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ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

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ELECTION OF JUDGES: ARE WE READY TO QUESTION THE DOGMMA?

The purpose of this work is to explore two methods of election of judges: election by the parliament and by the judicial council. The author compares these methods of election of judges using few principles which have to be fulfilled: legitimacy, accountability, and independence of judges, as well as merit criterion.

The author examines advantages and weaknesses of both methods. His hypothesis is that the judiciary is one of branches of state power, and that therefore the judges have to be legitimate and accountable since they have to be in a way responsible to the people who are the bearer of the sovereign power. This could be achieved only through direct or indirect election of judges. Since the author rejects direct election of judges, he finds out that the only way to achieve judges' legitimacy is through their election by parliament.

This method of election has one main weakness, namely very strong possibility that the parliament would elect judges according to political rather than professional (merit) criterion. This is the reason why the author thinks that there should not be parliament's monopoly in the process of election since the judges have to be elected on the proposal of the judicial council among candidates who have to pass special exam.

Key words: Judiciary; Judges; Judicial council; Parliament; Selection of judges; Political elites; Merit.

1. INTRODUCTION

The method of selection of judges is one of the most important topics in every constitutional system. Since the judiciary is one of three traditional branches of state power, its functioning and the principles on which it is based, are among the most important concerns of the public authorities as well as the constitution-makers. Principally, the judges can be selected

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either by the election or by the appointment. They can be elected by the voters, the parliament or special, nominally independent body, composed mostly of judges, or they can be appointed by the executive (head of state, government or ministry of justice)

The main purpose of this work is to discuss the positive and negatives aspects of different methods of selection of judges (i.e. election or appointment), in order to formulate some proposals for desirable constitutional solutions of this problem. The author will employ different scientific methods in order to explain his hypothesis and to explain his proposals. First, positive legal method is used in order to explore constitutional and other legal provisions on the selection of judges. Secondly, comparative method will have very important place in the research since it is necessary to compare constitutional solutions in different countries. Thirdly, the historical method will be of considerable use since some constitutional solutions were enacted in particular states which changed these solutions at some point of time. Fourthly, it is impossible to discuss this topic exploring only methods of legal sciences since it is important to understand which social factors influence the process of the selection of judges. Therefore, it is necessary to use the method of political sciences which will help us to understand which social factors influence the very process of the selection of judges.

The subject of this work is only one question: who selects judges. Some other issues are also important for this topic, such as the conditions for selection of candidates, the term length, etc., but we decided to focus only on the abovementioned issue, since the analysis of other issues deserves particular and deep studies.

The basic hypothesis is that the selection of judges has to be analyzed in the framework of the principle of popular sovereignty, and on the basis of the idea that the judiciary is one of three branches of state power. Therefore, the issue of the method of selection of judges can not be analyzed only through the notions of the judicial independence and the necessity for the judges' selection by an independent and professional body. Although it is necessary that the selection of judges is free from the political influences as much as possible, the opinion that this aim is achievable only through their selection by a professional body is not correct. We shall try to answer the question why it is so, and to explain how it could be possible to connect two demands – that the judges do not become a closed clique who is responsible to nobody, and that they do not become the means in the hands of political elites. We shall develop our own opinion on the most desirable method of selection of judges which includes participation and mutual dependence of two institutions, in order to achieve both basic aims: that the judges have democratic legitimacy since judiciary is the third branch of state power;

and that their selection is not under political control, or that at least political elites don't have monopoly over the process of selection.

We shall discuss only two methods of selection of judges: election by the parliament and election by the judicial council for reasons which we shall explain in the following pages.

2. THEORETICAL FORMULATION OF THE DILEMMA

The theories of the separation of powers formulate relationship between two political state powers – the legislature and the executive, while they find the judiciary as an independent and non-political[1] state power which should not be under control of the political state powers. Therefore, the argument goes, the legislature and the executive should not have institutional means of influence on judiciary at their disposal.

These theories, however, lack the answer to some important questions. First of all, the question is how it is possible to have the judiciary as a state power which is not under any influence of the bearer of the sovereignty, which is, at least nominally, the people. If the people are the source and the basis of the state power, and the judiciary is one of state powers, then it is natural that the judiciary is in some way under the popular control. If this is to be prescribed in the constitution, two possible solutions are possible. The first one is the popular election of judges,[2] and the second one is the election of judges by the parliament, with or without participation of other institution(s) in the process.

It is true that the arguments for the election of judges can not be the same as for the elections of members of parliament or a head of state since only the

[1] The judiciary is a non-political branch of state power in narrow sense. Namely, the judiciary doesn't create politics in narrow sense. It doesn't create political programmes in the spheres of economy, social security, security policies, etc. However, the judiciary is a policy-making power in wider sense, since every execution of legal system is a policy-making activity *per se*. In this sense, judges are also policymakers. This is so because judges don't simply say what the law is but they also say what the law should be. In difficult cases, judicial legal and extralegal considerations both play significant role as they influence not only the execution of law but, through this execution, they also influence shaping of social relations. – See on this issue: C. G. Geyh, „Judicial Selection Reconsidered: A Plea for Radical Moderation", *Harward Journal of Law & Public Policy* Vol. 35, 2/2012, 624–625, 628.

[2] The idea of popular election of judges first came into being during the period of US President Jackson who criticized the system of appointment of judges for several reasons: unaccountability of judges, aristocratic judiciary, and the elitism of appointed judges. – S. B. Burbank, B. Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, SAGE Publications 2002, 198.

The basic aim behind the method of election of judges by citizens had been to guarantee broad support for the elected judges and therefore to make them accountable to citizens.

On the popular election of judges, see also: W. St. Garwood John, „Democracy and the Popular Election of Judges: An Argument", *SMU Law Review* Vol. 16, 2/1962.

judges are elected primarily or exclusively on the merit criterion. Therefore, the citizens could not be competent to elect judges directly or through an electoral college. The judges don't propagate the political or any other programme or ideology,[3] and the citizens can't vote for judges as representatives of their interests or according to the judges' attitudes on state and society.

On the other hand, if the judges would be elected by the citizens, they would find themselves in the situation to act according to wishes, attitudes or expectations of the latter, which would not be acceptable since the judges have to act as independent competent persons and not as the persons who seek the electoral support of the citizens.

The election of judges by citizens opens some hard questions which, in our opinion, could not be resolved in satisfying manner, which is the reason why we don't think that this method of selection should be analyzed let alone accepted. This method of selection (i.e. of election) of judges opens two main problems. The first problem is that a candidate for the judicial post who intends to run for the office in the direct election will try to persuade voters that he/she is the best candidate. In order to do this, he/she would have to persuade them that his/her convictions are the same or very similar to those of the majority of voters.

The second problem is a financial one. In order to be elected, a candidate has to organize a campaign to some extent similar to the one organized by political parties during presidential or parliamentary elections. If a candidate organizes campaign with the money borrowed from the corporations or other financially powerful subjects, the latter would expect from the former to make judgments in his interest. Big money[4] which has to be spent in the campaign for direct election of judges limits elected candidate (i.e. newly elected judge) to act as an agent of those who gave him/her the money and who has the interest to influence the judgments in particular cases.

If the judges have to be independent, they have to act outside of politics, and independently from the political elites. The method of selection of judges has to enable the balance between few principles – accountability, independence, competence, legitimacy, and integrity.[5] Some theorists as well

[3] To be more precise, the judges develop their views on society and state, which means that they adopt certain ideological views to some extent. Although it is not desirable for them to openly express them when they decide on particular cases, they nevertheless base these decisions on their worldviews.

[4] Candidates for state supreme courts in the USA raised $206.4 million nationally between 2000 and 2009 which is more than double comparing to period between 1990 and 1999. – See: B. Brandenburg, „Big Money and Impartial Justice: Can They Live Together?", *Arizona Law Review* Vol. 52, 2/2010, 207–217.

[5] B. T. Fitzpatrick, „Judicial Selection and Ideology" (Speech), *Oklahoma City University Law Review* Vol. 42, 1/2017, 54.

as legislators think that this is possible if the judges are elected by a non-political body, composed of judges and some other independent professionals (lawyers, attorneys, etc.). This method of election of judges is called merit system or merit selection.

This solution, however, has two limitations. The first limitation comes from the fact that this solution is not convergent with the notion of popular sovereignty. The second limitation comes from the argument that even members of this nominally independent body are not necessarily really independent from different influences.

Regarding the first limitation, it has to be noted that the judges as the bearers of the state power have to be somehow connected to the bearer of the sovereignty since they fulfil a public function. They have to serve to the law, whose source, at least nominally although not in practice, is the people as the formal bearer of sovereignty. If the people have no influence on the selection of judges, its status of the bearer of sovereignty wanes.

The second limitation has even more serious consequences. It is impossible to assume that so important function, such as the selection of judges, can be exercised without external influences on the members of the professional body which is authorized for the selection. There is no guarantee at all that members of this professional body would really be independent from political elites or members of the economically dominant class. It is also possible that this professional body transforms into a kind of caste, i.e. of a closed group which promotes its own interests and views. It would become independent not only from any institution but also immune from any kind of control, whether it is a control by political institutions, judiciary, or public. Why should not, for example, dozen of members of this professional body decide to shape the judiciary according to their interests and views? Why shouldn't they decide to influence the process of election of judges in order to make a favour to some politically or economically influential individuals or groups? Why shouldn't they decide to act as a *per se* powerful group which has its own group interests?

It is desirable that the political elites do not have dominant influence on the selection of judges. However, the question is whether it is justified that the constitution-maker moves into the direction of the influence of a "judicial elite". Namely, if the influence of the political elites in the process of selection is replaced with the influence of a kind of „judicial elite", which has proto-political character, nothing changes in the nature and outcome of the method of selection. The aim of the method of selection should not be that any elite influences it but that the selection is based on objective criterion, which should not be subjugated to the political ones.

It seems that the dilemma looks like follows: whether it is more appropriate to elect or appoint judges by a political authority, i.e. the parliament or the head of state, or it is better to elect them by an independent and professional body, composed entirely or mostly by judges themselves? In our opinion, these two (or three) basic methods of selection as presented here don't include possible hybrid models of selection, such as, for example, selection by both subjects – the parliament and an independent and professional body. If two subjects (or two bodies, to be more precise) participate in the process of selection (or, better to say, of election) of judges, it is highly probable (although not guaranteed) that two bodies would control and limit each other in the process of election. Therefore, the election of judges would not be exclusive competence of any particular body, which could be a guarantee that the judges would not be elected predominantly according to political criterion and interests. Two bodies which would in this case participate in the election of judges would have different character. The one would be a political body, i.e. parliament, while the other would be a professional body, composed, at least dominantly, of people who don't belong to political elites. It is reasonable that these two bodies would limit each other in their attempts to monopolize the process of election of judges. They would be able to do it by sharing the competences.

In this work, we only discuss two models of selection of judges – by the parliament and the judicial council, with possible hybrid models, including both institutions. As we mentioned at the beginning of this work, judges also could be elected by voters or appointed by the executive, with or without participation of other institution. Our intention is to discuss only about the election of judges by the parliament and the judicial council. We are not going to discuss other methods of selection.

We chose this methodological approach for two reasons. First, we come from the Yugoslav legal tradition, which during the period of federal Yugoslavia had been marked by the election of judges by the legislature. After the process of "transition" to capitalism started in 1990 new constitutional solutions went into two directions. Some states (Slovenia, and Serbia but only to some extent) adopted the solution of election of judges by parliament, while most of them adopted different model of election of judges by the judicial council. Therefore, Yugoslav legal tradition influenced to some extent constitutional solutions in former Yugoslav republics. However, despite this legal tradition most of former Yugoslav republics decided to restrict or even delete the influence of parliament in the process, and introduced the model of election by different body – judicial council. Since we belong to this legal tradition, it is natural to explore two competing models of election of judges which had been or which still are constitutionalized in former Yugoslav republics.

The second reason for this methodological approach is as follows. The basic hypothesis of this research is that the model of election of judges has to harmonize few principles, such as: democratic legitimacy, accountability, and independence of judges. We have already formulated our opinion on the model of election of judges by electorate.

Regarding the model of appointment of judges by the executive, we have to stress two reasons why we don't analyze it in this work. First, this method of election has never been adopted in the recent Yugoslav legal tradition, and there are no voices for its introduction in any constitutional system. If there are discussions on the methods of selection of judges, they are centred on the issue whether judges should be elected by the judicial council, and what its exact competences should be. Therefore, in the past thirty years the only relevant discussion has been whether the judges should be elected by the parliament, the judicial council, or by both institutions.

Secondly, we think that this method of selection of judges is not appropriate since it gives considerable power to the executive (in most cases, the head of state) in the process of selection which is not in accordance with the principle of democratic legitimacy of judges. It is true that the executive also can have democratic legitimacy if it is directly elected. However, its legitimacy is not the same as the one of the legislative body since the latter is composed of political representatives who at least formally represent different social groups. This is not the case with the executive since it represents only the relative or absolute majority of the voters. Therefore, democratic legitimacy of judges appointed by the executive could be only limited.

The problem with the appointment of judges by the executive lays also in the fact that the executive is party oriented, no matter if by the executive we mean on the head of state or a ministry of justice or governor (like in the US federal units). It is true that the parliament is also composed of members of political elites. Therefore, it seems that there is no difference in this sense between the model of election of judges by the parliament and the model of appointment by the executive since both political branches of state power are party dominated.

However, the difference exists. The executive is under control of one political party or a coalition while the parliament, also under control of a party or a coalition, is composed of both ruling and opposition parties. Since one political party or a coalition controls the executive, it has the power to decisively influence the appointment of judges (president of the republic, for example, is a member or a leader of a political party and he/she "naturally" tends to appoint judges in accordance to his/her political or ideological preferences). The problem is not so obvious if the executive appoints judges on

the proposal of an independent body (judicial council, appointment commission, etc.) since the former is limited with the proposal of the latter. However, the executive still has considerable influence in this model of selection of judges, and the executive is under control of only one party or coalition.[6]

3. DIFFERENT MODELS OF SELECTION OF JUDGES

Two basic models of selection of judges are appointment or election by political authority in the face of executive or legislature, while the other is election by an independent and professional body. According to this, the basic distinction is whether the appointment or election has to be done by a political or a non-political body. The opinion that the election by a non-political body is more acceptable since the result of election doesn't depend on political considerations and interests is quite a usual opinion. We shall have to discuss about this hypothesis and to question it fundamentally.

3.1. The election of judges by an independent and professional body

3.1.1. Composition of judicial councils

The name of this body is different in contemporary constitutional systems.[7] We shall use the term "judicial council" as a generic name. The first question is what the composition of these bodies is in different constitutional systems. As a general rule, we can say that the judicial council is composed mostly, but not entirely of judges.[8] There are two reasons for such composi-

[6] It is important to note that one of reasons for the constitutional reform in the UK in 2005 has been to achieve more independence of judiciary for the judges were appointed by the Lord Chancellor, who was appointed by the Queen on the advice of the Prime Minister. During the reform, it has been recognized that the English judiciary is woefully unrepresentative of the nation's population. Although the Lord Chancellor retained its competence to appoint judges, he/she has been limited by the recommendation of the selection commission. – T. Smith *et al.*, *Selecting the very best The selection of high-level judges in the United States, Europe and Asia*, Kirkland & Ellis, 26–28.

As some authors noted, the Government accepted considerable self-restraint. – A. Bado, „Izbor sudija – nepristrasnost i politika", *Zbornik radova Pravnog fakulteta u Novom Sadu* 1/2014, 284.

[7] Judicial councils exist in more than 60 per cent of states worldwide although their composition and competences are very different. – N. Garoupa, T. Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, The Law School the University of Chicago, Program in Law and Economics Working Paper No. 444, 2008, *https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1221&context=law_and_economics*.

The same authors found out that out of 121 constitutions which they explored, there were provisions on judicial councils in 93.

[8] According to the ENCJ's Project Team proposal, the proportion of non-judicial members in the judicial council should be between 1/3 and 50%. – European Network of Councils

tion of the judicial council. The first one is that the judges enjoy autonomy in the process of election, since they constitute the majority of the judicial council. The second one is that other factors, including the state institutions, participate in the process of election. If the most members of the judicial council are judges, they feel independent in the process of election of judges.[9]

In Slovenia, the Judicial Council of composed of 11 members, out of which six are judges, while five are university professors, attorneys and other lawyers. As one could see, judges dominate this body, although it is given to other lawyers, including university professors, to be represented to considerable extent. It seems that this solution is acceptable since it enables all kinds of lawyers to influence the process of selection, although it gives the priority to judges who have the biggest interest to participate in the process.

It is to some extent similar in Spain, whose Judicial Council is composed of 20 members, including 12 judges. The others are also jurists, which mean that the political elites don't formally participate in its composition. It is important that these eight members have to be elected by a three-fifths majority in the Parliament. The Constitution didn't prescribe how the judges have to be elected. This changed in 1985, when it has been prescribed that each chamber of the Parliament elects ten members of the Council with three-fifths majority. It seems that this solution is acceptable although it has a huge weakness. Its positive side is that political parties who belong to majority and minority has to reach compromise on the Judicial Council's composition since it is not easy for the parliamentary majority to achieve this qualified majority. Therefore, the possibility that the members of the Judicial Council are supporters of ruling parties is lesser than it would be in the case that the members have to be elected by absolute majority. On the other side, it is not easy to reach qualified majority in the Parliament, particularly if differences between majority and opposition are wide.

In Italy, the Council is composed of twenty four members, out of whom sixteen are magistrates and prosecutors, while eight of them are lawyers and law professors, all of whom are elected by the Parliament.

In Serbia, out of 11 members of the Higher Judicial Council, seven are judges (president of the Supreme Cassation Court plus six judges), while the others are the minister of justice, president of the National Assembly's committee on judicial system, and two more jurists (Art. 153 of the Constitution). Members of this body are elected by the National Assembly, except those who are members *ex officio*. In Croatia, out of 11 members, seven

for the Judiciary, *Standards VI: Non-judicial Members in Judicial Governance, ENCJ Report 2015–2016*, *https://www.encj.eu/images/stories/pdf/workinggroups/encj_standards_vi_2015_2016_adopted_ga_warsaw.docx.pdf*, 9.

[9] N. Garoupa, T. Ginsburg, 23.

are judges, while two are MPs (one of them has to belong to opposition). It seems that this latter solution (which means that two opposing MPs are included) is quite acceptable since it enables the legislature to participate in the process of selection of judges while it doesn't enable parliamentary majority to become the sole subject in this process. In Slovenia, six out of 11 places in the Judicial Council belongs to judges, who elect these members among themselves (Art. 131 of the Constitution).

In the UK, there is the Judicial Appointment Commission, composed of 15 members. Five of them come from judiciary, but most of them have to be lay persons.[10] In Italy, the Higher Judicial Council is responsible for the selection of judges, and it is composed mostly of judges elected by the judicial profession (two-third of members) while the rest of members are so-called lay members, who are appointed by the Parliament.[11] It is important to stress that the reform in Italy has been promoted in 2002 in order to strengthen the role of the Parliament in the process of selection of judges. The reason was that it has been estimated that the Council's members coming from judiciary usually didn't seriously examine the candidates and their appointment in most cases has been only *pro forma*. In other words, the members of the Council who came from the judicial circles were not ready to seriously question the professional references of candidates. Therefore, it has been thought that the members of the Council elected by the Parliament would be ready to examine the references of the candidates more seriously.

Belgium has interesting solution, since non-judicial members compose 22 out of 44 members of the Judicial Council, and they are elected by the Senate.

Whether the judges should compose majority or minority of members of the judicial council is a controversial issue. If they compose the majority of this body, the consequence could be that the judges become a kind of closed group whose members elect each other. Judges have their own interests, and one of their most important interests is to be elected to a court. Therefore, they have the interest to model their behaviour in order to be fit for election. Even if they are not under the pressure of the political elites, they can be under a kind of pressure from powerful circles in the judiciary (or people who are connected with powerful circles in judiciary) to act in a certain way if they want to be elected.

On the other hand, if the judges compose the minority of the judicial council,[12] the question is whether election to juridical posts would be under

[10] T. Smith *et al.*, 27.

[11] *Ibid.*, 33–34.

[12] This is the case in France, although the original proposal was to introduce numerical equality of judges and other members of the judicial council. However, the external members of the judicial council, who don't belong to any branch of state power, are proposed by the

control of some other subjects, such as political elites or other jurists, which also could be dangerous, especially if the legislature and executive control the majority in the judicial council.

The question is also whether the legislature and executive should have their representatives in the judicial council. In some states this is the case, since the minister of justice is a member of the judicial council, either with full voting rights or the right to participate in decision on some matters. In some "established democracies", such as France or Italy, the head of state and/or the minister of justice are (or were[13]) members of the judicial council which is not an unacceptable solution for these countries. It is also the case in some countries in "transition", such as Northern Macedonia, Montenegro, or Serbia, where the minister of justice is a member of the judicial council. It is true that in these cases the executive has only one or two members of the judicial council. It could be argued that the executive could only minimally influence the process of selection since it has only one or two members of the judicial council. However, if the executive has sufficient political authority, particularly in cases when the judicial council is divided in opinions, the influence of executive could be decisive.

On the other hand, if the executive is not represented in the judicial council, the state power (or at least this branch of state power) would not have any direct or institutional possibility to influence the process of selection of judges. It seems that a compromise solution is optimal, namely that the persons who belong to legislative or executive branch don't have the right to be elected or appointed to the judicial council, but that the legislative and executive branches of the state power have the right to elect or appoint one representative each to the judicial council. In this way, these two branches of state power would have the right to participate in the process of selection of judges, but their members would not be members of the judicial council, which means that the persons with some political influence and power would not directly participate in the process.

In our opinion, the judicial council should have hybrid composition, in the sense that most of its members would be judges themselves, while the others would be other jurists, including university professors, and one or two would be representatives of the legislature (not the MPs though). This composition of the judicial council would enable the realization of few

President of the Republic, President of the Senate, and President of the National Assembly. – A. Bado, 310.

The reasons for this solution are as follows: avoidance of corporatism, self-interest and self-protection, and large participation of legal professionals and experts. – European Network of Councils for the Judiciary, 17.

[13] *Ibid.*, 309–310.

In France, for example, after 2008 constitutional reform the President of the Republic and the Minister of Justice do not participate in the meetings of the High Judicial Council.

aims. The first aim is that judges, as majority members of the council, have decisive influence over the process of selection of judges. The second aim is that other subjects are included in the process, in order to prevent predominance of the judges over the process. The third aim is that other branches of state power, or at least one of them (legislature), are included in the process. If the legislature's representatives are not MPs themselves but people outside parliament, this would mean that persons with no political power or with very limited political influence participate in the process of selection. If the parliament elects two representatives to the judicial council, which would be preferred, they would be proposed by parliamentary majority and opposition respectively. In this way, different political parties would get the chance to influence the composition of the judicial council.

It has to be noted that heterogeneous composition of the judicial council doesn't guarantee the absence of political influence in the process of selection of judges. This is not only because legislature and executive have their representatives in the judicial council. There is no any reasonable proof that the judges – members of the judicial council – would be independent from political influences in the process of selection of judges. First of all, judges themselves have political and ideological preferences and prejudices which can to some extent influence their decisions. Secondly, one couldn't claim in advance that the judges are immune to political pressures or even to their own personal calculations that they would get some advantages if they vote or decline to vote for a candidate for the judicial position. Therefore, there is a real danger that the judges from the judicial council become a clique which follows their own interests, and/or is connected with political elites or even economically dominated social class.

3.1.2. Should the judicial councils elect judges?

Some constitutions prescribe that the judicial council elects the judges.[14] In Bulgaria, judges are appointed by the Judicial Chamber of the Supreme

[14] It has to be noted that the constitutional systems mutually differentiate on the issue if the judicial council has to be constitutionally regulated. In most systems it is the case. The constitutions prescribe two basic models. In the first one, the judicial council elects judges, oversees their work, and has the disciplinary power over them. In the second one, the judicial council oversees the management of the courts, prepares and administers the budget, etc. – M. K. Dietrich, *A Comparative Review of Judicial Councils in the Former Yugoslavia*, East West Management Institute: Occasional Paper Series, 2008, *https://www.ewmi.org/sites/ewmi.org/files/files/programdocs/EWMIOPSJudicialCouncils.pdf#overlay-context=user/1*, 5.

For our work it is important to stress that the Consultative Council of European Judges (CCJE) Opinion No. 10 (2007) recommends that the judicial council selects and appoints judges itself or in cooperation with other institutions. The point is that even this body doesn't insist on the selection of judges by the judicial council itself, arguing that it could also select them in cooperation with other institution(s).

Judicial Council (Art. 129 of the Constitution). Article 121 of the Constitution of Croatia prescribes that the National Judicial Council appoints judges. In Germany, the Basic Law gives the possibility to federal units to prescribe participation of the committees of judges in the process of appointment of judges, together with respective ministers of justice (Art. 98). In Italy, the selection of judges is in the competence of the Higher Judicial Council.[15] According to articles 125 and 128 of the Constitution of Montenegro, the judges are elected by the Judicial Council. Amendment XXIX on the Constitution of Northern Macedonia prescribes that the Judicial Council elects the judges. It is somewhat specific situation in Serbia, where the High Judicial Council elects only judges for the permanent post, while the National Assembly elects judges who are elected to the post for the first time.

As this comparative analysis shows, the states in which the judicial council elects judges are not so numerous.[16] Some of these states are usually described as established democracies, in the sense that they established liberal democratic constitutional regime before 1989, while the others are so-called states in transition, i.e. former „socialist" states. There is no general conclusion on the question whether the selection of judges by the judicial council is more accepted in the „established democracies" or in the „new democracies".

It is more usual that the judicial council plays certain role in the process of selection of judges, mostly as a body which proposes candidates[17] or estimates their qualifications, while other institution elects or appoints the judges. This means that there exists a kind of misunderstanding in the public opinion, even among the academics, about the incidence of this method of selection of judges.[18] It is by no means the most accepted method of selec-

[15] See: G. Oberto, *Selection, Training, Career and Status of Judges: International Standards and the Italian Experience*, *https://www.giacomooberto.com/yerevan/report.htm#par10*, 11 May 2021; N. Garoupa, T. Ginsburg, 7.

[16] In some states, the UK for example, there is opinion that the judicial appointment commission's participation in the process of selection of judges means that ministers (!), judges and the legal profession have legitimate interest in the judicial appointments. – G. Gee, „Rethinking the Lord Chancellor's role in judicial appointments", *Legal Ethics* Vol. 20, 1/2017, 8.

Out of 13 states which are members of the Consultative Council of European Judges (CCJE) and which have been included in one of the reports, the judicial council elects judges in five of them. – Consultative Council of European Judges (CCJE), *Report on judicial independence and impartiality in the Council of Europe member States in 2017*, *https://rm.coe.int/2017-report-situation-ofjudges-in-member-states/1680786ae1*, 16–27.

[17] In Alaska, for example, the Judicial Council „identifies" candidates for judicial positions, and forwards at least two names to the Governor. – T. White Carns, S. Mason Dosik, „Alaska's Merit Selection of Judges: The Council's Role, Past and Present", *Alaska Law Review* Vol. 35, 2/2019, 178.

[18] As some authors conclude, the judicial councils don't by themselves „guarantee the substantive outputs of independence and quality." – N. Garoupa, T. Ginsburg, 3.

tion. It looks like most states didn't accept the notion that the best way of selection of judges is by an independent and professional body.

It is interesting to note that even some authoritative bodies understand the problem of the selection of judges using tradition as one of primary arguments. The Venice Commission, for example, finds out that even the executive can appoint judges without fear for their independence since possible abuses of the executive would be prevented thanks to developed legal culture and traditions.[19] If this argument is to be accepted,[20] the role of the judicial council could be relatively modest. Its role at best would be to analyze qualifications of the candidate, to make a list of candidates, and to propose one or few of them to the institution which elects or appoints them.

The basic argument in favour of the selection of judges by the judicial council is that it is able to act as an independent and competent[21] body. It is independent since it is not composed of politicians, and its members are not selected by political elites.[22] The independence is one of the most important principles in the process of selection of judges, since it is believed that their selection by political institutions would lead to politically determined composition of courts. Politically dependent judges are not able to act according to laws but to wishes of those who posses political or other power.

Judicial council is a competent body since it is entirely or mostly composed of judges who have knowledge and experience necessary to estimate whether candidates for the judicial positions deserve them. Members of political elites are not competent to decide on this issue even if one could presuppose that they would be politically neutral in their decisions.

The selection of judges by the judicial council, however, has to be seriously examined and challenged. Despite the fact that the mandate of the members of the judicial council is always limited, they are really not responsible to anyone for their decisions. They transform themselves into a body with great power, but without democratic legitimacy and responsibility to political institutions let alone the citizens. One can't formulate firm arguments for the attitude that such a body would not act according

[19] *Appointment of Judges*, CDL-JD(2007)001rev, European Commission for Democracy Through Law, para. 4.

[20] Some authors argue that researches show that political factors dominate the selection of federal judges in the USA. – T. Jennings Peretti, „The Lessons of Social Science Research", S. B. Burbank, B. Friedman (eds.), *Judicial Independence at the Crossroads*, Sage Publications, London 2002, 105.

[21] S. Spač, „The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia", *Problems of Post-Communism* 2020, 1.

[22] The Venice Commission follows the opinion that the very existence of the judicial council has to serve the aim of exclusion of pressures from other state authorities in the process of selection of judges. – *Opinion on the Reform of Judiciary in Bulgaria*, CDL-INF(1999)005, para. 28.

to private or group interests, but according to general principles of independence and merit. Why should they act according to these principles if they find themselves in the situation where different political and other pressures on them exist, and/or when they act according to their specific private or group interests? In other words, there is no even one firm proof that it could be reasonably expected that members of the judicial council would really act independently and according to standards of profession and moral. This is the case because members of the judicial council can expect some benefits for themselves in the future if they select a candidate who is preferred by political elites. It is reasonably expected that they behave according to the *do ut des* principle.

It is not even necessary that there are external pressures. Judges who are members of the judicial council could decide to prefer candidates who share their values, attitudes, and practices, or to prefer candidates whom they know.[23] It seems that this conclusion is quite natural. Namely, judges who are members of the judicial council have their opinion on the legal system, judiciary, and judicial practices, as well as on the social and political issues. They also adopt an ideology and have a vision of the state and society. It is expected that they prefer *status quo*. In order to preserve it, they chose the candidates with the same or similar ideology, values, visions, and practices.

If the judicial council is the sole body which decides on the selection of judges, the problem is that it monopolizes the process of decision-making because it is not limited by other institutions when it decides on the selection of candidates for the judicial positions.[24] Any monopoly in the process of selection of judges is harmful since the institution which elects or appoints judges is not controlled and limited by other institutions. In practice it means that if the judicial council decides on the basis of political criterion or in order to fulfil individual or group interests, no one could repeal its decision. This is a real danger for the realization of the notion of independent and non-political decision-making on the selection of judges. Some authors rightly point out that this method of selection could lead to corporatism.[25] Researches in some countries reveal that "the judiciary became captured from the inside"[26] and that a kind of balance between judicial self-government and influence of political institutions is necessary.

[23] S. Spač, 1.

[24] In our opinion, Thomas Jefferson was right saying that it would be counter to the principle of the government based on the public will that the judges are dependent only on themselves. – K. S. Klein, „Weighing Democracy and Judicial Legitimacy in Judicial Selection", *Texas Review of Law & Politics* Vol. 23, 1/2019, 271.

[25] A. Bado, 308.

[26] About the case of Slovakia, see: S. Spač, 3.

Although we don't adopt the notion that the judicial council should elect judges, we think that they should have an important role in the process of selection. There are two reasons why the judicial council should participate in this process. First, its very participation in the process of selection of judges serves as a means of limitation of the role of other subjects, namely those whose role is to elect or appoint the judges. Division of authority in this sense between judicial council and parliament or head of state could be very important in order to crash the monopoly of any institution in this process.[27] Secondly, the judicial council's role is to provide the implementation of the procedure of selection of candidates which has to be based on the merit. If the candidates have to pass exam, for example, which we prefer, then the judicial council, composed mainly of judges, as competent persons, is the most appropriate body for this.

If the exam is properly designed, both the judicial council and a political institution which elects or appoints judges wouldn't have wide possibilities for discretion. They would have to propose and/or elect/appoint a candidate or candidates with the best results on the exam. It is possible that an institution with the power to elect or appoint a candidate rejects to do it for it has some justified doubts based on the legally prescribed reasons. Even if this would be the case, two points are important to stress. First, an institution which has to elect or appoint a candidate can't do it without previous proposal of the judicial council, which means that a political institution doesn't have full freedom of election or appointment. When it chooses a candidate, it has at its disposal results of the exam(s), which means that it can't make its decision without previous careful thinking about best candidates. Secondly, if a political institution doesn't want to elect or appoint a candidate who is proposed by the judicial council, it has to explain its decision, which means that it can't just reject the council's proposal. If it rejects the proposal, it will have to discuss another council's proposal, also based on the results of the exam. Political institution is limited in exercise of its power to elect or appoint judges by the proposals of the judicial council and by the results of exam.

The question is what if this institution (parliament or head of state, for example) rejects to select a candidate or candidates nominated by the judicial council? Can it do this without any sanction for such decision? The answer is that it could not be any legal sanction for such behaviour. However, a political sanction is not excluded. If a political institution rejects nomination it could loose a part of its legitimacy since it would not have valid arguments for rejection of the nominated candidate(s). Whether this would happen, it depends also on the political culture and the importance of the very process of selection of judges in the minds of citizens.

[27] In some US states the commission method of selection of judges gives very important role to the commissions in the process of selection.

It seems that this model of selection of judges points to the dilemma who watches the watchmen.[28] Namely, even when the judicial council is included in the process of selection of judges, and it is not composed of the members of political elites, there is still a dilemma how to ensure that it gives proposals which are based on objective (i.e. merit) criterion. Since the members of the judicial council are just humans, who would probably follow their own interests or ideological attitudes when it comes to the selection of judges, some mechanisms for their limitation have to be found out. It seems that two possible (and cumulative) means are: making proposals for selection depending on the results of exam, and division of power in the selection process between the judicial council and a political institution, preferably the parliament. Although one could argue that the parliament decides on the selection of judges having in mind political interests and ideological considerations, it is equally probable that the members of the judicial council would act in the same way, at least in some particularly sensitive cases, when there is an interest of the political elites that some candidates are elected.

The proponents of the idea that the judicial council should elect the judges since it is an independent body fail to answer the question what are the proofs that the members of this council would be really independent.[29] It seems that the proponents of this idea literally believe that the judicial council would be independent since it is not composed of the members of political elites.[30] This kind of argument or belief has no scientific or even practical value, since the proponents of this idea give no proof that their model of selection of judges by the judicial council is the best possible one. There are no proofs that the judges elected by the judicial council would really be independent from political elites, senior judges, or the private capital owners.[31]

[28] T. W. Carns, S. M. Dosik, 301.

[29] Some authors argue that the election of judges by the judicial council instead of their appointment by other institution, such as the ministry of justice, is just removal of power and undue influence from one bureaucratic institution to another. – R. Coman, „*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe", *Europe-Asia Studies* Vol. 66, 6/2014, 893.

[30] As some authors point out, the judicial councils in some states (or in most of them) have transformed into someone who own the judiciary and make the rules for the judiciary. – *Ibid.*, 894.

This means that, even if the judicial council would be able and ready to effectively control the judges, the control would be exercised by an organ which would have under its control the whole judiciary, while that organ wouldn't be under any control. This kind of monopoly, which the judicial council would exercise, wouldn't be acceptable. If this monopoly would exist, the judges would be dependent by an institution which is not composed of the political elites but of members who are not responsible to anyone, having at the same time the authority to exclusively influence the composition of the courts.

[31] See: N. Garoupa, T. Ginsburg, 14.

4. ELECTION OF JUDGES BY THE PARLIAMENT

Alternative method of election of judges is their election by the parliament. This method is criticized for its alleged political nature and political influences in the process of decision-making. On the other side, its proponents argue that it enables judges to be responsible and to have democratic legitimacy.

Discussion about this method of selection of judges has to be connected with the issue of relationship between judges' independence, accountability, and legitimacy. It has to be noted that none of the methods of selection guarantees total fulfilment of any of these principles. If the judges' independence means that they have to be elected by an independent non-political body, the problem of legitimacy appears, because legitimacy has to be achieved through direct or at least indirect election by the electorate or an institution which earned its own legitimacy through democratic elections. Namely, the judges exercise state power and it is not acceptable to think that they ought not to be in any way under the control of the bearer of sovereignty, which are the people. If it is not acceptable that judges are elected by the people, for any reason mentioned above, then at least judges have to be elected by the parliament since it is or should be legitimate political institution which "borrows" its legitimacy from the people.

On the other hand, if the judges have to be elected by a political institution, problem of their independence appears since there is possibility that they would be dependent from the political elites which elect them. In this case, the problem of legitimacy also can appear but from another angle since it is doubtful whether their election by a political institution is legitimate. In one way, it is legitimate method of election since a political institution (parliament, for example) has its own, the strongest possible and democratic, legitimacy. In the other way, however, the legitimacy of the election of judges maybe doesn't exist since it is possible that the parliament elects politically dependent judges.

The problem of accountability is another problem which can't be solved by mere promulgation of one or another method of selection of judges. Although it could be reasonably concluded that their accountability more or less depends on the method of selection, some other issues also influence judges' accountability, such as (un)acceptance of the principle of the permanence of the judicial office.

We don't discuss the issue of the permanence of the judicial office although it is quite important but distinct problem. When it comes to the accountability, it seems logical that judges elected by their own colleagues feel less accountable since they are not in any way dependent from the public opinion, either directly or indirectly. In this case, judges are not accountable to someone outside their

inner circle, i.e. outside the judicial "community". Real accountability is possible only when one is accountable to an external factor, whatever it is. At least nominally the accountability is most serious when one is dependent from the public opinion or an institution with the strongest democratic legitimacy. This is because in these cases there is an external pressure on the holders of public functions, in this case on judges. However, if the judges are not elected by the parliament, but by the judicial council, their accountability virtually disappears. If the judges are accountable only to their colleagues,[32] doubt arises if this accountability would have any meaning since there is no outside subject who could hold judges accountable.

If the election of judges would be entirely in the competence of the parliament, it would not be a good solution since it is quite possible that political considerations would play the major role in the process of election. There is no any guarantee that the members of political elites wouldn't use the chance to elect the judges who are their political and ideological co-thinkers or even those candidates who are ready to follow instructions, wishes, and interests of the political elites. In the best possible scenario, the members of the parliament would have to elect judges considering the need for the best possible choice, having in mind the candidates' references. However, if the members of parliament make the final decision, there is no reason for belief that they will choose the best candidates, while they would neglect party preferences or ideological attitudes of the candidates. If the parliament decides according to these political and ideological considerations, the notion of judges' legitimacy wouldn't be fulfilled since it could hardly be believed that party dependent judges are at the same time the legitimate ones.

[32] In these considerations, the meaning of accountability is quite limited since it is obvious that there could not be any talk of literal accountability of judges to each other when the election of judges is in the competence of the judicial council. There are at least two reasons for this. The first one is legal, and the second one is sociological. The first reason means that the judicial council controls the judges' work and behaviour only in the sense of their disciplinary responsibility, not in the sense of quality of their work. Therefore, as long as judges don't break the law, or as long as it is not possible to prove that they break the law, their position is totally protected as the judicial council wouldn't sanction them for their incompetence. In other words, the low quality of work, i.e. of decisions, is not a matter of concern of the judicial council. This is very serious problem since there is no possibility to sanction the incompetent judges whose decision could make great harm to legal subjects.

The second reason why we think that the judges' accountability is almost nonexistent is a sociological one. It has nothing to do with the legal regulation but with the behaviour of the members of the judicial council. If one's work has to be controlled, the best way to do it is through the control by an outside subject, i.e. someone who doesn't belong to the same social or professional layer. In this sense, the judges' work has to be controlled by parliament or any other body which is not composed of the members of the judicial community. It is highly probable that the judges are not ready to control each other in any way, particularly not to control the quality of work of their own colleagues.

This hypothesis, however, doesn't neglect the importance of the election of judges by the parliament since the election could be prescribed in such a way that the parliament doesn't have the monopoly in the process of election of judges, which means that its role could be limited by the participation of other institution in the process of election.[33] The judicial council would be such an institution.[34] It is quite possible to imagine a solution that the parliament elects the judges on the proposal of the judicial council[35] which at the same time organizes testing of the candidates, i.e. which examines their qualifications. The parliament makes final decision, i.e. final choice, although it can't do it without proposal of the judicial council, and contrary to its proposal. If only one judge has to be elected, for example, the judicial council would propose one or more candidates, and the parliament could choose between them (if there are more candidates), but it could not elect as a judge someone who is outside the candidate list.

It is quite possible that the parliament would intend to use political criterion when electing judges. However, it has to evaluate also the professional criterion since the judicial council's proposal is based on the professional references of

[33] Although in slightly different political and constitutional contexts, political influence on the selection of judges has been analyzed in the systems where the government (i.e. the ministry of justice) appoints the judges. In these systems, it has been proposed that the minister appoints judges only with the participation of the judicial council. – R. Coman, 902.

[34] To some extent, California introduced a solution which rested on participation of two subjects in the process of appointment of judges. Similarity of this solution with the one in our text is that the selection of judges is not a monopoly of one institution since there should be the compromise of these bodies in order to appoint judges. Difference with our proposal lays in the fact that in California, according to 1934 solution, the judges were appointed by the governor (and not elected by the legislature) but only on the consent of three-members body (which was not a judicial council) consisted of lawyers (two judges and the attorney general). – S. B. Burbank, B. Friedman (eds.), 200.

[35] It is interesting to note that this solution has been rejected in Switzerland, since the members of the Federal Assembly thought that the parliamentary committee would be better solution than the judicial council. Two reasons influenced such an opinion. First, it was thought that the judicial council's proposals, due to its expertise, would have too much weight. Secondly, the Federal Assembly should be both factually and legally accountable for the election of judges, and it could not have such accountability if it would elect judges on the proposal of the judicial council. – B. Suter, „Appointment, Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries", *Victoria University of Wellington Law Review* 46/2015, 285–286.

Although these arguments have some theoretical and practical value, their advocates still neglect the problem of dominantly political influences and motives in the process of election of judges by the Federal Assembly without any participation and influence of an extra-parliamentary body.

Still, two cantons, Fribourg and Geneva, have adopted the system in which the judicial council prepares the appointment of judges, which means that it assesses the candidates, although their election is in the competence of the cantonal parliament.

a candidate (or candidates) which have to be commented by the parliament. Therefore, the judicial council pushes the parliament to discuss the candidate(s) following his/her or their professional references. Even when the parliament intends to make a political choice between the candidates for the judicial position, it still has to take into consideration the professional references. In other words, the parliament has to justify its choice which at least formally has to be based on the professional criterion. However, this justification can't be only formally based on professional criterion since the parliament could hardly avoid electing the candidates with the best professional references.

The public character of the parliamentary discussion about the election of judges also could be useful. Although the ruling parties decisively influence the process of election, the opposition naturally participates in the whole process, and it could be expected that it would never miss the chance to criticize the election of candidates who are not the best but who are politically acceptable for the governing parties or dependent on them. In other words, when they decide on the election of candidates, political elites have to find the best possible arguments for their choice even when they prefer political criterion over the professional ones.

In order to prevent parliamentary majority from imposing its candidates for the judicial positions, it could be prescribed in the constitution or in the law that qualified parliamentary majority is required for the election of judges. Since the parliamentary majority usually doesn't have qualified majority in parliament, it would need the support of a part of the opposition for the election of judges. Therefore, parliamentary majority and at least a part of the opposition would have to make a compromise on the candidates who are going to be elected. This compromise would exclude arbitrary behaviour of the parliamentary majority if it would try to enforce the election of suitable candidates.

The weakness of this solution is that it would not be easy to reach qualified majority for the election of judges. Parliamentary majority rarely enjoys support of the qualified majority of MPs. If the opposition is united in its negative attitude toward a candidate (or candidates) for the judicial post(s), then the parliamentary majority would have to propose other candidates, or it would have to negotiate with the opposition. This would take some time, and the outcome would also be that the parliamentary majority would not be able to elect a judge or judges.

The combined method of election of judges is an adequate compromise for two reasons. The first reason is that this method of election solves the problem of legitimacy of the election of judges, and that it establishes connection between different branches of power. This method of election of judges enables the parliament to influence the process of election of judges

in a way which opens the door for "external controllers" (i.e. someone outside judiciary) to exercise control in order to prevent judges to become a closed caste which is not responsible to anyone.

The second reason is that this method of election of judges makes the space for objective and professional considerations of the candidates' references as well. Although the parliament has the final word in the process of election, it still depends to some extent on the opinion and proposal of the judicial council. In fact, the parliament could only accept or reject the judicial council's proposal but it could not elect a candidate who previously has not been proposed by the judicial council.

When it is about the election of judges by the parliament, the most consequent model would be the one in which the parliament elects judges on the proposal of one of its bodies, such as the case in Switzerland.[36] In this case, the judges are proposed by the parliamentary committee, which is composed of the representatives of all parliamentary groups. This solution is coherent, since the procedure of election of judges is completely in the hands of the parliament. Its task is to propose candidates, examine their references, and elect them. The only difference between these phases of the procedure is whether the parliament *in toto* makes decision, or it is the task of its special working body, such as its judicial committee, to propose candidates.

The advantage of this solution is that this committee is composed of representatives of all parliamentary groups, which enables minority to have an effective word in the procedure. The main disadvantage of this solution is that there is no one outside political elites who participates in the election of judges.[37] The fact that the parliamentary committee is composed of the representatives of all parliamentary groups is a good solution although it still doesn't solve one of basic problems, namely the fact that those who are not members of political elites don't participate in the process of election of judges.

[36] B. Suter, 280–281.

[37] Similar problem exists in systems where the executive appoints the judges without participation of other institutions, such as the case with the federal judges in Germany. – See: A. Bado, 289–290.

In Germany, judges of the federal courts are appointed by the Federal President, after the procedure of recommendation is completed by the 32-strong Judges Election Committee, composed of 16 ministers of justice and 16 members selected by the Bundestag who need not be parliamentarians.

Although this system is quite different from the Swiss one, one similarity exists. In Germany, in the process of appointment of judges, the most important role belongs to the selection committee, which is composed entirely or mostly of members of political elites. Although the Federal President appoints the judges, his/her role is dependent on his/her overall constitutional competences, which are quite weak and limited. – See: V. G. Heinz, „The Appointment of Judges in Germany", *Berliner Anwaltsblatt* 4/1999, 178–183, *http://www.heinzlegal.com/sites/default/files/AppointOfJudgesInGermany.pdf*.

In some states, the model of election of judges by the parliament is criticized because it is widely thought that the judges elected in this way are dependent from the political elites and insufficiently qualified.[38] One of these cases is the US federal state South Carolina. In order to avoid these negative consequences, the model has been slightly modified in the sense that three bodies other than the legislature participates in the process of election of judges. All of them have a consultative competence which means that their role in the process is quite limited since the legislature has the sole right to elect judges. Theoretically speaking, these bodies could influence the election of judges although in practice it happens quite rarely.[39]

In some legal systems, where the parliament elects judges, it is limited by the participation of the executive. This system has been invented in the USA, as a compromise solution at the federal level between two models – the election of judges by the Congress, and their appointment by the President. Appointment of federal judges by the President had not been acceptable by the US Constitutional Convention since it much looked like the system which at the time existed in England (we talk about late 18th century) where the King appointed judges. Since the USA had been in the war against England only few years before that and the English King had been seen as a tyrant, it is understandable why the Constitution-makers rejected the model which meant that the executive appointed judges. On the other side, those constitution framers who advocated the election of judges by legislatures followed dominant practice in federal units, which meant that the judges were elected by legislatures.[40] At the end, the solution which had been adopted meant that the President appointed judges while the Senate had to confirm them.[41] This solution had been a compromise which included both political branches of state power in the process of selection of judges on equal footing.

Although this model excludes the monopoly of one branch of state power in the process of selection of judges, it still has two disadvantages. The first one is the fact that the professionals don't participate in the process of

[38] T. Smith *et al.*, 19–20.

[39] *Ibid.*, 19–20.

[40] S. B. Burbank, B. Friedman (eds.), 197.

[41] Researches show that this method of selection is highly politicized. Political character of the selection process is visible in few aspects. First, the President of the USA and the Senate tend to appoint candidates who are members or at least sympathizers of their political party. Secondly, they are aware of the ideological attitudes of the candidates which are very important for the final decision. Thirdly, the President sometimes expresses his opinion on some judgments, showing his disappointment when a judge who is his political or ideological co-thinker makes a judgments against the President's expectations. Fourthly, researches show that the judges who are close to the Democrats more often make judgments which could be described as more liberal. – A. Bado, 298–299.

selection although the judges should be selected primarily on the professional criterion. The second disadvantage exists when the same party has majority in the Senate and the President is its member as well. In this case, it is more probable that two political institutions would select judges who are their political or ideological co-thinkers.

5. CONCLUSION

The focus of this work is on two methods of selection of judges: by the judicial council and the parliament. We base our analysis on the principles which, in our opinion, have to be cornerstone of the judiciary: legitimacy, accountability, independence, and competence.

It seems that the election of judges by the judicial council gives the preference to the principles of independence and merit. Its advocates argue that the judicial council, as a non-political body, is politically independent, while at the same time, it is entirely or mostly composed of judges, who naturally have in mind professional competences of candidates before they decide on their election. Therefore, it seems that the most important principles are fulfilled in this way: the most competent candidates would be elected regardless of their political affiliation or preferences.

We argue against this approach for two reasons. First, advocates of this approach insufficiently take into consideration sociological and political aspects of the problem of selection of judges. Namely, they neglect the problem of factual influence of political elites and non-political subjects, such as the owners of private capital or interest groups, who can influence and indeed do influence the members of the judicial council. There is no guarantee that the members of the judicial council would be independent, moral, and resistant to corruption when deciding on the candidates for judicial positions. It is possible that they are under pressure of the political elites, interest groups or the owners of private capital when they elect judges. It is also possible that they make their decisions on the election of judges having in mind their own interests even if and when they are not under any direct outside pressure to elect this or that candidate.

Secondly, this method of election of judges doesn't take sufficiently into consideration the principles of legitimacy and accountability of judges. In other words, it neglects the fact that judiciary is one of branches of state power, which has to have its basis in the people, i.e. citizens. This fact leads to the conclusion that judiciary also has to be legitimate, and the best way to achieve this is that the judges are elected by a body which is in itself legitimate. The judicial council lacks legitimacy since it is not directly or indirectly elected by citizens. It seems that the advocates of this method of

selection of judges think that it is not necessary to have legitimate judges (in the sense that their legitimacy originates from the electorate or the legislature) since it is more important to have judges who are competent and politically independent. It means that advocates of this method of election of judges give clear advantage to the principles of independence and merit over the principles of legitimacy and accountability.

The other method of selection of judges which we explore in this work is their election by the parliament. We clearly prefer this method since it gives the preference to two principles: legitimacy and accountability of judges. It takes into account the notion that judiciary is also a branch of state power and that therefore judges have to be approved by citizens in one way or another. It is unacceptable that the judges as bearers of state power are elected by themselves (i.e. by a body composed of their colleagues) or by judges and other legal practitioners.

The problem of accountability is not so easy and it is also connected with the issue of term length. If the judges are elected for limited period of time, they will feel responsibility to the one who elects them. Even if their term in office is not limited, they will feel a degree of responsibility if they intend to be elected to higher judicial post.

We admit that this method of election of judges could be used by political elites for their political interests, i.e. if they want to influence the process of election of judges. One could hardly be right thinking that the political elites are not interested in the election of judges. Some decisions of judges influence individual interests of powerful people or have wider social and political impact. Therefore, it is important for political elites who the judges are, particularly in supreme courts.

Since the judges have indeed to be politically independent (although they can never be ideologically independent!) we don't advocate the monopoly of the parliament in the process of their election. Although the parliament should have the right to elect judges, this right has to be limited by the proposal of the judicial council. The judicial council should present the list of candidates (or the name of one candidate) to the parliament, which would have the right to elect one or more candidates (or to accept or reject the only candidate). It is assumed (although there is no guarantee!) that the judicial council would make its proposal according to professional criterion. In order to avoid political criterion in the process of selection, obligatory exam for all candidates (even for the posts in the supreme court) should be introduced.

This model of election of judges would introduce the principle of mutual restriction of parliament and judicial council since the parliament and the judicial council have to agree on the candidates. There is no guarantee that

this method of election would exclude political criterion but it is more probable that the absence of monopoly of any institution together with the exams for all judicial posts would prevent political elites from too open insistence on the political criterion in the process of election of judges.

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ИЗБОР СУДИЈА: ДА ЛИ СМО СПРЕМНИ ДА ПРЕИСПИТАМО ДОГМУ?

Резиме

Аутор се у раду бави различитим моделима избора судија. Идентификује четири основна модела: избор од стране грађана, именовање од стране извршне власти (шефа државе или владе), избор од стране посебног органа, који у раду означава као судски савјет, те избор од стране парламента. Аутор се опредјељује да анализира само два посљедња модела избора судија, правдајући то неколиким аргументима. Избор судија од стране народа (бирача) потенцијално највише одговара начелима демократије и принципу народног суверенитета, али је споран из два разлога, која сматрамо довољно снажним да га одбацимо као пожељан модел. Први разлог је што судије треба да буду биране примарно према својим стручним квалификацијама, а не према политичким или идеолошким опредјељењима. Бирачи не посједују стручна знања на основу којих би вршили избор, него би се руководили отвореним или прикривеним политичким преференцијама кандидата за судијску функцију. Други разлог у вези је са улогом коју би политичке странке, интересне групе и неформални центри моћи (крупни капитал, у првом реду) настојали да имају, а вјероватно и имали, приликом непосредног избора судија. Они би водили и финансирали кампању појединих кандидата за судијску функцију, па би ови, ако би били изабрани, морали да им узврате приликом пресуђивања у појединим предметима.

Именовање судија од стране извршне власти није разматрано такође из два разлога. Први разлог је што је извршна власт политичка, па је тешко очекивати да би била вољна да именује судије према професионалним а не према политичким мјерилима. Чак и кад би извршна власт именовала судије на приједлог судског савјета, па би њена надлежност самим тим била ограничена, остаје други разлог, који је у вези са самом природом извршне власти. Она никад не може имати представнички карактер, чак и кад је непосредно бирана (непосредно бирани предсједник републике), будући да је она израз расположења парламентарне већине или већине (релативне или апсолутне) бирачког тијела. Стога, извршној власти, чак и кад је ограничена у поступку именовања судија, недостаје легитимитет за вршење те надлежности.

Стога, ваља анализирати два преостала основна модела избора судија. Избор од стране судског савјета има своје предности. Прва је та што судије бира тијело које је неполитичко, будући да се у његовом саставу налазе искључиво или доминантно судије, а судски савјет није, односно не мора бити, биран од стране неке политичке институције, као што је парламент. Из овог разлога, може се претпоставити да ће судски савјет дати предност професионалним мјерилима приликом избора судија и да неће подлећи притиску политичких елита или неформалних центара моћи. Друга предност је у томе што избор судија врше стручна лица, која имају потребне квалификације да процијене који кандидат за судијску функцију је најбољи. Осим тога, може се претпоставити да ће чланови судског савјета бити заинтересовани да спријече одлучујући утицај политике приликом избора судија, јер на тај начин штите и себе и своју професију, њено достојанство и независност.

Овај модел избора судија има озбиљне недостатке, због којих га не сматрамо најбољим (или најмање лошим, што је можда и боља квалификација). Његов први недостатак је у томе што избор судија на овај начин престаје бити надлежност државне власти, иако судије врше једну функцију државне власти. Поставља се питање легитимности тако вршеног избора, јер судије бирају судије, тј. бирају сами себе. Иако врше државну власт, која треба да буде легитимна, јер потиче од народа, то није случај код овог модела, јер избор судија чак ни посредно није израз народне воље, макар да се одређивање народне воље тумачи на врло широк начин. Самоизбор судија нужно поставља питање њихове одговорности, чак и без обзира на то да ли је судијска функција стална. Уколико судијска функција није стална, избор од стране судског савјета значи да ће судије, у очекивању реизбора, ослушкивати расположења, ставове и интересе чланова судског савјета и оних који можда врше утицај на њега. Ако је судијска функција стална, судије се могу понашати на управо описани начин из другог разлога, кад желе да буду бирани на другу, по правилу вишу, судијску функцију.

Други недостатак овог модела избора судија у томе је што нема гарантија да ће судски савјет заиста бити непристрасан приликом избора судија, односно да ће узети у обзир искључиво или доминантно стручна мјерила. Чак и ако он тако поступа у неким случајевима, или знатном броју случајева, нема доказа да ће тако поступати увијек или најчешће, поготово кад се ради о избору кандидата за које су заинтересоване политичке елите, крупни капитал или интересне групе. Осим тога, чак и ако нема спољних притисака на судски савјет, то још увијек не значи да се већина његових чланова неће понашати као затворена група, котерија или каста, која намирује приватне интересе или се ру-

ководи разлозима који нису стручне природе, приликом избора судија. Другим ријечима, није само политички утицај непожељан приликом избора судија. Једнако непожељан је и утицај приватног капитала, интересних група или самог судског савјета (уколико није заснован на стручним мјерилима), а то је проблем који се врло често занемарује. Пошто судски савјет ником не одговара, својим одлукама може нанијети непоправљиву штету судству, поготово ако је уставом нормирана сталност судијске функције.

Избор судија од стране парламента, који заговарамо у овом раду, такође има своје предности и недостатке. Његове предности су вишеструке. Избор судија врши представнички орган, који проистиче из непосредног народног избора, а у коме су, иако са неједнаким снагама, представљене различите друштвене групе, идеологије и политички програми. На тај начин, избор судија врши политичка институција која је легитимна (или би требало да буде таква), и у којој, барем по слову устава (често не и у пракси), долази до изражаја воља народа као номиналног носиоца суверенитета. Судије, као носиоци једне функције државне власти, не бирају сами себе, него их бира парламент чији чланови, опет барем номинално, сносе политичку одговорност за избор који начине.

Пошто у избору судија учествује парламент као цјелина, то значи и парламентарна већина и опозиција, расправа о избору судија мора бити јавна, а парламентарна већина не може изабрати одређене кандидате без ваљаних аргумената. Уколико би то ипак урадила, ризиковала би осуду јавног мњења и губитак дијела легитимитета.

Питање одговорности судија поставило би се у другом свјетлу. Судија који подлијеже реизбору или се бира на вишу судијску функцију (уколико је судијска функција, на примјер, стална), морао би водити рачуна о свом поступању у вршењу судијске функције, јер би парламент као спољни контролор његовог рада могао одлучити да га не изабере. Одговорност судија је, напротив, тешко остварива у моделу у коме судије бира судски савјет, јер је тешко очекивати да ће судије постављати питање одговорности својих колега.

Кључни недостатак модела избора судија од стране парламента је у томе што би парламент могао давати предност политичким мјерилима приликом избора. Тешко је очекивати да би се чланови парламента самоограничавали и да би занемаривали идеолошке и политичке преференције кандидата за судијску функцију. Приликом конкретних избора, то ће вјероватно бити случај, јер политичке елите нису заинтересоване да изврше политички утицај или притисак на избор сваког судије. У одређеном броју случајева, међутим, то ће бити случај. Развијена по-

литичка и правна култура могу допринијети томе да политички утицаји буду мањи. Она их ипак не може елиминисати.

Проблем политички мотивисаног избора судија може бити умањен, а у доста (можда и у великој већини) случајева и превазиђен, укидањем монопола парламента у поступку избора. То значи да би парламент бирао судије на основу образложеног приједлога судског савјета. Притом, парламент би могао да усвоји или одбије приједлог судског савјета, али не би могао да изабере кандидате које судски савјет није предложио. То значи да би изабране судије морале имати подршку и парламента и судског савјета. Ни ово рјешење не искључује могућност политички мотивисаног избора, али га своди на најмању мјеру. Политичким елитама није једноставно постићи сагласност двије међусобно неповезане и по својој природи различите институције, при чему једна од њих (судски савјет) није састављена од припадника политичке елите. То није могуће поготово ако избору судија претходи судски испит, чији резултати су од великог значаја за доношење коначне одлуке.

Кључне ријечи: *Судство; Судски савјет; Парламент; Избор судија; Политичке елите*