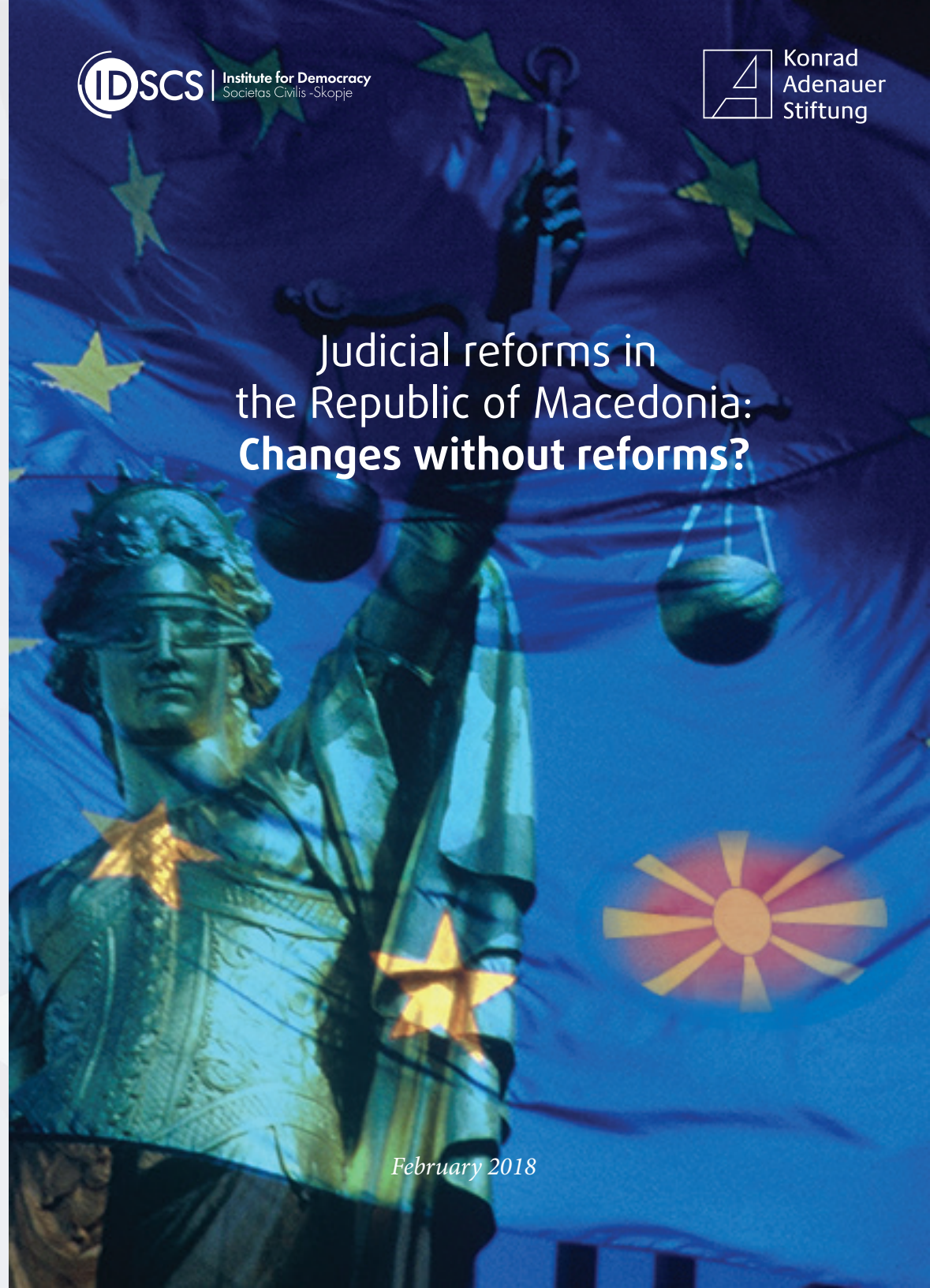


Judicial reforms in the Republic of Macedonia: **Changes without reforms?**

February 2018

Judicial reforms in the Republic of Macedonia: **Changes without reforms?**

February 2018



The views expressed in this report do not necessarily reflect the views of the Konrad Adenauer Stiftung and the Institute for Democracy “Societas Civilis” – Skopje.

IMPRESSUM

Title: Judicial reforms in the Republic of Macedonia:
changes without reforms?

Publisher: Konrad Adenauer Foundation in the Republic of Macedonia
Institute for Democracy "Societas Civilis" – Skopje

Author: Denis Preshova, LL.M. MES

Peer Reviewer: Ivan Damjanovski, PhD

Translation: Jane Bozinovski

Design: Vladimir Barlakoski

This publication is available at:

<http://www.kas.de/mazedonien/mk>

<http://www.idscs.org.mk>

CIP - Каталогизација во публикација

Национална и универзитетска библиотека „Св. Климент Охридски“, Скопје

347.97/.99.047(497.7)

PRESHOVA, Denis

Judicial reforms in the Republic of Macedonia : Електронски извор : changes without reforms? / [autor Denis Preshova]. - Skopje : Institute for Democracy "Societas Civilis", 2018Начин на пристап (URL): <http://www.kas.de/mazedonien/>

Начин на пристап (URL): <http://www.idscs.org.mk>. - Текст во PDF формат, содржи 22 стр.
- Наслов преземен од екранот. - Опис на изворот на ден 15.02.2018. - Фусноти кон текстот

ISBN 978-608-4775-32-4

а) Судство - Реформи - Македонија
COBISS.MK-ID 106207242

JUDICIAL REFORMS IN THE REPUBLIC OF MACEDONIA: CHANGES WITHOUT REFORMS?

Denis Preshova¹

Introduction

In the past few years, all the flaws and failings of the constitutional and political systems appeared in plain sight as a result of the political and institutional crisis in the Republic of Macedonia. Among these flaws, the piled up issues in the judiciary surfaced and merely confirmed the established negative view of the devastating situation in the judiciary, especially among professionals. The wiretapped phone conversations that were leaked revealed serious, worrying flaws in the operation and the management of the judiciary in regards to political and party influence, corruption, clientelism and the like. This development deteriorated the public perception even further and undermined the already frail trust of citizens towards the judiciary.

The significance of the judiciary in a (liberal) democracy has been lauded countless times and thus it is believed to be a key element and an indicator of how well a democracy functions. On the other hand, the judiciary system is exceptionally important in the European integration process where, in line with the 'new approach' to the accession negotiations, it is one of the vital requirements for the future EU membership. The judiciary is

1 LL.M., MES. The author is an Teaching assistant of constitutional law and political systems at the Skopje Iustinianus Primus Faculty of Law within the Ss. Cyril and Methodius University.

important in the enlargement process, but it is perhaps even more important in the period following the country's accession² to the EU because it will be crucial in application of EU law in the Republic of Macedonia. Due to the substantial significance of the judiciary, one of the key priorities of the Macedonian government is judiciary reform. To that effect, it recently adopted the 2017-2022 Judicial Reform Strategy, including an action plan (hereinafter referred to as the "Strategy").³ Despite the high expectations of the public and the fact that it was in favor of fundamental changes⁴, we are still left with an impression that the approach taken in this significant document will not yield any significant improvements in this sector. In spite of the fact that, from a political standpoint, it is quite reasonable to insist on swift, minor reforms which would result in a 'spotless' recommendation by the EC for the start of EU membership negotiations, if we consider the issue from a professional point of view and look at its essence, we can hardly find any reason why the judicial issues have not been accurately detected and why there is no clear vision on how to overcome those issues and what direction should the judicial reforms take in the next five years. The best proof of this statement can be found in the sections of this document that refer to judicial independence and the Judicial Council.

By focusing on judicial independence, which turned out to be issue number one in our judiciary, this brief analysis

2 Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, The European Commission's Activation of Article 7: Better Late than Never? *Verfassungsblog*, 23 December 2017, available at <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/>.

3 The strategy is available at <http://www.pravda.gov.mk/resursi.asp?lang=mak&tid=14>.

4 For more on this see the poll on the situation in the judicial system carried out by the institute for democracy Societas Civilis for the 360 stepeni TV show (December 2017), available at: <http://360stepeni.mk/article/465/anketata-za-sostojbite-vo-sudstvoto-85-od-gragjanite-baraat-promeni>

will investigate the issues related to the Judicial Council of the Republic of Macedonia (hereinafter referred to as “JC”). First we will review the Strategy and which future reforms of the JC are prescribed within. Then we will provide a critical overview of the European judicial independence standards and the model promoted by the European Commission (EC) in the enlargement process. Finally, we will point out that if a strong judicial council with a high level of concentration of powers is to be introduced, the effects on the independence of the judiciary and the judges individually in terms of judicial self-government will be adverse, especially in the context of the Republic of Macedonia.

The Strategy and the Judicial Council

The Judicial Council of Macedonia is a governing body of the judiciary enclosed between the political institutions and the judicial government, which is constitutionally obliged to guarantee judicial independence.⁵ This body was introduced in our constitutional system with the 2005 constitutional amendments focused on major judicial reforms that strived to fully implement the recommendations by the EC and the CoE, which advocated the introduction of a ‘strong’ judicial council.⁶ Bearing in mind the position of this body, we should not be surprised that the Strategy points the finger at the JC as one of the main culprits for the poor situation of the judiciary. While one of the aims of the Strategy is to reassess the performance of the Judicial Council, quite interestingly, it immediately refers to the need for deprofessionalisation, as well

5 Article 104, amended by amendment XXVIII, constitution of the Republic of Macedonia.

6 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.

as to the establishment of criteria and procedures for individual responsibility of the members of this body.⁷ Furthermore, it calls for a more precise definition of the term ‘distinguished lawyer’, for a more precise outline of the appointment requirements for the five council members by Parliament, for the participation of the president of the supreme court without the right to vote, for better transparency of the work of the JC and a revision of the selection procedures,⁸ for disciplinary responsibility and for the dismissal of the judges.⁹

If we analyze the Strategy, we are under the impression that the greatest emphasis is put on the composition of the Judicial Council over and over again. Namely, the need for criteria and procedure for determining individual responsibility of the JC members is outlined four times,¹⁰ while the need for a more precise definition of the term ‘distinguished lawyer’ three times.¹¹ Other terms that are mentioned include deprofessionalisation,¹² the requirements for selecting JC members from the ranks of the judges¹³ and the participation of the president of the supreme court without the right to vote.¹⁴ Therefore we can conclude that the composition is seen as the main reason for the fundamental issues in regards to judicial independence. However, there is no mention of the fact that perhaps the model of judicial self-governance through the establishment of a strong judicial council, that the Republic of Macedonia implemented through the amendments to the constitution, suffers from critical failings and weaknesses that are not a result only of the composition

7 Strategy (n 3) 5.

8 Strategy (n 3) 7-9.

9 Strategy (n 3) 32-34.

10 Strategy (n 3) 5, 8, 16 and 18.

11 Strategy (n 3) 8, 10 and 32.

12 Strategy (n 3) 5 and 33.

13 Strategy (n 3) 10.

14 Strategy (n 3) 32.

of the Judicial Council, but of its setup and competences.¹⁵ Specifically, the Strategy does not answer whether the same failings in performance might still be noticeable despite the new composition, which might, in turn, jeopardize judicial independence. Such conclusions are even more alarming if we consider that not a single member of the Judicial Council has participated or has been consulted in the drafting of the Strategy.

Since there are clear indications and doubts about the inappropriate operation of the JC in the recent period, one would expect that the first logical step would be to reassess whether this institution has been established (in)appropriately, even though that was based on the so-called European standards for judicial independence. The Judicial Council must represent a bulwark of the judicial independence, and it has failed to play that role continuously. The institution has been in operation for more than ten years, so rather than focus solely on its composition or some other auxiliary, yet significant details, we must carry out a thorough analysis of its operation.

For this reason, if the members of the JC were to be held responsible individually (politically), we would be in conflict with the European and international documents that govern judicial councils since that would endanger the basic idea and reason for founding these institutions. Namely, it is not by accident that such or similar responsibility has not been foreseen

15 For further information in the context of Macedonia, Denis Preshova, Ivan Damjanovski and Zoran Nechev, "The Effectiveness of the European model of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms", Center for the Law of EU External Relations, CLEER Papers 2017/1.

in any of the documents.¹⁶

Every constitutional and political system includes institutions whose members are not held politically accountable in front of the political institutions that have appointed them, above all parliaments. Perhaps the most obvious example are the constitutional judges. In fact, the judges themselves cannot be held politically responsible at all even in cases when they are elected or appointed by political bodies or politicians. There is no European state that prescribes another type of responsibility in front of another body apart from criminal and potentially disciplinary responsibility.¹⁷ In this context it would be interesting to note that the Strategy does not take into account the fact that the JC members, at least the ones appointed by Parliament, and also in line with the Constitution of the Republic of Macedonia¹⁸

16 The only issues for which the members may be held responsible or accountable are managing the finances and whether they have periodically published a report of the council's activities. See for instance, Consultative Council of European Judges (CCJE), Opinion No. 10, 2007, para 91-96, European Network of Councils for the Judiciary (ECNJ), "Self-Governance for the Judiciary: Balancing Independence and Accountability" – "Budapest Resolution", May 2008, para 8, ECNJ, Councils for the Judiciary Report 2010-2011 para 3.15.

17 Venice Commission, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia CDL-AD(2014)028, para 33, 53, 58, 66-70, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the CoE, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova CDL-AD(2014) 006, para 56, Venice Commission, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro CDL-AD(2014)038, para 45-48 and other opinions. Despite the fact that the opinion of the Venice Commission on the 2014 constitutional amendments makes vague reference to the fact that the grounds for dismissal should be prescribed by law, that does not imply broadening the grounds for responsibility. For further information Venice Commission, Opinion on the seven amendments to the Constitution of "The Former Yugoslav Republic of Macedonia" CDL-AD(2014)026, para 77.

18 Article 72, Constitution of Republic of Macedonia.

and the Rules of Procedure of the Parliament of the Republic of Macedonia,¹⁹ may be subject to interpellation, which does not directly assume responsibility, but still provides better insight into the activities of the person who performs a public function. On the other hand, the proposal for holding members responsible for not voting for the annual report of the JC in Parliament, which has spread among the public, is frivolous and seems to be a consequence of the lack of insight into the content of such reports.

Moreover, the issue with the term ‘distinguished lawyer’ is by all means a can of worms because it leaves too much leeway for situations where obviously underqualified staff is appointed to responsible posts such as membership in the JC.²⁰ However, it is surprising that the Strategy fails to point out anything outside of the 2015 amendments and supplements to the Act on the Judicial Council of the Republic of Macedonia, which leaves an impression that these amendments to the law had not been taken into account.²¹ On the other hand, we are faced with the issue of distortion of the terms in practice, more often than not as a result of the political needs du jour. In that sense, the issue could and should have been raised as early as 2007, that is 2014, when the Parliament selected JC members from the ranks of the

19 Article 45, Rules of Procedure of the Parliament of the Republic of Macedonia.

20 The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts’ Group on systemic Rule of Law issues 2017 (the 2017 Priebe report), 14 September 2017, 6-7.

21 Article 2, Act on Amendments and Supplements to the Act on the Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia, 61, 17 April 2015, and Strategy (n 3) 10.

judges, above all from the Administrative court,²² even though both the constitution of the Republic of Macedonia²³ and the Act on the Judicial Council of the Republic of Macedonia²⁴ clearly state that there are two categories of JC members. Namely, they make a distinction between members who come from the ranks of the judges on the one hand and members who the Parliament selects from the ranks of university law professors, attorneys-at-law and other distinguished lawyers on the other. For this reason, the decisions for selection had to be repealed right there and then, because the term ‘distinguished lawyer’, used to regulate the membership selection requirements, cannot be used in two different contexts, in the Judicial Council and at the constitutional court.²⁵ In this way, the issue could have been institutionally raised even earlier in front of the administrative judiciary.

The final point in regards to the composition would be the fact that the Strategy does not encompass any new solutions that would boost the performance and the transparency of the JC, such as for example allowing the parliamentary opposition propose member(s) of the JC.²⁶

22 In 2007, the then president of the Republic of Macedonia, Branko Crvenkovski, proposed a candidate for membership in the JC from the ranks of the judges who was elected by the Parliament of the Republic of Macedonia. The same thing happened again in 2014, when the current president of the Republic of Macedonia, Gjorgje Ivanov, proposed candidates from the ranks of the judges. Additionally, in 2014 the Parliament of the Republic of Macedonia elected a member of the JC of the Republic of Macedonia from the ranks of the judges.

23 Article 104, amended by amendment XXVIII, constitution of the Republic of Macedonia.

24 Articles 11 – 25 and 26 – 27, Act on the Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia 60/06, 15 May 2006.

25 Article 104, amended by amendment XXVIII and Article 109 para 4, the constitution of the Republic of Macedonia. In regards to the second provision, the constitution does not prohibit even regular judiciary judges to be appointed as constitutional judges.

26 Article 121 para 5, the constitution of the Republic of Macedonia.

European integration and European judicial independence standards

One of the main goals of the Strategy is to establish a Europeanization of judiciary by, among other things, introducing European institutional standards in judiciary performance.²⁷ At first glance, such an attempt and such goals appear pompous and ambitious, but the question is what is really meant by ‘Europeanization’ in the context of judicial independence and what standards are considered.

Judicial independence is not defined in the EU and the CoE documents and acts. If we take into account the European standards outlined by the European Commission in regards to Chapter 23, that discusses the judiciary, they do not constitute a part of the EU law. As a matter of fact, EU does not have direct competence in terms of the setup of the judiciary and judicial independence, so consequently it does not possess a single legal EU act that regulates these issues, i.e. there is no *acquis*.²⁸ Thus, the European standards that the European Commission refers to in the chapter on negotiation are mainly documents, opinions, recommendations and declarations of the CoE and the UN and

27 Strategy (n 3) 6.

28 For the issue of the lack of an appropriate *acquis*, Laurent Pech, “The EU as a Global Rule of Law Promoter: the Consistency and Effectiveness Challenges”, 14 *Asia Europe Journal* 2016, 11 and 13.

their advisory bodies, which are essentially not legally binding.²⁹ On the basis of these documents, the European Commission defined the so-called European model of judicial independence, that is a judicial council that promotes or imposes it in the enlargement process.³⁰ This model features a high degree of judicial self-governance through an institution that will be in charge for virtually all aspects related to the career of the judges, the court administration, the efficacy, and in certain situations the financing of the judiciary.³¹

Bearing in mind the close cooperation between the EU and the CoE in regards to the Western Balkan countries and Turkey,³² it should come as no surprise that no other relevant documents in this sphere are mentioned in the context of the enlargement process. For example, one such document are the Kyiv Recommendations on Judicial Independence in Eastern Europe by OSCE ODIHR and the Max Planck Institute for International

29 Recommendation No. R (86) 12 of the Committee of Ministers to member states concerning measures to prevent and reduce the excessive workload in the courts, CoE Committee of Ministers, 16 September 1986. Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; CoE Committee of Ministers, 17 November 2010. Magna Carta of Judges (Fundamental principles), Consultative CoEan Judges, CoE, 17 November 2010 CCJE (2010)3. Bangalore Principles of Judicial Conduct, endorsed by the United Nations Human Rights Council, 23 April 2003. Basic Principles on the Independence of the Judiciary, United Nations, 29 November 1985.

30 In regards to the design of the model and the creation of the myth of a single approach towards judicial independence Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence' in W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer 2006), 314.

31 Preshova, Damjanovski, Nechev (n 15) 16-17.

32 The European Union/CoE Horizontal Facility for the Western Balkans and Turkey (Horizontal Facility) available at <http://pjp-eu.coe.int/en/web/horizontal-facility/home?desktop=true>

and Comparative Law,³³ which contains recommendations for the judiciary which are not in line with what is promoted by the EC. To be more specific, in terms of selection of judges, it is recommended that apart from the young lawyers who are concluding their regular training at the academies, lawyers with extensive practical experience as judges are also introduced and selected.³⁴ Or there is reference to the need for avoiding a high level of concentration of powers in terms of judicial self-government within judicial councils.³⁵ Unlike the opinion held by the EC and found in the Strategy, the most recent opinion of the Venice commission in regards to the judiciary-related laws in Macedonia refers precisely to the Kyiv recommendations.³⁶

Thus it becomes evident that the way judicial self-government standards are determined is not the same across the board even in Europe, though there is consensus in terms of the general directions. For that reason, we should bear in mind that there is always enough room for negotiation and convincing that, at the end of the day, hinges upon the capacity of the administration and the expertise in a country, in this case Macedonia. By all means we must not lose sight of the fact

33 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability (Kyiv Recommendations), OSCE ODIHR, Max Planck Minerva Research Group on Judicial Independence, Kyiv 2010. It is interesting to note that according to this document, the Skopje OSCE took part in the entire project.

34 Ibid. para 17. It is interesting that the view of the Venice Commission is quite similar, Venice Commission, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia CDL-AD(2002)026, para 49.

35 Kyiv Recommendations (n 33) para 2.

36 Venice Commission, Opinion on the Draft Law on the Termination of the validity of the law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on the Draft Law amending the Law on Judicial Council and on the Draft Law amending the Law on Witness Protection of "The former Yugoslav Republic of Macedonia" CDL-AD(2017)033, para 10 and 25.

that we are striving to become a member of the EU and that we must incorporate and harmonize the standards,³⁷ but on the other hand the institutions and the experts of this country are best acquainted with the current situation in the judiciary. In this context, the judicial reforms must be implemented as a joint ownership with the EU, of course if we have the capacity, rather than something that must be imposed by an external factor. In this sense in particular we should not forget that the EC progress reports covering the period when the pressure and influence on the judiciary were at their highest point, the effects of which are felt even today, and which we got wind of after the phone conversations were leaked, were quite reserved in terms of negative comments.³⁸ They became louder and more immediate even after the conversations were leaked and the issues surfaced.

Apart the lack of clear-cut criteria for defining judicial independence, there is also a discrepancy in the practices within the EU which are promoted as judicial independence standards outside it. The model of judicial self-governance through the establishment of a strong judicial council is a far cry from being

37 In regards to the low level of compliance of the national legislative framework to the EU standards, “Judicial independence, impartiality, professionalism and efficacy: an assessment of the compliance of the legislative framework of the Republic of Macedonia to the EU standards” (original title: Независност, Непристрасност, Професионалност и Ефикасност на Правосудството: Оцена на усогласеноста на правната рамка на Република Македонија со стандардите предвидени од Европската Унија), Association for developmental initiatives Zenith, Ministry of Justice of the Republic of Macedonia and Denis Preshova, December 2014.

38 For example, in the period when most of the judges were dismissed and when changes were made to the special requirements for selection of judges that are not among the candidates graduated at the Academy or who have no experience to be selected for the higher instance courts, the European Commission even gave positive assessments of the JC dismissal procedures in terms of fighting against corruption and provision of impartiality. For further information, the chapters on the judiciary in the EC the annual reports on Macedonia for 2009, 2010, 2011, 2012 and 2013.

based on the experiences of most of the EU member-states, but, above all, it is based on the practice and the experiences of one state, Italy.³⁹ On the other hand, the developments in the judiciary in Hungary and Poland revealed the weaknesses in monitoring and implementing rule of law and judicial independence standards even within the EU.⁴⁰ Such discrepancies must be taken into account especially in terms of assuming greater responsibility within the country for proper organization of the judiciary instead of avoiding responsibility by hiding behind the ostensibly European standards and requests by the European Commission.

The Judicial Council as assurance or threat for the independence of the judiciary and the judges

The core issue in introducing the model of judicial self-governance, as promoted by the EC, is the lack of suitable contextualization.⁴¹ Namely, by adhering to the “EU” standards, above all to those of the CoE, the EC does not pay enough attention to the fact that the suitable requirements for the model to work successfully have not yet been met by most of the countries where it is being implemented. Namely, the lack of tradition of judicial independence, coupled with the preservation of the old ways in which things got done in the

39 At times the experience of Spain is also mentioned, but in essence the Spanish model is also based on the Italian model, and in certain aspects it deviates from the EC recommendations by a large margin.

40 Pech (n 28) 14; he calls this issue the “disconnect problem”.

41 Olga Burlyuk, Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighborhood, 53 *Journal of Common Market Studies* 2016, 510.

former system within the judiciary, or more precisely the court mentality and institutional memory, are key factors that were used to distinguish between the Central and Eastern European countries, now also the Western Balkans countries, on the one hand, and Italy or some other Western European states that have strong judicial councils, on the other hand.⁴² To put it bluntly, the establishment of judicial self-governance in a system which fosters a court mentality of subjugation and submissiveness as a result of a stringent judicial hierarchy turned out to be counter-productive, and Macedonia is no exception. Additionally, there are obvious differences in the way the judicial system is organized between Italy and the countries in the region, which also have bearing on the performance of the judicial council.

In this sense, scientific findings, but also the practice in countries that have introduced a judicial self-governance model by means of strong judicial councils promoted by the EC and the CoE have demonstrated that this model fails to achieve the desired results. Among those two negative effects stand out as a result of the setup and performance of the judicial councils in a situation where the appropriate requirements have not been

42 In regards to the current differences Maria Dicosola, 'Judicial Independence and Impartiality in Serbia: between Law and Culture, *Diritti Comparati*, 17 December 2012, available at: <http://www.diritticomparati.it/judicial-independence-and-impartiality-in-serbia-between-law-and-culture/>. In terms of the judiciary in ex-Yugoslavia and its heritage from the socialist regime Cristina Dallara, 'Judicial Reforms in Transition: Legacy of the Past and Judicial Institutionalization in Post-Communist Countries', available at: http://amsacta.unibo.it/2810/1/Judicial_Reforms_in_Transition..pdf. This is so despite the fact that public perception of the judiciary in Italy is virtually equally negative to that of, for example, Slovakia and Croatia, which have judicial councils. For further information, EU Justice Scoreboard 2017, European Commission, 37, chart 51, which contains information about 2016 and 2017 on the basis of data borrowed from the research carried out by Eurobarometer. The document is available at: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en

met.⁴³

First, the isolation of judicial councils, and by extension judicial self-government t, from the legislative and executive power, makes room for new types of negative influence on the judiciary within the institutions, but also, which is of even greater concern, outside of the institutions, i.e. informally as well. In the context of the Macedonian judiciary, the most visible type of institutional influence in the past was the role of the Minister of justice in the work of the Judicial Council. On the other hand, after the wiretapped conversations were leaked, the term ‘notepad’ was used as a synonym for the informal mechanisms for influencing the self-government of the judiciary. In view of the current situation, without more serious and more thorough reforms that would go far beyond the focus on the composition of the judicial council, the judiciary can swiftly turn into a ‘game of notepads’. The continuing external influence on the judicial council will allow for influence on the operation and administration of the judiciary as a whole.

Second, while the judicial councils are being lauded as the best alternative for guaranteeing judicial independence, in a Macedonian context they frequently have negative influence on the independence of individual judges by championing and bolstering the judicial elites. This leads to a paradoxical situation in which the state has seemingly independent judiciary, but with subservient and dependent judges.⁴⁴ This issue is frequently underestimated even though it poses a danger to the judiciary

43 Michal Bobek and David Kosar, ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’, 15(7) *German Law Journal* 2014,1269-1276 and Zdenek Kühn, ‘Judicial Administration Reforms in Central-Eastern Europe’, in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg: Springer 2012) 1257, 1277.

44 David Kosar, *Perils of Judicial Self-Government in Transitional Societies*, (Cambridge University Press 2016) 19.

on the same magnitude as the external types of influence. In fact, the independence of individual judges is a significant aspect of judicial independence which plays an exceptionally important role in the creation and influence on the citizens' perception of the judiciary, because they experience and come in touch with the judiciary directly through individual judges. Still, the relevant legal acts keep neglecting the significance of the individual independence of judges when defining the main role of the JC.⁴⁵

These internal imperilments to judicial independence are in fact made possible largely through the mechanisms of the deeply ingrained hierarchisation of the judiciary. These mechanisms are linked with the role and the position of the supreme court and the presidents of the courts, part of the qualitative criteria for the performance evaluation of the judges and their role in defining unprofessional performance. When the relationships within the judiciary are setup in such manner, the remarks of the expert commission headed by Reinhard Priebe that in fact only a handful of judges in key posts misuse their position⁴⁶ must in no way be overlooked, as it is frequently done in public.

In terms of the two negative effects of establishing strong judicial councils, that we already mentioned, the Strategy deals with the first one, i.e. the issue of the interference of the executive power and the partisanship of the judiciary⁴⁷ only partially, while it makes no mention of the influence and threats to the independence of individual judges that stem from the judiciary itself. Not only there is no mention of the latter effect in the Strategy, but by promoting some of the hierarchisation

45 Article 104, amended by Amendment XXVIII, Constitution of the Republic of Macedonia and Article 2, Law on Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia 60/06 of 15 May 2006.

46 Priebe's Report 2017 (n 20) 4, but immediately afterwards this threat was equated to involvement of the executive power in the work of the judiciary, 5.

47 Strategy (n 3) 4.

mechanisms or ignoring those mechanisms the judges are under even greater pressure in terms of their individual independence. Namely, in the Strategy, as well as in some research carried out by NGO's claiming to be specialized in legal research or ones that deal with such issues accidentally, completely contrary to the views of the Venice Commission and the other CoE bodies (CCJE) in the key documents aimed at judicial independence,⁴⁸ great significance is placed on the role of the supreme court in harmonizing judicial practice and in a equal application of the law by using principal legal views and opinions, and not exclusively through court decisions on specific cases.

In terms of the qualitative criteria for assessing the performance of the judges, the Strategy points out the need for better representation of the qualitative criteria, however it totally omits to explain whether the existing qualitative criteria will be changed and in what direction. Namely, precisely by means of some of the qualitative criteria, that is by carrying out evaluation on the basis of repealed or overturned decisions⁴⁹ and their role in defining unprofessional and performance,⁵⁰

48 Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the CoE, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, CDL-AD(2014)030, para 33, 34, Venice Commission, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, CDL-AD(2014)038, para 22, Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, para 68-72 and CCJE, Opinion No 1, 2001, para 66, CCJE and CCPE, Challenges for judicial independence and impartiality in the member states of the CoE, SG/Inf(2016)3rev, para 71.

49 Article 103, Law on the Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia 60/06 of 15 May 2006, introduced by the Law on Amendments and Supplements to the Law on the Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia 150 of 18 November 2010.

50 Article 27, Law on Amendments and Supplements to the Law on Courts, Official Journal of the Republic of Macedonia 150 of 18 November 2010.

the judge's competence is severely limited, and the former were severely criticized by the Venice Commission.⁵¹ Namely, in this way, the judge is sanctioned for interpretation of legal acts that conflicts with that of the higher instance courts.⁵² A positive step forward is the intervention on the aforementioned criteria by the Ministry of Justice which drafted a Act on Amendments and Supplements to the Courts Act which is about to enter parliament.⁵³ It remains to be seen whether the same criteria will be taken into account in the performance evaluation of the judges as well, since some of them are regulated by the Act on the Judicial Council of the Republic of Macedonia⁵⁴ bearing in mind that the particular provision was not amended with the most recent amendments to the law.⁵⁵ On the other hand, one of the more severe disciplinary offenses foreseen in the draft is "prohibiting supervision of the judge's work by the higher instance court", which again allows for negative influence on the individual independence of the judge.⁵⁶

Finally, the Strategy does not foresee any revision of the role of the court presidents, even though in recent years we were able to see that their position and role can seriously impede independence. Namely, by defining their role as 'the primary judge of the appropriate court'⁵⁷ and with the competences

51 Venice Commission, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The former Yugoslav Republic of Macedonia" CDL-AD(2015)042, para 23 and 100-102.

52 Priebe's Report 2017 (n 20) 9.

53 The proposal of the Ministry of Justice of 18 January 2018 is available on the webpage of the Unique National Electronic Registry of Regulations of Macedonia.

54 (n 49).

55 Law on Amendments and Supplements to the Law on the Judicial Council of the Republic of Macedonia, Official Journal of the Republic of Macedonia 197 of 29 December 2017.

56 Article 19 that amends Article 76 of the Law on Courts, draft Law on Amendments and Supplements to the Law on Courts (n 53).

57 Article 47 paragraph 2, Law on Courts, Official Journal of the Republic of Macedonia 58/06 of 11 May 2006.

allocated to them they can potentially endanger independence by exerting different sorts of pressure.⁵⁸

Conclusion

When we consider judiciary reforms, we must not overlook that the judiciary is merely a segment of the constitutional and political systems and it shares the same issues that contaminate the system as a whole. The judiciary and the judges are not a quirky exception, but yet another proof of the system anomalies. So, the success of the judiciary reforms will by all means depend greatly on the political culture, but also on the (lack of) existence of a culture of judicial independence. Still, in order for such culture to be established, the preconditions must be created by having an appropriate institutional and legal framework. By focusing on judicial independence, this analysis demonstrated the weaknesses of the Strategy and the survival of the current model for protection of judicial independence by means of a brief analysis of three aspects of the judiciary reforms. Firstly, the analysis of the Strategy indicated the lack of a clear vision as to what should be reformed and in what manner in order to achieve essential results. Secondly, a critical review of the allegedly European standards for judicial independence and the model including strong judicial councils which are a far cry from the general practice in the EU countries and which have not stemmed directly from EU law. Thus, we must take with a pinch of salt the EC's insistence on a uniform approach in terms of the institutional standards bearing in mind the local context in which the judiciary functions and subsists.

58 Priebe's Report 2017 (n 20) 5. For more general information, the report from the CCJE and the CCPE, Challenges for judicial independence and impartiality in the member states of the CoE, SG/Inf(2016)3rev, para 115. Article 22, draft Law on Amendments and Supplements to the Law on Courts (n 53). This will merely reduce the influence of the presidents on judges by a limited margin.

In this context, further efforts must be made in creating and utilizing the domestic capacity in the negotiations with EU representatives about the judicial reforms and the needs of the judiciary in Macedonia. Thirdly, pointing out the ramifications of introducing and insisting on a strong judicial council and how they are manifested in the Republic of Macedonia, and especially the issue of jeopardizing the individual independence of judges. This analysis clearly demonstrates that there is a great need for a more thorough approach in judiciary reforms in order to achieve more sustainable, longer-term reforms, rather than reducing them to changes without reforms. In this respect, the Strategy must be considered in a broader sense in order to find a way to introduce these remarks and, by implementing them, boost judicial independence in Macedonia.