

IMPROVING CHECK AND BALANCES IN REPUBLIC OF MACEDONIA:

JUDICIAL CONTROL OF EXECUTIVE*

SUMMARY AND RECOMMENDATIONS

1. Vision

Our vision is to have a functioning democratic system of checks and balances in Republic of Macedonia. To reach that, one of the goals is to have an independent judiciary that is able to exercise full control over the executive. The objective is to have judges and prosecutors that are able to hold politicians accountable for individual actions in a court of law. To achieve this objective it is needed to empower the judiciary, and to improve the independence, accountability and quality of justice.

2. Analysis

The analysis of the laws, institutions and reform processes showed that comprehensive reforms of the judiciary unfolded after 2005 and intensified in 2009. The much needed reforms created a Judicial and Prosecutor's Councils to improve the independence and accountability of judges. An Academy for training of judges and prosecutors was established and various IT tools were introduced. The backlog of cases decreased and there were improvements in terms of capacities and procedures.

However, results from 36 semi-structured expert interviews conducted during the months of December 2015 and January 2016, show that the political control of judiciary remains a serious problem. The political interference of the executive, which has surged in recent years, is the main problem that is inhibiting the independence of the judiciary in the Republic of Macedonia. In addition, the Judicial and Prosecutor's Councils are not acting according to their competences, that is to secure and protect the independence of the judiciary. Judicial institutions received a low grade for their functioning and many see them as an intermediary instrument for the executive to control judges and prosecutors. There is a very negative view about the elections for Judicial and Prosecutor's Councils in terms of whether they are free and fair; whether there are political influences and whether competent candidates are elected. There is a widespread belief that the Councils have been controlled by the executive since their formation and that the quality of elections for members of the Councils deteriorated over time. With the control of the Councils, the government was able to establish control over the functional hierarchy in the judiciary and interfere in the career system of judges and prosecutors. Independence of the judiciary is in decline and the political interference from the government is pointed out as the greatest obstacle. On a scale from 1 (no independence) to 5 (completely independent), the judiciary received an average score of 2, while the Judicial and Prosecutor's Council got 1.5. Despite the reforms, there is a widespread belief that the government controls the judiciary. Experts struggled to point out an example of judicial control over the executive, while the predominant view is that the judiciary is not an equal branch of

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power. Political influences from the government and incompetence of judges and prosecutors are seen as the main impediments for the independence of the judiciary.

Furthermore, the study identifies problems with accountability of judges. On the one hand, the results show that there is a lack of meritocracy in the career system as a result of the political influence. The career system is plagued to an alarming level. There is a perception that meritocracy is significantly eroded. On the other hand, the trust in the judiciary has eroded based on perception of several cases which are seen as selective justice or wrongful judgments. The way that politically sensitive cases were handled created an impression of selective justice. Ethnic Albanians, in particular, are skeptical about the accountability of judges and the impartiality of legal proceedings. The quality of justice needs improvement. Transparency remains an issue where further improvements are needed.

The study mapped four categories of stakeholders: 1. Judiciary (e.g. Judicial Council, Prosecutor's Council, Basic Court, Appellate Courts, Administrative Court, Supreme Court, Constitutional Court, Public Prosecutors – basic, high and public prosecutor of Macedonia, and special public prosecutor, Academia for judges and prosecutors court and prosecutor's administration,); 2. Legislative (relevant committees and parliamentary groups), 3. Executive (e.g. the Government, Ministry of Justice and Secretariat for European Affairs), and 4. Interested public (e.g. Associations of Judges and Prosecutors, NGOs, individual experts and international actors). Even though it was expected that the stakeholders from the judiciary will have most influence, since they have direct competences in regards to safe-guarding and improving the independence, accountability and quality of justice; the study found that it was the executive that has most influence, and in particular the government. The legislative was seen as secondary to the executive and equally subordinated to it, similar to the judiciary. Stakeholders from the interested public have the least influence; however, they do have significant capacities and some show extraordinary enthusiasm to support the judiciary in strengthening its independence.

Proposals for changes and their implementation are the main indicators to measure the success of policy reforms aiming to increase the independence, accountability and quality of justice. Some changes in the legislation are required; however, what is more needed are changes in practices. It is of crucial importance to diminish the political control of the judiciary. The urgent reform priorities, outlined in the Pribe report, need to be implemented without further delay. On one hand, the government should stop practices of political interference in the judiciary. On the other hand, it is required to increase the integrity of judges and prosecutors. In that regard, one should reconsider whether the current composition of the Judicial and Prosecutor's Councils are up to their tasks. Furthermore, an open and inclusive deliberation among all stakeholders needs to be started to outline additional reforms. Attempts of the judiciary to exercise judicial control over the executive will be crucial indicators for success.

The external influences that can block such a process are mainly political. At the current moment, there seems to be lack of political will to support judicial independence. Finding a political consensus and amassing political will is difficult under the conditions of political instability and deadlock between the main political parties. The economic implications are not very high. An adequate Judicial Budget is proscribed in law, but it is not implemented in practice. Prosecutors need more resources and capacities, and so do smaller courts around the country. But meeting the economic demands would not necessarily improve the situation in the judiciary. There is a high social demand to improve the judiciary and to have a functioning rule of law. Civil society capacities are in place to support such a process, and there is a high media attention that can be harvested to sustain a deep and wide reform process. The technical capacities of the judiciary are

adequate, and would require minimal improvements. And legal impediments can easily be overcome if there is the adequate political will.

3. Looking forward

The status quo will likely persist if the same composition of the Councils and the government are in place. Political obstructions due to lack of political will present the highest risk. It is very likely that an unaccountable government will want to have the judiciary subordinated. There is a risk as to how to reach a consensus and to build political will to improve the judicial independence. There is a risk if the reform criteria are not clear or if they are not equally implemented (i.e. the definition of 'distinguished lawyer' and its implementation will be a crucial test). Lack of will to implement the reforms is another risk. Some of the reforms can be painful, for example, if individual assessments of judges and prosecutors, and especially ones in politically sensitive cases, are made. This could further undermine the trust in judiciary and erode the hierarchy and functional subordination. Lack of capacities and resources to support reforms present an additional risk.

Positive changes can be made if there is higher political will and improvements in the integrity of the Councils. It is crucial to increase the independence of Judicial institutions. Furthermore, safeguards and instruments to build the integrity of judges and prosecutors are needed. For example, judges and prosecutors should accept only written instructions from superiors as a rule, there should be more training on integrity and ethics and 'soft instruments' should be introduced (i.e. instituting awards and acknowledgments and re-instituting specialized publications to present avenues for setting quality professional standards in the judiciary). It is utmost important to increase the transparency of the judiciary, and to embrace support from interested public toward securing the integrity of judges and prosecutors.

4. Policy options

The policy options that we suggest are to empower the judiciary, and to strengthen the independence, accountability and transparency.

1. To empower the judiciary:
 1. Fully implement the urgent reform priorities outlined in the Pribe report
2. To strengthen the independence:
 1. Institute a deliberative reforms' process
 2. Develop clear criteria for distinguished lawyer and equal application in all cases
 3. Make a comprehensive quality assessment of individual judges and prosecutors
 4. Make a comprehensive quality assessment of functional hierarchy
 5. Make a rule to accept only written instructions
 6. Enforce legal binding verdicts from domestic and international courts
 7. Enforce Judicial Budget as legally proscribed
 8. Increase capacities of public prosecutors
 9. Increase capacities of smaller courts
 10. Reinstate specialized judicial and prosecutor's publications
 11. Develop a system of rewards and acknowledgments
 12. Strengthen training on integrity and ethics

3. To strengthen the accountability
 1. Change electoral regimes for members of Councils
 2. Regulate campaign and presentations of candidates
 3. Make mandatory all CVs for candidates for judges and prosecutors and candidates for members in the Councils to be public
 4. Apply the existing set of qualitative indicators in the career system and make them clear
 5. Open specialization tracks in the Academy for judges and prosecutors

4. To strengthen the transparency (as an instrument to improve independence and to increase integrity)
 1. Publish full results from elections of members of Councils and selection of judges and prosecutors
 2. Increase involvement of CSO and media

The urgent reform priorities address the overall political and democratic environment. The assumption is that if they are implemented, then the political control of the judiciary will decrease. The implementation of the urgent reform priorities relies heavily on a political agreement between the political parties' elites. It would be ideal if they can come to an agreement and to enforce it fully. However, to avoid the over reliance on political elites, the judiciary should rely more on own capacities and be supported by other stakeholders, such as the interested public.

In that sense, it would be most effective, and also cost-effective, to increase the transparency. The assumption is that if the work of the judiciary is more open for the public, then the independence and accountability of judges and prosecutors will be higher. In return, this may restore the trust in the judiciary. For example, the recent press conference held by the special public prosecutor received a lot of positive reactions. Furthermore, there is no reason why the candidates' biographies, applying for the position of judges and prosecutors and for Councils' members, should not be public. In addition, closer cooperation with civil society, defined in the broadest sense, will be a crucial mechanism for the judiciary to increase transparency.

If such a reform path is taken, then it will be easier in that spirit to continue with deliberative practices among relevant stakeholders. The other reforms are time consuming and resource demanding, but necessary. It will require some time to make the analysis, define weaknesses and develop proposals towards overcoming and improving the situation.

5. Making change

The study suggest that it is essential to build a coalition for supporting judicial reforms between stakeholders from the judiciary and stakeholders from the interested public. Different civil society representatives and other interested stakeholders are willing and have the capacities to support efforts aiming to increase judicial independence. However, it is essential fist to create a critical mass of stakeholders within the judiciary. It may be needed to re-asses the composition of the Councils and the existing functional hierarchy. The willingness of the executive and the legislative to support a process of positive reforms will depend to a large extent on the outcomes of the political crisis. On the other hand, the judiciary can play a role in resolving the crisis – if it acts objectively, impartially and independently. Then the rewards will be double fold. The judiciary will contribute toward resolution of the crisis and it will exercise judicial control over the executive. The independence of judiciary will be strengthened and the system of democratic checks and balances will be improved.

6. Evaluation

To evaluate the progress of reforms, one should look at cases of judicial control over the executive, since they are the main test for judicial independence. Regular anonymous surveys of judges and prosecutors should be made to assess the independence, accountability and quality of justice. In addition, anonymous surveys of stakeholders and public opinion, on nation-wide representative samples, can offer results to show if there are changes in the perceptions about accountability of judiciary and citizens' trust in the judiciary.