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Đorđe Marković, LL.M.\*

## PROCEDURES AND CONDITIONS FOR THE SELECTION OF THE CONSTITUTIONAL COURT JUDGES IN THE POST-YUGOSLAV STATES\*\*

*This article systematically analyzes the procedures and conditions for the selection of the constitutional judges in the legal systems of the six post-Yugoslav states. Yugoslavia was the only post-socialist state with constitutional courts within its federal system, far before the transition occurred. Consequently, each constitutional court in the post-Yugoslav area had more than a half century-long tradition of constitutional review. However, it is the period after the democratic changes that is at the centre of our examination. The legal provisions of the six states are analyzed separately and then compared with prominent comparative examples. The procedure and conditions under which the constitutional judges are selected are in the focus and cause this issue to contribute the most to the so-called input legitimacy of the constitutional courts. Hence, the article attempts to shed light on the weak points in the current provisions and to propose a more suitable legal framework.*

**Key words:** *Constitutional courts. – Constitutional judges. – Former Yugoslavia. – Selection and appointment procedure. – Tenure and qualifications.*

### 1. INTRODUCTION

If the 19<sup>th</sup> century was the era of parliament, the 20<sup>th</sup> century was the era of the rise of the constitutional courts. However, the answer to the question what is the nature of this institution is still lacking, although it

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\* Lecturer, University of Belgrade Faculty of Law, [djordje.markovic@ius.bg.ac.rs](mailto:djordje.markovic@ius.bg.ac.rs).

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seems that we are closer than ever to figuring it out. In the conclusion of his book, Robertson (2010, 348) states: “Judges engaged in constitutional review act like political theorists, developing and explicating the value choices made, sometimes unconsciously, when the relevant constituent body set up the constitution”. Similarly, Stone Sweet (2000, 151) emphasizes the “mixed politicolegal nature” of constitutional courts, while Marinković (2016, 87) perceives courts as political agencies and judges as political actors, who “[...] decide cases not only on the basis of objective legal norms, but also on their values and ideologies, as well as with an eye on the expectations of other political institutions”.<sup>1</sup>

Therefore, regardless of whether we accept the abovementioned statements or designate the constitutional court as only a court, there is no doubt that the role played by this institution in the modern state is significant. It is in connection with this that the question of the legitimacy of the constitutional courts is being raised. Thus, Orlović (2013, 77) points out that the legitimacy of constitutional courts stems from citizens’ acceptance of the decisions they pass.<sup>2</sup> Personal and professional qualities of judges determine the courts’ decisions quality. Thus, the constitutional court legitimizes itself, indirectly and subsequently, through the authority of its decisions. In order for this quality to be high, the judges themselves must have excellent characteristics and possess “interpretative fidelity to law” because “certain liberty in the interpretation” which they enjoy can easily become arbitrariness, Marinković (2016, 90). This demanding task is even more difficult in the case of states in transition, with young and weak democratic institutions. In addition to the high institutional status proclaimed in the constitutional texts, constitutional courts have to find their own place in the political world. According to Tushnet (2015, 11) “‘New’ constitutional courts – including long-established courts emerging from long periods of relative obscurity [...] must somehow become ordinary participants in the nation’s political life. To do so, they must do something distinctive – that is, they cannot merely ratify decisions made elsewhere. In short, they must hold some actions unconstitutional”.

Taking all of these into consideration, it becomes obvious the rules concerning the procedure and conditions for the selection of constitutional

<sup>1</sup> Beširević (2014, 955) has almost the same opinion: “Constitutional courts are undeniably political actors. The simple fact that they are empowered to reject legislation drafted and adopted by political institutions, confirms that their decisions have political consequences, and that constitutional law is political law”.

<sup>2</sup> Orlović (2013, 77) explains that “Although there is no direct legitimacy of the constitutional court in the beginning, during the process of the selection (appointing) of its judges, it can be said that it exists in the end, in the phase of application of constitutional court decisions. By accepting the decisions of the constitutional court, by accepting its consequences, the citizens show the trust in the constitutional court. This is proof of the legitimacy of the constitutional court, which is subsequent and it is reaffirmed by every new important decision.” (translated by the author)

judges are very important, if not crucial. This is especially the case in countries with poor democratic legal and political culture. Following Marinković (2014, 95) “[...] the political nature of constitutional review is also identified with the way justices are appointed [...]”, it’s not negligible how detailed these rules are, in which act they are proscribed, etc. The vaguer the norms, the greater the chance the constitutional judges will be dependent on the body that appointed them. Provisions related to the selection of constitutional judges must ensure “[...] the chosen person possesses, besides its ‘political values’, undisputed professional competences and personal integrity [...]”. Consequently, such a selection should increase chances that selected judge “[...] will resist political challenges much more easily and play the role of the institution to which it belongs, instead of subjecting itself to its original tutor” Marinković, (2014, 96). In other words, the assumption is the more competent and self-conscious judges are, the more independent the constitutional court will be. For these reasons, the main aim of this article is to examine the normative basis of selection process for constitutional court judges in the post-Yugoslav states. Furthermore, the aim is to answer the questions whether the mechanism for the creation of competent and independent constitutional courts is established or not, and whether it functions under real socio-political conditions. In one sentence, as Hodžić correctly emphasizes, “for our purposes” the most important is “the input legitimacy (the pedigree of a constitutional court and actual basis of their legitimacy – process of election and authorization by parliament, charisma or reputation of individual justices etc.)” which directly influences the “output legitimacy (the consequences of their actions in relation to the dominant political values in a society)” (Hodžić, 2016, 26).<sup>3</sup> Therefore, the focus of the paper will be on “input legitimacy”, which is a precondition for the deeper analysis of the “output” component.

In addition to the significance of the topic itself, there is a specific purpose why this particular group of states was chosen for the article: most of the scholars who study the European constitutional courts seem to continue to adhere to the divisions that existed during the Cold War. In general, they analyze either the Western world or the Eastern block – using the name of the post-socialist (communist) states/societies. For this reason, they often don’t consider the non-aligned countries, in particular, the area of the former Yugoslavia. The states that have emerged on the ruins of Yugoslavia have not even been analyzed in studies concerning Eastern and Central Europe. The exception is Slovenia, to some extent, which has been a member of the EU for more than 15 years, and is therefore sometimes included in the group of Central European states or

<sup>3</sup> Here Hodžić refers to Wojciech Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization*, (2011) on [www.researchgate.net](http://www.researchgate.net).

post-socialist countries.<sup>4</sup> Consequently, there are almost no fundamental studies on the constitutional judiciary in the mentioned region, unlike the other post-socialist states (see Schwartz 2000; Puchalska 2011; Prochazka 2002). The exception is a comparative working paper series (edited by Sadurski, Hodžić, 2016). This publication is a valuable source of the “important, transformative cases” from the practice of constitutional courts from the post-Yugoslav area. Nevertheless, the study is not comprehensive since Montenegro and Slovenia are excluded and the approach is particularistic (see more: Hodžić *et al.*, 2016).<sup>5</sup>

The article is divided into several parts. In the first one, the historical foundations of the judicial review of constitutionality in Yugoslav federation are presented. Second, the main part of the paper critically addresses the analysis of the legal framework proscribed in the constitutions and legislations of the six countries. Furthermore, three models of the selection of judges are put forward, based on a comparative approach covering numerous Western and Central European countries. Finally, suggesting *de lege ferenda* legal solutions, the author pointedly remarks upon the major weak points in the current legislation and advocates for the improvement of the position of the constitutional courts in the analyzed countries.

## 2. HISTORICAL BACKGROUND

The Socialist Federal Republic of Yugoslavia (SFRY) was the first socialist state to introduce a constitutional court into its legal system and in which this institution was active for several decades.<sup>6</sup> It was introduced in the 1963 Constitution and, unfortunately, it followed the dynamic development of Yugoslav constitutionality. There were several amendments to the 1963 Constitution in 1967, 1968 and 1971. In 1974 a new Constitution was adopted, which was amended two times, in 1981 and in 1989. In almost thirty years of its existence, this institution suffered

<sup>4</sup> In his book, Benjamin Bricker examines cases of Poland, Czech Republic, Latvia and Slovenia. It is not quite clear why these four countries were chosen, except for this statement: “The four countries are united in being a part of the wave of democratisation that followed the end of communist rule in Eastern and Central Europe” (see Bricker 2016, 6 and 56).

<sup>5</sup> Available at <http://www.analitika.ba/publications> (last visited August, 23, 2019).

<sup>6</sup> Other than in Yugoslavia, constitutional courts appeared also in Poland and the USSR, but for a very short period of time. According to Schwartz (2000, 19–20): “Poland authorized seemingly weak tribunal in 1982, which went into operation in 1986. And under Mikhail Gorbachev, even the Soviet Union adopted a Constitutional Committee in 1988 that had a significant impact on the Soviet legal system”.

six major constitutional changes, on average every five years. All of this created an unfavorable environment for its operation.

The provisions on the Constitutional Court in the 1963 and 1974 constitutions were in the special part of the constitutions, the one regulating the position and operation of the federal bodies, which indicated that the constitution-maker undoubtedly separated the constitutional judiciary from the ordinary courts. The 1963 Constitution only laid the foundations of this institution, leaving the rest to the legislature, while the 1974 Constitution regulated the position of this institution in more detail.

According to the 1963 Constitution, the Constitutional Court of the SFRY had 11 judges (10 judges and a president of the Court), who were elected by the Federal Council of the Federal Assembly, at the proposal of the President of the Republic (Art 178). Since after (Amendment IX), both the Council of People and the Social-Political Council participated in the election. The judges were elected for a period of eight years, without the possibility of re-election. By Amendment XL of 1971, the Constitutional Court had 14 judges (13 judges and a president of the Court), two from each Republic and one from each Province.<sup>7</sup> The 1974 Constitution adopted these solutions, retained the mandate of eight years, but with nonrenewable term of office. The judges and the president of the court were elected by the Federal Council and the Council of Republics and Provinces within the Federal Assembly (Art 288). The Constitutional Court passed decisions by a majority vote of all the judges, and the judges had a right to dissent their opinion (Article 391).

According to both Constitutions, the Constitutional Court of the SFRY was elected by federal Parliament (one or more of its houses), which was quite common from the comparative perspective.<sup>8</sup> The members of the federal Parliament were initially elected by local assemblies and by citizens directly, and later by the assemblies of the Republics and Provinces and citizens within their working organizations. The main disadvantage of this model of composition, which could have affected the legitimacy of this institution, was that it took place within a one-party system, but even then there was a certain degree of democracy, especially when it came to citizens who chose their representatives within their working organizations. This was a unique system of citizen participation in public life that was mostly unknown in other socialist countries, which was called self-management. Using classical terminology, it could, in the broadest sense, be considered as what some authors described as

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<sup>7</sup> SFRY consisted of six federal units (Republics): Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and two autonomous provinces: Vojvodina and Kosovo. In the 1971 Amendments the provinces gained their own constitutions too.

<sup>8</sup> See below the electoral model of the judges' selection.

participatory democracy. Furthermore, the fact that since 1971 the judges of the Constitutional Court were chosen in accordance with the principle of parity, from each Republic and Province, it could be said that a certain degree of legitimacy existed, since each of those federal units had its own specific interests that could therefore be protected, or at least represented.<sup>9</sup>

According to the 1963 Constitution, in addition to the federal Constitutional Court, each federal unit of Yugoslavia had its own constitutional court. The Constitutional Court of the Socialist Republic of Serbia had 11 judges, the Constitutional Courts of Socialist Republics of Slovenia, Croatia, Bosnia and Herzegovina had nine judges each, while the Macedonian and Montenegrin courts had seven judges each. By the 1971 Amendments autonomous provinces got their constitutional courts as well, Vojvodina's court had nine judges, while Kosovo's court had seven judges. According to Đorđević (1989, 786–787): “The republic constitutional courts are courts that are modeled after the Constitutional Court of Yugoslavia, but do not differ from each other” (translated by the author). The constitutional courts of the republics operated under such a regime until 1991–1992, when the SFRY was dissolved.

### 3. LEGAL FRAMEWORKS OF THE CONSTITUTIONAL COURTS IN THE POST-YUGOSLAV STATES

#### 3.1. General Remarks

The constitution of Bosnia and Herzegovina differs from other “classical” constitutions. It is located within Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina (BiH), also known as the Dayton Agreement (1995). The provisions concerning the Constitutional Court of Bosnia and Herzegovina are contained in Article VI of the Constitution. Therefore, the Constitutional Court is formally separate from the other institutions and other courts, but it has a specific position, which is not common for centralized control of constitutionality, it also has appellate jurisdiction over issues “arising out of a judgment of any other court in Bosnia and Herzegovina” (Article VI).<sup>10</sup> The unusual position of the Constitutional Court of BiH is the result of the combination of the common law and civil law legal systems

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<sup>9</sup> It is debatable whether such a structure of the court was appropriate if knowing that this institution should be highly professional and non-partisan. Đorđević (1989, 766) wrote: “[...] the principle of parity can lead to confrontation with a national, regional or similar motive, which is not in accordance with the authority and function of the Constitutional Court of Yugoslavia” (translated by the author).

<sup>10</sup> The Constitution of BiH, <http://www.ccbh.ba/osnovni-akti/ustav/?title=clan-6> (last visited March 28 2019).

when the Dayton Agreement was being written. Because of the war, the Constitutional Court of Bosnia and Herzegovina, now an independent state, started operating in 1997.

The Constitution of Croatia was adopted in 1990, when Croatia was still a member of the Yugoslav federation. This Constitution was changed several times: in 1997, 2000, 2001, 2010, 2013.<sup>11</sup> The provisions regulating the position of the Constitutional Court of Croatia are in a separate part of the Constitution (Part V), which means that the Court is (at least symbolically) separated from the other authorities (Part IV).

After the dissolution of the SFRY, Montenegro became part of a union with Serbia, first as part of the Federal Republic of Yugoslavia (1992–2003) and afterwards the State Union of Serbia and Montenegro (2003–2006). After the independence referendum in 2006, Montenegro finally became an independent state. According to the 1992 Constitution of Montenegro the Constitutional Court had five judges elected by the Assembly at the proposal of the President of the Republic, for a nine-year term, without the possibility of re-election. The judges were elected from the ranks of prominent lawyers, with at least 15 years experience working in the legal profession (Article 111). After the independence referendum, Montenegro adopted a new constitution in 2007, which was changed in 2013 with 16 amendments. The status of the Constitutional Court is regulated by Part VI of Constitution.

The Constitution of North Macedonia was adopted in November 1991. In 2001 the Constitution was changed by 32 amendments. The Constitutional Court is in the separate part of the Constitution – Part IV. These are the only provisions on the Constitutional Court in the Macedonian legal system, since Macedonia has never passed a law that would specify the status of this body. Northern Macedonia is multiethnic state. Two main ethnic groups are Macedonians (~ 65%) and Albanians (~ 25%) (State Statistical Office of the Republic of Macedonia 2002, 25). The provisions concerning the Constitutional Court were formulated in accordance with the Ohrid Framework Agreement (2001), which solved complex ethnic relations in this country.

Like Montenegro, Serbia has also changed two constitutions so far: one that was in force when it was part of the federal state with Montenegro, and the second when it became independent again (in 2006). According to the 1990 Constitution, the Constitutional Court of Serbia had nine judges elected by the National Assembly, at the proposal of the President of the Republic. Judicial function was permanent. According to the 2006 Constitution of the Republic of Serbia, provisions on the Constitutional

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<sup>11</sup> The Constitution of the Republic of Croatia, Consolidated text, Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.

Court are prescribed in Part VI. The new Constitution brought a very different structure of the court in relation to the 1990 Constitution.

Although the Constitution of Slovenia was adopted in 1990, it has changed quite often, i.e. in 1997, 2000, 2003, 2004, 2006, 2013 and 2016. The position of the Constitutional Court of Slovenia is prescribed in Part VIII of the Constitution of Slovenia, separately from other political institutions.

### 3.2. Selection Procedures

The Constitutional Court of BiH has nine judges. Four of them are elected by the House of Representatives of the Federation and two are elected by the Assembly of Republika Srpska.<sup>12</sup> The remaining three judges are elected by the President of the European Court of Human Rights after consultation with the BiH Presidency. This is a unique provision that represents specific constitutional settings existing in this state.<sup>13</sup> The Parliamentary Assembly has the power to amend the provisions of the Constitution concerning the election of foreign judges, but it has not exercised it yet. The selection process starts with the public announcement of an open competition, published by the entity's parliamentary commission for the selections and appointments. Those commissions propose candidates to the parliaments of the entity. The further judges are elected by the absolute majority of MPs (see more, Ohranović, 2012, 111–112). All the rules are set by the rules of procedure of the Federation's House of Representatives and the Assembly of Republika Srpska. As it can be noted, the biggest deficiency of the BH selection procedure is that it is not regulated by law. According to Perić (2012, 169–170) such a situation causes many problems: non-transparent process of election of judges, the biographies of judges remain unpublished during the process, absence of presentation of judges in parliament, etc. Both the unregulated procedure and absolute majority election can influence the legitimacy of the court: the first causes the process to be completely hidden from the public eye, whereas the second implies the overwhelming influence of the ruling political party/parties in both entities.

Until 2010 the judges of the Croatian Constitutional Court were elected in the parliament, by absolute majority. Nowadays, the

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<sup>12</sup> Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska. The House of Representatives of the Federation and the Assembly of Republika Srpska are the lower houses of the entity parliaments.

<sup>13</sup> BiH also has the High Representative whose purpose is to oversee the implementation of Dayton Agreement. The idea was that BiH postwar society needed somebody neutral to deal with the most important legal and political issues. Nevertheless, only BiH and Liechtenstein in Europe have foreigners in their constitutional courts. See Trnka, (2012, 150).



Constitutional Court of Croatia consists of 13 judges elected by a two-thirds majority of the MPs (Article 122). This can be a positive change as the two-thirds majority requires broader political agreement, which increases the chances of selecting competent rather than politically biased candidates for judges. However, such a solution can also cause some inconveniences. For example, due to the deadlock inside the Croatian Parliament, the 2016 elections (10 judges selected) and 2017 elections (three judges selected) were held at the last minute, which could have caused the blockade of the Court.<sup>14</sup> Nevertheless, Antić (2012, 18) argues that similar problems with the selection occurred when the judges were elected by an absolute majority, so in the period from 2007 to 2012 the Constitutional Court operated for almost three years as an incomplete court. In addition to the Constitution, the norms that regulate the procedure for the election of judges of the Constitutional Court are included in the Constitutional Act of the Republic of Croatia.<sup>15</sup> The selection process is relatively detailed and starts with the announcement of an open competition in the Official Gazette by the committee of the Croatian Parliament responsible for the Constitution. According to the Constitutional Act, the committee is required to organize a public interview with each of the candidates who meets the conditions. This is a good solution because it increases the transparency of the entire process. However, the problem is that the number of those who can nominate candidates is practically unlimited: it can be judicial institutions, faculties of law, the chamber of attorneys, legal associations, political parties, as well as any other legal entities or individuals, individuals may even nominate themselves as candidates (Article 6 paragraph 4). Antić (2012, 27) criticizes this kind of “populist approach to the way of candidacy with the features of a public competition” and call it “Croatian rarity” (translated by the author).

The Constitutional Court of North Macedonia has nine judges. The President of the Republic and the State Judicial Council nominate two judges each, while the other five candidates are nominated by the special Parliamentary Commission. The way the Parliament decides on the proposed candidates is quite intriguing. The six judges are elected by the absolute majority while for the remaining three a special rule is set. According to the Ohrid Agreement, which was the political solution for the armed conflict between Albanians and Macedonians, a new constitutional setting was establish, and the aforementioned provision is part of that frame too. According to Amendment XV of the Constitution of North

<sup>14</sup> *N1 Hrvatska*. 2016. *Prisegnuli Ustavni suci*, 7 June. *N1 Hrvatska*, 2017. *Tko su tri ustavna suca koja smo danas dobili*. 11 October.

<sup>15</sup> The Constitutional Act of the Republic of Croatia – The consolidated text published in Official Gazette, No. 49/02. This Act was adopted in the same procedure as the Constitution, by 2/3 majority.

Macedonia “The Assembly appoints three of the judges by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in majority in the Republic of Macedonia”.

There are no rules on how the process of proposing candidates by the President and the Parliamentary Commission should be conducted. Krčinski (2012, 94) argues that the positive fact is that the Parliamentary Commission sessions concerning the proposal of the judges are sometimes broadcast on live television. Certain rules are prescribed only in the case when the Judicial Council proposes a candidate. Nevertheless, in this case, the mentioned provisions are not regulated by law but by the Rules of Procedure of the Council. Obviously, this is not an appropriate way for regulating such a complex and important issue, because the Judicial Council can change the Rules more easily than Parliament. The Judicial Council chooses the candidates by a two-thirds majority vote.<sup>16</sup>

The Montenegrin Constitutional Court has seven judges elected by the Parliament. The President of Montenegro proposes two judges and the competent working body of the Parliament proposes five judges after the announced public invitation.<sup>17</sup> The selection procedure of judges can be said to be transparent. The public call is announced in the Official Gazette of Montenegro and in at least one print media. The list of applicants is published on the website of the proposers. After conducting interviews with all the candidates, the proposer prepares a proposal for appointment that must be reasoned and the proposer must take into account the proportional representation of minorities and ethnic communities, as well as balanced gender representation. Probably the poorest provision in the selection process concerns the obligation that “the proposal for the appointment of judges shall contain the same number of candidates as Constitutional Court judges appointed under the proposal of that proposer” (Article 10 paragraph 3). The question is whether the Parliament chooses at all or just confirms the judges already chosen by the President or the working body of the Parliament. According to Amendment IV, the Parliament makes the decision by 2/3 majority or by 3/5 majority (if it wasn’t reached in the first vote). This solution can also be criticized because it additionally weakens the role of the Parliament in the selection process.

The Constitutional Court of Serbia has 15 judges, making it the largest court in the former Yugoslavia. The process of selection of the judges differs from all the other post-Yugoslav republics because Serbia

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<sup>16</sup> Rules of Procedure of the Constitutional Court of the Republic of Macedonia, [http://ustavensud.mk/?page\\_id=5211&lang=en](http://ustavensud.mk/?page_id=5211&lang=en) (last visited March 28 2019).

<sup>17</sup> Amendment XVI (3) of the Constitution of Montenegro, Official Gazette of Montenegro No. 1/07 and Amendments I to XVI to the Constitution of Montenegro, Official Gazette of Montenegro No. 38/13.

uses the Italian tripartite model.<sup>18</sup> The National Assembly, the President of the Republic, and the general session of the Supreme Court of Cassation participate in the selection process, by electing five judges each.<sup>19</sup> The National Assembly elects the judges by absolute majority, while the same institution proposes the candidates to the President of the Republic by simple majority – majority of the present MPs, whereby this number should not be lower than 64 out of 250 (Article 105, paragraphs 1 and 2). The provision that the High Court Council and the State Prosecutor Council propose candidates to the Supreme Court of Cassation has been criticized in two ways. Firstly, the State Prosecutor Council seems to be redundant, because the Public Prosecutor's Office is not part of the judicial branch of power but closer to the executive. Secondly, at first glance, as Marković (2007, 25) argues, it appears that the role of the High Court Council is degraded, although it is still questionable which role is more important, that of the proposer or the one who elects from the proposed list (see especially, Manojlović 2012, 66). The procedure for the selection of judges has not been elaborated in more detail manner in the Constitutional Court Act and, therefore, following Simović (2012, 272) there are many legal gaps that, combined with the lack of constitutional practice, lead to the “instrumentalization” and “politicization” of the selection procedure. Up to now the election process is completely unknown to the Serbian public. In other words, the election is politically influenced.

According to the Slovenian Constitution, the President of the Republic proposes the judges to the National Assembly, from among the legal experts. The Constitutional Court Act regulates in more detail the procedure for the election of judges of the constitutional court. This Act very precisely prescribes the timeframes in which the selection of judges must be carried out. In the first place this relates to the President of the Republic, because he has an important role in proposing candidates. Similar to other countries, the call for candidates is published in the Official Gazette. If the Assembly does not elect a judge in the first round, it is possible to organize two more votes, and if not a single candidate is elected at that time, the whole procedure would be repeated – “new

<sup>18</sup> As suggested by Barsotti *et al.* (2016, 42), “the way in which Justices of the Constitutional Court are recruited reflects how Montesquieu's traditional division of powers is used to reach a sort of equilibrium within the Court”.

<sup>19</sup> “The National Assembly shall appoint five justices of the Constitutional Court from among 10 candidates proposed by the President of the Republic, the President of the Republic shall appoint five justices of the Constitutional Court from among 10 candidates proposed by the National Assembly, and the general session of the Supreme Court of Cassation shall appoint five justices from among 10 candidates proposed at a general session by the High Court Council and the State Prosecutor Council”, Article 172, paragraph 3 of Constituion of Serbia, Official Gazette of the RS, No. 98/2006.

election is held on the basis of new candidatures” (Article 14). Due to this procedure, Vučić *et al.* (2010, 106) claim: “the disadvantage of this solution is the possibility of a long duration of the selection procedure and the uncertainty of the process” (translated by the author). Additionally, the provision that regulates that Parliament elects judges by a majority vote of all the deputies has been criticized, because it provides an overwhelming influence of the ruling political party.<sup>20</sup>

### 3.3. Tenure and Qualifications

The term of office of Bosnia and Herzegovina’s constitutional judges lasts until they turn 70, unless they resign or are removed by consensus of the other judges. This provision is unusual compared to other European courts, where the mandate is generally shorter. Therefore, what can be noted is the impact of common law. Following Comella (2009, 100), life tenure in BiH can be criticized: “life tenure for the constitutional judges has the disadvantage that it cannot guarantee in a satisfactory manner ‘the constant adequacy of the Court to the changes in the cultural conditions of the country’”. Since there is no lower age limit necessary for selection, it may happen that a judge can spend their whole career on this function (up to the age of 70), without having the highest professional and moral qualities.<sup>21</sup> The only specified requirement for the qualification of the judge is that he/she must have the right to vote, while the other two conditions are completely vague and unclear – to be a distinguished jurist of high moral standing. In fact, the ethnic criterion is the only reliable qualification for the election of judges of the constitutional court of BiH, because each of the three constituent peoples (Bosniaks, Serbs and Croats) must have two judges in the Court. This rule does not exist as such in the BiH Constitution, but it is in use in political life as a constitutional convention, and in turn is modeled on other political institutions (see, for example, Ohranović 2012, 119). The Constitutional Court has passed the Rules of the Constitutional Court of Bosnia and Herzegovina which confirm this unwritten practice.<sup>22</sup> In these Rules, in several places, the ethnic origin of judges affects the operation

<sup>20</sup> Bricker (2016, 58) argues that the appointment process was *highly politicised*: “It has become common practice for the president to consult with parliament before making any nominations, and parliamentary majorities regularly ‘impose [their] will’ in the appointment process”. Therefore, Ribičić (2012, 127) suggests that the decision making majority should be increased to 2/3.

<sup>21</sup> As Trnka (2012, 155–156) claims, sometimes it turned out that the person who held a high-ranking position in a political party became a judge.

<sup>22</sup> Rules of the Constitutional Court of Bosnia and Herzegovina (Revised Text Official Gazette of BiH No. 22/14), <http://www.ccbh.ba/osnovni-akti/pravila-suda/uvod/?title=uvod&second=true&lang=en> (last visited March 28 2019).

of the court itself.<sup>23</sup> As far as ethnic criteria are concerned, opinions are divided. Some authors point out that it represents discrimination of those individuals who could perform this function, but do not belong to any of the three constituent peoples, while others point out that ethnic legitimacy is a necessity and a consequence of the complex social and political circumstances that exist in BiH (compare, for example, Trnka 2012, 149; and Kuzmanović 1999, 536).

In Croatia the term of office is eight years, without the prohibition on re-election, so there have been cases where judges have been running for the third time, after two consecutive mandates.<sup>24</sup> The judge of the Croatian Constitutional Court should fulfill several conditions. There are two clearly defined conditions: a candidate must be a Croatian citizen and hold a degree in law; but also two indefinite: the candidate must have a minimum of 15 years of experience in the legal profession (or a minimum of 12 years of experience in the legal profession if he/she has received a doctorate in legal science) and be a distinguished jurist – distinguished by their scientific or professional work or public activity.<sup>25</sup> These unspecified conditions have caused many problems in practice, especially during the selection of candidates by the parliamentary Committee.

The mandate of North Macedonia's constitutional judges lasts for nine years without the possibility of re-election. The constitutional provision only states that judges should be elected from the ranks of "outstanding members of the legal profession". As mentioned before, there is no law in the Macedonian system that would specify this and other legal gaps. This is why Krčinski (2012, 94) describes the selection process in this country as "unregulated and unclear" (translated by the author).

In Montenegro the term of office is 12 years and it is nonrenewable. A Constitutional Court judge should meet the following requirements: to be a "reputable lawyer", to have reached 40 years of age and to have 15 years of working experience in the legal profession. The Law on the Constitutional Court of Montenegro specifies the term "prominent lawyer".<sup>26</sup> Professional reputation can be measured but the question is how to evaluate personal reputation.

<sup>23</sup> For example Mandatory Adjournment of a Session (Article 39), Election of President (Article 83), Election of Vice-Presidents (Article 86), etc.

<sup>24</sup> N1 Hrvatska, Razgovor sa kandidatima za Ustavni sud, *TV N1*, 17 May 2016, <http://hr.n1info.com/Vijesti/a124578/Razgovori-s-kandidatima-za-Ustavni-sud.html>.

<sup>25</sup> Article 122 of the Croatian Constitution and Article 5 of Constitutional Act.

<sup>26</sup> Article 9 (1) "Prominent lawyers shall refer to legal science professors, judges, public prosecutors, attorneys, notaries, lawyers who work in state authorities, public administration bodies and local self-government or local government bodies, as well as lawyers who work in companies and legal entities, who enjoy a professional and personal

The mandate of Serbian constitutional judges lasts for nine years and they can be re-elected. A judge of the Constitutional Court must be a prominent lawyer, at least 40 years old, with a minimum of 15 years of experience in practicing law. When it comes to the legislation, the term “prominent lawyer” is legally undefined. Likewise, there are some attempts to define this legal standard from the perspective of legal theory. Petrov (2012, 239–240) argues that a prominent lawyer is/should be “the owner of an undeniable professional and moral authority” or “the aristocrat lawyer with democratic views” (translated by the author). During the selection process, the proposers have to take into account that one of the appointed candidates from each of the proposed lists of candidates must come from the territory of the autonomous provinces.<sup>27</sup>

The Slovenian Constitutional Court is composed of nine judges for a term of nine years without a possibility of re-election.<sup>28</sup> In addition to being constitutionally required to be a legal expert, the constitutional judge must fulfill two more conditions prescribed by the Constitutional Court Act. Namely, judges must be citizens of the Republic of Slovenia and at least 40 years old.<sup>29</sup>

#### 4. COMPARATIVE SELECTION MODELS

From a comparative perspective there are several models for the selection and appointment of constitutional judges, (compare, for example, Venice Commission, 1997/020, 4–6; and Uitz 2013, 147–150). The bodies that have the most prominent role in this process are the focus of this analysis.

The direct or “discretionary” appointment appears as a model in France, where three candidates are nominated by the President of the Republic and the presidents of both Houses of the French Parliament. The relevant standing committees are authorized to provide an opinion and they may reject the proposed candidate by at least 3/5 majority of all MPs.<sup>30</sup>

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reputation”. In the English versions of Constitution and The Law on the Constitutional Court is written “reputable lawyer” and “prominent lawyer”, but in the original versions the term is same: *istaknuti pravnik* – distinguished (prominent) lawyer.

<sup>27</sup> This is quite an unusual solution, especially considering that Serbia is not a federal state, but the roots of it can be found in the provision from the 1974 Constitution where each federal subject appointed judges to the federal Constitutional Court.

<sup>28</sup> Article 163 and 165, Constitution of Slovenia, Official Gazette RS 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

<sup>29</sup> Article 9, Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 64/07 – Official consolidated text, and 109/12.

<sup>30</sup> French Constitution Article 56 paragraph 1 and Article 13 paragraph 5. Boyron (2013, 169) argues: “Surprisingly, although the Conseil constitutionnel has been

The electoral model, the election of judges in the parliament, is used in Germany where half of the total number of judges are elected by the upper house of Parliament, the Bundesrat, while the other half of the judges are selected by the Judicial Selection Committee of the lower house, the Bundestag.<sup>31</sup> The decision in both cases is made by a 2/3 majority of deputies. Kommers, Miller (2012, 23–24) refers to the German selection process as “highly politicized” but eventually the compromise between the leading political parties is reached, as it is “a practical necessity”. The same model is also in use in two post-socialist states. The lower house of the Polish Parliament, the Sejm, elects constitutional judges by the simple majority of its members, at the proposal of at least 50 MPs or at the proposal of the Sejm presidium.<sup>32</sup> Furthermore, in Hungary, the special parliament committee<sup>33</sup> nominates candidates to the Parliament, whose standing committee delivers the hearings of candidates. The final decision is reached by the 2/3 majority of all MPs.<sup>34</sup>

The hybrid or mixed model is the one that combines a system of election with direct appointment or confirmation by another authority. The oldest mixed model is the one that is applied in the United States. Likewise, the President appoints the judges of the Supreme Court with the prior consent of the Senate. Also, the role of the Senate is more than formal, since rejection of the proposed candidates is not a rarity (see more, Uitz 2013, 150). According to Kommers, Miller (2012, 24) the US selection process is more transparent than the German model, but at the same time the German “spirit of compromise and cooperation” results in the lack of the “sensationalism, scandal, and personalization that sometimes seem to dominate in U.S. Supreme Court appointments”. The Constitution of Italy (Article 135 paragraph 1) stipulates that five judges are appointed by the President of the Republic, another five are elected by the Parliament at a joint sitting of both Houses, by a qualified majority (if the 2/3 majority vote is not reached in the first three rounds, the decision shall be taken by 3/5 majority), and yet another five judges are elected from the ranks of Supreme Court judges (3), the State Council

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transformed by successive constitutional reforms, little has been done to strengthen the recruitment and membership of the Conseil; [...]”.

<sup>31</sup> According to Heun (2011, 169): “The Bundesrat elects the Justices in plenary session, while the Bundestag has delegated the election to a committee. This delegation is mostly considered unconstitutional but there is nobody who would bring that to the Court, and the Court would hardly declare itself or its composition unconstitutional”.

<sup>32</sup> Constitution of Poland, Article 194 paragraph 1, and Article 120.

<sup>33</sup> Following De Visser (2015, 207) this committee consists of nine to 15 members who are “appointed by the parties with representation in Parliament in proportions commensurate with the number of seats held by these parties”.

<sup>34</sup> Constitution of Hungary, Article 24 paragraph 4 and Article 7 paragraph 1.

(1) and the Court of Audit (1).<sup>35</sup> Barsotti *et al.* (2016, 44) emphasizes that similar to the German system, and unlike the US system, in Italy the “public opinion is completely divorced from the process”. Moreover, in Spain both Houses of Parliament propose four judges by 3/5 majority, two judges are proposed by the central government, and the last two are proposed by the General Council of the Judiciary. The formal appointment of all 12 judges is acclaimed by the King.<sup>36</sup> According to De Visser (2015, 209), the hearings of the candidates are to be conducted by the relevant parliamentary committees but in practice “such hearings do not in actual fact take place”. In addition, Belgium constitutional judges are appointed by the government (formally by the monarch) at the proposal of both Houses of Parliament (decision is reached by two-thirds majority).<sup>37</sup> Also, the President of the Czech Republic proposes candidates to the upper house of Czech parliament, whose MPs decide by the simple majority vote. Nevertheless, the examination of the candidates by the two standing committees is necessary (see De Visser 2015, 207).

## 5. TOWARDS THE PROFESSIONAL AND UNCONSTRAINED CONSTITUTIONAL COURT

The former Yugoslav states can be classified into two of the above-mentioned models. Firstly, BiH and Croatia represent the electoral model because the entire process of judicial selection is conducted by their parliaments. The system in BiH is quite unique due to the international membership of part of the judges. However, if the Bosnian court were entirely composed of BiH citizens, it would be closest to the German model. The Croatian approach is almost identical to the Hungarian model. The remaining states apply the mixed model. Likewise, in Montenegro and Slovenia parliament (and parliamentary commission) and the president of the republic are the main recruiting authorities. These models are similar to that of the Czech Republic: the president proposes some or all of the judges, but the final decision is reached in parliament. As far as Serbia is concerned, there still remains a central dilemma about which part of the process is more important: the act of proposing or the final appointment. The Serbian and Macedonian approaches are the most compelling and the greatest number of institutions is involved in the process. In Serbia

<sup>35</sup> Barsotti *et al.* (2016, 43) argue “[...] the way in which Justices of the Constitutional Court are recruited reflects how Montesquieu’s traditional division of powers is used to reach a sort of equilibrium within the Court. It also reflects the above-mentioned ambiguous nature of the Court: it is a partly judicial and partly political body”.

<sup>36</sup> Constitution of Spain, Article 159, paragraph 1.

<sup>37</sup> Special Act on the Constitutional Court, Article 32.



and North Macedonia the judicial branch of power has as important role in the selection process together with the parliament and the respective presidents. Serbian model is very similar to Italian, while the Macedonian is similar to the Spanish one. It is difficult to discern which of the mentioned models is the best. In general, we presume that the model that includes several different factors in the selection process should result in a wider consensus, which will in turn make the court more independent.

In most of the states that we examined here, the parliaments (their houses or committees) decide by supermajority of 2/3 or 3/5 of the total number of MPs (France, Germany, Hungary, Italy, Spain and Belgium). Simple majority is in use only in the USA, Poland, and the Czech Republic. This is not the case when it comes to the six analyzed states. The decisions are made by the supermajority just in Croatian (2/3) and Montenegrin (2/3 or 3/5) parliaments. In the other states their respective parliaments vote by absolute majority (in Macedonia what counts is also the absolute majority of minority communities). The absolute majority provision can be criticized due to fact that the constitutional courts should have the highest possible legitimacy. Therefore, the selection process for constitutional judges should be the result of a wider political and social consensus. Failing to reach the agreement should not pose an obstacle to introducing qualified majority rule into all of the remaining countries (BiH, North Macedonia, Serbia, Slovenia).

The most common duration of the term of office is nine years, both in European (France, Italy, Poland, Spain) and in the former Yugoslav states (North Macedonia, Serbia and Slovenia). Nonetheless, 12-year tenure is in use in Montenegro, as it is in Germany and Hungary. The Croatian Constitution adopted quite an unusual duration – eight year, similar to the Czech one – 10 years. The most specific solution is the Bosnian one: lifelong tenure (like in Belgium and the USA). A more problematic solution may be the possibility of renewable term in office in Croatia and Serbia. This is also the case in the Czech Republic and Spain (but for a three-year period), while the other states have nonrenewable tenure. The possibility of re-election can be characterized as a highly corruptive. However, some authors point out that the ban on re-election does not necessarily improve the level of the judges' independence.<sup>38</sup> Despite this, *de lege ferenda* proposal for all the post-Yugoslav states (except Montenegro) can be set to a 12-year term without the possibility of re-election.

<sup>38</sup> Pizzorusso (1988, 113) argues that “[...] it is questionable whether non-reeligibility for nomination is really sufficient to ensure the judges – independence. If we consider that some of them, at the end of their term of office, have been nominated or elected to important political offices, some doubt on the matter seems justified”.

Specific requirements exist in several countries, such as ethnic in BiH, Macedonia and Montenegro (along with gender criteria), and territorial in Serbia (there is a territorial affiliation of a future judge to the autonomous provinces). Although similar provisions also exist in other countries, for instance in Belgium, it is an open question what the final outcome of such norms will be.<sup>39</sup> In spite of the fact that the constitutional court also has a political element, what should be the prevailing criterion is the professionalism of the judges. Those specific criteria are even questionable in the process of electing political bodies. In this respect, Uitz (2013, 153–154) clearly questions the existence of such criteria, emphasizing that the tendency for diversity in the judicial structure is “problematic”. Not only is the number of judges limited, but the question is also raised about whether the representation of certain characteristic groups (less represented gender, ethnic minorities, etc.) leads to the desired result – their better protection. In other words, Uitz argues that “[...]gender or ethnic diversity in court composition does not necessarily translate to diversity of experiences and opinion”. Although we strongly agree with the aforesaid, we can hardly expect that these criteria will be omitted from the constitutional texts of the mentioned countries in the foreseeable future.

The lack of transparency during the selection process in all of the analyzed states is the result of two groups of factors: legal factors on one hand, and political and sociological on the other. In regard to the first group, some states, such as BiH and North Macedonia, do not have the legislation that would elaborate on the selection procedure. The Serbian Constitutional Court Act does not provide sufficient mechanisms to ensure a selection process that would provide the desired results. Moreover, the constitutional court acts of Croatia, Montenegro and Slovenia should be improved given that they also have certain legal gaps. All of these legal deficiencies or inconsistencies can be remedied relatively easily, through future constitutional or legal reforms, if there is the indomitable political will and intense awareness of the necessity of their implementation.

Conversely, in regard to the second group of factors, which are political and sociological, the situation is more difficult. This is best apparent through the “prominent lawyer” institute. This institute appears in five countries under the same syntagma, while only Slovenian Constitution has the syntagma *legal expert*. There are some remarks that the inconsistency of this term has led to problems, i.e. the lack of

<sup>39</sup> While Belgium is a multiethnic and multilingual state, its Constitutional Court consists of 12 judges, half of which should be French-speaking while the other half should be Dutch-speaking. Additionally, at least one of the judges needs to have “adequate knowledge of German”; also, each language group of judges has their own president. Moreover, there is a “rotation” of the Court president every year, among the different groups (see more, De Visser 2015, 215).

professionalism in these courts. This legal standard can be specified to a lesser or greater extent, and this has been done in Croatia, but it can never be fully precise. Furthermore, as suggested by Petrov (2012, 248), it should not be absolutely precise, but remain as “a guideline in the way of building a constitutional democracy”. In the same manner, Petrov (2012, 247) emphasizes it is necessary to develop “constitutional morality” in all the mentioned countries and to be aware of the necessity of constraining the authorities.<sup>40</sup> Otherwise, as Belov (2015, 257) argues: “[...] the Constitutional Court will additionally lose legitimacy if it is regarded by the society as an oligarchical institution and cartel composed by representatives of the political parties and lobbies”. Accordingly, the question may arise whether each of these courts has an excessive number of judges in relation to the number of inhabitants in the countries, and whether so many new distinguished lawyers can be found every 10 years (approximately).<sup>41</sup>

## 6. CONCLUSION

Despite the worldwide trend of unification of constitutional law and sharing good constitutional practices between the states, as suggested by Jovanović (2015, 79–80) “[...] one cannot operate with some abstract arguments regarding the relationship between constitutionalism, democracy, and constitutional review. [...] without paying attention to *particular* effects, produced by *particular* institutions in *particular* socio-historical circumstances.” In the case of our topic, that the particular socio-historical circumstances are the former common state, with its constitutional review experiences. There is a dilemma whether that relatively long tradition of constitutional courts in the SFRY contributes negatively or positively to the current situation in the six examined states. Hodžić (2016, 25–26) pointedly emphasizes, referring to Ginsburg,<sup>42</sup> that there are two possible approaches: first, it is unlikely for an institution that existed under authoritarianism to be seen as legitimate in the beginning of democratization, or the second: “Considering the specificities and tradition of the Yugoslav model of judicial review, one could as well plausibly

<sup>40</sup> Undetermined criteria in the selection of constitutional judges can be criticized, but, as suggested by Antić (2012, 57), these are more technical issues than legal ones. Perhaps, “political maturity” may be more crucial.

<sup>41</sup> In comparison to socialist era, three states maintained the identical number of constitutional court judges: BiH, Montenegro and Slovenia. The Constitutional Court of Serbia increased the number of judges from 11 to 15, the number of Macedonian judges went from seven to nine, and Croatian from nine to 13.

<sup>42</sup> Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).

assume that in the post-Yugoslav case(s) *the factor of legal tradition would work more in favour than against excessive constitutional review [...]*. For this reason, notwithstanding, under specific conditions we can put these six states in the same group with other post-socialist states. Nevertheless we have to make some distinction from that large group of states, and be aware of their common past, which still defined present-day processes. Despite this long-lasting constitutional review tradition, awareness of the significance and the role of constitutional courts is still missing in the post-Yugoslav area.<sup>43</sup> As a result, it is possible to imagine the vicious circle: the public interest in the selection process is low, the quality of some elected judges is dubious, a result of their work in the form of decisions is questionable, hence their legitimacy decreases, and the public is less interested in the work of the constitutional courts. From this perspective, it is clear that it is of the major importance who will sit in the constitutional bench.

When it comes to the normative framework for the selection of constitutional judges, we can conclude that the constitutional courts in the post-Yugoslav area rest on deep and solid foundations. Nonetheless, due to low political and public interest for this institution, a lot of purposeful work has to be undertaken to improve the courts' legal and actual political and social position, which will turn the courts into fully respectful institutions with a higher level of legitimacy. This goal will be achieved once the all three subjects, i.e. the citizens, the political elites and the courts themselves, become aware of the vital role they play. Theretofore, what can be done should be done – make the legal rules for the judicial selection as precise as possible, because in young democracies one cannot (only) trust good political practice.

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<sup>43</sup> Following Papić and Đerić (2016, 57) in Serbia “The general public seems to view the CC as irrelevant [...]” although “There are no publicly available opinion polls that could corroborate these impressions. However, this can be indicative in itself. [...] The fact that the CC does not appear in opinion polls speaks a lot about its relevance in Serbia”. For the Croatian case, Barić (2016, 38) similarly states: “Regrettably, at the beginning of 2016, public opinion on the CCC is extremely negative”.

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