BLIND JUSTICE:

TO STATE CAPTURE IN NORTH MACEDONIA

JUDICIARY, PUBLIC PROSECUTION AND POLICE

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ACRONYMS

ACCMIS	AUTOMATED COURT CASE MANAGEMENT SYSTEM
AJPP	ACADEMY FOR JUDGES AND PUBLIC PROSECUTORS
ANS	AGENCY FOR NATIONAL SECURITY
BPPO POCC	BASIC PUBLIC PROSECUTOR'S OFFICE FOR PROSECUTION OF ORGANIZED CRIME AND CORRUPTION
CC	RIMINAL CODE OF REPUBLIC OF NORTH MACEDONIA
MD	MINISTRY OF DEFENCE
CPC	CRIMINAL PROCEDURE CODE
DUI	DEMOCRATIC UNION FOR INTEGRATION
EC	EUROPEAN COMMISSION
ECHR	EUROPEAN COURT FOR HUMAN RIGHTS
ECHR	EUROPEAN CONVENTION ON HUMAN RIGHTS
EU	EUROPEAN UNION
FP	FINANCIAL POLICE
HPPO	HIGHER PUBLIC PROSECUTOR'S OFFICE
IA	INTELLIGENCE AGENCY
ICH	INSTITUTE FOR HUMAN RIGHTS
LEC	LAW ON ELECTRONIC COMMUNICATIONS
LFP	LAW ON FINANCIAL POLICE
LIA	LAW FOR INTERNAL AFFAIRS
LP	LAW FOR POLICE
LPP	LAW ON PUBLIC PROSECUTION
LSPPO	LAW ON THE SPECIAL PUBLIC PROSECUTOR'S OFFICE - LAW ON THE PUBLIC PROSECUTOR'S OFFICE FOR PROSECUTION OF CRIMINAL OFFENSES RELATED TO AND ARISING FROM THE CONTENT OF ILLEGAL INTERCEPTION OF COMMUNICATIONS
MI	MINISTRY OF INTERIOR
OSCE	ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE
PP	PUBLIC PROSECUTION
RNM	REPUBLIC OF NORTH MACEDONIA
SCD	SECURITY AND COUNTERINTELLIGENCE DIRECTORATE
SCPC	STATE COMMISSION FOR PREVENTION OF CORRUPTIONSDSM SOCIAL DEMOCRATIC UNION OF MACEDONIA
SEC	STATE ELECTION COMMISSION
SPO	SPECIAL PUBLIC PROSECUTION
UN	UNITED NATIONS
VMRO-DMPNE	INTERNAL MACEDONIAN REVOLUTIONARY ORGANIZATION – DEMOCRATIC PARTY FOR MACEDONIAN NATIONAL UNITY

EXECUTIVE SUMMARY

Democracy in North Macedonia was under serious threat for almost a decade. In the period 2006 -2016, the judiciary, public prosecution, police and media were under the control of the former government of the Internal Macedonian Revolutionary Organization – the Democratic Party for Macedonian National Unity (VMRO-DPMNE) and its leader, Nikola Gruevski. Critical academics, journalists and civil society activists, as well as opposition politicians, were silenced and many of them were persecuted. During this decade, a small group of ruling party politicians and government officials controlled all state institutions. Then came the 2015 scandal over the illegal wiretapping of more than 20,000 people, masterminded by former Prime Minister Nikola Gruevski and his counterintelligence chief. After the contents of wiretapped conversations were publicly disclosed, in its 2016 progress report the European Commission described the country as subject to "**state and institutional capture"**, reaffirming the findings of the Priebe-led senior experts' group published in June 2015.

Today, despite the fact that VMRO-DPMNE is no longer in power and its leader and former Prime Minister Gruevski is in exile in Viktor Orbán's Hungary, traits of state capture still remain in the judiciary, public prosecution and police. We must uncover the extent of the **"state capture"** in order to be able to understand existing institutional weaknesses, but also to develop strategies for early detection, prevention and proper sanctioning of such abuses. Through examples and real-life cases, this publication highlights specific manifestations of the state **"capture**" and their consequences.

As illustrated in the 2017 Priebe Report, the capture of the judiciary happened when a small number of judges in powerful positions abused the judicial system to gain power and promote both their personal interests and those of governing elites. Moreover, unclear and unsupported decisions on the selection and dismissal of many public prosecutors and judges confirm what the wiretaps suggested about political interference in these processes. Statistics also demonstrate a lack of willingness on the part of the public prosecution to investigate high-level corruption cases. Furthermore, judges and public prosecutors abused detention measures and violated the presumption of innocence by detaining suspects when the targets of these prosecutions held political power. This was not the case when politicians and government members faced *criminal* charges. In these cases, politicians seem to enjoy immunity, as many of those accused of criminal offenses were pardoned under discretionary authority held by the President of State, or were not sentenced. Following a political crisis triggered by the wiretapping scandal, the Special Prosecution Office was established in 2015 by mutual agreement among the four major political parties, brokered under EU mediation. Unfortunately, this institution also failed, with charges raised against the chief special prosecutor on the grounds of "abuse of public office and duty" in yet another corruption scandal.

The research presented in this publication was commissioned by the Open Society European Policy Institute and conducted by the Balkan Investigative Reporting Network Macedonia, in a joint effort with the All for Fair Trials Coalition, Institute for Human Rights, Macedo-

nian Helsinki Committee for Human Rights and the Foundation Open Society - Macedonia.

In particular, the research identifies **several** ways in which political interference interfered in the justice system when it was subject to state capture, and how existing systemic weaknesses pertaining to the rule of law were exploited in the ruling party's interests. Patterns or mechanisms, **described in five expert analyses and six investigative stories**, demonstrate how the party in power carried out "state capture" and how the judiciary's systemic weaknesses enabled it, through:

Clientelistic relations between the judiciary and political elites - Wiretaps leaked in 2015 contain strong indications of apparently unlawful behaviour on the part of judicial officials, such as: improper and unlawful selection and promotion of judges loyal to the previous governments; dismissal of independent judges; and interference in the selection of members of the Judicial Council. Abuse of ACCMIS through the manual allocation of court cases and misuse of pre-trial detention are only two of the many ways in which political control was exercised over the judiciary. These networks of judicial elites close to political parties in power risked the judiciary's independence and integrity, and created a safe zone where a small group of judges could gain power and promote political interests aligned with those of the political elites.

Manipulation of the Automated Court Case Management Information System – In 2017, the Ministry of Justice conducted an independent investigation into the use of the Automated Court Case Management Information System (ACCMIS). Despite clear procedures and division of responsibility among those involved, the report confirmed that the highest judicial authorities in the country had intentionally manipulated the system over a period of about five years (2013 - 2017).

Culture of absolute impunity of politicians amid a surge of political corruption – Senor Officials are almost untouchable by the law when they are in power. Statistics reveal that, almost without exception, they face criminal charges only when their political party is no longer in power. In addition to the abuse of power and authority, officials are charged with criminal association, damaging or privileging creditors, large-scale fraud and money laundering. Sanctions were rarely enforced, which tends to make corruption a low-cost and high-benefit activity for politicians. The investigative stories show how senior officials went unpunished in a large number of court cases.

Misuse of amnesty - Most amnesty decisions have problematic legal standing, as many have argued that they did not comply with the Law on Amnesty, and violated the Constitution and international treaties and norms. Case studies show that amnesty decisions were taken on the basis of party interests, rather than as part of a broader reconciliation process.

Lack of accountability of public prosecutors – The former chief special prosecutor has now been charged with abuse of office for allegedly receiving payments from a well-known businessman in return for a lenient sentence in his corruption trial. Events such as this go a long way to explaining public distrust in prosecutors who work on organized crime and corruption, and the widespread percep-

tion that their office lacks integrity and is not immune to interference from politicians and business elites. Public prosecutors are rarely held accountable for misconduct, even if it has been proven that their actions contributed to wrongful convictions. Experts discuss the public prosecution's passive role in conducting independent investigations and initiating criminal proceedings, which means the police enjoy significant autonomy to decide which criminal cases should be referred to the public prosecution, and which evidence should be revealed.

■ **Political pressure on the police in the initial stages of criminal proceedings** – While problems in the judiciary are in the spotlight, institutional weaknesses in the public prosecution and the police remain under the radar. In particular, the public prosecution's lack of investigative competences gives more power to the police to decide whether charges would be raised, whether cases should be referred to the public prosecution, and what evidence should be presented to the public prosecution in case files. As a result, the police are highly politicized due to their important role in the initial stages of criminal proceedings.

■ **Misuse of detention measures** – Excessive use of detention measures, long pre-trial detention, a lack of adequate rationale in Detention Motions and a lack of adequate evidence all indicate the abuse of this custodial measure. Detention has been used as a means of coercion or covert punishment, which inevitably violates the presumption of innocence, and consequently the right to a fair trial. The ECtHR has established violation of Article 5 from ECHR in cases such as *Vasilkoski and others v. Macedonia* and *Ramkovski v. Macedonia,* because decisions on imposing and extending detention did not provide the necessary arguments to justify the detention motions. Differences between the court's handling of motions submitted by the two prosecution offices (Special Prosecution Office and the Prosecution Office against Organized Crime and Corruption) provide additional evidence for the possible abuse of detention measures. Approved detentions as a percentage of all motions filed is significantly higher in the case of POOCC compared to SPO (95% and 25%, respectively).

■ **Abuse of institutions to prosecute CSOs** – The importance of free media and an independent civil society is crucial in the fight against state capture and corruption. During VMRO's regime, the State Commission for Prevention of Corruption, Financial Police, Public Revenue Office and the Public Prosecution Office were all instructed, by blatant abuse of their respective authorities, to initiate baseless investigations and inspections of 22 non-governmental organizations that had criticized the government.

■ **Lack of clear long-term reforms in the judiciary, public prosecution, the police and secret services** – Currently, reforms are largely focused on aligning national legislation with international and comparative legal standards without having conducted a thorough research of the actual causes of the justice system's dysfunction. In the past, legal amendments and reforms were frequently adopted, but have not made a significant difference in overcoming real challenges and institutional weaknesses in the justice system.

This report illustrates these systemic weaknesses through six case studies:

CS1. "The State Attack on Open Society" reveals a well-designed, politically-motivated and coordinated operation to exploit institutions to force a final confrontation with the civil society sector and individuals critical of the government, which the previous government called "de-Sorosization". The journalistic investigation showed that this operation had involved severalmonths of intensive audits at 22 non-governmental organizations, which failed to find anything illegal and did not hold accountable those who commissioned and implemented them.

CS2. In the **"No prosecutor for Macedonian Prosecutors"** chapter**,** BIRN investigates the responsibility of public prosecutors. In particular, the chapter illustrates their susceptibility to political corruption, direct and indirect influences, and lack of effective mechanisms to hold them accountable. The investigation

showed that in the period of 12 years a total of 12 prosecutors have been dismissed, of whom eight were dismissed in 2008, when Nikola Gruevski's government effectively seized control of the judiciary. It compares the relationship between the prosecution and politicians to the so-called "Stockholm syndrome", whereby they are captured, but have developed an emotional relationship with their aggressor, and help to attain his goals.

CS3. BIRN's investigation **"State Capture in the Story of Captured Court Software**" shows that the abuse of the software for automatically assigning court cases to judges was invisible to the Judicial Council and the Supreme Court - even though it was a public secret, and judges officially complained that they had been verbally ordered to take on particular cases. This went on until the abuse was noted in Priebe's 2015 report of the senior expert's group on the rule of law.

CS4. "Public Office as Best Protection against Incarceration" investigates whether it is true that politicians are never or rarely held responsible for crimes they have committed while in public office. It concludes that of 89 public officials charged with criminal offenses, only 17 have been appeared in court as defendants. Among them, eight were acquitted; court processes are underway for four officials; one was convicted in the first instance, pending a decision from the higher instance court; and five were sentenced to imprisonment. However, only two of them have so far served their sentence.

CS5. **"Justice helpless in face of unlawful pardons"** is focused on pardoning decisions during the last ten years, and the effect on wider society of extending pardons to political personalities.

CS6. The last investigation focuses on the use of custodial measures for suspects, titled **"Detention as Punishment for Common People"**. A comparative analysis of the "Mavrovo Workers" and "Snake's Eye" cases investigates how institutions act differently when the subject of a prosecution is a politically important player. These people could have their detention order revoked even after having fled the country.

POLICY RECOMMENDATIONS TO THE EUROPEAN COMMISSION AND THE GOVERNMENT OF NORTH MACEDONIAA

Recommendations for the European Commission and EU member member states

➲ Newly adopted changes to the accession negotiations methodology are welcome, as they give more powers to the EU to act when a candidate country shows significant backsliding under the rule of law in the course of accession talks. The European Union should continue to demonstrate political will to contribute to making the upcoming negotiations process with North Macedonia more predictable, dynamic and credible;

➲ Similarly, the European Union should revise its rules and monitoring procedures, in order to address backsliding under the rule of law in candidate countries that have not begun accession negotiations, aimed at preventing similar political crises like the one in North Macedonia and state capture at an institutional level;

➲ The European Commission should consider conducting more expert-led assessments. The so-called Priebe Report, developed by a group of independent experts assessing the rule of law, proved to be an effective monitoring mechanism for North Macedonia that went beyond technical monitoring of its alignment with the EU *acquis* and allowed independent professional assessment that properly identified the elements of state capture;

➲ The European Commission should continue to provide assistance to North Macedonia to accelerate reforms in the areas of judicial independence, anti-corruption, the fight against organized crime, and alignment with core European values;

➲ The European Commission should insist that local authorities make more effort to tackle high-level corruption and to implement research-based reform strategies. Without in-depth knowledge about which procedures and practices fail to prevent state capture at institutional level and fail to fight corruption, anti-corruption policies will remain ineffective;

➲ The European Commission should include national experts, think-tanks and civil society in evidence-based policy making and oversight on performance of the judiciary, public prosecution and the police, to ensure proper and consistent implementation of legal and policy solutions;

➲ The European Commission and the EU member states represented in the Council should put more emphasis on an outcome-orientated approach, instead of focusing too much on formal rules and institutional structure. This approach should involve changes to legal culture and institutional practices;

➲ The European Commission should enhance its efforts to promote reform in legal education, not only of the Academy for judges and prosecutors, but also at a faculty level.

Structural recommendations for the Government include the following:

➲ The government should conduct a comprehensive assessment of the root causes of "state capture", and

consequently address weaknesses in the judiciary, public prosecution and the police with sustainable and evidence-based solutions. These assessments would allow evidence-based policy making and would better prepare the country for the EU accession negotiations process;

- Specifically, in a joint effort with self-governing bodies (Judicial Council and Council of Public Prosecutors), the courts, professional communities (judges, prosecutors, lawyers), academia and civil society, the government should address problems related to judicial capture, and promote institutional capacity-building to achieve sustainable results instead of fast, superficial solutions;
- The government should strengthen the ability of the judiciary, public prosecution and the police to be proactive in the fight against corruption, and should establish legal responsibility for public office holders, tackling their impunity;
- Recommendations put forward in all five analyses from this publication should be taken into consideration when designing policies to improve systemic weaknesses in the judiciary, public prosecution, and the police, and to overcome the challenges of state capture.

Structural Recommendations regarding the Judiciary

- Political influence over the process of appointing, evaluation, promotion and dismissal of judges and public prosecutors, as well as members of the Judicial Council and the Council of the Public Prosecutor, should be removed;
- The Parliament of RNM should select respected members of the legal profession, of uncontested authority, as the so-called non-judge members in the Judicial Council;
- There should be full and timely implementation of the procedures on enforcement requests for ECtHR decisions, as well as serious consideration of requests for repeating the hearings for judges who have been improperly and unlawfully dismissed from office - and these judges should be allowed to return to judicial office;
- Authorized bodies should conduct mandatory and timely audits of the use of the Automated Court Case Management Information System;
- The courts must offer detailed and exhaustive rationales in their detention decisions, which adequately explain the circumstances and personal characteristics of each defendant
- The academic community and civil society should be involved in oversight of the Judicial Council and the courts, in order to ensure adequate implementation of the legal framework which is, to great extent, aligned with European standards.

Structural Recommendations regarding the Public Prosecution

- The Public Prosecution should be proactive in the fight against corruption, by initiating criminal procedures themselves when there are grounds for suspicion that a criminal offense has gone unreported by the relevant authorities, as well as through careful revision of charges reported by citizens, members of the legal profession and institutions to the police;
- A comprehensive analysis of the lessons learnt from the malfunctioning of the SPO should be conducted so as to better organize of the Prosecutor's Office for Organized Crime and Corruption, as a lasting instrument in the fight against corruption of the political elite;
- De-professionalization of the Council of Public Prosecutors would prevent its members to be alienated from their professions and would not allow this body to fall prey to bureaucracy
- Measures need to be taken to enhance the public prosecutor's functional superiority over the police departments involved in criminal proceedings, which would reduce the risk of direct interference by the executive powers;

➲ The capacity of prosecution offices needs to be increased, so they can provide adequate arguments in detention motions, supported by adequate evidence;
➲ The methodology currently applied to collect and process data about motions and decisions on issuing detention orders is not in line with Council of Europe and EU recommendations, and to a great extent does not reflect the actual situation. It needs to be aligned and improved.

Structural Recommendations regarding the Police

➲ Reforms of the police and other investigative authorities, as well as those of the secret services, should be implemented in a more transparent manner and the competences of all these bodies should be clearly defined

➲ The police should be more transparent when handling claims from citizens and legal entities, and inform the public prosecution of all cases by forwarding the relevant documentation;

Structural Recommendations regarding the Secret Service

➲ Despite the adoption of a new law which marked the start of security service reforms, they are still not completed. More efforts are needed to precisely define and regulate Secret Services competences in order to avoid abuse of legal authority for political purposes, or damaging human rights.
➲ Greater attention should also be paid to the legal framework and operational conditions for the oversight and control over these services

INTRODUCTION

The rule of law and curbing corruption are two key criteria for EU accession. Yet between 2006 and 2015, EU member states failed to acknowledge a decline that ultimately led to the abandonment of the rule of law in North Macedonia, and has contributed to a serious deterioration in the political situation in the country. Only after SDSM disclosed illegally wiretapped conversations that contained evidence of the abuse of power did the European Commission's 2015 progress report refer to backsliding and direct political interference in the judiciary. As a result of the deteriorating political situation, the 2016 report confirmed the findings of the Priebe-led senior experts' group and noted the state and institutional capture of North Macedonia.

State capture is a situation where the actions of individuals, groups, or firms both in the public and private sectors, influence the formation of laws, regulations, decrees and other government policies to their own advantage, as a result of illicit and non-transparent provision of private benefits to public officials.[1] The Commission's use of the term "state capture" to describe North Macedonia in 2015 has been superseded in the most recent reporting periods (2018, 2019 and 2020), which also noted some progress in the urgent reform priorities, including judicial reform. Despite this progress and recommendations to start EU accession negotiations with North Macedonia, state, judicial and police capture has ongoing consequences. Systemic weaknesses need to be identified and a serious analysis of potential reforms to the judicial system carried out. Finally, the EU's support is vital now that the so-called 'cluster on fundamentals' (especially chapters 23 and 24) has been formally opened.

1 Available at: http://iacconference.org/documents/statecapture.pdf

METHODOLOGY

This research applied a combined methodology approach[2] for collection and analysis of quantitative and qualitative data to assess the institutional and legal framework of the judiciary, public prosecution and the police, with a view to identifying the mechanisms used to abuse these institutions. The quantitative and qualitative data was collected through freedom of information requests.

Analysis of information from various sources (desk research):

- The Constitution of North Macedonia, relevant laws and regulations, bylaws, strategies, policies related to judiciary, public prosecution, police and secret service;
- Publicly available reports published by international and national institutions relevant to the topic of state capture and legal system reforms;
- Reports by non-governmental organizations;
- Academic papers related to the judiciary, public prosecution and the police;
- Disciplinary procedures initiated against public prosecutors;
- State Statistical Office reports;
- Minutes from sessions held by the Council of Public Prosecutors and by the Judicial Council;
- Minutes from oversight of the Automated Court Case Management Information System (ACCMIS) at the courts, including annual reports of the courts, extraordinary schedules of judges;
- Monitoring relevant court processes by the All for Fair Trials coalition;
- Interviews conducted with judges, lawyers, court presidents, experts and members of non-governmental organizations;
- Analysis of European Court of Human Rights case law related to applications that challenged the justification of detention orders;
- Decisions on detention orders.

Based on these sources, the researchers developed five analyses that cover systemic weaknesses of the justice system and the ways in which the judiciary, public prosecutors and police in North Macedonia became subject to state capture. BIRN conducted six journalistic investigations into elements of this systemic abuse.

2 This methodology builds onthe approach of the methodology used in the study: When Law Doesn't Rule: State Capture of the Judiciary, Prosecution, Police in Serbia. Available at: https://www.opensocietyfoundations.org/publications/when-law-doesn-t-rule-state-capture-judiciary-prosecution-police-serbia

CS1: THE STATE ATTACK ON OPEN SOCIETY

BIRN investigated how North Macedonia's former ruling party abused state institutions to take on George Soros

Author: **Goce Trpkovski**

By the time the former leader of North Macedonia's VMRO-DPMNE party Nikola Gruevski took to the stage outside the State Election Commission on December 17, 2016 and announced the de-Sorosization of the country, the process had already entered an advanced stage. Three weeks earlier, the institutions had begun preparing the grounds for detailed financial audits of 22 non-governmental organizations.

The country had just held snap elections, and the results meant that VMRO-DPMNE might lose power after running an 11-year authoritarian-style government distinguished by state capture. The party fought aggressively to remain in power and labelled its opponents "traitors" or "enemies of the state". Organizations supported by George Soros's Open Society Foundations were among the first in line.

Party rhetoric and institutional behavior should be kept apart. But in the case of VMRO-DPMNE, they were not. Gruevski's party did not only create an anti-Soros ideology, but drove the process. Together with the State Commission for Prevention of Corruption, they wove a net around dissenting civil society organizations.

BIRN's investigation reveals that the operation that took place before and after the 2016 parliamentary elections was coordinated, politically-driven and involved multiple institutions.

The documents we obtained and the testimonies of people involved in the process show that institutions made rapid decisions that unquestioningly accepted allegations made by VMRO-DPMNE. These allegations were later used as the sole justification for comprehensive document audits and searches.

The State Commission for the Prevention of Corruption played a key role, after the initial ground was laid by media and the *ad hoc* body of the Agency for Audio and Audio-Visual Media Services (AAAVMS). Later the Public Revenue Office, the Public Prosecutor's Office, the MoI, the Financial Police and lastly the Financial Intelligence Administration became involved.

Intensive audits of 22 NGOs lasted several months, yielded nothing illegal, and resulted in neither accountability for those who ordered or implemented them, nor in systemic changes that would prevent institutions from launching politically-motivated attacks on civil society organizations.

NEW LIGHT ON EVENTS

The NGOs targeted by this operation had long suspected that the attacks on them amounted to the abuse of institutions by a political party. The audits were accompanied by an intensive political and media campaign to "settle accounts with the destructive policies of SDSM/Soros and their paid megaphones" - rhetoric that came from the then VMRO-DPMNE leader Nikola Gruevski and other prominent party members, well known for their radical views.

The documents we obtained and the testimonies of people involved in the process show institutions made rapid decisions that unquestioningly accepted allegations made by VMRO-DPMNE. These allegations were later used as the sole justification for comprehensive document audits and searches.

The documents obtained by BIRN from the State Commission for the Prevention of Corruption and Conflicts of Interest (SCPC), which contain communications between the party, the commission and the investigative bodies, confirm the suspicion of strong partisan influence over the entire process.

That is most evident in the deadlines for action. It would take only a business day for the Commission, then headed by Igor Tanturovski, to conclude that VMRO-DPMNE's allegations - which had relied on media reports - were sufficient grounds to order detailed financial audits.

On November 28 2016, the party, through its lawyer and long-time member, Ilija Ilijoski, filed a complaint with the SCPC, citing allegations made by TV and online news outlets that "Soros" funded civil society organizations (as stipulated in the document) and that civil society activists who presented themselves as independent citizens actually worked for and advocated the views of opposition party SDSM.

Members of the civic action group We Decide, and all 22 organizations involved in it, were accused of being "perpetrators of illegal action". TV broadcasts by Sitel, TV Nova, Netpress and Telegraf were quoted, and similar statements repeating the narrative appeared in Deneshen, Republika, Kurir, Press 24, Vistina and others. All these were controlled by VMRO-DPMNE.

The articles claimed that "Soros has already started the SDSM campaign" and would then describe a We Decide truck driving through Ohrid spreading the anti-VMRO-DPMNE message. They went on to describe a video "sent to the editorial office" that showed a We Decide member "taking money for work done" from a man in a vehicle "legally owned by the Open Society Institute".

A quotation would then follow about the finding of the *ad hoc* media body that organizations should be careful not to play any part in the electoral process. The articles neither confirmed these findings nor sought comment from the other party, and were intended to imply that the NGO was using the same messages as SDSM.

EXPEDITED INVESTIGATIONS

The officers from the Anti-Corruption Commission needed only one business day to process the case, and to conclude that the allegations were sufficient grounds to require a complete audit of the financial operations of these organizations for a period of 12 months, from January to December 2016. By November 29, they had already forwarded these requests to the Public Revenue Office and the Public Prosecutor's Office.

In the correspondence they state that they were acting following an application, but failed to mention who from. Instead, they copied almost all the content of VMRO-DPMNE's submission, only adding their request for the execution of financial audits. A month later, on December 28, 2016, an identical request was made to the Financial Intelligence Administration for the execution of a five-year audit.

These institutions did not take long to respond. The NGOs testify that the following week, on December 5 2016, they began receiving calls from the PRO announcing pending inspections. Meanwhile, at the public prosecutor's office, according to a response sent to BIRN, two prosecutors from the department for prosecuting organized crime and corruption were engaged. Due to the volume of material requested, they had to form cross-departmental teams in order to conduct the investigations.

Igor Tanturovski and Goran Milenkov were not only publicly associated with the then ruling VMRO-DPMNE, but were also party donors

The prosecutor's office put together an cross-institutional team to conduct audits | Photo: BIRN

before taking office (Tanturovski in 2012 and Milenkov in 2011). They gave a thousand euros each.

On December 6 2016, the SCPC sent a letter to VMRO-DPMNE to confirm their suspicions,and proceedings were initiated. According to sources from the then Anti-Corruption Commission, who insist on anonymity, Milenkov (who was known to have protected Gruevski on previous occasions) made an initial attempt to persuade the Commission itself to open a case following a rumor, but his motion was not accepted by the other members.

Afterwards, VMRO-DMPNE filed a complaint about the same issue, and Tanturovski assigned the case to Milenkov. SCPC's sources say the case was handled at high speed, in a tense atmosphere and in the utmost secrecy.

The Anti-Corruption Commission can open investigations on its own, following public and media information, or can investigate complaints filed by others. In this case, it was the refusal of the other commissioners to accept Milenkov's proposal that forced the party to file a complaint, thus officially leaving its mark on the case.

This fact was, however, hidden from the public because the case was then classified. No information about it exists in the Commission's annual reports, which is uncommon.

Tanturovski and Milenkov acted as the main channel through which the party's desire to persecute NGOs was carried out. They refused to comment on past events, given they were no longer members of the Commission.

"I have been out of there for two years now and I no longer intend to comment on the matter," said Tanturovski for BIRN. Milenkov's response was similar: he insisted that everything that could be said about the matter had already been said.

The audits were carried out at the same time as the election campaign, voting and vote counting. VMRO-DPMNE protested to the State Election Commission against the annulment of the election results at some polling stations, which jeopardized their two-seat majority (51 to 49 for the then opposition, SDSM).

Party members would gather every afternoon in front of the SEC offices, outside the former Nova Makedonija building, to hear speeches by prominent party officials such as

Filip Petrovski, who spoke of "putting an end to the Soros media", or Valentina Bozhinovska, who called for "the night of the long knives".

On December 17 2016, on a foggy and polluted afternoon on which the speakers could barely be seen, Gruevski himself took to the stage and read VMRO-DMPNE's five-point proclamation, which announced its intention to take on critical NGOs. "We will fight for the de-Sorosization of the Republic of Macedonia and the strengthening of an independent civil society sector, which will not be under anyone's control. Regulation of foundations and NGO funding will be introduced, following the example of the most advanced democracies in the world," he said.

WHAT WAS THE WE DECIDECAMPAIGN?

We Decide campaign materials can still be found on the website of the same name. They include information about public events, newspaper articles, videos and other multimedia content made by 22 organizations supported by the OSF.

They urge citizens to vote, and pressure candidates to address key economic, social, legal and environmental issues, as well as public services, like education and health. The situation in all these areas is described as unsatisfactory.

The NGO campaign started with a public event in front of the Assembly on October 20 2016, and the first videos were released on November 14. A day later the Provisional Commission for Monitoring of Media Broadcasts released a statement. This was one of the hybrid institutions established after the major parties reached an agreement backed by the EU and US, which was supposed to secure conditions for fair parliamentary elections. It included two SDSM members (Goran Trpenoski and Ljubomir Kostovski) and two VMRO-DMPNE members (Cvetin Chilimanov and Slagjana Dimishkova). Ljuljzim Haziri, who was not a member of any party, was President.

As soon as the first videos were broadcast on Telma and Alsat-M, the body issued a statement warning that the Electoral Code should be adhered to. "The Interim Commission respects the right of the civil society organizations to organize campaigns of public interest and educate citizens. However, they must ensure their messages are not identified with the messages of the electoral process participants," the statement read.

This opinion was included in VMRO-DPMNE's complaint to bolster their argument that the SDSM campaign was being illegally managed and funded by NGOs.

The Open Society Foundation stated that a campaign was organized in the pre-election period for the purposes of educating and informing voters, rather than helping the opposition.

"All the findings we produce are based on research, analysis and monitoring. We stand behind our point of view, and if our narrative overlaps with someone else's, that is coincidence. One can expect critical civil society opinions to partially overlap with the views of the opposition, but that does not mean we have been favoring any one option," says Fani Karanfilova Panovska, FOSM's Executive Director.

In January 2017, Cvetin Chilimanov, actigng as a freelance journalist, launched the "Stop Operation Soros" movement along withthe journalist Nenad Mirchevski and the historian Nikola Srbov (who was not directly affiliated with the party at the time, but would later become a member of its Executive Committee).

Screenshot of the NGOs campaign video on environmental challenges. | Photo: YouTube

"Stop Operation Soros" held press conferences to reveal which organizations had received money from various donors, such as FOSM or USAID, claiming they had spent $5m in funds over five years to destabilize the Macedonian political scene.

The five-year period coincided with the period of investigation that the SPC ordered into the 22 NGOs. Biljana Bejkova of the NGO Info-Center suspects that some of the data collected by the inspectors during the audits ended up with SOS members, to be used at their press conferences.

"'Stop Operation Soros'" knew about a grant we received in November 2016. That grant had not yet been entered in our annual reports, so they couldn't have known about it except from the Public Revenue Office. Only they had the information about the amount of funds transferred,"she said.

LONG AND STRESSFUL INVESTIGATIONS

"The state has the right to inspect and perform audits and no one can deny that. But what happened to us was a vague and shady act that blocked our work, pressured us and spread fear."

This view was shared by representatives of the Helsinki Committee, the NGO Infocentre, Metamorphosis, Eurothink, JEF and other organizations targeted by the de-Sorosization process.

Hundreds of employees or supporters of these organizations recall six months spent in fear of being either arrested or framed.

Faced with financial controls internally and a media campaign against them, they suspected it was only a matter of time before

they would be publicly arrested. They feared fictional accusations and that the law would be twisted to charge them with abuse.

"On the one hand I was calm when it came to finances, because I knew everything was fine, but on the other I was not calm because I knew malign intentions backed up the action," says Uranija Pirovska, the executive director of the Helsinki Committee. The inspectors behaved professionally but had absurd demands that could barely be met. They demanded reviews and photocopies of all the documents, which amounted to thousands of pages for each organization

In May 2019 the Macedonian Parliament specified that travel expenses, catering and the like should not be liable to personal taxation. The state has taken no further steps since the change in government.

"They were trying to find evidence that NGOs were channelling funds to pay non-employees who actually worked for SDSM. They most certainly did not find that," says Filip Stojanovski from Metamorphosis.

The inspections, according to testimonies by staff, created extra work for the employees. They had to prepare documents, make photocopies, do translations, and explain accounting items. Time, money, resources and people were wasted, and the audits seriously hampered the regular activities of the non-governmental organizations.

Some of the requests were extraordinary. Karanfilova-Panovska of FOSM says that the PRO inspector, who would spend entire days at their premises, had requests that fell outside the institution's scope. "The PRO seemed to be trying to establish that we were working on indoctrination. We were interrogated about what we did, they requested materials, and were more interested in the programming and the content part of our work than the financial aspect," Karanfilova-Panovska said.

She adds that no inspector raised questions about the We Decide campaign, even though it had prompted the entire investigation. All activities came under scrutiny in the effort to find incriminating material.

The intensity of inspections dwindled after the storming of the Macedonian parliament on April 27, and after the change in government on June 1, the investigative bodies only rarely made contact.

Screenshot of the NGOs campaign video on environmental challenges. | Photo: YouTube

A year after the change of power, in 2018, the Minister of the Interior, Social Democrat Oliver Spasovski, summoned the organizations to a meeting, which was also attended by directors of the institutions involved in the investigation. They were told that the investigations against them had been suspended and that nothing illegal had been found.

Some representatives from the organizations said that during the meeting with Spasovski, they requested internal inquiries into possible abuse of office for those who ordered and carried out the investigations, and that he agreed. However, the Ministry did not respond to BIRN's question about whether any action had been taken.

WHAT HAPPENED NEXT

In the end, nothing. After investigators had auditedtens of thousands of pages of documents in each organization, some individuals were reported for not having paid personal income tax for travel costs, conference catering, humanitarian aid and similar payments. The law fails to stipulate whether this type of expenditure should be subject to personal income taxation.

In May 2019 the Macedonian Parliament specified that these costs should not be liable to personal taxation. The state has taken no further action in the matter since the change in government.

Some organizations received written notifications from the PRO or other organizations that the investigation had ended. No one received notification from the Prosecutor's Of-

The protests "For a joint Macedonia" and against "Soros" culminated in the bloody events of April 27, 2017, after which the investigations lost momentum.| Photo: Robert Atanasovski

fice, since the matter was treated as a preliminary investigation. Prosecutors told BIRN that when the investigation was finished, they decided to close the proceedings.

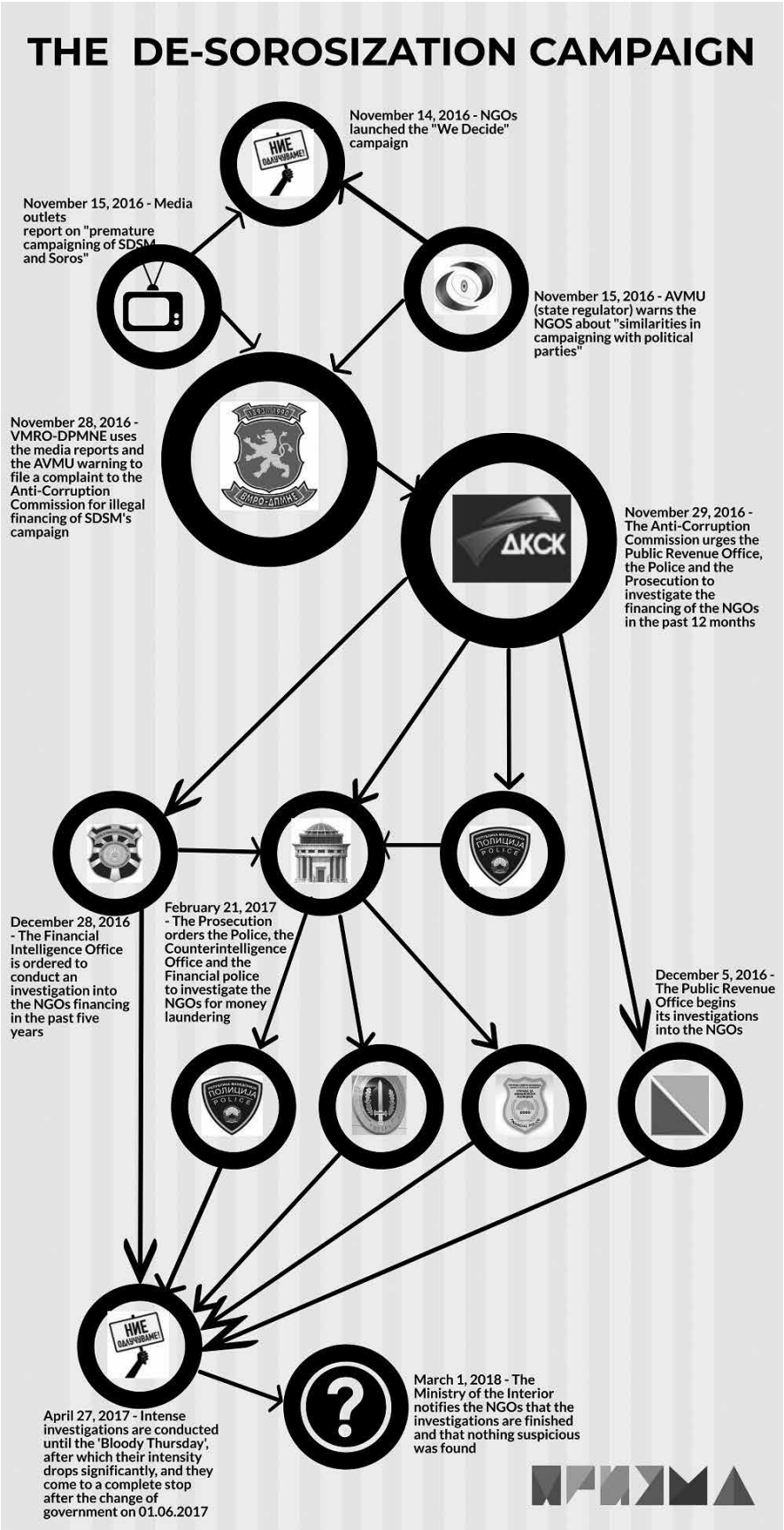
"After a thorough analysis of all evidence, no grounds for suspicion were found which may indicate a crime of 'money laundering or other proceeds of crime', nor were any elements of a crime liable to be prosecuted *ex officio* found, and [we] concluded that for this specific case, a prosecutorial action should not be pursued. Therefore the case was closed in December 2017," reads the response sent to BIRN by the Public Prosecutor's Office.

The Office failed to explain how an electoral malpractice case had become a money laundering and tax evasion investigation.

Some of the institutions failed to respond to our questions; others said that internal audits were not performed by them, since they acted professionally at the behest of the Prosecutor's Office, which they had no legal grounds to contest.

"I have neither promised an internal investigation about the case nor done anything similar in this institution," says Arafat Muaremi, who was appointed Director of the Financial Police by the Social Democrat government in 2017.

All in all, dozens of people, prosecutors, inspectors from institutions were engaged in the process, and spent months using state resources to conduct politically driven and biased audits.


THE DE-SOROSIZATION CAMPAIGN
November 14, 2016 - NGOs launched the "We Decide" campaign
November 15, 2016 - Media outlets report on "premature campaigning of SDSM and Soros"
November 15, 2016 - AVMU (state regulator) warns the NGOS about "similarities in campaigning with political parties"
November 28, 2016 - VMRO-DPMNE uses the media reports and the AVMU warning to file a complaint to the Anti-Corruption Commission for illegal financing of SDSM's campaign
November 29, 2016 - The Anti-Corruption Commission urges the Public Revenue Office, the Police and the Prosecution to investigate the financing of the NGOs in the past 12 months
December 28, 2016 - The Financial Intelligence Office is ordered to conduct an investigation into the NGOs financing in the past five years
February 21, 2017 - The Prosecution orders the Police, the Counterintelligence Office and the Financial police to investigate the NGOs for money laundering
December 5, 2016 - The Public Revenue Office begins its investigations into the NGOs
April 27, 2017 - Intense investigations are conducted until the 'Bloody Thursday', after which their intensity drops significantly, and they come to a complete stop after the change of government on 01.06.2017
March 1, 2018 - The Ministry of the Interior notifies the NGOs that the investigations are finished and that nothing suspicious was found

CS2: MACEDONIAN PROSECUTORS CAN DO AS THEY PLEASE

There is little to no accountability for lazy or corrupt prosecutors, revealed BIRN's investigation.

Author: **Vasko Magleshov**

Not a single aspect of the work of public prosecutors has remained free of political pressure in North Macedonia: from the election of prosecutors and case handling by prosecutors, through to the (lack of) accountability for their actions. Nor is there a single example of these influences and connections being investigated, let alone proven.

The link between the prosecution and politics could be described as a "Stockholm syndrome" in which the captured have developed an emotional relationship with their captors and even help them to achieve their goals.

POLITICAL INTERFERENCE IN PROSECUTING CRIME

When party leaders agreed in 2015 that tackling organized crime would be a state priority, few could have imagined that Katica Janeva, the head of the institution set up to fight it, would betray the trust placed in her so spectacularly.

The Special Public Prosecution Office (SPO) was purposely designed to sit above the rest of the justice system, since the regular prosecutor's office was criticized for being in hoc to the ruling party. The SPO gained full autonomy and sat outside the hierarchical prosecution system.

In 2016 the Macedonian public rallied in support of Janeva and her team, celebrating them as heroes who would bring oligarchs and corrupt officials to justice and put an end to politically-controlled trials. Four years later, Janeva is on trial for extortion.

The Second 2017 EU Experts Report stated that the Public Prosecutor's Office for Prosecuting Organized Crime and Corruption was under direct and indirect pressure. But even after both EU reports, and despite Janeva's case, no one has ever fully investigated this assertion.

More than five years after the creation of the SPO, the ability of prosecutors to resist political pressure is still in doubt. The extent to which their ties to business and political elites have obstructed or delayed investigations is also unclear. In the absence of credible institutions that can investigate, the public has concluded that prosecutors are in the pockets of politicians.

While not everyone's probity is in question, those with experience of the justice system publicly acknowledge that some prosecutors are partisan. "We have politicized prosecutors who do not at all deserve to hold office," the former public prosecutor Ivan Jakimovski told BIRN. He believes his colleagues were quietly working with politicians.

The State Public Prosecutors, leaders of the prosecutor's offices | Photo: BIRN

FILED UNDER 'MISCELLANEOUS'

When the SPO began its investigations, the first sign of a problem was the number of unresolved indictments. They included numerous financial and wiretapping cases. According to data obtained by BIRN, the cases the SPO took over were registered with the initials RO, which in prosecutors' jargon means 'miscellaneous'.

If the prosecution finds sufficient grounds for suspicion and evidence, the complaints are then re-registered under KO, for pending investigation. The decision as to how the case is to be assigned is made by the Chief Prosecutor.

However, all 72 cases that the SPO took over from the regular Prosecutor's Office to reinvestigate were registered as RO, which means that not a single one proceeded to the investigation stage. Of the 72, the SPO opened investigations in 53 cases.

These investigations, some of which had been relaunched, resulted in 22 indictments. Only few have been resolved so far.

"Eighty to ninety percent of the cases we took over were superficially processed. Only sporadic requests were sent to the MoI, in order to leave the impression, a trace, that some action was taken," said an SPO prosecutor who wished to remain anonymous.

Among the 72 were seven cases (five from the Skopje Prosecutor's Office and one each from Organized Crime and the Bitola Prosecutor's Office) which were rolled into the so-called *Empire* case, which involves one of the wealthiest businessman in the country. Over the course of nine months the SPO revived some of the charges, but when its mandate ended they were returned to the original offices.

12 PROSECUTORS DISMISSED IN 11 YEARS

The 170-180 prosecutors in North Macedonia do not enjoy immunity as judges do, but the Law on Public Prosecutors protects their activities. They can be disciplined or dismissed, but are appointed by the Council of Public Prosecutors. Between 2008 and 2019 nine prosecutors were dismissed for professional misconduct, two for disciplinary violations and one after being convicted of a crime.

The SPO's former head, Katica Janeva, is the second public prosecutor in eleven years to stand criminal trial. Ivica Efremov from Veles was convicted for the so-called *Liquidation* case, but the Supreme Court overturned the verdict and returned the case for retrial.

Dismissals peaked in 2009, when eight out of a total of 12 prosecutors were dismissed. But not everyone is convinced that they were made on the grounds of incompetence, pointing instead to political motivation. Sterjo Zikov, a former head of the Skopje Prosecutor's Office and now a lawyer for defendants in SPO cases, was removed for failure to take action and professional misconduct. But he told BIRN: "It was a political decision which hurt me, not because of the loss of office, but because of my peers.".

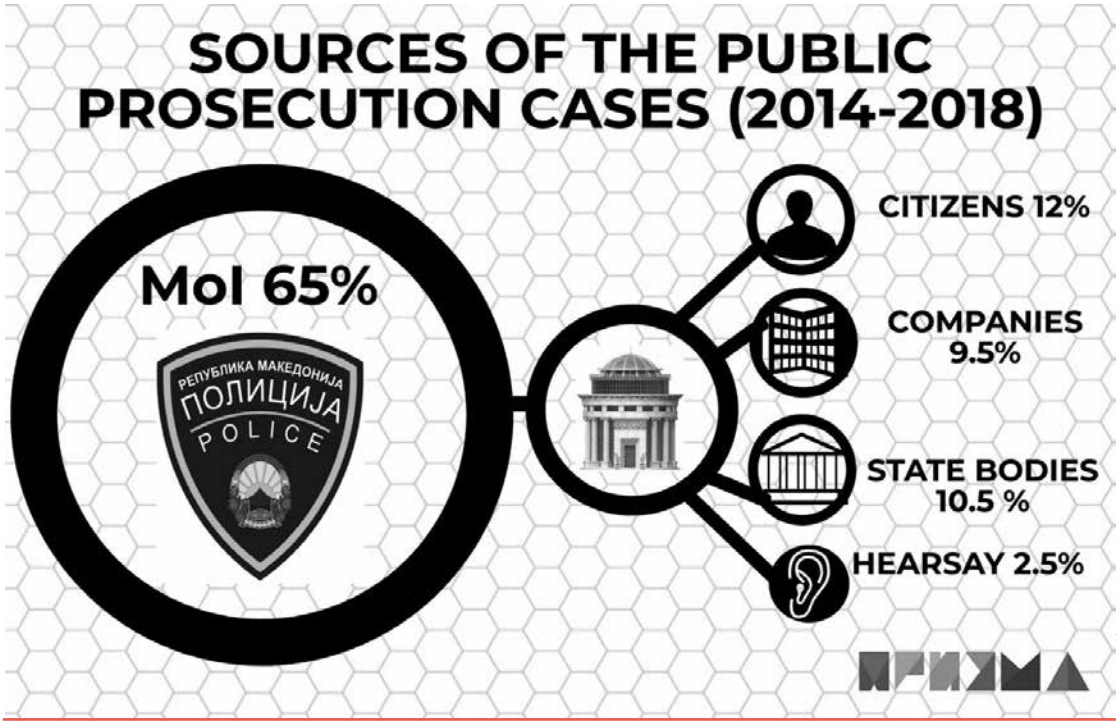
Case against Katica Janeva preceded the shutdown of the SPO | Photo: BIRN

CASES BASED ON HEARSAY EVIDENCE ARE A TINY FRACTION OF THE TOTAL

Cases involving hearsay evidence accounted for between 1.8-3.8% of the total between 2014-18 – an small but steady increase on the 2% in 2014. But in 2018 the proportion began to fall again, to 1.8%.

The State Public Prosecutor, Ljubomir Joveski, does not entirely agree that prosecutors are indifferent to public opinion. He says that last year, 18 cases were initiated on this basis, including one concerning racketeering. 'We worked based on what the Prime Minister had told us,' he said..

The State General Public Prosecutor reassures people that more work is being done on cases involving hearsay evidence | Photo: BIRN



PROSECUTORS' IRRESPONSIBILITY AFTER THE ASSEMBLY WAS STORMED

Prosecutors' ties with the ruling party may be best illustrated by the events of the night of April 27, 2017, when a mob stormed the Assembly and threatened the lives of MPs who voted for the nomination of Talat Xhaferi as Assembly Speaker.

"That night, in the Prosecutor's Office headed by the State Public Prosecutor Marko Zvrlevski, there was a discussion about whether the SDSM leadership, which had a majority in the Assembly, were criminally liable," a prosecutor from the same institution testified to BIRN.

Prosecutors were held responsible. A five-member disciplinary committee heard their defense and concluded that they failed to conduct an investigation following the storming of the Assembly, thereby allowing for evidence tampering. Their salaries were cut by 30% for six months. However, the case has now gone to appeal and is still in progress, although the event took place more than three years ago.

THE STATE PUBLIC PROSECUTOR IS APPOINTED WITH THE BLESSING OF THE RULING PARTY

The election of the State Prosecutor is the subject of intensive bargaining between political parties. Assembly transcripts show a consistent pattern, regardless of which party is in power, and the successful candidate never enjoys cross-party support. Aleksandar Prchevski, at the time of his dismissal as State Prosecutor in 2006, summarized his view: 'I am probably the last fool to accept the position.'

Between 2016 and 2018, there have been a total of 512 complaints about prosecutors' work. Almost half of them (201) were filed in 2018, indicating that the number is increasing.

Of the five state public prosecutors appointed since the new legal framework was adopted, four have been dismissed by the Assembly due to incompetence and professional misconduct. Only one completed his six-year term. All the dismissals occurred shortly after a change in government. As Aco Kolevski, the President of the Council of Public Prosecutors, put it: 'The State Public Prosecutor is changed when the government changes.' He believes the election needs to be reformed so the government no longer proposes the candidate: 'Usually, whoever got him elected is the one who can replace him. The election should be made by the Council [of Public Prosecutors] or following a citizens' vote, so the new SPP can be accountable to the citizens who elected him or her.'

Joveski disagrees, pointing out the candidates would need to campaign and raise funds, and would feel obligated to their backers. He suggests that the President rather than the government proposes the candidate: 'There is no way a president would tolerate a prosecutor tainted by scandal.'

The State Prosecution Office. Prosecutors are nominated on the basis of TV appearances rather than on merit. | Photo: BIRN

SELECTION OF PROSECUTORS THROUGH LOBBYING AND INFLUENCE

In North Macedonia, the Council of Public Prosecutors is responsible for electing and dismissing members of the profession. It fulfills a similar role to the Judicial Council for Judges. The Councils themselves cannot be disciplined or held liable.

The minutes of the meetings at which these decisions happen suggest that little proper discussion takes place, with the Council focussing on how often the prosecutor has appeared on TV and their opinions of their fluency or personality.

CITIZENS PAY FOR PROSECUTORS' FAILINGS

Compensating the victims of prosecutors' negligence or incompetence is expensive, and the money comes from the national budget. The Sopot case, in which villagers were accused of planting landmines that killed NATO soldiers, led to more than EUR1m in damages. In the Coup case, it exceeded EUR50,000 and in the Justitia case, thousands of euros. The Tank parts case, in which the former PM Vlado Buchkovski was charged, is also likely to attract large sums in damages. Yet these are negligible in comparison to the damage inflicted on trust in the rule of law.

CS3: STATE CAPTURE IN THE STORY OF CAPTURED COURT SOFTWARE

Until it was exposed by BIRN's Priebe Report, the abuse of the ACCMIS court management system was ignored by judicial authorities.

Author: **Vasko Magleshov**

Five years after suspicions were first raised that ACCMIS (the Automated Court Case Management Information System) had been tampered with, nothing has changed: the system, the judges and the software at the criminal court in Skopje remain the same. Only the government and the President of the Court are different.

The Office of Public Prosecution confirmed the abuse, and the former President of the Criminal Court, Vladimir Panchevski, faced charges, but the trial has been pending since late 2019.

Nonetheless, the government claims that the case allocation problems have been overcome and that state corruption has been tackled. The Law on Courts has been amended, judges are discouraged from meddling in cases by institutional oversight, and the software operates without obstruction or interference.

Yet domestic institutions have been apathetic in tackling the issue. The BIRN investigation showed that the abuse of the ACCMIS system was invisible to both the Judicial Council and the Supreme Court until it was mentioned in the EU Report of the Senior Experts' Group on Systemic Rule of Law led by Reinhard Priebe, although it was a public secret that both judges and officials had complained about being verbally instructed to handle specific cases.

EVERYTHING STARTED WITH PRIEBE

Priebe's 2015 report said: "It is perceived that the rules (on operation of ACCMIS) are not always adhered to and ways can be found to circumvent the system." In his 2017 report, he went further, directly recommending that an impartial audit replace the ACCMIS system.

'Unfit' judges were transferred to different sections of the court, cases were not assigned to judges who were on leave at the time of the request, judges tried cases pursuant to both the old and new criminal procedure laws – in short, the system was manipulated by clerks at the verbal request of court presidents, so that fewer judges were available to take on specific cases.

The ministry set up a special task force to establish potential systemic wrongdoings. As a result of the Report and the ensuing investigation, the Prosecutor's Office brought charges against the then President of the Criminal Court, Vladimir Panchevski, for abuse of power and office.

The Ministry of Justice. Charges were brought in the ACCMIS case in late 2019, but the trial is still pending | Photo: BIRN

THE JUDICIAL COUNCIL AND THE SUPREME COURT FAILED TO SEE ANY PROBLEM

The Judicial Council, which is the only institution that monitors the courts, behaved as if nothing had gone wrong with the case allocation in the criminal court, BIRN's investigation shows.

A detailed examination of Judicial Council transcripts from 2015 to 2017 indicated that the Council was alerted by mid-September 2015 that not all changes to 2014 Administrative Court cases had been entered into the ACCMIS system. But Council members failed to act. A month later Bekim Rexhepi raised the topic at a Council meeting and asked for a committee to be set up to investigate the software.

The members of the Judicial Council saw no problem with ACCMIS (2017) | Photo: BIRN

Members opposed the proposal. They argued that the Council had no such jurisdiction, and that no irregularities in case distribution had been reported up until then. The judges of the Supreme Court, which monitors the lower courts, had also failed to see any problem. BIRN's investigation showed that between 2012 to 2018, not a single report by the highest authority on the activity of the country's courts mentioned irregularities or software performance problems.

Violations of procedure have also been detected in the Supreme Court. A judge who extended their sick leave was shut out of the system a month after it. In addition, and in violation of the rules, electronic allocation of a small number of cases was carried out multiple times in one day.

Judges from the criminal court, who wish to remain anonymous, confirmed to BIRN that they did refuse to work on cases the court president had instructed them to take up. As a result, they were reassigned to less influential departments.

We requested information from the Judicial Council about these allegations, but the Council declined to respond, saying it would violate judges' freedoms, rights and integrity.

Yet the SPPO (Special Public Prosecutor's Office) saw a problem as far back as 2016. They noted that the court had rejected submissions under the pretense that they were unclear and imprecise. In one instance, search warrants for senior officials were submitted to one judge, only to be later dismissed by others as invalid. The SPPO called for five judges to be dismissed, but this was not acted upon. .

COURT PRESIDENT ACCUSED AFTER THREE AND A HALF YEARS OF TAMPERING

The Skopje Prosecutor's Office claims that Vladimir Panchevski, the former president of the criminal court, tampered with software in the Skopje First Instance Court 1 for three and a half years between January 2013 and September 2016, shortly before the end of his mandate. During this period he ordered officers with access to ACCMIS to manually assign cases to judges. Normally they would be assigned electronically.

Panchevski, who was elected court president during the VMRO-DPMNE government, and who has repeatedly shared Facebook posts alleging that after the change in government the judiciary became corrupted, claimed to BIRN that his actions were lawful. He pointed out that he had assigned all the cases on the basis of criteria stipulated in the Rules of Procedure of the Court.

"I have not assigned cases contrary to the law. That is allowed pursuant to the law and the Rules of Procedure, and the cases are not mine, but are Prosecutor's Office and the Republic of Macedonia cases against people who broke the law and were tried by judges elected by the Judicial Council." He did not want to answer other questions.

The presentation of the findings of the working group's report at the Ministry of Justice (2017) | Photo: BIRN

WAS THERE WRONGDOING BEFORE THIS ABUSE?

Ever since ACCMIS was launched in 2010, there have been no written internal procedures for its use. The Ministry of Justice established in its Oversight Report that the Case Tracking Working Group stopped operating in February 2012. Judge Nanev, who prepared the report, told BIRN that the Group was due to be wound down at that time and there was no evidence of wrongdoing before it concluded its mandate:

"Were there cases manually allocated during that period? The answer would be arbitrary, since no evidence exists to identify such cases and substantiate the alleged manual allocation."

According to the Oversight Report, the majority (41) of the manually-assigned cases came from the Public Prosecutor's Office for Prosecuting Organised Crime and Corruption, two cases from the Special Public Prosecutor's Office, four from the Skopje Prosecutor's Office and two from the First Instance Courts of Negotino and Kumanovo. Thirty-three of them were manually assigned in 2013. BIRN inspected a dozen of the criminal cases and concluded that it was difficult to prove that Panchevski had benefited personally from tampering with the system. Most of them were successful applications for pre-trial detention.

No high-profile cases were found among them, with most convictions concerning narcotics or the smuggling of migrants. One involved the former General Manager of the Ohrid Komunalec utility company, who received a suspended sentence for rigging a bid. Another concerns a civil servant working in the agriculture and rural development agency. He also received a suspended sentence for a kickback tied to a tractor subsidy.

If Panchevski is convicted, everyone who was convicted by a judge who was manually allocated may be eligible for a retrial.

Other manually-allocated cases include *Fortress 2* (about the illegal destruction of files related to wiretapping) and *Violence* (involving the former Prime Minister Nikola Gruevski) which were given to Tatjana Mihajlova and Lidija Petrovska, judges close to Panchevski. They are no longer hearing these cases, which are ongoing.

LAWYERS HAVE MANIPULATED THE SOFTWARE TOO

The loopholes in the ACCMIS system were not exploited only by Panchevski, but also by a small number of lawyers. According to the Minister for Justice, Renata Deskoska, they would repeatedly file the same case, then retract it, until they got the judge they were seeking. "We have learned that in some courts, lawyers would file multiple complaints on the same legal grounds, and depending on the matching of the case allocation to a specific judge, would either drop the complaint or fail to pay court fees," says Deskoska.

Another option, according to lawyers consulted by BIRN, was to enter different data about the parties in the complaint (e.g. an alternative name and surname). The system would identify them as separate cases, and the court fee would only be paid for the case involving the judge the complainant preferred.

PROSECUTORS ARE AGAINST CASE ALLOCATION SOFTWARE

Although the prosecution offices do not use an automated system for allocating cases, it is still possible for the choice of prosecutor to be manipulated. Criminal charges are allocated to them in Roman numerical order, which allows chief prosecutors to reassign them if they wish.

It would theoretically be possible to ensure a prosecutor was assigned a particular case by manipulating stacks of documents. Alternatively, a case could be assigned some time after it was received to match it with the 'right' prosecutor.

Prosecutors consulted by BIRN oppose introducing case allocation software, though the 2019-24 Strategy for ICT in the Judiciary foresees software upgrades. The General Public Prosecutor, Ljubomir Joveski, warns that very junior prosecutors would not necessarily be able to handle major criminal cases.

'The ACCMIS system would not work for us,' says the Chairman of the Council of Prosecutors, Aco Kolevski. 'Usually criminal charges are filed as they arrive and the gravity of the case cannot be evaluated at that stage.'

But the Anti-Corruption Commission members disagree. They stated in the Strategy that manual allocation of cases risks their being deliberately matched with certain prosecutors. asko.

The Anti-Corruption Commission delivers case allocation software to the Public Prosecutor's Office | Photo: BIRN

CS4: IS PUBLIC OFFICE THE BEST PROTECTION AGAINST JAIL?

BIRN investigates if there is any truth to claims that politicians are almost never held accountable for crimes committed while in office

Автор: **Aleksandar Dimitrievski**

Since 1998, a total of 186 people have held the posts of Prime Minister, deputy prime minister or minister. During their political careers, half of them have faced at least one criminal charge. But the chances of them being found guilty and jailed are about 2%.

In July 2019, the Public Prosecutor's Office in Skopje announced that it had dropped criminal charges against three people for recklessness in public office. The three were the ex-minister of culture, Elizabeta Kanceska-Milevska, her deputy Dragan Nedeljkovic, and the head of finances at the Ministry of Culture from 2009 to 2017 (whose name was withheld).

This is not in itself surprising: public prosecutors dismissed about 45% of criminal charges filed in 2017, for example. But two things make this case different. Firstly, the charges were filed by the Financial Police Office; and secondly, the prosecution admitted to irregularities in the case, which involved purchasing equipment from a foreign country that at the time the contract was signed did not have a subsidiary in North Macedonia.

"The expert stated that the invoices submitted by Svetlost Teatar Ltd in Belgrade, Republic of Serbia, to the Ministry of Culture were in euros, with a separate amount of VAT and with an account to which the money was to be transferred. The subsidiary was not fully functional, as the invoices were prepared and delivered by the parent company, and not by the branch. This created an irregular flow of money," the prosecution said in a statement.

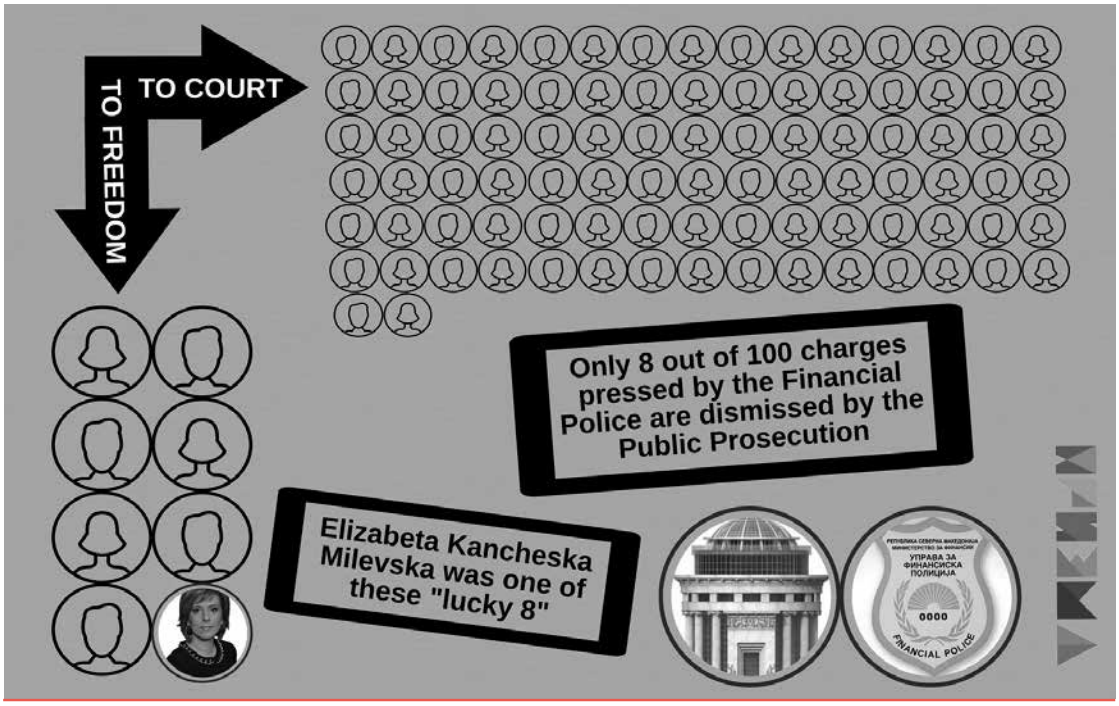
Yet the prosecution saw no merit in pursuing the case because all duties were paid: "The expert findings and opinion were that there was no damage to the state, nor to anything else."

ALMOST HALF THE OFFICIALS FACED CRIMINAL CHARGES

How often does the Public Prosecutor's Office dismiss criminal charges from the Financial Police Office? According to data from Basic Public Prosecutors' Offices throughout the country and the Financial Police Office, the picture is this:

In the five-year period from January 2014 to the end of December 2018, the Financial Police Office filed a total of 283 criminal charges with the public prosecution offices. Of those, only 22 were completely dismissed (7.8%), of whom Kanceska-Milevska and her colleagues were three. This lends credence to the public perception that there is one rule for those in power and another for the rest of the population.

But public perception is not a credible measure, so we dug deeper: is it true that politicians are never or rarely held accountable for crimes they committed while performing their duties?



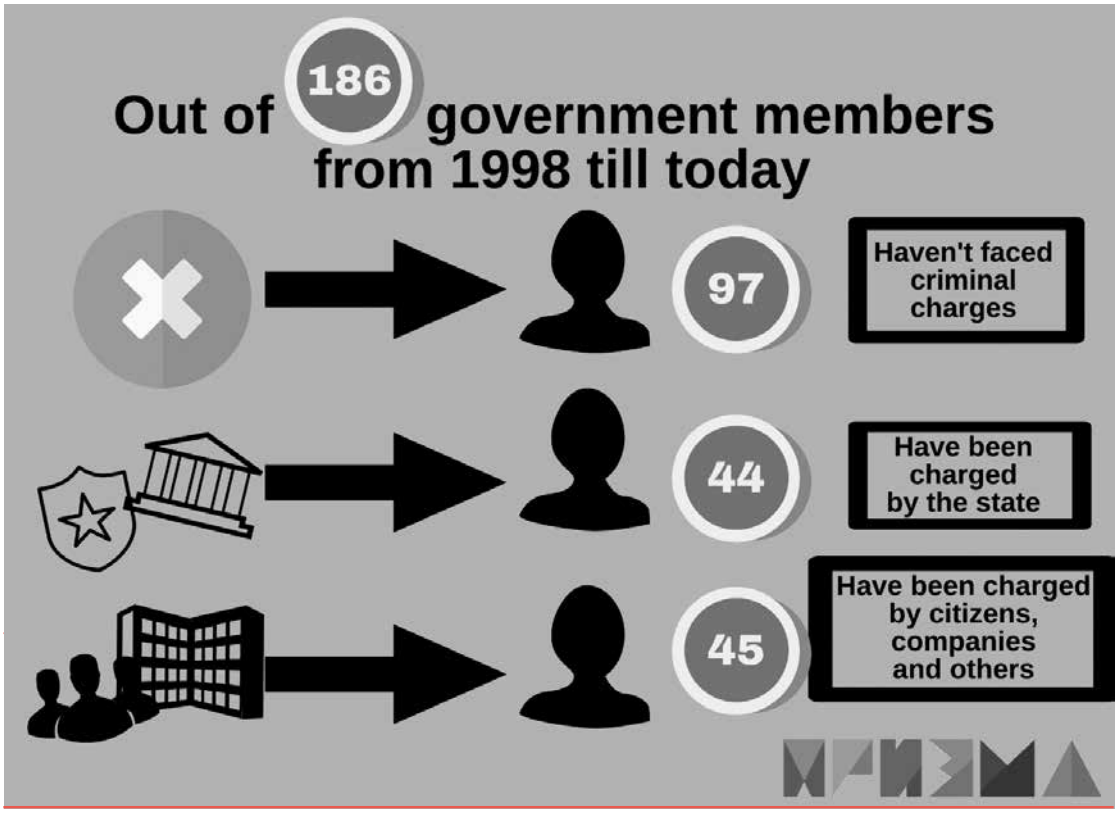
We compiled a limited list of top officials - all the prime ministers, deputy prime ministers and ministers who have served during the last two decades (from 1998 until present). Then we looked at the outcomes of criminal charges against them.

This proved difficult, as there is no institution that collects the information, but we managed to establish that 89 of the 186 had at least one criminal charge filed against them for abuses related to public office, at some point during or after their political career. Almost half (44) of the charges were filed by a state institution such as the MoO, the Anti-Corruption Commission or the Financial Police Office, or the prosecution itself. The remaining 45 officials were involved in cases filed by third parties, such as political opponents, businesses, individuals or group actions.

CRIMINAL CHARGES WERE FILED, BUT THEIR OUTCOMES ARE MOSTLY UNKNOWN

While we found evidence of the charges laid against these top officials, it was much more difficult to discover their outcome. The public rarely gets to hear when they have been dismissed. So we sent a questionnaire to the prosecution, asking about the outcome of ten criminal charges filed by state institutions, involving 13 officials.

We received replies about only four cases – those of the Mayor of Struga and former Minister without Portfolio, Ramiz Merko; the former Minister of Environment and Director of the Agency for Confiscated Property, Bashkim Ameti; former Ministers for Education Nikola Todorov and Pance Kralev; and former Minister for Agriculture, Aco Spasenovski.

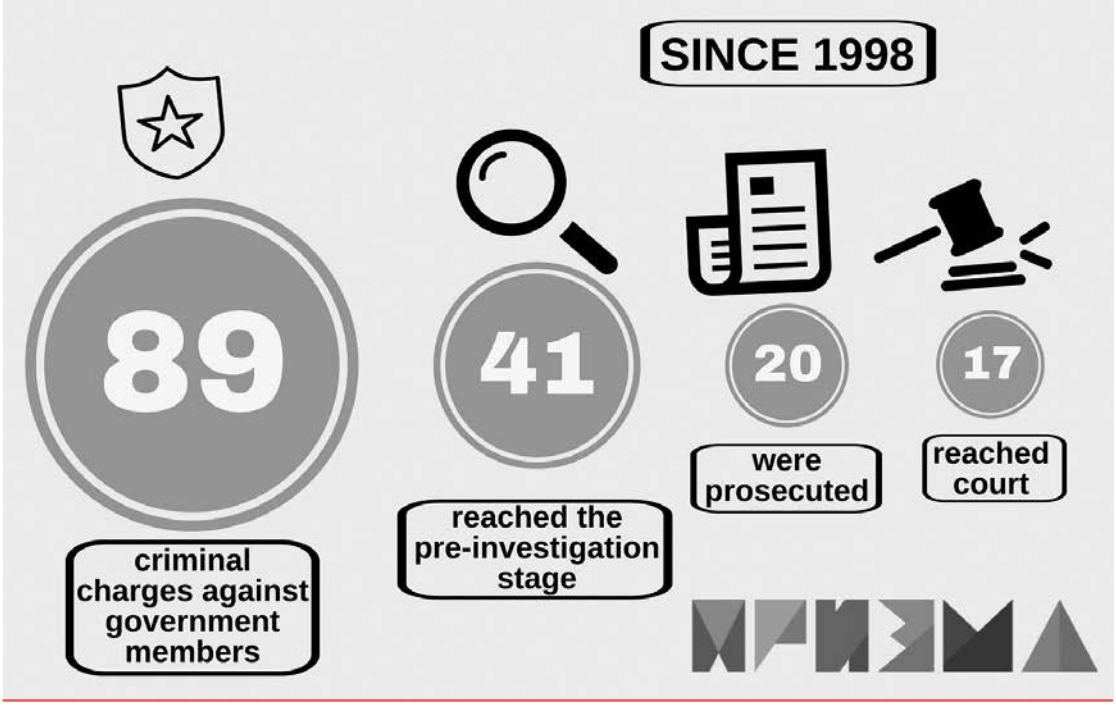


For cases before 2012, against ex-ministers Agron Buxhaku, Blagoja Stefanovski, Stevco Jakimovski, Bedredin Ibraimi, Xhemali Mehazi, Ljubco Georgievski, Boris Stojmenov and Marjan Gjorchev, the prosecution could not reply because their database did not contain that data.

OF THE 89 CHARGED OFFICIALS, ONLY 17 STOOD TRIAL

Although it is impossible to check the outcome of all the criminal charges against the 89 officials, public records exist in those (uncommon) cases when the prosecution has opened an investigation, filed charges or initiated a trial.

More precisely, we know that the prosecution opened a pre-trial or investigative procedure against 41 of the 89 charged officials. Twenty (19.1%) reached the next stage, indictment. Seventeen officials stood trial at least once.



PROSECUTION AS A TOOL FOR DEALING WITH OPPONENTS

Even apart from the small number of charged officials who have ended up in court (17) and the fact that 44 officials were reported by state institutions, analysis of each of these cases leads to another worrying conclusion. Of the 20 indicted high-ranking officials, the 17 who appeared in court belonged to a party that was out of power at the time of indictment.

The exceptions are indictments against the former Defense Minister, Ljuben Paunovski, the mayor of Struga and briefly Minister without Portfolio, Ramiz Merko, and the reactivation of war crimes charges against Hisen Xhemaili, which were returned to local courts from the International Criminal Tribunal for the former Yugoslavia, ICTY[3]. But in these cases, too, the story is complicated.

Paunovski was initially suspected in 2001 of supplying 11m German marks worth of food to the military during the Yugoslav wars. This food had been produced by his father's and brother-in-law's firms. Immediately afterwards, he threatened to speak in public about the shady deals of the political party he belonged to, including the sale of the Okta oil refinery. A meeting with the prime minister and his par-

3 The International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s.

ty chief, Ljubco Georgievski, followed. After he publicly repented, the amount of money Paunovski was accused of embezzling was reduced to 3m marks.

The MoI charged Merko in 2012 with permitting illegal construction. He was indicted a year later, when local elections were held. Merko was Mayor of Struga between 2009 and 2013 but his party, DUI, did not support him in these elections. There was media speculation that he had threatened to call for a boycott of the ballot if he did not receive the nomination. In the end, he calmly accepted the nomination of Arben Labenista and in 2016 the Basic Court in Struga acquitted him, ruling that the case did not amount to a criminal offense.

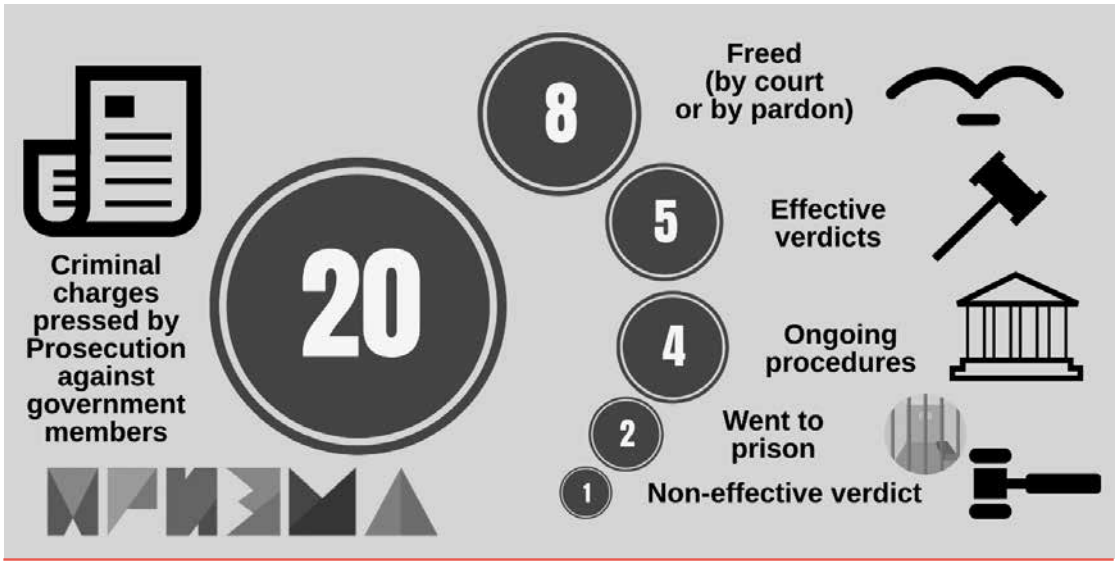
The indictment against Hysen Xhemaili was triggered while negotiations about the formation of a government between VMRO-DPMNE and Xhemaili's political party, DUI, were going on. He had been on the run for several months and did not appear at court or in Parliament.

The court's decision to revoke his detention despite him never turning up to court was considered a scandal., In 2011, after benefitting from the Amnesty Law, he became a free man.

ONLY 12.5% OF CHARGES AGAINST OFFICIALS LED TO A PRISON SENTENCE

Twenty officials should have stood trial, but only 17 did. In two cases, against Stevco Jakimovski and Spiro Ristovski, charges have been filed with the court but hearings have not yet begun. The third indictment that did not go to trial is for the *Big Ear* case against Dosta Dimovska. The then President, Boris Trajkovski, pardoned her at the same time the prosecution submitted the charge of illegal wiretapping by the MoI.

Of the remaining 17 officials who stood trial, eight were acquitted, whether through court proceedings or by pardon. Trials against four officials are ongoing: one has been convicted in the court of first instance and is awaiting a higher court ruling, and five have been sentenced to life imprisonment. However, to date only two, Ljuben Paunovski and Ljube Boskoski, have served their sentence.



HOW PRIME MINISTERS AVOID PRISON

The best illustration of the leniency of the justice system towards powerful political figures is the trials of Nikola Gruevski and Zoran Zaev.

When Zaev became prime minister, he had already received one pardon and had one charge against him retracted. In 2008 President Branko Crvenkovski acquitted him in the *Global* case, where he was suspected of the abuse of power when he built a shopping center and a market through a public-private partnership.

At the beginning of 2017, a few months before Zaev became prime minister, the SPO dropped the indictment in the *Coup* case, which Katica Janeva's team had taken over in December 2015. The case was opened in May 2015 by the regular prosecution and concerned the way in which illegally wiretapped conversations were obtained.

When the Assembly gave Zaev a vote of confidence, he had an active court case against him (*Bribery*). Following a charge at the Ministry of Interior's instigation and recordings made as part of a special investigation in 2013, in 2015 the Prosecutor's Office decided to charge him only with "taking a bribe".

The then government suggested the wiretaps, parts of which were leaked to the public, proved that Zaev had sought a 160,000 euro bribe from a businessman from Strumica. Zaev claimed the recording had been edited and the conversation taken out of context. The fact that the alleged bribe was never paid worked in his favour. But it was only after he became PM that the prosecution concluded there was no evidence of actual bribery, and changed the charge from 'taking a bribe' to 'seeking' one. This left the judge with no option but to free Zaev. Since the charge of seeking a bribe does not allow wiretaps to be used in evidence, the recording was no longer admissible, which in turn made the lesser charge untenable.

Nikola Gruevski was indicted in a total of six cases that SPO filed with the court in June 2017. In May 2018, he received his initial first-instance sentence (in the *Tank* case) of two years in jail. However, the Special Public Prosecutor's Office did not request detention until the judgment came into effect, despite the fact that Gruevski had also been indicted in five other cases involving more serious crimes.

The only ex-ministers who have ended up behind bars for a crime committed before, after or during their period in office are Ljuben Paunovski and Ljube Boskoski.

Gruevski appealed the decision, but in October 2018 the Court of Appeal confirmed the first-instance judgment. Still, it was over a month before Gruevski finally received the order to serve his jail sentence. Yet he never showed up at Suto Orizari prison. The next two days were a Saturday and Sunday, and the order for him to be forcibly brought to jail was only issued on the following Monday. By that time Gruevski had already escaped to Hungary, where he was granted asylum shortly afterwards.

No one in the court was held responsible for the three-day delay in ordering a search for a convicted person who did not show up compliance with a sentencing order. Nor was the MoI held accountable for not knowing where the highest-profile convict in the country's history was. The failure of the SPO to ask for detention after a first-instance verdict, as it would normally do, also went unpunished.

TRIALS RESTARTED INSTEAD OF REACHING JUDGMENT

The SPO's case files offered the country's best chance to improve its record when it comes to judgments and cases against senior officials. However, of the 26 cases that Katica Janeva's team presented to courts before the cases were taken over by the regular prosecution in 2019, only five led to an effective sentence. And only two people, the deputy Interior Minister Djoko Popovski and businessman Seat Kocan, are currently serving a prison sentence.

According to a survey by the All for Fair Trials coalition, as many as 13 SPO cases were restarted from scratch. In most instances this was because the requirement to hold at least one hearing within 90 days (or 60 days under the old Criminal Procedure Code) had not been met, or because a change in the judging panel necessitated a restart. This led to Gruevski being freed (in the *Trajectory* case) due to statutory limitation.

One case (*Tenders*) was restarted three times. It concerned Elizabeta Kanceska-Milevska, the same official who was one of the 8% lucky enough to have their Financial Police charges dismissed by the SPO. Meanwhile, she was immersing herself in politics, and left her own party to form a caucus with several other MPs. Kanceska-Milevska was one of the MPs who cast crucial votes in favor of changing the constitution. Without that change, Prespa's agreement with Greece would not have come into force and North Macedonia would have been unable to continue its applications to join the EU and NATO.

POLITICAL IMMUNITY OR POLITICAL PERSECUTION

These statistics and stories point to two unavoidable conclusions. Firstly, top officials are virtually untouchable while they or their party holds executive power. Those who have previously held office may be charged, but cases proceed with agonising slowness.

The late former State Public Prosecutor, Aleksandar Prcevski, in an interview with Utrinski Vesnik in August 2003, publicly acknowledged the failings in prosecuting officials, but primarily blamed the judiciary:

"Obviously there are some subjective weaknesses or pressure on court judges in certain areas ... In our view, there are individuals in the judiciary who are unknowingly or deliberately delaying the proceedings, so we do not have court decisions on specific cases yet."

The second conclusion is that all indicted senior officials claim the cases against them are politically motivated or fabricated. Buckovski accused the former Minister of Justice, Mihajlo Manevski; Zaev accused Gruevski; Gruevski accused Zaev, and so on.

CS5: JUSTICE HELPLESS IN THE FACE OF UNLAWFUL PARDONS

The abuse of political pardons over the last decade

Author: **Goce Trpkovski**

A number of Special Public Prosecution cases in North Macedonia are now due for retrial, and some of those indicted are trying to use evidence in their favor that was previously dismissed. Fifty-six people were pardoned by the country's former president Gjorge Ivanov in 2016, and although he was later forced to revoke the pardons, the defendants are keen to cite them in their defense.

One of them is Mile Janakieski, a former transport minister who is charged with organising the demolition of the Cosmos building as an act of revenge against its owner, the politician and businessman Fijat Canoski. Canoski had left coalition government to join the opposition.

How is it possible to cite a pardon that was later revoked in your favor?

Three years ago, when these trials began, it was widely expected that the cases would be tried. Now the political context has changed. For example, in 2016 the Constitutional Court was reluctant to rule on whether Ivanov's pardons were legitimate, but in 2019 it decided to review the case again. Janakieski's defence team therefore thought it worthwhile to cite the pardon.

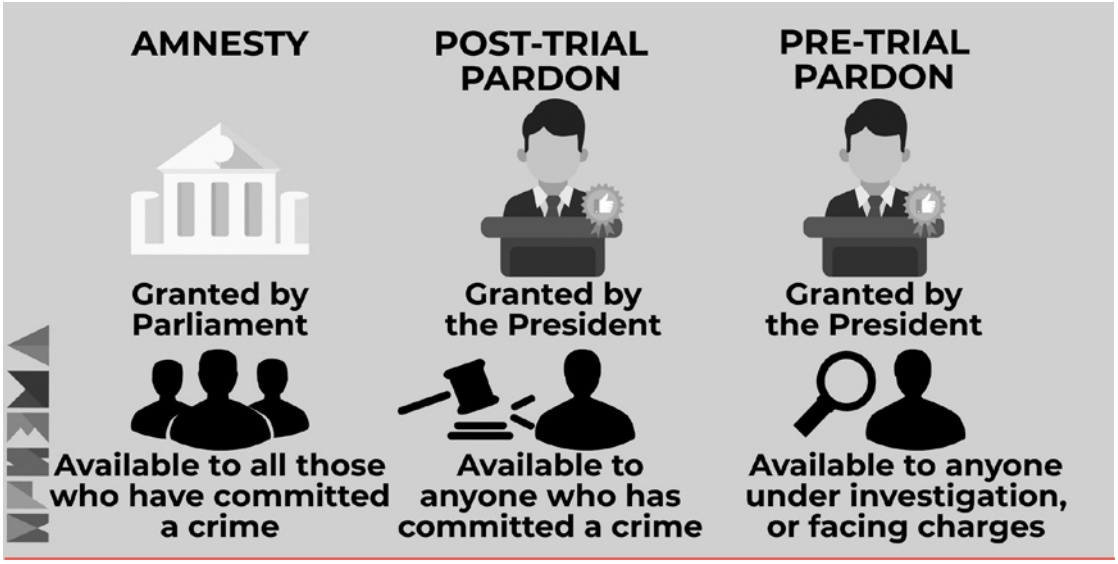
Amnesties and pardon decisions are evidence of how much politics has infiltrated the judiciary in North Macedonia. BIRN's investigation shows that four key decisions have shaped politics in the past decade. They allowed suspects and defendants to be active and influential participants in the political life, and ensured political debate could be reduced to the question of who was the greater criminal.

In at least three of these, we can identify when the decision has deviated from the Constitution, laws and rules, or international conventions. They have never been properly reviewed and have therefore become a tool with which parties settle their disputes.

PROCEED WITH CAUTION

For thousands of years, the powerful have had the ability to grant mercy, and that right is still exercised in modern democracies. Although amnesties and pardons technically sit outside the legal system, they can serve a higher purpose for the state when it is impossible to correct a wrong through judicial mechanisms. But that power must be used carefully and judiciously, or it will be abused.

BIRN spoke to several legal experts about the effects pardons have had on society. They believe that using them to achieve party goals has led to a deeply divided society. For some of the experts we spoke to, a degree of resolution may be possible if those pardoned can still be held accountable. For others, any attempt to do so will only create greater divisions.



THE ROOTS OF THE PROBLEM DATE BACK TO 2008

During 2019 and 2020 the opposition party VMRO-DPMNE published dozens of press releases referring to the 'pardoned criminal Zoran Zaev', who was until recently Prime Minister and still leads the Social Democratic Union of Macedonia (SDSM).

The decision to pardon Zaev was made by the SDSM's Branko Crvenkovski, then serving his final year as president, on August 2 2008. At the time, Crvenkovski said it was necessary in order to prevent a political crisis, because Zaev's arrest – he was a Mayor of Strumica and a vice-president of SDSM at the time - in the *Global* case could have led to the opposition leaving the parliament. VMRO-DMPNE had just won a landslide victory in early elections, with a 63-seat majority.

Even though the proceedings against Zaev were halted by Crvenkoski's intervention, they were still active in 2011 when the Supreme Court ruled nothing illegal had taken place. But the 'pardoned criminal' label stuck, and gained momentum after the State Commission for the Prevention of Corruption announced in May 2019 that it would reopen the case.

"In this case, technically, the law was not broken, because the law allowed Crvenkovski to pass the decision. But that does not mean that there was no substantive violation, because this is an option that is available to the President for him to meet goals of the society, not the interests of his political party," says Professor Gordan Kaladjdziev of the Iustinianus Primus Faculty of Law in Skopje. Crvenkoski has refused to give any public statements on the topic, and his office would not comment when we asked whether, in retrospect, the pardon was justified.

Crvenkovski's predecessor President Boris Trajkovski also used his right to pardon in 2003 when he absolved the former interior minister, Dosta Dimovska, of accountability. These two presidential pardons were the last in which we can say that, though the decisions were morally questionable, they were legally correct.

Crvenkovski saved Zaev from charges related to the construction of the Global shopping centre in Strumica | Photo: BIRN

PROCEDURAL RULES AND THE GENEVA CONVENTION GO OUT OF THE WINDOW

In order to stop the 'Hague cases' from going ahead, and so as to establish a coalition government in 2011, the government deployed the amnesty law creatively. Political considerations took precedence over the rules.

The amnesty referred to war crimes that occurred during the 2001 insurgency, when the armed ethnic Albanian militia National Liberation Army (Ushtria Clirimtare Kombetare) clashed with the Macedonian police and army. After the Ohrid Framework Agreement was signed in August 2001, Parliament passed an amnesty law providing that nobody would be charged for taking part in the clashes, apart from individuals who would be indicted for war crimes by the International Criminal Tribunal for the former Yugoslavia in the Hague.

Five cases were sent to the ICTY, four of which were against members of the NLA, one against the interior minister at the time, and a police chief killing of civilians in an ethnic-Albanian village near Skopje. The Hague court retained only the latter, and returned the other four to be handled by the domestic courts. They concerned the torture of construction workers, the disappearance of civilians in an ethnic Macedonian village controlled by the NLA, the cutting off of the

water supply in the city of Kumanevo after the NLA seized control of its reservoirs, and the NLA leadership.

Given that the NLA transformed later in 2001 into a political party called the Democratic Union for Integration (DUI), there was an urgent need for a parliamentary decision to close these cases. Consequently, DUI MPs called for an 'authentic' interpretation of the 2011 amnesty law in order to clarify that it covered war crimes.

'Authentic' interpretations exist so that Parliament can clear up something unclear or ambiguous in the implementation of a new law, or when institutions interpret it differently and proceed differently, which would endanger the principle of equality before the law. Article 175 in the Rules of Procedure of the Parliament prescribes how this is done.

It says the request can be submitted by members of Parliament, the government, courts, prosecutions and mayors if the "need for authentic interpretations be related to applying the law in their everyday work". In brief, if someone implementing a law is unclear on how to proceed, they can ask for it to be interpreted.

However, the request for authentic interpretation was made by DUI members of parliament - which raised the question of whether they had the right to do so, since they were not in charge of implementing the law.

Amnesty for war crimes is forbidden under the Geneva Convention: states are obliged to investigate and prosecute them.This is because a failure to act upon war crimes undermines the pursuit of the ultimate aim of an amnesty – reconciliation and cohesion.

In this instance, the four cases had already been opened before they were sent to The Hague. They were then returned to North Macedonia to be dealt with.

"Just because the Hague returned the cases, doesn't mean that the crimes did not exist. The Hague merely assessed that the state is capable enough to process this cases," says Kalajdziev.

The context was clear: after the elections in June 2011, VMRO-DPMNE won 56 parliament seats (five short of a majority) and DUI won 15, so they had to agree to form a

The appointment of Sadula Duraki (second from left) as a minister in Zaev's government caused a stir | Photo: The Government of the Republic of North Macedonia

new government together. An authentic interpretation of the Hague cases, in which suspects were accepted members of the DUI leadership, was the condition for coalition.

In some of the wiretaps published by SDSM in 2015, the VMRO-DMPNE leader Nikola Gruevski and party members Zoran Stavrevski, Gordana Jankulovska, Sasho Mijalkov and Silvana Boneva discuss the decision and admit that it was made purely in order to enable the coalition to be formed.

"They should leave everything else and go there,", Gruevski says in one of the recordings, after finding out that a large number of MPs found excuses not to be in the Parliament for the vote.

"*I made up an excuse that I have to be with Nora's child, that I have to take care of it,",* Stavrevski tells Jankulovska in another conversation.

"You thought of a good excuse, I am so naive..." she replies.

SDSM then left the parliamentary session and opposed the amnesty.

"The public had the opportunity to hear in the recordings the hypocrisy and the true creator of the authentic interpretation of the Hague cases. As for re-examining this process, I have to say there is no such legal option, because once an authentic interpretation has been delivered, it is in force as a law and it enters the legal system, with all the legal consequences that entails," says minister Renata Deskoska.

Most of those investigated in the Hague cases are now officials in the government of SDSM and DUI, including the vice-prime minister, Sadula Duraku (the *Lipkovo dam* case) and the foreign investment minister, Hisen Dzemaili (the *Mavrovo workers* case).

THE POLITICAL EARTHQUAKE CAUSED BY IVANOV

Some of the 56 people covered by President Ivanov's pardons in April 2016 are now politically active.

Ivanov's decision caused controversy, prompting the so-called Colourful Revolution and counter-protests by the pro-government initiative, GDOM. The attempted revival of the pardons is especially contentious because some of those charged in SPP cases intend to seek justice in the European Court of Human Rights, if convicted at home.

The argument is the same one used in the Greek and Hungarian courts when they refused to extradite Nikola Gruevski, Goran Grujevski and Nikola Boshkovski. Grujevski and Boshkovski were arrested in Thessaloniki, Greece in 2017, trying to board a plane to Hungary under false identities in order to escape detention and imprisonment in North Macedonia. Gruevski fled to Budapest through Albania, Montenegro and Serbia in 2018, on the day when he was supposed to begin a two-year prison sentence.

The courts in both countries refused to extradite them to North Macedonia, arguing that a presidential pardon cannot be revoked.

According to the former Constitutional Court judge, Natasha Gaber Damjanovska, this decision is understandable, considering that the legality of the pardons is still not clear.

"Greece and Hungary cannot assess which provisions are in force in a particular country, if the country in question hasn't resolved the issue. They can't allow themselves to draw such a conclusion," she says.

Legal experts consulted by BIRN think the only way to clear up the issue is to declare the decision illegal. Professor Svetomir Sh-

The pardon decisions made by President Ivanov prompted the Colorful Revolution | Photo: BIRN

karic is one of the legal experts who have pointed to the chronology of the episode in support of this argument.

The law on pardons (including the infamous Article 11, which allows the President to issue pardons even while proceedings are still active) was adopted in 1993. In 2009 it was amended by VMRO-DMPNE, who had a parliamentary majority at the time, in an attempt to prevent it being used. Two crucial new provisions abolished Article 11 and pardons for criminality, such as paedophilia or electoral manipulation, were forbidden.

Seven years later, in 2016, the Constitutional Court quashed these changes to the law. In doing so the court abolished a law that itself abolished an article from the law, making it unclear whether Article 11 now applied. This was not discussed in the Explanatory Note. Gaber-Damjanovska, who was a member of the court at the time, mentioned it in the concurring opinion, expressing her doubt that the intention was to revive the Article.

Her opinion has recently been reinterpreted, as she herself says, in a completely different way. VMRO-DPMNE MP Antonio Miloshoski claimed at a press conference that "judges close to SDSM have agreed that Article 11 exists".

"I raised the alarm that the intention of [the 2016 ruling] was not to revive Article 11... The decision of the court should never have been passed. The argument that the constitutional powers of the President were limited did not hold water, since the Constitution is clear that pardons are regulated by law. If that was not the case, the initial law from 1993 should have been repealed and the President should have been given unlimited rights," explains the former constitutional judge.

Shkaric says that the confusion means an illegal decision has begun to have legal consequences.

"You can't have an authentic interpretation of a 'dead' law. But they realised that too late. Parliament should have reacted immediately with a decision that the pardon was null and void, but clearly that was politically difficult at the time. That is why it is difficult to act now,"he says.

He adds that Ivanov's decision will have an impact if SPP cases reach Strasbourg, because pardons are normally very rare and the ECtHR consequently takes them serious-

ly. Gaber-Damjanovska thinks progress can be made if Ivanov himself accepts responsibility.

"Ivanov should have taken responsibility... At the time, it was difficult for Parliament or the Constitutional Court to take control of the issue, but now it must be done.".

When Ivanov decided to deploy Article 11, he said that his goal was to contribute to national reconciliation.

"Metaphorically speaking, [I wanted] to cut the knot, in accordance with all my constitutional and legal powers, by halting all proceedings against opposition politicians and their associates or supporters," Ivanov said in his explanation, adding that he was convinced that most of the politicians were innocent of the charges against them, and the charges were in any case put up by foreign powers.

But political tensions did not ease as a result. Indeed, they intensified. Opponents of his decision saw Ivanov's move not as an attempt at reconciliation, but as an effort to absolve those who had abused their power from responsibility.

Professor Gordana Siljanovska-Davkova, later a candidate to succeed Ivanov in his party, disputed this interpretation. She agued the Constitutional Court, unlike Parliament, was not a legislature. Accordingly,- constitutional judges can repeal laws, articles and other decisions passed by a state body, but they cannot bring back something that was repealed, as that would effectively create new law.

The question of whether Ivanov had overstepped his competencies was never raised by any institutions. The fact that the state now officially considers his 56 pardons to be invalid is not necessarily relevant in international courts.

Justice minister Renata Deskoska says that the extradition requests for Grujevski, Boshkovski and Gruevski stated that the pardons were null and void. But the courts in Hungary and Greece disagreed, since no law had been passed to nullify them. This encouraged the other defendants to seek justice abroad if they were convicted at home.

GUILTY UNTIL PROVEN INNOCENT

In December 2018, a law was adopted that experts described as the strangest amnesty in the legal history of North Macedonia. Unlike the usual practice, in which Parliament rules that an unspecified group of people who have committed a crime will not be prosecuted for it and it enters into force *ex officio*, this amnesty was granted after a request from the accused.

The law concerned the 'April 27' incident in which a mob stormed Parliament and injured several opposition MPs who were trying to form a majority. It exempts those who participated in the attack, but neither organized it or used violence, from prosecution. The Court had to rule on the individual circumstances of each defendant.

"As a rule, an amnesty is one event, and everyone included in this event can be granted the amnesty. Dividing it into violent and non-violent participants could be problematic. It was an interconnected event... Those who were violent, couldn't have committed the crime without the help of the others. It is also unusual for the Court to decide who has and does not have the right to amnesty,"- says Professor Kalajdziev.

Of the 34 people initially charged, 15 are still waiting for a verdict and 14 have been convicted.

The unusual amnesty saved some of thos eaccused of violence on April 27 2017| Photo: Robert Atanasovski

The right to presumption of innocence, guaranteed by Article 13 from the Constitution, has been brought into question, since only a guilty person can be granted amnesty.

The political motives behind this law are clear. The declared goal was to achieve "reconciliation by overcoming division in society" and to continue with reforms that would enable North Macedonia to apply to join the EU. But 19 of those freed were VMRO-DMPNE MPs, and eight of them supported the constitutional changes needed for the Prespa Agreement to be implemented and to change the name of the country to Republic of North Macedonia.

"The amnesty in 2018 was proposed as a process of reconciliation, led in the Parliament. Nonetheless, it is my opinion that the process was not fully completed and that is the reason why we still don't have reconciliation between the victims and the attackers on April 27," said Deskoska.

HOW FAR HAS RECONCILIATION BEEN ACHIEVED?

After a decade of efforts to achieve a sense of unity by granting pardons and immunity from prosecution, we have achieved precisely the opposite. For Natasha Gaber-Damjanovska, this is no surprise.

"The climate of impunity has upset the very core of society. For some crimes there must be accountability. If there is no equality even in the accountability, then we do not have an organized society," she says, adding that better efforts to

fight corruption and abuses of the system would have benefited all citizens.

Deskoska says polarization is even greater today because the previous ruling party fed existing divisions.

Kalajdziev points out, with heavy irony, that the injustices have prompted a kind of reconciliation in the form of widespread distrust of politicians.

"There is a high level of distrust in politicians in general, no matter which side they're on," he says. But like the other experts we spoke to, he regards the current situation of conflicting legal decisions as unsustainable.

Injustice enhances distrust and divisions | Photo: BIRN

CS6: DETENTION AS PUNISHMENT FOR COMMON PEOPLE

Those at the top of the political pyramid remain untouchable

Author: **Aleksandar Dimitrievski**

The disregard of the principle of equality before the law is best illustrated by the way pre-trial detention is applied.

Comparing how pre-trial detention orders were used in the *Mavrovo workers* and *Snake-eye* cases reveals how differently institutions behave when the target of pre-trial detention is a politically important player, and when they are an ordinary citizen. For the latter, pre-trial detention is almost routine, even at the cost of personal tragedy, while those on the top of the political pyramid are almost untouchable.

THE CURIOUS CASE OF HYSNI XHEMAILI

May 15, 2008 was the peak of campaigning for the general election, which was to be held on June 1. The public was shocked and disappointed by the news that Greece had vetoed North Macedonia's hopes of joining NATO.

It was at this moment that the VMRO-DMPNE justice minister, Mihajlo Manevski, announced the start of the so-called Hague cases. These were the four investigations into crimes against humanity committed by the National Liberation Army (NLA) in 2001, during the Yugoslav conflict. They were initially opened in 2001, then referred to the International Criminal Tribunal for the former Yugoslavia (ICTY), and subsequently sent back to North Macedonia in 2008.

Four days after the announcement, the then State Public Prosecutor, Ljupcho Shvrgovski, announced the indictment in one of the *Mavrovo workers* case. A large number of people were suspected of kidnapping and torturing workers from the Mavrovo construction company. Among the suspects was Hysni Xhemaili, a candidate running for the DUI party.

VMRO-DPMNE easily won a majority in the general election, but convention dictates that no Macedonian government can be formed without an ethnic Albanian coalition partner, since the group represents a quarter of the population. In the previous government VMRO-DMPNE had tried to bypass DUI and form a coalition with another minor ethnic Albanian party, but this led to a boycott of parliament and other difficulties. This time they negotiated with DUI.

Taking someone into custody, and informing the media in advance so they can set up their cameras, is being used to punish opponents and as a demonstration of the fight against crime. One extreme case was the arrest of Ljube Boshkovski in 2011, and the most recent one was when Katica Janeva was taken into custody.

During the negotiations, the court scheduled the first hearing for the *Mavrovo* case. Hysni Xhemaili was by now an MP. On September 16, when the government had been formed, only two of the 23 defendants appeared at the first hearing. It was the start of one of the most interesting detention-related stories in the Macedonian judicial system.

When a defendant does not appear in court for a hearing, the court can continue the trial in their absence, on condition that the Ministry of the Interior informs the court that they have been unable to locate them.

In the Xhemaili case, after postponing the first hearing due to the defendants' absence, the court issued a detention order *in absentia* for several of those charged, including Xhemaili. The MoI started a search for them, but months later they had still not been found. The hearings were repeatedly postponed because the police failed to inform the court they were still missing.

Xhemaili failed to show up for work in Parliament, but sent in regular notes excusing his absence.

The MoI continued to look for him until the end of 2008, during which time six hearings were postponed in the Skopje Criminal Court. The minister, Gordana Jankulovska, refused to inform the court that the police were unable to find him.

On January 9 2009, the Skopje court decided to terminate Xhemaili's pre-trial detention. After the prosecution agreed, he was allowed to defend himself from outside custody, with bail set at 50,000 euros in the form of a property guarantee.

Experts immediately criticised the decision: "What is the logic in exempting a fugitive from custody?"

The public prosecutor, Jovan Ilievski, brother-in-law of Sasho Mijalkov, the Chief of the Secret Police, issued a statement that the prosecution had agreed to the bail because it was the only way to secure Xhemaili's attendance at the trial. But in reality it was the court that had taken the decision, not the prosecution.

THE CASE OF THE PAY-TOLL WORKERS

While the police were failing to locate Xhemaili in the autumn of 2008, the Criminal Court in Skopje reached a verdict in the *Snake-Eye I* case. This huge case against 72 pay-toll staff concluded in the sentencing of only seven of the defendants, 61 probation orders and four acquittals. The original charges of organized crime were dropped and the final convictions were for misconduct in public office.

Unlike the Mavrovo case, when the police failed to find the defendants or inform the court they were still missing, most of the defendants in the *Snake-Eye* case spent five months in jail and another seven under house arrest. Some were imprisoned for nearly a year.

"They took us out of the vans in front of the Criminal Court, and started taking us towards the building, when they suddenly stopped. 'Take them back', someone from the special police unit said. 'The cameras are not here yet.'" He was supposedly talking about police cameras, but somehow the recordings later ended up in the media, Ljubomir Bundaleski, one of the accused, told BIRN.

The *Snake-Eye* trial is still ongoing after 13 years. During this time four of the accused have died. Another was denied the opportunity to stand trial despite her husband's fragile health. He set himself on fire and died while she was in custody.

Total of 72 persons were accused of having stolen pay-toll money | Photo: BIRN

IMPORTANT AND LESS IMPORTANT PEOPLE

The *Mavrovo* and *Snake-Eye* trials are completely different. But the contrast in the way custody was ordered and enforced is instructive. It reveals how the courts and police proceed when defendants are politically well-connected, and how they act when they are ordinary citizens.

The provisions of the old and new Criminal Codes state that pre-trial detention is prescribed in three cases:

- there is a risk the defendant will flee;
- there is a danger they will reoffend;
- there is a risk they will tamper with witnesses, evidence or the trial itself.

The court annulled Xhemaili's detention while he was *de facto* a fugitive. The *Snake-Eye* defendants, most of them just ordinary workers, spent more than 370 days in custody, even though they were suspended from work (so they could not repeat the crime), they obeyed the rules of house arrest (didn't flee), nor could they tamper with witnesses, since the MoI built its case using special investigative measures. The decision applied to all the defendants, with no explanation of why it was applied across the board or why any individual was, for example, considered at risk of absconding.

ONE COURT, DOUBLE STANDARDS

Macedonia's use of detention orders has been criticized by numerous international institutions. The European Commission's 2014 Annual Progress Report quotes the European Court of Human Rights:

"The ECHR found several violations of the right to freedom in cases in which pre-trial detention was ordered with no specified and satisfactory justification".

In 2015, an Organization for Security and Co-operation in Europe-funded study by Prof Gordana Buzharovska, Judge Slavica Andreevska and lawyer Aleksandar Tumanovski found that the Criminal Court in Skopje orders pre-trial detention in 93% of cases where the prosecution requests it.

In the same year, the Special Prosecution Office was established to investigate illegal wiretapping by the secret services. In February 2016, it opened its first case and asked for pre-trial detention for eight officials of the ruling party, or people close to them.

Four of them were unavailable at the time, and the court exempted the other four from detention the same night. They included the ex-transport minister Mile Janakieski. Shortly after 3am the president of the court, Vladimir Panchevski, emerged from the court building. Asked by reporters what he was doing there in the early hours of the morning, he replied he was overloaded with work.

Four days later the remaining defendants attended court and were also exempted.

The All for a Fair Trial coalition believes this example is typical.

By the end of 2018, the SPO, which prosecuted mainly senior officials, had requested pre-trial detention for only 20% of the suspects and the accused. This measure was approved in only 25% of the cases, or 5% of the total.

At present the only legal satisfaction the accused in this case have comes from Strasbourg. The European Court reached a verdict in 2010 that national courts were wrong to order collective pre-trial detention.

Over the same period of time, the Basic Public Prosecution for prosecuting organized crime requested pre-trial detention for an average of 40% of their suspects or accused, and the Court approved it in 95% of cases.

Yet another example of the flexibility of the Court where SPO cases were concerned was the *Trust* case against the businessman Sead Kochan. When the SPO requested pre-trial detention, the Preliminary Proceedings Judge refused it. As the later decision of the Judicial Panel to issue a detention order showed, the first instance judge thought there was a flight risk, though a small one. But the law does not allow courts to assess the severity of a flight risk: it either exists, or does not.

"SOME LOST A HUSBAND, SOME LOST A PARENT"

At the time his pre-trial detention order was issued, Sead Kochan had already left the country. The Supreme Court cancelled his detention order while he was *de facto* a fugitive from justice. Kochan eventually returned and was sentenced and jailed. He is one of only two people charged by the SPO who are behind bars.

Hysen Xhemaili, who escaped detention, was never convicted, nor cleared by a court. He continued to work at Parliament and showed up at the trial; in 2019, he became a government minister.

The proceedings in the Hague case dragged along until 2011, when Parliament adopted the amnesty law to free the suspects.

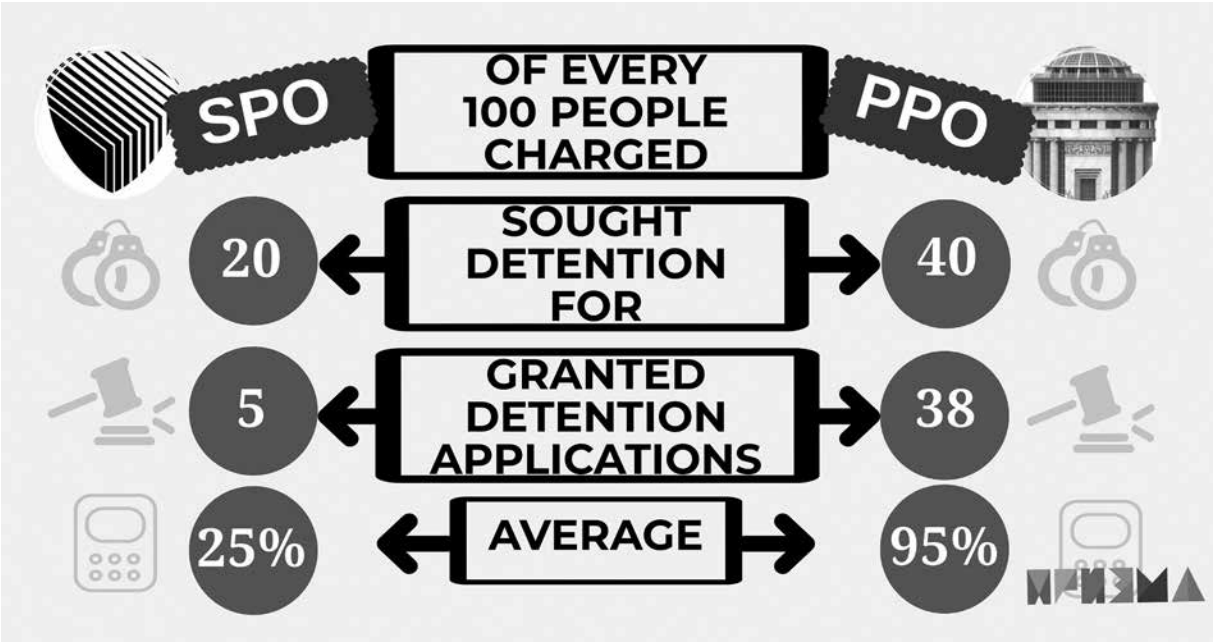
Ljubomir Bundaleski and most of his colleagues still work at the toll booths. In February 2020, the Criminal Court of Skopje reached a verdict for the third time. All the accused were freed on probation for official misconduct, despite the fact that the article used to convict

Numerous criticisms arrived from Brussels about the manner in which pre-trial detention is used.

them does not permit probation to be used as a punishment. The second charge by the prosecution, criminal association, was dismissed due to statutory limitation. They suspect that this particular sentence was handed down in order to stop them seeking damages for the 370 days they spent in pre-trial custody.

"Some lost a husband, some lost a parent. I wasted almost a quarter of my life on this case, but I did not lose my pride. I'll fight for as long as I'm alive," says Bundalevski.

The *Snake-Eye* case now goes back to the Appellate Court, and it may be years before a higher court reaches a verdict.



THE STRUCTURE AND ORGANIZATION OF THE REPUBLIC OF NORTH MACEDONIA'S JUDICIAL SYSTEM

Author: **Denis Preshova**

JUDICIARY

Thirty-four courts make up the judicial branch of the Republic of North Macedonia (RNM). The Law on Courts[4] stipulates five types of court: basic courts, courts of appeal, the Administrative Court, the Higher Administrative Court and the Supreme Court.

Article 101 of the Constitution of RNM[5] makes the Supreme Court the highest court in the Republic, and it ensures all courts apply the law in a uniform way. There are four courts of appeal, based in Skopje, Shtip, Bitola and Gostivar, which each have jurisdiction over several first-instance (basic) courts. Article 28 of the Law on Courts established 27 of these basic courts, which each have jurisdiction over one or more municipalities. Sixteen of them have expanded jurusdiction, which means they hear several types of criminal and civil law cases.[6]

The 1991 Constitution of the Republic of Macedonia (as it was called at that time) established the judiciary as a unitary organization, which implied a single hierarchy comprised of basic courts, courts of appeal and the Supreme Court as the highest-instance court. However, this principle was abandoned with the adoption of Constitutional Amendment XX in 2005.[7] This change allowed the creation of new courts which are part of the so-called administrative judiciary. The Administrative Court was founded in 2006,[8] followed by the Higher Administrative Court in 2010.[9] These courts have exclusive jurisdiction in administrative law disputes.

In fact, there are now two parallel hierarchies. The first is comprised of basic courts, courts of appeal and the Supreme Court, all of which are broadly competent in criminal law matters and civil law disputes. The second hierarchy is made up of the Administrative Court and the Higher Administrative Court, which both act in administrative disputes. The only point of contact between these two hierarchies within the judiciary is the Supreme Court, which can decide on legal remedies in administrative disputes, but cannot take merit-based decisions in this area.[10]

The Judicial Council holds a constitutionally-defined mandate to guarantee the judiciary's independence and autonomy. This body was first anticipated under constitutional amendments adopted in 2005, and was founded under provisions in the Law on the Judicial Council of RM, adopted in 2006.[11] According to the provisions of the new Law on

4 Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

5 Constitution of RNM, "Official Gazette of RM" no.52/1991

6 Articles 30 to 32 from the Law on Courts see footnote no.1

7 Article 98 and amendment XX from the Constitution of RNM, see footnote no.2

8 Article 25 from the Law on Courts, see footnote no.1

9 Article 4 which added Article 15-a, Law on Amending the Law on Courts, "Official Gazette of RM" no.150/2010

10 Article 4 from the Law on Courts, "Official Gazette of RM" no.62/06 and 150/10. Article 15 from the new Law on Administrative Disputes, "Official Gazette of RNM" no 96/2019, which will enter into effect in May 2020, stipulates that the Supreme Court of RNM shall decide only upon issues pertaining to conflict of competences between administrative courts and other courts.

11 Law on the Judicial Council of the Republic of Macedonia, "Official Gazette of RM" no.60/2006

the Judicial Council from 2019,[12] the Council is comprised of 15 members, as follows:

- The President of the Supreme Court and the Minister of Justice, who serve as ex officio members, without voting rights;
- eight members selected from the ranks of judges in direct elections held at courts;
- five members appointed by the Parliament of RNM from the ranks of university law professors, attorneys at law, former judges to the Constitutional Court of the Republic of North Macedonia, international judges and other distinguished law professionals. These are nominated by the President and the parliamentary committee for elections and appointments.

In its capacity as an independent and autonomous body, the Judicial Council takes decisions on all aspects of judges' careers (appointments, dismissals, promotions, disciplinary procedures, etc.), as well as other issues pertaining to administration of the judiciary. In determining the Judicial Council's composition, due consideration should be given to the principle for equal and adequate representation of ethnic communities. This is achieved by selecting four council members who must be from minority communities, three of whom are judges and one of whom is a member proposed by the President. At the same time, three of the Council members nominated by the parliamentary committee on elections and appointments are selected by Parliament by means of a majority vote among MPs. This must include a majority of MPs who are members of minority communities in the Republic of North Macedonia.

The Judicial Budget Council (JBC) was established to secure the judiciary's financial independence. Under the Law on the Judiciary Budget,[13] the JBC is comprised of a president and ten members. The JBC President is also the President of the Judicial Council, while the President of the Supreme Court is his/her deputy.

Other members of the Judicial Budget Council include:

- The Minister of Justice
- The President of the Administrative Court
- Presidents of all four courts of appeal
- Two presidents of basic courts according to a rota established by the Law on Courts, with a two-year term of office. One president should come from a basic court with expanded jurisdiction
- The Director of the Academy of Judges and Public Prosecutors.

Representatives of the Ministry of Finance also participate in the JBC's work, but they do not have decision-making and voting rights.

PUBLIC PROSECUTION OF THE REPUBLIC OF NORTH MACEDONIA

The public prosecution service, pursuant to Article 106 of the Constitution, is defined as a single and autonomous body tasked with prosecuting criminal offences and other acts punishable by law. The office of public prosecution is performed by the Chief Prosecutor of the Republic of North Macedonia and public prosecutors. As well as the Public Prosecution Office, the prosecution organization includes basic and higher prosecution offices and the Prosecution Office for Organized Crime and Corruption.

The Public Prosecution Office of RNM answers to the Supreme Court. Four higher prosecution offices answer to respective courts of appeal in Skopje, Bitola, Shtip and Gostivar.

The new Law on the Public Prosecution Office means that the Prosecution Office for Organized Crime and Corruption will cover all of RNM and will act before the Basic Criminal Court in Skopje. A specialist department will prosecute prison officers and police. Twenty-two basic prosecution offices will answer to their local basic court.

The Council of Public Prosecutors (CPP)[14] is defined as an independent body that guarantees the autonomy of public prosecutors. This council is comprised of 11 members:

12 Law on the Judicial Council of RNM, "Official Gazette of RNM" no.102/2019 from 22.5.2019

13 Law on Judiciary Budget, "Official Gazette of RM" no.60/2003, 37/2006, 103/2008 and 145/2010

14 Law on the Council of Public Prosecutors of the Republic of Macedonia, "Official Gazette of RM" no.150/2007 and 100/2011 and "Official Gazette of RNM" no.42/2020

- The Chief Prosecutor of the RNM in an ex officio capacity
- six members selected from the ranks of public prosecutors
- four members appointed by the Parliament of RNM from the ranks of university law professors, attorneys at law, former judges to the Constitutional Court of the Republic of North Macedonia, international judges and other distinguished law professionals.

In order to ensure minorities are sufficiently represented, one of the public prosecutors and two of the Parliament-appointed members must be from minority communities.

The CPP is the only body that decides on issues related to public prosecutors' careers and other matters related to the administration of the public prosecution service. Except for the Chief Prosecutor, who is proposed by the government and selected by Parliament, it selects all public prosecutors .

INTERNATIONAL (EUROPEAN) STANDARDS FOR THE JUSTICE SYSTEM

Under Chapter 23 of the EU Enlargement Policy, the European Commission established EU standards for the justice system (the judiciary and public prosecution). They fall into five categories: **independence, impartiality, professionalism, efficiency and quality of justice**. Given that EU law, with the exception of general provisions under treaties that serve as the primary source of law, does not provide a clear and detailed definition of standards for the judiciary, most of these standards are of an external character. In other words, the European Commission more often refers to documents by the Council of Europe and other organizations than EU legal acts.

Relevant provisions from **EU primary law** referred to by the European Commission concern Articles 2, 7 and 19 of the Treaty on the European Union, Article 49 of the Treaty on the Functioning of the European Union, and Articles 47 to 50 of the European Union Charter of Fundamental Rights.[15] For the first time, Chapter 23's explanatory notes for the Republic of North Macedonia and Albania feature references to relevant European Court of Justice case law.

Standards established in **Council of Europe** documents (and those of its advisory bodies) primarily refer to acts that do not have a formal and legally binding effect (so-called 'soft law'). These documents include:

- Articles 6 and 13 of the European Convention on Human Rights;
- Committee of Ministers, Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities;[16]
- Venice Commission, Report on the Independence of the Judicial System (2010) – Part I: The Independence of Judges, CDL-AD(2010)004,[17] and Part II: The Prosecution Service, CDL-AD(2010)040;[18]
- Venice Commission, Rule of Law Checklist, CDL-AD(2016)007;[19]
- European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest Guidelines) adopted by the Conference of Prosecutors General of Europe on 31.5.2005;[20]
- Consultative Council of European Judges, Opinion No.1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges;[21]
- Consultative Council of European Prosecutors, Opinion No.9 (2014) on European norms and principles concerning prosecutors;[22]
- Council of Europe, Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system;[23]

15 Macedonian translation of cited provisions is available at: http://www.sep.gov.mk/data/file/Publikacii/Dogovor%20od%20Lisabon(1).pdf

16 Available at: https://rm.coe.int/16807096c1

17 Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e

18 Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e

19 Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e

20 Available at: https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5

21 Available at: https://rm.coe.int/1680747830

22 Available at: https://rm.coe.int/168074738b

23 Available at: https://rm.coe.int/16804be55a

- European Charter on the Statute for Judges, 1998;[24]
- Committee of Ministers, Recommendation R(94) 12 on the independence, efficiency and role of judges, 1994;[25]
- Council of Europe, Recommendation No. R (86) concerning measures to prevent and reduce excessive workload in the courts;[26]
- Compilation of the Venice Commission's opinions and recommendations concerning courts and judges, CDL-PI(2019)008;[27]
- Compilation of the Venice Commission's opinions and recommendations concerning prosecutors, CDL-PI(2018)001.[28]

Furthermore, reference is made to reports of the **European Network of Councils for the Judiciary,** as follows:

- European Network of Councils for the Judiciary, Development of Minimum Standards for the Judiciary I + II, Reports 2010-2011 and 2011-2012.[29]

Finally, reference is made to a **United Nations** document concerning the conduct of judges:

- Bangalore Principles of Judicial Council (the Bangalore Principles) adopted by the United Nations Commission on Human Rights on April 23, 2003.[30]

24 Available at: https://rm.coe.int/16807473ef

25 Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804c84e2

26 Available at: https://rm.coe.int/16804f7b86

27 Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e

28 Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29009-e

29 Available at: http://www.csm1909.ro/csm/linkuri/15_06_2011__41805_ro.pdf and http://birosag.hu/sites/default/files/allomanyok/nemzetkozi/english/final_report_standards_ii_2011-2012.pdf

30 Available at: https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf

JUDICIAL INDEPENDENCE UNDER SIEGE

Author: **Denis Preshova**

1. PAST JUDICIAL REFORMS: FROM SUCCESS STORY TO JUDICIAL CAPTURE

An independent and impartial judiciary is one of the most important pillars of any functional liberal democracy: it is essential to the rule of law. Because of this, and given that Article 2 of the Treaty on European Union[31] stipulates the rule of law as one of the fundamental values on which the Union is founded, the EU pays special attention to it, both as part of the EU accession process and (recently) in EU member states.

The 1991 constitution of the Republic of North Macedonia enshrines a straightforward commitment and path to establishing a liberal democratic system. It integrates the rule of law and the principle of power-sharing as fundamental values in the constitutional order.[32] On the other hand, the ongoing emphasis on North Macedonia's integration into Euro-Atlantic structures as the top strategic foreign policy priority relies on the existence of an independent and impartial judiciary.

Establishing, organizing and regulating a judicial system are areas in which North Macedonia lacks significant experience. The origins of the judicial system in the country - or more specifically in the People's Republic of Macedonia (PRM) - can be found in the Proclamation on the Establishment of Regular People's Courts adopted by ASNOM's Presidium on March 31, 1945. Until the Constitution of SFRY and SRM were adopted in 1974, PRM (i.e. SRM) had relatively little influence on judicial organization and functioning, because these issues were regulated at central (federal) level. Even after the respective constitutions were adopted in 1974, the federal republics were granted partial authority in organizing and regulating judicial matters.[33]

Although the foundations were laid in 1991 when Macedonia became independent and acquired its first constitution, crucial legislative reforms began after adoption of the Law on Courts in 1995, which came into full effect in July 1996.[34] This law, which was implemented less than a month after the provisions came into effect in June, established how the judicial system should operate, as well as the principles on which it was founded, including the election of judges at newly-formed basic courts and courts of appeal, as well as the number of judges at the Supreme Court.[35] This procedure finally put into effect the constitutional provision that guarantees permanent tenure for judges. It did not apply to judges appointed prior to their (re)election, except for the president of the Supreme Court and a number of judges there,

31 Article 2 of the Treaty on European Union, consolidated version, available in the Macedonian language at: http://www.sep.gov.mk/data/file/Publikacii/Dogovor%20od%20Lisabon(1).pdf

32 Article 8, paragraph 1, items 3 and 4 from the Constitution of RNM

33 For more on development of the judiciary in Macedonia, see in: Kambovski, V., Judicial Law, "2nd August S" Shtip, 2010, pp. 164-169.

34 Law on Courts, "Official Gazette of RM" no. 36/1995 from 27.7.1995

35 Article 112 and 117 from the Law on Courts adopted in 1995

all of whom kept their posts.[36] In the period after adoption of the Law on Courts, except for the Law on the Republic's Judicial Council adopted in 1992,[37] all relevant laws pertaining to the judiciary system were adopted, thereby revoking the laws adopted by SRM and SFRY that had previously been in effect. By the mid-1990s the first steps had been taken to create an independent and impartial judiciary, and in ensuring constitutional guarantees that it would ensure the principle of the separation of powers. Previously the judiciary were subordinate, reflecting the unified principle of government. This period was the **first stage of reforms in the contemporary judicial system** in North Macedonia and lasted until 2005, until a major package of constitutional amendments was adopted.

This series of constitutional amendments was adopted after North Macedonia became a candidate for EU membership in 2005,[38] followed by the new Law on Courts[39] and the Law on the Judicial Council[40] in 2006, and a series of other laws aimed at aligning the national legal framework with European standards. In fact, RNM was the first state in the region to undertake such major judicial reforms - even before Croatia, which began somewhat later. These reforms aimed to ensure a solid basis for the decision to open accession negotiations with the EU. Nevertheless, the change of government in 2006, and Greece's veto of the country's NATO membership at the Bucharest Summit in 2008 and of the opening of accession negotiations with the EU in 2009, marked the start of a total capture of the judiciary through various forms of political influence and pressure. This period was characterized by the so-called "purge" of uncooperative judges, and the appointment or promotion of politically malleable and loyal judges.[41] The usual justification for the purge was that it would liberate the judiciary from the negative influence of the previous authorities, put it on solid foundations to improve efficiency, and deliver results that could be measured against objective criteria. The gravity of these developments was not immediately recognized - not even by the European Commission in its annual progress reports. Not until the political situation escalated, and the so-called 'bombs' emerged (illegally wiretapped conversations that contained serious evidence of the abuse of power, including by the judiciary) did the extent of the problem become apparent. Between 2009 and 2013 the Commission stopped short of identifying problems or instances of political interference, instead noting systemic shortcomings.[42] Indeed, in its 2014 report, it reiterated: "Many of the overarching problems faced by all candidate countries have been tackled, including the elimination of the court backlog, establishment of the Academy of Judges and Public Prosecutors, formal independence of the judicial governance body (Judicial Council)..."[43] These generally positive points overlooked concerns about selective justice and possible political influence in individual court cases.[44] Influenced by the first report of the senior experts' group, led by Reinhard Priebe in 2015, in its 2015 progress report the Commission for the first time

36 Article 99 from the Constitution of RNM

37 Law on the Republic's Judicial Council, "Official Gazette of RM" no. 80/1992 from 22.12.1992

38 Amendments XX-XXX to the Constitution of RNM from 7.12.2005

39 Law on Courts, "Official Gazette of the Republic of Macedonia" no. 58/2006 from 11.5.2006

40 Law on the Judicial Council of the Republic of Macedonia, "Official Gazette of RM" no. 60/2006 from 15.5.2006

41 In the period 2007-2015, 44 from the total of 63 disciplinary procedures for judges have been completed with dismissal decisions. For example, see: Venice Commission, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the Former Yugoslav Republic of Macedonia, CDL-AD(2015)042, pp. 6-7; 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, Brussels, 8.6.2015 (2015 Priebe Report), pg. 9. The report is available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

42 EC's Progress Reports for the Republic of Macedonia up to the year 2017 in the Macedonian language are available at: https://www.sobranie.mk/dokumenti-rm-eu-cbb3490c-fe7d-4750-82f4-67c619c46a6a.nspx

43 2014 Progress Report for the Republic of Macedonia, pg. 10-11

44 2014 Progress Report for the Republic of Macedonia, pg. 11

identified backsliding in judicial reform, and direct political influence.[45] After the wiretaps were revealed, the Commission's 2016 progress report included a straightforward assessment of state and institutional capture, including the judiciary, confirming Priebe's findings.[46]

Judicial reform stalled because of pressure from political elites, especially the executive branch. There was also a failure to change the mentality of judges and the legal culture of the state, in favor of a focus on the legal and institutional framework. The judiciary failed to resist this pressure because of a lack of will to take difficult decisions, a rigidly formalistic and textual approach to interpreting the law, and unchallenged perceptions about the role of judges.[47]

The most recent stage of judicial reform in North Macedonia began with the adoption of the Strategy on Justice System Reforms 2017-2022. Its overall goal is to free up the judiciary, but not by simply moving to a new form of "capture" - which Priebe's report warned about in 2017.[48] In fact, the second Priebe Report warns that a small number of judges with significant influence and strong ties to political elites are still in powerful positions that allow them to endanger the independence of the judiciary and of individual judges. A series of changes to the law were made in the last two years, including major changes to the Law on Courts from 2016[49] (adopted in 2019) and a completely new Law on the Judicial Council of RNM in 2019.[50] During this period, legal reforms to the judiciary were accompanied by positive opinions and reports by the European and Venice Commissions.[51] Although it is still early to evaluate the success of the third round of reforms, judging from the failure to identify critical problems in the judiciary and adequate responses to them, progress remains doubtful. The problem is not the existence of an adequate legal and constitutional framework; the challenge is to implement it.[52]

2. ARE THE MODELS OF JUDICIAL INDEPENDENCE AND SELF-GOVERNANCE A SOLUTION, OR ANOTHER PROBLEM?

The ex-communist states continue to face serious challenges to the rule of law. Consequently, the European Commission adopted a new approach to enlargement and accession negotiations, with a special emphasis on chapters 23 and 24, which relate to the rule of law.[53] This means that these two chapters are the first to be tackled at the start of accession negotiations, and the last to be closed. Yet judging by the state of judicial reform in some of these EU member states and the failure of the negotiations to secure crucial

45 Progress Report for the Republic of Macedonia, pg. 5 and pg. 12

46 2015 Priebe Report, paragraph no. 11

47 For more information on challenges relating to the legal and judicial culture in the countries from former Yugoslavia, see: Zobec, J. and Cernic, JR., "The Remains of the Authoritarian Mentality within the Slovene Judiciary", in Central European Judges under the European Influence: The Transformative Power of the EU Revisited, M. Bobek (ed.), Bloomsbury Publishing, 2015, pg. 137; and in: Uzelac, A., "Survival of the Third Legal Tradition?", 49 Supreme Court Law Review, 2010, pg. 377.

48 The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, Brussels, 14.9.2017, (2017 Priebe Report) pg. 4-5

49 Law on Amending the Law on Courts, "Official Gazette of RNM" no. 96/2019 from 17.5.2019

50 Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019 from 22.05.2019

51 Venice Commission, North Macedonia, Opinion on the Draft Law on the Judicial Council, CDL-AD(2019)008, 18 March 2019; Venice Commission, The Former Yugoslav Republic of Macedonia, Opinion on the Draft Law Amending the Law on Courts, CDL-AD(2018)033, 17 December 2018; European Commission, Progress Report on North Macedonia 2019, pp. 15-17, available in English language at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf

52 For example, see Venice Commission, North Macedonia, Opinion on the Draft Law on the Judicial Council, CDL-AD(2019)008, 18 March 2019, pg. 14; Venice Commission, The Former Yugoslav Republic of Macedonia, Opinion on the Law Amending the Law on the Judicial Council and on the Law Amending the Law on Courts, CDL-AD(2018)022, 22 October 2018, pg. 4; and 2017 Priebe Report, paragraph no. 18, pg. 2.

53 Louwerse, L. and Kassoti, E., "Revisiting the European Commission's Approach towards the Rule of Law in Enlargement", 11 Hague Journal on the Rule of Law 1, 2019.

reforms in the Western Balkans, the new approach has not brought about significant change. The list of standards, assessment methodology, expected outcomes, etc., have remained the same in spite of numerous criticisms.[54] The EC's approach to the rule of law, and especially to the judiciary and its independence, is more focused on institutional reforms and is characterized by one-sidedness and an absence of adequate contextualization. The judiciary and judicial reforms are mainly assessed on the functioning of two institutions: the judicial council, and the body that trains judges.

The EC insists on the existence of a judicial council comprised of a majority of members from the ranks of judges, and tasked with almost all issues pertaining to judicial governance. The overall goal is to create a high level of self-governance through a strong judicial council that resists external influences. Although a number of EU member states lack a strong judicial council of this kind, the EC still insists on this model, which is defined in Council of Europe documents.[55] For example, the Magna Carta of Judges adopted by the Consultative Council of European Judges stipulates that: "To ensure independence of judges, each state shall create a council for the judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status, as well as the organization, functioning and image of judicial institutions."[56] The EC promoted this model by referring to these documents in Chapter 23 of its screening process, when defining benchmarks, and by underlining the role of judicial councils in its progress reports. It should be noted that this model of judicial self-governance does not yield the desired results everywhere when it comes to ensuring judicial independence, as can be seen in the EC's annual justice scoreboard for EU member states.[57] Indeed, EU member states that have not established this model of judicial governance are regarded as having more judicial independence than those that have.[58]

In this context, state and judicial reforms in North Macedonia in recent years are perceived through the prism of the EU integration process. Guided by its foreign policy priorities, in 2005 RNM adopted constitutional amendments in judicial matters and introduced a new institution, the Judicial Council, to replace the Council in the previous Republic. By doing so, the Parliament no longer has a direct role in judicial governance, except for the selection of five from a total of 15 members of the Judicial Council. In his or her *ex officio* capacity, the Minister of Justice is a member of this council, but does not have the right to vote, which formally reduces the executive's influence. On the other hand, the new Law on the Judicial Council from 2019 stipulates that the President of the Supreme Court is also a member of this body in an *ex officio* capacity, without the right to vote.[59] This follows the so-called European model of a strong judicial council with broad powers and majority members selected from the ranks of judges, making RNM the first

54 Nicolaïdis, K. and Kleinfeld, R., "Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma", SIGMA Papers No. 49 (Paris: OECD Publishing 2012); Pech, L., "The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges", 14 Asia Europe Journal 2016; Kosar, D., "Perlis of Judicial Self-Government in Transitional Societies" (CUP 2016).

55 CCJE, Opinion No. 10 (2007) of the Consultative Council of European Judges to the Attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society, Doc CCJE (2007) OP No. 10, 23.11.2007, Venice Commission, European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, Study No. 494 / 2008 Doc CDL-AD(2010)004, 16.3.2010, pp. 11-12; CCJE, Opinion No. 1 (2001) of the Consultative Council of European Judges for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, Doc CCJE (2001) OP No.1, 23.11.2001.

56 Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), 17 November 2010, CCJE (2010)3, paragraph no. 13.

57 See EU Justice Scoreboard 2019, available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

58 EU Justice Scoreboard 2019, pp. 44-46

59 Article 6, paragraph 2 from the Law on the Judicial Council of RNM adopted in 2019

country in the region to adopt this model.[60] The adoption of the Law on the Judicial Council in 2006 officially launched this institution. Nevertheless, after 14 years, neither it nor the European model of judicial independence have yielded the desired results. The judiciary has failed to build resilience to negative influences. This situation should not come as a surprise, because instead of removing the judiciary from the influence of other branches of government, it is now exposed to new forms of internal and external pressure on its independence.[61] When a collectivist mentality prevails, based on strict judicial hierarchy and clientelism where judges are not prepared to act freely and hide behind rigid legal formalism and hierarchy, they are unlikely to fight for their independence.[62] In other words, the way judges perceive themselves and their institution is largely incompatible with a high degree of judicial self-governance. Reforms that fail to focus on the root of the problems in legal culture have led to contradictory and paradoxical conclusions. We have an *independent judiciary with dependent judges:* an independent judiciary in the formal sense, because it is managed by a strong judicial council, but dependent judges because they remain captive to the legal culture and mentality that prevailed in the previous system.[63]

Because of this, future judicial reforms must be geared towards addressing actual problems. Full "liberation" of the judiciary will require more work and commitment than simply the technical implementation of European standards at the level of the legal and institutional framework.

3. FORMAL AND INFORMAL WAYS TO INFLUENCE THE JUDICIARY

The consequences of this state of affairs in the judiciary cannot be reduced to academic or scholarly critiques that deal in abstractions. In order to understand how and why the judiciary has been 'captured', we have to pay attention to the specific forms its weakness takes - such as institutional design, but also legal culture and the mentality of judges. Here, I will examine these weaknesses, looking in particular at what the wiretaps revealed about the formal and informal pressures exerted on the judiciary.

3.1. The Judicial Council as the epicentre of political influences on the judiciary

The creation of significant judicial self-governance and a strong judicial council opened up new ways to influence the judiciary. Judicial governance is highly centralized, which means the Judicial Council has become the place where key decisions are taken about judges' careers. Consequently, it is the target of different types of influence. Indeed formal influence from the politically powerful is often much easier to detect. The Judicial Council was designed to protect judges from these external risks, but has failed to do so. A typical example of formal influence on the operation of the Judicial Council is the negative role played by former justice minister Mihajlo Manevski. His influence was noted in a series of European and international reports[64] and was the subject of criticism, especially until the law was changed to remove the justice minister's right to vote in the Council. The period of his tenure as Minister of Justice (MoJ)

60 For more on creation and criticism of this model see in: Preshova, D., Damjanovski, I. and Nechev, Z., "The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms", CLEER Paper Series, 2017.

61 Parau, C.E., "The Drive for Judicial Supremacy", in A. Seibert-Fohr (ed.), Judicial Independence in Transition, Springer Science & Business Media, 2012, pg. 640; and Bobek, M. and Kosař, D., "Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe", German Law Journal, 2014 15, pp. 1283–1288.

62 For more on problems related to the legal culture and judge mentality in the context of the judiciary see in: Uzelac, A., paragraph no. 17 and in Zobec, J and Cernic, JR., paragraph no. 17.

63 Uzelac, A., paragarpah no. 17.

64 For example, see the 2008 Progress Report for the Republic of Macedonia, pg. 14; 2010 Progress Report for the Republic of Macedonia, pg. 57; Group of States against Corruption (GRECO), Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors—The Former Yugoslav Republic of Macedonia, CoE Doc. Greco Eval IV Rep (2013) 4E, pg. 24.

corresponds to the time when the Judicial Council was used to "confront" uncooperative and disloyal judges, but also to reward loyal individuals with appointments to judicial positions. In this period, the MoJ often brought disciplinary and dismissal procedures against judges, exposing the judicial independence to direct attacks from the executive. Moreover, in 2013, according to the legal provisions in effect at that time, people appointed as judges were not graduates of the Academy of Judges and Public Prosecutors, and did not necessarily hold any previous judicial experience. Posts in the Courts of Appeal and the Supreme Court were directly recruited from the ranks of former court associates, attorneys-at-law, but also from among civil servants.[65]

Another form of political influence on the Judicial Council is through the selection of so-called non-judge members in the Judicial Council by the Parliament of RNM. Because of the broad interpretation of the term "prominent legal professional", some members appointed to the Council were not, from an objective point of view, prominent members of the legal profession, whether scholarly or in practice . The most glaring examples were judges appointed from the Administrative Court or the Higher Administrative Court as non-judge members in the Council. This disrupted the balance between judge and non-judge members in the Council, and paved the way for judicial corporatism.[66] In one case, administrative courts were presented with lawsuits to annul the decisions to appoint Lidija Kanachkovikj and Violeta Bogoevska, but unfortunately the Higher Administrative Court in the latter instance decided that these decisions could only be petitioned by the appointees themselves, as they are the only ones that had a legal interest.[67] Meanwhile, the recent appointments of non-judge members to the Judicial Council included one civil servant and an expert associate from the Criminal Court in Skopje. It is unclear how a person employed by the court as an expert associate, who was unlikely to gain prominence as a legal professional and who throughout her legal practice was the junior of judges at the Skopje court, would now be able to make disciplinary decisions, to appoint and dismiss judges, or evaluate their performance. New appointees will be in hoc to their political sponsors. Consequently, the reputational authority of the Council is diminished, particularly given the next council president will be selected from non-judge members.

3.2. The "notebook" as a a model of informal political influence

Formal political influences on the judiciary's independence are often easy to detect. More challenging, in terms of identifying and proving them, are informal channels of influence. The isolation of the judiciary, by creating significant self-governance, opened up a space in which informal influence and client relations between the judiciary and political elites could thrive. The wiretaps revealed an example of this kind of influence. The now-infamous notebook kept by then interior minister Gordana Jankulovska shows how politically compliant judges were selected and promoted outside formal institutions, especially in the period up until 2015.[68] These conversations referred to a list of people who could be appointed by a confirmatory vote in the Judicial Council.[69] The wiretaps also revealed agreements between coalition partners in the then government of VMRO-DPMNE and DUI discussing how to

65 Most notable example is appointment of Jovo Vangelovski in the Supreme Court of the Republic of Macedonia in 2008. For more details, see Article 6 from the Law on Amending the Law on Courts, "Official Gazette of RM", no. 35/2008 from 14.03.2008, and Articles 17 and 45 from the Law on Amending the Law on Courts, "Official Gazette of RM" no. 150/2010 from 18.11.2010.

66 2017 Priebe Report, paragraph no. 18, pp. 6-7

67 Administrative Court, Decisions U-5 no. 1760/2018 and U-5 no. 1762/2018 from 18.10.2018; and Higher Administrative Court, Decision UZ-2 no. 642/2018 from 25.2.2019

68 2015 Priebe Report, paragraph no. 11, pg. 9: "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".

69 For more, see: http://vistinomer.mk/prislushuvani-razgovori-set-12-koruptsija-vo-sudstvoto/

distribute judicial posts, in particular court presidents, along ethnic lines.[70] These informal influences are just a few of numerous examples that emerged in the wiretaps.

Signs of this type of informal arrangement are also evident after the change in government (i.e. between SDSM and DUI as coalition partners in the new government). For example, Prime Minister Zoran Zaev and Blerim Bedzeti, a former justice minister and incumbent mayor of Saraj, recently discussed the judiciary in phone conversations.[71] These exchanges make it clear that some decisions are agreed informally, not through institutions. The panicked reactions of some members of the Judicial Council during the initial attempt to vote on the appointment of judges in the Skopje Court of Appeal were also revealing.[72] Specifically, members of the Council were looking for instructions from prominent party figures on how to vote, as they had a political interest in appointing certain judges to senior posts.

3.3. The role of judicial elites in judicial (in) dependence

One of the major weaknesses of the European model of judicial independence is that it underestimates internal threats, particularly judges' self-interest. It is in judges' interests to keep their jobs and further their interests, often through clientelistic relationships with political elites.[73] In the second Priebe Report, the experts' group clearly indicated these risks and noted that a small number of judges in powerful positions have a disproportionate influence on the judiciary as a whole.[74] Moreover, the 2017 Priebe Report added: "The control and misuse of the judicial system by a small number of judges in powerful positions to serve and promote political interests has not diminished in any significant respect. These judges have continued to bring pressure on their more junior colleagues through their control over the systems of appointments, evaluation, promotion, discipline and dismissal, which have been used to reward the compliant and punish those who do not conform."

The hierarchical nature of the judicial system, its centralization and the dominance of court presidents, create a favorable environment for "judicial capture". This is pursued through "cooperation" with influential judges and presidents of the more important courts, especially those located in Skopje, using their clientelistic and patronage links. These judges exert influence at several levels: the appointment and dismissal of judges, disciplinary procedures and performance evaluations, and the allocation of annual work schedules. The members of the Council often include 'compliant' judges who further their own interests or those of the political elite. But the Judicial Council alone is not solely to blame.

Wiretaps of conversations between Aleksandra Zafirovska (the former president of the Judicial Council), Filimena Manevska (a former judge at the Skopje Court of Appeal) and Jovo Vangelovski (the former president of the Supreme Court) clearly indicate the existence of clientelistic relations, but also the influence and interests of judicial elites.[75]

70 For more, see: http://vistinomer.mk/prislushuvani-razgovori-set-2-dhoker-vo-sudstvo-to-nash-e-chovekot/

71 For more, see: https://sdk.mk/index.php/makedonija /zaev-barashe-od-mene-da-vlijaam-na-chlenovi-na-sudski-sovet-za-da-se-smeni-pretsedatel-na-sud-reche-gradonachalnikot-na-saraj-blerim-bedheti/ и https://www.novamakedonija.com.mk/makedonija/politika/%D0%B7%D0%B0%D0%B5%D0%B2-%D1%81%D0%BE-%D0%B1%D0%B5%D1%9F%D0%B5%D1%82%D0%B8-%D0%B7%D0%B1%D0%BE%D1%80%D1%83%D0%B2%D0%B0%D0%B2-%D0%B7%D0%B0--%D1%88%D0%BF%D0%B5%D0%BA%D1%83%D0%BB%D0%B0%D1%86%D0%B8%D0%B8/

72 For example, see: https://sdk.mk/index.php/makedonija/pritisotsi-po-telefon-kako-vo-vremeto-na-gruevski-i-bedheti-go-odlozhija-izborot-na-sudii-vo-skopska-apelatsija/

73 Such clientelistic relations are clearly recognized in released wiretaps, see paragraphs no. 39 and 40.

74 2017 Priebe Report, paragraph no. 18, pp 4-5, and paragraph no. 27. This has been described as a type of 'state capture' but is perhaps more precisely characterised as the "capture of the judiciary and prosecution by the executive power".

75 See paragraphs no. 39 and 40.

3.4. The individual independence of judges, versus independence of the judiciary as a whole

The biggest impact of judicial capture is on the independence of individual judges. While the Judicial Council guarantees the independence of the judiciary as one of the three branches of government,[76] it is clear the council can also threaten individual independence. Indeed, the Council is often used by political and judicial elites to reward compliant and loyal judges and to punish those who do not conform. This is often achieved by a failure to scrutinise appointees and by means of promotion, dismissal and disciplinary procedures or performance evaluations.[77] The last round of judicial appointments to the Skopje Court of Appeal was the latest in a long list of such examples.[78] Most disciplinary procedures and dismissals were based on legal grounds that were too broadly defined, i.e. on the grounds of "unconscious, untimely or haphazard performance of the office of judge in conducting court proceedings for individual cases".[79] These were particularly apparent in the period 2007-15, which overlaps with the "purge"[80] and opened up the judiciary to entrants without any previous experience as a judge, even at the higher-instance courts. As for performance evaluations, disciplinary procedures and dismissal, these were based on quantitative criteria until the adoption of the new Law on the Judicial Council. The emphasis was mostly on attainment of monthly and annual targets, which shifted the focus of court decisions from an objective assessment of evidence and the quality of justice to the efficiency and case law of the higher-instance courts.[81] Dominant court presidents would reassign judges to different sectors or departments within the court, and possibly to influence the supposedly random assignment of court cases.

The European Court of Human Rights has ruled in favor of previously dismissed judges in the cases of *Mitrinovski v. Republic of Macedonia, Jashkovski and Trifunovski v. Republic of Macedonia, Gerovska-Popchevska v. Republic of Macedonia,* and *Duma and Popovski v. Republic of Macedonia* – yet the decisions are not acted upon. In the case of Mitrinovski, for example, the original dismissal was upheld a second time.[82] The European Court of Human Rights has established that the role and influence of the Minister of Justice, President of the Supreme Court and other two members of the Judicial Council are incompatible with Article 6 of the ECHR, because in these cases they were also the entities that brought procedures for disciplinary responsibility and voted to adopt dismissal decisions in the Judicial Council. Since they had been directly involved in some of these cases, the disciplinary procedures could not be fair. Some sections of the ECtHR's judgements suggest there was conscious abuse on the part of participants in dismissal procedures. In Mitrinovski's case - the only

76 See Article 2 from the Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019 from 22.5.2019: "The Judicial Council of the Republic of North Macedonia (hereinafter: the Council) shall be an autonomous and independent body of the judiciary. The Council shall ensure and guarantee autonomy and independence of the judicial branch of government, by performance of its functions in compliance with the Constitution and the laws".

77 For more information on shortcomings in procedures on appointment, see reports of the Institute for Human Rights

78 For example, see Judicial Council of the Republic of North Macedonia, Decision on appointment of judge in the Skopje Court of Appeal no. 09-315/3 from 10.2.2020.

79 Article 75, paragraph 1, item 2 from the Law on Courts, "Official Gazette of the Republic of Macedonia" no. 58/2006 from 11.5.2006

80 Venice Commission, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the Former Yugoslav Republic of Macedonia CDL-AD(2015)042, pp. 6-7; and 2015 Progress Report for the Republic of Macedonia, pg. 13.

81 Articles 98 to 131 of the Law on the Judicial Council of the Republic of Macedonia ("Official Gazette of RM" no. 60/2006 from 15.5.2006); Venice Commission Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the Former Yugoslav Republic of Macedonia CDL-AD(2015)042, pp. 22-24.

82 ECtHR, Judgement, Mitrinovski v. Republic of Macedonia, application no. 6899/12, 30.4.2015; ECtHR, Judgement, Jashkovski and Trifunovski v. Republic of Macedonia, application no. 56381/09 and 58738/09, 07.1.2016; ECtHR, Judgement, Popovski and Duma v. Republic of Macedonia, application no. 69916/10 and 36531/11, 7.1.2016; ECtHR, Judgement, Gerovska-Popchevska v. Republic of Macedonia, application no. 48783/07, 7.1.2016.

applicant to request a second Judical Council procedure after his Strasbourg judgement - the saga went almost unnoticed by the public, especially the outcome of the Supreme Court appeal.

Recommendations to address the current problems:

- build institutional capacity to achieve sustainable results, instead of looking for rapid solutions;
- make a comprehensive effort to address key weaknesses in the judiciary, which in addition to the legal and institutional framework will also focus on the Europeanization of judicial culture;
- insist that the Parliament of RNM selects people of undisputed authority and respect in the legal profession as the non-judge members of the Judicial Council;
- mobilize the academic community and civil society to scrutinize the work of the Judicial Council and the courts, in order to ensure adequate implementation of the legal framework aligned with European standards;
- detect and to address the ways in which the individual independence of judges can be influenced;
- actively promote positive examples from the judiciary in order to re-establish standards about what it means to be a good judge; and
- promote strategic litigation as a means of changing bad institutional practices.

3. CONCLUSION

Political influence on the judiciary in North Macedonia has been apparent for many years. But between 2006-16, under the VMRO-DPMNE/DUI coalition, the problem became endemic. The adoption of European Commission's model of judicial independence has not only failed to prevent judicial capture, but has encouraged new formal and informal channels for corruption. In particular, the creation of the new Judicial Council has emphasized existing problems, worsening the hierarchical nature of the profession, the absence of judicial autonomy and individual independence, and clientelistic links between judges and political elites. The Council has become a vehicle for promoting elite interests, in particular through the appointment and dismissal of judges, disciplinary procedures and performance evaluations. The former MoJs who have been complicit in this process, and the political influences at work in the Council, fully justify the description of 'judicial capture'.

THE JUDICIARY IN NORTH MACEDONIA: THE PROCESS FOR SELECTION, PERFORMANCE EVALUATION, CAREER ADVANCEMENT AND DISMISSAL OF JUDGES

Authors: **Margarita Caca Nikolovska and Vera Koco**

1. OVERVIEW

For a long time, systemic weaknesses in the **selection, performance evaluation, career advancement and dismissal of judges** allowed them to be manipulated. Along with other aspects of the justice system, they were one of the indicators which led the European Commission to assess the country as having succumbed to "state capture".

Addressing the situation with meaningful reform requires enormous political will, decisiveness and energy. It demands consensus from all three branches of government.

The most recent country progress reports (2018 and 2019) show a general improvement in terms of democratic processes in the country. However, judicial reforms and the beginnings of a serious fight against corruption, nepotism and organized crime have still proved unsatisfactory, and require additional effort.

This chapter addresses legislative changes and previous legal solutions that regulate the **selection, performance evaluation, career advancement and dismissal of judges**. These procedures allowed potential abuse, as well as unprofessional and ineffective performance from a number of judges, and have led to high levels of public distrust.

Examining the problems that plague the judiciary in the Republic of North Macedonia also helps us to understand whether judicial authorities are ready to address the issue of captured institutions.

Their preparedness, commitment and effort come from, and depend on, these steps:

- changes to and alignment of the legislation (Law on Courts and Law on the Judicial Council) to meet international standards, which provide the basis for greater autonomy, independence and accountability of judicial authorities;
- effective and efficient implementation of new legal solutions to allow a greater degree of objectiveness, professionalism, transparency and accountability in the process for selection, performance evaluation, career advancement and dismissal of judges;
- specific action taken by judicial authorities to ensure the timely adoption of all bylaws and other steps necessary in order for them to do their jobs;
- ensuring they can be held accountable through internal procedures.

This state of affairs underlines the need for serious measures to eliminate the problems that have eroded the justice system. Aligning legislation with European standards would not in itself be enough to restore order and strengthen judicial institutions, but would also demand the removal of all judges who can be shown to have abused their office or behaved unprofessionally.

2. ASSESSMENTS AND RECOMMENDATIONS FROM INTERNATIONAL INSTITUTIONS

Judicial power is exercised by courts that are autonomous and independent and make judgments following the Constitution, laws and international agreements ratified in

compliance with the Constitution.[83] As holders of the judicial branch of government, judges ensure the impartial application of the law for all parties in court processes; ensure equality, equity and non-discrimination on all grounds; ensure protection, respect and promotion of human rights and freedoms; and guarantee legal security through the rule of law. This legal system must rely on legitimacy in the adoption of legal norms, and the legality of their enforcement.

An OSCE analysis of the judiciary's independence from 2009[84] indicated the possibility that certain influences could affect the judiciary's ability to ensure justice is done, but also referred to the (material and other) working conditions which allow such influence to be exercised. The findings from that research showed that there are frequent attempts to influence the workings of the justice system.

The Council of Europe Parliamentary Assembly's Report on "Post-Monitoring Dialogue with Macedonia" in June 2013[85] indicated the need for enhanced independence of judicial authorities, due to suspicions of selective justice towards the opposition of the time, but also because of distrust among civil society representatives in the judicial system. Moreover, the report underlined the need to establish a merit-based system for the selection, career advancement and dismissal of judges and prosecutors, and to secure institutional guarantees for the judiciary's independence and impartiality.

The **Report of the Senior Experts' Group**[86] from 2015 noted backsliding in judicial independence. It included recommendations for the rule of law and the judiciary intended to depoliticize the appointment and promotion of judges and prosecutors (in practice, not just in theory) and the establishment of a harmonized performance system based on qualitative and quantitative standards, which would serve as basis for all career decisions. The report also stressed the need to get rid of elements in the system of disciplinary procedures and dismissal of judges that undermine judicial independence, and the need to guarantee professionalism of the Judicial Council, increase its proactive role, and improve the quality of education, budget and autonomy of the Academy of Judges and Public Prosecutors. An important development is the recommendation to send domestic judges for internships at the ECtHR, to secure conditions for the publication of all court judgements within mandated deadlines, to work on speeding up court processes (with a special focus on case backlogs), and to ensure the rapid enforcement of all ECtHR judgements against the state.

In September 2017, the **Senior Experts' Group published another report**[87] **(i.e. the Second Priebe Report)** which noted that most of the recommendations in the first report had not been implemented at all. Moreover, many of the practices denounced in the 2015 Report had continued. The control and misuse of the judicial system by a small number of judges in powerful positions had not diminished significantly. Serious shortcomings were identified, and it was therefore recommended that members of the Judicial Council who were not selected from the ranks of judges be appointed in a non-political manner. This report emphasized the need to conduct a full and independent audit on the operation of the Automated Court Case Management Information System (ACCMIS). Recommendations in the field of judiciary reforms concern a detailed overview of the Judicial Council's role and responsibility, with the aim of reducing the influence of the judicial component, as proposed by the Venice Commission. Moreover, judges should be excluded from appointing members to the Judicial Council as part of

83 Article 98 of the Constitution of RNM, "Official Gazette of RM" no. 52/1991, date of publication: 22.11.1991

84 OSCE, Independence of the Judiciary: Legal Analysis, 2009, available at: http//www/osce.org.mk/67585

85 Parliamentary Assembly, Post-Monitoring Dialogue with fYR Macedonia", Report no. 13227, 2013

86 Report of the Senior Experts' Group on Systemic Rule of Law Issues, 2015, available at: https://eeas.europa.eu/sites/eeas/files/urgent_reform_priorities_mk.pdf

87 Second Report of the Senior Expert's Group on Systemic Rule of Law Issues, 2017, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf

the quota that is not reserved for judges, and these appointments must be made in a non-politicized way. The report also recommended replacing the system of evaluation at the time with a performance management system that focuses on enhancing the quality of justice. Individual sanctions should be proportional, and any dismissals on the basis of poor performance should be a measure of last resort. Bearing in mind that there is no opportunity for general or collective vetting of judges, in cases when there is solid evidence of wrongdoing, particularly at senior levels, appropriate steps and measures should be taken in accordance with the principles of a fair trial.

The report recommends urgent revision of disciplinary procedures and for the Judicial Council to take into account all relevant findings from the ECtHR, in order to give effect to its judgements and to ensure than anyone affected by a breach of law is restored to the position and rights they previously had. The minority of politically-influenced judges should be subject to effective professional and ethical rules and, where evidence is available to prove criminal responsibility, they should be held criminally liable. Judges dismissed on these grounds should be barred from practising the law in any form or at any level.

For many years, the **European Commission's** annual reports on progress made by the Republic of North Macedonia under the EU integration process have indicated problems regarding the appointment of judges - especially candidates from the Academy of Judges and Public Prosecutors - and regarding the clarification of grounds for dismissal, the criteria for performance evaluation and career advancement. In particular, this concerns the enhancement of qualitative rather than quantitative criteria for the performance evaluation of judges.

In 2019, **the Venice Commission**[88] issued its Opinion on the Draft Law on the Judicial Council. It emphasized that the draft law has achieved a high level of alignment with other laws and has complied with a significant number of recommendations. The overall assessment concluded that the draft law is in line with international standards and that, if applied in good faith, it can ensure the judiciary's independence and efficiency. The Venice Commission expressed a positive opinion in regard to the clear legal framework. In addition to other positive changes made to the Law on the Judicial Council, the Venice Commission recommends not using psychometric tests in the appointment of members to the Judicial Council, which would reduce the opportunity for political influence. Regarding the selection of the President of the Judicial Council, the Venice Commission recommends he or she be elected with a two-thirds majority among members of the Judicial Council appointed by Parliament.

As a result of the European Commission's Progress Reports for the Republic of North Macedonia and the Urgent Reform Priorities, as well as recommendations from the Senior Experts' Group on Systemic Rule of Law Issues, the overall legal system has improved in terms of alignment with international standards, democracy principles and tenets, the rule of law and protection of human rights and freedoms. Nevertheless, continuous effort is needed to eliminate risks and perceptions about political interference in the judiciary. In that regard, the Judicial Council's efforts to protect judicial independence are limited, and it should seek to increase its independence from both external and internal pressures.

3. THE LEGAL FRAMEWORK ON THE SELECTION, PROMOTION AND DISMISSAL OF JUDGES

The 2017-2022 Strategy on Justice System Reform defines the guidelines for addressing shortcomings of a normative and institutional nature, as well as those for enhancing the independence, impartiality, quality and responsibility of the holders of judicial author-

88 Barrett et al., Opinion on the Draft Law on the Judicial Council, adopted at the 118th plenary session of the Venice Commission (Venice, 15-16 March 2019), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)008-e

ity. Hence, in the period 2017-2019, a series of amendments were adopted to the Law on Courts[89] and the Law on the Academy of Judges and Public Prosecutors,[90] including a completely new Law on the Judicial Council,[91] to comply with the recommendations of the Venice Commission and GRECO.

These changes have altered the conditions and procedures for the selection of judges to basic courts and higher instance courts, the criteria for performance evaluation of judges and presidents of courts, and the legal grounds and procedure for establishing liability, dismissal and disciplinary measures for judges.

The desire to find an institutional solution for the removal of corrupt judges, with the full involvement of the relevant institutions, meant that the vetting process had to be abandoned. This was also recommended by the international bodies concerned.

3.1. The selection of judges

The Law on Courts and the Law on the Judicial Council of RNM stipulate the procedure for selecting judges for basic courts, which starts with a Council decision on determining judicial vacancies at these courts. The Council takes this decision after considering the opinions of the plenary assembly of the Supreme Court of the Republic of North Macedonia and the plenary assembly of judges at the court concerned, based on analysis and a projection of judge vacancies. It applies the principle of equitable and fair representation of non-majority communities in RNM, in compliance with the Judicial Council's annual work program.[92]

The Council then presents this decisionto the Academy of Judges and Public Prosecutors by March 31 at the latest in the year when the decision must be taken.[93] Although the Council establishes the number of judges required, AJPP does not necessarily comply with this decision because, due to insufficient capacity and resources, it enrols a smaller number of candidates. This is ultimately reflected in the Judicial Council's failure to recruit enough basic court judges in a timely manner.

The Law on Courts stipulates the general conditions that should be fulfilled by candidates for the judiciary, as follows:

- to be a citizen of the Republic of North Macedonia;
- to actively use the Macedonian language;
- to be capable of work and in good general health, proven by a medical certificate;
- to have completed law studies and acquired 300 ECTS or a VII/1 education degree in the field of law studies, or to have a validated diploma in law studies obtained abroad with 300 credits;
- to have passed the bar exam in RNM;
- to have a working knowledge of one of the three most used languages in the European Union (English, French or German);
- at the time of their candidacy, not to be the subject of a fine or misdemeanor sanction after offences related to performance of the law profession, or any other criminal offence that is punishable by at least six months of imprisonment;
- to be computer literate;
- to possess the integrity necessary for performance of the judicial office; and
- to possess the ability to carry out the judicial office, which is verified by ethical and psychometric testing.

89 Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

90 Law on Amending the Law on the Academy of Judges and Public Prosecutors, "Official Gazette of RM", no. 163/2018

91 Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019

92 Article 44, paragraph 2 of the Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

93 Article 45 of the Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019

Judicial candidates are not required to actively use any particular foreign language: a language exam is part of the admission tests for the Academy of Judges and Public Prosecutors, and establishes the language proficiency of future judges. Consequently, admission to the AJPP allows candidates to improve their knowledge of foreign languages.

Special conditions for the selection of judges to basic courts stipulate that candidates should:

- have completed training at the Academy of Judges and Public Prosecutors as stipulated by law; and
- in cases when candidates have not responded to the open call as graduates from AJPP, to have at least four uninterrupted years of service as a judge at another basic court, and to have been positively evaluated by the Judicial Council.

In fact, the completion of training at the Academy of Judges and Public Prosecutors is the only way for judges to start their careers at basic courts, and therefore the reassignment of judges with work experience of four years from one court to another is only possible when AJPP graduates have not responded to the open call. This could put judges who have already acquired judicial experience and have demonstrated solid performance at a disadvantage.

The Judicial Council selects judges to basic courts from a ranking list submitted by the AJPP, showing judges who responded to the open call. The order of appointment is established according to their scores on the final ranking list and the results of interviews conducted by the Judicial Council.[94]

Interviews conducted by the Judicial Council, which account for a maximum of 10% of the total number of points,[95] are an innovation under the new law, and imply that personal and social abilities will be taken into account for basic court candidates. This legal solution was designed to avoid the formal method applied by the Judicial Council for the selection of judges to basic courts from the AJPP ranking list. Moreover, the Council could assign value to other qualities, make a better selection from ranking lists with proposed candidates, and even change candidates' rankings.

The Law on the Judicial Council of RNM stipulates that the Judicial Council debates and decides on the selection of judges at sessions attended by at least eight council members with voting rights.[96] The Council is comprised of 15 members, of which the President of the Supreme Court of the Republic of North Macedonia and the Minister of Justice are members by virtue of their public office, and they participate in the council's work without the right to vote.[97] Under the legal situation in effect until 2018, the President of the Supreme Court as a member of the Judicial Council was given the right to vote. Allowing the Minister of Justice to take part in council sessions but *without* voting rights should contribute to reducing the opportunities for interference by the executive government in important decisions about the judiciary. Preventing the President of the Supreme Court from voting at council sessions stops him or her from having an influence in decisions made by both the Supreme Court *and* the Appeal Council of the Supreme Court. This implements recommendations made by international bodies, and is a positive development.

Discussions and decision-making are based on the final ranking of candidates, and each council member with the right to vote is obliged to explain and justify their selection decision.[98] The explanation of these decisions is an innovation that contributes to a better selection process, and to greater transparency in the Judicial Council.

94 Article 47 of the Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019

95 Ibid

96 Article 49, paragraph 1 of the Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019

97 Article 6 of the Law on the Judicial Council of RNM, "Official Gazette of RNM" no. 102/2019

98 Ibid, Article 49

Candidates who have received at least eight votes from the total number of council members with the right to vote are considered selected. They are informed of this decision in writing, and the decision includes reasons for their selection and is published on the Judicial Council's website and in the Official Gazette of RNM.[99]

The Institute for Human Rights' monitoring of the Council noted that, under previous practice, voting ended when the top-ranked candidate had received a sufficient number of votes, i.e. eight votes from the council members with voting rights (which implies a two-thirds majority vote in the Council), without the opportunity to cast votes for remaining candidates on the list - who could have ended up receiving a higher number of votes than the previous candidate. In other words, this method of selection prevented votes being cast for other candidates on the list who might have received more of them.

A positive innovation under the Law on Courts is the fact that candidates who have served at least one term of office at international courts and fulfil relevant conditions can also be selected as judges to courts at any level - although the limitation to one term of office should not be in place, as Council of Europe member states do not have this rule.

3.2. Analytical and statistical data on the selection of judges

After frequent public criticism of the Judicial Council's performance, and following the first and second round of amendments to the Law on the Judicial Council ("Official Gazette of RM" no. 197/17 and 83/18), the Council attempted to improve its practices through the reforms described above. This means that decisions on judge selection in 2017 and 2018 differ from those taken in the previous period, as they include the complete list of candidates, the points assigned for their performance, work biographies of candidates, total work experience and results from the anonymous survey. This, together with the opportunity for individual members of the Judicial Council with voting rights to give a verbal explanation of their selection decision for their selection, contributes to greater transparency and accountability of the Judicial Council, and a better selection process.

In particular, the Institute for Human Rights' monitoring report[100] shows that the Council had been most active in selecting judges in 2016, when it selected 26 of them, of whom eight were destined for basic courts and 18 for higher instance courts.

In 2017, the Judicial Council selected a total of five judges for higher instance courts: one to the Supreme Court of RM; one to the Bitola Court of Appeal; and three to the Skopje Court of Appeal.

At the same time, selection processes in 2017 included the appointment of several court presidents: the Supreme Court of RNM, Shtip Court of Appeal, Administrative Court, Basic Court in Gevgelija, Basic Court in Krushevo, Basic Court in Sveti Nikole, Basic Court Skopje 1 in Skopje, Basic Court in Kumanovo, Basic Court in Resen and Basic Court in Tetovo.

In 2018, the Judicial Council selected a total of four judges for higher instance courts, of whom one was for the Skopje Court of Appeal, one for the Higher Administrative Court, and two for the Administrative Court. It appointed presidents for the Skopje Court of Appeal and the Basic Court in Debar.

Due to the lack of precise criteria for evaluating judges' performance in accordance with international principles and standards, new legislation was adopted to monitor and evaluate judges, aimed at emphasising the judiciary's independence and autonomy

In 2018 the Judicial Council announced open calls for the selection of presidents to the Basic Court in Krushevo and the Basic Court in Berorvo, but these appointments were made in 2019.

At future selection processes, this obliga-

99 Ibid, Article 49, paragraph 1

100 Institute for Human Rights, Baseline Analysis of the Judicial Council's Performance, 2019, pg. 16, available at: www.ihr.org.mk/publikacii

tion for Council members is bound to cause a certain amount of disagreement about the merits of different candidates, and will, in turn, lead to delays in the selection of judges for some courts, in spite of the obvious shortages (for example, at the Skopje Court of Appeal). The altered composition of the Judicial Council will mean it has more influence in selection procedures – especially since, for a long time, this body received direct external instructions, as wiretapped conversations between the President of the Judicial Council, Aleksandra Zafirovska, and senior government officials revealed.

2016 saw the highest number of judges selected. This was before the law changed, and when the Judicial Council's selection procedure was insufficiently detailed and did not include precise obligations for members of JCRNM (such as the obligation to verbally justify their choice of candidate). This provided an opportunity for subjective and possibly biased selections.

Although the work of this Council was the subject of harsh criticism, especially among judges, who were often dissatisfied with the results of its selections,[101] its procedures continued to be opaque until its composition was changed (2018/2019). This marked the start of the process for opening up the Council's workings to the public.

4. PERFORMANCE EVALUATION OF JUDGES

Performance evaluations aim to assess judges' effectiveness, their professionalism and the quality of their decision-making in proceedings.

This could be achieved through professional development on the basis of individual needs, which would secure the conditions for judges' career advancement and strengthen their independence and autonomy. Under previous legislation, the criteria used to evaluate their performance were mainly based on the quality and quantity of their decisions (i.e. the number of completed cases assigned to them through the Automated Court Case Management Information System (ACCMIS)). That system did not take into consideration many of the skills necessary for judges, such as the ability to make argument-based and fully reasoned decisions, to handle complex cases and lead court hearings, and it did not assess whether the conditions for promotion had been met.

Monitoring the performance of judges and court presidents is done by **regular evaluation** (once every four years) and **extraordinary evaluation** (in cases where judges apply for a position at another court, a higher court or as a court president, but only when the candidate has not undergone evaluation in the previous year as part of their regular performance appraisal).

Changes to the Law on the Judicial Council from May 2018[102] introduced new qualitative criteria which the Venice Commission assessed as unclear and insufficiently objective, and they were clarified under the completely new Law on the Judicial Council adopted in 2019. For the first time, the new model for quality evaluation stipulates that, in addition to the commission comprised of members of the Judicial Council that takes the final decision on performance evaluation of judges and court presidents, the evaluation process must also include judges from higher instance courts, who will assess the quality of decisions taken in individual cases.

Quality evaluation is performed by a five-member commission consisting of judges from all appeal courts, which examines five randomly selected cases (via ACCMIS) and five cases nominated by the judge being evaluated. These commissions are formed by the Judicial Council through random selection of members and in the manner established under a bylaw adopted by the Judicial Council. Each member of the commission evaluates the judge's performance in all the cases, and the final assessment is calculated as the average value

101 See: Libertas, Judge Antoaneta Dimovska with an open letter: 'Why do we stay silent about the scandalous selection of judges?', 25.11.2017

102 Law on Amending the Law on the Judicial Council, "Official Gazette of RM" no. 83/2018

of individual assessments for all the cases reviewed. Details of the evaluation procedure should be regulated under the Methodology for Performance Evaluation, as secondary legislation,[103] based on the opinion of the Supreme Court of RNM.

The new legal amendments to disciplinary proceedings brought changes which could see a judge dismissed by the Judicial Council after two consecutive "negative" assessments. According to recent changes to the Law on Courts, this situation is considered to amount to unprofessional and incompetent performance of the judicial office, and is considered a serious disciplinary breach.[104]

In addition to regular and extraordinary evaluations of judges, the Law on the Judicial Council stipulates special evaluations for judges who are not subject to supervision by a higher instance court (the Supreme Court of RNM) and when former judges from an international court apply for a post in North Macedonia. Unlike the previous law, the new legal solution does not anticipate additional and special criteria for evaluating judges on their performance. As part of its work on monitoring judicial performance, the Council is expected to develop a template with data and information about a judge's performance according to the evaluation criteria, which is completed on a monthly basis, but there are no exact guidelines about whether and how this template will be part of judges' assessments.

Based on reports from these commissions, as well as its insight into the quality and quantity of judges' work, the Council takes a decision and explains its assessment. Judges and court presidents who are dissatisfied with their assessment are entitled to lodge a complaint about it within eight days, following which the appeal council can reject, approve or repeat the evaluation process. These legal provisions were also set out under the previous legislation. The appeal council at the Supreme Court is competent to act upon complaints against decisions taken by the Judicial Council. If the decision to repeat an evaluation is taken after a complaint, it is performed on the basis of a report by a commission comprised of three members of the Council, which cannot include members who participated in the commission that issued the performance evaluation.

Articles 80 to 85 of the Law on the Judicial Council stipulate qualitative criteria for performance evaluation of judges, as well as the method for assigning points, in compliance with the 2019 recommendations from the Venice Commission.

4.1Qualitative criteria

According to the new legislation, the qualitative criteria for performance evaluation of judges include:

- The ability to lead court proceedings effectively;
- The timeliness of actions in court cases; and
- The quality of a judge's work, based on the number of decisions revoked due to procedural violations compared to the number of resolved cases that concluded as normal.

Given that quality will be assessed through an insight into judges' actions and decision making, the Judicial Council should revise the **Methodology with indicators on complexity of cases** to take into account the legal field, complexity of subject matter and type of court, on the basis of previous positive opinions from the Supreme Court of RNM.[105] The methodology aims to establish the number of cases that a judge should resolve within one month, with due consideration of the scope of work and types of cases in different courts. This enhanced the role of the Supreme Court, giving it the competence to issue opinions and adopt the methodology at its plenary assembly.

4.2. Additional qualitative criteria for performance evaluation of court presidents

The law stipulates additional qualitative criteria for the performance evaluation of

103 Article 85 of the Law on the Judicial Council, "Official Gazette of RNM" no. 102/2019

104 Article 76 of the Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

105 Article 85 of the Law on the Judicial Council, "Official Gazette of RNM", no. 102/2019

court presidents who have undertaken the responsibility of judging cases[106]:

- whether the work program and action plan have been implemented;
- whether the Court Rules of Procedures have been applied, which is assessed through insight into reports from regular and extraordinary checks performed by a higher instance court, the Council or the Ministry of Justice;
- ACCMIS functionality, which is assessed in the same way;
- the quality of court administrative decisions;
- public relations and transparency in operation.

4.2. Quantitative criteria

Article 86 of the Law on the Judicial Council stipulates quantitative criteria[107] for the performance evaluation of judges:

- the scope of their work, which is assessed by the number and type of resolved cases compared to the expected average, obtained from ACCMIS's monthly reports; and
- the quantity of a judge's work: the number of reversed and revoked decisions, compared to cases that were resolved in the usual way, which is assessed though details on ACCMIS. Only decisions where legal remedies are allowed and were reversed due to wrongful application of the law are taken into consideration.

Secondary legislation by the Judicial Council should be used to implement the new system for performance evaluation. The law stipulates that the Council shall adopt all bylaws within a deadline of three months from the day when the law enters into effect, but at the time of writing they have still not been adopted.

The Judicial Council should develop:

- guidelines and templates with data and information about the work performed by judges and court presidents, in compliance with evaluation criteria;
- a decision on the calculation of effective work hours for judges;
- a methodology for performance monitoring and evaluation of judges;
- a rulebook on the operation of the commission for assessment of quality in court proceedings;
- a methodology with indicators on the complexity of cases.

The Judicial Council amended its **Rules of Procedure**[108] to regulate the way decisions on performance evaluation were taken, as well as how the three-member commission was appointed, and defined how performance evaluations should be explained and published. These are not regulated under primary law.

5. JUDGES' CAREER ADVANCEMENT

Attending training from the Academy of Judges and Public Prosecutors is very important to judges' career prospects. Non-attendance at mandatory training is defined as a disciplinary violation and the judge concerned is liable to disciplinary measures.

The Council selects as judges people who hold the highest expert and professional attributes and enjoy an excellent reputation in the performance of their duties, based on the following criteria:

- expert knowledge and specialization in the profession, and participation in ongoing training;
- positive performance evaluations;
- the ability to express themselves fluently, both verbally and in writing, which is assessed on the basis of draft decisions and expert interventions by judges;
- a willingness to take on additional work, and help resolve the backlog of cases;
- mentorship, education and the like; and
- length of service as a judge.[109]

The career advancement of judges is closely related to their performance evaluations and the process for their selection. As part of its competences, the Judicial Council appoints judges to higher instance courts (Court of Ap-

106 Ibid, Article 92

107 Law on the Judicial Council, "Official Gazette of RNM" no. 102/2019

108 Rules of Procedure for the Judicial Council, "Official Gazette of RNM" no. 60/06, 150/10, 100/11, 20/15, 61/15, 274/2019

109 Article 48 of the Law on the Judicial Council, "Official Gazette of RNM" no. 96/19

peal, Administrative Court, Higher Administrative Court and Supreme Court of RNM) and court presidents. Candidates who have responded to the open call and fulfil conditions and criteria stipulated under the Law on Courts and the Law on the Judicial Council of RNM are eligible, and are ranked according to the specialization required for the judge vacancy.[110]

6. DISMISSAL OF JUDGES AND DISCIPLINARY MEASURES

In addition to the termination of judicial office, which is a process established by the Judicial Council when relevant conditions from the Constitution are fulfilled and in a manner stipulated under Article 54 of the Law on the Judicial Council, another important responsibility is the dismissal of judges.

According to Article 74, paragraph 1 of the Law on Courts there are two grounds on which judges can be dismissed from office, as follows:

- A serious disciplinary violation that renders the judge unfit to perform their office as stipulated by law; and
- unprofessional and incompetent performance of the judicial office, under conditions stipulated by law.

5.1. Serious disciplinary violations

Serious disciplinary violations for which judges can be liable include:

- a serious breach of the peace and public order, and other serious forms of indecent behaviour that harm the reputation of the judge and of the court;
- blatant influence and interference in another judge's performance;
- a refusal to submit a declaration of assets and statement on conflict of interests in compliance with the law, or when the data submitted are untruthful; or
- evident violation of the recusal rules in situations when judges were aware or should have been aware of the existence of any grounds for recusal, as stipulated by law.[111]

Amendments to the Law on Courts reduced the number of serious disciplinary violations that lead to dismissal to only four. It was previously nine.

Additionally, new amendments to the Law on Courts removed the grounds for judges to be dismissed if the European Court of Human Rights established they had violated Article 5 or Article 6 of the ECHR. This provision was contrary to ECtHR's case-law and international practice on the judiciary's independence and impartiality.[112]

5.2. Unprofessional and incompetent performance of judicial duties

The unprofessional and incompetent performance of judicial duties means that the quality of a judge's work has been unsatisfactory in cases where:

- two consecutive performance evaluations have shown that the judge does not fulfil the criteria for successful performance, due to their own fault or without any justified reason, which resulted in two negative assessments adopted in compliance with the procedure established by the Law on the Judicial Council of the Republic of North Macedonia;
- the judge is convicted in court and given a sentence of less than six months, and this sentence is the direct result of actions they took in the pursuit of their duties as a judge, purposely or with conscious negligence;
- the judge has disclosed classified information without prior authorization, i.e. has disclosed information and data about court cases, thus violating the legal obligation to protect the secrecy of court proceedings when the public is excluded in compliance with the law;
- the judge has failed to schedule court hearings, without any justified reason, in

110 Ibid

111 Article 75 of the Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

112 Institute for Human Rights, Policy Brief on Position and Performance of the Judicial Council of RM, pg. 9, 2018, available at: http://ihr.org.mk/uploads/IHR%20-%20Sudski%20sovet%20na%20RM%202018%20(MKD)%20web.pdf

the cases assignd to them, or has otherwise delayed court proceedings;

- the judge has not taken on cases assigned to them, thereby allowing the statute of limitations for criminal prosecution, or the statute of limitations for the execution of sanctions for criminal offences, to take effect;
- the judge has taken on cases that are not assigned to them through the Automated Court Case Management Information System;
- the judge has intentionally and unjustifiably made grave professional errors, where differing interpretations of the law and facts do not amount to legal grounds for establishing liability.[113]

5.3. Minor disciplinary violations

Minor disciplinary violations that are liable to attract disciplinary measures include:

- minor public order disturbances or breaches of the peace, or other less serious forms of indecent behavior that affect the reputation of the court and of the judge;
- use of their judicial office and reputation to further their private interests;
- failure to fulfil mentorship assignments;
- violation of the rules governing work leave and absence;
- failure to attend mandatory training;
- failure to wear judicial robes at court trials.

In these cases, disciplinary measures can be taken when the violation has been committed intentionally, due to obvious negligence, or through their own fault, without any justifiable reason and when the violation has had serious consequences.

5.4. Dismissal of court presidents

Court presidents are dismissed from their office when the Judicial Council, acting in accordance with the relevant procedure, has established the following legal grounds have been met:

- overstepping or violation of their legal authority;
- illegal use of court funds;
- exerting influence on judges' independence, in relation to decisions taken in individual cases;
- failure to enforce provisions related to the management and assignment of court cases;
- violation of provisions related to the adoption of, and changes to, the annual schedule of judges;
- failure to notify the Judicial Council of the Republic of North Macedonia about serious disciplinary violations by judges at the court, when the court president was aware of such violations and had attempted to cover them up;
- preventing supervision at the court, in compliance with the law.[114]

As is the case with judges, disciplinary measures can be taken against court presidents for less serious forms of violations that amount to grounds for dismissal.

Legislative changes relating to the liability of judges and court presidents are aimed at improving the legal framework which stipulates that if a judge or court president is responsible for a serious disciplinary violation or behaved unprofessionally or incompetently, they will be dismissed.

In cases where judges are held liable for disciplinary violations, a voting procedure establishes which measures will be imposed. This is intended to make judges more effective, but also to ensure that the measures take account of the gravity of the offence.

5.5. Procedure for establishing liability of judges and court presidents

The procedure for establishing liability of judges and court presidents is initiated within six months from when the violation became known, but not later than three years after it was made. This procedure is defined as urgent and confidential, and it is led *in camera* and with due respect for the reputation and dignity of the judge or court president concerned, in compliance with regulations on personal data protection. At the request of the judge or court president, the Council decides whether the

113 Article 76 of the Law on Courts, "Official Gazette of RM" no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and "Official Gazette of RNM" no. 96/2019

114 Ibid, Article 79

procedure will be public and can be attended by a representative from the Association of Judges (Article 61 of the Law on the Judicial Council).

When the Judicial Council establishes that a judge or court president has been in serious breach of discipline or has carried out their duties in an unprofessional or negligent manner, it will take the decision to dismiss them if at least eight members of the Council with voting rights vote to do so. A judge or court president is then removed from their duties until the procedure is over.

Judges or court presidents whose rights have been violated as part of these procedures are entitled to a second hearing and a final judgement by the European Court of Human Rights in Strasbourg, if they ask the Judicial Council to reopen the case within 30 days, and not later than three years after the ECHR's initial judgement becomes final.[115]

The Law on the Council on Establishing Facts and Initiating Procedures for Establishing Liability of Judges[116] (2015), which dealt with the dismissal of judges, proved problematic. It was not a constitutional category, did not adequately define the powers involved, and was intended to establish Judical Council procedures in cases of unprofessionalism and negligence. This piece of legislation was abolished in a 2018 law.[117]

7. LEGAL AND PROCEDURAL SHORTCOMINGS IN DECISIONS TAKEN BY THE JUDICIAL COUNCIL

An Institute for Human Rights analysis of decisions taken by the Judicial Council in procedures for lack of professionalism and negligence in the period 2010-2014 (a total of 16 decisions)[118] showed they involved **significant legal as well as procedural shortcomings**.

The contents show **they lack sufficient arguments**. Notably, they do not include any arguments about the violations of which the judges are accused, explanation of the facts, or of the importance of the means by which judges can be recused. More specifically, they question whether a report signed by the manager of a forensic institute who happens to be a close relative of the judge concerned is legitimate, or whether it raises suspicions about the impartiality of the process.

Furthermore, dismissal decisions **do not include any reference to the liability of other judges on the panel** (except for the panel's president and rapporteur) in cases that imply the panel has made a decision collectively, where a public hearing has been held in the first instance, or where a panel of three judges from the first instance court are involved. When judges stay silent about circumstances that bring their impartiality and integrity into question, the panel's president or rapporteur can also be held liable for it. The procedural rules for both criminal and civil law allow them to question all the participants in the procedure about relevant facts and circumstances.

Analysis of decisions taken by the Judicial Council suggest that procedures that were discontinued because the statute of limitations came into effect **do not contain enough detail about the dates involved**.

Decisions which saw several judges dismissed due to delayed court proceedings or slow decision-making do not **include any reasons for the judges' actions** that would indicate negligence or unprofessional performance. This gives the impression that decisions about when to initiate dismissal procedures are selective, and only taken against particular judges.

115 Ibid, Article 73

116 Law on the Council for Establishment of Facts and Initiation of Procedure for Establishing Liability of Judges, "Official Gazette of RM" no. 20/2015

117 Law on Revoking the Law on the Council for Establishment of Facts and Initiation of Procedure for Establishing Liability of Judges, "Official Gazette of RM" no. 11/2018

118 Analysis on Independence of the Judicial Council of the Republic of Macedonia: Strive and Challenges, Institute for Human Rights, 2015, available at: http://www.ihr.org.mk/uploads/publications_pdf/sudskisovet.pdf?fbclid=IwAR1VEczUQQ9fY8FvY0L5t53-BKjbvul8LAaeKf8QEdhBj6PKh_O7DEmkrYE

In some cases, it was established that judges had acted in an unprofessional and negligent way in probate cases. They had not delivered court decisions, failed to ensure decisions about fines were delivered to local courts, or had not communicated decisions about asset confication to PRO. But it was not always clear whether the judges were to blame, or the court services.

Analysis suggests that the Judicial Council **has not developed any criteria for how its written decisions should be presented.** It is unclear whether they should include an introductory section or the name of the council's president, who signs off on the decisions. Moreover, decisions are taken without listing the case code and log numbers, under different dates and with a number of other shortcomings that indicate the drafting of decisions is inadequate and unclear.

Some of these Judicial Council decisions were contested before the European Court of Human Rights in Strasbourg and were revoked on the grounds of violation of Article 6 of the ECHR (the Mitrinovski, V. Duma and Gerovska-Popchevska cases). These decisions were revoked because Council members who initiated the procedures later participated in the appeal, including the Minister of Justice and President of the Supreme Court. However, the ECtHR judgments were inadequately and belatedly enforced.

7.1. Analytical and statistical data on the dismissal of judges

In the previous period, (2008-2010) a total of 24 judges were dismissed. In the subsequent period, (2011-2012) five judges were dismissed, and a further five in 2013-2014.

Between 2015 to 2018 - during the most critical period for state capture - the Judicial Council was least active in terms of monitoring judges' liability for unprofessional and negligent conduct. Only three dismissal procedures were conducted, although there were several attempts to launch more.

In 2019, after the Judicial Council's composition was changed, it took a more serious approach and five judges were dismissed. These dismissals included the president and two judges from the Supreme Court of RNM, the president of the Basic Criminal Court Skopje (who is also the subject of criminal proceedings in the Basic Criminal Court in Veles on the grounds of abuse of public office and duties) and another judge from a basic court.[119]

7. CONCLUSIONS

- Progress has been achieved in terms of legislation alignment, i.e. acceptance of proposals from the international community and the adoption of new legislation (in 2018 and 2019). Changes to the old legislation have contributed to reforms in the judiciary and the rule of law.
- Based on the European Commission's country progress reports about the implementation of reforms, and the Priebe Reports on possible abuses in the functioning of judicial authorities, the judiciary had undeniably been exploited as a means of capturing judicial institutions and blocking the possibility of reform.
- In its capacity as an independent and autonomous body responsible for guaranteeing the independence and impartiality of the judicial branch of government, the Judicial Council is vital to reform and could make the biggest contribution to resolving wrongdoing in the judiciary.
- In terms of efficiency, the Judicial Council takes too long to organize the selection and appointment of judges to vacant posts, especially at courts in Skopje, which is reflected in the courts' efficiency and effectiveness.
- Judicial Council decisions are not published, despite substantial public interest.
- The criteria for performance evaluation, which emphasises the quality of work

119 Minutes from 317th session of the Judicial Council of the Republic of North Macedonia, held on September 10 2019; minutes from 328th session held by the Judicial Council of the Republic of North Macedonia, held on December 25 2019, available at: http://sud.mk/wps/portal/ssrm/

(accounting for 60%) over quantity (40%), are aimed at strengthening judges' professionalism and expertise so they make rationalised and understandable decisions and enforce the law.

➲ Based on the Council's previous practice regarding judges who have been unlawfully and irregularly dismissed and have proven at the ECtHR that domestic institutions violated procedure, it could be concluded that the Council does not act with the necessary urgency, nor assesses the merits of relevant applications, but focuses only on tackling procedural violations, as indicated by ECtHR. Judicial violations are not properly clarified and therefore the judges who have been wrongly dismissed find it impossible to be reinstated.

RECOMMENDATIONS

➲ Competent institutions like the Judicial Council and the Supreme Court must immediately begin implementing legal changes in order to rescue captured institutions and to ensure the rule of law.

➲ All bylaws and procedures necessary for the functioning of the Judicial Council and related to selection, evaluation, promotion and dismissal processes must be adopted immediately, in compliance with the Law on the Judicial Council.

➲ Effort is needed to ensure that all the institutions (Judicial Council, State Commission for Prevention of Corruption, Financial Police and Public Prosecution) promptly and efficiently take all measures necessary to reverse state capture. They should also act on information in the public domain that could lead to the resolution of cases where individual judges have come under suspicion, for the elimination of public doubt.

➲ Complaints about the performance of judges, court presidents and courts must be taken seriously, and submitted to the Judicial Council by citizens and legal bodies, in order to identify possible violations.

➲ In order to fill vacant posts, the Judicial Council must organize the selection of judges for all courts in the state promptly. These selection processes should be implemented in full compliance with the new conditions and selection criteria.

➲ Effort is needed to ensure the publication of non-enforceable decisions taken by the Judicial Council, by means of anonymized personal data.

➲ Procedures to implement ECtHR judgments must be conducted in a proper and timely manner, including a serious review of applications for repeated procedures, not merely in terms of procedure but also on their merits, in order to rectify wrongs and enable judges to take up their posts again.

DYSFUNCTIONALITY AND POLITICAL INTERFERENCE IN THE PUBLIC PROSECUTION, THE POLICE AND SECRET SERVICES

Author: Gordan Kalajdziev

1. INTRODUCTION

For long time, North Macedonia's legal system has been in crisis: the public has lost trust in the judiciary and public prosecution, and the system as a whole is in disarray.[120] Every new government is aware of the seriousness of the problem, but all have failed to tackle it properly because they do not examine its root causes. So far the courts have received more attention, with the public prosecution and police only addressed sporadically. Reform of the secret services has gone undiscussed, except behind closed doors.

Law professionals often overstate the importanceof courts compared to the public prosecution, the police and other law enforcement authorities. Consequently, international human rights instruments, the constitution and legal regulations usually assume the public distrust the police but trust the courts, in the sense that the latter can offer protection to citizens against unfounded prosecution and arbitrary and unlawful attacks on their rights and freedoms.[121] Enormous attention and funds are channelled towards helping the judiciary perform better. But the courts receive far less, and they deliver a worse service than the public has a right to expect.[122] This is probably one of the reasons why citizens indicate they trust the police more than the courts and public prosecution. Yet they are unaware that most cases do not even reach court.[123]

The most recent public prosecution "reforms", which follow the 2017-2022 Strategy on Justice System Reform adopted in 2017,[124] were rushed and poorly implemented.[125] This is unsurprising, since the country has never discussed public prosecution reform. Internationally, public prosecutors are still moving from the executive branch to become part of the judiciary. Consequently, there are no clearly established international standards for public prosecution - at least not to the same extent as for the judiciary.

The public prosecution service in North Macedonia has been reformed along the same lines as the judiciary – in other words, not very successfully. The public prosecution did acquire some important guarantees of independence. Some judicial solutions were never fully adapted to the public prosecution service (for example, the transfer of competences from first-instance courts has left certain gaps). Thanks to a helpful twinning

120 See in D. Krapac, V. Kambovski, G. Lazhetikj, G. Kalajdziev, Strategy on Criminal Law Reform, Ministry of Justice of the Republic of Macedonia, Skopje, 2007, available at: (www.justice.gov.mk).

121 See in G. Kalajdziev, Court as the Guardian of Human Rights, MASA Inventory, Skopje, 2014; G. Kalajdziev, Role of the Public Prosecution and the Courts in Control over the Police, Inventory of the Faculty of Law "Iustinianus Primus" Skopje, 2016.

122 See in G. Kalajdziev, Judicial Reforms in the Republic of Macedonia – Concepts and Obstacles, in Rule of Law Enhancement in the Western Balkans, Aspen Conference Reader, Berlin, 2014.

123 See in G. Kalajdziev, Who is Who in the Criminal Law System of the Republic of Macedonia, MRKKP, Skopje 2014, MRKPK, G. Kalajdziev, On the Fight against Organized Crime and the Legal State, FOSM, Skopje, 2013

124 https://www.pravda.gov.mk/toc1/94

125 Compare with 2019-2021 Strategy Plan of the Ministry of Justice adopted in 2018, available at: https://www.pravda.gov.mk/Upload/Documents/STRATESKI%20PLAN%202019-2021%20god.pdf

project with Italy,[126] the 2007 Law on the Public Prosecution Office and the constitutional reforms (Amendment XXX) were unexpectedly progressive and, in terms of its independence, have brought the public prosecution service closer to the judiciary. Nonetheless, the chief state prosecutor (unlike other prosecutors) is still nominated by the government and appointed by Parliament, tying them to politics and the executive branch. However, the public prosecution is now significantly less hierarchical, reducing the chances of political interference.

The 2010 Law on Criminal Proceedings made significant changes to the public prosecution, creating the basis for it to manage the police and grow into a powerful institution in the fight against crime and corruption (with its own investigative capacity). But these plans have not been implemented by the former chief state prosecutor Marko Zvrlevski[127] and the current incumbent Ljubomir Joveski.[128] There are several explanations for this, ranging from ignorance to incompetence and a lack of will to strengthen the public prosecution, but ultimately the answer is straightforward: neither the social nor the political will exists to enforce the rule of law.

The Special Prosecution Office was a particular focus for reform.[129] Transforming the SPO[130] from an *ad hoc* into a permanent institution was seen as crucial: its new independence would, the public were told, give it the ability to tackle high-level corruption. In hindsight, the real reason for these reforms was to enable criminal investigations to continue, despite a Supreme Court ruling that they must be halted.[131] Extending the term of office of the chief special prosecutor Katica Janeva was also problematic. Janeva should have been re-elected in 2019 after her four-year term of office, but VMRO-DPMNE indicated it would not support her re-election.[132]

Although – after long and painstaking discussions – lawyers found a legally sustainable solution to the problem of the wiretap evidence having been illegally obtained, LPPO jeopardised it by invoking the deadline under Article 22 of the Law on the Special Prosecution Office for the use of such recordings as evidence. Previous attempts to invoke this argument have, however, failed. There is an important distinction between the deadline for filing indictments, and the use of allegedly illegal wiretaps as evidence by that deadline.

It is still unclear why the SPO became a scapegoat, given that it enjoyed broad support among the public.

2. THE POLICE AS A KEY ELEMENT OF THE CRIMINAL JUSTICE SYSTEM

Although in theory the public prosecution should lead pre-investigation procedures, in practice the police enjoy greater autonomy at this stage. The police are legally subordinate to the public prosecution, but in practice they enjoy more autonomy. This is because the public prosecution are poorly staffed, more

126 CARDS 2003, Judicial Project for Establishing a Reliable Judiciary in Western Balkans; CARDS 2005, Fight against Organized Crime and Corruption – Public Prosecution Office.

127 Marko Zvrlevski held the office of chief state prosecutor from 2013, but was dismissed due to unlawful actions in 2017. His name also featured in the wiretaps.

128 In 2017, Ljubomir Joveski was appointed Chief State Prosecutor of the Republic of North Macedonia.

129 See in G. Kalajdziev, Legal Challenges Faced by the Special Prosecution Office, FOSM, 2018, available at:http://www.merc.org.mk

130 The Prosecution Office for Criminal Offences Related to and Arising from the Contents of the Illegally Intercepted Communications, known as the Special Prosecution Office, was established with the Law on the Prosecution Office for Criminal Offences Related to and Arising from the Contents of the Illegally Intercepted Communications, adopted by the Assembly of the Republic of Macedonia on September 15, 2015 and with the appointment of KaticaJaneva as the chief special prosecutor.

131 This idea for SPO's transformation prior to expiration of its mandate, which is not attributed to any known author, was hastily integrated in the Strategy on Justice System Reform adopted by the new government in 2017 and quickly became generally acceptable, and was ultimately renounced by all, due to reasons unknown to authors of this text. See footnote 5.

132 See G. Kalajdziev, Who is Afraid of SPO and Who is Afraid for SPO, available at: https://novatv.mk/koj-se-plashi-od-sjo-a-koj-za-sjo/

TABLE 1 Reported, indicted and convicted adults (2002-2017)

YEAR	2002	2004	2006	2008	2010	2012	2014	2016	2017
Reported	18.171	22.591	23.514	26.409	30.004	31.860	37.164	20.502	20.582
Unknown perpetrators	7.114	9.088	8.868	10.947	14.621	16.380	19.237	8.636	9.979
Rejected reports	2.425	2.956	3.006	3.341	3.580	4.385	5.909	4.424	4.088
Filed indictments	7.756	9.641	10.757	11.181	10.990	10.351	11.661	7.280	6.351
Convicted	6.383	8.097	9.280	9.503	9.169	9.042	11.683	8.172	6.273

Source: State Statistical Office (www.stat.gov.mk)

passive and are sometimes not informed of cases until criminal charges are drafted.

Statistics show that the police fail to identify a large proportion of criminals. This share is continuously increasing, from one third of reported perpetrators (7,114 unknown of 18,171 reported) in 2002, to almost two-thirds (19,424 unknown of 34,436 reported) in 2013.[133] The number of reported perpetrators reached its highest in 2014, (37,164 people, of whom 19,237 are "unknown") followed by a significant fall (in 2017, they accounted for 20,582 people, of whom 9,979 were unknown). It should be noted that independently of the fact the number of reported crimes has been increasing for years, *the number of defendants* stands at around 10,000 people per year, reaching record lows in 2016 and 2017 (only 6,351 defendants in 2017).

Based on official data, the number of *rejected* criminal reports is low. This number varies significantly depending on whether these reports are submitted by the MoI or directly by citizens, other state bodies or legal entities.[134] The prosecution service rejects almost half of reports directly submitted by citizens or other bodies, while it approves and processes almost all criminal reports submitted by or through the police. In the period 2014-2018, 65% of procedures launched by the Public Prosecution Office were on the basis of MoI reports, while in the same period the share of procedures launched by the Public Prosecution Office based on public information ranges from 1.80% to 3.80%.[135]

Rather than the Public Prosecution Office, the vast majority of submitting parties make their reports to the MoI. By law, businesses and legal entities must submit these reports directly to the Public Prosecution Office, while citizens report criminality to the police. In 2018, of the total reports made to the prosecution services against 20,259 adult criminal suspects, the vast majority (13,666, or 67.4%) were submitted by MoI, 3,054 (15%) of the reports were submitted by citizens, while other state bodies submitted 792 criminal reports (3.9%). See Table 2.

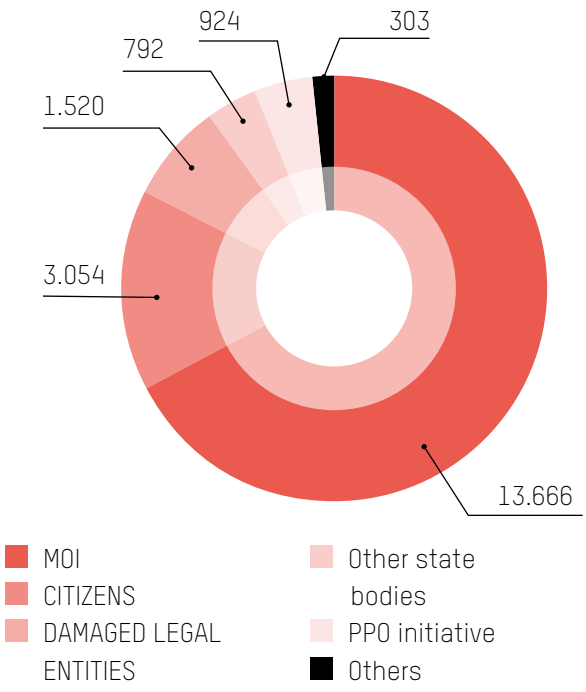
The number of criminal procedures launched by the Public Prosecution Office has seen a marked increase every year, although it is still too low (see Table 3). The gradual rise in the number of PPO-initiated procedures shows that it is taking on a more active role, albeit in the early stage of proceedings. According to the new LCP, the MoI's pre-investigations lead to formal criminal charges in a small number of less serious or straightforward

133 Perpetrators of Criminal Offences in 2017, State Statistical Office, available at: http://www.stat.gov.mk/Publikacii/2.4.18.07.pdf

134 T-04: Reported adults according to types of criminal offences, submitting parties, types of decisions and method for submission of criminal reports, available at: http://www.stat.gov.mk/Publikacii/2.4.18.07.pdf

135 The Stockholm Syndrome of Macedonian Prosecutors, available at: https://prizma.mk/stokholmskiot-sindrom-na-makedonskite-obviniteli/

Графикон 1 Поднесени кривични пријави пред ЈО за 2018 година



crimes.[136] This could be because the public prosecution now follows media reports closely, and when it believes a criminal offence has been committed but not reported, it launches criminal procedures on its own initiative.

The fact that the Public Prosecution Office rejects almost half the criminal reports submitted to it and only a fraction of the criminal reports submitted through the MoI confirms the thesis that the police do not only fail to report all crimes brought to their attention, but also fail to forward reports from citizens. The police are probably pre-selecting a proportion of them. How else can the difference in the approval rates of reports made by citizens and legal entities be explained, given that it varies significantly depending on whether they were submitted directly or through the police? A proportion of criminal reports are genuinely unfounded, which means the police reject them in order not to burden prosecution services with unfounded reports. But it would be useful to investigate whether - and to what extent - the police have appropriated the public prosecutors' authority to take decisions

TABLE 2 Overview of criminal charges by submitting parties motioned before HPPO and POOCC in 2018

HPPO	Total reports per person	SUBMITTING PARTIES					
		MOI	Citizens	Damaged legal entities	Other state bodies	PPO initiative	Others
Skopje	9657	5952	1740	907	548	417	93
Bitola	4078	2909	528	318	89	134	100
Shtip	3164	2209	455	135	99	226	40
Gostivar	2964	2359	286	123	35	128	33
PPOCC	396	237	45	37	21	19	37
Total	20259	13666	3054	1520	792	924	303
%	100%	67,5 %	15%	7,5 %	3,9%	4,6 %	1,5%

Source: Public Prosecution Office of RNM (http://jorm.gov.mk/category/dokumenti/izvestai/)

136 This unusual situation under LCP whereby the police notify and work under directions from PPO during the earlier stages of proceedings, instead of leading investigations independently and concluding them with criminal charges, creates statistical confusion.

not to initiate proceedings for some criminal offences, and whether there are reports that have not been documented at all because the police have detered people from formally submitting reports.

TABLE 3 Number of criminal report taken into work by PPO (per year)

Year	Total	Resolved (%)	Remaining (%)
2014	39.300	68,6%	31,4%
2015	33.405	66,8 %	33,2 %
2016	30.074	59,4 %	40,6 %
2017	29.637	56%	44%
2018	33.195	54%	46%

Source: Public Prosecution Office of RNM

Table 3 gives an overview of the total number of criminal reports in which the Public Prosecution Office took action, and their outcomes. It indicates the PPO's performance. Since the backlog has grown since the LCP came into effect, it seems likely the PPO is struggling to cope with its increased workload under the new adversarial model, and taking on the burden of activities that used to be done by the police or the courts.

3. THE PUBLIC PROSECUTION AS AN INVESTIGATIVE MANAGER, REPLACING THE POLICE MONOPOLY IN CRIMINAL DETECTION AND INVESTIGATION

The judicial police are criminal police who should co-operate closely with the public prosecution, so a proportion of them are integrated into the public prosecution's team.[137] This concept is borrowed from Italy (where it yields great results), but it encountered a great deal of resistance from MoI elites because their aim is to keep power within the Ministry. The reform is intended to free the police from MoI influence and ensure they report to the public prosecution.

The goal is not to paralyze the police and other crime detection bodies, or even to reduce their workload now that investigations are conducted by the public prosecution. The police must have autonomy and clear responsibility in police investigations, but that should not stifle their ability to take the initiative. Procedural provisions under LCP and LLP must not just set out the the obligation of the police to notify the public prosecution in a timely way, but also stress their obligation to follow the prosecution's guidelines and orders. In the future, the public prosecution must be more active in exercising this role which, of course, depends on adequate staffing levels.

We already knew the police had a monopoly over criminal detection and investigation. The police are not only most likely to report criminal offences, but they also dominate the initial stages of proceedings. Contrary to the letter of the law, most criminal reports are submitted to the MoI instead of the public prosecution. According to LCP,they should be submitted to competent prosecution offices.
This is because the police have a monopoly over investigative capacity. Whereas in theory the pre-investigation procedure is managed by the public prosecutor, in most cases, the police complete criminal investigations independently.

The police need autonomy in these initial investigations - primarily due to the need for rapid action, but also because they have more resources. The public prosecution's budget and resources are modest. Although there are numerous prosecutors, their offices do not have enough expert associates and other support staff, while their budget does not even cover routine work. The state has undermined and marginalized them for a long time.

Statistics show that the police do not just hold a monopoly over investigations, but are also the key player in the criminal law system, determining whether and whom should be held responsible for crimes. Most perpetrators are never detected, while almost all those reported to the police are accused and convicted.

137 Academy of Judges and Public Prosecutors, "Module 1: Pre-investigation Procedure", (Manual), 2012, pg. 5

The public prosecution and courts are under-resourced and do not have enough independence and autonomy from the executive branch. In order to speed up investigations and overcome the police monopoly, we need to establish investigation centres within the public prosecution.

Of course, in the early stages of an investigation the police must have enough autonomy to act without prior approval from public prosecutors, so they can act quickly where necessary and establish whether there are grounds for a full investigation. Nonetheless, public prosecutors must be kept informed of all their actions. Experience elsewhere suggests they will take full advantage of the autonomy they do have.[138] The police are reluctant to give up their dominance in the early stage of an investigation, and this manifests itself in a failure to inform prosecutors about crimes. In practice it means they can close cases without public prosecutors ever hearing about them, which is a legal authority reserved for public prosecutors.[139]

Here, I will focus on those investigations that the police complete on their own, only notifying public prosecutors after they are finished. Frequently, public prosecutors stand aside and leave the police to complete investigations, even when they are notified that a criminal offence has been committed. This is often blamed on workloads and a lack of investigative capacity at public prosecutors' offices. All this makes their legal authority to manage investigations an illusion.

Consequently, police and prosecution competences need to be better distinguished and defined in law. This was not previously an issue because, by law, prosecutors were involved only after the completion of police investigations (i.e. after criminal charges were brought). These issues could be regulated through secondary legislation or via a memoranda of co-operation. The refusal to accept a "subordinated" role, i.e. to serve as assistant to the public prosecution, is a problem here and elsewhere in Europe.[140]

Traditionally, police officers who perform certain functions in criminal proceedings are, more or less, under the control of the executive branch. This means that in operational terms public prosecutors are these officers' superiors. But in terms of hierarchy, their careers are dependent upon their superiors at the relevant ministry. Italy has overcome this hierarchical dualism by forming so-called *police sections* that are under the direct management of the chief state prosecutor - i.e. they are part of the prosecution team, meaning that they cannot be reallocated or assigned different tasks without the public prosecutor's approval. Ideally, we would recommend forming separate police departments that are answerable to the chief state prosecutor, whose assessments determine their career advancement.

But creating separate criminal police under the control of the chief state prosecutor is not feasible. Criminal police will remain under the auspices of the MoI, while financial police will stay under the Ministry of Finance. Nonetheless, some measures need to be taken in order to strengthen the public prosecution's powers over police involved in criminal proceedings, so as to reduce the risk of direct interference by the executive. Police inspectors assigned to the public prosecution should be exclusively under its control, and they should not be removed from cases by the executive without the chief state prosecutor's approval. Secondly, the public prosecution should have a say in the career progression of police inspectors who are members of the prosecution team, as well as other police

138 See in K. Ambos, Comparative Summary of the National Reports, in L. Arbour/ A. Eser/ K. Ambos/ A. Sanders (eds.), The Prosecutor of a Permanent International Criminal Court, Max-Planck-Institutfürausländisches und internationalesStrafrecht, Freibourg 2000, 495, 526.

139 Italy is the single example where this practice is more seriously sanctioned, with police officers held criminally liable for a failure to report criminal offences.

140 In 2004, Germany renamed criminal inspectors from prosecutorial assistants (Hilfsbeamten der Staatsanwaltschaft) into prosecutorial inspectors (Ermittlungspersonen der Staatsanwaltschaft).See in J-M Jehle, Vom Hilfsbeamten zur Ermittlungsperson, Funktionswandel der Polizei in europäischen Kriminaljustizsystemen, BO Die Kriminalpolizai, available at: http://www.kriminalpolizei.de/themen/polizei/detailansicht-polizei/artikel/vom-hilfsbeamten-zur-ermittlungsperson.html

officers involved in criminal investigations.[141]

The public prosecution should be obliged to oversee the lawfulness of police investigations by the time a decision is taken about whether to launch prosecutions. They should also ensure the police and similar bodies are respecting human rights.

4. TRANSFORMATION OF THE PUBLIC PROSECUTION: FROM STATE CONTROL TO INDEPENDENCE

Social and political norms should be reflected in the justice system. Mirjan R Damaska asserts that the functioning of the criminal law system and its institutions (and the model of criminal proceedings) depends on the way in which overall state governance is regulated. He identifies this as the source of differences between Anglo-Saxon and European legal systems.[142] The evolution of the public prosecution service has led to changes in its legal authority, which have distanced it from the executive and increasingly defined it as a justice body. Public prosecution systems still differ according to the way in which public prosecutors are appointed, the type of functions assigned to them, and a series of other characteristics, but they share the aim of achieving greater independence. Public prosecutors are being given more responsibilities as they acquire the ability, for example, to liaise with victims of crime.[143]

This is why the basic principles of ***hierarchy*** and ***subordination***[144] for public prosecutors should be redefined. They now make public prosecutors' jobs more difficult, and inhibit reform. Some principles of public prosecution organization would undoubtedly have to be changed. Hierarchy and subordination, insofar as they imply a centralised system, need to be re-examined. While there are arguments *for* and *against* hierarchy in public prosecution, maintaining the principle of subordination is completely unfathomable given that it is not supported by the organizational or functional needs of this institution and sometimes directly conflicts with the principle of legality.[145] Subordination is the inevitable result of hierarchy;[146] and it implies that even when orders are unlawful and those executing them know it, under the principle of subordination they must carry them out regardless.

From an institution tasked to protect state interests, the public prosecution slowly becomes an institution that must care for the rights of individuals, i.e. the rights of victims and damaged parties, but also the rights of defendants.[147] The principles of hierarchy and subordination mitigate the executive's influence on the public prosecution. Public prosecutors are convinced that they are necessary and refuse to discuss reform. The contradiction between the move to make individual prosecutors more independent and accountable and the legal principle of subordination is obvious.

There are similar misunderstandings about the public prosecution's **autonomy** and independence. In theory, their autonomy is often equated with theirindependence. Autonomy does overlap with independence, but differs in important respects. Our country's normative approach to public prosecution does not explicitly refer to its independence, but international documents consider independence

141 The fact that authorized officers are administratively subordinated to the MoI means their careers depend on their superiors at these ministries, and therefore they have no incentive to complete tasks assigned to them by public prosecutors.

142 See M. Damaska, The Faces of Justice and State Authority, Yale University Press, New Haven/ London, 1986.

143 See L. Raichevikj, The Role of Public Prosecution in the Criminal Law System, independent edition, published doctoral dissertation at the Faculty of law "Iustinianus Primus" in Skopje, Skopje, 2014; T. Vitlarov, Public Prosecution in the Legal System in Macedonia, Shtip, 1999; J. Ilievski, History of the Macedonian Public Prosecution – Position, Role and Perspectives, doctoral dissertation at the Faculty of Law "Iustinianus Primus" in Skopje, Skopje, 2013.

144 Analysis of historical reasons for adoption of hierarchy and subordination as underlying principles in public prosecution organization, in L. Raichevikj, cited above, pp. 29-45.

145 Ibid, pp. 83-91

146 See T. Stojanovski, Police in the Democratic Society, Skopje, 1997, pg. 172

147 See L. Raichevikj, cited above, pp. 89-90

as the basic precondition for public prosecution.[148] According to Lidija Raichevikj, the "**independence** of public prosecutors is achieved and protected through the method for their appointment and dismissal, the possibility of unhindered and independent performance of the prosecutor office, the appointment of prosecutors (not only on the basis of formal education criteria), but also through efforts for quality education, differential and clear relations with institutions to which public prosecutors are referred in their work, securing funds to finance the public prosecution's operation, finding administrative and technical solutions for proper performance of their office and a series of other circumstances".

The most serious threat to public prosecutors' independence is their dependence on the executive. The public prosecution implements the policy of legislative and executive governments by enforcing laws proposed and adopted by them, but the executive also secures other preconditions for its operation - from funding to proposals for selection, appointment and dismissal.

These factors directly affect the performance of the prosecutors' office, create professional insecurity, and make it impossible to fully enforce law and justice.[149] States, especially those belonging to the European legal system,try to overcome this situation by taking steps to create bodies that appoint and dismiss prosecutors. However, these bodies are artificial constructs, and the normative acts that govern them are inconsistent. In the Republic of North Macedonia, the Council of Public Prosecutors is the body responsible for appointing prosecutors, dismissing them and acting on complaints, but the state does not have a separate body to monitor the performance of the Council of Public Prosecutors.[150] The situation with the Judicial Council is the same. In this regard, I completely agree with Denis Preshova's opinion that "the model of judicial and prosecutorial self-governance, which was presented as the best model for new democracies in Central and Eastern Europe, has not yielded the expected results".[151]

Scholarly literature distinguishes several types of independence that the public prosecution strives to achieve: ***institutional, functional and personal***. All are mutually reinforcing. In particular, political independence is closely related to ***institutional*** independence***.*** Prosecutors cannot independently and impartially carry out their office when they are controlled, selected or appointed by the executive or legislative government, or when it decides on their dismissal. Creating autonomous bodies to decide on these issues is a misguided attempt to demonstrate the independence of public prosecutors, because there is no guarantee that their decisions are not influenced by another branch of government. Moreover, no system exists in law for their oversight and control.[152]

The ***functional independence*** of public prosecutors is also in question because they liaise with other bodies in the course of their work. The complete functional independence of public prosecutors would require each prosecutor to be able to detect criminal offenders and prosecute them - which they self-evidently cannot do alone.

The ***personal independence*** of public prosecutors is of crucial importance. It does not solely depend on personality traits and the moral and ethical credentials of prosecutors, but on the legislative and executive government. These two branches of government decide on the social status of public prosecutors, as well as their places of work, conditions, funding and salaries. Given their increased responsibilities, they should be properly paid and their workload should be manageable.[153]

148 Guidelines on the Role of Prosecutors, Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, contained in International Documents for Independent and Effective Judiciary, OSCE, 2011, cited by Raichevikj, pg. 93.

149 See L. Raichevikj, cited above, pg. 23

150 Ibid.

151 See D. Preshova, Judiciary Capture, 2020, pg. 15. (the title and pages of Preshova's article on independence of judiciary in this volume).

152 See L. Raichevikj, cited above, pp. 232-233; D. Preshova, Judiciary Capture, 2020.

153 See L. Raichevikj, pg. 233.

5. THE RISE AND FALL OF SPO AS AN IMPORTANT TOOL IN THE FIGHT AGAINST CORRUPTION AMONG POLITICAL ELITES

The Prosecution Office for Criminal Offences Related to and Arising from the Contents of Illegally Intercepted Communications, better known as SPO, was established by a separate law,[154] and with broad societal consensus, to investigate and deal with government wrongdoing that became apparent after the release of thousands of wiretaps. The SPO became the main hope in the fight against organized crime and high-level corruption among political elites. It was given considerable autonomy, both financial and operational, but also support from the international community. In truth, SPO had problems with its independence since it was established: from the start, its focus was the seriously corrupted elite of VMRO-DPMNE, although other political parties are not immune to corruption. It is widely acknowledged that political influence from abroad, as well as the selection of which wiretaps to investigate, greatly influenced SPO's work, and contributed to its demise.

Our society still needs an independent prosecution office that would be sufficiently strong and independent to fight crime and corruption among political elites. This is especially the case when the public prosecution continues to be politicized and the selection of the chief state prosecutor remains controversial because of the executive government's undeniable influence on the process. Indeed, until recently there was general agreement that the SPO's capacity should continue to be used, rather than disbanded.

In spite of serious objections to its work, public opinion supported the SPO. The *Strategy on Justice System Reform* backed continuing its work although VMRO-DPMNE did not, for understandable reasons).The goal was to transform it into a permanent institution that would be a serious instrument in the fight against high-level corruption and possible government wrongdoing. This would be done by means of amendments to the Law on the Public Prosecution Office (LPPO). Unfortunately, this became a political and media circus, and SPO paid the price - partly because of Katica Janeva, who ended up as a defendant in criminal proceedings, but also with the blessing of the most important political factions, both domestically and internationally.

Although, in legal terms, the best solution was for the SPO to complete its mandate according to the Law on the Special Prosecution Office (LSPO), there are several reasons why the SPO has transformed a completely autonomous institution into a relatively autonomous part of the regular prosecution. One was the attempt to extend Katica Janeva's term of office without re-election, which was SDSM's idea. The other two reasons concerned SPO's problematic constitutionality (two petitions are lodged before the Constitutional Court), and the biggest problem of all was the controversial deadline for filing indictments under Article 22 from LSPO.[155]

Several versions of an LPPO draft anticipated the transformation of SPO and offered different models for its organizational setup. Here we explain the most relevant**. Under the first option**, anticipated under the strategy and further developed in the draft text of a working group led by the academic Vlado Kambovski, SPO was to be incorporated into PPO in a similar way to the existing Prosecution Office against Organized Crime and Corruption. Itwould be competent to prosecute high-level corruption throughout the country, with a headquarters in Skopje. This proposal eliminated the constitutionality problem and opened a small door for other prosecution offices to potentially take over non-completed investigations, thus ensuring the continuation of SPO's work. On the other hand, there are no doubts that SPO's autonomy and effectiveness would have been sacrificed to some degree.

The second, less ambitious option, which emerged somewhat unexpectedly in late 2018, was developed as a completely new LSPO drafted by SPO itself. Under it the SPO, prior to expiration of its mandate under the first law, would be transformed

154 Law on the Prosecution Office for Criminal Offences Related to and Arising from the Contents of Illegally Intercepted Communications "Official Gazette of RM" no. 08-4352/1 from 15.9.2015).

155 See in G. Kalajdziev, More Important Problems Faced by SPO, Foundation Open Society – Macedonia, Skopje, 2018.

from an *ad hoc* into a regular institution, maintaining and enhancing its current autonomy. Rather immodestly, SPO proposed a law which, without re-election, would have extended its mandate by five years, thereby maintaining its competences, autonomy, salary brackets, etc. The investigations into the wiretaps would have continued indefinitely, which was problematic. Additionally, it is unlikely that Parliament would agree for the deadline for investigations to be simply abolished.

The Ministry of Justice was the first to come up with a version of the draft text prepared by Kambovski's group, but unnecessarily burdened it with two controversial issues that did not belong there: (1) the attempt to impose an LPPO solution for the outcome of investigations launched after the 18-month deadline under Article 22 from LSPO; and (2) reiteration of the problem of the legality of using wiretaps. According to the MoJ proposal, the SPO and Prosecution Office against Organized Crime and Corruption competences would be transferred to the Prosecution Office against Organized Crime and High-Level Corruption. Proceedings that had already begun would be continued by the new prosecution office. Although at first sight this appeared to be a merging of the two prosecution offices, in practice it would close SPO and transfer its staff and technical capacity to the Prosecution Office against Organized Crime. The formulation that "initiated procedures shall be continued by the Prosecution Office against Organized Crime and High-Level Corruption, *in the stage in which they are transferred*" is softer than the previous MoJ solution, which was explicit that investigations should continue.

After the Racket affair was revealed, everybody expressly renounced the SPO, and discussions about the LPPO were reduced to several issues that were irrelevant to this law. The SPO was consigned to history, and the recently adopted version attempts to compensate for its abolition with a degree of autonomy for the Prosecution Office against Organized Crime and Corruption.

Contrary to our expectations, the fiercest discussions during adoption of the new LPPO did not concern faith in the SPO's ability to do its job,[156] but two issues that do not fit in this law. One of them concerns the fate of investigations launched after the 18-month deadline has expired, which became especially important after the Supreme Court ruled that SPO investigations initiated after expiration of the deadline are unlawful. The attempt to "solve" the problem with the deadline for investigations or indictments under LPPO is legally unfounded: first, this issue pertains to criminal proceedings, i.e. LCP; and second, because any open and current issue cannot be solved *post festum* (at a later date). If the deadline has expired and investigations became unlawful, they should have been stopped in the interest of the suspects, and cannot be continued as if nothing had happened pursuant to legislation adopted at a later date. It would have been best to leave this issue to be solved by court jurisprudence – but politicians thought otherwise.

The second problem related to the lawfulness of evidence from the illegal wiretaps. According to Skopje Court of Appeal case law, they are allowed because they are not illegally obtained by prosecution authorities, but by third parties, which complies with opinions upheld by academia and with scholarly opinion abroad, primarily in the United States.[157]

Favoring a solution whereby investigations initiated after the deadline's expiration under Article 22 from LSPO are continued by effect of the law (LPPO), the MoJ unnecessarily sacrificed several important things: 1) the SPO as a permanent instrument in the fight against political elites and as a symbol of the rule of law;

156 Unfortunately, nobody answered the question of how a decision was taken overnight that is diametrically opposite to the reform strategy, which enjoyed a strong consensus for SPO to become a permanent institution. Moreover, nobody explained why the new chief special prosecutor was not selected, given that LSPO is still in effect, and there were no procedures initiated into this matter.

157 See G. Kalajdziev, Unlawful Evidence in Criminal Proceedings, MRKPK, no. 2, 2017, pp. 39-50; G. Kalajdziev, B. Arifi, A. Marshavelski, A. Bozhinovski, Unlawful Evidence in Criminal Proceedings, OSCE, Skopje,.

2) unhindered completion of key cases, the reason for which the SPO was formed; and 3) the late adoption of LPPO, which as an important requirement for joining the EU, has many harmful consequences.

If lessons are to be learned from all this, a future government should launch genuine rather than cosmetic reforms of the public prosecution by strengthening its independence from the executive and the police. The special prosecution, however, should become a small but strong and compact team within the Prosecution Office against Organized Crime and Corruption, and should have its own investigative team and operational and financial autonomy.

6. SECRET SECURITY SERVICES: A SERIOUS PROBLEM FOR THE DEMOCRATIC ORDER

For many decades, secret services have posed a particular problem to our democracy and the rule of law. In principle, the law should stop these services from engaging in any political activities or acting in the interests of any religious, ethnic, social or economic group. However, it is generally acknowledged that the main weakness of our secret services is their politicization. The last reform of these services took place four years after the wiretap scandal, which revealed major abuses at security and intelligence services, but unfortunately it failed to address this weakness. The transformation of the Administration for Security and Counterintelligence into the Agency for National Security reportedly involved some form of vetting process which was supposed to have ensured it was depoliticized.

Similarly, the problem of inter-ethnic distrust and its effect on the secret services has not been addressed systemically, but by means of informal agreements between the Macedonian and Albanian political parties in government, and under the influence of foreign organizations and "friendly" security services.

Security service reform should have been thorough, systematic and transparent, allowing experts and the broader public to contribute to the process. Efforts to reform the interception of communications, as part of broader security service reform, were pursued with insufficient transparency. The model has created a new centre of power, the Operational Technical Agency, which would probably only replace the Administration for Security and Counterintelligence (UBK). The new Agency for National Security (ANS), meanwhile, is merely a cosmetically-reformed UBK.

The security intelligence community in RNM is made up of three services: the Agency for National Security, the Intelligence Agency and Military Security and Intelligence at the Ministry of Defence. ANS is the new independent agency, replacing the infamous UBK. It is a counterintelligence service tasked with detecting and preventing espionage by foreign services, detecting and preventing threats to the constitutional order, terrorism and other forms of serious and organized criminal activity against the state. The Intelligence Agency (IA) is an intelligence service controlled by of the President, tasked with collecting and processing political, economic and military data about foreign states, institutions and services, as well as persons of interest to the state. The competent organizational unit for military security and intelligence is an agency within MoD which detects and prevents activity by foreign military intelligence services, as well as taking intelligence action against foreign states and nationals that affect the state's national security.

The legal authority granted to our security services is a problem. It has serious implications for human rights and democracy. After the secretive bylaws that regulate these services dating from the former SFRY became illegal (after adoption of the new Constitution), they effectively operated outside of the law, hiding behind the Law on Internal Affairs that specified they operated with "police authorization". The fact they are now regulated under the new Law on Interception of Communications is good. However, the move was rushed and inadequately debated, and the regulations allow them to be deployed in an arbitrary way and with little scrutiny. A new body has been formed, the Council for Civil Oversight over Interception of Communications, as an additional instrument to ensure respect

for privacy. Unfortunately, although the Council was formed in 2018, it is not yet fully operational, which is an indication that reform efforts remain largely theoretical.[158]

According to Article 18 of the Law on Interception of Communications (LIC), measures for the interception of communications for protection of the state's security and defense interests include:

1. interception and recording of telephone and other electronic communications;
2. interception and recording of building interiors, indoor spaces and facilities, and entrances to such buildings, indoor spaces and facilities for the purpose of creating conditions for implementation of interception measures;
3. interception and video recording of persons in open spaces and at public places; and
4. interception and audio recording of the contents of people's communication in open spaces and at public places.

In addition to these, pursuant to provisions under LIC (Articles 32 and 33), upon the request of authorized bodies for implementation of interception measures (the chief public prosecutor has to be informed of such requests), the operators are obliged to provide metadata for participants whose electronic communications are monitored. The new laws entrust these services to additional authorities. Therefore, with a relevant court order (Articles 25, 28 and 32 from LANS), the ANS has the exclusive right to intercept and record international telecommunications with assistance from operators, in cases where it cannot be otherwise performed.[159]

Generally speaking, the terms and conditions under which these measures could be taken are rather ill-defined. The fact they often have a preventative function makes judicial and other oversight extremely complicated, and even unfeasible. Sometimes, even the most minimal grounds for suspicion by the security services are accepted by the chief state prosecutor. Judges can approve requests for interception that are based on the suspicion of intent, which raises privacy concerns. This leaves plenty of leeway for law enforcement agencies to abuse the measures, putting judges in an *ad acta* position. In spite of this, legislators have opted for an odd solution: at the request of the security services, intercepts are submitted to the Supreme Court by the chief state prosecutor, who has neither experience nor knowledge of their subject matter. To make matters worse, if these measures were abused, the prosecution would face the problem of how to sanction measures proposed by the chief state prosecutor.

North Macedonia's security servicesare face several difficulties. One is a legacy from the past, while others are the result of inadequately developed legislation regarding the distinction between different security services. Several anomalies exist: the treatment of issues that are outside the competence of the relevant service; overlapping competences among the services, especially between intelligence and counterintelligence; and the abuse of invasive measures when collecting information. It often happens that some events and people whose activities are classified as security threats are investigated by several different services.

Reform of the security services was the most heavily criticized element of the legal system in the Priebe Report. It is objectively incomplete, and needs serious monitoring.[160]

158 Designed as a new body, the Civil Oversight Commission is neither a state body, a legal entity nor a non-governmental organization, and therefore it cannot use the funds intended for website design and hosting, an archive, etc. The most logical solution is for this commission to operate as a body within Parliament, and to appoint members drawn from civil society and experts. But proper control over the legality of interception is not well regulated under the new Law on Interception of Communications.

159 See in G. Kalajdziev, P. Gjurchilova (Eds.), Manual for Implementation of Interception of Communications Measures, DCAF, Skopje 2019.

160 In the Priebe Report, interception of communications is one of the areas where significant shortcomings have been observed. Hence, the report established the concentration of power with the Administration for Security and Counterintelligence (UBK) and the malfunctioning of the oversight mechanism for UBK. In technical terms, the Priebe Report indicated that UBK holds a monopoly over the use of surveillance equipment and has exclusive rights in the interception of communications, while pursuant to Articles 175 and 176 from the Law on Electronic Communications (LEC), this administration is enabled to directly intercept communications, autonomously and unimpeded, irrespective of whether court orders have been issued. Security service reform, and in particular UBK reform, was therefore one of the key recommendations in this report.

7. CONCLUSIONS AND RECOMMENDATIONS

- A clear and consistent set of reforms, supported by solid comparative and empirical research, is a precondition for the success of judicial and police reforms. A comprehensive reform effort must use rational and proven methods to detect and eliminate all dysfunctional elements of the public prosecution, police and judiciary.
- Unfortunately, reforms in our country are more focused on aligning national legislation with the most recent standards in comparative and international law, instead of actual research into the root causes of the system's dysfunction. Theoretical concepts and solutions that work in developed democracies do not guarantee success in North Macedonia. Continuous changes to national regulations have led to underperformance. Insufficient knowledge of the new regulations, which requires knowledge of the law and practices in the states from which these solutions have been taken, could lead to improvisation.
- Institutional reform, staffing and technical resources are another precondition for successful reforms. Legal norms, good though they may be, have limited power. Experience shows that the way in which police, public prosecution and courts act upon cases in their day-to-day practice is often based on unwritten rules, and is difficult to change by legislative and administrative means. If new legal solutions and a new organizational structure are imposed without adequate preparation and a realistic assessment of possible risks, reforms could fail. Implementing foreign solutions from comparative law, without enough knowledge of the weaknesses in our system, could collide with existing values in our legal culture and put an unnecessary burden on practitioners. In that respect, very important reform concepts - including the completely new model for relations between the police, public prosecution and courts - still founder on misunderstandings and resistance from a number of different sources.
- We need to take a serious approach to resolving dysfunctionality in the justice system. Fast-tracked political solutions are unrealistic: we would do better to consult lawyers themselves.

Recommendations

for the police

- Greater coordination and alignment of police and public prosecution reforms.
- Reform of the police and other bodies with investigative authority, as well as secret (security) service reform, must be done in a more transparent manner.
- Particular measures are needed to strengthen the functional superiority of the chief state prosecutor over police sections involved in criminal proceedings, which would significantly reduce the risk of direct interference by the executive government.

Recommendations

for the Secret Service

- Adoption of the new law marked the start of security service reforms, but they are still incomplete. More effort is needed to define competences, in order to avoid abuse of legal authority for political purposes or to the detriment of human rights.
- Greater attention should be paid to the legal framework and mechanisms that perform oversight and control over these services. Particular concerns are raised about the body for civil oversight of interception of communications.

Recommendations

for reform of the Public Prosecution Office

- More effort to promote the independence of the public prosecution. Changes should be made to way the chief state prosecutor is selected and dismissed so that it does not depend on the executive, although this would trigger changes to the Constitution.
- Public prosecution as an institution requires completely new principles of institutional and functional organization. Hierarchy and subordination, as basic principles of the prosecution organizational setup and modus operandi, call into question the independence of the public prosecution office.
- Adequate systems of control over the public prosecution.
- The public prosecution service needs to meet modern European standards, with due respect for international norms.
- Those selected as public prosecutors should be individuals of integrity and adequate ability, relevant education and training, i.e. with a firm grasp of their ethical duties, as well as the human rights and fundamental freedoms enjoyed by suspects and victims, as guaranteed under the domestic and international law.
- Avoid de-professionalization of the Council of Public Prosecutors.
- Urgent action is needed to reinforce staffing and technical resources at the public prosecution service and to establish investigation centres, i.e. departments with independent prosecutorial investigators.
- Better regulation is needed in order to distinguish between police and public prosecution competences.
- A comprehensive analysis of the SPO's functioning should be conducted in order to better organize the Prosecutor's Office for Organized Crime and Corruption, as a lasting instrument in the fight against corruption of the political elite.

ABUSE OF THE AUTOMATED COURT CASE MANAGEMENT INFORMATION SYSTEM (ACCMIS)

Authors: **Margarita Caca Nikolovska and Vera Koco**

1. OVERVIEW

Abuse of ACCMIS is one of many ways in which politics influences the judiciary.

In spite of strict legal norms governing the use of the automated information system, judicial authorities allowed staff to override the automatic assignment of court cases for around five years (2013-17) at the Basic Court Skopje I in Skopje (renamed the Criminal Court Skopje) and the Supreme Court.

Possible abuse of the random court case assignment system was first indicated in the Priebe reports of the experts' group contracted by the European Commission. However, the problem was not taken seriously by the bodies responsible, and it was even longer before adequate measures were put in place to address it.

Judicial authorities have yet to tackle the abuses, improve public trust in the judiciary, or support North Macedonia's Euro-Atlantic aspirations and accession to the European Union.

2. INTRODUCTION

Between the Republic of North Macedonia's independence in 1991 and until adoption of the Law on Management of Case Flow in Courts in 2010, assignment of court cases was performed manually. In that period, the judiciary identified a need for legal regulation of court case management in order to address problems related to paper-based record-keeping, and possible abuses in the manual assignment of court cases.

The automated court case management information system was designed one year before the Law on Management of Case Flow in Courts was adopted. Although the law introduced strict rules and obligations regarding the management of court case flow, these rules were not adhered to by all courts in the state. Apart from minor omissions related to insufficient IT knowledge, significant abuse of the system started soon after it was put into operation at the beginning of 2013 at the two most important courts (the Supreme Court and the Basic Court Skopje I, now called the Criminal Court Skopje).

A publicly available Ministry of Justice report (November 2017)[161] concludes that the obligation for electronic recording of all cases and their random assignment to judges had been grossly disregarded. Court cases were recorded by expert associates, who decided when and which court panels would be assigned to work on specific cases; annual work schedules were changed multiple times over the course of the year; some judges had been excluded from the system without a written decision to that effect; and a series of other forms of system override had taken place.

For a long time, the bodies controlling ACCMIS took no measures to detect and prevent these abuses. The first attempt to do so was by the Council on Establishment of Facts, which initiated a procedure for establishing

161 Report from insight performed into functionality of the information system and supervision performed on implementation of provisions from the Court Rules of Procedure at the courts, Ministry of Justice, available at: https://www.pravda.gov.mk/Upload/Documents/%D0%90%D0%9A%D0%9C%D0%98%D0%A1%20%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98.pdf?fbclid=IwAR29Up43ut2CLnYiZqjfqN6pelrRIN5sw8ZCgtC5biijXlfyGfdQLiwipvk

responsibility with one judge and one court president, but faced obstruction by the then President of the Supreme Court. Nevertheless, it still managed to initiate several procedures before it was abolished with the adoption of the law of January 11, 2018.[162]

The public learned about the problems with ACCMIS after the Priebe report was published in June 2015.[163] The problem had still not been resolved by the time of the second Priebe Report in 2017, which contained further details of the methods used to abuse the system.[164]

Three years ago North Macedonia was assessed by the European Commission as subject to "state capture". However, the two last two country reports (2018 and 2019) have noted a certain amount of progress in implementing urgent reform priorities, including that of the justice system.

Recommendations put forward under Chapter 23 of the EC's 2019 country report are aimed at continued implementation of the Strategy on Justice System Reform, giving priority to the human resource development strategy and improvements to ACCMIS. This means there is still a need for continued efforts to eliminate the risks or perception of political interference on the judiciary. The emphasis is on the Judicial Council's role and the need for it to become more efficient in order to protect judges from external or internal pressures.

162 Law on Revoking the Law on the Council on Establishment of Facts and Initiation of Procedure for Establishment of Responsibility of Judges, "Official Gazette of RM", no. 11/2018

163 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, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

164 The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf

3. FINDINGS OF INTERNATIONAL AND NATIONAL REPORTS

3.1. Conclusions from the report of the senior experts' group led by Priebe (2015 and 2017)

Although solid legislation governs court case management and procedure and the mandatory use of ACCMIS in the assignment of court cases, that did not prevent some high judicial officials (court presidents) - as in the case of the Supreme Court and the Basic Criminal Court in Skopje - finding ways to override ACCMIS and abuse the system **by allowing manual assignment of some court cases. This started in January 2013 and continued until mid-September 2017.**

The first Priebe report in 2015[165] underlined the need for the Judicial Council to tackle the problem, and recommended that the rules on electronic assignment of cases must be strictly complied with. Any exceptions must be clear and predictable, and should not jeopardize the principle for which the system was established. Compliance with the rules should be regularly assessed by the Judicial Council and assessment reports must be regularly published and made publicly available. The principle of random case assignment should not detract from the need to ensure greater specialization of judges.[166]

The problem with ACCMIS was not resolved by the time of the second Priebe report.[167] It reiterated the issue and provided a detailed explanation of the method in which cases are unlawfully assigned.

Judges considered to be untrustworthy were transferred to other court departments (e.g., from criminal to civil cases), which appears to have happened at the Basic Court Skopje I. In addition, cases were not assigned to judges who were on

165 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, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

166 Ibid, pg. 10, 11 and 12

167 The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf

leave or otherwise unavailable. There are indications that some judges were deliberately unavailable at the time when sensitive cases were assigned, because they wanted to avoid having to hear them. The differing treatment of cases under the old Law on Criminal Proceedings and the new law adopted in 2013, and the fact that the system was overburdened when more people were granted access to it, facilitated the manipulation.

Although the system was supposed to record any interference, no adequate audit has taken place. Neither the Judicial Council nor the Supreme Court, which could both have issued orders for audits, carried them out. Their aim should be to establish proof of any interference, and they should not be subject to political influence. When necessary, international institutions or experts should be involved.[168]

The comprehensive audit recommended in both Priebe Reports was not conducted. The Council on Establishment of Facts at the Supreme Court did launch an initial audit but it was not concluded by the time the body was abolished in January 2018.

3.2. The findings of the working group at the Ministry of Justice (2017)

By the end of 2017 the Ministry of Justice had formed a working group comprised of seven members, and tasked it with monitoring ACCMIS's operation. It also ensured provisions under the Law on Courts, Law on Management of Court Case Flow and the Court Rules of Procedure were being met.[169]

The Ministry of Justice's working group found a series of weaknesses. In particular, **Basic Court Skopje I** had not adopted its annual plans on case flow management, reduction of backlog and delays in case management (except in the year 2013). Internal procedures on case flow management were never drafted and annual plans for that purpose were not developed at all, although the acting president of the court had established the working group on case flow management. The procedure for the adoption of the annual court schedules was not complied with, while annual schedules for 2016 and 2017 were often changed beyond what was allowed. Specific cases were re-assigned from one judge to another. Several criminal panels were formed, and the selection of judges to be automatically assigned court cases had been limited.

According to a notification by the acting court president, there had also been manual assignment of court cases. Automated assignment had not been used for court departments handling adult criminals (K) and organized crime cases (KOK), and the parameters for automated assignment were not in place. The intake officer had assigned their own expert associate (not a judge) to carry out the selection of judges for criminal panels in particular cases. From the launch of ACCMIS right up until the audit was carried out, court cases from 14 intake registries had been manually assigned.

In 860 cases, his court had not assigned a judge, which brings into question the accuracy of the data presented in monthly and annual reports on court and judicial performance.

The court administration had kept only hard copy intake registries for cases. Minutes had not been finalized annually and empty log numbers were kept, so that it was impossible to find out which case was listed under a given log number. The same thing happened with the electronic intake registry.

At the **Skopje Court of Appeal,** court cases were assigned once per day. ACCMIS had been implemented and was regularly used, except for court administration. However, even at this court there were several instances in which the annual work schedule was changed, albeit in compliance with the law, and a large number of requests for recusal (around 200) were made on legal grounds.

The **Supreme Court of the Republic of North Macedonia** also ignored its obligations. This court had not formed a working group on case flow management. New annual work schedules

168 Ibid, pg. 5.

169 Report from insight performed into functionality of the information system and supervision on implementation of provisions under the Court Rules of Procedures at the courts, available at: http://www.pravda.gov.mk/toc1/407

were adopted several times during the year. Judges' specialisms were not respected. Often, judges were reassigned to a different criminal trial without adequate justification. In 2017, the court schedule was changed nine times, mainly to influence the composition of judicial panels, which triggered manual assignment of cases so that their cases were assigned to the desired judges. The number of judge recusals was high, and automated assignment of a small number of cases had taken place several times in the course of a single day, contrary to the rules.

The working group concluded there was inconsistency in the way the Law on Management of Court Case Flow and the Court Rules of Procedure were applied, because ACCMIS had not been used for its intended purpose. Certain provisions in legal regulations had been abused in order to make frequent changes to annual schedules and ignore judges' specialisms.

Based on these findings, the Commission planned measures to address the situation: working groups should be formed, and tasked with case flow management and case processing to comply with legal competences, in order to ensure full use of ACCMIS at all courts; a body on the standardization of procedures should be established at the Supreme Court and hold regular sessions; at the same time, controls by higher-instance courts should be strengthened in order to ensure the Court Rules of Procedure, Law on Courts and Law on the Judicial Council were followed.

The findings of this report essentially confirm that the automated court case management information system was unlawfully manipulated, as the Priebe reports set out. The Ministry of Justice's working group is very clear: it amounts to explicit evidence that ACCMIS had been purposely abused by violating the legal norms that govern court case management.

In early 2017, the abuse of ACCMIS was duly noted in the Special Prosecution Office's report about procedures related to their work, with an indication of names of the judges concerned,[170] but the Judicial Council ignored these remarks and insisted it was not competent to act upon the reports.

3.3. The findings of the supervision commission at the Ministry of Justice (2019)

The Ministry of Justice (in compliance with the Court Rules of Procedure and its work plan for the period February-May 2019) surveyed eight courts across the country and presented its findings in the bi-annual report published in July 2019, which is publicly available.[171]

This report concluded that all courts needed to urgently upgrade their ICT equipment and capacity in order to comply with their legal obligations on court case management through ACCMIS.

The report emphasised that the system was not being used to make audio recordings of court hearings, scan incoming documents or back them up. At some courts, the number of anonymized decisions uploaded onto the website is significantly lower than the number of decisions taken, which means that not all have been published.

The report also established the need for continuous training of IT specialists and other court staff.

Some courts with extensive jurisdiction do not have court administrators. The courts had not formed departments on case law (except for the Administrative Court). Some courts are facing a shortage of judges because they have been seconded to the courts in Skopje.

Registries for all types of cases have been installed at the Administrative Court and Higher Administrative Court, as well as the Basic Civil Court and Basic Criminal Court in Skopje.

170 Press releases of the Special Prosecution Office from January 2017, March 2017 and November 2017

171 Minutes from supervision of the functionality of the Automated Court Case Management Information System (ACCMIS) at the courts, available at: http://www.pravda.gov.mk/vest/2983

The recommendations made by the supervision commission are aimed at optimizing ACCMIS, adjusting it to the needs of individual courts, and ensuring intake registries are kept. It also recommended improving the facilities for audio recording, publishing anonymized court decisions, regular ICT training for staff, and increasing the role of the Judicial Council in monitoring performance.

3.4. Findings from monitoring of the Judicial Council

The Institute for Human Rights has monitored the work of the Judicial Council for more than four years by attending public sessions, examining its website and submitting freedom of information requests. Some failings in the use of ACCMIS were noted as early as 2015, but the Judicial Council did not act upon them. For example, the Administrative Court had not recorded any changes to cases since 2014.[172]

At a session held in October 2015,[173] one member of the Judicial Council requested the formation of a standing committee that would carry out oversight of ACCMIS work, bearing in mind the reform priorities and concerns raised by the public about case assignment. However, a majority of Council members disagreed, saying they did not have the required authority. Because these irregularities had not been established during visits to the courts, the Council decided to wait for changes to ACCMIS that would allow further insight into the system.

At a session held in April 2016, information was shared about the formation of the working group on improvements to ACCMIS, which included judges and members of the Council,[174] but there was no information on any of the working group's activities.

In November 2017, the Judicial Council reviewed reports about the operation of the courts in the third quarter of the year, and discussed cases at some courts that had been incorrectly recorded. A check was proposed to see whether this error could be fixed and whether action had been taken to correct it, but there was no follow-up.[175]

After the Ministry of Justice presented its report, the Judicial Council did not engage in meaningful debate on its findings. Only in March 2018 was the report put on the agenda, together with items about the appointment of judges and court presidents.

It was emphasised that the Ministry of Justice's report about ACCMIS abuse provided evidence of the manual rigging of case assignment. But this was only discussed in the context of the possibility that some candidates for President of the Skopje Court of Appeal had not been properly evaluated, because they were unable to fully resolve cases. It was therefore proposed to organize an extraordinary evaluation of the candidates, which caused heated exchanges among members of the

172 Minutes from attendance at session held by the Judicial Council of RM, Institute for Human Rights, September 16 2015, available at: http://ihr.org.mk/uploads/%D0%97%D0%B0%D0%B-F%D0%B8%D1%81%D0%B-D%D0%B8%D1%86%D0%B8%20%D0%A1%D0%A1%D0%A0%D0%9C%202015-2016/Zapisnik%20od%20sednica%20na%20SSRM%2016.9.2015.pdf

173 Minutes from attendance at session held by the Judicial Council of RM, Institute for Human Rights, October 13 2015, available at: http://ihr.org.mk/uploads/%D0%97%D0%B0%D0%B-F%D0%B8%D1%81%D0%B-D%D0%B8%D1%86%D0%B8%20%D0%A1%D0%A1%D0%A0%D0%9C%202015-2016/Zapisnik%20od%20sednica%20na%20SSRM%2013.10.2015.pdf

174 Press release from 223rd session held on April 21 2016.

175 Minutes from attendance at session held by the Judicial Council of RM, Institute for Human Rights, November 8 2017, available at: http://ihr.org.mk/uploads/%D0%97%D0%B0%D0%B-F%D0%B8%D1%81%D0%B-D%D0%B8%D1%86%D0%B8%20%D0%A1%D0%A1%D0%A0%D0%9C%202015-2016/%D0%97%D0%B0%D0%B-F%D0%B8%D1%81%D0%B-D%D0%B8%D1%86%D0%B8%202016-2017/%D0%97%D0%B0%D0%B-F%D0%B8%D1%81%D0%BD%D0%B8%D0%-BA%20%D0%BE%D0%B4%20%D1%81%D0%B5%D0%B4%D0%B-D%D0%B8%D1%86%D0%B0%20%D0%BD%D0%B0%20-%D1%81%D1%81%D1%80%D0%BC%208.11.2017.pdf

Judicial Council. The rest of the session was closed to the public in order to consider the agenda item on the Ministry of Justice's ACCMIS report. However, the Council subsequently discussed agenda items that should have been open to the public.[176]

The final review of the ACCMIS report took place behind closed doors. The explanation was that although some matters had already been discussed in public, maintaining the dignity and integrity of judges was a priority for the Judicial Council, and the conclusions would be made publicly available. This did not happen.[177]

The Judicial Council then formed a commission that should have carried out investigations into ACCMIS's functionality, but when it reported in 2019 the Council said that additional checks needed to be made in order to ensure it had all the facts. Subsequently, the term of office of number of the commission members expired, so no information is available about whether the report's findings were pursued.[178]

After the president of the Basic Criminal Court in Skopje was indicted, the Judicial Council decided to suspend him from the office of court president,[179] and in September 2019 it also dismissed the President of the Supreme Court.[180] This decision is still not enforceable and is not publicly available, so the reasons for it remain unknown. Later, dismissal decisions were taken against two judges at the Supreme Court, but they too were unpublished. An indictment was filed against the former president of the Basic Court Skopje 1 before the Veles Criminal Court on the grounds of having overstepped the boundaries of public office. This case is still in its early stages.

176 Ibid.

177 Monitoring report on performance of the Judicial Council of RM in the period December 2017 – March 2018, available at: http://ihr.org.mk/uploads/IHR%20-%20Izvestaj%2005%20MAK%20(web).pdf?fbclid=IwAR3yDJIui7v-UT5TDjByG2-wZ8VuPz2ZOKHyqKJLfMB-piNhfvjOPNUrrkrA

178 Press release from 297th session of the Judicial Council of RM held on 7.2.2019.

179 Press release from 315th session of the Judicial Council of RM held on 17.7.2019.

180 Press release from 217th session of the Judicial Council of RM held on 10.9.2019.

4. CONCLUSIONS AND RECOMMENDATIONS

- Our assessment of the ACCMIS situation is based on analysis of the legal framework relating the possibility for its abuse, findings from two reports of the senior experts' group led by R. Priebe, the European Commission's country progress reports, two reports by the Ministry of Justice, direct monitoring at the Judicial Council's public sessions by the Institute for Human Rights, and investigative journalism by BIRN, all of which provided a clear picture of the abuse.
- ACCMIS is installed at all 34 courts in the state in order to facilitate their work of the courts and improve their efficiency. The system is open to abuse by wrongdoers.
- Except for monitoring by the Judicial Council, there was no supervision of lower courts by higher courts. Court presidents also failed to keep abreast of the situation. Their unprofessional attitude directly influenced the failure to record cases accurately, and consequently court performance assessments.
- The judicial system has been damaged and needs to be rebuilt. There is an obvious need for more energetic action. One has to ask whether dismissal alone will be enough, or whether some judges should face criminal proceedings.
- Distrust of the judiciary among the public is high, but the most serious result of the abuse has been the price paid by citizens whose rights have been violated.
- The damage done was facilitated by the Judicial Council, which failed to protect the independence and autonomy of the judiciary.
- The current Judicial Council has an obligation to continue monitoring the situation. However, they must hold those responsible for the abuse of ACCMIS accountable.

CONCLUSIONS

- ACCMIS was not regularly monitored by the Judicial Council, the Supreme Court and the Ministry of Justice;
- It did not take urgent action to prevent abuse of the system by court presidents;
- There were long delays in establishing who was responsible;
- Not all those responsible have been identified;
- ACCMIS is not fit for purpose;
- ICT staff are inadequately trained;
- There is not enough interoperability with other bodies;
- There is a lack of expert staff (judges, expert associates and court administrators).

RECOMMENDATIONS

- Compliance should be regularly assessed by the Judicial Council, and the assessment reports should be regularly published and made publicly available;
- Procedures initiated before the Judicial Council and related to ACCMIS abuse need to continue in order to ensure they are completed rapidly;
- Mandatory and timely monitoring of ACCMIS needs to be conducted by all the authorized bodies;
- Audio recording should be enabled;
- Intake registries should be managed and kept by the court administration;
- Inheritance and domestic violence cases should also be subject to automated assignment;
- A legal framework should be adopted to ensure better communication and data exchange with other organizations;
- Anonymized court decisions need to be published regularly;
- ICT training should be given to staff;
- Expert staff, such as court administrators, judges and expert associates, should be recruited.

THE (AB)USE OF DETENTION

Author: **Darko Avramovski**

1. INTRODUCTION

Detention is the most serious step the state can take to ensure the smooth passage of criminal proceedings. It is intended to secure the presence of suspects or defendants (depending on the stage of criminal proceedings) and to make it impossible for them to tamper with evidence, influence witnesses and, in general, obstruct the investigation, while also stopping them from committing new criminal offenses.

Legal provisions on the basis of which people can be detained stipulate the existence of a reasonable suspicion that they had committed the criminal offense. This must be combined with reasonable suspicion that the person:
- might abscond;
- might influence witnesses and obstruct investigation activities; or
- might repeat the criminal offense or commit another criminal offense.

As such, detention is included in the catalogue of legal grounds under **Article 5 (Right to Liberty and Security) of the European Convention of Human Rights (ECHR)** according to which a person can be deprived of liberty. This gives legitimacy to detention imposed in criminal proceedings, and allows people to be deprived of liberty without an enforceable court verdict - but only when special circumstances in the criminal case allow it and when detention is imposed in a fair way, strictly defined in law. The ECHR provides basic safeguards that must be in place when imposing detention measures. The most importance is assigned to those under Article 5, paragraph 3, whereby detained persons are entitled to be promptly brought before the court, to be tried within a reasonable time and to be released during court trial, which could be conditional on other guarantees that the person will not obstruct the process. Furthermore, the ECHR provides a general guideline for national legislations about the legal grounds for detention.

In the spirit of the ECHR, North Macedonia's **Law on Criminal Proceedings (LCP)** regulates the legal grounds for issuing detention orders, stipulating that they should be imposed for the shortest possible duration and only when other precautionary measures would not have the desired effect. At the same time, the law obliges all competent authorities to *ex officio* pay due attention to the length of detention and the existence of grounds and circumstances that provide the basis for the measure to be imposed, so that detention orders may be revoked as soon as the reasons for them cease to apply. LCP stipulates that detention orders should include a rationale that explains the reasonable suspicion for the existence of reasons for the detention, bearing in mind the details of the case and personal characteristics of the person, as well as an explanation of why other precautionary measures would not have the desired effect. Based on these provisions, detention must be lawful and justified, and they appear in the context of **the European Court of Human Rights (ECtHR)'s case law**. According to this, the **lawfulness** of detention is assessed in strictly formal terms, by assessing compliance with the procedure on the issue of detention orders, the existence of legal grounds for

issuing them, the relevant legal authority of the courts issuing them, etc. Clear and detailed rationales in detention decisions actually provide the only basis for the ECtHR to establish the **justification** for the detention imposed. For this reason, and in order to avoid the possible violation of fundamental human rights, as anticipated under the ECHR (in particular those under Article 5), these decisions should be supported by adequate arguments and should contain individual rationales concerning the suspect or defendant in each case.

Given that detention is the most rigorous precautionary measure that can be issued and enforced, and that it deprives people of their fundamental human right to liberty without an enforceable court verdict, many states and international organizations are taking steps to monitor and evaluate the adequate use of detention in order to prevent it being used as a form of hidden punishment (i.e. to prevent the violation of the presumption of innocence). In this context, the European Union, in cooperation with the Council of Europe, has developed **a methodology with a series of indicators to monitor and evaluate the adequate use of detention in order to ensure the maximum protection of human rights.**[181] These are divided into quantitative indicators, which are related to statistical indicators provided by information holders (such as courts and prosecution offices) and which concern the share of detention orders in correlation with the total number of cases, defendants or suspects; the use of other precautionary measures; and qualitative indicators based on ECtHR case law. Almost without exception, this is related to legal grounds for detention, compliance with the procedure for issue of detention orders, and the court's due attention to the protection of defendants or suspects' fundamental human rights, in correlation with the public interest and the smooth passage of criminal proceedings.

181 According to the methodology and indicators defined in the manual "Pre-Trial Detention Assessment Tool", developed as part of the project "Partnership for Good Governance", co-funded by the European Union and the Council of Europe, available at: https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06

2. A STATISTICAL OVERVIEW ON THE USE OF DETENTION IN NORTH MACEDONIA

The use of detention in North Macedonia has been criticized on several occasions by both domestic and international organizations – not only as a hidden punishment, but also in the context of poor conditions in prisons and other detention facilities, and the need for more consideration from courts when they approve these measures. Several EU, Council of Europe and UN reports underline that the state must reduce the use of detention and ensure adequate conditions at detention facilities in order to avoid additional and unnecessary suffering. In this context, the Law on Probation was adopted in 2015 and came into effect in 2016. Its main purpose is to strengthen and increase the use of alternative and non-custodial measures. So far, however, the law has not been properly implemented and the use of non-custodial measures remains marginal; alternative measures (with the exception of probation) are, in practice, not used.

In North Macedonia precautionary measures are used in less than 15% of cases of investigation or indictment,[182] which is roughly the same figure as the average in Council of Europe member states.[183]

Of all the measures requested by the prosecution service, more than 90% concern the deprivation of liberty (i.e. detention and house arrest. Together with the courts' high approval rate for these measures (above 95%), this gives rise to concerns about the justified use of detention to the detriment of other precautionary measures.

On average, the proportion of detention orders is slightly higher for the Prosecution Office against Organized Crime and Corruption (POOCC). Precautionary measures requested

182 Annual reports of the public prosecution offices in the Republic of North Macedonia, available at: http://jorm.gov.mk/category/dokumenti/izvestai/

183 World Prison Brief https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees

between 2015 and 2018, on average, cover 40% of the people under investigation or indictment, which is significantly higher than other prosecution offices where the rate stands at 15%.[184] More than 90% of POOCC measures involve detention, while only 10% of all measures are for house arrest.[185] However, as part of its annual reports, the Public Prosecution provides its own statistics on detention measures, which show a significantly lower frequency of detention (around 1.5% of cases, or several times less, depending on the period of calculation).

This difference is mainly due to the methodology used by prosecution offices, which takes the total number of reported individuals as its reference value. These include dropped criminal reports and those not taken up in the current year, reports involving children, those involving legal entities and other categories where precautionary measures, especially detention, are inappropriate. The sample used by PPRNM (the total number of reported individuals) is therefore an inadequate basis for comparison.

The calculations for this analysis exclude criminal reports that were dropped or closed, penal orders, plea settlements in pre-trial proceedings, and children. This is because detention orders cannot be issued in these proceedings, or at this stage.[186] Our sample includes only relevant and applicable cases, i.e. the number of initiated investigations together with the number of indictments filed against adults.

For comparison, an analysis of relevant figures for 2017 shows that criminal reports were submitted against 31,511 persons, but in the same year investigations were opened into 2,477 people, which resulted in 733 acts of indictments and 4,028 indictment proposals[187], together accounting for a total of 7,716 persons that could be covered by detention orders. Based on these absolute figures, the share of detention orders issued (to 457 people) accounts for 1.5% when applying the PPRNM methodology (calculated in accordance with the total number of criminal reports adopted in the calendar year) or 6% when applying the Council of Europe/ EU methodology.

Analysis of 2017 statistical data for POOCC shows that this prosecution office acted upon a total of 408 reports, but investigations were opened into only 192 people, and detention orders were issued for 95. According to the PPRNM methodology, the share of detention orders for this prosecution office stands at 23.3% of all cases, while the relevant share calculated using the Council of Europe/EU methodology accounts for 49.5%. If competent institutions and especially PPRNM also collect and process other data which could be broken down by criminal offense, age group of the perpetrators, procedure duration and outcome, motions for detention after indictments are filed, etc., the difference between the shares obtained under these two methodologies could be even greater.

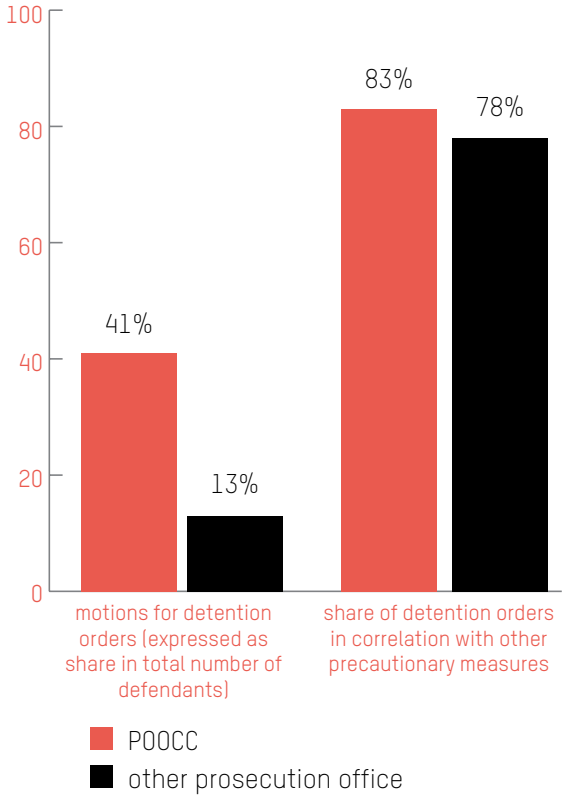
184 In 2017, total of 306 persons were reported to POOCC and custodial measures were imposed for 127 of them (41.5%), while detention orders were issued for 95 of the total of 192 persons under investigation (49.5%).

185 2015, 2016, 2017 and 2018 annual reports of the Prosecution Office against Organized Crime and Corruption, which are not publicly available.

186 According to the methodology and indicators defined in the manual "Pre-Trial Detention Assessment Tool", developed as part of the project "Partnership for Good Governance", co-funded by the European Union and the Council of Europe, available at: https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06

187 There are two types of indictments in Macedonia: acts of indictment, and indictment proposals. The first is filed by the prosecution in the cases of more serious crimes and has to be approved by a special council of the court before it reaches the trial council of the same court. The latter is an indictment filed in cases of lesser crimes, and initiates a summary criminal proceeding - basically a shortened procedure, which lacks an investigative phase and other elements.

Overview of relevant shares of motion for detention orders submitted by POOCC and other prosecution office

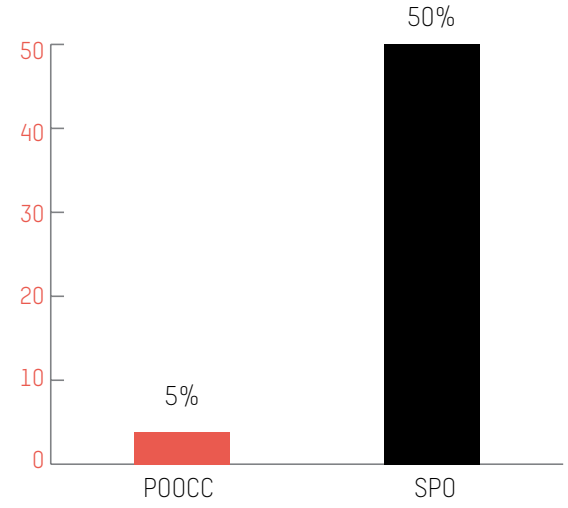


Although this deviation from the average - or more precisely, the high use of detention by POOCC – might be understandable, bearing in mind the nature and complexity of criminal cases falling under this prosecution office's legal authority, what is particularly noticeable is the equally high rate of approvals for detention by the courts, irrespective of whether these motions are submitted by POOCC or other prosecution offices.

35% of all criminal reports processed by POOCC concern criminal offenses related to corruption and abuse of public office and duty, but less than 5% of indictments are related to these criminal offenses.

Expressed in absolute figures, in the period 2015-2017 criminal reports on abuse of public office and duty were submitted against a total of 376 people, but indictments (acts or proposals) were submitted for only 14 - and detention orders were issued for only four. **In the context of these figures, on average, motions for detention related to criminal offenses of corruption and abuse of public office and duty account for 0.5% of the total.**[188]

Indictments filed (acts and proposals) related to criminal offences against public office (Chapter 30 of the Criminal Code)



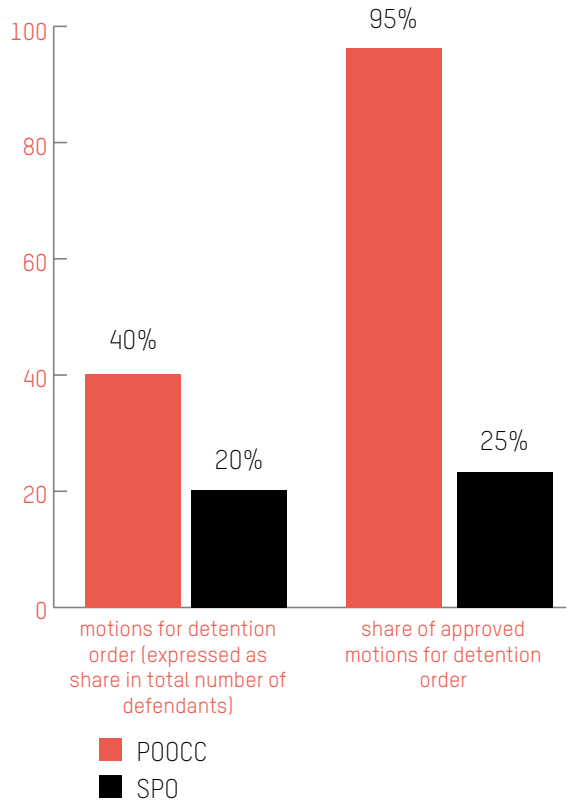
On the other hand, the Special Prosecution Office - which was formed to prosecute criminal offenses related to organized crime and high level corruption, because it was believed that regular prosecution offices, including POOCC, lacked the capacity to resolve these cases - used completely different statistics. First, **the number of indictments filed by SPO in relation to criminal offenses of corruption committed by senior public officials accounts for more than half of all indictments filed by the office.** In absolute figures, SPO's indictments cover 145 people in a total of 22 cases, of whom 85 are former or current public officials accused of corruption in 14 cases led by the SPO.

Although SPO has a smaller number of cases than POOCC, indictments (acts and proposals)

188 2015, 2016, 2017 and 2018 annual reports of the Prosecution Office against Organized Crime and Corruption, which are not publicly available.

filed by SPO in 2017 covered 121 people,[189] while the annual average of indictments (acts and proposals) filed by POOCC in the period 2015-2018 involved 187 people.[190] As regards detention measures, **SPO has requested detention for around 20% of people in its cases (compared to 40% in the case of POOCC), and the court has approved only 25% of requested detention orders (compared to 95% in POOCC).**[191]

Comparative overview on use of detention orders by POOCC and SPO



These statistics are partially due to the obstructions faced by SPO in the initial stages of its operation and the relatively smaller scope of indictments filed, but are also because of its efforts to minimize the impression that its use of detention, and consequent abuse, is excessive. Nevertheless, when these statistics are compared to POOCC's, particularly the low percentage of initiated investigations and cases of high-level corruption, there is a trend of minimal use of detention when former or current senior public officials appear as defendants or suspects.

189 http://sudskodosie.all4fairtrials.org.mk

190 Data are calculated as a mathematical average for the period 2015 - 2018 from figures indicated in 2015, 2016, 2017 and 2018 annual reports of the Prosecution Office against Organized Crime and Corruption and do not reflect the actual scope of POOCC's work per year. On an annual level, numbers vary from 106 indictments in 2016 to 288 indictments in 2018.

191 Numbers are expressed as shares due to substantial differences in absolute figures (in the case of SPO, motions for detention concern 20 people).

2.1. Legal grounds for the issue of detention orders

On the legal grounds for issuing detention orders, which provide the basis for assessing whether detention measures are formally compliant with the law (but not whether they are justified), Article 165 of LCP stipulates three legal grounds:

- when the person reasonably suspicted of having committed a criminal offense has absconded, or there is reasonable suspicion he/she might do so;
- when there is reasonable suspicion that the person might obstruct the investigation, tamper with evidence or influence witnesses; and
- when there are specific circumstances that refer to the risk of the person repeating the offense, pursung it or commiting a new criminal offense.

The separate legal ground under Article 165 concerns situations such as: 1) when the defendant avoids attending the main court hearing; and 2) when the defendant is absent, although the court has made two attempts to ensure his/her presence by means of a subpoena. Nevertheless, these cases do not amount to separate grounds for issuing a detention order, but rather a formal distinction *between* legal grounds, because the situation described under Article 165, paragraph 1, item 4 is already covered by the definition of reasonable suspicion that the person might flee the country (as stipulated in Article 165, paragraph 1, item 1). At the same time, item 4 under paragraph 1 refers to the issue of detention orders after the indictment entered into legal effect, i.e. after the investigation is

completed, and with a maximum duration of 30 days, while the first three circumstances could be used as grounds to impose or extend detention at any stage of criminal proceedings.

2.2. Based on the above, several conditions must be in place for detention order to be lawful:

- reasonable suspicion that the defendant has committed the criminal offense he/she is charged with;
- at least one of the legal grounds for the issue of detention order is in place, whereby each legal ground should be justified with separate reasons and circumstances that give rise to reasonable suspicion that provides a basis for detention, and each legal ground should be considered separately; and
- the court has objectively assessed that a combination of several non-custodial measures to secure the person's presence and the smooth course of criminal proceedings would not have the desired effect.

Article 163 of LCP regulates house arrest as a less severe alternative to prison detention, although it still deprives people of their liberty without a sentence. LCP stipulates the same conditions as those set out above on prison detention, but fails to say when detention could be replaced with house arrest, leaving it to the courts to decide which measure to impose. The fact that identical conditions are imposed in both suggests the two measures are equally weighted, and the ECtHR's case law also equates them, at least in terms of how they relate to Article 5 of the ECHR.[192]

A high percentage (more than 70%) of detention orders are issued on the basis of all three grounds: risk of absconding; risk of the person obstructing the investigation, tampering with evidence or influencing witnesses; and the risk of the defendant reoffending.[193] In other cases, detention orders are issued solely on the grounds of flight risk, or a combination of flight risk and another reason. In almost 1% of cases detention is imposed on other grounds. When it comes to extending detention, the grounds are similar.[194]

3. DURATION OF DETENTION ORDERS

When a freedom of information request was submitted about the length of detention, prosecution offices only disclosed the data for the years 2015 and 2016 and only for detention orders requested by POOCC. **In the vast majority of cases detention orders were extended, which means that in most cases they lasted for more than one month.**

For POOCC, in the majority of cases detention lasted for more than 60 days, and in a lower but still significant share of cases it lasted over 90 days. In some, it exceeded 180.

As shown in the charts below, in 2015 detention lasted for more than 60 days in almost 70% of cases (140 of a total of 201 people issued with detention orders). In 2016 it accounted for more than 75% of cases (72 of a total of 96).

There is insufficient data about the stage at which detention was extended (whether during the investigation or *after* the indictment was filed) which would allow further monitoring of the length of detention. Article 171 of LCP stipulates that detention orders at the investigation stage should have a maximum duration of 30 days, which can be extended for another 60 days by the court's judicial panel. In exceptional circumstances (when the

192 Buzadji v. Moldova, application no. 23755/07; Mancini v. Italy, application no. 44955/98; Nikolova v. Bulgaria, application no. 40896/98; DaCosta Silva v. Spain, application no. 69966/01

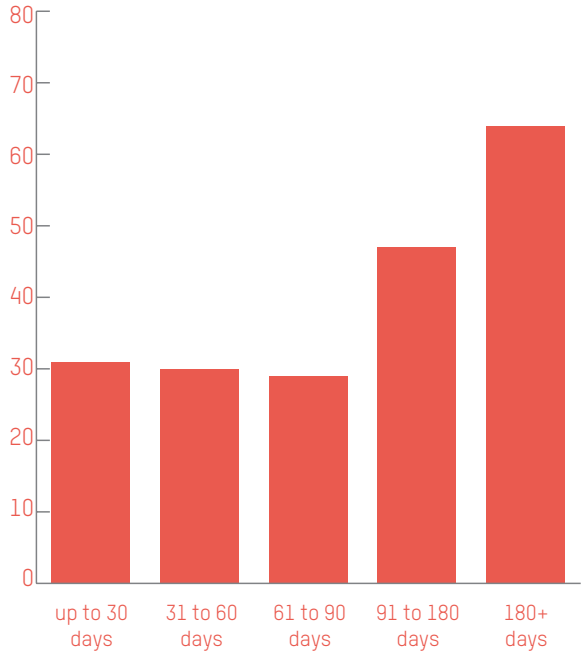
193 Basic Court Skopje 1, Skopje, Statistics on issuance of precautionary custodial measures in 2015, available at: http://www.sud.mk/wps/wcm/connect/osskopje1/a79b7f11-5c9a-4e0d-b2ff-bfcc875bf0db/Statistika+za+merki+za+obezbeduvanje+prisustvo+204+i+2015.pdf?MOD=AJPERES&-CACHEID=ROOTWORKSPACE.Z18_L8CC1J41LO88F0A1K-8MT8K0AM5-a79b7f11-5c9a-4e0d-b2ff-bfc-c875bf0db-liVU7u6

194 Data obtained in response to the request submitted under freedom of information laws, A. no. 03-941/2 from the Public Prosecution of the Republic of North Macedonia.

criminal offense concerned attracts a prison sentence of at least four years), detention could be extended for another 90 days. This means that the total duration of detention in the investigation stage, including the time from the person's arrest until adoption of the decision, cannot be longer than 180 days. After this period the detained person must be immediately released.

In 2015, detention orders were fast-tracked for 27 people, and for 22 people in 2016. They were set for a maximum duration (stipulated under Article 470 of LCP) of eight days after the submission of the indictment proposal: the first trial hearing must take place by this time. According to the same article, fast-tracked detention indictments can be set for a maximum of 60 days, but relevant data is not available for this category of detention.

Duration of detention orders in cases led by POOCC in 2015



Additionally, **there is a high frequency of detention orders lasting more than 90 days, i.e. 55% of the cases in 2015 (111 of a total of 201) and 30% of the cases in 2016 (29 of a total of 96).** The public prosecution offices said they did not have this data for 2017 and 2018, while the basic courts do not have any information on the length and and extension of detention.

4. JUSTIFICATION FOR DETENTION ORDERS

Although these statistics are relatively limited in terms of quantity and quality, and the methodology used by prosecution offices is inadequate, we should point out another concern: the justification of the length of detention.

As can be seen from the detailed elaboration of the ECtHR's case law, the court pays a lot of attention to the existence of adequate rationales in decisions on extending detention. The ECtHR found that when approving consecutive extensions to detention, the courts are obliged to pay even greater attention and to provide new arguments that explain why detention could not be replaced with non-custodial measures in the later stages of criminal proceedings. The project team was informed by the courts that their information system (ACCMIS) does not enable data on detention duration to be processed. This raises additional questions about the methods of data collection and processing by institutions. The failure to collate as much detention-related data as possible indicates the lack of awareness among authorities of the gravity of this situation, and of criticisms about the use of detention.

Every year, more than 10% of the people for whom precautionary measures were requested were subject to house arrest. This is about the same percentage as receive a non-custodial measure.[195] Nevertheless, partly because inadequate methodology is used to monitor and evaluate the use of detention, prosecution offices[196] and courts[197] believe that criticism of the excessive use of detention is exaggerated, even though detention is used four times more frequently than other precautionary measures.

195 Data obtained in response to the request submitted under freedom of information legislation, A. no. 03-936/1 from the Public Prosecution of the Republic of North Macedonia

196 2017 annual report of the Prosecution Office against Organized Crime and Corruption, pg. 18; 2018 annual report of the Public Prosecution of the Republic of North Macedonia, pg. 15

197 Basic Court Skopje 1, Skopje. Statistics on precautionary measures in 2015 and 2014, pg. 4

The high proportion of detention orders, together with the large proportion issued on the grounds of flight risk, suggest the Law on Probation is not being properly implemented. Judges are mistrustful of non-custodial measures in their efforts to ensure suspects appear at court.

On the other hand, although they account for a small share of the total measures, non-custodial measures are still imposed. This raises the following questions:

5. Whether the use of non-custodial measures is justified, if judges believe they are ineffective; and
6. If their use is justified and they are effective, why are they not more widely used?

5. CASE STUDIES THROUGH THE PRISM OF EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

Although these statistics are indicative and show certain trends, they are still insufficiently detailed and precise for specific conclusions to be drawn. More research is needed on this topic, as well as efforts to increase awareness among institutions about the implementation of systemic monitoring and evaluation of the policies and regulations that govern detention. In this context, the **ECtHR has assessed that detention is legal as long as it is imposed in compliance with legislation, but it has often found the inadequate explanation of courts' detention decisions problematic**. In the case of *Lind v. Russia*, the ECtHR established that as long as the domestic courts act within the framework of their legal authority detention orders cannot be considered unlawful, but it assigns crucial importance to the reasons listed in domestic courts' decisions, on the basis of which the ECtHR is called upon to decide whether Article 5, paragraph 3 from ECHR has been violated.[198]

The ECtHR's case law on assessing the justification for detention orders, established in several cases including *Vasilkoski and others v. Macedonia*, shows there must be detailed and individual rationales for imposing or extending detention. They cannot be in a brief or summary format (i.e. not general and abstract, or based on standard formulations) and the explanation of the grounds for issuing detention orders - such as the gravity of the offense, lack of personal property or permanent residence, etc – should not be based on a template.[199]

5. COBWEB[200]

This practice was confirmed in the case of *Ramkovski v. Macedonia*[201], which concerns the detention imposed on defendants in the case known to the Macedonian public as *Cobweb*. It is often cited by the public as an

198 Lind v. Russia, application no. 25664/05, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-124119%22]}

199 Vasilkoski and others v. Republic of Macedonia, application no. 28169/08, available at: http://biroescp.gov.mk/wp-content/uploads/2016/12/%D0%92%D0%90%D0%A1%D0%98%D0%9B%D0%9A%D0%9E%D0%A1%D0%9A%D0%98-%D0%98-%D0%94%D0%A0.-%D0%BF%D1%80%D0%BE%D1%82%D0%B8%D0%B2-%D0%A0%D0%95%D0%9F%D0%A3%D0%91%D0%9B%D0%98%D0%9A%D0%90-%D0%9C%D0%90%D0%9A%D0%95%D0%94%D0%9E%D0%9D%D0%98%D0%88%D0%90.pdf

200 Cobweb formally began with a criminal investigation launched by investigative judge in December 2010, and was preceded by tax inspections conducted by PRO in November 2010. The criminal investigation charged 23 individuals and 10 legal entities with criminal association, tax evasion, money laundering, embezzlement and abuse of public office and duty, under an indictment filed on May 24 2011. Legal entities accused of these criminal offenses included the media groups TV A1, TV A2 and Plus Production, which printed the newspapers Vreme, Koha e re and Spic which were identified at that time as critical of the government. Other defendants included owners, managers and editors at these media outlets. These actions, together with lack of transparency of the entire process, were why many domestic and international organizations expressed concerns about media freedom, freedom of expression, and the abuse of power for political purposes. The enforceable verdict in this case was adopted by the Skopje Court of Appeals on February 25 2013. Nineteen people were sentenced to imprisonment, while three were acquitted.

201 Ramkovski v. Macedonia, application no. 33566/11, available at: http://biroescp.gov.mk/wp-content/uploads/2016/12/%D0%A0%D0%90%D0%9C%D0%9A%D0%9E%D0%92%D0%A1%D0%9A%D0%98-%D0%BF%D1%80%D0%BE%D1%82%D0%B8%D0%B2-%D0%A0%D0%95%D0%9F%D0%A3%D0%91%D0%9B%D0%98%D0%9A%D0%90-%D0%9C%D0%90%D0%9A%D0%95%D0%94%D0%9E%D0%9D%D0%98%D0%88%D0%90-%D0%9F%D1%80%D0%B5%D1%81%D1%83%D0%B4%D0%B0.pdf

example of the abuse of detention as a hidden punishment, and a means of persecuting a media outlet that at the time was critical of the government.

Ramkovski v Macedonia, known as Cobweb

Nineteen people were detained during an investigation into suspected tax evasion and money laundering carried out by an organized group.

Legal entities accused of these criminal offenses included the media groups TV A1, TV A2 and Plus Production, which printed the newspapers Vreme, Koha e re and Spic, which were identified as critical of the government,. Other defendants included owners, managers and editors at these media outlets.

Initially, detention orders were issued on all three grounds stipulated under LCP (flight risk, the potential for reoffending and obstructing the investigation). After the indictment was filed, detention was extended only on the grounds of flight risk and the existence of special circumstances that indicate defendants might repeat the offense. In the course of criminal proceedings, detention orders for five people were replaced with house arrest, while detention for one person was replaced with non-custodial measures. Nine people remained in detention for more than a year. **A total of 20 people in the case were found guilty in court, including all 19 people initially issued with detention orders**.

Acting upon this application, the **ECtHR found a violation of Article 5 from ECHR** because decisions on imposing and extending detention, and subsequent decisions of the Appeal Courts, featured rationales with almost identical formulations. Therefore the ECtHR assessed that the domestic courts neither demonstrated nor provided arguments for a single specific fact justifying the detention measures. More specifically, regarding the flight risk which was the main legal ground for extension of detention in this case, decisions taken by the domestic courts were based only on threatened legal sanctions and the gravity of the criminal offense of which these people were charged and which, according to the ECtHR, cannot in its own right be grounds to impose detention. The additional reason for the ECtHR's judgment is that several co-defendants in this case had fled the country, which the domestic court assessed to have increased the flight risk of other defendants. The ECtHR again underlined that the behavior of other defendants should not be a decisive factor in imposing detention, and the personal circumstances of the suspect must always be taken into account. As regards the risk of reoffending, the ECtHR believed that the fact that defendants had committed the offense as a group could in its own right be considered sufficient to justify long periods of detention, while the fact that they still held the same jobs at companies implicated in the case could be a relevant factor in imposing detention, but not the sole grounds for extending it. The ECtHR's judgement also made clear that the extension of detention beyond the previously defined period must be based on additional and more significant reasons, adequately supported with evidence and explanations.

6. LIQUIDATION

The *Liquidation* case is similar to *Cobweb*: several people were accused of the abuse of office and public duty, offering and receiving bribes, and the unlawful mediation and unauthorized disclosure of information and data concerning witnesses, informers, undercover police officers, advisors, experts, victims appearing as witnesses and people close to them. What particularly attracted the attention of the public is that the defendants included a journalist who had been charged with the unauthorized disclosure of data related to a protected witness in an article, but also that the defendants, who included judges, prosecutor and an attorney-at-law, had been detained for an unusually long period of time: six months in detention, and later more than a year under house arrest.

Given detention is rarely imposed in cases related to the abuse of public office and duty, as well as the fact that the defendants again included a journalist who was critical of the government and had published an article to that effect, the public asked whether detention was being used as a hidden punishment and the principle of the presumption of innocence had been violated.
All defendants in this case were found guilty, but this year the case was returned for a retrial after the guilty verdict was revoked by the Supreme Court.

Without prejudice to *Liquidation*'s possible outcome at the ECtHR, an analysis of the decisions about detention orders concludes that they include the same (or similar) omissions, on the basis of which it established the violation of Article 5 of the ECHR in *Vasilkoski and others v. Macedonia* and *Ramkovski v. Macedonia* (cited above). These violations concern the use of summary and formulaic rationales for decisions about detention orders. In this case, too, the domestic courts had given particular weight to the gravity of criminal offense for which defendants are charged, as well as the fact that the criminal offense has been committed as a group, without assessing the personal characteristics of individual defendants and rejecting other precautionary measures instead of detention. In this case, the domestic courts did not take into account the fact that the defendants had no previous convictions and that their personal characteristics did not suggest a possible flight risk. The court also rejected the journalist's application for release from detention on bail, as well as several applications made on the basis of poor health. Finally, after the first-instance verdict, motions to replace detention with non-custodial measures were approved by the court on the basis of the same circumstances which the same court had previously considered insufficient to justify a non-custodial measure.

Due to the lack of adequate and individual rationales in decisions on detention orders, the opaque process and the societal context at the time, the public raised concerns about the abuse of detention. Non-government organizations and experts also criticised the implications for the violation of the presumption of innocence.

7. TWO MEMBERS OF THE POLITICAL PARTY LEVICA

Another example concerns the case against two members of the political party Levica**.** It involved their participation in protests organized by the so-called Colorful Revolution, and the demolition of the People's Office of the President of Republic of Macedonia, followed by presidential pardons for everyone involved in the cases led by SPO.

These two defendants were charged with "participation in a crowd that would a commit criminal offense", which according to LCP should be fast-tracked. However, the defendants spent 45 days under house arrest that was later replaced by non-custodial measures (confiscation of traveling documents and an obligation to regularly appear at the court) - and even these measures were later revoked.

This court process started in May 2016 and is still underway, as the Court of Appeal revoked the first-instance verdict acquitting the defendants of criminal charges and ordered a retrial. During the retrial in November 2019, the Skopje Criminal Court again established that the public prosecution had failed to prove beyond reasonable doubt that a criminal offense had taken place and that the defendants had committed it, again acquitting them of all charges. Although the decision to replace house arrest with non-custodial measures and their subsequent cancellation were welcomed by the public, it is hard to see how house arrest could ever have been justifed. Moreover, in this case there was no change to the circumstances in which house arrest was initially approved, and the court's decisions do not provide any indication of the

defendants' individual circumstances that would give rise to a flight risk or reoffending.

Furthermore, the house arrests were relatively long, especially bearing in mind that the criminal offense concerned was supposed to be fast-tracked due to the short sentences it attracts.

In fact, the damage caused served as a reason for the delay of other court trials related to Colorful Revolution protests. They ultimately resulted in the withdrawal of the charges, mainly because after the amount of damage had been established, it was found to justify only a misdemeanor rather than a criminal offense.

It is legitimate to ask whether, in this case, there is a reasonable suspicion that the people under house arrest had committed any criminal offense – given that the cost of the damage had not been clearly established and it was unclear whether it was a criminal matter at all. These uncertainties make it hard to see how the flight risk could be quantified.

For detention to be lawful and justified, there must be a reasonable suspicion that a criminal offense has been committed, together with the existence of at least one of the legal grounds to impose detention. Detention orders must set out these grounds in detail in the context of the defendants' individual circumstances, together with an explanation of why other measures to secure the defendants' presence would be insufficient. The public suspicion was that the use of house arrest was designed to intimidate the defendants and other people who participated in the protests – and that it amounted to political retaliation and abuse of the courts by the executive. The two first-instance acquittal verdicts lend weight to this interpretation, and if they are confirmed by the Court of Appeal the state would have to compensate the two defendants on the grounds that they were unlawfully deprived of their liberty - a violation of Article 5 of the ECHR.

8. CASES LED BY THE SPECIAL PROSECUTOR'S OFFICE: A DIFFERENT PROCEDURE

The Special Prosecution Office was formed after the so-called Przhino Agreement, which was brokered between the four biggest political parties under the auspices of the European Union and was the result of perhaps North Macedonia's biggest political crisis.

This process started when the then leader of the Opposition disclosed illegally wiretapped conversations. Their contents confirmed many public suspicions about the abuse of power for personal and political goals, mass interference by the executive in the functioning of courts and prosecution offices, and the organized and illegal interception of communications by the Administration for Security and Counterintelligence at the Ministry of the Interior.

SPO was tasked with investigating this wrongdoing by taking over cases which the Public Prosecution of the Republic of North Macedonia was not thought to have the capacity or willingness to resolve adequately.

As a result, the Special Prosecution Office was given complete autonomy, disposing of its own team of investigators and IT experts. It paid special attention to transparency in its operation and adequate enforcement of LCP and ECHR provisions. Because of the public's lack of trust in courts and prosecution offices, SPO took a new approach to public communications whereby prosecutors and its public relations department often informed the public of the start of investigations and of the actions being taken. This was done in accordance with the principles of secrecy for certain aspects of pre-trial proceedings and of the presumption of innocence. Intending to increase public trust in these institutions, SPO applied a different approach to custodial and property matters. It therefore often opted

for non-custodial measures in order to avoid the impression that it was being used for the purposes of political retaliation.

SPO's efforts to minimise the use of detention were fully compliant with the presumption of innocence and with Article 5 from the ECHR, whereby a person's liberty should always be privileged, irrespective whether they are a suspect or a defendant.

However, SPO faced active resistance from other institutions, a lack of cooperation, and even obstruction by courts in the form of a failure to schedule or hold trial hearings or other procedures stipulated under LCP. As a result, the court did not approve many applications for detention.

9. TRUST[202]

However, another facet of SPO's operation implied a complete deviation from established practices for the issue and enforcement of detention orders, including the voluntary interpretation of legal provisions regulating them. An example is the Trust case, which set a precedent for the interpretation of LCP provisions and exploited legal loopholes and overlapping legal provisions from the Law on the Public Prosecution Office and the Law on the Special Public Prosecution Office, which govern the autonomy of operation and the legal authority to act before the Supreme Court.

In this case, the deadline for drafting the detention decision was not met, which amounted to an abuse of legal authority. This period was used by the defendant to flee the country. Immediately afterwards, the then Chief State Prosecutor presented the Supreme Court with an application for detention to be revoked.

Yet this case was the result of illegal wiretaps, and therefore fell under the exclusive legal authority of SPO. Despite this, the Supreme Court admitted the application and revoked the detention order. The case was returned for repeated decisions and the judicial panel revoked the detention order even though throughout this period there was reasonable suspicion that the defendant was in hiding, given his attorneys were also unaware of his whereabouts. Immediately after detention was revoked, the defendant returned to the country and attended the main hearings for this case. He was found guilty.

Nonetheless, the blatant deviation from legal frameworks, the Chief State Prosecutor's interference in SPO's legal authority, the unprecedented decision by a public prosecutor to apply for an application to review the lawfulness of detention, and the fact that detention was revoked when the defendant was unavailable to the authorities are highly revealing. The intention was to avoid putting him in detention.

202 Trust was initiated by the SPO with an investigation launched in February 2017. It resulted in charges against three legal entities and three individuals. Defendants were charged with presenting fraudulent bids in 2011, which were subsequently awarded a contract with JSC Power Plants of Macedonia (ELEM) to the value of 17 million euros and thereby illegally profiteering. This case attracted the public's attention because the proceeds were so significant (the highest level under the Criminal Code), and because it was among the rare cases in which the defendants were not former or incumbent public officials, as well as being one of two cases that implied the confiscation of assets. The first-instance verdict was issued in July 2018, and implied a guilty verdict for two individuals and two legal entities. Another individual was acquitted and one indictment against a legal entity was withdrawn. The Basic Court issued prison sentences of six years for the first defendant and three for the second, although the criminal offense implied a jail term of at least five years, and the Criminal Code in effect at the time only allowed the sentence to be reduced below the minimum in cases of a guilty plea, which did not apply in this case. When the case was adjudicated on appeal, the Parliament of RNM adopted amendments to the Criminal Code that implied reduced sentences for this criminal offense (from at least five years to at least four years imprisonment) and restored the old and vague definition on reduction of sentences below the minimum set out in law, giving the court discretion when making such decisions. The first-instance verdict was amended by the Court of Appeal and the defendants' sentences were also reduced. The first defendant was sentenced to four years and eight months imprisonment , while the second was issued with a conditional sentence (release after two years and no further imprisonment, provided the person does not reoffend). Both legal entities had property confiscated to the value of 17 million euros.

10. FORTRESS 2[203]

Shortly afterwards the President granted blanket pardons, and then expressly withdrew them, meaning that criminal proceedings against all the defendants were terminated. After the pardons were withdrawn, the judicial panel rejected SPO's repeated application for detention and instead issued precautionary measures. Acting on SPO's appeal, the Skopje Court of Appeal issued detention orders.

Another case led by SPO and known as *Fortress 2* was the subject of similar abuse, and the selective interpretation of LCP provisions. It allowed two defendants to flee the country. This case involved deviation from legal frameworks, but also from established procedures in appeals lodged against detention orders, and concerned the legal effect and enforceability of these decisions. When criminal proceedings opened, the pre-trial judge approved detention for the defendants. This was followed by an appeal at the Basic Criminal Court Skopje which resulted in detention being replaced by house arrest.

In an unprecedented decision, the Court of Appeal made clear that detention would not become enforceable until the Supreme Court gave its opinion on the appeal. Although it is clear that the court assumed its decision would be appealed, the fact it anticipated a nonexistent future appeal and used this to justify the postponement of detention is especially problematic.

This unprecedented situation enabled the defendants to flee the country. They are still on the run.

This is a violation of LCP provisions, which do not allow appeals against Court of Appeal decisions. The All for Fair Trials coalition had made this clear in previous instances. In law, Court of Appeal decisions on issuing or revoking detention orders have legal effect and should be enforced.

In this regard, the Court of Appeal interpretation that an appeal against a decision about a detention order postpones its enforcement is inadequate. This is because, according to LCP, appeals against detention order decisions do not postpone their enforcement: the person is taken into detention each time an order is issued, and is released when their order is revoked on appeal. The same logic is applicable in the opposite situation: appeals against decisions on revoking detention orders postpone their enforcement, which means that if the detainee is released, they must wait for the outcome of the appeal and for the decision on revoking the detention order to be confirmed before they can be freed.

11. CONCLUSIONS

➲ Based on the statistics, it is clear that authorities are aware of the gravity of detention measures: they are issued relatively rarely, given how many people are under investigation or indictment. However, an analysis of detention orders in cases related to organized crime and corruption suggests detention is used more frequently. The disproportionately high frequency of detention to the detriment of other precautionary measures is concerning, especially since this

203 The Fortress 2 case began with an indictment proposal filed by SPO in November 2016 against seven people employed by the Administration for Security and Counterintelligence (UBK), and concerned the illegal destruction of equipment and evidence for the mass interception of communications by UBK. Given the specific criminal offense is tried by a fas-tracked procedure, SPO requested detention for two of the defendants immediately after indictment. The case was completed one year later, in November 2017, with first-instance guilty verdicts for the defendants. In May 2018, the first-instance verdict was confirmed for all but one defendant and they were given conditional sentences, while court proceedings for the other were returned for reconsideration. This part of the case is still underway. It was one of the rare cases in which the indictment was not made publicly available and the public were denied access to some court hearings. A particular type of precedent in this case were the blanket pardons granted by the then President, and their subsequent withdrawal, which happened when this court was already hearing evidence. This provoked debate about the legal consequences and the manner in which the case would continue after the blanket pardons were withdrawn.

year marks the third anniversary of the Law on Probation. A combination of these and other factors, such as the desire to demonstrate zero tolerance for organized crime, is the reason why judges prefer detention rather than other precautionary measures. However, in the absence of thorough and detailed rationales, sometimes the use of detention orders appear to distort the presumption of innocence.

- Differences have been noted between the actions taken by POOCC and SPO. In the case of SPO, greater care is taken in applications for precautionary measures and detention. The courts take a different approach when deciding applications submitted by the two prosecution offices. The share of approved detention orders is significantly higher in the case of POOCC compared to SPO (95% versus 25%).[204]
- Given most detention applications submitted by SPO concern former or incumbent high public officials, the low share of approved detention applications comes as no surprise, especially when factoring in previous actions on the part of prosecution offices and courts in such cases (less than 1% of motions for detention submitted by POOCC concern these officials).[205]
- It could be concluded that prosecution offices tend not to submit detention applications for former or incumbent public officials, while courts are unwilling to approve them - even though, bearing in mind the nature of the criminal offenses of which these people are suspected or charged and their status and position in society, they are more likely to flee the country, obstruct the investigation or reoffend, and therefore a higher proportion of them are approved. The evidence for this can be seen in the statistics above, which show prosecution offices submitted detention applications in less than 15% of cases, but more than 40% in POOCC.
- According to ECtHR case law, which is set out in many cases including several against the Republic of North Macedonia, the most important element in assessing justification of detention in the light of Article 5 from the ECHR is the rationales provided by domestic courts explaining the individual circumstances that make flight risk, obstructing the investigation and reoffending more likely.
- The absence of individual rationales indicating a need for detention, especially in a tense political atmosphere and where human rights are in jeopardy or previous practice suggests detention should not be used, will raise concerns about the abuse of detention - and will inevitably lead to violation of the presumption of innocence, and consequently the right to a fair and just trial.

204 In absolute figures, SPO has submitted applications for detention or house arrest for 22 people, and detention was approved for six of them.

205 On an annual level, in the period 2015 to 2018 and in relation to Chapter 30 of the Criminal Code (abuse of public office and duty), detention was imposed on one person or none. Data are taken from the annual reports of POOCC and annual reports of PPRNM for the period 2015-2018, available at: http://jorm.gov.mk/category/dokumenti/izvestai/

RECOMMENDATIONS

- The methodology currently used to collect and process data about applications and decisions on detention orders is not in line with Council of Europe and EU recommendations, and to a great extent does not reflect the true situation. This methodology needs to be aligned and improved.
- Detailed, multidimensional research studies are needed about the use of detention and other precautionary measures, including efforts to encourage public debate and an inclusive process to evaluate their use.
- The Law on Probation needs to be properly enforced and greater use made of non-custodial measures as an alternative to detention. This means allocating appropriate resources, as well as capacity-building for all the institutions that implement the Law on Probation, and an end to the excessive use of detention.
- Awareness of the presumption of innocence needs to grow. Unless the state can prove reasonable suspicion and provide adequate justification for use of detention in specific cases, a suspect should not be detained.
- The capacity of prosecution offices needs to be strengthened so they can provide adequate arguments in detention applications, supported by sufficient evidence.
- Court capacity needs to be increased, with adequate enforcement of provisions under LCP and ECHR, and especially of the ECtHR's case law on the lawfulness of detention measures.
- The courts must offer detailed and exhaustive rationales for their detention decisions which adequately explain each circumstance, relevant evidence, and the individual characteristics of each defendant.
- Rationales in detention decisions must avoid abstract suspicion that is not supported by facts, template-based formulas, and not rely on the gravity of the sanctions threatened or the fact that the criminal offense was committed by a group.
- The courts must act with greater caution when approving consecutive extensions to detention orders, in compliance with the ECtHR's position that after a certain period of time has expired the reasons for which detention was initially imposed cannot remain the sole grounds for extending it.
- Judicial panels that decide on appeals against detention orders should be careful and critical of first-instance detention decisions, and should always offer their own arguments, avoiding repeating allegations made by the judge or judicial panel that acted in the first instance.

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