

The constitutional reform of the Judicial Council in the Slovak Republic from the European comparative context

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Abstract

This contribution responds to the so-called judicial amendment to the Constitution of the Slovak Republic of 9 December 2020, which was published in the Collection of Law No. 422/2020, which resulted, inter alia, in major changes of the position, composition, and powers of the Judicial Council of the SR; the author points to the evolution of the Slovak Judicial Council since 2001 as well as summarizes the circumstances that led to its establishment, also changes in its constitutional status, composition, presidency, and competencies. The contribution includes concrete details how, according to recent constitutional reform, the system of checks and balances in the composition of the Judicial Council of the Slovak republic was implemented, to eliminate the judicial corporatism and negative consequences of political influence on that matter. The essential part of this document is the comparative analysis of the selected aspects of the composition of judicial councils in the selected European states. Special attention is paid to the issue of the majority of the judges among other members and the influence of the political forces in the process of selecting the members of the judicial councils. All of these used methods of scientific research led the author to formulate and identify the system of checks and balances in the composition of the judicial councils to ensure the independence and effectiveness of the judicial council and even for the whole judiciary in a national and/or European environment.

Key words: *the Judicial Council of the Slovak Republic, the system of checks and balances, the composition of the judicial councils, the presidency of the judicial councils, the Judicial Councils of the Southern model*

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1. Introduction

The judiciary is constantly changing to respond to a wide range of required levels of independence, resulting in establishing a new type of constitutional body operating in the sphere of the judicial power, which bears great powers concerning the governance of judiciary and judges legitimacy such as the **judicial councils**, which (citing P. O. Castillo) “*play an important role in strengthening judicial*

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*independence and in creating accountability mechanisms for the judiciary.”*² In recent decades, judicial councils (or also called as Councils of the Judiciary) have consolidated in Europe as one of the most wide-spread mechanisms for the governance of the judicial branch. These bodies can be defined as the constitutionally mandated bodies endowed with the legal authority to manage the careers of judges, independent from government influence and oversight.³

In various European countries, judicial councils have different competencies or different compositions. Although every judicial council is the unique product of a specific development within a legal culture, some general distinctions can be identified. W. Voermans⁴ distinguishes between Southern and Northern European models of Judicial Councils.⁵ **The Southern** European Councils are mostly constitutionally rooted and fulfill some primary function in the safeguarding of judicial independence such as advice as regards the appointment or promotion of members of the judiciary, or the exercise of the power of appointment or promotion by the Council itself, the training and the exercise of disciplinary powers with regards to a member of the judiciary.⁶ These types of judicial councils evolved from the original French *Conseil Supérieur de la Magistrature* of 1948, wherein the executive and legislative branches played important roles in the governance of the judiciary, to the Italian *Consiglio Superiore della Magistratura*, set up in 1958, whence participation by democratically elected representatives was removed.⁷ Those judicial councils were established as a reaction to the undemocratic regimes existing during the Second World War, after the fall of dictatorial regimes, as the defense against unintended interventions of political forces to the functioning of the judiciary. Therefore, they are considered to be the model example for other European states with a continental system of law. Many European countries have introduced judicial councils either voluntarily (apart from France and Italy, also Portugal and Spain) or under pressure from the European Union and the Council of Europe during the accession process (post-communist states in Central and Eastern Europe, except

² Autheman, V., Elena, S.: *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, 2004, IFES Rule of Law White Paper Series, p. 1.

³ Castillo- Ortiz, P.: *Councils of the Judiciary and Judges' Perceptions of Respect to their Independence in Europe*, "Hague Journal on the Rule of Law", 2017, Vol. 9, p. 316.

⁴ Voermans, W.: *Councils for the Judiciary in Europe: Trends and Models*, "The Spanish Constitution in the European Constitutional Context", 2003, p. 2134.

⁵ Apart from W. Voermans, the number of authors refer to the model of judicial governance by distinguishing Northern European and Southern European judicial councils or formulate other hybrid models in their scientific papers, for example: Bobek, M., Kosař, D.: *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, "German Law Journal", 2014, Vol. 15, No. 07, pp. 1257 – 1292. Castillo- Ortiz, P.: *The politics of implementation of the judicial council model in Europe*, "European Political Science Review", 2019, Vol. 11, p. 504.

⁶ Voermans, W., *op. cit.*, 2003, p. 2134.

⁷ Parau, C. E.: *Explaining governance of the Judiciary in Central and Eastern Europe: External Incentives, Transnational Elites and Parliamentary Inaction*, "Europe-Asia Studies", 2015, Vol. 67, No. 3, p. 410.

the Czech Republic).⁸ **The Northern** European model has distinctly different characteristics such as competencies in the area of court administration, court management, and the budgeting of courts,⁹ known as the also Court Service system, often combined with a special body for judicial appointments (Denmark, Ireland and Scotland).¹⁰ P. Castillo- Ortiz indicates “*judicial councils were selected as a mechanism for judicial governance in countries that have a strong tradition of executive interference in the court system, while countries that have a more established tradition of judicial independence opted for the Court Service Model.*”¹¹

L. Praženková notes, that above mention theoretical distinction is “*only a guidance*”, and points out, that there are also the judicial councils of the mixed model.¹² Differently, J. Drgonec does not accept the distinction between the South and North models of judicial councils and by closely linking the judicial councils with the democratic state governed by the rule of law, claims that “*the North European model has nothing to do with role, which is the Judicial Council supposed to play in a democratic state governed by rule of law.* He does not consider them as the judicial councils, but only as state bodies of judicial governance, which provide economic and material operation of the judiciary.”¹³ E. Bulmer also emphasizes the above-mentioned link, that exactly “*the sincere attempt to improve the rule of law, has been toward the constitutional establishment of judicial councils as one of several independent fourth-branch institutions.*”¹⁴

In that context, the subject of this contribution shall focus **only on Judicial Councils of the Southern European model** as bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability.¹⁵

It cannot be denied that judicial councils have played a notable role in strengthening judicial independence, which is protected exactly when a collegiate body, consisting of judges and representatives of political forces, decides upon the appointment of judges, their career, or training.¹⁶ It must be added that some aspects

⁸ Kosař, D.: *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, “German Law Journal”, 2018, Vol. 19, No. 07, p. 1574.

⁹ Voermans, W.: *Councils for the Judiciary in Europe: Trends and Models*, “The Spanish Constitution in the European Constitutional Context”, 2003, p. 2134.

¹⁰ Kosař, D., *op. cit.*, 2018, p. 1574.

¹¹ Castillo- Ortiz, P.: *The politics of implementation of the judicial council model in Europe*, “European Political Science Review”, 2019, Vol. 11, p. 507.

¹² Praženková, L.: *Niekoľko úvah k nezávislosti súdnej moci a zakotveniu súdnej rady v Ústave Slovenskej republiky [Some considerations on the independence of the judiciary and the anchoring of the Judicial Council in the Constitution of the Slovak Republic]*, “Ústavné dni, 25. výročie Ústavy Slovenskej republiky – VI. ústavné dni“, [„Constitutional Days, 25th Anniversary of the Constitution of the Slovak Republic - VI. constitutional days“], 2018 Košice UPJŠ, p.166.

¹³ Drgonec, J.: *Ústava Slovenskej republiky – Komentár, 2. vydanie [The Constitution of the Slovak Republic – The Commentary, 2nd edition]*, 2019, C. H. Beck, Bratislava, p. 1663.

¹⁴ Bulmer, E.: *Judicial Appointments*, “International Institute for Democracy and Electoral Assistance”, 2017, Stockholm, International IDEA, p. 16.

¹⁵ Garoupa, N., Ginsburg, T.: *Guarding the Guardians: Judicial Councils and Judicial Independence*, 2008, John M. Olin Program in Law and Economics Working Paper No. 444, p. 5.

¹⁶ Praženková, L., *op. cit.*, 2018, p. 165.

of judicial council may be controversial concerning, citing L. Orosz, “*the elitist closure of judiciary and its separation from the social environment and public control.*”¹⁷ On the other side, D. Kosař claims that “*the rise of judicial self-governance is not necessarily a panacea, as it may lead to political contestation and the creation of new channels of politicization of the judiciary.*”¹⁸ According to the opinion of P. Bovend’Eert “*it is crystal clear that a judicial council can be a dangerous tool in the hands of politicians who want to influence the judiciary.*”¹⁹ Another disturbing question is asked by E. C. Parau as follows “*why would self-interested, power-maximizing politicians adopt institutions of the judiciary that entail a transfer of power over the governance of the judiciary from themselves to judges?*”²⁰ In that context, J. Drgonec also points out the politicizing of the Judicial Council, in the case of Slovakia “*the Judicial Council as a constitutional institution was “established” for the depoliticization of the judicial power, but depoliticization (in Slovakia) is not suitable for many politicians, men influencing the politicians from the background, not even the judges themselves, resulting in the manipulation the interpretation of the purpose of the establishment of the Judicial Council, its composition, its organization, and the powers conferred in the phase of lawmaking as well as in the phase of application of the law.*”²¹ N. Garupa and T. Ginsburg summarized all these controversial aspects and raised a very pertinent point as follows “**judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline.**”²²

Judicial councils should be independent not only from the executive and legislative powers (external independence) and should be free from undue influence from within the judiciary (internal independence).²³ Considerations of depoliticization of judiciary and preventing the judicial corporatism is organically linked to the composition of judicial councils and selection of their members, including the membership of judges. Therefore, with the general aim of increasing the independence of the judiciary and contributing to the sustainable effective performance of their duties, the **main emphasis of this research** is currently on the issue of the **composition of judicial councils and selection of their members, with special regard to the membership of judges**. The other reason for choosing this research topic is to open the broader scientific discussion about the problems related

¹⁷ Orosz, L.: *Ústavný systém Slovenskej republiky (doterajší vývoj, aktuálny stav, perspektívy)*, [The constitutional system of the Slovak Republic (current development, current state, perspectives)], 2009, Košice UPJŠ, p. 122

¹⁸ Kosař, D., *op. cit.*, 2018, p. 1567.

¹⁹ Bovend’Eert, P.: *Recruitment and appointment of judges and justices in Europe and the US*, “Nederlandse Vereniging voor Rechtspraak”, 2018, Vol. 5, p. 6.

²⁰ Parau, C. E., *op. cit.*, 2015, p. 410.

²¹ Drgonec, J., *op. cit.*, 2019, p. 1664.

²² Garoupa, N., Ginsburg, T.: *Guarding the Guardians: Judicial Councils and Judicial Independence*, 2008, John M. Olin Program in Law and Economics Working Paper No. 444, p. 5.

²³ European Network of Councils for the Judiciary (ENCJ) Compendium on Councils for the Judiciary, Adopted 29 October 2021.

to the partial topic such as selection members and composition of judicial councils. Another issue of the judicial councils traditionally occupies an important place in the foreign scientific literature, particularly in topics such connection of judicial independence to the judicial councils²⁴, judicial career²⁵, the discipline of judge's²⁶ transparency of Judicial Councils²⁷, a court administration, etc.²⁸

The **scientific hypothesis** in which to set an ideal model of Judicial Councils is merely theoretical, bearing in mind that neither election by peers nor appointment by the executive and/or Parliament is likely to entirely insulate the council from external interference, politicization, and undue pressures. Although, the "mixture" of state bodies or entities (apart from the judiciary) who are allowed to appoint members of the judicial council may affect the level of politicization of the judiciary in some way. Also, the large majority of judges in this body may cause that judicial council becomes a sealed system of judges, known as judicial corporatism. Both of situations may bring some serious consequences, mostly in a negative way.

In that regards the **main aim** of that research is **the search for a system of checks and balances in the composition of the Judicial Councils** to ensure the independence and effectiveness of the Judicial Council and even of the whole judiciary. Other aims of that research shall identify some insufficiencies concerning the composition and the manner of selecting members in European judicial councils from the context of (de)politicization of the judiciary. The special aim of that research is connected to the Judicial Council of the Slovak Republic, which has been having critical a controversial history coming since 2001; the aim is also linked with the identification of the most significant changes in its position and composition, including the assessment of these changes. The final question concerns its place among all European judicial councils.

²⁴ Castillo- Ortiz, P.: *Councils of the Judiciary and Judges' Perceptions of Respect to their Independence in Europe*, "Hague Journal on the Rule of Law", 2017, Vol. 9, pp. 315-336. Garoupa, N., Ginsburg, T., op. cit., 2008, pp. 1-39. Preshova, D., Demjanovski I., Nechev, Z.: *The effectiveness of the 'European Model' of judicial independence in the Western Balkans: judicial councils as a solution or a new cause of concern for judicial reforms*. Centre for the Law of EU External Relations, CLEER Papers 2007/1, In: Asser Institute Centre for International and European Law, [online]. [2022-02-06]. Available at: <https://www.asser.nl/media/3475/cleer17-1_web.pdf

²⁵ Guarnieri, C.: *Appointment and career of judges in continental Europe: the rise of judicial self-government*, "Legal Studies", 2004, Vol. 24, Issue 1-2, pp. 169-187. Spáč, S.: *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, "Problems of Post-Communism", 2020. Dressel, B., Sanches-Urribarri, R., Stroh, A.: *Courts and informal network: Towards a relational perspective on judicial politics outside Western democracies*, "International Political Science Review", 2018, Vol. 39(5), pp. 573-574.

²⁶ Martinez, V. R.: *Avoiding Judicial Discipline*, "Northwestern University Law Review", 2020, Vol. 115, No. 3, pp. 953-986. Benvenuti, S.: *The Politics of Judicial Accountability in Italy: Shifting the Balance*, "European Constitutional Law Review", 2018, Vol. 14, No. 2, pp. 369-393.

²⁷ Solomon, P. H.: *Transparency in the Work of Judicial Councils: The Experience of (East) European Countries*, "Review of Central and East European Law", 2018, Vol. 43 (1), pp. 43-62.

²⁸ Bunjevac, T.: *From individual judge to judicial bureaucracy: the emergence of judicial councils and the changing nature of judicial accountability in court administration*, "University of New South Wales Law Journal", 2017, 40(2), pp. 806-841.

To achieve the aim of this document, it was necessary to use **theoretical research methods**. Firstly, to use the *comparative analysis* of the selected European's judicial councils, particularly some aspects concerning the composition and selecting members of judicial councils, and then to *analyze* the evolution of the constitutional regulation of the Judicial Council of the Slovak Republic since its establishment in 2001, including two important constitutional amendments, one of which is the extraordinary actual constitutional judiciary's reform, with special regard to its composition. Other steps are to *synthesize* the comparative results and findings. Subsequently, in accordance with the **aim** of this research, I shall try to *deduce* a relatively comprehensive **identification of the checks and balances** for effective protection against complete control of the judiciary by judges and on the other hand to guarantee the significant level of participation, independency, and accountability for judges and for the whole judiciary, while deciding upon important judiciary issues, including the appointing the judges and other issues concerning their professional career and their statuses.

2. Composition and selecting members of Judicial Councils in Europe

There are a wide variety of models of judicial councils, in which the composition and competencies reflect the concern about the judiciary in a specific context, balancing between demands for accountability and independence.²⁹ In European comparative constitutional law, the judicial councils are the product of various political and cultural developments within a legal system that in turn is deeply rooted in the historical, cultural, and social development of the country involved. Because of that, every council is unique and we cannot see or compare these institutions out of their context.³⁰ Mentioning the main focus in the Introduction, in this context, I shall focus on a comparative analysis of **the selected Judicial Councils of the Southern model**, including **“original” judicial councils** in South (Italy, Spain, Portugal, etc.) and West Europe (France) and **“derived” judicial council** in post-communistic states that have been adopted throughout the Central and Eastern Europe; the list of most of them is placed at the website of European Network of Councils for the Judiciary (herein also as *“ENCJ”*), which unites the national institutions in the Member States of the European Union which are independent of the executive and legislature, and which are responsible for the support of the Judiciaries in the independent delivery of justice.³¹

Therefore, the comparative analysis contains certain (mostly political) institutional elements in various states that are concentrated in table 1.

²⁹ Garoupa, N., Ginsburg, T., *op. cit.*, 2008, p. 5.

³⁰ Voermans, W.: *Councils for the Judiciary in Europe: Trends and Models*, “The Spanish Constitution in the European Constitutional Context”, 2003, p. 2138.

³¹ Members of the European Network of Councils for the Judiciary are listed in that website: <<https://www.encj.eu/members>>. Consultative Council of European Judges (CCJE), Opinion No. 24 (2021) Evolution of the Council for the Judiciary, Strasbourg, In: Council of Europe [online]. 16.3.2021. [2022-02-06]. Available at: <https://rm.coe.int/compilation-opinion-24-2021-all-responses/1680a1cb63>.

Table 1. The comparative analysis of selecting members of Judicia Councils in selected European countries

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency	
1	<p>BELGIUM</p> <p>The High Council of Justice</p>	<p>44 members: - 22 judges by their peers - 22 other members (8 lawyers, 6 university or college professors, 8 civil society members) by the Senate by a majority of two-thirds of the votes + bilingual aspect as 22 Dutch speakers and 22 French speaker</p>	<p>4 years, possible reappointment only once - successive term</p>	<p>partly, only for 4 members of the bureau</p>	<p>equally, half of the Council is composed of judges</p>	<p>a President - in turn <u>by</u> each member of the council for 1 year</p>
2	<p>BULGARIA</p> <p>The Supreme Judicial Council</p>	<p>25 members: - 11 members by the National Assembly by the two-thirds majority of votes - 11 members by the bodies of the judiciary (the judges elect 6, the prosecutors elect 4, the investigating magistrates elect 1) - 3 ex officio members- the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, the General Prosecutor.</p> <p>The Supreme Judicial Council shall exercise its powers through the Plenary (all members), the Judges' college</p>	<p>5 years for elected members, 7 years for ex officio members, possible reappointment, but not immediately upon expiration of the term of office</p>	<p>yes, for all members</p>	<p>yes, 14 judges out of 25 members</p>	<p>the President - the Minister of Justice without a right to vote</p> <p>no Vice-President</p>

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
	(14 members), and the Prosecutors’ college (11 members)				
3	CROATIA The State Judicial Council	11 members: - 7 judges elected by other judges - 2 university professors of law elected by all the professor of law faculties in Croatia - 2 members of Parliament, one of whom shall be from the opposition by the Parliament	4 years, possible reappointment only once (no one can be a member of Council more than twice)	no yes, 7 judges out of 11 members	a President and a Vice- President - elected by and <u>from</u> <u>among</u> its ranks and must come from the rank of judges
4	FRANCE The High Council of Justice since 1993	22 members (3 formations as Plenary formation, Formation with jurisdiction over sitting judges, and Formation with jurisdiction over public prosecutors): - 6 elected judges (5 are a member of the formation with jurisdiction over sitting judges and 1 is a member of the formation with jurisdiction over public prosecutors) - 6 elected prosecutors (5 are a member of the formation with jurisdiction over public prosecutors and 1 is a member of the formation with jurisdiction over sitting judges) - 2 members ex officio : President	4 years, possible reappointment, but not immediately upon expiration of the term of office (not consecutively)	no no, 7 judges out of 22 members	the President of the Plenary formation and the President of the formation with jurisdiction over sitting judges - the President of the Cour de Cassation the Substitute President of the Plenary formation and President of the formation with jurisdiction over public prosecutors - the General Prosecutor of the Cour de Cassation

	European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
		<p>of the Cour de Cassation and General Prosecutor of the Cour de Cassation</p> <ul style="list-style-type: none"> - 8 prominent members from outside the judiciary: 1 member of the Conseil d'Etat elected by the General Assembly of the Conseil d'Etat + 1 lawyer nominated by the President of the National Council of Bars + 6 members nominated respectively by the President of the Republic, the President of the National Assembly and the President of the Senate 				
5	<p>GREECE</p> <p>The Supreme Judicial Council of Civil and Criminal Justice</p>	<p>2 boards; one board with 15 members + one board with 11 members:</p> <ul style="list-style-type: none"> - ex officio the President of the Supreme Court - required number of members of the Supreme Court chosen by lot from among those having served in it for at least two years - ex officio the Prosecutor of the Supreme Civil and Criminal Court - 2 Deputy Prosecutors of the Supreme Civil and 	<p>1 year, possible reappointment</p>	<p>no</p>	<p>yes, majority of judges</p>	<p>the President - the President of the Supreme Court (presides on both boards of the Supreme Judicial Council)</p>

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
	Criminal Court chosen by lot from among those having served for at least two years				
6	HUNGARY The National Judicial Council	6 years, no reappointment	no	yes, all members are judges	a Presidential and a Vice- Presidential position shall be filled by members on rotation; members shall rotate every 6 months in a manner laid down by law
7	ITALY The High Council of the Judiciary	4 years, possible reappointment, but not immediately upon expiration of the term of office (not consecutively)	yes, for all members	yes, as to two- thirds of members (provided by the Constitution)	the President - the President of the Republic of Italy

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency	
8	LATVIA The Council for the Judiciary	15 members: - 7 elected members: 6 judges elected by the Judicial Conference, 1 judge elected by Plenary of Supreme Court - 8 permanent ex officio members: Chief Justice of the Supreme Court, President of the Constitutional Court, Minister of Justice, Chairperson of the Judicial Committee of the parliament, General Prosecutor, Chairman of the Latvian Council of Sworn Advocates, Chairman of the Latvian Council of Sworn Notaries and Chairman of the Latvian Council of Sworn Bailiffs	4 years , only for elected members, + possible reappointment only once (no more than twice in succession)	no	yes , all members are judges	the President - the Chief Justice of the Supreme Court No Vice-President
9	LITHUANIA The Judicial Council	23 members: - 3 ex-officio members - the Chairman of the Supreme Court, the Chairman of the Court of Appeal, the Chairman of the Supreme Administrative Court - 20 judges elected by the General Meeting of Judge: (3 from the Supreme Court, from the Court of Appeal, from the Supreme Administrative	4 years , possible reappointment	no	yes , all members are judges	a President and a Vice-President - elected for two years <u>by</u> and <u>from</u> <u>among</u> the members of Judicial Council

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
	Court each + 1 from each regional court + 1 from all regional administrative courts + 1 from all district courts located in the territory of each regional courts activities)				
10	<p>MALTA</p> <p>The Commission for the Administration of Justice</p> <p>10 members: - 4 ex officio members: The President of the Republic of Malta, the Chief Justice, the Attorney General, the President of the Chamber of Advocates - 4 judges elected by judges - 2 lay members: 1 appointed by the Prime Minister, 1 appointed by the Leader of Opposition</p>	4 years	no	equally, half of the Council is composed of judges	<p>the President - the President of the Republic of Malta</p> <p>the Vice-President - the Chief Justice</p>
11	<p>NETHERLAND</p> <p>The Dutch Council for the Judiciary</p> <p>4 members: - 2 members are former judges - 2 members with senior-level positions in the Dutch central government</p>	6 years, possible reappointment once, for a period of maximum of 3 years	yes, for all members	equally, half of the Council is composed of judges	a President and a Vice president are always judges

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
12	<p>PORTUGAL</p> <p>The High Council for the Judiciary</p>	<p>The duration of the mandate is the same as the body which has appointed them:</p> <p>- 5 years for those appointed by the President of the Republic</p> <p>- 4 years for those appointed by the Parliament</p> <p>- 3 years for the elected judicial members</p> <p>possible reappointment only for judge members, but only once</p>	<p>yes, it is possible to have a full-time position, it is a decision of the respective member</p>	<p>no, 8 judges out of 17 members</p>	<p>the President - the President of the Supreme Court of Justice</p> <p>the Vice-President - the judge of the Supreme Court of Justice</p>
13	<p>ROMANIA</p> <p>The Superior Council of Magistracy</p>	<p>6 years, no reappointment</p>	<p>yes, for all members</p>	<p>yes, 10 judges (including the President of the High Court Cassation and Justice) out of 19 members</p>	<p>a President and a Vice-President - shall be elected for one year's term of office <u>from among</u> the members who are judges or prosecutors; if The President is a judge, then a Vice-President must be a prosecutor and vice-versa</p>

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency	
14	<p>SLOVAKIA</p> <p>The Judicial Council of the Slovak Republic</p>	<p>18 members:</p> <ul style="list-style-type: none"> - 1 judge by judges of the Supreme Court of the SR and by judges of Supreme Administrative Court of the SR - 8 judges by the judges of the SR in several constituencies - 3 members by the Parliament of the SR - 3 members by the President of the SR - 3 members by the Government of the SR 	<p>5 years, possible reappointment only once (no more than twice in succession)</p>	<p>partly, only the President and the Vice-President</p>	<p>equally, half of the Council is composed of judges</p>	<p>a President and a Vice-President of the Judicial Council are elected by the Judicial Council <u>among</u> its members</p>
15	<p>SLOVENIA</p> <p>The Judicial Council of the Republic of Slovenia</p>	<p>11 members:</p> <ul style="list-style-type: none"> - 6 judges elected by judges: (1 by the judges of the Supreme Court + 1 by judges of the Higher Courts + 1 member by judges of District Courts + 1 by judges of Local Courts + 1 by all judges) - 5 members elected by the Parliament on the proposal of the President of the Republic from among university professors of law, attorneys, and other lawyers 	<p>6 years, possible reappointment, but not consecutively</p>	<p>no</p>	<p>yes, 6 judges out of 11 members</p>	<p>a President and a Vice-President are elected by the members <u>from among</u> themselves by a 2/3 majority of members</p>

European states	Composition Selection of members	Term of office Reappointment	Full-time position of members	Majority of judges	Presidency
16 SPAIN The General Council for the Judiciary	<p>21 members appointed by the King:</p> <ul style="list-style-type: none"> - ex officio the President of the Supreme Court - 12 judges and magistrates of all judicial categories - 4 members nominated by the Congress of Deputies + 4 members nominated by the Senate elected in both cases by three-fifths majority from among lawyers and other jurists of acknowledged the competence 	<p>5 years, possible reappointment only for the President of the Supreme Court</p>	<p>Partly, only 6 members (the Chair and other 5 members) a have full-time position. These members are the ones who make up the Standing Committee</p>	<p>yes, 12 judges out of 21 members</p>	<p>the President - the President of the Supreme Court is elected at the first plenary meeting by the Members of Council - once is elected, he also becomes the President of the Council</p> <p>the Vice-President - shall be elected <u>be</u> a member, he must by a judge of the Supreme Court</p>

2.1 Models of the composition of Judicial Councils, selecting their members with special regard to judge’s membership

In order to avoid politicization and encroachments on the independence of the judicial council the author V. Autheman and S. Elena emphasize, that “*the selection process for members should be objective and transparent.*”³² F. van Dijk and G. Vos are aware of the fact that “*the mere existence of a council of the judiciary is, for instance, no guarantee of independence. If the (judicial) members are selected by the government or parliament, it is an extension of the other state powers within the judiciary.*”³³ M. Leloup points out to the European Court of Human Rights, reviewing the fragile balance that had been struck between the judicial and political members. The cases (for example Oleksandr Volkov v. Ukraine³⁴) concerning the composition of judicial councils thus put the Court in a position “*to delineate a more*

³² Autheman, V., Elena, S.: *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, 2004, IFES Rule of Law White Paper Series, p. 10.
³³ Dijk, F., Vos, G.: *Method for Assessment of the Independence and Accountability of the Judiciary*, “International Journal for Court Administration”, 2018, Vol. 9, No. 3, p. 4.
³⁴ Case of Oleksandr Volkov v. Ukraine, No. 21722/11, 2013, In: HUDOC ECHR [online]. [2022-02-21]. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-115871%22%5D%7D>.

*nuanced aspect of the independence of the judiciary from the political branches of power.*³⁵ The ENCJ formulates the characteristics of the most successful models “*which appear to be those with representation from a combination of judges elected by their peers and members elected/ or appointed from the ranks of legal, academic or civil society, with broad powers sufficient to promote both judicial independence and accountability. This is seen as the most appropriate pathway to promoting and guaranteeing the real independence of the Judiciary by rendering the Council free from any political interference and serves to reinforce its autonomy.*”³⁶ According to those recommendations, on the ground of the data on the composition and selection of judicial councils in Europe, it is possible to draw certain generalizations and name the main models of selecting a member of judicial councils.

The first model as the most broadly available model (10 states out of examined 16 states) can be characterized as a **direct co-nomination**, resp. **co-election** of individual members of the judicial councils by different state authorities, or by judges themselves as so-called **Quota system** or **Quota nominations**. The selection of members is predominantly divided between judges and legislative power as the parliaments (Bulgaria, Croatia, Italy), or just one chamber of parliament, usually Senate (Belgium, Romania). Except for judiciary and parliaments, some states allow the representatives of executive power to participate in selecting the members of the judicial council, for example, the government (Malta) or the president of the Republic (Portugal). Some states allow for all branches of power (legislative, executive, and judicial) to participate in the selection process (France, Slovakia, Slovenia, Spain). One of the selecting entities can be all the professors of law faculties in Croatia or the President of the National Councils of Bars in France. With regards to the judicial selection by their peers, it is possible to distinguish the various way of selection as selection the judges from among judges belonging to the various degree of courts withing the court system (for example Bulgaria, Italy, Romania, Slovenia, Spain) or by using the principle of proportional representation (Portugal, Slovakia).

This first model can be also divided into two subgroups, depending on if the nomination is:

- (i) complemented by the ex officio membership mostly of the Heads of Judiciary, or other high positions in the judiciary (Bulgaria, France, Italy, Malta, Portugal Romania, Spain) or
- (ii) without ex officio membership (Belgium, Croatia, Slovakia, Slovenia)

The second model, less widely used, can be characterized as a **direct nomination** solely by judges belonging to the various degree of courts withing the court system, complemented by the ex-officio members (Hungary, Lithuania, and Latvia). **Special model**, occurring in Greece, can be called nomination by lot, complemented by the ex-officio members.

³⁵ Leloup, M.: *Who Safeguard the Guardians? A Subjective Right of Judges to their Independence under Article 6 (1) ECHR*, „European Constitutional Law Review“, 2021, Vol. 17, p. 398.

³⁶ European Network of Councils for the Judiciary (ENCJ) Compendium on Councils for the Judiciary, Adopted 29 October 2021.

The **membership** of judicial council varies greatly from country to country and depends on the political reasons which motivated its creation. **Judges' membership** represents an integral part of judicial councils. The important questions are: (i) Do they form the majority of members or not? (ii) What is the appropriate balance of judicial membership?

The answer to the first question can be found in the comparative analysis in table no. 1; the large majority of European states contain the majority of judges in composition of their judicial councils (10 out of 16 states). Only two states (France, Portugal) do not contain the majority of judges and in four states (Belgium, Malta, Netherland, Slovakia) the number of judges makes up half of all members.

The answer to the second question is rather complicated due to some negative sides and consequences related to a large majority of judges in judicial councils and can be discussed from a multitude of different angles. Before considering its "downside" it should be pointed out the general view which recognizes the majority of judges in judicial councils, mainly presented by ENCJ as follows "*in case of mixed composition, the Council should be composed of a majority of members of the judiciary, but not less than 50%.*"³⁷ A similar opinion is also presented by the Venice Commission "*several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges.*" What is even more important, the Venice Commission goes further by distinguishing some disproportions with some negative subsequences; either a large majority of judges (for example, 11 judges among 15 members), which would lead to inefficient disciplinary procedures or a low number of judges (for example, 8 judges out of 24 members) as a fall short of the standards requiring a substantial judicial representation.³⁸ Also, Autheman and S. Elena present a general consensus that judges should represent a majority of the Council's membership, referring to some international and regional instruments which recommend "*substantial judicial representation*", "*representatives of the higher judiciary and the independent legal profession*", "*a majority of members drawn from the senior judiciary*", "*member selected by the judiciary*" or "*judges elected by their peers*".³⁹

Contrary to the above, numbers of authors present completely different views; J. Drgonec claims "*the composition of judicial council exclusively or predominantly from judges is not necessary, even distorts the purpose of establishing a judicial council.*"⁴⁰ Similarly, P. H. Solomon takes a critical look at this matter and links the majority of judges in councils with judicial corporatism "*common charge against judicial councils is that they encourage judicial corporatism, especially*

³⁷ Ibid.

³⁸ European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, 2015 In: Council of Europe [online]. [2022-02-11]. Available at: https://www.venice.coe.int/web_forms/documents/?pdf=CDL-PI%282015%29001-e.

³⁹ Autheman, V., Elena, S.: *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, 2004, IFES Rule of Law White Paper Series, p. 8.

⁴⁰ Drgonec, J., *op. cit.*, 2019, p. 1671.

when their members are predominantly judges.”⁴¹ Another view related to the majority of judges in judicial councils, formulated by S. Voight and N. El-Bial, may adversely affect the important interests of the judiciary due to the fact “judges are not necessarily experts in administrative affairs could, hence, imply that increased levels of judicial autonomy will be connected with lower levels of performance standards.”⁴² Another authors see the predominance of judges in councils as a “threat” to the independence of the judiciary.⁴³

As an optimal compromise between these two options, may seem to be an **equal representation of judges and other members of the judicial council**, for example, recommended by L. Praženková “the essential is that generally, a number of judges are equal to the number of political representatives in judicial council.”⁴⁴

Apart from the judiciary, **other categories of members** may be represented on judicial council: (i) university professors of law faculties as academics, (ii) attorneys and other lawyers as practitioners, (iii) prosecutors, (iv) civil society members, or even members of parliament, one of who shall be from the opposition (Croatia). The Venice Commission emphasizes their “important role in those institutions when this representation is justified since a Council’s objectives relate not only to the interests of the members of the judiciary but especially to general interests. What is more, the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge.”⁴⁵

2.2 Presidency of the Judicial Councils

Judicial councils vary greatly in the regulation of their presidency, despite that fact, it is possible to recognize some type of setting up the presidency, particularly in the manner of choosing their president. The important requirement formulated by the Venice Commission is that “it is necessary to ensure that the president of judicial council is exercised by an impartial person who is not close to party politics.”⁴⁶ Regarding the appointment and adhering to the legal tradition of a particular country, the president of judicial council shall be appointed in a manner that ensures hers/his impartiality and independence from the legislature and executive and should ensure the absence of undue influence from within the judiciary.⁴⁷

⁴¹ Solomon, P. H.: *Transparency in the Work of Judicial Councils: The Experience of (East) European Countries*, “Review of Central and East European Law”, 2018, Vol. 43 (1), p. 44.

⁴² Voigt, S., El-Bialy, N.: *Identifying the determinants of aggregate judicial performance: taxpayers’ money well spent?* “European journal of law and economics”, 2016, Vol. 41, p. 288.

⁴³ Kosář, D., Spáč, S.: *Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back*, “International Journal for Court, Administration”, 2018, Vol. 9, No. 3, p. 38.

⁴⁴ Praženková, L., *op. cit.*, 2018, p.167.

⁴⁵ European Commission for Democracy through Law (Venice Commission) *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges*, 2015 In: Council of Europe [online]. [2022-02-11]. Available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>.

⁴⁶ *Ibid.*

⁴⁷ European Network of Councils for the Judiciary (ENCJ) *Compendium on Councils for the Judiciary*, Adopted 29 October 2021.

The combination of the function of chief justice of supreme court with the president of judicial council ex officio is the most frequently used model of the presidency of judicial councils in Europe. It means that the president of judicial council performs this function ex officio due to the function of chief justice of supreme court (France, Greece, Latvia, Portugal, and Spain). Chief justices often represent the entire judiciary and have additional powers beyond the Supreme Court, including presiding over judicial councils.⁴⁸ In that case, the Venice Commission recommends, in view of enhancing the independence of the judiciary to separate the administrative positions within the judiciary and the membership in the Council.⁴⁹

Another subsection of the combination of the functions is **the combination of the president of judicial council with the function outside of the judiciary**; it concerns either the function of the Minister of Justice (Bulgaria,) or the President of the Republic (Italy, Malta). The Venice Commission took a view on the Minister of Justice as the chairman of judicial council who should not be able to block the discussion of a particular issue within this body. Also, considering that providing that the president of republic chairs judicial council, could prove rather problematic, it is not necessarily the best solution and his/her role as the chair should be purely formal.⁵⁰

Another type of model gives members of judicial council “freedom” in choosing their president by the opportunity to elect a president **from among themselves** (Croatia, Lithuania, Romania, Slovakia, and Slovenia). The Venice Commission “*generally welcomes, as the part of the balance sought, that the President of the Judicial Council shall be elected by the Judicial Council itself.*”⁵¹ The last identified model of choosing a president of judicial councils represents selection on the ground of **rotation** resp. in turn. In other words, the members shall rotate to fill to post (in Hungary the members rotate every 6 months, while in Belgium every year). ENJC claims that “*rotating presidency is viewed as a good institute*” and in that case, the term of the President should not be too short. Also, a rotating presidency does not imply that each member of judicial council should serve a mandate as president.⁵²

2.3 Other institutional aspects of the functioning of the Judicial Councils

Other institutional aspects of the functioning of examined judicial councils, in particular shall include the issues as number of their members, term of office, the possibility of reappointment, and full-time position of members.

⁴⁸ Kosař, D., Spáč, S.: *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?* “Hague Journal on the Rule of Law”, Vol. 13, p. 114.

⁴⁹ European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, 2015 In: Council of Europe [online]. [2022-02-11]. Available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² European Network of Councils for the Judiciary (ENCJ) Compendium on Councils for the Judiciary, Adopted 29 October 2021.

Some authors consider the issue of **the number of members and the length of tenure of members** an important guarantee for the independence of judicial council and even for the judiciary. For example, citing V. Autheman and S. Elena “*the number of members may also affect the independence of the Judicial Council and its ability to promote judicial independence...*”⁵³ “*The length of tenure of members is equally important issue....*”⁵⁴ J. Drgonec presents the different attitude to above-mentioned issues when he states that “*the Judicial Councils have the different number of members*” and subsequently emphasizes that: “*these differences are not that important.*”⁵⁵

My attitude toward these approaches is somewhere in the middle. European judicial councils also differ in the **numbers of their members**. The assessment of the adequate number is a quite a complicated issue, because the number of members may derive from the size of the territory or the number of competencies. This statement shall not apply absolutely, as can be seen from the case of two examined states with the similar territory as Belgium with even 44 members of judicial council and Netherland with only 4 members. However, in this regard, it is possible to form some generalizations as the most frequently occurs the number of members in the group from 10 to 20 members (8 states – Croatia, Hungary, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia). The following category represents a group of countries, where a higher number of members occurs - from 20 to 30 members (6 states - Bulgaria, Greece, France, Italy, Lithuania, and Spain).

As far as the **length of tenure of members** is concerned, V. Altheman and S. Elena claim that “*there is a consensus that the length of tenure should be sufficient to guarantee the independence of the Council and short enough to ensure periodic renewal and accountability of the members.*”⁵⁶ However, Venice Commission considers the issue of the length of the term of office as a standard one, as in most countries, members are elected for a rather short period in time. In some countries, members have life tenure (Canada, Cyprus), or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate.⁵⁷ From the comparative perspective, as it is seen in table no. 1, actually it seems that members are appointed for a rather short period of time, predominantly for the term of 4 years (Belgium, Croatia, France, Italy, Latvia, Lithuania, Malta), than the term of 6 years (Hungary, Netherland, Romania, Slovenia) and 5 years (Slovakia, Spain). There occurs also a combined term of office of members, which means the different terms of office for a different type of members (Bulgaria, Portugal). Considerably

⁵³ Autheman, V., Elena, S.: *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, 2004, IFES Rule of Law White Paper Series, p. 9.

⁵⁴ Ibid, p. 11.

⁵⁵ Drgonec, J., *op. cit.*, 2019, p. 1662.

⁵⁶ Autheman, V., Elena, S.: *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, 2004, IFES Rule of Law White Paper Series, p. 11.

⁵⁷ European Commission for Democracy through Law (Venice Commission) *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges*, 2015 In: Council of Europe [online]. [2022-02-11]. Available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>.

short term of one year occurs in Greece. Besides, the possibility of reappointment of members prevails, except for two states such as Hungary and Romania. It may be linked to the fact, that there is a longer-term - of 6 years.

Another quite important institutional aspect occurs concerning the matters **of the full-time position of members**. Mostly, (in 8 out of 16 states) the position of member of judicial council is an honorary post, which means, that members do not have a full-time position. In the light of the research, it is possible to point out 5 states, where it is allowed to have a full-time position for members of judicial councils (Bulgaria, Italy, Netherland, Portugal, and Romania). Special attention is given to the case of Portugal, where it is the optional scheme, under which it is up to the respective member if he/she decides about a full-time position. In three other cases, not every member of judicial council has a full-time position. However, it should be noted that the number of members with full-time positions is marginal; in the case of Belgium, there is a small number of full-time positions in judicial council (4 out of 44). The slight difference is in the case of Slovakia, where only the President and Vice-President have full-time positions. In the Judicial Council of Spain, there are only 6 members with a full-time position.

3. The Judicial Council in the Slovak Republic (previous state, current state, and perspectives)

The Judicial Council is considered to be a “young” constitutional body in the constitutional system, since the Judicial Council of the Slovak Republic (herein also as “JCSR”, or “*the Judicial Council*”) was established by the Constitutional Act No. 90/2001 Coll. with effect from 1 July 2001. The details concerning the composition, scope, organization, and relations to the body of administrating the judiciary and to the body of judicial self-government were set by Act No. 185/2002 Coll. as The Act on the Judicial Council of the Slovak Republic with effect from 16 April 2002. During the existence of the Judicial Council, its status has been changed by two amendments: (i) the Constitutional Act No. 161/2014 Coll. (as the substantial expansion of competencies and changes of organization), (ii) the Constitutional Act No. 422/2020 Coll. (as the reform of judicial power).

3.1 The evolution of the Judicial Council of the Slovak Republic

In this context it is possible to distinguish **three periods of evolution of the JCSR**:

- **the first period from 2001-2014** as it can be characterized as the establishment of the JCSR and first years of its existence
- **the second period from 2014-2021** is characterized by the significant change in the President of the Judicial Council status and by conferring important competence to decide about the judicial competence of the candidate for the judge or of the judge
- **the third period from 2021** starts with the crucial constitutional reform of the judiciary, including the reform of the JCSR

Table 2. The evolution of the Judicial Council of the Slovak Republic

SR Period	1 2001-2014	2 2014-2021	3 2021-
Explicit constitutional status	no	no	yes - the constitutional body of judicial legitimacy
Composition Selection of the members Status of the President and the Vice President of the Judicial Council	18 members appointed and removed: - The President of the Judicial Council is the Head of the Supreme Court of the SR - 8 judges by the judges of the SR - 3 members by the Parliament of the SR - 3 members by the President of the SR - 3 members by the Government of the SR	18 members appointed and removed by: - The President of the Judicial Council by the Judicial Council among its members - 9 judges by the judges of the SR - 3 members by the Parliament of the SR - 3 members by the President of the SR - 3 members by the Government of the SR	18 members appointed and removed by: - The President and the Vice-President of the Judicial Council by the Judicial Council among its members - 1 judge by judges of the Supreme Court of the SR and by judges of Supreme Administrative Court of the SR - 8 judges by the judges of the SR in several constituencies - 3 members by the Parliament of the SR - 3 members by the President of the SR

SR Period	1 2001-2014	2 2014-2021	3 2021-
			- 3 members by the Government of the SR
Term of office Reappointment	5 years	5 years	5 years
Reappointment	Yes, but not more than for 2 subsequent terms	Yes, but not more than for 2 subsequent terms	Yes, but not more than for 2 subsequent terms
Full-time position of members	Membership of the Judicial Council is not a profession, but an honorary position	Membership of the Judicial Council is not a profession, but an honorary position, except the function of President of the Judicial Council	Membership of the Judicial Council is not a profession, but an honorary position, except the function of the President and Vice President of the Judicial Council
Judicial membership	unlimited	unlimited	limited to only 9 judges
Explicit possibility of recalling the members at any time	no	no	yes
in the judicial career (selection, promotion, training, education of judges)	yes	yes	yes
Powers in the discipline of judges	yes - in the form of electing and removing the members and Heads of disciplinary senates	yes - in the form of electing and removing the members and Heads of disciplinary senates	no

SR Period	1 2001-2014	2 2014-2021	3 2021-
in court administration	no	yes - to provide the public control of the judiciary	yes - to provide the public control of the judiciary
in the budget of the courts	yes - the expression an opinion on the draft of the budget of the courts within the state budget	yes - to express of an opinion on the draft of the budget of the courts within the state budget - to make statement to the draft of the budget of the courts to the parliament	yes - to express an opinion on the draft of the budget of the courts within the state budget - to make the statement to the draft of the budget of the courts to the parliament
in judicial ethics	no	yes - in the form of the principles of judicial ethics in cooperation with the judicial self-government bodies	yes - in the form of the principles of judicial ethics in cooperation with the judicial self-government bodies
Assessment of the judicial competence of the candidate on the judge and of the judge as to the guarantee that the function of the judge shall be performed properly	no	yes - the decision about the judicial competence is adopted on the basis of documents from the body performing the tasks of protection of classified information (National Security Authority) and	yes - the decision about the judicial competence is adopted on the basis of its own verification, procurement, or documents obtained from state authorities (without National Security

SR Period	1 2001-2014	2 2014-2021	3 2021-
		the opinion of the person concerned.	Authority) and the opinion of the person concerned - the supervision in property matters of judges

At the time of the beginning of the new millennium, the new body of judiciary was established as the Judicial Council with a view to increasing the efficiency and constitutional guarantees of independence of the overall judicial system. The ground for such an important change rested on these facts:

(i) The **strong influence of the government** to the judiciary, especially the Minister of Justice from the view of excessive and abusive powers.⁵⁸ The influence, that political branches exercised over court presidents, was another major tool of political control over the judiciary.⁵⁹

(ii) The manner of appointment of judges also called as **“questionable” institute of four-year judges**⁶⁰ – introduction of limited 4-year terms for newly appointed judges, while they were appointed by the parliament upon the nomination of the Minister of Justice. If judges were re-elected after 4-year probation, they enjoy life tenure. The European Commission repeatedly criticized this provision for the excessive control vested into the hands of political branches and stressed the need for an establishment of a judicial council to foster the independence of the judiciary from politicians.⁶¹

(iii) **Pressure** from the European Union and the Council of Europe during the accession process due of the lack of conformity with the international standards of judicial independence (according to the Report of the Group of experts of the European Commission in the field of the judiciary and the Ministry of the Interior from November of 1997 the main problems of the judiciary in Slovakia are the absence of self-government of the judiciary and vice-versa completely dependence on government.)⁶²

⁵⁸ Balog, B.: *Bezpečnostné previerky sudcov [The security clearance of judges]*, Constituent Power V. Review of Constitutionality, Bratislava Legal Forum,” 2018, Univerzita Komenského v Bratislave, p. 11.

⁵⁹ Spáč, S., Šipulová, K., Urbániková, M.: *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, „German Law Journal“, 2018, Vol. 19, No. 07, p. 1746.

⁶⁰ Orosz, L.: *Ústavný systém Slovenskej republiky (doterajší vývoj, aktuálny stav, perspektívy)*, [The constitutional system of the Slovak Republic (current development, current state, perspectives)], 2009, Košice UPJŠ, p. 121.

⁶¹ Spáč, S., Šipulová, K., Urbániková, M., *op. cit.*, 2018, Vol. 19, No. 07, p. 1746.

⁶² Orosz, L., *op. cit.*, 2009, p. 121.

Despite that pressure, A. Krunková evaluates the constitutional enshrinement of the Judicial Council of the Slovak Republic “*as a beneficial step towards an international judicial body*” and adds that “*it found its place within the constitutional system of the Slovak Republic.*”⁶³

3.2 The practical difficulties of the newly established Judicial Council of the Slovak Republic

The newly established Judicial Council in Slovakia closely followed by the Euro-Model of the judicial council has struggled to cope with the new model.⁶⁴ Naturally, this new constitutional body in the sphere of the judiciary, having significant competencies regarding the running of the judiciary (particularly the judicial legitimacy) had been criticized by the members of constitutional theory and by the relevant political parties from the very start. The subject of the criticism was mainly the unclear constitutional status of the Judicial Council, particularly the impossibility to directly decide upon the disciplinary responsibility of judges (J. Drgonec) and the scope of its constitutional powers and the problem of its composition (J. Svák).⁶⁵

As the most serious problem, defined by A. Krunková, was, that “*the Judicial Council had to tackle the problems arising from the **interest of other branches of power to control it** during its twenty years of operation.*”⁶⁶ As a consequence of the above-mentioned inconsistencies, it is possible to outline some of the **most problematic issues** in original constitutional regulation arising from:

- (i) the absence of the constitutional definition of the Judicial Council
- (ii) the strong position of the Chief Justice of the Supreme Court of the Slovak Republic, which was at the same time the President of the Judicial Council
- (iii) no restrictions on the balance of members concerning the proportion between the number of judges and other members
- (iv) the competence to assess the judicial competence of judges.

Turning back to the absence of a constitutional definition of the Slovak Judicial Council until 2021, it is necessary to stress (citing A. Krunková) that “*ex constitutione this body belongs to the category of judicial power in a formal and material view and its separation of executive and legislative power **shall be declared.***”⁶⁷ However, it took almost twenty years to put **the definition of the**

⁶³ Krunková, A.: *K niektorým aspektom ústavnej genézy orgánu sudcovskej legitimacy v Slovenskej republike* [On some aspects of the constitutional genesis of the body of judicial legitimacy in the Slovak Republic], “Organizácia súdnej moci v Poľskej republike, Českej republike a Slovenskej republike”, [“Organization of the Judiciary in the Republic of Poland, the Czech Republic and the Slovak Republic”], 2019, Košice UPJŠ, p. 67.

⁶⁴ Kosař, D.: *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, “German Law Journal”, 2018, Vol. 19, No. 07, p. 1579.

⁶⁵ Orosz, L., *op. cit.*, 2009, p. 122.

⁶⁶ Krunková, A., *op. cit.*, 2019, p.70.

⁶⁷ *Ibid.*, p. 69.

Judicial Council in the Constitution in art. 141a/1. The JCSR was the only constitutional body lacking the constitutional definition. Thus, the failure to observe that definition sometimes caused problems by grabbing the essence and the mission of the JCSR. Before that explicit constitutional definition, The Constitutional Court took over the role to define the lacking constitutional status, firstly only marginally,⁶⁸ later comprehensively, emphasizing its independence and guarantee the independence for the whole judiciary, while being the full partner to legislative and executive power.⁶⁹ Finally, the latest constitutional amendment brought the new definition of the JCSR as the constitutional body of judicial legitimacy, which makes the most exact essence of it.

During the evolution of the JCSR, it is possible to distinguish two models of **the appointment of its President**. The JCSR was initially headed by the Chief Justice of the Slovak Supreme Court – who was thus also the President of the JCSR (from 2001 until 2014). That was the case (described by M. Bobek and D. Kosař) in which senior judicial cadres coming from the communist period are given the chief say. This may even amount to hijacking the new institution by the communist-era judicial elites, and sealing it off behind a veil of judicial independence.⁷⁰ Slovak Chief Justices have not become fully autonomous actors, despite the Euro-model of the judicial council and EU membership, as Slovak politicians still consider the position of the Chief Justice strategically important and are willing and able to interfere with them.⁷¹ Naturally, this approach obviously failed, since in Slovakia (citing D. Kosař and S. Spáč) *“the proximity between the politicians and the judiciary has been a topic for a long time.”*⁷² The Chief Justice’s position eventually lost some of its powers, as in 2014 the dual role of the Chief Justice and the President of the JCSR was split in order to prevent the concentration of too much power.⁷³ The above-mentioned split of functions has brought a significant change - the strengthening the position of the JCSR since the members have had the opportunity to appoint their president from among themselves, along with the strengthening the position of the President himself; the President of the JCSR performs his function as his profession due to incompatibilities of other public functions. Moreover, the President of the JCSR shall file the proposal to start proceeding before the Constitutional Court in the matter of consistency of legal regulations. New constitutional change in 2021 also brought a professionalization of the Vice-President of the JCSR.

From the very start, the Slovak Judicial Council consists of 18 members, who represent all state powers (3 of them nominated by the President of the Republic, 3 of them nominated by the Government of the SR, 3 of them elected by the

⁶⁸ See The Constitutional Court of the Slovak Republic ruling III. ÚS 79/04 of 21 October 2004.

⁶⁹ see The Constitutional Court of the Slovak Republic ruling PL. ÚS 2/2012 of 18 November 2015.

⁷⁰ Bobek, M., Kosař, D.: *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, “German Law Journal”, 2014, Vol. 15, No. 07, p. 1283.

⁷¹ Kosař, D., Spáč, S.: *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?* “Hague Journal on the Rule of Law”, Vol. 13, p. 107.

⁷² Ibid, p. 116.

⁷³ Ibid, p. 119.

Parliament, 9 of them elected by the whole range of judges from among themselves). The Slovak constitutional system creates two independent centers of legitimacy since the direct election of the President of the Republic has been constitutionally established. The status of the Government is directly derived from the status of the Parliament. It results therefrom to be legitimate, apart from the judiciary, to give the Parliament, the Government and the President an important role in designating members. Moreover, the Venice Commission submits that “*in a system guided by democratic principles, it seems reasonable that the Council should be linked to the representation of the will of the people, as expressed by Parliament.*”⁷⁴ Also, the balanced way applies to appoint the members, who are either nominated or elected. Whereas there are 18 members, the ideal situation would be, if at least one-half of the member would-be judges. Such a composition contributes “*to ensure the comprehensive solution of problems in the judiciary and prevents the unilateral decisions or unintended influence of other two state powers.*”⁷⁵ The important question arises: Is the composition of JCSR actually balanced? In the finding of the answer, at least two disturbing correlations occur; (i) the (internal) threat of judicial corporatism, (ii) the (external) threat of political control of judicial council.

Firstly, in relation to **the internal threat of judicial corporatism**, it is possible to identify the problems with the original version of the Slovak Constitution from 2001 until 2020, which although distinguished between members of judicial council who are the judges and other members who have to meet the requirements to hold a degree in law with the fifteen years of legal practices, but without any restrictions concerning the balance between members. That imperfection caused, that the judges in the JCSR used to prevail; in the first term, judges made up a total of two-thirds of all members of the JCSR. In the second term, this number of judges increased to 16 members.⁷⁶ This development shows how important it is to decide who selects judicial members and how the electoral law to judicial council is designed.⁷⁷ J. Drgonec suggested to interpreting this distinction (by using a literal interpretation) as follows “*the judicial council consists of 9 judges and of 9 other members who are not judges.*” J. Drgonec further takes the view, “*that instead of implementing that rule as the constitutional custom, it is overlooked.*” Subsequently, the author firmly criticizes “*the instrumentalization, in order to maintain self-govern nature of Judicial Council, which in that view seek the judicial corporatism.*”⁷⁸ A

⁷⁴ European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, 2015 In: Council of Europe [online]. [2022-02-11]. Available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>.

⁷⁵ Giba, M., *Ústavné právo, [Constitutional law]*, 2019, Wolters Kluwer, Bratislava, p. 325.

⁷⁶ Domin, M.: *Zloženie Súdnej rady Slovenskej republiky pod 1. septembri 2014 [The composition of the Judicial Council of the Slovak republic after 1st of September 2014]*, “Projustice”, published 24th July 2014, [online]. [2022-02-11]. Available at: <https://www.projustice.sk/ustavne-pravo/zlozenie-sudnej-rady-sr-po-1-9-2014>.

⁷⁷ Bobek, M., Kosář, D.: *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, “German Law Journal”, 2014, Vol. 15, No. 07, p. 1284.

⁷⁸ Drgonec, J., *op. cit.*, 2019, p. 1671.

similar opinion regarding the rise of judicial corporatism is presented by D. Kosař who claims that “*the constitutional design of its judicial council supposed a parity of judges, elected by their peers with non-judicial members appointed by /elected by political actors, but in practice, judges have always had a majority on the JCSR.*”⁷⁹

After all, the latest constitutional amendment brought a little change with a significant consequence by stating that the legislative and executive branches of state power shall nominate to JCSR only members, who are not judges. By adopting this change, it may be expected broader legitimacy of JCSR, also the variety of legal professions and at the same time increasing the effectiveness to prevent being a very inward-looking judiciary, resp. being subject to judicial corporatism.

Secondly, to illustrate my point, in relation to **the external threat of political control over the JCSR**, I shall highlight the approach presented by A. Krunková who points out the case of a political party with an absolute majority in parliament, which enabled it to form a one-party cabinet, similarly when this political party has the President’s sympathy, moreover with the judges, which supervisory authority is the Ministry of Justice within a one-party cabinet and as well as claims that “*such a constitutional constellation caused doubts concerning the true balance between members, more specifically in immediate connectivity of the executive and legislative power.*”⁸⁰ Such a situation in Slovakia was real (from 2012-2016 as the political party SMER-SD was the single ruling party). This seems to be a very extreme situation, which obviously can occur in a state of a low political and legal culture. In this context, the relevant question is asked by a number of authors *whether the JCSR itself managed to depoliticize the Slovak Judiciary and the results are, at best, dubious.*⁸¹ At the same time, they explain the broader political context and atmosphere in which the JCSR was operating.

A number of measures have been taken to strengthen the independence of the judiciary, including through constitutional changes, such as the provisions which set out the new appointment procedure of judges. The **inverse situation** occurred by adoption the Constitutional Act No. 161/2014 Coll, which allowed the Judicial Council to decide upon the judicial competence of the candidate on the judge and of the judge on the basis of documents from the body performing the tasks of protection of classified information (the National Security Authority) by so-called **security clearances** and the opinion of the person concerned (art. 141a/9). Exactly, the **process** of securing the documents for deciding on the fulfillment of the conditions of judicial competence appeared to be **controversial** in the manner of the intervention of the executive power (through the National Security Authority) to judiciary as “*potential for preventive intimidation*”. B. Balog critically claims “*if we, in the Slovak Republic, have been unable to create a proper and effective control system of judges, herein lies the weakness of the whole judicial system and its low confidence in society. The question is if it is possible to bridge these imperfections*

⁷⁹ Kosař, D.: *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, “German Law Journal”, 2018, Vol. 19, No. 07, p. 1588.

⁸⁰ Krunková, A., *op. cit.*, 2019, p. 70.

⁸¹ Spáč, S., Šipulová, K., Urbániková, M.: *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, „German Law Journal“, 2018, Vol. 19, No. 07, p. 1767.

by new security clearances.”⁸² Naturally, this led to the initiation of proceeding of the conformity of laws before the Constitutional Court according to Article 125 of the Constitution. The Constitutional Court for the first time since its establishment decided upon the compatibility of constitutional law with the constitution, despite the fact, the Constitutional Court has not had the power to repeal part of the Constitution, because no legal regulation allows it to do so.⁸³ Despite that, the Constitutional Court, on the ground of drawing implicit competence, decided by the judgment PL. ÚS 21/2014 (citing L. Orosz) “as a decision that had a high potential to rise a conflict between the Constituent body and the Constitutional Court.”⁸⁴ The main core of that decision can be characterized as follows “the provisions concerning the possibility of dismissing a judge who does not meet the conditions for judicial competence and the provisions concerning the mechanism for obtaining an opinion on the fulfillment of judicial qualifications do not respect the principle of separation of powers, violate the individual independence of judges as well as the institutional independence of the judiciary.”⁸⁵ The latest constitutional change performed by the Constitutional Act No. 422/2020 corrected an atypical situation since the decision about the judicial competence is adopted on the basis of its own verification (by the Judicial Council itself), procurement, or documents obtained from state authorities (art. 141b). Moreover, the other significant change has been adopted, by explicitly stating, that constitutional court shall not decide upon the compatibility of constitutional law with the constitution (art. 125/4).

⁸² Balog, B.: *Bezpečnostné previerky sudcov [The security clearance of judges]*, Constituent Power V. Review of Constitutionality, Bratislava Legal Forum,” 2018, Univerzita Komenského v Bratislave, p. 11.

⁸³ Many domestic constitutional experts have launched numerous contributions on that subject: Balog, B.: *Ústavoobrana na temnej strane Sily (?) [Constitutional Guard on the Dark Side of the Force (?)]*, “Acta Facultatis Iuridicae Universitatis Comenianae, 2019, Vol. 1, pp. 223-236. Kubina, P.: *Kde sú hranice ústavodarnéj moci? [Where are the limits of constitutional power?]*, “Bratislava Legal Forum,” 2018, Univerzita Komenského v Bratislave, pp. 78-91. Lapčáková, Breichová, M.: *Ústava v ohrození – Zopár zamyslení nad jedným nálezom Ústavného súdu Slovenskej republiky (PL. ÚS 21/2014) [Constitution in danger - A few reflections on one finding of the Constitutional Court of the Slovak Republic (PL. ÚS 21/2014)]*, “Acta Facultatis Iuridicae Universitatis Comenianae”, 2019, Vol. 1, pp. 237 – 260. Neumann, J.: *Ústavný súd SR ako efektívny ochranca ústavnosti pri zásahu do materiálneho jadra? [The Constitutional Court of the Slovak Republic as an effective defender of constitutionality in the intervention of the material core?]*, “Acta Facultatis Iuridicae Universitatis Comenianae”, 2019, Vol. 1, pp. 298 – 311. Ealík, T.: *Nález PL. ÚS 21/2014 ako nevyhnutný liek na ústavné zákonodarstvo na Slovensku [Finding PL. ÚS 21/2014 as a necessary remedy for constitutional legislation in Slovakia]*, “Acta Facultatis Iuridicae Universitatis Comenianae”, 2019, Vol. 1, pp. 274-297.

⁸⁴ Orosz, L.: *Justičná novela Ústavy Slovenskej republiky (solídne zámery – rozpačité závery), [Judicial amendment to the Constitution of the Slovak Republic (solid intentions - mixed conclusions)]*, “Úvahy o zmenách v ústavnej úprave súdnej moci a ich dopady na rozhodovacie činnosť Ústavného súdu Slovenskej republiky – IX. ústavné dni” [“Reflections on changes in the constitutional regulation of the judiciary and their effects on the decision-making activity of the Constitutional Court of the Slovak Republic - IX. Constitutional days”], 2021, Košice UPJŠ, p. 87.

⁸⁵ Farkašová, S.: *Kam kráčaš Ústavný súd, [Where do you head, Constitutional Court]*, “1989-2019: Dekády zmien Kam kráčaš demokracia”, [“1989-2019: Decades of changes Where do you head, democracy”], 2021, Košice, UPJŠ, p. 128.

4. The comparative results and conclusions

In Europe, a variety of different systems of judicial councils exist and there is not a single model that would apply to all countries. Therefore, I, as the author, do not consider setting an ideal model of judicial councils. Some of the aims of this research have been to trace **some insufficiencies** of the composition of the European Judicial Councils and to identify the **system of checks and balances**, while taking into account the synthesis of my own comparative findings, scientific knowledge of academics, and recommendation of the Opinions and Reports of Council of Europe, including Venice Commission and, as follows:

- The composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicization and autocratic government (Belgium, Malta, Netherland, Slovakia).
- The “slight” majority of judges cannot be assessed a priori negatively as compared to a large majority of judges, or even the domination of judges (Bulgaria, Croatia, Romania, Slovenia, Spain).
- Among the judicial members of judicial council, there should be a balanced representation of judges from different levels of courts, and this principle should be explicitly established (Italy, Portugal, Romania, Slovakia, Slovenia, and Spain, including the state with solely judge’s representation as Hungary, Latvia, and Lithuania).⁸⁶
- Judicial corporatism can be avoided by ensuring that the judges must be usefully counterbalanced by the representation of civil society as lawyers, professors of law, representation of State powers (all of the examined states except Hungary, Latvia, and Lithuania).
- The parliamentary election of members shall include the participation of opposition political parties, not solely coalition political parties. This requirement can be provided through the qualified majority either by two-thirds of the present members or three-fifth of the present members of the parliament (Belgium, Bulgaria). On the other side, I shall propose some reservation relating to quorum concerning the simple majority since it does not take into account the opposition.
- The President should be elected by judicial council from among its members, or by the turn (Belgium, Croatia, Hungary, Lithuania, Romania, Slovakia, Slovenia).

The special aim was closely connected to the evaluation of the evolution and the current state of the Judicial Council of the Slovak Republic, which was adopted in the atmosphere of post-Mečiar optimistic Europeanization and under the political pressure of the European Commission and the Council of Europe with the

⁸⁶ European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, 2015 In: Council of Europe [online]. [2022-02-11]. Available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>.

predominant influence of judges.⁸⁷ The evaluation of the JCSR by a number of foreign authors was rather critical, for example as M. Bobek and D. Kosař who critically claims “*in sum- the Slovak Judicial Council, created following the best practices of the Euro-model, has turned gradually into a mafia-like structure of intra-judicial oppression, run in the name of judicial independence by judges who started their judicial careers in the communistic period*”⁸⁸ From the perspective of multi-value qualitative comparative analysis by P. J. Castillo Ortiz, JCSR is considered as “*a disempowered Council, included a low perception of disrespect to independence by associations, but a high perception of corruption and a hybrid model of appointment.*”⁸⁹ Unfortunately, these authors approach is not out of touch with previous reality, as demonstrated by a number of problems the Council had been facing, particularly (i) the politicization of the judiciary through the dominant role of the Chief Justice of the Supreme Court in the Judicial Council⁹⁰ as the consequences of the controversial dual role, which concentrated too much power in the hands of one person, (ii) de facto overwhelming majority of the judicial members of the Council, (iii) problematic power to assess the judicial competence of judge and so on. In such the gloomy, but realistic circumstances, it may be understandable “the idealistic hope” formulated by M. Bobek a D. Kosař that “*one day there would be enough political will to reform the administration of justice, the hopes for a new reform of a stillborn model, which meanwhile had acquired a constitutional status, are now close to zero.*”⁹¹

However, the 2020 constitutional amendment undoubtedly brought improvements in the above mention situation, as well as the favorable position of the JCSR among other European judicial councils; welcomes the numerous laws passed for judicial reform and calls for further intensive efforts in the reform of the judiciary, in order to ensure its professionalism, efficiency and independence from political pressures such as the improvement of the process of selecting the members aim at:

- improving the legitimacy by increasing of its representativeness in the benefit of better distribution of judges as members (the regional principle of the election of judges in several constituencies),
- explicit limitation of a number of judges and equality with other members of JCSR. In that context, it is possible to assess positively the manner of selecting the members of JCSR, which involves the participation of all branches of state power (the legislative power, executive power, and judiciary),
- professionalization of the function of the Vice-President of the JCSR.

⁸⁷ Spáč, S., Šipulová, K., Urbániková, M.: *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, „German Law Journal“, 2018, Vol. 19, No. 07, p. 1767.

⁸⁸ Bobek, M., Kosař, D.: *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, “German Law Journal”, 2014, Vol. 15, No. 07, p. 1288.

⁸⁹ Castillo- Ortiz, P.: *Councils of the Judiciary and Judges’ Perceptions of Respect to their Independence in Europe*, “Hague Journal on the Rule of Law”, 2017, Vol. 9, p. 332.

⁹⁰ Kosař, D.: *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, “German Law Journal”, 2018, Vol. 19, No. 07, p. 1592.

⁹¹ Bobek, M., Kosař, D., *op. cit.*, 2014, p. 1288.

To conclude, I agree with J. Drgonec with his statement, that “*in the creation of the judicial council, in the selecting the members, in its competences and organization everything is connected to everything else. The characteristics of judicial councils are neither accidental nor end in themselves. The Judicial Council must have such individual characteristics as to enable it to carry out the tasks for which it is established.*”⁹²

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⁹² Drgonec, J., *op. cit.*, 2019, p.1665.

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