

November 11, 2015

POLICY MEMO

-on the release of the EU Progress Report on Macedonia of November 2015 -

“LEGISLATION IS GOOD, IMPLEMENTATION BAD” IS A MANTRA THAT NEEDS TO BE CHECKED OF THE UNEXAMINED PRECONCEPTION ABOUT THE “ALIGNMENT WITH THE ACQUIS”

Katerina Kolozova

OF THE UNEXAMINED PRECONCEPTION ABOUT THE “ALIGNMENT WITH THE ACQUIS”

There is a widespread preconception among the opinion makers, both local and international, that the legislation in Macedonia is “generally in line with the EU Acquis,” or in other words that “the laws are good, but the implementation is poor. We claim the opposite.

The legislation created by the ruling coalition is detailed to the extent of absurdity leaving it the single example in Europe of a hybrid of law and by-law (the only existing similarities we could note are those with the legislation of Hungary). It is also a hybrid of ordinary law and criminal code, allowing the ordinary law to fine draconically and thereby enabling the government to act as if it were the judiciary.

The type of legislation the ruling coalition produces leaves no space for the companies, institutions, organizations and other legal persons to make informed professional decisions and act with even a minimum of autonomy. It is also abundant with contradictions which bring in legal uncertainty leaving the implementation utterly arbitrary. Thus the excessive detailing allowing the government to directly control practically all imaginable activities within a company or an institution – and in the cases of the laws on education and media this tendency is most extreme – is coupled by an excessive number of administrative fines paralyzing free judgment.

The law on audio and audio-visual services is de facto a rule book for the Agency (and, as a consequence, for the ministry) prescribing in detail the programmatic structure for all media outlets. A technical breach of even trivial prescriptions can lead to draconic administrative fining which can ruin an outlet without recourse to – or corruption of – the judiciary.

The Law on audio and audiovisual services enables the perfectly legal fact that the government is the biggest media advertiser in the country. The article 3 line 5 of the Law legalizes government propaganda. If Macedonia is a country in which party and state are blurred, government propaganda means party propaganda throughout the year. The government campaigns constantly, prior to any election campaign (something the incumbents do not need in order to win).

According to the European jurisprudence to which the Macedonian legal system has belonged since the beginning of its statehood, the category of laws called *leges ordinaires* (ordinary law) should render the regulating role of the executive branch minimal. The ordinary law does not stipulate penalties except an almost symbolic number of administrative fines. In the case of education, according to our comparative analysis of the Macedonian and European legislation, the ratio between the number of administrative fines prescribed by the European and Macedonian laws is 1:67 respectively.

EXCESSIVE LEGAL DETAILING AND ADMINISTRATIVE FINING ENABLES ABSOLUTE POWER OF THE EXECUTIVE BRANCH

The degree of direct penalization through fines prescribed in the ordinary law renders the government self-sufficient in its absolute rule. It no longer needs to subdue or corrupt the judiciary as it can penalize to the extent of effacing legal entities if it chooses to do so for whatever reason which can be corrupt too. For example, with just three fines for 5 minutes breaching of the legally prescribed time of airing folk and popular music which amount to 20 000 euro each an independent media outlet could be let to bankruptcy.

All of this is, in fact, no surprise if one is aware that Macedonia belongs to the category of hybrid regimes, according to the Freedom House criteria (as well as of other relevant institutions and organizations). Therefore, state capture is a technique of ruling and profiting, while democracy and EU technocracy are a mere façade. Another term used in the political sciences as synonymous to that of “hybrid regime” is – “competitive authoritarianism.” In their groundbreaking article published in *Journal of Democracy* (2002), Levitsky and Way define competitive authoritarianism as marked by “formally free and fair elections on the day of voting preceded by an unfair advantage of the incumbents.” The unfair advantage is systemic and long term consisting mainly in the incumbents’ control of the media and the abuse of state institutions in order to exert influence or pressure thereby “blurring state and party.” The definition of competitive authoritarianism or of hybrid regime, therefore, matches perfectly with the description given by OSCE/ODIHR of the general elections held in Macedonia in April 2014 as well as the local ones from 2013.

LEGALIZATION OF CORRUPT GOVERNING: CRONYISM IS LEGALLY ENABLED

Let us focus on several specific features of the education laws in the country in order to establish whether they are exemplary of phenomenon of state capture which is the defining characteristic of a hybrid regime. The three laws on education - encompassing primary, secondary and university level education - favor legal persons or, more specifically, profit making companies such as Scopus, Thomson Reuters TOEFL and

others. Most striking is the obsession with the “Shanghai ranking of universities” upon which receiving or losing already received accreditation depends (again: retroactive legislation and, thereby, legal insecurity). This is, of course, a commercial product of an existing legal entity. Legal economic favoritism, evidently, undermines the very fundament of a free market economy as one of the defining criteria of European democracy (comprised in the so-called “Copenhagen criteria”).

Detailed requirements for the academic advancement of all faculty in all universities are laid out in the legislation leaving literally no room for the institutions to establish their own criteria and enact the higher education autonomy. The article which stipulates the “state exam” on university level is both in its form (more than 1600 words long) and in its content contrary to any idea of minimal academic autonomy: failure to pass an exam carried out by a government body (the Board of accreditation which operates under the authority of the Minister of education) derogates the previously granted right to the HE institutions to issue a graduation diploma.

In a country in which, according to the EU progress reports and the OSCE/ODIHR reports from 2013 and 2014, state and party are blurred the government conducts external testing independently from the criteria and staff of the educational institutions on all three levels. Thus, ideological control is invited. (And this is, perhaps, an understatement).

The society is submerged in fear of the state institutions and, as a consequence, in self-censorship constituted by the following elements:

- 1) Legal insecurity created by constant changes and amendments to the laws,
- 2) drastic limitations to developing informed professional and ethical decisions due to the excessive legal detailing, and
- 3) almost absolute authority accorded to the executive branch coupled with excessive administrative penalization in the area of the ordinary law to which the laws on education belong.

In short, it is not the “rule of law” which is the problem in Macedonia but rather the types of laws that rule and the core question – are they democratic and in line with the basic European values? Our research proves they are not. We intend to present the evidence which supports this claim in the form of data visualization and with the goal of advocating for democratic legislature enabling truly autonomous academia in a society of functioning market economy and freedom of thought.

CONCLUSION AND A RECOMMENDATIONS

In its progress monitoring, the EU should look at the substance by way of using a more comprehensive and analytical approach rather than a merely technical one. In other words, the EU cannot overlook the fact that Macedonia is indeed a hybrid regime as the indicators of the Freedom House and other relevant methods of measurement show. In this sense we commend the new style of progress reports for they give the civil society a tool to criticize the government for its inability to meet the enlargement criteria.

Instead of repeating the mantra of “implementation is necessary, but the laws are good,” the EU should conduct a comprehensive review of the legislation related to the harmonization with the Acquis.

Assess whether the legislation itself, under the guise of “transposing the acquis”, serves as a mechanism for the absolute power of the executive branch over the judiciary and the legislature.

Introduce mechanisms challenging the partocratic style of governance enable by the legislation itself.

For more evidence and elaboration, see: <http://isshs.edu.mk/index.php?newsinfo=274>, <http://isshs.edu.mk/documents/Legalizing-Restrictions-of-the-Freedom-of-the-Press.pdf>, and <http://www.isshsvisualizations.com/data-visualizations.html>