



Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability

and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.



CLEER

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

Denis Preshova, Ivan Damjanovski,
and Zoran Nechev



CLEER

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**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**

**DENIS PRESHOVA, IVAN DAMJANOVSKI,
AND ZORAN NECHEV**

CLEER PAPERS 2017/1

Governing board / Board of editors

Prof. Fabian Amtenbrink (Erasmus University Rotterdam)
Prof. Steven Blockmans (CEPS/University of Amsterdam)
Dr. Wybe Douma (T.M.C. Asser Institute)
Prof. Christophe Hillion (SIEPS/University of Leiden)
Dr. Andrea Ott (Maastricht University)
Dr. Luca Pantaleo (T.M.C. Asser Institute)
Dr. Tamara Takács (T.M.C. Asser Institute)
Prof. Ramses Wessel (University of Twente)

Associate editors

Dr. Ton van den Brink (Utrecht University)
Dr. Andrés Delgado Casteleiro (Durham University)
Dr. Angelos Dimopoulos (Queen Mary University)
Dr. Christina Eckes (University of Amsterdam)
Prof. Dr. Peter Van Elsuwege (Ghent University)
Dr. Ester Herlin-Karnell (VU University, Amsterdam)
Prof. Dr. Dimitry Kochenov (Groningen University)
Dr. Jan-Willem van Rossem (Utrecht University)
Dr Jorrit Rijpma (Leiden University)
Dr. Nikos Skoutaris (University of East Anglia)
Dr. Bart Van Vooren (University of Copenhagen)
Prof. Dr. Henri de Waele (Radboud University, Nijmegen)
Dr. Geert De Baere (KU Leuven)
Dr. Joris Larik and Dr. Aaron Matta (The Hague Institute for Global Justice)

Editor-in-Chief

Dr. Tamara Takács (T.M.C. Asser Institute)

Academic programme coordinators

Dr. Tamara Takács (T.M.C. Asser Institute)

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at info@cleer.eu. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER and in 100 hard copies with full colour cover.

This text may be downloaded for personal research purposes only. Any additional reproduction, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year and the publisher.

The author(s), editor(s) should inform CLEER if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Authors
Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

Abstract	5
About the authors	6
1. Introduction	7
2. Theoretical framework	8
3. ‘European model’ of Judicial Independence	13
4. Is there an actual ‘European model’ of judicial councils?	16
5. The track record of the ‘European model’ in CEECs	18
6. EU-led judicial reforms in Macedonia and the ‘European model’ of judicial councils	21
7. Conclusion	24

ABSTRACT

This paper examines the extent to which EU-driven institutionalisation of the judicial councils has been successfully operationalised to deliver the anticipated results regarding judicial independence as well as the influence of intervening factors such as the determinacy of conditions, historic legacies and informal practices. By analysing the case of Macedonia, it argues that the establishment of judicial councils has not met the normative values and expectations that they were set to achieve through the judicial reforms. The paper detects four general negative effects of the 'European model' of judicial councils: (1) premature introduction without paying due consideration to the actual context in the respective countries, (2) increased exposure of the judiciary to both internal and external pressures induced by newly established institutional avenues, (3) further compromising of individual independence of judges, and (4) reduced transparency of judicial self-governance.

ABOUT THE AUTHORS

Denis Preshova is Research/teaching assistant, Faculty of Law, Ss. Cyril and Methodius University in Skopje, Doctoral student, Faculty of Law, University of Cologne

Ivan Damjanovski is Assistant Professor, Political Science Department, Faculty of Law, Ss. Cyril and Methodius University in Skopje

Zoran Nechev is Senior Researcher and Program coordinator, Center for European Integration, Institute for Democracy "Societas Civilis" - Skopje and Academic guest, Center for International and Comparative Studies, ETH Zurich.

1. INTRODUCTION

Judicial reforms have been one of the focal points of the European Union (EU), particularly in the pre-accession period, representing a crucial pillar in the Enlargement process. The importance of an independent and functioning judiciary is twofold within this process. On the one hand, it is one of the fundamental components of the rule of law and the overall democratisation of a country in transition. On the other hand, the future 'European mandate'¹ of national courts is of utmost importance for the effective application and enforcement of EU law, particularly after the accession. Therefore, the independent and self-governed judiciary has been an essential part of the Copenhagen criteria,² as well as the overall Enlargement process.³ While judicial reforms were not seen as a very important issue for the so-called old Member States, it has become a centre of interest with the EU accession of the Central Eastern European Countries (CEECs), and now even more so for the Western Balkan countries aspiring to become members of the EU.

These reforms, led by the EU, have been characterised by a strong emphasis on the establishment of powerful judicial councils as institutions for judicial self-administration and guardians of judicial independence. This EU approach is the result of a sort of joint effort of both the Council of Europe and the EU, along with a plethora of non-governmental organisations, development agencies and experts in a so-called 'international rule of law industry'.⁴ The end result of this 'joint venture' is the 'European model' of judicial councils. They have promoted the establishment of a strong judicial council, at the beginning only as a 'recommendation' for the CEECs, while later on as a strict requirement and obligation for the countries of the Western Balkans. But is there truly a 'best practice' or a genuine 'European model' based on the actual practice in at least a majority of EU Member States?

Whilst there is an abundance of literature on the Europeanisation of the candidate countries in Central and Eastern Europe, that does not seem to be the case with the Western Balkans countries, where, despite the centrality of judicial reforms in the new EU Enlargement strategy, there is a clear lack of both empirical and theoretical accounts of the processes of Europeanisation of the judicial systems. Hence, this paper would contribute to the debate by

¹ We would like to thank Tamara Takacs for her editing efforts and support as well as the two anonymous reviewers for their useful comments and suggestions. The authors can be contacted at the following email addresses: i.damjanovski@pf.ukim.edu.mk, dpresova@yahoo.com and zorannecev@gmail.com

M. Claes, *The National Court's Mandate in the European Constitution* (Oxford: Hart Publishing 2006).

² Conclusions of the Presidency, European Council in Copenhagen, June 21–22 1993, Doc SN 180/1/93 REV 1, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf>.

³ M. Bobek and D. Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15(7) *German Law Journal* 2014, 1257-1292, at 1275, 1276.

⁴ *Ibid.*, at 1276.

shedding light on the effects of EU induced processes of institutionalisation of the judicial councils as one of the most important pillars of the judicial reforms. More precisely, the paper examines to what extent the EU-driven institutionalisation of the judicial councils has been successfully operationalised to deliver the anticipated results regarding judicial independence, and what was the influence of intervening factors such as the determinacy of conditions, historical legacies and informal practices. By the same token, the paper argues, through the analysis of the case of Macedonia supported by comparative findings and parallels with other CEECs, that the establishment of judicial councils has not met the normative values and expectations that they were set to achieve through the judicial reforms. Namely, the paper detects four general negative effects of the European model of judicial councils: (1) premature introduction without paying due consideration to the actual context in the respective countries, (2) increased exposure of the judiciary to both internal and external pressures induced by newly established institutional avenues, (3) further compromise of individual independence of judges, and (4) reduced transparency of judicial self-governance.

2. THEORETICAL FRAMEWORK

The processes of transfer and adoption of EU rules in the countries aspiring EU membership in the past 15 years has inspired an ever growing Europeanisation literature that analyses the mechanisms and the extent of EU impact on domestic transformation in the candidate countries.⁵ Scholarly work on the Europeanisation of the CEECs has been predominantly framed in the new institutionalist dichotomy of rationalist 'logic of consequences' and constructivist 'logic of appropriateness'. The rationalist explanations emphasise the role of external incentives as the driving force of compliance in the target countries, especially in the case of political and rule of law conditionality.⁶ According to this model, rule adoption in the candidate countries is enforced by the EU through a strategy of reinforcement by reward,⁷ meaning that as long as the EU provides a credible membership incentive, the candidate states are more inclined to comply with EU conditionality. Hence, EU rules adoption in the candidate countries occurs when the benefits of EU rewards exceed the domestic adoption costs, whereby the cost benefit balance is dependent on four intervening variables, i.e. determinacy of conditions, the size and speed of

⁵ U. Sedelmeier, 'Europeanisation in New Member and Candidate States', 6(1) *Living Reviews in European Governance* 2011: 1-30.

⁶ F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', 11(4) *Journal of European Public Policy* 2004, 661-679; F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (Ithaca, New York: Cornell University Press 2005); S. Richter, 'Two at One Blow? The EU and its Quest for Security and Democracy by Political Conditionality in the Western Balkans', 19(3) *Democratization* 2012, 507-534.

⁷ F. Schimmelfennig, S. Engert and H. Knobel, 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey', 41(3) *Journal of Common Market Studies* 2003, 495-518.

rewards, the credibility of threats and promises, and the size of adoption costs.⁸ On the other hand, alternative constructivist explanations, such as the social learning model, see EU rule adoption as a process of socialisation of domestic norm entrepreneurs, which (through persuasion) internalise EU norms through the notion of their legitimacy and resonance.⁹ Although the social learning model has not been able to provide a coherent explanatory framework of compliance with EU rules, in some limited cases where social learning has been established as the main mechanism of rule adoption, it appears that the implementation of EU rules has been widely accepted.¹⁰

On the other hand, some scholars have problematised the effect of conditionality on democracy promotion by indicating the negative impact that EU conditionality has had on the inter-institutional balance in the candidate countries; in the sense that the EU induced mechanisms of legal harmonisation, which have introduced fast-track procedures of law adoption, have contributed towards a disproportional strengthening of governmental powers over the other branches of governance.¹¹ In this sense, Grabbe points at an 'executive bias' in the accession process, which in the long run would reinforce the democratic deficit in the enlarged EU.¹² Furthermore, she argues that EU influence is additionally diffused due to the complexity of actor constellations involved and the ambiguousness of conditionality portrayed by the EU's own lack of 'comprehensive institutional templates that would be needed to shape political institutions into an identifiably "EU" mould.'¹³

In this sense, despite being among the key priorities of conditionality since the very onset of the Eastern Enlargement, rule of law and judicial independence have been hindered by the apparent incoherence and ambiguity of EU demands, which derive from the inconsistent functioning of rule of law policy within the EU itself. Although rule of law is perceived as a constitutional principle of a foundational nature,¹⁴ its incoherent policy framework has not been able to prevent numerous deviations from guaranteeing rule of law in many Member

⁸ F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality', *supra* note 6, at 672.

⁹ *Ibid.*; F. Schimmelfennig and U. Sedelmeier, (eds.), *The Europeanization of*, *supra* note 6.

¹⁰ R. Epstein, 'Diverging Effects of Social Learning and External Incentives in Polish Central Banking and Agriculture', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of*, *supra* note 6, 178-198.

¹¹ K. Raik, 'Bureaucratization or Strengthening of the Political? Estonian Institutions and Integration into the European Union', 37(2) *Cooperation and Conflict* 2002., 137-156; A. Dimitrova and G. Pridham, 'International Actors and Democracy Promotion in Central and Eastern Europe: The Integration Model and Its Limits', 11(5) *Democratization* 2004, 91-112; K. Goetz, 'The New Member States and the EU: Responding to Europe', in S. Bulmer and C. Lequesne (eds.), *The Member States of the European Union* (Oxford: Oxford University Press 2005), 254-284; W. Sadurski, 'Introduction: The Law and Institutions of New Member States in Year One', in W. Sadurski, J. Ziller and K. Zurek (eds.), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence: European University Institute 2006), 3-18.

¹² H. Grabbe, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity', 8(6) *Journal of European Public Policy* 2001, 1013-1031.

¹³ *Ibid.*, at 1013.

¹⁴ L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', *CLEER Working Paper* No 3 (2012).

States, to the point where some authors have alerted that the EU is faced with a constitutional crisis and systemic deficiency in the rule of law.¹⁵ The ambivalent outcomes of EU oversight of Member State breaches of rule of law and EU fundamental values,¹⁶ further emphasise the necessity of more structured and reinforced monitoring mechanisms of Member State rule of law outputs.¹⁷ This problem has been further amplified with the performance of some of the 'new' Member States from Central and Eastern Europe. The post accession actions of populist ruling elites in Hungary and Poland aimed at the systemic dismantling of judicial autonomy seriously put into question the long term effectiveness of EU conditionality. Such outcomes indicate the rather mixed outputs of the EU's promotion of the rule of law, whose effectiveness, according to Pech, has been undermined by the lack of a proper monitoring framework and a more integrated approach connecting its internal and external policies of promotion of EU values.¹⁸

Hence, considering the high transaction costs and the sheer complexity of reforming legal systems with strong communist legacies,¹⁹ the lack of a comprehensible framework of EU induced rules hinders the effectiveness of conditionality and produces inconsistent and divergent compliance outcomes.²⁰ Keeping in mind that the European Commission could not employ an explicit set of rules that would oblige candidates to adopt a specific judicial model, the promotion of judicial independence had to be executed in correspondence with external epistemic communities, most notably with the expertise and legitimacy of the Council of Europe.²¹

One could argue that this exercise of soft rule of law conditionality has become stronger and more refined over time through the application of more rigorous and structured assistance and monitoring schemes devised by the European Commission. The ever growing importance of rule of law is highlighted by the EU approach in exercising conditionality on the Western Balkans applicant states. Drawing on the lessons learned from previous enlargements, the EU has devised a new strategy that has put rule of law reform at the very

¹⁵ A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51(1) *Common Market Law Review* 2014, 59-96.

¹⁶ J.W. Müller, 'Europe's Other Democracy Problem: The Challenge of Protecting Democracy and the Rule of Law within EU Member States', 21(2) *Juncture* 2014, 151-157; J.W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', 21(2) *European Law Journal* 2015, 141-160.

¹⁷ C. Closa D. Kochenov and H.H.J. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', *Robert Schuman Centre for Advanced Studies Research Paper No 25* (2014), available at <<http://ssrn.com/abstract=2404260>>.

¹⁸ L. Pech, 'The EU as a Global Rule of Law Promoter: the Consistency and Effectiveness Challenges', 14 *Asia Europe Journal* 2016, 7-24.

¹⁹ A. Mungiu-Pippidi, 'The EU as a Transformation Agent. Lessons Learned from Governance Reforms in East Central Europe', *Hertie School of Governance Working Paper*, No 33 (2008), at 19.

²⁰ D. Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion', 2(1) *Erasmus Law Review* 2009, 5-24; D. Mineshima, 'The Rule of Law and EU Expansion', 24(1) *Liverpool Law Review*, 2002, 73-87.

²¹ D. Piana, 'The Power Knocks at the Courts' Back Door: Two Waves of Postcommunist Judicial Reforms', 42(6) *Comparative Political Studies* 2009, at 823.

heart of the accession process. Rule of law conditionality has been further streamlined by the introduction of two negotiating chapters and country specific benchmarks, by keeping both chapters open for the complete duration of the accession negotiations and by conditioning the dynamics of negotiations in other chapters upon the progress made in the rule of law area. However, the inexistence of a composite internally implemented EU judicial model severely limits the consistency of promotion of rule of law and makes it susceptible to politicisation.²² Kochenov's criticism of the European Commission's administration of conditionality goes beyond this determinacy dilemma as he argues that the inconsistencies have often been a result of a poor application and assessment of the principle.²³

Hence, the absence of a coherent European model of judicial governance has been subject to extensive academic criticism. As Coman argues, the EU has failed to prescribe a specific blueprint of judicial independence albeit there have been made indirect attempts by the European Commission to impose a normative model of judicial governance, through empowering new institutions like the judicial councils.²⁴ Its attempt to construct a harmonised judicial model based on the institutional legacies of the judicial systems of the old member states²⁵ has been limited by the diverse and sometimes incompatible nature of those legacies. Hence, the demands for accomplishment of standards that are non-existent and sometimes disputed in the EU itself have had a negative effect on the credibility and consistency of the process. This has been quite evident in the application of judicial cooperation where the transfer of knowledge of the 'European model' by Member State experts results in fragmented outcomes due to domestic bias.²⁶ Smilov has brought such criticisms to an even higher level. By demonstrating that that Western European legal systems provide a non-convergent plurality of models of judicial independence, he argues that the European Commission reports have developed a 'myth of a common European theory of judicial independence' that has been instrumentally convenient for certain actors, i.e. it assists bureaucratic elites, strengthens the image of the EU as a community based on common values, and empowers the European Commission's position in the accession negotiations.²⁷

The lack of precision of EU conditions for judicial reforms has had a varied effect on the dependent variable. Most empirical studies of the Eastern Enlargement solidify the argument that the enforcement of EU demands did not result

²² H. Grabbe, 'European Union Conditionality and the Acquis Communautaire', 23(3) *International Political Science Review* 2002, 249-268; D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International 2008).

²³ D. Kochenov, *supra* note 22.

²⁴ R. Coman, 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe', 66(6) *Europe-Asia Studies* 2014, at 899.

²⁵ D. Piana, *supra* note 21, at 828.

²⁶ *Ibid.*, at 829, 830.

²⁷ D. Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer 2006), at 314.

in similar outcomes but, on the contrary, it produced a variation of country-specific judicial patterns whose outlook has been heavily influenced by a particular convergence of external incentives with domestic actor constellations.²⁸ Similar conclusions have been drawn in the case of the Western Balkans and Turkey.²⁹

Bearing in mind what has previously been said, our account of the impact of EU conditionality on the judicial reforms in Macedonia takes into consideration three intervening factors. Determinacy of conditions that refers to the clarity and formality of rules³⁰ is the most obvious variable. Previous research has shown that the effectiveness of conditionality can be restricted if EU criteria are not precise or consistent.³¹ The absence of a coherent *acquis* in the area of judicial independence could impose obstacles on compliance in the target countries. This is even more evident in institution-building processes, especially in cases where common European institutional regimes are absent.³² Also, convergence can be hindered when candidate countries are faced with a multiplicity of overlapping standards.³³

Another surprisingly overlooked factor that influences compliance is the role of historical legacies. Pop-Eleches argues that overlapping cultural, socio-economic and institutional legacies have been an important explanatory determinant of variation in post-communist democratisation in relation to external conditionality.³⁴ On the other hand, Schimmelfennig and Scholtz's testing of four historical legacies (cultural, imperial, independent statehood and Leninist) as control factors for EU conditionality has shown that, although none of them can outweigh the causal role of conditionality in democratisation, cultural and institutional legacies have still played an important role in the democratisation of EU neighbouring countries, and consequently reduced the impact of EU accession conditionality.³⁵ In a narrower sense, we cannot overlook the impact of the legacies of communist and pre-communist judicial culture on the dynamics of contemporary judicial reform and behaviour of judicial elites. This rationale has been comprehensively summarised by Nicolaïdis and Kleinfeld, who claim that

²⁸ D. Piana, *supra* note 21, at 816-840; R. Coman, *supra* note 24, at 892-924.

²⁹ G. Noutcheva and S. Aydin-Düzgüt, 'Lost in Europeanisation: The Western Balkans and Turkey', 35(1) *West European Politics* 2012, at 59-78.

³⁰ F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality', *supra* note 6, at 672.

³¹ G. Schweltnus, 'The Adoption of Non-Discrimination and Minority Protection Rules in Romania, Hungary, and Poland', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of*, *supra* note 6, 51-70.

³² O. Anastasakis, 'The EU's Political Conditionality in the Western Balkans: Towards a More Pragmatic Approach', 8(4) *Southeast European and Black Sea Studies* 2008, at 371.

³³ K. Nicolaïdis and R. Kleinfeld, 'Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma', *SIGMA Papers* No 49 (Paris: OECD Publishing 2012), at 25.

³⁴ G. Pop-Eleches, 'Historical Legacies and Post-Communist Regime Change', 69(4) *Journal of Politics* 2007, at 908-926.

³⁵ F. Schimmelfennig and H. Scholtz, 'Legacies and Leverage: EU Political Conditionality and Democracy Promotion in Historical Perspective', 62(3) *Europe-Asia Studies* 2010, 443-460.

'historical legacies may constitute formidable and structural obstacles to the rule of law in countries in transition [...] the echoes of communism followed by civil war still deeply permeate the social fabric of all the successor states of the Former Yugoslavia, giving rise both to an intense yearning for and resistance to the durable entrenchment of the rule of law.'³⁶

Lastly, we look at the impact of informal networks and behaviour on judicial governance. Encroaching informal practices within institutional set-ups can have a disrupting effect on the quality of compliance with EU rules. Such interactions between informal political patronage networks based on clientelistic relations of power and weak democratic institutions might produce outcomes that result in de facto 'behind the scenes' political elite control of the judiciary. In such cases, 'externally induced processes of modernisation end up as 'simulated change' against the backdrop of structural, informal continuities.'³⁷

3. 'EUROPEAN MODEL' OF JUDICIAL INDEPENDENCE

Due to the limited 'hard' *acquis* on the judiciary in general, and different legal traditions, the EU relies on so-called European standards sponsored by Council of Europe institutions like the Consultative Council of European Judges (CCJE),³⁸ advisory body of the Council of Europe on issues related to independence, impartiality and competence of judges; the European Commission for Democracy through Law (Venice Commission),³⁹ advisory body on constitutional matters; and the European Committee on Legal Co-operation,⁴⁰ inter-governmental body responsible for the standard-setting activities in the area of public and private law; in addition to international non-governmental associations such as the European Network of Councils for the Judiciary,⁴¹ consisted of national institutions in the EU Member States that are responsible for the support of the judiciaries in their independent delivery of justice.

Such an outsourcing of expertise in relation to rule of law and, more specifically, the judiciary has been the result of a lack of expertise in the European Commission as the judiciary was initially not even part of the EU *acquis*. Therefore, the EU lacks power of enactment of harmonising legislation in this area. Additionally, while the European Commission can recommend or require the fulfillment of EU standards in the pre-accession period, which are essentially standards introduced by other organisations, it lacks any significant power when it comes to the post-accession period, as the organisation and functioning of

³⁶ K. Nicolaidis and R. Kleinfeld, *supra* note 33, at 21.

³⁷ A. Mungiu-Pippidi, 'Deconstructing Balkan Particularism: the Ambiguous Social Capital of Southeastern Europe', 5(1) *Southeast European and Black Sea Studies* 2005, at 49-68.

³⁸ For more information, see <http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp>.

³⁹ For more information, see <<http://www.venice.coe.int/webforms/events/>>.

⁴⁰ For more information, see <http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/default_en.asp>.

⁴¹ For more information, see <<http://www.encj.eu>>.

the judiciary in the Member States is generally not part of EU powers or of the European Commissions' jurisdiction.⁴²

As a direct consequence, the effectiveness and the consistency of the approach applied by the EU in implementing EU-related actions to produce and safeguard judicial independence in Enlargement countries have been undermined.⁴³ The support expected from the European Commission in guiding judicial independence reforms has been weak, taking into consideration the plethora of external institutions, above all the Council of Europe, involved in structuring and subsequently in operationalising the EU approach in the accession process. In a situation like this, where a chorus of voices is being heard on how to promote judicial independence, the European Commission is faced with the role of only managing the process, rather than substantially engaging itself in it.

In the same vein, the lack of a unified approach in preserving judicial independence in the Union and its Member States is evident in the European Commission's Justice Scoreboard.⁴⁴ To a great extent, this current state of play facilitates the understanding of the inconsistencies and the lack of clarity in dealing with the countries of the Western Balkans in regard to judicial independence.

The method used to employ the 'European model' and transfer of knowledge is made by exchange of information, questionnaires, recommendations by judicial specialists/experts, peer review mission, European Commission's opinions and annual progress reports, as well as lessons learnt from previous Enlargement rounds. In doing so, the aim is to identify best practices as common standards and denominators of EU countries, ensuring mutual trust and confidence in the judicial system.

The new approach towards accession negotiations, introduced with the negotiation framework for Montenegro, invariably puts the judiciary and judicial independence specifically on the pedestal in the accession process. The model of judicial independence is introduced through negotiations with candidate countries within Chapter 23, which deals with issues related to the judiciary and fundamental rights. The EU is using the recommendations from these external institutions and organisations in order to construct its own approach. Thus, it envisages the establishment of a self-governing judiciary led by a judicial council, which is independent from government and administration, with responsibility for the career of judges, and eventually also for the prosecutors.

Opinion No. 1 of the Consultative Council of European Judges on the 'standards concerning the independence of the judiciary and the irremovability of judges' set up the scenery for the introduction of the 'European model' of judicial independence operationalised by judicial councils.⁴⁵ The Opinion stan-

⁴² L. Pech, *supra* note 18, at 11 and 13.

⁴³ *Ibid.*, at 7-24.

⁴⁴ European Commission, The 2015 EU Justice Scoreboard, Doc COM(2013)160 final, available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf>.

⁴⁵ CCJE, Opinion No 1 (2001) of the Consultative Council of European Judges for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the

standardises the institutional framework and guarantees needed to secure judicial independence in a particular European country. Consequently, it determines the level at which judicial independence should be guaranteed, the basis of appointment or promotion, tenure related issues (period of appointment, irremovability and discipline), remuneration, freedom from undue external influence, independence within the judiciary, and the role of judiciary, and gives recommendations for each of these topics. With regard to the level of judicial independence that should be guaranteed, it recommends the adoption of the provision from the European Charter on the statute for judges,⁴⁶ which states that in each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level (paragraph 16). In terms of appointing and consultative bodies, the CCJE, on the basis of its judicial specialists, recommends an independent authority with substantial judicial representation chosen democratically by other judges. It goes further in elaborating the role of the consultative body in the sense that it considers that every decision relating to a judge's appointment or career should be based on objective criteria by this body (paragraph 37). In the same vein, the CCJE further encourages the involvement of this independent authority in relation to appointment and re-appointment, also of international courts (paragraph 56). Interestingly enough, this approach is deemed increasingly relevant mainly for former communist countries, which do not have long-entrenched and democratically proven systems, and where formal institutional safeguards such as the introduction of strictly non-political appointing bodies are essential for securing judicial independence (paragraph 45). This is the actual core of the approach applied in the accession of the Western Balkans countries, Macedonia in particular.

Opinion No. 10 of the CCJE on the 'Council of the Judiciary in the service of society' further develops the position of judicial councils:

'the Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.' [...] However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of Parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice" (paragraph 19).⁴⁷

The Venice Commission's report on judicial appointments also covers issues of particular importance for judicial independence. There is an obvious compli-

Independence of the Judiciary and the Irremovability of Judges, Doc CCJE (2001) OP N°1, 23.11.2001.

⁴⁶ The European Charter on the Statute for Judges is available at <https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf>.

⁴⁷ CCJE, Opinion No 10 (2007) of the Consultative Council of European Judges to the Attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society, Doc CCJE (2007) OP N°10, 23.11.2007, available at <https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf>.

ance with positions expressed by the CCJE with regard to the approach promoted for guaranteeing judicial independence. Namely, the Venice Commission recommends the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy (paragraph 32).⁴⁸ In addition, the Council, comprised of majority members elected by their peers in the Judiciary, should have a decisive influence on the appointment and promotion of judges and the disciplinary measures against them. Finally, the Venice Commission emphasises that the greatest safeguard for judicial independence, whether 'internal' or 'external', can be assured by the judicial councils.

4. IS THERE AN ACTUAL 'EUROPEAN MODEL' OF JUDICIAL COUNCILS?

Based on the way and manner in which the European Commission and the Council of Europe have promoted and recommended the establishment of a specific form of judicial councils, one could easily assume that there is actually one single 'European model' of judicial administration. But how has the European Commission come up with such a model? Is there really one model of judicial administration within all EU Member States?

There are five approaches to judicial administration known today, which are the Ministry of Justice model; the judicial council model; the courts service model; the hybrid model and the socialist model.⁴⁹ Accordingly, judicial councils represent only one model of judicial administration, which is characterised by a high level of self-administration of the judiciary, often by the judiciary itself. Judicial councils represent intermediary institutions placed between the judiciary on the one hand, and political institutions on the other, in charge of safeguarding and guaranteeing judicial independence. They are essentially administrative bodies of the judiciary with broad powers over judicial appointment, promotion and dismissal, the disciplinary responsibility, and the evaluation of the work of judges. The majority of members of judicial councils should come from the judiciary, where possible directly elected from their own ranks, while the other members are nominated by the political branches from a pool of legal experts. In this way, judicial councils are rather detached from the executive and legislative branches and thus represent the highest possible level of judicial autonomy, working as synonyms for judicial self-governance, at least for the EU.

Some authors⁵⁰ argue that today in Europe, there are in essence two models of judicial councils. The first one is the Southern European model, mainly

⁴⁸ European Commission For Democracy Through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, Study No. 494 / 2008, Doc CDL-AD(2010)004, 16.3.2010, at 11-12, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e)>.

⁴⁹ M. Bobek and D. Kosar, *supra* note 3, at 1265.

⁵⁰ W. Voermans and P. Aleber, *Councils for the Judiciary in EU Countries* (Leiden/The Hague 2003), at 10, available at: <http://www.drb.de/fileadmin/docs/sv_councils_for_the_judiciary_voer

based on the design of judicial councils in Italy, France, Spain and Portugal.⁵¹ According to this model, the overarching function of judicial councils is to guarantee judicial independence, while being provided with broad powers in the areas relating to it. Basically, this model of judicial councils fits within the definition provided above.⁵²

On the other hand, we have the Northern European model, which is based on the experience of some Scandinavian countries, such as Sweden and Denmark, and the Netherlands and Ireland, in which judicial councils only have certain limited powers with respect to judicial appointments and dismissal. However, these councils have extensive powers in the administration of the judiciary in issues such as court management, education and training, budgeting et cetera.⁵³

Even though, on a first glance, this classification might be useful, and is often referred to by international organisations,⁵⁴ it has not been broadly accepted by scholars.⁵⁵ The latter have suggested that the Northern European model of judicial councils actually represent a separate approach in judicial administration. Different from the judicial council, these independent intermediary bodies form a so-called court service model.⁵⁶ Therefore, they are councils of judiciary only by name. Furthermore, they do not even possess some of the main elements of the ideal type of judicial councils as recommended and foreseen by the Council of Europe, and then taken over in the 'European model', as promoted by the EU.⁵⁷

Ironically, however, the model of judicial councils promoted by the EU, misleadingly termed as the 'European model', has been a theoretical construction

mans_albers_2003.pdf>.

⁵¹ Ibid., at 10 et seq.

⁵² Ibid., at 10.

⁵³ Ibid., at 11.

⁵⁴ V. Autheman and S. Elena, 'Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America', *IFES Rule of Law White Paper Series* No 2 (April 2004), European Network of Judicial Councils, available at <<https://www.encj.eu/images/stories/pdf/judiciaries/authemaandelena2004judicialcouncilslessonslearnedeuropelatnamerica.pdf>>; European Commission for Democracy Through Law (Venice Commission), Opinion of the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Opinion No. 712 / 2013, Doc CDL-AD(2014)008, 24.3.2014, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)008-e)>; CCJE, Opinion No 10, *supra* note 47.

⁵⁵ M. Bobek and D. Kosar, *supra* note 3, at 1257; M. Bobek, 'The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance', 16(2) *European Public Law* 2010, at 251; N. and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57(1) *The American Journal of Comparative Law* 2009, at 103, 109 and others.

⁵⁶ M. Bobek and D. Kosar, *supra* note 3, at 1257, 1266.

⁵⁷ See, for example, European Network of Councils for the Judiciary (ENCJ), Councils for the Judiciary Report 2010–2011, available at <http://www.csm1909.ro/csm/linkuri/15_06_2011_41800_ro.pdf>; CCJE, Opinion No 10, *supra* note 47; European Charter on the Statute for Judges, *supra* note 46; General Assembly of the European Network of Councils for the Judiciary, Self Governance for the Judiciary: Balancing Independence and Accountability (May 2008), available at <<http://www.encj.eu/images/stories/pdf/resolutionbudapestfinal.pdf>>;

Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency, and Responsibilities, Doc CM/Rec (2010) 12, 17.11.2010, para. 27, available at <<https://wcd.coe.int/ViewDoc.jsp?id=1707137>>.

of the so-called international rule of law industry, not really based on the actual practice in Europe. Mainly relying on the documents of the Council of Europe and its consultative bodies, the EU has actually based its model on a single, arguably successful experience, namely, the Italian judicial council.⁵⁸ As a matter of fact, most of the Member States do not even have this type of judicial council in their political system.⁵⁹ As a result of such an absence of a coherent *acquis*,⁶⁰ as well as of the obvious 'disconnect problem',⁶¹ which reveals the inconsistency between accession conditions and membership obligations⁶² in this area, the EU promotion of judicial reforms since the late 1990s and early 2000s represents an exercise of learning by doing. This exercise eventually resulted in the construction of a model for judicial councils that is supposed to be implemented in all the prospective Member States. Consequently, the European Commission has promoted a model of judicial councils on which there exists no basic consensus in the existing EU Member States. Thus, excluding Member States with the so-called Northern model of judicial councils, we have a rather small number of states that have a judicial council fitting the 'European model'.

5. THE TRACK RECORD OF THE 'EUROPEAN MODEL' IN CEECS

The 'European model' has served as a pattern of EU-led judicial reforms initially targeted at the CEECs, but used a lot more in the case of the Western Balkans region. In order to better understand the main weakness that this model manifests in the Western Balkans countries, one needs to take a look at the track record of judicial reforms in the case of some of the CEECs.

In the CEECs, the EU has had limited success, taking into consideration that several of these countries, the Czech Republic and Poland being the most notable examples, have refused to implement such institutional reforms and opted for some alternative models of judicial administration.⁶³ On the other

⁵⁸ On the influence of the Council of Europe, see more in A. Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle', 52 *German Yearbook of International Law* 2009, 405-436; on the influence of the Italian model, see more in M. Bobek and D. Kosar, *supra* note 3, at 1257, 1258-1265, and M. Bobek, *supra* note 55, at 251; on the influence of the Spanish model, see D. Piana, *supra* note 21, at 816, 829 and D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Barnham: Ashgate 2010), at 102.

⁵⁹ These are the countries that have a judicial council according to the European model: France, Spain, Italy, Portugal, Belgium, Slovakia, Slovenia, Croatia, Romania and Bulgaria.

⁶⁰ D. Dozhilkova, 'Measuring Successes and Failure of EU-Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria', 9(2) *European Journal of Legal Reform* 2007, at 285, 311. For a more detailed account of the lack of coherent *acquis* in the area of rule of law in general, see L. Pech, *supra* note 18, at 9-14.

⁶¹ L. Pech, *supra* note 18, at 14.

⁶² *Ibid.*, at 15.

⁶³ For instance, Poland opted for a mixed approach partly incorporating the European model of judicial council, but preserving a high level of influence of the executive branch, particularly of the President, on the judiciary. For more on the specific approaches in different CEECs, see A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg: Springer 2012), at 603-884.

hand, the problem of reversibility and lack of sustainability in judicial reforms as part of the rule of law framework in the post-accession period, regardless of the latest developments and backsliding in Poland, are best perceived in countries that have completely implemented EU suggestions and recommendations with regard to judiciary, or more precisely, administration of judiciary. While Hungary is definitely the most notable example in this regard,⁶⁴ as well as on many other issues related to democracy and rule of law, there are also the examples of Slovakia, Bulgaria,⁶⁵ and Romania,⁶⁶ which expose the weaknesses of the EU approach towards judicial reforms, resulting mainly from the 'disconnect problem'.⁶⁷

More specifically, when speaking about the judicial councils, the contrasting experiences of the Czech Republic and Slovakia are very telling in this respect, and illustrative especially due to their shared history and circumstances of once having belonged to a single country. The Czech Republic was one of the countries that opted not to introduce a judicial council, a decision for which it was often criticised, and implemented a model very similar to the one present in Germany and Austria, where the Ministry of Justice has a very important role.⁶⁸ On the other hand, Slovakia was the exemplary pupil and established a strong judicial council, largely based on the European model. Nevertheless, the results of establishing and safeguarding judicial independence have not been so exemplary in the case of Slovakia. Instead of safeguarding it, the judicial council has jeopardised the independence of the judiciary, particularly the one of individual judges.⁶⁹ On the contrary, the track record of the Czech Republic (and of Poland) has been much better than in Slovakia⁷⁰ and other CEECs that have established strong judicial councils.⁷¹

One of the main reasons for this lack of success has been the premature introduction of strong judicial councils without contextualising them in terms of judicial culture and the overall status of the judiciary in the respective countries. It is exactly this feature of a certain level of tradition in judicial independence, which was present in Italy,⁷² but lacking in the CEECs and the Western Balkans,

⁶⁴ See, for example, European Commission for Democracy Through Law (Venice Commission), Opinion on the Cardinal Acts on the Judiciary That Were Amended Following the Adoption of the Opinion CDL-AD (2012)001 on Hungary, Opinion No. 683 / 2012, Doc CDL-AD(2012)020, 15.10.2012, available at: <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)>; L. Pech, *supra* note 18, at 13; J.W. Muller, 'Should the EU', *supra* note 16, at 141–149.

⁶⁵ See, for example, D. Dozhilkova, *supra* note 60.

⁶⁶ R. Coman and C. Dallara, 'Judicial Independence in Romania', in A. Seibert-Fohr (ed.), *supra* note 63, 835–882.

⁶⁷ L. Pech, *supra* note 18, at 14 et seq..

⁶⁸ M. Bobek and D. Kosar, *supra* note 3, at 1265.

⁶⁹ *Ibid.*, at 1283–1288.

⁷⁰ *Ibid.*, at 1283.

⁷¹ A. Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle', in A. Seibert-Fohr (ed.), *supra* note 63, 1279–1362; D. Piana, *supra* note 21.

⁷² The Italian model of judicial administration makes a distinction between ordinary and administrative judiciary, and the Superior Council of Judiciary has powers only in relation to the ordinary judiciary and not for the administrative judiciary. In contrast, most of the countries of the Western Balkans have an 'integrated' form of judiciary, which does not distinguish between ordi-

that seems crucial for the success or the lack of it in this type of grand institutional reforms. The EU's mere emphasis on institutional reforms above all the establishment of judicial councils, without first making smaller scale reforms in the judiciary related to judicial mentality and culture, has had negative effects on the main goal judicial councils were supposed to accomplish. In the words of Dicosola: 'the adoption of reforms introducing completely new rules [and institutions] without a parallel process of transformation of culture risks to be useless or, even worse, to produce adverse effect.'⁷³ As a result, what has occurred in the countries that have introduced judicial councils in a context of political environments that were not democratically mature, and that have not properly tackled the historical legacy of the judicial mentality of subordination to other political branches, widespread corruption and clientelism, is a partial failure of judicial reforms.⁷⁴ Parau has clearly detected this problem by arguing that 'if such grave defects pollute the rest of the polity, what are the odds of finding freak exceptions in judges.'⁷⁵ Under such circumstances, the insulation of the judiciary from other parts of the political system through judicial councils has served the unwarranted empowerment of judicial elites as represented by senior judges,⁷⁶ and/or the creation of new institutional avenues for applying political pressure from the executive on the judiciary.⁷⁷ Both of these occurrences have had negative consequences on judicial independence, as the insulation of the judiciary made it even more vulnerable and exposed it to different types of pressure. One cannot simply establish new institutions amidst an existing judicial culture and mentality, power regimes and personalities, which have psychological ties to the previous regime and expect it to deliver a substantially different result.⁷⁸ Consequently, judicial councils have in essence brought changes without reforms.⁷⁹ Based on these claims, one could easily trace and detect four general shortcomings and negative effects of these institutions in meeting the normative values and expectations they are supposed to achieve.⁸⁰

First, the 'European model' is based on assumptions and preconditions relating to a legal and judicial culture and mentality that was/is not in place in most of these countries. Therefore, it can be said that the model has been

nary and administrative judiciary. This difference finds its reflection also in the procedures upon an appeal on decisions of the judicial councils for the ordinary judiciary.

⁷³ M. Dicosola, 'Judicial Independence and Impartiality in Serbia: between Law and Culture', *Diritti Comparati*, 17 December 2012, available at <<http://www.diritticomparati.it/2012/12/judicial-independence-and-impartiality-in-serbia-between-law-and-culture.html>>.

⁷⁴ M. Bobek and D. Kosar, *supra* note 3, at 1280.

⁷⁵ C.E. Parau, 'The Drive for Judicial Supremacy', in A. Seibert-Fohr (ed.), *supra* note 63, at 640.

⁷⁶ See, for example on the case of Slovakia, M. Bobek, and D. Kosar, *supra* note 3, at 1283–1288.

⁷⁷ G. Gee, 'The Persistent Politics of Judicial Selection: A Comparative Analysis', in A. Seibert-Fohr (ed.), *supra* note 63, at 133.

⁷⁸ M. Bobek, *supra* note 55, at 255.

⁷⁹ M. Podumljak, 'Country Report: Croatia', in C. Ghinea and L. Stefan (eds.), *EU Approach to Justice Reform in Southeastern and Eastern Europe* (Bucharest: Romanian Center for European Policies 2011), at 117.

⁸⁰ On these normative values, see M. Bobek and D. Kosar, *supra* note 3, at 1269–1276.

introduced prematurely. **Second**, as a result of this, not only have judicial councils not been able to guarantee judicial independence but they have opened the door to further threats to it from both internal and external actors, and exacerbated the issue of judicial accountability.⁸¹ The insulation of the judiciary through judicial councils has made it even more prone to political pressure. **Third**, while judicial councils have tried to safeguard judicial independence, individual independence of judges has in certain cases been compromised, as a result of political pressure, mainly through the disciplinary procedure, evaluation of their work and dismissal. Judicial councils have served as an instrument for the disciplining of disobeying and dissenting voices in the judiciary. **Fourth**, despite being one of the goals of judicial councils, increasing the transparency of the judiciary has not been achieved. As a result of the increasing political pressure and existing judicial clientelism as led by the judicial elites, the judicial councils consequently became less transparent and closed to the public in the exercise of their powers and duties.

6. EU-LED JUDICIAL REFORMS IN MACEDONIA AND THE 'EUROPEAN MODEL' OF JUDICIAL COUNCILS

Against this background, the EU has maintained the approach of insisting on the establishment of strong judicial councils in the countries of the Western Balkans. Regardless of the fact that the practice and experiences in some CEECs have suggested something else, it still seems that lessons have not been learnt. Furthermore, in the Western Balkan countries, this model has been implemented without any major debate or contestation over its suitability and effectiveness,⁸² especially in light of the experiences of some of the 'new' Member States that have abided by the suggestions and recommendations from the EU⁸³ (Slovakia, Romania, Bulgaria and Hungary prior to 2011). It is conventional wisdom that one cannot achieve different results if one sticks to the same approach and method. Exactly this has been proven once again in this region, and Macedonia represents an evident example for making this claim when it comes to judicial reforms.

Macedonia was one of the first countries in the region that entered the process of judicial reforms with EU assistance and support. In 2005, the country introduced a large package of constitutional amendments related to the judi-

⁸¹ For more on the issue of judicial accountability, see D. Piana, *supra* note 58; G. Di Federico, 'Judicial Accountability and Conduct: An Overview', in A. Seibert-Fohr (ed.), *supra* note 63, 87-120; Z. Kühn, 'Judicial Administration Reforms in Central-Eastern Europe', in A. Seibert-Fohr (ed.), *supra* note 63, at 603.

⁸² M. Kmežic, 'Adoption of International Legal Standards in the Field of Judiciary Reform: Comparative Legal Study', *Project Report: Europeanization by Rule of Law Implementation in the Western Balkans*, Regional Research Promotion Program (2012), available at <http://www.rppp-westernbalkans.net/en/research/Completed-Projects/2013/Europeanisation-by-Rule-of-Law--Implementation-in-the-Western-Balkans/mainColumnParagraphs/00/text_files/file/FinalSyntheticReport.pdf>.

⁸³ For more on the lack of democratic debate, see M. Bobek and D. Kosar, *supra* note 3, at 1257, 1277.

ciary.⁸⁴ One of the focal points of these reforms was the establishment of the Judicial Council of the Republic of Macedonia.⁸⁵ It incorporated all of the characteristics of the European model: a high level of concentration of powers related to judicial appointments, promotions and dismissals, as well as in determining disciplinary responsibility of judges. The composition of the Council also follows EU recommendations. A majority of eight of its fifteen members are from judicial ranks, five are appointed by the Parliament upon nomination from the respective Parliament Commission, and the President of Macedonia, the Minister of Justice, and the President of the Supreme Court are members *ex officio*.

Consequently, the judicial council also inherited the same shortcomings as those in the cases of the CEECs. Namely, when observed through the prism of the four general shortcomings of the work of judicial councils in other countries, Macedonia is absolutely no exception. Exactly ten years after the establishment of the new judicial council, it is rather evident that the judiciary was not ready for the high level of self-government. This new institution was introduced amidst existence of strong ties with the past judicial mentality and culture, and an evident tendency towards political pressure despite several major political and governmental shifts from previous reform cycles since the country had gained independence in 1991. There is an inherent discrepancy between experience and values. Those with experience bring with them some other values stemming from the previous communist regime, even though everyone expects that they are the ones with authority to lead judicial reforms.⁸⁶ Under such circumstances of not having a true established tradition of judicial independence in the country, the introduction of the judicial council could not lead to a positive outcome. Judicial independence could not be imposed without a proper awareness among judges and their will to obtain it.⁸⁷

The insulation of the judiciary from the other branches of state power through the judicial council has actually exposed the judiciary even further to undue political pressure from the executive and ruling party elites. The recent wiretapping scandal⁸⁸ in Macedonia revealed what was already known about the extensive political pressure on the judiciary and judicial council, often through informal networks and means of political control. The recordings brought serious allegations on the establishment of an extensive informal mechanism of governmental and party control over the processes of recruitment, promotion

⁸⁴ Constitution of Republic of Macedonia from 19.11.1991, Amendment XX-XXX from 7.12.2005, English version available at <<http://sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>>.

⁸⁵ *Ibid.*, Amendment XXVIII from 7.12.2005.

⁸⁶ M. Bobek, *supra* note 55, at 258.

⁸⁷ On the judiciary in former Yugoslav countries and the legacy of the socialist regime, see C. Dallara, 'Judicial Reforms in Transition: Legacy of the Past and Judicial Institutionalization in Post-Communist Countries', available at <http://amsacta.unibo.it/2810/1/Judicial_Reforms_in_Transition..pdf>.

⁸⁸ The wiretapping scandal occurred in the first half of 2015, when the main opposition party 'Social Democratic Union of Macedonia' published 38 batches of recorded conversations, which allegedly feature the involvement of government officials and high ranking politicians from the ruling parties in a number of corruptive and illegal activities.

and dismissal of judges, as well as governmental influence over high profile court verdicts.⁸⁹ These notable examples of political interference with the work of the judiciary have been noted quite clearly in the latest progress report of the European Commission, however, without the European Commission taking responsibility for the model it promoted.⁹⁰ The report goes further and concludes that achievements of the last decade's reforms are being undermined by real and potential political interference with the work of the judiciary.⁹¹ Politically motivated appointments and promotions were regularly used by the ruling parties for extending their influence in the judiciary and for political bargaining among the coalition partners, by filling the ethnic and 'political party' quotas within the judiciary.⁹² As a result, the EU set out a list of 'urgent reform priorities' that Macedonia needs to implement to avoid further backsliding. Presented in rather undiplomatic manner, several recommendations are directly related to the judicial council and its implementation performance, such as the de-politicisation of the appointment and promotion of judges and prosecutors in practice; additional professionalism of the judicial council in practice; and finally a call for taking a more pro-active role in protecting judges from interference with their independence (both through improved communication strategies and decisive action regarding complaints of interference or pressure).⁹³

Another form of political pressure, but also internal pressure coming from 'well connected' senior judicial figures, has been manifested through the disciplinary and dismissal proceedings before the judicial council. This practice has been condemned by the European Court of Human Rights (ECtHR) in its latest decision ruling against Macedonia on infringements of Article 6 ECHR in dismissal proceedings against several appellate court judges. The Court has found that the whole procedure was flawed by partiality, which was institutional and systemic as the procedure before the judicial council was not conducted by an 'impartial tribunal' in either the initial or appeal proceedings, *inter alia* as a consequence of the decisive involvement of the Minister of Justice

⁸⁹ S.J. Marusic, 'Macedonia Opposition: Transcripts Show 'Staggering' Interference in Courts', *Balkan Insight*, 15 February 2015, available at <<http://www.balkaninsight.com/en/article/opposition-macedonia-govt-appointed-judges-influenced-verdicts>>; S. J. Marusic, 'Courts 'Fixed' in Macedonia, Opposition Says', *Balkan Insight*, 19 March 2015, available at <<http://www.balkaninsight.com/en/article/fresh-tapes-discredit-macedonian-judiciary>>.

⁹⁰ European Commission, The Former Yugoslav Republic of Macedonia – Report 2015, Doc SWD(2015) 212 final, 10.11.2015, available at <http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf>.

⁹¹ *Ibid.*.

⁹² The Venice Commission has expressed certain concerns over the continued existence of ethnic quotas within the composition of the Judicial Council, as well as within the appointment of judges. For more on this, see European Commission for Democracy Through Law (Venice Commission), Opinion on the Seven Amendments of the Constitution of "The Former Yugoslav Republic of Macedonia", Opinion No. 779 / 2014, Doc CDL-AD(2014)026, 13.10.2014, at 12-14, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)026-e)>.

⁹³ European Commission, Neighbourhood and Enlargement Negotiations, Urgent Reform Priorities for the Republic of Macedonia (June 2015), available at <http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_urgent_reform_priorities.pdf>.

and the President of the Supreme Court in all parts of the procedure.⁹⁴ The government attempted to remedy this situation by establishing a new body, the 'Council for Determination of Facts', in charge of initiating disciplinary and evaluation procedures. However, this 'reform' has caused additional criticism and added to the already existing complexity and lack of clarity of the legal regulation and institutional framework in the judiciary, while not tackling the problem at hand.⁹⁵

Another indication of this type of revanchist attitude amongst the ruling political structures and certain parts of the judicial elite is the drastically reduced number of dismissal proceedings in the past two years, with only one in 2015, after almost ten years of rule of the current government coalition.⁹⁶ In comparison, since 2007, there have been 44 dismissals in total, resulting from 59 dismissal proceedings, initiated against 'unruly' judges.⁹⁷

Lastly, while the transparency of the judiciary might be said to have been slightly improved, the transparency of the judicial council is far from satisfactory. In order to hide the traces of political pressure and bargaining, the processes of judicial appointments and dismissals are rather hidden from the public. Before the judicial reforms of 2005, the Parliament was involved in these processes, which provided more transparency as there were often very heated debates among members of Parliament over the new judicial appointments. However, now that the judicial council has exclusive power over these matters, the public usually does not have a proper insight into these processes.

7. CONCLUSION

The findings of our research confirm the mixed impact of EU conditionality in promoting judicial reforms in candidate countries; however, they raise serious doubts about the effectiveness of the sponsored European model, in which the judicial councils are the main institutions responsible for safeguarding and guaranteeing judicial independence. The paper indicates that the primary cause for trivial success of the model has been the premature establishment of all-powerful judicial councils without taking into consideration the judicial culture in these countries and the context in which the judiciary functions in practice. Respectably, this conclusion is supported by the examined case of Macedonia.

⁹⁴ ECtHR, *Mitrinovski v. The Former Yugoslav Republic of Macedonia*, Appl. No. 6899/12, 30 April 2015; ECtHR, *Gerovska-Popčevska v. The Former Yugoslav Republic of Macedonia*, Appl. No. 48783/07, 7 January 2016; ECtHR, *Poposki and Duma v. The Former Yugoslav Republic of Macedonia*, Appl. No. 69916/10 and 36531/11, 7 January 2016.

⁹⁵ For more on this, see European Commission for Democracy Through Law (Venice Commission), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", Opinion No. 825 / 2015, Doc CDL-AD(2015)042, 21.12.2015, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)042-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)042-e)>.

⁹⁶ Judicial Council of the Republic of Macedonia, Report for the Functioning of the Judicial Council of Republic of Macedonia for 2015, at 8, available at <<http://www.ssrn.mk/docs/formulari/Godisen%20izvestaj%20za%20rabotata%20na%20SSRM%202015.pdf>>.

⁹⁷ European Commission, *supra* note 90 at 13 and 52.

Even though Macedonia was one of the first countries to introduce this type of reforms and has achieved a high level of alignment of its legal framework with the EU standards on judicial independence, in practice, the judicial system has not improved substantially. Therefore, it should not come as a surprise that Macedonia received the harshest criticism so far on the state of its judicial system in the latest European Commission progress report. In a very direct and undiplomatic manner, the European Commission has pinpointed the burning issues in the judiciary, which also show that, after almost ten years since the introduction of the most comprehensive judicial reforms, the country has not advanced drastically in the realm of judicial independence, despite the establishment of a strong judicial council. Without the intention of relieving the domestic actors of any responsibility for this situation, the EU should seriously consider the approach taken in judicial reforms, and particularly with regard to judicial independence. The European model has simply not proven to be successful so far, and Macedonia is just another demonstration of it.

Three additional negative effects of the European model have been detected, also through its operationalisation in Macedonia. First, the premature establishment of the judicial council has had a negative spillover effect on existing judicial independence in terms of intensified pressure from internal and external players. Second, the establishment of judicial councils and their functioning has reduced transparency of the judicial self-governance. Third, the individual independence of judges has been additionally challenged through the exercise of the judicial council powers related to the evaluation of individual performance, disciplinary procedure and dismissal.

All these developments indicate that while the introduction of the 'European model' of judicial councils was supposed to create a sustainable solution to the long-lasting conundrum of judicial independence in post-communist countries in Europe, in many cases it actually had a reverse effect. In this sense, the imposed conditionality by the European Union of introducing strong judicial councils has created more concerns than effective solutions.

