



# Final Report

**Project: “Countrywide Observation of the Implementation of International Fair Trial Standards in Domestic Courts and Assessment of the Functioning of the Judiciary”**

**Skopje, September 2004**



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## **Acknowledgement**

The Final Report of the Coalition “All for Fair Trials” is a result of a joint and devoted effort of large number of performers. It is primarily a result of the professional and impartial contribution of the Coalition observers who collected the data from the judicial trials, the local co-ordinators being a pillar of the structure of the Coalition and a guarantee for fulfilment of the project activities, and the local legal experts, who control the validity of the data.

The Final Report is based on the analyses done by Ljupco Arnaudovski, PhD, Gordan Kalajdziev, PhD, and Gordana Buzarovska, PhD, in the field of criminal procedures, and Arsen Janevski, PhD, and Mr. Ranko Maksimovski, a retired Supreme Court judge, in the field of civil procedures.

This Report of the Coalition would have been impossible without the support of OSCE Rule of Law Department in Skopje.

The financial support for the project activities was provided by the Canadian International Development Agency (CIDA), OSCE Rule of Law Department, the Canadian Embassy in Skopje and the Open Society Institute - Macedonia.

The Coalition “All for Fair Trials” is extending its appreciation to the Presidents of the Basic Courts in Republic of Macedonia for providing access to data related to the observed cases assisting the Coalition to increase the public confidence in the judiciary, locate the problems which the judiciary is facing and find possible solutions to these issues. The Coalition is also grateful to the President of the Supreme Court of the Republic of Macedonia and the Ministry of Justice for their support while initiating the project “Countrywide Observation of the Implementation of International Fair Trial Standards in Domestic Courts and Assessment of the Functioning of the Judiciary”.

Moreover, we extend our gratitude to all the judges at the Basic Courts in the Republic of Macedonia for their professional and irreproachable attitude towards the observers.

Coalition “All for Fair Trials”

## Introduction

During the year of completing the project “Countrywide Observation of the Implementation of International Fair Trial Standards in Domestic Courts and Assessment of the Functioning of the Judiciary”, the judiciary in the Republic of Macedonia has been under permanent pressure from domestic and international political subjects, judgements by international and national authorities and institutions, and the mass media. In all discussions, reviews and estimates, the judiciary was evaluated as imprecise, ineffective and corrupt. In general, the judiciary was characterised with inefficiency that does not support and promote the functioning of the state as democratic and legal, based on the principles of the rule of law.<sup>1</sup>

Within the same period of time, the work on alteration and amendment of the Law on Criminal Procedure (LCP) entered the parliamentary procedure, as well as the Law on Alteration and Amendment of the Law on Civil Procedure (LCIP) and the Law on Executive Procedure. Furthermore, a Committee for Alteration and Amendments of the Law on Courts has been established, and in the meantime a Proposal Strategy was created for carrying out reforms in the Judiciary System, the Public Prosecutor’s office, the system of penitentiary institutions, the Public Ombudsman’s office, the Bar and the Notary Public. The Law on independent Judicial Budget has been enacted, as well.

In the current position of the judiciary and the necessity of legal reforms in order to provide a prompt access to justice, immediate and efficient execution of citizen’s rights and their legal interests, and effective protection of human rights through the mechanisms of the legal system, the results acquired with completion of this project will provide empirically based data that will contribute towards accomplishing ongoing judiciary reform.

The Final Report of the Coalition “All for Fair Trial” presents data gathered during the observation process, individually referring to each international standard in both civil and criminal procedures. Furthermore, a review is presented comparing domestic regulations and the regulations in international documents. The recommendations presented in the text are based on results and drawn conclusions, and will contribute towards consistent implementation of the international fair trial standards.

The text also includes examples of the observed cases in order to emphasise certain conditions or facts.

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<sup>1</sup> This claim is particularly emphasized through some published articles: “Without judiciary reorganization, the legislature amendments in vain” (Dnevnik, 12.05.2004); “I was almost put in prison because of judiciary mistake” (Vreme, 27.04.2004); “Confinement for a judge who accepted a bribe of 250 euro “ (Vest, 19.07.2004); “The judiciary is an obstacle to the fight against the crime” (Dnevnik, 05.08.2004), etc.

## Executive summary

In the Final Report of the Coalition “All for Fair Trial”, the conclusions concerning the current situation of the judiciary in the Republic of Macedonia regarding implementation of the international fair trial standards are aimed at promotion the legal system and functioning of the judiciary in accordance with that standards.

The analysis about the respect of the **Right to a trial before a competent, independent, impartial and by law established court** shows that in both the criminal and civil procedure:

- The courts are founded in accordance to the legal regulations.
- The request for exemption of judges and jurors is not frequently used.
- In a certain number of cases the jurors act indifferent and uninterested.
- Under exceptional circumstances, the Rules of the Judicial Register for assigning cases to the judges are not respected, and thus the principle of impartiality is jeopardised.

Regarding the respect of the **Principle of Equality of arms** it is determined that:

- Only in a few cases the right of the defendant and his counsel to sufficient time for defence preparation is violated.
- The defendant and his counsel had a chance to expose their defence, to suggest new evidence and hearing of witnesses, and to dispute the prosecutor’s evidence.

The Courts respect **the Right of the defendant to be present during the trial** and the trials in absence of the defendant are rare, and the court without exception has assigned a counsel.

Concerning **the Right to a public trial**:

- In some courts daily agenda of trials are not placed in front of the courtrooms where the hearings should be hold.
- In a case of public exclusion, the judge brought the corresponding decisions in full compliance with the legal regulations for both, civil and criminal procedure.
- In some Courts it has been noticed that trials are held in the office of the judge instead of courtroom.

Regarding the **Right to a trial in a reasonable time**, the findings point out that:

- The trials usually last for a very short time and mostly, the reasons for postponed hearings are on the part of the defendant and his counsel.
- A lengthy period passes from the submission of the indictment until the first hearing.
- 12,2% of all observed hearings are postponed for a period longer than 30 days that results in unnecessary delays of the trial.
- There is a necessity for more prompt co-operation between the Court and the Ministry of Internal Affairs regarding the execution of the orders for apprehension.

- The judge rarely urges for more timely expert testimony.

The **Right to remain silent** is usually respected in the proceeding before the Basic Courts. The defendants rarely use their right to remain silent.

The insufficiency of qualified interpreters in the courts of the Republic of Macedonia leads either to postponements of the proceeding or to engaging persons who do not have suitable qualifications.

The **Right to defence** is respected by the judges. In the greatest number of cases, a proxy holder during the court proceeding represents both the plaintiff and the defendant. The proxy holder is usually an attorney. The right to a free legal aid is used rarely in the criminal cases.

The analysis of the observed cases shows no violation of the **Right to appeal**.

The problem of spatial and technical conditions for the judicial proceedings to be carried out, mainly lack of sufficient number of courtrooms and computer equipment, are of vital importance for the functioning of the judiciary.



## **Abbreviations**

**LCIP Law on Civil Procedure**

(Official Gazette of the R. of Macedonia 33/98)

**LCP Law on Criminal Procedure**

(Official Gazette of the R. of Macedonia 15/97; 44/02)

**UDHR Universal Declaration on Human Rights**

(Adopted by The General Assembly of the UNO 1948)

**ECHR European Convention on Human Rights and Fundamental Freedoms**

(Council of Europe 1953)

**ITCPR International Treaty on Civil and Political Rights** (United Nations 1966)

**LC Law on Courts**

(Official Gazette of the R. of Macedonia 36/95;45/95;64/03)

**LLT Law on Court Taxes**

(Official Gazette of the R. of Macedonia 46/90;11/91;65/92;20/95;48/99)

**CR Court Register**

(Official Gazette of the R.of Macedonia 9/99)

**LAALCIP Law on Alteration and Amendment of the Law on Legal Procedures**

(Official Gazette of the R. of Macedonia 44/02)

**CC Criminal Code**

(Official Gazette of the R. of Macedonia 37/96;80/99;4/02;43/03;19/04)

## **CHAPTER I Basic Information**

### **1. NGO Coalition “All for Fair Trial”**

The NGO Coalition “All for Fair Trial”, Skopje is a voluntary-based association with 20 NGO member-organisations from all over Macedonia:

MOST-Skopje, Youth Educational Forum-Skopje (MOF), SPPMD-Kavadarci, CDR-Tetovo, ARKA-Kumanovo, FEMINA-Kumanovo, ADI-Gostivar, Civic Tracks-Bitola, Association for Roma Rights, ARRP-Stip, Helsinki Committee for Human Rights in Republic of Macedonia, Center for Children’s Rights Protection-Skopje, MEDGASI-Skopje, PHURT-Delcevo, ROZPR-Skopje, ASVIN-Skopje, MPRC-Skopje, CIC Spectar-Stip and FOCUS-Resen, Temis-Skopje, Ani-Stip.

The Coalition was established on May 12, 2003, with an aim to:

- Ensure that the international fair trials standards are obeyed in domestic courts;
- Increase the public trust in the legal system and the judiciary;
- Identify the inherited problems in the judicial system and point out to the need of legal and institutional reform; and
- Raise public awareness on international fair trial standards.

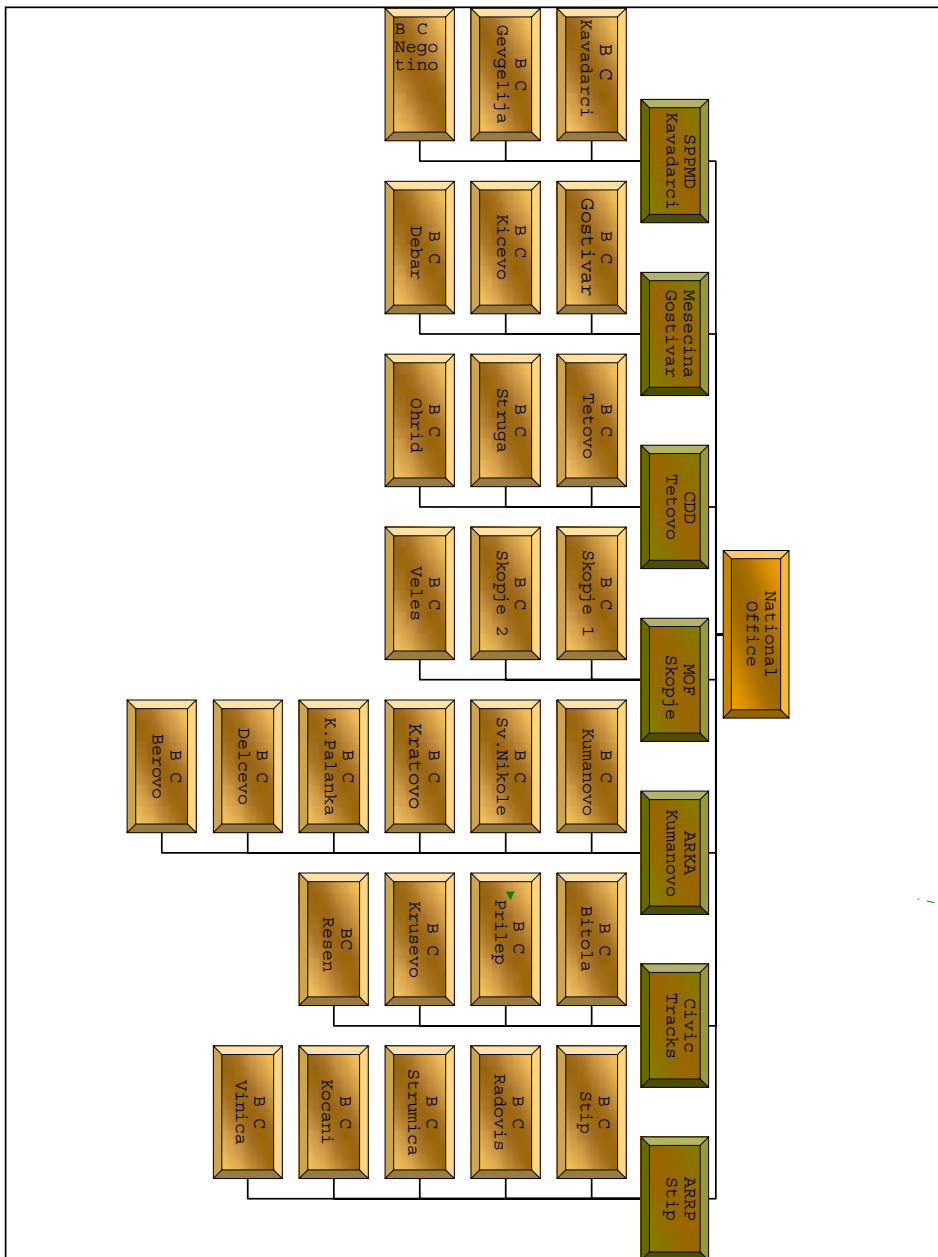
The Assembly, which includes representatives of each of the above-mentioned member-organisations, is the highest decision making body of the Coalition.

The Executive Board is an executive body of the Coalition and consists of 8 members, and the Coalition’s President, Mr. Trajce Pelivanov.

The Executive Director of the Coalition is Miss Violeta Velkoska.

The Coalition has 80 trained observers, mostly lawyers and attorneys at law, who act as observers in civil and criminal cases in all Basic Courts of the Republic of Macedonia.

Their activity is co-ordinated through 7 regional offices which cover different courts, such as:



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View of Basic Court in R. Macedonia as they are covered by the regional offices

The regional offices employ local co-ordinators to supervise the work of the observers, and a local legal analyst who prepares monthly legal analysis for the observed cases.

A pilot phase of the project “Countrywide Observation of the Implementation of International Fair Trial Standards in Domestic Courts and Assessment of the Functioning of the Judiciary” was implemented from April to September 2003 with funds from the Canadian International Development Agency (CIDA) and monitored by the Rule of Law Department of OSCE Spillover Monitor Mission to Skopje.

After the successful completion of the pilot project, the process of observance of civil and criminal cases continued and lasted until July 2004.

At the beginning of May 2003, a working version of the “Trial Observation Manual” was prepared by the team of legal experts, which was used as a basis for the training of 108 solicitors, lawyers, and Law Faculty students-activists in the domain of fundamental human rights.

In addition to the Manual, questionnaires for civil and criminal cases observation were designed and used as instruments for collecting impartial and credible information on the implementation of international standards for fair trial in domestic courts’ practices.

In June, after the expressed support by the President of the Supreme Court of the Republic of Macedonia and the Ministry of Justice, all the Basic Courts’ Presidents of Macedonia and all the judges were informed about the observers’ attendance in the courtrooms.

Since the beginning of July, 108 observers started observing court trials in all Basic Courts of the Republic of Macedonia.

A “Code of Conduct” was prepared and it was officially signed and accepted by all the observers of the Coalition.

The collected impartial data on the observed civil and criminal cases obtained in the questionnaires was filled into a data base designed with an aim of further analysis by the team of legal experts.

The public is being informed about the activities of the Coalition and the international standards for fair trial through leaflets, press conferences and case reports, which are considered to be of special interest. The Coalition maintains also a web-site where all its reports are available for the public: [www.all4fairtrials.org.mk](http://www.all4fairtrials.org.mk).

In performing the activities, the Coalition co-operates with the “Justinijan I”, Faculty of Law in Skopje and the South-Eastern European University, Faculty of Law, through the student training programme for international standards of fair trial.

In order to present the conclusions from the one year observation of civil and criminal cases in all the Basic courts in Macedonia contained in the Final Report of the Coalition, a Round Table organized by the NGO Coalition “All for Fair Trials” and

the Rule of Law Department of OSCE Spillover Monitor Mission to Skopje was held on 23.09.2004. Regarding the conclusions, consultations and discussion took place<sup>2</sup>.

Beside the members of the Coalition' National Office, national legal experts in criminal and civil proceedings, and representatives of the OSCE Spillover Mission to Skopje, the Round table was attended by the highest representatives of the judiciary, the Ministry of Justice of R. Macedonia, the Association of Judges, the Association of Public Prosecutors, the National Judicial Council, representatives from the Ombudsman' Office, representatives from the Office of the Council of Europe in Skopje and the representatives of the international organizations operating in the domain of the functioning of the judiciary.

## 2. Methodology, time frame and topics

### Methodology

The Final Report of the Coalition, is a result of the analysis conducted and based on the acquired data from the questionnaires completed by the observers of the civil and criminal cases, as well as from the data obtained through the data processing, and the reports prepared by the local legal experts, the reports of the local co-ordinators and interviews with selected observers.

The basic method used in the project is **the method of observation** of the proceedings that took place at the Basic Courts in the Republic of Macedonia.

The selection of cases is made by the local co-ordinator in accordance to the specially chosen topics of interest by the Coalition members. The local co-ordinator delivers monthly "Proposal on Cases to be Observed" in the region under his jurisdiction to Coalition's National Office in Skopje. After the approval of the proposal by the Project Manager, the local co-ordinators make the final schedule of trials to be observed and instruct each of the teams consisted of two observers. The schedule of trials together with the questionnaire is than distributed to each of the observers. The Selection of cases and collection of trial data in different stages of the project and in different regions is conducted in a variety of manners:

- Random selection, made by the observers done only in July 2003;
- Through obtaining a list of set cases from the judicial administration;
- Through data acquired from court presidents;
- Through data received from the judges and in direct contact with them;
- Through selection of cases done by the local co-ordinators in the judicial clerk's office and in co-operation with the administration;

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<sup>2</sup> The comments from the Round Table regarding the conclusions and recommendations of the Coalition are consisted in the Final Report, while the conclusions from the Round Table are enclosed in the Annex of the Report.

- Through information received from clients, though rarely, if their cases are of interest for the Coalition.

After the observation, the observers fill in **an observation questionnaire** of the civil or criminal cases, depending on the type of the observed proceedings, based both on the collected data about the case at the hearing and information acquired by the local co-ordinator. The signed questionnaire is then sent to the local co-ordinator who keeps the original sample for his own record and sends a copy to the Coalition's National Office.

All the data about observed cases is filled in a specially prepared **database**, customised to the observation questionnaires, which allows further data processing, cross-reference and categorisation.

The local legal experts prepare **reports** once a month, based on the analysis of the questionnaires in their region and information received through the communication with the observers. These reports present an integral part of the monthly Coalition's internal reports prepared by the local co-ordinators.

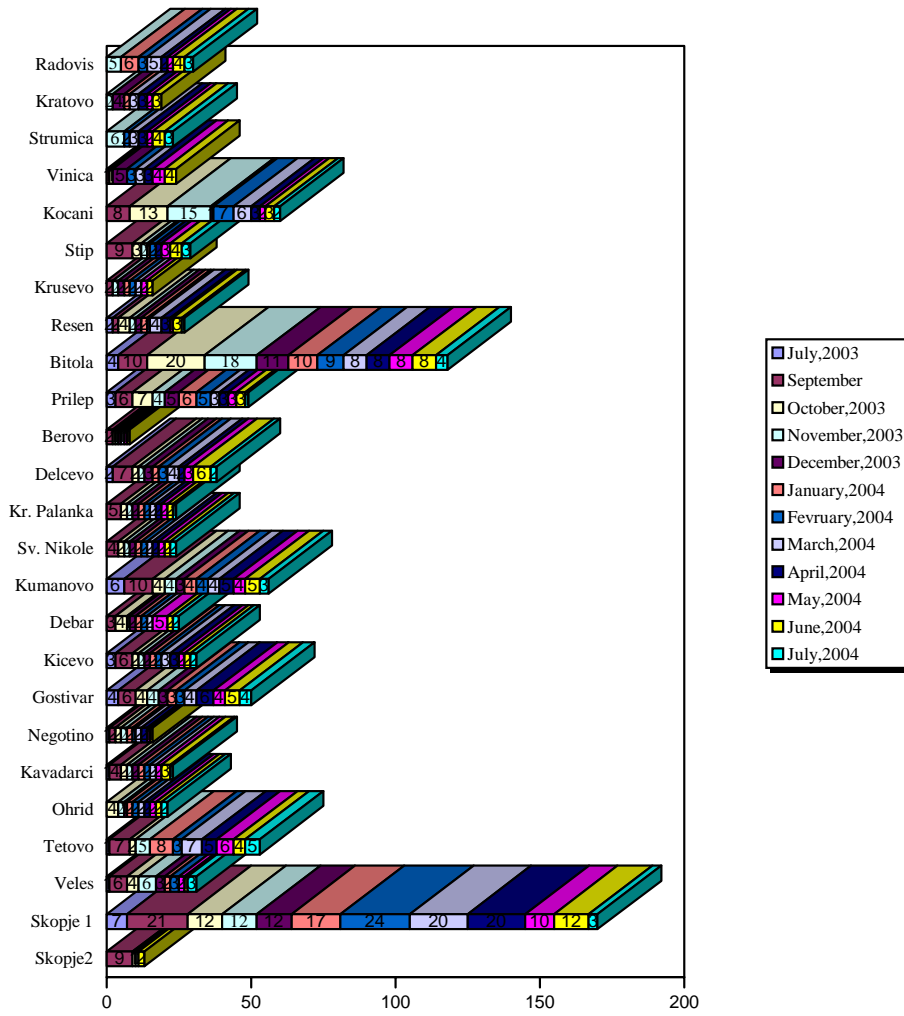
All observers and co-ordinators are obliged to respect the principle of confidentiality of the data that is acquired during the observation activity.

In accordance with the "Code of Conduct" disrespect of this principle can cause exclusion from the Coalition monitoring effort.

#### **Time Frame**

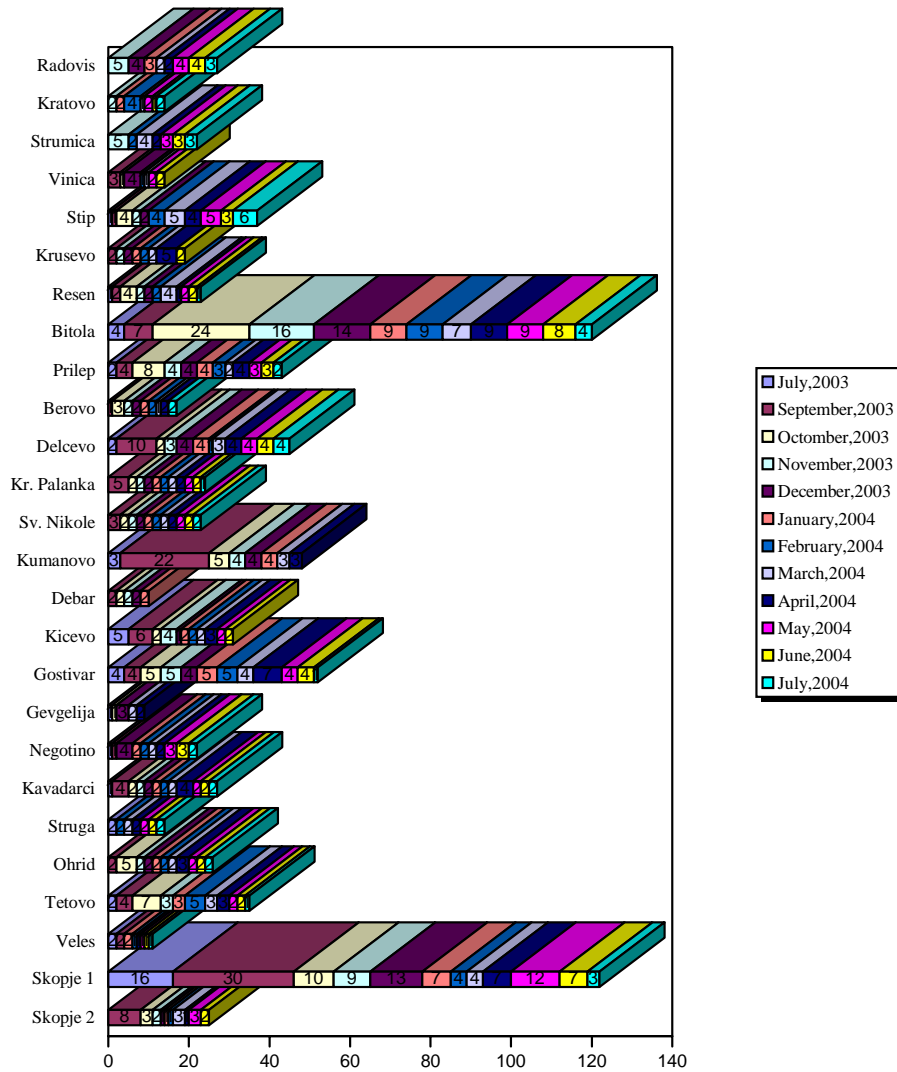
During the period from July 2003 to July 2004 a total of 643 criminal cases at 1010 hearings and 720 civil cases at 907 hearings were monitored.

### Criminal cases



The number of monitored criminal hearings by month and by Basic Courts in the Republic of Macedonia

### Civil Cases



The number of monitored civil hearings by month and by Basic Court in the Republic of Macedonia



## Topics

The Coalition gave priority to the following topics within **criminal area**:

- Human trafficking, domestic violence
- Children and youth
- Corruption, property and labour issues
- Violation of human rights and police abuse

Areas of interest for monitoring **civil cases** are:

- Family Law cases (marital disputes, paternal and maternal disputes, child and spouse support disputes, child care disputes and property adjustment disputes)
- Civil cases (ownership disputes, employment and occupation rights disputes, damage disputes, fiduciary duty disputes, company disputes)
- Employment disputes.

## CHAPTER II Implementation of International Fair Trial Standards

### 1. Right to Equality in Court and Law

*... All people are equal before the law and they are all entitled to equal law protection without any discrimination (Article 7 from the Universal Declaration on Human Rights)*

*... All people are equal before the law and they are all entitled to equal law protection without any discrimination. Thus, the law must prohibit any discrimination and ensure that all people are granted equal and successful protection against any discrimination concerning race, colour, gender, language, religion, political or other orientation, national or social origin, property, birth or any other status (Article 26 from the International Treaty on Civil and Political Rights)*

In order to enforce the above mentioned principles and standards, there are number of norms taken into consideration in the laws for judicial proceedings, through which their accomplishment can be provided.

The citizens are equal before the Constitution and laws (Article 9 paragraph 2 of the Constitution of the Republic of Macedonia). This constitutional standard is defined in the Law on Courts. Namely, in Article 7 of the Law on Courts, several principles are determined such as that everyone has the right to equal access to the courts in the protection of their rights and the legal interests; everyone has the right to legitimate, impartial honest and reasonable time trial; the access to court cannot be limited to anyone in lack of financial means, etc. The above-mentioned principles are the standards prescribed by International documents<sup>3</sup>, which have been ratified by the Parliament of the Republic of Macedonia and are an integral part of our legislation.

#### Civil Proceedings

The **Right to a Fair Trial** contained in Article 6 of the European Convention for Human Rights involves several aspects, one being the right to access to court. The standard of equality proclaimed in the Constitution is defined in the Law on Courts. For accomplishing the above-mentioned standard, Article 7 of the LC determines several principles through which the citizens of Republic of Macedonia are enabled to accomplish the constitutional standard. Namely, the access to court cannot be limited to anyone in lack of financial means. Due to the fact that the provision of judicial protection is not free of charge, the clients who are in lack of funds and not able to pay the costs without damaging their own and their family's basic survival needs, can

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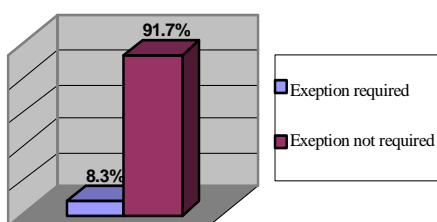
<sup>3</sup> Art. 6 of the European Convention on Human Rights and Fundamental Freedoms

The guarantee for equality refers to several aspects:

- The Right of Equality before the laws
- The Right of Equality before the courts
- The Right to Equal access to courts
- The Right to Equal treatment in the courts

request exemption from paying court taxes. The exemption from payment of procedural costs (**cautio judicatum solvi**) includes exemption from paying taxes and exemption from advance payment for costs related to witnesses, expert witnesses, and inspection, and for court advertisements. The exemption from paying procedural costs can also include exemption from paying costs related to court representation and exemption from paying the proxy award. Taking into consideration the large number of unemployed people in the country, a question was posed about the extent to which the clients use the right to free defence.

**Request for Exemption of Payment of Court Taxes**



The research shows that from each of the answers received during the observation, the exemption of tax and other procedural costs was requested in only 30 cases (8,3%), and in 332 cases 91,7%)the clients did not request exemption from court taxes and other procedural costs.

Whether these figures are real reflection of the citizens' financial situation is an open question. The doubts that the citizens are not informed that they have a right on exemption from court taxes and other procedural costs if they are in lack of financial means, is discarded due to the fact that in the greatest number of observed cases the clients have been represented by a proxy holder - an attorney (the percentage is 87,2% for the plaintiff, and 88,6% for the defendant)<sup>4</sup>.

The court granted the payment exemption in 13 cases out of 30 (or 43.3%) where the exemption from payment of court taxes was requested. Such a percentage clearly points out that the provisions in the LCIP regarding the conditions for accomplishment of this right are in accordance to the real needs and it is our opinion that they should not be amended<sup>5</sup>.

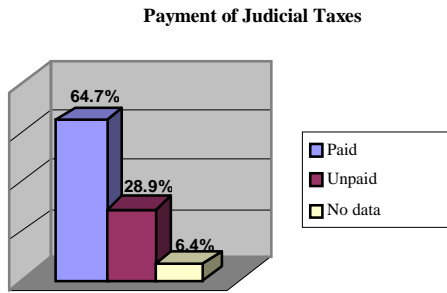
Directly related to the right of access to court, is the payment of court taxes. Because the clients, in many cases, disrespect the regulations concerning paying court taxes, i.e. they do not pay them on time, the state was forced to launch a procedure for their forceful payment.

The newly enacted LCIP contains a provision according to which the court will not take actions related to cases for which the taxes are not paid (Article 141 paragraph 2 of the LCIP).

<sup>4</sup>See Chapter II, Point 9.

<sup>5</sup> At the Round Table organized by the Coalition "All for Fair Trial" and the Rule of Law Department of OSCE Spillover Monitor Mission to Skopje aimed at presenting the conclusions and recommendations from the Final Report of the Coalition (Hereafter Round Table), it was emphasized that the issue of court taxes payment exemption may be solved through creating a Fund by the State that will cover the court taxes payment if the citizens are in lack of financial means to bear them, in respect of the right to legal aid.

*In the Basic Court in Debar, for the proceeding of Compensation of Damage from Employment Dispute, the hearing was postponed 2 times due to the unpaid court taxes.*



Out of 720 monitored hearings, in 466 or 64.7%, court taxes are paid on time. In 208 cases or 28.9%, the clients did not pay court taxes, while in 6.4% out of the total number of cases there is no data. From the above mentioned, we can conclude that in most cases the clients pay the court taxes on time (knowing that if they do not do so, the court will not consider the case).

It is important to mention that in the cases when the court taxes (28,9%) were not paid, the reason for avoiding the payment was not related to the lack of the means. We conclude this based on the fact that the clients were in a position to ask for exemption from payment of these costs when the trial procedure started; yet they did not do so. **The plaintiff is usually the one who pays or makes an advanced payment of the court taxes, because the procedure starts with the appeal and the court will not act upon it, unless he/she pays the taxes either voluntarily or when pressured by the court (Article 141 paragraph 2 of the LCIP).** The percentage of 64,7% timely paid court taxes, shows that this regulation is a good solution tending to discipline the clients in meeting their obligations, but it does not affect the right of the parties to the equal access to the court<sup>6</sup>.

However, the data received from the questionnaires showed that there are cases when hearings are held despite that the fact that the court taxes are unpaid<sup>7</sup>.

*In the Basic Court in Gostivar, for the proceeding of an unpaid debt, the judge has set the case despite unpaid court taxes. Before the same court for the proceeding of compensation of damage, the judge has started to act upon the legal suit although the court taxes are not paid.*

<sup>6</sup> In that sense there is decision of the European Court of Human Rights. In the case *Kreuz v. Poland* held before the European Court of Human Rights, the applicant claimed that his right to access to court was violated because he had to deny his right to accomplish rights before the court because he was not in a position to pay the court taxes according to the Polish law. He considered that the state has violated Article 6, paragraph 1 of the European Convention on Human Rights. But the state considered that determining court taxes as a compulsory form of legitimate limitation of the right to access to court can not be viewed as violation of Article 6, paragraph 1 of the European Convention on Human Rights. The Court concluded that the right to access to court is not absolute right and it can be legitimately limited because in its own nature it should be regulated by the state. Thus, the Court held that the requirement for court taxes payment can not be considered as violation of Article 6, paragraph 1 of the European Convention on Human Rights.

<sup>7</sup> At the Round Table, it was emphasized that although Article 141, paragraph 2 from the LCIP prescribes that the court will not consider the petition or undertake any other procedural action if the court taxes are not paid, on the other hand, according to the provisions from the Law on Court Taxes, the court must not deny to consider case where the court taxes are unpaid. Thus, these two provisions are in collision.

*Recommendation*

**The provision of the LCIP for payment of court taxes shall be consistently applied by all courts thus the citizens would be in equal position as it is prescribed by the law. Attention should be paid to those courts that do not apply the provision for payment of court taxes consistently.**

## ***2. Right to a Trial before Competent, Independent, Impartial and by Law Established Court***

A Right to a Trial before Competent, Independent, Impartial and by Law Established Court is guaranteed and contained in the Article 6(1) from the European Convention for Human Rights and the Article 10 from the Universal Declaration on Human Rights, and one of the key issues for conducting fair trial.

The court competence is a complex of qualifications that are related to the attitude of the judge to his/her work, and are consisted of taking care for the actual and local competence, independence and impartiality in ruling the cases.

The legal norms that guarantee the constitutional standard of independence of the courts are contained in the Constitution and the Law on Courts. According to the Art.98 from the Constitution of the Republic of Macedonia, the judiciary power is executed by the courts, whereas the types of competence, the foundation, the abolition, the organisation and court composition, as well as the access to them is prescribed by the law. Consequently, a competence to judge is also acquired in accordance to the Law on Courts. The Law on Courts explicitly states that the courts are independent and impartial state bodies performing their judiciary function in accordance to the Constitution, the laws and international documents being ratified by the Parliament of the Republic of Macedonia, and providing fulfilment of the principle of the rule of law and protection of human rights and freedoms.

Despite the fact that the principle of division of state power is formally recognised, and there are general guarantees for court independence prescribed within the provisions in the Constitution and the laws, in practice, these guarantees remain without significant impact due to the lack of mechanisms for their realisation. The legal norms, which are relatively well normatively founded, are formally obeyed, but there is still room for outside influence. The judiciary as a whole, to some extent is still considered as a part of the state administration. The financial control and design of judiciary income and budget are concentrated within the executive authorities, primarily at the competent ministry. Thus, the project for an independent judicial budget is a significant step towards substantial independence of the judiciary.

***Recommendation:***

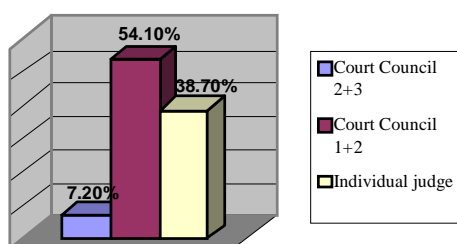
**The issue of independence of the judiciary in the Republic of Macedonia is a very complex one, and seeks for complementary approach through the Strategy for Judicial Reform with a clearly set directions in the Constitution of the R. Macedonia, and consequently in all other laws that determine the duty, the position, the functioning and the organisation of the judiciary.**

## **Criminal proceedings**

The key component of the court competence and its foundation, in accordance to the law, is within the way the court is composed depending upon the gravity of the criminal act.

According to Art.22 from the LCP, the criminal proceedings for crimes for which a sentence of fine penalty is proscribed, or a sentence to a three-year imprisonment, an individual judge tries in the court of first degree. The courts hold trials through judicial councils composed of two judges and three jurors for crimes for which by law it is proscribed a sentence to a fifteen-year prison, or a sentence to life imprisonment, and in councils consisted of one judge and two jurors for crimes for which a mitigated sentence is proscribed by law it is.

**A View on Court Composition**



The data received from observed hearings shows that the individual judge tried 38,7% of cases, the council of three judges 1+2, tried 54,1%, while the council of five judges, 2+3, tried 7,2%.

The analysis shows that the judiciary council in accordance with the type and gravity of the criminal acts, was established properly, and in that respect, no violations of the law were

noticed. The principle of lawful court composition is consistently performed. The structure of the court created in such way is corresponding to the type and the nature of the crime acts.

The composition of the judicial council should remain the same, which means that the whole proceeding should be held before the same council. According to the analysis of the questionnaires it can be concluded that, during the proceeding, if some of the members of the judiciary council are absent, the hearing is to be postponed due to the incomplete judiciary council, except in the cases of alteration of the judicial council.

***In the case observed on 15.03.2004 before the Basic Court in Tetovo for the criminal act of Robbery, the main hearing was postponed because one of the jurors was absent, and the court considered that it is not suitable to alter the council so the trial was postponed.***

***On 24.09.2003 in the Basic Court in Tetovo, a trial on the criminal act of Murder was observed, and the trial is postponed due to the absence of the third juror.***

***In the case of criminal act of Mediation in conducting prostitution tried before the Basic Court in Tetovo, the hearing from 03.03.2004 is postponed because of jurors absence.***

In one case this principle is violated.

***In the case before the Basic Court in Kumanovo, for a criminal act of Murder, where the judiciary council is composed of 2+3 judges and jurors, on the observed hearing, during one hour, the President held the trial only in presence of three jurors while one of the judge was absent.***

The LCP contains a provision for exemption of judge or juror, as a guarantee for an impartial trial.

The exemption can be requested in accordance with the law, as well as upon the request of the parties. The parties can submit a request for exclusion prior to the beginning of the trial; but if they are informed for the reasons of exclusion latter, they can submit the request for exclusion immediately after being informed (Article 38 paragraph 2 from the LCP).

In order to satisfy consistently the requirements for impartiality of the court, and in accordance to the practice of the authorities in Strasbourg, the LCP (1997) prescribes exemption for a judge if he participated in the examination of the indictment before the trial (Article 36 paragraph 4). Some smaller courts complain that this creates difficulties due to the insufficient number of judges.

The exemption of a judge, if there are circumstances which provoke suspicion on his impartiality, is not a solution that lacks principles (Art.36, paragraph 6) though is illogical, since the request can be submitted only prior to the trial and the indications for impartiality are coming across only at the trial. The newest proposals for amending the LCP, to some extent correct this situation, but they do not satisfy the requirements of the convention since evidence is required for judge's partiality! Undoubtedly, this is far away from the "doctrine of indications" of the European Court for Human Rights.

Although the *impartiality* usually means non-existence of inclination, prejudice, subjectivity, its existence or non-existence, according to the European Court for Human Rights, can be validated in different ways. Yet, a distinction must be made between the subjective approach, as an attempt to determine judge's personal conviction in a particular case and where the subjective impartiality is implicit until the opposite is proved, and the objective approach, where it can be determined at stake whether there are guarantees which are sufficient to exclude any reasonable

suspicion, yet being aware that even the indications (as such) can bear some significance. Namely, the point is that the court in a democratic society has to inspire public confidence and, above all, the confidence of the defendant in the criminal case proceedings. Therefore, any judge should retreat in a situation of existence of reasonable doubts in his impartiality.

***Recommendation:***

**The possibility to submit the request for exemption of a judge should be extended after the beginning of main hearing because the circumstances that cause suspicion in the impartiality of the judge or the judge-juror might be found out during the proceeding. But, considering the fact that the main hearing is ongoing, short periods to decide upon the request for exemption must be prescribed in the law.**

The data received from the observation shows that an exemption of judge is requested in 20 cases. An exemption of the judge-juror is requested in 8 of these cases; in one case an exemption of the President of the Appellate Court is requested because the decision he made on rejection of the defendant's request for exemption of the President of the Basic Court was considered unfounded, while the exemption of the President of the Basic Court is requested in only one case<sup>8</sup>.

According to these findings, the request for exemption of judges and judges-jurors is not frequent, which can be considered positive. Namely, this points to the fact that this mechanism as an instrument for evaluation of the suspicion in the partiality of the judges is not often used. On the other hand, this also influences the procedure not to be prolonged.

*On 22.10.2003 before the Basic Court in Tetovo, a trial on the criminal act of Tax Evasion, Art.279 p.2 from LCP was observed. The defendant requested exemption of the entire judicial council. The trial was postponed 28 times. The verdict was reached on 18.12.2003.*

***Recommendation:***

**In order to prevent the abuse of the possibility to request an exemption of the judges aimed only to prolong the procedure, repetitive requests for exempting the same judge due to the same circumstances that are presented in a previous request for exemption which were rejected, should be prevented.**

The estimation about the impartiality of the judges was confined with the impression acquired by the observers monitoring one case in a longer period. According to the observers' estimation, the judge has acted impartially during the proceeding, which meant that the judicial resolution was reached on the grounds of proper presentation of the evidence; the verdict was reached on the grounds of objectively established

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<sup>8</sup> According to the Proposal for Alteration and Amendment of the LCP, an exemption of the President of the court can not be requested, except when he is acting in a capacity of a judge, and for his exemption decides the President of the superior court.



facts; the judge had an equal treatment of the parties and unnecessary postponements of the hearings were avoided.

During the implementation of this project, a case of impartiality violation within the courts is not noticed. Namely, there is no record of court violation when applying the law regulations through interference, influence or exerting pressure on the judge in a particular case, expression of interest for particular case, giving suggestions to the judge on how certain case should be tried, or alike.

**Recommendation:**  
*The impartiality must be constantly reviewed through the right on exemption of the judge or the juror, the procedure of allocating cases among judges, and the Law on Organisation of the Judiciary that must be enacted as soon as possible.*

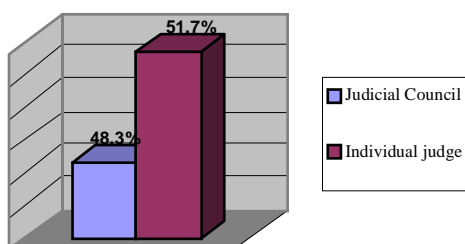
## Civil Proceedings

According to the Law on Civil Procedure (later on referred to as LCIP), the court may try as a council, while the Supreme Court of the Republic of Macedonia may try even on a general session (Article 35 paragraph 1 of the LCIP). The cases tried by an individual judge are determined by LCIP (Article 35 paragraph 2 of the LCIP). At first instance, a council or individual judge tries the disputes. The council is composed of one judge, who at the same time acts as the President of the Council, and two jurors (Article 36 of the LCIP). Individual judge tries disputes related to property law requests when the case costs do not exceed 300.000 MKD (Article 37 paragraph 1 of the LCIP), and in company disputes 600.000 MKD (Article 466 of the LCIP).

During the procedure, the clients negotiate, so the individual judge can try the property law dispute, regardless of the value of the dispute (Article 37 paragraph 2 of the LCIP).

***In the case before the Basic Court in Vinica the value of the dispute is 700.000 MKD. Accordingly, a council should try the dispute, but the client made an oral statement for the minutes, stating that he consents the individual judge to continue trying the case.***

A View on Court' Composition



The questionnaires' data analysis show that an individual judge tried in 51,7%, while 48,3% were tried by the judicial council. From the data mentioned above, we could conclude that the percentage of disputes tried by individual judges is almost equal to the number of the judicial councils.

However, having in mind the data concerning the value of monitored disputes (see table 1) it can be concluded that the clients did not use, or used to a very low extent, the possibility of being tried by an individual judge in property disputes and even in cases with an authorised judicial council for the trial.

**Table 1. Dispute issue value**

<b>Cost</b>	<b>Number of cases</b>	<b>Percentage</b>
Up to 30.000 MKD	In 135 cases	20,2%
30.001-100.000 MKD	In 206 cases	30,8%
100.001-500.000 MKD	In 62 cases	9,3%
500.001-1.000.000 MKD	In 11 cases	1,6%
1.000.0001-10.000.000 MKD	In 24 cases	3,6%
50.000.0001-100.000.000 MKD	In 2 cases	0,3%
100.000.001-1.000.000.000 MKD	In 4 cases	0,6%
Above 1.000.000.000 MKD	In 1 case	0,1%
Indefinite	In 224 cases	33,5%

The principle of participation of jurors was introduced since 1789 and the French Bourgeoisie Revolution, becoming universal postulate. Today, it is on a level of constitutional principle (Article 103 from the Constitution of the RM). The participation of the jurors during the judicial procedure is explained as participation of the “lay element” in the trial, and thus avoiding creation of “professional judiciary”<sup>9</sup>.

The observation data analysis shows that in a certain number of cases the attitude of the jurors is very indifferent, and their participation during the hearing is minimal.

***Recommendation:***

**According to the results from the analysis, the provisions of the LCIP for the value of the dispute as a criterion for a case to be tried by an individual judge should be altered, and the value of the dispute tried by an individual judge should be increased (for the property law disputes in a regular procedure, as well as for economy disputes).**

From the above data we can conclude that the courts were properly founded.

In accordance with the principle of immediacy in the civil proceedings, it is impossible to replace the judicial council during the proceeding, i.e. there is no

<sup>9</sup> In some of the recently enacted laws, such as the Law on Alteration and Amendments of the Law on Civil Procedure of the Republic of Croatia (Official Gazette no. 117/03) almost all cases in first degree are tried by judge individual. According to Article 20 of the LCIP of the Republic of Croatia “In the Civil Procedure, all cases in first degree are tried by individual judge, if by the law is not determined to be tried by judicial council.

Upon the request for revision the courts decide through council if by the law is not differently determined”.

possibility the trial to be held before one council and the decision to be reached by another judicial council. If such a situation of replacement of judicial council occurs by any reason, then the proceeding should start again, and then, if the parties consent that the evidence should not be presented again, the minutes containing previously given statements will be red.

The data from monitored cases shows that this principle is usually respected, and in the case of replacement of the judiciary council the proceeding has started again.

***In the case before the Basic Court in Gostivar, for an overruling of the judgement for cessation of employment, the judiciary council has been replaced and the proceeding started again.***

***Before the Basic Court in Veles, in a case of employment dispute, the judiciary council was replaced. The proceeding started again.***

The court composition depends on the dispute issue value. Bearing in mind the presented data about the dispute value (see Table 1), the number of cases where the dispute value is not defined is surprising. Out of 720 monitored hearings, 224 are with indefinite value or 33,5%. The data that 224 cases are with indefinite value shows that the clients try at the beginning to avoid the payment of court taxes. When submitting the appeal, the clients pay an approximate amount of money until the moment when the court by official duty reacts and determines the dispute issue value which is very low so that the initial payment of the court taxes is avoided and the case is proceeded by the court<sup>10</sup>.

***Recommendation:***

**For high percentage of cases where the dispute value is not determined, the court should be warned about applying the law regulations properly and consistently, or otherwise it can result in serious misuses of court taxes payment.**

The judges in the execution of their judiciary function are independent. One of the guarantees for their independence is the permanent judicial mandate, as well as the judicial immunity<sup>11</sup>. On the contrary, the system of their election and suspension (the election and suspension of the judges is made by the Parliament of the RM on National Judicial Council recommendation) can jeopardise the judge independence in performing the duty.

<sup>10</sup> At the Round Table it was mentioned that there is a Supreme Court' statement of principles from 1980, according to which the legal suit with an indefinite value should be rejected by the court as inadmissible.

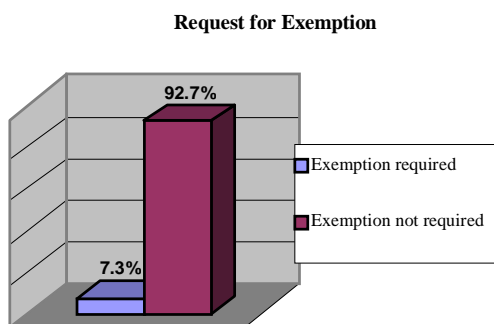
<sup>11</sup> Judge (and judge juror) can not be called to account for given opinion and decision made in performing judicial service; judge can not be detained without permission of the Parliament of Republic of Macedonia, except if he was caught in criminal act for which a sentence of at least five years imprisonment is prescribed.; the procedure for judge's immunity is urgent and it is carried out on previously obtained opinion of the National Judiciary Council (Article 65 of the LC).

According to the analysis of the answers provided through the questionnaires, there are some cases that were noticed which can, though not necessarily, serve as an indicators and point to the danger arising from political attack on the judicial independence. The postponements of the hearings due to the engagement of the judges during the elections, is not a rare occurrence<sup>12</sup>.

**Recommendation:**

**In order to eliminate all possible suspicions about any influence on the independence of the judicial service, steps towards reviewing the possibility for amending the regulations regarding the procedure of election and suspension of the judges should be made.**

The request for exemption of a judge or a juror is one of the issues through which we get the notion of client’s trust and/or distrust in courts (the judicial council and the individual judge). The aim of the request for judge or juror exception is to eliminate all doubts regarding the judge’s impartiality, i.e. the case to be tried by an impartial court.



The answers received from the questionnaires show that a judge or juror exception was required in 37 or 7,3%, and in 92,7% of cases this was not the case. Out of 37 requests for judge exception in 7 cases the request is accepted or 18,9%. From the above mentioned data a conclusion can be drawn that the clients have trust in the members of the court or the individual judges who try their cases. Therefore, the request for exception is not used

often, which can be considered positive.

In the cases where an exception is requested during the proceedings, the procedure is stopped (Article 69 of the LCIP) until the President of the court decides upon the request for exception. In the LOCIP there are no provisions about time limit in which the President have to decide upon the request. This can affect the length of the proceedings.

**Recommendation:**

**Establishing terms in the LCIP, by which the President of the court will decide upon the request for exception, can affect the proceeding and prevent its prolongation.**

<sup>12</sup> During the Presidential elections, in the Basic Court in Kavadarci, two judges that try criminal cases were engaged in the elections.

The data acquired from the research show that this right is not abused. The research findings point out that the claims that the clients in civil cases often use the exemption right even without a reason to prolong the procedure are groundless.

Beside the clients, the request for judge exception can be submit by the judge himself.

***The hearing observed on 29.09.2004, before the Basic Court in Bitola is postponed on indefinite time to prevent the partiality of the judge since he is in a good relation with the plaintiff. The judge himself postponed the trial on indefinite time. The judge also submitted the request for an exception to the President of the court.***

### ***3. Equality of Arms***

The key element of the concept of a fair trial is the principal of procedural equality. Although, it is not explicitly mentioned in the international instruments for human rights, it is considered as a universal legal standard. In Europe, the concept behind this expression is the *principle of contradiction*. The principle is also considered as fundamental principal of the criminal procedure, but it is essentially limited by the so called, investigating norm (an active role of the court).

In our system, the issue of providing equality between the parties is of different nature, which is quite reasonable, because the system with mixed procedure and an active role of the court does not incline towards principle of equality between the parties. Namely, primarily the court is responsible for establishing the truth ex officio, and the parties only provide assistance, more or less. Therefore, one of the main problems is the fact that the judge is in detail informed about the prosecution's records, and even with the evidence that are not formally presented before the court.

In practice, the Court and the Public Prosecutor's office co-operate more closely than in the adversarial systems, because they have common starting hypothesis and interest. Although, from theoretical point of view, this plays no significant role - since the court can reach the verdict only on the grounds of evidence which are represented immediate in public and in contradictory hearing - the indirect effect can be harmful for the defendant. The problem with the expert witnesses is resolved in a different manner since they are assigned by the court and therefore considered as neutral and objective. That is the reason why the defence is having difficulties when the expert opinions and their diagnosis should be denied, due to the fact that such official expert witnesses have certain reputation that goes with their position. This gives grounds to the relative independence of the expert witnesses, but it can cause great problem for the defence when the expert findings are essentially in favour of the indictment. For that reason, the stance of the European Court for Human Rights is of a particular importance. Namely, it suggests that in cases where the indictment is based on the diagnosis and opinions of such "neutral" judiciary experts, for the purposes of the Article 6 of the Convention, they are considered as "witnesses against the defendant", which gives defence right to request examination of witnesses in their favour. Who will bear the costs for these experts is a very delicate question. However, the idea for

assigning official experts as expert witnesses by the court, is still considered as acceptable as far as higher standard regarding their expert opinion are guaranteed. Nevertheless, the defence has to have a real opportunity to deny the expert opinions of the expert witnesses assigned by the court, which is not always guaranteed in our judicial proceedings.

*A sufficient time to prepare the defence* is one of the minimum rights prescribed for anyone accused (Article 4 paragraph 2 of the LCP). During the procedure, the defendant is given a sufficient time to prepare his defence, but a special attention is paid to the preparation for the main hearing (the court summon has to be delivered to the accused in such a way that between the delivery of the summons and the date of the main hearing there must be sufficient time for defence preparations, at least 8 days, except for the Brief procedure where that period is 3 days). The accused that received no summons on time is not obliged to come and his absence will not revoke any procedural sanctions. Furthermore, due to the preparation of the defence, the court may interrupt the trial if during the trial the prosecutor orally alters the prosecution act (Article 329 p.2 of the LCP) or submits a prosecution act for a crime committed or revealed during the session of the trial (Article 330 p.2 of the LCP).

The results of the data analysis concerning the time passed from the receipt of the court summons until the main hearing occurs are presented in Table 2.

**Table 2. The time passed from the receipt of the summons until the main hearing.**

Time	Number of cases
3 days	In 26 cases
8 days	In 61 cases
15 days	In 141 cases
More than 15 days	In 148 cases
No data	For 267 cases

The data in the table above shows that in 26 cases 3 day passed from the receipt of the summons until the main hearing, out of which in 12 criminal cases the Brief procedure was not prescribed.

On the other hand, in 175 cases the time that passed in between is more than 15 days, which is a long period and can contribute to undue delays of the procedure.

*Access to the records.* According to the 1997 Law, the rights of the defence are enhanced by abandoning the most of the limitations regarding the access to the records and the supervision of the communication between the defender and the detained defendant. Namely, in both cases the right of the defence being previously conditioned by examination of the accused, is now abandoned, and the defender has a right to *have an access to the records and other obtained material which serve as evidence* from the moment when the request of the prosecutor for initiation of a criminal procedure is submitted, as well as in the case when, before bringing the decision for investigation, the investigating judge has conducted necessary investigation (Art. 69 of the LCP).

The accused has the right to an access to records and objects serving as evidence, after he is interrogated (Art.124 p.5 of the LCP) that can also be criticised. But in the cases of *Jaspers* and *Kamasinski*, the authorities in Strasbourg held that the accessibility to the records for the defendant's counsel satisfies the requirements of the Convention: the defendant himself does not have an autonomous right on reviewing the records.

Accordingly, the domestic legislation exceeds the requirements established by the bodies that implement the Convention, since they do not recognise the right to access to the records at the early stage of the proceedings. The requirements for recognising this right at the stages that precede the indictment are frequently abandoned by the European Commission. Namely, it is sufficient that the defendant has a right to access after the prosecution act has been enforced.

The observers have noticed that in 194 cases or 30,1% out of the total number of observed cases the defence has gained the access to the records and had the possibility to review the evidence and any materials from the case.

**Rules for disclosure of evidence.** Unlike the access to record, it must be recognised that in our system there are no standards that will support the rules for disclosure of evidence by the courts and other state bodies that take part in the presentation of evidence, and particularly those in favour of the defence. According to the report of the Commission held in *Jaspers v. Belgium*, the prosecuting and investigating authorities are obliged to disclose any material in their possession, which may assist the defence.

In the provisions of the LCP, Article 166, it is indeed prescribed that "If before the completed investigation, the investigating judge finds that it is on behalf of the defence, the accused and his council to be introduced to important evidence collected during the investigation, he/she will inform them within certain period that they can have an access to the material and records referring to that evidence". Still, the national law and practice recognises no rules that can oblige *the Public Prosecutors office* to disclose any material in their possession which may assist the defence, although their obligation for objectivity should not be neglected (with equal attention to investigate and establish both the facts on behalf and the ones against the defendant, Article 14 paragraph 2 of the LCP).

During the analysis of the received questionnaires, the restriction of the guarantee, which assumes existence of reasonable opportunity for preparation of defence, is not noticed. According to the received data, the observers estimated that the defendant and his counsel had a chance to present their defence and to contest the prosecutor's evidence.

In 190 cases or 29,5%, the defendant and his counsel had the opportunity to contest the evidence of the prosecution and to suggest new evidence in their favour.

**A Right to examine the witnesses.** In accordance with Art.6 p.3 (d) of the European Convention on Human Rights, everyone charged with a criminal offence has the right

”to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

The European Court of Human Rights begins with the statement that the opportunity to contest all the evidence presented before the court and upon which the judicial verdict is reached, is essential for the defence. Generally, all the evidence should be presented in the presence of the defendant and in a public hearing before the court, with an opportunity to confront the arguments in a contradictory hearing. Apart from some exceptional cases (that require particular justification) the witnesses should be examined in the presence of the defendant at the main hearing, where both parties will have the opportunity to present their arguments, but also the susceptibility of the main hearing to a public control offers tangible guarantees for fairness of the procedure. Nevertheless, “this does not mean that the statements of the witnesses in order to be admissible as evidence have to be given at a main hearing before the court. The use of witness statements obtained in a pre-trial procedure as an evidence on its own, is not considered as contrary to the Convention”, “under condition that the rights of the defence are respected. By the rule, these rights require that the defendant should have an adequate and reasonable opportunity to challenge and examine the witnesses against him, either when the witness has given the statement or at any latter stage of the proceedings if that is decisive evidence.”

The LCP requires all evidence relevant for a fair judgement to be presented before the court (principle of immediacy) and determines under what conditions the minutes of the witnesses’ statements can be read. It seems that all of this is prescribed only from the point of view of the court, its role and duty to establish the truth, and not as a guarantee for the defendant. This becomes very clear if we take into account that the bare existence of adequate and reasonable opportunity for the defence to examine the witnesses is not a condition for admissibility of such statements. The admissibility of the statements given outside the main hearing is examined (in a manner characteristic for continental systems) only from the aspect of the *principle of immediacy*.

The principle expresses the significance that is given to the immediacy in the establishment of the facts and evidence by the court. In order to evaluate the credibility of the statements it is very important the witness to be examined at the main hearing by the court through observance of his/her behaviour, the movements and other psychical elements. Reading of the minutes from pre-trial procedure is not permitted because the court has to establish the truth, and not because the defence did not have an opportunity to examine the witness.

Likewise, within the continental procedures, the provisions from the LCP prescribe only the reading of the statements given in the pre-trial procedure without interpretation of such explicit prohibition in a manner that will also encompass statements given outside the court through “hearsay evidence”.

Besides the erroneous application of the provisions from the LCP, as a ground for revoking the verdict by an appeal, the Article 364 paragraph 2 of the LCP (relative violation of the procedure) also contains a provision that prescribes a violation of the right to defence at a main hearing, if that was or could impact the lawful and proper application of the regulations.



The proposals to introduce a cross-examination of the witnesses did not find their place in the last project on the Law on Criminal Procedure; thus, these suggestions are left for the thorough stage of the domestic criminal law reform. Namely, the modification of the way evidence is presented requires completely different role of the all parties and bodies in the procedure, which is related to certain preliminary preparations. However, the standards established by the jurisprudence of the Court in Strasbourg must be achieved by the domestic judicial practice, as well. Further more, this is a paramount because the fundamental rights to defence (including the right of the defendant to be present during the examination of the witnesses and to be able to questions them, according to Art.4 of the LCP) are listed in the basic principles of the criminal procedure. In addition, the principle of immediacy is reinforced with the requirement that if the certification of a fact is based on person's observation, than he/she is to be heard at the trial in-person. The hearing (apart from the cases which are anticipated by this Law in particular) neither can be altered by reading the previous statement from the minutes, nor by the statement in writing (Art.328).

***Witnesses on behalf of the defence.*** This guarantee does not give the defendant an indefinite (absolute) right to suggest new witnesses. The National courts are free in their decision whether the hearing of the witnesses of the defence could contribute towards the establishment of truth, and if that is not a case, to reject hearing of the witnesses insofar the Convention is obeyed, and particular, the principle of equality.

Instead of the right of the defendant to be present and to examine the witnesses on his/her behalf, as one of fundamental personal and affirmative rights guaranteed within the international documents for human rights, the new LCP guarantees only that a person charged with a criminal offence shall have the right to be present during the examination of the witnesses and to be able to ask questions himself (Art.4, p.2). However, it must be emphasised that according to the Constitution of the Republic of Macedonia, the guarantee in the Art. 6, p.3 (d) from the European Convention is incorporated in the domestic legislation. Besides this, the provision is precise enough and suitable to be directly applied without a need for additional legal arrangements.

On the other hand, in order to confine the broad discretionary powers of the court, the provisions that regulate presentation of evidence explicitly lists the situations when the proposal of the parties for obtaining new evidence at the main hearing may be rejected. Thus the proposal may be rejected if: 1) it refers to illegal ways to obtain evidence, to an evidence whose presentation is not allowed according to the law, or to the fact which according to law cannot be proved (not allowed proposal); 2) the fact is already validated or is not significant for the decision (insignificant proposal); 3) there are reasons to suspect that within the proposed evidence, the fact of significance cannot be validated or this could be done but only with immense difficulties, i.e. if that evidence in the previous course of the procedure could not have been obtained and it is highly likely that it cannot be obtained in the primary period (inadequate proposal); if it is not clear, complete or according to the current condition of the procedure and the acts undertaken by the proposer where is obvious that the suggestion will cause significant delay in the procedure. Such regulation means that all proposed evidence shall be accepted, and the exceptional cases when the judiciary council may reject the presentation of new evidence are explicitly listed in the Law.

In accordance to the previously presented jurisprudence of the European Court and Commission of Human Rights, alongside with the duty to note in the verdict for

which reasons certain proposals were not approved of the parties (Art.348 p.7 of the LCP), the decision with which the proposal for presentation of new evidence is rejected must be elaborated. The Council may alter or revoke them in the further course of the procedure(Art.314 p.8 of the LCP).

***In the Basic Court Skopje I, a trial on the criminal act of Mediation in conducting prostitution was observed. The counsel of the defendant requested an exemption of the President of the judicial because he has rejected the counsel's proposal for presentation of new evidence since he considered that they are irrelevant for the proceedings.***

The legal statement of the Supreme Court of the R. Macedonia is that the right of equality of arms is not violated if the evidence suggested by the defendant is not presented, if the facts for the perpetrator of the criminal act are undoubtedly established. (The Supreme Court of the Republic of Macedonia Kvp.br. 98/95, 04.10.1995).

***Recommendation:***

**In respect to the witnesses of the defence, a German model can be proposed, according to which when the court will reject to summons somebody, the defence can invite witnesses directly. The persons who are directly invited are obliged to come before the court only if they get cost compensation. If at the main hearing is proved that the hearing of the directly invited person was useful for clarification of the case, than the costs fall on state cash register<sup>13</sup>.**

According to the received empirical data, the conclusion can be drawn that in 174 (or 27,1%) out of all observed cases the defendant and his counsel used the right to suggest new witnesses on their behalf, and that right was accepted without exception.

In 169 cases or 26,3% the defence suggested presentation of new evidence and their proposals were accepted and the evidence was presented before the court.

#### ***4. Right to be present at the trial***

From the stance of the right to be present at the trial as part of the fair trial standards, the trial in absence is not desirable, but may be allowed in certain exceptional circumstances if the postponement of the trial can lead to lost of evidence, obsolescence of criminal prosecution and alike.

However, in accordance to the practices established by the European Convention, the provision from the Article 292 of the Law on Criminal Procedure (LCP), for a trial in absence will not cause a problem, especially because in such cases the necessary

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<sup>13</sup> At the Round Table, it was emphasized that this decision could be contra productive because it could bring to delay of the procedure.

guarantees are prescribed, and particularly *ensuring a counsel* (Art. 66 of the LCP), as well as because there is an *opportunity for repetition of the criminal procedure* if the defendant or his counsel submit a request for repetition of the procedure within the period of one year from the day when the defendant was informed on the verdict reached in his/her absence (Art.398 of the LCP).

***In the Basic Court Skopje I in Skopje, a trial on the criminal act of Robbery from Article 237 p.3 of the CC was observed. The trial is held upon the request for repetition of the procedure. Namely, for the same criminal act the verdict has been previously reached in the absence of one of the defendants. This is a repetition of the procedure only for the absent defendant.***

The possibility to remove the defendant from the main hearing if he disturbs the order in the courtroom (Art. 287 of the LCP) is an exception that is allowed by the Convention, as well.

The observers noticed one case when the order in the courtroom has been disturbed by the defendants, and the judge warned them. The case where the defendant has been removed from the trial due to the disturbance of the order has not been noticed.

Similarly, the removal of the defendant from the trial in the cases when some of the accomplices or witnesses refuses to give a statement in his presence or if the circumstances point out that in his presence the truth will not be said, is also allowed under condition that his counsel is present and the defendant to be informed of the statements.

The provision from Art. 428 of the LCP might be problematic in respect to the compliance with the Convention. This Article prescribes the opportunity for *trial without the presence of the defendant in the brief procedure* if he does not attend the trial although he has been summoned or the court summons could not have been handed to him because the accused has not informed the court of his new address or residence, and the court may decide the trial to be held in his absence but only under the condition that his presence is not necessary and that he has been examined before.

The practice of the bodies and authorities in Strasbourg requires the defendant to be efficiently informed (summoned) for trial, which means to be informed timely and using a language that he understands. In the leading case regarding this issue *Kolozza and Rubinat v. Italy*, (Series A, No.89, 1985), The European Court for human rights found that the authorities did not undertake all necessary efforts to find out the new address and that *the trial in absence is a disproportional penalty for failing to inform the court about change of address*.

Nevertheless, such cases are very uncommon in the practice, particularly because it happens very rarely the defendant to be previously examined in a brief procedure. It must be stressed that in such cases neither there is possibility for repetition of the procedure, nor there has been the counsel assigned by the court. Every person charged with a criminal act has a right to be present at the trial in order to hear the indictment and to defend himself. This means that the court is obliged to inform the accused for the indictment, to summons him for a trial and to demand his presence, and not to exclude the defendant from the trial deliberately.

***Recommendation:***

**The possibility for a trial in absence shall be abandoned for cases where the summons can not be handed due to the failure to inform the court about new address.**

According to the Article 292, paragraph 3 of the LCP, the accused may be tried in absence only if he is a fugitive or not available to the state agencies and there are particularly significant reasons to be prosecuted although absent<sup>14</sup>.

Out of all the observed cases, in 21 cases the trial was conducted in the absence of the defendant. In 15 of those cases the defendant was tried in absence because he was not available (unknown address or with residence abroad), in 3 cases the defendant was tried in absence because he was a fugitive, and in the rest 3 cases from other reasons.

According to the analysis of the cases when the defendant is tried in absence, in 11 cases the trials were for criminal acts conducted by several accomplices.

***Recommendation:***

**In the cases with several accomplices, when suitable, the judge shall bring a decision for separating of the procedure instead of bringing decision for a trial in absence.**

In accordance with the provisions from the LCP, in all cases where the defendant is tried in absence, the court in official capacity has assigned a counsel.

### ***5. The right to public trial***

The right to public trial<sup>15</sup> is a constitutionally guaranteed right to all citizens, and it is incorporated in the Law on Criminal Procedure and Law on Civil Procedure.

The principle of public trial is accomplished by:

***a) presence of the public at the main hearing***

The presence of the public at the main hearing assumes presence of all interested individuals. In order to provide circumstances for their undisturbed presence, the

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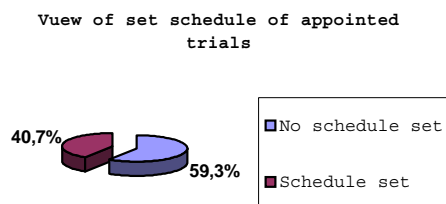
<sup>14</sup> The European Court of Human Right established that if the defendant has received the summons but he did not come at the hearing and if he is informed about the procedure against him, than there is no violation of a fair trial right.

<sup>15</sup> In the case *Axen v. the Federal Republic of Germany*, The European Court of Human Rights stated that "The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior or inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention".

written schedule of the appointed trials should be announced and set on a visible place<sup>16</sup>.

***On 24.09.2003 in the Basic Court Skopje I, the observers noticed the following: "Before and after the trial, while we were present, the list of appointed trials for today was not set in front of the courtroom.***

***On 04.12.2003 for the case before the Basic Court Skopje I, the observers noticed that on the board in front of the courtroom where the schedule of appointed trials is set, the schedule for the trials for all day was missing.***



In more than half of the Basic Courts of the Republic of Macedonia, the schedule of the appointed trials is not set on a visible place.

With the Amendments of the Law on Criminal procedure a new Article 123-a is anticipated, which prescribes that the court is obliged every working day to enable all participants in the proceedings to have access to the record of appointed trials by electronic mail or by other ways. For the implementation of this provision the computerization of the courts is very important and it will enable greater efficiency and effectiveness of the judiciary<sup>17</sup>.

***Recommendation:***

**In order to enable the presence of the public, the courts have to solve the organizational issue of how to make the information for the day and hour of a certain trial available for those who have interest for them<sup>18</sup>.**

**The computerization of the courts must begin as soon as possible, which will enable all interested parties to gain on time information for the day and hour of the trial, as well as the stage of a certain case. It will facilitate the communication with the clients and the counsels, and with all interested subjects.**

The circumstances for the exclusion of the public, either partially or totally, are prescribed by Law.

In the **criminal procedure**, the judicial council can exclude the public from the entire main hearing or a part of it, if it is necessary a secret to be kept, the public order to be

<sup>16</sup> In accordance with Article 57 paragraph of the Judicial Register, every day prior to the beginning of working hours a list of appointed trials for that day is to be put on a notice board and in the entrance of the courtrooms where the trials will be conducted, and the lists of carried out trials are to be removed.

<sup>17</sup> . See Chapter III, Point 9.

<sup>18</sup> At the Round Table the example of Slovenian practice was emphasized, where the judges have to deliver the schedule of trials for the following week to the Supreme Court every Friday till 14.00. Thus, everyone can see when a particular trial is appointed.

restored, the morality to be protected, the personal and private life of the accused to be protected, the witness or the damaged to be protected and the interests of the minor to be also protected (Art.280).

The analysis of the questionnaires shows that, in this respect, the principle of publicity is obeyed by the court. Namely, in the **criminal procedure**, exclusion of the public, either totally or partially, with a court' decision is registered only in 5 cases:

- in one criminal case the public was partially excluded because there was no space in the courtroom.
- in one criminal case the public is excluded in order to protect the personal and private life of the accused, the witness or the damaged.
- in three criminal cases the public is excluded in order to protect the interests of the minor.

***In a criminal case observed in the Basic Court in Skopje I, at the hearing held on 27.02.2004, the public was partially excluded because there was no space in the courtroom.***

It is noticed that in some courts the trials are carried out in the judge's office which can violate the principle of publicity because the presence of the all interested individuals is not possible in the office.

The above mentioned is disturbing particularly if we consider that in the Basic Courts in Vinica, Sv. Nikole, Struga and Stip, the number of observed cases which were conducted in the judge's office is bigger than those held in a courtroom.

***Recommendation:***

**Considering the nature of the criminal cases, an effort must be made (even to insist) for conducting trials in courtrooms and not in the judge's office where there is no place for normal conduct of the trial, for presence of the all interested individuals, for presentation of procedural actions as hearing of witnesses, experts, etc<sup>19</sup>.**

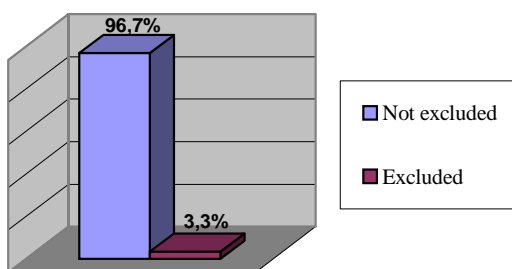
In the **civil procedure**, the public may be excluded by force of law in the status disputes (paternal, maternal and marital disputes), while the court can bring a decision for public exclusion if the interests of public order or the reasons of morality require so, and when with the measures for maintenance of public order prescribed by the LCIP the undisturbed conduct of the hearing can not be provided.

Even when the public has been excluded from the main hearing, the pronouncement of the decision has to be publicly announced, and the court decides whether to announce or not the reasons reaching such the verdict. Although the ways in which publicity is accomplished can be various, in most cases it is achieved through the main hearing.

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<sup>19</sup> The issue of spatial organization was underlined on the Round Table, and the insufficient number of courtrooms because of what the judges try in their offices.

**View of public exclusion from the main hearing**



Out of 720 observed cases in 696 cases or 96,7% the main hearing was public, and only in 24 cases or 3,3% the public was excluded at the main hearing. Such small number (only 24 of 720) of cases where the public was excluded is due to the fact that the number of observed cases where by statutory effect of the law the public should be excluded is very small (total of 42 cases where 38 marital disputes, 2 disclaiming paternity

disputes and 2 paternity affiliation disputes). The unharmonisation of the number of cases where the public has to be excluded (42) with the number of cases where the public was excluded is a result of that, according to the LCIP (Art.293 par.2), even in the cases where the public should be excluded by statutory effect of the law, the judicial council may allow certain officials, as well as scientists and public workers to be present at the main hearing, if that contributes towards their official duty and scientific or public work. In these disputes the procedure may end with a preparatory hearing without carrying out main hearing. All 24 cases where the public was excluded were marital disputes<sup>20</sup>. Generally speaking, the data received from the research indicate that the principle of publicity at the main hearing was consistently respected.

The single violation of the principle of publicity were the cases where the observers were obstructed access to the court i.e. their presence was unable.

*On 26.01.2004, in the attempt to follow a civil case before the Basic Court in Kumanovo, the observers were obstructed access to the hearing by the judge with the explanation that they need a letter from the Supreme Court of the R. Macedonia, the Ministry of Justice and the President of the court. After the conducted hearing the judge did not submit the case documents to the Records Office of the court.*

Due to the publicity of the court proceedings, a special attention must be paid to the presence of the media at the trials. The tendencies of sensationalism, recognizable in the press, significantly jeopardize the presumption of innocence and the fair trial conditions. It is indispensable to regulate what media and by which mass-medias may follow the trials, and what they may record and broadcast. Regarding this issue it is necessary to organize education of journalist that follows court trials in order to avoid violation of the rights, dignity and honour of the parties, especially the defendants and convicted persons.

<sup>20</sup> Despite the fact that the public was excluded from these hearings by the force of law, the observers were allowed presence at the hearings.

***b) reporting on the progress of the trial to interested subjects who require so.***

Regarding the request to receive information for the progress of the trial and additional information about the observed cases, the observers in general met a correct attitude of the judges and in most of the cases they received the necessary information completely.

There are certain cases where the necessary information was not given to the observers.

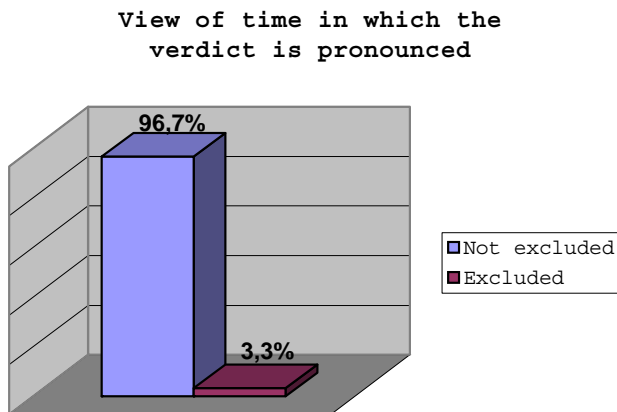
*On 28.11.2003 before the Basic Court in Strumica, for a procedure on a legal basis of damage compensation, the judge refused to give the information from his papers to the observers.*

*Before the Basic Court in Skopje, in observation of a criminal case on the criminal act of Unauthorized production and release for trade of narcotics, psychotropic substances and precursors in accordance with Article 215 of the CC, the observers noticed that the judge had an improper attitude and he did not want to give them any information with explanation that he has too much work.*

*Considering the fact that these are exceptions, we can conclude that the principle of publicity is consistently respected.*

***c) announcement of the verdict.***

A significant element of the publicity of the trial is the announcement of the verdict.



In **criminal procedure**, in 106 observed cases the verdict was pronounced immediately, in 11 cases after three days, in 8 cases after 8 days, in 4 cases after 15 days, in one case after 30 days and in case after 90 days.

Regarding the announcement of the verdict, the time limit of at least three days for announcement of the verdict in a procedure when more complex cases are carried out, although instructive, must be considered. An announcement of the verdict after 30 or



even 90 days, as we noticed, is impermissible. In such case, the President of the court must ask the judge to explain the reasons for non announcement of the verdict in a long time period, and the National Judicial Council that takes care for the professionalism and quality in the work of every judge, should be informed. Even more, because the defendant after the completion of the main hearing until the announcement of the verdict remains to be uncertain for its destiny and has no available legal remedy to protect his rights. He is completely helpless to undertake anything except to inform the President of the court.

In **civil procedure** according to LCIP, the verdict is reached immediately after the closure of the main hearing and is announced than, except in more complex cases where the court may postpone the pronouncement of the verdict for 15 days from the day of the closure of the main hearing. In such case the verdict will not be announced but a copy will be delivered to the clients.

According to the data from the observed cases, in 58 cases the verdict is reached immediately after closure of the main hearing. Out of those 58 cases, in 37 cases the verdict is announced to the clients immediately.

## ***6. Trial in a reasonable time***

With ratification of the European convention, Macedonia undertakes a serious responsibility to organize the legal system in such manner that will provide trial “in a reasonable time”. The European Court of Human Right in many occasions has strived to turn the attention to the exceptional meaning that this requirement has for the legal system. In fact, the greatest number of verdicts of this court is in relation to the right of the defendant on a final verdict in a reasonable time.

### **Criminal Procedure**

In the criminal procedure the purpose of the reasonable time guarantee aims to avoid the uncertainty which an accused person faces, or the exposure to various deprivations on account of a criminal charge against him. The prompt trial should protect the defendant’s right on effective defence concerning the fact that the delays may resulted in loses of the evidence in favour of the defence, and the objectivity of the verdict reached long time after the crime event, became an issue for controversies which undermines the public confidence in the criminal justice system.

The time to be taken in consideration encompasses the entire criminal procedure. The European practice applies very flexible approach. The stadium considered relevant is when the position of the person is significantly upset as a result of the criminal charges against him. The same general principle regarding the beginning of the relevant period, by the authorities in Strasbourg is applied for its closure. Accordingly, the considered period lasts until the end of the position into which a person finds himself on account of a criminal charge against him. Thus the considered period covers the entire criminal procedure, including the procedure of judicial remedies.

The reasonable length of the procedure is not examined in abstracto, but in the light of the particular circumstances of the case. On the other hand, the omission for undertaking certain procedural activities in terms that are prescribed in domestic law, is without particular importance in the evaluation whether the requirement of Article 6(1) from the Convention has been satisfied.

In criminal cases particular attention is paid to: 1) the complexity of the case (the nature of the criminal act and the number of charges), 2) the conduct of the clients and 3) the manner in which the case is carried by the competent national authorities. None of these factors is decisive on its own, rather they are considered as factors that could explain the long duration of the criminal procedure in a particular case. Each of them is estimated separately, and their contribution toward the length of the procedure is evaluated. At the end, considering all relevant factors together, the evaluation is made whether the assessed period can be considered reasonable. The Court for Human Rights shows understanding and tolerance until the national authorities deals with the case, but the long periods of inactivity are considered particularly negative.

The national Law on Criminal Procedure does not pose the issue of efficiency as a right of the defendant, but rather as an obligation of procedural subjects. Thus “the court is obliged to insist the procedure to be enforced without delay and to prevent any violation of the rights of the persons that participate in the procedure” (Art.14 of the LCP). Such regulation, to some extent, seems that relative the responsibility of the court, and binds other participants more than the court. According to LCP, the general duty relates to the activity of the court free of the terms determined in special norms. It should induce the court to self-discipline while managing the trial and to discipline other participants in accordance with the Rules of the procedure. Various other norms are aimed at acceleration of the procedure (for example: the brief procedure, denial of the right to request judge or juror exemption after the main hearing commences, the possibility to dispose with the prosecution act by the prosecutor even in second degree procedure, the possibility to shorten the time period between the delivery of the summons and the main hearing in accordance with the defendant, the unfeasibility to object the prosecution act submitted at the main hearing, etc).

The fact that the duration of the procedure in great extent depends on the organization and personnel and computer equipment of the judiciary must be considered.

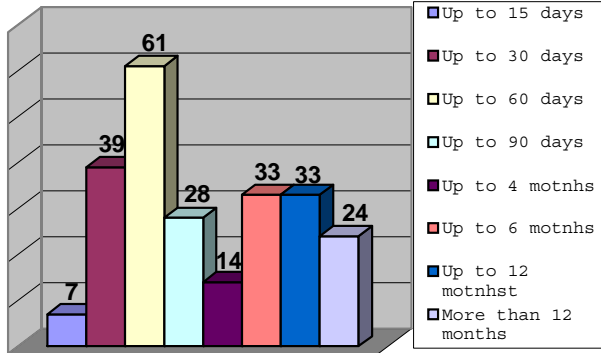
The Law on Criminal Procedure has determined time periods in which certain activities in the criminal proceeding should be undertaken.

Regarding the certain phases of the criminal procedure in which, according to the analysis of the questionnaires, the undue delays in the procedure is noticed, primarily an analysis of **the period between the submission of the prosecution act and the first hearing at the main hearing** may be conducted.

According to Article 271 paragraph 2 of the LCP, the President of the council will determine the trial at the latest within 30 days from the day of the receipt of the prosecution act at the court and if there is a request under Article 269 of this Code- as soon as in reference of the decision of the council, the trial can be determined. If he

does not determine the trial within this period, the President of the council will inform the President of the Court of the reasons for which the trial is not determined. If necessary the President of the Court will undertake measures the trial to be appointed.

The period between the submission of the prosecution act and the first hearing at the main hearing



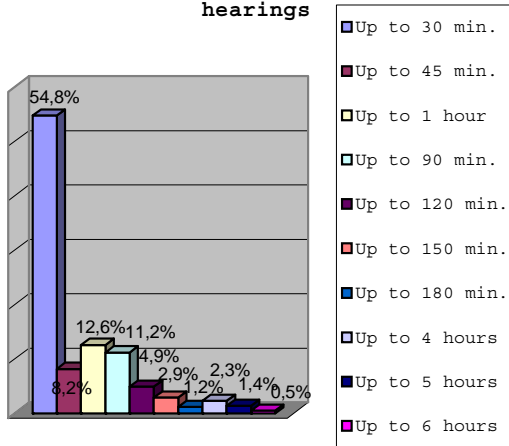
According to the analysis of the data from the questionnaires, it can be concluded that out of a total of 239 filled-in questionnaires, only in 46 case or 19,2%, the period for scheduling the first hearing of the trial at the latest within 30 days from the day of the receipt of the prosecution act is respected. The percentage of cases where the hearing was determined in a

period of more than 12 months is high. Out of 24 registered cases, 12 cases or 50% are noticed in Basic Court in Bitola.

*Before the Basic Court in Bitola, the prosecution act on a criminal act of Issuing a bad check and abuse of a credit card in accordance with Art. 274 p.1 of the CC, is submitted on 23.11.2000, and the first hearing of the main hearing is held on 20.11.2003.*

Another element in estimating the “trial in a reasonable time” principle is the observed phenomenon of *short duration of the court hearings*.

View of duration of the hearings



According to the data from the 918 filled-in questionnaires, the conclusion can be drawn that the highest percentage, more than 54,8% of the trials lasted less than 30 minutes.

In the greatest number of the cases, the short duration of the hearings is a result of frequent postponement of the hearings.

In the Basic court in Veles the observers monitored a case of a criminal acct: Tax evasion- Art.279, paragraph 2 connected to paragraph 1 from CC. On 10.01.2004, after 44 postponed and held hearings the verdict was reached and red by the judge.

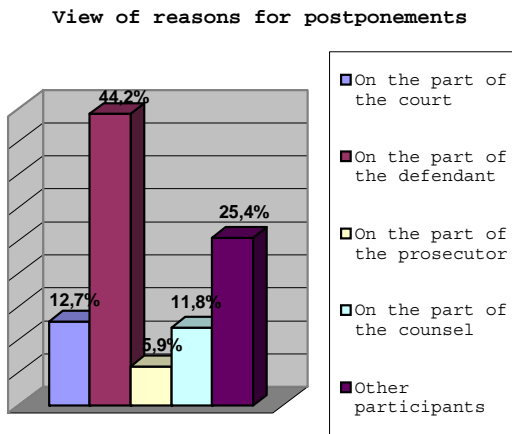
Before the Basic Court in Skopje, a trial on the criminal act of Rape according to Art.186 of the CC is held. It was postponed 29 times. The proceeding is still in progress.

In the trial conducted before the Basic Court Skopje I for the criminal act of Covering up according to Art.261 p.1 of the CC, the hearings are delayed because in the last 6 months of the proceeding the first accused is not accessible. Thus, after 21 delayed hearings, on 10.02.2004 the verdict is reached in the absence of the first accused.

On 05.04.2004 before the Basic Court Skopje I, a trial on the criminal act of Sexual attack upon a child according to Art. 188 p.1 of the CC is observed. The prosecution act is received on 24.06.1998. It was postponed 31 times. The proceeding is still in progress.

In the trial conducted before the Basic Court in Tetovo for the criminal act according to Art.272 paragraph 2 of the CC, the reached verdict is pronounced immediately, after 5 years of trial delay and 30 postponed main hearings.

Due to the **reasons** for the postponement of the main hearing, the results show the following:



These data show that very often the postponements are due to the defendant's initiative.

There are cases where the defendant uses his rights from the Law on criminal Procedure in order to delay the trial.

Before the Basic Court in Skopje, in a trial on the criminal act of Mediation in conducting prostitution according to Aer.191 of the CC, the defendant uses the law on his behalf by replacing the defender. He delayed the proceeding which was in a concluding phase, thus harming accomplices who were detained. Accordingly, he has a possibility for further postponements due to the suggestion of new evidence.

The postponement of hearings due to the absence of one of the defendants is sufficient reason for separation of the proceeding in order to avoid unnecessary delay of the hearings.

According to Article 30 of the LCP the competent court may decide the procedure for separate crimes or against different accused to be separated and finished separately or to be directed to another competent court if there are important reasons or for the reasons of suitability<sup>21</sup>.

*In the trial conducted before the Basic Court Skopje for the criminal act of Misuse of official duty and authorities according to Art. 353 of the CC, the procedure was initiated against five accused. But, the absence of one of the defendants at two hearings has resulted in separation of the proceeding. The judge brought a decision for separation of the proceeding at the third hearing.*

This is a good example of trial delay prevention.

The delay of the main hearing should not be exceeded for a period longer than 30 days. In accordance with Art.297 paragraph 3 of the LCP, if the postponing lasted for more than 30 days, the trial must start from the beginning and all evidence must be presented again<sup>22</sup>. This situation can result in unnecessary delay of the trial.

The analysis shows that 12,2% of observed hearings are postponed for a period longer than 30 days.

*On 30.03.2004 before the Basic Court in Vinica, the observers monitored a case of a criminal act of Bribe. Due to the postponement longer than 30 days, the main hearing started again and the statements of the witnesses and the defendant are red. An inspection and reading of all material evidence is conducted as well.*

***Recommendation:***

**Considering the overburdening of the courts with cases and frequent re-started beginning of the main hearing due to the expiration of the period of 30 days, certain comparative solutions where this time limit is two months i.e. not more than 3 months could be accepted.**

In order to ensure the presence of the defendant who did not come at the main hearing although he has been correctly summoned and he did not explain his absence, or if the delivery of the court summons could not have been completed and according to the circumstances it can be concluded that the accused avoids the receiving of the court summons, in accordance with Art.177 of the LCP, an order the accused to be apprehended may be issued by the court. The order for apprehension is carried out by the Ministry of Internal Affairs. The person entrusted with the order hands in the

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<sup>21</sup> In the Law on Criminal Procedure of Albania, the reasons for which the court may separate the procedure are enlisted in Article 93. In one of the enumerations (point c) it is prescribed that the court will separate the procedure if one or more defendants do not come at the trial due to irregular delivery, unintentional evasion of delivery....

<sup>22</sup> According to the Law on Criminal Procedure of the Republic of Serbia, Art. 309, p.3, the main hearing will start again if its postponement is longer than three months. And according to the Law of Croatia 9Art.327, p.3, that time period is two months.

order to the accused and asks him to follow him. If the accused refuses it, he will apprehend him forcefully.

This provision of the Law on Criminal Procedure assumes a complete cooperation between the Court and the Ministry of Internal Affairs that is responsible for carrying out of the court order for apprehension. The analysis of the questionnaires and the observed hearings shows a high percentage of cases where the defendant has not been apprehended by the MIA even after several court orders for apprehension. This points out to the insufficient coordination between the court and MIA, and lack of efficient cooperation.

According to the available data, in 61 cases an order for apprehension is issued. Only in 35 cases the order is carried out.

*In the case conducted before the Basic Court in Gostivar for a criminal act of Severe theft according to Art.237 p.1, p.1 of the CC, the hearings were postponed nine times because the presence of the defendant can not be provided. The court already issued two orders for apprehension.*

*On 16.12.2003 before the Basic Court in Sveti Nikole, a trial on the criminal act of Falsifying a document according to Art.378 p.1 in relation to p.3 is postponed because the MIA did not carry out the court order for apprehension of the defendant.*

*On 20.01.2004 before the Basic Court in Prilep, the observers followed a case of a criminal act of Theft according to Art.235 p.1 of the CCL. They noticed that the main hearing is postponed seven times and for the next hearing the court issued an order for apprehension with a remark the order to be obligatory carried out because it has been issued several times. At the trial, the reactions of the witness and the damaged are noticed.*

During the observation, there are 11 noticed cases when the main hearing is postponed in indefinite time. The data show that the reasons for such decision are:

- in one case on the part of the court
- in 6 cases on the part of the defendant
- in 3 cases due to expert testimony order

In the criminal procedure the *expert testimony* is used as means of evidence which helps the judge to reach an objective and just verdict based on precisely confirmed facts. But, the practice shows that the expert testimony itself may have a negative impact on the duration of the procedure.

According to the data from the questionnaires, it can be concluded that in 107 cases the expert testimony is requested:

Criminology expert testimony	In 14 cases
Forensic medicine expert testimony	In 28 cases
Psychiatry expert testimony	In 17 cases
Financial expert testimony	In 18 cases
Traffic expert testimony	In 11 cases
Other type of expert testimony	In 19 cases

The analysis shows that 40 expert testimony requests were sent to the Expert Testimony Bureau, 12 of them being for financial expert testimony. In 5 of these cases the testimony is conducted and sent back for more than 5 months.

*The case conducted before the Basic Court in Bitola for the criminal act of Embezzlement in the service according to Art.354 of the CC, in the procedure on the appeal was returned the first degree court for a re- trial. On 04.05.1999 the expert testimony order was sent to the Expert Testimony Bureau, and the testimony was done on 02.12.1999. There was no intervention from the court for faster expert testimony.*

*In the case before the Basic Court in Gevgelija for the criminal act of Use of a document with false contents according to Art 380 of the CC, on 25.04.03 the court sent an order for graphology expert testimony to the Bureau. The expert testimony is done on 16.09.2003. There was no intervention for faster expert testimony.*

It is true that very often the expert testimonies last too long and the judge have no possibility to influence the process in order to accelerate the expert testimony, although, in general, the judge is responsible to take care the cases to be tried without undue delay.

***Recommendation:***

**In order to accomplish the role of the judge as a dominis litis in the procedure, legislative changes in the provisions that refer to the expert testimony as a means of evidence must be introduced. In this sense, it is desirable, if in the written expert testimony order, the judge can determine a time limit in which the testimony has to be finished. The determined time period can be prolonged on the request of the expert in order to successful completion of the testimony. In this manner, the delay of the procedure on indefinite time can be avoided which gave the expert freedom, but also non-delivery of the finished findings of expert witnesses due to the unpaid costs between the institution that carried out the expert testimonies and the court can be avoided.**

## **Civil Procedure**

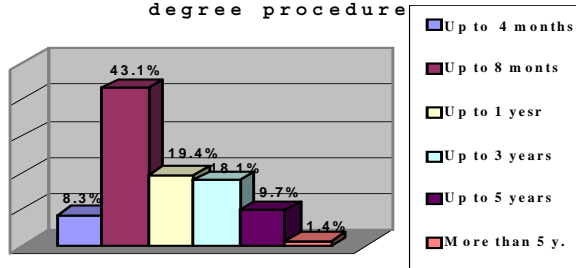
The LCIP (Article 10) prescribes the regulation prohibiting the misuse of rights of the parties during the process, and explains that the parties are granted procedural authorisations with an aim to promote reaching lawful and just decision and to avoid mistreatment of the opposing party, the court or other procedural participants. Thus, there is a direct penalty prescribed within the provisions of Art.301 authorising the court to impose a fine to the party, the legal representative, the proxy holder or the intruder that by undertaking procedural activities have more seriously misused the

rights recognised by this Law. The amount required is up to four average salaries in the Republic of Macedonia, as are during the last month.<sup>23</sup>

The question is how often the judge uses this penalty to prevent process participants from misusing their rights.

The results from the research (for the period July 2003-2004) for the question related to the duration of the first degree proceeding state that there are precise findings for only 72 cases out of 720 (10%), while all other cases are in progress.

View of timeframe of the first degree procedure

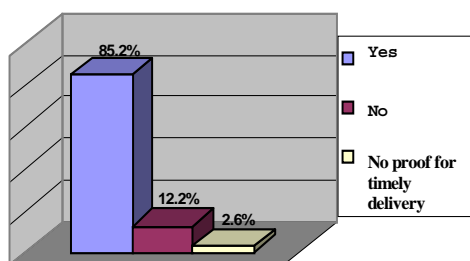


The timeframe is also different for the previously stated cases where the verdict is reached.

the duration of the procedure (72 out of 720) it can be said that the procedures last too long.

Although there is little data on the number of cases and

View of the delivery



In the highest number of cases, the regular or irregular delivery to the parties appears as important factor.

even from these examples that we have findings for, we can conclude that regarding the delivery there are activities that need to be undertaken if we aim to improve the efficiency and regular delivery. Regular delivery has without any doubt great influence over the proceeding duration, but it is not overwhelming.

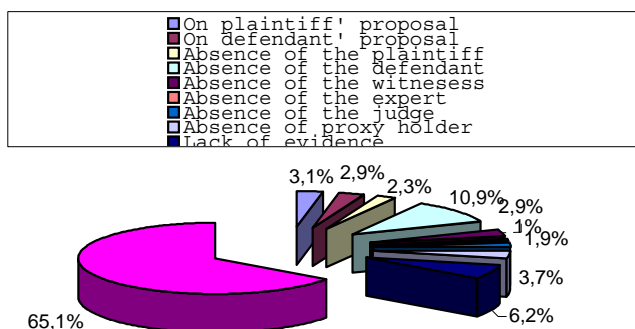
Regarding the delivery, if we take into account only the cases where there are findings for, than the percentage of the regular delivery is satisfactory compared to the irregular cases. However,

The important factor of the process is also postponement of the trials. The numbers show 626 cases out of 758 where the main hearing was adjourned. The results of the research also show that the reasons for trial adjournments differ.

<sup>23</sup> According to the Law on Trial Procedure of Sebia, art. 316 prescribes the amount of the financial punishment (10.000 dinars) and states that “the legal representative, the proxy holder or the intruder will be punished if aiming to use their trial activities to misuse the rights prescribed by the law”.



**Reasons for adjournment of cases**



The results of the research also show that differences and adjournments per case occur several times, having an impact over the duration of the procedure (Table 5).

*In the case held before the Basic Court in Tetovo, the main hearing is postponed 15 times during the one-year procedure from variety of reasons.*

*In the case held before the Basic Court in Gostivar – legal case related to shares, the main hearing is postponed 11 times due to different reasons. The procedure is still in progress.*

**Table 5. Number of postponements of the main hearing**

No. of times	No. of hearings	Percentage
Up to 2 times	151	20.1%
3 to 6 times	108	15%
7 to 15 times	37	5.1%
More than 15 times	13	1.8%
No data	598	66%

These findings are related to the cases that are still not concluded, which means that this is not the total number of postponements that occur for one case between the first hearing until the main hearing is concluded and the verdict reached.

**Recommendations:**

**Postponements of hearings for one and the same case in larger number of times is considered as something that cannot be allowed and there should be solutions that would lead to alterations and amendments of the LCIP.**

According to the Article 270 from the LCIP, the defendant has a right to submit reply on a legal suit, and this can be done by his/her free will or by the President of

the Council if he/she considers it necessary, by suggesting to the defendant the period of time that can be used for this purpose, but cannot be longer than 15 days from the date that the legal suit was delivered. As an exemption and under special circumstances related to the case, the deadline can be prolonged and the reply timeframe can last 30 days (in total). Providing reply to the legal suit can clarify some of the facts and can make the whole additional procedure simpler and faster.

The data included within the questionnaire show that defendants replied on the verdicts in 160 cases, while 493 cases are left with no reply. This high degree of cases with no replies to the legal suits has certainly great influence on postponements of the hearings. If we add to this the data stating that in 23 cases (14,4%) the answers to legal suits were late, than it is very clear that the hearings have to be postponed since there are no conditions for the court to organise the proceeding.

The President of the Council can decide to re-schedule the preparatory hearing (only in trials led by the Court Council), or can immediately schedule the date for the main hearing if he/she thinks that regarding the claims within the legal suit and the nature of the dispute, there is no need to schedule preparatory trial (Art. 269 from the Law on Civil Procedure).

In 259 cases preparatory hearings were held. They are usually scheduled only if the Court Council is leading the proceedings. This step can have a positive influence bringing further clarifications and acceleration of the procedure, since the preparatory hearing usually discusses issues that are related to the possible breaches within the subsequent process, regardless whether the President of the Court, after investigating the legal suit, decided to postpone the resolution on these issues, or they were raised as an answer to the legal suit on the preparatory hearing. For all these issues the evidence can be presented at the preparatory hearing, whenever considered necessary.

The preparatory hearing, if obligatory, would have an influence on improving and advancing the duration of the procedure.

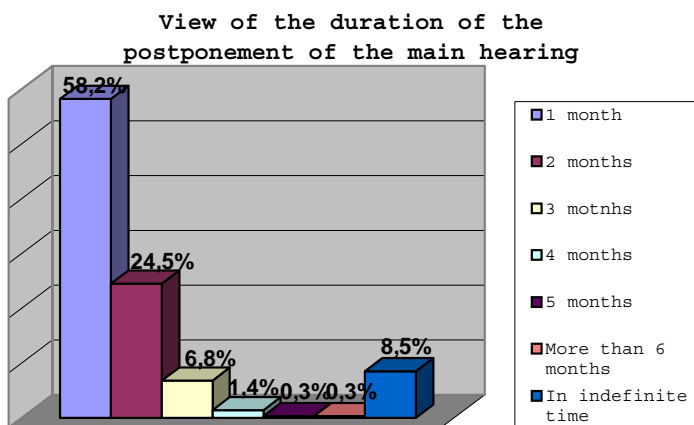
***Recommendation:***

**There should be changes in LCIP anticipating replies on the legal suits and preparatory hearings included as obligatory phases in the process<sup>24</sup>.**

The duration of the procedure is also influenced by the time period that occurred as a result of postponed hearing.

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<sup>24</sup> At the Round Table it was also noticed that if the replies on the legal suits are included as obligatory phases in the civil proceedings, the issue of payment of court taxes for reply on legal suit arises, which compels the defendant on payment. Thus, it must be emphasized that if the replies on the legal suits are included as obligatory phases, than there should not be payment of court taxes for replies on legal suits.

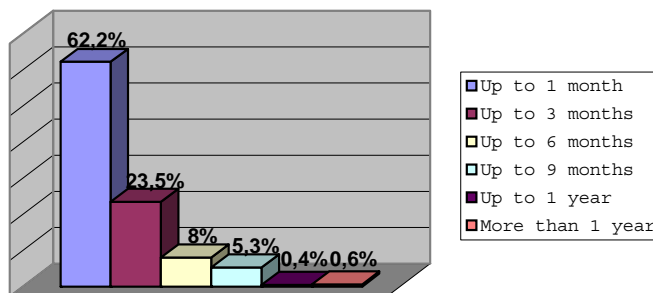


**Recommendation:**  
**The court should insist to have no hearing postponements for an indefinite time.**

In accordance to the Article 172 paragraph 1 from the Law on Civil Procedure, the proceeding starts when the legal suit was delivered to the defendant (litis pendentia). If we want to analyse the expeditiousness of the court work, than we need to take into account the time needed for the legal suit submitted in the court to reach the defendant.

The data analysis on the issue shows the following:

View of the time between the submission of the suit to the court and delivery to the defendant



In the case that is held before the Basic Court in Bitola legal grounds – Debt, the legal suit was submitted to the court on 26.08.2002, to the judge on 15.07.2003, and it

was submitted to the defendant 23.07.2003. The period that passed since the indictment was submitted to the court and delivered to the defendant is 11 months.

This period can be influenced by many factors related to the activities that need to be undertaken in the mean time. Namely, before the court decides to inform the defendant on the legal suit, there is a need for the court to be secure that the legal suit is timely and completed. If the legal suit is missing something, than it is to be returned to the plaintiff stating due time for the review and return to the court.

*In the case conducted before the Basic Court in Berovo, 4,5 months were needed for the legal suit to reach the defendant after being submitted to the court for the first time – in this case, the indictment was considered incomplete and returned to the prosecutor.*

Although these processes imply no infringement on the laws, they greatly influence the principle for trial in a reasonable time, as well as the citizen's confidence in the judiciary and their desire to fulfil their rights before courts.

In no case should the delivery of the legal suit to the defendant be longer than three months and in this sense there is a need to create conditions within the courts aiming at shortening the duration of the court procedures.

The stay of the procedure<sup>25</sup> is a special institute in the civil procedure and represents an obstacle to the courts' activities and influence over the parties, since the terms defined by the law do not stop to be valid although the stay of the procedure is activated. What can occur as a result is to have the main hearing closed with having either both parties absent or as legal result of their inactivity. The stay of the procedure thus can also influence the length of the procedure.

During the observed period and in accordance to the received data, the stay of the procedure occurred in only 19 cases (2,6%).

***Recommendation:***

**Though the percentage of observed cases having stay of the procedure is relatively small, the LCIP regulations for stay of the procedure should be abolished.**

The analysis of research results related to some cases is showing that sometimes the procedure lasted too long though for that kind of cases LCIP is stating that the procedure is urgent (work disputes<sup>26</sup>).

<sup>25</sup> In accordance to the ZPP article 201 stay of the procedure can occur if both parties reach resolution before the main hearing is concluded; if they are absent from the preparatory hearing or the main hearing; or when they do not want to argue/dispute, and when one of the parties will be represented only by the prosecutor so there will be no verdict due to absence.

<sup>26</sup> In the case Janeva vs. the Republic of Macedonia carried out by the European Court of Justice in Strasbourg, the applicant states facts that go in favour of the infringement of her right to trial in reasonable time – the domestic courts conducted the process for 10 years; the case was 4 times returned to first degree decision; and the last verdict was laying unwritten by the court 1 year and 9 months. Finally, a friendly agreement was reached, and the applicant was paid damage compensation of 77.000 EUR.

*Before the Basic Court in Gevgelija, on 06.10.2003 we have observed a case on the grounds – Compensation for salaries. The legal suit was submitted to the court in 1992 and the first-degree procedure finished after 10 years. An appeal was submitted against the procedure that was abolished by the higher court returning the case for a re-trial to the first-degree court. The second-degree procedure lasted for 3 months.*

*Before the Basic Court in Kumanovo, the case related to Abolishing decision and return to work was submitted to the court on 29.07.1998 and the verdicts was reached on 19.03.2003. The second-degree court accepted the plea on the decision and abolished the verdict, returning the case to the first-degree court.*

*The Basic Court in Skopje carries out a work dispute case since 1999. The main hearing is postponed for many times and from different reasons - one of them is a change of the court council for which the case needed to start all over again.*

In all these cases the question remains the same - whether the trials are in reasonable time.

## ***7. The right to remain silent***

The right to silence in the police hearings and the privilege (to use it) against self-accusation is proclaimed as commonly accepted international standard being part of the fair trial concept and securing the defendant's protection against unlawful extortion of confession (John Murray v. U.K., 8.02.1996, R.J.D., 1996-1, No.1).

In all contemporary legal systems, the defendant has a right to remain silent at least in the following very narrow sense of the word: during the entire criminal procedure the defendant has a right to reject to answer the questions. To use this right he/she should not be subjected to criminal sanctions, even to torture ordered by the authorities, as there were examples in the history.

In the domestic judiciary there are certain doubts related to the constitutional ban stating that the person being called, confined or detained ***cannot be asked for a statement***. In the Law on Criminal Procedures this constitutional resolution is interpreted as an expression of the right to remain silent, or as an interdict (protecting the person) from being forced to state or sign a statement, and not in the sense of prohibiting any kind of communication. This is not so restrictive interpretation of the constitutional regulations that tend to be more fundamental and genuine approach to the basic rights and freedoms, in accordance to the solutions and practices of the contemporary comparative and international law.

The court is obliged to instruct the defendant on his/her right to silence and this should be included in the minutes.

In 430 cases, the defendant was instructed on the right to silence whilst in 17 cases this was avoided to be done. Ten of them were conducted by the Basic Court in Vinica. The defendant is most often left uninformed on this right, but the instruction-statement is included in the minutes. Thus it must be said that the bare inclusion of the right to silence instruction is not enough to fulfil the obligation that the judge has regarding informing the defendant of his/her rights during the process. Before notifying the instruction in the minutes, the judge is obliged to inform the defendant that he/she is not obliged to speak and state the defence, to explain the meaning of this right and the fact that if the defendant decides to use this right, this decision will not be followed by any negative procedural consequences.

A view on the courts omitting to inform the defendants on their right to silence:

<b>Basic court in Vinica</b>	<b>10 cases</b>
<b>Basic court in Skopje I</b>	<b>1 case</b>
<b>Basic court in Radovis</b>	<b>1 case</b>
<b>Basic court in Kocani</b>	<b>1 case</b>
<b>Basic court in Debar</b>	<b>2 cases</b>
<b>Basic court in Bitola</b>	<b>1 case</b>

A view on the use of the right to silence



The analysis shows that rarely the defendant is using his/her right to silence. Namely, in only 10 out of 395 cases the defendant used the right to silence.

## ***8. The right to interpretation***

### **Criminal procedure**

One of the important standards of the international law on human rights, the right of the defendant to interpretation if he does not understand the language is also accepted in the comparative law as a right of everyone deprived from his liberty or charged with a criminal act, and in our legislation this right is expanded to all participants in the procedure. The international standard does not assume a right of the person to use the language of his own choice, if he or his defender is sufficiently skilled in using the language of the court (which is a factual question).

In the criminal procedure the assistance of the interpreter to enable understanding of all evidence that are presented by the prosecution, the witnesses and experts is assumed, but the right to a free assistance of an interpreter is not restricted only to the

oral hearing before the court. In order to ensure the fair trial requirements, besides the oral statements, this is related to the all documents that the defendant has to understand. This guarantee also covers the preliminary procedure and the translation of the documents such as prosecution act, etc. But the European Court of Human Rights held, in relation to Article 6 (3) e, of the European Convention that the right *does not require written translation of each written evidence or official paper in the procedure*. Accordingly, the assistance of the interpreter should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. Furthermore, this right assumes translation of the oral statements of the defence's witnesses.

The competent authorities' obligation is not limited to the mere appointment of an interpreter but may also extend to exercising a degree of control over the *adequacy of the interpretation*, if they are put on notice of the need to do so. In that sense, a replacement of the interpreter can be required.

In accordance with Article 5 and 6 of the ECHR, the LCP primarily prescribes that anyone who is summoned, apprehended or arrested, must immediately be informed, in the language which he understands, of the reasons for his summoning, apprehension or arrest and of any charge against him, as well as about his rights and that he cannot be compelled to make a statement (Art.3). Every accused has the right to be informed immediately and in detail, in a language which he understands, of the crime he is charged with and the evidence against him (Art.4, p.4,1).

It is very important to emphasize the fact that, in accordance with the practice of the European Court of Human Rights, the burden of costs for the interpretation fall on the budget, and not only for the defendants who does not understand the language, but for all participants. Besides that, the violations of the provisions for the language are not an absolute violation of the procedure any more, but it can present only relative violations in the meaning of the rights of the defence violated at the main hearing.

According to the Law on criminal procedure, a representative of the minorities-citizen of the Republic of Macedonia in the court procedure has the right to use the language of his nationality and his alphabet. The court provides the person a free assistance of an interpreter. Other parties, witnesses and participants in the court procedure have the right to a free assistance<sup>27</sup> of an interpreter if they do not understand or speak the language in which the procedure is performed. This is in accordance with Article 6 (3) d of the European Convention for Human Rights.

*In the Basic Court in Vinica, a trial on the criminal act of Special cases of falsifying documents in accordance with Art. 379 from the CC was observed. During the presentation of the defence and the hearing, the defendant uses English language and for that purposes an adequate interpreter has been provided. The court could not find an interpreter from Holland language, and because of that the defendant agreed to*

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<sup>27</sup> In the case *Luedicke, Belkacem and Koc v. The Federal republic of Germany*, the Court held that the provision for free assistance of an interpreter absolutely prohibits a defendant being order to pay the costs of an interpreter, and that this provision covers those documents or statements against in the proceedings instituted against him which is necessary for him to understand, in order to have a fair trial.

*present his defence and to communicate with the court in English language<sup>28</sup>. The defendant makes an objection because after he has given his statement nothing from the hearing has not been interpreted, and he requested the objection to be noted down in the minutes. The court rejected his objection elaborating that the defendant has a right to interpretation only during his hearing or while he is giving the statement. There is no obligation for further interpretation of all procedural activities and oral hearings because the defendant's proxy holder is taking care for his interests<sup>29</sup>.*

Out of all monitored cases, in 95,1% of the cases the defendant uses Macedonian language, in 22 cases he uses Albanian language, in 2 cases he uses Turkish language and in one case English language.

The court provided the right to free assistance of an interpreter for those participants who do not use the Macedonian language. In one case the violation of this right was noticed.

*In one monitored case before the Basic Court in Kumanovo the defendant requested an interpreter from/into Albanian language. The Court asked for an interpreter but did not provide him due to the illness of the authorized interpreter, thus the defendant is heard without assistance of an interpreter. The verdict is reached at the same hearing.*

The court's obligation is not limited to the mere appointment of an interpreter, but also it should take care for the quality and adequacy of the interpretation, if there is need of that. In the Basic Courts the issue of sufficient number of authorized interpreters should be primarily solved<sup>30</sup>.

***Recommendation:***

**In accordance with the provisions for the use of languages during the criminal procedure every court should poses a list of authorized interpreters so the judge could provide quality and tested interpreter on time.**

**The absence of an interpreter can not be tolerated as a reason for postponement of the hearing. This speaks that the judge insufficiently prepared the main hearing.**

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<sup>28</sup> *In Brozicek v. Italy*, a German national was charged in Italy. The Court held that documents constituting an accusation should be provided in German unless the Italian authorities were in a position to establish that the applicant in fact had sufficient knowledge to understand Italian language (European Court of Human Rights).

<sup>29</sup> *In Kamasinski v. Austria*, the Court held that the assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the Court his version of the events (European Court of Human Rights).

<sup>30</sup> In the trials conducted for a criminal act of Mediation in conducting prostitution, the damaged party is usually from Romania and Moldova. There are no authorized interpreters into Romanian and Moldova language, and during the hearing the interpretation is conducted by persons who have knowledge of Romanian and Moldova language. This contributes towards bad quality of the interpretation and the damaged clients complained



## **Civil procedure**

One of the important standards guaranteed by the Constitution, and latter made concrete by the LCIP is the issue of the language and scripts used during the court proceedings. This standard is of special significance concerning the minority rights in the Republic of Macedonia. Minority rights in the Republic of Macedonia, which include the use of their own language and alphabet during the court proceedings has three aspects: the first aspects concerns the equality and indiscrimination before the law, the second concerns the opportunity of the client to use his own language and alphabet before the court during the proceeding, when this right is determined by the Constitution in accordance with the law, and the third refers to the client's right to interpretation if he does not speak Macedonian language and its Cyrillic script.

In accordance with Article 1 paragraph 1 of the LAALCIP, the civil procedure is conducted in Macedonian language and its Cyrillic script. In the civil procedure, another official language spoken by at least 20% of the citizens and its script is used in accordance with this law (Art.1 paragraph 2 of the LAALCIP). A representative of the minorities acting as client or other participants in the proceedings who do not understand and speak Macedonian language and its Cyrillic script, are entitled to interpretation (Article 1 paragraph 3 of the LAALCIP). The court bears for the interpretation costs (Article 1 paragraph 4 of the LAALCIP).

In accordance with these provisions, the clients and other participants in the proceedings, who are citizens of the Republic of Macedonia, and whose language is an official language different from the Macedonian language, receive the court invitation, the decisions and other court letters in the Macedonian language and the other languages. These clients and participants in the proceeding, the appeals, the law suits and other documents can be submitted to the court in their language and script, if it is an official language besides the Macedonian language and script. The submissions in another official language and script are translated by the court into Macedonian and its Cyrillic script and are thus submitted to the other clients and participants in the proceeding. Authorised translators carry out the translation and the court bears the costs for it.

The court is obliged to instruct the client or the other participants in the proceeding on the above mentioned rights for language use and to note down the instruction and the statement of the client, or the other participant in the proceeding, in the minutes.

The clients and the other participants in the proceeding, citizens of the Republic of Macedonia, whose language is not Macedonian language and its Cyrillic script and is not an official language different from Macedonian language and its Cyrillic script spoken by at least 20% of the citizens, during the proceeding are entitled to use their own language during hearings and when orally undertaking other procedural actions before the court. These clients and participants in the proceeding are provided with interpretation of everything that is said during the hearing in their language as well as an oral translation of the documents used at the hearing as evidence. The court is obliged to instruct the clients and participants in the proceeding on their right that they can follow the oral proceeding in their own language by using interpretation.

This raises the question of the court's current situation with qualified interpreters, which can be a reason for delayed proceeding of these cases. Considering this, the clients who want their case to be considered more rapidly, still might not decide to

accomplish their right to use their own official language which is different from the Macedonian language.

The question of whether the court provides an interpretation to the clients or the participants whose native language is not the Macedonian language, the received answers show that only in 3 cases the court did not provide the interpretation to the clients. Regardless of the reasons why the court was not able to provide interpretation to the clients who are entitled to this right, and even if there were no interpreters that does not exempt him from its legal obligation to do so, and the court was obliged to postpone the hearing until the necessary conditions are provided.

Although the courts make serious efforts to provide conditions to meet the right to interpretation, because the current needed number of qualified interpreters in all the languages causes organizational problems which have to be solved in the future, that can not be a justification.

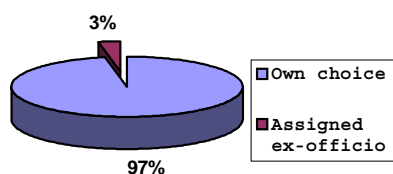
## ***9. The right to defence***

### **Criminal procedure**

The right to defence is proclaimed by all international documents, providing guarantees for the right of the defendant to defend himself or with the help of a defender he has chosen (Art. 14 of the ITCPR; Art. 6 paragraph 3 of the ECHR).

The right to defence is a constitutional standard, and in accordance with Art. 12 of the Constitution of the Republic of Macedonia, that right is extended to the police procedure as well. The right is specified with many provisions of the LCP including those which for omission to inform the defendant about his right to defence prescribe strict procedural sanctions consisted of prohibition for the verdict to be based on the given statement (Art,218, paragraph 19 of the LCP).

The defendant can defend himself on his own, and he decides freely whether and who will he select for a defender. But, this does not means that the above right is absolute, because the defendant can select only a lawyer for his defender, and the law determines specific cases when the defendant must have a defender, and the court will assign a counsel in official capacity, if the defendant does not select his defender.



The analysis of the data shows that in 97% of the cases the defendant selected the defender by himself, and only in 3%, the defender is assigned in official capacity.

Besides the cases of compulsory defence, the defence assigned ex officio is also possible in cases when the defendant is not able to bear the costs of defence. In accordance with the decisions of the European Court for Human Rights, in the cases *Goddi v. Italy* (Series A, No.76, 1984) and *Artico v. Italy* (Series A, no.37, 1980) the President of the Court, on the request of the accused or on his agreement can dismiss the assigned counsel who has not exercised his duties competently. The President of the Court will assign another counsel instead. The Bar will be informed of the dismissal of the counsel (Art. 68 p.4 of the LCP). Regarding the costs for the defence, the defendant is always released from payment of the costs in the cases when the defender, according to the Art.66 of the LCP, is assigned by the court due to the defender's lack of means to bear the costs of defence and in the cases of obligatory defence, when the payment of the costs will damage his own and his family's basic survival needs, even when the court finds the defendant guilty (Art. 91 of the LCP).

These solutions are in accordance with the established interpretation of Art.6 (3) (c) of the European Convention, thus the conclusion can be drawn that there should not be significant difficulties in the harmonization of the domestic legislation with the Convention. Currently, there are three provisions that still seek harmonization: 1) the supervision of the communication between the counsel and the defendant who is detained; 2) the defence of the poor persons; 3) the defence in trials in absence.

**Free legal aid.** For a long time it was considered that it is a matter of the State to regulate the way and the conditions for a legal free aid if the defendant lacks sufficient means to pay for legal assistance. The requirements for a free legal aid when "the interests of justice" demand that start to get concrete content in the recent jurisprudence in Strasbourg. The following criteria are used in that sense: the seriousness of the crime and the severity of the possible sanction; the complexity of the case and personal situation of the defendant. From our point of view, particularly significant is that in the *Quaranta* case (*Quaranta v Switzerland*, Series A, no.205, 1991), the European Court for Human Rights found that the Convention has been violated, primarily taking in consideration the circumstance that the prescribed penalty might be three years of imprisonment. This requires amendments in the domestic criminal procedure since the provisions from Art. 67 of the LCP prescribe the possibility for free legal aid in the cases where the defendant due to his property condition can not bear the defence expenses if the procedure is conducted for a crime for which a sentence to *over three years* is prescribed, and a request for a counsel assignment can be submitted only after the prosecution act is brought<sup>31</sup>.

On the other hand, this Article of the LCP slightly determines the conditions for granting free legal aid in respect of provisions contained in Article 6 (3) c of the Convention, according to which the defendant has the right to... if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

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<sup>31</sup> According to the Laws of Criminal Procedure of Croatia, Slovenia and Albania, as a condition for free legal aid it is determined that the defendant is entitled to free legal aid only if considering his financial situation he can not bear the defence costs. There are no other limitations (but only for a criminal act for which a sentence above three years of imprisonment is prescribed).

The second condition established by the Convention, “In the interests of justice”, is not contained in the provisions of the Law on criminal procedure<sup>32</sup>. This condition is very important because the court will consider the ability of the defendant to present his case adequately without legal assistance<sup>33</sup>.

According to the analysis, the defendant has used his right to free legal aid only in seven cases.

***Communication between the defendant and the counsel.*** The former federal LCP (Art.72 p.2) simply authorizes the investigating judge to supervise the written and oral communication between the defendant who is detained and his counsel, until the investigation is completed. According to the new LCP (1997) the counsel *can freely and without supervision correspond and communicate* with the defendant who is in a pre-trial confinement or prison for conducting a trial (Art.70 of the LCP), In accordance with this law, during the investigation, the investigating judge may exceptionally subdue this right to supervision, *if the detention is determined due to a danger of collusion* (Article 184, paragraph 2, item 1).

***Recommendation:***

**There is a necessity of precise definition (in the meaning of former Art.74, p.9 of the LCP) that the order for this can be issued only by the investigating judge and in such cases only he is authorized to review the written correspondence, i.e. to be present at the conversation, and not someone else.**

The listing of the reasons under which such supervision can be exceptionally applied is in order to prevent the same restriction to be exposed to a defendant who is not detained due to a danger of collusion. The amendments were aimed to determine the possibility for supervision restrictively, thus to avoid its unnecessary use in the practice, and on the detriment of the defence. It seems as a very logical solution to anticipate such possibility only for cases where there is a possibility to influence the statements of the accomplices or witnesses, or to abuse the contacts with the counsel to preclude the investigation and to destroy the traces of the crime. Still, the analysis of the practice established by the European Convention on Human Right shows certain weaknesses of such solution which were considered in the preparations of the legal text.

The European Convention for Human Rights does not explicitly guarantee the *right on free communication* with a counsel he has chosen. However, this right can be derived form Art. 6 (3) (b) and (c) of the Convention, and the same right is also

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<sup>32</sup> In the Law on Criminal Procedure of Serbia, Article 71 prescribes that except defendant’s lack of financial meanings to pay the costs of defence for a criminal act for which a sentence above three years of imprisonment is prescribed, he can also use this right .... in other cases when interests of justice require so.

<sup>33</sup> In the case of *Hoang v. France*, the Court stated that where there are complex issues involved, and the defendant does not have the legal training necessary to present and develop appropriate arguments and only the experienced lawyer would have the ability to prepare the case, the interests of justice require that a lawyer be officially assigned to the case (European Court of Human Rights).

recognized in Art. 93 of the Standard Minimum Rules for the Treatment of Prisoners, involved in the Resolution (73)5 of the Committee of Ministers of the Council of Europe, and in Art. 3.2 of the European Treaty related to the individuals who participate in the proceedings in Strasbourg.

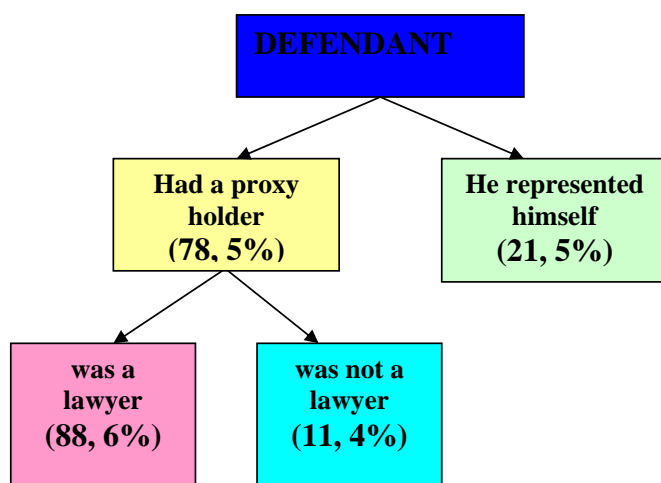
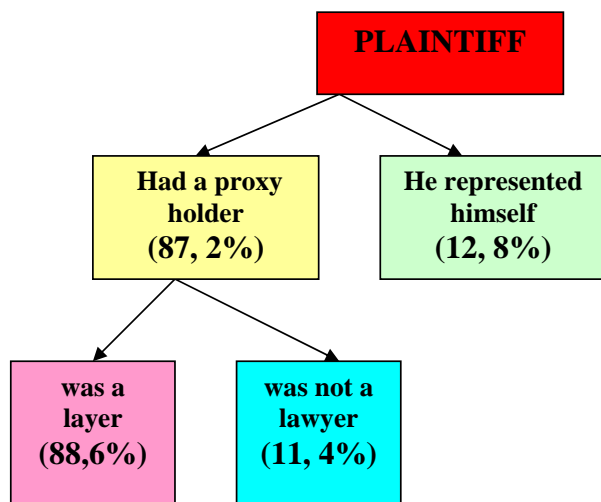
The European Court for Human Rights concluded that “the right of the defendant to communicate with his counsel without being heard by third person is part of the fundamental demands for fair trial in a democratic society and is coming from Art. 6 (3) (c) of the Convention. If the counsel can not consult with his client and to get confidential instructions without supervision, his assistance will lose much of its usefulness, while the Convention is occupied to guarantee rights that are practical and efficient”. In order to avoid extensive use of the legal authorization for supervision of the communication between the defendant who is detained and his counsel( *by exception* indeed),but to provide compliance with the practice of the European Court as well, it seemed as a reasonable the provision from Art.70 of the LCP to be amended with “ And there is justified suspicion that the defendant could abuse the communication with the counsel”, which have to be proved and elaborated in the circumstances of each case. Thus, in accordance with the practice established in Strasbourg, the plausible restrictions can not be automatically imposed to all cases of pre-trial detention determined due to a danger of collusion. The Committee for torture prevention of the Council of Europe still considers that such regulation is not in accordance with the European standards and on our amazement quotes the same verdicts!

## **Civil Procedure**

The legal representation of the clients is one of the important standards and the court is officially obliged to take care of that. Namely, during the entire procedure the court is obliged to pay attention whether the legal entity that represents the client in the dispute is a person authorized by administrative rules, or by the law. In addition, during the entire procedure the court is obliged to pay attention to whether the litigant incapable client is represented by its legal representative and whether he has the required authority when necessary.

During the entire procedure the court must pay attention to whether the person who has a power of attorney is authorized for representation, and whether he can appear as a proxy holder. If, during the procedure, the court confirms that there are some deficiencies while the client is represented, it is obliged to take all the necessary precautions.

The analysis of the questionnaires, on the question whether the clients had a proxy holder, and whether the proxy holders were lawyers, gives the following results:



With the analysis of the above mentioned data, we can conclude that a proxy holder, who in most cases is a lawyer, represents both the plaintiff and the defendant in most cases in the procedure before the court. This shows that the clients want to be represented by qualified proxy holder-lawyers, which is completely understandable and positive.

Considering the issue of free legal aid, neither is it anticipated in the civil procedure<sup>34</sup>; nor is it clearly set out in the European Convention on Human Rights<sup>35</sup>.

<sup>34</sup> The Central -Eastern European countries, Hungary, Lithuania, Poland, Romania and Slovakia determine that in the civil procedure, assigning free legal aid to those who do not have sufficient financial means is one of the mechanisms to alleviate the access to court. In Bulgaria and Latvia, as well as in our country, only exemption from court taxes payment is determined as such mechanism in civil procedure.

<sup>35</sup> .Ireland offers free legal aid only in criminal proceedings (*Airey v. Ireland*)

The only provisions from the Law on Civil Procedure, Article 160, in relation to the free legal aid when the client is completely free of payment of the procedure' costs is if the first degree court, upon client' requests appoints a proxy holder if that is necessary<sup>36</sup> for the protection of his rights. The client with appointed proxy holder is exempt from payment of the factual costs and the reward of the appointed proxy holder. The lawyer is assigned as a proxy holder, but if in the area of court jurisdiction the number of lawyers is insufficient, as a proxy holder can be appointed any other person with legal background capable to provide the necessary legal aid.

If the decision for an exemption was suspended because it was established that the client is in the situation to bear the costs of the procedure, he will be obliged to pay the reward to the lawyer. If the client is a foreign citizen, the suspension can be result of non-existence of reciprocity.

According to Article 161 of the LCIP - when the client is completely released from payment of the procedural costs, the advance payment of the costs of the witnesses, experts, for inspection and for issuing court notice, as well as factual costs of the appointed proxy holder will be provided from the court' sources. The court taxes and expenses are considered as procedural costs.

If the client who is released from payment loses the lawsuit the court will not charge the costs. If the client wins the lawsuit then he should pay the advance payment and the real costs of the proxy holder.

## ***10. Right to Appeal***

### **Criminal procedure**

Every person convicted of a criminal act shall have the legal right to his conviction and sentence being reviewed by a higher court (Art.14, p.7 of the ICCPR, Prot.7 of the ECHR).The right to appeal ensures that there will be at least two levels of judicial scrutiny of a case, the second of which is by a higher court than the first.

The review by a higher court must be a genuine review of the issues in the case. This means that a review limited only to questions of law may not satisfy this criterion. The appeal proceeding must be conducted on time.

According to the Law on Criminal Procedure after the announcement of the verdict the President of the Council will instruct the parties on their right to an appeal as well as on their right to reply on the appeal.

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<sup>36</sup> In determining the necessity the Court starts from the point whether the client have some understanding of the law, whether there are complex issues involved that require professional assistance, the importance of the issue of the dispute for the client, etc...

In 17,9% of the observed cases the defendant is instructed on his right to appeal. According to the analysis of the observed trials, the violation of this right is not noticed.

### **Civil Procedure**

In accordance with the LCIP the dissatisfied client can submit an appeal against the court decisions that are not final. The appeal can be submitted to the second degree court through the court that brought the decision in first instance in 15 days from the receipt of the decision. The time limit to appeal against the decisions brought in a special civil procedure is eight days.

According to the data received from the observed cases, an appeal is submitted only in 17 cases. Such small number of submitted appeals is not a result of the client' satisfaction with court decisions but that is because the courts during the observed period reached only 89 judgements for total of 772 cases.

Considering the fact that in 631 cases the judgement is not reached, we can not take a stance in respect of client' satisfaction with court judgements.



## CHAPTER 3 Functioning of the Judiciary

### 1. Allocation of Cases

Immediately related to the question of an independent, impartial and competent judiciary<sup>37</sup> is the one that is linked with the way and the method of allocation of cases to a certain judge or council to decide.

This question is directly anticipated within the principle 14 from the UN “Basic Principles of the Judiciary Independence”. According to these principles, *within every judiciary system there should be strict administrative rules regarding allocation of cases between different judges or judiciary councils.*

This question is considered so seriously that the UN Principles for Independence of the Judiciary define the infringement of this particular principle/rule as a good basis for suspending the judge from his/her duty, or punishment of the administrative clerk who manipulates with the cases on this ground.

The question of allocating cases in the courts is regulated by the Judicial Register where the allocation is done in accordance to numbers assigned to each of the judges, and related to the annual division of tasks. The President of the Court is primarily making the decision in regards to the judges’ expertise and the areas where the judges work; the judges that fall within the same area, have different numbers in accordance to which (than) receive cases to work on. Namely, the case allocation most often is done accidentally, based on the (serial) number that each charge receives upon submission in the court. Each completed/received case is assigned with different number and that is how they are further allocated to the judges.

The problem with case allocation in our analysis was identified through two of its aspects: firstly, the influence of the administration over the process of assigning the numbers/cases which often can be found to be a source of court corruption. The bare fact that the Records office of the court is obliged to assign numbers is with a possibility for a misuse of the whole process.<sup>38</sup>

On the other hand, the Presidents of the courts have a discreet right to allocate certain cases to any of the court judges.

#### ***Recommendation:***

**The solutions should be sought in twofold manner: requiring legal changes within the Law for Judicial Organisation, introducing hard and precise norms how to conduct the process of evidencing and allocation of the cases and who is responsible for this task. And secondly, professional, moral and ethical education of the judges in accordance to the Judicial Ethical Codex. Infringement of these**

<sup>37</sup> See Chapter II, Point2.

<sup>38</sup> According to the ABA/CEELI (American Bar Association’s Central and East European Law Initiative) Judicial Reform Index from November 2003, the interviewed cases show not always objectivity in the allocation process. For an example, when there are more charges received in a shorter period of time, than they are allocated in a manner to obtain the results desired. But sometimes, the cases are granted their numbers after they are allocated to a certain judge. One of the problems related to the objective allocation of cases stated by the prosecutors is the allocation of severe criminal cases to inexperienced judges.

**rules should be a basis for suspension of judges in accordance to the international rules of the independent judiciary.**

## **2. Preparation of Cases**

The preparation of cases is a methodological question distinct for every organ and every phase of the proceedings. It is a question that is, in a certain manner, determined within the Judicial Register, though there is a need to have it more thoroughly analysed and adopted to the new working conditions, the new competence and position of each judiciary organ, finding new professional approach for its application.

### ***Recommendation:***

**If the Judicial Register is to be replaced with the Law for Judicial Organisation, then the work methodology will receive more attention, and there would be an increase of responsibility and discipline in applying the rules stated within the Law.**

Namely, the question is how ready the judges are for the processes/hearings, are they previously prepared for, and studying the cases, checking in advance the delivery, and whether the evidences that are to be the subject of validation and evaluation during the hearing/process are provided?

To have a normal, expedite, legal and efficient proceeding, the judge is to take certain advance and preparatory acts:

- To assign the main hearing in accordance to his estimate on the duration of the proceeding and in compliance to the legal terms;
- To secure presence of the parties in the process through delivery (of summons), to check whether the delivery is regular, undertaking timely measures to avoid the delay in the process;
- To check if the evidences are on court disposal and to have an insight in the evidences;
- To see if the expert testimony is needed and to issue an order for them so they could be concluded and the expert opinion is obtained;
- To resolve the issue of securing the publicity of the proceeding, and other issues that are to be settled by the judge.

## **3. Case Filing and tracking system**

The case filing and tracking system has many aspects-it is an administrative and process activity conducted by multiple court services. Administering the cases according to certain process and administrative rules is securing the efficacy and expediency of both the courts and the judges, in deciding on the cases, successful use of the materials being part of the case, and securing the materials from thefts, destruction and other undesired events that can make the dossier/file incomplete and inappropriate for (the final) decision. In the insofar court practice, the questions related to administering the cases was covered by the Judicial Register while all the activities related to this matter were assigned to the court administration.

***Recommendation:***

**The computerisation of the judicial operations should enhance the court and all the procedural activities, while the materials should be processed, evidenced and registered within the computer/computer file. This way we create a possibility for each judge to have the file through the computer and use it when needed for preparing for work or while studying the case. The file prepared and stored within the computer (computer file) is helping the judge in his/her work and secures that he/she has all the necessary insight about what is happening with the file, who is using it, for which purposes and aims, providing at the same time high degree of security.<sup>39</sup>**

The second part of the case filing and tracking system is the one that is conducted within the Court's Records office and begins with receiving the criminal charge or prosecution proposal or other form of complaint, and petition requests from state or other organ or citizen that has initiated the court procedure. The court administration is administering and regularly updating the dossier, filling it with new materials arising as a result of undertaking procedural activities by the court or by other organ(s) having obligations related to the case. These procedural activities, as well as the judiciary books that record the cases are part of the judiciary evidence(s), as regulated and prescribed by the Judiciary Register.

***Recommendation:***

**The system for computerised filling and processing of the court cases should include this process too. Hence it is necessary to develop appropriate computer programmes following a unified methodology for administering the court files/dossiers and allowing communication related to the dossiers between all first and second degree courts throughout the country. The IT system introduction should be followed by the programmes for dossier data processing.**

The IT judiciary system should also resolve the problem related to the lack of regular communications with other state organs on all levels.

#### **4. Hearing Appointment**

Concerning the hearing appointment procedures, the analysis of the questionnaires showed that there are certain cases, of the so-called, judiciary in-discipline.

The questionnaires include examples when scheduled processes *do not begin at the precisely foreordained time*.

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<sup>39</sup> Introducing the IT system in the courts is one of the changes anticipated by the Strategy of Judiciary Reforms

*The observers noted that in the criminal case that was regularly monitored by the observers held before the Basic Court in Veles for a criminal charge of Violence, under the Article 386 from the CC, the beginning of the hearing was repeatedly delayed, sometimes for even 30 minutes during the eight times the case was observed.*

These delays are often related to the fact that there are **more than one hearing scheduled at the same time**<sup>40</sup>

*In the Basic Court Skopje I, the trial for a criminal act of Misuse of official position and authorisations under the Article 353 from the CC being previously postponed for 10 times, began at 08:45 instead of 08:30 because two trials were set at the exactly same hour.*

On the other hand, there are examples of trials to begin and end **before the scheduled time** and this again, in turn, caused postponement of the trial.

*Before the Basic Court Skopje I, the trial for the main hearing for the criminal charge - Defamation in accordance to the Article 172 from the CC, began and ended prior to the time that was set and caused delay in turn. The observers were in front of the courtroom when the defendant arrived and was notified about the delay.*

These data speak also about the court discipline to keep on time and to the schedule for the trials and hearings.

## 5. Minutes

Minutes are prepared for the court activities that are undertaken during the court procedure, hearing or trial; for more important statements or announcements of the parties or other process participants; for their statements given outside the hearing or the trial; and for other court proceedings regulated with specific regulations.<sup>41</sup>

The minutes, how they are composed is regulated with the Law on Criminal Procedure, Articles 75-82 and the Law on Civil Procedures Articles 112-117.

The minutes should include all actions that were undertaken during the main hearing/main trial. They are a proof for the procedural activities that are conducted by the court, the parties and other participants which are filed-in the minutes, and have all the elements that are typical for an official document.

During the court trials that were observed, the observers noticed a number of inaccuracies regarding the minutes.

According to the Law on Civil Procedures (Art. 115 paragraph 2) the parties in the proceeding have a right to read the minutes and to request the minutes to be read to them, as well as to put their objections to the content of the minutes.

According to the observed trial data, in 579 trials the parties had no objections to the minutes, while in 7 trials they objected the content.

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<sup>40</sup> According to the art. 135 from the Judicial Register "it is not allowed to schedule hearings and trials for more than one case and at the same time/hour".

<sup>41</sup> Article 142 from the Judicial Register

In the **civil procedure**, the parties, their proxy holders and legal representatives have a right to access to the documents of the case and inspection of the minutes. Third parties need special permission for examining and copying the minutes. The permission for examining and copying the minutes can be granted only for a justifiable cause that is to be proven, and its very relevance is to be assessed by the court. The permission is granted by the President of the Council or the individual judge if the procedure is still in progress, or by the President of the Court or court clerk being assigned by the President, if the procedure is completed. The minutes from the counselling and voting are confidential by the nature – they are placed in a special folder within the case file, but the trial parties have no right to have an access to it.

In the **criminal procedures**, third parties have no right to access the files or the minutes, except when this right is granted by the court, and only if there is a justifiable cause for doing so.

The observers' opinion analysis showed that the court allows unlimited access and view into the files and the judges were open for co-operation and issuing the necessary information.

## **6. Judicial Decisions**

Judges' impartial decisions are based on their free estimate of the evidences and the application of law. While deciding, they cannot be limited, influenced, and pressured, threatened or interfered, directly or indirectly, by any party or reason. No one has the right in any way, to limit or prevent the right of the judge to announce his/her independent decision (Article 14 from the Judicial Register).

Corruption, political party influence, as well as personal interest can be serious threat to the impartiality of judge's decisions.

ABA/CEELI (American Bar Association's Central and East European Law Initiative) Judicial Reform Index from November 2003 shows the American State Department research conclusion on the human rights in the Republic of Macedonia which states that "the judiciary is generally weak and under political influence/pressure and corruption, which in part, is due to the minimal wages; however, there are no reports on the size of the misuse or systematic corruption."

On the other hand, and according to the observers, the trials that were monitored gave no ground for reasonable doubt in the impartiality on behalf of the judge(s).

## **7. Ethical Code**

In 1994, the Association of Judges of the Republic of Macedonia accepted the judges' ethical code. The code contains regulations that are not obligatory in their nature but can serve as guiding principles in their work. In parallel, the National Judicial Council issued a number of documents regarding the election and responsibility of the judges that contain many elements similar to the judicial ethical code. The National Judicial Council together with the Association of Judges organised also several expert debates regarding the application of the judicial ethical code.

In the mean time, many international documents were delivered introducing changes and promoting enhanced standards of judicial behaviour. These new approaches to the situation with the judges and courts in the country required new codes of conduct, new obligations and putting new requests in front of the judges.

***Recommendation:***

**It is necessary for the Association of Judges and the Republic Judicial Council to reflect again about, and add, change and promote the judicial code. This process should be followed by voluminous education of the judges in Macedonia regarding the content of the judicial code, the type, the nature and the character of the code detriments.**

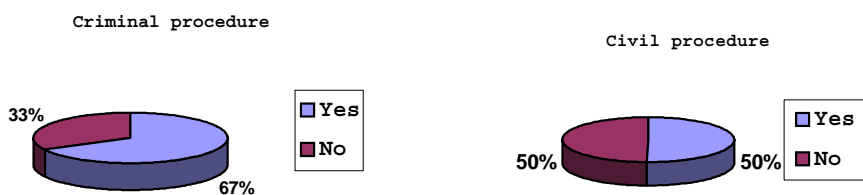
The Ethnical Code contains no coercive measures, being a sum of moral norms needed to secure an independent and impartial judiciary.<sup>42</sup>

According to the Ethnical code, the judges are not allowed to give any legal advises if not otherwise regulated by the law; they cannot perform activities outside their judicial capacity and that can discredit their independence; and, they should restrain from business activities if unrelated to their properties.

There are no obligatory regulations for the court ethics in the Republic of Macedonia.

Nonetheless, the Law on Courts contains numerous provisions that are related to the court ethics. As an example, the judges cannot accept gifts by the parties or people being directly or indirectly connected to the trial<sup>43</sup>. The judge also cannot hold any other public function or profession, apart from those stated within the law<sup>44</sup> and cannot be a member of, or hold political function in a political party, or perform party or political activities.<sup>45</sup>

The judges are obliged by the Judicial Law to wear special judicial clothes (TOGA) in contrast to the others in the judicial processes. Observed trials both in civil and criminal procedures give the following data on the question related to whether the judge wore toga:



<sup>42</sup> According to the article 12 from the Ethnical Code “the judge has a moral responsibility to apply, improve and advance these principles and to be a role model to the others to regard them as well”. In compliance to the article 13 “the judge is morally responsible if violates the principles of the codex”.

<sup>43</sup> Article 54 from the Law on Courts

<sup>44</sup> Article 50 item 2 from the Law on Courts

<sup>45</sup> Article 50 item 6 from the Law on Courts

## 8. Suspension and Discipline of the Judges

In accordance to the Law for the National Judicial Council, suspension of the judge is proposed by the National Judicial Council on a personal request, if the conditions for pension are fulfilled, and if accused for a criminal charge on unconditional prison sentence for at least six months. Moreover, the NJC confirms the proposal for suspension of the judge and recommends this measure to the Parliament of the Republic of Macedonia if some of the conditions for this act included within the Constitution are fulfilled, and in a manner and way prescribed by the law - if the judge loses permanently the psycho-physical ability to perform the judicial function; for an incompetent and unmoral conduct; or for more severe violation of the discipline procedures prescribed by the law, that make the judge unfitted to perform further the judicial role.

The judge can be suspended from the function if more severe discipline infringement is involved, and in consequence to the objective criteria.

The objective criteria that confirm the breach done by the judge are part of the Constitution of the Republic of Macedonia, as well as within the Law on Courts.

Namely, in accordance to the Law on Courts, Article 69, under “more severe discipline infringements” are enlisted:

- Adamantine breach of the public peace and order jeopardising the reputation of both the judge and the court
- Party or political activities
- Other public function(s) or profession(s)
- Causing more severe disruptions of the relationships within the court with significant impact over the (overall) judicial function, and
- Harder infringements of the rights of the parties and other process participants that harm the reputation of the court and the function of the judiciary.<sup>46</sup>

The solutions offered by the Law on Courts are incomplete regarding certain types of discipline infringements.

***Recommendation:***

**It is necessary the approach to Law on Courts to be thorough and detailed especially if related to the discipline responsibilities of the judges.**

The National Judicial Council can only recommend suspension of a judge during his/her judicial service. According to the Constitution, the decision is issued by the Parliament of the Republic of Macedonia.

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<sup>46</sup> National Juridical Council within the regulations no. 08/238/2 annex A and B renders precisely what is unethical and unprofessional behaviour (frequent and unnecessary trial delays, procedures where the judge expresses inclines for one of the parties, disrespect of the independence code, receiving gifts or awards, as well as being under outside influences, disrespect towards the new laws or higher courts decisions, etc.) Judicial report Index, ABA/CEELI (American Bar Association’s Central and East European Law Initiative), November 2003

A proposal to launch procedure to determine discipline responsibility of a judge can be issued by the President of the court, the President of the higher court and the general assembly of the Supreme Court of the Republic of Macedonia.

Republic Council then gathers data from the Ministry of Justice regarding the proposals for suspension related to the achieved results, the number of resolved cases, the quality and agility in the judge's work. The procedure is closed for the public and the judge has a right to reply to the convictions. After the investigation is to be concluded and if two-thirds of the Council members voted for judge's suspension, the proposal is submitted to the Parliament of the Republic of Macedonia for final decision.<sup>47</sup>

During the investigation, the judge may be suspended from his/her duty.

## 9. Computer Equipment and Office Facilities

The programme (Strategy for Judicial Reform) that anticipates building of an IT system presupposes resolution of the problem with courts' computerisation. There are special on-going programmes already in use, such as PHARE and CARDS as to assist installation of computer equipment.

Regarding the size of computer equipment installations within the courts in Macedonia, and technical inconsistencies related to the equipment/installations, the situation in certain courts is as follows:

**Basic Court Stip** – while the courtrooms, judges' and the expert-associates' offices have computers, there is no computer at the clerk office.

**Basic Court Radovis** – there are computers in the judges' offices and in the courtroom. The Register office has none.

**Basic Court Strumica** – previously, the courtrooms had computers and a network system, but now they are removed and placed into the judges' offices.

**Basic Court Kocani** – only few offices have computers.

**Basic Court Skopje II** – every courtroom has one computer and one printer. There are computers for each typist in the typist' office. Judges' offices have no computers, since there is typist' office and the typists have a separate office.

**Basic Court Negotino** – only the judges' offices have computer equipment. The courtrooms have none.

**Basic Court Bitola** – the court has computers, but they are used parallel to the typewriters.

The computerisation in the rest of the court is on a satisfactory level.

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<sup>47</sup> In May 2004, the Parliament of the Republic of Macedonia suspended three judges due to their lack of professionalism, one from the Basic Court in Kumanovo, and two judges from the Strumica Basic Court. In July 2004, Strumica Basic Court issued verdicts for ransom and convicted the judge with one year and three months penitentiary punishment.



***Recommendation:***

**Entire court computerisation can mean better access to the necessary information and allow application of the principle of publicity. Namely, with the changes in the Law on Criminal Procedures, Article 123-a states that “the court is obliged to provide electronic or other access to the evidence regarding court appointed trials, every day and to every participant in the process.” Full application of this Article is possible only if the courts are equipped with substantial amount of computers, and if the judges can use them during the work. The computer networking is also necessary and that will improve the level of communication.**

Apart from the computers, another special problem for the courts is the office furniture: desks, chairs, closets and other commodities which are old and need complete replacement. For many years now, the courts are left without means to renew this part of the equipment.

***Recommendation:***

**It is necessary to create special support programme for each of the courts with dynamism in renewing the commodities that is in accordance to the conditions found and the urgency of court needs<sup>48</sup>.**

## **10. Efficiency of Judicial Administration**

If the judges are to work adequately and efficiently, the necessity is to have sufficient number of expert assistants and administrative clerks. The number of administrative positions in each court is defined by the regulations outlined by the Ministry of Justice. According to them, the Basic Courts have to have 2.4 employees per judge, including one typist per judge and one expert associate on two judges.

According to the data analysis, the average number of administrative workers in one Basic Court in the Republic of Macedonia is 3.9 which exceeds the number that is prescribed as a rule by the Ministry of Justice. The greatest balance is noticed at the Basic Court in Strumica with 5.8 administrative workers per judge.

## **11. Court Buildings and Security**

The area of court infrastructure in the Republic of Macedonia was left with no investments for years, apart from constructing the Supreme Court and the Skopje

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<sup>48</sup> “Judicial authorities should be attained with the most advanced technological means aiming at proper and efficient justice realisation, especially by securing fast access to the justice sources and expeditious fulfilment of the court decisions.” (The code 9, Recommendation no.r(84)5 the Committee of member states ministers)

Basic Court II buildings. All other courts are faced with problems related to working and functional space areas.

The **Basic Court in Bitola** started a process of building the additional floor that would allow expansion of the court space.

**The Basic Court in Tetovo** is undergoing internal space restructuring.

Following spatial problems can be also enlisted:

- The judges in all courts but the Basic Court Skopje II in Skopje that has a separate office called daktilbiro, share their offices with typists and other associate staff.

- The Basic Courts in Gevgelija and Veles have two institutions sharing the same building: the Court and the Public Prosecution Office.

- The insufficient number of courtrooms leads to a situation where judges work in their offices causing damage to the lawsuit as such – the legal process thus, cannot be normally conducted facing obstacles to the use of the principle of publicity. According to the data analyses, 89% of the criminal trials were conducted in the courtroom and 11% in the judges' offices, while in the civil proceedings, 66.7% were performed in the courtroom while 33.4% in the offices. The biggest number of trials performed in offices (compared to the number of trials conducted in courtrooms) is found in the Basic Court in Vinica which can be understood since the court has only one courtroom, and 15 judges with an average of 15 cases per day.

On the other hand, the Basic Court in Sveti Nikole has 6 judges and 8 courtrooms in total, two bigger and 6 smaller in size.

According to the analysis, the average of judges using the courtrooms in the basic courts is 3.5. The greatest difference in numbers between the judges and courtrooms are observed in the Basic Court in Gevgelija with only 2 courtrooms and 17 judges, the Basic Court in Kocani with 3 courtrooms and 17 judges with an average of 35 cases on a daily basis, the Basic Court in Stip with 3 courtrooms and 24 judges with an average of almost 60 cases daily.

- There is also a lack of special rooms for lawyers and public prosecutors where they can spend their time in between two proceedings. These kind of facilities are provided only in the Basic Court Skopje II having separate rooms for both the lawyers and the prosecutors, and at the basic courts in Bitola, Krusevo, Veles, Kriva Palanka, Berovo, Sveti Nikole, Kratovo, Kumanovo and Delcevo.

***Recommendation :***

**It is necessary to conduct more thorough examination of the problem related to the court working space as to prepare long-term building capacity programme to satisfy the needs connected to the contemporary judiciary process and the work of the judges.**

The issue of securing the judiciary facilities was resolved in 1996 by forming judiciary police whose activities are regulated by the Law of Courts.

The **Basic Court in Bitola** has two court police representatives for each of the court floors directing the clients, and that is why there are no lists placed marking the trials or other processes for the current day.<sup>49</sup>

Court door entries are also secured by metal detectors which should increase the court security as well.

According to the analysis of the questionnaires, 7 cases of court order disturbance were noticed in the cases related to criminal procedures, and only during the one of them a person was removed from the courtroom, while in the civil procedures disturbances occurred in only 4 cases. In all of these cases no severe disorder of court process occurred by the procedural participants.<sup>50</sup>

## 12. Financing of the Judiciary

The Elaborate preceding enactment of the Law for Independent Judicial Budget enlisted all the problems related to the material and financial situation of the judiciary. The Elaborate proposed long and short-term solutions, a general Law budget physiognomy, as well as a methodology for preparing and enacting the court budget. Unfortunately, many of these proposals and solutions were not built into the Law for Independent Judicial Budget. This Law was passed more than a year ago and is still not into function; the courts are not financed nor the judicial budget is formed in accordance to this Law.

The reason for this situation is multiple:

**Firstly**, the executive authority shows no understanding about the problems of the judiciary undertaking no measures for the Law application;

**Secondly**, the Law has no firm methodology for judicial budget preparation, both regarding the total and the budgets for each of the separate courts; there is no methodology adopted for enacting the judicial budget as autonomous and independent in a special procedure; and there is no methodology for dividing means for the judicial budget from the state budget.

### ***Recommendation:***

**It is necessary and urgent to approach the preparation of regulations and the methodology for preparing and activating the judicial budget. There is also a need to prepare Programme for creating a fund from the court self-resources which will be used to improve the conditions in the judiciary in all its domains: the facilities, equipment and technology, the work methodology and scientific and research activities.**

**Finally, the question of preparing and enacting the Law of Salaries for the judges should be also resolved.**

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<sup>49</sup> Chapter 2 point 5

<sup>50</sup> "A murder trial has turned into a mass fight with around 10 people participation. However, no serious injuries were caused thanks to the police intervention." (Dnevnik daily, 12.03.2004 )

The courts also are financed through the court taxes, court deposit taxes, etc. These sums are kept on special accounts and are transferred to the state budget on every 15 days.

## Recommendations

1. The question of judicial independence in the Republic of Macedonia is complex and requires complementary approach through the Judicial Reform Strategy, by setting clear directions in the Constitution of the Republic of Macedonia, and for all other laws that regulate the work, the position, way of functioning and organisation of the judiciary.

2. All courts should resolutely apply the LCIP regulation for paying court taxes, a step will make citizens equal, as prescribed by the Law. The courts that do not follow resolutely the regulation for paying court taxes, should be reminded to do so.

3. The request for exemption should be submitted even after the main hearing has started, since there is a possibility the circumstances causing doubts in the impartiality of the judge or the juror to be revealed during the process. On the other hand and having in mind that the main hearing is in progress, the law should also assign short time limits for deciding on the exemption request.

4. With an aim to prevent misuse of the possibility to demand exemption of judges only with an aim to prolong the procedure, it would be useful to legislatively prevent repeated request for suspension of the same judge, under the same conditions as stated within the prior exemption request that was considered as groundless.

5. The impartiality should be constantly monitored through the Institute for exemption of judges and jurors, the methods used for allocation of cases between the judges, making it urgent to find a way and enact special Law for organising the judiciary which should follow and add up the Law on Courts.

6. The LCIP regulations related to relevance of the value of the dispute issue for a case to be tried by judge individual should be changed and the value of the dispute issue tried by judge individual should be increased (as well as for the cases related to legal property requests in a regular procedure and economy trials).

7. The courts should be informed about the high percentage of cases having no dispute issue value as to require appropriate and thorough application of legal regulations since these occurrences can lead to serious misuses regarding paying court taxes.

8. To be able to set aside all possible doubts for any kind of influences over the independence of the judicial function, some measures should be undertaken related also to the prospects of changing the regulations, defining the process and defining mechanisms for election and suspension judges.

9. The LCIP should also include the time frame during which the President of the Court will reach the decision regarding judges' exemption.

10. For the cases with multiple accomplices a decision to separate the procedure should be reached, if the judge confirms the necessity of such a step, instead of going for trial in absence.

11. To endow general publicity presence in the courts, they should resolve one technical issue – how can information on the day/hour concerning a particular trial be available in time to those expressing interest to be present at the event.

The courts thus, should be computerised – this is to be done as soon as possible since it will provide the possibility for timely trial information, and data on the progress of different cases. This way also the communication will be easier, both with the parties within the proceedings, and with the defence and other interested persons.

12. Having in mind the nature of the criminal cases, there should be additional endeavour (even to insist) the trials to be held in the courtrooms, and not at the judges' offices where there are no conditions for normal judicial process – for presence of all interested persons, conducting additional procedural activities such as hearing of witnesses, experts etc.

13. Concerning the judges' overwork with cases sometimes also effected by the frequent renewal of the main hearing due to 30 days deadline omission, we propose to review and accept other comparative solutions where the time limits are two months, but no more than three months.

14. It is also useful to have written order for expert testimonies stating time limits for the expertise examination to be concluded. Stated time limits can be prolonged on the expert's request with an aim to continue with successful assessment. This way we will avoid suspensions of the main hearings for an indefinite time giving the expert greater freedom, and the problems related to timely delivery of completed expert testimonies due to unresolved money requests between the institution conducting the expert testimony and the court.

15. Numerous trial postponements connected to one and the same issue should not be allowed to happen and solutions should be sought leading to changes and annexations of the LCIP.

16. There should be also changes in LCIP regarding replies on legal suits and preparatory trials so they could be anticipated as obligatory phases of the procedure.

17. The courts should make an effort so that the trials should be on time.

18. LCIP regulations for stay of the procedure should be abolished.

19. According to the regulations related to the use of languages in criminal procedures, each court should have a list of authorized judicial translators from the relevant languages as the judge could be timely secured with quality and experienced interpreter.

Securing no interpreter should not be tolerated as a reason for delay in trial. This is as the judge did not prepare well for the process.

20. Computerisation of the judicial activities should advance the efficiency of the judges and all related procedural activities, as well as processing, evidencing and filing the files (computer files). Using this possibility, the judge can always have an access to the file, to use it while preparing for work, or while directly working on a particular case. The files that are processed through the computer system assist the

judges and allow them to have full view in what is happening and who is using them, and for what aims, acquiring high degree of security for the files.

21. Through and detailed approach to the Law on Courts might be necessary as to clarify the questions related to the discipline responsibility of the judges.

22. It is also necessary to undertake urgent activities for preparing the sub-legal acts and methodology for preparation and realisation of the court budget. In parallel to this, it is necessary to prepare Programme for establishing fund gathering the means collected from the judiciary individual resources which are to be used for advancing the court conditions in all areas: facilities, technique, technology, promoting methods for scientific and research work, etc.

Finally, the question related to the preparing and enacting the Law of salaries for judges should be resolved as well.

## Annex I

### 1. A Report of high profile cases

Within the “Countrywide Observation of International Fair Trial Standards Implementation in Domestic Courts and Assessment of the Functioning of the Judiciary” project on 22.12.2003, on behalf of the Executive Board of the Coalition, two cases were selected as high profile:

1. Case **P.no.612/01** processed by the Basic Court in Tetovo for terminating the buying and selling agreement of fixed assets between Tetovo Tabak AD Skopje represented by the Director Sretko Gjurcinovski as a sales party and Makedonija 2000 DOO Export Import represented by the proxy holder Bozidar Gjorgjievski as a buyer.

The judiciary council constituted of one judge and two jurors conveyed the case.

The parties had proxy holders being lawyers and during the process their right for defence *was respected*.

The legal suit regarding this case was submitted on 10.09.2001 and on 17.09.2001 it was delivered to the accused. The verdict was once annulled and returned to the first-degree proceeding along with the Appellate Court decision on 20.02.2003 and related to the appeal on behalf of the accused.

During the process the principle of publicity was fully respected and the observers had unconstrained access to the trials and case materials both by the judge and by the court administration.

During the entire procedure, the President of the court exempted two judges. The first one was exempted on the request of the accused and in accordance to the Article 65 point 6 from the Law on Civil Procedure for being close relative to the plaintiff. The second judge was exempted on the grounds of being closely related with the parties in the process.

The case was adjourned 17 times and it can be stated that the most frequent reasons were the requests by the parties in the process or their proxy holders; than, the failure to be present at the trial; irregular delivery of court summons which occurred 6 times as a reason for postponement of the main hearing, whereas for two hearings adjournment occurred on behalf of the courts. due to the main hearing delays, may be concluded that at two hearings the parties and their proxy holders were not present at the trial although regularly summoned.

On 30.03.2004 the court reached a verdict immediately after concluding the main hearing, and the file was in the repository on 29.06.2004 to be delivered to the parties.

Apart from certain omissions regarding the reasons for trial postponement, and the 90 days duration for reaching the verdict until the verdict is delivered to the



parties in the process (which is an infringement to the principle trial in reasonable time according to the Article 6 from the European Convention for Human Rights), no other breaches were concluded to be committed regarding the international standards for fair trial.

2. The case K.no.229/03 processed by the Basic Court in Veles for criminal charge – Violence, in accordance to Article 386 paragraph 2 and related to paragraph 1 from the CC against the defendants Ordanco Tasev and 19 others. The Court Council in 1+2 composition carries out the case. According to the seriousness of the case it can be confirmed that the council is justly composed. In addition, minors appear as victims in the case.

The case is complex and related to the act defined by Art. 386 from the CC – Violence – complex criminal charge by its nature. The case is related to the paragraph 2 from the same Article – a group act, an act of severe violence with large number of perpetrators, and an act that causes feeling of insecurity, disgust and fear by the general public.

The Court Council secured defence attorneys to the defendants on their choice. There were times that the counsels did not appear in the courtroom due to being overworked or rejected as a counsel on behalf of the defendant, where the court in official capacity immediately appointed another attorney. This means that the court respects fully *the right to defence*.

The Court Council also respects fully the right to introduce the defendant with *the right to remain silent* (no one insofar has used this right), *the right to the use of language(s)*, and other standards for guaranteeing the fair criminal procedure.

Until this report was prepared, eight evidence presentation hearings were held.

Regarding the presentation of the evidences, the court used the double approach: some of the witnesses stated their findings orally, while others' statements (given during the investigation procedure) were read. Some of the witnesses during the main hearing withdraw from their statements given during the investigating procedure by saying they were influenced as to what kind of statement to give. The defence also required using the right to confront during the main hearing process.

Expert testimonies are also conducted, especially regarding the body injuries.

Concerning large number of defendants, the trial is conducted in continuation and insofar several main hearing were already conducted presenting evidences on the case. The last trial held 31.03.2004 was postponed since the counsel has informed the court that the firstly accused is seriously sick and unable to participate in the trial. The court adjourned the main hearing for an indefinite time.

The process observers found out that the rights of the defendants for fair trial are respected, being given an access to the evidences, by accepting their suggestions for hearing witnesses, and providing confrontations, respecting the legal terms regarding timely information on the hearing dates and receiving the same in written. The court is also securing itself (and the procedure) in the way that after each concluded main

hearing, there are minutes stating the date of the next hearing, informing all process parties in advance.

No request for *exemption* occurred during this case, for the President of the court or to the jurors. The general estimate is that there are no indications that would point to partial act or behaviour on behalf of the court representatives.

During the entire procedure the *right for publicity* is fully respected. We also need to mention that this case was monitored, commented, and explained in almost all-public media, which in turn created an atmosphere of continued pressure over the court.

Regarding the President of the Court and his personal behaviour, the observers noted that he smoked during the trial. This comment is very good having in mind the judges' behaviour during the main hearing.

## **Annex II**

### **Conclusions from the Round table held on the occasion of the Final Report of the Coalition “All for Fair Trials”**

Regarding the Final Report of the Coalition “All for Fair Trials” a Round table was organized. Beside the members of the Coalition’ National Office, national legal experts in criminal and civil proceedings, and representatives of the OSCE Spillover Mission to Skopje, the Round table was attended by the highest representatives of the judiciary, the Ministry of Justice of R. Macedonia, the Association of Judges, the Association of Public Prosecutors, the National Judicial Council, representatives from the Ombudsman’ Office, representatives from the Office of the Council of Europe in Skopje and the representatives of the international organizations operating in the domain of the functioning of the judiciary. The following conclusions resulted from the discussion:

- The participants granted full support to the Coalition “All for Fair Trials” in the realization of the on-going project in the domain of observation of the implementation of international fair trial standards in domestic courts.
- The participants concurred on the need for observation of the court proceedings by impartial persons which are neither part of the judiciary, nor parties in the proceedings, and the necessity for carrying out actual research in order to locate the problems that confronts the judiciary and to come across to appropriate solutions that will be delivered to the competent authorities as proposals.
- The conclusions and recommendations from the draft version of the Final Report of the Coalition have been appraised positively acquiring support from the representatives from the judiciary and institutions related to its functioning. The Report, together with the recommendations will be delivered to the Committee for Judiciary reform within the Ministry of Justice, once published.
- An establishment of a working group consist of representatives from the Coalition “All for Fair Trial”, the Ministry of Justice, the Supreme Court, the Appellate courts, the National Judicial Council and the Public Prosecutor’ Office in RM, with a basic goal to monitor the implementation of the recommendations from the Final Report and their utilization during the process of judicial reform that will contribute towards enhanced implementation of fair trial standards in domestic courts, increased citizens’ confidence in the judiciary, and more effective completion of the judicial reform in Macedonia.

## **Annex III**

### **Letters of Support**

(Translation from Macedonian original)

#### **BASIC COURT PRILEP**

**-The President-**

**20.09.2004**

#### **The Coalition “All for Fair Trials”**

The successful completion of such project is of particular importance for this court and the entire judiciary as well.

In my opinion, the presence at the trials is very important; persons who are not parties in the proceedings will evaluate the work of courts, and that will influence the objectivity of the evaluation for the work of the court. In particular, because of frequently present opinions in public, in my view in large extent groundless claims, about inefficiency and corruption of the judiciary.

Based on conducted research by the independent Organizations like Yours, the real grounds for location of problems will be created, and for objective evaluation of the work of the courts. The materials that are delivered, clearly presents that Your main interest is application of Laws by the judges in different proceedings before the courts in RM.

The gathered data and the given recommendation can serve as recommendations for amendments of procedural laws that will enable more efficient deciding of cases.

The cooperation of the Basic Court Prilep will continue.

Respectfully,  
President of the Basic Court Prilep  
Angelco Videv  
Signature  
Round seal affixed  
Basic Court Prilep

(Translation from Macedonian original)

**Republic of Macedonia**

**BASIC COURT**

**Sy.no. 347/2004**

**24.09.2004**

**R e s e n**

**The COALITION**

**-All for Fair Trials-**

**S K O P J E**

Regarding the Final Report (draft version) of the Coalition “All for Fair Trials”, on the session held on 21.09.2004 the Judicial staff of the Basic Court Resen, discussed the report and full support is given, and without any notes the statements and given recommendations are accepted.

In respect of this, we point to the two most zealous problems in the judiciary, generally. Those are the torts, the execution and the delivery issues. This has been underlined years ago, since the judicial reforms from 1996, and they are notorious facts, so we would not like to elaborate them now, but we consider them significant problems which must be prioritised in the reforms and in our opinion the situation of the judiciary will be improved to a great extent if they are solved. The number of judges that decide cases of torts is big. If those cases are exempted from the court competence, the judges will be engaged in solving other complex cases, in criminal and civil proceedings, more attention will be paid to those cases and the interventions from the parties due to the postponements of the proceedings will be reduced. Furthermore, if the problem with the delivery would be solved, that will have positive impact on the improvement of the financial situation of the courts and accuracy of the court, as well. Namely, the cases that are postponed on the grounds of irregular delivery will be decided timely and the expeditiousness of the courts will become apparent and the situation of overburdening with cases will be exceeded.

At this point we would like to point out to certain problems that exist in this court that influence the whole work of the court. Namely, those are the problems with courtrooms, the spatial conditions and the archive.

The court possesses two courtrooms that are used by 5 judged, including the President of the court. Thus, the courtrooms may be used for adjudication only by two judges, and other has to adjudicate in their office which is unpleasant situation and a serious problem. Three offices in the Court' building are used by the Public prosecutor. This problem has been emphasized many times, and it is present in other courts as well, because the Public Prosecutors, in general are settled in the Court' buildings. If a solution for this problem can be found and the Public Prosecutor dislocated, than with the use of these three offices the spatial problems will be solved since, at present, the judicial counsellor and two expert associates share one small office. The same is the situation with the typist, which does not provide for normal and efficient performance

of the duties. The existing archive is absolutely insufficient and the cases that are finished and should be archived, are put aside in the Court' Clerk office. Pointing out to these serious problems for the court and considering Your possibilities, we hope that we can expect appropriate help from You in the future.

Respectfully,

Judicial staff,  
President  
Dragi Zalovski  
Signature  
Round seal affixed  
Basic Court Resen