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# Judicial Reforms *and* ANTI-CORRUPTION Practices

## CHALLENGES, PROSPECTS AND TRANSFER OF EXPERIENCES

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# IMPACT OF FOREIGN DIRECT INVESTMENT (FDI) AND CORRUPTION ON THE ECONOMIC DEVELOPMENT OF THE REPUBLIC OF MACEDONIA

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## Abstract

Interdependence between different countries caused by the globalization has influenced the geographical borders and distances between people making them lose their meaning. Continuous process of globalization increased the importance of foreign direct investments (FDI) for the economic development. Although the economic literature has not reached any consensus, several numbers of empirical analyses conclude that the size of FDI is a kind of catalyst of the economic development and the FDI have positive influence on the economic growth. At the same time, the growth of negative phenomena in society such as corruption could reduce the foreign direct investment in the country and the economic development as well. As a result, the aim of our paper is to analyze the current state of the investments i.e. the current state of the FDI and the corruption in the Republic of Macedonia.

Consequently to the abovementioned, the purpose of our paper is to analyze the trend and the state of the investments since the independence of the Republic of Macedonia and with the help of relevant statistical data to confirm their size and structure for that period of time pretending that foreign direct investments affect the country's economic development.

According to this, the hypothesis of the paper is as follows: the size of foreign direct investments and the corruption affect the economic growth of the country in an opposite way. This is confirmed by determination test $R^2$=0.86 which shows high approximation of variables.

**Key words:** *foreign direct investments, corruption, economic development R. of Macedonia.*

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# INTRODUCTION

The modern economy is characterized by the globalization process which has undermined the barriers in international trade and has intensified the relationship between individuals, organizations and institutions globally. This growing interdependence between the various countries has caused geographical distance and distance between people to lose their meaning. The continuous process of globalization of the world's economies has influenced the growth of the importance of foreign direct investment for economic growth and development. Although economic literature has not yet reached any consensus, a large number of empirical analyzes conclude that the size of FDI are catalysts of economic development and have a positive impact on economic growth, but the growth of negative phenomena in society such as corruption reduces foreign direct investment in the country and consequently economic development as well.

Although many factors affect the country's economic growth at different times with different intensities over this size, in our study we have focused only on foreign direct investments and corruption leaving the other divisions with reasoning of the analysis in any other sort of work of this nature. For the analysis, we focused on the ten year period of time whereas the data have been obtained from the National Bank of the Republic of Macedonia.

National governments have a priority to adjust their macroeconomic policies in order to attract foreign direct investments. For this reason, in the Republic of Macedonia, from the moment of independence to date, economic policies have been developed which enable the matching of national interests with the interests and strategies of foreign investors. In order to create and implement effective anti-corruption policies and practices and strengthen the institutional normative capacity of the Republic of Macedonia for the prevention of corruption and conflict of interest on a long-term basis, in 2002, according to the Law on Prevention of Corruption the State Commission for the Prevention of Corruption was established. However, in the meantime it is evident that the expected volume of foreign investment flows is far from the expected volume and because of this it is imperative to continuously develop new macroeconomic policies that will create a comprehensive economic environment and institutional base for attracting foreign direct investments. In particular, in order to create a more favorable climate for foreign direct investments, Macedonia needs to undertake a number of economic and legal measures, as well as to have adequate implementation of fiscal, monetary, social and foreign trade policies. As a result of all this, our aim is to analyze the situation of foreign direct investments and corruption in the Republic of Macedonia.

Consequently, the hypothesis of the paper has a duty to realize the purpose of the research being: the size of foreign direct investments and corruption affect the opposite shakes

in the country's economic growth. This is confirmed by the probability test $R^2 = 0.86i$ which indicates high approximation of the variables.

During the research work, these methods are characteristic of social sciences: analysis and synthesis, qualitative and quantitative methods and statistical methods where through multiple regression we are going to test the hypothesis. Static statistical programs of SPSS will be used for statistical processing.

## THEORETICAL SUPPORT RELATED TO SUBJECT STUDY

Foreign direct investments have their beginnings since the early 19-th century, but after World War II they began to grow at a faster pace. This increase was influenced by a number of factors among which most notably, the market change in which firms operate. In addition to international trade another way that firms began operating and gaining positions in foreign markets were foreign direct investments. Technological development prompted FDI spread rapidly around the globe while globalization created opportunities for foreign investors to exploit all potential markets causing rapid production growth. With its potentials today, FDI is seen as one of the key factors in economic development for developing countries.

Although some researchers see FDI as a solution to various global problems, such as crises of hunger, malnutrition and environmental damage, on the other hand, some other researchers think that FDIs are the very instruments by which these global disasters are caused. (Sezer, 2006)

The development and growth of international trade assisted by technological development have highlighted the phenomenon that is widely recognized as globalization. Globalization is the rapid spread of a company's production and sales around the world, seeing each country as a potential market and a potential production or source center along with the rise of international trade that goes hand in hand with this global business expansion. Multinational companies are the business form that carries globalization around the world, and FDIs are an important method that firms use for their global growth strategies.

According to Chakrabati (2007) companies can enter a foreign market either by exporting or through FDI. Exporting is the simplest and low-risk method by which the firm can enter the foreign market, but it is not able to control production or benefit from opportunities that can only arise from a concrete presence on a foreign market. While a firm invests directly in it is about FDI.

Barre and Pain, (1999) emphasize the difference between FDI flows and FDI stock. FDI flows refer to their amount production or in other ways in a foreign country over which it exercises significant control, then over a given period of time (e.g., within one year). FDI

stock refers to the total accumulated value of foreign-owned assets at a given time. As far as the FDI flows, it is important to distinguish between incoming and outgoing FDIs. FDIs are outgoing when they exit from a country while they are incoming when they imply their influx in a country, so when foreign firms undertake direct investments in the host country.

Undoubtedly, except for those who promote FDI and together with economic growth, there are a number of factors that stagnate these two phenomena. In this group of factors, the dominant place is reserved for corruption as a negative social phenomenon which cannot exist without a conflict of interest. If a state institution is able to effectively manage conflicts of interest, it will then be able to manage its coping with corruption. The question is what the conflict of interest is and what is corruption? According to the Organization for Economic Cooperation and Development "a conflict of interest occurs when an individual or organization (whether private or public) is in a position to utilize its professional or personal capacity for personal gain." (http://stats.oecd.org/glossary/detail.asp? ID = 7206). According to the World Bank, corruption is "abuse of public interests for private interests." Only by comparing these two definitions we see that these two concepts are closely intertwined with one another. Put simply, a conflict of interest exists when an official can misuse his/her position for private gain while corruption exists when an official has misused his position for private gain. So if a conflict of interest always leads to corruption, corruption always comes about because of a conflict of interest.

Regarding situation in the Republic of Macedonia for the purpose of establishing and implementing effective anti-corruption policies and practices, and strengthening the normative and institutional capacities for the prevention of corruption and long-term conflict of interest in 2002, the Law on preventing corruption has established the State Commission for the Prevention of Corruption. The SCPC competencies defined in the Law on Prevention of Corruption, the Law on Prevention of Conflict of Interest, and the Law on Lobbying, are as follows (State Anti-Corruption Commission, 2015):

- Issues Strategic Documents - State Program for Prevention and Repression of Corruption;
- Provide opinions on draft laws that are important for preventing corruption and conflict of interest;
- Introduce initiatives to competent bodies on the material and financial situation of political societies, trade unions, foundations etc.;
- Initiates procedures for commencing criminal prosecution of officials and responsible persons possessing state capital;
- Record and monitor assets and changes in the assets of elected officials and

persons in charge of state capital;

- Keeps a register of elected persons, responsible persons in public enterprises, institutions with state capital;
- Supervises lobbying and announces the measures set out in the Law on Lobbying;
- Cooperates with national and international institutions and bodies in the field of preventing corruption and reducing the occurrence of conflict of interest;
- Education of the authorities responsible for detecting and prosecuting corruption and other types of crime and disclosing conflicts of interest;
- Informs the public about the measures and activities taken and results in preventing corruption and conflicts of interest;
- Enables the working rule;
- Adopts regulations on internal organization and systematization of work in the SCP secretariat etc.

## FOREIGN DIRECT INVESTMENT, CORRUPTION AND ECONOMIC DEVELOPMENT ANALYSIS IN THE REPUBLIC OF MACEDONIA

Like all others countries in transition, the Republic of Macedonia has been making efforts since its independence to attract a larger amount of foreign capital through FDI. Economic and legal measures are constantly being taken to create the most suitable investment climate. In order to increase the interest of foreign investors, the Republic of Macedonia has undertaken more macroeconomic reforms. Areas in which measures are taken to attract investors are: legal protection of foreign investors, low taxes, rapid registration of companies, low operating costs and expertise to quickly implement the process of obtaining the necessary permits, exclusion for the period of ten years from the payment of income tax and personal income tax to foreign investors in technology industrial development areas, long-term lease of land in technology industrial development areas up to 99 years, free connection to the water and sewage network in these areas etc.

For the purpose of ongoing analysis, we present FDI in absolute quantity and as a percentage of gross domestic product (GDP) from 2012 to 2016.

*Table 1. FDI in the Republic of Macedonia and participation in % of GDP from 2012-2016*

| Year | 2012 | 2013 | 2014 | 2015 | 2016 |
|---|---|---|---|---|---|
| In million dollars | 165.5 | 305.0 | 261.4 | 230.3 | 390.6 |
| % of GDP | 1.7 | 2.8 | 2.3 | 2.3 | 3.6 |

*Source: National Bank of the Republic of Macedonia*

If we analyze Table 1, we can conclude that the size of foreign direct investments in the period from 2012 to 2016 expresses a variable trend in oscillating movements both in volume and percentage of GDP. In 2012, FDI amounted to $ 165.5 million or 1.7 percent to GDP. In 2013, they amounted to $ 305.0 million, and in 2014 they decreased and amounted to $ 261.4 million, 2.8% and 2.3% respectively. From 2015 to $ 230.3 million, they begin to increase and in 2016 they reach a maximum of $ 390.6 million.

Foreign direct investments in quantity and structure are affected by corruption. The State Anti-Corruption Commission after each submitted information regarding the suspected cases verifies how to take the procedural measures available to it under the law, providing the necessary information and documents from the relevant entities. The following table shows the number of corruption prevention cases dealt with by the State Council against Corruption in Certain Areas.

*Table 2. Selected Corruption Sources from 2013 to 2016*

| Field | selected corruption cases | | | |
|---|---|---|---|---|
| | **2013** | **2014** | **2015** | **2016** |
| Preventing corruption in performing public authorizations | 68 | 57 | 41 | 24 |
| Prevention of corruption in the performance of public interest affairs | 84 | 71 | 41 | 48 |
| Jurisprudence | 35 | 31 | 23 | 18 |
| Preventing Corruption in Politics | 2615 | 1351 | 1 | 2325 |
| Other subjects | 13 | 34 | 31 | 29 |
| In total | 2815 | 1544 | 137 | 2444 |

*Source: State Anti-Corruption Commission.*

In 2013, the State Anti-Corruption Commission addressed 3119 cases in the area of corruption prevention, of which 2615 are related to the 2013 local elections, 2815 cases have been selected.

In 2014, 1544 cases were selected, of which 1351 are subjects for preventing corruption in politics, belonging to the pre- and post-election period (State Anti-Corruption Commission, 2014).

In 2015, 124 cases were filed under the accusation of citizens for corruption, legal entities and the initiative of the State Commission for Corruption. The State Commission for Corruption has treated 273 cases and 137 cases have been selected. In 2016, 2335 cases were created and 2444 cases were selected. As shown in Table 2 cases of corruption in the Republic of Macedonia from year to year increase by issuing metastases throughout the economy of the country.

The economy of the Republic of Macedonia since independence until today can be said to have shown a certain vitality and stability, although in the meantime has experienced strong shocks and crises. The biggest problems faced by the Macedonian economy during this period were: the dissolution of the former Yugoslavia and the ensuing wars between 1993 and

1994, the United Nations imposed economic and political sanctions against Yugoslavia, thus closing the Macedonian border with Yugoslavia for any transport and economic activities; In 1994, Greece imposed an economic embargo on Macedonian products trade, and the transport costs of Macedonian products through Bulgaria were significantly higher; In 1999 came the ”Kosovo crisis“; In 2001 has experienced the most horrible strike of the ”armed conflict“ which has ruined a part of the Macedonian economy, where investments in the economy were drastically reduced.

Although Macedonia’s economy suffered heavy blows again, it proved to be stable and potential. When it began to mark continuous and vital growth the global economic crisis 2008 – 2009 happened. The economic growth movement, measured by the GDP growth will be shown in the table below.

*Table 3. Gross Domestic Product of the Republic of Macedonia from 2011 to 2014*

| | **GDP at the following prices (in million denars** | **GDP per capita in euro (according to the following rate)** | **GDP in million euro (according to the following rate)** | **Actual GDP growth rate in%** |
|---|---|---|---|---|
| **2011** | 461,730 | 3,645 | 7,504 | 2.8 |
| **2012** | 458,621 | 3,616 | 7,454 | -0.4 |
| **2013** | 499,559 | 3,930 | 8,112 | 2.7 |
| **2014** | 525,620 | 4,126 | 8,530 | 3.5 |
| **2015** | 558,240 | 4,377 | 9,061 | 3.8 |

*Source: State Statistical Office.*

Table 3 clearly shows the sustainability of the economy of the Republic of Macedonia. According to the State Statistical Office data derived from annual business accounts and other sources, the gross domestic product (GDP) in 2011 was 461,730 million denars and compared to 2010 it has increased nominally by 6.4%. The real GDP growth rate compared to 2010 was 2.8%.

The gross domestic product (GDP) in 2012 was 458,621 and compared with 2011 it has decreased by 0.3%. The real GDP growth rate compared to 2011 was -0.4%.

According to the data of the State Statistical Office derived from annual business accounts and other sources, gross domestic product in 2013 amounted to 499,559 million and compared to 2012 it increased nominally by 7.0%. The real GDP growth rate compared to 2012 is 2.7%

Gross domestic product in 2014 amounted to 525,620 million denars and compared to 2013 has increased nominally by 4.7%. The real GDP growth rate, compared to 2013, is 3.5%.

In 2015 gross domestic product amounted to 558,240 million denars and compared to 2014 it has risen nominally by 5.8%. The real GDP growth rate in 2015, compared to 2014, was 3.8%.

## EMPIRICAL ANALYSIS

As a consequence of the complex nature of phenomena there was a need to analyze the correlation between several variables and almost every time when the studied dependence is incomplete we have used the multiple regression analysis which takes the mathematical form in this way:

$$Y = a + bx_1 + cx_2 + \varepsilon_{it} ,$$

where Y in our model is the dependent variable identified with the gross domestic product (GDP) which is dependent on many factors, whereas in the model it is dependent on $x_1$ and $x_2$. In our regression analysis $x_1$ represents the independent variance of foreign direct investments and $x_2$ represents the independent variability variable (selected corruption cases). The regression analysis extends for a period of 6 years from 2010 to 2016 while the data are used by the Central Bank of Macedonia, the State Statistical Office and the Annual Report of the State Anti-Corruption Commission.

Using this form of regression we will test our hypothesis which is as follows: the magnitude of foreign direct investments and corruption influence the opposite directions in the country's economic development (GDP). Although many factors affect the economic development of the country at different times with different intensity over this size, in our study we have focused only on foreign direct investments and corruption leaving the other divisions with the justification of the analysis in any other sort of papers of this kind.

Through the SPSS statistical program we have processed the data and the obtained regression results are as follows: $Y_i = 439{,}133{,}160 + 0.403X1 - 2.33X2$.

Starting from the regression equation, we conclude that the constants (a) are 439 133 160 million which means that the gross domestic product will be 439,133,160 million denars without affecting foreign direct investment (FDI) and corruption. Constant value represents the point where the regression line awaits abstraction. The regression coefficient (b) is 0.403, which means that gross domestic product will grow by 0.403 units if foreign direct investment increase for a unit when other variables remain constant. The coefficient (c) is -2.33 since there is a negative sign that means countering the gross domestic product, this means that if corruption rises for a unit, the gross domestic product will decrease by 2.33 units and vice versa. This impact on Gross domestic product is logical after multi-collinearity between independent variables has been avoided. It means that independent variables have a low coefficient of correlation, which makes it possible to isolate from the others the influence of each variables on the dependent variables. The probability test $R^2$ was 0.86, which indicates that our model yields 86% predictions.

## CONCLUSIONS

Based on the analysis of our work in this paper we can draw the following conclusions:

- Foreign direct investments are important factors that directly affect the growth of economic development.
- Corruption is one of the negative phenomena of society and is recently falling deep into society and as such has a negative impact on the country's economic development.
- The economy of the Republic of Macedonia is facing severe blunders of various crises, but has managed to withstand and be vital.

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# TREATMENT AND RESOCIALIZATION OF THE PERPETRATORS OF INCEST

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**key words:** s*exual violence, family, victim, child, incest, treatment*

The word pedophilia originates from the Greek words paido - which means a child, and filia - which means love. The pedophile is characterized by sexual attraction, and perhaps love for children.

The history of pedophilia points to the fact that sexual intercourse between adults and children has always existed. The views on this have changed over the history, and these relations begin to be condemned from the end of the ancient period.

When sexual abuse occurs between blood relatives it is called incest. It occurs usually in cases where the parent himself has ever been a victim of abuse, when the parent is too dominant and jealously keeps the child away and he is trying to separate as much as possible from the environment.

The most bizarre cases of pedophilia, according to the experience of people who worked directly with the victims, derive from sexual violence in the family. Examples of incest may be: "The father put his hand between the legs of his 4-year-old daughter, with excuse that he is learning the right penetration", but there are also examples in which the mother is committing the abuse: "Mother encouraged her 10-year-old son to kiss her breasts while they are in bed together. "

Incest is one of the most extreme forms of child abuse, which often results in serious and long-term psychological trauma, especially in the case of parental incest.

It is difficult to generalize, but research shows that 10-15% of the general population had at least one such sexual contact; in less than 2% this contact involved sex or an attempted sex.

The father-daughter incest is the most commonly reported form of family sexual abuse.

The story of Oedipus is an example of the incest between the mother and the son, who ends with a disaster and shows the ancient taboos against incest, that is how Oedipus was punished for his actions.

Incest appears in the generally accepted version of Adonis's birth when his mother had sex with her father, who was disguised as a prostitute.

## Definition and characteristics of incest families

There is no medical definition of incest, and legal definitions are varying from country to country.

In 1978, for the first time, the incest was defined as sexual contact between people who were bloodied. It was a direct consequence of the special trust that children have in the parental figure and can easily be referred to as a sexual act.

The family is always believed to be a coherent composition in which no one stands out, since it is considered that the individual is inextricably linked and dependent on others. Family interactions are always considered linear, and filled with feelings.

A study on the incest father - a daughter in the 1970s showed that the family had certain characteristics before the onset of incest, such as: alienation between mother and daughter, extreme father's dominance. The oldest daughters in the family are more likely to be victims of incest.

This experience is psychologically harmful to women in later life and often leads to low self-esteem, unhealthy sexual activity, problems in interpersonal relationships and are at extremely high risk of many mental illnesses, including depression, anxiety, phobias, substance abuse, borderline personality disorder and complex post-traumatic stress.

Herman and Hirschman (1981) conducted a study on the hysteria between a father-daughter who showed that most of them experienced an open-hearted father's father in families where the mother was ill or unable to protect them.

In the families where the incestuous act occurred, the mother was mostly absent from the home, with psychosis, depression, and episodic alcoholism.

Blair and Rita (1979) concluded that mothers in incestuous families were often frigid and completely uninterested in sex with their husbands. The dissatisfaction that these men incurred in them made the daughters subject to satisfying their sexual needs.

The following things often contribute to the incidence of incest:

- The family has a strict hierarchical nature with inflexible rules and stereotyped sexual positions;
- The family has a dominant father who maintains his position with threats and orders;
- The family is isolated from the environment;
- The family of the environment sees as the outsiders who are here to compromise the sanctity of the emotional stability of the individuals in it;

According to Raffling, Carpenter and Davis (1967), the father who makes the incest is usually one who looks like a typical father, non-aggressive, polite, in his 30 to 40 years of life. They

argue that in many cases the child actively seduces the father by demanding love and safety in him, sending out confusing signals, and that love coincides with sexuality.
Thurman (1983) in his own research stated that incestuous daughters had positive feelings towards their fathers and negative feelings towards their mothers.
In all of the above studies, the explanation for the incidence of incest is that it is complicated medical, psychodynamic or behavioral, but also active in the blood. However, it is a pathological state that causes an emotional conflict in the victim.

## Legal regulations for the crime - sexual assault on a child in the Republic of Macedonia Macedonia

The law applies to the protection of sexual integrity and morality, particularly of sexual freedom and sexual morality: rape (art. 186), sexual intercourse with a helpless person (art. 187), sexual assault on a minor under 14 years (art. 188, Articles 1 and 2).
Sexual assault on a minor who has not reached the age of 14 (Article 188) - A person who committed an act of sexual intercourse against / instead of: a child / juvenile who have not turned 14.
If the crime from item 1 is committed by a blood relative in a straight line or brother or sister, teacher, tutor, stepfather, stepmother, doctor or other person by abuse of his position or while performing domestic violence, he shall be punished with imprisonment of at least eight years .
The sentence of paragraph 2 shall apply and who commits the crime from item 1 with a juvenile less than 14 years of abuse of his mental illness, mental disorder, helplessness, retarded mental development or some other condition that is incapable of resistance.
A few more remarks on the crime: Sexual assault on a juvenile under the age of 14 is related primarily to the need of this juvenile for proper growth and development. These are persons who are at the earliest stage of sexual (and physical, emotional intellectual) development, when by rule they cannot fully perceive the significance of sexual relations, and these relations themselves are not accompanied by deep emotional urges, due to which There is a danger of them dehumanizing and to pull the development of the young person into a disharmonic direction. "(Kambovski, V., 1997: 209)
When it comes to this work, it starts from the knowledge of psychology that by touching in the sexual integrity, the development of his sexual identity and the possibility of sexual self-esteem can easily be considered. In order to speak of a criminal act, there must be no consequence because it is an abstract danger for the child's sexual development (the work can be done on a child who sleeps).

This is the reason why the criminal law contains a basic prohibition of any sexual intercourse with minors who have not reached the age of four, regardless of gender.

Violent or a violent intercourse or other sexual acts are incriminated. The significance of the object of protection of the victim in the act that can be identified with the interest in the proper sexual and other development of these persons. The special nature of this work does not result in respect for the consent of the child. It starts from the fact that a child (in this case and a victim) cannot form a free will, which means that his eventual admission is legally irrelevant.

The presumption of existence of this work is the consent, or rather, the lack of resistance of the child. An act of execution is objection or another sexual act.

The subjective side, which consists of intent, encompasses the awareness that it is a child (it is possible to intend), as well as awareness of the special situation of the victim, due to which she is not capable of resistance, as well as awareness that this does not oppose the act Sexual intercourse or sexual intercourse. (Kambovski, V., 1997: 209-210)

## Treatment and resocialization of pedophiles

The treatment of pedophiles is oriented towards changing sexual orientation, with the help of psychotherapy and pharmacotherapy.

This treatment initially eradicates the thoughts that almost every pedophile has that the child enjoys the sexual act, which begins the correction of cognitive behavior.

In the past, pedophiles were treated with electrical shocks of the brain, intended to remind them of the sinfulness of their thoughts. It was a bizarre way of further damaging the brain of these people.

The German psychologist thinks that pedophile lacks the passage of sexual affinity from pre-pubertal to post-pubertal partners. This usually occurs at the onset of puberty after the development of the foreskin of the brain. There are some indications of the presence of pedophile inclinations in the family, but it is not yet clear whether these inclinations are conditioned by genetics.

According to a new study by the Center for Addiction and Mental Health (CAMH), pedophilia is probably caused by poor brain links. The research used magnetic resonance and sophisticated computer analyzes to compare pedophile groups to groups of criminals whose crimes were not of sexual nature. It has been observed that pedophiles have a significantly less white mass, a substance responsible for linking to different parts of the brain.

Although in psychiatry pedophilia is considered incurable, there are some new techniques used to combat pedophile activity. They do not influence the patient's thoughts or feelings but help him refrain from illegal things.

One of these techniques is the creation of fragile aversion, that is, nausea towards children, by releasing unpleasant smells to seeing child sexual content. Also, chemical castration is done with agents that reduce the level of testosterone and decrease libido.

The treatment of pedophilia is quite difficult and the rate of failure is low. One of the reasons for the poor success of the treatment is that in many cases, pedophiles come for treatment after a court decision and are not motivated for treatment. In rare cases when there is a motivation for treatment, success is greater. (In the Netherlands, there is an institution where persons, without fear of criminal prosecution, may face treatment).

Pedophilia is a disorder of sexual inclinations. Pedophile sexually excites children (thinking for children, seeing children that are scratching, bathing or masturbating).

The type of activity that a person sexually arouses cannot be changed, because today pedophile treatment leads to two directions. On the one hand, an attempt is made to find a model of a sexual pattern with adults who would be exciting for pedophile by encouraging such fantasies in masturbation, and then such activities. On the other hand, the treatment is aimed at identifying situations that are an impetus for pedophile (e.g., the opportunity for a child to see in an exciting situation, such as children on a playground, kindergartens, children's films, certain magazines and Internet addresses). Then the pedophile is taught how to avoid such situations or how to react when faced with such a situation. Of course, for this type of treatment a need is a great motivation.

As with many types of disorders, pedophilia cannot be completely cured.

Mental images are a perfect display of deviant inclinations, claim psychologists. Therefore masturbation and fantasies about sexual relations with a child can be used in behavioral - cognitive therapy for the treatment of pedophiles.

During this therapy, the roots of the sexual fantasies of the pedophile are first revealed, and then they are only enriched with images of arrest, humiliation and torture in prison, which slowly changes the perfection of the pedophile for the whole work.

This therapy can be used to reduce the recurrence of pedophiles by treating all the subtle emotions that encourage the desire for sexual contact with a minor in them, such as irritability, depression, family problems, confusion and love pain.

Drugs, in turn, aim to reduce the amount of testosterone in the pedophile's body, which will not respond to visual sexual stimuli.

Chemical castration is mandatory for pedophiles in Poland, Russia, Moldova, the Czech Republic and some US states. The debate on chemical castration last year began in Romania, following a tragic case where a 10-year-old girl was sexually abused and then killed.

For now, the competent authorities in Macedonia do not have a specific and unique position on this issue and the introduction of this type of protection.

Should chemical castration be introduced for pedophiles?

• Yes, I think it should (86%, 604 Votes)

• No, there are other ways to solve this problem (10%, 67 Votes)

• I do not know, I'm not interested ... (4%, 32 Votes)

Total Votes: 703

The survey was conducted at www.zase.mk.

The Russian Duma has responded to public pressure and passed the law on chemical castration of pedophiles. Faced with the increase in pedophilia, the Duma has also increased the prison sentence involving mandatory castration.

All convicted pedophiles are prohibited from approaching institutions where there are children, as well as work related to minors.

Those who have turned 18 will be castrated, and they have committed such a sexual assault.

The law was signed by Medvedev, and the representative for children's rights stressed that this would be a step in the fight against this kind of violence against children.

Pedophiles will be castrated before being sentenced.

In California there is a prison only for pedophiles called Coaling State Hospital where only male pedophiles are located. The institution offers treatment for the treatment of these monsters.

1/3 of them accept the treatment. The capacity is 1500 beds and opened in 2005. Since August 2010, there are no places in the prison.

The need for such a prison was great because pedophiles were most often killed by other prisoners in prisons who consider child sexual abuse the worst offense.

Recidivism is the biggest problem in the treatment of pedophiles. Recidivism is defined as getting a prison sentence for the same done again. Although most of them pass through three to five years in prison, however, after completing them, they again make sexual acts, sometimes on other adults.

Most of them, 35%, show their relapse through illegal activities with children on the Internet, by collecting children's pornographic material, as well as by indicating children for meetings. It is in this way that they return to the penal correctional homes again, and the number of

victims who left behind contributes to the actualization of the need for chemical castration of them even at the first committed delict.

In the 1940s and 1950s, castration of the testes, considered the main producers of male hormones, was an effective solution to pedophilia in Europe, and in that period recidivism was a single-digit number.

In order to reduce the number of relapses when it comes to child sexual abuse, therapists from California research centers recommend a "positive approach" to perpetrators in penitentiary correctional facilities.

According to this "positive approach" pedophiles would be treated with one-on-one conversation with the therapist, through which the perpetrator would feel understanding, empathy, a desire for help, which would inspire it to be easier to open, trust the therapist and of course improve the re-socialization process.

And perpetrators of sexual crimes against juveniles, according to experts, should undergo cognitive group therapy, where they can find a reason for all their inadequate thoughts, behaviors and attitudes. Often, the perpetrators themselves have been victims of sexual abuse, and suppressed anger, a desire for power, and a desire to feel their pain all the time causes child abuse, reasons that can only be cured through cognitive therapy.

This type of therapy, even in 20% of pedophiles, reduced the recidivism and helped them take responsibility for their actions and develop a chain of skills to create a better life.

With the skills for a better life, pedophiles increase their self-esteem, and thus do not need to feel power in sex, one of the main causes of child sexual abuse.

The legal regulations in our country do not regulate the manner of communicating the father - pedophile with the children after the end of the prison sentence and the treatment for proper re-socialization, which is a big omission, because without controlling this, conditions for repetition of the work are created.

Such was the case with Bajram Velioski (55) from the village of Plasnica near Kicevo, who in 2009 was sentenced to eight years in prison for raping and becoming pregnant then his 16-year-old daughter, after serving his prison sentence, repeated the act again Back to the now-old 24-year-old daughter. (zase.mk)

Such examples of everyday life are more than sufficient incitement to look for ways to regulate the contacts of the father and daughter.

The Republic of Slovenia started to allow meetings under the supervision of a dad with the daughter, after both of them received appropriate psychosocial help for normal operation.

Meetings are held in special rooms in the presence of a social worker who visually monitors any interaction between the father and daughter and notes in a written report that you send to

the court and the Center for Social Work. Before starting the bras if the person is a minor, it is necessary for the mother to give permission for them and first to meet with the father.

The time of arrival, the emotionality of the meeting, the communication contacts, the attempt to get closer, the topics that are discussed, the way the meeting ends. Care must be taken not to use violent games to intimidate or threaten a child, cautioning that the father does not use physical contact during the meeting. Photographing and using digital cameras and toys is strictly prohibited in order not to create possible sexual content.

The gifts and bringing food by the father to these meetings is also prohibited. During the meeting, if the child needs to visit the toilet, the social worker is accompanying him, and not by the father.

In this way, social workers and the service have a constant insight into the vulnerability of child safety, whether meetings are a psychological burden for the same, whether the emotions they experience are negative, whether there is a need to initiate a procedure for prohibiting the approximation, etc.

If a child and father develop a positive attitude to these meetings, it helps him to build a genuine emotional connection with him, and to develop an appropriate parental role.

These is very important to provide in our social services institutions because is one secure way to rebuild life's of pedophiles, victim, and from a whole family. Incest cases have log influence of victim life, because they also lose confidence in mother as well, because in some cases she doesn't protect the daughter and sometimes she doesn't believe in abuse. So treating institutional approach for treatment of pedophile – father, victim – daughter and mother is only way to save next generations in that family, because in these way will be solved post – traumatic stress who is destroying peoples may years after the abuse.

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# THE LAW ON PROTECTION OF WHISTLEBLOWERS IN FUNCTION OF FIGHTING CORRUPTION: THE CASE OF THE REPUBLIC OF MACEDONIA

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## Abstract

The authors of the paper analyse the Macedonian legislation on protection of whistleblowers as an efficient tool for fighting corruption.

Firstly, the authors point that corruption in all its forms is a real problem of the modern society, as well as in our country. The corruption in Macedonia affects all aspects of the society: from the performance of the government and the public officials, to social activities that endangers the rule of law. The issue of corruption in the country is constantly present in the reports of the European Commission, in a negative connotation. In this regard, according to the Progress Report 2014, a top priority for the enlargement countries, including the Republic of Macedonia is "the need to introduce stronger framework for effectively preventing and combating corruption".

Next, the authors of the paper refer to the relatively new Macedonian legislation on whistleblowing. In terms of its implications in practice, it is still too early to draw conclusions since the law was adopted in 2015 and entered into force in 2016. However, the authors of the paper specify certain observations regarding the strengths and the weaknesses of the legal text compared with the laws of other countries that have a longer tradition of regulation and application of the whistleblowing.

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Finally, the authors note that the law is modern, it incorporates the contemporary solutions for legal regulation of whistleblowing, however, it cannot be included in the group of countries that are most advanced in this field. As a conclusion the authors suggest recommendations for further improvements of the protection of whistleblowers in fighting the corruption in the country.

## INTRODUCTION

Whistleblowers play an important role in detecting corruption, fraud, mismanagement and other crimes that endanger human health and safety, financial integrity, human rights, the environment, and the rule of law. By disclosing information about such offenses, whistleblowers help save lives and billions of dollars from public funds. Whistleblowers often expose themselves to high risk. They can be expelled from work, sued, blacklisted, arrested, threatened, or in extreme cases attacked or killed. Hence, the need for protection of these persons must be imposed (Transparency International, 2013). However, those who report wrongdoings may be subject to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. In many countries, whistleblowing is even associated with treachery or spying (Banisar, 2011; Transparency International, 2009).

In order to ensure the appropriate protection of the "whistleblowers", Transparency International has established international principles for the legislation for the protection of whistleblowers. These are the best practices for the laws on protection of whistleblowers and support for "whistleblowers" of public interest.

In recent years, whistleblowing has been used as a means of combating corruption.

Some forms that today would be described as whistleblowing exist from the beginning of human civilization, but in recent years they have been used as measures to fight corruption, mismanagement and general disrespect of legal obligations by the wider public.

In some countries there is a whistleblowing law for more than a hundred years.

Whistleblowing has become especially actual in the last decade. It also refers to all aspects of the law, but it is an issue that has attracted the attention of the wider public (especially after the cases of Julien Assange, Bradley (now Chelsea) Manning and Edward Snowden, who filled the front pages of the media, and then caused political consequences). Although in many countries there is a legislation on "whistle-blowing," however, the interest in "whistle-blowing" has increased lately due to the findings of Edward Snowden. He revealed the intrusion into the privacy of citizens of a global scale by the secret services in a dimensionless and literally unthinkable before.

Regardless of the popularity of this topic, whistleblowing also raises several legal issues that have not yet been adequately addressed in any legislation.

Whistleblowing in different countries is treated in a different way. However, there are many similarities between legislations, hence, and similar problems faced by lawmakers and judges.

The most developed legislation regarding the whistleblowing has Britain, Japan and South Korea. For years, even decades, they have sophisticated regulations for whistleblowing. The United States, although it is the first country with a whistleblowing regulation, however, has no regulation that can be applied generally, but rather different regulation in different spheres of life. Many EU legislation has made progress in establishing modern rules for protecting whistleblowers in recent years, such as Italy, Malta and Romania. In many other EU member states, advances in legislation are needed, as is the case with Germany. Namely, the German legislator fails to deal with the problem, leaving the courts with a difficult task, which, in turn, can not solve the problem in a coherent way, except that they can decide on individual cases (Dokmanovikj, Gruevska-Drakulevski, & Shapkova Kocevska, 2017).

Improvements to the whistleblowing regulation, even in the most developed legislation, should be guided in the following directions:

First, the protection of whistleblowers and witnesses of whistleblowers may and should be improved. Although witnesses are protected if they testify in trials, they are usually not protected in private investigations. The protection of supporters is even weaker (the exception is South Korea, which should be an example for other legislations).

Secondly, the role of collectives in the protection of whistleblowers should be promoted. It refers to trade unions, consumer protection associations, and even associations of whistleblowers such as Public Concern at Work. Collectives should be taken to protect the whistleblowers, because it will be beneficial for everyone.

Thirdly, the issue of financial incentives for the whistleblowers. The United States is leading in this matter, having the centuries-old experience with this technique. However, financial incentives have a bad side as they increase the risk of malicious whistleblowing (Dokmanovikj et al., 2017).

The legislation of the Republic of Macedonia for "whistling" is relatively new. The law was enacted in 2015 and entered into force in 2016. Regarding what implications it has in practice, it is still too early to comment, because the time for its application is very short. However, in the following text the authors of the paper draw certain perceptions regarding the pros and cons of the legal text compared to the legislation of the other countries which, however, have a longer tradition of regulating and applying the whistleblowing. Furthermore

the authors refer to the current legislation on fighting corruption in the Republic of Macedonia.

## THE CURRENT LEGISLATION ON FIGHTING CORRUPTION IN THE REPUBLIC OF MACEDONIA

The significance of the problem of corruption is undoubtedly an issue that is the European Union's policy in the field of justice and fundamental rights (Chapter 23). Furthermore, it is strengthened by the fact that according to the latest European Union Progress Report on the Republic of Macedonia for 2014, the top priority for the enlargement countries, including the Republic of Macedonia, is "the need to introduce stronger frameworks for effective prevention and fight against corruption". Corruption, as pointed out in the Report, "also directly affects citizens when they have access to certain public services" (European Commission, 2015).

Corruption, in all its forms, from the large that is an element of organized crime and the abuse of power, to ordinary, "daily" corruption is a real "cancer" of modern society. Corruption is a problem that the whole world faces, it knows no borders. Macedonian society in the transition period is faced with a wave of corruption that affects all pores of society: from the exercise of power and public functions to social activities (Kambovski & Tupancheski, 2011, p.484).

Corruption represents a major problem in the country and “it is perceived to be spread in all levels and areas of the country. Corruption is ranked as the fifth top problem in the country after unemployment, poverty, low incomes, and high prices. For years, numerous polls showed that corruption was considered as one of the top three problems in the society of the beneficiary country. There are differences between perceptions and experience (victimization). While customs officers, judges, ministers, and tax officers are perceived as the most corrupt, on the other hand, professions such as doctors, local authorities, police officers, and university professors are those who are actually most corrupt” (USAID, 2014; Škrbec, 2016).

The UN, the Council of Europe and the European Union have developed a complete anti-corruption legislation with effective preventive, control and repressive mechanisms in many areas (The United Nations Convention Against Transnational Organized Crime (the Palermo Convention) of 2000 and the Special Anti-Corruption Model, the United Nations Convention against Corruption of 2005, the Penal Convention against Corruption of 1998 and the Civil Convention against Corruption of 1999 The Council of Europe (both ratified by our state), the EU's Financial Interest Protection Convention of 1995 and the Anti-Corruption

Convention involving officials of the EU since 1997), Resolution (99) 5 on the establishment of a group of countries against corruption (GRECO), Resolution (97) 24 on the twenty guiding principles for the fight against corruption and others).

The Republic of Macedonia adopted anti-corruption legislation in accordance with the undertaken obligations from the ratification of the conventions. Thus, the Law on Prevention of Corruption was adopted (Official Gazette of the Republic of Macedonia, no. 28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 97/2015 and 148/2015), the State Commission for the Prevention of Corruption was established, then a Law on Prevention of Conflict of Interest (Official Gazette of the Republic of Macedonia, no. 70/2007, 114/2009, 6/2012 and 153/2015), the Law on Prevention of Money Laundering (Official Gazette of the Republic of Macedonia, no. 130/2014, 192/2015 and 27/2016) etc. were adopted. What is of particular importance for the fight against corruption is the adoption of the Law on Protection of Whistleblowers (Official Gazette of the Republic of Macedonia, no. 196 of 11.10.2015).

The causes of corruption are different in different countries, but anti-corruption measures include, among other things, the widespread use of whistleblowing by promoting it, encouraging whistleblowers, adopting laws to protect them, and so on.

According to the Transparency International: “Corruption is the abuse of entrusted power for private gain. Whether active or passive bribery in business transactions across or within national borders, whether venality within political spheres or devising to gain advantage through bribes - corruption causes not only material damage, but undermines a society’s very foundations. All sectors of society can provide the structural gateways that foster corruption. Corruption denotes corruptibility, bribing, and the acceptance or granting of benefits or advantage. It is estimated that the cost of global corruption ranges between 1.3 and 1.75 trillion euros, weakening global economic growth by around two percent” (Kreutzer, 2016).

The term corruption (lat. Corruptio - corruption, bribery) in the most general sense is defined as abuse and exploitation of the public function for personal gain. In a criminal sense, this notion covers the acts of bribery (active and passive) and unlawful mediation (trading with influence), all with the intention of gaining benefit (Kambovski & Tupancheski, 2011, p.484).

**The Criminal Code of the Republic of Macedonia (CCM)** (Official Gazette of the Republic of Macedonia, no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015 and 226/2015) incorporates the acts: taking bribe (Article 357), giving a

bribe (Article 358), giving a reward for unlawful influence (Article 358-a) and accepting a reward for unlawful influence (Article 358-b), as acts of corruption.

Taking bribe under Article 357 of the CCM has three forms: regular, irregular and additional passive bribe. On the other hand, giving a bribe (Article 358 of the CCM) or active bribery: stands in an essentially unbreakable relationship with passive bribery; individual incrimination that may exist and independent of passive bribery; there is a crime even when the official refuses the gift or the benefit or the promise of gift or property gain. It has two forms: regular and irregular active bribery.

A particular form of corruption is "trade with influence", that is mediation (active and passive) between the official or the responsible person and the perpetrator who bribes him to abuse his official position or duty. An intermediary in such a transaction appears a person who uses his influence to establish a relationship between the briber and the official or the responsible person, and to perform or not to perform certain official action or duty of the responsible person. This kind of corruption enables the creation of "vip" links and protection, which transforms the performance of public functions and duties into an ordinary trade activity (Kambovski & Tupancheski, 2011, p.491-496).

According to the **Law on Prevention of Corruption,** corruption means taking advantage of the function, public authority, official duty and position for the accomplishment of any benefit for itself or for another (Article 1-a).

Among other things, the law provides provisions on: prohibition of receiving gifts (Article 30), unlawful requests of the superior (Article 40), failure to report punishable offense (Article 41), prohibition to exercise influence on another (Article 42), exercise discretionary powers (Article 43), offering a bribe (Article 44), a procedure in the case of an allegation of corruption (Article 45), nullity of legal acts and compensation for damages (Article 46).

**The Law on Prevention of Conflicts of Interest** is of importance for the suppression and prevention of corruption. The law stipulates, inter alia, a ban on the receipt of gifts, that is, the official person may not receive a gift while performing public authorizations and duties, except in the cases determined by the **Law on use and disposal of the assets of state bodies** (Article 15). The official who, contrary to the provisions of this Law, is offered a gift or other benefit related to the performance of the official duty, is obliged to reject it, to determine the identity of the person, and if it is a gift that can not be returned, the official is obliged to report it to the competent body without delay, to present the witnesses and other evidence, immediately, and within 48 hours at the latest, to submit a written report to the State Commission (Article 16).

Having in mind the current legal framework for preventing corruption, in the next section we will focus on the current regulation for protecting the whistleblowers.

***THE LAW ON PROTECTION OF WHISTLEBLOWERS***

The whistleblower owns both special and important role in the process of combating corruption.

International instruments aimed at combating corruption have also recognised the importance of having whistleblower protection laws in place as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the United Nations Convention against Corruption (UNCAC Articles 8, 13 and 33), the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) (Section IX.iii. and Section X.C.v), the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service (Principle 4), the Council of Europe Civil (Article 9) and Criminal Law Conventions on Corruption (Article 22), the Inter-American Convention against Corruption (Article III(8)), and the African Union Convention on Preventing and Combating Corruption (Article 5(6)). These extendeded provisions have significantly strengthened the international legal framework that aimes for countries to establish effective national whistleblower protection laws.

The legislation of the Republic of Macedonia for whistleblowing is relatively new. Regarding what implications it has in practice, it is still too early to comment, because the time for its application is very short. However, certain perceptions can be given regarding the pros and cons of the legal text compared to the legislation of the other countries which, however, have a longer tradition of regulating and applying the whistleblowing.

It can be noted that the Law is contemporary, it incorporates the modern solutions for the legal regulation of whistleblowing, and however, it can not be included in the group of countries that are the most advanced in this field.

Regarding the question of who is protected as a whistle-blower, we can notice that our solution is approaching that group of countries that provide protection in accordance with labor legislation. Subsequently, whistleblowers of works of public interest are protected, private interest is not foreseen. Also, the same remark remains as for other countries in terms of (non) protection of witnesses outside the trial.

The new **Law on Protection of Whistleblowers (LPWB)** regulates the protected whistleblowing, the rights of whistleblowers, as well as the activities and the duties of the institutions, that is, the legal entities in relation to the protected whistleblowing, and the

provision of protection for whistleblowers. The Law protects the public interest, which implies represent protection of the basic human and citizen's freedoms and rights recognized by the international law and laid down in the Constitution of the Republic of Macedonia, including the rule of law and the prevention of crime and corruption (Article 2, Pargraph 4)

Although, the law was enacted in October 2015 and came into force in March 2016, it seems that the public is not familiar with the concept that the law offers, especially in terms of the possibilities for preventing corruption.

The law provides protection of blowing of the whistle that, in accordance with this Law, conveys a reasonable doubt or knowledge that a punishable or other unlawful or illegal act infringing or jeopardizing the public interest has been committed, is being committed or is likely to be committed. A whistleblower, in terms of this Law, shall be:

- a person who is employed for an indefinite period or definite period of time at an institution, that is, a legal entity about which he/she blows the whistle;

- a job candidate, a volunteer or trainee candidate at an institution, that is, a legal entity about which he/she blows the whistle;

- a person who is or has been a volunteer or a trainee at an institution, that is, a legal entity about which he/she blows the whistle;

- a person who is hired or has been hired for doing a job on whatever ground by an institution, that is, a legal entity about which he/she blows the whistle;

- a person who has or used to have a business relation or another form of collaboration with an institution, that is, a legal entity about which he/she blows the whistle;

- a person who uses or has used services of an institution, that is, a legal entity in the public or the private sector about which he/she blows the whistle, who does protective whistleblowing in good faith in accordance with this Law (Article 2 Paragraph 2, 3).

The law distinguishes protected internal whistleblowing (Article 4), protected external whistleblowing (Article 5) or protected public whistleblowing (Article 6).

The whistleblower shall make protected whistleblowing within the institution, that is, the legal entity wherein he/she suspects or has an information that a punishable action or another unlawful or illegal act violating or jeopardizing the public interest has been committed, is being committed or is to be committed (hereinafter: the protected internal whistleblowing). The whistleblower shall make the protected internal whistleblowing orally read into the record or in a written form to a person authorized by the manager of the institution, that is, the legal entity about which he/she blows the whistle (Article 4).

The whistleblower may also make protected whistleblowing by filing a report to the Ministry of Internal Affairs, the competent public prosecution office, the State Commission

for Prevention of Corruption, the Ombudsman of the Republic of Macedonia, or other competent institutions, that is, legal entities, if: the whistleblowing concerns directly or indirectly the manager of the institution, the whistleblower does not receive information about the measures taken in relation to the whistleblowing; or measures have not been taken or the whistleblower is not satisfied with the actions taken or suspects that measures are not to be taken or that the whistleblowing is to cause harmful consequences for him/her or for his/her close person (the protected external whistleblowing) (Article 5).

The whistleblower may make protected public whistleblowing by making publicly available the information related to the knowledge that a punishable act violating or jeopardizing the life of the whistleblower and his/her close person, the health of the people, the security, the environment, damages of great proportions, has been committed, is being committed or is likely to be committed, that is, if there is a direct danger of destruction of evidence (Article 6).

The whistleblower acts in good faith and with a reasonable doubt in the truthfulness of the information included in the report at the time of blowing the whistle and shall not be obliged to prove the good faith and the truthfulness of the whistleblowing (Article 3 Paragraph 1 and 2). The whistleblower is provided protection in accordance with the law (Article 8 and 9) and is guaranteed anonymity and confidentiality to the extent and up to the moment he/she requires so (Article 7). The right to anonymity of the whistle-blower can be restricted by a court decision about which the whistle-blower shall be informed without any delay (Article 3, Paragraph 3 and 4).

The whistleblower shall have the right to court protection before a competent court in accordance with the law. The whistleblower may request before a competent court by a lawsuit: - determination that a harmful activity has been taken or a right has been violated because of the whistleblowing; - prohibition on performing a harmful activity or violating a right and repeating the harmful activity or the violation of a right; - annulment of an act that caused a harmful activity or violation of a right; - removal of the consequences of a harmful activity or violation of a right; - compensation of material and non-material damage. The procedure on the lawsuit shall be urgent. Revision shall be allowed in the procedure for court protection related to the whistleblowing (Article 10, 11, 12).

The whistleblower shall have the right to compensation for a damage that he/she or his/her close person may suffer because of the protected whistleblowing. The request for damage compensation shall be exercised by filing a lawsuit to the competent court (Article 13).

If it is determined that the whistleblower has made abuse of the reporting, he loses the protection guaranteed by this Law (Article 14).

The authorized, that is, the managerial persons in the institutions, that is, the legal entities in the public sector to which reports are submitted for protected internal whistleblowing, protected external whistleblowing or protected public whistleblowing, shall be obliged to submit semi-annual reports about received reports from “whistelblowers” to the State Commission for Prevention of Corruption (Article 15).

The Law on Protection of whistleblowers provides misdemeanor provisions (Article 16-23). The law provides draconian fines for committing misdemeanors in violation of the provisions of this law. This is a problem of misdemeanor law and the policy of prescribing and imposing high fines, in general, a question that needs to be revised.

It is also worth mentioning that in the transitional and final provisions of the Law, it is clearly stated that “It shall not be allowed to use materials resulting from illegal interception of communications in the period between 2008 and 2015 as contents of the report.” This, was accordance with the current political and legal crisis in the Republic of Macedonia in the past period. Such a solution is not unknown in the comparative law regarding the protection of whistleblowers (Dokmanovikj et al., 2017).

For the successful implementation of the Law are adopted:

• **Rulebook on guidelines for adopting internal acts for protected internal whistleblowing in the legal entity in the private sector** (Official Gazette No. 46/2016).

• **Rulebook on protected internal reporting in institutions in the public sector** (Official Gazette No. 46/2016).

• **Rulebook on Protected External whistleblowing** (Official Gazette No. 46/2016).

It is worth mentioning the **Opinion of the Venice Commission** on the Law. The Law on Protection of whistleblowers is very well elaborated and clear and represents a positive development of the national legal framework. Among other things, in the opinion of the Venice Commission on the Law on Protection of whistleblowers, it is recommended to designate the main state agency that will be obliged to carry out a check of the legislation and conduct training to raise public awareness about the legal framework. This may be the State Commission for the Prevention of Corruption (SCPC) or the Ministry of Justice, which already have certain functions under Article 15 of the Law, is in the opinion of the Venice Commission. It is also recommended that the state provide assistance to create an independent advisory body where potential whistleblowers can be given advice.

The SCPC or the Ministry of Justice should be the connection with the advisory body and the annual reports that will be submitted to the SCPC should be public without violating the privacy of the whistleblowers, as defined by the Law.

Article 6 of the Law on protection of whistleblowers should be revised: public disclosure should be possible. When there are no internal/ external detection mechanisms, where they are not effective enough or where there is a noticeable risk of concealment of offenses or an attempt to evade responsibility from the perpetrators. This article should be based on the general definition of "public interest" contained in Article 2.

The Law on Protection of whistleblowers should emphasize to what extent and under what circumstances the public interest provided protection for the whistleblowers, and not only what are the possible disciplinary procedures (and similar measures that apply to the workplace), but also criminal sanctions and civil liability and what are the possible exceptions to this rule.

At present, goes the process for preparation of the Draft Law on Amending and Supplementing the Law on Protection of Whistleblowers. The proposed amendments are aimed at harmonizing the recommendations made by the Venice Commission with Opinion no. 829/2015 of March 15, 2016.

*The Law on Protection of Whistleblowers in Practice*

Regarding the implementation of the Law on Protection of Whistleblowers, we can note that according to the Annual Report of the State Commission for Prevention of Corruption (SCPC) in 2016, the SCPC in the reporting period undertook activities in the direction of building a system for protection of whistleblowers for protected internal and external reporting. In April 2016, the SCPC appointed an authorized person for receiving reports from pointers in the SCPC.

After the implementation of the Law and the bylaws deriving from it, the institutions began to submit to the SCPC notifications for appointed authorized persons for the acceptance of application from whistleblowers. Thus, a total of 29 institutions from the public sector submitted a notice for an authorized person for receiving applications in the public sector pointers, while such notification was submitted by 20 institutions from the private sector, although according to the Law they are not obliged to submit such notification to the SCPC.

Subsequently, 42 public sector institutions submitted a semi-annual report for the period from 13 March to 30 June 2016, while for the period 01.07.-31.12.2016, a total of 18 institutions from the public sector submitted to the SCPC semi-annual reports on received reports from pointers.

From the analysis of the submitted reports, it can be concluded that in the two reporting periods for which reports were submitted, no application was submitted from a whistleblower in the institutions. The same applies for the period 01.01.2017-30.06.2017.

The question arises whether the timeframe for implementation of the Law is still short, or the Law is inapplicable, or the public is still not sufficiently familiar and confident with the opportunities offered by the Law.

Hence, we believe that in the shortest time, the Venice Commission's remarks should be addressed and the promotion of the law and the opportunities it offers should be promoted, especially as an effective tool in the fight against corruption, and to convince the public that the law will offer a secure guarantee in case they appear as whistleblowers.

## CONCLUSION

“Whistleblower protection is essential to encourage the reporting of misconduct, fraud and corruption. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. This applies to both public and private sector environments, especially in cases of bribery: Protecting public sector whistleblowers facilitates the reporting of passive bribery, as well as the misuse of public funds, waste, fraud and other forms of corruption. Protecting private sector whistleblowers facilitates the reporting of active bribery and other corrupt acts committed by companies” (G20 Anti-Corruption Action Plan).

Whistleblowing in different countries is treated in a different way. However, there are many similarities between legislations, hence, and similar problems faced by lawmakers and judges.

The most developed legislation regarding the whistleblowing has Britain, Japan and South Korea. For years, even decades, they have sophisticated regulations for whistleblowing. The United States, although it is likely that is the first country with a whistleblower regulation, however, has no regulation that can be applied generally, but rather different in different spheres of life. Many EU legislation has made progress in establishing modern rules for protecting whistleblowers in recent years, such as Italy, Malta and Romania. In many other EU member states, advances in legislation are needed, as is the case with Germany. Namely, the German legislator fails to deal with the problem, leaving the courts with a difficult task, which, in turn, can not solve the problem in a coherent way, except that they can decide on individual cases (Thüsing & Forst, 2016).

It can be concluded that legislation on protection of whistleblowers is more sophisticated in common law countries than in European countries of continental law. The

same applies to culture and practice in connection with whistleblowing because these states have laws of whistleblowing from a long time ago. States belonging to European continental law have not yet developed mechanisms for effective protection of whistleblowers. Certain European countries do not have a proper translation of the whistleblowing and "whistleblowers", hence very few people decide to report punishable offenses under these laws. Finally, there is still a lack of commitment from political leaders in continental Europe and Eastern Europe to promoting whistleblowing as a means of tackling corruption, especially in the public sector (Schultz & Harutyunyan, 2015).

Transparency International urges all EU Member States to provide comprehensive protection for public and private sector advocates in their respective legislations and to identify whistleblowers as important figures in the fight against corruption. The whistleblowing brings professional and personal risks, and EU citizens and citizens need to enjoy protection when reporting corruption for punishable offenses and give them access to the best advice before doing so (Worth, 2013).

Improvements to the whistleblowing regulation, even in the most developed legislation, should be guided in the following directions:

First, the protection of whistleblowers and witnesses' references may and should be improved. Although witnesses are protected if they testify in trials, they are usually not protected in private investigations. The protection of supporters is even weaker (the exception is South Korea, which should be an example for other legislations).

Secondly, the role of collectives in the protection of whistleblowers should be promoted. It refers to trade unions, consumer protection associations, and even associations of whistleblowers such as Public Concern at Work. Collectives should be taken to protect the whistleblowers, because it will be beneficial for everyone.

Thirdly, the issue of financial incentives for the whistleblowers. The United States is leading in this matter, having the centuries-old experience with this technique. However, financial incentives have a bad side as they increase the risk of malicious whistleblowings (Worth, 2013).

The legislation of the Republic of Macedonia for whistleblowing, as stated before, is relatively new.

It can be noted that the Law is contemporary, it incorporates the modern solutions for the legal regulation of whistleblowing, and however, it can not be included in the group of countries that are the most advanced in this field.

Regarding the question of who is protected as a whistleblower, we can notice that our solution is approaching that group of countries that provide protection in accordance with

labor legislation. Subsequently, whistleblowers of works of public interest are protected, private interest is not foreseen. Also, the same remark remains as for other countries in terms of (non) protection of witnesses outside the trial.

The law provides protection for internal whistleblowing, external whistleblowing and public whistleblowing. The good intent and truthfulness of reporting is not obligated by the whistleblower to prove it.

The law provides protection of the whistleblower and guarantees anonymity and confidentiality to the extent and to the point that he requests. However, the right to anonymity of the whistleblower may be limited by a court decision for which the whistleblower is notified without delay.

In certain cases, the law allows protected public whistleblowing. Namely, a protected public whistleblowing can be done by making publicly available information regarding the realization that it has been committed, executed or is likely to commit a criminal offense that violates or endangers the life of the whistleblower and the person close to him, the health of the people, security, the environment, large-scale damages, that is, if there is an imminent threat of destruction of evidence.

The Law pays particular attention to the protection of the data and the identity of the whistleblower, as well as protection of the whistleblower and the person close to him from any kind of violation of the right or harmful action or danger of occurrence of harmful acts due to the performed protected internal and external reporting or protected public reporting. Hence, we see that the Law protects the vicarious persons of the whistleblower. However, such protection remains to be extended to what other legislations call supporters of whistleblowers.

Furthermore, the Law guarantees judicial protection of the whistleblower. In case of a dispute over the existence of a violation of the right of the whistleblower and his/ her close person for reporting, the burden of proof is on the side of the institution, that is, the legal person that violated the rights of the whistleblower and the members of his family. Also, the whistleblower has the right to compensation for damage that may be suffered by him or her close associates due to a protected whistleblowing.

The whistleblower loses the protection if he/ she makes a misuse of registration, i.e he/ she consciously reports false information about a natural or legal person in order to cause harmful consequences for the same, or if with due diligence and diligent, to the extent allowed by the circumstances, he has not checked whether they are accurate and reliable.

The managers of the institutions, that is, the legal entities in the public sector to which they apply, are obliged to submit to the State Commission for Prevention of Corruption semi-

annual reports for received reports from whistleblowers. And the State Commission for Prevention of Corruption and the Ministry of Justice are obliged to submit to the Parliament of the Republic of Macedonia special Annual Reports on received reports from whistleblowers.

The law provides draconian fines for committing misdemeanors in violation of the provisions of this law. This is an issue that needs to be revised.

It should also be noted that in the transitional and final provisions of the Law, it is clearly stated that it is not allowed for the content of the application to use materials arising from unlawful interception of communications from the period from 2008 to 2015. Such a solution is not unknown in the comparative law regarding the protection of whistleblowers.

In the end, the opinion of the Venice Commission, as well as proposals for improving the text of the Law, as well as its implementation must be taken into account. In particular, the recommendation is to designate the main state agency that will be obliged to carry out legislation review and to conduct training to raise public awareness of the legal framework, as well as to create an independent advisory body where potential advisors can address for advice.

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# CAN LAW ON PROBATION IMPROVE THE IMPLEMENTATION OF THE MEASURES FOR PROVIDING THE DEFENDANT'S PRESENCE IN THE CRIMINAL TRIALS IN MACEDONIA?

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**Key-words:** *measures for providing defendant's presence, probation, house detention, electronic monitoring.*

## Abstract

The author critically elaborates the jurisdiction of the new Probation Service as regulated within the provisions of the newly enacted Law on Probation in Republic of Macedonia. He states that the Macedonian legislator has omitted to regulate one very important part of the Probation service's jurisdiction, such as the implementation of the measures for providing the defendant's presence during the criminal procedure. The author stresses the fact that in one broader European sense, the Probation Services has imminent jurisdiction regarding the proper implementation of these measures, as ordered by the courts. Through this jurisdiction the probation service is serving to the court as Pre-trial service. In order to overcome this situation, author initially examines the connection between these measures and the Probation service and in addition provides specific suggestions for further improvement of Law on Probation provisions'.

## Introduction

In this text the author examines the jurisdiction of the newly enacted Law on Probation in Republic of Macedonia and scrutinizes whether the Macedonian legislator has provided sustainable legal grounds for effective and efficient implementation of the measures for providing of the defendants' presence during the criminal trials and particularly the alternative measures to detention. The main hypothesis of this article is to determine whether this legal text, first of its kind in Republic of Macedonia, has established proper basis for reaching of the above mentioned criminal justice process' goals and to determine whether this law is in compliance with the latest trends that are comparatively known regarding the Probation Services' and their jurisdiction.

The new Law on Probation in Republic of Macedonia was enacted on 25-th of December, 2015-th (No. 226/2015) with *vacatio legis* until 01-st of November 2016-th. Unfortunately, despite the fact that the *vacio legis* has elapsed, this Law has not yet been implemented in practice. The main goal of this law was to improve the implementation of the less severe sanctions to the imprisonment and to promote the implementation of the alternative sanctions as an effective and efficient tool for the fight against the crime in Republic of Macedonia. Furthermore, improvement of the implementation of these alternative sanctions is necessary due to the fact that since their enactment within the Criminal Code of Republic of Macedonia, most of the alternative measures were not used, or were considered as a legal décor primarily to the prison, fines and suspended sentences. With such treatment by the Macedonian courts these alternative measures were vastly neglected and/or put aside from the sight of the judges while deliberating the criminal sanctions at the end of the criminal trials.

One of the main arguments regarding such treatment of the alternative measures by the Macedonian judges is that the legislative basis for the implementation of these alternative measures is poor and undeveloped and by that can't provide proper legal basis for theirs appropriate implementation.

Due to these arguments, the Macedonian legislator have decided to improve this situation trough enactment of the Law on Probation and trough the establishment of the Probation service to provide sufficient basis for proper and increased implementation of these sanctions within the criminal justice system.

However, the purpose of this article is not to examine whether this new Law is providing proper or sufficient grounds for implementation of the alternative measures, nor to examine the suitability of the established Probation Agency. The purpose of this article is to shed light to the implementation of another also diminished part of the coercive measures of the Macedonian criminal justice system and to evaluate whether this newly enacted Law could improve the implementation of the less severe measures for providing of the defendant's presence during the criminal trials. Since by their nature these measures are very similar to the alternative sanctions and they bear many resemblances.

Unfortunately, this article contains critics regarding the outreach of the Law on probations, since this law has omitted the part for regulation of the implementation of the alternative measures to detention as a means for providing the defendant's presence during the criminal trials. Furthermore, reasons for such position of the Macedonian legislator are also evaluated, since the impression is that the Macedonian legislator has lost its momentum to

make better and provide additional improvements particularly in the area of the regulation and implementation of the measures for providing defendant's presence during the criminal trials.

These arguments are based upon the theoretical evaluation of the essence of the alternative measures as sanctions and the alternatives to detention as less severe measures for providing the defendants' presence during the criminal trials. In addition author, through the comparative method the regional experiences regarding the implementation of these measures and sanctions and the functioning and the jurisdiction of the Probation Service Agencies is also analyzed. Finally, conclusions and practical recommendations regarding the necessity for legislative amendments of the Law on Probation in Republic of Macedonia are generated in order to accept the implementation of the measures for providing of the defendant's presence during the criminal trials within the Law on Probation. Bearing on mind that the Law on Probation through such amendments can become a base-line from which the necessary legal preconditions and logistical support are established for the Macedonian judges while implementing these less severe measures for providing the defendants presence.

## Theoretical background for the implementation of the less severe measures for providing defendant's presence during the trial by the Probation Services

The idea for enactment of the Law on Probation in Republic of Macedonia rests upon the necessity for providing further legislative framework for proper implementation of the alternative sanctions, and to reach the CoE Directives' goal for increased imposition of alternative sanctions and reduction of the imposition of prison sentences (Rec(2006)13, CM/Rec(2010)1, EU FD No. 2008/909/JHA EU FD No. 2008/947/JHA and EU FD No. 2009/829/JHA). Despite the fact that these alternative sanctions, or alternative measures as they are named in the Macedonian Criminal Code, were established within the Criminal Code several years ago (No. 19/2004), the impression remained that these measures are loosely regulated and there are no additional mechanisms for their proper implementation. These arguments rested upon the fact that there weren't enacted any additional bylaws which were supposed to bring into live these provisions of the Criminal Code.

Hence, even the Law on Execution of the Criminal Sanctions has also omitted to provide further legislative framework for proper administration of these measures, since it does not contain specific provisions for detailed regulation of the implementation of the alternative measures.

Due to these facts it was obvious or even expected that Macedonian judges would not apply, or even not consider applying these sanctions to the defendants who were found guilty at the end of the criminal trials (State Statistical Bureau, 2017).

As an answer to these circumstances the newly enacted Law on Probation, besides providing additional and necessary clarification of these Criminal Code's provisions, have moved one step forward into establishing specific agency – Probation Service which will be authorized for execution of these specific sanctions. This agency should provide support to the courts and to the prison authorities with implementation of these sanctions (Kambovski, 2004; Strategy for Development of the Probation Service, 2013).

In addition, enactment of this new law – Law on Probation was also eagerly expected by the Macedonian legal professionals since it was expected that this law would provide systematic support to another similar part of the criminal justice process which was also neglected. This part of the criminal justice process was the part regarding the implementation of the less severe measures to detention to providing defendants' presence during the criminal trial. Despite the fact that on first sight it would appear that we are comparing "apples and pears", these two types of measures carry with them specific resemblance. This is primarily based upon the facts that the implementation of these less severe measures and the alternative sanctions in practice is usually connected with same or similar problems and they have similar implementation methodology.

Considering the nature of these alternative sanctions and the nature and the specific purpose of the less severe measures than detention for providing of the defendant's presence during the trial, it is acceptable to interconnect these two types of measures within one agency for their proper administration (Gianluka, 2017). The interconnection between these two types of measures, as Hucklesby and Marshall (Hucklesby and Marshall, 2000; Haddad, et al, 1998) emphasizes lays upon their minimum limitation of the defendant's right to liberty and bears minimum limitation towards their social activities, despite the fact that alternative measures are criminal sanctions and are imposed only upon finished criminal procedure and to the defendants which were found guilty, while the second measures are measures imposed to the defendants which are presumed innocent and during the phase of the criminal trial. In addition these two types of measures identically impose certain obligations or limitations to the defendants in order to test their responsibility and capability to properly function with their everyday life within the community of their origin (Turnbull and Hannah – Moffat, 2009).

Henceforward the same arguments which are used to justify the necessity to reduce the implementation of the imprisonment sanctions and to foster the imposition of the alternative sanctions are or can be used in the justification of the promotion of the implementation of these less intrusive measures to the defendant's right to liberty in comparison to the detention (Kanevcev, 2006; Buzarovska, 2006; Gruevska Drakulevski, 2011).

The reason for this analogy can be found in at least two different aspects.

The first aspect is connected to the empirically proved fact (Arnaudovski and Gruevska Drakulevski, 2013; Corre and Wolchover, 2007) that the processes of the resocialization and punishment of the convicted persons are far more effective and efficient if this person is not deprived from his/hers natural environment, meaning that the sanction is served within the convicted persons' community. Due to this fact if these arguments are plausible to the convicted persons they should be even more acceptable to the persons whish are standing trial and are protected with the principle of presumption of innocence. Hence, if the defendant is considered innocent until proven guilty it should be also treated likewise by the courts and his/hers right to liberty should be deprived only in specific, limited by law and necessary cases. This means that defendants' presence during the criminal trial in every other case should be provided, if needed, only through the imposition of the less severe measures for providing the defendant's presence. These measures as determined within the Criminal Procedure Code are very similar to the alternative sanctions as regulated within the Criminal Code, particularly regarding their implementation.

Second aspect considers the fact that specific state body or agency is necessary for proper administration of these measures, both the alternative sanctions and the alternatives to detention. Since establishment of a specific state agency for administration of the criminal sanctions is always expensive and connected with significant financial burden to the state's budget, it is also appropriate to provide as much as possible similar workload to these agencies which would reduce the court's or prison authorities' workload, but in the same time it would increase the overall court's and criminal justice system efficiency. This means that if we establish new criminal justice agency, then this agency should be in charged with performance of the complete workload of the other criminal justice stakeholders (such as the courts and prison authorities) that provide same or similar services in order to provide specialization of its services. It is needless to mention that the specialization of the workload of one agency leads to increase of the quality of its work performance (Kleiman, 2009; Arnaudovski, 2010). In our case this means that if the Probation Agency provides effective actions to increase the implementation of the alternative sanctions, than these positive experiences should, by all means, be replicated in the implementation of the alternatives to detention as measures for providing the defendants' presence during the criminal trial.

Considering these aspects, in the next chapter we will critically examine the provisions of the Macedonian Law on Probation in order to determine whether it is possible to extend its application to these less severe measures to detention. This analysis will be mostly based upon the comparison of the Macedonian law on Probation with the legislative solutions of other

states or criminal justice systems which have longer practical experience with Probation Services and the implementation of the alternative sanctions.

## Analysis of the Macedonian Law on Probation

Even at the first glance of the provisions of the Law on Probation (articles 1 and 3 of the Law on Probation) is obvious that the Macedonian legislator has reduced the impact of this law only within the implementation of the alternative measures to prison as regulated within the Criminal Code. Having on mind the comparative experience (Austrian experience http://cep-probation.org/wp-content/uploads/2015/03/Probation-in-Europe-2013-Chapter-Austria.pdf; or Italian experience http://cep-probation.org/wp-content/uploads/2016/04/Chapter-Italy-final.pdf; or Serbian experience, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/1362-14Lat.pdf), and in particular the US federal legislation's (Probation and Pretrial Services, 2017; Haddad et al, 1998) experience of the pretrial and probation services (Abadinsky, 2001) we can conclude that the Macedonian legislator has omitted to impose the provisions of this law in at least one area which is generally consider as jurisdiction of the probation services. Considering the tree most common areas of the probation services' jurisdiction, as regulated within the US criminal justice system (Pretrial and Probation Service History, http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history), particularly considering the Pretrial Services and the Probation services as part of the Administrative Office of the US Federal Courts, we can conclude that Macedonian legislator has decided to implement only the provisions that are regulating implementation of the alternative measures as criminal sanctions, while has omitted to regulate the implementation of the alternatives to detention and only partially her regulated the third area – performance of the pretrial reports regarding the selection of the most appropriate criminal sanction as a measure of support to the lawgiving process delivered by the judges.

This means that the Macedonian legislator has decided to act only in the area of substantive criminal law, while, deliberately or not, decided to disregard the other, even more important, area of the probation services designated for support of the actors within the criminal procedure.

This situation raises the dilemma whether there were specific reasons for such reduction of the jurisdiction area of this law, or is it at all possible to amend this law and to provide its genuine jurisdiction as it is known from the comparative experience into Macedonian criminal justice system. Hence, we need to examine whether there was sufficient

justification for such normative decrease in order not to consider all aspects which are well known and established within the jurisdiction of the Probation services as pointed out from the comparative experiences.

In order to answer to this dilemma we need to examine each three, comparatively known, aspects of the jurisdiction of the probation service from Macedonian perspective.

***Implementation of the alternative measures***

Considering the first field of jurisdiction of the Probation services, it is obvious that this Law completely regulates the jurisdiction of the Probation service in Republic of Macedonia, through the provisions for regulating of the procedure for implementation of the alternative sanctions as determined in the Criminal Code and with the procedure for control of their implementation.

However, despite the fact that this area is fully regulated within the Law on Probation in Republic of Macedonia, even at a first glance it is obvious that this law contains provisions which are redundant and unclear. This means that the legal text is overburdened with technical provisions, which are not essentially legal material and could be easily transferred into legal bylaw, such as Probation Service's Book of Rulings or Manual. It is obvious that the provisions from the articles 22, 23 and from 27 to 35 of this Law are particularly good example of this lawmaking mistake performed by the Macedonian legislator. Transferring these provisions into bylaw would allow further improvement of the implementation of these provisions, since if they were part of some Manual or Book of Rulings, than these provisions would be easier to be amended due to the needs realized from the practice of the Probation service's implementation of these alternative sanctions. Unfortunately, since these provisions are part of the Law, every future amendment or change, if determined as necessary is burdened with complicated legislative procedure. Considering the fact that this is new law, we can be even more certain that through the practice several dilemmas or problematic issues will be determined, disregarding the fact that the legislator has made his best efforts to construct as best as possible, in that time, legal provisions. Due to this we deem that in order to reach Law's goal - to increase the implementation of these alternative sanctions this law should be as much possible unconstrained with technicalities in order to pass the timeline test and to serve as basis for further improvement of the practical implementation of these alternative sanctions.

It is needles to point out that this discussion will be more substantiated in future when we can examine the effects of this Law. However, it is always beneficial to be able to predict the strengths and weaknesses of some legal provisions, in order to produce better laws. Laws

which would be able to generate better results in practice on a longer term, and not to have laws which should and must be amendment frequently, due to the inconsistencies pointed out over its implementation in practice.

***Implementation of the less severe measures than detention for providing defendant's presence during the criminal trials***

Second area of jurisdiction that could be implemented with the laws on probations is the regulation of the implementation of the less severe measures than detention for providing defendant's presence during the criminal proceedings. This area of jurisdiction is commonly connected to the jurisdiction of the Probation agencies, since, as we have established earlier, these measures are similar to the alternative sanctions and their implementation bear same or similar burden regarding the professionalism and knowledge of the probation agencies' employees. Due to this, it is very often to correlate implementation of these two types of measures into one state agency.

Furthermore, considering the wording of the article 1 of the Macedonian Law on Probation, we could by mistake conclude that these measures are also *ratione materia* of this Law. Since, paragraph 1 of the article 1 of this law literally states: "…obligations as determined within the criminal procedure in accordance to the law (in the text bellow: alternative measures and obligations)". Considering this paragraph, together with the comparative experiences from the region, (Serbian Law on Probation, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/1362-14Lat.pdf) an optimistic reader could conclude that this Law also regulates the implementation of these less severe measures implemented by the court as alternative to detention during the criminal trial, since the words "alternative measures and obligations" as defined in the Law on Probation, could with no prejudices impose to the implementation of the less severe measures to detention. Unfortunately, this optimism is vain, since there are no further provisions in this Law regarding the implementation of these less severe measures.

However, the aim of this article is to examine what were the reasons behind this normative decision of the Macedonian legislator and to determine whether the positive comparative experiences regarding the second area of jurisdiction of the laws on probation could be implemented within the Macedonian Law on probation.

Justification and background for such legislative decision can be found in the Strategy for enactment and implementation of the Law on Probation, enacted by the Ministry of Justice (Strategy for Development of Probation, 2013; Legal Analysis for Changes, 2015). Unfortunately, the Strategy does not contain any arguments for support of this decision, and

further more in one sentence even is mentioned that despite the fact the these two type of measures are correlated and similar the legislator will not regulate the implementation of the less severe measures than detention for providing defendant's presence within the Macedonian Law on probation.

Disregarding this situation, although there are not substantive grounds, or at least they are not publicly justified, for refusal of this area of jurisdiction of the Macedonian Law on Probation, we think that Macedonian legislator has omitted a good chance for further fostering of the implementation of these procedural measures. This is based upon several arguments.

First argument is rather the obvious one and is based upon the similarity of the measures. Due to this, if we compare the measures for precaution as determined within the article 144 of the Criminal Procedure Code, we can conclude that there are many similarities between these measures and alternative measures as determined within the Criminal Code.

Hence, Macedonian legislator has regulated the following measures for precaution: ban for leaving the residence, mandatory reporting to a specific state organ or official person, temporary ban of driving license or ban for its issue, temporary ban of the passport or ban for its issue, temporary restriction for visiting specific places or areas, restrictions regarding maintaining contact with specific persons and temporary ban for undertaking specific professional activities or work related activities. Together with house detention, bail, short time detention and citation as part of the less severe measures to detention. These measures, except with detention, can be simultaneously implemented and imposed by the courts in order to provide additional guarantees that the defendant will be present during the court hearings of the criminal trial. Through this process of mixing of the measures, the court should provide the most suitable combination of measures which would serve this above mentioned purpose without imposing the most severe measure – detention. Meaning that the defendant's right to liberty will be primarily considered and will be limited only in inevitable cases, while the detention, as most severe measure, will be imposed only in strictly limited and necessary cases.

Considering the effect and implementation of these measures, it is obvious that they carry resemblance with several of the alternative sanctions as defined within the Criminal Code. It is obvious that the most similar measures are house detention as regulated with the article 163 of the Criminal Procedure Code and house imprisonment as regulated with article 58-a of the Criminal Code. Despite the fact the Macedonian legislator has opened the legal lacunae for implementation of the house detention (Misoski, 2014), contrary to the nature of this measure, to every defendant and not only limiting it to pregnant women, chronically

deceased and elder people, as defined with the house imprisonment within the provisions of the Criminal Code.

These two measures bear significant resemblance due to the fact that both of them are implemented within the premises of the defendant's or convict's house, together with the fact that control over the implementation of this measure, so far, has been performed by the police officers. This means that with both measures the convicted person or the detainee should not leave the premises of the house or residence, while supervision and control of the proper implementation, so far until the enactment of the Law on Probation, was dedicated to the police officers. Granting the implementation of the house imprisonment to the Probation Service is far more efficient and effective since the Probation Service's officers have additional knowledge and training than regular police officers, in order to be able to determine whether the detainees or convicted persons are law abiding citizens and that they do obey the limitations and restrictions imposed by the court with these measures. In addition, police officers, generally, are not sufficiently trained regarding meeting these specific duties, which in this situation leaves them unguarded or unprepared, regarding the possible obstructions or factual needs of the detainees or convicted persons, which means that they can't provide the proper support or monitoring over the life on freedom of these persons.

This situation could lead to the result where police officers might be eider too harsh or too lenient towards the defendant or convicted person, meaning that without proper training nor experience regarding the probation service, activities performed by the police officers might even jeopardize the proper implementation of the house detention, or even destroy the main essence of the implementation of this measure.

For these reasons we deem that it is best for the criminal justice system to be able to provide specific training and even more to delegate this prerogative to the agencies that are specifically established and trained for undertaking these specific responsibilities. Only through specialization of the state agencies is possible to provide proper and effective service to the defendants or convicted persons, and further more to effectively serve the justice to every citizen of Republic of Macedonia.

Similar arguments can be set regarding the implementation of the electronic monitoring (Article 20, Law on Probation), which is defined as a measure for support of the implementation of the house detention within the provisions of the CPC (Article 163, CPC). Unfortunately this measure is also not covered by the provisions of the Law on Probations, despite the fact that the Probation Service is the most suitable state agency for undertaking these activities. In addition, implementation of the electronic monitoring within the CPC remains vaguely regulated, since the CPC is does not provide further provisions regarding this

issue and probably it should be regulated with additional legal bylaws or other laws (Paragraph 3 and 4, Article 163, CPC).

The same dilemma can be raised regarding the implementation of the precaution measures as regulated within the CPC. Hence, analyzing the Legal Analysis as supportive document to the Strategy there are no information regarding the reasons for not implementing the less severe measures than detention for providing of the defendants' presence during the criminal trials as part of the Law on Probation, while the house detention is only vaguely mentioned. Due to this, it is not clear whether the authors of the Strategy have even evaluated the possibility for implementation of these less severe measures to detention as part of the Law on Probation at all.

Furthermore, it remains unclear what is the difference between the measures regulated within the CPC such as: ban of leaving the premises of the house or residence, obligation for report to the specific official body, ban of visit specific premises or areas, ban of contacting with specific persons, ban related undertaking specific work related activities; and measures regulated within the article 58, paragraphs 1, 6, 7 and 9 of the Criminal Code which are regulating the control over the additional obligations determined together with the conditional sentence with protective supervision. Considering the essence of these measures the only difference is that the first measures are limiting defendant's right to liberty in order to be present and to stand at a trial, while the second measures serves as a support to proper implementation of a criminal sanction served at liberty, but with several limitation to his/hers right to liberty. Or in short, the bot measures are controlling the persons' live at liberty, by imposition of one or several conditions.

The only obvious difference is that the first measures are imposed prior to the sanction and are implemented to presumed innocent person during the criminal trial, while the second measures are considered as sanctions imposed to guilty persons as determined by the court after the criminal trial.

Hence, even grater similarity is obvious between the measures ban for issuance of the driving license or temporary cease of the driving license and the sentence ban for driving of motor vehicle as regulated within the article 38-c of the Criminal Code. Meaning that despite the fact that the one is criminal sanction, while the former is measure for providing the defendant's presence, both measures are bearing the same effect – ban of operating motor vehicle.

The same can be said regarding the sanction ban of performing specific work related activities as regulated within article 38-b of the Criminal Code and the measure for temporary ban of performing specific work related activities.

This simple “face-to-face” comparison between these alternative sanctions and the preventive measures for providing the defendant’s presence during the criminal trial reveals the pattern that, despite the fact that between the two measures are significant differences regarding the purpose of their implementation, the practical implementation is the same.

However, leaving these measures to be implemented by two different state agencies, one to the Probation Office supported with additional training regarding meeting the convicted persons’ personal needs and characteristics, while the second implemented by the police that does not have any understandings regarding the defendants’ personal needs and characteristic, opens the floor for unequal and erroneous implementation.

Due to these facts, we deem that the implementation of the preventive measures as regulated within the CPC should be delegated to the Probation Service, since this service, if properly staffed with trained employees, should implement these measures with greater success, particularly taking into consideration the needs and individual characteristics of the defendants’ and not disregarding the aim of the criminal justice process (Hucklesby, 2011; Dhami, 2002).

Furthermore, testing of one similar measure during the criminal trial could provide significant insight to the law-enforcement agencies regarding the effectiveness of this measure to the specific persons if it will be imposed at the end of the criminal trial as a sanction. This means that the effectiveness of one measure imposed to the defendant regarding his/hers preparedness to follow instructions, obeying certain rules etc., can be evaluated during the early stages of the criminal procedure.

On the other hand imposition of these measures automatically as a sanction, simply because they were implemented as a measure during the criminal trial, without knowing the insight of the real defendant’s behavior during the imposition of this measure within the criminal trial, is also not acceptable or desirable practice. Due to the fact that the defendant has different motivations during the criminal trial, where he/she is presumed innocent and at the end of the trial where he/she is proven to be guilty.

This practice is comprehensively elaborated by the case law of the European Court of Human Right in several judgments where the court is elaborating the reasoning of the implementation of these measures during the trial and at the end of the trial as sanctions (ECtHR, Wemhoff v. Germany).

However, imposition of these two types of measures by the one same state agency could increase the likelihood of proper implementation of these measures, since the same agency will have the information of the effects of the similar measure in different stages of the criminal procedure. Henceforward, by having professional training and knowledge, this

agency could provide substantive insight in a form of a report to the court in order to properly determine whether one sanction will be effective and/or could reach its goal towards the specific defendant/convicted person.

Finally, by establishing of the implementation of these two types of measures “under the hood” of one state agency will increase the likelihood of improvement of the imposition and implementation these measures and sanctions, above all. This might become an effective tool for avoidance of the current situation where these measures are considered as a legal décor (Buzarovska, Andreevska and Tumanovski, 2015; Misoski, 2013) to our criminal justice system.

***Implementation of the risk evaluation schemes***

Finally the third field of jurisdiction of the Probation Services is the analysis of the defendants’ personality, trough creation of the risk evaluation schemes. This risk evaluation is particularly important for the courts while deliberating what is the most appropriate measure or sanction for the defendant at the end of the criminal trial (Tombs and Jagger, 2006; Rumgay, 1995). This is one of the most important areas of jurisdiction of the Probation Services, since trough these evaluation schemes the Probation Services are directly influencing the adjudication process (A Measure of Last Resort?, https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf; Persson and Svensson, 2012; Ostrom and Kauder, 2013).

This third filed of jurisdiction of the Probation services regulates the obligation to provide complete social and psychological profile of the defendants’ and convicted persons’ personality. This is regulated within the article 12 of the Macedonian Law on Probation. This article regulates the obligation for providing of the risk evaluation reports by the Probation Services during the criminal trial. In this article it is determined that Probation Services are authorized to summon the defendant and to perform an interview with him/her, and/or to collect additional documents and personal data from other state agencies as requested by the court, and by using specific risk assessment tools to generate final report to the court regarding the defendants’ state of risk.

However, considering this third area of jurisdiction of the Macedonian Law on Probation reveals one dilemma. Are there legal basis within the Criminal Procedure Code for undertaking such activities as regulated within the Law on Probation?

Hence considering the provisions of the Macedonian Criminal Procedure Code remains the dilemma whether Macedonian legislator, following the comparative experiences, has surpassed the authorizations as determined within the Criminal Procedure Code.

Unfortunately, Macedonian Criminal Procedure Code does not contain any provisions regarding the request by the court for risk assessment activities performed by third parties. This means that, at this point, there are no legal grounds within the Criminal Procedure Code for the activities as regulated within the article 12 of the Macedonian Law on Probation.

However, it is admirable the visionary attitude of the Macedonian legislator regarding this issue. Since this legal situation should be implemented within the new amendments of the Criminal Procedure Code, which are still in a Legal drafting phase, in order to introduce the sentence hearing as specific procedural step of the criminal trial where, besides other activities performed by the court and the parties, this risk assessment tool would be particularly beneficial for the criminal justice process in general, and in particular would be beneficial to the court.

Besides this amendment to the Criminal Procedure Code, we deem that there should be another one, specifically addressing this Probation Services' area of jurisdiction. Hence, Criminal Procedure Code should be also amended with provisions that would allow the judge in any phase of the criminal procedure while deliberating regarding the implementation of the measures for providing of the defendant's presence to be authorized to request defendant's risk evaluation to be performed by the Probation Service. Only with this provision, the judges will be able to use another very effective tool for assessment of the most suitable measure for providing defendant's presence.

Due to this, we support this idea, or any other which would be beneficial in order to increase the implementation of these less severe measures to detention for providing of the defendant's presence during the criminal trial together with the implementation of the alternative sanctions.

## Conclusion

The enactment of the new Law on Probation in Republic of Macedonia has been long expected and accepted as a great reform towards the implementation of the alternative sanctions. Unfortunately, this Law has not been implemented yet since the practical preconditions and establishment of the Probation services and its employees which are crucial for its implementation has not been met, nor performed any further activities other than setting up the legal framework. Due to this, so far, this Law is observed only as a partial legislative solution towards the proper implementation of the alternative sanctions, but with its effects yet to come.

Despite the fact that this Law was expected to produce positive effects regarding the fostering of the implementation of the less severe sanctions and less severe to detentions

measures for providing defendant's presence during the criminal trials, the Macedonian Law on Probation has not answered these expectations. This is due to the fact the Macedonian legislator with the enactment of the Law on Probation has omitted to regulate one another equally important part of the criminal justice system – implementation of the alternative measures to detention as a measures for providing of the defendant's presence during the criminal trials. As discussed above in the text, this part of the criminal justice system is also considered as genuine area of jurisdiction of the Probation services. In particular, since these measures by their structure and *modus* of implementation bears great resemblance to the actual structure and implementation of the alternative sanctions.

Hence forward, with the Law on Probation Macedonian legislator has lost its opportunity to extend the impact of the Law's provisions regarding this additional field, and by this to provide more structured and equally important impact to the criminal justice system regarding the increase of the proper implementation of these two types of measures. Due to this, it is necessary to provide additional amendments to the Macedonian Law on Probation in order to implement the provisions regarding the impositions of these less severe measures to detention.

Newly enacted Macedonian Law on Probations could be also criticized regarding the quality of the provisions, since some of them are predominantly part of a practical implementation of some measures in virtue of this they should not be part of the legal text, but part of legal bylaw or book of orders designed for administration of these alternative sanctions. The same conclusion regarding to the legal amendments can be said regarding this remark, since if these provisions which are primarily from organization nature are struck out of the Macedonian Law on Probation and put into bylaw or book of orders, Macedonian Law on Probation would become prone to the time influence regarding the effects of the practical implementation of these measures and would avoid frequent needs for changes and amendments to the law due to the necessary need for fine tuning of these legal provisions from organizational and strictly operational nature. This amendment to the Macedonian Law on Probation would increase its trust and would increase the overall legal certainty regarding the implementation of the alternative sanctions and less severe measures to detention.

However, several provisions which *per se* can be defined as modernistic or even visionary, which are part of this Law, unfortunately are practically impossible to implement, since there are no legal preconditions in other laws for their implementation. This is particularly the case with the third area of jurisdiction of the Law on Probation - implementation of the risk evaluation schemes. Unfortunately, Criminal Procedure Code does not provide the opportunity for the judges to be able to request the risk evaluation procedure for the defendant's state of risk at any stage of the criminal trial. Despite the fact that these

risk evaluation schemes for defendants are greatly appreciated and considered as necessary supportive mechanisms to the judges during the criminal trials, regarding the implementation of the measures for providing of the defendant's presence during the trial or at the stage of deliberating of the criminal sanction the most suitable criminal sanction regarding defendant's personality. Finally, we think that these provisions should not be struck out of the Macedonian Law on Probation, hoping that the legislator would consider them and provide legislative background for their practical implementation trough the amendments to the Criminal Procedure Code.

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# CORRUPTION AS A HUMAN RIGHTS VIOLATION

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## Abstract

In recent years, the relationship between corruption and human rights has been the subject of many studies. There is violation of rights by different corrupt practices in the background of these debates on human rights. Informal tax and the prevention of right to access to basic services access are known facts in societies where corruption is common. Therefore, one can say that corruption and the realization of human rights are mutually exclusive. This means that, countries with a high rate of corruption are the ones which human rights violations are widespread. Common causes of corruption and therefore, human rights violations, are weak institutions, poor governance with limited transparency, accountability and participation, massive discrimination against vulnerable and disadvantaged groups, and poverty.
Moreover, national and international law address corruption, in order to eliminate it as an obstacle to realization of human rights. In 2011, the United Nations Human Rights Council adopted a resolution on corruption and human rights issues. In this resolution, the Human Rights Council emphasized that States should promote favorable and supportive environments for the prevention of human rights violations by fighting corruption. Even the Preamble of the French Declaration of Rights of Man and the Citizen of 26 August 1789 declared that, *"[i] gnorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments…"* (http://avalon.law.yale.edu/18th_century/ rightsof.asp).

The aim of this paper is to determine when and how specific human rights are violated due to corruption. The paper evaluates the negative effects of corruption on the realisation of human rights and how it causes discrimination in relation to the right to access to public services.

## Introduction

Corruption is a phenomenon that societies have experienced for thousands of years and have tried to overcome ever since (Alatas, 1990; Morgan, 1998, as cited in, Pearson, 2001, p. 30). Alatas notes that the issue of corruption can be attributed to the beginnings of humanity's social interaction and the development of social organizations. Today, sespite limited empirical evidence, most studies state that corruption is both widespread and significant in the World (Shleifer/Vishny, 1993, p. 599, as cited in, Pearson, 2001, p. 31) Indeed, the World Bank estimates that more than $1 billion of bribe is paid annually (*The Guardian,* 2007). The study of ancient civilisations shows that corruption in human societies is as old as civilizations and governments are now facing with it (Gebeye, 2012, p. 3). Corruption undermines the rule of law and democracy leads to human rights violations, distorts markets, erodes the quality of life, and allows organized crime, inequality and deprivation, terrorism and other forms of crimes threat the human security ("Introduction", 2013, p. 4).

Along with the globalisation of corruption in the twentieth century, the international community has realistically addressed concerns about corruption in the Convention Against Corruption to United Nation General Assembly Resolution 58/4 of 31 October 2003. Nevertheless, this international document and other international and domestic laws have not been able to provide a comprehensive definition of it. Because, corruption is a complicated and changeable issue and it conflicts with all the precise definitions, like other social and political phenomena.  Corruption must be broadly understood to cover all acts that can be considered as such. Thus, Transparency International defines corruption as *"[a]n abuse of power delegated for private purposes."* (How Do You Define Corruption? Transparency International, available at: https://www.transparency.org/what-is-corruption/#define). Therefore, corruption constitutes an abuse of power for private purposes, for oneself or a close relative, whether in the public sector or the private sector (Corruption and Human Rights, 2009), p. 16).

Human rights benefit every human being and are mainly protected by numerous international texts; but also in the national legislation of certain countries. These rights are grouped into several categories such as civil and political rights, economic, social and cultural rights (Gözler, 2017, pp. 103-105).

*"Human rights are indivisible and interdependent and the consequences of corruption touch upon them all — civil, political, economic, social and cultural, as well as the right to development. Corruption can also affect the enjoyment of civil and political rights in all*

*States, even long established democracies, by weakening public institutions and eroding the rule of law."* ("Introduction", 2013, p. 4).

These issues should be clarified by discussing first how corruption is a source of human rights violations, before dealing with issues relating to the challenges of fighting corruption. This article proposes a study of the relationship between human rights and corruption. Central to this is the idea that corruption affects every citizen in their rights. In recent years, many efforts have been made to create access to the fight against corruption based on human rights. This study attempts to summarise these latest developments and to clarify the relationship between the fight against corruption and human rights protection.

In this paper, the first part addresses the definitions and types of corruption and attempts to define corruption. The second part analyses international and domestic documents on corruption and finally, the third part addresses the effects of corruption on human rights and specifically, the first and second generations of human rights.

## Definition of Corruption

The definition of corruption used by the New South Wales (NSW) Independent Commission Against Corruption (ICAC) is provided in sections 7-9 of the ICAC Act (1988). In general, "corruption", as specified in the ICAC Act, is the conduct of any person who interferes with the honest and impartial exercise of the functions of NSW public officials. Corruption involves the misuse of civil service. This also implies the misuse of information obtained when performing public duties. Commonly, it is the dishonest or biased use of power or position, which makes one person benefit from another. The ICAC definition of corruption takes into account the seriousness of the conduct. The only cases that constitute a criminal offence, disciplinary offence or conduct that would justify dismissal would be considered corrupt conduct by the ICAC. The ICAC definition includes the behaviour of private sector employees or community members if this behaviour is intended to divert the performance of a public duty by a public official (Gorta, 2001, pp. 13-14).

The term "corruption" is the Latin word of corruptio, which means *"[m]oral decay, wicked behaviour, putridity or rottenness."* (*Oxford English Dictionary* https://www.oxfordlearnersdictionaries.com/definition/english/corruption?q=corruption; Milovanovic, 2001, as cited in, Corruption and Human Rights: Making the Connection, p. 15). The concept may have a physical reference, as in *"[t]he destruction or spoiling of anything, especially by disintegration or by decomposition with its attendant*

*unwholesomeness and loathsomeness; putrefaction"*; or moral significance, as in *"moral deterioration or decay... [the] [p]erversion or destruction of integrity in the discharge of public duties by bribery or favour..."* (*Oxford English Dictionary*, 1978, pp. 1024-1025, as cited in, Corruption and Human Rights: Making the Connection, p. 15).

These definitions represent two common deficiencies: they define corruption only regarding corruption or in very general terms. Therefore, definitions of corruption tend to be either too restrictive or excessively broad. This is because corruption has great causes and consequences. As Michael Johnston has stated: *"In rapidly changing societies the limit between what is corrupt and what is not is not always clear and the term corruption may be applied broadly." (*Johnston, 2005, p. 11, as cited in, Corruption and Human Rights: Making the Connection, p. 15).

Corruption requires many approach and disciplines, from political science to economics, have been addressing the issue. There are different perceptions of the problem and this generates different policies. Operational definitions tend to become widespread and become more specific, trying to make corruption measurable. A well-known classification distinguishes great from petty corruption. Great corruption refers to the corruption of heads of state, ministers and senior officials and usually involves large amounts of assets. Petty corruption, also known as "weak" and "street", indicates the types of corruption that people encounter in their meetings with public officials and when they use public services. This usually involves modest sums of money (Corruption and Human Rights: Making the Connection, p. 15; Pearson, 2001, p. 33).

In the most criminal codes, corruption is not a criminal offence and as mentioned above, corruption is not defined in most international treaties. Therefore, there is no universally accepted definition of corruption. The most common definition is that of Transparency International: *"corruption is the abuse of a public office for personal benefit"*. Such misuse can occur at the level of day-to-day management ("petty corruption" or "minor corruption") or the level of the highest, often political offices ("grand corruption") ("Glossary: Accountability").

*"The term political corruption is conceptualised in varios ways through the literature on corruption. In some instances, it is used synonymus with grand or high-level corruption and refers to the misuse of entrusted power by political leaders. In others, it refers spesifically to corruption within the political and electrol process. In both cases, political corruption not only leads to the misallocation of resources, but it also perverts the manner in which decisions are made."* ("Glossary: Accountability").

United Nations (UN) Former Secretary-General Kofi Annan defined corruption as an *"[i] nsidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats of human security to flourish… Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic underperformance, and a major obstacle to poverty alleviation and development."* (Annan, 2003). Furthermore, there is not just one complete list of acts that are universally accepted as corruption. Among types of corruption are bribery, embezzlement, trading in influence, abuse of functions and illicit enrichment.

Pillay explains that corruption is not exclusive to a particular region: *"Corruption is not a localized problem specific to certain countries, regions, societies, or traditions. It plagues not only public offices but also businesses, sports and more. Corruption is also global. It is reported that from 2000 to 2009, developing countries lost $8.44 trillion to illicit financial flows, 10 times more than the foreign aid they received. In times of protracted financial and economic crises, people, especially the poor and the marginalized, cannot be expected to absorb austerity measures while public funds are not managed in a transparent and accountable manner. The impact of corruption on development and on human rights is multifaceted; so too must be our response."* (Pillay, 2013, p. 9).
Corruption is not a recent issue either. In ancient times, political theorists such as Aristotle considered corruption an issue of morality. Corruption has been regarded as a reflection of of political and moral decay on the structures and functions of society. (Heidenheimer/Johnston/Vine, 1989, p. 5, as cited in, Pearson, 2001, p. 51). Non-Western thinkers have also been concerned about corruption. In his influential work, *The Sociology of Corruption*, Syed describes the philosophy of Wang An Shih (AD 1021-1086) that corruption is caused by a combination of bad systems and bad men. As for Ibn Khaldun (AD 1332-1406), he argues that it is due to the luxurious life of the elite (Larmour/Wolanin, 2001, p. iv).

## Anti-Corruption Regulations

The main international instrument on corruption is the United Nations Convention Against Corruption (UNCAC) (General Assembly Resolution 58/4 of 31 October 2003). This convention represents the first universally restrictive agreement on corruption. The convention was signed by 95 countries at the conference in Merida (Mexico), December

2003. It contains new provisions in areas such as asset recovery, private sector corruption, political corruption and monitoring and control, which has caused most of the controversy. Moreover, UNCAC is particularly important for combating corruption in the judicial system (Jennet, 2007, p. 2).

UNCAC adopts a holistic approach towards the comprehension of the root causes of corruption and the various conditions that lead to its growth. It enables member states to evaluate, promote and implement anti-corruption and judicial reforms and to measure reform progress. The primary objective of the UNCAC is to prevent and punish corruption of public sector officials, including judges. It encompasses a wide range of corruption activities, such as the payment and receipt of bribes and embezzlement of property by public servants. The UNCAC also covers corruption and embezzlement carried out by private sector employees. Apart from these criminal offences, UNCAC also tackles nepotism and favouritism in recruitment and promotion in the public sector. Offences stipulated in the convention include laundering corruption earnings, assisting and encouraging corruption, and obstruction of justice (Jennet, 2007, p. 2).

***Can Corruption Be Conceptualized As A Human Rights Violation?***

Corruption has not always been considered a cause of human rights violations. Therefore, until recently, it has been inadequately tackled. Due to insufficient proof of the connection between human rights violations and corruption, it has not been easy to argue in favor of this. The reason is not the lack of information on the status of human rights in countries. Conversely, this information is present in many UN reports, such as the United Nations Development Programme Human Development Report. The actual reason is the inability to demonstrate a direct link between these violations and acts of corruption. There is some evidence derived from personal testimonies, which can be used to conclude that corruption is in contrary to the human rights obligation of states and that this leads to human rights violations. Although these data do not represent the ideal, they exemplify the connection between corruption and human rights violations and thus ensure a starting point for discussion (Pearson, 2001, p. 52). Moreover, it is a fact that in countries that have high levels of corruption, human rights violations are more prevalent (Peters, 2013, p. 11).

In fact, one of the obstacle against realisation of human rights is the corruption. Human rights standards aim to prevent abuses of power and corruption is a misuse of economic, political and cultural power. It has been empirically proven that in states that have a high degree of corruption, regular and grave human rights violations occur. Accordingly, weak institutions,

poor governance and lack of transparency, lack of accountability and non-participation in political, social, economic life, discrimination, a mass of vulnerable and disadvantaged groups and poverty are the main causes of corruption and human rights violations. The violation of fundamental rights and freedoms such as freedom of expression or association and the right to education are violated, this leaves the way for corruption. Corruption affects people's lives in myriad ways. Widespread corruption ihnibits access to justice, people do not have safety and cannot safeguard their sources of income. Court officials and the police pay more attention to bribes rather than complying with the law. Hospitals do not cure people because medical staff give better treatment to patients who pay for it or because they lack the necessary supply due to corrupt public procurement procedures. Families with low-income can not feed themselves because of the corrupt social security programs. Schools cannot offer good education because the education budget has been looted and therefore, teachers cannot be paid and books cannot be purchased. Also, farmers and market dealers can not earn a living because corrupt policies result in the reduction of production and sales. These examples illustrate how corruption leads to discrimination, robs vulnerable people of their incomes and hinders the realization of political, civil, social, cultural and economic rights (Corruption and Human Rights: Making the Connection, 2009, p. 23).

The following passage succintly explains the effects of corruption on human rights, specifically that of marginalised groups: *"For too long the anti-corruption and human rights movements have been working in parallel rather than tackling these problems together. Through this first and innovative report on human rights and corruption, the International Council on Human Rights Policy (ICHRP) has provided an important conceptual basis for aligning the work of both movements. The report's recommendations emphasise a need to address the destructive relationship between corruption and human rights and find ways to mitigate its negative impacts, which can be direct, indirect and remote. As identified in the ICHRP report, it is the vulnerable and marginalised – women, children and minority groups – who often suffer corruption's harshest consequences. In dealings with police, judges, hospitals, schools and other basic public services, poor citizens tend to suffer more violations than the rich and see a larger share of their resources eaten away. In Mexico, it is estimated that approximately 25 percent of the income earned by poor households is lost to petty corruption." (*de Swardt, 2009, p. v). In the first paragraph of the foreword of the United Nations Convention Against Corruption, the effects of corruption are described as follows: *"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts*

*markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."* (https://www.unodc.org/documents/brussels/UNConvention_AgainstCorruption.pdf).

Vulnarable individuals are not the only ones affected by corruption. It is estimated that in the most corrupt economic sector of the European Union, the public procurement sector, approximately 13% of all budget expenditure on public supply is lost (OLAF, 2013, as cited in, Peters, 2013, p. 11). Thus, if unsuccessful competing entrepreneurs have not been awardeda contract due to subjective criteria which they already qualified for, they are the victims of corruption in the public procurement sector. Other victims of corruption in procurement are the customers and end users who pay higher prices or a product not worth the money because money has been diverted in the production of the product or service. In the political process, voters are affected by the financial dependence of the eligible candidates on large sponsors. If candidates do not know about the interests, they are politically vulnerable after their election. (Peters, 2013, p. 11).

***How Does Corruption Affect Human Rights?***

In prevailing UN practice, the link between corruption and human rights violation is weakly established. This is present both in strategic documents - such as the new reports of the Human Rights Council -, in jurisprudence of the treaty bodies and in practice of the Human Rights Council. Nearly all texts either state that corruptions has a "negative impact" on the enjoyment of rights or affirm that corruption "undermines" human rights or emphasize the "serious and devastating" impact corruption has on human rights. Similarly, the Indian and South African constitutional courts have not ruled that corruption is in itself a human rights violation. Rather, they have acknowledged that it leads to human rights violations. For example, the South African Constitutional Court has held that: *"[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms." (*Peters, 2015, p. 12). In a 2012 judgment, the Supreme Court of India ruled: *"[c]orruption [...] undermines human rights, indirectly violating them", and that "systematic corruption is a human rights' violation in itself."* (Peters, 2015, p. 12). However, it is crucial to make a distinction between interference with human rights and violation thereof; which is unlawful and subject to relevant sanctions (Peters, 2015, p. 12).

It must be noted that every kind of corruption has an effect on human rights in the long-term, yet this does not result in the violation of a human right by a specific corrupt practice. Therefore, acts of corruptions that directly violate a human rights and acts of corruption which cannot be causally linked with a specific human rights violation. This is necessary fort he application of human rights. (Peters, 2015, p. 24). Accordingly, the following distinction can be made: corruption that directly or indirectly leads to human rights violations; this is called the causal link. There are two kinds of causal links, Direct Violations and Indirect Violations.

## Direct Violations

Direct violations of human rights occur when an act of corruption is purposely undertaken to violate a right. When a judge is bribed, this has a direct impact on the independence and impartiality of the judiciary and therefore, results in the violation of the right to a fair trial. But when a public servant has not caused the damage on purpose, the test due diligence is utilized: should the human rights violation have been predictable, the officials should have used all means at their disposal to prevent it. In such cases, state responsibility of the violation is determined on the particular conditions and the right that has been violated. Direct violation may also ocur when the state or an agent of the state is negligent, i.e. the failure to ensure access to a right. For instance, if individuals are forced to bribe doctors in order to be treated or to bribe teachers in public schools for their children to be enrolled; corruption violates the rights to health and education (Corruption and Human Rights: Making the Connection, p. 27).

## Indirect Violations

When corruption is a critical factor in the sequences of events that result in human rights violations, this is an indirect violation caused by corruption. In this case, the act that violates a right is the consequence of an act of corruption and the latter is required for the violation to come about. For instance, if a state agent is bribed to authorize unlawful import of toxic waste and the waste affects the wellbein of people; their rights to life and health would be violated as a result of the bribe. The rights of women and children are also indirectly violated due to corruption, as in the case of human trafficking. It is common that public officials accept bribes and provide necessary documents or ignore trafficking. Another case of indirect violation is when state agents facilitate exposure to corruption. For example, when a dentist is harassed, threatened, imprisoned or killed; this may result in the violation of the right to life, absence from torture or cruel, inhuman or degrading treatment, freedom and liberty or freedom of expression (Corruption and Human Rights: Making the Connection, p. 27-28).

## Linking Acts of Corruption with Specific Human Rights

***Violation of the Principle of Equality and Non-discrimination***

Corruption has a detrimental impact the principles of equality and non-discrimination as well, which are principles recognised and protected under many international instruments such as the Charter of the United Nations, the Universal Declaration of Human Rights or the European Convention on Human Rights. However, corruption does not automatically result in the violation of these principles; there must be a clear link between the two (ReisDos, 2011, p. 5).

The principle of equality and non-discrimination are fundamental principles of human rights. All major human rights instruments recognise equality of all persons before the law and the right to be protected equally by law. Every individual has the right to be treated equally by public officials. Corruption means that a person or group of people attain privileged status when compared to similarly placed persons who have not bribed public officials. Similarly, when a public official receives a bribe to provide a service that a person is entitled to without any payment; she is discriminated against other persons in the same situation. Both are unlawful as the difference in treatment stem from corruption, which is not an objective or reasonable justification for discrimination. Generally, corruption results in discriminatory practices. The principle of non-discrimination guarantees equal treatment of all individuals irrespective of their race, gender, religion and other features. Corruption violates this principle because it results in favorable treatment or exclusion of people with regard to these attributions. For instance, the corrupt health system of Serbia excludes disadvantaged groups, Roma and refugees in particular. These groups are denied adequate social protection and access to health care. Moreover, individuals with low income are stigmatized as they cannot afford to bribe doctors for their treatment. More importantly, in terms of indirect violation, the overall corruption in Serbia has the most detrimental effect on the health system. This is because corruption results in the reduction of publice expenditure in the health sector; resulting in unequal treatment of individuals with low income (ReisDos, 2011, pp. 4-5).

In general, corruption indirectly violates the principle of non-discrimination, as it is difficult to see the impact of a corrupt act when individuals pay for personal benefit. When money offers an advantage, this means that there is inequality between those who have the necessary means and those who do not due to their low income. For instance, if a citizen of the Democratic Republic of the Congo that can not afford to bribe officials for a passport, either she has to wait for a long time or she cannot obtain it at all (ReisDos, 2011, p. 5).

## Violation of Civil and Political Rights

In this section, corruption as a violation of human rights will be analysed in relation to the right to a fair trial and the right to political participation.

The right to fair trial is guaranteed by many human rights treaties (for example, art. 14 of the ICCPR; art. 6 of the ECHR; art. 8 of ACHR and art. 7 of the ACHPR). It entails a wide range of standards that ensure the fair, effective and efficient execution of justice. With regard to the judiciary, corruption consists of acts or omissions that constitute the use of public authority for the private interests of judicial personnel and result in the unlawful and unfair implementation of judicial decisions. Such acts and omissions comprise corruption, extortion, intimidation, influence and mishandling of judicial proceedings for personal benefits. This involves a wide range of acts performed by various personnel of the judiciary. For instance, a judge may accept a bride to disregard evidence that would lead to the conviction of a criminal. Police officers may be bribed to tamper with evidence. Prosecutors may be paid off to refrain from initiating a case or to misevaluate evidence. These are all acts that violate the right to a fair trial and the administration of justice. Acts of corruption also incite arbitrary detention or even torture through judicial and police corruption. Indeed, many have been and continue to be detained for political reasons. Many people have been, and are, arbitrarily most often. In addition to cases of deprivation of liberty and injury to physical integrity, corruption contributes to the insecurity of citizens, including police corruption. For example, in Brazil, the corrupt police do not effectively combat drug trafficking. This allows drug traffickers to freely continue their traffic and settle their accounts by having an arbitrary right of life or death. Another instance where the right to life is violated is when corrupt officials authorise the dumping of toxic waste in an inhabited area. Corruption may also violate the right to self-determination. For example, when a corrupt government member authorises the private exploitation of a territory, this constitutes a serious attack on the self-determination of the minority who are in the territory. Corruption infringes the righ to political participation as well. Failure to respect political rights undermines the democratic state in which human rights are effectively protected (DosReis, 2011, p. 7).

The right to political participation guarantees the right of all citizens to participate in decision-making processes that affect them. Primary examples are the freedom to vote and stand for election, the right to equal access to public services and freedom of association and assembly, which are all protected by several human rights treaties (for example, ICCPR, art. 25; CEDAW, art. 7; ECHR, art. 3 of the First Protocol; ACHR, art. 23; and ACHPR, art. 13).

Influencing elections mainly violates the right to be elected and undoubtedly disadvantages certain candidates in the competition. (DosReis, 2011, p. 6). For instance, if voters are bribed to either vote or refrain from voting, this impairs the integrity of an election and therefore, violates the right to vote. The freedom to vote is also violated when corrupt voters intimidate and force other voters to vote in one direction or another. The right to equal access to public services, another expression of the right to political participation, is violated when public servants are corrupt. As the right to political participation guarentees the equality of all participants, its violation due to corruption diminishes equality and leads to exclusion of certain groups (Gebeye, 2012, pp. 21-23).

The right to vote and to stand for election in fair and periodic elections has two elements: universal and equal suffrage and the secrecy of the ballot and the guarantee that voting must reflect the free expression of the will of the voters. When public officials perform acts of corruption, this impairs the integrity of the election, thus violates these rights. The violation arises either from the bribing voters to persuade them to vote or to abstain from voting, or from corrupt election officials who are bribed to interfere with the election process. Examples are present in countries in North America, Europe and Asia. Corruption does not merely affect the election process; it also affects political campaigns of politicians. Those that have interests in influencing legislative outcomes and government policy commonly fund these campaigns, which results in another interference with the integrity of the electoral process and a potential violation of voting rights and participation in public affairs (Rose-Ackerman, 1999, pp. 132-138, as cited in, Pearson, 2001, p. 55).

Another right that is violated in this context is freedom of expression. Corrupt governments utilize media censorship to prevent critical information from reaching the public. In this way, corruption is an on the rule of law and democracy. For instance, the Human Rights Committee has noted in 1995 with regard to Tunisia: *"The Committee is...concerned that present laws are overly protective of government officials, particularly those concerned with security matters, it is particularly concerned that those government officials who have been found guilty of wrongdoing remain anonymous to the general public, becoming immune from effective scrutiny."* (Human Rights Committee, Fiftieth Session, Supplement No. 40 (A/50/40), para. 86). The Human Rights Committee has also stated that: *"The Committee is concerned that dissent and criticism of the Government are not fully tolerated...and that, as a result, a number of fundamental freedoms guaranteed by the Covenant are not fully enjoyed in practice. In particular, it regrets the ban on the publication of certain foreign newspapers. The Committee is concerned that those sections of the Press Code dealing with defamation,*

*insult and false information unduly limit the exercise of freedom of opinion and expression as provided for under article 19 of the Covenant. In this connection, the Committee is concerned that those offences carry particularly severe penalties when criticism is directed against official bodies as well as the army or the administration, a situation which inevitably results in self-censorship by the media when reporting on public affairs" (*Human Rights Committee, Fiftieth Session, Supplement No. 40 (A/50/40), para. 89, Pearson, 2001, pp. 54-55).

## Violation of Social, Economic and Cultural Rights

As stated above, corruption has critical consequences with regard the human rights and on social, economic and cultural rights in particular (DosReis, 2011, p. 10).

Member States of the International Covenant on Economic, Social and Cultural Rights (ICESCR) have the obligation to *"[t]ake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."* (http://www.ohchr.org/EN/ProfessionalInterest /Pages/CESCR.aspx). This means that Member States are obligated to allocate more and more of their resources in order to ensure the actualisation of the rights recognised in the Convention. Theymust take the necessary measures and provide public services such as food, education, health, water, whiletaking into account the principles of availability, accessibility, acceptability and adaptability. With regard to the situation in Azerbaijan, The Committee on Economic, Social and Cultural Rights (CESCR) noted in its 1998 Annual Report that: *"[t]he ability of people to defend their economic, social and cultural rights depends significantly on the availability of public information. Efforts to ensure accountability and to combat corruption also require such information in order to be effective."* (Committee on Economic, Social and Cultural Rights Report on The Sixteenth and Seventeenth Sessions, 20/06/98. E/1998/22, para. 346, Pearson, 2001, p. 54). Also, concerning Azerbaijan, *"[t]he Committee notes with concern that a large proportion of resources necessary to finance social programs is diverted by corruption, which is pervading State organs and the sectors of the economy that are still under State control."* (Committee on Economic, Social and Cultural Rights Report on The Sixteenth and Seventeenth Sessions, 20/06/98. E/1998/22; Pearson, 2001, p. 58).

The effect of corruption on the actualization of these rights is illustrated with the following example. The right to a proper standard of living comprises the right to adequate housing and the right to food. States have the obligation to ensure that each individual has safe, healthy

and proper housing. In addition, discrimination is prohibited with regard to housing, as well as forced or arbitrary evictions or acts of unjust dispossession. Corruption may violate this right by precludinf the realization one or more of these elements. Furthermore, since discrimination is embedded in acts of corruption, it will violate the right to adequate housing (Gebeye, 2012, p. 24) Another example is interference with the access to health care. Commonly, a bribe is necessary to get a doctor's appointment quickly, to be treated first or merely to have access. Patients are also forced to bribe doctors with regard to surgeries as they are forced to endure long waiting times otherwise. This practice even results in the death of some patients as the system is guided by money and not the urgency of the state of health of people (DosReis, 2011, p. 9).

Corruption also plays a significant role in the educational system of many countries. Many examples are present in Transparency International's report on corruption in education. This report presents various cases where the rules of access to education are determined by courruption, as well as examples of numerous countries. For instance, Transparencia Mexicana has reported that, Mexican parents had to pay about 300 pesos ($30) to obtain a school record or for their children to take a public school exam (Editeurs: Meier et Griffin, 2005, p. 55).

Cultural rights suffer from corruption as well. In Algeria, citizens are deprived of their cultural rights. The government's policy of deculturation diverts subsidies originally assighed to cultural activities and associations, which are all necessary. Therefore, in some villages, there is no school of art, cinema or cultural centre (DosReis, 2011, p. 10).

## Conclusion

Corruption has been studied since ancient times.
However, it has recently been regarded a violation of human rights thus, combatted internationally. The United Nations Convention Against Corruption, which opened for signature on 31 October 2003 and came into force on 31 December 2005, is the only legally binding international instrument on combatting corruption.
As stated above, corruption is clearly a violation of human rights. Especially in societies where corruption is prevalent, human rights are violated in all aspects. In other words, corruption in these countries violates both civil and political rights and social and economic rights of the individuals.
Although no country in today's world is completely free from corruption, it is more prevalent especially in underdeveloped/developing countries. This means that there are more human

rights violations in these countries. Corruption in these countries particularly vioaltes the rights disadvantaged groups, children, women and minorities.

Fighting corruption is not an issue that countries can accomplish on their own. Therefore, it is clear that, there is a need for wider international co-operation in this regard. The fact that the vast majority of the United Nations Member States are parties to the Convention demonstrates that there is development in the fight against corruption.

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# COMPARATIVE LEGAL ASPECT OF CORPORATE CRIME

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## Abstract

The purpose of this paper is to, theoretically and practically, study the concept of "corporate crime" in the context of comparative legal solutions, theoretical concepts, and practical implications. For this purpose, the key method of analysis will be the method of comparative legal analysis, which basically should allow us to analyze comparative legal solutions that regulate this issue and their practical implications.

There are numerous theoretical and practical research papers on this topic that involve economic, legal, sociological, criminological dimension. However, the specifics of this research can be seen throughout the mutual analysis of corporate and criminal aspects of this issue and placing them in service of a systematic study of the most modern and frequent models of "corporate crime," and at the same time we'll make an effort to illustrate the potential threats of committing corporate crime in the process of corporate management, and finally we'll make an effort to observe if the type and length of the potential punishment can suppress or reduce these crimes.

The main scientific incentive to consider this issue is the due to the rise of "corporate crime," especially through the expansion in creating transnational companies, the daily takeovers, and mergers of companies (banks, insurance companies), deals between interested parties, friendly and nonfriendly transfers of capital, abuse of procedures for public procurement, the award of public contracts etc. In addition to this, the challenge to study this issue stems from the complexity in locating torts of corporate management, their distinction as misdemeanor conduct alongside from corporative crimes, the determination of liability for restitution in case of a crime, and finally, the determination of the essence of these types of crimes.

## Introduction

The study of the concept of "corporate crime" in a comparative legal sense imposes the need to analyze multiple heterogeneous issues from different legal nature: criminological, sociological, economic, legal, political, etc. Within this research, we will try to focus on the legal dimension of this issue, and for the purpose of the research in certain segments, we will use results from other research projects that have an altered character.

Barring in mind the subject and purpose of the research, the use of the analytical descriptive and comparative method is prevailing. This is a result of the main targeted goal that we want to achieve with this paper and that is analysis of the concept of "corporate crime" in a broader context, focusing on the ‘economic” crimes and the criminal responsibility of legal entities.

The main idea of the research is to analyze the comparative legal regime of "corporate criminality" and to study the legislation in the Republic of Macedonia that regulates the issues of criminal responsibility of legal entities, with an emphasis on the criminal responsibility of trade companies. The study of these two questions is based on the indispensable causality that exists between these two questions in theoretical and practical sense. Namely, the issue of criminal liability of legal entities is closely related to the issue of criminal liability of trade companies, especially for crimes that fall under the category of criminal offenses of economic crime (Nanev, 2008, p.13).

In the legal literature, as well as in judicial and business practice, for a long time the issue of criminal liability of legal entities was not on the agenda. From a historical perspective, the importance of the maxim: *societas delinquere non potest* (Weigend, 2008, p. 934) dominated for a long period. Nevertheless, the concept of corporate criminal responsibility developed as an Anglo-American concept of responsibility (Bernard, 1984, p. 9). In the legal literature, it seems to us that the beginnings and development of the concept of corporate criminal responsibility were best illustrated by Mueller, by comparing the development of this concept with the growth of wildflowers, saying "no one planted it, nobody cultivated it, it simply grows" (Mueller, 1957, p. 27).

The origin of the development of the concept of corporate criminal responsibility is related with the civil legal liability of legal entities. This in general means existence of legal entities as separate legal entity that can be sued, that can litigate, have ownership, enter into a bond of legal relations, and that is, in the legal sense, to exist as separate entity. Legal entities become subjects of law starting in the 12th century within Europe. For the creation of the

concept of the existence of legal entities as a subject of law, in the theoretical and practical sense, there were numerous disagreements. Namely, according to certain points of view, the legal entity represents an "artificial creation" that enables concealment of the acts of management behind the veil of the legal entity, which are often contrary to the law. On the other hand, it was more than clear that there was a need for “unravelling” legal entities as a separate legal entity, for the plain requirement to motivate entrepreneurs in undertaking business ventures with far-reaching positive effects for the whole society (Smith 2012, p. 84).

This was the case until the moment when there was an undeniable compromise in the theory that the existence of legal entities as separate entities in law constitutes unavoidable evil in society (Arcelia Quintana Adriano, 2015, p. 384). This concept, in the field of business law, was widely accepted. This is especially due to the positive effects of the work of traders in almost all spheres of social life. Together with the appearance of legal entities as separate legal entities, the question of their criminal responsibility as separate entities, was raised. The initial type of liability that burdened the legal entities was the civil legal duty. Then, step by step, gradually, was introduced the necessity of anticipating and developing the concept of criminal liability of legal entities also known as corporate criminal responsibility.

The expansion of the concept of criminal liability of legal persons, in theoretical and practical sense, is a consequence of numerous and diverse factors. In the last decades of the 20th and the beginning of the 21st century, globalization and the liberalization of the market for goods and services have had an additional impact on the development of this concept and its implementation in the legislation into many legal systems. These two global impact phenomena have resulted in the creation of multinational companies and companies with representative offices and subsidiaries that have contributed to increasing the volume and dynamics of transactions in the daily supply of goods and services. Parallel to this, research that was conducted in the field of corporate crime theory, showed a tendency to increase the number and dynamics of criminal offenses, which were influenced by the increase in the number of multinational companies, the development of computer technology and cybercrime, fraud in stock market, insurance fraud, money laundering, crimes in public procurement contracts, etc.[7]

Worldwide, many multinational corporations have gained huge capital and grown such power through which they have influenced almost all spheres of society. Particularly worrying and alarming is the influence in political elections and the dictation of working conditions in a wider social context. The experience in politics has shown that numerous governmental and political decisions are determined by the will of certain powerful corporations with offices

[7] https://www.bjs.gov/index.cfm?ty=tp&tid=33, [accessed on 1 August, 2017].

around the world. Numerous articles and research projects manifest the role of "black money" in the conduct of political campaigns during political elections around the world (Freed, Currinder, 2016).

In the Republic of Macedonia and in the region, the process of privatization of the social capital into a private property had major influence on the overall situation. During the privatization period, a number of criminal incriminations were introduced gradually, that were in the area of corporate crime. Before the introduction and implementation of these incriminations, these acts of crime have contributed to the enormous and prompt enrichment of certain persons in a dubious way. However, for a small part of them, the court detected improper privatization and criminal responsibility for several criminal offenses.

The constant rise of the number of such crimes and the dynamics of the corporate crime was followed with serious debate from the professional and scientific public in a global context. These debates introduced theoretical and practical, professional and academic delimitation, which more or less advocated or opposed the view that legal entities should be held criminally responsible for the acts prescribed as crimes with the relevant laws. After a while, the criminal responsibility for legal entities was accepted by many theorists, that resulted with implementation of the criminal liability of legal entities in the criminal legislation of numerous legal systems of the Anglo-Saxon and Continental systems. With the entry into force of the Lisbon Treaty (1 December 2009), the EU has taken concrete measures in the field of criminal law, creating minimum rules for defining criminal offenses (euro-crimes) involving money laundering, corruption, cybercrime, organized crime, fraud and abuse on the market. The latter is in direct relation to the issue of corporate criminality, and the responsibility of trade companies for acts committed in the scope of economic criminality.

The concept of corporate criminal liability is a relatively new concept of responsibility. An exception in this regard is the legal regime in the United Kingdom and the Netherlands (Wetboek van Strafrecht).[8] Outside these two countries, France is the cradle of the concept of corporate criminal responsibility, which was implemented in 1994. Following the example of France, this concept of criminal liability was implemented in Belgium in 1999, Italy in 2001, Poland in 2003, Romania in 2006, and Luxembourg and Spain in 2010. Curiosity regarding this issue is the solution in the Netherlands, where until 1976 the only criminal responsibility of legal entities was for tax crimes (Keulen, Gritter, 2012, p. 9). According to the review by *Cliford Change in 2016, "corporate criminal responsibility*" was introduced into Slovakia in November 2015, with the intervention into the national legal regime. According to the same review, a draft version of a corporate criminal law was drafted

[8] Види: http://www.legislationline.org/documents/section/criminal-codes, [accessed on 15 July 2017].

in June 2014, but it was rejected by the Russian Federation Council. According to the *Cliford Change in 2016*, globally, the origin of the concept of "corporate criminal responsibility" is in India, and for Australia, Hong Kong, Singapore and the United States, the criminal responsibility of companies is more thorough and more precisely implemented.

## The concept of corporate criminality

The study of "criminality of corporations" or "corporate criminality" imposes the need for systematically explore the emergence, significance and distinction of this concept of criminal law from other classical criminal law institutes. The study of this phenomenon is under the influence of the precise terminological distinction of this completely new concept.

In scientific and professional literature, there are several different definitions regarding this conception, which more or less criticize, or change elements in the new conceptions of this phenomenon (Braithwaite, 2012, p. 178); (Simpson, 1992); (Gruner, 1994, p. 302). To this end, in one of his works in this field, Nanev will point out: "There is no single definition of economic criminality. In order to point out this type of crime, the following terms are used: economic criminality, corporate crime, the crime of white collar, criminality of corruption, and criminality of the gray zones. Nanev also is emphasizing the complexity in comparing these different terms (Nanev, 2008). The utmost theoretical disagreements in terms of the terminological determination of this conception are in terms of the scope of criminal offenses that are the product of corporate criminality. Namely, according to certain authors, corporate criminality includes every kind of criminal behavior of legal trading companies that is ccarried out within the regular trade activity, and consists of violation of criminal, civil and administrative norms (O' Brienand, Yar, 2008, p. in Keković, Milošević, 2011). Contrary to this, the literature also finds a point of view that seriously criticizes this (according to them) the broad concept of "corporate criminality" (Schlegel, 1990, p. 74).

According to most criminologists, "corporate crime" refers exclusively to crimes that are punishable under criminal law. According to Australian criminologist John Braithwaite, "corporate crime" is the behavior of a corporation or employee in the corporation on its own behalf, which is prescribed and sanctioned by law (Braithwaite, 2012). Furthermore, Keković, Milošević, for the purpose of understanding corporate crime, will point out that "corporate criminality does not refer only to criminal offenses against trading that are committed by trade companies, but they can also include crimes of misuse the official power or position, crime against the environment, crimes of violation of the legal regime for the protection of employees, etc. This is because it is possible the criminal activity in the field of trading to be related to other crimes, other than the ones that we have mentioned. In their articles, the same

authors point out that the term criminality of corporations can be used as a synonym for the term criminality of legal entities.

As we have pointed out, the precise understanding of "corporate crime" is essential for the determination of the criminal responsibility of the companies, as well as for lo of the responsibility of the members of the management bodies, the determination of the type and duration of the sentence etc. It is indisputable that many of the terms used to indicate this phenomenon are synonymous, but it is also extremely important to point out the differences between certain concepts that in certain situations are studied as synonyms. In this context is the delineation of the concept of "crime of white collar" versus "corporate crime" or "economic criminality."

In the academic literature we find that the concept of "crime of white collar" is the fruit of the creativity of criminologist Edward Alsworth Ross (Cullen, Wilcox, 2010). This concept, also known as "high class crime", poses a serious danger to society and is a generator of numerous and heterogeneous negative consequences in a wider social context. However, in today's theoretical sense there is a distinction between "crime of corporations" and "crime of white collar" (Benson, Simpson, 2014, p.203).

It seems that such a distinction is logical and necessary. This is especially due to the fact that the criminal liability of corporations can be attributed to situations where members of the governing bodies or members of the supervisory have taken certain unlawful actions on behalf of and at the cost of the company. More precisely, "corporate crime" exists in cases where unlawful actions are undertaken solely in an interest of increasing the company's assets, tax evasion, violation of the rules of fair competition, acts of insurance fraud, fraud of customers, market abuse, etc.

All listed actions are crimes in the area of economic crime, and their main goal is the increasing of the property of the legal entity. This is especially the case when the companies operate at a loss, or show indications for starting a bankruptcy procedure. In these situations, management often undertakes unlawful actions on behalf of the company, with the intention of preventing the bankruptcy and liquidation of the legal entity. On the contrary, "crime of white collar" is behavior typical of members of management bodies who take illegal actions solely in their own interest. More precisely, the "crime of white collar" contributes to damage the company's property, damages to shareholders, employees, creditors, the environment, etc.

This seems to be the most serious type of criminality, given the fact that the consequences of these actions are far-reaching and are reflected in the broadest circle of stakeholders including the state as a damaged entity. In this direction, the literature and practice show the consequences of the collapse of Enron, WorldCom, Energy Transfer Partners, Correction

Corporation of America (CCA), DESA (Desarrollos Energèticos S.A.), Exxon Mobil, McDonald's Corporation, PepsiCo.[9] This criminal behavior of the management can by no means qualify only as corporate criminality. In the segment of these criminal activities, there are elements of two types of criminality, sometimes typical for the interests of management, and somewhat typical of the interests of the corporation. However, in determining the occurrence and determining of the responsibility for the consequences, it is extremely important not to equate the crime of white collar with corporate crime, and to create conditions (the example with Enron) for punishing the legal entity in cases when the state of the company is a consequence of the criminal activity of the management.

In the legal literature and in the legislation of certain legal systems, different concepts of criminal responsibility are accepted such as: responsibility prescribed only for natural persons i.e. executive directors acting as legal representatives, (with the introduction of the criminal liability of legal entities this concept is almost abandoned), criminal liability prescribed for both natural and legal entities. The latest conception is most widely accepted in the legislation of individual countries. This seems to be the best model of legal protection in the function of prevention and reduction of the harmful consequences of the criminal actions of the management and the legal entity.

In a theoretical sense, there are also standpoints that oppose this distinction (Schlegel, Weisburd, 1994, p.31). Finally, for us, their argumentation is indisputable, especially because the corporations' crime often overlaps with the crime of white collar, i.e., the illegal money acquired in the name and at the expense of the companies often ends up in the hands of the management or shareholders who at the same time have one of the management positions in the company. The point of the need for delimitation is in the fact that the legal entities are being used as a panel behind which all criminal activities are carried out, while at the same time this is negatively affecting and damaging the entire economy, creating unfair competition. Tolerating the existence and operation of these companies would mean favoring one against the other, and direct discrimination in the business sector.

Finally, on the basis of the stated theoretical views, we emphasize that the determination of the criminal liability of legal entities in practice is posed as a complex issue, from several aspects (Deanoska-Trendafilova, Bozhinovski, 2014, p. 114). The complexity of this issue is often reflected to the question: whether the particular behavior of the trader or the responsible person (a member of a management body or manager) in the legal entity (commercial company) entails criminal liability, or constitutes an admissible conduct in accordance with the accepted legal business regime? Considering the fact that this behavior in most cases is a

[9] https://globalexchange.org/campaigns/corporate-human-rights-violators/, [accessed on 15 June, 2017].

violation of provisions of business or financial character, it is clear that there is a need for extensive knowledge of the regulations of the criminal justice and business regime, and the need for necessary intervention of the state regarding the creation and implementation of criminal policies for prevention and reduction of criminal behavior in the corporate world. A good question in the context of this is set by Keković, Milošević. The question is: Is that the only measure from the aspect of the criminal policy that the state can implement in order to reduce corporate crime?!

## Corporate criminal responsibility of companies under the European legal regime

Within the framework of the European Union, since the Maastricht Treaty of 1992, the obligation for mutual recognition of court decisions adopted in EU member states was formally noted, in the interests of prevention and reduction of crime within the EU. In addition to this, in 2000 the Convention on mutual assistance in criminal matters was adopted in order to strengthen the cooperation and assistance between the judicial, police and customs authorities. In 2004 the concept of a European arrest warrant was adopted.[10]

As part of a strategy to prevent and reduce the criminal activities of legal entities, the EU has created a legal framework with minimum rules that reflects the binding policy of protecting against criminal activities of market abuse in member states. To this end, in 2014, specific measures were taken to incriminate abuses in the market. The Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 (the market abuse regulation) was adopted. According to the data from Clifford Change, 2017, in 2017, the results of the regulation are expected to be implemented in the legal systems of the Member States.

The basic idea of strengthening the European legal framework in this field is to create a minimum harmonized legal regime in member states in order to reduce market abuse. Most important of all is that this directive provides provisions for expansion of the criminal liability of legal entities. In this manner, in 2009, the Directive of the European Parliament and a Ship pollution advice Council, was adopted, Directive 2009/123 / EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35 / EC on ship-source pollution and on the introduction of penalties for infringements (Text with EEA relevance).[11]

Worldwide, the intention to reduce the criminal activities of legal entities is also in expansion. Recognizing the danger and seriousness of the increased volume and dynamics of criminal activities of corporations, in 2009, the Economic Cooperation and Development

[10] hhttp://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030, [accessed on 16 June, 2017].
[11] Достапна на: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0057, [accessed on 20 July, 2017].

Organization adopted a convention for preventing / combating bribery of public officials in international business transactions (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions). Basically, all European and international legal regimes have created a minimum legal framework for implementing the concept of corporate criminal responsibility. Although most of the states have prescribed the concept of "corporate criminal responsibility," the conditions under which corporations, as legal entities, are charged with criminal liability, are different. To this end, corporate accountability in certain legal systems is conditioned by the fact that criminal activity has been taken by one of the members of the management, within the scope of the company's activity, in the exclusive interest of the corporation. There are differences also, based on whether separate responsibility is foreseen for legal entities, or the responsibility for legal entities does not exclude liability of natural persons. Systemic differences exist concerning the control system and the rejection of the liability of legal entities implemented in separate legal systems. In essence, the discharge of criminal liability is based on: proving that there was no intention to commit a crime by the corporation; To provide evidence in the defense; Be a deceptive factor when making a decision; To influence the decisions on prosecution and punishment (Clifford Change report, 2016). As part of the EU's tough criminal policy, is the draft directive COM / 2016/0826 final - 2016/0414 COD (Proposal for a directive of the European Parliament and of the Council on the Prevention of Money Laundering by Criminal Law).[12]

In June 2017, entered into force the Directive (EU) 2015/849 of The European Parliament and the Council of 20 May 2015 on the prevention of the use of a financial system for the purpose of piracy or financing of terrorism, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC) as part of a package of measures against money laundering, terrorism and accountability of corporations.[13]

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[12] Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0826, [accessed on 10 June 2017].

[13] Available from: http://europa.eu/rapid/press-release_IP-17-1732_en.htm, [accessed on 20 June, 2017].

## The legal regime of corporate criminal liability in comparative systems of the Anglo-Saxon and Continental law

### *3.1. The concept of corporate criminal responsibility in the Republic of France*

In France in 1994, the Criminal Code foresees the concept of corporate criminal liability in art. 121,122,131,137of the French Code Penal also known as French Criminal Law. In Article 121-2 it is provided that legal entities (except for the State), are criminally responsible for acts committed on their behalf by their managing authorities or agents, in accordance with the decisions laid down in provisions of the law. Furthermore, the criminal liability of legal entities does not exclude the liability of natural persons who commit or participate in the crime. This is subject to the decisions provided in paragraph 4 of Article 121-3 (Nouel, 2008, p. 5). According to the French Penal Code, companies can be prosecuted for almost the same acts as natural persons. The penalties imposed on legal entities are five times higher than the penalties of individuals. Finally, companies may oppose the imposition of criminal responsibility, noting that the employees were not acting within the scope of their assigned tasks in the course of taking criminal actions in the sense of the French Criminal Code, that they were not advocates by law of the company.

### *The concept of corporate criminal responsibility in Belgium*

According to the Belgian concept of liability of legal entities, for a long time, the assumption was that corporations could not be held criminally accountable because they did not form a will, and consequently their intention to commit a crime could not be determined (Gutermann, De Winter, Houben, 2016). According to the established concept of responsibility of legal entities, companies can be burdened with civil and administrative responsibility, even when it comes to criminal activities.

However, in 1999 the concept of criminal liability of legal entities has been implemented in Belgian law. According to the legal formulation of Article 5 of the Criminal Code, *"a legal person is criminally responsible for crimes that are or are essentially related to the accomplishment of the corporation's corruptive purpose or the interests of the corporation, or which according to the circumstances were committed on behalf of the joint-stock company."* In accordance with Belgian law, the public prosecutor is official that can initiate proceedings against criminal liability of legal persons. Regarding the procedure, the legal regime established in the Belgian Code of Criminal Procedure" applies. According to Belgian law, criminal liability of corporations can be provided in cases where criminal actions

are taken on behalf of the company, or when the crime is essentially tied to the activities of the corporation (Clifford Change report, 2016).

### *The concept of corporate criminal responsibility in Germany*

The implementation of the concept of corporate criminal liability, that is, the criminal liability of legal entities in Germany, is one of the longer-lasting implementation processes within the EU. Under the influence of legislative interventions in European legislation and the reformed EU policy in September 2013, Germany drafted a draft law on criminal liability of corporations. According to the solutions outlined in the draft law, the acts committed by the executive directors or any advocate by law of the company should not be provided only for them as natural persons, but also to the legal entity for whose account the actions are being undertaken. Although this draft is still under review by the competent authorities, as well as the fact that several authorities consider that in essence there is no place for implementation of this concept in the Criminal Code (Maglie, 2005, p.555), according to the existing legislation of corporations, competent authorities can impose a ban of performing duties.

### *The concept of corporate criminal responsibility in Italy*

According to the data taken from the report (Clifford Change, 2016), in 2014 and 2015, the Italian Parliament intervened with amendments to Regulation No. 231/2001, extending the list of criminal acts by including the criminal act money laundering as one of the principal crimes for creating illegal capital and destruction of the economy. (Levi, Reuter, 2006). With the same amendment, an intervention has been made in the application of Decree No. 231/2001 including crimes against the environment, criminal acts against public administration, organized crime, the provision of false statements regarding the financial performance of the company and accounting.

Pursuant to Decree 231, legal entities based in Italy may be charged with criminal responsibility for offenses established in the decree. According to its legal regime, legal entities in Italy are charged with criminal liability in cases where management or employees in the company have committed criminal acts in the interest of the legal entity. Under Italian law, directors and management members can be relieved of criminal responsibility in cases when they prove that they have implemented an effective managerial and organizational protocol system of control, training, adequate internal communication, adequate system of sanctions. Although state authorities in Italy implemented exclusively listed crimes, we are of the opinion that with the changes of the regulation from 2015, Italy manifested the will to implement the EU regulations in this field.

## The Anglo-Saxon concept of responsibility of companies as separate legal entities

### *4.1. The concept of corporate criminal responsibility in the United Kingdom of Britain*

The beginnings of the concept of full corporate criminal responsibility can be found in the legislation of United States, Canada, England, and the Netherlands (Leigh, 1982). According to the understanding of the Anglo-Saxon conception of liability of legal entities, the concept of corporate responsibility, that is, the responsibility of legal entities existed even in the ancient era. Although this was not the case with Ancient Rome, where the long-standing concept was that the legal entities couldn't form a will, that they do not took actions for themselves, hence, they can not be criminally responsible (Bernard, 1984, p. 11).

In England, as early as 1917 in the case of Mollsell Brothers v. London and Northwestern Railway has been confirmed the concept of corporate criminal liability. In today's situation, the situation in this field is more complex. This is the result of many different factors, among which the Kingdom's comparisons with the US situation in this field, as well as the impact of Brexit on the overall legal, economic and political relations (Delahunty, 2016). Regarding the applicable legal regime, UK is based on the corporate criminal responsibility of the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) and the Bribery Act 2010 (the Bribery Act). According to the current legislation, legal entities are subject to criminal liability. Depending on the nature of the offense committed by the legal entity, the competent authorities are also competent to initiate a determination procedure for criminal liability (Clifford Change, 2016). In the UK, in determining corporate criminal responsibility, the role of "identification principle" and the concept of "vicarious liability" is essential (Grimes, Niblock, Madden, Napley, 2013/2014). The tendency to intensify the legal regime and the criminal liability policies of legal entities is undeniable. However, in the near future, Brexit's influence on this issue must not be ignored in this field.

### *Corporate Criminal Responsibility in the United States*

The United States is the cradle of Doctrine of Responsible Corporate Officer (RCO). In this doctrine, the concept of responsibility of representatives by company law is implemented, for acts for which they are not familiar, for actions undertaken by the company for which they are not aware of or for acts they do not intend to perform (Lane, 2011). Regarding the concept of corporate criminal responsibility, until the 20th century the concept of "strict liability crimes" was in force in the United States, after which the Sherman Antitrust Act was adopted by the Congress in 1890, which is the base for determining Corporate criminal responsibility (Scura, 2013).

In the United States, the concept of "respondeat superior" is fully implemented, according to which legal entities are charged with the criminal activities of members of the management and employees if they are undertaken within the company's business activities, and at least partly in the interest of legal entity. Regarding the sanctions that can be imposed against legal entities, the courts may impose a ban on performing the activity, fine, establish a special program for consolidation in the company, engage in the performance of matters of general interest, restitution, establishment of special monitoring in the company's business activities from where the work came from, etc. Of course, this refers to the solutions contained in federal law.

## Criminal liability of legal entities in the Republic of Macedonia

According to the current legislation in the Republic of Macedonia, "the legal entity is criminally responsible, in cases determined by law, for criminal acts committed by the responsible persons in the legal entities, in the name, for the account, or for the benefit of the legal entity." (Vitlarov, 2014). According to the legal formulation of Article 28-a of the Criminal Code,[14] *in the cases stipulated by law, the legal entity is responsible for the criminal act committed by a responsible person in the legal entity, in the name, for the account or for the benefit of the legal entity*. The legal regime regarding the criminal liability of legal entities also includes the companies for which separate criminal acts are provided in the special Chapters of the Criminal Code, which refer to the protection of the environment, legal traffic, public finances, payment operations, economy, etc. Therefore, when it comes to the responsibility of the company for the offense of the responsible person in the legal entity, art 3 paragraph 33 from the Law on Trade Companies is to be considered.[15] In this article it is provided that " *"responsible person" in a general partnership is the partner, authorized to manage and represent the company, provided that the management is not entrusted to a third party (manager); in a limited partnership and a limited partnership with stocks it is the limited member, provided that the management is not entrusted to a third party (manager); in a limited liability company - a manager, that is, managers, a member of the supervisory board, that is, the controller, and in a joint-stock company - a member of the management*

[14] Criminal Code of the Republic of Macedonia („Official Gazette RM" No. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015 и 97/2017, *hereinafter CC*).

[15] The Law on Trade Companies ("Official Gazette of the Republic of Macedonia" nos. / 2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014 , 41/2014, 138/2014, 88/2015, 192/2015, 6/2016, 30/2016 and 61/2016, hereinafter LTC),

*body, that is, a member of the supervisory board and the managerial persons in the trade companies*.

In the Republic of Macedonia, with the legal intervention in the criminal code from 2004 (Official Gazette 19/2004, terms for criminal responsibility of a legal entity), the maxim of "societas delinquere non potest" has been abandoned, and with Article 28-a the concept of Criminal liability for legal entities, which, in the sense of Article 122, paragraph 6 of the Criminal Code, includes companies has been adopted. According to the 2004 Decisions, "the legal entity is criminally responsible if it did come into action or by failing to perform the due supervision by the management body or the responsible person in the legal entity or to another person who was authorized to act on the name of the legal entity within its powers, or when it exceeded its authorizations in order to benefit the legal entity.

With the intervention in the 2009 legislation (Official Gazette 114/2009), "a fully reformed concept of criminal liability of the legal entity has been accepted, not only for the criminal acts of the responsible persons in the legal entities, but it is also provided that "the legal entity shall be liable as well for a crime committed by its employee or by a representative of the legal entity, wherefore a significant property benefit has been acquired or significant damage has been caused to another, if: 1) the execution of a conclusion, order or other decision or approval of a governing body, managing body or supervising body is considered commission of a crime or, 2) the commission of the crime resulted from omitting the obligatory supervision of the governing body, managing body or supervising body or, 3) the governing body, managing body or supervising body has not prevented the crime, or has concealed it or has not reported it before initiating a criminal procedure against the offender. Under these conditions, criminally liable shall be all the legal entities with the exception of the state (CC, art. 28-a 3). Finally, foreign legal entity shall be criminally liable if the crime has been committed on the territory of the Republic of Macedonia, regardless whether it has its own head or branch office performing the activity on its territory (CC, art. 28-a 5).

In addition to this, the CC provides solutions in Article 28-b, which relates to the limits of the liability of the legal entity. To this end, the liability of the legal entity does not exclude criminal liability of a natural person as an offender of the crime. The liability of the legal entity does not exclude the criminal liability of the natural person as offender of the crime. the legal entity shall be liable for a crime even when there are factual or legal obstacles for determining the criminal liability of the natural person as offender of the crime. If the crime is committed out of negligence, the legal entity shall be liable under the conditions of Article 28-a of this Code, unless a law anticipated sentencing for a crime committed out of negligence.

According to the existing solutions in the Republic of Macedonia, the concept of assumed responsibility of the legal entity was adopted (Deanoska-Trendafilova, Bozhinovski, 2014, 123). With the 2009 amendments, a strict regime of liability is provided, which includes the responsibility of the legal entity and the criminal actions of employees, of course, under strictly determined legal conditions. In other words, the concept of indirect liability of legal entities is accepted, which implies the implementation of the organic theory of responsibility of legal entities (Kambovski, 2011). Despite the acceptance of (according to us) the best legal solutions in a comparative sense, the establishment of criminal liability of legal entities in practical terms entails numerous problems. Judicial practice in the Republic of Macedonia still manifests uncertainty, especially in the area of determining the elements of the crime in the business operations of companies, both of status law and in the field of trade in goods and services. Toward this, with the appealed verdict in Case No. K-81/12 from 11.05.2012, the court acquitted defendant V.D. from Stip, emphasizing "the change of the legal entity's headquarters, made in a legal and lawful manner, is not a fraudulent act by which the defendant evaded payment of a claim to his legal entity.

According to the position of the Second Instance Court, the first instance court correctly applied the Criminal Code when he released the defendant from criminal charge of committing criminal act "Damage to someone else's rights" from Article 244 paragraph 2 of the Criminal Code. "(Court of Appeal in Shtip, Bulletin No. 8, 2014). Furthermore, the decisions of the Basic and Appellate Courts in the case Kz.br.361 / 13, where the first instance and second instance court, with their decisions, found defendant B.S of S.N guilty of committing a criminal act "Illegal exploitation of mineral raw materials" of Art. 225-a paragraph 1 from the Criminal Code and the accused legal entity AGP DOOEL CH for the criminal act "Illegal exploitation of mineral raw materials" from Art. 225-a paragraphs 3 and 1 in relation with art.28 paragraph 1 from CC in relation with the Law for amendment of the Criminal Code, published in the Official Gazette of the Republic of Macedonia no. 114/09.

In this case, the Supreme Court of the Republic of Macedonia, acting upon the request for protection of the legality, pursuant to Article 342, paragraph 1, item 1 of the Law on Criminal Procedure, found a violation of the Criminal Code in the first instance and second instance verdict, and therefore changed them and released the defendants from charges because of lack of elements of the criminal act "Illegal exploitation of mineral resources" from Article 225-a paragraph 1 and paragraph 3 of the Criminal Code. According to the verdict of the Supreme Court of the Republic of Macedonia in this particular case, *in the actions of the defendants there are no elements of the criminal act "illegal exploitation of*

*mineral resources"* because the important element for the existence of the criminal act - the exploitation of mineral resources has not been realized.

The aforementioned acts represent, in a theoretical sense, corporate criminality, and besides the responsibility of natural persons, criminal liability is foreseen for legal entities as well. Comparatively with the region, the Republic of Macedonia has adopted identical solutions. In the direction of this (Keković, Milošević, 2011, p. 28), based on the applicable positive law in the Repubica Serbia will point out that: "The criminal act of the corporation is the criminal offense committed within the scope of its activity or authorization of the responsible person, for the purpose to benefit for the legal entity, as well as those acts done for the benefit of the legal entity by persons acting under the supervision and control of the responsible persons, if the crime is committed because of lack of supervision or control that the responsible person is obliged to implement.

Aside from the legal solutions and state criminal policies, in order to prevent and reduce crime, state authorities must consider implementing measures, programs and strategies for increasing the business ethics of management, to increase responsibility of the members of the supervisory board (although from the aspect of the legal Standard in the Republic of Macedonia all members are liable according to the equal concept), to increase the awareness of corporate crime and social responsibility of companies. On the other hand, aside from companies like trade firms, other legal entities also contribute to the increase of criminality in the field of finances, taxes, environment, employees, etc. Consequently, the measures should be applied to all legal entities.

The behavior of corporations, that is, the implementation of managerial decisions by law representatives in trade companies, directly or indirectly reflects upon numerous and heterogeneous entities in a wider social context. In this sense, business policies and the behavior of the corporations are reflected on consumers, shareholders, employees and numerous other stakeholders including the state. In our opinion, from a point of view of statute commercial law there should be positive criticism of the implementation of this concept. The Republic of Macedonia, in terms of legislation, is in line with the best solutions in the world. The 2009 interventions are a confirmation of this conclusion. In procedural legal terms, the goal is also confirmed by the decisions contained in Chapter XXXIII of the Law on Criminal Procedure (Official Gazette of the Republic of Macedonia No. 150/2010, 100/2012 and 142/2016), which refers to legal entities.

## Conclusion

Guided by the analysis of comparative solutions in the field of "criminal liability of legal persons", as well as the concept of "corporate criminal responsibility", it is more than clear that in the last decades of the 20th and 21st century globally, concrete interventions in the legislatures of the countries of the continental system, have been made. In the other hand, in the Anglo-Saxon system, this concept is not a novelty which we can conclude form the analysis made in a historical perspective in the US, UK, Australia, etc.

In the present, the greatest danger of corporate crime is not only reflected in the unlawful enrichment of managers, directors, members of top management, but also in the direct damage of the environment, in the unfair competition, consumer abuse, company discrimination, evasion of tax and damage to the state property, etc. From the statistics of numerous research projects cited in this paper, this kind of crime has long been the greatest danger to society. From recent research in this field, it is clear that this type of crime is closely linked to political processes, democracy and in general the highest (world) social policies. This conclusion is in the context of the notion that reputable judgments from authoritative judicial bodies have identified crime of companies, which companies, on the other hand have been declared financially supportive of certain political parties. Hence, the implementation of the concept of criminal liability of legal entities, that is, corporate criminal responsibility, is a necessity in the direction of building a society under democratic and reasonable standards.

In addition to legal interventions, it is necessary to emphasize the influence of criminal policies of state and EU-level organizations, the United States, the OECD, etc. In our opinion, the model of prescribing responsibility for committed criminal acts of legal entities, not excluding natural persons from responsibility, from the aspect of legislation, is a fitting solution in this field. This in two respects, firstly, often, individuals did not have financial opportunities to reparate claims, and the legal entity behind whose veil hides the interests of shareholders (usually members of the board of directors as shareholders) continue to realize their interests. We believe that this model implemented in our law is compatible with the actual trends on this field. It is problematic and complicated in proving the crimes, especially because the managers who commit the crime, at the same time are the only ones that have access to the overall documentation regarding the transactions carried out. In addition to the main penalties provided for in the criminal codes, particularly important are the secondary sanctions, among other things, in the function of distorting the reputation of the companies. This is especially because through their criminal activities they influence the creation of unfair competition, both in terms of fixing prices, limitations and violation of industrial property rights, cybercrime, etc.

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# MEDDLING WITH JUSTICE AND RULE OF LAW: CORRUPTION AND CULTURE OF IMPUNITY

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## ABSTRACT

Of all the challenges that Republic of Macedonia is facing, perhaps none is more complex than reducing corruption and strengthening the Rule of Law. As a matter of fact no one is immune to corruption and there is no anti-corruption vaccine. Bribery and corruption, endemic to most cultures and mainstay of human greed, is now as it has always been, a thorn in our righteous side. What once almost 25 years ago started as a new independent Republic, Macedonia now faces a terrible state of absurdity or the twilight zone of legal horror. It was Chief Justice Aharon Barak of the Supreme Court of Israel who said: "The judiciary is the guardian of the Constitution", but if the Constitutional Court is the guardian of the Constitution, who is going to guard us from the Constitutional Judges. It is clear that all this could seriously destabilize an already unstable situation. So how do we fight corruption if we lose control of the criminal prosecution system? In this paper we will try to present the absurd state in which current Macedonian society is. Republic of Macedonian is in desperate need of institutional reconstruction. Macedonian people cry for justice and rule of law. The need for reform is long overdue. Ending impunity is the way to end corruption. However, the justice system itself is corrupt. The judicial system must clean up its own ranks and bring in new staff in through merit based recruitment. Today the judiciary is too often a tool for the powerful and rich and it is not serving ordinary citizens who suffer from injustice fed by corruption. By starting from the top, the Macedonian Government can send a strong signal to all people of Macedonia that the time of corruption is over.

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# INTRODUCTION

Abuses of power are almost certainly the daily reality in the world. The news around the world report recurrently all kinds of scandals and public policy mistakes, which result in economic crisis and poverty.

In this philosophical line of thought, corruption is defined as the renunciation of the ethics, morality, law and good habits of the country where a person lives. Corruption nevertheless is a concept that has been in existence since the very beginnings of humankind. As Professor Barry A.K. Rider puts it: "Corruption is something that we all had to live since Eve took the first bite of the serpents' apple, and as it but one manifestation of our human greed and insecurity, I suppose that we will have to live with it to the end of time." (Rider,1997)

In Joseph Nye's classical definition, corruption is "behavior that deviates from the formal duties of a public role because of private-regarding wealth or status gains". (Smith, 2010, pg.16) Or as we would say let's view corruption as a world wide web, spread all over the world!

Corruption is ultimately the direct result of decisions, choices and behavior at the level of the individual. One can restructure institutions or political systems, but if individual motivations for corrupt behavior are not understood, these restructurings may not be effective – and corruption will persist.

The decision to engage in corrupt behavior, weather by public officials or citizens, is primarily influenced by a personal definition of corruption. Here we could borrow the social learning theory to understand the causes of various sorts of deviant behavior and try to find the answers. The answers to these two simple questions: Why are some public officials more prone to corrupt behavior than others? Why are some citizens more likely to offer bribes than others?

We could say that the willingness to pay bribes or engage in corrupt behavior in some other way feeds the corrupt system. We should take an individual level approach and tackle the question of why people engage in corrupt exchanges.

In the vast majority of instances, the motive for corruption is simple greed. All indicators of corruption are based upon perception.

You can't get an objective measure of dishonesty. If corruption is "done well" we won't be able to observe it. Grand Corruption involves big money and ordinary people are simply observers rather than participants.

Let's take an example:

"Africans view participation in politics as an instrument, similar to putting money in a bank or buying stocks in a firm and capturing (or securing) an important political position is like winning the lottery. The new political office can be used to amass wealth for one self and also reward one's supporters." (Mellen, 1998) So, the point here is that corruption in Africa and elsewhere has enriched the political elites and especially the heads of states. Similar cases abound in other countries too.

This may all sound as a fairy tale, but nevertheless we need to say it: Our world, our Planet as we know it, is a world that has entered deeply into very turbulent times. We are facing a series of mounting, perhaps unprecedented, global challenges - economic uncertainty, terrorism, huge numbers of refugees, increasing distrust among leading powers, climate change and so on. And we tend to be brilliant in bad things.Why could not it be vice versa?

Corruption is the antithesis vis-a-vis human rights, the venom vis-a-vis the rule of law, the poison for prosperity and development, and the reverse of equity and equality. Most fundamentally, it erodes trust and confidence and contributes to the collapse of societies and economies.

Corruption is viewed today as one of the most serious and pressing issues facing governments and civil societies around the globe. It is rightly deemed a major factor in the erosion of trust in the political class and discrediting of financial institutions and institutional regulators. It is an important obstacle to economic efficiency and the application of the principle of equality before the law.

Former US Secretary of State John Kerry spoke powerfully at the World Economic Forum in Davos, Switzerland in 2016, noting: "Now, obviously, corruption's not a new problem. Every nation has faced it at one time or another in its development. America's own Founding Fathers knew the threat of corruption all too well, warning of the dangers that it posed to democratic governance. But today, corruption has grown at an alarming pace and threatens global growth, global stability, and indeed the global future."

## Corruption – the Macedonian Context and Recent Scandal

The Macedonian Case study clearly shows how corruption can lead to total failure of the rule of law which, can eventually lead to a failure of the state.

The Western Balkans (WB) is a region with a history of corrupt practices, and an area usually perceived as vulnerable to corruption. With the exception of Kosovo, all countries from the Western Balkans – Albania, Bosnia and Herzegovina (BiH), the former Yugoslav Republic of Macedonia, Montenegro, and Serbia – are parties to UNCAC. Without exception, they are faced with widespread corruption – one of the key challenges with regard to their aspirations

for European integration. They have each made different progress towards EU membership, but share similar difficulties in the fight against corruption. (Lilyanova, 2015)

On September 18, 2013, USAID in Macedonia launched its new Anti-Corruption Program, with the main purpose to support civil society organizations, improve the integrity of state institutions and hold them accountable to the people. USAID Mission Director for Macedonia James Stein on that occasion stated that "Corruption is a global concern because where it is tolerated, or left unchecked, it undermines social values, inhibits economic growth, and corrodes the very fabric of society. But, it is only a threat to the degree that we, the democratic citizens, allow it to be." (USAID)

The Macedonian society is no stranger to the phenomenon of corruption, but when it comes to forms of corruption such as bribery, in the general point of view a well-established and selective code of silence still exists in the most cases.

Macedonia is a country where corruption is pervasive at the highest levels of the national government and is unpunished. Grand corruption depends on the existence of a culture of impunity. In countries with such a culture, there is neither the will nor the capacity to investigate, prosecute, and punish grand corruption, in large part because the corrupt leaders in those countries control the entire system.

This blockage on Macedonia's path toward EU integration has taken the incentives for reform out of the political equation and created a sense of disillusionment with the EU, clearly contributing to the making of the biggest institutional crisis in the country since its independence.

The following remarks by the former US Ambassador Paul D.Wohlers at the anti-corruption policy forum which was held in our capital, Skopje on the 14th of October 2014 , shows how serious the situation in Macedonia was and still is.

> Comparisons across countries are always imperfect, but they can be instructive. So I would note that last year, in 2013 in another Balkan country, Romania, the National Anti-Corruption Agency sent 910 individuals to court and the National Integrity Agency sent forward 797 cases of incompatibility – people holding office with unacceptable conflicts of interest – and 72 cases of elected officials with unjustified assets. During the same timeframe, in 2013, the Macedonian State Commission for the Prevention of Corruption investigated 228 corruption cases but, of those, the Commission referred only 7 corruption cases to prosecutors. That's 3% - almost nothing. In Romania, of those 910 cases referred by the National Anti-Corruption Agency, Romania convicted 244 individuals on corruption charges in 2013 – that's 27%. Macedonia convicted zero. Even

> accounting for differences in population, that discrepancy is staggering. I hope the Government and Parliament will give the Commission the resources and staff it needs to fulfill its mandate, coupled with the political will to ensure that allegations of corruption, no matter who is involved, receive the scrutiny they deserve.

These remarks from the Ambassador remain only on paper, with no action by the Government of Macedonia to increase corruption prosecutions. On the other hand, Romania's National Anticorruption directorate DNA during 2013-2016 indicted a Prime minister, a Deputy Prime Minister and eight Ministers, obtaining convictions of the Prime Minister and six ministers. (Kövesi, 2017)

During the first six months of 2016 the State Commission for the Prevention of Corruption in Macedonia referred two cases of misuse of public funds to the Basic Public Prosecution Office. In one of the cases, the commission initiated a procedure for removal of a public official. The commission also received and checked 535 conflict of interest statements by public officials and determined that a conflict existed in 53 cases; resolution of these cases remained pending as of the year's end. (U.S. Department of State Report, 2017)

This current state of things - the status quo of corruption in Macedonia - is an ideal situation for Grand Corruption. A rich government official, gaining wealth every day in office and believed to be admired by a majority of citizens, will not be interested in disrupting this current state or affairs.

Our duty as a members of the Academia is to constantly ask ourselves and challenge others to ask the inevitable question: Is Macedonian society today living in a state of comfortable delusion?

The Macedonian scandal exploded in February 2015, when the opposition accused the government of then Prime Minister Gruevski of abuses including using the intelligence services to wiretap some 20.000 officials, journalists and other citizens, some of which were made public showing government officials (including the Prime minister) discussing illegal activities. (Berendt, 2015)

The tapes contain incriminating evidence against many senior officials, including: proof of high-level corruption; the government grip on the judiciary, prosecution, businesses and media; politically-motivated arrests and jailings; electoral violations; and even an attempted cover-up of a murder of a young man by a police officer. (Amnesty International, 2015)

In short, Macedonia was in a political crisis triggered by wiretap revelations that appear to show dramatic levels of government corruption and criminality. Now known, nothing has been done to address the corruption in government, at a time when Macedonia appeared to be

building a modern, transparent, and democratic state on a faster pace than the rest of states in the western Balkans.

But, here we must acknowledge that the government of the past nine years did not invent corruption or state capture. EU and US Ambassadors, Transparency International, and various International organizations reported in 2002 that: “Corrupt links between large enterprises, state organs and political parties were a feature of the landscape in Macedonia long before the present government came to power.” (ICG Balkans Report 133, 2002) The Oposition leaders even admit that corrupt practices were common under previous governments, including their own 2002-2006 administration.

The government has the legal and institutional tools that in principle can prevent abuses like those exposed by the wiretaps, but it ignores those tools or circumvents their use. Most of the institutions that should prevent abuse of power have been co-opted or undermined. Some officials cannot be relied on to deal with wiretap revelations, in part because they are reportedly implicated in the scandal themselves. Even the Macedonian judiciary is known for making decisions based on the political affiliation of the involved parties, and is widely viewed as “totally controlled”. (U.S. Department of State Report, 2017)

Here we would like to point out to the European Commission Report on Macedonia from June 8, 2015. The report, chaired by retired Commission Director Reinhard Priebe (known as the Priebe Report), noted the following about the Judiciary and Prosecution: “The country possesses a comprehensive set of rules which, if fully observed, should generally ensure a proper functioning of the judicial system to a high standard, although there is a need for some further reform, particularly in relation to the appointment, promotion and removal of judges and prosecutors. Highly qualified and experienced judges, prosecutors and judicial staff are available in sufficient numbers to enable the judicial system to function effectively.” (Priebe Report, 2015).

When this article’s primary author arrived at Ohio Northern University as a visiting scholar in August 2015, the following questions were pondered: Will the government show accountability for their actions? What will be implemented and what shall be done?

The Special Prosecution body in Macedonia was set up to rein in corruption and criminal conduct by officials. It is led by three women who have become national heroines. Indeed, it is especially symbolic that the biggest cases in modern Macedonian history are being prosecuted by a trio of women. In the past 10 years, Mr. Gruevski and his political cronies built a corrupt system based not only on intimidation and clientelism, but also by limiting women's rights and promoting machoism, chauvinism, homophobia, and anti-feminism.

Despite the prosecutions, the political process still interfered with the administrative of justice, with the controversial pardoning by President Gjorge Ivanov of 56 individuals connected to the wiretapping scandal that sparked mass protests, dubbed the “colorful revolution,” which also resulted in vandalism of several government buildings and monuments. "I have decided to put an end to this agony for Macedonia,” said Ivanov in speech to the nation.

The only thing that he forgot to mention is that the “general halt to all proceedings against and among politicians” is in fact a general halt to the rule of law. Fortunately, President Ivanov withdrew his pardons on June 6, 2016.

The most significant human rights problems stemmed from pervasive corruption and from the government’s failure to respect fully the rule of law, including continuing efforts to restrict media freedom, interference in the judiciary, impeding the work of the Special Prosecutor’s Office charged with investigating and prosecuting crimes relating to and arising from illegally intercepted communications, as well as the selective administration of justice. Official reports noted political interference, inefficiency, favoritism toward well-placed persons, prolonged processes, violations of the right to public trial, and corruption characterized the judicial system. (U.S. Department of State Report, 2016)

Perhaps the strongest fear out of this process was revealed when instead of portraying the Special Prosecutor’s team as Macedonia’s ‘Untouchables’ it actually portrays the corrupt government officials as absolutely untouchable, and derogates the legal paradigm that no one is above the law. Here, state institutions are usurped and the Macedonian democracy is utterly humiliated. It is our duty not only to point out the need for, but to insist on personal, social, moral, political, and legal responsibility of all those involved. This will be perhaps the greatest struggle for accountability in modern times in Macedonia!

The Macedonian Republic is in desperate need of institutional reconstruction. Corruption as a global ethical and legal problem should be addressed with all the scrutiny that it deserves.

To be moral, you must exercise your morality in your daily life as you exercise to develop your muscles. It is not something that we can easily comprehend and then apply by logic alone. It is something that we must live spontaneously. To achieve the ability to be moral requires developing the proper character. To develop the proper character requires developing virtues. To develop virtues requires creating and living with moral habits. We must develop virtue within us. Intellectual virtue comes from being taught. Moral virtue results from developing proper habit. (Garofalo, et al., 2001)

Unfortunately all this sounds like a fiction or fantasy to Macedonia's past and current government officials. Which leaves us with the question: *Why did they even bother to print out the code of ethics for government officials?*

The most significant human rights problems in Macedonia have stemmed from pervasive corruption and from the government's failure to respect fully the rule of law. As noted above, this has included: continuing efforts to restrict media freedoms; interference in the judiciary; impeding the work of the Special Prosecutor's Office charged with investigating and prosecuting crimes relating to and arising from illegally intercepted communications; and the selective administration of justice. The Special Prosecutor's ability to independently and thoroughly investigate and prosecute cases of corruption are a critical step forward for Macedonia and an assertion for the population here that government should be accountable to the people. (U.S. Department of State Report, 2017)

The Constitution of Macedonia provides for "autonomous and independent" courts, supported by an independent and autonomous Judicial Council. The judiciary failed to demonstrate independence and impartiality, however, with judges subject to political influence and corruption. The outcomes of many judicial actions appeared predetermined, particularly in cases where the defendants held views or took actions in opposition to the government. Inadequate funding of the judiciary continued to hamper court operations and effectiveness. A number of judicial officials accused the government of using its budgetary authority to exert control over the judiciary.

## Implementing The Rule Of Law

As professor Academic Vlado Kambovski, the former president of the Macedonian Academy of Arts and Sciences, stated in a recent interview : It's not only sufficient to write the law–the law must be implemented." Only than we can talk about the rule of law.

The rule of law literature does not make clear in its description of judicial independence precisely from what judges are expected to be independent. Different conceptions of proper judging yields different answers. One modality of judicial independence stresses freedom from the reality or appearance of judicial corruption. Here, the defining element of judicial independence is fidelity to law and legal principle regardless of where this fidelity leads the judge. A judge betrays this fidelity, and thus the public trust, when he or she pursues other objectives. These can be self-regarding or in service of the objectives of other individuals or institutions with influence over the judge. However, corruption is only one concern undergirding the case for an independent judiciary. Another very different take on judicial independence stresses the value and virtue of judicial impartiality. The idea is that judges

should come to legal disputes with an open mind; their judgments should be influenced solely by the merits of the arguments, gleaned through (in the American context) the arguments of the disputants or (in the civil law tradition) by the judge's own investigation and inquiry. Whatever threatens impartiality threatens sound adjudication. Judges, in this conception, should be kept independent from all realistic threats to this ideal of impartiality. Political influence is a significant threat to judicial impartiality. Members of the executive or legislative branches frequently undertake to influence judges in the outcome of specific cases, directly threatening the ability of judges to render impartial judgment. Judicial independence is regarded as a structural mechanism to insulate judges from external influence. And the influence that is most worrisome is the kind of influence that would encourage a judge to decide an issue on the basis of non-objective criteria-in short, to rule on the basis of "men," not "law." (Rodriguez, McCubbins, Weingast, 2010, pg.36)

## The Core of the Rule of Law is an Independent Judiciary

The United Nations has endorsed the essential importance of an independent judiciary by its adoption of the Basic Principles on the Independence of the Judiciary at its Seventh Congress in 1985. (General Assembly resolution 40/146, 1985) The Basic Principles, at Article 1, states that each member state is expected to guarantee the independence of its judiciary in its constitution or the laws of the country.

Although judicial independence seems on its face to be an obviously essential ingredient to any just and fair legal system, a precise definition of the scope of the principle may be difficult in a world of diverse cultures and legal systems. (Justice F. B. William Kelly)

An essential precondition for the protection of the constitution within the framework of a democracy is that the judge and the judiciary enjoy independence: "the judiciary can effectively fulfill its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently." (Shetreet & Deschenes, 1985) Many undemocratic countries also have impressive constitutions that purport to protect human rights and values, but these constitutions are empty shells, because there is no independent judiciary to give them content. Independence of the judiciary should always have to mean, first and foremost, that when judging, the judge is subject to nothing other than the law. The law is the sole master of the judge. From the moment that a person is appointed judge, he or she must act independently of everything else. (Barak, 2002, pg.54)

The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have the power to allow it to “keep its distance” from other

governmental institutions, political organisations, and other non-governmental influences, and to be free of repercussions from such outside influences. (Justice Kelly, F. B. William) This principal role of and independent judiciary, so far is not a case with Macedonian Judiciary.
At the core of these and more modern concepts of judicial independence is the theory of separation of powers: that the judiciary should function independently of the legislative and executive arms of government. The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. But it seems that judges in Macedonia have not heeded the words of the late US Supreme Court Justice Thurgood Marshall: “We must never forget that the only real source of power that we as judges can tap is the respect of the people.”
We agree with late Justice F. B. William Kelly, that perhaps the most important safeguard for an independent judiciary is the ‘open court’ principle, in place in virtually all democratic societies. This principle requires that justice be dispensed ‘in open court,’ and that every member of the public has a right to enter any court at any time a trial is in progress. The open court principle gives to the public the right to be present to assess the manner in which justice is being dispensed in their courts, including an assessment of whether their judges are acting independently and in accordance with the law. (For a good discussion of judicial independence, see Prof. David Pimentel’s article, *Reframing the* Independence *v. Accountability Debate: Defining* Judicial *Structure in Light of Judges' Courage and Integrity*.)

## A Note on the Judicial Appointment Process

Undoubtedly the most important thing to achieve judicially impartiality is the process of selection and appointment of Judges. Persons selected for judicial office should be those with integrity and ability with appropriate training or qualifications in law. Any method of judicial selection must safeguard against judicial appointments for improper motives, and weed out corruption before it starts in the judiciary.

## CONCLUSION

Frank Vogl, writing about former judge Mark Wolf’s efforts to create an International Anti-Corruption Court, noted that “there is no effective legal means today to bring the world’s greatest kleptocrats to justice.” (Vogl, 2016) They are able to steal vast amounts of wealth from citizens they are meant to serve, but generally operate with impunity. When asked to give a comment about the present situation in Macedonia, the special advisor to the

Independent Prosecutor, Mr. Aleksandar Tortevski, answered: “Our possibilities in decaying are limitless.”
Even if we agree with Mr. Tortevski, we must prove him wrong for the sake of the future of Macedonia.
The key link to fostering and establishing the rule of law is ensuring an independent judiciary, and providing the environment of a fair and equitable legal system where an independent judiciary can flourish, safeguarded from outside influences. A society where people know their rights are guaranteed by fair laws which apply in the same way to all citizens equally, and are applied in an open and public way by an independent and impartial judiciary, is always a secure and stable society.
The potential for corruption is within us all, like the potential for violence, deceit and no doubt lust, but it does nothing to mitigate our responsibility as a matter of morality, good governance or even self-interest in survival, to control and curb it. Corruption is and can be many things to many people, and is a chameleon in its forms. Hopefully students, scholars, citizens and officials will never fail to provide difficult questions, challenge the status quo, and promote new ideas.
In his work, Peter de Leon claims that the "morality model" is "naively optimistic and ineffectual" when confronting corruption. (DeLeon, 2015) On the other hand, others have concluded that “unified ethics that includes an emphasis on character development, can be an effective means to combat corruption.” (Garofalo, et al. 2001)
Scholars give Aristotle (384 to 322 B.C.E.) credit for the development of virtue ethics. He wrote two treatises on ethics called *The Eudemian ethics* and Nicomachean Ethics. Achieving a high morality is no easy task because it requires a person to live the Golden Mean between excess and deficiency. The aim is to perform the right action, with the right person, to the right extent, at the right time, and in the right way.  Although this is the objective, Aristotle considered achieving this goodness as rare, laudable, and noble (Aristotle, 2011) We form habits of one kind or of another from our very youth; it makes a very great difference, or rather all the difference." (Aristotle, 2011) If we learn by doing as children and behavior is the result of repeated actions, we are going to form habits anyway. Therefore, they might as well be good ones.
And, if we want to establish the Rule of Law in our countries, we have to go back to the basic, fundamental values of our Constitutions.

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# PARENTAL RELATIONS AFTER DIVORCE

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## ABSTRACT

Marriage which is concluded for objective or subjective reasons may also be terminated (by death of one of the spouses, through declaring the missing spouse dead, by annulling and with divorce). This article analyzes in detail the termination of the marriage by divorce, the reasons for divorce and its consequences for the children, under family legislation in the Republic of Macedonia. The dynamics of divorced marriages is one of the reasons which leads to redefinition of the concept of the family globally. This trend of increasing number of divorces is recorded in our society too, for which the article gives statistics regarding divorced marriages in our country. A key problem that occurs among the divorced partners is the exercise of the parental rights. Law on Family of Republic of Macedonia contains outdated and traditional solutions when it comes to the decision on the determination of single parent custody as well as the decision for maintaining the personal and direct contact with the parent who does not live with the children. Through a comprehensive analysis of the problems faced by divorced parents, this article lists recommendations for incorporating legal solutions stipulated in modern family legislation within the European countries, along with the need for harmonization of the Law on Family with the international documents ratified by our country, in which parent-child relationships after the divorce are regulated.

***Keywords:*** *divorce, children, exercising parental right after divorce*

## Introduction

Parental responsibility and the exercise of parenthood are one of the most researched issues in contemporary family law, especially the exercise of parenthood after divorce. The dynamics of divorces is one of the reasons leading to the redefinition of the concept of the family globally. This trend of rising number of divorces is also present in our society. The

most sensitive part of the whole story of divorce is of course the future care for mutual children. In contemporary family law, parental care and the exercise of parental responsibility is one of the most researched questions, which, in recent years, has been part of debates within the legal science dealing with family law in the Republic of Macedonia.

Minors have the right to live with their parents, but they can also live separately from their parents only when it is of their immediate interest or when it is of mutual interest to children and parents (The Law on Family, LF, article 47, paragraph 1). The child realizes the right to live with their parents when parents lead a life together. When parents live together, they exercise their right of parenthood jointly and amicably. When parents do not live together, they can continue the joint exercise of their parental rights (*joint custody*). The main goal of this text is to provide a comprehensive analysis of the Macedonian family law on the termination of marriage through divorce, as well as the consequences of divorce towards children, and on the basis of the established inadequate legal solutions to propose amendments to the family law that will be based on the most important international documents, the jurisdiction of the European Court of Human Rights (ECHR), as well as the solutions provided in European countries. Special emphasis will be given to the institute joint custody after divorce, taking into account the modern concepts introduced in the modern family law around this issue.

## The reasons for divorce

Divorce is an integral part of every society (at all stages of its development), the causes of which are different from one society to another. The family as an institution in Macedonia largely functioned based on the customary rules according to which marriage represented something sacred, and the termination of it came mainly due to moral reasons. Therefore the tradition was the protector of marriage.

The reasons for divorce in our territory experienced a major evolution. In 1946, due to the great authority of the court, divorce was perceived as impossible. However, today with the reduced jurisdiction of the court, a complete liberalization of divorce has occurred, thus the marriage with no children can be terminated much faster and easier. This is due to the modern view of marriage as a community in which the interests of the spouses are realized, and the child-rearing will be harmoniously conducted. If such a goal cannot be accomplished, then discontent and unsuccessful marital relationship arises which leads to divorce of the spouses (Razvod na brak vo sudska praktika, 2015).

Our legislation provides 3 reasons on the basis of which marriage may be terminated, and those reasons are the following:

- mutual consent of the spouses on divorce;
- the request of one of the spouses, in cases when the marital relations are so far disturbed that the common life became unbearable;
- factual termination of marriage.

The first cause of divorce is the mutual consent of the spouses (art. 39 par. 1, LF). The mutual consent for the divorce of marriage is expressed by the spouses in the divorce proposal on the basis of mutual consent to the competent court, while the legislator makes it conditional that at the same time they submit an agreement on the manner of exercising the parental rights and the duties that must be clear, and completely determined. If the spouses have joint minor or adult children over which the parental right has been extended, the court is obliged to obtain an opinion from the Center for Social Work in assessing the agreement whether it is appropriate and in the interest of the children. A characteristic of this method of divorce is that spouses do not necessarily have to state the reasons for divorce because the court will make a decision to divorce them if the consent for divorce is achieved freely and seriously (Justicia, 2015).

The second reason for divorce is at the request of one of the spouses. According to the LF, a marriage can be terminated with divorce at the request of one of the spouses if the marital relations are so far disturbed that the common life became unbearable (art. 40, LF). When assessing whether relationships are permanently disturbed or there is an opportunity to correct relationships between spouses, the court takes into account the totality of their relationship and is not guided by one circumstance or act of one of the partners. The disruption of relations cannot be precisely specified and defined as it represents an objective circumstance which is determined on the basis of certain criteria of the environment in which the partners live, as well as on the basis of generally accepted standards for interpersonal relations. It is important to note that the pronouncement of the judgment in which the marriage is dissolved with divorce, does not stipulate stating who is to blame for the divorce, however the guilt can only be of relevance when deciding on the claim for the right to support the spouse (Justicia, 2015).

The third reason for a divorce is the factual termination of the marital union for more than one year (art.41, LF). This means that spouses are leading separate lives for more than a year; however, for a divorce procedure it is not enough that the condition for the factual termination of the marriage is fulfilled, but a lawsuit for the divorce should also be filed at the competent court. In this sense, if the partners have agreed to lead a separate life or, if one spouse lives

abroad for temporary employment, this is not considered to be a reason for divorce on the basis of a factual termination of the marriage (Justicia, 2015).

These are the three legal reasons for divorce. However, from the research conducted on the most common reasons for divorce in Macedonia, as well as the duration of the marriage, the most common reasons for divorce are: the economic situation of the spouses, the dynamic way of life, adultery, the interference of the parents of one or both spouses, the media, the inability to conceive children, as well as pathological phenomena such as alcoholism and drugs. As a conclusion from the conducted research turned out that regardless of their social status and the age limit, spouses divorce.

***Statistical data on the concluded marriages and divorces in the Republic of Macedonia***

The dynamics of divorce is one of the reasons leading to the redefinition of the concept of family globally. This trend of rising number of divorces has been observed in our society as well; therefore it is very important in this paper to provide a statistical analysis of divorces in our country.

According to the data of the State Statistical Office data, the number of marriages in 2014, compared to 2013, decreased by 1.2% and amounted to 13,813 marriages. Most marriages during the year were concluded in August, 13.2%, and at least in March, 5.8%. Most of the marriages concluded were first time marriages, accounting for 92.7% of women and 90.6% for men. Second marriages, with a share of 8.7% and the third marriages, with a share of 0.7% in the total number of marriages, are more often concluded by men. The average age for a first marriage is 26.0 years for the bride and 28.8 years for the groom.

The number of divorces in 2014 increased by 8.1% compared to 2013, and amounts to 2,210 divorces. The lowest number of divorces during the year were conducted in August, 3.0%, and the highest in December, 11.2%. According to the age of the wife, most divorces occurred in the age group of 30 to 34 years, and for the husband in the age group from 35 to 39 years (Statistical data on Marriages and divorces in the Republic of Macedonia in 2014).

In 2015, the number of marriages in comparison with 2014 is increased by 2.7% and amounts to 14 186 marriages. Most marriages, 1,844 or 13.0%, were concluded in August, and at least, 702 or 4.9% in March. Most common are first marriages with 92.6% for women and 91.2% for men. The number of divorces in 2015 marks a decrease of 0.5% compared to 2014 and amounts to 2,200 divorces (Statistical data on Marriages and divorces in the Republic of Macedonia in 2015).

In 2016, the number of marriages in relation to 2015 decreased by 7.0% and amounted to 13,199 marriages. Most marriages, 1,721 or 13.0%, were concluded in August, and at least,

637 or 4.8% in the April. Most common are first marriages with a participation of 92.5% for women and 91.2% for men. The number of divorces in 2016 is declining by 9.8% compared to 2015 and amounts to 1985 divorces (Statistical data on Marriages and divorces in the Republic of Macedonia in 2016).

| *Year* | *Marriages* | *Divorces* | *Divorces %* |
|---|---|---|---|
| 2014 | 13813 | 2210 | 16.00% |
| 2015 | 14186 | 2200 | 15.51% |
| 2016 | 13199 | 1985 | 15.04% |

To avoid the myth that divorce is always negative and so should it be viewed, Hetherington, in his book "For Better or For Worse: Divorce Reconsidered", over three decades has conducted surveys related to divorce and the effects of divorce on 1,400 families and 2,500 children (Hetherington & Kelly,2003, p.3) She emphasizes that one should not always emphasize only the negative consequences of divorce and to ignore the positive effects of separation. Divorce, undoubtedly, in many tense situations has saved many adults and children from the horrors of domestic violence. Also, after the divorce, many women and girls have experienced a positive transformation and new opportunities in their future life (Ibid.) Her study aims to prove that life continues after the divorce and that divorce, in many situations, should be seen as a way to resolve partner problems.

Based on that, in no case the divorce of a marriage in which there are continuing problems should not be seen as the end of the world, but as the possibility to pursue a new, more qualitative life full of love, solidarity and mutual understanding.

## Respecting the best interests of the child through joint custody after the divorce

As noted above, the most sensitive part of the divorce episode is the continued care of the common children. Starting from the principle of the best interests of the child, parenting should precisely be based on respect for this interest, which is the fundamental and most important imperative advocated by all international documents, contemporary family law, as well as the suggestions of the European Court of Human Rights. The right of children to be cared for and raised by their parents, whether living together or separately, is certainly guaranteed by the most prominent document on children's rights, the UN Convention on the Rights of the Child. Under the Convention - Separation of children and parents must in no way be contrary to his/her will, unless that separation, according to state authorities and judicial decisions, is in the best interests of the child. Such decisions can be made if the child is neglected or mistreated by the parents; also, separation can occur as a result of the divorce

of the parents, thus a decision should be made to make it clear where and with which parent the child will continue to live (CRC, art.9 par.1).

On the other hand, parents who live together (married or out of wedlock), *per se* perform their duties together and amicably and in the interest of the children. Parents together decide on all the rights and obligations of their minor children. The situation gets complicated when the joint life of the parents needs to be terminated, which implies a decision on how, when and which one of the parents will take care of the children. In order to respect the best interests of the child, a lot of debates have opened around this issue in the second half of the 20th century, when the concept that children after divorce are in most cases confined to the mother, while for the father only the right to maintain personal contact with the child and the obligation to pay support were foreseen, started to be abandoned. One of the main factors is the dynamics of divorced couples which led to the redefinition of the family concept in European countries. This trend of rising numbers of divorces has questioned the child's interest through the decision on his future life. Therefore, for a normal and stable psychophysical development of the child, European family legislation advocate for responsible parenting with full capacity even after the divorce or separation of the parents, and have introduced this principle into their family law or civil law. It's important to point out that all these countries promote joint custody after the divorce based on a common agreement between the parents in which all important issues for further parenting and contact with the child is decided. The agreement between the parents gets a legal basis if approved by the court, assessing whether it is in the best interest of the child. Family legislations, as a key element, direct the rights and interests of children in all family-legal relationships, especially in the parent-child relationship, and give priority to the court to assess whether the parents take into account the child's interest through their contract.

This institute, known as *Joint legal custody*, allows parents who, although not living together, are equally able to perform parenting. So, parents jointly decide to perform parenthood, especially on key issues related to the personality and property of the child (on education, medical emergencies and similar important issues) which require the explicit consent of both parents. With this joint agreement, the parents also agree on the place of residence of the child, with which of them the child will continue to live after the divorce. Another important aspect of joint custody after the divorce is the equal distribution of time between parents and children. This concept is known as shared custody. Shared custody implies an equal and quality time spent with both parents who certainly aims at strengthening mutual relations. Through enough time spent together with the child, the parent will have the opportunity to be closer to the needs of the child, which in effect would have an important

role in avoiding the unpleasant feeling of separation of the common life. The child will have two houses and of course a primary residence. An important role is played by professionals through mediation in creating a successful plan for joint custody as well as organizing an equally divided time for contacts, which certainly helps in overcoming all problems related to the future performance of parenthood.

***Joint custody after the divorce - dominant concept in the laws of the European countries***

The institute of joint and responsible parenthood even after the divorce, as has been pointed out above, has been introduced in a number of European legislation.

Germany- Based on Child Law Reform Act of 1998, joint parental responsibility is generally maintained despite divorce. No court ruling is required. A parental divorce no longer means that family courts are obliged to deal with the future arrangements regarding parental responsibilities (Dethloff & Martiny, p.18, see also Dethloff, 2005, p.319).

France - The reform Act of 4 March 2002 incorporated a new section into the French CC concerning “the exercise of parental responsibilities by separated parents.” In all cases of parental separation both parents generally remain holders of parental responsibilities (French CC, art. 373-2), and the French CC requires each parent to maintain personal relationships with the child (para. 2) (Ferrand, p. 12).

In Italy the new regime of joint custody in Italian Law established in 2006 (*Legge 8 febbraio* 2006, n. 54, *“Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli”*) has severely reduced the role that the Civil Code formerly reserved to parents’ negotiation. In the name of the best interest of the child, interpreted as the right of the child to bi-parental care, the matter is currently ruled by a strict regime of joint custody that can be derogated only in few, exceptional cases. Courts emphasize that child custody is subtracted to parents negotiation, so that one parent cannot renounce to joint custody: this is in fact a right of the child and not a right of the parents (Rosaria Marella,2015,p. 244). According to the Italian Law, parents are free to make an agreement, but the judge always controls the agreement made. This control, expressly provided by law, aims to verify that the conditions of the agreement are not in conflict with the interests of the child. If they are, the judge can rule against the agreement. If an agreement between the parents cannot be reached, the judge is entitled to make the decision, based exclusively on the moral and material interests of the child (Patti, Rossi Carleo & Bellisario, p. 16.).

Similar legal solutions are also provided in other European countries, such as Sweden (see article 5,7 and 8 of the Swedish Children and Parents Code). In Sweden, parents are free to enter into agreements concerning the attribution of parental responsibilities after divorce. The

agreement is valid if it is in writing and approved by the local social welfare committee or by the court. The social welfare committee or court should approve the parents' agreement on joint custody, if joint custody is compatible with the best interests of the child. The social welfare committee should also approve an agreement providing for the sole custody of one of the parents, if sole custody is in the best interests of the child. The court formally remains free to decide, based on the best interests of the child, between joint custody or sole custody, even if the agreement stipulates sole custody. Joint custody can not be granted, however, if both parents are opposed to it (Chapter 6 Sec. 5 para. 2 Swedish Children and Parents Code ; see Jänterä-Jareborg, Singer & Sörgjerd, p.13).

*Switzerland* - On 1 July 2014 the new rules on parental responsibility entered into force in Switzerland. The aim of the reform was to introduce joint parental responsibility as a general rule independent of the parents' marital status and therefore to enhance equal treatment of women and men and to eliminate discrimination of children, born out of wedlock and children of divorced or separated parents (Schwenzer & Keller, 2014, p.457). It's important to notice that the new law introduced joint parental responsibility for divorced parents as a rule. As stipulated under the main principle in art 296(2) Swiss CC, parental responsibility is vested in both parents. Hence, according to the new law a divorce of the parents of a child does generally not change the allocation of parental responsibility (Ibid). In accordance with Art. 297 § 3, 2nd sentence Swiss CC, the court must decide on parental responsibilities in accordance with the clauses of the divorce. In so doing there is the possibility to attribute parental responsibilities to one parent or, upon joint petition, to leave parental responsibilities with both parents if this is reconcilable with the child's welfare and the parents have agreed to the division of the maintenance costs and their respective share of taking care of the child in an agreement which is approvable by the court (Art. 133 § 1 and 3 Swiss CC). By way of exception the court will deprive both parents of parental responsibilities, based on Art. 311 Swiss CC in combination with Art. 315a Swiss CC, if the child's welfare is endangered and this danger cannot be avoided in any other manner (Hausheer & Wolf, p.12).

Also in Norway a divorce does not have any consequences for the attribution of parental responsibilities. According to the Art.34 para.2 of The Children Act, parents who separate or divorce may agree to have joint parental responsibility or that one of them shall have sole parental responsibility (Lødrup & Sverdrup,p.7)

In the Netherlands in principle, the parents are free to decide with whom the child should live. The determination of the (main) residence of the child is one of the mandatory requirements of the "parenting plan" (*ouderschapsplan)* that the parents are obliged to draw up upon their separation. The parents can agree on residence with one of them or on shared

residence. If they cannot reach an agreement as to with whom the child should live or whether it should live with both parents on an alternating basis, they can ask the court to decide (Boele-Woelki & Jonker, 2015, p. 322).

***Judicial practice of the European Court of Human Rights in respecting the best interests of the child after the divorce of the parents***

The European Court of Human Rights as a judicial authority has a key role to play in achieving civil and political rights as well as the freedom of every individual guaranteed by the European Convention for the Protection of Human Rights (ECHR). Its role is particularly committed to the field of family law where member states to the Convention enjoy great autonomy. Member States are recognized the right to free assessment (*margin of appreciation*), in that family-legal relations can be regulated according to their tradition and cultural value (Jakovac-Lozić, 2011, p. 1134).

Based on the judicial practice of the European Court of Human Rights, it should be noted that the violation of Article 8 of the ECHR has been called upon in a number of cases filed for violation of family life. In a number of cases, the court has ruled that parents have the right to joint custody after the divorce, while no parent has the right to prevent the other parent from exercising parenthood. A number of cases reviewed by the ECtHR are distinguished, for example the Giorgioni case against Italy - The case concerned the effectiveness of the measures taken by the Italian authorities to ensure that a father could exercise fully his contact rights in respect of his son despite a situation of conflict with the child's mother. The Court found in particular that in placing reliance on a series of automatic and stereotyped measures such as successive requests for information and monitoring of the family by the social services, in order to secure the exercise of the father's contact rights in respect of his child, the domestic courts had not taken the appropriate measures to make the full exercise of those rights possible and to establish a meaningful relationship between Mr Giorgioni and his child (see case Giorgioni v. Italy).

Other similar case is the case of *Bondavalli v. Italy*. The case concerned the applicant's inability to exercise fully his right of contact with his son on account of negative reports by the Scandiano social services, with which the mother had professional links. The Court noted that in spite of several applications lodged by Mr Bondavalli and a number of assessments produced by him, according to which he was not suffering from any psychological problems, the domestic courts had continued to entrust the supervision of his right of contact to the Scandiano social services. The Court found in particular that the domestic courts had not taken any appropriate measure to protect Mr Bondavalli's rights and to take his interests into

account. In view of the irremediable consequences of the passage of time on the relationship between the child and his father, the Court took the view that it was for the domestic authorities to re-examine Mr Bondavalli's right of contact, in a timely manner, taking into account the best interests of the child. (see case *Bondavalli v. Italy*) The case of Mitovi against the Republic of Macedonia should also be pointed out, as a classic example of the denial of the father's right to maintain personal and direct contacts with his daughter (see case *Mitovi v. Macedonia*).

Through these and many other cases of its practice, the ECHR points out that the basic imperative is to respect the best interest of the child, by expressing the right to respect for the family life of the child through joint custody.

## The current solutions for divorce and parenting after the divorce according to the Family Law of the Republic of Macedonia

With the adoption of the Family Law in 1992, the codification of marital and family relations was carried out. With the current Law on Family and up until now all important issues related to family law have been regulated by it, which before were regulated by the previous laws - the Law on Parents and Children Relations, the Law on Marriage, the Law on adoption and the Law on Custody. It should also be noted that in the Republic of Macedonia the preparation of the Civil Law is in progress, within which the family-legal relations will be regulated (Book 5 of the Civil Code).

According to Article 6 of the Law on Family, marriage is a community of a man and a woman regulated by law in which the interests of spouses, family and society are realized, where the relationship between the spouses is based on the free decision of the husband and wife to get married, and all this should be supported by mutual respect, equality, and mutual assistance.

In modern society, if the marriage does not develop according to the expectations of the spouses, of either one of them or both, such a marriage even during the lifespan of the spouses, is permitted to terminate with divorce, which is regulated by law in a particular procedure with a decision of an authority based on the rules provided for in the law (Razvod na brak vo sudska praktika, 2015).

In Macedonia, especially during the Ottoman rule, divorce was quite rare because of the circumstances at that time and socio-economic conditions in which Macedonia was found, as a consequence of the patriarchal character of marital relations. With the adoption of new rules in this field, with the creation of Yugoslavia, in 1946 and 1947, a new and independent legal system was built, and with it a new divorce regime, the main characteristic of which was the

abolition of gender discrimination and their equalization before the law (Spirovic-Trpenovska).

The divorce, according to the legal term, is the termination of marriage by a court decision in a court process initiated by the mutual consent of spouses or by a lawsuit filed by one spouse.

All that divorce procedure must be led by a competent authority in order to record the fact that has significant legal consequences in relation to the spouses as well as in the relationship with the children. Also, the property and legal relationship between them, such as the joint property, the expenses for the joint household and other obligations, is also important (Razvod na brak vo sudska praktika, 2015). But as stated above, a divorce procedure is more complicated if in that marriage the spouses have joint minor children or adult children over which the parental right has been extended.

Unlike the contemporary law, Roman law stipulated that marriage constitutes *Matrimonium justum* or *justae nuptiae*, a lifelong relationship between husband and wife, based on legally relevant facts and under the provisions of Roman law, marriage could be terminated exclusively by the action of new legal facts - natural phenomena, as well as by the actions of the people. The right to a divorce belonged exclusively to the husband and *pater familias* of the husband (Puhan, 1989, p.188-189).

Regarding the manner that parental rights and obligations in our family law is regulated, we need to interpret Article 80 of the LF according to which "With a verdict with which the marriage has been divorced, the court shall decide on the care, education and maintenance of the common children. If the parents has not reached an agreement on this, or if their agreement does not meet the interests of the child, the court, after obtaining a professional opinion from the Centre for Social Work and investigating all circumstances, shall decide whether the children shall stay for further care and education with one of the parents or some shall stay with the father, and some with the mother, or all shall be entrusted to some third person or institution. The parent to whom the children have not been entrusted shall have the right to maintain personal relationships with them, if not otherwise determined by the court, in light of the interests of the children. Our judicial practice shows many cases of the children being entrusted to one parent only, mainly the mother, in which case the other parent (the father) over time gets alienated from the child. This discriminatory and outdated concept is prevalent in our society, which in a number of cases negatively influences the children. Taking into account the consequences for children and the poor practice of maintaining personal relationships and direct contact with the parent who does not live with children after divorce, amendments to the Law on Family in the part of the exercise of the parental right are

imminent, which means that both parents will continue to exercise this right in full capacity as before the divorce.

## Conclusion - the need to introduce the concept of *joint custody* after the divorce in the Macedonian Family Law

The introductory part of this paper emphasized that in the European family law the problem of joint custody after divorce is slowly overcome through legal provisions that guarantee this concept. Parents are committed to agree on joint exercise of parental right, and they do so voluntarily or with the help of lawyers or mediators (Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 2008). The Joint Legal custody institute, as stated above, implies the joint exercise of the parental right after the divorce or separation of parents. Through this paper, the authors conclude that divorce is understood as a formal act and a legal process that separates only the joint life of the parents, but to no extent the parenthood. Also, through this paper they emphasize the current situation in our family law and the problems that arise in practice. The authors in particular emphasize that the concept of joint custody after divorce has already been introduced into a number of family laws outlining some contemporary legislation on this issue, which is not the case in the Republic of Macedonia. According to the Family Law, parental right belongs equally to both parents, and they perform it jointly and amicably (see art.45 par.1 and art.76 par.1 of LF). Although the LF promotes the principle of parental equality, yet, after the divorce, an exception is made to this principle, so that the court grants the children only to one parent. The Family Law of the Republic of Macedonia, unlike most other legislations in Europe, does not provide for an explicit provision for the joint exercise of parenthood after the divorce, but retains the old concept under which the children are entrusted to one parent and the other has the right to maintain personal contacts with them and an obligation to pay support. This outdated concept of performing parental responsibilities after the divorce does not correspond to the best interest of the child, who needs to have intensive contacts with both parents after the divorce and they both participate actively in the process of his education, which is why reforms in the regulation of the parental responsibilities after the divorce are necessary. In other words, the legal introduction of this institute would certainly guarantee: parenthood with full capacity after divorce; equal care of both parents; both parents together will directly decide on all issues that are in the interest of their children. Both parents will have the same attitude and approach to their children, no parent has the right to show power through parental right. The interests and rights of the child

will be the key imperative, both in terms of practice, as well as in terms of the international regulation and the indications of the European Court of Human Rights.

It should also be noted that Macedonia has ratified the Convention on the Rights of the Child, which means that respecting the right of the child to live together with their parents is a part of the rights that constitute the principle of the best interests the child. However, in our domestic family law, the principle of best interest of the child is not envisaged as a basic principle in the Family Law. On the other hand, the best interest of the child should be the primary and the highest concern of the state authorities whenever deciding on the rights and the interests of the children. Therefore, in order to harmonize our family legislation with the CRC, it is certainly necessary to introduce this principle into the Family Law, especially in the part of parental rights under which principle the child's subjectivity in the parent-child relationship will be fully regulated.

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# ESSENTIAL CHANGES TO THE LAW ON ENFORCEMENT OF JUDICIAL DECISIONS IN THE REPUBLIC OF MACEDONIA

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## INTRODUCTION

For a long time in the Republic of Macedonia, but also in the countries of the region, the legal - civil defense in the contested procedure (of cognition) has been the at the center of the interest of doctrine, legislation and practice. The legal-civil enforcement (executive protection), was included within the normative framework, but was still in the second plan. Having in mind the fact that, unlike the contentious and non-contentious procedure, the enforcement procedure is an executive procedure, or a procedure for forced execution of decisions made in cognition procedures within which the actual relations between the parties definitely fit the legal norm contained in the decision (Janevski, Zoroska-Kamilovska, 2009 fq.21) The key issue was how to ensure the integrity, quality and efficiency of the trial. After a long period of marginalization for several decades, the issue of legal-civil protection of subjective civil rights, respectively, the issue of legal-civil enforcement in recent years has been added to the top of the legal-political priorities with the reforms in the judicial system. Such a reshaping of the institute of forced execution comes as an immediate need for intervention in this sphere of legal protection, because the practice has proved to be ineffective for the enforcement of civil judicial decisions and the dysfunction of the judicial system in the Republic of Macedonia.

Viewed over a period of time, the process of enforcement of judicial decisions in the Republic of Macedonia has been a subject of regulation of some legislative forms in the field of enforcement, which were brought in order to implement the reforms and increase the efficiency of the enforcement of judicial decisions. For the first time after the independence of the Republic of Macedonia the subject of forced enforcement was regulated by the provisions of the Law on Contentious Procedure (1997). Despite the fact that the legal framework was considered a reformer and provided a number of new solutions, however, the general assessment was that this law was not an effective instrument and did not meet the purpose for which it existed in the legal system (Zoroska-Kamilovska, 2013, p. 457). Consequently, significant deficiencies were further evidenced in the area of enforcement, which led to the overload of enforcement courts with enforcement cases, and to excessive prolongation of

enforcement procedures. Greater shortcomings were found in the dependence of the procedure by bailiff judges who were leading, controlling and bringing decisions in court proceedings, while other officials had very limited authority (Article 6, al.1, Zakon za izvrshnata posatpka, („Sl.vesnik na R.Makedonija", br.53/97). Shortcomings were present in sending paperwork, the opportunity for objections and interruption of the procedure by the debtor and third parties, the lack of reliable public registers and records, the insufficient information of the creditors, transactions for the purpose of creditor fraud, the privileged position of the debtor, problems with the estimates and public sale of immovable property resulting in frequent termination of the enforcement procedure, etc.

Alarming figures on the number of unsolved cases in the courts demonstrated that there were systemic, structural and conceptual problems in the law on enforcement procedures (1997). Thus, the number of pending cases had risen from 99 946 cases in 1997 to 291 700 in 2004. Enforcement of judicial decisions has often lasted for years, even decades taking into account the time of decision-making in contentious or administrative procedures.

The situation that was created, respectively, the infinite prolongation of the enforcement procedure of judicial decisions complicated and deepened even more the problem of realization of the rights of citizens. It was clear that this law as such could not fulfill the conditions required by the market economy, the way to which the Republic of Macedonia was oriented, much less to provide a safe basis for attracting foreign capital. Under these conditions, the legislator's attention was directed towards reforming the enforcement system by introducing a new legislative framework that would transform the enforcement procedure and ensure effective enforcement of judicial decisions.

The need for reform of the enforcement system came also as a response to the requirement deriving from Article 6 of the European Convention on Human Rights and Fundamental Freedoms (The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) was ratified by the Assembly of the Republic of Macedonia on 10.04.1997), according to which the right to effective enforcement of judicial decisions is an integral part of the realization of the rights and is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The idea of reforming the system of enforcement of judicial decisions in the Republic of Macedonia was finalized with the adoption of the Law on Enforcement of 2005 (Law on Enforcement (Official Gazette No. 35/2005)). With the provisions of the enforcement law (2005), the legislator sought to avoid the problems and difficulties encountered in certain segments of the enforcement process of the civil judicial decisions, as a result of the application of the Law on Enforcement Procedure (1997).

The Law on Enforcement (2005), as a modern and efficient regulation conducted a series of conceptual changes, which were intended to enable a rapid and secure enforcement. Regarding the naming, the law did not maintain a continuity with its predecessor, the Law on Enforcement Procedure (1997), but was renamed taking into account the need to redefine the notion of *"enforcement procedure"*, because under this law enforcement is not a judicial procedure that takes place before the court, but is merely an act of enforcement of decisions brought by the court. Based on this law, the enforcement procedure has already been taken out of the competencies of the courts and entrusted to the bailiffs as persons with public authorizations determined by law, namely, this reforming law has promoted the concept of de-judicialization, de-etatisation and privatization of the legal-enforcement function.

The Law on Enforcement (2005) built the bailiff's system; shortened deadlines; the possibility of postponing the execution solely on the proposal of the creditor; the inability to appeal the decisions of the president of the court;[18] the exemption from the enforcement of movable objects, so the object of enforcement could not be decorations, medals, war memorials etc. (Article 84, paragraph 1, item 6, Law on Enforcement (Official Gazette No. 35/2005)); drastic increase of monetary penalty for debtors who do not perform actions that can be performed only by them (Article 222, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, Law on Enforcement (Official Gazette No. 35/2005)). etc.

## Law on Enforcement (2016)

Even despite the reformed approach and the new solutions it brought, the implementation of the Law on Enforcement (2005) proved that there were a series of problems and difficulties during its implementation in practice, therefore, as a consequence in 2016 the new Law on Enforcement was introduced, (Law on Enforcement (Official Gazette of the Republic of Macedonia, No. 72/2016 - LP / 2016)), which began to be implemented from January 2017.

The new enforcement law (2016) was brought with the idea of correcting defects and enforcement difficulties of the law on enforcement (2005) and with the aim of creating a modern approach to enforcement by following world trends, in particular the principles

[18] After a short time of implementation of the Law on Enforcement, this provision was subject of assessment of its constitutionality in a procedure before the Constitutional Court of Republic of Macedonia. Since, according to the Constitution of Republic of Macedonia, the right to appeal against any first instance decision is guaranteed (Article 15 of the CRM), considering that the decision of the chairman of the Basic Court has a first instance verdict character, the Constitutional Court abrogated this provision, and verified that the inadmissibility of the complaint was not in accordance with the Constitution of the Republic of Macedonia. Look at: Одлука на Уставниот суд на Република Македонија У. бр.185/06, Сл. Весник на РМ, бр. 20/07.

outlined in the International Code of Conduct of Bailiffs brought by the International Union of Bailiffs (http://www.uihj.com/en/, 03.12.217).

The legal solutions provided aimed at specifying the provisions that were divergently enforced by different bailiffs during enforcement, filling legal loopholes, the nomotechnical and content rearrangement of the law structure etc. The main novelties are related to: expanding the powers of bailiffs involving extrajudicial payment of debts based on credible document; the legislator's request that submissions the main demand of which has a value greater than €10,000 to be drafted by a lawyer; obligatory invitation of the debtor to meet the debt before the blocking of the account; establishing electronic method of passing the bailiff exam, verification of bailiff's knowledge every 7 years from the date of appointment; defining the provisions for disciplinary procedure (offenses and disciplinary measures); changes to the enforcement on immovable property: extending the bailiff's access to all data from banks, registers, public books and employers; the sale of property and other property rights to a bankruptcy proceeding as requested by the bankruptcy administrator; realization of the physical separation of items and immovable assets by the bailiff when this is not done by the parties themselves (if the item is inseparable the bailiff acts in accordance with the provisions of the Law on enforcement for the sale of movable or immovable items).

All the above-mentioned innovations, in a certain manner and volume have affected and will affect the forced enforcement procedure, but we will address those innovations that have sparked debate in the social circle and have raised questions to the extent that the return of the enforcement procedure from the private bailiff to the courts has been asked.

***Extrajudicial payment of debts***

The extra-judicial payment of debts is an attempt to realize the cash demand according to the receipts of municipal accounts which, at the request of the creditor and with the consent of the debtor, is executed by the bailiff as a person with public authorizations (Article 11, paragraph14, LP / 2016).

The institute of extrajudicial debt payment is a completely new enforcement action in our enforcement system. It was developed with the aim of achieving faster and more efficient execution of creditors' requirements that provide municipal services (electricity, heating, drinking water, waste collection, telephony, celular and cable operators, costs for regular maintenance of the common parts of the building owned by floors), as well as for the purpose of protecting the debtors from excessive expenditures, which could incurr in the procedure for bringing the notary's decision which would permitt a forced execution of requests (notary expenses, attorney expenses, court fees). In fact, through extrajudicial payment of debts based

on a credible document, it is possible for creditors to utilize an efficient system of bailiffs to remind debtors about their debts as well as about the legal consequences of their non-fulfillment in time.

Provisions on extrajudicial payment oblige creditors (legal persons) that for claims arising from municipal services to debtors (service users), before initiating a procedure in front of the notary for the issuance of a decision allowing enforcement on the basis of the provisions of the Law on Notary (Article 53, para. 1, Law on Notary (Official Gazette of the Republic of Macedonia, No. 72/2016), to file a request for extrajudicial debt payment (Article 240, para.1, LP / 2016). The creditor will directly address the bailiff for the execution of claims, in extrajudicial way if the requests in question are with a certain level of value. Thus, the request for extrajudicial debt payment may be made for a reliable document for water supply, waste collection and maintance of common areas at ownership by floors that cost up to 2,000 denars; for a reliable electricity bill, or heating that can cost up to 6,000 denars and for reliable document for phone, mobile or cable operators that cost up to 2,000 denars (Article 11, paragraph14, LP / 2016).[19]

Upon receipt of the request for extrajudicial payment of debts by the creditor, the bailiff has the obligation to invite the debtor to fulfill the debt within a period not longer than 15 days and to remind him of all the procedures and expenses that may be incurred in the future if he does not fulfill his obligation under the extrajudicial payment procedure (Јаневски, Зороска-Камиловска, Ракочевич, 2016, page 56).

Despite the tendency of the legislator to defend the debtor from excessive expense by imposing extra-judicial payment, the eventual failure of this procedure damages the debtor in the sense that it doubles its obligation because the creditor is likely to file the expenses incurred in this procedure in the eventual procedure that will take place before the notary. In this case, the debtor is charged more than he would be charged if the creditor would directly initiate the procedure before the notary for a decision with which would forced enforcement of requests would be allowed.

***Drafting of the submissions by the lawyer***

A significant innovation in the provisions of the Law on Enforcement (2016) is also the legislator's request that submissions, such as: requests, objections and complaints in cases

[19] Although from the provision cited from the law, it turns out that the creditor has to file a claim for extra juridical payment for any individual bill that reaches the value (2,000 denars respectively 6,000 denars), however, given that such view conflicts with the purpose for which it stands, the Chamber of Bailiffs of RM made a different interpretation of the provision and took the view that there is the possibility of assigning more bills whose value does not exceed 2,000 respectively 6,000 denars. So, the creditor can accumulate more bonds and initiate a single extrajuridical payment procedure.

where the main claim has a value greater than €10,000 to be compiled by the lawyer and bear his seal and signature (Article 28, para. 1. LP / 2016). As a consequence of this provision, companies are forced to hire lawyers to represent them, and not as they have done so far by engaging lawyers who have been engaged as employees within their company. Of course, this action has increased the costs, but also the parties' discontent.

The dilemma up for debate regarding the legal obligation for submissions of over €10,000 to be drafted by a lawyer and to have his stamp and signature, is whether an objection or other submission regarding the enforcement of debt worth over 10,000 euros, which is not drafted by a lawyer and does not contain his stamp and signature of the lawyer is sent back to be edited, dismissed or considered incomplete or inadmissible.

***Mandatory invitation of the debtor to fulfill the debt before blocking the account***

The mandatory invitation of the debtor to fulfill the debt before blocking the account as a novelty promoted by the Law on Enforcement (2016) came in order to increase the efficiency of the procedure, but also in order to protect the debtors as individuals. Thus, the bailiff, in the case when the debtor is an individual, prior to any other enforcement action, including the blocking of the account, is obliged to call the debtor within 3 days to fulfill the request and at the same time will require him to declare the property status,the status of the employee and the amount of income from salaries and other compensations (Article 17, paragraph 3. LP / 2016). There will be no account block before the bailiff notifies the debtor and before consuming all the other mechanisms that are less expensive, as well as extrajudicial payment of debts to municipal debts does not apply.

***Establishing an electronic method of passing a bailiff exam***

With the amendments to the Law on Enforcement (2016), the electronic method of passing a bailiff exam was established. The exam for ranking and the exam for deputy bailiff consists of two parts as follows: the first part (theoretical part) that confirms the theoretical knowledge of the candidates and the second part (case study), which confirms the ability to practice the law effectively. The exam is written in electronic form, providing answers to a number of questions in the form of electronic test solution (Article 246, paragraph 1, 2, LP / 2016).

Although this novelty by the legislator was justified by the need to adjust the method of passing a bailiff exam with modern information technologies and also with the aim of achieving the most objective evaluation of candidates, however, this form of examination may also reduce the criteria and standards of the bailiff's profession.

***Verification of the bailiff's knowledge every 7 years from the day of appointment***

In order to maintain the level of professionalism in the work of bailiffs, the legislator has introduced the requirement that bailiffs be subjected to a professional examination for verification of their knowledge every 7 years from their appointment (Article 35, paragraph 10, LP / 2016). In this respect, the law is aligned with the law on general administrative procedure, while the bailiff's examination system is fully aligned with the Law on Jurisprudence Examination (Law on the Jurisprudence Examination (Official Gazette of the Republic of Macedonia, No. 137/2013), 153/2015).

Bailiffs appointed under the former Law on Enforcement, will have their first professional examination for verification of konowledge no later than 2 years after the entry into force of the new Law, and then the verification of the knowledge will be done every 7 years from the day of passing the examination for verification of knowledge (Article 35, paragraph 11, LP / 2016).

***Precise disciplinary measures***

The Law on Enforcement (2016) has placed particular emphasis on the provisions governing the supervision of the work of bailiffs and the Chamber of Bailiffs of the Republic of Macedonia. The execution of supervision on the work of bailiffs and the Chamber of Bailiffs is regulated by the Ministry of Justice, which ensures the legal, efficient and professional exercise of the bailiff's work as well as unified action by bailiffs. The Ministry of Justice controls the fulfillment of administrative and technical obligations by bailiffs (Article 33, paragraph1, point 10 dhe paragraph 2, LP/2016), The Chamber of Bailiffs controls conscientiousness and ethics while the Court controls the legality.

The bailiff responds according to civil law rules for the damage he or she caused to the party or third parties in the event of the unlawful execution of enforcement actions and failure to perform the legal duties as bailiff (Article 57, paragraph 3, and Article 59, paragraph 2, LP/2016). There are specific disciplinary measures that are appropriate to the gravity of the disciplinary violations, which will influence preventively on other offenders and will ensure legal certainty for the citizens of the Republic of Macedonia. The deputy bailiff holds the same responsibility when substituting for the bailiff (Article 50, paragraph, LP/2016)

The bailiff holds disciplinary responsibilities foreseen by the law, bylaws and acts of the Chamber of Bailiffs, through which the bailiff's activity is regulated for the unprofessional and unconscious actions incurred during his work (Article 57, paragraph 1, point 10 dhe paragraph 2, LP/2016)).

Misdemeanor provisions have been introduced which foresee penalties for offenses committed by the President of the Chamber of Bailiffs of RM and other persons who do not respect the provisions of the law. Thus, the President of the Chamber of Bailiffs of RM will be fined from 1,000 €up to 1,500 €in denar equivalent value if he: does not specify the date for commencement of work of the bailiff within the deadline set by law (Article 35, paragraph 5, LP/2016); does not register the appointed bailiff within the deadline set by law (Article 35, paragraph 8, LP/2016); does not keep well the register of bailiffs, deputy bailiffs, assistant bailiffs, interns and volunteers (Article 78, paragraph 1, point zh. LP/2016); does not allow access to the premises of the Chamber or in submissions during the surveillance (Article 54, paragraph 8, LP/2016); does not act upon the request of the Ministry of Justice to avoid the deficiencies found during the supervision of the Chamber (Article 79, paragraph 3, point v, LP/2016); does not send data on insurance policies to the Ministry of Justice (Article 43, paragraph 6, LP/2016); does not execute the decisions of the Disciplinary Commission (Article 68, LP/2016 ); does not send annual reports to the Ministry of Justice (Article 56 paragraph 3 dhe Article 82, LP/2016); does not call meetings of the Assembly of the Chanber based on the decision of the governing Board or upon the request of more than 30 members of the Chamber (Article 77 paragraph 4, LP/2016); and unjustifiably does not provide certificates for internships and volunteering (Article 79 paragraph 3, point b, LP/2016).

***Change in the process of enforcement in immovable property***

Referring to the fact that the quality and efficiency of the norms according to which bailiffs act in the case of forced enforcement on immovable property, movable property and money demand of the debtor, has a direct impact on the fulfillment of the property interests of the citizens, the legislator on the occasion of issuance of the Law on Enforcement (2016) has taken into account the *Doing Business* recommendations for improving the business climate in the Republic of Macedonia. In this context, the legislator has undertaken serious changes in the enforcement part and especially in the enforcement of immovable property.

Regarding the enforcement of immovable property, the legal provisions have decreased the deadline for the certification of the value of the immovable properties by the evaluators from 15 to 8 days (Article 176, paragraph 1, LP/2016). The law has eliminated the possibility of the third public sale of immovable properties, thus, if in the first public sale the items are not sold, the bailiff will determine a second public sale in which it may reduce the price by a maximum of 1/2 of the market value. The second public sale will be held no later than 30 days from the first public sale. If the items have not been sold even in the second public sale, the creditor may within 8 days propose that the sale be made by direct agreement

at a fixed selling price as in the second public sale (Article 110, paragraph 2, 3, LP/2016), to divert the manipulation of potential buyers to reduce the price of the immovable property, thereby harming the debtors and the creditors while benefiting only the "professional" public sales participants. In this way, the time of the enforcement of the immovable property is shortened for at least 45 days and the value of the real estate is guaranteed because the value of the immovable property can not fall below 75% of the estimated value.

With such a change, buyers are encouraged to buy immovable property in public sales with the possibility of bidding higher prices rather than calculating the price of the immovable property. The sale by direct agreement may be concluded at any time after the first public sale, but no longer than 90 days from the holding of the second public sale.

The compulsory electronic communication of the bailiff with the cadastre significantly shortens the time for performing the cadastral records, but also obtaining data from it, thereby increasing the efficiency of the proceeding and reducing the costs (Article 36, paragraph 10, LP/2016).

The new enforcement law creates additional costs for bailiffs. They are required to provide a qualification certificate issued by the authorized issuer for the electronic signature of the cases in the pre-cadastral procedures (Article 49, paragraph 4, LP/2016), but also in other institutions and payment holders in order to simplify and accelerate the proceeding before them.

The law abolished the part dealing with the decision-making process that permits enforcement on the basis of a credible document, taking into consideration the circumstance that the process is included in the Law on Notary (Article 68, paragraph 1, Law on Notary (Official Gazette of the Republic of Macedonia, nr. 72/2016)).

The new law provides an implementation of a unified tariff for rewards and reimbursement of other expenses for the work of bailiffs and the ban on unfair competition (Article 78, paragraph 1, point g, LP/2016).

## Conclusion

The process of forced enforcement of judicial decisions in the legislation and practical jurisprudence of the Republic of Macedonia has undergone a long way, always with the aspiration of reforming the judicial system and creating an efficient legal system. As a unit of the former Federation of SFRY, it inherited the Law on Enforcement Procedure (1978), which continued to be implemented even six years after the independence of the Republic of Macedonia, respectively, until the adoption of the New Republican Law on Enforcement

Procedure. By adopting the Law on Enforcement Procedure (1997), apart from some minimal technical changes, the Republic of Macedonia, in fact accepted the Federal Law of the former SFRY, and thus with time it came to the general assessment that this law was not an effective instrument for realization of the purpose for which it had taken place in the legal system. In 2005, the Assembly of the Republic of Macedonia brought the Law on Enforcement as a reform law, which was supposed to correct the shortcomings that its predecessor had shown with respect to the inefficiencies and the prolongation to the infinitude of enforcement procedures in order to create a modern and efficient regulation, adapted to the current social problems and needs in the field of enforcement of court decisions.

The Law on Enforcement (2005) has promoted several new solutions, but more important is the fact that this law has set a new institutional enforcement framework. The enforcement procedure according to the provisions of this law was no longer under the competence of the court, but was entrusted to private bailiffs as persons with public authorizations verified by the law. Even though, with the establishment of the bailiff system, the Republic of Macedonia (2005) has made a courageous step in the process of privatization of the enforcement process, however, this law underwent many changes, so in 2016 the New Law on Enforcement was introduced.

The Law on Enforcement (2016) has brought a series of novelties aimed at more efficient realization of the rights of citizens, legal entities and all participants in the procedure before the bailiff. Among the main novelties are: extrajudicial debt payment based on a credible document; the lawmaker's request that submissions to which the main claim has a value greater than €10,000 must be compiled by a lawyer; a debtor's mandatory invitation to meet the debt before blocking the account; setting the electronic way of passing the bailiff's exam, verification of the bailiff's knowledge every 7 years from the appointment day; specification of the provision for disciplinary procedure, shortening of the deadline assessment of the immovable property; the obligatory electronic communication of the bailiff with the cadastre, etc.

Despite the ambitious approach, for a short time the implementation of the Law on Enforcement (2016) demonstrated deficiencies, difficulties, unclear legal solutions, etc. In this context, among others, dilemmas were brought regarding the extrajudicial payment institute, which, although in reality, was created for the purpose of faster and more efficient realization of creditors' claims that provide municipal services and with aim to protect the debtor from excessive expenses that could be incurred in the procedure of the notary's

decision which permits forced enforcement of claims (notary expenses, attorney's expenses, court fees), posing the possibility of damaging the debtor when the attempt for extrajudicial payment is unsuccessful, so that the creditor may incur the costs incurred in this procedure in the eventual procedure that will take place before the notary. In this case, the debtor is charged more than he would be charged if the creditor would directly initiate the procedure before the decision of the notary that would allow forced execution of claims. Another dilemma is the lawmaker's request that the submissions, such as: requests, objections and complaints in cases where their value is more than €10,000 must be drafted by the lawyer and bear his stamp and signature. As a consequence of this provision, companies are obliged to hire lawyers to represent them, and not as they have done so far by engaging the lawyer employed in their company. With this request, not that only have the expenses been increased, but also the parties' discontent.

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# The Impact of the European Convention on Human Rights on Judicial Reforms in Macedonia

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## Abstract

The paper analyses the measures undertaken by the Republic of Macedonia in response to the judgments of the European Court of Human Rights finding a violation of the right to a fair trial (Article 6 of the ECHR). It aims to assess the impact of the Strasbourg Court on judicial reforms in the country. The paper focuses upon the following question: Have the general measures undertaken in response to the judgments of the ECtHR finding a violation of Article 6 of the ECHR by Macedonia strengthened the capacity, independency and efficiency of the Macedonian judiciary? In order to answer the question, the paper first, identifies the main problems in the country in relation to the right to a fair trial through analysis of the judgments of the ECtHR against Macedonia. Second, it examines the country's response to those violations using the existing documents adopted at national and international level. One cannot argue that the paper found causal relationship in that the judgments of the ECtHR have impact on judicial reforms in Macedonia. However, it provides solid arguments that many reforms in this area (particularly legislative reforms) were made in response to the judgments of the ECtHR. The paper, also, makes certain recommendations on further measures that should be undertaken by the country under Article 6 of the ECHR.

## Introduction

The paper discusses the impact of the European Convention on Human Rights (ECHR) on judicial reforms in the Republic of Macedonia.

Much has been written on the impact of the ECHR on protection of human rights at national level. A number of authors argue that the Convention has impact on national law and practice (see, for instance: Gerards & Fleuren, 2014; Keller & Sweet Stone, 2008; Sadurski, 2009; Arold, 2007; Anagnostou & Psychogiopoulou, 2010; Repetto, 2013; Donald, Gordon &

Leach, 2012). As Gerards & Fleuren observe “important areas of law (e.g. criminal law, family law, administrative law, immigration law, and social security law) have changed as a result of the influence of the ECHR” (Gerards & Fleuren 2014, p. 1). But while, the existing literature reveals that the human rights regime established by the ECHR is considered to be “the most advanced and effective among the world’s systems of human rights” (Golghaber 2007, p. 2) it, also, testifies that the implementation of the Convention varies from one member state to other (Arold 2007, p. 32). In this context, the paper aims to assess the impact of the ECHR on judicial reforms in Macedonia.

This aim of the paper leads us to one of the main dilemmas in the human rights theory: How do we measure the impact or effectiveness of the international human rights regime? There is no consensus on this issue in the literature (see, for instance: Goodman & Jinks, 2003; Hathaway, 2002; Hathaway 2003; Alston & Goodman; 2013). Some authors use quantitative and qualitative indicators, while others focus on the empirical effects of international human rights law on state practice (Alston & Goodman 2013, pp. 1225-1274). It is visible that any approach is subject to criticism. The vast majority of scholars speak about the methodological problems in the measurement of a state compliance with the international human rights agreements, including with the ECHR.

One may agree with Greer that “while it is difficult, if not impossible, objectively to measure a state’s compliance with the ECHR, it can, nevertheless, be assessed in other ways” (Greer 2006, p.72). In this regard, the paper focuses on the judgments of the European Court of Human Rights (ECtHR). More precisely, it analyses the measures undertaken by the authorities in response to the judgments finding a violation of Article 6 (right to a fair trial) of the ECHR by Macedonia. The fact that the paper focuses on cases to which Macedonia is party implies that the term compliance with a judgment, for the purpose of the paper, is equal with the term execution of the judgment (the state’s obligation under Article 46 of the ECHR) – the *res interpretata* authority of the judgments is beyond the scope of the paper.

This approach to assessing the impact of the ECHR, also, leaves room for discussion – as mentioned above any approach does. Nevertheless, we use it in the paper, as many authors did before. Delivering a judgment by the ECtHR is not an end, but the begging of a process. As Keller & Sweet Stone observe the Court’s rulings “challenge national officials to take decisions that will render national law compatible with the Convention” (Keller & Sweet Stone 2008, p. 30).

Therefore, the paper focuses upon the following question: Have the general measures undertaken in response to the judgments of the ECtHR finding a violation of Article 6 of the

ECHR by Macedonia reinforced the capacity, independency and efficiency of the Macedonian judiciary? To answer this question Part I of the paper analyses the position of the ECHR within the Macedonian legal order. Part II of the paper explains the notion execution of judgment or abide by the judgment in terms of Article 46 of the Convention. Part III of the paper analyses the judgments of the ECtHR finding a violation of Article 6 of the ECHR by Macedonia, thus identifying the main problems of the country regarding the right to a fair trial. Part IV of the paper discusses the impact of those judgments using the existing literature and the official documents of national and international institutions. The conclusion summarises the main findings of the paper, searching for some causal relations and looking for answer to the main research question.

## The status of the ECHR within the Macedonian legal order

Article 118 of the Constitution of the Republic of Macedonia (Official Gazette of the Republic of Macedonia, 52/91) provides that "the international agreements ratified in accordance with the Constitution are part of internal legal order and cannot be changed by law".

The wording of this article reveals that: 1) Macedonia has adopted the monistic approach to the implementation of international law in the domestic legal system; 2) international agreements ratified in accordance with the Constitution have a legal status above the domestic laws; and 3) international agreements ratified in accordance with the Constitution apply directly.

It follows from above that the ECHR, as international agreement, ratified by the Macedonian Parliament on 10 April 1997, is part of the internal legal order of the country and is above the laws.

At the same time, it bears noticing that according to the Macedonian Constitution the basic rights and freedoms of the individual and citizen, recognized in international law and set down in the Constitution are fundamental value of the of the constitutional order of the country,

## Execution of the judgments of the European Court of Human Rights – Article 46 of the ECHR

Article 46 of the ECHR provides that the Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties" (Article 46, ECHR). The Convention has made clear that states have obligation to implement the judgment of the ECtHR to which they are part, however it failed to provide a clear answer in relation to the

scope and extent of this obligation. Yes, Article 41 of the ECHR provides that the state that violated the Convention is obliged to pay the sums awarded by way of just satisfaction to the injured party, but the official documents of the Committee of Ministers of the Council of Europe (CM) and the case law of the ECtHR reveal that the scope of the state's obligation to implement the judgment of the ECtHR goes much further than this.

The CM in its Recommendation on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights adopted in 2008 stated that the judgments in which the ECtHR finds a violation impose on the High Contracting Parties an obligation to: "1. pay any sums awarded by the Court by way of just satisfaction; 2. adopt, where appropriate, individual measures to put an end to the violation found by the Court and to redress, as far as possible, its effects; 3. adopt, where appropriate, the general measures needed to put an end to similar violations or prevent them" (CM/Rec(2008)2). The ECtHR took the same position. Thus, in the case *Scordino v Italy* it explicitly stated that "where the Court finds a violation, the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects" (*Scordino v Italy* 2006, para. 233).

Hence, one may conclude that the state could be obliged to undertake two types of measures in order to execute the judgments of the ECtHR to which it is party: individual measures (to provide the just satisfaction or to achieve as far as possible *restitutio in integrum* including in exceptional circumstances to provide the re-examination of a case or a reopening of proceedings) and general measures (review of legislation, refurbishing of a prison, construction of prisons, training of police, increasing the number of judges or prison personnel, improvements of administrative arrangements or procedures, translation and dissemination of the judgments, etc.) – (see, for instance, Abdelgawad, 2008; Addo, 2010; Committee of Ministers, 2010).

It has been well established that the concrete executive measures depend on particular circumstances of each case. The respondent state enjoys certain discretion in this regard. It remains "free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention to abide by the final judgments of the Court." (Recommendation CM/Rec (2008)2). As the ECtHR in the case *Broniowski v Poland* observes "it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention" (*Broniowski v Poland*

2004, para. 193). Consequently, one may agree with Abdelgawad (2008) that “the nature of the obligation on the state to comply with judgments of the Court, it has always been interpreted as purely an obligation to produce a specific result” (Abdelgawad 2008, p.7).

It bears noticing that the ECtHR is increasingly more often pointing to the direction that have to be followed by a country when implementing its judgement by way of recommendations referring to individual and/or general measures (especially in cases of systemic and structural violations – pilot judgements) that have to be taken. At the same time, while the “respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment” (*Broniowski v Poland* 2004, para.192), this freedom is subject to monitoring by the Committee of Ministers.

The measures that have been taken by the Macedonian authorities in response to the judgments of the ECtHR finding a violation of Article 6 of the ECHR (that is, the means by which the state has discharged its obligations under Article 46 of the Convention) will be discuss below, but first we will analyze the content of those judgments.

## Macedonia and Article 6 of the ECHR – analysis of the judgments of the Court in Strasbourg finding a violation of the right to a fair trial

The analysis of the judgments of the ECtHR finding a violation of Article 6 of the ECHR (1998 – 2013) by Macedonia reveals that the major problem in the country in relation to the right to a fair trial is the right to a trial within a reasonable time. The Court found a violation of the right to a trial within a reasonable time even in cases that by their nature required special diligence (pension disputes (see: *Dika v Macedonia* 2007), employment-related disputes (see, e.g. *Ziberi v Macedonia,* 2007) or disputes concerning determination of compensation in personal injuries cases (see: *Blage Ilievski v Macedonia*, 2009)). It has even raised a dilemma whether the Macedonian legal system is organized in a way that courts can guarantee everyone’s right to a trial within a reasonable time by reiterating many times that “it is for the Contracting States to organize their legal systems in such a way that their courts can guarantee everyone’s right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time” (*Gjozev v Macedonia* 2008, para. 51).

The Court in Strasbourg criticized different aspects of the Macedonian judicial system, including the following: 1) repeated re-examination of cases, that is, returning the case files to the first instance court (*Ziberi v Macedonia* 2007, para. 46); 2) excessive length of enforcement proceedings – according to the ECtHR “the execution of a judgment given by any court must be regarded as an integral part of the “trial” for the purposes of Article 6 of the

Convention" (*Krsto Nikolov v. Macedonia* 2008, para. 21); 3) the trial court's inability to secure the attendance of the defendants, their representative or the witnesses;" (*Čaminski v Macedonia* 2011, para. 30); and 4) excessive workload of the Supreme Court – according to the ECtHR "a chronic overload cannot justify an excessive length of proceedings" (see, for instance, *Markoski v.Macedonia*, 2006; *Lickov v Macedonia*, 2006).

There are, also, cases (see, for instance, *Ogražden Ad and Others v. Macedonia*, 2012; *Atanasovic and others v Macedonia*, 2006) where the ECtHR found a violation of Article 13 of the ECHR, taken in conjunction with Article 6 of the Convention, because the state had failed to provide effective remedy in respect of the length of the proceedings complaint. In the case, *Atanasovic and others v Macedonia* (2006), the Government itself admitted that the national legal system had not provided for an effective remedy in respect of the length of proceedings complaints. Thus, it is not a surprise that in this case the ECtHR found a violation of Article 13 pointing out that: 1) the applicants "had no domestic remedy whereby they could enforce their right to a "hearing within a reasonable time" (*Atanasovic and others v Macedonia* 2006, para. 47) and 2) "the requests for speeding up the proceedings to supervisory organs cannot be considered as a remedy in respect of the complaints of delay" (*Atanasovic and others v Macedonia* 2006, para. 46).

Yes, the right to a trial within a reasonable time is the main problem in Macedonia when it comes to the right to a fair trial as protected by the ECHR. But, it is not the only one. The ECtHR found a violation of other aspects of Article 6 of the Convention too. For instance, in the case *Petkoski and others v Macedonia* (2009) and in the case *Boris Stojanovski v Macedonia* (2010) the Court found a violation of the right to access to court, while in some other cases it found a violation of the defence rights of the applicant regarding the examination of witness. The case *Papadakis v Macedonia* falls within the latter category. In this case, the applicant, *inter alia*, complained that "he had been denied the right to put questions to the undercover witness who had given evidence at the hearing" (*Papadakis v Macedonia* 2013, para. 82), that is, that his "defence rights regarding the examination of the undercover witness were restricted to an extent that was incompatible with the requirements of Article 6 of the Convention" (*Papadakis v Macedonia* 2013, para. 81).

The Court in Strasbourg in the case *Naumoski v Macedonia* (2012), where the applicant brought a civil action against its employer, examined different aspect of the right to a fair trial. Namely, in this case, it found a violation of the right to an adversarial trial (in addition to a violation of the right to a trial within a reasonable time) as one aspect of the right to a fair trial – that "implies the right of the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's

decision" (*Naumoski v Macedonia* 2012, para. 25). The applicant, *inter alia*, claimed that his right to a fair trial had been violated because "the defendant's observations in reply to his appeals had not been communicated to him, and since the courts had not considered his arguments and had decided solely on the basis of evidence submitted by the defendant" (*Naumoski v Macedonia* 2012, para. 20). As we mentioned above, the Court found a violation of Article 6 of the ECHR and, in this context, it criticized the Macedonian legislation by pointing out to the section 345 of Law on Civil Proceedings – because it did not require that belated observations of the respondent party, which were included in the case file and submitted to the Court of Appeal for consideration, be served on the appellant (*Naumoski v Macedonia* 2012, para. 28) – as to the source of the problem.

The national legislation governing the criminal proceedings has been criticized by the ECtHR too. Namely, in the case *Atanasov v Macedonia* the Court observed that the Law on Criminal Proceedings provided "only the public prosecutor with a right to be apprised of the Court of Appeal's session [(when decided – in second instance – the appeal)] automatically, while restricting that right for the accused only in case he or she requires so" (*Atanasov v Macedonia* 2011, para. 32). Such legal solution according to the Court leads to procedural inequality, which is not in a compliance with the principle of equality of arms, as "one of the elements of the broader concept of a fair trial" (*Atanasov v Macedonai* 2011, para. 29), which "requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent" (*Atanasov v Macedonai* 2011, para. 29).

A violation of different aspect of Article 6 of the ECHR (in addition to violation of the right to a trial within a reasonable time) was found in the case *Balajdziev v Macedonia* (2011) In this case, the applicant complained that "the Supreme Court had not been impartial since its bench had included judge V.K., who had presided over the bench of the Court of Appeal, when it had dealt with his case" (*Balajdziev v Macedonia* 2011, para. 29). The ECtHR applied both the subjective test –"consists in seeking to determine a personal conviction of a particular judge in a given case" (*Morel v France* 2000, para. 40) – and the objective test – consists "in asserting whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect" (*Morel v France* 2000, para. 40) – to the circumstances of this case in order to assess whether the Tribunal is impartial within the meaning of Article 6 (1) of the ECHR. Based on the circumstances of the case, the Court considered that " there was objective justification for the applicant's apprehension that judge V.K. lacked the requisite impartiality to the extent necessary under Article 6 of the Convention" (*Balajdziev v Macedonia* 2011, para. 38). Consequently, it found a violation of the right to a fair trial as

protected by Article 6 of the ECHR on account of the lack of impartiality of the domestic court. The Court of Strasbourg found a violation of the right to a hearing by an impartial tribunal, also, in the case *Nikolov v Macedonia* (2007). In this case, the applicant complained that "his case had not been heard by an impartial tribunal as the trial judge's wife had been employed by the defendant soon after the proceedings had started" (*Nikolov v Macedonia* 2007, para.16).

The ECtHR,, also, criticized the mechanism established in the country to ensure judicial consistency. For instance, in the case *Stoilkovska v Macedonia*, where the applicant complained under Article 6 of the ECHR because "her case had been decided contrary to those involving her colleagues, despite the fact that they had concerned identical issues of fact and law" (*Stoilkovska v Macedonia* 2013, para. 32) the Court found a violation of the right to a fair trial because the decision of the domestic court run contrary to principle of legal certainty. It took the same position in the case *Balažoski v Macedonia* (2013). It concluded that the state violated the principle of legal certainty, inherent in Article 6 § 1 of the Convention, in this case, too, "by adopting a different decision on the same issue in the same proceedings and thereby effectively overruling its previous decisions, without any reference to them or reasoning to the contrary, the Supreme Court in the instant case itself became the source of uncertainty" (*Balažoski v Macedonia* 2013, para.33).

## The response of Macedonia to the judgments finding a violation of Article 6 of the ECHR

In 2009 Macedonia established a mechanism for implementation of the decisions of the ECtHR by adopting the Law on the Implementation of Decisions by the European Court of Human Rights (Official Gazette of the Republic of Macedonia, no. 67/2009) and the Law on Representation of the Republic of Macedonia before the European Court of Human Rights (Official Gazette of the Republic of Macedonia, no. 67/2009). These legal acts provide a visible institutional structure for implementation of the judgments of the ECtHR and lay down the procedure for their implementation. Also, the Law on the Implementation of Decisions by the European Court of Human Rights (Official Gazette of the Republic of Macedonia no. 67/2009) defines the term implementation of judgments – "paying off the complainants the adjudicated amount of money as a form of just satisfaction, and also adopting and undertaking individual and general measures for the purpose of elimination of the violation and the incurrent consequences, but also of the reasons leading to the application of the complaint to the Court and adequate prevention of such or similar violations" (Article 2).

One may agree with Najcevska & Todorovski (2013) that the mechanism for implementation of the judgments of the ECtHR introduced in Macedonia has some weaknesses (that should be overcome in the future). Nevertheless, it may be said that the adoption of the laws that provided the legal framework for implementation of the judgments of the ECtHR is one step forward in the right direction.

Although the country was late in enforcing the legislation in practice (Ministry of Justice, 2011), the mechanism for implementation of the decisions of the ECtHR has started to operate. And, as the wording of the official documents of the established institutions within this system reveal, the state took number of measures in response to the judgments of the ECtHR finding a violation of the ECHR by Macedonia that impact the domestic legislation and practice in number of areas, including judiciary. Of course, one cannot argue that causal relationship in that the judgments of the ECtHR have impact on judicial reforms in Macedonia has been found. However, the documents adopted by the Committee of Ministers of the Council of Europe and the submissions from the Macedonian authorities provide solid arguments that many reforms in this area have been made so far in response to the judgments of the ECtHR finding a violation of the right to a fair trial by Macedonia.

As mentioned above, we focused on measures aimed at preventing similar violations of the right in the future, that is, general measures. These measures can be summarized (at risk of some over-generalization) in the following categories: 1) legislative changes; 2) reinforcement of the capacity of judiciary – trainings (dealing with Article 6 of the ECHR) and awareness-raising measures; and 3) translation, publication and dissemination of judgments of the ECtHR in order to make sure that domestic judges are aware of the findings of the Court in Strasbourg.

When it comes to legislative reforms two set of issues deserve emphasis. The first set of issues concerns the right to a trial within a reasonable time, more precisely, the length remedy. Namely, in 2006 a domestic remedy in respect to the length of the proceedings was introduced in the country by adoption of the new Law on Courts in response to the judgements of the ECtHR finding a violation of the right to a trial within a reasonable time. The law provides that a party may request protection of his or her right to a trial within a reasonable time before domestic courts and where appropriate be awarded just satisfaction. However, according to the ECtHR this remedy was not effective within the meaning of the Convention (see, for instance, *Ogražden AD and others v Macedonia*, 2012). It had criticized the remedy because of the ambiguity of rules concerning the determination of the court competent to decide upon such remedy and the timeline when the proceedings upon the

request for protection of the right to a trial within a reasonable time should terminate (see, for instance, *Parizov v Macedonia*· 2008).

Therefore, in 2008 the Macedonian Parliament amended the Law and provided for the exclusive competence of the Supreme Court to decide upon the length remedy. An interested party is entitled to use the length remedy while proceedings are pending, but not later than six months after the decision becomes final (Article 36, Law on Amendment on the Law on Courts, Official Gazette of RM, 35/2008). The Supreme Court when deciding whether the court below breached the right to a hearing within a reasonable time shall take into consideration the rules and principles set forth in the ECHR. According to Article 36 of the Law on Courts (as amended in 2008): "if the Supreme Court finds a violation of the right to a trial within a reasonable time, it will in its decision set a time-limit for the court before which the impugned proceedings are pending to determine the right, obligation or criminal responsibility of the claimant and award just satisfaction for the claimant, owing to a violation of the right to a trial within a reasonable time" (Article 36, 2008). The length remedy introduced in 2008, according to the ECtHR, met the requirements of the ECHR. As the Court in the case *Adzi Spirkoska v Macedonia* observed the "the length remedy, as specified in the 2008 Act, is "fully operational" (*Adzi Spirkoska v Macedonia*, 2011) and "is to be regarded, in principle, as effective within the meaning of the Convention" (*Adzi Spirkoska v Macedonia*, 2011). Yes, one can agree that the length remedy is fully operational. However, one should not forget the problem of the significant number of requests for violations of the right to a trial within a reasonable time in front of the Supreme Court, as well as, the fact that there are delays in some of those proceedings.

The second set of issues concerns the legislation governing civil (the new Law on Civil Proceeding was adopted in 2005; amended may times so far), criminal (the new Law on Criminal Proceeding was adopted in 2010) and enforcement proceedings (the new Law on Enforcement Proceedings was adopted in 2005; amended many times so far). The legislative changes in these areas have solved many problems identified in the judgments of the ECtHR. For instance, based on the Action Plan – Communication from the Republic of Macedonia concerning Atanasovic and other group of cases against Macedonia (application no. 13886/02) one may argue that many problems in regard to the right to a trial within a reasonable time were solved in response to the judgments of the ECtHR (the manner of service the writ was changed; the manner of disclosure of the evidence through expert testimony was changed; timelines for certain type of actions were prescribed, detailed or changed; a new way of issuing payment order was introduced. etc.). Also, on 23 July 2015 in response to the judgment of the Court in Strasbourg in the case *Naumoski v Macedonia* (2012)

the Macedonian Parliament adopted amendments to Law on Civil Proceedings providing an obligation to forward to the appellant belated observations of the other party, which were included in the case file and submitted to the Court of Appeal for consideration. Consequently, the problem which originated from the provisions from the section 345 of the Law on Civil Proceedings (which did not require that belated observations of the respondent party, which were included in the case file and submitted to the Court of Appeal for consideration, be served on the appellant (see, *Atanasov v Macedonia*, 2012) and constitutes a violation of the right to an adversarial trial was solved.
However, the provision of the Law on Criminal Proceedings that provided "only the public prosecutor with a right to be apprised of the Court of Appeal's session [(when decided – in second instance – the appeal)] automatically, while restricting that right for the accused only in case he or she requires so" (Atanasov *v. Macedonia* 2011, para. 32) thus, leading to procedural inequality, which is not in a compliance with the principle of equality of arms, has not been changed yet. Yes, the new Law on Criminal Proceeding was adopted in 2010, and many weaknesses in legal framework governing criminal proceedings identified by the ECtHR were overcome. However, the provision of Article 421 of the new Law on Criminal Proceedings is not different from the provision (applicable before) that was criticized by the Court in Strasbourg in the case *Atanasov v Macedonia* (2012).
It follows from above that the authorities has made significant steps to comply with the findings of the ECtHR. However, the progress reports of the European Commission and the reports of other relevant institutions speak in favor of the conclusion that they have to take additional efforts to establish fully independent and proper functioning judicial system.

## Conclusion

The paper aimed to assess the impact of the ECHR on judicial reforms in Macedonia. Therefore, it, first, analyzed the judgments of the ECtHR against Macedonia finding a violation of the right to a fair trial. Then, it analyzed the official documents of the relevant institutions (international and national) adopted in response to those judgments, searching for some causal relations between the ECHR and judicial reforms in the country.
The analysis of the judgments of the ECtHR revealed that the state has violated different aspects of Article 6 of the ECHR so far, but the main problem in Macedonia, when it comes to the right to a fair trial, is the excessive length of proceedings.
In response to the judgments of the ECtHR against Macedonia the authorities have undertaken a number of measures that aimed at preventing similar violations in future (general measures), which impact judiciary: legislative reforms (including the introduction of domestic remedy in

respect of length of proceedings); training and awareness-raising measures; and translation, publication and dissemination of the judgments of the ECtHR. Of course, one cannot argue that the paper found causal relationship in that the judgments of the ECtHR have impact on judicial reforms in Macedonia. However, (as the language of the analyzed documents implies) it provided solid arguments that many reforms in this area (in particular, reforms of the legislation governing: 1) civil, criminal and enforcement proceedings; and 2) organization and work of the courts) have been made, so far, in response to the judgments finding a violation of the right to a fair trial.

The paper showed that the state should take additional measures in order to fully comply with the judgments of the ECtHR. For instance, it should consider to amend Article 421 of the Law on Criminal Proceeding because according to the ECtHR it leads to inequality in the proceedings, or to solve the problems in relation to the requests for violations of the right to a trial within a reasonable time (the significant number of requests; delays in the proceedings). Yes, additional reforms are needed. However, the paper focused on what have been done so far, not on what should be done in the future, so it did not provide detailed directions. Therefore, additional researches in this area are welcomed.

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# REFORMS AND JUDICIAL INDEPENDENCE IN THE REPUBLIC OF MACEDONIA

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**Key words:** reforms, rights, cases, etc.

*„Non fucata, sed est simplex oratio very"*

## Abstract

The right of every citizen to be tried in absolutely impartial and independent way, is definitely one of the fundamental rights and freedoms of man and citizen, guaranteed by all documents and mechanisms, whether in international, regional and national level.

That we do not have an independent judiciary system in Republic of Macedonia, it is shown in the recent cases, certainly influenced by day-to-day politics, legislative and executive power, from the state itself and state apparatus, but also from the public opinion and potential pressures. For these and many other reasons, there is a need for urgent reforms in the Republic of Macedonia in the justice system, in the transparent and meritorious selection of staff who practice important judicial functions, as the so-called reforms in the justice system in the Republic of Macedonia unfortunately in practice hasn't given the expected result.

So, in this paper, we will analyse the judicial system in Republic of Macedonia, as a matter of urgency, respectively the necessary reforms that need to be applied. It remains a huge dilemma in how far in Macedonia we have an independent judiciary, independent judges and prosecutors? What should an independent judiciary do to promote the principles and

foundations of its independence and autonomy? What has been done in this direction and which results are achieved? Why do citizens of Republic of Macedonia increasingly lose their faith in the justice system and how does it affect the level of respect for human rights and freedoms in the country?

**Key words:** *judicial independence, reforms, freedoms and rights of citizens, etc.*

## Introduction

Even though there is not a clear definition of the concept 'judicial independence', in general, it can be stated that the level of judges' independence is decided by two factors: by the manner judges are protected from the irregular impact by the third party as individuals or institutions as well as from the level in which judges think, act and make their own decisions independently, regardless other factors, besides the facts related to the case and the law in power. The first factor refers to the legislative system, but in practice to the judicial system too, whereas the second factor refers to the thought of judges like factors closely related with each-other, due to the fact that judicial independence in general is taken as the basement of the domination of the lawful state. A number of documents and international agreements such as Basic Principles of Judiciary of UN and the European Map on the status of Judges, state the importance of the judiciary independence and attempt to describe the main elements of an independent court.

"The newest" chapter – Chapter 23: The Court and the basic rights and the prevention and the battle against corruption is the most significant for entering in EU as a catalizator of the entering process. With its establishment (in 2005) political conditions enter negotiations for membership in EU along with the 24$^{th}$ – Law, Liberty and Safety, comprise the axis of "the rule of law" in the strategy of EU for the expansion and the basis of "the new approach" in the negotiations for membership in EU, these are the first chapters to be opened and the last to be closed. For those countries which have yet to begin the negotiations with EU, the content of Chapter 23 is an uncompromising condition for further advancement in the integration in EU, because in any case, the essence of this chapter is the approval of democratic standards of Europe, prior to membership.

The Republic of Macedonia unfortunately in regard to neighbouring and regional countries remains at the end of the tunnel, in this very vital process for the Euro Atlantic perspective of the country, due to the reason that the famous chapter ,, Chapter 23" that should have been a lesson learned for Macedonia, unfortunately remains a failed lesson.

The constant and continual impact of the executive power on top of other state organs and institutions, took back the advancement of the development of international standards

worsening the level and following of human liberties and rights, then disregarding of the division of state power, while on the other side the control and influence of political parties and party figures above state circles, continue to endanger the integrity of the so called Republic of Macedonia. This negative reflection describes a very faint and distant towards Euro Atlantic processes which Macedonia should and aims entering. The entering approach of Macedonia towards EU depends on the fulfilling of task which derive from Chapter 23.

Even though Republic of Macedonia has not begun the negotiations with EU, this chapter is the basement for the harmonization of lex nationalis with the standards and practices of EU as a condition in 2005 and continues to this day. While this is also a structure followed by the reports of the European Commission for the Progress of Macedonia as well as part of the National Program for the approval of the right in EU.

## Legal framework and international standards that guarantee an independent judiciary

The EU standards in judiciary field are set by the UN documents and the "soft law" of the European Council. The independence of the judiciary should be guaranteed by the state and sanctioned in the Constitution or laws of the country.

The UN's fundamental principles of judicial independence are related to these very important issues as in the judiciary independence, freedom of expression and association, qualifications, elections and training, terms of service and duration, professional security and immunity and in suspicion, suspension and leaving.

Legal proceedings and guarantees of fair trial must be fully respected. The European Convent for Human Rights in the article 6 and the Basic Card of the European Union in article 47 emphasize that the judiciary system should be independent and impartial

The Universal Declaration of Human Rights, in the article 10 specifies that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

2 –The International Covenant on Civil and Political Rights, in the article 14 specifies that all persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, to decide about the authenticity of each penal charge against the person, as well as about the charges regarding the fulfilment of civil rights and obligations of that person.

– The General Assembly of the United Nations, in 1985, specified a specter of standards known as: Basic Principles of the Autonomy of the Judicial Body, which demand

that judges, individually and collectively, respect judicial functions that aim to reinforce and support the credibility of the judicial system and predict that judges with full power act unobstructed by pressure and blackmail, to be well-paid and fitted to fulfill their obligations.

4 The Commissioner for Human Rights of United Nations, on April 23, 2003 approved the Bangalore Principles of Judicial Conduct. These are international mechanisms of United Nations that guarantee an independent judicial system.

The main European document is the European Convention on Human Rights (ECHR), where the rule of the right is set as the ground of the convention in general. Signatory states should guarantee the right of the proper judicial procedure (article 6), according to which everyone should be reviewed and specified, in a fair and public manner, within a reasonable timeframe, before the independent and impartial court established by law, the civil rights and obligations or the authenticity of any penal charges against him.. Within the framework of the European Council are approved a number of documents, which contain the principles for the judiciary, judges, and public prosecutors: – Recommendations of the European Council SM/Prep (2010)12 by the Committee of Ministers for member countries for judges: autonomy, efficiency and responsibility; – Recommendations of the European Council Prep (2000)19 from the role of the public prosecutor in the penal system; – European Card for the Judges Status (1998); – Magna Carta for Judges (basic principles) (2010); – European Directions for Public Prosecutor's Ethics Behaviour (Budapest Directions, adopted at the Conference of European Prosecutors on 31 May 2005).

In accordance with these standards, are set the requirements of Chapter 23 for entering in EU in the field of judiciary: independence of the judiciary (external and internal), impartiality and responsibility, professionalism, competence and efficiency.

For further and detailed examine about the judicial independence we should refer and take into consideration the judgments of the European Human Rights Judge on Campbell and Fell v Great Britain and Incal v Turkey, where the judge established the “independent requirements”, that contains: the way of how are named the judges, the duration of their mandate, guarantees against external pressure and the questions if the body presents an independent view.

## Ensuring the independence of the judiciary in the Republic of Macedonia according to national legal frameworks

Independence of the judiciary is guaranteed by the state itself by incorporating itself into the highest legal act, i.e. in the Constitution and in the laws of the state. Ensuring judicial independence is an imperative task of all governments and other institutions and as such they

must respect and look at the independence of the judiciary as "rescue from injustice". The judiciary has jurisdiction over all matters of judicial nature and has the exclusive authority to decide on any matters falling within its jurisdiction. For this reason and many others there should not be any external interference in the broader process. The principle of the independence of justice requires undoubtedly that the judiciary ensures the proper implementation of the proceedings and observes the rights of the parties to the proceedings. In order to ensure efficient and effective judicial procedures and to ensure that judicial work is carried out independently and impartially, the state should provide adequate resources to enable the judiciary to properly implement its functions.

One of the fundamental values of the Republic of Macedonia is the rule of law and the division of legislative, executive and judicial power (Article 8). The concept of power-sharing is of particular importance for securing the rule of law, because respecting this concept must ensure independence and autonomy in the work of all power bodies within their competences without any influence or pressure between them, out of relationships that are regulated by law. In our country, the independence and autonomy of the judiciary is based on this principle. In the Constitution of the Republic of Macedonia (Article 98) it is stipulated that the court performs the judicial power in an independent and autonomous manner and adjudicate on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. There is no time limit on the performance of the judge's function. The establishment, powers, types, interruption, organization and composition of the courts as well as the procedure before them are determined by law which is approved by two-thirds majority of the votes in the Assembly. These laws should be in the function of institutional guarantees for independence and autonomy of the judicial system. In accordance with the Constitution, the function of a judge is incompatible with the exercise of any other public function or profession or membership in any political party. Political organization and activity is prohibited in court.

In 2005, the constitutional articles related to the court were amended, especially with the appointment and dismissal of judges, which was passed by the Assembly of the Republic of Macedonia to the Judicial Council of the Republic of Macedonia. Most Council members (8 out of 15) elect judges from among their own ranks, but its work, according to the function, is also attended by the Minister of Justice. His membership does not have the right to vote, but his participation is perceived by the public as a mixture of executive power on the judiciary. On the other hand, imprisonment of up to 3 years is prescribed for anyone who impels a judge to do something or even fail to do something. Bribing the judge or even attempting to do so, is also envisaged as a punishable offense within the criminal law.

The judicial activity in the Republic of Macedonia is regulated by the Law on Courts. The Law of Courts regulates the organization and competence of courts, the election of judges and lay judges, the rights, obligations and immunities of judges, the termination and dismissal of judges from the function of the judge, judicial administration and jurisprudence. In addition, it also principally regulates the judicial system, judicial service, judicial police and work tools. This law stipulates that the courts in the Republic of Macedonia are independent and autonomous state bodies, determining the judicial competence and the importance of judicial function, mediation and communication with other state powers, as well as the relationship with citizens. The Law on Courts stipulates that the proceedings before the court are regulated by special laws and based on the principles of legality and legitimacy, equality of parties, reasonable time trial, justice, public and transparency, contradictions, duplicity, speech, promptness of the defense right, i.e. representation, free evaluation of evidence and economy. The Law on Courts also envisions the selection procedure, the determination of disciplinary responsibility, and the dismissal of judges and lay judges, which is within the competence of the Judicial Council of the Republic of Macedonia. Article 43 of the Law stipulates that in the selection of judges and lay judges there should be no discrimination based on sex, race, color of skin, social and national origin, political and religious beliefs, social and property position, and also adequate and fair representation of citizens belonging to all communities should be ensured.

For the selection of judges, special and general conditions are envisioned, which depend on the court where the judge applied. One of the general conditions for the selection of a judge is the result of the integrity tests and the psychological tests performed by the Judicial Council of the Republic of Macedonia. Special conditions provide the necessary qualifications depending on the degree and type of court. A judge at the Basic Court may be elected a person who has completed the initial training at the Academy for Judges and Public Prosecutors, a condition which has started to be implemented since January 1$^{st}$ 2013. The judge at the appellate court must have at least four years of experience without interruption as a judge in the basic court, or court at the Administrative Court and the Supreme Administrative Court. The judge in the Administrative Court needs to have a minimum of four years without interruption of work experience as a judge in the Basic Court or five years of legal work in a state body. The judge at the Supreme Administrative Court needs to have at least three years of continuous experience as a judge at the Administrative Court, or a person who has six years of legal employment in a state body. A judge of the Supreme Court of the Republic of Macedonia may be elected a person who has a minimum of six years of uninterrupted work experience as a judge at the Court of Appeal or as a judge at the

Administrative Court or at the Supreme Administrative Court. The special conditions for the selection of judges in the Courts of Appeal and the Supreme Court are being implemented since July 1st 2013. A lay-judge can be elected an adult citizen of the Republic of Macedonia, who has completed minimum higher education, fluently speaks Macedonian language, has a good reputation in performing this function and is not older than 64 years. The juvenile judge for juvenile delinquency is elected from within the ranks of persons with experience in education and the education of young people. The lay judge is elected for a term of four years and can be re-elected.

The Law on the Verification of the Facts and the Establishment of the Procedure for Determining the Responsibility of Judges, was approved by the Assembly of the Republic of Macedonia in February 2015. The Council for the Verification of the Facts is envisioned as a new legal body, which is intended to participate in the work of the Judicial Council of the Republic of Macedonia. The key competence of the Council for Determining the Facts will be the establishment of disciplinary proceedings and the procedure for unprofessional and unconscious work of judges before the Macedonian Judicial Council. The Council for the Verification of the Facts may reject the accountability initiatives, after that its decision becomes final, i.e. the failed initiatives will not be examined at all by the Judicial Council of the Republic of Macedonia. The Council for Verification of the Facts will consist of 9 members, who must be retired lawyers as well: 3 judges, 3 public prosecutors, 2 law professors and 1 lawyer. Apart from the fact that all members should be retired, they should have 15 years of uninterrupted experience, good results in their work, and to not have been sanctioned for discipline. The term of the elected members is four years and they no right to be re-elected. Minimum 1/3 of the members are expected to be among the representatives of communities that are not majority in the Republic of Macedonia. Candidates for the Council for Determining the Facts appear in the public announcement, and are elected by all judges through secret and direct election.

In terms of ensuring greater independence of the judiciary, through the concept of professionalism and efficiency, of particular importance is the Law on the Academy for Judges and Public Prosecutors. The purpose of the establishment of this institution is to ensure the professional, independent, impartial and efficient activity of judges and public prosecutors, as well as the professionalism and efficiency of professional services in the judiciary and public prosecution. The Academy organizes and conducts continuous training of professional services in the judiciary and public prosecution, as well as training of all subjects involved in law enforcement in the field of judiciary, in carrying out analytical activity in the field of judicial theory and practice.

In 2003, the Law on Court Budget was approved, which provides for the financing of courts, judges, the Judicial Council in the Republic of Macedonia and the funding of the Academy for Judges and Public Prosecutors. For the performance of the judicial budget work, the Council of Judicial Budget, consisting of the chairman and ten members was formed. President of the Judicial Council of the Budget is the President of the Judicial Council of the Republic of Macedonia. His deputy is the President of the Supreme Court of the Republic. Members of the Judicial Budget Council are the Minister of Justice, the President of the Supreme Court of RM, the President of the Administrative Court, the presiding judges of the appellate courts, the two presidents of the basic courts according to the order set forth in the Law on Courts and the Director of the Academy for Training of Judges and Public Prosecutors. Representatives from the Ministry of Finance also participate in the work of the Council for the Judiciary Budget, but without the right of decision-making. Of particular importance to ensuring the independence of courts and judges is their financial independence.

Judges' salaries are regulated by the Law on Judges Salaries, calculated on the basis of two parameters: Average Net Pay in the state over the past year and on the basis of a coefficient that depends on a number of factors that affect the complexity of the judge's duties and the burden of his work. The coefficient ranges between 2.8 and 3.7 depending on the type of court in which the judge works, the specialized sector, the internal duties, the professional experience, and the performance of the judge. In addition, judges are entitled to additional benefits in respect to professional travel and support in the amount of two master wages. Payments calculated on the basis of this law cannot be reduced by other laws or decisions by other state bodies. A reduction is only possible as a disciplinary measure by a decision of the Judicial Council.

Judicial services are composed of judicial officers, persons employed in courts that perform technical and auxiliary work and judicial police. Judicial officers are persons with the status of an administrative clerk. In order to preserve and protect the rights of the judiciary, a Council of Judicial Service has been formed, consisting of 11 members. Employment of judicial officers is carried out through public announcement, advancement through publication of internal revelation and mobility through distribution and receipt. The Law on Judicial Service regulates the rights, obligations, responsibilities of judicial officers, salary system and compensation of salaries of judicial officers. Employment of judicial officers is carried out through public announcement, advancement through publication of internal revelation and mobility through distribution and receipt. For the selection of candidates from the public competition, a Selection Committee for Employment is formed. The selection procedure for employment consists of administrative selection for employment, probation for

judicial clerks, proof of evidence reliability and interviews, as well as a personality test. A candidate for a judicial clerk provides an examination for a judicial officer. The trial attorney consists of two parts: the professional part and the part for assessing the candidate's capacity. Advancement of judicial officers is done through internal announcement, and the aim is to enable career advancement, i.e. shifting from a lower-level job to a higher-level job. Mobility is the horizontal movement of employees from one job to another, within the same set of jobs, as defined by this law. Mobility is carried out through the distribution of the employee at the same level, i.e. a job for which the employee meets the general and special conditions determined by the act of systematizing the jobs at the court which distributes and takes them. Mobility is carried out without publication of the internal announcement, i.e. public announcement. As far as responsibility is concerned, the judicial officer is personally responsible for the performance of the duties assigned to the workplace and for the violation of the official duty of the judicial officer, except for the court administrator, he has disciplinary responsibility. Responsibility for the offense committed, respectively for the violation does not exclude the disciplinary responsibility of the judicial clerk.

## Achievements, stagnations and challenges in the judicial system of the Republic of Macedonia

According to an annual report published by the Helsinki Committee for 2013, the basic principle of the Macedonian Constitution is the division of power in: legislative, executive and judiciary power; and also the rule of law, which should be achieved through the protection of citizens' rights by the independent courts. Such constitutional provisions still have to progress with the adoption of relevant legal solutions, which would guarantee the independence and professionalism of the judiciary. In the past 25 years, a large number of laws have been approved, as well as amendments to the Constitution in order to accomplish the standards of the European Union in the judiciary, but also to adequately protect the human rights and freedoms guaranteed by the Constitution and international laws. The legal solutions opened up the possibility of realizing an independent judiciary, especially by not being influenced from the executive power. In this context, the selection of judges, in Republic of Macedonia, according to Article 38 paragraph 1 of the Law on Courts, is without a mandate limitation and is of special importance. Compared to other public office holders, the salary of judges in the Republic of Macedonia is relatively high and should contribute to their independence and impartiality. However, the implementation and application of legal solutions remained a problem with which the judiciary was facing from the beginning.

The reality for the judicial partition in the Republic of Macedonia, the failure to respect the principle of the rule of law and the non-existence of the power-sharing was also confirmed in the filming of high state officials' talks, which were extracted in public by the leader of the Social- Democratic Party of Macedonia. Starting from 09.02.2015, the Social Democratic Union of Macedonia has held 36 press conferences where were published information that state services unlawfully followed the communications of over 20,000 citizens of the Republic of Macedonia; we heard also that a part of government has done a lot of crimes and have misused their official duties, they have done election fraud, etc. From the published conversations, we saw how the executive power have impact on selection of judges and prosecutors, and how they have done agreement for the specific cases. Additional published conversations provide indications on the linkage of executive power with the Public Prosecutor of the Republic of Macedonia. Such conversations are not only contested from the judicial aspect but also from the aspect of the fundamental rights of the citizens, especially the right of privacy, if the data are verified that more than 20,000 citizens of the Republic of Macedonia were illegally pursued.

The misuse of authorizations by the detective and counterintelligence director and the use of the wiretap system for the purpose of the ruling party was also found in the Expert Group Report of the European Commission, which notes serious shortcomings in five areas: the pursuit of communications, external oversight of independent troops, judiciary, elections and media. In the judiciary section, it has been established that there is a selective approach and political influence in all aspects - from the moment of the election of judges and public prosecutors, judicial procedures, judge's evaluation, dismissal of judges, The Judicial Council, the transparency of the selection and dismissal of judges and the functioning of the distribution system.

The group of Experts engaged by the European Commission has also reviewed the report on the judiciary in Macedonia, assessing that the procedure for the annual evaluation of judges has a positive impact on the efficiency of their activity, but at the same time jeopardizes the competence of Judges and legal security of citizens. The assessment system is more related to prosecuting the work of judges, in terms of speed of action and decision-making, instead of competency and set in this way thus in particular influence in enhancing the career of judges, which may be the basis for promotion disciplinary or dismissal liability. Such an assertion is also given by the European Commission Report on the state progress for 2014 with concrete recommendations for its change, but the legal amendments haven't been yet proposed in this section. According to the research conducted by NOVUS from Strumica, implemented within the framework of the "Network 23" project, "Judge Evaluation is

experienced as a" competition "among them who will complete the year with fewer annulled or amended rulings."

The ombudsman institution also estimates too lowly the work of the judiciary and its dependence, emphasizing that there exist doubts about the new system which is set for the election / advancement of judges this system does not put the candidates in the same position. Advancement of judges is not based on a thoroughly transparent procedure and objective criteria.

Regarding citizens' confidence in the judiciary, the People's Advocate in the latest 2014 report found a rise in distrust by saying that "statistical data prove that proceedings in first instance courts last for many years, which in reality is a violation of the right to a trial within a reasonable time. In most cases, citizens complain about the length of proceedings in the Administrative Court, followed by civil proceedings, in which the submitters request the realization and protection of certain property rights, respectively statutory rights and interests, and less on criminal proceedings of the first degree. There are a lot of complains where the citizens complain the court decisions which are taken with bias by unprofessional judges, under pressure or with corruption.

About the question, according to you, Are the judges selected by the Judicial Council of RM under pressure, a large percentage of citizens of the Republic of Macedonia (56%) consider that the Judicial Council of RM performs the selection of candidates under the pressure. 23.5% of them think that the selection is carried out in full pressure, while 32.7% consider that the selection is done mainly under pressure. Only 39% of citizens consider that selection is not done under pressure. The question who influences the independence and autonomy of the work of the Judicial Council of RM, was submitted to those who for the previous question answered that certain external factors affect the independence and autonomy of the Judicial Council of RM. The largest percentage of citizens, 52.5%, respectively, replied that government has the greatest impact. 31.2% responded that all in same way have influence, 5.6% that the opposition has influence and 2.8% have no opinion on this issue.

The Republic of Macedonia has received negative marks in the judiciary in all international reports, including the European Commission reports, especially in the 2014 Report, where it is noted that "there are suspicions in and out of the country about the political impact on certain judicial processes "as well as that" there is still no solution to the shortcomings of the current judiciary career system even though there is a potential threat that they represent the independence of judges ". Similar are the remarks of the United States Department of State Department, which in the Human Rights Report for 2013 states that there

is a problem in the state with the right to a fair trial and the proceedings before the courts, especially because of political and government pressure.

Such remarks have also been ascertained by GREKO, which in the 2013 report concluded that the legal provisions that were to be taken into account by selecting the judges were not respected and with which is determined that 50% of the newly elected judges should be among the graduates of the Academy of Judges and Public Prosecutors. It is also reportedly informed by various sources that nepotism and political influence still play an important role in practice. In the Progress Report of the Republic of Macedonia for 2014, the European Commission recommends that "The practice of the Judicial Council on disciplinary procedures and dismissal procedures should be more proportionate and transparent. The issue of poor judges' results should be first addressed through remedial measures, such as improvement in organization and training instead of being discharged. Discharging should be limited to uncompetitive behavior at work and should only be applied if earlier disciplinary sanctions have been imposed, such as warnings and reduction of salary, which currently are rarely used.

Based on such recommendations, the state decided to form a Fact Verification Council as a new body in the judicial system, which should initiate disciplinary proceedings and procedures for unprofessional and unconscious work of judges before the Judicial Council of Republic of Macedonia.

The main challenge of the judicial system of the Republic of Macedonia is the Special Prosecution, which is the only hope to have an independent judiciary system, all citizens of the Republic of Macedonia, especially the Albanians, have their eyes on the Special Prosecution and are hoping to achieve the justice for the cases Monstra, Sopoti, Kumanova, etc. However, this Prosecutor is also struggling to develop a fair and independent investigation because of the unwillingness of many state institutions and state officials to find out the truth of numerous court cases that sent Macedonia into a complete collapse.

The Special Prosecution for Albanians in Macedonia failed because during the entire period of the Law on Special Public Prosecution, we have witnessed that this prosecutor did not raise any of the issues that matter the Albanians, therefore, even the mandate is continued is not a guarantee that the Special Public Prosecution will deal with cases targeted Albanians. The cases like "Mostra 2014", "Skopje 2014" should be the culmination of Special Prosecution work for returning justice, because it is important for the Albanians to find out the truth about cases where is been denied justice and are deprived of their liberty.

During its one-year mandate and its work, the Special Public Prosecution has conducted 7 investigative and 20 pre-trial investigations, over 80 persons are involved in

prosecution procedures. Investigative and pre-trial procedures have to do with illegal media financing, misuse of public finance procedures, fiscal evasion, money laundering, various corruptive acts, abuse of office and official authorization, financial investigations, etc. Cases that were worked by the Special Public Prosecution so far are: Titanic, Torture, Carrier, TNT, Pucc, Spy and for many other cases are expected in the future to be raised new indictments. Katica Janjeva's first report, March 15, 2017, caused controversy between the Special Public Prosecution and the Public Prosecution Council. This Council asks Katica Janjeva to personally justify some parts of the report, where sessions for deliberation were postponed several times. The same thing was requested by the VMRO parliamentary group. For many citizens it seems that the work at the Special Public Prosecution is flowing slowly, but these procedures are quite sensitive and require a maximum discretion from the Janeva’s group. The other problem is that the citizens are not used in that way of working, so it leave the impression that something is not going right. The slowdown in the work of the Special Prosecution is due to various obstructions such as the disapproval of the Law on Witness Protection and the decision to abolish or apologize, which should be overcome and only after that will be seen concrete results from the work of the Special Public Prosecutor. This means the fact that when are in question the Albanians the access of the so called justice is not the same, maybe this raises the reaction to Albanians that the justice for Albanians is not coming, this also will happen if The Special Public Prosecutor's Office continues to use double standards on case processing, seeing in the interest of whom is revealed the concrete case and true discovery.

Otherwise, the Special Public Prosecution was established as a result of the agreement of the four political parties VMRO-DPMNE, the Social Democratic Union of Macedonia, the Democratic Union for Integration and the Democratic Party of Albania with the mediation of the international factor, known as the “Agreement of Perzhino”, after which, with an absolute majority, MPs issued a visa for the adoption of the Law on the Establishment of the Special Prosecution Office in September 2015, while this institution was formed three months later, respectively in December 2015. Katica Janjeva from the very beginning of the establishment of this prosecution has requested the new parliamentary majority to delete, change or annul the article of the Law which limits the indictment of the Special Prosecution in time because only in this way this institution will be able to finally investigate the criminal offenses related to the intercepted conversations.

## Conclusion

In conclusion we can say that republic of Macedonia has a lot of work to do in the judicial system, even though it has done changes on certain laws for making a believable and independent judiciary this haven't functioned till now days.

The judicial independence in our country is fading every day, thus because of the daily politics influence, disrespect of power-sharing, misuse of official positions, and many other factors. The principle of fair and adequate representation of ethnic communities that live in Macedonia in the judicial system has marked a decrease in place to mark a raise.

No professional and completely political approach to cases such as "Sopot", "Mostra", "Kumanovo" etc, as well as the latest case with the telephone conversation wiretap scandal are additional indications of selective justice and the direct impact that have representatives of executive power on public prosecution and the judiciary. On the other hand, there is distrust on the independence of the Public Prosecutor of the Republic of Macedonia, because of the connection between the Public Prosecutor of the Republic of Macedonia in the "Interception" affair, but also for the constant non-undertaking criminal prosecution against senior state functionaries in cases of based suspicion for corruption, as well as for not undertaking prosecution in order to protect civil society activists in cases on attack on them.

The only hope for having and independent judiciary in our country is the Public Special Persecutor. This institution is trying to tell the truth and to make its work independently and in an objective way. According to criminal justice experts legal obstacles for Special Prosecution functioning should not prevent the conduct of investigations because the crime represents "gangrene for society" and as such should be eradicated until the last pore. Perhaps the solution to these issues will only be solved by the creation of a Special International Court, which would prosecute the cases raised by the Special Prosecution, because the national courts have a total block in direction of clearing the cases Initiated by the Special Public Prosecution. Consequently, the work in the judicial system without any radical changes, may be negative for the Special Public Prosecution, about whether to be pronounced a trial or acquittal decision for the accused of specials under the pretext that concrete evidence is lacking in the concrete case. Since the special Public Procurement is been extended the mandate, we have to wait for Katica Janjeva's second report, which will show us what concrete results have been achieved by the special public prosecution investigation procedures.

This is the biggest challenge that our country has undertaken in order to prove that justice should triumph by doing the impossible and by working hard in the judicial field in

order to achieve the objective for having an independent and impartial judiciary system. So, for having and independent judicial system in our country the institution should respect the constitution, the laws and international ratified agreements, the laws must be applied in correct way for returning the faith to the citizens of our country.

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# GENERAL OVERVIEW ON THE JUDICIAL CONTROL OF THE EXECUTIVE IN THE REPUBLIC OF MACEDONIA

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## ABSTRACT

Many analyses and international reports point out that there is a significant lack of judicial control over the executive state power in the Republic of Macedonia. This article aims to analyze the weaknesses that contribute to the lack of control, and to focus on the administrative judiciary as one basic form of judicial review of final individual administrative acts of executive state power and public institutions.

The first part of the article focuses on challenges for judicial control of the executive government. It shows the results of semi-structured interviews conducted with 36 stakeholders (i.e. judges, prosecutors) about the limits to judicial control of the executive.

The second part focuses on weaknesses and challenges of the administrative judiciary, and makes proposals how to improve the administrative judiciary as a special judiciary in the framework of the judicial system of the Republic Macedonia. Administrative judiciary through administrative disputes as a legal institution provide judicial control over the legality of the decisions of public authorities, respectively ensure objective legality, as well as the legal protection of individual rights in administrative affairs. This allows the possibility to be understood that administrative dispute is the basic instance where administrative judiciary reviews the activity and work of the government and public institutions from legal perspective. Therefore, it presents a crucial illustration to detect the specific problems and to offer possible remedies.

**Keywords**: *judicial control; rule of law; democracy; administrative judiciary.*

## Introduction

Rule of law failure underlines the main problems of democracy in Macedonia. The third branch of government seems unable to live up to its competences. This has been well elaborated in many international reports. Lack of implementation of laws as well as the budgetary constraints are some problem areas identified in various reports about the judiciary in Macedonia. For example, the Priebe Report notes that "the country possesses a comprehensive set of rules which, if fully observed, should generally ensure a proper functioning of the judicial system to a high standard" (*The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, pp. 9*). Indeed, this is an often-heard statement in Macedonia, namely the idea that the problem is not in the legal framework but in the implementation. However, this puts to question the adequacy of laws, are they implementable at all? An answer to this question of implementation of laws as well as the independence of the judiciary may partially lie in budgetary constraints. As the State Department report states that the "inadequate funding of the judiciary continued to hamper court operations and effectiveness. A number of judicial officials accused the government of using its budgetary authority to exert control over the judiciary" (*US State Department, 2014. Macedonia Human Rights Report, pp. 6*).

However, the judiciary is not simply hampered by the lack of independence or budget, but also by the lack of trust among citizens. Two studies, one supported by IRI and the second conducted within Network 23, provide data which show a deep mistrust in the judiciary and its various institutions. The IRI Survey shows that a majority of the citizens interviewed do not trust the Courts, nor the Public Prosecutors based on their actions in the past year *(IRI Center for Insights in Survey Research, 2015. Survey of Public Opinion in Macedonia, pp. 31*). While the analysis within the Network 23 notes a lack of trust of the Judicial Council, particularly among the Albanian population (63%) (*Institute for Human Rights [Институт за човекови права]. 2015; Analysis of independence of the Judicial Council of Republic of Macedonia – Aspirations and Challenges, pp. 27*). The lack of trust by citizens hinders the legitimacy of the courts as well as the perception of their reliability by the citizens, which might partially serve to explain why there is no public pressure on judiciary reform.

Lack of preparation of laws and their hasty implementation is another serious problem that has been noted in various reports. For example, the EC Progress Report noted that the law for established the Council for Determining Facts is a "further blow to a profession which is already under siege (*EC Progress Report 2015, pp. 52*). The enactment of this law points out

the persisting challenges that exist for independence of the judiciary in Macedonia. Despite the numerous negative comments, the government formed the Council for Determining facts in a hasty procedure. However, it was not operational in March, 2016. Why is judiciary not able to carry out its constitutional duty and act as third branch of government? This article aims to answer that question. In doing so it assumes a two-step process. In the first part it outlines results from an empirical study that enlighten the limits of judiciary's control of the executive. In the second part, it takes a closer look at administrative judiciary, as the basic line of individual's citizens possibility to control and/or remedy the acts of the public administration. We aim to show the major weaknesses of the judiciary in their (in)ability to control the executive, and then we proceed in the area of administrative judiciary as the most favorable case for control of the executive and the public administration (i.e. the area which de facto should provide maximum instruments for individual citizens to protect their rights against the actions of the public administration). In the conclusion we summarize our findings.

## Analysis: Challenges for judicial control of executive

The first part of the paper utilizes parts of an empirical study conducted with 36 semi-structured expert interviews conducted during the months of December 2015 and January 2016 (*Taleski et alia 2016*). This is not a representative sample of the relevant stakeholders. However, it is a very high number for experts' interviews and there is a high saturation in the answers. Most of the interviews (14 which is 38.9% of the total) were done with judges and prosecutors. Interviewees include judges from the Basic Courts all the way to the Constitutional Court and prosecutors from different levels. Interviews were also done with relevant members of parliament (5) (e.g. Deputy Speaker of Parliament and members of legislative committee) and government (6) (e.g. acting and previous Ministers of Justice, high ranking public administration officials) and interested public (11) (e.g. relevant NGOs, journalists, university professors and international actors). The experts interviewed included former and acting stakeholders whose experience with the judiciary ranges between 5 and 40 years. Respondents were asked to answer closed questions which evaluated the independence of judiciary, and open questions which focused on the challenges and accomplishments of reforms. The data was analyzed by comparing the means with a Cronbah's Alpha test for reliability of results (*Cronbah's Alpha is a statistical measure which shows the correlation within a set of answers. It is a standardized test when analyzing and comparing means to show internal consistency and reliability of the answers. The test value ranges from 0 to 1. Values above 0.5 are acceptable; however higher values designate higher consistency and*

*reliability*). The respondents gave relatively low grades for the functioning of judicial institutions. The results are shown below in table 1. The answers are an assessment of the judicial control of executive and judicial independence, then an evaluation of the work in civil cases. It is somewhat surprising that the Judicial and Prosecutors' Councils, the new institutions set up to guarantee the independence of the judiciary from political interference, got the lowest grade. The Judicial Academy got a relatively higher grade, which means almost a 3 and it was generally seen as the most positive step towards the improvement of the judiciary both in its efficiency and its quality, as one respondent stated "the Academy provides the positive step towards the long-term improvement of the judiciary".

*Table 1. Grading the work of the judicial institutions, on a scale a scale from 1 (worst) to 5 (best)*

| N = 35 | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Courts | | 2.42<br>(0.80) | | | |
| Prosecutors | | 2.34<br>(1.02) | | | |
| Judicial Council | 1.78<br>(0.83) | | | | |
| Public Prosecutors Council | 1.77<br>(0.97) | | | | |
| Judicial Academy | | 2.97<br>(0.87) | | | |

*Cronbah's Alpha: 0.79, standard deviation in parenthesis*

The independence and accountability of the judiciary was supposed to be strengthened with the introduction of the Judicial and Public Prosecutor's Councils. However, in practice the Councils seem to play somewhat a different role. Respondents gave a very low score for their functioning, and other research corroborates the existing weaknesses (*Institute for Human Rights, 2015; Analysis of independence of the Judicial Council of Republic of Macedonia – Aspirations and Challenges, pp. 27*). For many of our respondents, the Councils represent an intermediary instrument for the executive to control judges and prosecutors, even though some measures were undertaken to increase their independence (e.g. the Minister of Justice no longer has the right to vote in the Judicial Council). Judges and prosecutors elect the majority of the members in the Councils. The elected members represent the geographical and hierarchical set up of the courts and prosecutor's office.

In general, the respondents considered the independence of the judiciary to be in the decline, and noted that this was mostly due to the presence of political interference. As indicative examples of this is the respondents pointed to cases where high ranking government officials sued journalist or political opponents for libel and defamation and to cases where opposition politicians are put on trial, which are seen as cases portraying

selective justice. Furthermore, when asked about the challenges of the judiciary most of the respondents noted that political interference was the greatest obstacle. Indeed, the EU Progress Report also notes that "the extent of previously suspected political interference in both the appointment of judges and the outcome of court proceedings was confirmed by the content of the intercepted communications" (*EU Progress Report 2015*). Serious concerns about the lack of judicial control of executive, or to put it precisely - the belief that the executive controls the judiciary, provide a very negative view about the entire judicial system.

Even though on average the judicial system has improved compared to previous years, the handling of sensitive and politically charged cases creates an impression of a failing rule of law. Such cases present a minority of all cases; however, they show precisely what the state of judicial control of the executive is. Almost all of our respondents, across categories, believed that the executive controls the judiciary. Respondents were asked to name an example, the first that comes to mind, of judicial control of executive. Almost none of the respondents could point out an example of judicial control over the executive. Some even claimed that the judiciary can't control the executive, because the judiciary was there to enforce the laws, while the executive together with the legislative enacted the laws, while one respondent noted that the way that the system in Macedonia is built simply does not allow for judiciary control over the executive (Category III). This shows that many of the relevant stakeholders, including judges and prosecutors, do not see the judiciary as an equal and independent branch of power, but as being subordinated to the executive. Very few of the respondents pointed out to cases where acting politicians were held accountable in a court of law. These were mainly corruption cases against state secretaries, some heads of sectors and local government officials. There have been no cases when acting high level politicians were taken to court. On the other hand, there are cases against former high-level politicians, which one of our respondents labeled as "revenge cases", namely former executives being charged by the new governing powers to assert strength.

*Table 3. Grading the independence of the judiciary*

| N = 34 | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Judiciary | | 2.03 (0.75) | | | |
| Judicial Council | 1.53 (0.75) | | | | |
| Public Prosecutors Council | 1.5 (0.75) | | | | |
| Adequacy of Judicial Budget | | 2.68 (1.06) | | | |
| Judicial Control of Executive | 1.74 (1.05) | | | | |

*Cronbah's Alpha: 0.62, standard deviation in parenthesis*

The results show that there is very low independence of the judiciary. There is some financial independence. The adequacy of the judicial budget has a mean score of 2.68, which is the highest compared to the others. The independence of the overall judiciary has a mean score of 2, while the independence of the Councils and the possibility for judicial control over the executive were graded as lower.

Respondents were asked to grade to what extent different factors limit the independence of the judiciary, on a scale for 1 (lowest) to 5 (highest). Majority of the respondent pointed out to political influences as the main impediment for the independence of the judiciary. The results, with a relevant Cronbah's Alpha test, are shown in table 4.

*Table 4. What is limiting the independence of the judiciary.*

| N = 32 | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Bad laws | | 2.31 (1.2) | | | |
| Political influences | | | | 4.47 (1.07) | |
| Incompetent judges and prosecutors | | | 3.19 (1.03) | | |
| Lack of capacities (space) | | 2.34 (1.23) | | | |
| Bad technical resources | | 2.41 (1.21) | | | |
| Bad administration | | 2.5 (1.08) | | | |
| Low salaries | | 2.59 (1.27) | | | |

*Cronbah's Alpha: 0.55, standard deviation in parenthesis*

It is not surprising that political influences are the main factor. Other research, done in Macedonia in 2015, corroborates the findings. According to an IRI nation-wide survey, a majority of the respondents considered that courts are susceptible to political influences (i.e. 22% of respondents said "fully susceptible" and 33% said "rather susceptible") (*IRI Center for Insights in Survey Research, 2015. Survey of Public Opinion in Macedonia, pp.* 57).

However, it is somewhat surprising that the incompetence of judges and prosecutors comes as the second most influential factor that limits the independence of the judiciary, with a mean score of 3.19. The other factors were seen as having less of an influence and approximately being on the same level. These results point out the doubts about the quality of human resources in the judiciary. They also reflect deep mistrust in the personal capacities of individual judges.

## Administrative judiciary: Challenges and perspectives

Judicial dispute as a judicial protection of citizen's right from unlawful acts of public administration has a long tradition in the Republic of Macedonia. It was first introduced in the Law on administrative disputes of 1952, supplemented by a new Law on administrative disputes of 1977 and the last third Law on administrative disputes of 2006 with which a specialized administrative judiciary was formed within the state. This Law has been amended in 2010 with provisions for the establishment of a Higher Administrative Court without stipulating provisions for conducting proceedings before this Court.

The biggest problems that citizens face in administrative-legal relations with the state are:

*First*, in the duration of the overall administrative procedure (administrative procedure before public authorities, followed by an administrative dispute) and,

*Secondly*, in the non-enforcement of decisions made by the administrative judiciary.

The length of the procedure, which consists of five instances, two in front of the state administration bodies called public authorities and three in the framework of the administrative dispute before the Administrative Court, the Higher Administrative Court and declaratively before the Supreme Court of the Republic of Macedonia, make the protection of citizens' rights overdue and expensive. The large influx of new cases, as well as the late start of the work of the Administrative Court (because the Judicial Council took months to elect judges in the Administrative Court, and the Supreme Court, by the force of the law, ceased to settle administrative disputes). The Administrative Court started its work with a large backlog of cases transferred by the Supreme Court resulting in its inefficiency even today as much as the number of resolved cases annually increases by this Court (*Draft-strategy on the judicial reforms of judiciary sector, Skopje, pp. 31-33*).

In the multi-decade system of administrative-legal protection from unlawful activities of public bodies, in 2010 silently without any previously conducted analyzes, without public hearings and debates, without the participation of the wider professional and scientific public, the Law on Courts and the Law on Administrative Disputes were changed and they introduced a new judicial organ in the organization of the judiciary – the Higher Administrative Court. Seven years after the establishment of this Court, there is no analysis of the expediency/purposefulness of its existence, the financial implications of its work, the efficiency of the administrative dispute after the establishment of the Higher Administrative Court. The academic research community and non-governmental organization have noted the following: the protection of the rights of the citizens is delayed, the same judgments of the Administrative Court that were previously annulled and returned to the resettlement are confirmed, which for the party means only a waste of time and an increase in the costs, an

extremely large number of appeals to the Higher Administrative Court have been submitted by the state attorney representing the public authorities who, at once from a defendant party before the Administrative Court, become plaintiffs before the Higher Administrative Court. The possibility, that is to say the right of sued organ that is part of the administrative dispute to be able to submit an appeal to the High Administrative Court, is the most criticized and unjustified novelty in the changes to the Law on Administrative Courts of 2010. This decision contradicts with the basic idea and the main goal of the administrative dispute, that the judicial control represents an external form of control of the public administration organs which evaluates the legality of final individual administrative acts. The public administration organs cannot appeal a verdict of the administrative court that declares their act as unlawful in no country in the world, because the rational of the administrative judiciary is precisely that – to control the legality of the public administration's acts in cases when the citizens put forward appeals to repeal unlawful acts (*Draft-strategy on the judicial reforms of judiciary sector, Skopje, pp. 31-33*).

It is also unnecessary that public administration is represented by the state attorney in cases when they are a party in an administrative dispute. According to the Law on General Administrative Procedure of 2015, the public administration employee that was in charge of the administrative procedure should finalize the procedure or with other words to enact and sign the resolution. He is responsible for appeals against that resolution in front of a second instance state committee that decides on appeals in administrative procedure. If the citizen as a party starts an administrative dispute against a resolution of the second instance state committee, there is no logical or legal justification, for the state attorney to represent the public administration organ in such an administrative dispute. It is even less logical or justifiable for the state attorney in the name of the public administration organ to submit appeals against the verdicts of the Administrative Court, which unfortunately is the current practice in the Republic of Macedonia. On the other hand, from some strange and difficult to explain reasons, the legal solutions provide a possibility for the state attorney to represent the central public organs in administrative disputes, but not the organs of the local self-government (*Ibidem*).

Failure to act in full jurisdiction by the judges in the Administrative court is an additional problem for the citizens that creates a ping-pong effect for the protection of their rights. On the one hand, they have received a verdict which is in their favor by the Administrative Court, however, on the other hand, instead of having the verdict to solve their problem, they are returned for another administrative procedure in front of the public administration organs. In this way, the citizens have legal justice de jure, or on paper, but not de facto or in real life. This problem is a consequence of the lack of delivery of documents by defendant public administration organs during the administrative dispute which impedes the Administrative court to decide in merit with full jurisdiction. The verdicts of the Administrative court repeal the resolutions of the public administration organs and they are returned for another resolution with concrete judicial guidelines that are not executed by the public administration organs that again bring resolution with the same content as the previously repeal resolution. The Administrative court faces a problem that its verdicts are not implemented, which is a

phenomenon that is not seen in another country were rule of law is meaningfully implemented (*Draft-strategy on the judicial reforms of judiciary sector, Skopje, pp. 31-33*).

Disputes arising from administrative contracts, even though they are regulated with the Law on Administrative Disputes of 2006, and also by the Law on General Administrative Procedure as being the competence of the Administrative Court from 2015, are still trialed in front of the regular courts and in this sphere there is a complete disbalance in the rule of law implementation. The conditions for the work of the Administrative court (space, technical equipment and human resources) are brought down to minimum and are not satisfactory for a court of that rank, that deals with the most important disputes against the state. To deal with all of the negative conditions that are pointed out above it is necessary to enact a completely new Law of Administrative Disputes, and also to change the Law on Courts. The right of second instance of the judicial procedure, that is guaranteed by the Constitution of the Republic of Macedonia of 1991, in administrative disputes should be realized in a way that the right of appeal will be given to cases where the Administrative Court has made a final decision and the appeal will be submitted in front of the administrative department of the Supreme Court of the Republic of Macedonia. The judges in the existing High Administrative Court can strengthen the human resources of the existing Administrative Court, so that it can increase the efficacy of its work and to decrease the backlog of cases. The new Law on Administrative Disputes should regulate the rules for appeal procedures. The public administration organs as well as the other public organs, regulatory bodies etc, cannot appear as plaintiffs in administrative dispute, nor can they submit appeals to the verdicts of the Administrative Court that repeals their resolution. The state attorney has no need to represent the public administration organs in administrative disputes taking in consideration the new solutions in the Law on General Administrative Procedure according to which the official that leads the procedure is also in charge for the final act. Therefore, the official will represent the public administration organ and will defend owns decision in an administrative dispute. It is needed to take measures to fully implement the compulsory judicial verdicts and to find ways to determine how many of the verdicts in full force have been implemented in the legally proscribed deadline of 30 days. This is one of the European principles that is noted in the Protocol. The Law on Administrative Disputes should contain regulations to sanction the public administration organs that will fail to submit the necessary documents to the Administrative Court to have full legal grounds to adjudicate in the administrative disputes. Specific trainings are necessary for the administrative judges to rule justly in disputes dealing with administrative contracts. Domestic and foreign experts, practitioners from the administrative organs and judges from the Supreme Court should conduct the trainings. The number of trials with public hearings should be increased. The Law on Administrative Disputes should be aligned with the Law on General Administrative Procedure of 2015. There is a need to amend and make more precise certain information in the framework of the Annual Reports on the work of the Administrative Court, for example how many verdicts are delivered in disputes with full jurisdiction, how many verdicts are delivered after an oral deliberation has been previously held, how many verdicts are delivered by an individual judge, in the cases where those are accepted to give

the legal bases of such decisions. It is necessary to improve the spatial and technical conditions for the work of the Administrative Court so that the administrative judges can be more efficient in their work, but also to gain the necessary dignity and integrity (*Draft-strategy on the judicial reforms of judiciary sector, Skopje, pp. 31-33*).

## Conclusion

The article starts from the factual situation of the judiciary that is well noted in several international reports. The findings suggest that the judiciary faces serious impediments to act as the third independent branch of government and that it not able to fully control the executive. These findings were corroborated in the empirical results of the study that the article utilizes. The results of the study suggest that various stakeholders within the judiciary give low grades for the functioning of judicial institutions. Furthermore, there seems to be a vide spread opinion that the independence of the judiciary is very low. For many of our respondents, the Judicial and Prosecutor's Councils represent an intermediary instrument for the executive to control judges and prosecutors, even though some measures were undertaken to increase their independence. In general, the respondents considered the independence of the judiciary to be in the decline, and noted that this was mostly due to the presence of political interference. As indicative examples of this is the respondents pointed to cases where high ranking government officials sued journalist or political opponents for libel and defamation and to cases where opposition politicians are put on trial, which are seen as cases portraying selective justice. Furthermore, when asked about the challenges of judiciary most of the respondents noted that political interference was the greatest obstacle.

Even though on average the judicial system has improved compared to previous years, the handling of sensitive and politically charged cases creates an impression of rule of law failure. Respondents were asked to name an example, the first that comes to mind, of judicial control of executive. Almost none of the respondents could point out an example of judicial control over the executive. Some even claimed that the judiciary can't control the executive. This shows that many of the relevant stakeholders, including judges and prosecutors, do not see the judiciary as an equal and independent branch of power, but as being subordinated to the executive. Majority of the respondent pointed out to political influences as the main impediment for the independence of judiciary. The second reasons were the incompetence of judges and prosecutors. The other factors were seen as having less of an influence and approximately being on the same level. These results point out the doubts about the quality of human resources in the judiciary. One needs to point out that these conclusions came from a study that was done in December, 2015 and January, 2016. From a time-perspective, they

need to be taken with a grain of salt, even though they are very indicative for the improvements and reforms that need to be outline in the future to have a functional judicial system,

When one turns to the administrative judiciary, as the most favorable area for citizens to uphold their individual rights against the actions of the public administration, then one should point out that there is a long tradition of administrative judiciary in the Republic of Macedonia. Albeit, the entire administrative procedure lasts very long and very often decision made by the administrative judiciary are not executed.

The changes introduced in 2010 were a precedent in the several decades of experience in the system of administrative legal protection, mainly because the Laws on Courts and the Law on Administrative Disputes were changed silently without any previous analysis, without public discussions or debates, and without engaging with the academic and professional public. At the same time, the current legislative framework of administrative judiciary has several paradoxes. For example, the possibility, that is to say the right of sued organ that is part of the administrative dispute to be able to submit an appeal to the High Administrative Court, is the most criticized and unjustified novelty in the changes to the Law on Administrative Disputes in 2010. This decision contradicts with the basic idea and the main goal of the administrative dispute, that the judicial control represents an external form of control of public administration organs which evaluates the legality of administrative individual final acts. It is also unnecessary that public administration is represented by the state attorney in cases when they are a party in an administrative dispute. Furthermore, the conditions for the work of the Administrative court (space, technical equipment and human resources) are brought down to minimum and are not satisfactory for a court of that rank, that deals with the most important disputes against the state. To overcome the impediments, we suggest to streamline the process legal and procedural processes and to increase accountability of individual acts to bear full legal consequences. It is also necessary to improve the existing legislation, to amend the existing and to create new legislation. Last, but not least, there need to be improvements in the spatial and technical capacities of the judiciary, not alone of the administrative judiciary, and to provide comprehensive training of judges and the other staff.

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# UNDERSTANDING THE CENTRIFUGAL FORCES IN ASYMMETRIC POWER - SHARING ARRANGEMENTS. *THE CASE OF GAGAUZIA*

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## Abstract

The aim of this work is to understand the main centrifugal forces in the dialogue between the autonomous region of Gagauzia and the Moldovan central public authorities. Despite being one of the few cases of peaceful mitigation of an ethnic conflict in the post-Soviet space, the autonomous arrangement was established with loose requirements that resulted in Gagauzia having only a superficial mechanism of integration. As such, it depicts the grounds for which Gagauzia, despite beings a different case, is addressed in the reintegration policies in parallel with the Transnistrian issue. The analysis depicts the irregularities, the tensions and the threat to regional stability that Gagauzia brings on. Attempting to depict a complex picture of the aspects that hinder the well-functioning of the autonomy, the present work sheds a light on the occurring informal practices and the lack of political will to efficiently implement the special legal status of Gagauzia.

**Key-words:** *centrifugal forces, power-sharing arrangements, Gagauzia, Republic of Moldova, inter-ethnic tensions, minorities.*

## Introduction

The Autonomous Territorial Unit of Gagauzia (ATU Gagauzia) is a discontinuous region in the South of the Republic of Moldova, and is the only case in Central-Eastern Europe where a territorial autonomy has been granted to an ethnic group. Established in 1994, as a compromise to secessionist intentions, Gagauzia is still a prominent illustration of central government's inadequate and neglected efforts to integrate Moldovan minorities. Although the settlement prevented a replication of Transnistria's scenario, the loose settlement of Gagauzia has persistently challenged the national and territorial integrity of Republic of Moldova (Goda, 2016, p. 209).

The adoption of the Law No. 344/1994 on the Special Legal Status of Gagauzia, institutionalized the compromise, entitling the region with the status of a territorial autonomous unit and own executive and legislative bodies: the Governor and the Executive Committee and respectively the Popular Assembly. Although it prevented a conflict, lessened

ethnic tensions and provided with a mechanism to protect the interests of the Gagauz minority, the law aimed to suspend the conflict and to move it to a post agreement phase (Protsyk, 2010, p. 235). The compromise was reached to the detriment of specific and clear provisions (Weller, 2008, p. 391) (Jävre, 2008, p. 311, 313), namely to ambiguous and extensive competences for the autonomy's executive and legislative authorities (Venice Commission, 2002). As such, "the lack of specific details regarding relations between the central authorities and the autonomous administration, especially in terms of competencies and finances, once again created a space for mutual mistrust, suspicion, and blame" (Goda, op.cit, 211).

Despite its initial mandate on the Transnistrian issue, the OSCE took a stance in 2000 in monitoring "the political situation in the autonomous region […and] the centre-region relations in the areas of tax revenues, budget allocation, public property ownership, and adjustment of legislation" (OSCE , 2000, p. 75). The efforts to consolidate the confidence building measures intensified after the signing of the Association Agreement in 2014. Both the policies of regional development and the requirement to strengthen the political dialogue spotlighted the strained relationship between Comrat and Chisinau. Subjected to policies of social cohesion and uniform development of the regions, Gagauzia is also expected to serve as a positive example for the settlement process in Transnistria.

In the debates over the centrifugal forces around Gagauzia, Chisinau is criticized for being "uninterested in the Gagauz issue, relying mainly on political control technologies over the Gagauz elites and ignoring the Gagauz society" (Ciurea and Berbeca 2015, 5). It is important to mention that the use of political leverage as well as administrative and financial centralization prevails in the entire domain of Moldovan public administration. While this does not excuse government's failed policies of integration, it reveals that including the ethnic factor, the conflict over Gagauzia is highly politicized (Botan, 2014), and stirred up by political leaders.

To depict the sources of tensions, the work will look at the legislation that regulates the autonomous arrangement to analyse the impediments that hinder the implementation of its special status. Moreover, it will focus on the performance of the mechanisms of cooperation in representing the interests of Gagauzia within the central representative bodies to depict the factors that lead to their underperformance.

The arguments of this work emerge from the results of the interviews led with both Gagauz and Moldovan civil servants and representatives of civil society; from an analysis of both the autonomy's and national legislation as well as from observance and the existent scholarly work on the issue of Gagauzia.

## Why is it worth keeping an eye on Gagauzia?

Largely populated by the Gagauz people, who are Turkic-speaking Orthodox Christians, the region comprises as well significant populations of Ukrainians, Bulgarians, Roma and other ethnic minorities. The autonomous unit is one of the poorest regions in Moldova, with the least dense transport infrastructure, yet the best supplied with water and gas conducts. Its administrative center is the city Comrat.

Like the other minorities in Moldova, Gagauz people have poor knowledge of Romanian and pursue their education mostly in Russian. Preferred among the young and urban population, Russian overtakes the Gagauz language, which existence is threatened since it is used mostly among the aged population, in the rural areas or only in the private life (Cantarji, 2016, p. 19). Given the scarce knowledge of Romanian language, Russian media is highly popular in the region and the main opinion-forming source (Nantoi, Cantarji, Botan, Gremalschi, & Sirkeli, 2016, p. 28), which not only induces a one-sided opinion among Gagauzia's population, but it also represents a threat to its linguistic identity.

Another factor that brings the region closer to Moscow is the anti-Western discourse inherited from the russification policies and reinforced afterwards in the politicized discourses around national identity. In the times of national awakening that followed perestroika, like Transnistrians, Gagauz people associated the intentions for cultural approach or unification to Romania (advocated by the National Front of Moldova) with a threat to their culture and with eventual oppression.

The relationship between Russia and Gagauzia is defined by close ties that become evident in times of either geopolitical unrest or internal power struggle. For instance, while banning the Moldavian wine in 2013, Russia made an exception for Gagauz wine factories (Prina, 2014, p. 10). Also, the results of the Gagauz referenda organized in 2014 in the eve of the signing of the Association Agreement revealed Gagauz residents' strong sympathy for Russia (Całus, 2014), and a negative approach to a foreign policy that would distance Moldova from the Russian radius. One referendum addressed the question: "*Do you agree with the choice of Moldova's foreign development course aimed at joining the Customs Union (Russia- Belarus-Kazakhstan)?*"; while the other one asked: "*Do you agree that the UTA Gagauzia adopts a law allowing Gagauz people to exercise their right to self-determination in case the Republic of Moldova changes its status of an independent state?*" The results of the referenda are unavailable on the website of the Gagauz Central Electoral Commission. Nevertheless, according to media reports, 98,47% agreed with Moldova developing its external policy towards an eventual membership of the Customs Union (Russia-Belarus-

Kazahstan), and 98.9% of the voters supported Gagauzia's right to declare independence should Moldova lose or surrender its own independence.

Inherently, Gagauzia's overwhelming support for the Customs Union was driven by "the traditionally pro-Russian attitude of the local population; a fear of the potential unification of Moldova and Romania (fuelled by local officials and compounded by statements released by Bucharest); a fear of a further drop in trade with Russia and restrictions on access to the all-important Russian labour market; and also poor knowledge about the European Union and the process of European integration" (Całus, 2014, p. 1).

The preservation of the close ties with Russia has also been the motto in the 2015 electoral campaign for the Governor seat. For instance, while declaring openness to cooperate with everyone who is willing to invest in the region, the current governor- Irina Vlah stated in her election manifesto that the Russian Federation is a guarantor of Moldovan statehood as well as Gagauz autonomy. It is also known that during her campaign she received financial support from Iurii Iakubov, a Russian oligarch with Gagauz roots (who also financed the referenda), and unanimous support for her candidacy from the Russian mass media (Chamber of Regions, 2015), (Piligrim-Demo, 2012 (sic!), p. 13) that intensely and unprecedentedly reported about the gubernatorial elections (Berbeca, 2015, p. 12).

While within Gagauzia the soviet legacy i.e. collective consciousness and memory, language, perception of the 'West' act as centripetal forces, same aspects turn into centrifugal forces in relation to the Centre. Although valid to a larger extent for all the minorities in Moldova, these aspects have a higher resonance in Gagauzia given the fusion of the leverage on enhanced powers that come with asymmetrical power-sharing and the sensitivity to geopolitical struggle. This fusion serves in fact the interests of the political cartels, that reinforce and perpetuate those centrifugal forces, mainly through mass media, discourses or simply inaction.

## The (conflicting) Legislative Framework

Other centrifugal forces that affect the functioning of the Gagauz autonomy emerge from the loopholes in the functioning of the public administration. For instance, the National Strategy on Decentralization points out issues that mirror as well the main sources of tensions in relation to Gagauzia. Among the most prominent are: the unclear, incomplete delimitation of competences between public administration authorities of different levels; to the excessive intervention of central public administration and local public administration (LPAs) of the second level in the process of financial resources management by LPAs of the first level and

to the budgetary dependence of each level of the public administration on the higher one. The following section will elaborate on the above states issues.

***Incomplete delimitation of competences***

The Law No. 344/ 1994 is the primary law that regulates the peculiarities of the autonomy of Gagauzia and mainly the competences of its public authorities and their relationship with the other local and central public authorities within the state. The law enlists only the domains where the representative bodies of the autonomy hold competences to perform. The most illustrative example is Art. 12 (2) which states the areas where the Popular Assembly can issue normative acts (local laws): "a. science, culture, education; b. housing and utilities, amenities, […] e. economy and ecology" etc. As such, Gagauz regional authorities adapted to the ambiguity of the Law No. 344/1994 by interpreting the "power in their own way, developing it for other local legislative acts", which led in fact to the extension of the regional autonomy (Cioaric, 2016, p. 33).

The issue of ambiguous power sharing is reflected as well in the inaccuracy of Gagauzia's status in the hierarchy of both the territorial and public administration and the unclear legislative hierarchy between the Law on Local Public Administration, the Law on Special Legal Status of Gagauzia and the Legal Code of Gagauzia adopted by the Popular Assembly, which "amounts to a constitution for the autonomous region" (Venice Commission, 1999).

***Unclear status in the territorial administrative organization***

The territorial-administrative organization is another ground for tension between the Centre and the autonomy. The main discontent of Gagauz authorities is the way that, when it comes to the transfer of financial means from the central national budget, Gagauzia is treated as one administrative unit (Ekspres-Kanon, 2016), although it comprises 3 raions from their point of view. In the annex No. 4 of the national law No. 764/2001 on Administrative-Territorial Organization, Gagauzia is presented as one territorial unit which comprises 3 cities. Yet, the regional law of the autonomous unit uses the same wording as in Art. 10 of the Law No. 764/2001 when defining 'dolay (raions)', and lists the three cities as dolays. Some officials from the central administrative bodies think that Gagauz elites insist on having recognized 3 raions for financial interests, since more territorial divisions will mean more money transferred from the central budget and more personnel.

### *Unclear hierarchy of institutions*

Within the national system of public administration, the Executive Committee and the Popular Assembly are hierarchically equal to other second level LPA authorities. Yet, according to the Gagauzia's Legal Code, within the autonomy the same bodies stand as supreme representative bodies in relation to both the first and the second level LPA authorities, that have been elected following national elections. Partly stated in the Law No. 344/1994 and expanded in the Legal Code of Gagauzia the competences of the Popular Assembly, of the Executive Committee and of the Governor overlap as well with the competences of the national representative bodies and contradict the provisions regulating their functioning. For instance, Art.51 of the Legal Code of Gagauzia sets out the powers of the Popular Assembly, among which the right to "revoke in whole or in part, decisions and orders of the Executive Committee and of local authorities if they conflict with the legal code and the laws of Gagauzia"(§9) which conflicts with the jurisdiction of the courts to rule on the legality of a particular decision. Another competence allows the Popular Assembly to "determine the functioning of local authorities" (§7) and "dismissal of persons holding positions of responsibility in authorities of public administration of Gagauzia"(§8). Also, the status granted to the Governor in Art.14(1) of the Law 344/1994 and Art. 58 of the Legal Code which stipulate that "All bodies of public authority of Gagauzia submit to him/her (the Governor)", although only officials of the Executive Committee can be subjected to the Governor's submission. Or the Executive Committee's right to "cancel the decision of any local government body if it contradicts the current legislation and interests of society", provided in the Art. 78(2) of the Legal Code of Gagauzia, which breaches the principle of divisions of powers and of local autonomy. As such, the overlapping breaches the principle of decisional autonomy of public authorities stated in both the European Charter of Local Self-Government and in the national legislation regulating the public administration.

### *Unclear legislative hierarchy*

This reverberates on the naming of the decisions issues by the Popular Assembly given the interchangeable use of the terms 'normative acts' and 'local laws' within the legal system of Moldova. This ambivalence reveals the conflicting views about the implementation of Gagauzia's special status. The Gagauz insist on the recognition of 'local laws' as a law type (Berbeca, 2016, p. 46), while the central government argues that there is no such category of law (i.e. local laws) in the national legal system. Moreover, the Parliament is the only representative body entitled with legislative powers, which makes any other legal acts issued by the other bodies of public administration - normative acts, and not laws.

It is important to emphasize that the issue is also rooted in the general principles ruling the hierarchy of legal norms. Namely, in case of conflict between legislative acts of equal juridical force, subsequent normative acts hold priority. This lead in the absence of coordination to a multitude of (national) legislative acts adopted after the Law No. 344/1994 being detrimental to the autonomous region, as they ignored the legislative competences of the Popular Assembly (Cuijuclu and Sircheli 2015). Per contra, it is worthwhile to consider the acts issued by the Popular Assembly, such as the 'law on legal acts' or 'education code'

which not only duplicate the national laws, but also assign powers that bring the autonomy close to a 'state in state' structure.

In the absence of a strongly consolidated status as well as a clear legislative and institutional hierarchy, the arrangement on Gagauzia seems to be a 'back and forth' issue. In other words, both sides follow contrasting interests and views which explains their firm stance and the little receptivity for compromise. In this light, the dialogue between the center and the autonomy is defined by swaying arguments that inhibit any effort to settle the dispute.

### Budgetary dependence on the higher level of the public administration

Despite several provisions on taxes and duties, which allow for higher autonomy over the sources of its budget, Gagauzia remains highly dependent on the transfers from the central national budget. For instance, Gagauzia's budget for 2016 consisted in 62,47 % of the transfers from the national central budget (special destination 61,60% and social assistance 0,87%) and 37,5% of proper earnings (Ekspres-Kanon, 2016).

One of the major claims of the Gagauz representatives towards the Center is to receive larger financial aids for capital investments and reparations. They argue that too few infrastructure projects have been developed or successfully completed, and that too little of the foreign grants were distributed to Gagauzia. As Protsyk describes it, the absence of formalized procedures for making decisions about transfers, "increases the central government's leverage over local governments across the country as well as over the Gagauz leadership" (2010, p. 247). Nevertheless, Berbeca insists that the problem is not entirely the fault of central authorities. He argues that the reason Gagauzia had so little funding is explained by the lack of already established projects, or in general – lack of project proposals that would comply to the eligibility criteria (Berbeca, 2013, p. 11). Also the poor knowledge of Romanian affects the capacity of the autonomous unit to absorb the funds from the national central budget, given the projects' applications are required to be written in Romanian.

Tensions over the distribution of financial resources are not related only to the central authorities. They also emerge within the autonomous unit and concern mainly the access to the reserve fund, which is mainly intended for acts of God and humanitarian help, and is equally divided between the Popular Assembly and the Executive Committee.

90% of Popular Assembly's reserve fund is assigned to deputies after being divided proportionally on the population among the 35 electoral districts. This enables each deputy to decide over the management of the financial resources within the electoral district that he/she represents. Doubts arouse both about the degree of transparency of expenditures and the legitimacy of the Popular Assembly's competence, as a deliberative institution, to manage

budgetary funds (Sirkeli, 2016). Criticism was levelled against the money from the reserve fund being used in the eve of electoral campaigns for publicity purposes. Often deputies will direct the money into the reconstruction of the infrastructure (Piligrim-Demo, 2016, p. 4-5) and ascribe the merits and costs to their name.

The other share of the reserve fund allotted to the Executive Committee is administrated by the Governor. The absence of clear provisions on the distribution of the financial sources leads to tensions between the mayors and the Executive Committee. For instance, the mayor of the city Vulcanesti accuses the Executive Committee of favouritism and centralization of decision-making, arguing instead that the mayors know the localities' issues the best and are the one competent in deciding where the money should be assigned to.

## Underperforming Mechanisms of Cooperation

The dialogue between Gagauzia and the centre is institutionalized though the following mechanisms of cooperation: Popular Assembly's right of legislative initiative in the National Parliament; the institution of the Governor as a representative of the Autonomy in the Government; the appointment of the heads of Executive Committee branch divisions as members of the Moldovan Government within the ministries' boards and departments. Yet, a series of shortcomings in their activity reveal the absence of a contractual relationship as well as the failure to lead a constructive dialogue and to promote Gagauz minority's interests.

### *The Popular Assembly*

The Popular Assembly of Gagauzia is both the deliberative body of the autonomy and a mechanism meant to represent Gagauz interests in the national Legislative. Like the Government, the Popular Assembly has the right of initiative, while the Chair of the Assembly is responsible for introducing and advocating the draft laws during the parliamentary sessions. The Assembly has as well the right to participate in the implementation of national foreign and domestic policy relevant to the interests of the autonomous unit.

Scholars point out to the Popular Assembly's lack of professionalism and failure to identify the current issues of the autonomous unit and to adopt a comprehensive approach to solve them; to use appropriate terminology when drafting the bills and to promote draft laws into being adopted (Cuijuclu and Sircheli 2015, 16). Moreover, the Popular Assembly misses a consecutive order in legislative procedures, including the monitoring expertise of draft laws, which leads to inefficiency in realizing the right of legislative initiative. This explains why

most of the draft laws submitted in the Parliament have been cancelled on technical grounds (Cuijuclu and Sirkeli 2015).

Most of the drafts submitted by the Popular Assembly referred either to the electoral system, the public administration or financial issues of Gagauzia (Parlamentul Republicii Moldova, 2015); (Cuijuclu and Sircheli 2015, 22-32). While claiming respect of equity and equality principles, some legislative initiatives were in fact tendentious and aimed to increase either political or economic leverage (Cuijuclu and Sircheli, op.cit., 16). The initiative no.277 from the 13 June 2014 required an amendment in the national Law No. 847/1996 on Budgetary System and Budgetary Process, namely that not less than 5% of the public money assigned for local capital investments to be allotted to ATU Gagauzia, intending as such to obtain preferential treatment for the autonomy, compared to other territorial divisions. And the initiatives no. 266 and no. 228 from 13 June 2014 calling for amendments of national laws for harmonizing the national legislation with the regulations of the Law on Special Legal Status of Gagauzia. The requests aimed at transferring the "institutions of Police, Prosecutor and other [state] bodies" under the absolute control of the autonomy, which conflict with the national legal system and would foster practices of patronage.

***The Executive Committee***

On the proposal of the Governor, Executive Committee's heads of branch divisions are appointed as members of the Moldovan Government within the boards of ministries and departments. Not only are autonomy issues rarely discussed, but the lack of any reports on the Ministries boards' activities and meetings makes it "difficult to assess the performance of the Executive Committee within the Ministries' boards" (Cuijuclu, 2015, p. 16). There is no standing practice in organizing regular meetings, since the frequency of the Ministries' boards meetings varies from monthly basis to more than two years' lapse (ibid). Also, both the poorly trained personnel and the lack of documents regulating the activity of the employees (professional development plans, duty regulations) affect the performance of the Executive Committee (Levitskaia, 2016, p. 68).

A former member of a Ministry board considers that, while within the boards the atmosphere is usually propitious for dialogue, there are issues of cooperation between the offices of the Government and of the Executive Committee. The ambiguities in laws and power devolvement; and simply the civil servant's poor knowledge about autonomy's issues hinders the interaction between the authorities of public administration.

Since ministries' boards meetings are conducted in Romanian, language is another impediment for the Gagauz heads of branch divisions to be actively involved in the discussions of the boards. Given their scarce knowledge of state's official language, the heads

of branch divisions often prefer to stay quiet or even to not attend the meetings, thinking of being unable to have a say in the outcome of the discussions.

Lacking a consolidated and transparent procedure, the dialogue between the government and the regional executive bodies is highly vulnerable to tensions. For instance, following the issuance of the Gagauz Education Code, tensions increased to the point where the Gagauz side stated that the head of the Education Division has not been invited to the board meetings of the Ministry of Education (Guvernul Republicii Moldova, 2016). On the other side, the Ministry of Education argues that it has sent an invitation. While hard to determine the truth, it is obvious that such an atmosphere cannot lead to a constructive dialogue.

***The Governor***

The Governor is the head of the Executive Committee, holds an *ex-officio* mandate in the national government and enjoys the status of a minister. Despite Governor's competence to address the interests of Gagauzia during the government's meetings and parliament's sessions, this mechanism of cooperation is inefficiently used (Cuijuclu, 2015, p. 9). The main hindrances in successfully implementing the mechanism are: the limited human resources of autonomy's executive authorities needed to facilitate the process and an effective participation; and Governor's failure to elaborate both a clear vision of Gagauzia's main interests and a strategy to promote them in the framework of cooperation with the central government (ibid.). Also, during the analyzed period (10.2014-11.2016), the Governor neither introduced any issues on the meeting agenda of the Government, nor questioned issues regarding the protection of minority rights (Guvernul Republicii Moldova, 2016).

## The Working Group – a hope?

With the signing of the Association Agreement, like Transnistria, Gagauzia became an important aspect of EU's efforts to strengthen the sovereignty and territorial integrity of the Republic of Moldova and to contribute to the reintegration of the country. Considering EU's priorities in Moldova, improving the functioning of Gagauzia's autonomy stands high on the agenda of the EU-Moldova Human Rights dialogue, and is part of the confidence building process and the creation of an inclusive society.

To enhance the dialogue between the central and regional authorities, a working group was created in 2015. The working group consists of MPs from the national Parliament and members of the Popular Assembly. Compared to the pervious joint commissions that ceased their activity after the elections and lacked a strategy, this is a permanent working group that

aims to define the competences of the autonomy within the constitutional norms of the Republic of Moldova (PRM; GHT, 2016).

The Group seems to be promising and is praised for having a systematic and pragmatic approach. For the beginning, it addressed first the socio-economic issues and according to the activity report for the first year of activity (2015-2016), the Group took decisions upon the following aspects:

- the use of international loans and means of the road fund in relation with UTA Gagauzia;
- distribution of money of the National Ecologic Fund for the last five years;
- setting up the Gagauz Agency for Regional Development, which enables the autonomy with direct access to capital investment, and is supposed to remove the tensions with the Centre and the suspicions for favoritism;
- working out the Action Plan for 2016-2019 on the improvement of the socio-economic situation in the autonomy;
-the adoption of three draft laws on consolidating and defining the special legal status of the autonomy;

Moreover, at the request of the working group, the National Justice Institute will provide specialized training to the aspiring judges and prosecutors who are willing to work in Gagauzia. At another request, the civil servants working in the Popular Assembly can pursue a traineeship with the Secretariat of the Moldovan Parliament.

Although it has created a more positive political environment, the working group requires permanent experts to assist with analysis and evaluate the feasibility of the decisions taken (Cuijuclu 2015, 14). Also, the incongruity in the appointment of deputies, leads to "new changes in the composition of the Commission, which may affect the decision-making process and the continuity of its functioning" (ibid), since the members of the commission (group) are appointed by the Parliament for the period of convocation of the Moldovan legislature, which does not coincide with the period of convocation of the Popular Assembly.

Compared to previous joint commissions, the recent working group provides evidence of some attempts to improve the dialogue between the two centers of powers and to harmonize the legislation regulating the special legal status of ATU Gagauzia. Yet, given the weak governance, the Group might risk to be displayed as an illusionary model of minority rights protection to attract the appreciation and support of international actors. Therefore, there is the need for a thorough analysis of the group effectiveness, so that another scenario of misuse of the international budget support could be avoided.

## Conclusion

The ATU Gagauzia is an intriguing case when it comes to observing the functioning of territorial autonomies, the more so in the context of democracies in transition and geopolitical struggles. Despite being a successful case of inter-ethnic conflict mediation, the autonomy of Gagauzia is a modest example of harmonious asymmetric power-sharing. Three main factors – socio-economic, politic and geo-politic fuel the constant discord between Comrat and Chisinau. Although formally the arguments concern the implementation of the special legal status of the autonomy, in practice, the divergent views on distribution of resources generate most of the tensions.

Given the legal uncertainty present in the entire national legal system, and the conflicting provisions regulating the special legal status of Gagauzia, – the centre-autonomy relationship is plentiful with contradictory arguments that hinder the efforts to reach a compromise. The formal debate revolves around arguments related to irregularities in the laws regulating the special legal status of Gagauzia. Yet, in practice the dispute is caused by the interest of each side to keep or obtain more power of decision. The same holds for the distribution of political and economic resources.

Meant to support the dialogue between the central and regional authorities, the cooperation mechanisms clearly underperform, and are rather used as channels to increase leverage in the national institutions or over economic matters. Moreover, the lack of initiative and skillful staff could be understood as a general disinterest in improving the status-quo. As such, the legislative inconsistences and ambiguous power-devolvement favors in fact the private interests of both the national and regional shareholders.

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# ESTABLISHING A NON – PARTISAN JUDICIARY: MACEDONIA'S STANDING CHALLENGE

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## Abstract:

The wire-tapping scandal that stroke Macedonia's political establishment in early 2015 and consequently produced one of the deepest political crises since independence, has revealed the tremendous level of political interference, influence and control over the country's judiciary system. Hence, implementing a so-called judicial 'purge' to ensure the establishment and functioning of a credible, non-partisan and professional judiciary will be Macedonia's greatest challenge in the coming period.

This paper will argue for an emergent need to review or correct the existing mechanisms for the nomination and election of judges and prosecutors. By examining the political influence and control over the two bodies competent for their election and dismissal- the Judicial Council of the Republic of Macedonia and the Council of Public Prosecutors of the Republic of Macedonia, it will call for the complete reformatting of their composition, election procedure and mandate. The political influence on the judiciary has become the inherent side-effect of democratic transition in South Eastern Europe. Paradoxically, the judiciary should have been the guarantor for independent functioning of institutions; however in most post-communist countries the flaws in the judiciary have only revealed the intrinsic dependence of political classes from an obedient judicial system. A comparative analysis with countries in the region will try to bring up some of the good practices already established or being tested for their functionality. Serbia, for instance, has publicly invited the Organization for Security and Cooperation in Europe (OSCE), to organize the election of judges, while Albania is struggling to implement a 'vetting reform', which provides for a thorough examination of flaws of judges and prosecutors prior to their nomination and appointment.

In the final part, this paper will analyze the idea for a general re-election of judges and prosecutors, as promoted by the leader of Macedonia's opposition, currently holding a political majority in Parliament. Despite the urgency to carry out a deep rooted reform in the judiciary, it is of great importance for the process not to be politically disputed and hence delegitimized. Another rather sensitive aspect of this process is the negative reaction of the existing cadres well established in the system. It is therefore of crucial importance that the

mechanisms established to reform the judiciary be genuinely recognized and acknowledged as credible, non-partisan, professional and for the entire process to be overseen preferably by an international organization, such as the OSCE.

**Keywords:** *judicial reforms, political interference on judiciary and prosecution, captured political systems, vetting*

## INTRODUCTION

Macedonia's wire-tapping scandal broke out in January 2015. The leader of the Macedonian opposition at the time released a series of wiretapped conversations that revealed grave abuse of power by the Prime Minister and high ranking government officials. Moreover, the tapes revealed that, for a period of over ten years, the country's Secret Service had been spying on opposition politicians, judges, journalists, and civil society activists. The contents of the conversations showed that Macedonia, a country candidate to join the European Union, had actually reconceptualized itself as a captured state! As is the case in captured states, the government did not respond to the allegations made. No government official or representative of the Interior Ministry resigned. The government did not conduct a transparent and credible investigation into the scandal, and nor did any official face charges and undergo a trial. On the contrary, the government chose to present the scandal as an internationally sponsored plot to topple down the government, executed by the leader of the opposition. Almost three years later, no question of responsibility was raised, while every attempt to address the question in an institutional manner[20] has been confronted to endless political and bureaucratic barriers and obstructions.

The events related to the spying scandal and particularly the reluctance by government authorities to take action and put an end to it raised a number of issues that demand a close and insightful attention. The most basic of those is clearly, the notion of state capture and what it means for a young democracy struggling to consolidate strong independent and accountable institutions. For many years now, the blurred line of division between the government and the party is regularly subject to attention in the European Commission's

[20] The first attempt for an institutional response to the scandal was the establishment of the Office of the Special Public Prosecutor. In September 2015, the Parliament of Macedonia established the Special Public Prosecutor (SPP), mandated to process allegations of abuse of powers and other wrongdoings related to or deriving from the contents of illegal wiretapping. Although the establishment of SPP was adopted by consensus in the Parliament as it was the result of intensive political negotiations between the government and the opposition and facilitated by the US and EU Ambassadors in Macedonia, its mandate has been and remains subject to breach. Its operations are regularly discarded by the courts while institutions have only begun to show some basic willingness to cooperate following the government change and transition of power.

Country progress reports. The second big issue that emerged particularly in the aftermath of the wiretapping scandal and particularly following the announcement of Presidential pardons[21], is the institutionalized culture of impunity which is still threatening to become a standard in the Macedonian society. The pardons were marred by so much scrutiny and produced enormous controversy. The first and most basic question they produced was, obviously, 'how did the President know whom to pardon?'; or '*quo vadis* the universal principle of presumption of innocence and the right to a fair trial for every citizen?'. The third and no less important issue revealed by the tapes referred to the dependence of the judiciary on political control and dictate. In fact, the reluctant behavior and lack of response as demonstrated by the Macedonian institutions only brought to the surface the high degree of political obedience of what are constitutionally coined independent and autonomous institutions in the country. Ultimately, these questions put to the test the capacity and willingness of Macedonia's institutions to reform and to begin to implement the standards of rule of law in the country.

This article will shed light to some of the weaknesses of Macedonia's judiciary system witnessed during what was rightfully branded as the country's gravest political crisis after the armed conflict in 2001. It will argue that a politically controlled judiciary represents an infringement to the basic notions of separation of powers, universal rule of law and institutional accountability. When the judiciary is captured, a society is left with very little, if any hope, that wrongdoings and wrongdoers would ever face justice, the more so when the alleged perpetrators are government officials, including ministers and a Prime Minister.

## A BRIEF OVERVIEW OF THE MACEDONMIAN JUDICIARY REFORM PROCESS

The development of Macedonia's judiciary system went hand in hand with the conception of the new State, which emerged as a result of the breakup of former Yugoslavia. Naturally, this was going to be a painful and complex process. Setting up independent institutions in an environment that for decades had been living in a monolithic regime where no one dares think or speak of independent institutions represented indeed a challenge of its own kind. Hence, the process was marred with much controversy and utter distrust.

[21] In April 2016, the President of Macedonia announced a sudden and abrupt decision to pardon all politicians facing possible investigation and indictment by the Office of the Special Public Prosecutor. This decision appalled the Macedonian public and shocked the representatives of the international community who condemned, asked and pushed for its withdrawal, as it was seen as a first major demonstration of an instituted culture of impunity. The pardoning triggered massive unrest and citizens took to the streets in demonstration that lasted for almost six months and were branded as the "Colorful Revolution"

The new Constitution and the basic legislation on the judiciary system were adopted between 1991 and 1994. The initial solutions provided for the election of judges in Parliament. But the opposition had boycotted the session and refused to vote in what would later be termed as a general (re)-election of judges. Instead, the opposition used this opportunity to its own ends and it served as a strong enough argument to question and dispute the legitimacy of the elected judges.

As the country made progress on its reform path in efforts to join the European Union, the question of an independent and professional judiciary gained political weight yet again. Between 2004 and 2007, the judiciary underwent a second, more substantial reform. On 7 December 2005, the Parliament of Macedonia adopted 11 constitutional amendments (Am. XX, XI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX), which created a more efficient and credible institutional framework, particularly on the election and discharge of judges and public prosecutors, the mandate and powers of the Minister of Justice, the mandate and powers of the State Judiciary Council, and the powers of the President in appointing members of the Council. These reforms laid the foundations for an efficient and functional judiciary system, thus significantly advancing the legal framework and putting it in line and accordance with numerous international standards and recommendations. Yet, genuine independence of the judiciary lagged and left much to hope for. The growing perception is that implementation and realization of these standards and laws is the weak side of Macedonia's institutions. But implementation and realization are in most cases dependent of the political will of a country's ruling elites. This close interconnection and dependency is what the wiretapping revealed to Macedonia's citizens and to the world.

## A NON-PARTISAN JUDICIARY: AN ILLUSIONARY IDEA OR A CHANCE FOR GENUINE INSTITUTIONAL REFORM?

The political control and influence over the judiciary has proven to be almost an inherent side-effect of democratic transition processes in post-communist countries. The position of the courts as the third power with executive authorities had always been attractive to authoritarian regimes. No better way to cover up for a wrongdoing than to have an obedient judge reaches a verdict over it! Hence, securing an obedient and loyal judiciary meant the government's abuses would neither be prosecuted, nor tried for. Consequently, while the judiciary should have been the guarantor of independent institutions, it became an executor of the will of political stake-holders. Macedonia was no exception.

The scandal not only shook Macedonia's public, it also shook its foundations as a democratic state with an established and functioning system of the rule of law. The conversations which revealed judges receiving instructions and political orders by senior government officials proved a very high degree of political interference in the judiciary. Senior officials in the judiciary such as the State Public Prosecutor were no exception, to the contrary. Members of Parliament were heard asking the Public Prosecutor to proceed or not proceed with action in certain cases of interest for the ruling party. These grave abuses ruined the basic institutional stability and discredited the sense of justice and rule of law as universal and full-fledged human rights and social standards in the country.

The big question emerging from this situation is undoubtedly, how to correct the system? What is the best response? Should there be new mechanisms created, or is it sufficient to correct and improve the existing ones? As this article is being written, the Government of Macedonia has created a consultative body comprised of experts, academics, sitting and retired judges, to work on the judiciary reform process. This body has come up with a Draft Strategy for the Reform of the Judiciary System with an Action Plan 2017-2021, and this strategy will briefly be referred to in this article.

## THE EXISTING INSTITUTIONAL MECHANISMS FOR THE ELECTION OF JUDGES AND PROSECUTORS

The organization of the judiciary system of Macedonia is regulated in Chapter III of the Constitution – State Regulation of Republic of Macedonia. The Constitution, the basic legal act of the country, provides that, "the judiciary powers are executed by the courts. The courts are sovereign and independent. Courts try based on the Constitution and the laws and the international treaties ratified in accordance with the Constitution."[22] The following articles 99 through 113 all regulate the basic judiciary institutions, beginning with the Judiciary Council, the Council of Public Prosecutors, the Supreme and the Constitutional Court of Macedonia. As emphasized earlier in the article, these provisions underwent major amendments in 2005, with the purpose of creating a more professional, transparent, efficient and more importantly, politically independent judiciary.

[22] Art.98, Constitution of Macedonia, available at: http://sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

***THE STATE JUDICIARY COUNCIL***

The State Judiciary Council is the body mandated to nominate and discharge judges. Its mandate and powers were regulated in Article 104 of the Constitution of Macedonia, which read that, "The Republican judiciary council is composed of seven members. The Parliament elects the members of the Council."[23] In 2005, this provision was amendment by Amendment XXVIII, which expanded the role and functions of the Council, and created a framework for it to be freer of political interference. While it did not completely strip off the Parliament and the President from the process of electing members of the Council, the Amendment read: "The Judiciary Council of the Republic of Macedonia is a sovereign and independent body of the judiciary. The Council secures and guarantees the independence and sovereignty of the judiciary power. The Council is composed of 15 members. Members by function of the Council are the President of the Supreme Court of the Republic of Macedonia and the Minister of Justice…."[24] According to this constitutional amendment, eight members of the Council are elected by the judges, three members are elected by the Parliament, and two remaining members are nominees of the President to be voted by the Parliament. This new solution seemed to be more inclusive and more credible for it gave the judges too the opportunity to be part of the process, and limited the powers of the Parliament to only three members in the Council. Later on, this solution proved to be non-immune to political influence either, for the fact that political exponents also sat on the Council, with a voting right. The presence of the Minister of Justice was by default perceived as a political voice in the decisions of the council, and the same was true of the President of the Supreme Court too. The further mandate, election and discharge of judges is regulated with the Law on the Judiciary Council of the Republic of Macedonia adopted in 2006 and further amended mainly in relation to the membership and right to vote of the Minister of Justice and the President of the Supreme Court. The powers of the Judiciary council in the election and discharge of judges and jury are prescribed in Amendment XXIX.

***THE COUNCIL OF PUBLIC PROSECUTORS***

The Council of Public Prosecutors is of relevance to this article for it regulates the process of election and discharge of prosecutors in the Office of the Public Prosecution of Macedonia. Similar to the Judiciary Council, the Council of Prosecutors is also a constitutional body

[23] Art.104, Constitution of Macedonia, available at: http://sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

[24] Art. 104, as amended by Amendment XXVIII, available at: http://sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

whose further mandate, duties and powers are regulated with the Law on the Council of Public Prosecutors adopted in 2007 and further amended in 2011. The constitutional provision (Amendment XXX) provides that the Law on the Council of Public Prosecutors is adopted by a two-thirds majority in Parliament, in an effort to make it a consensual and inclusive peace of systemic legislation. This amendment further provides that the Council of Prosecutors is mandated to nominate and discharge prosecutors in a procedure further regulated by law. Perhaps the most important aspect of this amendment which is of relevance for this article is the stipulation that "The function of the Public Prosecutor of the Republic of Macedonia and public prosecutor is incompatible to membership in a political party or with the exercise of other public occupations defined by law. Political organization or action within the Public Prosecution is forbidden."[25]

### *MINISTRY OF JUSTICE*

As described above, the Minister of Justice has a seat in the Judiciary Council and during the first years of the functioning of this body, the Minister had an equal right to vote with the remaining council members. However, his presence was marred with great political controversies and criticism, and such an environment imposed the need to adopt a further reform on the composition of the Judiciary council. Being a constitutionally conceived body, amending its composition meant amending the actual Constitution. As the parliamentary majority could not secure the required two-thirds majority for such an amendment, a legally controversial and dubious solution was found. This solution foresaw an amendment to the Law on the Judiciary Council, through which the Minister would still be formally sitting in the Council, but he was stripped off his right to vote. In fact, this solution represents a breach of the Constitution, but demonstrates a good political will to secure a judiciary council free of political interference, and as such, it seems to have been acknowledged and recognized by all stakeholders.[26]

## INSTITUTIONAL EFFORST TO SECURE A NON-PARTISAN JUDICIARY:

### *THE SPECIAL PUBLIC PROSECUTOR'S OFFICE- SPP*

The election of the Public Prosecutor in charge of the Office of the Public Prosecutor (hereinafter SPP) is regulated in the Law on the Special Public Prosecutor (hereinafter LSPP). Upon proposal by the Committee on elections and nominations in the Parliament of

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[25] Amendment XXX to the Constitution of Macedonia, available at: http://sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

[26] For further, see amendments to the Law on the Judiciary Council of the Republic of Macedonia: Official Gazete of Macedonia no. 60/2006, 69/2006, 150/2010, 100/2011, 20/2015, 61/2015

Macedonia, and following a previous consent by the four political parties with the largest number of members in the Parliament of Macedonia, the Council,[27] following a proposal by the Parliament of the Republic of Macedonia, without a public call, elects the Public Prosecutor, with a four-year mandate, and a right to re-election.[28] In order to be elected, the Special Prosecutor must be voted by a required qualified majority of two-thirds of the total number of members of Parliament.[29] Article 3 of the Law, which defines a rather unique procedure for the election of the Special Prosecutor, shows that political consensus is a decisive precondition to set up this very important judicial institution.

The new Law on the establishment of the Special Prosecutor and the election of the Special Prosecutor were adopted during the same plenary session of the Parliament. Critics have used the election procedure to question the legitimacy as well as the constitutionality of this institution for several reasons. Firstly, the Special Prosecutor is not a constitutional institution for it does not derive from any article in the Constitution of Macedonia. It emerged as a result of an intensive period of political negotiations aimed at overcoming a deep political crisis produced by the massive wiretapping scandal revealed by the opposition leader. In this sense, one could argue that the mandate of the Special Prosecutor is strictly limited to investigate the wrongdoings of government officials and therefore, the Law limits its jurisdiction as well as the time scope for its activities. Thus, "unauthorized wiretapping of communications" is defined as unauthorized wiretapping conducted between the period of 2008 and 2015, including but not restricted to audio recordings and transcripts submitted to the Prosecutor before June 15 2015,[30] while the mandate of the Special Prosecutor ends upon completion of all investigations and prosecutions which are under its competence.[31]

Secondly, both the Constitution and the Law on the Public Prosecutor define the procedure regarding the candidature, nomination, and election of the Public Prosecutor and his/her deputies. Namely, the election and the revoking of public prosecutors is a competence of the Council of Public Prosecutors, and it is prescribed in more detail in Article 9 of the Law on the Council of Public Prosecutors of Macedonia. The Special Prosecutor clearly does not follow that procedure. The first big dilemma raised regards the position of the Special Prosecutor in relation to the Public Prosecutor: is there a principle of subordination or equality between the two? In fact, the obstructions that the Special Prosecutor has been facing in performing her duties seem to be related precisely to this controversy-who reports to whom

[27] The Council' refers to the Council of Public Prosecutors, the body in charge of nominating and dismissing the prosecutors on the national level
[28] LSPP, Article 3, paragraph 1.
[29] LSPP, Article 3, paragraph 2.
[30] LSPP, Article 2, paragraph 1.
[31] LSPP, Article 20.

has been a major point of contention as the SP prepared the six-month report and was expected to present it to the public. The Law, however is clear as it stipulates that "The Public Prosecutor will report for his/her work before the Parliament of the Republic of Macedonia as well as before the Council of Public Prosecutors",[32] whereas Article 6 regulates the principle of Autonomy of the Special Public Prosecutor, thus providing that: "The Special Prosecutor has complete autonomy in investigating and prosecuting criminal acts related to or that derive from the contents of the unauthorized wiretapping of communications. No public prosecutor from the Public Prosecution of the Republic of Macedonia can influence his work, or ask reports related to cases from the Public Prosecutor or the public prosecutors within the Public Prosecution." Moreover, paragraph (5) 0f Article 6 defines the exclusive competence of the Special Prosecutor as it stipulates that "The Public Prosecutor of the Republic of Macedonia or any other public prosecutor cannot undertake investigations or prosecute cases which are in the jurisdiction of the Special Prosecutor without his/her prior written consent".

As it was previously mentioned, the SPP has an exclusive jurisdiction to investigate and prosecute criminal offences related to and that derive from the contents of the illegal recording of communications.[33] These illegal recordings have a time restriction stretching only between 2008 and 2015,[34] something that puts a limitation *ratione temporis* of the jurisdiction of the SPP.

The LSPP does not enumerate which specific criminal offences fall within the jurisdiction of the SPP. For this reason, the LSPP gives a great power to the SPP to decide on its own jurisdiction. Namely, the SPP will request any case which is in jurisdiction of other public prosecution offices, so the SPP can decide whether the case falls within the jurisdiction of the SPP (the so-called "kompetenz-kompetenz". The public prosecutions have an obligation to delegate these cases to the SPP in a period of 8 days[35] and the SPP will decide in a period of 8 days whether the case falls within its jurisdiction. The SPP will also take over the cases that fall within its jurisdiction, no matter in what phase of the proceedings are they.[36]

The SPP has full autonomy over its work. No other public prosecutor can influence the work of the SPP, nor can they ask reports or report on a specific case.[37] Even more, all institutions that have jurisdiction to enforce the laws including the Public Prosecution of the Republic of Macedonia have an express obligation to provide assistance, upon request of the SPP.[38]

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[32] LSPP, Article 7, paragraph 1.
[33] LSPP, Article 5, paragraph 1.
[34] LSPP, Article 2, paragraph 1.
[35] LSPP, Article 11, paragraph 2.
[36] LSPP, Article 11, paragraph 1.
[37] LSPP, Article 6, paragraph 2.
[38] LSPP, Article 9, paragraph 9.

## THE NATIONAL STRATEGY FOR JUDICIARY REFORM 2017-2021

The National Strategy for Judiciary Reform with an Action Plan 2017-2021 was drafted as a result of major drawbacks detected in the work of Macedonia's judiciary system so far. It came as a consequence of the grave interference of the executive power in the position of systemic independence of the judiciary. The wiretapping scandal revealed for the first time the close ties and dependence of the judiciary on the political party. As a consequence, Macedonia was termed 'captured state'. A shaken judiciary rightfully put to the test Macedonia's democratic capacities in general and seriously questioned its genuine commitment to the rule of law.[39]

The strategy provides for an all-out and extensive reform of the judiciary, beginning with the constitutionally guaranteed institutions and ending with every aspect of the society that actually deals with the positive law. By conducting a thorough reform that also includes major interventions in the legislation already in place, the Strategy aims to reach the following strategic objectives: Impartiality and independence; quality; responsibility and accountability; efficiency; transparency; equal access to justice; free legal aid, and so forth. The Strategy calls for urgent improvement of the current standings in the judiciary, and calls for a raise in payments, establishment of functioning transparent mechanisms to hold the judges and prosecutors accountable, and the like.

The actual implementation of this Strategy is expected to the followed by yet another public controversy and disapproval, for the simple fact that the opposition will attempt to gain political points from this process. The current Prime Minister had promised during the election campaign to conduct a general re-election of judges and public prosecutors. However, he quickly withdrew the idea, for the simple fact that it could produce dissatisfaction and potential unrest. The Strategy aims to offer a more trustworthy, more inclusive and less hostile process of reforming the judiciary and it should produce positive results in due time.

## SOME GOOD REGIONAL PRACTICES

In the fall of 2015, Serbia organized the election of judges on a nation-wide level. The authorities invited the Organization for Security and Cooperation in Europe to oversee the process of election, as the judges voted in ballot-boxes as if political elections were organized.

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[39] Draft Strategy of the Reform of the Judiciary System with an Action Plan 2017-2021; Source: Ministry of Justice of the Republic of Macedonia

This is indeed one good example of organizing a general election of judges that would be carried out in a public, transparent, unbiased and a process free of political control.

On the other hand, Albania is still in the process of implementing the so-called 'vetting' process for judges, prosecutors and politicians. This process foresees for an institutional clearing of potential candidates to join office or the judiciary power. Clearly, Albania's challenge with organized crime and the political connections to the criminal world imposed 'vetting' as a no-alternative choice that must be embraced and supported by both the majority and the position on an equal footing. Currently, Albania has adopted the vetting legislation, but the process is still fragile because of the political interests that parties involved want to protect or to bargain for. The advantage in both examples, however, is the presence of the international community in the processes. In Albania, vetting was and remains the number-one priority for both the United States and the European Union, as the key strategic partner to this young democracy. Had it not been for their major contributions and political pressure, it is rather difficult to predict what the actual outcome of the vetting process would actually be. No doubt that the process of reforming Macedonia's judiciary will have to be supported, sponsored and closely overseen by Macedonia's strategic international partners, i.e., the United States and the European Union.

## CONCLUSION

The reform of the judiciary remains an ultimate priority for Macedonia. This will be the number one test to prove country's maturity and readiness to embrace international standards on rule of law and democracy. The high degree of distrust of citizens in the country's judiciary has created apathy of its own kind, a sense of insecurity and lack of institutional protection, for the fact that there is a dominant feeling that Macedonia has a missing justice system. A politically biased judiciary is no guarantee of secured foreign investment either. No foreign investment means less jobs and more poverty and despair among ordinary citizens of the country.

The current mode of composition, operation, mandate and powers of both the Judiciary Council and the Council of Prosecutors must be reviewed and redefined. The practice so far speaks of both councils failing to be immune from political orders. Therefore, a new institutional mechanism must be enforced in order to correct this growing perception among the public and stakeholders.

The reform of the judiciary must remain the most serious task of the new government in order to set up and put in function such institutional mechanisms that would first and foremost restore the citizens' confidence in the judiciary, but also ensure that there is a third power in

the system that serves as a corrector of government's potential wrongdoings. Holding a government accountable is yet another overwhelming quality of a functioning democracy.

# THE LACK OF JUDICIAL INDEPENDENCE AND ITS REFLECTION ON THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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## ABSTRACT

Independence and impartiality should be recognizable and important categories connected to the judiciary in order to establish the rule of law and implementation of democracy. The main benefits from the applications of these principles, among others, are the protection of human rights, achieving social progress and increasing the trust in the judiciary as the "third branch of power". Having a fully functional judicial system which will provide for the rule of law is an essential requirement to obtain a full membership in the European Union. For that purpose, Republic of Macedonia since 2004 initiated judicial reforms in order to create more efficient, credible judiciary in which the citizens will trust, exercise their rights, judiciary that will apply the laws in practice.

This paper will try to analyze the lack of judicial independence in the Republic of Macedonia and its reflections on the judgments of the European Court of Human Rights, especially in the circumstances when the Court brought a judgment against a state that failed to protect the rights and freedoms of the citizens guaranteed by the European Convention of Human Rights. Subject of discussion will be the fact that in some of the cases, the Court detected that there was not "an independent and impartial tribunal" and that the judges consciously were breaking the laws in some politically motivated cases.

## INTRODUCTION

The principle of an independent judiciary has its origin in the theory of separation of powers, whereby the Executive, Legislature and Judiciary constitute three separate branches of government. This way of creation of the separation of power represents a fundamental value in the constitutions of democratic states which strive to achieve the rule of law and respect for the human rights. The independence of judiciary means that both the judiciary as an institution and also the individual judges deciding particular cases must be able to exercise

their professional responsibilities without being influenced by the Executive and Legislature. Only an independent judiciary is able to render justice impartially on the basis of law and in the same time protecting the human rights and fundamental freedoms of the individual.

Many international and regional conventions, resolutions and recommendation emphasize, directly or indirectly the importance of judicial independence in the protection and preservation of human rights. The foundation from where the necessity for independence and impartiality of judiciary arises is the demand for equality before the laws and equality of citizens before courts and tribunals. This is the so called external independence which establishes the relationship between the independence of the judges and principles of equality of the citizens before the law. The internal independence presupposes the independence of each individual judge in the exercise of his/her function without any restrictions, interferences, pressures or any kind of threats.

With violation and serious breaches of the mentioned fundamental values, the state creates a judiciary which is not independent and impartial, judges who do not exercise the laws as they should and that lead us to violation of the basic human rights of every individual in the concerned state. And finally, the lack of judicial independence and impartiality creates a bad image for one state on international level among other states and international organizations, but also internally, creates a deficient of trust of its own citizens in the judiciary as one of the braches of power.

Establishing an efficient judiciary which will be independent and impartial in conducting its part of duties and responsibilities, for Republic of Macedonia is a "must" for successful transition and gaining a full membership in the European Union. Therefore, the reforms of the judicial system in Republic of Macedonia are crucial requirement for the start of the accession negations with the European Union and afterwards gaining the membership in it.

For that purpose, Republic of Macedonia has started the hard path of reforming its own judiciary among other reforms, with undertaking serious constitutional and legal changes. Maybe, in the middle of these reforms, the main intension has been lost. According to the last reports of the European Commission regarding the EU Enlargement Policy, the European Commission for the Democracy through Law (Venice Commission) and the European Union's IPA Program for Western Balkans, the independence of judiciary is not on the level that would satisfy the EU's founding values.

Furthermore, the lack of judicial independence in the Republic of Macedonia has its own reflections on the judgments of the European Court of Human Rights (ECtHR). Namely, the statistics of brought judgments by the ECtHR concerning Republic of Macedonia in the past few years are showing that in particular seven (7) cases the lack of judicial independence

constitutes a violation of Article 6(1)– right to a fair trial and lack of independent and impartial tribunal.

## THEORETICAL BACKGROUND/OVERVIEW OF JUDICIAL REFORMS IN THE REPUBLIC OF MACEDONIA

The process of transition of the Republic Macedonia towards modern, democratic and legal state discovered some weaknesses i.e. the need to intensify the reforms in all segments of social life. The aspiration of Republic of Macedonia for EU and NATO membership has been conditioned with the existence of fully functional democratic institutions. Among these, an independent and impartial judiciary is one of the most important preconditions without whom these memberships would be impossible. Republic of Macedonia as a potential candidate first of all, to EU membership had to fulfill the so-called 'Copenhagen criteria' before membership negotiations can begin. Although, the Copenhagen criteria focus on stability and efficiency of the institution guaranteeing the rule of law, they do not explicitly mention judicial independence as one of the conditions for EU accession. However, an independent judiciary is one of the preconditions for proper protection of human rights and establishment of rule of law (Treneska-Deskoska, 2014, p.8).

Since 2004 the process of transition and harmonization of the Macedonian legislation to the EU has started with the Stabilization and Association Agreement signed between Republic of Macedonia and EU. This was the first step to start the reforms of the judiciary which covers the most important segments such as strengthening its independence and increasing its efficiency. To achieve the successful reform of the judiciary, the Government of the Republic of Macedonia adopted the Strategy for the reform of the judicial system. This Strategy contains measures and actions for the Government and the Assembly of the Republic of Macedonia, as well as for the judiciary directed towards setting up a new constitutional and legal framework with improved organizational, managerial, material and human resource prerequisites for the purpose of performing the main function of the judicial system (World Bank, 2005). According to some experts, the major weakness of the judiciary before establishing a new constitutional and legal framework was the way of selection of judges which in some way enabled certain political influences and that lead to a lack of judicial independence and impartiality.

Republic of Macedonia between 2004-2010 has brought crucial reforms regarding the judiciary and further progress has been noted in improving the efficiency of the judiciary (Memeti, 2014, p.64). The Progress Report notes that during this period an impressive set of judiciary reforms were introduced including:

*"significant changes to the Constitution, the Law on Courts and the Judicial Council, the establishment of the Academy for Judges and Prosecutors, the introduction of stricter professional requirements, the establishment of an Administrative Court and High Administrative Court, the shift towards enforcement of court judgments by professional bailiffs, the elimination of court backlogs, the introduction of legal aid and mediation, the establishment of an automated case management system and e-justice, as well as the complete overhaul of the criminal procedure legislation and reform of the police."* (European Commission, Report, 2013).

In relation to the above mentioned, the judiciary is mentioned as a third branch of power and one of the fundamental values of the constitutional order of the Republic of Macedonia. The Amendment XXV to the Constitution of the Republic of Macedonia which concerns the judiciary proclaims the following: *"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…"*.

With the adoption of the new Law on Courts in 2006 (Official Gazette No.58/2006) the procedure for election of judges has been completely changed and new rules for independent and impartiality of judges has been set. The only way to guarantee the independence of the judiciary is actually to obey all regulations that have been passed with the purpose to guarantee the independence. Before the promulgation of the new Law on Courts i.e. till 2005, judges were elected by the Assembly of the Republic of Macedonia on the proposal of the Republican Judicial Council, without limitation of the duration of the term of office. However, this way of election of judges has been subjected to different disputes and opposite argumentations because there was interference of the Legislature on the Judiciary, especially in circumstances where according to the branches of power, Judiciary should be equal among the Legislature and Executive.

The Law on Courts from 2006 endorsed the new way of election of judges by the independent body called Judicial Council of the Republic of Macedonia. The establishment of this body has also been included in the Constitution of the Republic of Macedonia and afterwards amended with promulgation of Amendments XXVIII and XIX to the Constitution of the Republic of Macedonia (Official Gazette no.107/2005). In accordance with Amendment XIX, the Judicial Council will elect and dismisses judges; determines the termination of a judge's office; elect and dismisse Presidents of Courts; monitors and assesses the work of the judges; decides on the disciplinary accountability of judges; has the right to revoke the immunity of

judges; proposes two judges for the Constitutional Court of the R. Macedonia from among the judges and performs other duties stipulated by law.

The process of selection of judges is regulated by the Law on Courts and also by general and specific conditions, which particularly depend on the instance of court that the judge applied for. One of the general requirements for judges is their result in the integrity test and psychological test conducted by the Judicial Council of the Republic of Macedonia. However, many experts argued that the most important requirement for election of a judge is the factor of non having political relations to any party whatsoever and that the person must have an integrity in order to perform the duty as an independent and impartial judge (Network 23 Project, 2015, p.15).

The Judicial Council has been created as autonomous and independent judicial body that will ensure and guarantee the comity and independence of the judicial branch, through performing its functions in line with the Constitution and laws (Law on Judicial Council No.07/2006; 150/2010). Article 6 of the Law on Judicial Council describes the composition of the Council which is consisted of 15 members (the President of the Supreme Court of the Republic of Macedonia and the Minister of Justice are *ex officio* members ( The Minister of Justice as a member of the Council may participate in the work of the Council, but without right to vote); eight members of the Council shall be elected by the judges from their ranks -three of the elected members shall be members of the communities that do not constitute a majority in the Republic of Macedonia, where the principle of equitable representation of citizens belonging to all the communities shall be observed; three members of the Council shall be elected by the Parliament of the Republic of Macedonia with a majority of votes from the total number of representatives, along with the majority of votes of the representatives belonging to the communities that do not constitute a majority in the Republic of Macedonia; two members of the Council shall be nominated by the President of the Republic of Macedonia and elected by the Parliament of the Republic of Macedonia, from whom one shall be a member of the communities that do not constitute a majority in the Republic of Macedonia.

The idea for creation of the Judicial Council as an autonomous and independent judicial body actually was not realized fully in the Republic of Macedonia. Moreover, no Law on Judicial Council 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 (Taseski, p.8) Hence, the major weakness of this Council was that fact that it was not immune of the influence and interference by the executive branch of power. Because of that reason, the Judicial Council was not able to fully protect judges in applying the relevant domestic laws on a proper

manner. Although there was an adequate legal framework for the functioning of the Judicial Council it was not achieved in practice.

In the following years, other package of reforms was conducted and one of them is the promulgation of the Law on the Council Determining the Facts and Initiating Procedure for Liability of Judges which was adopted on 11 February 2015 by the Assembly of the Republic of Macedonia (Official Gazette no.20/2015). This Council was founded as a new judicial body, whose aim is to take over some of the work of the Judicial Council. The main competence of the Council Determining the Facts would refer to initiating disciplinary proceedings and proceedings for unprofessional and unethical conduct of judges before the Judicial Council of the Republic of Macedonia.

Negative remark connected with this Council is the fact that it was adopted without public debate and without the involvement of experts. Because of the manner of adoption of this law, in particular the part on election of the members of this body, suspicions were raised again as to whether its purpose is to enable greater independence or open another way for influence over the judiciary (Network 23 Project, 2015, p.21).

Furthermore, the Judicial Council proceeded with the "reforms" in the judiciary. On 12 January 2016, the Judicial Council has adopted an Action Plan for resolution of pending or so-called "old cases" and has just begun with implementation of the document. In addition, efforts on moving more quickly on execution of ECtHR judgments are increasing but are still insufficient when it comes to individual cases (Ali and Ramic-Mesihovic, 2016, p.112). The major problem lies in the fact that these past years, the judgments of the ECtHR are against Republic of Macedonia i.e. they have been in favor of the applicants who have submitted applications before this Court for alleged violations of the Convention's rights. If the judges of Macedonian courts would have applied the relevant domestic laws on a proper way, in that case there would not have been any violation of the guaranteed Convention's rights.

## *DETECTION OF WEAKNESSES IN MACEDONIAN JUDICIARY (WHAT HAS BEEN ACHIEVED AND WHAT SHOULD BE ACHIEVE IN FUTURE)*

Beginning from 1991 till today, Republic of Macedonia adopted a large number of laws as well as constitutional amendments in order to meet EU standards and to fulfill the requirements for EU accession in the area of judiciary and in the same time protecting the guaranteed rights and freedoms. A well-functioning judiciary which is impartial and effective represents a key criterion for EU integration.

Republic of Macedonia was one of the first countries in the region that entered the process of judicial reforms with EU assistance and support. In 2005, the country introduced a large

package of constitutional amendments related to the judiciary. One of the focal points of these reforms was the establishment of the Judicial Council of the Republic of Macedonia. It incorporated all of the characteristics of the European model: a high level of concentration of powers related to judicial appointments, promotions and dismissals, as well as in determining disciplinary responsibility of judges. Exactly ten years after the establishment of the new judicial council, it is rather evident that the judiciary was not ready for the high level of self-government. This new institution was introduced amidst existence of strong ties with the past judicial mentality and culture, and an evident tendency towards political pressure despite several major political and governmental shifts from previous reform cycles since the country had gained independence in 1991. (Preshova et al, 2017, p.21-22).

Furthermore, as it was mentioned before in this paper, many of the laws which were brought satisfied the requirements for EU accessions and were harmonized with the EU laws, but in some parts they failed in the implementation especially in the area of judiciary. Hence, the public had suspicions that the newly established system of selection and promotion of judges fails to put all candidates in the same position. The promotion of judges is not based on fully transparent and objective criteria. Hence, according to some experts in the area of judiciary, this means that the persons elected for judges must have experience in the area of judiciary, must have integrity to perform their work and must be persons without any political relations. The practice of the Judicial Council in relation to election and dismissal of judges needs to be more proportionate and transparent and based on the requirements mentioned above.

If we make a retrospective of these 25 years, it is obvious that the judicial system is still one of the major problems with which Republic of Macedonia is facing, especially because of the interference of the two other branches of power, mainly by the executive. This fact has been confirmed in the reports of the European Commission on EU Enlargement Policy and the European Commission for Democracy through Law (Venice Commission) starting 2014-2016, a period which will be analyzed in this paper in regard to the findings about the situation with judiciary in Republic of Macedonia.

In the report of the European Commission – Enlargement Strategy and main challenges for 2014 (regarding Chapter 23: Judiciary and Fundamental Rights), it has been stated that the main reforms in the area of judiciary have been already completed, but improvements are needed to ensure the correct implementation of European standards relating to independence and quality of justice. Defects in the current career system for judges have still not been addressed, despite the potential threat they pose to judges' independence. Security of tenure needs to be more robustly safeguarded by amending the legislation relating to discipline and dismissal, which is overly complex and insufficiently precise and predictable. The practice of

the Judicial Council in relation to discipline and dismissal proceedings needs to be more proportionate and transparent. (European Commission SWD /COM, 2014). In relation to the findings of the European Commission, in 2013, the Judicial Council failed to comply with the legal requirement that all new first instance judges must have completed the training of the Academy for Judges and Prosecutors, by appointing numerous candidates who had not. The legal requirement for higher court judges to have prior judicial experience was also circumvented by a number of appointments being made immediately before the amendment entered into force and even ignored in some appointments made after its entry into force. This continues to cast doubt on the commitment to merit-based recruitment. The appointment process of the Judicial Council, in particular the evaluation of candidates' respective merits, needs to be made more transparent.

In conclusive remarks for the 2014 report, the European Commission agrees with the fact that the Republic of Macedonia completed the majority of reforms and has established the necessary legal and administrative structures in this are, however, the risk of back-sliding in some area including the judiciary is evident.

Similar conclusions for the condition of the judiciary can be noted in the report of the European Commission – Enlargement Strategy for 2015 (regarding Chapter 23: Judiciary and Fundamental Rights), except for the findings that "*there has been no progress in the past year*". The de facto de-politicisation of judicial appointments and promotions, overhaul of the professional evaluation system and reform of the disciplinary provisions are still outstanding (European Commission SWD 2015/ 212). According to the findings of the European Commission, Republic of Macedonia *"should demonstrate real political will to ensure the full independence of the judicial system; provide full support and resources to the Special Prosecutor appointed to look into the making and content of the intercepted conversations"*(ibid, p.51, Chapter 23: Judiciary and Fundamental Rights).

Furthermore, the opinion of the European Commission is that the extent of previously suspected political interference in both the appointment of judges and the outcome of court proceedings was confirmed by the content of the intercepted communications. In order to restore public confidence, professional bodies such as the Judicial Council and the Association of Judges need to be proactive in visibly promoting judicial independence and defending the judicial profession from any form of explicit or implicit pressure, both external and internal.

In relation to the above mentioned, the European Commission – Enlargement Strategy and main challenges for 2016 (regarding Chapter 23: Judiciary and Fundamental Rights) gave the conclusions as to the previous year with recommendation for the Republic of Macedonia to

demonstrate greater political will to ensure the independence of the judicial system and to allow the Special Prosecutor to work unhampered (European Commission SWD /COM, 2016). Regarding the functioning of judiciary, the Commission found that some improvements have been noted by the Judicial Council in order to improve transparency and by the new President of the Association of Judges who started to actively engage in promoting judicial independence.

In 2014 upon request made by the Republic of Macedonia, the European Commission for the Democracy through Law (Venice Commission) gave an opinion about the proposed seven amendments to the Constitution. Among them were Amendments XXXVIII which redefines the composition of the Judicial Council and Amendment XXXIX which expands the jurisdiction of the Constitutional Court. Namely, regarding the composition of the Judicial Council, under the 2014 Draft Amendment the Council continues to be composed of 15 members, but the Minister of Justice and the President of the Supreme Court are no longer members of the Council. Instead, the judges are to be represented by 10 members; three of them must belong to non-majority communities (Venice Commission CDL-AD 2014). In respect of the proposed amendments to the Constitution, the Venice Commission considers that, given the current political situation (and the fact that these amendments were proposed in the absence of opposition in the Parliament), it is not the most opportune moment for introducing constitutional amendments. However, till today these amendments were not completed or enacted by the Assembly due to the political crisis in Macedonia.

The Venice Commission, in 2015 gave opinion on the Law on the Disciplinary Liability and Evaluation of Judges, the Law on Courts, the Law on the Judicial Council and the Law on the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge. According to Venice Commission, the practical application of those laws, however, led to a comparatively high rate of judicial dismissals; thus, from 2007 to 2014, the Judicial Council initiated a total of 63 procedures against judges, which is above the European average, especially given the size of the population of the Republic of Macedonia. However, it must be noted that in the last few years the number of judicial dismissals dropped significantly compared to the previous period (Venice Commission CDL-AD (2015)042).

Hence, the given findings, both, the European Commission – Enlargement Strategy and main challenges for 2014 (regarding Chapter 23: Judiciary and Fundamental Rights and the European Commission for the Democracy through Law (Venice Commission) gave similar opinions about the judiciary in the Republic of Macedonia. Nevertheless, it has been stated that the main reforms in the area of judiciary have been already completed (the legal

framework has been set, but not applied fully in practice) however improvements are needed to ensure the correct implementation of European standards relating to independence and quality of justice. According to this, judiciary is still a vulnerable area which should be “cured” in order to provide proper application of the laws and respect for the guaranteed human rights and fundamental freedoms.

## FINDIGS OF THE EU INSTITUTIONS REGARDING THE LACK OF JUDICIAL INDEPENDECE IN REPUBLIC OF MACEDONIA DETECTED IN THE JUDGMENTS OF THE ECtHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms provides compliance by the signatory states with the rights and freedoms established in the Convention, including the Republic of Macedonia, as well as effective control in case of their limitation. The ECtHR was founded in order to ensure compliance on the part of the signatories with the obligations under this Convention and its protocols, and it puts particular emphasis on compliance with the rule of law in the signatory states. In fact, the rulings of ECtHR that indicate violation of rights of citizens upon previously filed appeal to the court need to be implemented by the signatory states in such a way that, besides the damage compensation that needs to be paid to the victim, the state should also change the jurisprudence in the violation of rights or make changes in the legislation in order to establish a certain right or provide a mechanism for its protection.

Macedonian dossier in Strasbourg and the judgments brought by the ECtHR are a true indicator that Republic of Macedonia is facing with serious issues about the lack of judicial independence and impartially which have direct influence on the judgment’s outcome. Furthermore, this was also confirmed in the reports prepared by the European Commission – Enlargement Strategy and main challenges for a period 2014-2016 and the report given by the Senior Experts’ Group on systematic Rule of Law lead by the retired Commission Director Reinhard Priebe.

Moreover, during the reporting period of 2013/2014 the ECtHR found that Republic of Macedonia had violated the ECHR in 6 cases, mainly concerning the right to fair trial and equality of arms. The Bureau for Representation of the Republic of Macedonia before the ECtHR developed an action plan for execution of some 50 older judgments against the country, mainly concerning the excessive duration of court proceedings. However, a total of 92 judgments finding violations have still not been executed (European Commission SWD /COM, 2014). According to the findings that Article 6 of the ECHR has been violated is in

direct relation with the judicial independence, because in those cases, the Strasbourg court found that there was not “an independent and impartial tribunal”.

In the prepared report for 2014/2015 by the European Commission it has been stated that the ECtHR has found that Republic of Macedonia has increased the number of cases in which the Court found violation of the Convention’s rights i.e. in 11 cases relating the most to the right to a fair trial within a reasonable time and respect for family life. A total of 379 new applications were allocated to a decision-making body, bringing the number of pending applications to 324. At present, 117 ECtHR judgments still have to be executed by the country, of which two are under enhanced supervision (European Commission SWD 2015/ 212). Moreover, this report does not only shows the problems with the lack of judicial independence and Article 6 with which Republic of Macedonia is facing, but also are appearing on the surface the problems with the slow execution of ECtHR judgments.

Furthermore, since September 2015 the ECtHR has found violations of the ECHR in 11 cases relating mainly to the right to a fair trial, respect for family life and protection of property. A total of 359 new applications were allocated to a decision-making body, bringing the total number of pending applications to 318. The Bureau for Representation before the ECtHR made significant efforts to ensure the speedy execution of ECtHR judgments (an 'Urgent Reform Priority') and achieved good results. (European Commission SWD /COM, 2016). Republic of Macedonia has reduced the number of ECtHR judgments still to be executed by more than half to 56, of which 3 are under enhanced supervision.

Difficulties in exercising the independence and impartiality of the Macedonian judiciary have been detected also in the report prepared by the Senior Experts’ Group on Systematic Rule of Law lead by the retired Commission Director Reinhard Priebe. According to this Group, Republic of Macedonia possesses a comprehensive set of rules which, if fully observed, should generally ensure a proper functioning of the judicial system to a high standard, although there is a need for some further reform, particularly in relation to the appointment, promotion and removal of judges (Recommendation of the Senior Experts’ Group on systematic Rule of Law, 2015). However, there is a perception, that in some areas and in particular with regard to cases considered to have a political dimension or believed to be of interest to politicians, the usual standards are set aside.

Additionally, it was stated that there is an atmosphere of pressure and insecurity within the judiciary. This is confirmed by the revelations made by the leaked conversations. Many judges believe that promotion within the ranks of the judiciary is reserved for those whose decisions favour the political establishment. There must be no such thing as a “political case” in the judicial process. All cases reaching the judiciary should be handled with the same

approach to efficiency, independence and impartiality, simply applying the law, both substantial and procedural, in a clear and predictable way (ibid, p.9, section Judiciary and Prosecution). This is essential if the confidence of the public in the proper functioning of the judiciary and the public prosecution is to be maintained or, to the extent that may be necessary, restored.

Proposed recommendations are in relation with the need to increase the independence and impartiality of judges especially by the Judicial Council and the necessity for speedy implementation of the judgments and decisions of the ECtHR by Republic of Macedonia.

Hence, the report given by the European Commission and the Priebe report are detecting practically the same difficulties which connects the lack of judicial independence with the findings of the ECtHR given in their judgments.

## WHY JUDGMENTS BROUGHT BY MACEDONIAN COURTS DOES NOT SATISFY THE SCOPE OF ARTICLE 6 AND THE CASE-LAW OF THE STRASBOURG COURT?

Independence and impartiality of the judges is a key ingredient for successful and effective judiciary not only in the countries in transition, but also in the democratic and more developed countries. The procedure for election of judges in the ECtHR should be a real example of what qualities every judge should possess, not only to be judge in the ECtHR, but also in the national courts in member states of the Council of Europe. According to the ECHR, judges must *"be of high moral character and possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence"*.

Macedonian judiciary for a long period has been exposed to critics regarding its lack of independence and impartiality and beside them, it stayed quite passive and maybe without any willingness to change the picture that was created about the judiciary. Insufficiently elaborated judgments can also be a problem which affects the quality of the judges and that makes suspicion on their independence and impartiality. The major problem can be identified in the fact that Judiciary is not considered as an equal branch of power mainly because of the influence/interference by the Executive and afterwards by the Legislature. Subsequently, there are the issues about the lack of independence and impartiality of judges and cases in which was indentified political pressure over the judges.

One form of political pressure has been manifested through the disciplinary and dismissal proceedings before the judicial council. This practice has been condemned by the ECtHR in its latest decision ruling against Macedonia on infringements of Article 6 in dismissal proceedings against several appellate court judges. The Court has found that the whole

procedure was flawed by partiality, which was institutional and systemic as the procedure before the judicial council was not conducted by an 'impartial tribunal' in either the initial or appeal proceedings, *inter alia* as a consequence of the decisive involvement of the Minister of Justice and the President of the Supreme Court in all parts of the procedure. The government attempted to remedy this situation by establishing a new body, the 'Council for Determination of Facts', in charge of initiating disciplinary and evaluation procedures. However, this 'reform' has caused additional criticism and added to the already existing complexity and lack of clarity of the legal regulation and institutional framework in the judiciary, while not tackling the problem at hand.

In the past several years, Macedonian dossier in Strasbourg has been increased with judgments in which the ECtHR has established violation of Article 6(1) of the ECHR which particularly enshrines the following: *"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"*. For example, in 2014, the ECtHR has brought eight (8) judgments from which six (6) have been against Republic of Macedonia and in four of them the ECtHR established violation of Article 6 of ECHR (in most cases it was about the duration/length of the procedure). In 2015 it can be noticed a slight increasing of the judgments to eleven (11) (all of them were against Republic of Macedonia) from which five (5) were connected to Article 6 of the ECHR. In 2016 from 11 judgments, the ECtHR detected violation of Article 6 of the ECHR in six (6). Additionally to the above mentioned statistics, there were exactly seven (7) cases in which the ECtHR detected violation of Article 6 of the ECHR in correlation to the lack of independent and impartial tribunal in the Republic of Macedonia. Exactly these cases will be analyzed in this paper in order to explain what the ECtHR established and where Macedonian judges failed to comply with the rights of the Convention.

Moreover, the case of Gerovska-Popcevska v. R.Macedonia was the first case in which the Court was reexamining the issue about the independence and concluded that the presence and involvement of the Minister for Justice as a member of the executive had infringed the independence of the Judicial Council where the Minister is a member *ex offcicio*. (*Gerovska-Popcevska v.R.Macedonia No.48783/07 [ECtHR]).* Namely, the applicant Gerovska – Pocevska complained under Article 6 of the Convention that the Judicial Council was not *"an independent and impartial tribunal"* in view of the participation of the then President of the Supreme Court and the Minister of Justice in the decision of the SJC on her dismissal. She alleged that both had had a preconceived idea about the merits of the issue, namely her dismissal. Because of these reasons, the ECtHR declared that: *"there has been a violation of*

*Article 6 (1) of the Convention in that the Judicial Council lacked the requisite impartiality and independence given the participation of the then President of the Supreme Court and the Minister of Justice in the decision of the SJC dismissing the applicant" (ibid, p.20).*

In January 2016, the ECtHR held that there had been a violation of the right to fair hearing, due to the overall unfairness of the lustration proceedings relating to the former President of the Constitutional Court *(Ivanovski v. R.Macedonia no. 29908/11 [ECtHR]).* In this case, the applicant Ivanovski complained that the Lustration Commission and the courts lacked impartiality and independence, given the functioning and the composition of the Commission, the promotions of certain judges who had been sitting in his case, and the public statement made by the Prime Minister, which reflected the political influence exerted by the Government. Subsequently to these findings, the ECtHR declared that there was a violation of Article 6 (1) on account of the overall unfairness of the lustration proceedings and violation of Article 8 of the Convention in so far as it concerns the lustration proceedings (ibid, p.46 from the judgment of ECtHR).

Additionally, the independence of the judges has been questioned in relation to the assumed probability for presence of the lack of impartiality of the judge. In the case of Nikolov v. R.Macedonia, the applicant complained under Article 6 of the Convention that his case had not been heard by an impartial tribunal as the trial judge's wife had been employed by the defendant soon after the proceedings had started *(Nikolov v. R. Macedonia no.41195/02 [ECtHR]).* According to these facts, the ECtHR declared that there has been a violation of Article 6 (1) of the Convention concerning the impartiality of the trial judge. Furthermore, in the case of Bajaldziev v. R.Macedonia, the applicant complained under Article 6 of the ECHR that the proceedings had been unfair since the same judge had participated in the adjudication of his case at second and third instance. Based on these allegations, the ECtHR declared that there has been a violation of Article 6 of the Convention on account of the lack of impartiality of the Supreme Court and on account of the excessive length of the proceedings *(Bajaldziev v. R. Macedonia no.4650/06 [ECtHR]).*

In the cases of Mitrinoski and in Poposki and Duma, the applicants raised the issue about the independence and impartiality of the Judicial Council. In the both cases, the ECtHR established that the Judicial Council as not "an Independent and impartial tribunal" and that the applicants did not have a fair trial. In the case of Mitrinoski the applicant complained under Article 6 of the Convention that the Judicial Council was not an "independent and impartial tribunal" since the President of the Council, who had been member of the Commission in his case, as well as the President of the Supreme Court, whose request had set

in motion the impugned proceedings, had subsequently taken part in the Council's decision dismissing him *(Mitrinoski v. Republic of Macedonia no.6899/12 [ECtHR]).*

Additionally, in the case of Poposki and Duma, the both applicants complained, under Article 6 of the ECHR, that the Judicial Council which had dismissed them for professional misconduct had lacked the requisite impartiality since the members who had instituted the impugned proceedings had ultimately taken part in the Council's decision dismissing them *(Poposki and Duma v. R. Macedonia nos. 69916/10 and 36531/11 [ECtHR]).*

Guided by the same principles, in the case of Jaksovski and Trifunovski the ECtHR declared there has been violation of Article 6 (1) in that the Judicial Council was not "independent and impartial". Namely the applicants complained that the Judicial Council was not "an independent and impartial tribunal" because members of the Council who had instituted and impugned proceedings had subsequently taken part in the Council's decision dismissing them *(Jaksovski and Trifunovski v. R. Macedonia nos.56381/09 and 58738/09 [ECtHR]).*

The above analyzed cases are showing the real problem with which Macedonian judiciary is facing. First of all, as it was mentioned previously in this paper is the political interference of the executive branch on the judges which results with judgments that do not satisfy the scope of Article 6 and precisely in which the Strasbourg Court had established that there was not "an independent and impartial tribunal". These findings from the ECtHR are creating a bad image for Macedonian judiciary and in some point are showing the unwillingness of judges to be more professional in applying the laws.

## CONCLUSION

Major part of the Macedonian legislation has been harmonized with the requirements for EU accession and judicial reforms implemented since 2004 have shown good results in the efficiency of the judiciary. However, there are still critical points such as the lack of judicial independence and impartiality which affects the work of judges and that has influence on international level with the judgments of the Strasbourg Court that in most part are against Republic of Macedonia.

Major problem of the Macedonian judiciary is and remains the political interference upon the judges and the judiciary as a whole by the executive branch of power. In many reports dedicated to the situation of the judiciary in the Republic of Macedonia, has been stressed the problem with the selective and non-balanced approach of the judiciary in many court cases, especially those who are politically motivated. According to this, the first problem can be identified in the separation of powers. The concept of separation of power assumes that each branch will act independently from the other and each will observe the work of the other in a

system of check and balances. Unfortunately that is not the situation in the Republic of Macedonia. The Judiciary as third branch is put in unequal position among other two, mainly because of the interference/influence of the Executive and in some cases of the Legislature over Judiciary.

Republic of Macedonia in future must show real willingness in the area of judiciary. First of all conducting major reforms in the judiciary is a 'must' for the Republic of Macedonia in order to gain EU membership. In this relation, the state must be able to return the faith of the citizens in the judiciary. Further, judges need to be free to carry their professional duties without political interference. They should in turn be active protectors of human rights, accountable to the people and must maintain the highest level of integrity under national and international law and ethical standards. Those judges, who will reveal any kind of influence on them, must be protected of any kind of further pressure or persecution. In this regard the most important will be the role of the Judicial Council (not only as a body for election and dismissal of judges, but also a body that will act as a protector of judges in relevant circumstances). The most important is that the judges must apply the laws (domestic and international) and for that reason, the judges must have quality, integrity – they must be independent and impartial.

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- *Nikolov v. R. Macedonia no.41195/02 [ECtHR]*
- *Bajaldziev v. R. Macedonia no.4650/06 [ECtHR]*
- *Mitrinoski v. R. Macedonia no.6899/12 [ECtHR]*
- *Poposki and Duma v. R. Macedonia nos. 69916/10 and 36531/11 [ECtHR]*
- *Jaksovski and Trifunovski v. R. Macedonia nos.56381/09 and 58738/09 [ECtHR]*