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JUSTICE REFORM AND THE SHADOW OF THE EXECUTIVE: THE NEW ROLE OF THE MINISTRY OF JUSTICE IN THE JUDICIAL GOVERNANCE IN ALBANIA

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INTRODUCTION

The redesign of the judiciary architecture in Albania, conceived by a broad range of actors, was one of the main pillars of the comprehensive justice reform in Albania (hereinafter the Reform), pursued since 2014 and still ongoing. The aim of the Reform is to reinforce the independence, efficiency and accountability of the judiciary as one of the top priorities for opening Albania's EU accession negotiations. A prerequisite for the implementation of the Reform was the adoption of the Constitutional Amendments that were approved in July 2016, followed by 27 laws.

The Reform was led under the auspices of the Assembly. By means of decision no. 96/2014, the Assembly established the ad-hoc Parliamentary Committee, which was especially depicted for the purpose of the Reform. The decision provides in point VII that the high-level Albanian and international experts (EU experts from EURALIUS and US experts through USAID/OPDAT) will perform near this Committee. The activities of the experts were supported by a Technical Secretariat, composed of specialists/advisors of the Legal Department of the Assembly, Ministry of Justice, and experienced lawyers of other state institutions (point VIII of the decision)[1]. This process has been guided twice by means of opinions of the Venice Commission.[2]

The constitutional amendments were followed by a comprehensive package of organic laws, 7 out of which were considered a priority. Judicial governance was judged to be a matter of absolute priority and belonged to the first package of laws passed, the main ones in this regard being the law on Governance Institutions of the Justice System and the law on the organisation of the Judicial Power, approved respectively in November 2016 and October 2016. The establishment of the new governing bodies of the judiciary, such as the *High Judicial Council*[3], the *High Prosecutorial Council*[4], the *High Justice Inspector*[5], which were *de jure* provisioned in the Constitution and in the organic laws mentioned above, has started to take shape *de facto* only as of June 2017. Its prolonged set-up process is being monitored by the International Monitoring Operation (IMO). IMO[6] became operational in February 2017 and it engages international judges and prosecutors in the role of observers (European and US experts, from the Department of State and from the Justice Department). This process of designing, deciding on and monitoring of the reform in the judiciary aimed to distance the newly created judicial governing bodies from political influence while being inclusive.

In the midst of all these significant changes, this brief will focus on the Ministry of Justice (MoJ), portraying an overview of the changing role of the executive body, in light of the new structures of the judicial governance institutions. It will describe the shifts of competence toward the new judicial governance bodies, its expected role towards them

1. The structure of the actors of the justice reform: http://reformanedrejtesi.al/sites/default/files/organigramasekretariati_teknik.jpg
2. Two opinions were offered by the Venice Commission during this process, with regards to i) the revised draft constitutional amendments on the Judiciary (15 January 2016) and ii) for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law) on December 2016
3. Article 147/a of the Constitution of Albania, as approved on 21.06.2016.
4. Article 149 of the Constitution of Albania, as approved on 21.06.2016.
5. Article 147/d of the Constitution of Albania, as approved on 21.06.2016.
6. Article B of the Constitution Annex.

and the challenges of inter-institutional cooperation. The stagnation of the political situation will be brought to attention as a factor influencing the current situation of stagnation and instability of the justice bodies. The analysis will also provide for a brief comparative analysis of the regional practices, particularly in Serbia and in Montenegro, concerning the same challenges in matters of governance of the judiciary in relation to the executive.

LEGAL FRAMEWORK OVERVIEW: SHIFT OF COMPETENCES OF THE MINISTRY OF JUSTICE

The aim of the institutional part of the reform is to guarantee a three-dimensional independence of the judiciary: structural, financial and substantial.

Composition and competence: *no representative of the executive in the High Judicial Council – (HJC) body.*

The set-up of the new governing bodies of the judiciary, the key one being the *HJC* that substitutes *the existing High Council of Justice (HCJ)*, introduced comprehensive changes in the composition and competences of the governing body of the judiciary. HJC has gained substantial competences in comparison to the repealed *High Council of Justice*, including in its scrutiny all levels of courts, the High Court as well (a novelty of the reform). Taking into account this fact, the composition of the HJC has been more carefully designed, reducing the bonds of the judiciary with the legislative and the executive. The composition and election procedure of the HJC members indicates a will to create a strong self-regulated, unbiased body. Different from the former structure which was composed only of judges, the new format opts for a balanced composition, including lay members that represent the interests of citizens (civil society), and of the legal community (bar association and academia)[7]. For the first time since the creation of the judicial bodies, the Minister of Justice is not an *ex officio* member in the HJC and the executive is not represented in this body, which also means that the executive has no say in matters of appointing, evaluating, promoting, transferring and deciding on the disciplinary proceedings of judges. However, the issue of check and balance between the judicial bodies and the Ministry of Justice remains complex considering that according to the constitution and the approved laws the executive still preserves some competences, given that the Minister of Justice, although without a voting right, still sits in the meetings of the HJC concerning the budget of the judiciary and strategic planning (Article 147/ a of the Constitution).

Financial independence and management independence**:** *full budgetary independence accorded to HJC.*

Most powers of judicial governance, formerly vested with the Ministry of Justice, were transferred to the High Judicial Council in order to increase efficiency and accountability in the exercise of these powers. The Office of the Administration of the Judicial Budget, an independent body to-date, will fall under the new, encompassing umbrella of the HJC, responsible not only for the drafting, proposing and implementation of its annual budget (in cooperation with the Ministry of Justice and the Ministry of Finances), but also in charge of managing the fund raising process for the management of the courts (up to the level allowed by the law), as well as assist and monitor the budget proposals of the courts of all levels (Article 96 of the Law on Justice Governance Institutions). Since the budget will also be substantially higher, internal control units and external controls will be introduced, which was not previously the case with the High Council of Justice, due to the low budget and the low level of the assessed risk. The amendments to Law **no. 8678, date 14.5.2001** "On the Organization and Functioning of the Ministry of Justice", adopted on 30 March 2017 and entered into force on 6 May 2017, reflect in Article 6 the changes in the management role of the MoJ. The statistical administration of the judiciary, the relationship of the judiciary to the public and media, the management of the judicial administration, the human resources, the reporting process in front of the public and the Assembly, the administration of the physical infrastructure and safety, as well as the measurement of the performance of courts – all these actual responsibilities of the Ministry of Justice have passed to the High Judicial Council. Only the management information technology systems of the courts is to be

7. Note: *While the members' number remains 11, out of which 6 are judges, the formula of composition of HJC changes in regards to the lay members: 2 members from academia, 1 from civil society and 2 from the bar associations. The two lay members coming from the academia (pedagogues of the Law Faculties or School of Magistrates) are chosen from the academic bodies with the right to vote, the one lay member of the civil society is chosen from at least three civil society organizations with the right to vote and in the case of the lawyers, everyone with the required qualifications can apply. The process is administered by the people's Advocate and the Assembly. The Minister of Justice or persons authorized by him may observe the voting process without prior authorization*.

regulated by means of Decision of the Council of Ministers.

On the disciplinary proceedings: *The Ministry of Justice is not anymore in charge of leading court inspections and at the same time it does not hold the exclusiveness of initiating the disciplinary proceedings towards the alleged misconducts of judges.*

The Venice Commission, in its *amicus curiae* opinion on the draft constitutional amendments specifically addressed the disciplinary proceedings and recommended total independence of the High Justice Inspector from the Ministry of Justice. Parallel inspections were led to-date by the Inspection Unit in the Ministry of Justice and the Inspectorate under the umbrella of the High Council of Justice based on a Memorandum of Understanding between the Ministry of Justice and the High Council of Justice in 2012. The Inspectorate of the High Council of Justice was in charge of leading the investigations on alleged misconducts following the MoJ Inspections. With the new changes in legislation, the overlapping of inspections has been avoided by concentrating these competences in the High Justice Inspector, an independent constitutional and monocratic body, regulated by law that is responsible for the disciplinary liability of judges and prosecutors of all levels (High Court included). As rightfully stated by the MoJ in its Justice System Evaluation in 2015, in countries with democratic traditions, such as Italy and Germany, the MoJ is active in initiating disciplinary proceedings and court inspections, and this does not in itself violate the principle of division of powers, but in the practice this always needs to be contextualized. The overlap of competences regarding inspection is not a best practice in the context of an actual problematic judiciary, instead the solution of an external independent monitoring body is more appropriate.

Many challenges to the foreseen *establishment of the new Councils: HJC and HPC.*

Their setup was provided in the Constitution (Article 179 par. 5) to happen no later than 8 months after the entry into force of the Constitution, i.e. no later than 12 April 2017. Until mid- June 2017 the process was still blocked by the stagnation of the vetting process and the lack of political will to settle it as a priority. Furthermore, the decision of 1/5th of the Members of the National Assembly to address the Constitutional Court on the constitutionality of several articles of the law "On the status of judges" and the law "On the governing bodies of the judiciary" has resulted in the delay of the normal implementation of this law. Following their claims, on 14 April 2017 the Constitutional Court has abrogated certain articles of the law no. 115/2016 "On governance institutions of the justice system" creating a legal vacuum.[8] The missing provisions will be addressed when the new Parliament approves the respective changes of the above-mentioned laws, which is expected to happen in September 2017. A second claim was deposited in the Constitutional Court on 1 June 2017 by the Union of Judges on the unconstitutionality of certain provisions of the vetting law and the law on justice governance, the last one regarding the criteria of professional experience of the members-to-be of the HJC and HPC, as well as the role of the lay members in choosing the heads of these institutions. This is a second challenge in the establishment of the Councils as originally foreseen.

Meanwhile, the administrative staff of the institutions that are to be merged and transformed are in a period of stagnation, with no clear perspective on the working procedure, on the organizational structure and on the survival of the unit they belong to. The situation has contributed to an uncertain environment and the paralysis of the justice institutions.

EXPERIENCES FROM THE REGION

The Balkan countries share a turbulent past of totalitarian regimes, a present made of fragile transition democracies, the perspective of EU membership promised in Thessaloniki and the pressure of conditionality to improve their systems in order to reach the European standards. The example of two Balkan states that already opened the accession negotiations with chapter 23, on the Judiciary and Fundamental rights, namely Serbia and Montenegro, will presumably help compare and understand the position of Albania at present with regards to common challenges on the rule of law.

Serbia did not undergo a comprehensive reform of the judiciary, even though the accession negotiations were launched in January 2014, opening chapter 23 (Judiciary and Human Rights). The country is still in the process of consolidating the reforms aiming to tackle the independence, accountability and the efficiency of the judiciary by means of law amendments, since the Constitution has not been changed during this process. Challenges concerning undue political influence in the

8. Articles repealed: 5, 61, 103, 159, 169 of the Law *"On the governing bodies of the judiciary"*.

governance of the judiciary continue to exist. The High Judicial Council and the State Prosecutorial Council are going through transitional periods towards the consolidation of their independence, while still keeping the Ministry of Justice as a key player in judicial governance. The composition of the 11 members of the HJC includes the President of the Cassation Court, the Minister of Justice, one representative of the Parliament as ex officio members, and the 8 remaining members, 6 judges and two lawyers elected by the National Assembly.[9] This body holds all competences regarding the proposals (to the Assembly), appointment, promotion and release of judges and Presidents of Courts.

On the other hand, there are many other competencies which have remained exclusively under the power of the Ministry of Justice, such as court security, proposals on the amount and structure of budgetary funding and its distribution to courts. Nevertheless, *the Councils do share some responsibility for court and prosecution budgets with the Ministry of Justice, the latter being responsible for court staff, expert assistants, infrastructure and investments*.

The specific circumstances of the judicial reform process in Serbia have also contributed to the empowerment of the role of the Minister of Justice in driving forward these reforms. After a process of dismissal of most of the judges from the High Council of Justice in an attempt to save the image of the widely perceived corrupt judiciary, the dismissed judges appealed to the Constitutional Court, although most of their claims were to be reconsidered by the same organ that dismissed them: the HJC. In its 2013 Opinion on the draft amendments to laws on the judiciary of Serbia, the Venice Commission urged the Ministry of Justice of Serbia to take stock of the situation in the country and take an active role in developing a clear concept on what the courts' network of Serbia should look like, since this task could not be carried out by the HJC on its own, due to the problems resulting from the unsuccessful reappointment procedure. At the time, the Venice Commission already stated that the reform process should be measured and well prepared so as to be successful in achieving a right balance between speed and quality. The executive was too much of a key player to be left aside.

The full administration of the judicial budget was to be transferred from the MoJ to the Councils in January 2017. Based on the report on the implementation of the Action Plan on Chapter 23 (Judiciary and Fundamental Rights) for the first quarter of 2017, the implementation of the provisions of the law on the organization of the courts, covering the transfer of jurisdiction on: supervision of courts' work, supervision over the results of the work of courts, collecting of statistical data and analysis of statistical data from the Ministry of Justice to the High Judicial Council is still in progress.

Constitutional amendments have been recommended by the Venice Commission in order to separate the Councils from political influence (mainly from the Assembly). This same request came from the European Commission in the frame of Chapter 23 of the *acquis* (Judiciary and Human Rights) to bring the recruitment and judicial career management procedures in line with European Standards with the advancement of the accession negotiations.

The general impression, also because of scandals involving the judiciary and the executive, remains that political influence on the judiciary remains high, that judges are still widely scared and corrupt, and that the executive aims to limit judicial independence. A comprehensive constitutional-based reform would be one side of the coin, the other one would be a general will to fight against self-serving elites in the judiciary and in the executive itself.

Montenegro. The Constitutional amendments in July 2013 followed the opening of EU accession negotiations, granted in 2012 by the European Council. The amendments were preceded by a Government determined to pursue the integration road by reviewing the Action Plan for the Reform of the Judiciary, introducing new deadlines and implementing the unfinished measures. The changes intervened across the entire justice system and also targeted judicial independence by reshaping the Judicial Council, considered by the European Commission broadly in line with European standards. The continuously adopted package of laws, especially the Law on Courts and the Law on the Judicial Council aimed to reduce political influence from the legislative and executive by adding transparency elements, thresholds and specified criteria for the appointment of judges and prosecutors. According to the Constitutional amendments of 2013, even if the Minister in charge of Judicial Affairs is part of the composition of this body (balanced 5:5 between judges and other members, seen as a good formula

9. Article 153 of the Constitution of Serbia.

for inclusion)[10] he/she shall not vote in the disciplinary proceedings related to the accountability of judges[11]. Besides the appointment, career, evaluation, disciplinary liability and release of judges, the Judicial Council is also responsible for the management of the judicial system, of the information system, data records, etc.[12]

The concerns regarding political influence in the judiciary still persist because the comprehensive judiciary reform has still not been fully implemented, but in general Montenegro has been perceived from the EU as a country willing to drive on reforms and to strike an independence-accountability balance between the executive and the judiciary that allows for a democracy to work.

REFLECTIONS

It is clear now to the EU, that with regards to the judicial reforms as a basis for the rule of law establishment in Western Balkans countries, they should be done comprehensively, fully, and led not only under the pressure of conditionality and the desire to enter the EU club, but also by means of technical assistance, peer-to-peer guide and a real political will to advance quickly.

The set-up of a whole comprehensive legal framework, starting with the Constitution and continuing with packages of organic laws is an approach that results to be more efficient and less time-consuming than several prolonged by-passes that address an issue without improving the system as a whole (the case of the independence of the judiciary in Serbia). A various composition of the governing bodies of the judiciary is crucial in balancing various interests and perspectives within this body. The question is always about striking the right balance between the de-politicization of the judiciary and the trend of judicializing politics, the latter being the over-influence that the judiciary might exercise if it is way too independent and not accountable. Financial and management independence of the judiciary is a crucial pre-condition as well for a substantial independence, otherwise the structural independence would be void of substance.

The involvement of many actors is a must, including the executive, as well as the will of the parties to move forward. Transitions through substantial reforms, especially in fragile democracies, under the pressure of conditionality, always tend to unbalance the system, even if the latter is compromised, until a new institutional balance is established through practice. In the best case, the establishment of a good practice is the final aim of a reform. In the case of Albania, the process has technically and procedurally been correct, involving every possible actor but it is the political will and the individuals that have the choice to bridge the gaps which are still potentially able to compromise the process. On the issue of the will of the involved parties, it is precisely this element that makes the difference between Serbia and Montenegro, the first one lacking it, while the second one being on the right track to achieving this successfully.

The impetus always defines the reform. During all judicial reforms, in the Western Balkan countries the role of the Ministry of Justice has been expected to shrink. Strong self-regulated judicial governing bodies were created in countries with a past of a strong, influential executive in the judiciary, as a counter-action to their past, as is the case in continental Europe. The reform of the judicial governing bodies was made in the shadow of a past with an interfering executive and between the institutions there is an atmosphere of mistrust. But, if the challenge of an independent judiciary will be overcome as foreseen in the best scenarios in Albania, what will matter the most is the inter-institutional relationships. The quality of justice and of the judiciary relies very much on common draft strategies, on legal acts concerning the judiciary, on the budget, management issues and on the sharing of information. When the MoJ will be perceived by the newly established bodies as not only a structure from which to separate from but rather as a crucial partner for common challenges, then the judicial reform will have completed its aim in the institutional level.

10. Amendment VIII of the Constitution of Montenegro.
11. Amendment IX of the Constitution of Montenegro.
12. *For more see*: Judicial system in Montenegro (historical development, basic principles and organization), Prof. Dr. Mladen Vukčević, Miloš – Bošković, *Law & Justice Review*, Vol. 7, no. 13, December 2016.