election of judges by parliament on a proposal of an independent body, and offers his arguments in favour of this method.

Key words: Constitutional court; Judges; Parliament; Head of state; Election and appointment; Independent body.

1. INTRODUCTION

Constitutional courts are political institutions *per se*. Since their decisions often influence the very nature of the legal and more widely social system, their composition is of profound importance. Although their decisions should be politically as neutral as possible and based on their understanding of the legal system, this is not the case in the most sensitive cases, when ideological attitudes and political sympathies of judges decisively and inevitably influence the outcome. Therefore, political neutrality is possible

Goran Marković, *goran.markovic@pravni.ues.rs.ba.*

only when ideological attitudes, class, economic or political interests do not considerably influence the process of decision-making.

These facts make the issue of election of judges of constitutional courts one of the most important issues regarding their very existence and, even more, their influence on the legal system. Therefore, it is very important to explain both positive and negative sides of different methods of election of judges.

The aim of this work is not just to analyze these legal solutions using legal methods, but also to advocate the solution according to which the judges have to be elected by the parliament, with particular and important role of other institutions, for limited term of office, which has to be twice or three times longer than the time length of the legislature, and with no right of judges to be re-elected. In our opinion, these solutions could contribute to the fulfilment of some basic constitutional principles, such as the principles of popular sovereignty, as well as judges' accountability and independence. Although the solution which we shall advocate in this work establishes only relative balance between these principles, we shall argue that other solutions could not guarantee more balanced approach either.

Every serious analysis includes comparative legal approach. However, the analysis has to include political aspects as well since it is not possible to understand the procedure of election of judges if one excludes political and ideological motives which very often decisively influence those subjects who are authorized to make the decision on the selection of judges.

2. WHO ELECTS JUDGES?

2.1. The basic principles

The first question is who elects judges of the constitutional courts. The answer to this question is important for several reasons. Firstly, the constitutional courts' judges have to be politically independent[1] and therefore it is very important to prescribe legal solutions which would enable the achievement of this aim, at least to degree to which it could be achieved. Secondly, judges have to be competent which means that organ(s) which elect(s) them have (or has) to have sufficient competence to make the right choice. Third-

[1] As Maurice Duverger rightly emphasized, judges have to be independent although they are recruited on political ground. They exercise political interpretation for political purposes. – M. Duverger, *La Cinquième République*, Presses Unniversitaires de France, Paris 1960, 144.

Therefore, although political independence of judges is one of principles and aims which a constitutional system has to fulfil, it is highly improbable that independence as a principle could prevail over the fact that judges are in practice political beings and that they are elected or appointed in order to assist in fulfilling particular political aims.

ly, the attitude exists in theory that the judicial review as such is illegitimate[2] since a small number of unelected and unaccountable judges can decide to overrule legislation enacted by parliament which has democratic legitimacy.[3] Judicial interpretation is not "far removed from legislation",[4] as some authors rightly claim, while the classical Kelsenian attitudes begin with the idea of a constitutional court as a negative legislator.[5] Some authors argue that it is sometimes quite difficult to differ between interpretation of law and creation of law by judges.[6] Other authors differ between co-legislative function of parliament and constitutional court, judicial development of the law beyond the text, and judicial development of the law within the text.[7] Fourthly, constitutional courts stand between law and politics[8] which means that the method of their selection could not be analyzed only taking into consideration principles of professional qualifications and independence of judges but also the principles of legitimacy and accountability.

The first tough issue is the potential political independence of the judges. One has to differ between two issues. Firstly, judges can't really be politically independent if one has in mind that they have their own political and ideological preferences, and that they can't really be independent when they have to decide on legal issues with strong political and ideological background. This has been visible and proved in so many cases in practically all countries and constitutional courts, and also in the case of countries whose supreme courts exercise the competencies of the constitutional courts, such as the case in the USA. Since the judges belong to different social classes, and have their own political and ideological beliefs as social and political beings, it would be really ridiculous to imagine that they can neglect all these elements of their social and personal existence and to vote as a kind of "judicial machines".

[2] On this issue, see: G. Mace, „The Antidemocratic Character of Judicial Review", *California Law Review*, Vol. 60, 4/1972, pp. 1140–1149.

[3] On this issue, see: A. von Staden, „The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review", *I.CON*, Vol. 10, No. 4/2012, 1028.

[4] G. Mace, 1140.

[5] On this issue, see: A. Stone Sweet, „Constitutional Courts and Parliamentary Democracy", West European Politics, Vol. 25, 1/2002, 81–82.

[6] A. Gamper, „Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters", *Cambridge Journal of International and Comparative Law*, Vol. 4, No. 2/2015, 431.

[7] N. Palazzo, „Law-making power of the Constitutional Court of Italy", M. Florczak-Wator (ed.), *Judicial Law-Making in European Constitutional Courts*, Routledge, London and New York 2020, 50–56.

[8] See: S. P. Orlović, *Vladavina ustava ili ustavnog sudstva*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad 2013, 93–99.

Secondly, there is another kind of judges' political dependence, namely their dependence on the existing political regime, or more precisely on the ruling political elite. This kind of dependence could be avoided at least in some cases. Namely, it is not necessary that each judge decides according to wishes or even directives of ruling political elite on each important or at least the most important case. However, it is expected that the cases will often have political and ideological background and it is not sure if the judges would be able or willing to avoid political influences.

These theoretical as well as practical issues and controversies are directly interconnected with the issue of the election of the judges. The outcome of the election of judges has to serve two aims: the competence of judges and their political independence.

Since constitutional courts sometimes have to decide on the issues with political background and implications,[9] political elites are interested in their composition. Constitution-makers are aware of these facts and interests. It is common place that constitutional courts participate in the process of creation of legal system, as so-called negative legislator.[10] Although they can't formally influence the process before the enactment of laws, they can influence the preservation of laws in the framework of legal system. However, it could be rightly said that they can even influence the very process of creation of laws before they have to be voted on in the legislature since if there is a negative attitude of judges on a bill, the doubt arises whether the legislature would be willing to vote it.[11] Moreover, constitutional courts influence the process of implementation of constitution since their opinion on the meaning of the constitutional provisions is the ultimate interpretation of the highest legal act. In federal states, constitutional courts can influence the very content of the constitutions of federal units.

All these well-known facts lead us to the conclusion that the election of judges of constitutional courts has to find its basis in the principle of popular sovereignty. The influence of constitutional courts on the very legal system,

[9] One author rightly observes that a judge also governs (as political institutions govern – G.M.) when a court resolves a legal dispute. – A. S. Sweet, 92.

It arises that judges govern not only when they resolve legal disputes with obvious political background but also in other cases since the enactment of laws (or their removal from a legal system) is always about the politics since a law is nothing but „legalization" of particular policies.

This fact makes even stronger the case for election of judges by a parliament as we shall discuss later in the text.

[10] A constitutional court in fact vetoes an unconstitutional bill which means that it directly interferes in the legislative process. – *Ibid.*, 93.

[11] D. Grimm, „Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics", *R. EMERJ*, Vol. 21, 3/2019, 58.

as well as their relationship with the political institutions, demand that the election of judges becomes the competence of the parliament as the only, at least formal, representative of the popular will.

The problem arises that the parliament is a political institution, and that it would not be able to elect judges according to merit system but to political considerations and interests. This problem is very serious and we are going to tackle it later on.

Another issue is responsibility of judges.[12] Since they exercise state power, they have to be responsible to someone.[13] Their alleged independence can't be an excuse for absence of their responsibility. If this would be the case, the judges would misuse their position to impose their own political and ideological attitudes regardless of the parliament's decisions. The constitutional court can become an alternative centre of political power if the majority of judges share the same ideological and political beliefs and are ready to base their judgments on them. The judges do not have legitimacy for such behaviour since they have not received political mandate from citizens. If they, however, behave as a political institution, they have to be responsible to someone.

The only possible form of responsibility of judges is their re-election. The organ which elects them (or more than one organ which elect them) could decide not to elect judges if it is dissatisfied with their behaviour, particularly if their decisions are politically influenced. However, another question arises. If there is constitutionally prescribed possibility for judges' re-election, the decision of parliament (or any other organ) not to re-elect a judge could be based on political considerations of that organ, and not on its evaluation of judge's professional qualifications and results. Therefore, as we shall argue, it is better for judges not to have the right to re-election. In turn, it means that they would not be responsible for their decisions, not even indirectly.

It seems to us that one form of judges' at least indirect responsibility is their election by parliament. This method of election of judges enables the citizens to influence this process at least indirectly and formally while the other methods of selection of judges exclude even this distant form of influence or they diminish it even more. On the other hand, although no one can influence judges during their mandate, influence could be exercised at least during the procedure of their selection, and it is better that this procedure is under control of popular representatives than some other institutions which do not have such a character even formally.

[12] Some authors wrote about the problem of unaccountability of judges of the constitutional courts as well as the judges of supreme courts particularly if their term of office is not limited. – See on this issue: G. Mace, 1140–1142.

[13] See: A. Lever, „Democracy and Judicial Review: Are They Really Incompatible?", *Perspectives on Politics*, Vol. 7, No. 4/2009, 805–822.

The question is also whether the judicial review would in some cases be contrary to the principle of majority rule. Let us suppose that parliamentary majority is legitimate and that it enacts a law which enjoys support not only of this majority but also of a majority of population at large. The constitutional court could declare such a law as unconstitutional and remove it from the legal system not only in a case when its unconstitutionality is obvious but also when the judges are led by their ideological and political considerations. It goes without saying that this is one of deficiencies of the very system of control of constitutionality and legality by constitutional court. However, a constitution-maker could try to diminish this deficiency if the judges of the court have to be elected by a legitimate institution such as at least formally a parliament.

Of course, majority rule should not be understood as an absolute value. What if the majority in a parliament is not a legitimate one since there is no guarantee that a parliamentary majority would represent true interests and political will of the majority of population? What if a majority of population wishes something which is essentially undemocratic and contrary to its own interests? Isn't it better to have someone who can limit the will and decisions of a majority?

These questions are legitimate. However, there is no guarantee that a constitutional court, particularly if its judges are not elected for a limited period, and if they are not elected by a legislature, would "protect" majority from itself. Instruments have to exist in order to change the mind of a majority and to enable new majority to be formed and to assume power. However, nothing guarantees that a constitutional court is such an instrument. On the contrary, it is quite possible that a constitutional court could oppose a majority only because majority of judges think that the decisions of parliamentary majority or a majority of population (on referendum, for example) are opposite to their own ideological attitudes.[14]

There is one possibility of indirect "punishment" of judges by the parliament if they try to act as a negative legislator in a manner which parliament finds to be illegitimate. Namely, if a constitutional court interprets a law in a

[14] Take, for example, legislation on abortion or nationalization of some sectors of economy. These issues have much to do with ideological attitudes of judges on the economy, society, human rights, etc. Since the judges have their ideological beliefs and prejudices as everyone else, it is impossible to presume that they could act independently of their basic attitudes which considerably influence not only them but could also influence the future of a society. One has also to take into consideration that judges are also under the pressure of public opinion as well as of political elites.

Therefore there is a sort of auto-limitation on the side of judges as much as there could be auto-limitation on the side of political elites which could quit their efforts to enact a law if there is high probability that a constitutional court would annul it.

manner which is in parliament's opinion unjustified since it obviously could not be interpreted in that way, parliament could decide to amend a law or to enact a new law in order to prevent or reverse constitutional court's arbitrariness.

One of the main dilemmas is how to make the balance between two principles: legitimacy of judges and their competence. In other words, how to elect judges who would be legitimate office-holders but who would not be dependent from those who elect them and would have necessary professional qualifications. Here the issue of double nature of the constitutional courts and their members arises. The judges exercise one of the state functions and therefore they can't avoid the issue of legitimacy since they influence the very nature and contents of the legal system. So, even if they imagine that they don't exercise the state power, they really do it, since they participate in shaping legal system and, directly or indirectly, in shaping policies of the state.

On the other hand, it seems, at least at first sight, that it is not so hard to elect competent judges. It is only necessary to prescribe the conditions which the candidates have to fulfil and to act in accordance with them. However, some structural problems occur. Firstly, the conditions which the candidates have to fulfil are often relatively general which means that they don't sufficiently limit the subject(s) who elect(s) judges since it/they can relatively freely manoeuvre in order to facilitate the election of desirable candidates. Secondly, although the conditions are prescribed, the subject who elects judges has the relative freedom to choose between more candidates who fulfil these conditions without fear that it would be condemned for violation of constitutional or legal norms.

In order to avoid voluntarism and selection of candidates who are not the best possible choice, it seems that constitutionally or at least legally two norms have to be prescribed. Firstly, the subject who elects judges has to be obliged to submit detailed report on the reasons for the election of particular candidates. The purpose of the submission of the report would be manifold. If the election of judges is to be done by a collegial organ, it would be completed according to the report as a basis for giving voice to particular candidates. Even if an individual organ has to nominate judges, the reasons for nomination of particular candidates could influence the public opinion or other organs to discuss about the validity of the decision which at last could influence the legitimacy of the respective individual organ.

Secondly, it should be prescribed that the organ which elects judges has to follow strictly the conditions for election without the right to give priority to a candidate whom it finds the best. For example, if the professional experience is one of conditions for the election of judges, the competent organ has to give priority to a candidate who has the biggest professional

experience. Of course, this candidate would be elected only if he/she has the best references regarding other conditions (or at least regarding most of other conditions) for the election. A degree of voluntarism on the side of an organ which elects/appoints judges could be justified only if it has to choose between two or more candidates with the same references which would indeed be very rare occasion.

2.2. Comparative analysis

Constitutional solutions on the election of judges are very different. In general terms, the most accepted are following solutions: 1) elections by parliament; 2) nomination by the head of state, with approval of legislative (or at least one of its houses) or government; 3) combination of election and nomination by two or three different institutions.[15]

2.2.1 Election by parliament

In the case that the judges are elected by the parliament, few questions arise: 1) who proposes them to the parliament; 2) what majority is necessary for their election. Both issues are potentially important for the efficiency of the electoral procedure as well as for the absence of monopoly of the parliamentary majority in the electoral procedure. Some constitutions prescribe that the candidates for the office are going to be nominated by the parliament's working body,[16] while the others prescribe that the candidates will be nominated by a body outside the very parliament.[17] Nomination of candidates by the parliament's working body has one advantage and one dis-

[15] As some authors point out, in the European system of constitutional courts the role of legislative and executive powers prevail in the process of selection of judges. – A. Saiz Arnaiz, „Constitutional Jurisdiction in Europe: Between Law and Politics", *Maastricht Journal of European and Comparative Law*, Vol. 6, 2/1999, 113.

[16] According to Article 122 of the Constitution of Croatia, candidates for the position of judges will be nominated by the Parliament's committee on constitutional matters. Similar provision is contained in the Constitution of Montenegro.

[17] Although in Albania only one third of the judges have to be elected by the Assembly, the candidates first have to be ranked by the Justice Appointments Council.

In Republika Srpska, the National Assembly elects judges on the proposal of the President of the Republic, which he/she makes on a basis of the list of candidates made by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

In Lithuania, nine judges of the Constitutional Court have to be elected by the Parliament. The President of the Republic, the President of the Parliament, and the President of the Supreme Court submit three candidates each.

In Montenegro, two judges have to be nominated to the Parliament by the President of the Republic and five judges by the competent working body of the Parliament.

Article 163 of the Constitution of Slovenia prescribes that the judges will be elected on the proposal of the President of the Republic.

advantage. The advantage is that the electoral procedure begins and finishes in the parliament. If the idea is that the parliament has to elect judges, for one reason or another, it is principally correct to prescribe that the parliament nominates candidates and then to elect them. If the parliament, which is expression of popular sovereignty, has to elect the judges, then the whole electoral procedure has to be under its control.

This is the doctrinal justification of this method of election of judges. Its main disadvantage is that the parliamentary majority could control the electoral procedure from the beginning which could be undesirable since it could influence the composition of the constitutional court. Even if the parliamentary majority would have to reach an agreement with the opposition on the candidates for judicial positions, it would still mean that political elites would have the monopoly over the procedure of election of judges.

If the parliament would have to elect judges on the proposal of another institution, such as government, the head of state, or a nominally independent judicial body, such as judicial council, its monopoly over the election procedure would be limited to some extent since the parliament would have to choose between the candidates who would be nominated by someone outside the parliament. In that case, the parliament's right to elect judges would depend to some extent on other institution(s).

It seems to us that the second of the abovementioned solutions is better and that it in better way establishes the balance between two aims – fulfilment of the principle of popular sovereignty and the absence of anyone's monopoly in the process of election of judges. Although the parliament elects judges in this case it nevertheless can choose between the candidates who are submitted to it by another institution. The parliament can reject all the candidates but it still can't elect the one(s) who it desires. Therefore, the parliament has to find a common language with an institution which nominates the candidates.

If this method of election would be accepted, the principle of popular sovereignty would not be fully exercised. However, it would still be preserved while at the same time it would be harder for the parliament to misuse its right electing those candidates who don't have the best qualifications but who are favourites of the political elites.

It would be possible that the head of state or the government proposes candidates to the parliament. This solution would be in accordance with the principle of separation of powers. However, it has a grave disadvantage. If the executive belongs to the same political party as the parliamentary majority, then the separation of powers would be only formal since the legislative and the executive would agree on the person of candidates. If the legislative and the executive would not belong to the same political party, then it could

be possible that they would have to reach an agreement on the candidates. Two outcomes would be possible in this case. Firstly, two branches of state power would have to make a compromise if there are few candidates who have to be elected, in the sense that each branch would insist on one or more of its candidates who would be elected. Secondly, if the compromise could not be reached, particularly when only one judge has to be elected, the legislative could at the end have the upper hand since it would have the right to elect a judge, while the executive would have to find a candidate who would be acceptable to the legislative.

However, all these possible solutions only reflect the relationship between two political branches of state power. Political elites still have the final word in the procedure of election of judges although it is important whether only political elite representing parliamentary majority or also political elite representing minority participates in this procedure.

It seems to us that it is better if there is at least nominally independent professional body which is authorized to propose to the parliament candidates for the judicial positions in the constitutional courts. The main argument in favour of this solution is that political influences would be lesser since political elites could not exercise direct influence over that independent body. This argument can be accepted if political independence of this body has to be compared with political independence of the executive which is obviously nonexistent for quite natural reasons. In that sense, it is better to have an institution which is formally politically independent and which in fact could be politically independent to some degree than to give the authority to nominate judges to an institution of executive power which can never be politically independent since it is one of two political branches of state power.

The independent body would make a list of candidates, according to their references, and present it to the parliament, which would have to make a choice. Although the parliament could reject proposals, it would nevertheless be limited in two ways. Firstly, the parliament would have to explain the reasons for rejection of proposals. In societies with developed civil society and strong parliamentary opposition, the reasons of the parliamentary majority have to be strong and serious. Secondly, even when the parliament rejects a proposal, it still can't elect its favourites to the constitutional court but has to analyze new proposal of an independent body.

We don't think that it is a good solution that an independent body makes a list of candidates while parliament would have the right to elect one or more candidates from a list regardless of their ranking on a list. If this solution would be accepted, parliament could neglect opinion and proposal of an independent body and elect a candidate with the worst references. On the other hand, if

parliament would be legally obliged to elect the first ranking candidate(s), its role would be meaningless since it would only have to act according to opinion of an independent body. Therefore, parliament would have the right to elect or reject to elect only the first-ranking candidate(s), depending on the number of judges who have to be elected. If it fails to elect them, low-ranking candidate(s) could not be elected. In that case, electoral procedure would have to be realized from the beginning including new public call for candidates.

Independent body which would be authorized to submit to the parliament a list of candidates for the judges of the constitutional court would be regular, constitutionally or legally established, judicial council which participates in the election of judges of ordinary courts, or an *ad hoc* body composed of judges, professors of law schools, and representatives of legislative and executive institutions, under condition that they are in minority in this body.

The second major issue is the majority which is necessary for the election of judges. Two options are possible: judges have to be elected by absolute majority of all members of parliament[18] or at least of those present, or by a qualified majority, which could vary. The election of judges by absolute majority enables parliament to elect them whenever parliamentary majority is basically stable.[19] This solution guarantees effective election of judges without delays and unnecessary political negotiations. If the parliament nor-

[18] This is the case, for example, in Northern Macedonia, where six judges have to be elected by the majority of all members of the Parliament, while three of them have to be elected by the same majority which has to include the majority of all MPs who belong to the communities which are not in majority in the Republic.

According to Article 14 of the Constitutional Court Act in Slovenia, the Parliament elects the judges by a majority vote of all deputies. – The Constitutional Court Act (ZustS9), *Official Gazette of the Republic of Slovenia*, No. 64/07 – official consolidated text and No. 109/12.

According to Article 105 of the Constitution of Serbia, the National Assembly elects five judges of the Constitutional Court by a majority of all its members. This solution has to be examined in connection with another provision, which prescribes that the National Assembly usually does not decide on bills by this majority but by a majority at the session which is attended by a majority of all MPs. This means that the election of five judges has to be decided by a majority which is stronger than the usual majority for the enactment of laws although it has to be admitted that prescribed majority for the election of judges is still quite thin and easily achievable.

[19] The original text of the Croatian Constitution prescribed that the Parliament elected judges by an absolute majority of all its members, on the proposal of its competent working body (committee). This solution was among the worst possible solutions for two reasons. Firstly, the procedure of elections began and concluded in the parliament. The fact that it began in the competent working body meant nothing as a guarantee of independence of judges since the parliamentary majority dominated the committee. Secondly, it was easy for a parliamentary majority to elect candidates who were under its influence or at least who shared the same ideological and political values. Parliamentary majority even did not have the reason to negotiate with the opposition on the list of candidates for the former did not need support of the latter for the decision.

mally decides by absolute majority of present members, while the judges have to be elected by absolute majority of all members, it seems that parliament has to fulfil somewhat stronger condition, namely the judges have to be elected according to stronger conditions.

However, we think that it is necessary for a constitution-maker to prescribe the election of judges by a qualified majority (probably two-thirds majority).[20] Qualified majority ensures more serious considerations in the parliament before its final decision is reached since it is not easy to secure two-thirds of votes in favour of all or at least some of candidates.[21] This is particularly true if the parliamentary majority does not command two-thirds majority which is the case quite often. In such cases, parliamentary majority has to reach an agreement with at least some oppositional political parties.[22] It is even possible that the most influential political parties agree to share the positions in the constitutional court so that the most influential party of the majority gets majority of judicial positions, while the rest positions belong to the most influential party of the opposition.

[20] This solution is relatively widely accepted in the comparative law. Constitution of Albania prescribes that the Assembly has to elect three members of the Constitutional Court by a three-fifth majority of its members.

Article 122 of the Constitution of Croatia prescribes that the judges shall be elected by a two-thirds majority of the members of the Parliament.

The same is prescribed in the Hungarian Constitution, the Constitution of Montenegro (although if this majority is not reached, the judges will be elected by a three-fifth majority in the second round).

In Spain, each house of the Parliament will elect four judges by a three-fifths majority of their respective members.

In Turkey, the Parliament elects a part of judges by a two-thirds majority in the first ballot, by an absolute majority of the total number of its members in the second ballot, and by the greatest number of votes in the third ballot (Article 146 of the Constitution).

[21] As one could see, some constitutions require a three-fifths majority in the parliament for judges to be elected. This solution has been adopted in order to reconcile two aims: consensus on elected judges as wide as possible, and efficiency of the very procedure of their election. It is obvious that constitution-makers thought that it would be easier to make a decision by three-fifths than by two-thirds majority, which is, at least principally speaking, true. At the same time, in many cases it would be hard enough for parliamentary majority to reach this majority and it would therefore be obliged to negotiate with the parliamentary minority on compromise.

However, it seems to us that a three-fifths majority would be acceptable solution only in the second round of voting, in the case if parliament would not be able to elect judges by a two-thirds majority in the first round. This solution would still oblige parliament to try to reach a compromise which would include serious majority in parliament, probably including some opposition political parties, while at the same time the very procedure of election of judges would not be too complicated since the possibility of the second round voting would have to secure a kind of efficiency of the very procedure.

[22] Some authors rightly argue that a qualified majority makes „extreme partisan" appointments unlikely. – D. Grimm, 60.

It is obvious that the election of judges by qualified majority is not a solution without deficiencies. It still does not preclude the possibility of the election of candidates who are politically acceptable for political elites. However, it is true that this solution considerably aggravates intention of the parliamentary majority to impose its own candidates. It is more probable that it would have to find candidates who would be acceptable for the great majority of parliamentarians which includes at least a part of opposition political parties. It is usual for negotiations between parliamentary political parties to occur in order to find compromises.[23]

This is unavoidable in a system which gives the right to a political institution to choose judges. However, the dilemma arises whether this method of election, with these consequences, is acceptable regarding both the notions of legitimacy and independence of judges. The answer is an ambivalent one – it is and it is not acceptable, depending on the angle from which one analyzes the issue. This method is not acceptable regarding the notions of legitimacy and independence since it looks that neither of these notions can be fulfilled. It is doubtful whether one could talk about legitimacy of judges since they are not elected according to professional qualifications or at least there is a doubt that these qualifications had any significant role in the process of election. It is the same with the notion of independence. One can doubt that judges can't be really independent if they are elected by political parties.

On the other hand, if it is unavoidable for judges to have ideological and political preferences and, at least in some, although important, cases act in accordance to them, it is better if a constitutional court is composed of judges with different, even opposite ideological and political views. It is more probable that a constitutional court would have such a composition when its judges are elected by parliament with a qualified majority.

The election of judges by parliament, by a qualified majority, on proposal of an independent body, which we advocate, has following advantages. Firstly, it preserves the idea of popular sovereignty since the election of judges is in hands of the institution which at least formally represents people. Secondly, political elite which commands parliamentary majority can't easily impose its favourite candidates on judicial positions since it has to reach an agreement with at least some opposition parties.[24] Thirdly, even if political elite commands a qualified majority in parliament, it still can't easily impose its political will since it can choose only between candidates proposed by an independent body.

Despite these advantages, the basic disadvantage of this method of election of judges is that a political institution decides which gives considerable

[23] A. S. Sweet, 88.

[24] See also: O. Vučić, V. Petrov, D. Simović, *Ustavni sudovi bivših jugoslovenskih republika. Teorija, norma, praksa*, Dosije studio, Beograd 2010, 100.

power to political elites.[25] There are two possible means which could be used in order to limit the power of political elites: qualified majority and the election on proposal of an independent body. It could not be said in advance whether these means would be efficient but they nevertheless limit the monopoly of the parliament in the electoral procedure.

Another issue is very important. That is the precise enactment of the very procedure of election of judges which includes as much as possible precise mechanism of election and mutual relationship between an organ which proposes candidates and a parliament which elects them. This issue has to be regulated by a law on a constitutional court and in some aspects also by a constitution. Take one issue for example. If an independent body, before proposing candidates to a parliament, interviews and numerically evaluates their professional qualifications, what a parliament has to do? Can it reject all the candidates or at least some of them? Can it decide to elect candidates with worse marks which were given to them by an independent body, or it has to follow evaluations of this body?

These questions have to be answered explicitly by a law on a constitutional court. Otherwise, a parliament could in practice overshadow an independent body and choose candidates according to its political will and interests. Of course, a parliament could not have a legal duty to elect the first-ranking candidate(s) since in that case its role would be meaningless.

2.2.2. Nomination of judges by head of state

Another method of selection of judges is their nomination by head of state. It traces origins back to the nomination of judges of the US Supreme Court by the US President, which also exercises some functions of constitutional courts.

[25] Some authors argue that the fact that legislature is elected does not by itself guarantee its democratic nature and legitimacy. – A. Lever, 809.

However, we find that the author's opinion that there are a variety of ways in which judges can represent democratic ideas and ideals in their person and behaviour (*ibid.*, 809–810) is somehow too strong. Namely, it is quite possible that judges really represent democratic ideas even if they are not elected to their positions by parliament, for example. However, the question arises who is authorized to evaluate democratic character of judges' ideas and ideals? If one concludes that their ideas and ideals are democratic because they are complementary to dominant ideas in a society, for example, such an evaluation does not need to be correct. On the contrary, if the judges' ideas are contrary to dominant ideas in a society which is evaluated as a dictatorship, the question arises who is authorized to evaluate a society as a dictatorship?

The fact that judges are elected by parliament is not a value in itself since the question is also if that parliament has democratic legitimacy. Even the fact that it is elected in multiparty elections does not necessarily mean that it really represents interests of the majority or that all relevant social layers have their own representatives in it. However, we think that the election of judges by parliament is one, although not necessarily the most valuable let alone sufficient, condition for conclusion that judges of the constitutional court are legitimate.

Two possible reasons could justify this method of selection. Firstly, if head of state is elected directly, he/she has legitimacy which is sufficient to give him/her the right to nominate judges. Secondly, this method of nomination is efficient since head of state is, in almost all states, a single institution. Since the President of the USA is a chief of the whole executive branch of power who decisively shapes policies it is not surprising that he/she nominates judges. However, if his/her authority to nominate judges could be connected to his/her dominant role in shaping state policies, it implicitly leads to the conclusion that judges of the Supreme Court should support his/her policies which would undermine their supposedly independent constitutional role.

The history of nomination of the US Supreme Court judges has shown to what extent the political interests and considerations have influenced decisions of the US Presidents.[26] Some authors emphasized that until 2012 the Senate declined confirmation of appointment only 12 times,[27] which to some degree is a result of the provision after which the Senate decides on the confirmation by a simple majority. This practice shows that the head of state has decisive role and the most influence in the process of selection of judges. However, both the President and the Senate take into considerations not only professional qualifications of candidates but also their attitudes toward different social, economic, political and other issues. Both institutions could find out what the attitudes of candidates are even before they start the procedure of selection or during that procedure which could decisively influence the outcome of the procedure. As some authors rightly conclude, the fact that the President seeks judges who are their political followers does not necessarily mean that judges follow them strictly in every possible situation. It happened more than once that the Presidents appointed judges who only generally followed their „legal or political philosophy".[28] On the other hand, the Senate usually has in mind political and ideological attitudes of candidates.[29]

The main disadvantage of this method of selection of judges lays in the fact that one political person, who belongs to this or that political party, has the

[26] On the criteria for appointment, see: N. Dorsen, „The selection of U.S. Supreme Court justices", *International Journal of Constitutional Law*, Vol. 4, 4/2006, 654–657.

[27] S. P. Orlović, 112.

Other authors claim that until now there have been 110 justices of the US Supreme Court with about 30 nominations rejected by the Senate. – N. Dorsen, 652.

[28] *Ibid.*, 655–656.

[29] Although judges made many decisions according to their ideological and political attitudes in different eras, maybe the most famous is so-called Lochner Era, i.e. a period between 1897 and 1937, when the judicial activism played considerably conservative role, particularly with the aim of protection of private property and limiting any possibility of widening labour's rights. – J. Waldron, „Judicial review and the Conditions of Democracy", *The Journal of Political Philosophy*, Vol. 6, No. 4/1998, 338: J. M. Balkin, „*Lochner* and Constitutional Historicism", Boston University Law Review, Vol. 85, 2005, 677–725.

right to nominate (appoint) judges. Since the head of state is always a representative of one political ideology and one political movement, it is unavoidable that appointment of judges is a political issue. The head of state would have to be an angel in order to avoid politically conditioned nominations.

In order to avoid this disadvantage, constitutions usually prescribe that the nomination by head of state has to be confirmed by parliament or at least by one of its chambers. It was prescribed firstly in the Constitution of the USA, which prescribed that the President of the USA had the right to nominate judges of the Supreme Court with the consent of the US Senate. Comparatively, head of state nominates judges either on recommendation of another institution or with the consent of another institution. Therefore, the difference between these two options is whether another institution participates in the electoral procedure before or after the decision of head of state. In both cases head of state has to firstly consult an institution whose consent he/she needs. If head of state nominates judges on recommendation of another institution, he/she is limited in the sense that he/she has to accept or reject proposal which has been formulated in advance and which is known not only to head of state but probably also to public and to other institutions. Therefore, head of state is to some extent under the pressure to adopt recommendation. If he/she rejects it, he/she has to justify such a decision and to wait for new recommendation from another institution.

If another institution has to give its consent for nomination done by head of state, situation could be, although by no means necessarily, different. Nomination has already been done and another institution is compelled to give its consent or otherwise to justify its rejection of nomination which is sometimes not easy to do since it has to have valid arguments in order to veto the nomination. Since head of state has the right to take the first move, his/her position is relatively stronger than the one of an institution which has to give or reject the consent.

Two issues have to be discussed. Firstly, what majority is needed for confirmation of appointment made by head of state? Secondly, what is the importance of confirmation if head of state and parliamentary majority belong to the same political party or parties? The answer to the first questions offers two possibilities. The first one is that parliament or one of its chambers confirms the appointment by simple majority, i.e. the same majority by which it enacts laws and make all other or at least most of decisions in its competence. In this case, parliamentary majority has a great opportunity to influence the electoral procedure since it can easily decide to reject nomination of one or more judges even if there is no valid reason for such a decision. For that reason, this method of selection of judges is, in our opinion, least desirable.

It has to be stressed that the constitutions which prescribe this method of selection of judges usually do not predict a qualified majority for confirmation of appointment.[30] Two reasons could cause such a solution. Firstly, a constitution-maker could be of opinion that it is not necessary to prescribe a qualified majority for confirmation since two institutions share responsibility for selection of judges which is, at least principally, a sufficient guarantee that political neutrality would be achieved. Secondly, a constitution-maker could be of opinion that the very procedure of selection of judges would be made too complicated if a qualified majority would be required for confirmation of an appointment.

The first issue is directly connected to the second one. If head of state belongs to the same political party which forms parliamentary majority, confirmation of appointment of judges could be a mere formality since it is highly improbable that there would be disagreement between them. If head of state belongs to an opposition political party, the problem could arise if parliamentary majority would not be willing to confirm the nomination. In that case, the idea of separation of powers in the procedure of election of judges could be significant to some degree. The outcome could be twofold: either one of institutions would prevail and impose its political will or a compromise on the judges would be reached. The first possible outcome is still principally unacceptable since its consequence would be that one of political institutions prevails and makes a final decision. Only the second outcome could be acceptable although there is no any guarantee that the political will of the parliamentary majority would prevail.

2.2.3. Mixed systems of selection of judges

By mixed systems of selection of judges we understand different systems of selection in which three institutions participate.[31] These institutions are parliament (or one of its chambers), the executive (usually head of state),

[30] Constitution of the Czech Republic prescribes in Article 84 that the judges of the Constitutional Court shall be appointed by the President of the Republic with the consent of the Senate. Neither this article nor Article 39 prescribe a qualified majority would be necessary for confirmation of an appointment in the Senate.

In Slovakia, the President of the Republic appoints judges on the proposal of the National Council. Neither Article 134 nor Article 84 of the Constitution requires a qualified majority for making such a proposal.

It is different in Spain where the King appoints the judges after the nomination by three-fifths majorities in both chambers of the Parliament. It seems that this constitutional solution has been accepted since the King only formally appoints the judges since his powers are really only nominal. Therefore, since the Parliament nominates the most judges of the Constitutional Court, it has the real power in the sense that its proposals will be accepted by the King. Therefore, it seems rational to the constitution-maker to prescribe qualified majorities for nomination of candidates.

[31] Hans Kelsen also recommended the election and appointment of judges by legislature and executive. – See: O. Vučić, V. Petrov, D. Simović, 95–96.

and the highest body of judiciary, or an independent body which participates in the selection of judges of ordinary courts.

This system has been modelled on the principle of separation of powers,[32] with the basic notion that all three branches of state power have to share the competence of selecting judges of constitutional courts. Few arguments stand behind this constitutional solution. Firstly, since constitutional court does not belong to any of three branches of state power but is the fourth branch[33] or is a state institution *sui generis* (depending on understanding of its legal nature), it is natural that state institutions which exercise three functions of state power participate in the process of selection of judges. This is the way of establishing equality of three branches of state power in the procedure of selection of judges.

Secondly, if three institutions participate in the process of selection, they can check each other in order to prevent the monopoly of any of them in the procedure of selection. This will be the case not only when each of them appoints or elects a part of judges (for example, a third of them), but even more when each of them has to appoint or elect judges from a list of candidates which has been created by other institution (for example, when a parliament elects judges from a list created by a head of state).

This model of selection, firstly adopted in Italy,[34] and later adopted in some other states,[35] has to guarantee selection of judges who are at the same

[32] Some authors emphasize that this system introduces specific checks and balances in the electoral procedure. – D. Simović, „Slabost institucionalnih garantija nezavisnosti Ustavnog suda Srbije", E. Šarčević (ur.), *Ko bira sudije ustavnog suda? Regionalni bilans teorije i prakse: BiH, Srbija, Hrvatska i Makedonija*, Fondacija Centar za javno pravo, Sarajevo 2012, 268.

[33] On this issue, among other authors, see: O. Vučić, V. Petrov, D. Simović, 24–29, 117; S. P. Orlović, 24–29; B. Nenadić, *O jemstvima nezavisnosti ustavnih sudova. Sa posebnim osvrtom na Ustavni sud Srbije*, glasnik, Beograd 2012, 49–57; G. Marković, *Ustavno pravo*, Zavod za udžbenike i nastavna sredstva Republike Srpske i Pravni fakultet Univerziteta u Istočnom Sarajevu, Istočno Sarajevo 2021, 452–453; B. Hadži Stević, „Preispitivanje dogme o trodeobi funkcija državne vlasti – Ustavno sudstvo kao četvrta funkcija državne vlasti" (manuscript is prepared for publishing in the Collection of Papers *Contradictions of Contemporary Law*, Faculty of Law, University of East Sarajevo, East Sarajevo 2022).

[34] According to Article 135 of the Italian Constitution, the Constitutional Court is composed of 15 judges. Third of them are elected or appointed by the President of the Republic, the Parliament in the joint sitting of the chambers, and ordinary and administrative supreme courts.

[35] In Albania, the Assembly, the President of the Republic, and the High Court shall elect/appoint three judges each, from the list of candidates submitted by the Justice Appointments Council. Although the Assembly has to elect only a third of judges, it still has to reach a three-fifths majority for the decision.

In Austria, „The President, the Vice-President, six additional members and three substitute members are appointed by the Federal President on the recommendation of the Federal Government; (...) The remaining six members and three substitute members are appointed by the Federal President on the basis of proposals submitted by the National Council for three

time politically independent and competent. This would particularly have to be the case if each institution elects/appoints judges on the proposal of other institutions which is not generally accepted solution. If each institution has the right to elect or appoint judges between the candidates who applied on public call, its autonomy is higher. On the contrary, it is limited in its right to make a decision when it has to choose between candidates submitted to it by another institution.[36] However, one has to be very careful with conclusions. If two political institutions participate in the process of selection of judges, one

members and two substitute members and by the Federal Council for three members and one substitute member."

According to Article 147 of the Constitution of Bulgaria, the Constitutional Court is composed of 12 judges, and a third of them will be elected by the National Assembly, by a joint meeting of the Supreme Court of Cassation and the Supreme Administrative Court, while a third will be appointed by the President of the Republic.

Article 56 of the Constitution of France prescribes that the President of the President, President of the National Assembly and the President of the Senate each nominate a third of members of the Constitutional Council.

Article 136 of the Constitution of Moldova prescribes that two judges are elected by the Parliament, two by the Superior Council of Magistrates, while two are appointed by the Government. It is worth noting that the Government appoints two judges while the President of the Republic does not have any role in the procedure of selection of judges. The issue is important since the Government is an expression of the political will of the Parliament while the President of the Republic is elected directly and does not necessarily belong to the same political party as the parliamentary majority.

Article 142 of the Constitution of Romania prescribes that the President of the Republic nominates a third of judges, while the chambers of the Parliament elects a third of judges each.

In Serbia, Article 172 of the Constitution prescribes that the National Assembly and the Supreme Court of Cassation elects a third judges each, while the President of the Republic appoints a third of judges. Some authors, rightly in our opinion, criticized the solution after which a third of judges have to be elected by the Supreme Court of Cassation on the proposal of the general session of the High Judicial Council and the State Prosecutor Council, since the former also proposes candidates for judges of the Supreme Court of Cassation, while the latter has no any connection with the judicial power. – R. Marković, „Ustav Republike Srbije iz 2006 – Kritički pogled", *Anali Pravnog fakulteta u Beogradu*, 2/2006, 29.

Some authors are of opinion that one thord of judges should be elected by the High Judicial Council. – D. Simović, (2012), 268.

[36] This is the case in Serbia. The National Assembly elects five judges from among ten candidates proposed by the President of the Republic, while the President of the Republic appoints five judges from among ten candidates proposed by the National Assembly. Although both institutions have limited autonomy they still retain the right to make a choice. If the President of the Republic belongs to the parliamentary majority, his/her influence is bigger than the one of the National Assembly since it is improbable that the National Assembly would reject his/her proposals. Therefore, he/she has the right to appoint five judges while at the same time there is big probability that the National Assembly will accept five candidates among ten who he/she submitted to it. This is the reason why some authors, in our opinion rightly, emphasize that this system of selection of judges favours the President's role. – See: D. Simović, „Problem politizacije i sastav Ustavnog suda", B. M. Nenadić (prir.), *Uloga i značaj Ustavnog suda u očuvanju vladavine prava*, Ustavni sud, Beograd 2013, 247.

of them can prevail even if they submit to each other lists of candidates for judicial positions. It does not necessarily have to be like this but political belongings of head of state and of parliamentary majority very much influence the final outcome. If both parliamentary majority and head of state belong to the same political option, the fact that they submit to each other lists of candidate does not mean much. Even if one does not take into consideration political belonging of parliamentary majority and head of state, the fact remains that two eminently political institutions participate in the election of judges which makes political neutrality of judges practically impossible.

This method of selection of judges can be criticized for following reasons. Firstly, the very fact that three institutions participate in the procedure of selection of judges does not necessarily mean, as we have shown, that the monopoly of one of them would be impossible. Political conditions and relation of forces in the political sphere influence very much the real role of each of these institutions in the selection procedure. Therefore, no one can say for sure and once for all that this method of selection would decrease let alone abolish the decisive influence of political elites in the selection of judges. In fact, this method of selection prescribes domination of political elites since they elect and appoint two-thirds of judges.

Secondly, there could not be real equality between legislative and executive powers in the process of selection of judges not only because it does not exist in reality but also because legislature is, at least formally, an expression of popular sovereignty while the executive can not be that not even formally. Therefore, even if legislative and executive powers are equal in the selection procedure, although we think that they are not, they must not be equal since legislative power has to prevail over executive power.

Thirdly, the fact that a constitutional court does not owe its mandate to one particular institution does not mean in itself that it is an independent institution, composed of judges who are not under influence or even control of political elites. Theoretically, it could happen that judges are politically independent from any particular institution since not all of them are elected by it. However, this does not mean that judges will act independently from those institutions which elected or appointed them. Another problem also arises. It is not even necessarily the question whether judges would be under a pressure of any particular political institution. It is quite possible that there is no need for any particular, direct or indirect pressure. If judges have been elected or appointed according to their ideological and political beliefs their decisions would be convergent with political will of political elites almost "spontaneously", i.e. without any pressure. Legislative and executive powers count on this. Since they elect and appoint candidates who are their favourites, it is not necessary for them to exercise direct pressure or influence over

judges quite often. Judges are their like-minded persons, and this remains the most important deficiency of this method of selection which can't be overcome. The fact that both legislative and executive powers elect and appoint two-thirds of judges confirms opinion that two political branches of state power don't have any formal legal duty or political reason to elect of appoint judges primarily according to professional than to political qualifications.

3. IMPORTANCE OF OTHER PROVISIONS

The main purpose of this article is to discuss about positive and negative aspects of different methods of selection of judges. Therefore, we can't go into details regarding some other important issues which deserve careful and serious analysis in particular scientific works. These issues are directly connected with the issue of the method of selection of judges. In fact, the issue of a system of selection of judges includes: the method of selection of judges (election or appointment or combined), professional qualifications, term of office.

Since we can't explore all these issues in details for methodological reasons, we intend only to stress them[37] since they could be of importance for the issue which we explore in this work.

Regarding professional qualifications which candidates for judges have to fulfil, it is necessary to stress that they have to be relatively concretely prescribed by a constitution. If they are not prescribed by a constitution, they can be prescribed by a law although we find this solution unsatisfactory since this is *materia constitutionis* of fundamental importance. These qualifications have to include: minimum age of candidates, minimum legal experience, possibly academic qualifications. In addition, a law on a constitutional law has to prescribe in details the procedure for selection of candidates in order to prevent any institution from making arbitrary decision on the most desirable candidates.

Term of office should not be shorter than eight years although higher one (ten or twelve years) is even better. It is of fundamental importance to prevent every new parliamentary majority or new head of state to get a chance to elect or appoint new slate of a constitutional court. If this possibility would be allowed, a constitutional court would be under direct influence of political elites since each new parliamentary majority would elect candidates who support its policies. Even if a term of office is eight years it is possible that one and the same parliamentary majority elects judges twice. However, this is less possible for two reasons. Firstly, it is not so often that one party or a coalition rules for more than eights years. Secondly, even if it is a case, relationship of political forces is not necessarily the same which

[37] B. Nenadić, 139.

may prevent a parliamentary majority to elect twice the same judges. However, it seems that the independence of judges could more easily be fulfilled if their mandate is longer than eight years.

The notion of judges' independence is more in accordance with the prohibition of their re-election. If they could be re-elected, it is more probable that they would act in accordance with the interests and attitudes of ruling political elite since they would expect to gain their confidence. If there would be no possibility of re-election, judges would not have an interest to gain the confidence of political elite. The possibility of re-election impels judges to try to appeal to ruling political elite in order to get a new mandate.

It seems that secret ballot, as it is prescribed in the Slovenian law, is very good solution. Namely, members of a parliament should choose judges by secret voting. This solution could be useful if a lawmaker wants to diminish a possibility for dependence of members of parliament during the voting. One could not guarantee that secret ballot would solve the problem of voting according to political rather than professional qualifications but the possibility that at least some members of parliament would vote for the best candidate(s) remains.

A constitution or at least a law has to regulate a deadline for the election or appointment of judges and the consequences of its breach. If an institution or institutions which are competent to elect or appoint judges fail(s) to do it in the prescribed terms, different, less complicated, procedure for election or appointment should be prescribed in order to facilitate the procedure of selection of judges.

4. CONCLUSION

Theoretical researches of the issue of methods of selection of judges of constitutional courts are relatively well developed since authors have analyzed known solutions in comparative constitutional law, sometimes giving their opinion on the value of different systems of selection of judges. However, only few of them have formulated their opinion on the best possible system of selection or at least of system which would be better than the others.

Each method of selection of judges has to be analyzed as a part of a wider system of selection of judges since method of selection (election, appointment, or combination of both) is not the only important issue. Some other issues are equally important and together with method of selection they constitute a particular system of selection of judges. These issues are: 1) term of office; 2) possibility of re-election; 3) qualifications for election or appointment; 4) detail legal regulation of the procedure for election or appointment of judges.

We emphasize these issues since we want to stress that it is not possible to say the final word on the most appropriate method of selection of judges if we don't take into account these other issues. It is obvious that each method of selection of judges has its positive and negative sides. Each author and a constitution-maker have to choose one of them having in mind his/her opinion about those positive aspects which prevail over deficiencies. Each method of selection of judges has to be analyzed in connection with: 1) other legal and political principles such as popular sovereignty; 2) the fact that constitutional judiciary is a separate branch of state power or at least "something between" existing branches of state power; 3) judges' professional qualifications; 4) judges' responsibility.

We prefer the method of selection of judges by parliament on the proposal of an independent body. We understand that this method of selection has its deficiencies but its positive aspects prevail. Positive aspects of this method are as follows: 1) election is in the competence of parliament which is a representative body of citizens who are formal bearers of sovereignty; 2) parliament has to elect judges in public session which means that it has to explain its choice to wider public; 3) if election of judges has to be realized by a qualified majority, which we prefer, parliamentary majority is, most probably, obliged to find a compromise parliamentary minority or at least with a part of it, which limits the possibility of domination of any political elite in the process of election; 4) this method of selection introduces the possibility of parliament's monopoly over the process of election of judges which can be limited or even excluded if parliament would have to elect among candidates proposed by an independent body.

Negative aspects of this method of selection of judges are as follows: 1) political elite could prevail in the electoral process thus eliminating or at least significantly limiting the role of other institutions; 2) even if the role of an independent body is prescribed it could be only formal if parliament has the right to elect any candidate who is on a list of candidates submitted by this independent body.

LIST OF REFERENCES

Books and articles

1. Balkin, Jack M., „*Lochner* and Constitutional Historicism", Boston University Law Review, Vol. 85, 2005;
2. Dorsen, Norman, „The selection of U.S. Supreme Court justices", *International Journal of Constitutional Law*, Vol. 4, 4/2006;
3. Duverger, Maurice, *La Cinquième République*, Presses Unniversitaires de France, Paris 1960;

4. Gamper, Anna, „Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters", *Cambridge Journal of International and Comparative Law*, Vol. 4, No. 2/2015;
5. Grimm, Dieter, „Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics", *R. EMERJ*, Vol. 21, 3/2019;
6. Hadži Stević, Brano, „Preispitivanje dogme o trodeobi funkcija državne vlasti – Ustavno sudstvo kao četvrta funkcija državne vlasti" (manuscript is prepared for publishing in the Collection of Papers *Contradictions of Contemporary Law*, Faculty of Law, University of East Sarajevo, East Sarajevo 2022;
7. Lever, Annabelle, „Democracy and Judicial Review: Are They Really Incompatible?", *Perspectives on Politics*, Vol. 7, No. 4/2009;
8. Mace, George, „The Antidemocratic Character of Judicial Review", *California Law Review*, Vol. 60, 4/1972;
9. Marković, Goran, *Ustavno pravo*, Zavod za udžbenike i nastavna sredstva Republike Srpske i Pravni fakultet Univerziteta u Istočnom Sarajevu, Istočno Sarajevo 2021;
10. Marković, Ratko, „Ustav Republike Srbije iz 2006 – Kritički pogled", *Anali Pravnog fakulteta u Beogradu*, 2/2006;
11. Nenadić, Bosa, *O jemstvima nezavisnosti ustavnih sudova. Sa posebnim osvrtom na Ustavni sud Srbije*, glasnik, Beograd 2012;
12. Orlović, Slobodan P., *Vladavina ustava ili ustavnog sudstva*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad 2013;
13. Palazzo, Nausica, „Law-making power of the Constitutional Court of Italy", M. Florczak-Wator (ed.), *Judicial Law-Making in European Constitutional Courts*, Routledge, London and New York 2020;
14. Saiz Arnaiz, Alejandro, „Constitutional Jurisdiction in Europe: Between Law and Politics", *Maastricht Journal of European and Comparative Law*, Vol. 6, 2/1999;
15. Simović, Darko, „Problem politizacije i sastav Ustavnog suda", B. M. Nenadić (prir.), *Uloga i značaj Ustavnog suda u očuvanju vladavine prava*, Ustavni sud, Beograd 2013.
16. Simović, Darko, „Slabost institucionalnih garantija nezavisnosti Ustavnog suda Srbije", E. Šarčević (ur.), *Ko bira sudije ustavnog suda? Regionalni bilans teorije i prakse: BiH, Srbija, Hrvatska i Makedonija*, Fondacija Centar za javno pravo, Sarajevo 2012;
17. Staden, Andreas von, „The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review", *I.CON*, Vol. 10, No. 4/2012;
18. Stone Sweet, Alec, „Constitutional Courts and Parliamentary Democracy", West European Politics, Vol. 25, 1/2002;
19. Vučić, Olivera, Petrov, Vladan, Simović, Darko, *Ustavni sudovi bivših jugoslovenskih republika. Teorija, norma, praksa*, Dosije studio, Beograd 2010;

20. Waldron, Jeremy, „Judicial review and the Conditions of Democracy", *The Journal of Political Philosophy*, Vol. 6, No. 4/1998.

Legal Acts

1. Constitutions of Albania, Belgium, Bulgaria, Croatia, Czech Republic, France, Greece, Hungary, Italy, Japan, Latvia, Lithuania, Montenegro, Moldova, Northern Macedonia, Poland, Portugal, Romania, Russian Federation, Serbia, Slovenia, Spain, Turkey;
2. The Constitutional Court Act (ZustS9), *Official Gazette of the Republic of Slovenia*, No. 64/07 – official consolidated text and No. 109/12.

Проф. др Горан Марковић

Правни факултет Универзитета у Источном Сарајеву

О НАЧИНИМА ОДАБИРА СУДИЈА УСТАВНИХ СУДОВА

Сажетак

У раду се врши анализа различитих метода одабира судија уставних судова. Аутор анализира три основна метода: избор од стране парламента, именовање од стране шефа државе и мјешовити метод избора односно именовања судија од стране трију институција, при чему свака од њих бира односно именује једну трећину судија.

Сваки начин одабира судија само је дио ширег система одабира судија, који обухвата и сљедеће елементе: дужина мандата, могућност реизбора, услови за избор односно именовање, поступак избора односно именовања. Методолошки разлози, међутим, нису омогућили да се овим питањима бавимо у раду.

Коришћењем позитивноправног и упоредног метода, као и општим теоријским приступом неким од основних уставних принципа, као што су народни суверенитет, демократски легитимитет, одговорност и квалификованост, аутор анализира позитивне и негативне стране посматраних начина одабира судија.

Аутор заговара један од њих – избор судија од стране парламента, на приједлог независног органа, и образлаже аргументе у прилог том приједлогу.

Кључне ријечи: *Уставни суд; Судије; Парламент; Шеф државе; Избор и именовање; Независни орган*.