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THE EVOLUTION OF THE JUDICIAL INDEPENDENCE IN WESTERN BALKANS: The case of the Republic of North Macedonia

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Introduction

One of the core elements of today's liberal democracies is the rule of law. In the words of Lord Bingham, the core of the principle is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts"[1]. Rule of law poses limits to the governmental action and individual behavior. It is also fundamental in the development of principles for the protection of human rights.

The importance of the rule of law has been acknowledges as fundamental in a political society since the ancient Greece and it has been numerous theorists have analyzed it during the centuries. Still today, it is considered as crucial for the well-functioning and a good governance of a democratic society. It gained a universal validity in that it is enshrined in several regional and international conventions and statutes. The Council of Europe defines it as "an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures"[2]. Since the judiciary is the organ that applies the law on individual cases, it is considered as the guardian of the rule of law. Thus, the presence of an independent and impartial judiciary is crucial for ensuring the rule of law.

The rule of law is one of the values of the European Union, enshrined in article 2 of the Treaty on European Union[3] and it is one of the key prerequisites for EU membership.

In this work the goal is to describe and analyze the principles of the rule of law, access to justice and judicial independence in the Republic of North Macedonia (RNM), in view of its future adhesion to the European Union.

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[1] Lord Bingham, *The Rule of Law,* Cambridge Law Journal, 2007, Vol 66 No 1, 2007, pp. 67-85

[2] *See* Venice Commission report on the Rule of law CDL-AD (2011)oo3rev

[3] Treaty of the European Union, article 2

Chapter I will focus mainly on theories and definition of the rule from historical perspective. Starting with the liberalist John Locke, going through the Montesquieu theory of the separation of powers until recently, in order to demonstrate how the idea of the rule of law developed and became more complex with the evolution of societies. Today instead, the debate mainly concerns about whether the rule of law should be conceived narrowly, focusing only in its formal or procedural aspects, or whether it should be provided with more substantial principles, such as the justice and democratic governance. It will then follow an overlook of international and regional standards on the rule of law and the importance of judicial independence, with a particular attention to the European Union approach and that of the Council of Europe. Lastly, the Chapter will introduce the main issues in the case of the RNM and its status in the accession process within the EU.

Chapter II will analyze the link between the rule of law and the judiciary, with a deep analysis of the notion of access to justice. Its importance mainly at the European level, in particular within the framework of the European Convention of Human Rights (ECHR). In order to do so, an overview of the case study of the European Court of Human Rights is made, in particular with regard the backsliding in the cases of Hungary and Poland. Within this context, of paramount importance is the judicial independence, and what kind of guarantees within a domestic legal framework are necessary to assure it.

Lastly, Chapter III will focus on our case study, namely the RNM. Its judicial system analyzed since the socialist period, during which the country was part of the former Socialist Federal Republic of Yugoslavia. The European Union granted the country candidate status in 2005, acknowledging at the same time, that the rule law was still weak, thus, urging for reforms in order to strengthen it, with a particular attention put on reforms of the judiciary. Since then, efforts have been made in order to meet the criteria for the accession. Still, internal crises have been serious obstacle to achieve a strong rule of law and full judicial independence.

CHAPTER 1

RULE OF LAW PRINCIPLES AND THE JUDICIARY

1.1 Introduction to the concept of rule of law

The Rule of law is considered as the cornerstone of the modern democratic political system. For the well-functioning of a democratic society, law enforcement is essential. Countries and international organizations concerned with the promotion of democracy throughout the world are doing so by focusing on the promotion and the establishment of democracy through the principles of rule of law. The simplest way to define the rule of law is that the law is above everybody. The law is based on fundamental principles that bound citizens, including rulers and rule makers. State actions must be in accordance with the law and authorized by it[4]. The principle goes against that of autocracy, tyranny etc. This means that there is the need to avoid the exercise of an arbitrary power by government. In order to assure that also government take actions legally permitted, the existence of an independent judiciary is indispensable. The fundamental characteristic of courts today is their independency from the other branches of the government, which is based on the principle of separation of powers. Within the rule of law, judicial independence is considered as "freedom from direction, control, or interference in the operation of exercise of judicial powers by either the legislative or executive arms of government"[5].The first author who theorized the separation of powers was Montesquieu in 1748, in his "The spirit of laws". The idea is to divide government into three branches: legislature, executive and judiciary with separate and independent powers in order to avoid conflicts among them. The importance of the independence of the judiciary within the structure of the separation of powers comes by its role to safeguard citizen's rights and freedoms guaranteed by constitution. Government

[4] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007
[5] Bara B., Bara J., *Rule of Law and Judicial Independence in Albania,* University of Bologna Law Review, Vol.2:1, 2017

power is divided with laws enacted by one body and administered by another, and an independent judiciary to ensure laws are administered objectively.

1.2 Theories and definitions

Rule of law entails supremacy of law over governmental action and individual behavior. Government and people in governmental position are abided by the legal framework in exercising their power and cannot act in an arbitrarily or discretionarily manner on the basis of their own preferences or ideology. In case of illegal actions, government is accountable through those public norms. Rule of law is also about citizens, which are bound by laws at the same way as government is, even when those norms are in contrast with their personal interests.

The rule of law has been a fundamental principle of the organization of political societies since the ancient Greece, when philosophers such as Plato and Aristotle have discussed the importance of the supremacy of a law within a society. It is linked to the rise of liberal democratic forms of government in the West[6]. During the Renaissance the theory of liberalism emerged with the rule of law as a key concept in political theory. **John Locke**, considered by many as the father of liberalism, in his *Two Treaties of Government* (1689), defines liberty as freedom from violence and restraint with well-established laws to guarantee them, putting the rule of law at the foundation of government[7]. The concept of individual liberties and the rule of law was further developed by **Montesquieu** in his *Spirit of Laws* (1748)[8]. His theories go further in that he insisted on the idea of separation of powers and, in particular, of the judicial power. The separation between legislative, executive and judicial functions of government is based on the idea that they can check each other in order to avoid the government's abuse on citizens' liberties. Differently from previous theorists, he puts particular

[6] Valcke A., *The Rule of Law: Its Origins and Meaning (A Short Guide for Practitioners),* Encyclopedia of Global Social Science Issues, ME Sharp publishing, available at https://ssrn.com/abstract=2042336

[7] Locke J., *Two Treaties of Government,* edited by Peter Laslett, Cambridge University Press, 1988

[8] Montesquieu, *The Spirit of the Laws,* edited by Cohler Anne M., Miller Basia C., Stone H., S., Cambridge University Press, 1989

attention to the key role the judiciary plays in his scheme. The independency of a judiciary is considered to be the citizens' rights protector and the "best barrier against lawless governmental actions"[9].

Locke's and Montesquieu's ideas on the rule of law had a strong impact on the US. Written by Hamilton, Madison and Jay, ***The Federalist Papers*** (1787-88) is one of the most influent contributions on the rule of law in liberal systems. In this attempt to prompt the ratification of the US Constitution, the authors provided also a political theory on how to put in practice the liberal theories for the construction of efficient government and a set of institutions. With the aim to create mechanisms able to protect democratic principles, including the protection of individual liberties, the instruments proposed included a representative democracy, a horizontal and a vertical separation of powers in order to avoid any popular abuse of the governmental power, and the mechanism of judicial review of legislation in order to safeguard the fundamental law, namely the Constitution. Principles that are still essential for the rule of law and liberal democracies. This led Chief Justice John Marshal to recognize "a government of laws, and not of men" as Constitutional principle[10].

It is worth underlining the importance of England's longest tradition of the rule of law theories and the influence they had on following authors. England was, in fact, Locke's homeland, whose works have strongly inspired Montesquieu and the Federalist Papers' authors. Moreover, it is important to remind that this was also the context in which Albert Venn Dicey formulated his discussion about the decline of the rule of law.

During the centuries, several attempts have been made by numerous political philosophers to define the concept of rule of law. The idea behind it was existed already, but the term Rule of law became of popular usage since the Seventieth Century thanks to the work of the English professor Albert **Venn Dicey**. The analysis he provides in his *Introduction to the Study of the Laws of the Constitution (1885)* is the first important one on the rule of law and on its content

[9] Tamanaha Brian Z., *On the Rule of Law – History, Politics, Theory,* Cambridge University Press, 2004

[10] *Marbury v. Maddison*, 5 U.S. 137, 1803

within the liberal democratic system[11]. His analysis was focused on the characteristics of the English political institutions, in particular the supremacy of the central government and of the Parliament in the modern era and the Rule of Law. According to Dicey, three different interrelated elements have to coexist in order to guarantee the supremacy of the rule of law, namely: the supremacy of Law, equality before law and predominance of legal spirits[12]. Following these three aspects of the rule of law, Dicey's idea is that every person can do what is not expressly prohibited by law, that is, nobody can be punished if there is no breach of a pre-established law[13]. Secondly, it means that everybody has the same rights and is subject to the same law, including government officials[14]. Public officials should be accountable for their unlawful actions to the same law framework and court as any other citizen. The third principle concerns the importance given to Courts, which are considered, - at least in the United Kingdom -where there is no a written Constitution, as the source of the rule of law and are deemed to be the guarantor of individual rights through their judicial decisions[15]. Dicey's interpretation of the rule of law has been influential and it constituted the basis for all the following reflections on the topic.

Sixty years later, **Friedrich Hayek** recalls Dicey's contribution on the rule of law and individual liberties and equality. Even though he was an economist, he has always put attention on the relationship between legal and economic structures in a national political system. In *The Road to Serfdom* (1944) he identifies the rule of law as fundamental precondition to the liberty[16]. Economic liberalism cannot be separated from political liberalism, with the rule of law playing a crucial role for the realization for both. As many other scholars, he stated that the rule of law implies that everyone, including government officials are bound by the same laws. According to Hayek, for the existence of the rule of law system, laws have to possess three different elements. Laws are required to

[11] Dicey A., V., *Introduction to the Study of the Law of the Constitution,* Macmillan and Co., Limited, London, 1915
[12] Dicey, *op. cit.,* 11
[13] Dicey, *op. cit.,* 11
[14] Dicey, *op. cit.,* 11
[15] Dicey, *op. cit.,* 11
[16] Hayek F., A., *The Road to Serfdom,* edited by Caldwell B., The University of Chicago Press, 2007

be general because adopted by the legislature, a power separate from the judiciary[17]. They have to be equal because they have to be applied equally to everyone[18]. They have to be certain in order to give people the possibility to know in advance what the consequences of their actions could be, therefore the possibility to base their behavior on this knowledge[19]. The rule of law, in this conception, promotes liberty by providing individuals with the knowledge of the legal framework within which they can freely act as they please. The rule of law is considered as the guardian of individual rights and justice. Moreover, he states that these three features of laws implicitly considered the separation of the judicial from the others public powers to be indispensable and a fundamental requirement to the rule of law[20]. An independent judicial institution is required in all situations in which government interferes with an individual's person or property. Hayek supported economic as well as political liberalism, thus he saw the Rule of law as contradictory to the state's positive intervention. In this sense, Rule of law is also contradictory to the "discretionary powers of administrative organs to achieve goals of the welfare state" and it cannot comprise substantial equality or distributive justice[21]. The complete achievement of all these features in a legal system is almost impossible. Nonetheless, every legal system should aspire to succeed in it. Even though his attention was still on the people's liberty through the rule of law, in the 70's Hayek changed his position. He was no more convinced of the idea that the pre-established laws, as he defined them previously, are not enough for the expression of citizens' freedom and liberties within a political system. At the same way, they would not be enough for the predictability of judge's decisions. Hayek applies to the common law the economic idea of the "invisible hand", stating that the law evolves with the evolution of social interactions without anybody's intervention[22]. Considering

[17] Hayek, *op. cit.,* 16
[18] Hayek, *op. cit.,* 16
[19] Hayek, *op. cit.,* 16
[20] Hayek, *op. cit.,* 16
[21] Narasappa H., *Rule of Law in India: A Quest for Reason,* Oxford Scholarship Online: January 2019
[22] Hayek, *op. cit.,* 16

this idea, the common law becomes fundamental for the rule of law and the individual's liberty.
The central idea is always the fact that the rule of law allows "individuals autonomy and dignity" by giving people the possibility to "plan their activities with advance knowledge of its potential legal implication".

The same view on the rule of law belongs to **Lon Fuller**, a theorist from the Twentieth Century, who formulated the rule of law as "a moral good", "in that it enhances individual autonomy"[23]. His attempt was to provide a definition by combining the traditional natural law and the legal positivism. Linking legality and justice, he believed that a system which is based on the principles and values of the rule of law, is able to assure morality and justice through the positive law. Considering the minimal requirements of the rule of law, government will be reluctant to act in a completely arbitrary and unjust manner. In the *Morality of Law* (1964), focusing on the procedural aspects of law, Fuller provided a number of fundamental principles that laws have to be based on, considering them necessary in law-making[24]. Laws have to be general, public, prospective, coherent, clear, stable and practicable[25]. They do not have to be seen as merely instrumental, but also as a way to respect of the dignity and the freedom of those who are bound by the law[26].

At the end of the Nineteenth century and during the late twentieth century, the idea of a weakening of the principles of the rule of law in Western societies was spread among political theorists. The reason for this decline can be found in the changes that occurred in the ideological context, begun in England. The industrial revolution led to an expansion of the commercial activity which brought to a spread of liberalism. At the same time, while an increase of the wealth of the upper and the upper middle class occurred, the working-class rewards was minimal. Their interest concerned the support of the technological

[23] Tamanaha, *op. cit.,* 9
[24] Fuller L., *The morality of Law,* Yale University Press, 1969
[25] Fuller, *op. cit.,* 24
[26] Fuller, *op. cit.,* 24

progress and a representative government with rights and liberties within the rule of law principles as long as the poorest class couldn't damage them. But at the end of the century it was exactly the poor class, that saw the intervention of government through the adoption of social policies in order to safeguard it. Despite resistances, shift occurred from classical liberalism to social welfare challenging, in this way, the rule of law principles. The argument was strongly supported by Dicey and Hayek.

1.2.1 Rule of law today

Nevertheless, the rule of law, together with democracy, human rights and economic freedom, remains one of the main desirable ideals for today's political, sociological and legal theory[27]. The rule of is deemed to be crucial for a good governance and to be essential in a democratic society[28]. However, contemporary scholars are still concerned on what exactly rule of law means, on what are its fundamental requirements and on how can it be implemented.

Nowadays further theoretical distinctions, besides the traditional historical development, have been made on the rule of law. Starting from the shared agreement that the rule of law comprises a variety of principles, we can distinguish between two major categories of theories; one which supports the formality of the rule of law, and the other which supports the substantivity of the rule of law[29].

On the one hand, the former subset concerns with the formal aspects of laws, that is their generality, predictability, publicity etc[30]. In this way, the formal theories provide a very narrow definition of the rule law, focusing only on the fact that government should operate within the framework provided by laws, no

[27] Bisarya S., Bulmer W., E., *Rule of Law, Democracy and Human Rights: The Paramountcy of Moderation,* edited by Maurice Adams, Cambridge University Press, 2017

[28] Hussein D., S., *The Importance of the Rule of Law in Governance,* Journal of Raparin University 6(1):73-90, 2019

[29] Silkenat J., R., Hickey J., E., Barenboim P., D., *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer International Publishing, Switzerland, 2014

[30] Tamanaha B., *The Rule of Law for Everyone*, Current Legal Problems, Vol. 55, Issue 1, 2002 pp. 97-122

matters the content of the law itself[31]. Once a set of rules and functions are established, what is important is the fact that they are predictable, that is they give individuals the possibility to know in advance the possible legal consequences of their actions. This kind of approach, by requiring the generality of laws, can be seen as discriminatory in the substance as it does not consider the particularity of each case. That is, the formal element is not consequently just for being contained in laws, rather, the rule of law and justice belong to two different spheres of a political system.

Since their basic requirements, formalistic theories are the most widespread, particularly within promoters of the rule of law because "they are capable of universal appeal regardless of whether certain countries recognize fundamental rights or democratic values"[32]. The approach is supported by a wide number of contemporary legal scholars, such as by **Joseph Raz** in his essay on *The Rule of Law and its Virtue* in *The Authority of Law* (1979)[33]. The author maintains that the rule of law is a neutral notion, which can be used as a tool to realize social goods, but contrary to what Fuller stated, it is not, necessarily a moral good. "While it is a moral virtue to follow the rule of law, it is not necessary that the rule of law is itself moral"[34]. Laws are in the hand of the government and if a government is not moral, it would use laws in an immoral way. It recognizes it as a virtue, but at the same time, rule of law permits laws to be used for "bad purposes", as for instance in the United States, where the rule of law was already established, but the slavery was legal[35]. In this sense, respecting of this narrow notion of the rule of law does not necessarily avoid government to enact repressive laws. To the formal elements of law Raz added the institution of an independent judiciary as fundamental for the enactment of these kind of laws, together with the mechanism of check on the other governmental powers, such as the legislature[36].

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[31] Tamanaha, *op. cit.,* 30
[32] Valcke, *op. cit.,* 6
[33] Raz J., *The Authority of law: Essays on law and morality*, Clarendon Press, 1979
[34] Raz, *op. cit.,* 33
[35] Raz, *op. cit.,* 33
[36] Raz, *op. cit.,* 33

On the other hand, numerous jurists underpin the substantive version recognizing the importance of all formal elements as part of the rule of law but going deeper. A range of fundamental individual rights widely recognized need to be guaranteed and protected by governments through the rule of law[37]. This concept of Rule of Law here encompasses social and moral values and links justice with fairness. Namely, applying substantive values to the rule of law implies also the distinction between good laws, able to provide a protection of individual rights, and bad laws that are not[38]. As aforementioned a purely formal definition of the rule of law is that it cannot explain those regimes that formally encompasses the rule law, but they actually do not respect moral principles and commit strong violations of human rights. An example is South Africa during the apartheid era. Laws satisfied the formal requirements of the rule of law, in the sense that laws were clear and stable, and they were upheld by judges. Yet, a substantive element was missing: the process by which those laws were adopted was not fair and laws themselves were not fair too. Moreover, a broad discretionary power in the hands of the executive branch failed to protect fundamental rights[39]. Thus, the establishment of a set of institutions and procedures are insufficient to limit the exercise of an arbitrary power by governments and to protect individual rights and liberties. That is why a substantive definition of the rule of law, including "qualitative principles of justice" were developed and now has been spreading more and more[40].

Thus, human rights protection has become one of the main goals to be achieved through the rule of law mechanism. **Ronald Dworkin** theorizes 'a rule book conception of the rule of law' and a 'rights conception of the rule of law' as two different and contrasting characteristics of the rule of law[41]. The first conception corresponds to the formal side of laws which requires that any government's action towards citizens is in accordance with the rule book and where judges

[37] Tamanaha, *op. cit.,* 9
[38] Tamanaha, *op. cit.,* 9
[39] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007
[40] Ellis M., *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice,* University of Pittsburg Law Review, Vol. 72, No 2, 2010
[41] Dworkin R., *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, 1986

guarantee the compliance with the rule of law by their adjudications[42]. The rule book conception is not always clear, and it can have different interpretations. Judges have to make an interpretation of what the law maker intended when he created a certain law and the reason for this kind of interpretation is found in the background theory of the political principles on which the legal order is based. Judges should ask themselves what "legislators should have done had they been acting consistent with the political principles underlying the system"[43].
The second conception, the rights one, in Dworkin's theory is different in that "it assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable"[44].

Tom Bingham is one of the most important scholars of the substantive model. A rule of law cannot be seen merely as a doctrine, but it must be considered as a fundamental principle to be adopted in a society in order to reach fairness and justice[45]. Respecting the rule of law implies an efficient government acting responsibly and able to guarantee freedom and peace. "All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts"[46]. Bingham enumerates several elements that deeply describe the rule of law principle: "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion"; laws should apply equally to everyone; public officers exercise their power within the limits posed on them; protection of fundamental human rights; dispute resolution; rights to a fair trial; compliance with international law as with the national law[47]. Bingham was of the idea that these

[42] Dworkin, *op. cit.,* 41
[43] Dworkin, *op. cit.,* 41
[44] Dworkin, *op. cit.,* 41
[45] Bingham Tom, *The Rule of Law*, Penguin Books, 2011
[46] Bingham, *op. cit.,* 45
[47] Bingham *op. cit.,* 45

elements are not enough to ensure the rule of law, so he includes two other elements: "adequate protection of human rights and compliance by the state with its obligations in international law"[48].

The conception of the rule of law can be more or less wide depending on the historical context in which scholars were living and on the power they intended to limit through the supremacy of law. Despite the various interpretations today rule of law contains some basic elements commonly recognized. Brian Tamanaha's definition of the rule of law recognizes the fact that government and citizens actions have to be consistent with the law[49]. The rule of law can be satisfied only if laws are: prospective, which means that they have to be set in advance; of public knowledge, clear, stable, certain, and applicable to everyone. Starting from the distinction between substantive and formal versions, Brian Tamanaha provides an alternative and deeper "theoretical formulations" of the rule of law.

ALTERNATIVE RULE OF LAW FORMULATIONS

Thinner - - - - - - - - - - - - - - -> to - - - - - - - - - - - - -> Thicker

FORMAL VERSIONS:	1. **Rule-by-Law** – law as instrument of government action	2. **Formal Legality** – general, prospective, clear, certain	3. **Democracy+ Legality** – consent determines content of law
SUBSTANTIVE VERSIONS:	4. **Individual Rights** – property, contract, privacy, autonomy	5. **Right of Dignity and /or Justice**	6. **Social Welfare** – substantive equality, welfare, preservation of community

Figure 1: Alternative Rule of Law Formulations

Source: Tamanaha B, On the Rule of Law – History, Politics, Theory, Cambridge University Press, 2004

Each of the two general categories has three different forms which are analyzed starting from the thinnest one to the thickest one.

[48] Ellis, *op. cit.,* 40
[49] Tamanaha, *op. cit.,* 9

Starting from the formal alternatives, in the thinnest version, the laws adopted are only an instrument in hands of political elites to exercise their power over citizens. Here, the rule of law is substituted by the rule by law. Thomas Hobbes may be considered as a theorist of the rule by law because he "considers law as a tool for the sovereign to ensure order and peace"[50]. Despite Hobbes considers laws as essential in a political life, he nonetheless thought that it would undermine the state's sovereignty as a law, according to him, is not able to bound even the last law-maker. Going further by adding components, we found scholars such as Hayek and Raz who also consider an independent judiciary necessary in order to assure the respect of the rule of law. This version of the rule of law, according to Tamanaha, coincides with the one provided by Fuller which, as mentioned above, considers the rule of law has an "affinity with the good" and as morally good, "it enhances individual autonomy"[51].

The thickest one of the formal versions which considers democracy as a part of the rule of law. But none of the elements considered until now, are merely procedural in that they do not say anything about the content of laws. Nonetheless, formal legality is necessary to democracy and vice versa[52].

On the other hand, the substantive versions add substantive elements that have to be included, recognized and protected by the rule of law. The thinnest definition in this second subset focuses on individual rights that every citizen must enjoy and that have to be recognized by laws. The second version of this kind considers essential to ensure justice and dignity through law, while the thickest one incorporate also the social-welfare rights.[53]

Brian Tamanaha points out that the differentiation among the different understanding of the rule of law is not aimed to establish which theory is the right one, rather to make clear that every version is helpful to "describe different features and purposes of different legal systems", even if in any case guarantees high levels of predictability and of protection of individual rights and

[50] Lang A., F., *Thomas Hobbes: theorist of the law*, Critical Review of International Social and Political Philosophy, Vol 19, 2016
[51] Tamanaha, *op. cit.,* 9
[52] Tamanaha, *op. cit.,* 9
[53] Tamanaha, *op. cit.,* 9

freedoms[54]. Thus, in a society where there is a lack of strong institutions, where judges are corrupt, where there are structural problems it is necessary to start from the application of a formal definition of the rule of law, to strengthen firstly the rule of law itself. While, in a society where the rule of law is present, it is necessary to work on qualitatively different problems, such as the recognition of fundamental political and social freedoms, that could be solved with a more substantive interpretation of the rule of law. For example, if we consider the solid different societal organization network in the present world, it is clear that also minimal limits posed to governments can be considered as a big achievement.

1.2.2 Rule of law at international level

As mentioned above, the rule of law is the key element to assure protection of fundamental rights and to guarantee a free market economy, since guaranteeing stable institutions engenders predictability of law.

"The rule of law generates contestations especially when it has to be squared with democracy, the social or welfare state, fundamental rights, and even when it is appealed to outside the national State. At the same time, however, it is very often considered as a necessary premise for these objectives to be achieved"[55].

This is the reason why developed countries and international organizations are concerned with its promotion worldwide. They have spent billions of dollars in rule of law reforms in countries who are in a phase of transition from authoritarian regime to democracy. The rule of law has a universal validity and "it has been proclaimed as basic principle at universal and at regional level"[56].

United Nations' definition of the rule of law is given by the UN Secretary General in a report to the Security Council in 2004: " It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with

[54] Tamanaha, *op. cit.,* 9
[55] Morlino L., Palombella G., *Rule of Law and Democracy*, Brill, 2010
[56] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007

international human rights norms and standards"[57]. Indeed, promotion and consolidation of the rule of law in developing countries and countries in transition is the key objective of the United Nations[58]. The International Commission of Jurists also dealt with the rule of law principle, providing in the Delhi Declaration 1959 three important elements of the rule of law: for the maintenance of the justice is necessary the state's subjection to the law, the respect and enforcement of individual rights under the rule of law and the need of an independent judiciary[59].

The rule of law is recognized as fundamental value also by several regional organizations. The Council of Europe considers the rule of law as the basic element for democratic society and as a precondition for accession of new member States to the organization, as enshrined in the article 3 of the Statute of the Council of Europe[60]. Thus, the Council of Europe recognizes the relationship between human rights, democracy and rule of law and it is committed to its promotion through several bodies, such as the ECtHR.

The recognition of the rule of law as fundamental value for any constitutional democracy exists also within the European Union. Enshrined in the Preamble and the article 2 of the TEU, as well as in the Charter of Fundamental Rights, the rule of law is one of the core values on which the Union pivots[61]. Therefore, the respect of the rule of law is one of the key requirements for EU membership according to article 49 TEU[62], and in accordance to the criteria (an independent and impartial judiciary, accountable government, corruption-free officials, transparent participatory and fair process of law making) set out during the European Council in Copenhagen in 1993 (Copenhagen Criteria), to which chapter 23 and 24 are dedicated.

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[57] United Nations Security Council report on The rule of Law and Transitional Justice in Conflict and Post-conflict societies, S/2004/616

[58] United Nations Rule of Law Indicators, 2011

[59] *The Rule of Law in a Free* Society: Report on the International Congress of Jurists, New Delhi, India, January 5-10, 1959

[60] Statute of the Council of Europe, article 3

[61] Treaty on the European Union ("TEU"), adopted in Maastricht 7 February 1992, article 2

[62] TEU, article 49

1.3 Independence and impartiality of the judiciary and constitutional transitions

Judicial independence is fundamental to ensure the rule of law in a country. Initially, the rule of law theories spread to limit the political power but later on they developed with the purpose to protect individual rights. Rule of law entails subordination of the government, of public officials and of all citizens to the framework of laws established in a country. Today's democracies are constitutional democracies, based on the idea of the supremacy of the constitution, the piecework containing all the fundamental principles and values, rights and duties of the members of that particular state. Under the doctrine of separation of powers, the judiciary "is the arm that interprets and enforces the constitution, all ordinary laws and policy measures"[63].

States and other international actors are concerned with promoting the rule of law principles as the key element for the development of democratic principles across the world. It is considered to be essential against the abuse of political power but also for the socio-economic development. Whether there is the attempt to strengthen democracy or a transition from non-democratic to democratic regime, a strong and independent judicial power becomes significant. This is evident during the process of democratic transition in which today much more emphasis is posed to the power of courts: "Judges have begun to play an increasingly significant role in the policy process of most democratic regimes"[64].

The strengthening of the judicial power is also due to the fact that in recent decades, even in the well-established democracies, parliamentary supremacy lost predominance in favor to the judicial power through constitutional reforms in favor of the judicial independence against the political interference. The reason for such a change came together with the increasing concerns by international community toward the protection of citizen's rights, thus, the independence of the judicial system is considered to be crucial for the safeguard

[63] Tridimas G., *Independent Judiciary*, Springer Encyclopedia of Law and Economics, New York, 2014

[64] Guarnieri C., *Judicial Independence in Europe: Threat or Resource for Democracy?*, Journal of Representative Democracy, Vol 49, 2013

of those rights against political abuses. Indeed, the influence for and independent judiciary comes from international human right treaties that enshrine as fundamental individual right the fair trial and the right to be tried before an impartial and independent tribunal.

Separation of powers and consequently judicial independence are essential pillars to a democratic society which aims, among other priorities, the protection of individual rights and freedoms. "There is no liberty, if the judiciary power be not separated from the legislative and executive"[65].

"Separation of powers is not only a matter of constitutional architecture for the sake of the rational organization of powers. It is a matter of liberty for each person and for society as a whole. It is a basic condition for the effective protection of individual rights and liberties, in order to assure each individual an effective remedy against any breach of her or his rights"[66].

"It is and indispensable part of the rule of law which requires that laws apply equally to both ordinary citizens and public officials, and that they protect the rights of individual against the power of the state in both the political and economic sphere. In this respect the rule of law and judicial independence are inextricably linked with liberal democracy. An independent judicial authority is necessary to resolve disputes and maintain the rule of law which are prerequisites for the functioning of a market economy and a free society"[67].

The essentiality of an independent judiciary within a democracy is an idea spread worldwide and also states in which it is not already established, showing their willingness to do it. Nowadays the number of written constitutions is increasing more and more, and they always contain some explicit form of protection of the independence of the judiciary.

However, the first international text on standards of judges was adopted by the UN General Assembly in 1985, the Basic Principles on the Independency of the judiciary[68]. This masterpiece's aim is not only the independence of the judiciary

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[65] Montesquieu, *op. cit.,* 8

[66] Cartabia M., *Separation of Powers and Judicial Independence: Current Challenges*, Seminar in the occasion of the Solemn Hearing of the Court, Strasburg, January 2018

[67] Tridimas, *op. cit.,* 63

[68] United Nations, Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in

but also the safeguard of the right of everyone to a fair and public trial before an independent and impartial tribunal, according to the article 10 UDHR and to the article 14 of ICCPR[69]. It provides a list of the measures the States are required to adopt to guarantee a minimal independence of the judiciary at national level.
A more recent recognition of the importance of the judicial independence is provided in the 2018 Annual Report of the International Commission of Jurists. It states that a "robustly independent, impartial and accountable judiciary is the cornerstone of upholding human rights through the rule of law"[70]. But it goes further "judges, lawyers and prosecutors have a dynamic role to uphold the rule of law … judicial actors must also be accountable to those that rely on them to deliver justice"[71].
Moreover, the General Assembly of the UN in its 2019 annual Rapporteur on the independence of judges and lawyers, considers as a governmental and State institutions' obligation "to respect and observe the independence of the judiciary and to adopt all appropriate measures to ensure that judges can decide matters before them impartially and without improper influences, pressures or interference"[72].

On the other hand, at European level, there are no specific standards on the judiciary, but as all Member States are also members of the Council of Europe, EU states relies upon principles developed by the Council of Europe. These principles and values can be found in the ECHR, in particular in the article 6 which provides that "everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law".
Despite the lack of legal consequences for judges, it is important is to consider the Judge's Charter in Europe, issued in 1993 by the European Association of

Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

[69] United Nations, International Covenant on Civil and Political Rights ("ICCPR") Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with article 49

[70] International Commission of Jurists Annual Report, 2018

[71] *Op. cit.,* 70

[72] United Nations General Assembly Annual thematic reports of the Special Rapporteur on the Independence of Judges and Lawyers, 2019

judges, which in its article 3 establishes the impartiality of judges and the need to be considered as impartial.

At regional level, the Council of Europe, in its 2010 recommendation, considers the principle of independence of the judiciary as essential for the guarantee of the individual right to have access to a fair trial. Moreover, the independence of a judge can be assured only if there is the independence of the whole judiciary[73].

"Judicial independence stems from the need for impartial adjudication of all cases, whether criminal, civil or administrative law cases. The judge should not be affected by differences of power between litigating parties. Protection of the citizen against the power of the government of the state is obviously central. But the issue is broader. The judge must be incorruptible and able, in a proper case, to decide cases in ways that contravenes both media and public opinion"[74].

"An independent judicial authority is necessary to resolve disputes and maintain the rule of law which are prerequisites for the functioning of a market economy and a free society"[75].

While there is a widely spread consensus of the importance of the independence of the judiciary power, there is a little agreement upon its real meaning, as we will see now on.

1.3.1 Independence and impartiality

The efficiency of the judiciary is given by its impartiality and independence. The two principles are closely related to each other and are essential in order to ensure the "objectivity and the fairness of judicial proceedings"[76]. Even though often they treated as synonym, they are not the same principle. For what concern the impartiality, it is related to the right of a fair trial, while the independence refers to the institutional aspect.

[73] Judges: independence, efficiency and responsibilities Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe

[74] European Network of Councils for the judiciary (ENCJ) (2014). Independence and accountability of the judiciary. ENCJ Report 2013 - 2014

[75] Tridimas, *op. cit.,* 63

[76] Tridimas, *op. cit.,* 63

Judicial independence is related to the idea of separation of powers which requires the complete absence of any kind of interference in the justice administration. Courts have to decide on disputes that can involve private actors, private actors and government and disputes within government. The interference may come both from the other governmental branches but also from other actors or private people. The idea is that there are specific competences, established by law, that are attributed to each branch of the government and that they are exclusive. This means that the legislature and the executive power cannot act in the sphere attributed to the judiciary. Under this definition of judicial independence, courts are given "special responsibility for ensuring that individuals and minorities do not suffer illegal treatment at the hands of the government"[77]. At the same time, this independence is often threatened by the other branches that are not willing to follow courts' decisions.

It is important in this sense to remember the Federalist Paper n 78 published in 1788 by Alexander Hamilton with regard to the adoption of the US Constitution[78]. Hamilton dedicates the essay to the centrality of the degree of independence of the judicial structure and of the accountability of judges in a democracy. According to him the judiciary was the weakest branch among the three governmental branches, thus the judiciary would not be able to defend itself from the interference of the other branches and would not be able to act independently as it should to guarantee a democratic system.

Historically, the first real protection of the independence of the judiciary occurred in 1701 in the United Kingdom. The Act of Settlement was a reaction against a royal document that enshrined that the crown had the power to remove judges unilaterally.

The courts must be established by law and thus, the appointment of judges cannot be on an ad hoc basis. These measures are applied in order to avoid that the executive branch nominates judges in a specific case for its own purpose and interest, influencing in this way the court's decision; and at the same time to

[77] Law D., S., *Judicial Independence*, The International Encyclopedia of Political Science, Vol 5, 2011, pp. 1369-1372

[78] Federalist Paper n 78, available at https://avalon.law.yale.edu/18th_century/fed78.asp

avoid that the legislature uses its power to act against courts after the decision has been taken.

Furthermore, the independence must be applied both to the judiciary as a whole and to single judges. The presence of one aspect unfortunately does not consequently imply the other one. Indeed, having the judicial independence of the judicial branch does not guarantee the independence of single judges, since judges can receive pressure both externally and internally from the other judges, other superior actors or their head. At the same time, an excessive individual independence may lead judges to decide on base on their personal interests, thus, abusing their power and "undermining the predictability and stability of the law"[79].

On the other hand, judicial impartiality is related contemporarily to the state of mind of the court as a whole or of a single judge.

Judges not only must be impartial, deciding on cases only according to the pre-established law without prejudice or preconceptions about the question posed and without promoting interests of one of the parties; but they also have to be perceived as impartial, in order to guarantee the credibility of a court before citizens. This duplicity is stated in the Principle 3 of the European Charter on the Statute for Judges, in which it is stated that "not only must the Judge be impartial, he must be seen by all to be impartial"[80]. This implies that a judge, when he/she has to decide a case, have to show clearly his/her attitude of impartiality and that has no intentions to disfavor any of the parties involved. These reasoning leads us to the position that only and impartial judiciary applies the law properly.

Over the last decades, states and international actors and organizations have been pursuing a wide array of reforms to achieve democratic principles and development. These actions were mostly concentrated on the judiciary, in particular with the scope of its independence and impartiality. The desirable judiciary is, indeed, the guardian of fundamental rights of people, the protector of the equality of all, the guarantor of a system of check and balances. Thus, an independent and impartial judicial system, as we try to clarify 'till now, is the

[79] Law., *op. cit., 77*

[80] *See* DAJ/DOC (98)23, European Charter on the statute for judges and Explanatory Memorandum, adopted by the Council of Europe, Strasbourg, 8-10 July 1998

cornerstone of the rule of law and so of the establishment of a strong and proper democratic regime, especially in new formed democracies or for democracies still in transition.

1.4 Rule of law principles and the Republic of North Macedonia: Theory applied in our case study

The "rule of law is considered as one of the building blocks of democracies in modern society, which ensures that all people are treated equally before the law and that they can effectively participate in the decision-making process"[81]. It is based on the compliance with constitutional principles and the set of laws adopted. "Rule of law, as seen from the perspective of the constitutionalists, enshrines the principles of legality, which stipulates that all acts and procedures should be based and be in accordance with the constitution as the highest legal act in the state, and in accordance with the law, seen as a generic concept"[82].

As aforementioned the existence of the rule of law is considered one of the main aspects that a country should have to become a member of the European Union. The EU supports a politically driven process through which EU institutions, rules and policy-making processes (especially through the Stabilization and Association Processes) could impact on the legal system, on the institutional mechanisms, with the aim of the creation of a collective cultural identity even in non-EU member states.

The strengthening of the rule of law as a means for the European Union have been fraught with difficulties in the Western Balkans for over 20 years[83].

After the fall of the Berlin Wall there was no doubt that "the Western ideals of freedom, democracy and individual rights would spread" throughout the world in post-communist countries. This conviction involved also the then Former Yugoslav Republic of Macedonia. Nonetheless, the spread of conflicts and

[81] *The Rule of Law in Macedonia*, Konrad Adenauer-Stiftung, Center for Research and Policy Making, Skopje, 2018
[82] *Op. cit.,* 81
[83] Kmezić M., *Europeanization by Rule of Law Implementation in the Western Balkans,* Institute for Democracy SOCIETAS CIVILIS, Skopje, 2014

economic crisis weakened the previous confidence, so the international community agreed only on one thing: "that the rule of law is good for everyone"[84]. Considering this, the enlargement compliance with the fundamental liberal democratic rule of law of the EU has been the formal precondition for entering into accession negotiation with the EU itself, while "the negotiations have been mainly a process of rule transfer"[85]. Democratic conditionality has led to the process of transition of Central and Eastern European Countries while democratic consolidation is intimately linked with the effectiveness of the rule of law.

Macedonia gained independence from Yugoslavia in 1991, a year in which it adopted its first democratic constitution, enshrining the principle of the rule of law as a fundamental value. Since then the country had to tackle with several problems, such as an internal ethnic conflict, a dispute with Greece concerning the name adopted and its institutional instability. Some of those issues were solved, (such as the name dispute with the 2018 Prespa Agreement which changed the name of the country from FYROM to RNM and an end to the conflict was put) while others are still persistent such as the widespread corruption, the issues of efficiency of the judiciary, of the media freedom and of minorities protection, despite progresses made in recent years.
According to Freedom House, the RNM has still not complete the transition to liberal democracy with an effective rule of law, so it is considered as a hybrid regime[86]. This means that there is a protection of fundamental rights and freedoms, yet a full democratic transition did not occur, and elements of an authoritarian regime are still persistent. A lack of institutional checks and balances has been evident in the country, with the predominance of the executive over the legislature and the judiciary. Moreover, a widespread corruption

[84] Tamanaha, *op. cit., 9*
[85] Schimmelfennig F., Sedelmeier U., *Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe*, Journal of European Public Policy 11(4):661-679, 2004
[86] Freedom House, https://freedomhouse.org/country/north-macedonia/freedom-world/2020

emerged particularly in projects in which public money were given to some private companies[87].

Regarding the implementing programs carried out in the country, they were put in place mainly since the country attempted to become a member of the European Union and of NATO. In 2001 RNM was the first Western Balkan country to sign a Stabilization and Association Agreement with the EU. Negotiations took place in the midst of an internal conflict between the Macedonian armed forces and the Albanian National Liberation Parties, ended only with the Ohrid Framework Agreement signed by the four largest political parties. "One obvious incentive that was used in later phases of the conflict resolution was constant reference to the prospect of EU membership for Macedonia"[88].

With the likelihood of a future membership, institutional reforms were adopted with the purpose to strengthen the rule of law more and more. The rule of law is contemplated as the "dominant organizational paradigm of modern constitutional law in all EU members states and has gained unanimous recognition, since the end of the Cold War, as one of the foundational principles on which all European constitutional systems must be based"[89].

The EU establishes that a country can apply for membership have to "respect democratic values of the EU and is committed to promoting them"[90]. The accession process then can be guaranteed only if a country meets the criteria established by the European Council in Copenhagen in 1993[91]. The first cited one is the need to have a "Stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"[92]. The establishment of the rule of law is nevertheless considered as the "major challenge" to achieve especially for what concern Western Balkan countries. For this reason, the Commission considers that the rule of law requires a particular

[87] *Op. cit.,* 81
[88] *Op. cit.,* 81
[89] Schimmelfennig F., Sedelmeier U., *op. cit.,* 85
[90] TEU
[91] European Council in Copenhagen, 21-22 June, 1993 https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en
[92] European Commission https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en

attention since the beginning of the accession process with a priority put on the judicial independence and public administration reforms[93].

Relying on European financing, technical and advisal assistance the then Former Yugoslav Republic of Macedonia began to harmonize its political and legal system with the Acquis Communautaire. And the monitoring of the process of evaluation of its improvements had continued until it gained the status of EU candidate in 2005.

As already mentioned, the rule of law and an independent judiciary, especially as guarantor of the separation of powers, are essential elements for a modern and liberal democracy. Keeping in mind the importance of the judiciary and the fact that the judicial system in North Macedonia suffers from politicization, external influence and corruption, the main focus was put on reforming it.

Despite the efforts through the years in this direction, main of all the Judicial Council, and despite the progresses made recognized in 2015 recommendation of the EU, "political intervention and influence in judicial decisions are common" and there is still evidence of "politically-influenced judges"[94].

Recently, after the wiretap scandal which occurred in 2015, the complete control over the judiciary by the executive was clear, in particular during the appointment procedure. After the adoption of the 2017-2022 Judicial Reform Strategy the independence of the judiciary is considered to have made some improvement, nevertheless reforms have not been substantially implemented, and the functional independence of the judiciary has deteriorated[95].

[93] Communication from the Commission to the European Parliament and the Council, of 12 October 2011 – Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 551 final

[94] European Commission Implementing Decision of 29.11.2017 adopting an Annual Action Programme for the FYROM for the year 2017 C(2017) 8047final

[95] Haider, H. (2018). *Rule of law challenges in the Western Balkans.* K4D Helpdesk Report 464. Brighton, UK: Institute of Development Studies

CHAPTER 2

THE DESIGN AND THE PRACTICE OF THE JUDICIARY: THE RIGHT OF ACCESS TO JUSTICE FROM THE INTERNATIONAL AND EUROPEAN PERSPECTIVES

2.1 Introduction to the concept of access to justice

The basic definition of the rule of law implies a government acting according to pre-established and predictable laws, that the law is above every citizen, and that justice is accessible to all. The existence of the above-mentioned elements aims at avoiding governmental abuses of power and consequently at safeguarding the fundamental rights of citizens.

In order to guarantee the enforcement of citizen's rights through the rule of law, an independent judiciary is a prerequisite. Each person that sees his/her rights violated by any other citizen or by the public authority must have the possibility to request and to obtain a remedy before an independent and impartial court. Thus, the respect of fundamental rights is made possible by the existence of the right to access to justice. Access to justice is the possibility for every human to access the tools provided by the legal order, aimed at protecting its rights and interests. So, the protection of fundamental rights becomes concrete and effective when justiciable within the legal order.

"When a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights"[96]. Considering this definition, the access to justice itself takes the form of a fundamental right. A right which cannot realize itself alone, rather, on the contrary, it is a tool with the scope to recognize and protect other fundamental rights. Guaranteeing the access to justice allows individuals to defend their personal rights, however, it is evident that the right to access to justice is not only a private, personal right, instead, it implies, through

[96] Francioni F., *Access to Justice as a Human Right*, Vol. XVI/4, Oxford University Press, 2007

single cases the recognition and promotion of those rights to the whole society [97].

The individual right of a remedy before a tribunal established by law, which decides on cases by applying the law independently and impartially, derives from the concept of the rule of law and the constitutional separation of powers [98]. The judicial independence and its role to interpret the law without interference from the executive and the legislative is a typical feature of constitutional democracies. The right of access to justice is a key element of the rule of law and fundamental prerequisite for every contemporary democratic society. The legal protection is a fundamental right and, as such, is enshrined in each democratic constitution. Its central position derives from its role to ensure individual right's protection from any abuse of power.

Moreover, according to Baumgartner, an effective access to justice at national level improves the conformity of national legal orders to international standards on human rights. It is less likely for countries to violate obligations under international norms on fundamental rights.

Indeed, the right of access to justice is becoming more and more recognized also at international level. With the attempt to improve the protection of individual rights, the acceptance of the access to justice as a fundamental individual right can be found since the adoption of the Universal Declaration in 1948. With article 8 it recognizes everyone "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", while with article 10 it recognizes the right to a "fair and public hearing by an independent and impartial tribunal"[99]. At European level, the aforementioned principle is enshrined in the ECHR in article

[97] Osti A., *Teoria e Prassi dell'Access to Justice. Un raffronto tra ordinamento nazionale e ordinamento esteri*, Milano, Giuffrè, 2016

[98] Francioni F., *op. cit.,* 96

[99] United Nations Universal Declaration of Human Rights ("UDHR"), adopted by the General Assembly resolution 217 A in Paris on 10 December 1948

3 and article 6[100], in the TEU in article 4 (3)[101], as well as in the Charter of Fundamental Rights of the European Union in article 47[102]. We can note that most of the international human rights instruments do not use the term access to justice, preferring instead the broader terms "an effective remedy" (UDHR and the EU) or a "right to a fair trial" (ECHR).

However, there is a more specific reference to the term access to justice since the Treaty of Lisbon. In particular, article 67(4) of the TFEU states that "The Union shall facilitate access to justice, in particular through the principle of recognition of judicial and extrajudicial decisions in civil matters"[103].

The Treaty of Lisbon gives the Charter of Fundamental Rights the same legally binding position as the Treaties. The third paragraph of article 47 of the Charter uses the term access to justice with reference to legal aid, but it can be also considered as a conclusion of the article as a whole[104]. The Explanations relating to the Charter of Fundamental Rights recalls the ECtHR case Airey v. Ireland with the purpose to provide an explanation of access to justice through the concept of effective remedy[105]. Article 47 can be seen as summarizing the different rights enshrined in the principle of access to justice. Effective remedy and access to justice, thus, are used interchangeably.

Since the ensuring of the access to justice, being a central element of the rule of law, implies the existence of a stable system of legal aid and assistance, it is recognized to assume a significant importance especially for transitional countries. On this wavelength, the European Union recognizes the access to justice as one of the most important developments urged from candidate countries.

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[100] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as amended by Protocols Nos. 11 and 14, 4 November 1950 entry into force 1953

[101] Treaty on the European Union ("TEU"), adopted in Maastricht 7 February 1992

[102] European Union, Charter of Fundamental Rights of the European Union ("EU Charter"), adopted in October 2012, 2012/C 326/02

[103] Treaty on the Functioning of the European Union ("TFEU"), art. 67(4)

[104] FRA – European Union Agency for Fundamental Rights, Report: *Access to Justice in Europe: An Overview of Challenges and Opportunities*, Luxemburg, 23 March 2011

[105] Explanations relating to the Charter of Fundamental Rights

2.1.1 Access to justice in Western Balkans

Our focus will be always on the Western Balkans, where, as mentioned above, the consolidation of the rule of law is the key challenge.

Besides Albania, Western Balkans countries are born from the dissolution of the former Yugoslav Republic. During the period of socialism, social problems were usually resolved through non-institutional channels, with the judiciary being marginalized most of the time[106].

With the collapse of the communist regime, the new countries experienced institutional crises with the adoption of new constitutions based on the democratic principles and the rule of law, but in which citizens saw their right to access to justice weakened.

Since their independence, the Western Balkans countries' judiciaries were facing similar issues, although differences in their judicial systems exist. Their formally democratic constitutions, established after the fall of the previous communist regime, were not able to strengthen in practice an effective separation of powers or to assure the self-governance of the judiciary. A low level of integrity and the prominence of the executive branch of government weakened the judicial power and the judicial effectiveness, and, what is more important for the right to access to justice, weakened the public trust in the system [107].

Since its independence, the Republic of North Macedonia (RNM) formally recognizes its 1993 Constitution as the supreme law of the country, since it contains the basic principles guaranteeing the fundamental citizens' rights and freedoms, among which obviously the right to a fair trial[108]. It nevertheless recognizes the equality of each citizen before the law and the constitution which is also guaranteed by the labor market, in education.

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[106] Uzelac A., "*Reform of the Judiciary in Croatia and its Limitations (Appointing Presidents of the Courts in the Republic of Croatia and the Outcomes)* in *Between Authoritarianism and Democracy: Serbia, Montenegro, Croatia*: Vol. I – *Institutional Framework,* pp. 303-329, Belgrade, CEDET, 2003

[107] Anastasi A., *Reforming the Justice System in the Western Balkans. Constitutional Concerns and Guarantees.* Workshop No. 18, of the 10th World Congress of Constitutional Law (IAC-AIDC); 2018 SEOUL 18-22 June 2018

[108] Constitution of the Republic of North Macedonia ("RNM Constitution"), 1991

The Macedonian constitutional text recognizes the equality of each citizen before the law, the respect of the rule of law, the right to a fair trial, all guaranteed by the presence of an independent and impartial judiciary which administers justice in compliance with the Constitution, with ordinary laws and with international agreements[109].

Since the RNM is a member state of the Council of Europe, the latter specification implies the application and the full respect of the ECHR. Indeed, article 1 of the Convention binds and obliges member states to "secure to everyone within their jurisdiction the rights and freedoms" defined in the same Convention[110]. In particular, the right to a fair trial can be found in the Article 5 of the Code on Criminal Procedure.

As mentioned in the previous chapter, the RNM submitted its EU membership application in 2004 with the commitment to adopt provisions reforming the national legal order[111]. The country is specifically requested to comply with the EU's standards by meeting the Copenhagen criteria that focuses primarily on the strengthening of the rule of law and the respect of human rights.

Despite these obligations and the consequent various attempts, the legal system in the RNM has been facing some difficulties in the administration of justice, acknowledged also by EU bodies. For this reason, the EU identified the ability to strengthen the rule of law within the accession process in Western Balkans as a "continuing major challenge and a crucial condition"[112].

2.2 Access to justice: theories and definitions at international level

According to the international covenants and customary law, access to justice is the obligation of a state to guarantee to each individual the right to go before a court, in order to receive a remedy in case of violation of his individual rights. It

[109] *Ivi,*
[110] ECHR, art. 1
[111] Decision 2004/239/EC, Euratom of the Council and Commission concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part
[112] Communication from the Commission to the European Parliament and the Council - Enlargement Strategy and Main Challenges 2011-2012 COM(2011) 666 final

is considered a right which gives individuals the possibility to enforce other rights. "Access to justice is not just a right in itself but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress". In this sense, "it transforms fundamental rights from theory into practice"[113].

However, as already mentioned, the concept of access to justice "is not commonly used as legal terminology"[114]. This also since it is difficult to find a specific and widely applicable definition of this notion, often because it depends on the approach that is used. If we look at it in a narrower way, we focus mainly on the procedural aspects of the notion, that is, the availability of tools for a person to go before a court or a tribunal. If we follow this kind of approach, we are concerned mainly with the obstacles a person faces when seeking a remedy before a court.

Otherwise, if we follow a wider approach, we are not concerned only with the right to access to a judicial proceeding. Instead, we go deeper to include also the quality of the outcome of the procedure.

Nevertheless, even though the terminology used differs, the access to justice as a fundamental right to be guaranteed to every person is enshrined in all democratic constitutions and in many international conventions, aimed at the protection of individual rights.

In the following paragraphs I will examine more thoroughly the notion and its links to other individual rights.

2.2.1 Access to Justice: United Nations Provisions

Access to justice is enshrined in international and in regional instruments, whose aim is to provide individual's rights protection. Recognized not only as a fundamental right itself that guarantees to each person the access to an independent, impartial and fair process when other individual rights are at stake, but it is also a tool for the recognition of many other human rights.

[113] FRA *op. cit.,* 104
[114] FRA *op. cit.,* 104

It is a broad concept that comprises other several concepts. Indeed, all the rights coming from the broader one of access to justice are central elements of the rule of law, on which today's democratic societies are based. One of these is the right to a fair trial, which becomes effective if there is the availability for each person of a legal aid. According to national and international legal standards, the legal aid should be ensured for everyone in order to allow that justice can be done for everyone, and to avoid that a specific group of people it left out[115]. Behind the principle of legal aid, thus, there is the principle of equality of all citizens before the law. Legal aid means the establishment of a justice system and make it available to all. It is the tool for each individual to assert the proper rights. In lack of appropriate judicial system and of the right of access to justice and the consequent legal aid, the existence of all other rights is jeopardized. From the instruments that international law provides, it emerges certainly that the concept of legal aid became a right itself which is essential for the justice to be accessible. This is true even though, as already mentioned before, the language of international human rights instruments does not use those terms specifically. With this regard, the judicial interpretation concerning the issue and their interpretation on the legal instruments are central.

The notion of access to justice begun to gain more and more attention and importance after World War II and upon the establishment of the United Nations. In particular, it is enshrined, among others, in the UDHR, the ICCPR, the ECHR, the Charter of fundamental Rights of the EU, the American Convention of Human Rights, the African Charter on Human and People's Rights.

Adopted as a Resolution in 1948 by the United Nations General Assembly, the Universal Declaration of Human Rights embodies fundamental individual's rights. Article 8 provides the right to an effective remedy in case of violation of fundamental rights, while article 10 requires a fair and public hearing by an independent and impartial tribunal[116]. However, the UDHR is considered to

[115] *See* ECHR; ICCPR; UNHRC
[116] UDHR

contain only a general provision with regard the access to justice, as there is not a specific explanation of how it should be reached and to what extent.

One of the most important instruments that provides protection of individual rights at international level is The International Covenant on Civil and Political Rights. It is a multilateral treaty adopted within the UN General Assembly, entered into force in 1976. It ensures the right of a "fair and public hearing by a competent, independent and impartial tribunal established by law"[117]. The absence of one of the elements listed in article 14, entails that the trial lacks effective fairness.

Moreover, the Covenant provides a more detailed indication of the application of the right to a fair trial and contain important principles regarding the process as a whole. The first paragraph of article 14 assures the right of access to a court to every person without any discrimination, which means that equality before courts should be guaranteed. This equality is about to have the same rights in accessing courts or tribunals as well as to provide all parties the same equipment. Then, the article requires independency and impartiality of the judiciary, which guarantees a fair and public hearing. Furthermore, there should be presumption of innocence (fundamental to the protection of human rights). For what concerns the concept of legal aid, the ICCPR requires from states to provide, without any payment, legal assistance to everyone charged with criminal offence if he does not have sufficient means to pay for it.

The UN General Assembly recognizes the legal aid as an important element to the right to a fair trial also recently. In 2012 it adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System was adopted, considering the legal aid as "an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the

[117] United Nations, International Covenant on Civil and Political Rights ("ICCPR") Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with article 49

enjoyment of other rights, including the right to a fair trial". Legal aid should be provided at "all stages of the criminal process"[118].

2.2.2 Access to justice and economic development

Even though promoting the rule of law and in particular the access to justice have not been the principle goals, the UNDP and the OECD are concerned with their strengthening. Specifically, within the UNDP, access to justice is considered to be a fundamental right, consistent with the Sustainable Development Goals, and essential in the poverty reduction and in the increase of human development[119]. The UNDP is concerned with it mainly in less developed countries as well as in post-conflict countries, where the government faces difficulties to provide it.

The OECD is following a similar approach, considering the access to justice as crucial for the economic growth, in reducing inequality and in achieving many other SDGs. "Equal access to justice and legal empowerment have been recognized as intrinsic goods and fundamental components of inclusive development and growth, good governance, effective public policy and the rule of law " [120].

2.2.3 Access to justice under the European legal framework

The European Convention on Human Rights

A few years after the World War II and with the still open wounds that it caused, the protection of human rights started to gain wide and spread attention throughout the world.

With the aim to protect human rights and liberties in Europe, in 1953 and within the Council of Europe, the European Convention of Human Rights entered into force. Article 1 of the Convention obliges the (now 47) member States "to secure

[118] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly resolution 67/187 in New York 2013

[119] United Nations Development Programme, Sustainable Goals, goal 16 Peace, Justice and Strong Institutions

[120] Organization for Economic Co-operation and Development ("OECD") – 2019 Global OECD Roundtable on Equal Access to Justice held in Lisbon from 27 to 28 March 2019

to everyone within their jurisdiction the rights and freedoms" defined in the Convention[121]. What makes the convention one of the most powerful tools for the protection of fundamental rights is the authority of its Court.

Within the ECHR, the right of access to justice is guaranteed by article 6 and by article 13 of the same Convention. More precisely, article 6 paragraph 1 states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" [122].

Following the case law of the ECtHR, the right to a fair trial is considered to be fully effective when other fundamental rights are guaranteed. Among them, the most important are: the right of access to a court that implies an independent and impartial tribunal, the right to equality of arms, the right to a public hearing, the right to be heard within a reasonable time and the right to interpretation.

The Court points out the prominent role of the right to fair trial in a democratic society, that is the reason why it should not be given a restrictive interpretation to it [123].

The first paragraph of article 6 provides also some description of the judicial body, but what is mostly important is that it gives individuals the possibility to see his/her case heard before a court. The Court held that the procedural guarantees for the parties in litigation, set out in article 6, implicitly entails the access to a court. This means that the right to a fair trial - under the ECHR - does not apply only in an already pending cases, but it also entails the right of access to justice[124].

With this regard, it is important to remember the first case brought before the ECtHR challenging article 6, which was Golder v. The United Kingdom in 1975. In this judgement, the Court defines the access to court as "an inherent aspect of the safeguard enshrined in article 6"[125]. The right of access to a court constitutes an important aspect of the access to justice, considering the role of the courts to

[121] ECHR, art.1
[122] ECHR, art. 6
[123] *Moreria de Azevedo v. Portugal* No. 11296/84, ECtHR 1990
[124] *Golder v. The United Kingdom* No. 4451/70, ECtHR 1975
[125] *Golder v. The United Kingdom* No. 4451/70 ECtHR 1975

safeguard parties against unlawful actions and to guarantee the respect of the rule of law.

Alongside with Courts, nation states have an important role in the effective realization of the rights deriving from article 6. Thus, the responsibility to safeguard fundamental rights is primarily given to member states, in other words, the necessary tools for the effective realization of the access to justice shall be provided first of all at national level[126]. These tools comprise the establishment – by law – of an independent and impartial tribunal, legal aid and practical support to individuals to access court proceeding. The link between article 6 of the ECHR and the rule of law is clear if we consider the legal aid provided by states at national level as a tool to enact the individual right of access to justice, one of the requirements to make the hearing before a court (what the Convention considers) "fair".

On the other hand, article 6 does not expose the notion of remedy, that is however enshrined in article 13 of the same Convention. Article 13 is more relevant in this sense as it states that: "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority"[127]. This provision that the right to a fair trial, thus to an effective remedy before an independent and impartial tribunal, must firstly be available at national level, is underpinned also by the ECtHR jurisprudence, according to which an individual should firstly exhaust all the domestic remedies before bringing his/her case to the Court of Strasburg [128]. The Convention, thus, does not provide a direct access to its judicial body in case of violation of individual rights; instead, the ECtHR has a subsidiary authority, effective when member states are not able to fulfil their responsibility deriving from article 6 and article 13[129]. Moreover, article 13 becomes an effective right only if an individual finds another fundamental right set out in the Convention violated.

[126] *Scordino v. Italy* [GC], No. 36813/97, § 140, ECtHR 2006, paragraph 140
[127] ECHR, art. 13
[128] *Er and others v. Turkey*, No. 23016/04, § 57, ECtHR 2012, paragraph 57
[129] ECHR, art. 35

The real meaning of 'remedy' is not provided in the Convention, but this does not stop the Convention from specifying that the requirement of the remedy must be "effective in practice as well as in law" [130].

Nevertheless, even though discretion in States' hands is left in establishing the domestic remedies, from the ECtHR case law emerge several principles determining the effectiveness of a remedy.

The Court states that an applicant must be able to put forward his or her substantive arguments for consideration before a national authority[131]. The national authority does not necessarily have to be a judicial one, but if it is not, its powers and procedural safeguards are relevant in order to determine the effectiveness of the remedy[132]. Nonetheless, it is acknowledged that judicial remedies furnish strong guarantees of independence, access for victims and families, and enforceability of awards in compliance with the requirements of article 13[133]. Moreover, the Courts also states that is not required a single remedy, on the contrary, an aggregate of domestic remedies may satisfy the requirements of the abovementioned article[134].

Another aspect of effectiveness is that the remedy must provide an appropriate relief for the Convention compliant[135].

However, when assessing effectiveness, it should be considered not only the formal remedies available, but also the general and political context in which they operate as well as the personal circumstances of the applicant[136].

The EU and the Charter of Fundamental Rights

Under the law of the European Union, the right of access to justice derives from article 47 of the Charter of fundamental rights and from article 19 of the TEU. In details, the first paragraph of article 19 of the TEU obliges Member States to

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[130] *M.S.S. v Belgium and Greece*, No. 30696/09, ECtHR 2011; *El-Masri v. "the former Yugoslav Republic of Macedonia",* No. 39630/09, §255, ECtHR 2012, paragraph 255

[131] *Soering v. United Kingdom*, No. 14038/88, ECtHR 1989

[132] ECtHR 2000; *Alisic and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and the former Yugoslav Republic of Macedonia*, No. 60642/08, ECtHR 2014

[133] *Z and Others v. United Kingdom*, §110 No. 29392/95, ECtHR 2001 paragraph 110

[134] *Kudla v. Poland*, No. 30210/96, ECtHR 2000;

[135] *M.S.S. v Belgium and Greece*, No. 30696/09, ECtHR 2011

[136] *Đorđevič v. Croatia*, No. 41526/10, §101, ECtHR 2012 paragraph 101

"provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"[137].

The European Charter of fundamental rights and freedoms entered into force in 2009 and according to article 6(1) of the TEU gained the same legal force of the EU primary law. Our focus, as aforementioned, is on article 47 of the Charter, which states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"[138].

As explained in the Charter itself, article 47 is closely linked and derives from article 6 and article 13 of the European Convention. Even though the Charter's rights are based on the ECHR provisions, there are nonetheless, some differences in the field of application. In some circumstances, the EU law is considered to provide a wider protection. First of all, the rights which is referred to comprise all rights recognized by the EU law, including some economic, social and cultural rights, without the limitation of application in case of rights contained in the Charter. Differently, article 6 of the ECHR clearly finds application in case of "criminal charges, disputes concerning civil rights and obligations"[139]. Moreover, the Charter makes an explicit reference to the right of access to a "tribunal" guaranteeing stronger protection[140].

For what concerns the field of application and the cases in which such access to courts is guaranteed, the EU standards seems more restrictive, since it ensures such a right only in case of application of the EU law. More precisely, the CJEU states that the Charter's provisions shall be apply at a domestic level only when Member States are implementing the EU law[141].

However, there are also several similarities between the two systems. As in the case of the Council of Europe, the enforcement and implementation of the EU

[137] TEU, art. 19
[138] EU Charter, art. 47
[139] ECHR, art. 6
[140] EU Charter, art. 47
[141] *See* Case C-370/12, *Thomas Pringle v. Government of Ireland*, CJEU 2012

law should firstly be guaranteed at national level, enforcing with this regard article 4 (3) of the TEU which asks member states to fulfil their obligations under the European law[142]. This means that one of the main principles under the Eu law is the ability of individuals to enforce their rights at a domestic level and that the primary guarantors of the Eu law, and of the rights deriving from it, are national tribunals. Nevertheless, national tribunals may ask the CJEU to "rule on issues of interpretation through the preliminary ruling procedure"[143].

Although the two instruments are different, both provide the right to a fair trial and to an effective remedy. Council of Europe and the EU law systems requires the guarantee of these rights to be implemented at national level, binding states to provide the necessary tools for citizens to be able to enforce and defend their individual rights. This includes, among others, legal aid and legal protection of less advantaged people, the existence of an independent and impartial tribunal, the right to a public hearing (within a reasonable time) which increases the confidence in the judiciary.
For what concerns the right to an effective remedy, as in the case of the ECHR, a specific definition is not given. In order to set the standard about the right to an effective remedy, the CJEU suggests considering not only its jurisprudence but also the ECtHR' one. This also emerges from the affinity that exists between the two systems, since article 47 of the Charter finds its basis in the European Convention's articles on the same issue.

The important requirement, however, is that the remedy shall be effective in practice and in law. And the primarily responsible actors are member states for the guarantee of an effective judicial protection of individual rights deriving from the Charter. According to the CJEU, the judicial protection, enshrined in the Charter as well as in the ECHR, has to be considered as a "general principle" of the European law. The Court reminds that the EU is based on the rule of law principles, of which the right to an effective remedy is a key element. It is up to each Member State to establish a judicial system to ensure legal remedies that

[142] TEU, art. 4(3)
[143] TFEU, art. 267

makes possible the respect of individual rights, without undermining the right to an effective judicial protection[144].

2.2.4 Hungary and Poland

The European Union and the Council of Europe provisions regarding the right to a fair trial and the access to justice were recently found violated. A series of reforms, especially regarding the judiciaries, adopted in Hungary and Poland undermined the rule of law principles and the protection of access to justice.
Hungary and Poland are two of those countries included in the EU during the first enlargement in 2004. There was a widespread conviction that the democracy in these countries was fully consolidated and that this democracy would consequently last forever. Instead, the recent events have proven the opposite. For the first time, in 2015, Freedom House lowered the democratic assessment of a country, Hungary, and the same happened some time later to Poland[145]. In both countries, the new elected right wing and autocratically inclined parties adopted reforms, which had the effect of neutralizing firstly the constitutional judiciaries and lately the ordinary one.

Hungary

The reforms in Hungary started with the change of the appointment procedure and the number of judges of the Constitutional Court. Moreover, the Court's competences were restricted by the new Fundamental Law adopted after Orban election, such as the fact that the Court was prevented from reviewing the constitutional amendments and the abolition of the actio popularis [146].
For what concerns the ordinary judiciary, it was reformed starting from the adoption, in 2011, of the Act on Status and Remuneration of judges, which weakened the ordinary courts' independence. The age-limit for retirement was lowered from 70 to 62-65 years which led to the retirement of the majority of senior judges. The Hungarian Constitutional Court found the provision

[144] *See* Case C-432/05, *Unibet (London) and Unibet (International) v. Justitiekanslern*, ECJ 2007
[145] Freedom House, 2015
[146] Kovàcs K., Scheppele K.L., *The fragility on an Independent Judiciary: Lessons from Hungary and Poland -and the European Union*, Communist Studies, 51(3), 2018, 189-200

unconstitutional because in breach of the principle of irremovability[147], but the government included it in the Fundamental Law (the new country's constitution) as amendment, so impossible to modify[148]. So, in 2012, the European Commission brought the case before the ECJ. The court of justice found that the lowering the retirement age of judges is a violation of the EU law based on age discrimination[149]. The Commission could not charge the country for violating a principle, namely the judicial independence. The reason is that EU treaties presuppose the existence of independent judiciary, while there is no any legal mandate with this regard (at least until the most recent developments in relation to Poland). Hungary merely paid compensation, remaining nonetheless able to keep in charge the newly appointed judges[150].

Another consequence of the reforms adopted was also the removal, in advance, of the president of the Supreme Court, Mr Baka, through a Transitional Provision. Mr Baka, claiming that he was denied the right to access to domestic remedies, challenged his removal before the ECtHR. In this way, the ECtHR for the first time had the possibility to decide on a case regarding (what scholars defined) "authoritarian constitutionalism", a phenomenon spreading in Central and Eastern Europe[151].

The president of the Hungarian Supreme Court claimed violation of article 6(1) of the Convention (namely the right to a fair trial as above specified) because the possibility of judicial review was not guaranteed. The ECtHR found that, considering the lack of domestic remedies for Mr Baka to contest his early removal, there is a violation of article 6, namely the right of access to justice[152]. Moreover, the Strasbourg Court stated that the premature removal of Mr Baka was not reviewed, for the reason of a "legislation whose compatibility with the requirements of the rule of law was doubtful". Thus, according to the Court,

[147] Decision 33/2012, Constitutional Court of Hungary
[148] Kovàcs K., Scheppele K.L., *op. cit*., 146
[149] *See* Case C-286/12, *Commission v. Hungary*, ECJ 2012
[150] Kovàcs K., Sheppele K.L., *op. cit*., 146
[151] Landau D., *Abusive Constitutionalism*. University of California Davis Law Review 47(1): 189-260 (2013); Tuschnet M., *Authoritarian Constitutionalism.* Cornell Law Review 100(1): 391-462 (2015)
[152] *Baka v. Hungary*, No. 20261/12, ECtHR 2016

Hungary "impaired the very essence of the applicant's right of access to a court and violated article 6(1)"[153].

Furthermore, in 2017 the "Sargentini report" investigating the situation in Hungary found breaches of the EU values. The following year, the European Parliament, by reaching the supermajority adopted the report and triggered for the first time article 7(1) TEU against Hungary[154].

Poland

Similar events took place in Poland, where the 2015 elections saw the right-wing party gaining the absolute majority in the national Parliament.

However, it was the defeat Civic Party which had acted in an unconstitutional way just before the elections by changing the law through which constitutional judges were elected. The reform allowed the Parliament to elect judges months ahead of an actual opening. Thus, besides the three incumbent judges, the Parliament elected two more judges filling an opening that would have been materialized after the elections. This led to a stand-off within the Constitutional Tribunal, since the new president refused to swear in all five judges, while doing so in all five judges elected by the new Parliament. The European Commission reacted invoking the Rule of Law Framework, designed in the case of Hungary, but never used before[155].

Unfortunately, this did not manage to improve the situation in Poland, rather, the government started reforming the Court and the whole judicial system with restrictive legislation.

The 2017 reforms, which consisted in lowering the retirement age of judges, engendered an infringement procedure against Poland by the European Commission. But, notwithstanding the EU institution's action, the Polish

[153] Kosař D., Šipulovà K., *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*. Hague J Rule Law 10, 83-110 (2018)

[154] European Parliament resolution of 12 September 2018 on proposal calling on the Council to determine, pursuant Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)

[155] EU Commission, 2016. Commission Recommendation (EU) 2016/1374, 27 July 2016 regarding the rule of law in Poland. Commission Recommendation (EU) 2016/146, 21 December 2016 regarding the rule of law in Poland complementary to recommendation

government continued the reform packages not only regarding the Constitutional tribunal, but also on the ordinary justice.

The law on the Supreme Court, for instance, permitted the removal of 27 out of 72 judges and created the extraordinary appeal through the new established Disciplinary Chamber, which permits the reopening of almost any court's decision. Consequently, none of the Court's decision can be considered as final. Moreover, the new law creates a special disciplinary officer, appointed by the President of the Republic, with the role to bring charges against judges. The wide discretionary power given to the President of the Republic in the extension of judges' mandate extension was deeply criticized.

All these reforms were considered by the EU Commission as a threat to the independence and the legitimacy of the Constitutional Tribunal, since there is a clear interference on the structure and on the output of the justice system by the legislative and the executive powers[156].

Differently from the Hungarian case, the EU intervention here was stronger. Firstly, the Commission triggered article 7 of the TEU[157], since a violation of the principle of the irremovability of judges was identified in the lowering retirement age reform, considered as a political manoeuvre taken by the government in order to modify the Court's composition [158].

In few words, the judicial reforms adopted in Poland, led to a deterioration of the principle of separation of powers, a fundamental element of the rule of law on which the EU is based. Thus, the EU Commission launched an infringement proceeding against Poland claiming that Poland failed to fulfill its obligations under article 19 TEU and article 47 of the Charter. The EU Court finds that the reforms on the retirement age were not base on the principle of proportionality and that their purpose was to remove a targeted group of the Supreme Court. Moreover, the Court finds that the discretionary power provided to the president of the Republic "gives rise to reasonable doubts, inter alia in the minds of

[156] Press release: European Commission launches infringement against Poland over measures affecting the judiciary, 29 July 2017. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205

[157] European Commission Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland COM(2017) 835 final

[158] TEU, art. 7

individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them"[159]. In conclusion, unclear, non-proportional and discretionary provisions on the removability of judges violate the rule of law principles, since the fear of judges to be anticipatedly removed would render the judiciary less independent.

Here, it is important to recall the judgment of the CJEU in the ASJP case of 2018. In 2014 the Portuguese legislation introduced a temporary reduction on the remuneration paid to persons working in the Portuguese public administration, including judges. The Trade Union of Portuguese Judges, the "ASJP", brought a claim before the national tribunal which referred the case to the CJEU for a preliminary ruling for the interpretation of article 19(1) TEU and article 47 of the Charter of Fundamental Rights. The Court's judgment establishes a general obligation for Member States to guarantee and respect the independence of national courts. What makes this judgment of particular importance is that the CJEU reached this decision by relying only on article 19(1) TEU which the Court describes as giving "concrete expression of the value of the rule of law stated in article 2 TEU[160]. As stated by the Court, article 19 TEU can be applied in national situations irrespective of whether the Member State is implementing EU law within the meaning of article 51(1) CFR. The Court underlines the duties of national courts under the EU Treaties, their duty to ensure that "in the interpretation and application of the Treaties, the law is observed" and that the independence of national courts is essential in order to guarantee individuals an effective judicial protection[161].

The same proceeding was followed by the Court in the Poland case, giving the principle of effective judicial protection a wider scope of application since the notion of "fields covered by Union law" related to in article 19 TEU is wider

[159] *See* Case C-619/18 *Commission v. Poland*, ECJ 2019 para 118; Case C-192/18 *Commission v. Poland,* ECJ 2019

[160] *See* Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECJ 2018

[161] *See* Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECJ 2018

than the "implementation" laid down in article 51(1) of the Charter of Fundamental Rights.

Another important consequence of the Polish case is the emergence of a different mechanism for the safeguard of the principle of the rule of law, since it provides national judges - thorough EU law interpretation – lines of conduct in case there is a risk of violation of the rule of law principles. The mechanism concerned is the preliminary ruling, which in the case we are going to exemply have been used by the Irish High Court. Mr. Celmer, a Polish citizen, was arrested in Ireland and he had to be surrender upon Polish courts requests based on the Framework Decision on the European Arrest Warrant (FDEAW)[162]. Mr. Celmer opposed to be surrendered, claiming that the recent judicial reforms brought in Poland would deny him the right to a fair trial, thus, violating article 6 of the ECHR. The Irish Court brought the case before the ECJ asking for interpretation of the FDEAW. Firstly, the Court of Justice states that the national authority has to determine whether there is a risk of a breach of the fundamental right to a fair trial enshrined in article 47 of the Charter[163]. It reminds that the EU is based on the rule of law and that both national courts and the CJEU have the duty to guarantee individuals the right to a fair trial which is possible only if judicial independence is in place. With regard to this specific case, FDEAW is based on the principle of 'mutual trust', thus, the Court statement enables a member state to derogate from that principle if it suspects that in the other state there is a high risk of violation of the fundamental values of the EU.

The Hungarian and the Polish examples show us the importance that the rule of law and the principles deriving from it, have within the EU and under the ECHR. It becomes clear the relationship between democratic stability and the safeguard of fundamental individual rights. If there is any kind of threat to the judicial independence, there is also a threat for citizen's rights to be effectively enforced, such as the right to a fair trial. Moreover, it emerges the importance of the

[162] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by council Framework Decision 2009/299/JHA of 26 February 2009 ('Framework Decision 2002/584') FDEAW

[163] *See* Case C-216/18 PPU *Minister of Justice and Equality*, ECJ 2018

attention should be put on in recently established democracies, as backsliding can occur at any time.

Within the rule of law reforms, in particular the strengthening the judicial independence and efficiency, implies also the guarantee of the right to access to justice. Nation states are the main responsible in providing individuals the necessary tools for the enforcement of the proper rights, but also for the state to fulfill its obligations deriving from International instruments.

2.3 The role of the Venice Commission

"One of the challenging tasks of the 21 Century is continuing the development of democracy"[164]. In the last three decades, an important role in this field has been played by the Commission of Democracy through Law, better known as the Venice Commission.

In the late 1980s, the collapse of the communist regimes raised the need for constitutional assistance in the newly established democracies in Central and in Eastern Europe. The Venice Commission was exactly created as an advisory body of the Council of Europe with the aim to provide constitutional support for national authorities in those countries.

On one side, its main role is the monitoring of the respect of democracy, of the rule of law and of human rights. On the other side, consequently, its activity consists of giving legal advices on institutional reforms considered necessary in order to bring the country in line with European and international standards, with the aim of "dissemination and consolidation of a common constitutional heritage"[165].

The Commission was originally established as a partial agreement of the Council of Europe[166], but in 2002 it was transformed into an "enlargement agreement",

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[164] Hoffman-Riem W., *The Venice Commission of the Council of Europe – Standards and Impact,* vol. 25 no.2, The European Journal of International Law

[165] Venice Commission webpage https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

[166] *See* Council of Europe, Glossary on the Treaties: "A partial agreement is a particular form of agreement, which allows some member States of the Council of Europe to participate in any activity in spite of the abstention of other member States", https://www.coe.int/en/web/conventions/glossary

allowing in this way the membership of non-Council of Europe countries too[167]. Provided originally only with regional tasks, today the Venice Commission is involved at global level in judicial debates and democratic transformations.

Article 2 of the Statute regulates the membership of the Commission, stating that it shall be composed of "independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science". Moreover, "the members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions"[168].

The Venice Commission may carry out research and draft guidelines on its own initiative (article 3.1) or it can be triggered to draft opinions by a Member State or by the Council of Europe bodies (article 3.2)[169].

Regardless of the activation mode, the powers of the Commission remain only advisory: "It cannot impose solutions, but it nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion"[170]. Its opinions, thus, are not legally binding, belonging exclusively to the sphere of soft law. According to Hoffmann-Riemm, the concept of soft law includes norms that are legally non-binding, or binding to only a very limited extend, and do not have sovereign enforceability/sanctionability, but nevertheless provide other incentives for compliance and, thus, enable effectiveness[171].

However, the Commission's standards comprise primarily hard law, such as the ECHR and the case law of the Court of Strasburg, besides standards of soft law such as Council of Europe recommendations or best practices[172]. It is precisely this method of dialogue between national authorities and international experts as well as the interconnection between national legal order and international

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[167] Council of Europe, Revised Statute of the European Commission for Democracy through Law ("Revised Statute"), 21 February 2002

[168] *See* Revised Statute, art. 2

[169] *See* Revised Statute, art. 3

[170] Jowell J., *The Venice Commission: Disseminating Democracy through Law,* Public Law 2001

[171] *See* Hoffman-Riem W., *op. cit.,* 164

[172] Craig Paul P., *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy,* in UCI *Journal of International, Transnational and Comparative Law,* University of Oxford – Faculty of Law, October 2016

standards that characterize the Commission's action. Most commonly, it is a nation state that ask for an opinion by the Commission, on constitutional amendment or on intra-institutional tensions. The reason behind is the idea of commonly accepted shared values and standards for the evaluation of the issue, but it can be also related to the state's membership in the European institutions, such as the CoE or the EU[173]. So, the Venice Commission is an advisory body, namely its role does not consist in obliging states to enforce its decision, yet to provide them with legal advices; nonetheless, its influence may emerge also from its collaboration with other institutions, such as the Council of Europe and the European Commission.

As already mentioned, the key objectives of the Venice Commission are democracy, rule of law and human rights. Indeed, article 1.2 of its statute establishes that the Commission's focus must be on the "constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law"[174].

As far as the rule of law is concerned, the contribution of the Venice Commission is very significant. In 2011, upon request of the Parliamentary Assembly of the Council of Europe, the Commission issued a report in which it identifies 6 main characteristics, commonly recognized, of the Rule of Law: legality, legal certainty, prohibition of arbitrariness, access to justice before an independent and impartial court, respect for human rights, non-discrimination and equality before the law[175]. Moreover, in 2016, the Commission published "Rule of Law Checklist", providing a deeper scrutiny of the above-mentioned elements. The aim is to provide a toll for assessing the Rule of Law in a given country through an objective, thorough, transparent and equal assessment[176].

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[173] Bartole S., *International Constitutionalism and Conditionality – the Experience of the Venice Commission,* Rivista AIC – *Associazione Italiana dei Costituzionalisti,* 4/2014

[174] Revised Statute, art.1

[175] See CDL-AD (2011)003rev Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)

[176] *See* CDL-AD (2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016)

Another important role played by the Venice Commission is the one of developing of international standards and principles on the functioning of national judicial systems. With this regard, it is important to remind its 2010 report on the independence of the judicial system, based on the most European standards, with the aim to assess a country-specific legislation regulating the judiciary and the guarantees put in place to ensure its independent functioning[177]. Even though the Commission's opinions are not legally binding, as we have already specified above, their impact on the countries involved are nonetheless evident, as those opinions are "reflected in the legislation of the State". Moreover, an important effort is made by the secretariat which controls if the country implemented the opinion.

The Venice Commission has been called to provide its opinion in the reforms on the judiciary adopted in Hungary and Poland. Firstly, in 2011, the Commission gave its opinion on the adoption of the Fundamental Law in Hungary and found that there were no any clear guarantees on the independence of the judiciary[178]. Furthermore, the restricting role of the Hungarian Constitutional Court, after the reform of the judiciary, did not seem to the Commission in line with the European standards on democracy, rule of law and human rights[179].

Similarly, the Venice Commission intervened in Polish rule of law crisis. in detail, it condemned the restrictions posed on the functioning of the Constitutional Tribunal, by raising concerns that the amendments threatened the rule of law and the functioning of the democratic system[180].

The Commission's intervention in Hungary and Poland were used as a base for the EU triggering of its rule of law procedure against those countries' breach of TFEU[181] and for the following proceedings.

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[177] *See* CDL-AD (2010)004 Report on the independence of the judicial system Part I: the independence of judges, adopted by the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2010)

[178] *See* CDL-AD (2011)016, Opinion of the Venice Commission on the New Constitution of Hungary

[179] *See* CDL-AD (2013)012, Opinion of the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary

[180] *See* CDL-AD (2016)001, Opinion of the Venice Commission on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland

[181] TFEU, art. 2; art. 7

Indeed, the RNM well aware of the central role of the Venice Commission in the development of international standards and principles on the functioning of national judicial systems, since the initial phase of the adhesion procedure for its membership in the European Union, has frequently requested the opinions of the Venice Commission on the constitutional amendments adopted in the last years, regarding, in particular, the judicial system. The judiciary has been repetitively considered as not in compliance with the international and European standards on the independence.

However, the RNM is already a member of the Council of Europe, consequently part of the ECHR and the Venice Commission, and therefore, is required to ensure institutional reforms in order to bring the national constitutional framework in line with the European standards. Accordingly, this would require: the respect of the fundamental European values, such as the rule of law; an effective enforcement of the fundamental rights – such as the right to access to justice - recognized by the European Charter of fundamental rights and by the ECHR; so, in other words, standards on judicial independence must meet with appropriate fundamental guarantees.

2.4 Constitutional Justice and Ordinary Justice

In the previous century, there was a widespread introduction in the Constitutions, especially in Europe, of the Constitutional Courts as the protector of constitutions against ordinary legislation[182]. Such as ordinary courts, Constitutional Courts are separated from the other branches of government. Thus, it is an independent judicial institution, yet the composition and the role of Constitutional Courts (CC) are different from those of ordinary courts. Indeed, in the following paragraph I will compare their respective main characteristics and their roles.

After the WWII and the collapse of the previous autocratic regimes, the purpose of the new European democracies became to safeguard individual rights violated

[182] Ferreres Comella V., *Constitutional Courts and Democratic Values: A European Perspective,* Yale university press, 2009

by those previous regimes. Thus, the rule of law and the protection of human rights became key element and as such enshrined in the new countries' constitution. Since the fundamental values on which a society is based are contained in the constitution, a guardian of the constitution was needed. To this end, Constitutional Courts were introduced, with the role to watch over the democratic principles established in the new constitutions.

The emerging liberal constitutionalism was based on a written and entrenched constitution, on the protection of fundamental rights and on the consequential constitutional judicial review of legislation for the protection of those rights. It is not only the executive but also the legislative branch to be obliged to the respect of the constitution and to be subject to the control by other state's institution, that is the Constitutional Court. So, this new constitutionalism puts aside the principle of Parliamentary sovereignty and crowns the Constitutional Court as the main institution responsible for the respect of the constitution and for its interpretation.

Effectively, what CCs actually do is constitutional review by interpretation. In detail, on the one hand, the constitutional interpretation is the process of "constructing, establishing the meaning of and explaining a country's written constitution, other institutional texts and other norms and principles that are of constitutional quality"[183]. On the other hand, constitutional review consists in the "process of assessing whether one's own behavior or that of other actors is in line with the constitution and other texts or principles with a constitutional rank or role"[184]. So, the review consists of the evaluation of the conformity of laws and norms with the constitution. More specifically, CCs assess that an action of the other branches of government do not contrast constitutional provisions.

The CCs role of reviewing hinges on the principle according to which the constitution is the supreme law of the country, so constitutional changes require a more complex procedures than modification of other norms.

[183] de Visser M., *Constitutional Review in Europe: A Comparative Analysis*, Oxford, Hart Publishing, 2014

[184] de Visser M., *op.cit.,* 183

The principle of the constitutional supremacy and the introduction of the constitutional review of legislation was firstly established in the 19th Century in the U.S. through the case Marbury v. Maddison. In that case, Chief Justice John Marshall stated that the constitution is a limit to the government's actions, a limit in place only if government actions are subject to judicial review [185]. However, in the US every court has the role to control the constitutionality of legislative or executive acts, thus, every judge is allowed to decide whether there is a breach of the constitutional principles.

The model which spread in Europe, instead, derives from the Kelsenian centralized idea, hinged on constitutional review.

Hans Kelsen, in "The Pure Theory of Law" 1934 theorized the hierarchy of norms. According to the author, legal norms derive their legitimacy from their compliance with a higher one, and, climbing the hierarchy, more important are the norms fewer they become[186]. At the top of the hierarchy we find the Constitution without another norm above it, so it is conceived as the fundamental norm. Moreover, Kelsenian model theorized also a special tribunal - distinct form the ordinary judiciary – for the safeguard of the constitution against unconstitutional actions[187]. On this wavelength, in fact, the 1920 Austrian Constitution was the first one who provided for a Constitutional Court, applying consequently a centralized model of constitutional adjudication. Differently from the. U.S. model in which the constitutional review is a role that belongs to each Court, in the centralized model are only the Constitutional Courts are the only institutional bodies that can deploy this role.

The idea behind the need of a strong guardian of the constitution, separated and independent from the other political actors lies in the very essence of a constitution, and the rationale of adoption of a CC in a democratic society.

[185] *Marbury v. Maddison*, 5 U.S. 137, 1803
[186] Kelsen H., *The Pure Theory of Law.* Translated by Max Knight. Clark, New Jersey, The Lawbook Exchange, Ltd., 2005
[187] Kelsen H., *op. cit.,* 186

Giovanni Sartori, in 1962, underpinned a limited perception of a constitution, defining it as a limitation on the governmental action, introduced in order to avoid arbitrary power[188].

Today, instead, the concept of constitution refers to different spheres of a society. A constitution is the body that contains fundamental principles concerning the state's political organization and the guidelines for the government's action.

Going further, as Dieter Grimm states, a constitution contains empirical and normative meaning. As an empirical tool it is descriptive of the political organization of a country; while in its normative sense, it is a law establishing the rules that should be used in the exercise of political power [189]. In other words, from the political point of view, the constitution sets up and distributes governmental power and the instruments for deciding public policy; while in its normative sense, it contains human rights that the state have to ensure and the legal framework under which state's institutions should operate.

In a democratic system based on the separation of power which is enshrined in the constitution, the CC performs the role of control over the constitution itself, over the legislature, the executive and the over political parties and elections.

Since there is the risk that the majority ruling in a country, in the given ruling period, will act by interpreting the constitution in its proper interests, there is the need of constitutional adjudication by an independent institution in order to "enforce constitutional law vis-à-vis government" [190]. Putting it differently, since the constitution is a legally binding document, there is the need of a mechanism to establish whether an act or a decision is in contrast with the constitution itself. This process, called constitutional review, is exclusively in the hands of Constitutional Courts in the centralized model adopted especially across Europe. Indeed, "a CC is a constitutionally-established, independent

[188] Sartori G., *Constitutionalism: A Preliminary discussion*, The American Political Science Review, Vol. 56, No 4, 1962, pp. 853-864

[189] Grimm D., *Constitutionalism. Past, Present and Future,* New York, Oxford University Press, 2016

[190] Grimm D., *op. cit.,* 189

organ of the State whose central purpose is to defend the normative superiority of the constitutional law within the juridical order" [191].

However, the most important task of CC is the protection of fundamental rights and the provision of a remedy when such rights are violated. This emerges especially in case of adjudication of legislative acts, being it before the promulgation of the legislation (ex-ante abstract review) or after the promulgation (ex-post which can be abstract or concrete when emerging in a course of litigation before an ordinary court). There are some countries' constitution who provide for a possibility for everyone to bring the proper claims before the CC when they think their rights have been violated.

Even though review of legislative and executive acts is the primary role of CCs, they also decide on impeachment proceedings, on disputes arising between state's institutions or between different levels of government (especially in the case of regional of federal form of government), on banning political parties considered as unconstitutional and on national elections or referendum.

Within the centralized model of constitutional adjudication, ordinary courts are prohibited to perform tasks attributed to the CC and, at the same time, CCs do not preside over litigation which continue to be an ordinary court's prerogative. Moreover, ordinary courts are always bound by the supremacy of the constitution and CCs have the duty to preserve this supremacy.

2.4.1 Appointment Procedure: Constitutional Courts

Since constitutional courts and ordinary courts have different roles, different respective methods of appointment of judges result necessary.

On the one hand, Constitutional Courts are more publicly exposed in particular because their decisions assume a highly political importance. Indeed, often CCs have to "decide on politically controversial questions" and they influence with these decisions the political branches of government [192]. Consequently, the selection and the appointment procedure of constitutional judges are of special

[191] Stone Sweet A., *Governing with Judges. Constitutional Politics in Europe*, New York, Oxford University Press, 2000

[192] de Visser M., *op.cit.,* 183

concern for political institutions. For instance, a decision on a case by the CC that contrast the will of the other branches of power could lead the legislature or the executive to push for the change of court's composition, appointing new judges closer to their ideas and interests.

Such 'court-packing' was pursued in some Eastern European countries, such as Poland and Hungary as explained in the previous paragraph, by changing nomination procedures and lowering the retirement age.

According to our observation, although the appointment procedure varies in different countries, the political branches of government are always involved. According to Dieter Grimm, this is due the fact that the CC is an institution sharing political power, thus, it needs some kind of democratic legitimation[193]. The direct election by people, however, would undermine the independence of judges and of the Court as a whole, so the solution is to include elected branch of government in the appointment procedure of CCs' judges.

Each country adopts its own mechanism for constitutional judges' appointment, thus there are no two identical procedures. Still, it is possible to identify three different models. In the first model each constitutional judge is selected only by the legislative branch of government, usually through a parliamentary committee[194].

In the second model, there is also the involvement of the executive, besides the legislature. Here, the two branches of government do no decide separately, so this kind of model is also called "collaborative"[195].

The third model sees the power of appointing constitutional judges shared among different institutions, which select their portion of judges separately[196].

On the one hand, ordinary courts administer justice according to the law in the dispute resolution. Such as CC they are interpreter of the law, but their interpretation is aimed at reaching a judgement in a specific case.

[193] Grimm D., *op. cit.,* 189
[194] de Visser M., *op.cit.,* 88
[195] *Ivi,*
[196] *Ivi,*

2.4.2 Appointment Procedure: Ordinary Courts

Also for judges of ordinary courts, as we have already highlighted for constitutional judges, different countries apply different recruitment procedures. However, for what concern European countries, the methods of recruitment can be summarized in few categories.

The first method hands in this prerogative to the legislature or the executive. Surely it provides a higher degree of legitimacy to the appointment procedure, nonetheless, it may entail the risk of judicial dependence upon the political branches of power.

The second method contemplates the direct election of judges by the electorate, entailing the same pros and cons of the first method.

The third method confers the recruitment of judges to the judiciary itself.

The fourth method implies a (possibly independent) committee of judges and a public competition.

The fifth and last method, the more spread across Europe, differs itself in different countries in that it can follow access to a training institution or a direct access to the judiciary. However, the process is different in some Northern European countries and Common law countries where the competition is not provided.

Another relevant difference between ordinary and constitutional judges can be found in the length of tenure of judges. For what concern ordinary judges, they are recruited until retirement, the age of which, however, differs across countries. CCs' judges, instead, are usually appointed for a fixed period of time, often without the possibility of re-election. The term of office and the possibility of re-appointment have an important impact on the independence of the Court as a whole, on the independence of individual judges, or, at least, on the perception by citizens on the aforementioned independence.

At the light of all this analysis, mechanisms provided for the safeguard of judicial independence gain more and more centrality, and, thus, they will be analyzed in the following paragraph, through an overview on international instruments and standards upon the status of judges and courts.

2.4.3 Guarantees of Judicial Independence at European level

In the first chapter we have already analyzed the fundamental principles of judicial independence, based on the principle of separation of powers, namely the independence of the judiciary from the other branches of government, from the political parties or from other external actors, with the purpose of safeguarding the fundamental rights.

In order to establish and strengthen such independence, more detailed guarantees should be secured by every national legal framework. With this regard, various conferences at international level are organized and several documents on standards guaranteeing judicial independence can be found. As already mentioned, there are no common methods adopted. Nonetheless, at European level, limits are posed by European standards on democracy, on the rule of law and on the protection of fundamental rights. In this discourse, an important role is played by the Venice Commission and by its Consultative Council of European Judges (CCJE). The Venice Commission's approach aims at the safeguard of individual rights, underlying that judicial independence is a tool for every citizen to see the proper right to a fair trial ensured, as enshrined in article 6 of the ECHR (developed in previous paragraphs).

Guarantees of judicial independence are, thus, put in place since the initial phase of selection or recruitment procedure, which may change depending, as already mentioned above, on the type of Court we are taking into consideration.

As to ordinary courts, generally, the selection should take place on the base of objective criteria, in compliance with the law and based on merit, without any kind of discrimination[197]. The Venice Commission suggests that applying an elective system in the selection procedure – being it by the Parliament or by people directly - would for sure give a stronger legitimacy to the judiciary, but, at the same time, it could provoke a high risk of politicization of the procedure, since judges would be involved in a kind of political campaign and the "political

[197] Judges: independence, efficiency and responsibilities Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe

consideration may prevail over the objective criteria"[198]. Thus, the Commission retains that the authority responsible for the selection of judges should be independent from the executive and the legislative powers[199]. Following this reasoning, the creation of a judicial council, whose establishment, composition and powers are to be regulated at the constitutional level, would be a suitable tool for the safeguard of the independence of the judiciary [200]. This does not mean that the involvement of the executive in the appointment procedure is expressly denied, rather, for the ECHR it does not entail in itself the undermining of the judicial independence. Nonetheless, legal guarantees from possible future attempts of the executive to influence judges' operate are necessary, in that pressure on judges should be always avoided in the adjudication in a case[201].

Moreover, the Court of Strasburg, in its case law, specifies that an appointment procedure jeopardizes the judicial independence only if the process of appointment as a whole is proven to be unsatisfactory. The Venice Commission has a similar point of view on this issue, indeed, it considers the involvement of the other branches of government in the selection procedure to working only in countries with a strong judicial tradition. With the same logic, the involvement of the political branches of government may raise concern and may risk to undermine the judicial independence in cases of recently established democracies, where the judicial tradition is not rooted[202].

Another important feature in the strengthening of the independence of the judiciary is the security of tenure. The case law of the ECtHR suggests that there is no need of an appointment for life, since what is really important for the judicial independence is the stability of the mandate. In the case Campbell and Fell v. UK, the Court accepted an only 3 years period of office, because in that case it was proven that judges were unpaid, thus the judges were unwilling to accept a long-term mandate with that law salary. According to the Council of Europe "judges should have guaranteed tenure until a mandatory retirement age,

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[198] *See* CDL-AD (2007)028, Judicial appointments - Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)
[199] *See* Council of Europe Recommendation CM/Rec (2010)12
[200] *See* Venice Commission Report CDL-AD (2007)028
[201] *Campbell and Fell v The United Kingdom,* No. 80.7878/77, ECtHR 1984
[202] *See* Venice Commission Report CDL-AD (2007)028

where such exists" and that the term of office should be guaranteed by law [203]. The same provision is enshrined, among others, in Principle 12 of the 1985 UN Basic Principles on the Independence of the Judiciary[204] and in the 1983 Universal Declaration on the Independence of Justice[205] among others. An early retirement is allowed if it is requested by the judge itself, or in case of breaches by a judge of disciplinary or criminal provisions established by law.

However, some countries provide a probationary period before the judges' permanent recruitment. Even in this case, the provisions require that a decision to confirm or not the appointment should be taken by the independent body established for the appointed procedure, namely the Judicial Council. Nonetheless, the European Charter on the statute for judges states that "clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed"[206].

The same point is offered by the Universal Declaration on the Independence of Justice, which considers the probationary period as inconsistent with judicial independence and suggests that "they should be phased out gradually" from the systems in which they are still in action [207].

The Venice Commission too considers the probationary period as a risk to the judicial independence. In order to follow this argument, it is important to keep in mind the Scotland case in which the Appeal Court of the High Court of Justiciary of Scotland stated that the guarantees of an independent tribunal, as expressed in article 6 of the ECHR, are not satisfied through an appointment of

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[203] *See* Council of Europe Recommendation CM/Rec (2010)12

[204] United Nations, Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

[205] Universal Declaration on the Independence of Justice ("Montreal Declaration") adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on June 10th, 1983

[206] *See* DAJ/DOC (98)23, European Charter on the statute for judges and Explanatory Memorandum, adopted by the Council of Europe, Strasbourg, 8-10 July 1998

[207] *See* Montreal Declaration, *op. cit.,* 205

a temporary sheriff whose mandate lasts for one year and whose reappointment or not is totally subject to the discretion of the executive[208].

The Commission recognizes that the security of tenure, namely an assessment of the effective ability of a judge to perform his or her duties before a permanent appointment, is particularly important in countries where the judicial system is of recent establishment [209]. Obviously with this position the Commission does not want to rule totally out the possibility of changes of courts' composition, rather precising that the "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office" [210]. Even though such decision is in the hands of the Judicial Council, avoiding in this way any involvement of the other branches of government, the Venice Commission still looks doubtfully on it. After all, the Commission attempts to preclude any element that would jeopardize judicial independence, concluding its 2005 opinion on the draft of constitutional amendments in Macedonia by stating that "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value"[211].

The security of tenure inevitably implies, in turn, the principle of irremovability of judges, enshrined in the European Charter, which denies the possibility for a judge to be moved from one office to another without his-her consent. The reason behind this principle is to avoid external influence on individual judge. Such transfer or removal during the mandate must be enacted within a disciplinary framework and the involved judge has the right to appeal before an independent authority [212].

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[208] *See* case Starrs v Ruxton, [2000] H.R.L.R 191

[209] *See* CDL-AD (2005)038 opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "The former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005)

[210] *Ivi,*

[211] *See* Venice Commission opinion CDL AD (2005)038

[212] *See* Charter on the statute for judges; CM/Rec (2010)12

The CCJE adds that the principle of irremovability "should be an express element of the independence enshrined at the highest internal level" and express other main topics through its case-law[213].

In Campbell and Fell v UK, the Court states that a court's member must be protected against an act of removal during their term of office. "The irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6§1"[214]. In Baka v Hungary, the Court held that the judicial reforms adopted in Hungary, which altered the judicial system, were jeopardizing the judicial independence and that the earlier removal of Mr. Baka from office violated the principle of irremovably[215].

Moreover, according to the Court, these principles should be applied not only to a tribunal, within the sense of article 6 of the Convention, but also to any "officer authorized by law to exercise judicial power" [216]. In the Poland case, the assessor was provided with judicial power to decide on a judicial case, but, since the assessor's removal was totally and only in the hands of the Minister of Justice, with no guarantees by national law against his discretionary power, a lack of independence of the officer was acknowledged.

External pressures must be avoided, as we demonstrated above, not only in the initial proceeding of appointment but also during the mandate of a judge, yet interferences from the executive or the legislature must be avoided also during a proceeding in order to safeguard and strengthen the judicial independence.

In the Sovtransavto Holding v Ukraine, it was found that the political pressure exercised in several occasions during the procedure - "whatever the reasons advanced by the Government" - to be "incompatible with the notion of an independent and impartial tribunal"[217]. Moreover, in Kinský v. the Czech Republic the Court affirms that also an indirect interference harms the judicial

[213] Opinion No 1 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges
[214] *Campbell and Fell v The United Kingdom,* No. 80.7878/77, ECtHR 1984
[215] *Baka v. Hungary*, No. 20261/12, ECtHR 2016
[216] *Henryk Urban and Ryszard Urban v. Poland*, No. 23614/08, ECtHR 2010
[217] *Sovtransavto Holding v. Ukraine,* No. 48553/99, §80 ECtHR 2002, paragraph 80

independence, since politicians' statements before the media on the ongoing case were considered influential on the case's outcome[218].

Recommendation 2010/12 deals with this issue and suggests that "the law should provide for sanctions against persons seeking to influence judges in an improper manner" [219]. Moreover, it links the external influence with the public confidence on the judiciary. It states that any intervention from the legislative or the executive that "would undermine the independence of or the public confidence in the judiciary" should be avoided. Judges role consists in interpreting and applying the law as a fair and impartial arbiter, and their ability to fulfill effectively their duties is guaranteed only if there is public confidence in its independence and impartiality[220].

From this workpiece emerges another important requirement for the independence of the judiciary, namely the appearance of independence. The impartiality of judges denies any type of prejudice, and can be tested according to subjective criteria, that is, on the individual judge's behavior, or according to objective criteria, regarding the tribunal and its internal organization[221].

In particular, several ways to ascertain the public perception on judicial independence can be abstract from the ECtHR case-law: "whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of the tribunal[222]; whether there are "legitimate grounds for fearing" of an impartial and independent tribunal[223]; whether there are "ascertainable facts that may raise doubts or whether such doubts may be objectively justified"[224]. Anyhow, the Court considers that if an "objective observer" does not raise doubts in a specific case, there is no problem regarding the independence of the involved judicial power[225].

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[218] *Kinský v. the Czech Republic,* No. 42856/06, §95 ECtHR 2012, paragraph 95
[219] *See* Council of Europe Recommendation CM/Rec (2010)12
[220] Ivi,
[221] *Morice v. France*, No. 29369/10, §73 ECtHR 2015, paragraph 73
[222] *Campbell and Fell v. The United Kingdom,* No. 80.7878/77, ECtHR 1984
[223] *Langborger v. Sweden,* No. 11179/84, ECtHR 1989
[224] *Castillo Algar v. Spain,* 79No. 28194/95, §45 ECtHR 1998, paragraph 45; *Sacilor-Lormines v. France,* No. 65411/01, ECtHR 2006
[225] *Clarke v. the United Kingdom,* No. 23695/02, ECtHR 2005

The questions about the independence an impartiality of the judiciary could be on the independence of single judge or on the court as a whole. So, the individual impartiality of a judge can be established through the subjective test proposed by the ECtHR, while the objective test is intended to establish if the tribunal as a whole is impartial, besides the individual judge's conduct.

On the other hand, questions about the independence of a judge may arise in different circumstances, for instance, when the judge previously has held different position. This was the case of Piersack v Belgium, in which the judge has previously been the Head of Section of the Public Prosecutor's Office which initiated the proceedings against the applicant. According to the Court "the impartiality of the tribunal which had to determine the merits was capable of appearing open to doubt"[226]. The appearance of impartiality is important, as "justice must not only be done, it must also be seen to be done"[227]. What is at stake is the confidence that the courts must inspire in the public in a democratic society[228]. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw[229].

In Piersak v Belgium, it was clear the real involvement of the former official in the case, thus, raising doubts on its impartiality, but, as the Court states, a previous involvement of the judge as a counsel in the case does not in itself imply lack of partiality. The appearance of impartiality, thus, should be tested in every single case and depends on the case's circumstances.

On the other hand, the questions on the collective independence of a tribunal regard the internal organization of a tribunal and the presence of hierarchical relationships.

As the Recommendation 2010/12 states "in their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from an authority, including authorities internal to the judiciary"[230]. Also the opinion No1

[226] *Piersak v. Belgium,* No. 8692/79, ECtHR 1982
[227] *Denisov v Ukraine,* No. 76639/11, ECtHR 2018
[228] *Incal v Turkey*, No. 22678/93, ECtHR 1998
[229] *Micallef v Malta,* No. 17056/06, ECtHR 2009
[230] *See* Council of Europe Recommendation CM/Rec (2010)12

expressed by the CCJE, recognizes the hierarchical organization of a tribunal as a "potential threat to judicial independence"[231]. Similarly, according to the Universal Charter of the judge, adopted by the International Association of Judges, "a hierarchical organization of the judiciary…. would be a violation of the principle of judicial independence"[232]. Judicial independence, as already mentioned, is not only about the independence and impartiality of a court as a whole, it also entails a single judge's independence in relation to other judges but also in relation to the court's president or other superior courts. This is the reasons why superior courts must avoid giving instructions to lower courts on how to decide in a single case and the motive why the cases must be distributed following objective criteria established by law.

The judicial independence is fundamental for the rule of law in a free and democratic society, and the strengthening of its independence is indispensable in order to guarantee the protection of individual rights against state's and other actors' arbitrary actions.

From the analysis on the guarantees provided to safeguard judicial independence, emerges the role played by many European and international institutions and conventions. Especially, the second half of the last century saw an increasing interest at international level on judicial independence, starting from 1948 with the UN declaration on human rights.

2.4.4 Judicial Training

Judicial independence implies two main features: 1) an institutional framework, able to safeguard the judiciary (as one of three branches of government) from external influence; and 2) the independent perspective of each judge. For these purposes, on the one hand, judges are granted numerous rights and guarantees, on the other hand, they are charged with duties. The explanatory memorandum of the Charter on statue of judges sets out that "judges must ensure that they

[231] *See* CCJE opinion No 1, *op. cit.,* 213

[232] The Universal Charter of the Judge, adopted by the International Association of Judges in Taiwan, 17th November 1999 and updated in Santiago de Chile in 2017

maintain the high level of competence that the hearing of cases demands" [233]. Similarly, the 2010/12 recommendation of the Council of Europe requires that judges are guided by ethical principles in carrying out their professional duties [234]. Indeed, the professional diligence of judges and their ability to perform judicial work in deciding cases should be a "constant requirement" in order to inspire public confidence in judges themselves and the judiciary as a whole. The quality of the judiciary is fundamental to ensure the right of access to justice, which in turns can be achieved mainly through education. Judges' competence to perform professionally their judicial work is acquired through training, which is recognized as a right but also as a duty of every judge. Judicial training is, thus, necessary for judicial independence and for "the goof quality and efficiency of the judicial system"[235].

Judicial training is gaining more and more attention by international instruments related to the independence of the judiciary.

Judicial training can be found for the first time in the 1985 UN Basic Principles on the Independence of the judiciary, in particular in article 10, which states that "Persons selected for judicial offices shall be individuals of integrity and ability with appropriate training or qualification in law" [236].

Also the European Charter on the statute for judges aims at an appropriate training of judges, maintaining that each judge "must have regular access to training courses organized at public expense, aimed at ensuring that judges can maintain and improve their technical social and cultural skills" [237]. Within the Council of Europe, judicial training is also recognized in the 2010/12 Recommendation, whose section 56 provides for "theoretical and practical initial and in-service training" which should consist in "economic, social and cultural issues related to the exercise of judicial function"[238].

At European level an important role in this field is played by the already mentioned Consultative Council of European Judges (CCEJ) too, especially with

[233] *See* Charter on the statute for judges
[234] *See* Council of Europe Recommendation CM/Rec (2010)12
[235] *See* IAJ Universal Charter of the judge, *op. cit.,* 232
[236] *See* UN Basic Principles, *op. cit.,* 204, art. 10
[237] *See* Charter on the statute for judges
[238] *See* Council of Europe Recommendation CM/Rec (2010)12

its opinion no 4 of 2003 on "appropriate initial and in-service training for judges" [239]. The aforementioned opinion recognizes the judicial education as a right and as a duty for the judges, so "that they are able to perform their duties satisfactorily", so that the judicial independence and impartiality are safeguarded and that, consequently, the trust in the judiciary in strengthen[240].

Considering its importance, judicial training should be regulated by the rules on status of judges and should be guaranteed by the State, obliged to supply the necessary tools and funds to the judiciary. Moreover, the European Charter refers to the independent body responsible for the appointment of judges - namely the Judicial Council - to be the adequate one also in supervising the training programmes. The training provisions are considered necessary prerequisites for judges' impartial decisions; hence, open-mindedness should be provided since the initial stage, that is exactly the training itself[241]. Thus, the authority carrying out educational programmes should be independent, not only from the executive and the legislature but also from the body responsible for the administration of the judiciary. As the opinion n 4 states: "those responsible for training should not also be directly responsible for appointing or promoting judges"[242].

Another focus point is the composition of the training body, which should mainly consist of judges with the inclusion of experts in the different disciplines, such as representatives of other legal professions (attorneys, notaries or university law professors).

Judicial training is mandatory for judges just recruited at the initial stage of their career. It is considered as indispensable, yet based on a voluntary participation of judges, also during their mandate[243]. This duplicity suggested is due to the fact that the initial training is important for young judges to acquire judicial skills

[239] Opinion No 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels
[240] *See* CCJE opinion No 4, *op. cit.,* 239
[241] *See* Charter on the statute for judges
[242] *See* CCJE opinion No4, *op. cit.,* 239
[243] *Ivi,*

and qualities, while the in-service training comes from the need to update the knowledge and skills with the change of laws and technology.

Living in a world with a rapid evolution, in which technologies, laws and social environment are rapidly changing, requires a diversified training curriculum. Training programmes, hence, should not be concentrated only on legal techniques, but they should comprise also education in ethics and other fields relevant for the judicial activity, bearing in mind "the need for social awareness and the extensive understanding of different subjects reflecting the complexity of life and society"[244]. Indeed, the judicial training is intended to contribute to the improvement of the judicial activity, which in turns consists in the safeguard of individual rights, thus, the training programmes have to take into consideration the judiciary needs but also the needs of the society[245].

From the international instruments we draw that judicial training is closely linked with the judicial independence, so that training is an entitlement of every judge and prosecutor, but at the same time it is a judge's responsibility to undertake it.

As far as training institutions are concerned, we have seen that they are regulated within the Statute on judges and funded by the State. The body responsible for the training, on the one hand, must be independent from any other authority, on the other hand, it is supervised by the judiciary or the judicial council. Finally, the appointed authority should be composed by judges and experts from all the relevant fields and it, in the drafting the training program, should consider judicial techniques and at the same time the social context.

EU law and judicial training

The European Union is particularly concerned with judicial training across its Member States, since the EU law is firstly enforced at national level. Indeed, national courts are the main responsible for an effective application of the

[244] *See* CCJE Opinion No 4, *op. cit.,* 239

[245] Knezevic Bojovic A., Purić O., *Judicial training and EU law: A view on comparative Serbian practice*, Institute of Comparative Law, Belgrade, January 2018

European law, which have precedence over the national law[246]. The application of the EU law comes from its direct effect[247] or by its indirect effect through the domestic interpretation of law in the light of EU goals. Moreover, national judges are responsible for the enforcement of individual rights deriving from the EU law which implies the activation of the preliminary ruling procedure. The correct application of the EU legislation and the effective enforcement of the rights, deriving from it, by and across MSs, necessarily requires a deep knowledge of the European law.

With this in mind, the European Union managed to gain competence in this field only with the adoption of the Treaty of Lisbon. Article 67 of the TFEU establishes an area of freedom, security and justice, while article 81(2)(h) and article 82(1)(c) enable EU to adopt measures in order to ensure "the support for the training of the judicial staff" in civil and criminal matters[248].

However, the European Union has always been acting in this area, in particular in candidate countries in order to be sure that judges of those countries are sufficiently trained in EU law and regarding the impact of the EU law on national law and national judges. Judicial training is traditionally rooted in some of the European countries, such as Spain, France and Germany. On the other hand, different legal tradition concerning the judicial independence and judicial training characterized the Central and Eastern European countries.

The European Commission enhanced its effort in the area of judicial training and judicial education soon after the adoption of the Lisbon Treaty. In particular, in 2011 it published a Communication on "Building trust in EU-wide justice, a new dimension to European judicial training", with the aim to provide access to high quality training in EU law[249]. With this communication the European Commission sets the concrete objective to train 700 000 legal professionals by 2020, by increasing funds for judicial training and by supporting exchange programs for new judges and prosecutors.

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[246] *See* Case 6/64 *Costa v Enel*, ECR 1964

[247] *See* Case *Van Gend and* Loos, ECR 1963

[248] TFEU, art. 67; art. 81(2)(h); art.82(1)(c)

[249] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions of 13 September 2011 - Building trust in EU-wide justice: a new dimension to European judicial training COM(2011) 551 final

The judicial training is even considered as the key element for the implementation of a "true European judicial culture", because it intensifies "mutual confidence between Member States, practitioners and citizens" [250].
The development of the European legislation raised the need to provide continuous judicial training at European level. For this reason, several institutions are established with the support of Member States, such as the European Judicial Training Network. It was founded in 2000 and it consists in a platform for the promotion of knowledge of legal systems through training programmes[251]. In 2016, its General Assembly adopted Nine Principles of Judicial Training, stressing the scope of trainings and the relevance of initial training, and recognizing the right, as well as the duty, for judges and prosecutors to undergo to continuous training throughout their careers[252]. In fact, the EU Justice Scoreboard monitors yearly the progresses made in EU countries in the field of judicial reforms and the functioning of the judicial system, whose one indicator shows the percentage of judges taking part in training activities.

Up to this point I analyzed the international covenants, with particular attention to the European legal framework on the rule of law, on the access to justice and on the role of the judiciary. I stressed several times the importance of the judicial institutions in a liberal democracy as a fundamental element and as a significant indicator of the functioning of a democracy.
The judiciary is important in the European integration process because it is a crucial requirement for a future EU membership. It is even more important after the accession since it is vital in the application of the EU law at national level.
As previously mentioned, due to the considerable importance of the judiciary, one of the key priorities of the Macedonian government is judiciary reform[253].

[250] European Commission Communication, *op. cit.,* 249
[251] EJTN webpage http://www.ejtn.eu/About-us/
[252] Judicial Training Principles, adopted by the General Assembly of the European Judicial Training Network, Amsterdam, 9-10 June 2016
[253] Preshova D., *Judicial reforms in the Republic of Macedonia: changes without reforms?* Konrad Adenauer Foundation in the Republic of Macedonia Institute for Democracy "Societas Civilis", Skopje, 2018

In the following chapter I will analyze the RNM's constitutional framework, regulating the judicial system, its flaws and what point it was asked to repair or to redesign.

CHAPTER 3

CASE STUDY: THE JUDICIAL SYSTEM IN THE REPUBLIC OF NORTH MACEDONIA (RNM)

3.1 Evolution of the judiciary in the RNM

Since the beginning of the People's Liberation war within the whole territory of former Yugoslavia, there was a continuous effort for the establishment of the new national government, still depending on the military, political and organizational conditions. Within the same framework, liberation parties sought to establish the judiciary as well, which at the time was different in the different regions within the Yugoslav territory depending on the role they were settled for[254].

The judiciary reflected the development of the NOB (People's liberation Army) and of the first organs of the new authority, applying within the partisan orders and within the territorial military organs later. The courts purposes were the protection of the National Liberation Army and the Partisan Detachment of Yugoslavia[255].

Among the first documents with regard to the judicial bodies, the orders in the bulletin from 1941-1942 from the Supreme Headquarters (of the Yugoslav Partisans) to the People's Liberation Detachments to establish military courts represent an important element. The establishment, the organization and the functions of those courts were regulated by the so called Focanski Propisi adopted in 1942 by the Supreme Headquarters of the People's Liberation Army and the Partisan Detachment of Yugoslavia[256].

At the end of 1944 and the beginning of 1945 there was also the establishment of the Supreme courts of the Federal Units and the establishment of the Supreme

[254] Лазар Нанев, *60 години основен суд Кавадарци,* Основен суд Кавадарци, 2005
[255] Created in 1941, it was the Communist-led resistance to the Axis powers which occupied Yugoslavia during the World War II
[256] *Op. cit.,* 254

court of Democratic Federal Yugoslavia, as the highest judicial organ in the whole country territory.

In Macedonia, the military courts were established in the cities of Skopje, Štip and Bitola, according to decisions adopted by the Supreme Headquarters for Macedonia starting from 1943.

After the founding of the Socialist Republic of Macedonia, the development of the judicial system took the same path[257].

The process of establishment of national courts which was separated from the public administration was performed following the instructions from 1944 of the National Committee on the Liberation of Yugoslavia, which recommended the antifascist assemblies to set ad hoc national courts which should judge in a council chosen by people[258]. Those courts had to be independent, free in their own organization, and able to decide not only on civil matters but on all the crimes which were not under military courts' competences. Yugoslavia had two national court systems, the first devoted to the resolution of civil and criminal cases and the second to judge the conformity of national law with the Constitution and the conformity of laws passed by republics and provinces with national law. The Federal Constitutional court did not have the authority, however, to take actions against such infractions. Its judgments were passed to the Federal Assembly for action. The Federal Constitutional court also resolved disputes of authority among regional bodies or between a regional body and the national government, but it could not act as an Appellate Court at regional level. To the Federal Constitutional Court, the Yugoslav Constitution dedicated Section VII, in which article 124 enumerates its role, while article 125 concerns its composition. It is not provided however the manner in which justices are appointed, it nonetheless provides for their nine-years term, their immunity and the incompatibility of the role of justice with other public roles[259].

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[257] *Op. cit.,* 254

[258] *Op. cit.,* 254

[259] Constitution of the Federal People's Republic of Yugoslavia 31 January 1946, available at http://www.arhivyu.gov.rs/active/sr-latin/home/glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/ustav_fnrj.html

Constitutional Courts were established also at the level of the Republics and Provinces level, having the role of deciding on matters of constitutionality within their territory. In order to have uniformity within the territory of the Federation, the members of the regional courts had to held regular consultations on procedures and constitutional interpretations.

In January 1946 the first Yugoslav Constitution was adopted. According to its provisions, the regular court system consisted of the Federal, Republican, and Provincial Supreme courts, and Local courts, each resolving civil and criminal cases involving laws at their level of government[260]. The military courts completed the Yugoslav justice.

According to the Federal law, political crimes were first tried at district level, then cases could be appealed at the level of the Republics and at a Federal level before the regular courts at the Federal level. The Federal Supreme Court was the final court of appeal for lower courts of all types. The Chief civil law enforcement officer was the public prosecutor, elected by the Federal Assembly. The republics and provinces had corresponding officers, similarly elected and under the direction of the Federal Prosecutor[261].

However, the real turning point in the establishment of regular courts in the Federal Republic of Macedonia is represented by March 31st 1945, considered as the day of the establishment of the judiciary. In that day the ASNOM (the Anti-fascist Assembly for the National Liberation of Macedonia) adopted the Charter on the establishment of the judiciary - the most important legislative act by which the foundation of the judicial power was led[262]. The Charter contains provisions on almost every aspect of the courts which later on will be enshrined in the 1946 Constitution of the then People's Republic of Macedonia[263].

[260] 1946 Constitution
[261] *Op. cit.,* 245
[262] ASNOM was the supreme legislative and executive people's representative body in the Macedonian state until the end of the World War II
[263] The name of the country changed in 1963 when it became the Socialist Republic of Macedonia

The 1946 Constitution, in fact, contained a specific Chapter dedicated to the court's organization, regulating their position and relationship with the other branches of government, the rules of their organization and the court's activities. The Republic and Provinces however, were bound by the legislation adopted at Federal level. Thus, the 1953 change not only affected federal courts but also national ones. In 1953, in fact, the 1946 Constitution was amended. For what concerns the judiciary, only two provisions were adopted: according to the first provision, the federal judicial power is in the hands of the Federal Supreme Court and of the other Federal courts according to the Federal law[264]. The importance of this provision lies in the adoption of a constitutional provision which establishes a kind of independence of federal courts that, from that moment on, are no more part of the Federal National Assembly and its executive organ (this means that courts are now separated from the federal administrative bodies), even though still not fully independent.

The second provision regulates the appointment procedure of the Federal Supreme Court. The Federal Assembly, in joint session, chooses the members of the Supreme Court. This constitutional amendment did not change the chapter on courts from the 1946 Constitution but raised the need for new constitutional provisions in order to better regulate the position and the characteristics of courts. This was achieved with the new Law on Courts of 1954 which has constitutional status and substituted the previous chapter on courts. This new law states that in the FPRY the judicial power is in the hands of ordinary, economic and military courts. Economic courts were established in order to resolve disputes involving state economic enterprises[265]. The system of ordinary courts is composed of district courts, national supreme courts and the federal supreme court. For what concerns military and district courts, their organization and status are regulated by the national assemblies[266].

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[264] Constitutional law, 1953, Article 1 paragraph 2, available at http://www.arhivyu.gov.rs/active/sr-latin/home/glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/ustavni_zakon_1953.html

[265] Goldstajn A., *Reform of Economic Courts,* The American Journal Comparative Law, Vol 4, No 4, pp.600-603, 1955

[266] Радованов А., Стефановић Х., *Развој судског система,* Београд, 2011

Another important change was introduced with the new Constitution adopted by the Socialist Federal Republic of Yugoslavia of April 7th, 1963[267]. The new Constitution provides for the establishment of courts with general competences and special courts, namely the military and economic ones[268]. Moreover, it gives the possibility for the set of different kind of courts at the level of the Republics regulated by national law. These new provisions on courts are very significant because they widen the competences of the Republics in judicial matters; since until that moment the regulations of every aspect of courts could be made only at Federal level through federal legislations. While the general aspects are regulated by Federal legislation, every other aspect on courts not mentioned in it, falls within the competences of each Republic.

Going into details, article 136 of the 1963 Constitution states that, in performing their judicial role, courts are independent and decide on cases according to the Constitution and the law. However, the emphasis on the principle of judicial independence does not necessarily mean absolute independence. By the very fact that the courts judge according to the law, their action is intended to realize and protect the interests of the working class, since the whole legal and normative action express the will of the working class[269].

In order to further guarantee the judicial independence, the provision sets the rule according to which the judge is not accountable for its opinion provided within its judicial function, namely his decision is independent since based on a previous establishment of the facts concerning the case.

The 1974 Constitution of the SFRY goes even further: organization and jurisdiction of courts fully falls in the legislative competences of the single republics, meaning that the republics can decide also on the type of courts to establish in their national judicial system[270].

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[267] Constitution of the Socialist Federative Republic of Yugoslavia, April 7th, 1963

[268] Goldstajn A., *Reform of Economic Courts,* The American Journal Comparative Law, Vol 4, No 4, pp.600-603, 1955

[269] Радованов А., Стефановић Х., *Развој судског система,* Београд, 2011

[270] Constitution of the Socialist Federative Republic of Yugoslavia, February 21st, 1974

This entails that the Yugoslav Federation has no more a unique judicial system, in the organizational and functional sense, rather, each Republic and Autonomous Province has the proper Supreme Court.

However, there was not yet a parallelism between the Federal Court and the national courts yet, since the courts continued to implement all federal laws and provisions as well as the national ones. More precisely, the protection and the realization of unity, power, self-management, rights and equality before courts of the working class was still guaranteed according to the unique Federal procedural laws.

Under the one-party communist regime, the political influence on the judiciary was very strong, and characterized the entire history of the communist regime, especially with regard to adjudication of political cases[271]. Nevertheless, international observers have been optimistic on the country's development of the judiciary, considering it's growing self-confidence, the respect of constitutional norms and the elimination of arbitrary justice, in particular if compared to other Eastern European countries[272]. In practice, the judicial system has always remained as an instrument for the suppression of political dissidence, including ethno-political protests against the regime's policies[273]. The diminishing of the legitimacy and power of the Communist Party in the late 1980s did not mean however an end of the political interference in the justice administration[274]. The national judiciaries in this period became instruments in the hands of the emergent regional political elites for advancing their nationalist strategies[275].

In the light of the adoption of the new Constitution at Federal Level, Republics changed their provisions as well. For what concerns the Macedonian judicial system, the organizational structure changed, and different types of courts were established: Basic courts at the level of municipalities and courts representing

[271] Ćavoski M., *Tito-Technologija Vlasti*, Belgrade, 1991
[272] Cohen L., J., *Post-Federalism and Judicial Change in Yugoslavia: The Rise of Ethno-Political Justice,* International Political Science Review, Vol 3, No 3, 1992
[273] Cohen, *op. cit.,* 272
[274] Vasilijević V., *Ko sudi sudijama?* NIN, 1990
[275] Cohen, *op. cit.,* 272

areas comprising several municipalities, besides the Supreme Court of the Republic[276].

The Supreme Court is the highest court which assures the right application of the law by each court, thus operating for the harmonization of the judicial practices. It is also a court of appeal of second or third instance depending on the decision it is called to judge on.

Lastly, according to the first Constitution adopted after the dissolution of the Former Yugoslavia, the judicial functioning, in the newly established Republic of Macedonia, is performed by the Supreme Court, the Courts of Appeal and the Primary courts[277].

Courts are independent and impartial state organs and the judge, according to the Constitution, secures the application of the law and the protection of human rights and liberties.

The well-functioning of judicial power is hinged on the two fundamental values of a stable constitutional order that are the principle of the rule of law and the principle of the separation of powers.

The 1991 Constitution contains all those principles and regulates all the aspects necessary to assure the judicial independence, such as: the appointment procedure and the permanent term, the establishment of the judicial council as the self-governing body of the judiciary and so on. However, the attention to the judiciary and its independence was put only four years after the independence of Macedonia. More precisely, the first reforms on the judiciary are put in place in 1995 with the adoption of the Laws on Courts and of Courts[278].

However, reforms aimed at the implementation of the judicial independence will be analyzed in the following paragraphs.

[276] *Op. cit.,* 254
[277] Constitution of the Republic of North Macedonia, 1991
[278] Law on Courts, Official Gazette of Macedonia 36/1995, 1995

3.2 Rule of Law and Access to Justice in RNM

In this paragraph I will analyze the protection of the access to justice and of the rule of law in the RNM following the Rule of Law Checklist developed by the Council of Europe (Venice Commission)[279].

The RNM recognizes itself as a parliamentary democracy based on the principle of separation of the three branches of government, namely the Legislative, the Executive and the Judiciary. Since the independence, however, the weakness of the system of checks and balances among the branches of government emerged several times. This occurred due to the preponderant role of the government and the Prime Minister (in a parliamentary democracy) at the expense on the Parliament and the Judiciary. Moreover, the society has been characterized by political and party polarization[280].

In the last decade the country has even witnessed several institutional crises. Partisation was evident, as well as a high influence over the judiciary by the executive power[281].

From these issues, it became even more evident the overall absence of the rule of law and access to justice in the country. Their strengthening is of vital importance also in the light of the Macedonian accession to the European Union, which, as already mentioned, considers the rule of law as the most fundamental requirement for a country's adhesion as stated by the Copenhagen criteria (chapter 23 – Judiciary and Fundamental Rights and Chapter 24- Freedom, Justice and Security) and the Union's founding values as defined in article 2 TEU[282]. The European Union requires an independent and impartial judiciary, as well as a fair, transparent and participatory law-making process.

The concept of the rule of law has already been developed in the previous chapters, while here I would just like to remind the Council of Europe Report on the Rule of Law in which the different notions of the Rule of Law are reconciled,

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[279] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007
[280] *Op. cit.,* 78
[281] Marjan Madjovski, *Access to Justice in Macedonia and Some International Experiences*, MIT University 2019
[282] TEU article 2

together with that of Etat de droit and Rechtsstaat[283]. The Report's conclusion is that the notion of rule of law is complex and difficult to define as a concept, providing instead, a series of features characterizing it.

Here, however I would like to provide an overview of the fundamental elements of the rule of law in the RNM by following the fundamental elements of the notion provided by the Rule of Law Checklist adopted by the Venice Commission[284]. The checklist includes numerous indicators, which are divided into 5 categories, namely:

- Legality (Supremacy of the law; Compliance with the Law…)
- Legal certainty
- Prevention of abuse (misuse) of power
- Equality before law and non-discrimination
- Access to justice

3.2.1 Legality: the principle of legality entails that all legal acts have to be adopted in compliance with the law. It moreover requires the compliance of any legal act with any kind of higher law, according to the principle of hierarchy of legal acts. The formal legality entails the adoption by the competent state body, while the material legality entails the compliance of the lowest legal act with the higher legal act.

Formally, the principle of legality is enshrined in the RNM Constitution. According to article 51 In the Republic of Macedonia "laws shall be in accordance with the Constitution and all other regulations in accordance with the Constitution and law. Everyone is obliged to respect the Constitution and the laws"[285]. The Constitution is the highest legal document and all other legal acts should be adopted in compliance with its provisions.

Researchers finds out however, that even though this principle is largely respected and ensured, there is still a need of some improvements. In particular, the issue emerges evidently during the aforementioned period of political crisis, in which it became evident that the principle is not fully respected in practice.

[283] *See* Venice Commission Report on the Rule of Law CDL-AD (2011)003
[284] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007
[285] Constitution of the RNM, 1991

However, following the same political crisis and important legal precedents something arose which is considered to go beyond the Constitution's provisions. More precisely, in 2015 the main political parties in the country stipulated the so called Pržino Agreement with the mediation of the European Union[286]. The Assembly of the Republic and the President of the Republic adopted a Decree on the proclamation of the Law on Public Prosecution for Prosecution of Crimes related to the Contents of the Illegal Interception of Communication in 2015. According to article 106 of the Constitution the "Public Prosecutor's Office is a single and autonomous state body carrying out legal measures against persons who have committed criminal and other offences determined by law, it also performs other duties determined by law". However, there are no further legal obstacles to the newly established Special Prosecutor's Office.

For what concerns the timing of the adoption of regulation, it is regulated by article 52 of the Constitution: "laws and regulations are published before they come into force… in the Official Gazette of the Republic at most seven days after their adoption" and they come into force on the eighth day from the publication. The decisions of the proclamation of law are signed by the President of the Republic and the President of the Assembly. The supremacy of the Law is further guaranteed by article 79 of the Rules of Procedure of the Constitutional Courts which establishes that a CC decision on the annulment of a law or of a regulations produce legal effect from the day of its publication of the Official Gazette; and by article 80 of the same Rule of Procedure which states that "The execution of legality enforced individual acts passed on the basis of a law, regulation or other common act, which by a decision of the Court is revoked, cannot be allowed, nor implemented, and if the execution is being started, it will be canceled"[287].

Similarly, Constitutional provisions, laws and ratified international agreements bind the executive branch of power in that, the Government and the other organs

[286]Pržino Agreement, 2 June 2015,
available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_agreement.pdf

[287] Rules of Procedure of the Constitutional Court of the Republic of North Macedonia, 1992, available at http://ustavensud.mk/?page_id=5211&lang=en

of the executive branch shall perform their duties independently, but still in accordance with the Constitution and laws of the Republic of North Macedonia[288].

For what concerns the powers and the boundaries posed to the Constitutional Court, the Constitution does not provide any provision. They are thus regulated entirely by the Rules of Procedures of the Constitutional Court which will be analyzed the in following paragraph concerning the CC.

One of the more specific aspects of Legality is the Compliance with the law by Public authorities. In the Republic of North Macedonia, the competences of public authorities are enshrined in the Constitution, besides numerous provisions contained in special laws, regulation and so on. The main documents however are the Law on Government, the Law on the Assembly, the Law on Local Self-Government of the Republic of North Macedonia. The organ responsible for deciding in cases of conflict of competences, being it between the holders of the three branches of Government, or between them and institutions of the local self-governments, is the Constitutional Court[289].

It must be noted that several events occurred which put into question the respect of the principle of compliance of Public Authorities acts with the law or even with the Constitution. One of the recent examples is the Prespa Agreement between the RNM and Greece by which the dispute over the official name of Macedonia was settled. The Agreement however, has been highly criticized from different points of view. One of the critiques concerns the signing of the agreement only by the Minister of Foreign Affairs, an action considered as illegal and in contrast with the Constitutional provisions. The reason lies in article 119 of the Constitution which nominates the President of the Republic the state's organ with the power to sign international agreements in the name of the Republic[290]. It is nevertheless true that the same article presupposes special cases in which, when previously established by law, and international agreement can be signed by the Government (in this case Minister of Foreign Affairs).

[288] Law on Government of the Republic of North Macedonia, article 2, available at Law on Government of the Republic of North Macedonia, article 2
[289] Constitution of the Republic of North Macedonia, article 110
[290] Constitution of the RNM, article 119

Furthermore, the doubt on the constitutionality of the agreement is raised with regard the consultative referendum held with the purpose to involve the citizens in the decision on changing the name. The Constitutional Courts found the referendum question too much complex and confusing, in that, three separate question were posed to citizens, with the possibility of a unique answer[291]. The third reason regards one of the three question, namely, whether citizens supported NATO accession. Since NATO is considered as a military alliance, an obligatory referendum had to be held, as provided by the Constitution.

Within the context of separation of powers and check and balances, it is important to note the role of the political party in power on the Assembly work. Article 61 of the Constitution establishes the Assembly as the holder of the legislative power and representative of the citizens. Despite such constitutional provision, from the reality emerges the control of the ruling political party (through the executive) in the Assembly. This is also evident from article 68 of the Constitution which provides the Assembly with the power to adopts the Constitution, with the power to control the Government and other public institutions which are, at the same time, elected by the same Assembly[292].

3.2.2 Legal certainty: The second main characteristic for assessing the rule of law, provided by the Council of Europe's Checklist, is legal certainty within which several more specific features need to be analyzed. One of these is the accessibility of legislation, in particular we should determine if legislations are published before entering into force and if they are easily accessible. Moreover, the accessibility of court's decisions and the foreseeability of the laws are analyzed.

Wide range of provisions are present in the Macedonian legal order regulating these aspects. In particular, article 52 of the Constitution states that laws and other regulations have to be published in the Official Gazette before their entering into force (more precisely, no later than seven days from the day of the

[291] The question posed to the referendum was the following: Are you in favour of European Union and NATO membership by accepting the agreement between the Republic of Macedonia and the Republic of Greece?

[292] Constitution of the RNM, article 68

adoption)[293]. Moreover, citizens are enabled to follow the preparations of the draft laws in process of adoption through the Single National Electronic Registry of Regulations (ENER). ENER is a recently established electronic system on which there are notifications regarding the preparation of draft laws, draft ministerial laws, opinions, comments and so on[294].

For what concerns instead the accessibility of courts decisions, provisions can be found in the Rules of Procedures of Constitutional Court. Citizens have to be informed about the work of the CC through the mass media for public hearing; the CC, if retained necessary, can organize press conferences twice a year and it issues Bulletin and a Collection of decisions as a source of acquainting the public with its decision, professional opinions and attitudes[295].

Considering the different tools used to inform citizens on the preparation and adoption of laws and the different means through which the CC shares information regarding its work, it can be assessed that also a foreseeability of the laws is formally guaranteed in the country.

One of the most important aspects of the rule of law is, however, the stability of laws in a political order. The Venice Commission points out that a person's ability to plan the proper actions are affected by instability and inconsistency of laws[296]. In the case of RNM, several analyzes have revealed that since 2011 more than 60% of the legislation adopted with a short procedure[297]. This trend has serious consequences most importantly on the political stability, but also on the economic stability, as certainty of legislation is much likely to attract foreign investors.

A positive indicator however is provided by the principle of non-retroactivity of laws which is guaranteed by article 52 of the Constitution and several CC decisions on the same issue[298].

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[293] Constitution of the RNM, article 51. The publication is on the website of the Official Gazette, while citizens can request a hard copy

[294] https://ener.gov.mk/Default.aspx#

[295] Rules on Procedures of the Constitutional Court, article 84

[296] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007

[297] http://vistinomer.mk/sobraniski-trend-nad-60-otsto-od-zakonite-po-skratena-postapka-1/

[298] Constitution of the RNM, article 52

3.2.3 Prevention of abuse (misuse) of power: According to the Venice Commission, guarantees against an abuse discretionary use of power should be in place and it shall be controlled by the judiciary or other independent organ.
In our specific analysis, such guarantees are formally largely present. However, several reports show a lack of cooperation between the two most important institutions in this field, namely the State Commission for Prevention of Corruption and State Prosecutor Office. The consequences are that despite widely recognized high level of corruption, the number of prosecutions of public officials is very law. A very known example is that of the former Prime Minister who, in 2014 was sentenced for 2 years for abuse of power, but he has not been sanctioned.

3.2.4 Equality before law and non-discrimination. These two principles are among the strongholds of the international human rights doctrine. They are affirmed by several international and regional institutions and conventions, such as UN human rights instruments, for instance in article 2 and article 26 of the already mentioned ICCPR[299]. At European level, they are enshrined in the ECHR which in article 14 contains the prohibition of discrimination[300]. Furthermore, the ECHR issued the Protocol No. 12 adopted in 2000 as an anti-discrimination treaty of the Council of Europe which offers a wider protection to individuals because unlike article 14 of the Convention, the prohibition of discrimination is not limited only to rights enshrined in the Convention[301]. The practical limits of the protocol however derive from the fact that, until now only 20 member states have ratified it.
The prohibition of discrimination is also contained in article 18 of the TFEU which states that "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited"[302]. The limits of the provision are evident in that it prohibits discriminations only on the base of nationality and only within the scope of application of the Treaties. More general prohibition of

[299] ICCPR, article 2 and article 26
[300] ECHR, article 14
[301] Protocol 12
[302] TFEU, article 18

discrimination is contained in article 21 of the EU Charter on Fundamental Rights[303]. But also in this case, the practical limits emerge if we consider article 51 of the same convention which states that the fundamental rights of the charter are binding to MSs only in case of implementation of the EU law[304].

In the case of RNM, in article 8 the Constitution enumerates the fundamental rights and freedoms on which the constitutional order of the country is based[305]. The principle of equality is enshrined in the following article 9 in which it is stated that "Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law[306].

An important instrument at national level was the Law on Prevention and Protection against discrimination adopted in 2019 upon a request by the European Union as a precondition for the country's opening accession process[307]. The document is of a paramount importance for the ensuring protection of the marginalized communities in the country. According to article 2 the protection and prohibition of discrimination shall regard all natural and legal persons in their exercise of the rights and freedoms provided in the Constitution. Article 3 is wider and much more similar to the provisions provided at international level. Unfortunately, a step backward occurred recently, when the Commissioners for Protection against Discrimination (CPAD) challenged the constitutionality of the law before the Macedonian Constitutional court on the ground of the lack of the majority with which the law was passed (the law did not gain the majority required by article 75 of the Constitution, i.e. the President of the Parliament declared the law adopted by 55 votes instead of the 61 required). The Constitutional Court declared the law unconstitutional and adopted a decision annulling the law[308].

[303] EU Charter on Fundamental Rights, article 21
[304] Charter article 51
[305] Constitution of the RNM, article 8
[306] Constitution of the RNM, article 9
[307] Law on Prevention and Protection against Discrimination [Закон за спречување и заштита од дискриминација], Official Gazette of the Republic of North Macedonia, No. 101/2019
[308] Constitutional Court, Decision U.br.115/2019 [Одлука У.бр.115/2019],

3.2.5 Access to justice: The notion of access to justice has been deeply analyzed in the previous chapter. But, following the Council of Europe checklist, the elements within this category to be analyzed are the independence and impartiality of the judiciary and the access to justice and fair trial.

In the case of the RNM, the judiciary is the main institution facing heavy problems and, in particular, the respect of principle to fair trial before and independent and impartial tribunal has been highly criticized over the years, both at national and international level.

In particular, even though the right to a fair trial within a reasonable time is considered as one of the most important elements within a legal system, the Constitution of RNM does not mention it. The country however, is obliged to the respect of this principle since it is a part of the ECHR. The ratification of the Convention provided citizens, who perceive their proceedings to be too long, with the possibility to bring the proper claims before the ECtHR. In fact, the Court has found numerous violations of the abovementioned principle[309].

The Constitution however provides for a protection of citizens' rights in article 50 which states that "every citizen may invoke the protection of freedoms and rights determined by the Constitution before the regular courts, as well as before the Constitutional Court of Macedonia, through a procedure based upon the principles of priority and urgency"[310].

Yet, the right to a fair trial can be find in the Law on Courts of 2006, which in the second paragraph of article 6 states that "Everyone shall be entitled to just and public trial within a reasonable time before and independent and impartial tribunal"[311].

In order to assure the access to justice, there is the need to strengthen the public opinion on the judiciary, something that can be achieved only through the strengthening of its transparency and accountability.

This analysis highlights the presence of legal and institutional practices in place in RNM, but the process of implementation of the rule of law principles faced

[309] *Bocvarska v "The FYROM"*, No. 27865/02 ECtHR 2009; *Stoimenov v "FYROM"*, No. 17995/02 ECtHR 2007; *Mitrinovski v "FYROM"*, No. 6899/12 ECtHR 2015

[310] Constitution of the RNM, article 50

[311] Law on Courts, adopted in 2006, article 6

several challenges over the years. In particular, with the 2015 wiretapping scandal the weaknesses emerged. The event saw the intervention of the European Union, which called for a group of experts to analyze the situation in the country and to write a report on the issues that urged intervention. The expert group led by Reinhart Priebe adopted the so called Priebe Report in which it states that one of the biggest challenges in the country is the corruption; also considering the inability and even the unwillingness of the institutions to effectively resolve the problem[312]. Notwithstanding the presence of the Law on Prevention and Corruption and some progresses made, there is still inefficiency of the actions against high level corruption. The report points out also the necessity to adopt measures on the monitoring of the surveillance process since the major reason for the 2015 crisis was the interception of communication and the release of the tapes recorded[313]. Up until now, some development in order to assure democratic control of the surveillance have been made.

3.3 The judiciary and the Judicial Council

Within the constitutional system in North Macedonia, the judicial power is in the hands of independent courts, according to the principle of separation of power. The general principles of the judicial system in RNM are established by the supreme law of the state – the Constitution. The structure, organization and competences of the courts are regulated by the Law on Courts.

In particular, the Constitution dedicates article 98 to courts in which states that the "judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution"[314]. The constitution moreover establishes that the types, competences, establishment and abolition, as well as the organization and composition of the courts are regulated by a law which is adopted by a two-thirds majority of the total number of

[312] Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015
[313] 2015 Recommendations
[314] Constitution of RNM, article 98

Representatives[315]. This last provision is considered as a protection of the judiciary from external control.

The current Law on Courts has been adopted in 2006 (amended twice in 2008 and in 2010) and establishes that the judicial power is exercised by the Basic Courts, the Appellate Courts, the Administrative Court, the High Administrative Court and the Supreme Court of the Republic[316].

The Basic Courts are the courts of first instance and are established in the area of one or more municipalities. In the country there are 27 courts of first instance which judge on criminal matters, economic disputes, disputes with personal, familiar, working or other civil disputes.

The Appellate Courts are the courts of second instance and are established in the area of several Primary Courts. Within the country there are four courts of Appeal in the cities of Skopje, Bitola, Štip and Gostivar. They decide on cases in which there are compliants against the Basic Courts' judgments.

The Administrative courts is a relatively new type of court, since established only recently with the adoption of the New Law on Courts in 2006. The role of this type of court is to decide on the actions of the Public Administration and to decide on their legality. In particular, when a citizen is convinced that his or her right have been violated by any state organ or institution or when they find that such state body acted against the law, he or she can bring the claim before the Administrative court which have to decide in the case.

The Supreme Court is the highest court in North Macedonia. Its authority is over the whole territory of the country and its headquarters are in the capital city Skopje. It is a court of third and last instance, decides on claims against judgments of the Appellate Court. However, the mere existence of a court of third appeal, does not entail a direct access to it. In order to have such a possibility, there are several legal requirements that need to be met.

In RNM, formally, a legal framework containing guarantees of judicial independence is formally in place. As already mentioned, besides the general

[315] Constitution of RNM, article 98
[316] Law on Courts

provisions enshrined in the Constitution of the Republic, there is also the Law on Courts.

For what concern the selection and appointment procedure, it is regulated by articles from 41 to 50. As suggested by international instruments on the judicial independence, the selection and dismissal of judges and courts presidents are in the hands of an external and independent body, namely the Judicial Council[317].

The principles guaranteeing the judicial independence (analyzed in detail in the previous chapter) are also present in the Macedonian legal system. The independence of the judiciary is thus further strengthened through the ensuring of the security of tenure, according to article 99 of the Constitution which states that "a judge is elected without restriction of his/her term of office"[318]. The same article provides for the principle of irremovability: "a judge cannot be transferred against his/her will"[319].

Notwithstanding the present legal framework, in practice, political and party influence have practically jeopardized judicial independence. The politically and party coating of court decisions has become established practice since the country's independence. These practices have had a strong impact on the principle of appearance of independence, as it lowered the confidence of the citizens on the judiciary.

3.3.1 The Judicial Council

The Judicial Council was introduced in the Macedonian legal order in 2006 with the Law on the Judicial Council of the RNM in order to strengthen the judicial independence. The establishment of a Judicial Council as an independent body was strongly recommended by international institutions, namely the EU and the Council of Europe[320]. Formally, the Judicial Council is an independent body in

[317] Law on Courts, article 41
[318] Law on Courts, article 99
[319] Law on Courts, article 99
[320] European Commission for Democracy through Law – Venice Commission, Opinion on Draft Constitutional Amendments Concerning the Reform of the Judicial System in "The Former Yugoslav Republic of Macedonia", CDL-AD (2005)038, para 38-54

the judiciary, but in practice the political influence is still evident, and it is very often an object of the international organizations reports. It was also the case of the abovementioned Priebe Report in which the Judicial Council was mentioned several times in a negative context[321].

According to article 6 of the Law on Judicial Council, the Council is composed of 15 members including the President of the Supreme Court and the Minister of Justice. Eight members are chosen by judges among their ranks, three of which are selected among members of the ethnic communities that are not in majority in the country, respecting the principle of equitable representation of citizens belonging to all the communities[322]. Three members are elected by the Assembly of the RNM with a majority votes from the total number of representatives and two members are proposed by the President of the Republic of North Macedonia and elected by the Assembly of the RNM (one of whom should be a member of the communities that are not in majority in the country). Despite the formal provisions, the procedure of selection and dismissal of judges is considered to be the process mostly affected by external influence. With the attempt to resolve the issue, since 2015 - 6 amendments were adopted. However, the most important changes for what concern the selection and dismissal of judges were introduced only in 2018. The priority moreover, was put on the qualitative assessment of the judges, instead of the quantitative one previously adopted.

Furthermore, within the reforms of the Judicial Council, an emphasis was also put on the need of de-professionalization of the Judicial Council, recommended especially by non-governmental actors who however monitors the judiciary in RNM[323]. The principle was acknowledged and introduced in the Reform Strategy as part of the attempt to raise the responsiveness of the members of the Council and as part of its democratization.

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[321] The FYROM: Recommendations of the Senior Expert's Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, Brussels, 8 June 2015

[322] Law on the Judicial Council, article 6

[323] https://all4fairtrials.org.mk/?portfolio=%D1%81%D1%83%D0%B4%D1%81%D0%BA%D0%BE-%D0%B4%D0%BE%D1%81%D0%B8%D0%B5&lang=en

For what concern the efforts on the strengthening of the judicial independence, they will be analyzed in the paragraph related to the reforms adopted with regard the judiciary and the judicial council.

3.4 The Constitutional Court of the RNM

Constitutional justice in Macedonia has been working for more than forty years. Indeed, the Constitutional Court as an independent body, adjudicating the constitutionality of laws, was established already in 1963 in the Constitution of the Socialist Republic of Macedonia. The 1974 Macedonian Constitution also included the existence of the Constitutional Court, in an almost identical form as the aforementioned one. Only with the 1991 Constitution of the Republic of Macedonia, completed after its independence from the Yugoslav federation, a little change and a stricter regulation for the Constitutional Court were applied.
This decades-long tradition of development of the constitutional justice had positive influence on the authority and the work of the CC in assuring the principle of the rule of law, in the complex and unpredictable conditions of transition from a socialist society to a liberal-democratic one[324].
Regardless of the stage of development, the model followed by the Macedonian Constitutional justice is the Kelsenian one, namely the centralized model firstly established in Austria in 1920 and then adopted in most of European countries. As a matter of fact, the Constitutional Court in Macedonia was established as a result of several interconnected processes of deconcentration, decentralization and destatization, the process of transforming state-owned enterprises into private or mixed enterprises with partial ownership by the public sector[325].
Besides the common and basic points highlighted above, now we are going to analyze the different stages and processes of Macedonian constitutional justice development.
In the period between 1946 and 1963, the Macedonian method was the self-control of constitutionality, meaning that the control of constitutionality of laws

[324] Шариќ С., Силјановска Давкова Г., *Уставно право,* Култура, Скопје, 2009
[325] Op., cit., 324

belong to the legislature's power, namely the People's Assembly of People's Republic of Macedonia, which represented the popular sovereignty and was the highest state's organ[326]. The constitutional review was made during the process of adoption of a law with the aim to assure its conformity with the constitutional provisions. So, the review was ex-ante and internal, since the control was made by the legislative organ itself before the law come into force[327]. It is clear that a real and objective constitutional review was not in place in the considered period, as the control of constitutionality of a law cannot be made by the same organ that adopt the law.

However, some kind of external control was in place even if only at the level of the Yugoslav Federation (FPRY), which People's Republic of Macedonia was part of. In particular, according to the 1946 Constitution of the FPRY, the Committee of the Federal Assembly had the role of constitutional review of national laws with the Federal Constitution, with the necessary final evaluation of the Federal Assembly itself[328].

Nevertheless, it is wrong to consider this procedure as a real constitutional review of laws, because it is not pivoted on the principle of the rule of law. On the other hand, the object of this review was the relationship between the federation and its Member States, with the aim to maintain the federal balance as stated in the FPRY Constitution, preserving the Yugoslav community from the possible separatist tendencies of the then six Yugoslav republics.

This emerges also from the text of the Yugoslav Constitution of 1946 which does not mention any indication of any kind of constitutional review, neither for laws at federation level nor for those at the level of the single republics. In fact, in the period 1946-1963, the process of control of constitutionality had never take place, confirming the fact that it was made in order to protect the federal order of the Yugoslav community rather than the principle of constitutionality in case of its breaches by federal or national laws[329].

[326] Nikolic P., *Ustavno Pravo,* Beograd, 1991
[327] Op., cit. 62
[328] 1946 FDRY Constitution
[329] Op., cit., 62

A turning point is represented by the Constitution of the Socialist Republic of Macedonia, adopted in 1963, when Macedonia was still a federative unit of the Yugoslavian federation. The Constitutional Court, as an independent state organ began to work in February 15, 1964. Its position and competences were defined in the Constitution, while other aspects, such as the procedures or the legal effects of its decisions were regulated by the Law on Constitutional Court of Macedonia of 1963.

The constitutional review became centralized, in the hands of a separate organ, that is the Constitutional Court; and ex-post, which means that the control of constitutionality takes place after a law enters in force, and, in case of declaration of unconstitutionality, laws lose their legal effects after six months.

The 1963 Constitution attributed to the Macedonian CC the power to decide on: the conformity of national laws with the Constitution, the conformity of the Statutes of local communities with the Constitution, the conformity of the statutes of enterprises with laws and with the Constitution, on disputes on the competences between the republic and the local communities, and on disputes on the competences among courts on one side and the state's and community organs on the other side[330].

Moreover, the Constitutional Court must act for the protection of the right of self-government and the protection of human rights, enshrined in the Yugoslav Constitution on two condition: if the rights are violated by an act of a state organ and if there are no other remedies for that violation (subsidiary competence).

In case of a declaration of unconstitutionality of a law by the CC, the Assembly had to intervene within six months, otherwise the law loses effectiveness as a consequence of the CC decision. However, such a decision did not have the effect of repeal or annulment, which was still a prerogative of the legislative power as the highest organ of the State. Hence, this postponing mechanism represents a compromise decision because the law remains in force for another six months but without the force of law.

For what concern the CC, the 1974 Constitution of the Socialist Republic of Macedonia did not bring significant changes even if it is considered to be a

[330] Constitution of SRM 1963

document that largely regulates the position and the competences of the Constitutional Court. On the one hand, this new Constitution was a step forwards for the strengthening of the CC because it established the impossibility for the president and the six judges of the court to be reelected at the end of their eight years mandate[331].

On the contrary, it can be said that the 1974 Constitution took step backwards because it did not mention the protection of individual rights and the right of self-government and it introduced the possibility to extend the deadline for the declaration of unconstitutionality, keeping in this way the unconstitutional law for a whole year[332].

The 1991 Constitution declares that the newly independent Republic of Macedonia is based on the principle of the rule of law, human rights and freedoms, separation of power and other fundamental democratic values[333].

It is interesting to note that Macedonia, among the socialist countries, as well as among the other former Yugoslav Republics, is the first one who introduced a Constitutional Court as a separate "body of the republic protecting constitutionality and legality"[334]. It is nevertheless comprehensive that such organs could not play wholly their role, considering the one-party system of government. Large part of the aspects of constitutional justice are regulated by the Rules of Procedure of the Constitutional Court of the Republic passed on 7 October 1992, and not by the Constitution itself[335]. However, the Constitution of the Republic of Macedonia defines the base, composition, competence and legal effect of the Constitutional Court decisions.

As to the composition, The Court is composed by 9 judges including the President elected by the Court itself. The term of office of the judges is of nine years without a right of re-election, while the President is elected for three years without the possibility to hold the same position again[336].

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[331] Constitution of SRM 1974
[332] Constitution of SRM1974
[333] Constitution of Macedonia 1991
[334] Constitution 1991, article 108
[335] Rules of Procedure of the Constitutional Court of Macedonia, 1992
[336] Constitution 1991, article 109

The composition of judges is in the hands of the Parliament, the President of the Republic and the Judicial Council. However, all nine judges are elected by the Assembly and are chosen from the ranks of outstanding members of the legal profession[337]. The Constitutional Amendment XV 2001 introduces two different types of selection of judges: six out of the nine judges are appointed by the Assembly by absolute majority, while the other three are elected by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in the majority in the population of Macedonia.

According to the Constitution, the Constitutional Court is an independent organ both from the other branches of government and from the laws, because it can annul them if it declares them unconstitutional [338].

The independence of the CC is underpinned by the independence of the constitutional judges, namely the incompatibility of their role with the discharging of other public offices and professions, or with the membership of a political party, in order to guarantee professional and impartial performances (as for the Italian constitution)[339].

The judicial independence is furthermore guaranteed by the possibility to dismiss a judge before the end of his/her mandate only upon conditions established by the Constitution, namely: if the judge decides to resign, if he is sentenced for a criminal offence to unconditional imprisonment of a minimum six months, or if he/she loses permanently the capability to perform his or her functions[340].

Moreover, Constitutional judges enjoy immunity which is regulated by the Rules of procedure of the CC and decided by the CC, not by the Parliament as in Slovenia.

As to the competences, they are enumerated in article 110 of the Constitution. According to it, the Court has the power to decide on the conformity of the laws with the Constitution before their entering into force; to decide on the conformity

[337] Constitution 1991, article 109
[338] Constitution 1991, article 112
[339] Constitution 1991, article 111
[340] Constitution 1991, article 111

of other regulations and of collective agreements with the Constitution and with the laws[341].

Also the constitutional review, as already mentioned, is a prerogative of the Constitutional Court. However, differently from other countries, in Macedonia constitutional amendments are not subject to constitutional review since considered integral part of the Constitution itself, and International Agreements are ratified according to the constitutional recognition of the primacy of the international law above the national one.

In addition, the Court has the duty to protect individual rights and freedoms, reintroduced in 1991 after the period of break made by the 1974 Constitution. Indeed, article 51 of the Rules of Procedure of the CC states that any citizen considering an individual act or action has infringed his/her right or freedom, as provided in article 110 paragraph 3 of the Constitution, he/she may request protection by the Constitutional court within 2 months from the day of delivery of the final or legally enforced individual act, but not later than 5 years from the day of the undertaking[342]. This means that an individual may bring his claims before the Constitutional Court if any other tool of legal protection before ordinary courts is exhausted and respecting the deadline.

Furthermore, the Constitutional Court decides on competency conflicts between the legislative, executive and judicial powers, and arbiters in case of collision between one or more state organs (positive collision) or if state organs are considered incompetent to decide on a question (negative collision)[343].

Similarly, the Court decides also on competency conflicts between the bodies of the Republic and local self-government units, operating only as a *Tribunal des conflicts,* deciding merely which organ is competent on the question, without directly resolving the question itself. For instance, in 1994, the conflict between the President and the Ministry of Defense on the command of the Armed Forces was brought before the CC, which decided in favor of the President, as the Highest Commander of the Armed Forces of the country.

[341] Constitution 1991, article 110
[342] Rules of Procedure of the Constitutional Court, article 51
[343] Rules of Procedure of the Constitutional Court, article 62

The 1991 Constitution introduced also the possibility for the CC to decide on the accountability of the President of the Republic, who must be brought before the Court by the Parliament which should decide by 2/3 of votes of the total number of Representatives[344].

Anyway, the Macedonian CC does not decide on the accountability of the President and of the Members of the Government of the Republic (such as in Slovenia), neither on the ministerial accountability or that of the Prime Minister (such as in Austria, Germany and Italy). In fact, on the accountability of Ministers and of high state organs decide the ordinary courts upon citizens or public prosecutor's initiative.

The 1991 Constitution attributes to the CC even the competence of deciding on the conformity of programs and statutes of political parties and of citizen's associations with the constitution[345].

The Macedonian CC could only decide whether those statutes are adopted with respect to the constitutional provisions, but cannot, differently from the CC of Germany or Croatia, ban political parties which act unconstitutionally, expertise within the powers of ordinary courts.

The CC in Macedonia cannot decide on parliamentary or presidential elections (such as in Austria and in Germany), cannot decide on the procedural aspects of referenda nor on their outcome and finally, it is not competent on constitutional interpretation (such as in Germany)[346].

For what concern the initiative of the procedure, the 1991 constitution does contain any provision. It only states that it shall be regulate by an act of the Constitutional Court itself, hence, it is entirely regulated by the Rules of Procedure adopted in 1992.

The right to initiate a procedure before the CC is in the hands of any citizen of the Republic and in any legal entity, while the Court can start a procedure by its own initiative in case of constitutional review of laws or of other regulations[347].

In case of competency conflict, the case can be also brought upon initiative of

[344] Constitution 1991, article 110
[345] Constitution 1991, article 110
[346] Уставно право
[347] Rules of Procedure of the Constitutional Court, article 11, article 12 and article 13

any of the organs involved in the conflict or by anyone who retains that by accepting or refusing the competence cannot exercise his/her rights. Besides, as I already mentioned above, in case of questioning of the accountability of the President of the Republic, the initiative is started upon request of the Parliament, that must take the decision according to the majority of votes.

3.5 Reforms adopted in the period 2005-2019

The Republic of North Macedonia was identified as a potential candidate for EU membership in 2003 during the Thessaloniki European Council summit. The following year it become the first country in the region to sign the Stabilization and Association Agreement with the European Union[348]. The country applied for EU membership in 2004 and a year later it was granted the status of candidate country.

In order to become EU member, a country is required to respect the principles and conditions enshrined in article 49 and article 6(1) of the Treaty on European Union[349]. Moreover, during the European Council in Copenhagen in 1993, the EU developed a series of rules, namely the Copenhagen criteria in order to establish whether a country can be eligible to join the European Union. Those consist of political and economic criteria and legislative alignment, among which the first are the most important. In order to start the negotiation process, a country is required to assure a stable and democratic institutions, the rule of law, respect of human rights and protection and respect of minorities[350]. Moreover, during the negotiation process the progress toward meeting the criteria is constantly monitored.

The obstacles challenging the Macedonian accession has been numerous, both national and international. At international level, the name dispute with its neighborough Greece was in place since the independence of the country, with Greece opposing to recognize the country's name Macedonia. The dispute

[348] Stabilization and Association Agreement is a framework of relations between the EU and the Western Balkan countries establishing a free trade area and identifies political and economic objectives and encourages regional cooperation

[349] TEU

[350] Copenhagen criteria 1993

however has been solved only in 2018 when the two countries signed the Prespa Agreement. According to the agreement the country has been renamed the Republic of North Macedonia, new name that shall be used domestically, in a bilateral relation and in all regional and international organizations and institutions.

At domestic level instead, the country did not manage to assure a full respect of the rule of law. In particular a high level of corruption and organized crime has been difficult to eliminate due to the weak domestic institution. Particular attention however has been given to the judicial branch of power, which was found to be under strong party and political control. For this reason, since the initial stage of the negotiation process, the EU has always stressed the importance of adopting all the necessary reforms in order to strengthen the judicial independence.

The EU has provided for financial and technical aid as a support to the country in its efforts to strengthen democracy and the rule of law. One of the first one has been the installation by the European Agency for Reconstruction the IT system in the judiciary in order to accelerate the case management process. The judiciary was found to face difficulties to make the courts system functioning because of the heavy workload which caused high backlog cases. It was the first step undertaken in order to increase the independence of the judiciary and to raise the citizens' trust in the courts system.

RNM started the reform process soon after the Stabilization and Association Agreement by amending the Macedonian constitution.

The first important step in the reform of the rule of law was made in November 2004, when the Macedonian government adopted a Strategy and an Action Plan on Judicial Reform for the period 2004-2007, with the primary purpose to increase the judicial independence and efficiency[351]. The general goal was to build a "functional and efficient justice system based on European legal standards"[352]. The process of drafting the text of the Strategy was strongly supported by the EU which provided for law experts from other EU member

[351] Ministry of Justice of the RNM. Strategy on the Reform of the Judicial System. Skopje, November 2004

[352] Strategy

states to take part to the process which was monitored by the European Commission.

The reforms consisted in legislative, procedural and structural reforms covering the relationship between institutions and their internal organization and competences[353].

As a consequence, the first significant changes in the national legal order took place in 2005 with the adoption of eleven constitutional amendments[354]. Numerous laws regarding the judiciary were enacted simplifying judicial procedures and creating of new institutions, such as the new Administrative courts and the Academy for judges and Public Prosecutors[355].

The reforms were mainly adopted with the purpose to fully implement the recommendations by the European Union and the Council of Europe who strongly recommended a creation of an independent Judicial Council as an important institution in order to "strengthen the independence of the Judiciary as an institution and to insulate the Judiciary from political influence or interference"[356].

With this regard, the Judicial Council has been changed almost in all of its aspects, in order to be in line with European and international standards. Besides the change of its name from Republic Judicial Council to State Judicial Council, its role and powers were significantly increased. Furthermore, its composition and the appointment procedure of its members were reformed.

Differently from the past when the Judicial Council was regulated by constitutional provisions, in 2006 the Law on the Judicial Council was adopted[357]. Previously, the Judicial Council consisted of seven members elected by the Parliament from the ranks of outstanding members of the legal profession with a six-years term of office renewable only once[358]. The number of members

[353] Marko Kmezic, *Europeanization by Rule of Law implementation in Western Balkans*
[354] Amendmnet XX to XXX available at https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx
[355] Kmezic, *op. cit., 348*
[356] *See* Venice Commission opinion CDL AD (2005)038
[357] Law on the Judicial Council
[358] Constitution, article 104

however, was considered as not sufficient to secure the open mindedness and make decisions by evaluating them from different aspects.

The new Judicial Council is now composed of 15 members, eight of which are to be selected from among the judges, 3 are appointed by the Parliament and two by the President[359]. The President of the Supreme Court and the Minister for Justice are *ex officio* members. This amendment in particular has been welcomed both by the Council of Europe and the European Union. First of all, it was seen as an effort to depoliticize the process of appointment and dismissal of judges, even though the possibility of appointment of a number of members by the Parliament would provide it with a democratic legitimacy. Secondly, a judicial majority has been introduced[360]. Thirdly, a provision was introduced which guaranteed one member in the Judicial Council which is representative of the non-majority communities. Lastly, in order to minimize the influence of the executive, the Minister of Justice was member of the Judicial Council but without the voting right.

Moreover, the power and role of the Judicial Council was further strengthened with the Amendment XXIX which shifted the power to elect and dismiss judges from the Parliament to the Judicial Council. The Judicial Council was also given the right to appoint the Presidents of the courts, and to decide on the evaluation of judges, on their removal and immunity, and to appoint two members of the Constitutional Court. The Venice Commission, in its draft opinion considers such reforms as a fundamental in order to strengthen the judicial independence and an effort to avoid as much as possible the political influence on the judiciary[361].

Similarly, reforms on the State's Public Prosecutor were adopted. The Council of Public Prosecutors was adopted, with the role to intervene in the process of appointment, dismissal and determination of liability of public prosecutors, which significantly contributed to the independence of the judiciary.

[359] Law on Judicial Council

[360] Because of the lack of precise requirement of obligatory participation of judges as members, the act regulating the composition of the Council was considered as not in compliance with the Recommendation R(94)12 and the European Charter of the Statute of Judges 98/23

[361] *See* Venice Commission opinion CDL AD (2005)038

Amendment XXX to the Constitution provides for the election of the State's Public Prosecutor by the Assembly with a previous consent by the Council of Public Prosecutors, for a six-year mandate with the right to reelection. The jurisdiction, establishment, abolition, organization and the functioning of the Public Prosecutor's Office shall be regulated by a law adopted by a two-thirds majority vote of the total number of members of the Parliament. The position of the Public Prosecutor is incompatible with other public functions and with any political party membership. The position of the public prosecutor was further strengthened with in 2007 with the adoption in 2007 of the new Law on the Public Prosecutor's Office, which incorporated the Recommendations of the Venice Commission[362]. Moreover, the public prosecutor is provided a leading role in the investigative procedure in the fight against perpetration of crimes that are prosecuted *ex officio* with the 2010 Law on Criminal Procedure. Finally, the organization and the work of the Public Prosecutor's office were additionally implemented in 2020 with the adoption of the latest Law on the Public Prosecution. The new Law increases the responsibilities and the basis for accountability of the public prosecutor office, but at the same time it strengthens its independence in addressing concrete cases.

In support of the constitutional amendments of 2005, the year later numerous laws were adopted. The Law on Courts was adopted, introducing a fourth court of appeal[363]. The Law on Administrative Disputes[364] instead, established the Administrative Court on administrative disputes which previously have been a prerogative of the Supreme Court[365].

In 2006 moreover, the Law on the Academy for the Training of Judges and Prosecutors was adopted and established the Academy with the purpose to promote a merit-based career system for judges and prosecutors[366].

[362] See Venice Commission opinion CDL AD (2007) 011-e
[363] Law on Court. Official Gazette of the Republic of Macedonia 58/2006 (11.05.2006)
[364] Law on Administrative Disputes. Official Gazette of the Republic of Macedonia 62/2006
[365] With this regard, the EC Progress Report from 2006 finds out that during the same year, 80% of the cases brought before the Supreme Court were od administrative nature
[366] Law on Academy for the Training of Judges and Prosecutors. Official Gazette of the Republic of Macedonia 13/2006 and Law on Academy for the Training of Judges and Prosecutors. Official Gazette of the Republic of Macedonia 88/2010

Reforms were adopted also in the sphere of protection of human rights, once again in order to conform the national provisions with international standards and in order to implement EU and CoE recommendation. In particular, amendment XXI to the Constitution regarded the right to a fair trial in order to implement the Recommendation of the Committee of Ministers of the Council of Europe from May 2004 which stress the importance of the principle of subsidiarity established in the ECHR[367]. In fact, according to article 1 of the Convention, the primary responsibility for the protection of human rights provided by the Convention shall be at domestic level, while the ECtHR's role is that of surveillance over the actions undertaken nationally[368]. For this reason, a concrete and effective legal remedy have to present within the domestic legal framework, capable to provide citizens the tools to present their claims before the domestic competent authorities. Furthermore, an adequate protection of the right for deciding without undue delay was strongly recommended in the Venice Commission opinion[369].

The Amendment XXII to the Constitution was introduced in order to simplify the election procedure of the President of the Republic. The decision came from the need to implement the OSCE/ODIHR report on the presidential elections in 2004[370].

The subsequent significant changes occurred almost ten years later, in 2015. However, the draft amendments were discussed already the previous year and an opinion from the Venice Commission was requested. The Venice Commission adopted its draft opinion with regard the major reforms proposed by the Macedonian government[371]. The Commission acknowledged the efforts of the government to further strengthen the judicial independence by including the recommendations provided in its 2005 document.

The amendments regarded mainly the reform of the Law on the Judicial Council replacing the 2006 one. The main proposals consisted in the composition of the

[367] Recommendation of the Council of Europe 2004
[368] ECHR article 1
[369] *See* Venice Commission opinion CDL AD (2005)087
[370] OSCE/ODIHR Election Observation Mission Final Report ODIHR.GAL/53/04
[371] *See* Venice Commission opinion CDL AD (2014)026

Judicial Council. The President of the Supreme Court and the Minister for Justice are no longer members. The Council from now, include 10 members among judges – three of them have to represent the non-majority communities and the other five are elected by the Parliament. The term of office was also changed, in that the members of the Judicial council have no more the right to consecutive re-election. The number of members representatives of the non-majority communities in Macedonia was increased (by introducing a direct ethnic quota), an action justified as implementation of the 2001 Ohrid Framework Agreement (point 4.3 and 5.2)[372]. Even though the criteria for selecting State officials based on ethnicity may be seen as suspicious[373], it nonetheless has to be interpreted in the lights of the recent history of the country. In the case of Macedonia, it was seen as necessary to protect the non-majority communities and to help solve the hostilities after the 2001 events[374]. Furthermore, the provision can be considered as in line with the UN Basic Principles on the Independence on the Judiciary which in point 10 states that there should not exist any kind of discrimination in the appointment of judges, except the national requirement[375]. The provision moreover, is in line also with the European standards, in that, similar provision is enshrined in the European Charter on the statue for judges in article 2.1[376].

In its opinion, however, the Venice Commission recommends to better evaluate if this kind of mechanism – the direct ethnic quota – is adequate also in relations to members of the Judicial Council that are elected by the Parliament[377].

Another concern is related to the majority of members coming from the judiciary itself. The Venice Commission recommends to carefully establish the best balance between judges and members from other professions, in order to avoid corporatist management[378].

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[372] Ohrid Framework Agreement signed in 2001
[373] *See* Venice Commission opinion CDL AD (2014)008
[374] Insurgency in Macedonia when the ethnic Albanian Liberation Army attacked militant group attacked Macedonian security forces
[375] Un Basic Principles, article 10
[376] EU Charter on the statute for judges, article 2.1
[377] *See* Venice Commission opinion CDL AD (2014)026
[378] *See* Venice Commission opinion CDL AD (2014)026 and CDL AD (2013)034;

However, the aforementioned reforms have not been fully adopted. Following the 2014 parliamentary election, the center-right coalition gained 61 of the 123 seats in the Parliament. Subsequently, the opposition had contested the fairness of the election and boycotted the Parliament work. The ruling government, however, initiated the amendment process, despite the absence of the opposition in the Parliament. Several provisions were voted, but the process was not finalized because of the aforementioned political crisis began in January 2015 which reach its peak in the spring the same year.

The reforms voted were those on the Law on Courts and on the Law on the Judicial Council. Moreover, the Parliament adopted a new law establishing the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge (CDF) with the role to investigate on the disciplinary cases against judges – a role which was in the hands of the Judicial Council.

The procedure and the contexts in which the voting in the Parliament took place, were highly criticized. The adoption of the amendments without the opposition, considering their importance have been perceived as an attempt by the ruling majority to capture the newly created bodies and through them, to establish control over the judiciary.

Once again, the Venice Commission expressed its opinion with regard the amendments and found a lack of coherence between the constitutional proposals put forward in 2014 and the actual legislative amendments of 2015. A specific concern was expressed on the creation of the CDF considered as not necessary for better administration of the justice[379]. Thus, the 2017 law on the termination of the validity of the law on CDF can be considered as implementation of the Venice Commission 2015 opinion on its establishment.

As noted here, the major steps in reforming the judiciary took place with the 2006 amendment on the Law on Courts and with the adoption of the Law on the Judicial Council. Since then, however, the two documents were changed several times, with the Law on the Judicial Council latest update in 2019[380]. According

[379] *See* Venice Commission opinion CDL AD (2015)042

[380] https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-Sudskiot-sovet-na-Republika-Severna-Makedonija-22-05-2019.pdf

to this latest version, the President of the Supreme Court and Minister for Justice are again members of the Judicial Council[381]. The number of the members is still 15, eight of which are elected by judges, three are elected by the Parliament and two are nominated by the President of the Republic and then elected by the Parliament[382]. Those chosen among the judges have a six years term with the possibility to be re-elected after six years of their latest mandate. Differently, the members elected by the parliament, having the same term of office can be re-elected (without the need of "break") for another more term of office[383]. Moreover, the President of the Council is chosen from among those members elected by the Parliament with a two years term[384].

Since 2018, moreover, several other amendments to laws and new laws have been adopted. All of these measures are aimed at the raising the transparency of the appointment procedure of judges, to increase the qualitative criteria for election and to increase their accountability. The amendments relate to the Criminal Code, to the Law on Courts and to the Law on the Judicial Council, and to the adoption of the Law on the Public Prosecutor, among others.

Considering the status of candidate country within the EU, the Macedonian reforms and progresses have also been monitored by the European Union. The European Commission has published annual or multiannual reports on the implementations pursued and evaluated them positively. It nonetheless, showed its awareness of the continuous need of further implementations especially in the area of the rule of law, fundamental rights, strengthening of the democratic institutions and administration reform[385].

Considering the progresses achieved, the Commission recommended the Council to open accession negotiations with the Republic of North Macedonia[386].

[381] Law on the Judicial Council article 6
[382] Law on the Judicial Council article 6
[383] Law on the Judicial Council article 7
[384] Law on the Judicial Council article 8
[385] European Council conclusions 2018
[386] Communication from the Commission COM(2019)260 final

Conclusions

In this work, we analyzed the main characteristics of the rule of and the judicial independence, in order to show its importance in a democratic society.

The rule of law is the key element to assure protection of fundamental rights and to guarantee a free market economy, since guaranteeing stable institutions engenders predictability of law.

"The rule of law generates contestations especially when it has to be squared with democracy, the social or welfare state, fundamental rights, and even when it is appealed to outside the national State. At the same time, however, it is very often considered as a necessary premise for these objectives to be achieved"[387]. This is the reason why international organizations are concerned with its promotion worldwide.

The "rule of law is considered as one of the building blocks of democracies in modern society, which ensures that all people are treated equally before the law and that they can effectively participate in the decision-making process"[388]. It is based on the compliance with constitutional principles and the set of laws adopted. "Rule of law, as seen from the perspective of the constitutionalists, enshrines the principles of legality, which stipulates that all acts and procedures should be based and be in accordance with the constitution as the highest legal act in the state, and in accordance with the law, seen as a generic concept"[389].

It is considered as a key element to be achieved by a country willing to become a member of the European Union.

It emerges from our analysis that for what concern the formal elements of the rule of law and with regard to the independence of the judiciary, they are considered as in place. This is true if we look at the constitutional provisions and other laws adopted, especially after the reform process begun in 2005. It is nonetheless evident that, such legal framework is not enough to guarantee the full judicial independence and a political influence over the judiciary still

[387] Morlino L., Palombella G., *Rule of Law and Democracy*, Brill, 2010
[388] *The Rule of Law in Macedonia*, Konrad Adenauer-Stiftung, Center for Research and Policy Making, Skopje, 2018
[389] *Op. cit.,* 81

emerges. The efforts made by the Macedonian government show a step forward in the strengthening of the rule of law and the judicial independence. However, and as stressed several times in the CoE report, there is still need for further development.

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European Courts of Human Rights, *Alisic and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and the former Yugoslav Republic of Macedonia*, No. 60642/08, 2014

European Courts of Human Rights, *Morice v. France*, No. 29369/10, §73 ECtHR 2015

European Court of Human Rights, *Mitrinovski v "FYROM"*, No. 6899/12 ECtHR 2015

European Courts of Human Rights, *Baka v. Hungary*, No. 20261/12, ECtHR 2016

European Courts of Human Rights, *Denisov v Ukraine,* No. 76639/11, ECtHR 2018

SUMMARY

Introduction

One of the core elements of today's liberal democracies is the rule of law. In the words of Lord Bingham, the core of the principle is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts"[390]. Rule of law poses limits to the governmental action and individual behavior. It is also fundamental in the development of principles for the protection of human rights.

In this work the goal is to describe and analyze the principles of the rule of law, access to justice and judicial independence in the Republic of North Macedonia (RNM), in view of its future adhesion to the European Union.

Chapter 1
Rule of Principles and the Judiciary

Rule of law entails supremacy of law over governmental action and individual behavior. Government and people in governmental position are abided by the legal framework in exercising their power and cannot act in an arbitrarily or discretionarily manner on the basis of their own preferences or ideology. In case of illegal actions, government is accountable through those public norms. Rule of law is also about citizens, which are bound by laws at the same way as government is, even when those norms are in contrast with their personal interests.

The rule of law has been a fundamental principle of the organization of political societies since the ancient Greece, when philosophers such as Plato and Aristotle have discussed the importance of the supremacy of a law within a society. It is

[390] Lord Bingham, *The Rule of Law,* Cambridge Law Journal, 2007, Vol 66 No 1, 2007, pp. 67-85

linked to the rise of liberal democratic forms of government in the West[391]. **John Locke**, considered by many as the father of liberalism, in his *Two Treaties of Government* (1689), defines liberty as freedom from violence and restraint with well-established laws to guarantee them, putting the rule of law at the foundation of government[392]. The concept of individual liberties and the rule of law was further developed by **Montesquieu** in his *Spirit of Laws* (1748)[393]. His theories go further in that he insisted on the idea of separation of powers and, in particular, of the judicial power.

The idea behind it was existed already, but the term Rule of law became of popular usage since the Seventieth Century thanks to the work of the English professor Albert **Venn Dicey**. The analysis he provides in his *Introduction to the Study of the Laws of the Constitution (1885)* is the first important one on the rule of law and on its content within the liberal democratic system[394]. According to Dicey, three different interrelated elements have to coexist in order to guarantee the supremacy of the rule of law, namely: the supremacy of Law, equality before law and predominance of legal spirits[395].

Sixty years later, **Friedrich Hayek** recalls Dicey's contribution on the rule of law and individual liberties and equality. In *The Road to Serfdom* (1944) he identifies the rule of law as fundamental precondition to the liberty[396]. The rule of law, in this conception, promotes liberty by providing individuals with the knowledge of the legal framework within which they can freely act as they please.

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[391] Valcke A., *The Rule of Law: Its Origins and Meaning (A Short Guide for Practitioners),* Encyclopedia of Global Social Science Issues, ME Sharp publishing6

[392] Locke J., *Two Treaties of Government,* edited by Peter Laslett, Cambridge University Press, 1988

[393] Montesquieu, *The Spirit of the Laws,* edited by Cohler Anne M., Miller Basia C., Stone H., S., Cambridge University Press, 1989

[394] Dicey A., V., *Introduction to the Study of the Law of the Constitution,* Macmillan and Co., Limited, London, 1915

[395] Dicey, *op. cit.,* 5

[396] Hayek F., A., *The Road to Serfdom,* edited by Caldwell B., The University of Chicago Press, 2007

The same view on the rule of law belongs to **Lon Fuller**, a theorist from the Twentieth Century, who formulated the rule of law as "a moral good", "in that it enhances individual autonomy"[397].

Nowadays, further theoretical distinctions, have been made on the rule of law. We can distinguish between two major categories of theories; one which supports the formality of the rule of law, and the other which supports the substantivity of the rule of law[398].

On the one hand, the former subset concerns with the formal aspects of laws, that is their generality, predictability, publicity etc[399].

The approach is supported by a wide number of contemporary legal scholars, such as by **Joseph Raz** in his essay on *The Rule of Law and its Virtue* in *The Authority of Law* (1979)[400]. The author maintains that the rule of law is a neutral notion, which can be used as a tool to realize social goods, but contrary to what Fuller stated, it is not, necessarily a moral good.

On the other hand, numerous jurists underpin the substantive version recognizing the importance of all formal elements as part of the rule of law but going deeper. Applying substantive values to the rule of law implies also the distinction between good laws, able to provide a protection of individual rights, and bad laws that are not[401].

Ronald Dworkin theorizes 'a rule book conception of the rule of law' and a 'rights conception of the rule of law' as two different and contrasting characteristics of the rule of law[402].

Tom Bingham is one of the most important scholars of the substantive model. A rule of law cannot be seen merely as a doctrine, but it must be considered as a fundamental principle to be adopted in a society in order to reach fairness and

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[397] Tamanaha B., *The Rule of Law for Everyone*, Current Legal Problems, Vol. 55, Issue 1, 2002 pp. 97-122

[398] Silkenat J., R., Hickey J., E., Barenboim P., D., *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer International Publishing, Switzerland, 2014

[399] Tamanaha *op. cit., 9*

[400] Raz J., *The Authority of law: Essays on law and morality*, Clarendon Press, 1979

[401] Tamanaha Brian Z., *On the Rule of Law – History, Politics, Theory,* Cambridge University Press, 2004

[402] Dworkin R., *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, 1986

justice[403]. Respecting the rule of law implies an efficient government acting responsibly and able to guarantee freedom and peace.

Today, the rule of law has a universal validity and "it has been proclaimed as basic principle at universal and at regional level"[404].

The Council of Europe considers the rule of law as the basic element for democratic society and as a precondition for accession of new member States to the organization, as enshrined in the article 3 of the Statute of the Council of Europe[405]. The rule of law is also enshrined in the Preamble and the article 2 of the TEU, as well as in the Charter of Fundamental Rights, the rule of law is one of the core values on which the Union pivots[406].

Judicial independence is fundamental to ensure the rule of law in a country. Separation of powers and consequently judicial independence are essential pillars to a democratic society which aims, among other priorities, the protection of individual rights and freedoms. "There is no liberty, if the judiciary power be not separated from the legislative and executive"[407].

The first text on standards of judges was adopted by the UN General Assembly in 1985, the Basic Principles on the Independency of the judiciary[408]. This masterpiece's aim is not only the independence of the judiciary but also the safeguard of the right of everyone to a fair and public trial before an independent and impartial tribunal, according to the article 10 UDHR and to the article 14 of ICCPR[409].

At European Union level, there are no specific standards on the judiciary, but EU states relies upon principles developed by the Council of Europe. These principles and values can be found in the ECHR, in particular in the article 6

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[403] Bingham Tom, *The Rule of Law*, Penguin Books, 2011

[404] *See* Venice Commission Rule of Law Checklist CDL-AD (2016)007

[405] Statute of the Council of Europe, article 3

[406] Treaty on the European Union ("TEU"), adopted in Maastricht 7 February 1992, article 2

[407] Montesquieu, *op. cit.,* 4

[408] United Nations, Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

[409] United Nations, International Covenant on Civil and Political Rights ("ICCPR") Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with article 49

which provides that "everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law". At regional level, the Council of Europe, in its 2010 recommendation, considers the principle of independence of the judiciary as essential for the guarantee of the individual right to have access to a fair trial[410].

Chapter 2
The Design and The Practice of the Judiciary: The right of Access to Justice

"When a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights"[411]. Considering this definition, the access to justice itself takes the form of a fundamental right. A right which cannot realize itself alone, rather, on the contrary, it is a tool with the scope to recognize and protect other fundamental rights.

The notion of the access to justice as a fundamental individual right can be found since the adoption of the Universal Declaration of Human Rights in 1948[412]. At European level, the aforementioned principle is enshrined in the ECHR in article 3 and article 6[413], in the TEU in article 4 (3)[414], as well as in the Charter of Fundamental Rights of the European Union in article 47[415].

Our focus will be always on the Western Balkans, where, as mentioned above, the consolidation of the rule of law is the key challenge.

Besides Albania, Western Balkans countries are born from the dissolution of the former Yugoslav Republic. With the collapse of the communist regime, the new

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[410] Judges: independence, efficiency and responsibilities Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe

[411] Francioni F., *Access to Justice as a Human Right*, Vol. XVI/4, Oxford University Press, 2007

[412] United Nations Universal Declaration of Human Rights ("UDHR"), adopted by the General Assembly resolution 217 A in Paris on 10 December 1948

[413] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as amended by Protocols Nos. 11 and 14, 4 November 1950 entry into force 1953

[414] Treaty on the European Union ("TEU"), adopted in Maastricht 7 February 1992

[415] European Union, Charter of Fundamental Rights of the European Union ("EU Charter"), adopted in October 2012, 2012/C 326/02

countries experienced institutional crises with the adoption of new constitutions based on the democratic principles and the rule of law, but in which citizens saw their right to access to justice weakened.

Since its independence, the Republic of North Macedonia (RNM) formally recognizes its 1991 Constitution as the supreme law of the country, since it contains the basic principles guaranteeing the fundamental citizens' rights and freedoms, among which obviously the right to a fair trial[416]. All these principles are guaranteed by the presence of an independent and impartial.

The RNM submitted its EU membership application in 2004 with the commitment to adopt provisions reforming the national legal order[417]. The country is specifically requested to comply with the EU's standards by meeting the Copenhagen criteria that focuses primarily on the strengthening of the rule of law and the respect of human rights.

"One of the challenging tasks of the 21 Century is continuing the development of democracy"[418]. In the last three decades, an important role in this field has been played by the Commission of Democracy through Law, better known as the Venice Commission.

Its main role is the monitoring of the respect of democracy, of the rule of law and of human rights. The powers of the Commission are only advisory: "It cannot impose solutions, but it nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion"[419]. In 2011, Commission issued a report on the Rule of Law[420], while in 2016, the it published "Rule of Law Checklist". The aim is to provide a toll for assessing the Rule of Law in a given country through an objective, thorough, transparent and equal assessment[421]. It is also important to remind the 2010 report on the independence of the judicial system, based on the most European standards, with

[416] 1991 Constitution
[417] Decision 2004/239/EC, t
[418] Hoffman-Riem W., *The Venice Commission of the Council of Europe – Standards and Impact,* vol. 25 no.2, The European Journal of International Law
[419] Jowell J., *The Venice Commission: Disseminating Democracy through Law,* Public Law 2001
[420] See CDL-AD (2011)003rev
[421] *See* CDL-AD (2016)007-e

the aim to assess a country-specific legislation regulating the judiciary and the guarantees put in place to ensure its independent functioning[422].

The RNM well aware of the central role of the Venice Commission in the development of international standards and principles on the functioning of national judicial systems and has frequently requested its opinions on the constitutional amendments.

After the WWII and the collapse of the previous autocratic regimes, Constitutional Courts were introduced, with the role to watch over the democratic principles established in the new constitutions. The CCs role of reviewing hinges on the principle according to which the constitution is the supreme law of the country, so constitutional changes require a more complex procedures than modification of other norms.

Turning to the judicial independence, the guarantees necessary to it are analyzed. Guarantees of judicial independence are put in place since the initial phase of selection or recruitment procedure. The Venice Commission retains that the authority responsible for the selection of judges should be independent from the executive and the legislative powers, suggesting a creation of a Judicial Council[423]. Another important feature in the strengthening of the independence of the judiciary is the security of tenure which in turns, inevitably implies, in turn, the principle of irremovability of judges, enshrined in the European Charter[424]. Another important requirement for the independence of the judiciary is the appearance of independence[425]. Moreover, judicial training is considered as necessary for judicial independence and for "the goof quality and efficiency of the judicial system"[426].

[422] *See* CDL-AD (2010)004)
[423] CM/Rec (2010)12
[424] CM/Rec (2010)12
[425] *Morice v. France*, No. 29369/10, §73 ECtHR 2015, paragraph 73
[426] The Universal Charter of the Judge, adopted by the International Association of Judges in Taiwan, 17th November 1999 and updated in Santiago de Chile in 2017

Chapter 3

Case Study: The Judicial System in The Republic of North Macedonia (RNM)

Since 1944, Republic of North Macedonia has been part of the former Socialist Federal Republic of Yugoslavia. Thus, the evolution of the judicial system of the country need to be considered within the wider law framework at Federal level. This is due to the fact that the Federal Constitution provided for any laws on the establishment, role and organizations of courts, being at federal or local level. An important change, however, occurred with 1963 Constitution which widened the competences of the Republics in judicial matters, while the 1974 Constitution states that organization and jurisdiction of courts fully falls in the legislative competences of the single republics.

Under the one-party communist regime, however, the political influence on the judiciary was very strong, and characterized the entire history of the communist regime, especially with regard to adjudication of political cases[427].

According to the first Constitution adopted after the dissolution of the Former Yugoslavia, courts are independent and impartial state organs and the judge, according to the Constitution, secures the application of the law and the protection of human rights and liberties.

The RNM recognizes itself as a parliamentary democracy based on the principle of separation of the three branches of government. Since the independence, however, the weakness of the system of checks and balances among the branches of government emerged several times.

In the last decade the country has even witnessed several institutional crises. Partisation was evident, as well as a high influence over the judiciary by the executive power[428]. From these issues, it became even more evident the overall absence of the rule of law and access to justice in the country. Their strengthening is of vital importance also in the light of the Macedonian accession to the European Union.

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[427] Ćavoski M., *Tito-Technologija Vlasti*, Belgrade, 1991

[428] Marjan Madjovski, *Access to Justice in Macedonia and Some International Experiences*, MIT University 2019

Here, I provide an overview of the fundamental elements of the rule of law in the RNM by following the fundamental elements of the notion provided by the Rule of Law Checklist adopted by the Venice Commission[429].

The checklist includes numerous indicators, which are divided into 5 categories, namely:

- The principle of legality which is enshrined in article 51 In the Republic of Macedonia. Researchers finds out however, that even though this principle is largely respected and ensured, there is still a need of some improvements. In particular, the issue emerges evidently during the period of the 2015 political crisis.
- Legal certainty which is enshrined in article 52 of the Constitution. The Venice Commission points out that a person's ability to plan the proper actions are affected by instability and inconsistency of laws[430]. In the case of RNM, several analyzes have revealed that since 2011 more than 60% of the legislation adopted with a short procedure[431]. This trend has serious consequences most importantly on the political stability, but also on the economic stability, as certainty of legislation is much likely to attract foreign investors.
- Prevention of abuse (misuse) of power: In our specific analysis, such guarantees are formally largely present. However, several reports show a lack of cooperation between the two most important institutions in this field, namely the State Commission for Prevention of Corruption and State Prosecutor Office. The consequences are that despite widely recognized high level of corruption, the number of prosecutions of public officials is very law.
- Equality before law and non-discrimination: enshrined in article 9 of the Constitution. An important instrument at national level was the Law on Prevention and Protection against discrimination adopted in 2019 upon a request by the European Union as a precondition for the country's opening accession process[432]. Unfortunately, a step backward occurred recently, when the

[429] CDL-AD (2016)007
[430] CDL-AD (2016)007
[431] http://vistinomer.mk/sobraniski-trend-nad-60-otsto-od-zakonite-po-skratena-postapka-1/
[432] Law on Prevention and Protection against Discrimination [Закон за спречување и заштита од дискриминација], Official Gazette of the Republic of North Macedonia, No. 101/2019

Constitutional Court declared the law unconstitutional and adopted a decision annulling the law[433].

- Access to justice: In the case of the RNM, the judiciary is the main institution facing heavy problems and, in particular, the respect of principle to fair trial before and independent and impartial tribunal has been highly criticized over the years, both at national and international level.

Within the constitutional system in North Macedonia, the judicial power is in the hands of independent courts, according to the principle of separation of power. The general principles of the judicial system in RNM are established by the supreme law of the state – the Constitution. The structure, organization and competences of the courts are regulated by the Law on Courts.

Notwithstanding the present legal framework, in practice, political and party influence have practically jeopardized judicial independence. The politically and party coating of court decisions has become established practice since the country's independence. These practices have had a strong impact on the principle of appearance of independence, as it lowered the confidence of the citizens on the judiciary.

The Judicial Council was introduced in the Macedonian legal order in 2006 with the Law on the Judicial Council of the RNM in order to strengthen the judicial independence. The establishment of a Judicial Council as an independent body was strongly recommended by international institutions, namely the EU and the Council of Europe[434].

In order to start negotiation process with the European Union, the country was requested to adopt numerous reforms, regarding mainly the judiciary.

The first important step in the reform of the rule of law was made in November 2004, when the Macedonian government adopted a Strategy and an Action Plan on Judicial Reform for the period 2004-2007, with the primary purpose to increase the judicial independence and efficiency[435]. The general goal was to

[433] Constitutional Court, Decision U.br.115/2019 [Одлука У.бр.115/2019],

[434] European Commission for Democracy through Law – Venice Commission, Opinion on Draft Constitutional Amendments Concerning the Reform of the Judicial System in "The Former Yugoslav Republic of Macedonia", CDL-AD (2005)038, para 38-54

[435] Ministry of Justice of the RNM. Strategy on the Reform of the Judicial System. Skopje, November 2004

build a "functional and efficient justice system based on European legal standards"[436]. Differently from the past when the Judicial Council was regulated by constitutional provisions, in 2006 the Law on the Judicial Council was adopted[437]. The composition and the appointment procedure of the Judicial Council were reformed. It's role and independence were further strengthened with the Amendmnet XXIX which shifted the power to elect and dismiss judges from the parliament to the Judicial Council. The Judicial Council was also given the right to appoint the Presidents of the courts, and to decide on the evaluation of judges, on their removal and immunity, and to appoint two members of the Constitutional Court. The Venice Commission, in its draft opinion considers such reforms as a fundamental in order to strengthen the judicial independence and an effort to avoid as much as possible the political influence on the judiciary[438].

In 2006 moreover, the Law on the Academy for the Training of Judges and Prosecutors was adopted and established the Academy with the purpose to promote a merit-based career system for judges and prosecutors[439].

The subsequent significant changes occurred almost ten years later, in 2015. The Venice Commission adopted its draft opinion with regard the major reforms proposed by the Macedonian government[440]. The Commission acknowledged the efforts of the government to further strengthen the judicial independence by including the recommendations provided in its 2005 document. The amendments regarded mainly the reform of the Law on the Judicial Council replacing the 2006 one.

However, the aforementioned reforms have not been fully adopted. Following the 2014 parliamentary election, the center-right coalition gained 61 of the 123 seats in the Parliament. Subsequently, the opposition had contested the fairness of the election and boycotted the Parliament work. The ruling government,

[436] Strategy
[437] Law on the Judicial Council
[438] *See* Venice Commission opinion CDL AD (2005)038
[439] Law on Academy for the Training of Judges and Prosecutors. Official Gazette of the Republic of Macedonia 13/2006 and Law on Academy for the Training of Judges and Prosecutors. Official Gazette of the Republic of Macedonia 88/2010
[440] *See* Venice Commission opinion CDL AD (2014)026

however, initiated the amendment process, despite the absence of the opposition in the Parliament. Several provisions were voted, but the process was not finalized because of the aforementioned political crisis began in January 2015 which reach its peak in the spring the same year.

The procedure and the contexts in which the voting in the Parliament took place, were highly criticized. The adoption of the amendments without the opposition, considering their importance have been perceived as an attempt by the ruling majority to capture the newly created bodies and through them, to establish control over the judiciary. Since 2018, moreover, several other amendments to laws and new laws have been adopted. All of these measures are aimed at the raising the transparency of the appointment procedure of judges, to increase the qualitative criteria for election and to increase their accountability. The amendments relate to the Criminal Code, to the Law on Courts and to the Law on the Judicial Council, and to the adoption of the Law on the Public Prosecutor, among others.

Considering the status of candidate country within the EU, the Macedonian reforms and progresses have also been monitored by the European Union. The European Commission has published annual or multiannual reports on the implementations pursued and evaluated them positively. It nonetheless, showed its awareness of the continuous need of further implementations especially in the area of the rule of law, fundamental rights, strengthening of the democratic institutions and administration reform[441].

Considering the progresses achieved, the Commission recommended the Council to open accession negotiations with the Republic of North Macedonia[442].

Conclusions

In this work, we analyzed the main characteristics of the rule of and the judicial independence, in order to show its importance in a democratic society.

[441] European Council conclusions 2018
[442] Communication from the Commission COM(2019)260 final

The rule of law is the key element to assure protection of fundamental rights and to guarantee a free market economy, since guaranteeing stable institutions engenders predictability of law.

The "rule of law is considered as one of the building blocks of democracies in modern society, which ensures that all people are treated equally before the law and that they can effectively participate in the decision-making process"[443]. Moreover, it is considered as a key element to be achieved by a country willing to become a member of the European Union.

After analyzing the international standards on the rule of law, access to justice and judicial independence, this work provides a framework of the judicial system in the republic of North Macedonia and the reforms adopted in view of its accession to the EU. It emerges that the formal elements of the rule of law and with regard to the independence of the judiciary, they are considered as in place. This is true if we look at the constitutional provisions and other laws adopted, especially after the reform process begun in 2005. It is nonetheless evident that, such legal framework is not enough to guarantee the full judicial independence and a political influence over the judiciary still emerges. The efforts made by the Macedonian government show a step forward in the strengthening of the rule of law and the judicial independence. However, and as stressed several times in the CoE report, there is still need for further development.

[443] *The Rule of Law in Macedonia*, Konrad Adenauer-Stiftung, Center for Research and Policy Making, Skopje, 2018