

A Comparative Review of Judicial Councils in the Former Yugoslavia

By Mark K. Dietrich*

A. Introduction

While many countries of the former Yugoslavia—Bosnia & Herzegovina (BiH), Croatia, Kosovo, Macedonia, Montenegro, and Serbia—continue to be riven by the aftermath of war and competing political interests, they are also now focusing on an important common goal: membership in the European Union (EU). Each country, to varying degrees, is already undertaking steps needed for accession to the EU, which Slovenia, the other former Yugoslav state, joined in 2004. The EU, for its part, is carefully monitoring the political and economic progress of each country. One of the key issues that the EU is tracking is the rule of law, including the independence, efficiency, and accountability of the court systems of the applicant states.

In line with European traditions, each of the former Yugoslav states has created judicial councils, which, to varying degrees, are responsible for appointing and disciplining judges, and overseeing the court system, tasks that were previously handled by the ministries of justice (MOJs). Recognizing the importance of these councils to the creation of independent and effective judiciaries, donor projects designed to build the capacity of such councils are currently in place in BiH, Kosovo, Macedonia, and Serbia. Creating a well-functioning judicial council is seen as a vital step towards having a judicial system that will comport with European standards and will further each country's prospect of EU accession.

The following report seeks to accomplish two goals. First, it attempts to outline “European standards” for judicial councils. In that regard, we have been guided largely by Opinion

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No. 10 (2007) of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of the Council of Europe on the Council of the Judiciary at the Service of Society (Strasbourg, 23 November 2007) (hereinafter, “CCJE Opinion”), as well as practices and legislation governing judicial councils in established EU member states.

Second, we seek to determine how the new councils that have been created are functioning, and to examine their role and performance in providing their governments and societies with independent and effective judiciaries. We also seek to establish whether they have been given the appropriate powers, mandates, and resources to accomplish their missions. The following, accordingly, provides a snap-shot of each of the judicial councils in BiH, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia. Our review is based on entirely objective information: what the constitutions and laws regarding the councils provide, and available budgetary and statistical data.

It is hoped that our findings will provide some minimum standards against which the structure and work of the councils can be measured, identify areas where host governments and the councils themselves need to improve performance, and provide a baseline for the work to come.

One note specific to Serbia is that although it enacted a new constitution in 2006 which calls for the organization of a new judicial council, it has only recently passed implementing legislation, and so our legislative review is limited to what is provided for under the constitution and the prior law. Likewise in Kosovo a new council will be established once a new constitution is in place, but we report on the status and activities of the current council.

To provide some overall context, the following chart summarizes the sizes of the countries, judiciaries, and councils under consideration:

Table 1: Summary of Countries and Councils

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Country Population	4,552,198	4,493,312	1.9 – 2.2 million (est.)	2,055,915	684,736	10,150,265 (includes Kosovo)	2,009,245
Number of Judges	885 (plus 112 reserve judges)	1,492	370	650	230	3,180	1,091
Name of Council	High Judicial and Prosecutorial Council	State Judicial Council (DSV)	Kosovo Judicial Council	Republic Judicial Council	High Judicial Council	High Judicial Council	Judicial Council
Size of judicial council	15 (plus one int'l member)	11	13	15	10	11	11

B. Composition of the Judicial Councils

The first issue we review is the composition of the judicial councils. One of the key questions here is whether the executive branch, in particular through the MOJ, has representation on the council, as such is sometimes cited as an indicator of a lack of judicial independence. This presence has reportedly been a source of executive interference with the courts in the past in countries such as Romania, but it should be noted that the head of state – the president – chairs the Conseil Supérieur de la Magistrature in France, and the Minister of Justice acts as Vice-Chair. In Italy, the Consiglio Superiore della Magistratura is also chaired by the president of the republic. There, however, the position is considered to be largely ceremonial, and when the president sought to assert greater powers over the council in 1991, the entire council resigned and the president was forced to back down. The CCJE Opinion is generally agnostic on the issue, stating only that councils may be made up solely of judges (which should be elected by their peers) or of judges and non-judges, although in the latter case the judicial members should be elected by their peers. It also provides that non-judicial members should be selected by the executive. (pp. 4 and 6).

The presence of a non-judicial representative on the council is also of interest as such may indicate (but not guarantee) greater transparency and openness on the part of the council. The CCJE Opinion expresses a preference for mixed composition councils because such avoids “the perception of self-interest, self-protection and cronyism” and provides “the judiciary with an additional source of legitimacy.” (p. 5).

The chart below summarizes the membership and composition of each of the councils:

Table 2: Composition of Judicial Councils

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Judges	5 or 6	7	9	9	5	7	6
Prosecutors	5 or 6						
MOJ				1 Minister of Justice is full voting member	1 Minister of Justice may not vote in disciplinary matters	1 Minister of Justice is full voting member	
Legislators					2	1	
Bar, law professors or others	4	4	4	5	2	2	5
Total:	15	11	13	15	10	11	11

It would appear that the former Yugoslav states largely comply with European standards under this measure. In each country, Montenegro being the exception, the majority of the members are judges. While the minister sits on three of the seven councils, he or she wields no special powers; in Macedonia the law specifies that the minister may not serve as the

president or deputy president of the council, and in Montenegro the minister may not vote on disciplinary matters. In addition, all the councils include some outside representation, usually by the bar or by law professors.

A related question concerns who appoints the members of the judicial councils. As noted above, the CCJE Opinion states that judicial members should be elected by their peers.

Table 3: Appointment Process

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Membership selection process	Judicial members elected by judges	Elected by parliament.	5 judges selected by judiciary, 4 by parliament	Judicial members elected by judges	Judicial members elected by judges	Elected by parliament	Judicial members elected by judges
Term of elected members	4 years, two terms permitted	4 years, two terms permitted	5 years	6 years, two terms permitted	4 years	5 years.	5 years
Ex officio members	None.	None.	President of SC	President of SC; Minister of Justice. But may not serve as Chair.	President of SC (Chair); Minister of Justice	President of SC; Minister of Justice; Chair of Judicial Committee of parliament.	None.
Council Chair	Elected by and from among members	Elected by and from among members	President of Supreme Court (ex officio)	Elected by and from among members	President of Supreme Court (ex officio)	Not determined.	Elected by and from among members

Problems can be identified in Croatia and Serbia, where the judicial councils are appointed by parliament. The four year renewable term in Croatia contributes to the concern that political pressure may be brought to bear on council members. It is notable, on the positive side, that the council chairs are generally elected from among the members.

C. Constitutional Status

A second threshold question is whether the council is established pursuant to a constitutional requirement, or whether it is governed solely by legislation (and hence more readily subject to being revoked, or to having its functions curtailed). The CCJE Opinion recommends that councils be established at the constitutional level. Again, the councils under consideration, except for in Bosnia, do well by this measure:

Table 4: Constitutional Status

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Is the Council's existence mandated by Constitution?	No	Yes	Yes	Yes	Yes	Yes	Yes

D. Competencies

In the established European democracies, two types of judicial councils predominate. Pursuant to the Southern European model, in use in France, Italy, Spain, and Portugal, the role of the council is largely limited to the appointment, promotion, and disciplining of judges. The French and Italian councils exercise these powers with respect to all “magistrates,” i.e., judges and prosecutors, whereas in Spain and Portugal the council has jurisdiction over the judiciary only. Under the Northern European model, found in Sweden, Ireland, and Denmark, the primary role of the councils is to oversee the management of the courts, preparing and administering the budget for the judiciary, and conducting or overseeing training. Some European countries, including Austria and Germany, do not have judicial councils, leaving the appointment, advancement, and disciplining of judges, as well as the management of the courts, to the ministries of justice.

Recognizing this split in European traditions, the CCJE Opinion “recommends that the Council for the Judiciary ensures that the following tasks, to be performed preferably by the Council itself, or in cooperation with other bodies, are fulfilled in an independent manner” (p. 9):

- Selection and appointment;
- Promotion;
- Evaluation;
- Disciplining;
- Training;
- Control and management of a separate budget;
- Administration and management of courts;
- Protecting the image of judges;
- Providing opinions to other powers of the State;
- Cooperating with other relevant bodies on the national, European, and international level; and
- Promoting transparency, accountability, and reporting.

The following summarizes the key competencies of the judicial councils in the former Yugoslavia:

Table 5: Competencies of the Judicial Councils

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Is ultimately responsible for judicial appointments	Yes	Yes	No – makes recommendation to president	Yes	Yes	No – makes recommendation to parliament for initial appointment	No – makes recommendation to parliament
Is ultimately responsible for removing judges for disciplinary violations	Yes	Yes (although appeal to constitutional court is permitted)	Yes (although appeal to SC is permitted)	Yes	No – makes recommendation to parliament	Yes (although appeal to constitutional court is permitted)	No – makes recommendation to parliament
Oversees court administration	Yes	No	Yes	No	No	No	No
Prepares budget for court system	No	No	Yes	No	Yes (proposes to parliament).	No	No. Gives opinion to parliament.
Oversees training	Yes	No	Yes	No	No	No	No

The judicial councils of the former Yugoslavia, for the most part, follow the southern European model, with their main responsibility being for the appointment and disciplining of personnel. In Kosovo, the country where the donor community has played the most dominant role, the role of the council has been expanded to include court administration and budget responsibility. Likewise in BiH, the law provides that the HJPC is responsible for court administration, but the division of labor between the HJPC and the MOJ remains unclear. The law also calls for the HJPC to be responsible for court budgeting, but the council has not yet taken over responsibility for that role.

One important concern is that in Serbia and Slovenia, the councils only make recommendations to the parliaments, which then make the actual appointments. In Serbia, after an initial three year appointment the council will confirm permanent appointment, but the gatekeeper to the judiciary is still the parliament, leaving the potential for the appointment process to be highly politicized. The role of the council in Slovenia is even more limited, since there it does not have the power to remove judges for disciplinary violations, but may only make a recommendation to the parliament.

E. Performance

The next issue is to determine the extent to which each of the councils is performing its constitutional and legislative mandates. Given that most of the councils follow the Southern European tradition and that all of them are mandated with key roles in the appointment and disciplining of personnel, we focus in on those two areas.

1. Appointments

The following chart reflects the numbers of judicial appointments made over the five years between 2002 and 2006, to the extent such information is available.

Table 6: Judicial Appointments Made (by Year)

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	846 (due to creation of Minor Offense Courts)	90	7	26	N/A	107	104
2005	22	72	N/A	57	N/A	N/A	85
2004	37	111	N/A	47	N/A	N/A	80
2003	N/A	141	N/A	N/A	N/A	N/A	51
2002	N/A	174	N/A	N/A	N/A	N/A	53

What is most startling here is the lack of available and reliable information, even in countries, such as BiH and Kosovo, which have been long dependent on the international community. Most countries, however, reported that as a general matter the councils were conducting appointments in an efficient manner, and that their judiciaries were not suffering due to too many judicial vacancies. In this area, then, the councils seem to have performed as required. (The question of whether there are too many judges for the population of each country is an important one, being debated in several of the countries under review, but goes beyond our inquiry regarding the functioning on the judicial councils.)

2. Discipline

The following charts demonstrate the activity of the councils in the disciplinary context for the five years between 2002 and 2006:

Table 7: Number of Disciplinary Complaints Filed

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	17	12	38	N/A	N/A	116	N/A
2005	12	8	N/A	N/A	N/A	117	N/A
2004	6	16	N/A	N/A	N/A	78	N/A
2003	N/A	7	N/A	N/A	N/A	71	N/A
2002	N/A	24	N/A	N/A	N/A	50	N/A
TOTAL	N/A	67	N/A	N/A	N/A	432	N/A

Table 8: Number of Disciplinary Matters Resolved

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	17	9	20	N/A	N/A	22	N/A
2005	12	7	N/A	N/A	N/A	19	N/A
2004	6	15	N/A	N/A	N/A	25	N/A
2003	N/A	7	N/A	N/A	N/A	N/A	N/A
2002	N/A	23	N/A	N/A	N/A	N/A	N/A
TOTAL	N/A	61	N/A	N/A	N/A	N/A	N/A

Table 9: Number of Disciplinary Actions Taken (other than removal)

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	16	6	12	N/A	0	5	N/A
2005	11	5	N/A	N/A	N/A	7	N/A
2004	6	4	N/A	N/A	N/A	3	N/A
2003	N/A	1	N/A	N/A	N/A	33	N/A
2002	N/A	8	N/A	N/A	N/A	N/A	N/A
TOTAL	N/A	24	N/A	N/A	N/A	N/A	N/A

Table 10: Number of Judges Removed

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	0	1	3	N/A	0	4	N/A
2005	1	1	N/A	N/A	N/A	1	N/A
2004	0	2	N/A	N/A	N/A	5	N/A
2003	N/A	2	N/A	N/A	N/A	22	N/A
2002	N/A	1	N/A	N/A	N/A	N/A	N/A
TOTAL	N/A	7	N/A	N/A	N/A	N/A	N/A

Again, the most revealing aspect of the above charts is how little information is available. (European standards on transparency and access to information are discussed below). Interestingly, Croatia and Serbia had the most available information. The lack of information from Montenegro may be ascribed to its recent independence. Disciplinary matters, except removal, are not heard by the judicial council in Slovenia, but by a disciplinary court, so statistics for the judicial council there are not completely applicable. Nevertheless, the lack of information over the course of five years is startling.

To the extent reliable information is available, one can conclude that the relatively few numbers of complaints reported do not comport with the generally low level of trust that the public has in the judiciaries in the countries under review. Serbia is the exception, which does indeed show a high number of complaints, but relatively few actions taken. Bosnia

stands out as having resolved the relatively few complaints that have been filed. But again, the overall number of disciplinary actions seems low, given the overall public perception in these countries that the judiciaries are corrupt and ineffective.

E. Resources and Support

One of the reasons for the low level of activity by the judicial councils in the disciplinary area may relate to whether the councils enjoy sufficient resources and support to properly fulfill their obligations in this regard. The question comes down to staffing and budgeting. The CCJE Opinion “stresses the importance that the Council for the Judiciary is financed in such a way that it is enabled to function properly... [I]t should have its own premises, a secretariat, computing resources, and freedom to organize itself... (p. 8). The following chart shows the level of staff support provided to the councils.

Table 11: Support Staff for Judicial Councils

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Number of permanent professional support staff	42	3	79	9	No full time staff	Relied on MOJ staff	6

It would appear that none of the councils in the former Yugoslavia, with the exceptions of BiH and Kosovo which enjoy very high levels of donor support, has been provided with sufficient staff.

A review of the budget tells a similar story. The judicial council in Serbia, again prior to the recent constitutional amendments, had no separate budget to cover its activities. The Bosnian and Kosovo councils depend heavily on financial support from donors. The following chart summarizes the situation:

Table 12: Budgets (in Euros) for Judicial Councils

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
2006	1.1 million (including donor support)	139,726	10,886 (excluding donor support)	36,926	Had no separate budget	Had no separate budget	190,340
2005	848,454	146,575	N/A	52,800	N/A	N/A	83,692
2004	International funding	121,917	N/A	N/A	N/A	N/A	71,395
2003	International funding	130,822	N/A	N/A	N/A	N/A	77,886
2002	International funding	143,835	N/A	N/A	N/A	N/A	60,482

F. Accessibility of Information Regarding Council Activities

As indicated by the numerous lacunae throughout the above charts, it is clear that basic data regarding the councils is not easily or publicly available. The CCJE Opinion makes clear that “transparency in the actions undertaken by this Council must be guaranteed” and that judicial councils, among other steps, “should periodically publish a report of its activities.” (p. 17). The French Conseil Supérieur de la Magistrature publishes an annual report, for example, and its disciplinary decisions are available on its website (www.conseil-superieur-magistrature.fr). The following chart summarizes the situation in the former Yugoslavia:

Table 13: Access to Information

	BiH	Croatia	Kosovo	Macedonia	Montenegro	Serbia	Slovenia
Council publishes statistics regarding its activities	Yes	No	No	No	No	No, although some included in MOJ reports.	No
Council maintains a website with statistics on activities	Yes. hjpgc.ba	No. But website (without statistics) is dsv.pravo-sudje.hr	No. But website (without statistics) is kgjk-ks.org	No	No	No	Yes. sodni-svet.si (not in English)
Disciplinary decisions are published	Yes	No	No	No. But should be, in Official Gazette.	No	No	No

BiH is the sole standout here, meeting European standards. The other councils under review do not yet meet those standards.

G. Conclusions and Recommendations

The primary finding from the above review is that the judicial councils of the former Yugoslavia generally do a poor job of maintaining statistics and in communicating with the public regarding their activities. Information and statistics regarding appointment and disciplining of judges are simply not available in many countries. Even in Kosovo, where the donor community has played such a leading role in the justice sector, it is difficult to obtain information regarding the functioning of the council. The councils, accordingly, must place a greater emphasis on transparency and reporting. Only by laying out all information regarding their operations, in particular with regard to disciplinary procedures, can the councils build greater credibility for the courts they represent, and be held accountable for their actions. Donors can and should provide more examples and greater technical assistance to further the transparent functioning of the councils. The councils themselves need to aggressively embrace the concept of transparency. If they indeed are to become the

leaders of the new judiciaries of the new countries, they must lead by action: by establishing themselves as transparent and accountable and dedicated to promoting a corrupt-free corps of judges.

A second conclusion, more positive, is that in terms of structure and legal bases, the former Yugoslav states generally attain European standards. Their compositions, appointment structures, and constitutional safeguards (not without exception) appear satisfactory.

Without better information and statistical data, it is difficult to determine whether the councils are fulfilling their mandates and performing as they are supposed to. While they seem to be meeting their obligations in terms of appointing judges, it seems that they are not receiving and resolving as many complaints regarding ethics as one would have expected, given the frequently cited lack of trust by citizens in the judiciaries. The countries under review should allocate further staffing and budgetary resources to enable the councils to be better receive, investigate, and resolve complaints on judicial misconduct. The resolution and reporting on such actions and decisions will serve to strengthen public confidence in the judicial councils, as well as the overall judiciaries, in the future.

A Note on Sources

Many of the constitutions and laws that provide the *de jure* structure for the judicial councils may be found at a very helpful website published and maintained by the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) called Legislationline (www.legislationline.org). Its stated purpose is to “assist lawmakers in OSCE participating States by providing them with sample domestic legislation and international standards on selected human dimension issues.”

The CCJE Opinion and other useful materials may be found through the Council of Europe website (www.coe.int/t/dg1/legalcooperation/judicialprofessions.ccje). Information regarding many of the judiciaries under consideration may also be found within the Judicial Reform Indices (JRIs) developed by the Central European and Eurasian Law Initiative of the American Bar Association (CEELI) (www.abanet.org/rol/publications/judicial_reform_index.shtml).

The estimates on population sizes are from the CIA World Fact Book (www.cia.gov/library/publications/the-world-fact-book).

Information regarding the actual functioning of the councils was more difficult to obtain. EWMI implements a judicial reform project in BiH, and therefore had ready access to judicial personnel and information there. In preparation for this report, we also visited Kosovo and Serbia. In order, however, to acquire uniform information from each of the judicial councils, we sent a questionnaire to each council, with the results tabulated above. The template for the questionnaire and responses from each of the countries, which varied widely in their level of completion, are on file at EWMI.