

**MACEDONIA'S JUDICIAL REFORMS: A ROCKY PATH TOWARD
ACCOUNTABILITY AND INDEPENDENCE**

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INTRODUCTION

Facing the consequences of the prolonged transition process and accompanied by the turbulent events in the past two decades in the Balkans, Macedonia still wobbles toward efficient and independent judiciary. The need of fully functional judicial system is crucial for the country to continue its development. The reforms in the judicial system should consolidate the rule of law in the country and entrench the democracy. Tomas Carothers, a political scholar and vice president for studies at the Carnegie Endowment for International Peace, defines the rule of law “as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.”¹ In his view, “they enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half century. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence and manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.”²

Establishing the rule of law, for Macedonia is not just part of the process of successful transition, but as a candidate for full membership in the European Union is a crucial requirement for the country to fulfill the political criteria. However the path toward the rule of law leads through successful reforms of the judiciary. Therefore, the reforms of the judicial system in Macedonia are, by no accident, a crucial requirement for the start of the accession negotiations with the European Union (EU). In a group with seven other benchmarks the EU delivered a list of musts for the judicial system. However, Macedonia badly failed on the assessment from the European Commission. Although the progress report in 2008 stated that the country has progressed in adopting new legislation and changes in the judicial system, yet it concluded that the judicial branch is not independent and efficient.³ Even worse the report pointed to direct involvement of the executive branch of power in the work of the judicial branch. The recent 2009 progress report of the European Commission on Enlargement states that despite the reported progress “continued efforts are needed to ensure the independence and impartiality of the judiciary, in particular through the implementation of the provisions regarding appointments and promotions.”⁴

¹ Thomas Carothers. Chapter 1: The Rule of Law Revival. *Promoting the Rule of Law Abroad: In Search of Knowledge*. Pg 1 <http://www.carnegieendowment.org/files/CarothersChapter11.pdf>

² Carothers 1

³ Комисија на Европските заедници. *Извештај за напредокот на Република Македонија 2008*. 05 Нов. 2008. <http://www.sep.gov.mk/Default.aspx?ContentID=36&ControlID=IzvestaiEU.aspx>

⁴ European Commission. Country Progress Report 2009. Pg 14 http://ec.europa.eu/enlargement/pdf/key_documents/2009/mk_rapport_2009_en.pdf

ASPECTS OF JUDICIAL REFORM – THEORETICAL BACKGROUND

Before going into the discussion about the stage of the judicial reforms in Macedonia, the theoretical background should give better perspective to understand the overall reform process. Thomas Carothers, stated that the rule of law promises to move countries beyond the first, relatively easy phase of political and economic liberalization to a deeper level of reform.⁵ According to him in the core, the rule of law is building an accountable judicial system that will ensure the application of laws and provide an institution where citizens would channel their problems. The lack of efficient judicial system hinders the development of the country. Foreign investors avoid the country, the protection of property is blurring, and citizens lose their faith in the system and thus are reluctant to take active role in the democratic debate. As a consequence, and opposed to Carothers claims the country is unable to conduct deeper reforms. According to Blair and Hansen, the core of judicial reform consists of measures to strengthen the judicial branch of government and such related entities as the public prosecutor and public defender offices, bar associations and law schools.⁶ In this respect these reforms should guarantee the independence of the judicial branch, accelerate the processing of cases and allow wider access to dispute resolution mechanisms. However Anderson and Gray state that the principle issue is not ensuring greater judicial independence (although de jure might exist, but de facto may not), but to ensure judicial accountability, given the newfound independence.⁷

To achieve such successful conversion from a system that was heavily under the control of government during communist period, deep and sincere reforms are necessity. Carothers states that there are three types of reforms of the judicial system; each with a different set of challenges. As reforms move deeper and deeper to root the rule of law, they become more difficult and painful for the country. At some point the success of the reforms depends on the existence of a wide consensus in the society, especially among the government and those who practice the law. Such classification of the reforms could give an framework to cluster the reforms in a transitioning country such as Macedonia and create clear map where the country stands on its way to successful completion of the reform process.

The first type of reforms concentrates on the revision of the laws that weed out antiquated provisions.⁸ The purpose of these reforms is to overthrow legal procedures that might pose obstacle in the system, and create a solid legal foundation that will guarantee the independence of courts and protection of citizens' rights. The first type of reforms are the easiest part of the reform process mainly because transition governments are excellent in declarative actions, but weak in implementation of the undertaken commitments. However, the other two types of reforms are much more challenging.

The second type of reforms is building institutional capacity.⁹ In this phase of the reform process the focus is on the law related institutions, like courts, penitentiary system, public prosecutors, defenders and etc. The goal is to create independent, but yet accountable institutions that will be efficient, competent and impartial. This set of reforms includes many mechanisms like new salary system for judges, new technology, ethic codes, trainings, setting out standards for lawyers, judges etc. The most important component of this type of reforms is also successful establishment of a functional human resources management that will be able to attract most suitable candidates, offer to them rewarding positions and successfully escape the trap of human capital policy based on political and kinship relations. Without such human resources management it is impossible to imagine efficacious system that will hold accountable those within the system.

While the first two types are more technical and include restructuring of the system itself, the third type of reforms refers more on the behavioral change of the actors within the government. These reforms, and probably the most vital. They are the key to genuine independence of the judicial system.¹⁰ The third type of reforms aims to create environment where the government (all three branches) will increase its compliance with the law. Government officials should stay away from interfering in the work of the judiciary. This reform is the most challenging, but also crucial for the success of all other reforms. All three types of reforms should induce the driving impulses of a judiciary that complies with highest democratic standards.

Considering the above reform framework of the judicial system, having in mind/starting from the standpoint that the reforms of the judicial system proved difficult in transitioning countries, the rest of this paper assess and comments the progress in the judicial reforms in Macedonia. The paper is focused on assessing Macedonian judiciary attentiveness to comply EU standards. The 2009 progress report recommended start of accession negotiations, but the question that remains is whether the overall positive assessment refers that Macedonia succeeded to reform its judicial system. The paper considers the different events during in the past couple of years that affected the judicial branch of government.

MACEDONIA – GENERAL OVERVIEW OF REFORM

On August 1st, Mr. Manevski the minister of justice in the Macedonian government stated that the new statistics for the performance of the courts indicate on a substantial progress in the reforms of the judiciary in Macedonia.¹¹ These reforms re-shape the image of slow court procedures in Macedonia. According to his statement, in the period of 2006-2009 the civil procedures declined for 32%, criminal proceedings for 21.7% and the criminal processes for 26%. According to the head of the Ministry of Justice in the three year period the government has adopted 100 new laws that strengthened the independence of the judicial system and made the judicial institutions compatibility with the European legislation.

⁹ Carothers 7

¹⁰ Carothers 7

¹¹ Маневски – напредок на поле на ажурноста на македонското судство. Сител 01/08/2009 http://www.time.mk/story_7624685355.html

Contrary to the statement of the Minister of Justice, the Head of the Mission of the EU Commission in Skopje, Mr. Ervan Fuere the reforms in the judiciary are lagging behind. In a statement for Radio Free Europe, the ambassador stated that the reforms in this branch have not reached the desired level.¹²

The discrepancy in the conclusions of the Minister of Justice and the EU ambassador in Macedonia raise many questions regarding the success of the reform process. The claims of the Minister that the number of cases declined are true because most of reforms restructured the judiciary into more efficient manner. The government has passed new legislation that harmonized the laws with those of the European Union. In addition investments in technology, infrastructure, trainings, new compensation plans has been adopted and conducted. The net result of these reforms has indicated decline in the time needed for a court to process a case. New alternative ways of dispute resolution like mediation has emerged.

However, despite all these reforms still the judiciary cannot escape the shadow of political influence, corruption and kinship ties. Polls show that the average citizen in Macedonia has no trust in the judicial system and consider it as corrupted.¹³ In reality the adoption of new legislation might have accelerated the procedures in courtrooms and produced the current results, but still one aspect of justice has not been tackled by the reforms: quality of justice. The lack of real implementation of the laws is the real inhibitor of the independence and impartiality of the system. Even further some of the reforms, according to a research story published in Dnevnik, became new source of political influence and corruption.¹⁴

Observing the state of the Macedonian judiciary one could recognize two problematic dimensions that are serious obstacle to the impartial and independent judicial system. The line between these two dimensions is blurry and in some point/certain points the one dimension reinforces the other.

The *first dimension* goes in line with the separation of powers. The separation of powers is crucial concept in a democratic society. This concept assumes that each branch will work independently from the other and each will observe the work of the other in a system of check and balances. The Macedonian judiciary preserved the main characteristic from the former communist system and continued to exist in an environment where the executive branch often directly or indirectly influences and exercises pressure on courts. Although the existing laws guarantee the independence of the courts from the interference of other branches of government, in practice the political elites abuse their positions to use the judiciary as an extended apparatus to support their governing of the country. Many examples in the further text will reveal this negative perspective of the Macedonian courts.

¹² Zoran Gadjevski. (Не)Исполнети Реформи. Radio Free Europe. 26/06/2009
<http://www.makdenes.org/content/article/1764952.html>

¹³ Сашо Клековски, Александар Кржаловски, Сунчица Саздовска, Гонце Јаковлеска. Довербата во граѓанското општество 2008. Македонски центар за меѓународна соработка. Декември 2008

¹⁴ Natali N. Sotirovska. Судството слепо за бенчмаркот. Dnevnik 2009.
<http://www.dnevnik.com.mk/?ItemID=27652006B5F3374DAB4B213039CA328A>

The *second dimension* goes beyond the political influences and pressures and looks back within the

resolution: mediation and private execution. The Ministry also decided to lower the court taxes. Such decision is expected to grant wider access of citizens to courts; however it is a measure that might also lead to increasing the number of cases in courts.

On August 5th 2009 the Government published a statement for its activities in the past year. According to this, 15 new laws that refer to the judicial system have been passed or are in a procedure to be passed. A new law on Court Service, Law for Lobbying, Law for Management of Confiscated Property, Law for the Public Defender, Law on Conflict of Jurisdictions, Law on the Financing of Political Parties and etc.¹⁶ The expectations of the Law for Management of Confiscated Property are that the police will be able to freeze property that was acquired through criminal activities. The new law should strengthen the fight against organized crime.

In respect to harmonization of the existing laws with the European legislation the country is showing significant progress. As it is expected in a country where transition is lasting almost two decades, the first type of reforms in the judicial system go smoothly and are almost finished.

According to the country report published by Freedom House the independence and efficiency of the judiciary is a challenge in Macedonia, as the opposition and the government cannot reach consensus on the implementation of the reforms.¹⁷ Implementation of the newly adopted laws is not a problem only in the reforms of the judicial system, but a general problem in every aspect of the functioning of the public and state administration. In this respect the lack of institutional capacity of the Ministry of Justice effectively to implement the adopted legislation is evident. The reasons of lack of institutional capacity might be due to the lack of willingness, suitable organizational knowledge of simply because it is against the interest of certain groups or individuals. Several events discussed below indicated that still the political influence affects the efficiency of the courts.

Second Type of reforms: Strengthening Macedonia's Institutions

As presented earlier in this report, the second type of reforms is building institutional capacity. In this phase of the reform process the focus is on the law related institutions, like courts, penitentiary system, public prosecutors, defenders and etc. In the months following the 2008 progress report Macedonia continued with the reforms in the judicial system. Nine new institutions have been set to ensure more efficient judicial process. A new Court of Appeals has started to function in Gostivar; new specialized Public Prosecutor was created to deal with corruption and organized crime and a new Administrative Court has been established as well. In the following period the Academy for Judges and Prosecutors has continued to work and ten graduates from the academy have been appointed for public prosecutors. The delegation of the European Commission (EC) in Skopje is satisfied of the work of the Academy as stated Mr Patrick Paquet, the Head of Political Section within EC Delegation in Skopje.¹⁸ The modernization process of the courts continued and reconstruction of the courts' buildings and equipping the courts has been finished in Prilep, Tetovo, Veles, Strumica and Ohrid. This project was conducted with the help of World Bank.

¹⁶ Government of the Republic of Macedonia. Отчет од работењето на Владата на РМ во период од една година – дел од поважните проекти. Dnevnik 05/08/2009

¹⁷ Freedom House – Country Report 2008. <http://www.freedomhouse.org/template.cfm?page=47&nit=460&year=2008>

¹⁸ Interview with Mr. Patrick Paquet. Please see Notes

For restructuring the processes a new law on public prosecutors has been passed in end of 2007. The changes in this law strengthened the role of the public prosecutor in the criminal investigation process. Now the public prosecutors are responsible for the conduct of evidences and they have extended overview of the work of the police, as opposed to the old system when investigation judge conducted evidences.¹⁹ The new law led toward the creation of a primary public prosecutor office with the duties to investigate criminal activities and corruption and a higher public prosecutor office in Gostivar. A new Council of Prosecutors has been established to guarantee the independent work of the prosecution.

Recently a new State Judicial Council was established with the purpose to appoint and discharge judges and oversee the work of the judicial system in Macedonia. The idea behind was to create a body that will hold accountable judges to perform their duties in good faith. However, this proved inefficient in practice. In November 2008 the analysis showed that there are 10,500 cases stuck in the system and some of these cases are decades old. The Minister of Justice a month ago stated that all judges that have old cases will face penalties.²⁰ The Chief Justice of the Judicial Council opposed to the intentions of the minister and stated that only the Council can penalize judges. The net result was that no judge faced penalty and that the Council concluded that the judges perform their duties in a good faith. As earlier discussed by Anderson and Grey, such developments indicate that the Macedonian judiciary besides the issues with its independence, still lacks of practical application of a system that will hold accountable judges, prosecutors and etc.

Mr. Paquet, the Head of Political Section within EC Delegation in Skopje, states that all these reforms are recent and recently entered into force, like the full-functional Judicial Council and the new Law on Prosecutors. According to him the results produced by these reforms would come in the next couple of years. In his view, sometimes on the beginning of the reforms it is usual peopley, such dev7s47 7

However, according to a World Bank study, training judges, improving management systems, supplying computers and other resources to the judiciary has little impact in countries where a consensus for judicial reform is lacking.²¹ Before such institutional strengthening of the judicial system there is a need of wide support of the reforms by all political structures, the civil sector and citizens. In order the institutional strengthening to produce the required results certain pre-conditions should be met, like independence of the courts and mechanisms that will evaluate the work of judges and other involved in the process, anti-corruption measures etc. In the view of Mr. Paquet the heads of institutions need to push the change.

Third Type of Reforms: The Painful Reality

As mentioned in the theoretical background presented earlier, the last and most important type of reforms refer neither to structural changes nor creating new laws, but to the moral and ethical behavior of those who hold office. This set of reforms (type three reforms) simply requires from government officials to abide the laws, to be held accountable for their actions and refrain from direct influence of government on the judicial branch. This stage of reforms requires all institutions to implement the laws. The only way to guarantee the independence and impartiality of the judiciary is actually to obey all regulations that have been passed with the purpose to guarantee the independence. No law on State Judicial Council or law on Election of Judges or any other piece of legislation can entrench the independence of the judicial system if those who proposed the laws are those who circumvent the laws. Independence and impartiality is the part that Macedonia fails to secure in its own courts. Thus, justice is obstructed and all other reform efforts are nullified. Truly consolidated democracy can be recognized by the culture of the structures of power in a state, which refrain in their attempts to influence the judicial system. Several events in recent period indicate government's interfering in court's matters. Some of these events negatively affected the 2009 Country Progress Report to which the Macedonian public pledged so many hopes that it will contain the desired recommendation for a start of accession negotiations.

The establishment of a judicial council that independently elects judges was a crucial reform in the court system in Macedonia and a huge step toward independence. However, Transparency Macedonia, local NGO focused on corruption in its monthly report noted that the government violated Article 64 of the Law on Judicial Council. According to their report "the Government reviewed the 2008 Annual Report of Judicial Council activities at a session held on 25 April 2009, while the issuing Opinion adopted at the meeting was dully sent to the President of the Assembly of the Republic of Macedonia."²² According to the existing law, the Assembly not the Government is the one that reviews the Annual Report of the Judicial Council and adopts opinion. In such case the Government has exercised indirect influence pressure to the Judicial Council abusing the overwhelming majority that enjoys it in the Assembly.

²¹ Richard E. Messick. Judicial Reform and Economic Development: A Survey of the Issues. The World Bank research Observer vol.14 no.1 (February 1999). Pg 124

²² May 2009: Monthly Report On The State of Corruption and Crime and the State of Transparency in Society. Transparency Macedonia Jun 2009. http://www.transparentmost-mk.org.mk/wp-content/uploads/microsoft-word-may-2009_eng.pdf

The decision of the Prime Minister of Macedonia to call the president of the Appeal Court Mr. Jor-

dressed, however Macedonia's judiciary is in a transitioning period and usually the EC holds the government accountable for the progress.

CONCLUSION AND RECOMMENDATIONS

From the discussion presented above the overall conclusion contains bitter-sweet remarks for the judicial reforms in Macedonia. The country successfully progressed in the first two types of reforms and invested a lot in structural changes and adoption of new legislation. However, there are three deficiencies of the reforms. First, the judicial branch of government still is under tremendous political influence and still faces severe corruption. Such circumstances affect the efficiency of the system, depreciate the effect of the reforms, cause decline of the quality of justice and create negative perception for the judicial system among citizens. The second problematic part is the absence of efficient human resources system that will select, discharge and penalize judges, prosecutors, defenders and etc. on a merit base. As direct consequence of the previous two, the third deficiency is that besides failing to produce full independence, the reforms fail to hold accountable those who work in the system. Thus, although with positive progress report in 2009 and recommendation for start of negotiations, it is more evident that the judicial reforms still lag behind to produce the desired results. The reforms continue, but the judicial system is still inefficient and not fully independent. As a consequence the inefficient judicial system together with the public administration reform is pillar factor in inhibiting progress in most aspects. It is tempting, but immature, to see judiciary reforms as a necessity that is needed to buy Macedonia a ticket to the EU. These reforms are first and foremost necessity for the citizens in the country in order democratically proclaimed governments to provide actual democratic environment where citizens' rights and liberties are practically protected.

Thus, the first recommendation to those involved in the reform process is to acknowledge the need of wide consensus for the reforms and promote public debate where everyone would be able to take part in the process.

The Government must immediately prepare and pass suitable legislation that will give legal framework on the selection, compensation and etc. of civil servants. This should give the structure of a human capital management system that will be primarily focused on merit base. De-politicizing of the courts' servants (as well the overall public administration) is vital, otherwise hardly any other reform will produce the desired outcome.

The Government has the obligation to refrain from any direct and indirect interference in the matters of the judicial branch of government. Officials should try not to cross on the other line of the law. However in this respect the whole civil sector has the responsibility to pressure and held accountable any official who will try to interfere in the work of the judiciary.

A new changes in the legislation that will ensure that only judges who graduated from the Academy for Judges and Prosecutors can be become judges and prosecutors. The new legislation should disable the Judicial Council to select candidates; the Council should just appoint those who passed enrollment, examinations and training at the Academy. The existing plan to wait until 2012 until such selection of judges enter into practice might prove inefficient for the judiciary.

Notes:

Mr. Patrick Paquet, the Head of Political Section within EC Delegation in Skopje, Macedonia for the purposes of the preparation of this report gave interview on a meeting with the team from Analytica on the 27.08.2009.

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