

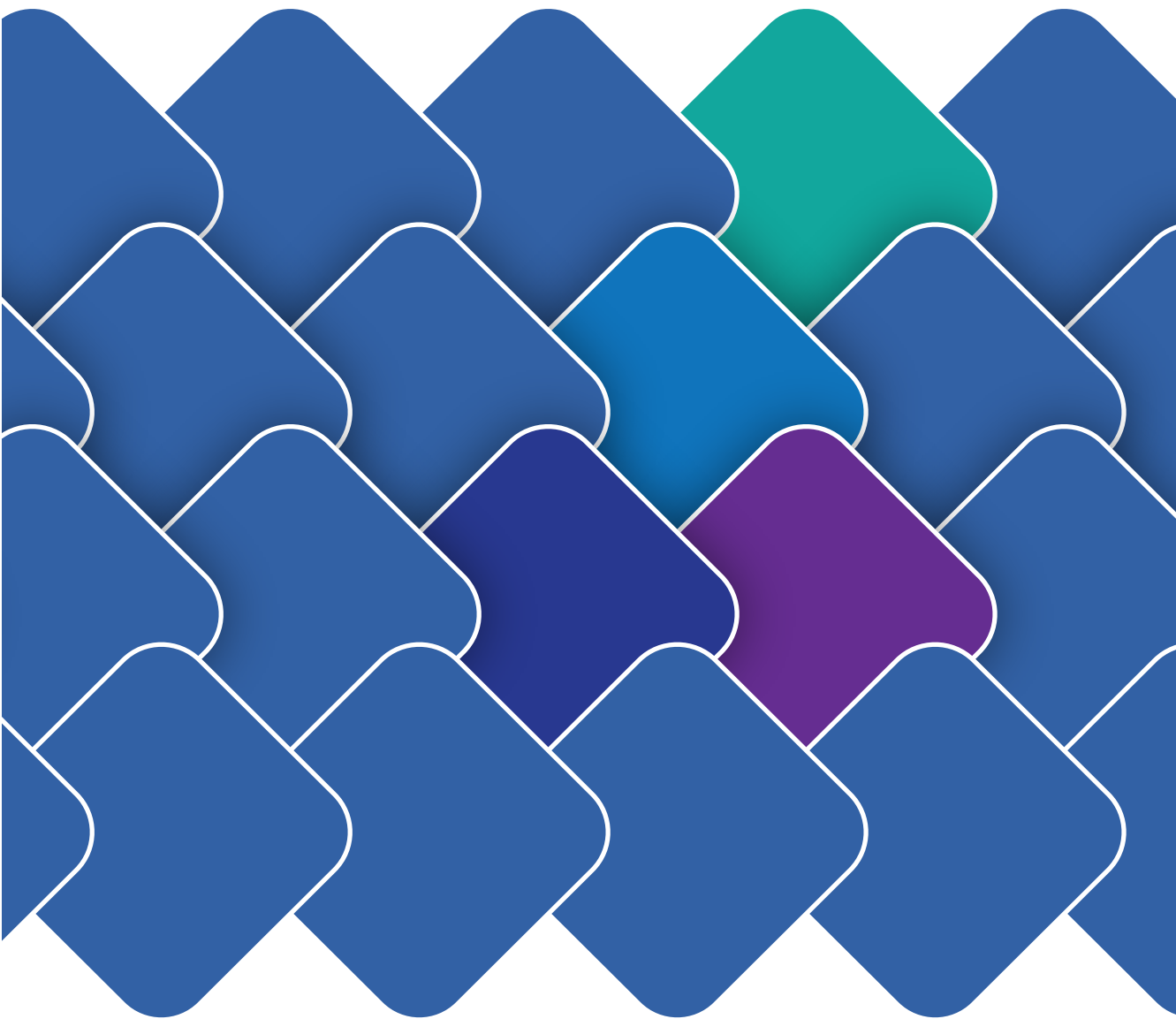


ЦЕНТАР ЗА ПРАВНИ
ИСТРАЖУВАЊА И АНАЛИЗИ
CENTER FOR LEGAL RESEARCH AND ANALYSIS



Kingdom of the Netherlands

THIS PROJECT IS FUNDED BY THE KINGDOM OF THE NETHERLANDS



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POSSIBILITIES AND PERSPECTIVES FOR IMPROVEMENT OF THE QUALITY OF THE JUDICIARY IN MACEDONIA

◆ APPOINTMENT, EVALUATION, AND DISMISSAL OF JUDGES ◆
◆ POLICY ANALYSIS AND RECOMMENDATIONS ◆

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Publisher:

Centre for Legal Research and Analysis - Skopje

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Graphic designing and printing:

Relativ

May 2018, Skopje

The Project “Comparative study on vetting experiences in judiciary in emerging democracies” is supported by the Embassy of the Kingdom of the Netherlands. The content of this publication does not necessary reflect the position or the opinions of the donor.

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Summary

The paper presented here is based on data, information, and recommendations for appropriate legislative provisions for the problems that affect directly the work, role, and positions of the judges in the judicial profession. *The data presented were gathered via discussions of focus groups composed of judges of the four appellate districts in the Republic of Macedonia. Moreover, opinions and recommendations were collected via structured interviews conducted with experts in the judicial field* regarding the implemented reforms, possible legislative amending and provisions for the role and positions of judges in the judicial profession. This paper also draws on the *Comparative Analysis on Judicial Vetting Mechanisms in Albania, Bosnia and Herzegovina, Serbia, and Macedonia*, whereby special attention was paid to the experiences and results recorded in our neighboring countries that share similar legal traditions, historically speaking, with the Republic of Macedonia. This paper also analyzes the reports of the European Commission, the two Reports of the Senior Experts' Group under the leadership of Mr. Reinhard Priebe, the Recommendations of the Venice Commission, as well as all amending of the legislation related to the judiciary that has been adopted to the date of this paper.

The most important realizations, proposals, and recommendations in this policy paper are of significance for the makers of judiciary policies, the legislators, as well as the members of the Judicial Council, judges, prosecutors, attorneys, and all other participants in the judicial system. The goal of the primary recommendations is to **improve and reinforce the independence of the judiciary and judicial institutions, develop an in-practice implementable and efficient system for equitable appointment, evaluation, and promotion of judges, including the development of a model of a multilayered spectrum of disciplinary sanctions that would enable responsible and accountable performance.**

Problem introduction

On many occasions, at both scientific and political levels, the rule of law has been pinpointed as one of the major challenges on the road to development of the Republic of Macedonia as a modern European state that would establish the frameworks for the modernization of the Macedonian society as a whole. The independence of the judicial power is at the very core of this challenge. The key role here, aside from that of the legal and institutional frameworks, is that of the judges, i.e. of the ways in which they perform their judicial function in the judicial system.

For a long time now in the reports of the domestic non-governmental organizations, the safeguards of human rights, the analyses of the developments in the judicial system, as well as in the reports of the international organizations we have been reading about and hearing **warnings about political interference in the appointment of judges and public prosecutors, judicial dismissals, as well as political pressure exerted on judges for certain high-profile political cases.** Moreover, often there is **contestation over the objectivity in the evaluation and promotion of judges.** These criticisms were reiterated by the judgments of the **European Court of Human Rights for the Republic of Macedonia.** The judgments of this Court restate that **political interference, inefficiency, violation to the right to public discussion, clientelism, and corruption are heavily present in and form the character of the Macedonian judicial system.**¹

A number of factors contribute to these developments. Presuming that the constitutional and political systems of the country secure the systematic principles of the independence of the judiciary (separation of powers, democracy, etc.), an essential prerequisite for judicial independence is the **independence and impartiality of judges.** It is software requirement for the rule of law and protection of human rights and fundamental freedoms, and consequently for the country's European perspective. As it is highlighted in the EU Enlargement Strategy for the Western Balkans, the rule of law is the first and primal strategic objective in the approximation of EU standards. The rule of law is not possible without an independent and impartial judiciary, that is, without independent and impartial judges.

There are numerous mechanisms and policies through which countries are working on achieving this prerequisite for the rule of law. *In this paper, we are going to focus on the appointment, evaluation, and dismissal of judges in the Republic of Macedonia.* Our goal is to assign directions for the development of appropriate public policies based on empirically acquired insights about the advantages and disadvantages of the current models of appointment, evaluation, and dismissal of judges in our country and their validation in the context of the regional and European experiences.

1 Gerovska Popchevska v. Republic of Macedonia (Application No. 48783/07), Jakshovski and Trifunovski v. Republic of Macedonia (Application No. 56381/09 and 58738/09), Popovski and Duma v. Republic of Macedonia (Application No. 69916/10 and 36531/11), Mitrinovski v. Republic of Macedonia (Application No. 6899/12), and Ivanovski v. Republic of Macedonia (Application No. 29908/11) <https://hudoc.echr.coe.int/eng#> (last accessed: 10 May 2018).

Context

The Republic of Macedonia in the last year (2017-2018) started with judicial reforms which were fostered and supported by the international community.² In November 2017, the Government of the Republic of Macedonia adopted the 2017-2022 Judicial Reform Strategy and the Action Plan for the Judicial Reform Strategy for the same period.

Although the contents of the documents mentioned above show that the initially proposed idea for general reappointment of judges has been abandoned, it seems that the concept of general reevaluation of the performance of the judges is still on the table. The comparative analysis used in the drafting of this paper shows that the experiences of our neighboring countries that had chosen the path of general reappointment of judges in the name of judicial reforms have been negative; however, it also demonstrates that **reevaluation supported by other qualitative criteria**, such as integrity, reputation, conduct of the judge in judiciary-related activities, can strengthen public trust in the judiciary.

The report of the Senior Experts' Group led by Mr. Reinhard Priebe puts its emphasis on the concerns over the absence of a framework for the protection of judges from external pressure. It states that this has resulted from the fact that resolving the issue regarding the security of the judicial mandate had been avoided for a very long time, as it was underlined in the 2015 Recommendations of the Venice Commission.³ It seems that the *recently adopted amending to the Law on Courts and Law on the Judicial Council do not remove fully the concerns regarding the strengthening of the independence and stability of judges and their mandate*. Moreover, they overburden dismissal procedures accounts that are not familiar to the other systems in Europe which is completely unnecessary.⁴

The EU Strategy on “Credible perspectives for enhanced EU engagement with the Western Balkans,” puts the focus on the urgency and necessity of significant strengthening of the rule of law, observance of fundamental rights and good governance, judicial reforms, fight against corruption and organized crime, as well as public administration. The emphasis is that these reforms must show real results and they must strengthen the functioning of the democratic institutions significantly.⁵ These strategic objectives cannot be met without an independent judiciary. The European Convention on Human Rights, too, establishes the independence of the judiciary in general and non-interference in the judicial power as one of the key principles on which the right to a fair trial is based. This principle presumes that the judge is completely independent from the other powers, which means both parties and politics, but also that it is independent from other influences as well. No state or other body of the public power could or should interfere in the ruling or instruct the judge in any way. All these challenges to the independence highlight the importance of the personal and professional characteristics of judges.

2 Plan 3-6-9, presented by the Government on 4 July 2017, envisages the reform steps the new Government were to take in the period of 3-6-9 months. In the segment on the judiciary, the Plan covers judicial dismissals and disciplinary sanctions listing the following steps: repealing the Law on the Council for the Establishment of Facts, drafting amending to the Law on the Judicial Council for the purpose of restoring the competences to the Judicial Council, and formation of a Working Group to draft the Law Amending the Law on Courts and Law on the Judicial Council in the segment on the proceedings for disciplinary accountability of judges, grounds for disciplinary accountability, disciplinary measures, and judicial evaluation.

3 Evaluation of judges, incorporating the principles of election and evaluation and subjecting judges to effective, professional, and ethical rules (controls) found necessary for proper administration of justice.

4 For example, retaining judgments of the ECHR that confirm violation as grounds for judicial dismissal.

5 Strategy for the Western Balkans: EU sets out new flagship initiatives and support for the reform-driven region, Strasbourg, 6 February 2018 (http://europa.eu/rapid/press-release_IP-18-561_en.html).

Problem description

The problem description is based on materials of the Center for Legal Research and Analysis acquired from discussions of focus groups composed of judges of the four appellate districts (Skopje, Gostivar, Bitola, and Shtip) and interviews conducted with experts in the fields of judiciary, law, and human rights. Considering the traditional isolation of and absence from the public of judges, *we find that including judges from the four appellate districts and former judges of higher courts in the thematic discussions and structured interviews give this paper the privilege to present publicly their analyses and proposals and to include their suggestions in its recommendations making them an exceptionally important platform which, we believe, is going to be of great use to the reform efforts.*

General image of the state of the judiciary and ongoing reforms

The constitutions of democratic societies guarantee the independence of the judiciary through the guarantees that secure legal, economic, educational, and professional conditions for judges enabling them to perform their judicial function free from any pressure from the executive power, the parties or any other involved individuals or groups. However, even the best worded guarantees fail to have any effect if they are not properly implemented in practice and if there is no institutional transparency or visibility. The judges from three out of the four focus groups composed of judges of the four appellate districts base their recommendations on this general image. **The judges of the Appellate Courts in Skopje, Bitola and Shtip claim that aside from the lack of transparency and trust in the judiciary another major problem is the silence of the judges. The judges of the Appellate District of Gostivar, however, believe that the reality is different and that the positive perception about the judiciary should be enhanced through the media as most judges are honest and perform their function in compliance with the law and that, even though the judiciary is not perfect, it is not the black spot of the state.**

The judges and experts that participated in the structured interviews commented on the ongoing reforms as well as part of their general assessment of the state of the judiciary. Only one of the experts interviewed believes that the reforms are going well and that certain working groups are functioning well. **The judges from all four appellate districts all agree that the reforms are too frequent and reduced to law amending only, when the essential problems are related to the impartiality, non-transparency, and lack of integrity.** Most of the interviewed experts delve even deeper into this problem and define the reforms as changes void of reform that are focused on institutional reforms only, that lack of vision about the direction in which the judiciary is to be reformed, that is, that the reforms are purely cosmetic and reduced to changing dots and commas in the laws, that in order to get things done quickly there is only partial implementation of the reform strategy which then leads to poor partial amending of the legislation. One of the experts finds that the adopted Strategy and Action Plan are good as indicators, but they are not key to the reforms.

Election of Judicial Council members

With regard to the organization, manner of election, and mandate of the Judicial Council as an institution of vital importance in the election, evaluation, and promotion of judges, as well as to the reputation of the judiciary, the judges and some experts remark that there is a problem in the election of this body's members. According to them, **a major shortcoming is that the résumés of the judges are not published and the procedure is non-transparent in its entirety.** It is emphasized that the members of the Judicial Council should be at least appellate judges and that this body should not be permanent; in fact, they recommend that the judges should spend half of their business day in the courtroom, and the other half on their post in the Judicial Council.

The experts offer varying opinions upon this issue. One expert, for example, believes that the members of the Judicial Council should not hold permanent function and that they should not receive a salary but compensation. Another expert points out the Slovenian model and proposes the role of this body to be transferred to inquiry committees. **Yet, most experts believe that the current model of the Judicial Council should be kept and that the Council should remain permanent, however it should include in its composition judges of the highest courts only, i.e. the composition should be improved and enhanced, and the legislation should be amended with regard to the accountability of the council members.**

It can be concluded from the conducted interviews that the idea for partial bearing of the function of council member and the inclusion of council members in the regular court work through case adjudication touches upon the dilemma regarding the evaluation of their performance as judges. Some experts believe that **they should be evaluated as council members and never as judges for the duration of their mandate.** This raises also the question of **objectivity in the evaluation of their performance as judges, and how their performance would be validated in terms of their future advancement.**

Moreover, the Report of the Senior Experts' Group under the leadership of Mr. Priebe clearly states that this body must acquire an active attitude in safeguarding judges from political interferences and attacks that impact their independence and impartiality. This group does not contest this institution's election model stating that *"...Appointments and promotions should be made by the Judicial Council and the Council of Public Prosecutors according to transparent, objective, and strictly merit-based criteria, and using transparent procedures which should be established by law and not merely by internal rules, in accordance with the recommendations of the Venice Commission's reports on judicial appointments and the independence of the judiciary as well as the specific recommendations contained in opinions specific to the Republic of Macedonia, many of which have not been implemented. No room should be left for political or partisan relations or support as election criteria."*⁶

The judges who took part in the focus groups demonstrated strong disappointment with the current performance of the Judicial Council and the Council of Public Prosecutors, especially because of the lack of transparency and foreseeability in their performance as the legal expectations very often do not correspond with the manner of application of the legislation in the appointment, promotion or dismissal of judges and prosecutors. For that reason specifically all serious reforms should originate from the idea of **building clear high criteria for the persons in the composition of the Judicial Council and the Council of Public Prosecutors.** If the objective of the reforms is to ensure the independence of the judicial institutions and especially to exclude the possibility

6 14 September 2017, Second Report of the Senior Experts' Group of Mr. Reinhard Priebe, items 29 and 30 on the issue of general judicial reappointment
https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

for political influence in the judicial decision-making, aside from amending the Law on Courts and Law on the Judicial Council, *the focus should be put on selecting top experts in the judiciary who must abandon all bad practices of partisan engagement in the procedures of appointment and promotion of judges and prosecutors.*

Appointment, evaluation, and dismissal of judges

Judicial independence requires for judges to be free not only from outside influence but also from influence from within the judiciary. Independence inside the judiciary presumes freedom from directives and pressures from fellow judges or *vis-à-vis* supervisors in the judiciary, as well as existential security and independence. The judge must be free in their considerations and adjudication. Only judges with personal integrity and dedication to the judicial profession can handle pressures of any kind as independence is their biggest relief. The judges of the appellate district of Skopje believe that, in general, “...**The procedure for the appointment of judges and court presidents and for the advancement to a court of higher instance is non-transparent, because in the procedure only the name and surname of the candidate is submitted to the members of the Judicial Council and never their résumé.**”

Appointment and advancement in the judicial career

Past experiences, as well as research conducted by judges of the four appellate districts and some former judges and experts, demonstrate that *appointment and advancement of judges and prosecutors under the influence of political parties and personal connections with politicians has ruined the image and integrity of the judiciary and lowered the quality of judicial decisions significantly.* The non-transparency and unforeseeability of these procedures is openly recognized especially by judges of the Skopje and Bitola appellate districts.

Some of the interviewed experts expressed **critical stances towards the role of the Academy for Judges and Public Prosecutors** in the judicial appointment process. They believe that the Academy for Judges and Public Prosecutors is “*the most politicized institution in the judicial system*” and that the way it is managed has closed off the judiciary for new persons; moreover, they find that judicial candidates who lack the required professional qualifications are appointed, that the evaluation model is disputable, and that all candidates either have identical score or their scores differ only in the decimals. One expert points out that *the Academy must be transformed into a specialization institution and offer judicial specialization curriculum and the model of selection of Academy lecturers must be revised in order to include eminent professionals from the practice and theory.* Another expert believes that the appointment of judges of basic courts through the Academy is a completely flawed model and that the judiciary must be opened and it must offer equal opportunities for attorneys and expert associates. He finds that in order to be allowed to apply for the judicial function, the persons from these professions first would have to had acquired a three-year working experience in the judiciary, through trainings and professional engagement, and based on that experience to be evaluated independently by the mentors; for this purpose, they would have a judicial file of achievements and based on it the inquiry committee would make its decision on the candidate application. The phase, as an integrity test for the judicial candidate, should be a two-stage training as preparation for adjudication which would also be the grounds for the evaluation of the candidate, whereby the final score recorded in the candidate’s file would determine whether or not they were prepared to bear the judicial function.

On the other hand, judges from the focus groups and especially the judges from the Gostivar appellate district emphasize the need of having an Academy for Judges and Public Prosecutors, but at the same time the need to implement reforms in this institution. The judges of the Bitola appellate district remark that *in the process of appointment of basic court judges, the Academy for Judges needs to acquire a more open approach and publish calls the purpose of which would not be to meet the current need of judges in the basic courts, but they should encompass more persons of which a waiting list would be composed and used in the following election.*

Regarding the **criteria for election and advancement in the judicial career**, some experts comment that consideration must be taken for criteria that are impossible to grade but affect the general score, such as professional experience, manner of conducting the judicial procedure, culture, integrity, professionalism, dedication, application and reference to the case law of the European Court of Human Rights, and their professional development with theoretical knowledge. *The judges from all four appellate districts comment that in the election process, as well as in the process of advancement in the judicial career, the focus is put on the quantitative evaluation through rating. Especially with regard to the advancement, they find **grading unrealistic as consideration is not taken about the volume, complexity, and difficulty of the cases.** According to them, **the personality of the judge is neglected and it is obvious that the servility of the judges is a strong unofficial criterion for advancement to a higher instance.** They believe that only judges should be allowed to provide opinion for judicial advancement, and not all court employees, and that the integrity test is just a formality that incurs additional charges for the candidates.* They remark that there have to be special criteria in the process of appointment of Supreme Court judges and that judges of administrative and basic courts should not be allowed to apply for Supreme Court positions. Judges of the Skopje appellate district state numerous reasons for which **the two basic courts in Skopje should be subjected to special analyses and validations as the cases in these courts, according to their volume and specificity, are of different character than the cases in the courts of extended jurisdiction.**

Evaluation of judges

The evaluation of judges is a very important element in the functioning of the judicial system and ensures the impartiality, transparency, and efficiency of the judicial system, and with that the rule of law. That is why all national judicial systems have judicial evaluation provisions incorporated. For the purposes of this paper, we are going to examine the experiences of the regional countries of relevance to our research.

Under the Albanian Vetting Law, judges are evaluated on their adjudication skills, while the prosecutors on their abilities to conduct investigations. This assessment covers organizational skills, ethical and personal quality of the person based on standards prescribed by law. Finally, the Report on the Reevaluation of the Assessed Expertise is drafted based on the report from the Inspectorate, information from other sources, and evaluation criteria from the legislation regulating the statuses of judges and prosecutors, and other legal acts. The ratings awarded with this evaluation establish the level of expertise as follows: “competent,” “deficient,” or “inadequate.” The persons found “deficient” are given a recommendation to attend training at the Academy for Judges, while the persons found “inadequate” with regard to a certain skill are immediately dismissed.

The Bosnian Vetting Law, on the other hand, is unlike the Albanian approach and some analysts consider that the failure of the Bosnian Vetting Law stems from the lack of clarity over the evaluation criteria (such as personal integrity, qualifications, competence, property and financial standing, and war crimes convictions) and the lack of efficiency in conducting this process in a transparent and accountable manner, which delivered rather modest results. The analysts of the Bosnian judicial reforms argue that these early efforts to vet judiciary collapsed, *inter alia*, due to a lack of qualified staff, inadequate resources, and insufficient time as the process was hugely resource-intensive. Serbia as well was subjected to severe criticisms from all relevant European institutions for its judicial dismissals, an act that was a breach of the fundamental principles.

The judges in the focus groups of the four appellate districts believe that **judicial evaluation should not be a pure statistical operation but instead it should be grounded on qualitative criteria**. Such as: *the quality of the views and opinions expressed by the judge, their reference to and use of jurisprudence, the participation of the judge in judicial five-member panels and/or in criminal council sessions, which should be evaluated according to special criteria, the individual characteristics of the judge, their reputation among judges, and the efforts they make for professional development and/or education should be taken into consideration as well.*

Moreover, with respect to the **quantitative evaluation**, they believe that in order to have objective evaluation the analyses must encompass the last 8 years or the overall judicial work from the beginning of the career to the moment of evaluation in order to remove the deadlines and normative criteria as they burden the quality of the judgments. The judges of the Bitola appellate district state that the quality of the judge’s performance could be evaluated, for example, by selecting and analyzing three meritoriously decided cases with relation to dismissed cases, the judge’s eight-year experience in the court of lower instance, as well as the annual evaluation – which they find necessary – at the same time pointing out that evaluation should be carried out only for the purpose of advancement to a higher court. The judges of the Skopje appellate district point out that judges of the two courts of extended jurisdiction in Skopje should be evaluated based on special criteria due to the volume and complexity of their work; moreover, they say that a judge from a basic court without extended jurisdiction should not be allowed to advance to an appellate court directly, but first they should advance to a court of extended jurisdiction, i.e. they support the idea of horizontal advancement or promotion.

The experts, similar to the judges, believe that despite the already known quantitative criteria for the evaluation of judges' performance, the **Strasbourg qualitative criteria** should be taken into consideration as follows: *the number of decisions reversed on appeal due to breach of procedure with regard to the total number of closed normative cases; the manner of implementation of the judicial procedure (observance of the legal deadlines for taking procedural actions, observance of the legal deadlines for adoption, public pronouncement and preparation of the decisions, duration of the judicial procedure, and observance of the principle of trial within a reasonable time), the number of decisions reversed on appeal versus the total number of closed normative cases.* The criterion on the **quality of the rendered decision** would be determined via insight into five cases, selected at random by the automated court case management information system (ACCMIS) and five cases selected by the judge in the evaluation period whereby the following would be evaluated: legal grounds, comprehensibility and clarity of the language of the text of the decision, clear argumentation for all facts, circumstances and evidence, and the pronounced disciplinary measure, or, as an indication of a problem, complaints filed against the judge. Moreover, the personality of the candidate (integrity) should be taken into consideration as well. Some experts believe that evaluation should be carried out annually, thus exerting mild pressure on the judges to perform their function adequately. *They point to the need of rationalizing the judicial network and abolishing certain courts* thus establishing a balance in the system and at the same time ensuring that certain judges of the smaller courts are not discriminated against when applying for advancement on the basis of their number of closed cases.

Dismissal of judges

Experts and judges both agree that **the grounds for dismissal require reconsideration**. According to the opinions expressed by the two categories of interlocutors, the dismissed judges did not all commit the same violations and they are not all equally guilty. They propose that the dismissal model should follow the appointment and evaluation models, i.e. it should include a two-instance disciplinary commission which would have rotating composition and would be formed once in three years or under extraordinary circumstances (upon received information, tip), and emphasize that the second-instance proceedings should be public, which would also contribute to the transparency of the entire process. In Priebe's Report, in the segment on dismissals and disciplinary sanctions against judges, it is pointed out that "*...Dismissals or other disciplinary penalties against judges need to rigorously respect procedures and rules laid down by law, meaning not only the letter but also the spirit of the law. The applicable procedures should be regulated in a similar manner to questions of appointment and promotion, without political interference.*"

Financial independence

This question is very popular among experts and judges both. It is largely agreed by everyone that the current funding rate in the judiciary is below the legally prescribed threshold. In that respect, judges believe that restoring the competence of the budget allocation to the judiciary would bring greater independence to the courts and an opportunity to secure the legally prescribed 0.8 percent of the budget.

Some experts are certain that in order to ensure judicial integrity and freedom from pressure financial independence is a requirement, and that is why the independent court budget should be taken away from the Judicial Council and transferred to the Supreme Court of the Republic of Macedonia. Moreover, the funds from the independent court budget should be allocated according to a proposed program for funds allocation. Other experts, however, find the current financial independence satisfactory, but they agree that the prescribed 0.8 percent must always be allocated to the judiciary.

Conclusions and recommendations

The numerous criticisms regarding the independence, which are directly related to poor reputation,⁷ have not stimulated the judges to speak out in public - individually or through associations - about the accusations and conclusions of domestic and international analysts and organizations. With very few exceptions, judges are still exceptionally passive and have left room for the public image to be built based on negative examples. What is lacking is visibility and presence of the heads of the highest courts (Constitutional, Supreme, Appellate Courts), in the Judicial Council, and of the associations of judges and public prosecutors in the public discussions about legal provisions and specific proposals.

The general image leads to the conclusion that there is no publicly expressed or visible determination of the judges to face and deal with the criticisms regarding the pressures and influences that could originate from powerful sources (such as the executive power, for example), and not just from the public, as they have claimed on numerous occasions, and that there is insufficient evident inclusion in the judicial reforms with specific proposals.

The judiciary must be completely outside of all influences from policies and politicians. Courts and judicial institutions are severely pressured by political parties and *Macedonia is going through a process of liberation of the 'captured' judicial institutions. However, in order to liberate the institutions, the external energy must be supported with internal impulses and initiatives in the judiciary.* The experience with the focus groups from the four appellate districts shows that the judges have numerous constructive ideas and a high dose of self-criticism.

In that respect, the **role of the Judicial Council** is undoubtedly important as it could open, in cooperation with the higher courts, opportunities for the judges to be able to make themselves heard and participate in policy-making. According to the legal norms, as well as the practice, in the Republic of Macedonia, the Judicial Council plays a key role in the efficient functioning of the judicial system and, whether or not the model of election and functioning of this body would be changed, regardless, it must ensure and guard the independence of the judiciary. The practice of Bosnia and Herzegovina and Serbia demonstrates that changing the model of performance of this judicial body frequently harms the stability of the judiciary. It shows specifically that judges who work part time in the judiciary and part time in the Judicial Council are not effective in either of the institutions; moreover, since they have two parallel engagements, one has to question the objectivity of the evaluation on their performance and their advancement. All previous experiences and analyses demonstrate that the members of this council should be selected only from the ranks of professionals who have proven their qualification through their work and are recognized as experienced legal experts in the country. The models of the European and neighboring countries show that best results with regard to the independence and impartiality of this body are demonstrated by compositions whose members are nearing the end of their career and are experienced and proven professionals who have no need of making compromises.

The latest amending to the Law on the Judicial Council support the transformation and strengthening of the institutions as they give the Judicial Council the competence in its “Annual program to include measures and activities for the promotion of the independence of the judiciary, measures and activities for increasing the efficiency of the judiciary, plan for continuous monitoring of the work of the courts, projection of vacated judicial positions, and observance of the principle of adequate and equitable representation of the members of non-majority communities in the Republic of Macedonia, observance of the recommendations and proposed measures from the analyses of the quarterly and annual reports on the performance of the courts, and other aspects of its competence that it finds necessary to include in the Annual Action Programme of the Council.”⁸

7 Inter alia especially the 2015 Progress Report for the Republic of Macedonia - https://www.sobranie.mk/content/HCEI/PR2015_ALL_CK_FF_MK_16.11.2015.pdf

8 Article 8 of the Law Amending the Law on the Judicial Council of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 83/2018)

All these new competences are supported by the law amending to serve the implementation of specific measures with regard to the reopened proceedings upon judgment adopted by the European Court of Human Rights related to the judge or court president whose right had been violated in dismissal proceedings, and to strengthen and expand the jurisdiction of the Judicial Council as the primary guardian of the independence of the judiciary and judges.⁹ The Law even allows for the Judicial Council itself to propose things that had not been exhaustively stated by the legislator. This openness of the provision in fact leaves room for the Council to be creative and to propose measures for and forms of strengthening of the judiciary and its independence.

The Law Amending the Law on the Judicial Council does not transform the model for **election of Judicial Council members** and this approach reflects the opinions of some experts. There is no clearly argued need for transforming the current model of the formation of the Judicial Council and Council of Public Prosecutors. All stakeholders in this project remark that it is necessary to set higher criteria in the election of members of the Judicial Council and Council of Public Prosecutors from the ranks of sitting or former judges of higher courts (Constitutional, Supreme, Appellate judges, judges of international courts, prominent attorneys, law professors, etc.). The concept here should include building the reputation and integrity of the institution through the individual integrity of each member separately. The quality of the members of the Judicial Council should serve as guarantee for complete exercising of the competences of the Judicial Council. In that respect all participants in the focus groups of the four appellate districts, as well as former judges and experts, unequivocally claim that the personal integrity of the members of the Judicial Council is especially important, consequently only the most experienced, most reputable, and most skilled judges and lawyers should be members of the Judicial Council.

Having an independent judiciary is an obligation for the judges but a right for the citizens. Therefore, for a court to be considered as independent, *“...the manner of appointment of the judges, their mandate, the existence of guarantees against outside pressures must be considered as well as the issue of the visible independence of the body.”*¹⁰ This approach rests on the understanding that the separation of powers and the protection it is given by the judiciary is a right that belongs to the citizens and that justice must always serve the citizens. At the same time, the constitutional guarantees, immunity and financial independence are necessary but not sufficient prerequisites for the observance of the principle of judicial independence. The concept of independent judges could succeed only if merged with judges who are committed to perform to the best of their knowledge and ability and dedication to the Constitution and as a result upon their personal moral and professional pledges. The better the reputation of the judges is in the public eye, the better the acceptance of their decisions would be. If it is not reputable, the Court would not be able to play its role. And reputation is built on the decisions of the court and on the personal integrity of the judges.

Appointment, evaluation, and dismissal of judges in an equitable, fair, and transparent procedure are of key importance. **Judges, who are not characterized with professionalism, loyalty to law and justice, and who lack moral and ethical characteristics and personal integrity are a serious problem for the judicial system and could undermine the rule of law.** In dealing with this part of the judicial community, which despite its small numbers cause severe damage to the profession, it is important to construct a system of a broad spectrum of penal disciplinary measures where as a final measure the judge would be dismissed and barred from practicing law at any level

in compliance with the recommendations of the EU, Council of Europe, and Venice Commission. The idea of Priebe's Senior Experts' Group to bar from practicing law or other judicial profession in the judicial system everybody who would be found guilty in fair and equitable proceedings was backed in the discussions with the focus group judges, which leads us to believe that this idea could be developed further.

⁹ Articles 8 and 18 of the Law Amending the Law on the Judicial Council of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 83/2018)

¹⁰ Findlay v. the United Kingdom and later Brudnicka and Others v. Poland,

In that respect, evaluation based on objective and transparent criteria as a model could help reforming the current courts and building effective ones. The experience of Bosnia and Herzegovina, for example, demonstrates that the process of evaluation of judges' work in a transparent procedure that is clearly regulated by law contributes to increasing the level of public trust in the judiciary. The efforts to improve and enhance the reputation of the judiciary require total engagement of judges and other judicial stakeholders as no reform could ever be successful if the voice of those concerned is not heard.

As for the **appointment** of judges, it is true that the Academy for Judges and Public Prosecutors has come under numerous criticisms and dissatisfaction over their work has been expressed frequently, this concept of preparation of future judges and prosecutors should still be kept but the manner of functioning, election of lecturers and judicial and prosecutorial candidates must be reformed. As reforms in this segment of the judiciary have not been initiated yet, we find that the views of judges and experts could contribute to the process of construction and development of this institution which in our country is still very new.

Regarding the **evaluation** of judges, it seems that the remarks of the judges in the focus groups from all four appellate districts, of the former judges and legal experts have been included in the amending to the Law on the Judicial Council. For example, the Law prescribes that the monitoring of the performance of the judge and court president shall be carried out through regular and extraordinary evaluation, whereby regular evaluation of judges and court presidents shall be conducted once in two years, while extraordinary evaluation of the performance of the judge and court president shall be carried out when they apply for a position in a higher court or for the position of court president respectively. This amending elaborates in better detail the qualitative criteria of the evaluation of judicial performance, covering quality of the performance of the judge in terms of the number of decisions reversed on appeal, the number of overturned decisions, the number of closed normative cases; the quality of the adjudication (observance of the legal deadlines for taking procedural actions, observance of the legal deadlines for adoption, public pronouncement and preparation of the decisions, duration of the judicial procedure, and observance of the principle of trial within a reasonable time). Furthermore, the evaluation shall cover the quality of the decision made, which shall be established via insight into five cases, selected at random by the automated court case management information system (ACCMIS) and five cases selected by the judge in the evaluation period.

Aside from these qualitative criteria, the Law prescribes that the pronounced disciplinary measure shall be properly considered. **The qualitative criteria would account for 60% of the total score, as opposed to the 40% accounted for by the quantitative criteria.** Regarding the quantitative criteria, the Law Amending the Law on the Judicial Council prescribes the possibility for lowering the judge's rating if their adjudication has led to a judgment of the ECHR establishing breach of the right to a fair trial. This approach is extremely rigid and, on the one hand, it could become a problem when applied in practice, but on the other hand there is a risk for judgments of the ECHR to become an instrument for penalizing national judges, which could not be good either for the future of the European Court of Human Rights or the European Convention on Human Rights or the reputation of the judges in the Court's member states.

The law amending must produce practical results through a complete depolitisation not only of the system for appointment and advancement, but also for the **dismissal** of judges and prosecutors in a transparent procedure according to objective criteria. Dismissals must be incorporated into a system that would produce visible results of individual accountability of those involved in past abuses of the judicial function. That the assessment of the accountability of judges leading to dismissal should be individualized is proven by past experiences from the leading judgments of the ECHR, such as Oleksandr Volkov v. Ukraine.¹¹ The dismissal or change of the judicial status

11 Oleksandr Volkov v. Ukraine, Judgment of 09. January 2011 upon Application No. 21722/11

or position must not be penalty of their own without taking into consideration the guarantees for equitable and fair proceedings.¹² The assessment of individual accountability must rest on law-regulated criteria in a transparent procedure guaranteeing equitable and objective proceedings before an independent and impartial composition of the Judicial Council, whereby the law allows for the decision of this body to be appealed before an independent judicial body. Dismissals or other disciplinary penalties against judges need to rigorously respect procedures and rules laid down by law and in compliance with the standards established by the case law of the Strasbourg Court, recommendations of the EU and of the Venice Commission.

Aside from the clearer determination of the criteria and method of evaluation of judges and court presidents and clearer elaboration of the disciplinary proceedings, the Judicial Council now has the obligation to form a **Center for Information and Communications Technologies, Analytics and Statistics**, which would be in charge of keeping the database of judges' electronic files, candidate lists for elections of judges and court presidents, evaluations of judges and court presidents, and database for the financial and material operations of judicial budget beneficiaries. This Council-based Center would be in charge of keeping a replicated database of the Judicial Information System which is located at the premises of the Supreme Court of Republic of Macedonia and of coordinating the activities of the remaining information centers of the judiciary for the purpose of improving the software and hardware equipment of the judiciary.

All these duties (with the exception of the new information and communications technology, the implementation of which is excepted to take one year) require serious engagement on the part of the Judicial Council in the development of the necessary bylaws and technical preparations in the three months provided by the law amending; however, it has not been considered whether the Judicial Council has the necessary human and technical resources and premises to observe these requirements and whether the prescribed deadline is perhaps too short.

The amendment of the Law on the Judicial Council follows the amending of the Law on Courts and most of the amending is related to judicial accountability and disciplinary proceedings. Just like the Law on the Judicial Council, this law too prescribes that one account for disciplinary accountability leading to judicial dismissal is a decision adopted by the European Court of Human Rights confirming violation of Articles 5 and 6 of the European Convention on Human Rights. This approach towards the judgments of the ECHR is too rigid and it has not been considered why only these two accounts related to the Convention were included. The judgments of the ECHR should no longer be included as accounts for judicial accountability. One of the reasons for this statement is that it would be difficult to pinpoint the accountable judge or judges considering that the case had gone through all judicial instances before reaching the one in Strasbourg, and in some cases the final word in the decision is that of the Constitutional Court. This is creating unwarranted antagonism towards the European Court of Human Rights.

One of the topics that are very important to the judges is the **financial independence**. Although there is no clear determination for transferring the court budget from the Judicial Council to the Supreme Court, it is crystal clear that judges and experts both maintain that the judiciary should receive its 0.8% of the budget prescribed by law. Although this issue was not properly addressed in the structured interviews and discussions with judges, the courts not having the appropriate IT equipment, internet access, paper, premises and toilets, and the necessary number of legal associates at the beginning of the 21st century is simply unacceptable. All these administrative and technical prerequisites that have never been addressed in the right manner influence the efficiency of judges and court officers and consequently the quality of justice, and they are all related to the court budget.

12 Baka v. Hungary, Judgment of the Grand Chamber of 23 June 2016 upon Application No. 20261/12

Judges and prosecutors must work on fostering the awareness that securing the judicial independence does not depend solely on the quality of the amended legislation, but also on the principled and to-the-word observance of said legislation through publicly recognized decisions of the Judicial Council based on law and on building a consistent case law through well-reasoned judgments of the courts of all instances. Often the problem of poor implementation or lack of implementation of the laws in practice (due to presumed political influences or instructions) is much more significant than the quality of the legislation, and sometimes it leads to problems of systematic nature, smothering and undermining the judicial system and the rule of law. The numerous constructive ideas offered both by judges and experts, and the well-worded legal norms shall not produce any results if an approach is not constructed towards the practical application of the laws which would lead to a stable case law as a guarantee for the legal safety and foreseeability.

FOCUS GROUPS

Event	Appellate district	Court instance	Number of participants	Gender	
				M	F
Focus group I	Shtip	Basic Court Shtip	4	3	1
		Appellate court Shtip	1	/	1
Focus group II	Gostivar	Basic Court Tetovo	3	2	1
		Appellate court Gostivar	5	4	1
Focus group III	Skopje	Basic court Skopje I	9	3	6
		Basic court Skopje II	2	/	2
Focus group IV	Bitola	Basic Court Bitola	3	2	1
		Basic Court Prilep	1		1
		Appellate court Bitola	5	1	4

INTERVIEWED LEGAL EXPERTS

1. Judge Margarita Tsatsa Nikolovska –
former Judge of the European Court of Human Rights
2. Judge Dane Iliev –
former President of the Supreme Court of the Republic of Macedonia
3. Prof. Gordana Lazhetikj, PhD –
Justinian I Faculty of Law in Skopje
4. Prof. Bekim Kadriu, PhD –
Faculty of Law, State University of Tetovo
5. Assist. Denis Preshova, LL.M. –
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Bibliography

Constitution of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 52/1991, 1/92, 31/98, 91/01)

Judgments of the European Court of Human Rights:

1. Gerovska Popchevska v. Republic of Macedonia (Application No. 48783/07),
2. Jakshovski and Trifunovski v. Republic of Macedonia (Application No. 56381/09 and 58738/09),
3. Popovski and Duma v. Republic of Macedonia (Application No. 69916/10 and 36531/11),
4. Mitrinovski v. Republic of Macedonia (Application No. 6899/12),
5. Ivanovski v. Republic of Macedonia (Application No. 29908/11) <https://hudoc.echr.coe.int/eng#> ,
6. Oleksandr Volkov v. Ukraine, Judgment of 9 January 2011 upon Application No. 21722/11
7. Baka v. Hungary, Judgment of the Grand Chamber of 23 June 2016 upon Application No. 20261/12,
8. Findley v. the United Kingdom, Judgment of 22 July 1997 upon Application No. 22107/93,
9. Brudnicka and others v. Poland, Judgment of 3 March 2005 upon Application No. 54723/00,

Plan 3-6-9 presented by the Government on 4 July 2017 (<http://www.sobranie.mk/content/Dokumenti%20RM-EU/EU/Plan%203-6-9%20MK.pdf>)

Strategy for the Western Balkans: EU sets out new flagship initiatives and support for the reform-driven region, Strasbourg, 6 February 2018 (http://europa.eu/rapid/press-release_IP-18-561_en.htm).

2017-2022 Strategy for Judicial Reform and Action Plan (<http://pravda.gov.mk/documents/%D1%F2%F0%E0%F2%E5%E3%E8%BC%E0%20%E7%E0%20%F0%E5%F4%EE%F0%EC%E0%20%ED%E0%20%EF%F0%E0%E2%EE%F1%F3%E4%ED%E8%EE%F2%20%F1%E5%EA%F2%EE%F0%202017-2022.pdf>)

2015 Progress Report for the Republic of Macedonia - https://www.sobranie.mk/content/HCEW/PR2015_All_CK_FF_MK_16.11.2015.pdf

8 June 2015, First Report of the Senior Experts' Group of Mr. Reinhard Priebe with recommendations,

(https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)

14 September 2017, Second Report of the Senior Experts' Group of Mr. Reinhard Priebe items 29 and 30 on the issue of general judicial reappointment

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

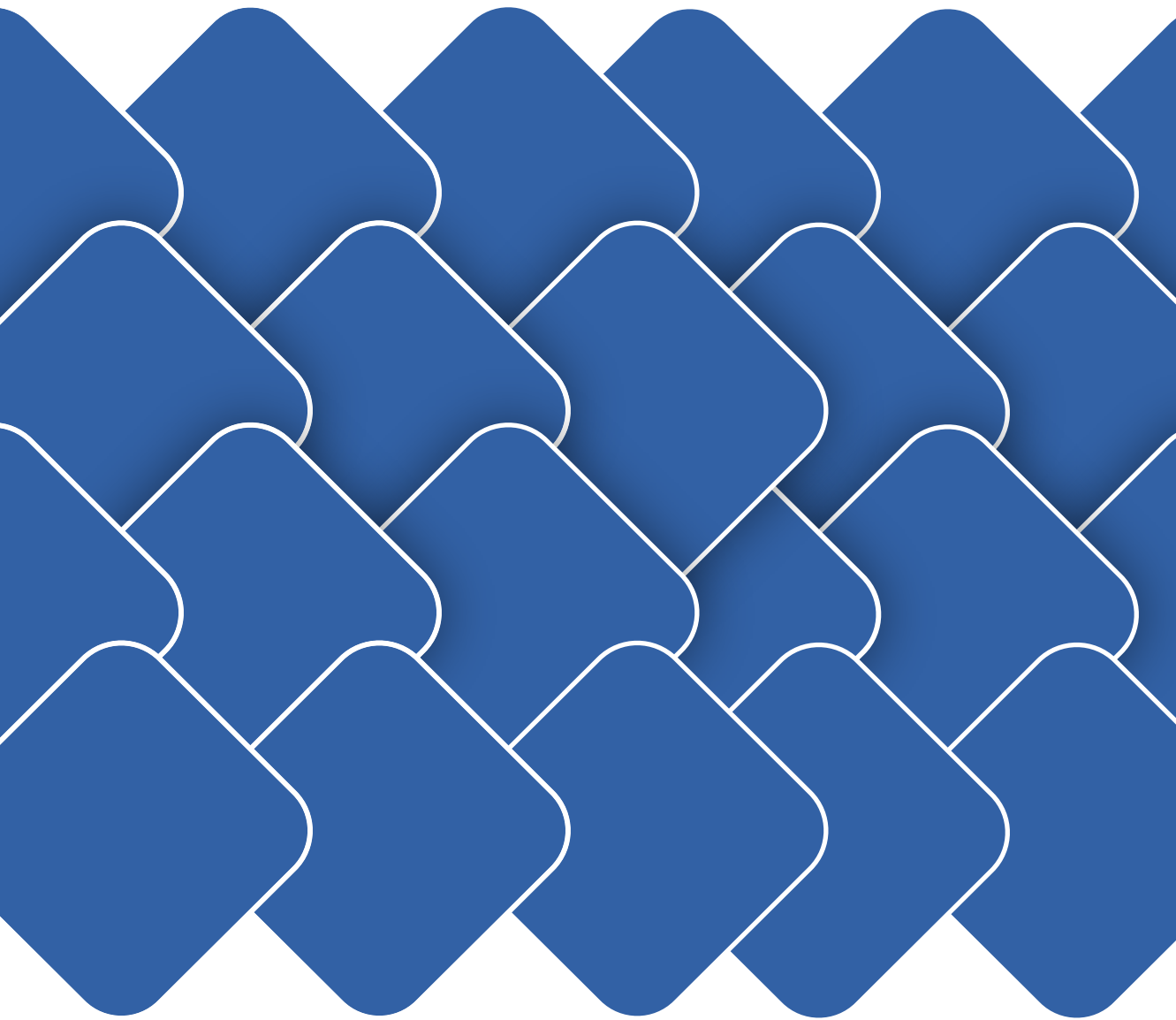
Law on the Judicial Council of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 60/2006, 150/10, 100/11, 20/15, 61/15 and 197/17)

Law on Courts (Official Gazette of the Republic of Macedonia No. 58/2006, 35/2008 and 150/10)

Law Amending the Law on Courts (Official Gazette of the Republic of Macedonia No. 83 of 8 May 2018)

Law Amending the Law on the Judicial Council of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 83 of 8 May 2018)

Law on the Academy for Judges and Public Prosecutors (Official Gazette of the Republic of Macedonia No. 13/2016)



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