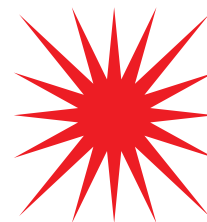
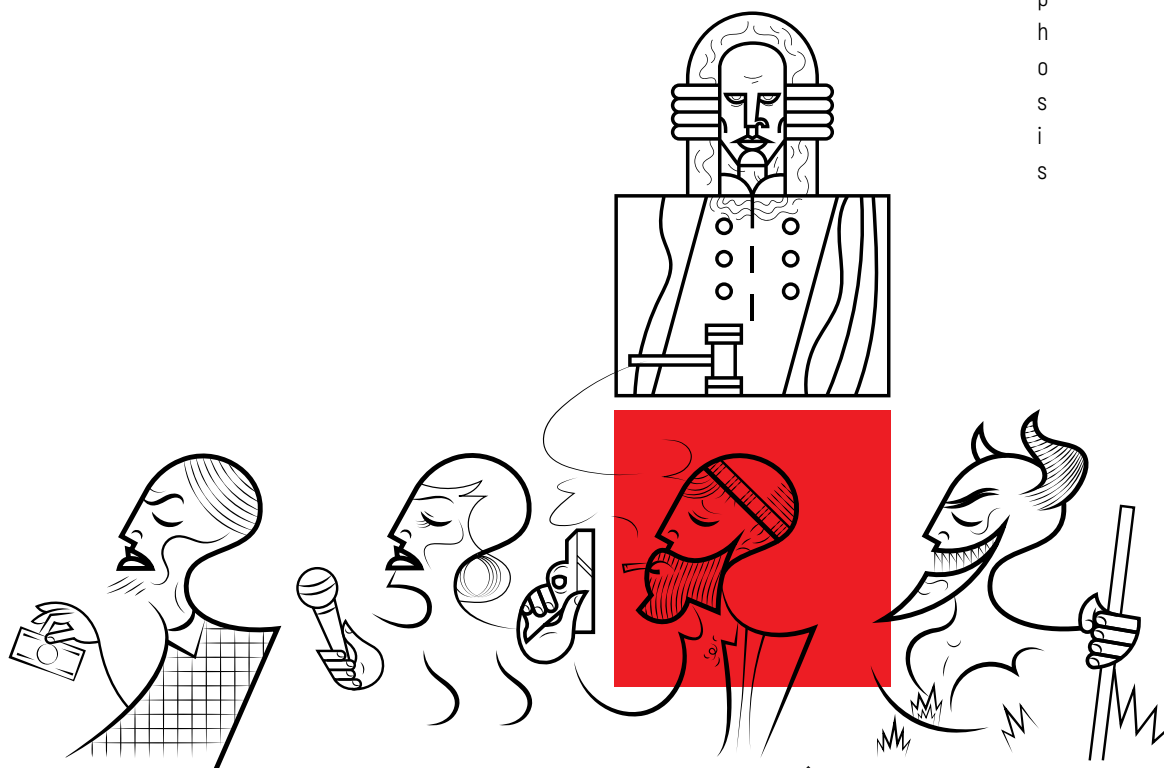


Judiciary Reforms: laws adopted, EU satisfied, experts with divided opinions



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A key change this year from last year's report on judiciary reforms is the fact that all laws that have been identified as necessary for reform have been amended. Seemingly, with this, the need for reform is met. The EU, in its latest short progress report, also notes this fact with a positive assessment. However, some domestic experts and the public have expressed some doubts about the successfulness and the sufficiency of the reforms in this area. The emergency due to Covid-19 highlighted further issues and challenges for the judiciary.

Authors: Teofil Blaževski and Goran Rizaov

Shortly before the research, a parliamentary debate on the very day the Parliament dissolved on 16 February 2020 due to the 12 April elections, ended with the adoption of the new Law on Public Prosecutor's Office. The Government, with uncertainty, however, announced that it had managed to secure a two-thirds majority in Parliament to pass the law and announced that, with this, **the legal framework for finalizing judicial reforms is completed.**

One day later, the ruling party first, held a so-called "March for Justice", and then the main opposition party held a "Protest for Justice" and stalled reforms in the area. Ratings were diametrically opposed. **The ruling party claims that it now depends on the sole integrity of the judges and prosecutors themselves. The opposition, however, says that almost nothing has been done.**

In the meantime, some of the main recommendations of the experts from last year's research were not even noted, let alone accepted and they still remain in force. One of the main recommendations is the demonstration of political will for non-interference in the judiciary.

A major problem remains the independence in financing and insufficient budgetary resources. The legal provision that the judiciary in North Macedonia will be funded with 0.8% of the GDP in the country has yet to be implemented, and tens and tens of millions of Euros in annual budget are still missing, although the salaries of the judges are not a problem, neither in terms of amount, nor by regularity in payment. There is a similar problem with the financing of the Public Prosecutor's Office, although there has been little progress in determining the item of 0.4 per cent of current budget revenue, but with a restrictive clause.



The staffing situation in prosecution offices and courts remains a problem. The prosecution lacks about 200 prosecutors, less than 100 prosecutors lack in the judiciary, and according to recent analysis by some NGOs, this is an important factor in the speed of justice.

The situation with the electronic modernization of the judiciary and the automatic electronic submission of cases has not been (much) improved. Although investigations into the functioning of the ACCMIS (Automated Court Case Management Information System) have been conducted, and although numerous weaknesses and suspected abuses have been identified, **there are still no significant charges against judges.**

The same is true with the discovery that the former president of the Supreme Court and several other judges deliberately kept cases in the drawer. The investigation has been going on for months, but there is no outcome yet, i.e. prosecution or termination of the investigation, although three judges have been dismissed.

The advice of the experts we talked to last year about how to retain the process of selection of new judges and prosecutors only through the Academy for Judges and Prosecutors has been accepted, so it remains that way despite numerous objections from both prosecutors and judges that say they have sufficiently trained staff within the courts to be able to promote new prosecutors and judges.

Some of the in-depth functional analyses to improve the situation in the judiciary have been done by experts¹. These are in the possession of the judiciary and the prosecution, they contain numerous recommendations, and this fact only shows how much more work has to be done in this area.

¹ META.mk – March 2020 – A plan to improve the situation in the judiciary – (available at <https://www.instagram.com/p/B-O6LOGnrwe/>)

The “Racket” case and the collapse of the Special Prosecution

The political earthquake but also the shocked public last year prompted the opening of an investigation, indictment and detention of former Special Prosecutor Katica Janeva, who headed a special prosecutor’s office to clear up cases stemming from the 2009 illegal wiretapping, including the case on whose order and how did the mass wiretapping actually occurred.

The prosecutor, whose signature rests on 20 indictments (most of which are still pending, though filed in 2017 and 2018), is charged with misuse of official position and authority (Art. 353 of the Criminal Code). In fact, Janeva was involved in the so-called “Racket” affair, which was originally indicted against some of the richest people in the country for crimes committed in about a decade (from 2002 to 2012/13). She then, with her signature and court order, allowed the first defendant in this case, the tycoon Orce Kamchev, to

be released from detention and his passport to be returned, for which she received a financial reward through intermediaries, as the prosecution now claims.

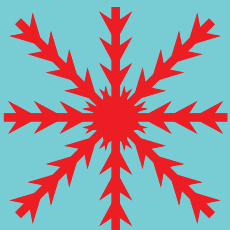
Since being detained in late August, the SPO appears to have been sealed, although the institution still formally has a mandate until the end of September 2020. Prosecutors, on orders from the State Public Prosecutor were withdrawn back to the Public Prosecutor's Office in various prosecution offices. Also, on the order based on Janeva's permission from detention, the State Prosecutor's Office established jurisdiction over all cases before the courts, but also for all investigations and prosecutions led by the SPO, as well as over the entire archive. However, this jurisdiction was disputed, as was Janeva's legal ability to grant permissions from detention, so it was clear that the legality of the entire procedure had to be ensured either by a separate law or under the new Law on Public Prosecution, which ultimately happened.

In any case, the dilemmas before the expert public, including the experts we talked to, are still present, because in some final legal proceedings the defence of the SPO defendants hopes and announces that they will challenge these charges before the Supreme Court and, if necessary, before the Court in Strasbourg. The following issues are mentioned as the most common dilemmas here:

Does the SP Katica Janeva have a legal right to issue orders and give consent to the fate of the processes run by the SPO while being in detention?

Does the state have a legal basis by law (with the new SPO Law) to consider legal the charges and lawsuits filed after 30 June 2017 (because in the SPO Law this date was final for the filing of investigations resulting from the illegally wiretapped materials - as the Supreme Court argues in principle legal opinion)?

Is the segmented use of the illegally wiretapped materials as evidence before the court, which is regulated by Article 110 of the new SPO Law, constitutional and is it in accordance with the Law on Criminal Procedure?



Law of politicians

For the opposition, such decisions in the new SPO Law are made in order for the current SDSM government to secure amnesty for the future. For the ruling party, the opposition's refusal to vote on the new SPO Law is nothing more than an attempt to "legalize" the SPO cases in the regular prosecution, which would save most of the defendants, who are high-ranking representatives of the former and current leadership of the opposition VMRO-DPMNE.

If we analyze this last law from the set of reform laws for the judiciary, one thing is certainly clear. The law was harmonized and passed under the watchful eye of politics until the last day (16 February 2020). Although government officials claim that it was written by the expert public, it is a fact that some of the experts who participated in the initial law-making consultations shortly before it was adopted and afterwards, claimed that, after the adoption, they did not recognize the legal solution and that they do not support it.

The fact that politicians played a key role in the decision-making and the writing of new versions until the very last day of adoption is also evidenced by the instance that, at least for one year, there had been regular meetings of groups delegated by the two largest parliamentary parties, which stopped shortly before the law was passed. The public has also warned that it is unacceptable for the group represented by the opposition to include persons subject to an SPO investigation or lawsuit, but one of the opposition MPs who was under investigation, was one of the main negotiators (MP Antonio Milošoski from VMRO-DPMNE).

Finally, after two draft versions, the second of which was put in parliamentary procedure, a third version was adopted², which was changed in the last few days, in order to obtain the necessary parliamentary majority for the law.

The law itself does not cover radical reforms in the Public Prosecutor's Office of the Republic of North Macedonia. However, autonomy in the work of public prosecutors has been underlined, conditions for their accountability have been tightened, and age limits have been raised for certain levels of promotion in the prosecution. From the formative point of view things have not been changed, with the increased autonomy of the Prosecutor's Office for prosecution of organized crime and corruption and the autonomy of the head of this prosecution. It is decided that the head of the Prosecution will be elected by the Council of Public Prosecutors via competition and with a salary only 5% lower than the one of the state prosecutor.

Of course, it is not known to what extent all this will contribute to enhancing the efficiency of the Public Prosecutor's Office. From the 2018 Annual Report³, which is the latest and was only published at the end of 2019,

² Parliament of the RNM – 16 February 2020 - Materials – (available at <https://www.sobranie.mk/materialdetails.nsp?materialId=3a61271e-d147-46b2-a450-fe01a6be4167>)

³ RNM Public Prosecutor's Office – 2018 Annual Work Report (available at <http://jorm.gov.mk/wp-content/uploads/2020/01/godishen-izvestaj-za-raboteneto-na-javnoto-obvinitelstvo-na-republika-severna-makedonija-za-2018-godina.pdf>)

4 META.mk – 10 January 2020 - Good staffing of the Public Prosecutor's Office... (available at <https://meta.mk/dobro-ekipirana-%d1%98avnoobvinitelska-sluzhba-e-preduslov-za-nezavisno-i-efikasno-%d1%98avno-obvinitelstvo-infografik/>)

5 One of the experts we spoke to states the following: "The Law on Public Prosecution is unclear in terms of the competences of the specialized prosecution offices and specialized departments established in the basic prosecution offices. At the same time, the same Law introduces the use of evidence rules, so it technically intervenes in the (already insufficiently clear) LCP"

6 Parliament of RNM – 16 February 2020 – Materials – (available at <https://www.sobranie.mk/materialdetails.nspx?materialId=7e30ef53-733f-40eb-8789-7adc561bdbd9>)

it can be seen that the efficiency in 2018 in dealing with criminal charges for adult offenders in all basic public prosecutions was 54 percent, while the most prominent were the higher prosecution offices in the area of Štip and Bitola. The Report recognizes that the situation is bad and pointed out the following:

“The above facts indicate the state of affairs of the Public Prosecutor’s Office in terms of human resources. If no solution is found at the state level to overcome the problem of insufficient number of staff coming out of the Academy of Judges and Public Prosecutors, which is an obligatory condition for the election of public prosecutors in the first instance, the situation will only get worse. Of concern is the fact that these conditions most directly affect the efficiency and effectiveness of the Public Prosecutor’s Office and the performance of its function.” (p. 9 of the 2018 Annual Work Report).

This finding is also confirmed by a functional analysis completed at the end of 2019, which highlights the problem of a large shortage of public prosecution officials.⁴

With regard to the new PPO Law, perhaps the biggest dilemma remains Article 110, contained in the transitional and final provisions, which has led to widespread debate both between the ruling party and the opposition and between the expert public. Namely, this article provides for different handling of cases by the Special Prosecutor’s Office, which is de facto “dead” with the non-election of a successor to the first and now former Special Prosecutor Katica Janeva. In cases filed before 30 June 2017, including those for which litigation is already underway, the illegally wiretapped materials can be used as evidence, and for those that are at the level of an indictment or are already in the courts, such illegal materials can only be used as clues. It remains unclear why this is done, unless it is only a matter of adjustment and compliance with the existing Law on Criminal Procedure (LCP), in which illegally obtained evidence in the context of audio-visual recordings cannot be used in court proceedings, although the practice in RNM is also familiar with different court behaviours, outside of the cases pursued by the SPO⁵.

Along with the new LPP, the Law on the Council of Public Prosecutors⁶ was adopted and amended on the last day of Parliament’s mandate, the main body that should be hierarchically above the prosecutors and which should take care of all things in the prosecution system, including election and dismissal of prosecutors. Revising the amendments, several changes can be noticed in the process of election of council members by Parliament, requiring now that, in addition to being “experienced and proven lawyers”, they should also be among the “former judges of the Constitutional Court, international judges and other prominent lawyers”. There is a refinement and improvement of the provisions that ensure

transparency in the work of the Council, but there is not, for example, a provision that would guarantee the financial independence of the Council. The money comes from the RNM Budget, and how much will be allocated for the Council is determined by the Public Prosecutor's Office.

The expert recommendations that we read in the functional analysis for the Public Prosecutor's Office warn, for example, that the Council of Public Prosecutors cannot depend on the head prosecutor in terms of funds allocated and should have its own budget, which will have the effect of independence of this body..

Vetting – experts and judges say no, politics is still announcing it

Performing a background check of judges or prosecutors, generally known as vetting, has been the subject of debate in our society since before the 2016 election, when the then opposition SDSM announced it as part of the judicial reform processes. There has been little talk of this since they became a ruling party, and the excuses were that the European Union had a negative opinion of such a process. Because over the course of almost three years of practicing the executive branch judiciary reform has proved to be the slowest and most painful step, in the early election campaign for the 2020 parliamentary elections (now postponed until the end of the coronavirus crisis), SDSM but now also DUI (these two parties were and are the main ones in the executive branch until now), have imposed the issue of vetting and made it relevant again. DUI even offered a draft concept of how the vetting process is imagined for all elected or appointed people, not just for the people of the judiciary. The main opposition party, VMRO-DPMNE, also announced a background check on all prosecutors and judges, if they come to power.

However, judges, prosecutors and the expert public are generally against the vetting process, given the experiences from Serbia and Bosnia and Herzegovina, where vettings were conducted through controversial processes of general re-election of judges, as well as based on the relatively negative experience that Albania had, producing over 14,000 cases in the courts, some of which have reached the Court of Human Rights in Strasbourg.

At a recent international debate on the vetting process, held in Skopje and organized by the European Policy Institute - EPI⁷, supreme judges, members of the State Commission for Prevention of Corruption - SCPC, university professors, current judges in the Criminal Court for organized crime and corruption, had a joint stance that the vetting of the entire judiciary is unnecessary, and if it is conducted only to some judges who are suspected of being politically corrupt or affiliated with business elites,

7 EPI – 9 March 2020 – Policy Dialogue:
Vetting as an extraordinary measure will
create extraordinary problems – (available
at <https://epi.org.mk/post/14608>)

then the process should be done very carefully with two basic principles followed: a) what is the aim of the process; b) who will who will conduct the vetting of judges.

It was also emphasized that vetting should be an option only, and that opportunity should be given to the much broader competences of the Judicial Council (JC) with the 2019 amendments to the Law. In addition, it was noted that prior to the changes to the Law, the JC received 18 complaints throughout 2018, while in 2019 the number of complaints was 107, which is interpreted as increased confidence in this body.

Finally, last year, the Judicial Council dismissed four judges for negligent performance of their duties. Vladimir Pančevski, the president of the Criminal Court Skopje 1, was dismissed in July 2019, while in the fall, the president of the Supreme Court, Jovo Vangelovski and the supreme judge Rahilka Stojkovska were dismissed. In January this year, Risto Katavenovski, another supreme judge was dismissed.

Financing remains low, although there is progress

One of the major problems of the RNM judicial-prosecutorial system so far is the financing. In all expert debates and published analysis, it is stated that without a stable, reliable and separately deployed financing system, neither the judiciary nor the prosecution can guarantee their independence and efficiency.

It can be concluded that the financing area is still far from the desired measures, although there are some positive developments. For example, the new Law on Public Prosecutor's Office for the first time provides a fixed amount of 0.4 per cent of the budget as the least possible funding for the prosecution system. Given that the revenue side of the budget amounted to about 3.9 billion Euros last year, this means that for 2020 the PO of RNM should receive about 15.6 million Euros. However, the Law also contains the following wording: "if this does not disrupt the equitable allocation of budget funds and does not affect the funds planned for all budget expenditure items", as well as the precondition that the RNM Public Prosecutor should consult with Minister of Finance before preparing the budget for each subsequent year. The RNM 2020 Budget, which is adopted before the PPO Law, stipulates that the public prosecution of RNM will be financed with 10.45 million Euros, which is about 4 million less than what was prescribed by the Law adopted after the adoption of the Budget!

8 Akt.mk - 2010 - Law on Judiciary Budget - (available at <https://www.akt.mk/%d0%b7%d0%b0%d0%ba%d0%be%d0%bd-%d0%b7%d0%b0-%d1%81%d1%83%d0%b4%d1%81%d0%ba%d0%b8%d0%be%d1%82-%d0%b1%d1%83%d1%9f%d0%b5%d1%82/>)

The judiciary, on the other hand, is generally funded by the RNM Budget. For ten years in a row, there is a provision in section 4 of the Law⁸ that has never been applied - the judiciary budget in the part financed by the state should annually receive **“at least 0.8 per cent of GDP ...”**. That would mean that for 2020, for example, courts should receive around 101 million according to data from the World Bank for the nominal value of GDP in 2018 or around 120 million Euros according to a more recent unconfirmed GDP data for 2019.

The reality is that the courts still have (only) about 40 million Euros available from the Budget each year, but this amount also includes either their own revenues or some foreign aid. In 2020, the budget of RNM for the Judiciary should allocate just over 35 million Euros. This amount does not cover the Constitutional Court, because this court is financed separately by a special rate in the budget.

The judiciary itself generates a revenues of around 1 million Euros. That is at least the amount for 2018, and this can be seen from the annual report of the Judicial Budget Council. With these facts, the question of why the promise has not been fulfilled (mostly given by political elites) remains open, at least for the reduction of court fees and lump sums, which are only a fraction of this 1 million Euros sum, in order to make it easier for citizens to access justice.

The general remark would be something similar to a Macedonian folk saying - **“the musicians will play on as long as you pay them”**, meaning that the state has not yet fulfilled its obligations to the judiciary and prosecution to a satisfactory level. Also, one of the experts we spoke to noted that “the item for the judiciary, envisioning 0.8 percent of the GDP is the largest one in all European countries, which may seem too much to prime ministers and finance ministers,” but added that “the proportionality between the amount of GDP of the European countries and North Macedonia should also be considered”.

But now, in 2020, a new challenge and problem arises over the current finances. Authorities, parties and NGOs that are following the finances have already announced that the budget for 2020 will face an enormous gap, even over half of the projected revenues, if current initial negative trends in the economy due to the “corona crisis” continue for a longer period. The leader of the ruling party, Zoran Zaev, however, proposed lowering the salaries for two months of all elected and appointed officials, including judges and prosecutors, with everyone receiving a net salary of 14,500 denars per month (that is the minimum wage in the state, about 235 Euros). The budgets for the judiciary and prosecution will of course be cut, but it is still unknown to what amount they will be reduced.

Lack of judges and how that affects efficiency

According to the Judicial Council decision made in October 2019, the number of judges in the Supreme Court should be 28. Before the end of the year, this court had 19 judges, but three were dismissed and the decision was upheld by the Judicial Council at the time this analysis was written. The Department for prosecuting cases of organized crime and corruption in the largest criminal court in the country, for example, has 9 active judges, and, according to the systematization, there should be 13.

There are more such examples. At the beginning of 2018 (this is the last year for which an annual report by the RNM Judicial Council is available), there were 529 judges, but at the end of the year, according to a report from the Judicial Budget Council, there were 512 judges. According to the systematization adopted by the same Judicial Council, there should be 636 judges in all positions in the judiciary. Did this affect the timeliness and efficiency of the judiciary? Judging by the Report by RNM Judicial Council and the figures provided there, courts were effective at a state level in 2018.

However, two facts are worrying. Most of the cases filed by the Special Public Prosecutor's Office are still pending. Also, in the Annual Report for 2018, there is a worrying information that there are unsolved cases older than 3, 7 and 10 years. As of December 2018, there were over 3.500 cases older than three years, 240 cases older than 7 years, and as many as 118 older than 10 years.⁹

The coronavirus pandemic and COVID-19 disease will make the situation even worse. After the hesitation of the Judicial Council around mid-March 2020 about their stance over the situation, the RNM Government recommended to the JC and the Supreme Court to instruct the lower courts to start trying only a certain number of urgent cases.¹⁰ The JC has issued such guidance (following prior guidance from the Government, which is in itself symptomatic), but it has not been fully implemented (e.g. daily disinfection of courts), and a group of 70 lawyers and the Lawyers' Chamber have demanded that all hearings be terminated over a set period of time. They also demand that a decree with force of law be passed that would freeze the proceedings so as not to break the deadlines judges have i.e. the 90-day suspension of a case, after which a court case must start from the beginning. Interestingly, some of the lawyers dealing with the SPO-related cases or the high-profile case "Racket" did not mention the freezing deadlines in public statements, arguing only that no case would become obsolete if a three-month moratorium was introduced.

⁹ RNM Judicial Council – RNM Judicial Council Annual Work Report for 2018 – (available at <https://bit.ly/3cR8nIY>)

¹⁰ Government of the RNM – 16 March 2020 – Announcement, see item 7 – (available at <https://vlada.mk/node/20544>)

However, on the last day of March another verdict from the SPO cases was given, so it is obvious that the litigations of these cases are continuing despite the corona crisis. This can be explained by another insight into the efficiency of these cases we received from the NGO sector. A still unpublished analysis of one NGO, in fact a coalition of organizations working in the field of the judiciary, states that the reason for the delays of hearings and the delay in the completion of court cases related to the former SPO lies with the Court, and to a lesser extent with the defence and other real obstacles. This suggests that the court is not well managed (as many of these cases are delegated to only a few judges), but also that there is a lack of judges in the Department for prosecuting cases of organized crime and corruption - the only specialized department in the state. A third possible reason for the ineffectiveness is that the estimate of the number of evidence the Prosecution offered in the case, before the Court approved the trial, may have been wrong.

Probation is still “on probation”

More remarks can be attributed to the judiciary in RNM, from being slow to reform, to refusing to accept novelties. One such novelty is probation as an effective way of reducing the number of sentenced inmates to a more successful resocialization. We also identified this problem in last year’s report. There is now progress in the technical preparations for the implementation of the Law on Probation passed as early as 2015, but it appears that for the courts this Law is still “on probation.”

At a recent conference organized on this topic by the NGO sector, it was said that although there were conditions, a court in south-eastern Macedonia boycotted the process. That is, out of ten requests for probation, none was accepted, although in at least four cases there were conditions and recommendations to do so.

At the same time, it was reported that in our state 25% of convicts end up in prisons, while in Germany, a state that actively uses the probation system, that percentage is reduced to 5¹¹.

Among the other problems found in the indicators of this research and pointed out by the experts, we can generally distinguish the following: improvement of the material and technical conditions in the courts, in which, for the most part, there are no special safes for the storage of case materials (the same applies to the prosecution); improving a uniform judicial practice and greater activity of the Supreme Court in this regard; improving the transparency, accountability and the public relations of the courts; harmonization of the procedural legislation and the Criminal Code.

¹¹ MMC.mk - 28 February 2020 - “Courts in Macedonia avoiding probationary measures” - (available at: <https://bit.ly/2QnchQi>)

Finally, we would conclude with the recommendation of one of the experts: **“judicial reform should be an evolutionary rather than a revolutionary process, and the process of obtaining an independent judiciary should start in the creation of law education. This implies a thorough revision of the programs in the faculties of law in the state and investing in higher education in the field of law.”**



Methodology

This research by the Metamorphosis Foundation, within the project implemented by the Center for Democratic Transition in Montenegro (CDT), covers five areas: elections, judiciary, fight against corruption and organized crime, media and public administration reform, with each area covered in a separate document. This policy paper covers the area of judiciary reform.

The areas consist of a number of sub-areas related to the regulation of the strategic and legal framework, institutional, administrative and material capacity, as well as the practically achieved results.

The analysis is based on the fulfilment of the criteria created by collecting the assessment of the indicators and the issues related to them by experts monitoring the implementation of EU standards, as well as on the basis of an analysis of normative and institutional reforms and their practical results. In this analysis, we would like to express gratitude to the following experts: Assistant Professor Denis Prešova, PhD, from the Faculty of Law Iustinianus Primus from the Ss. Cyril and Methodius University in Skopje, Natali Petrovska, lawyer and director of the Coalition All for Fair Trials, as well as Vasko Maglešov, a well-known journalist employed in the Prizma/BIRN editorial office, who has been monitoring and writing about the situation in the judiciary for the past ten years.

The CDT made an assessment of the progress made in meeting political criteria for the first time in 2017. Then, with the help of Dr. Martin Bruce's methodology, indicators were developed for each of the areas mentioned, which serve as a measure to assess the situation in the areas and, in fact, represent an authentic understanding of what the EC is requesting from each country as progress in a given area. Following the first assessment, the CDT in 2018 has expanded the research focus to other countries in the region, and together with colleagues from CRTA (Serbia), the Metamorphosis Foundation (Macedonia), Why Not? (Bosnia and Herzegovina), the methodology has been refined, and on the basis of this methodology are conducted such researches.

The basics for the development of the indicators are the key assessments and recommendations from the European Commission's reports, but also other international reports, comparative studies and research, action plans, as well as numerous international standards and practices and other reference materials. The total number of indicators for all areas is 168, with several indicators added this year in each area in terms of gender representation, budgeting and overall policies.

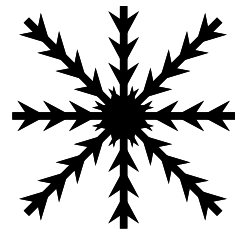




About the Metamorphosis Foundation

Metamorphosis Foundation for Internet and Society is an independent organization operating in the Republic of North Macedonia and in our wider European home. Our team is comprised of dedicated activists who advocate for democracy, united by a common goal and values of mutual accountability, open communication and an unwavering commitment to universal human rights and democracy.

We strive for a society in which engaged and aware citizens actively use innovative tools to fulfil their civil rights and responsibilities, citizens who unconditionally influence the authorities and demand accountability, thereby ensuring democratic, accountable and transparent governance.





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