NEWSLETTER 4

WORKING GROUP III
JUDICIARY AND FUNDAMENTAL RIGHTS

Preparatory activities

First preparatory meeting

On 19 July 2019, the preparatory meeting of the Program Council of WG 3 took place. The meeting was attended by MilevaGjurovska, National Coordinator of NCEU-MK; Simonida Kacarska, Executive Director - EPI; OljaRistova - Judge; Vesna Dimiskova - Judge; Julijana Karai and Biljana Stojanoska - Officers from SEP (Secretariat for European Affairs at the Government); Nikola Jazadziski and Slavica Markovska - Project Assistants. First point of the discussion was the date of the next session offering the middle of September 2019 as optimal one. A discussion on the topic of the session followed. One of the target topics was Vetting in judiciary system. It was explained by the two judges, present at the meeting, that it was very relevant theme and as topic was accepted by the Program council of WG 4 offering the argument that Vetting as instrument for sustainable integrity of the institutions could be effective if it was to be implemented in the entire judiciary and justice system. Some of the present members thought that it was not a right moment for this topic to be considered because it was a new concept, while more time was required to implement effectively the recommendations as such. Simonida Kacarska, rejecting this topic, directed the discussion to internal organizational mechanisms in the judiciary system.

She also mentioned the problem of recruitment and training, indicating some problems in this context. The discussion unlocked the conclusion that the efficiency of the judiciary system was affected by the lowlevel of use of the settlement measureor also known as plea-bargaining. This raised high interest among members, andso the topic was agreed upon. Concerningthe possible speakers and presenters, a decision was made to involve allrelevant stakeholders and that it would be best to have legal practitionersfrom every legal sector, such as judges, prosecutors, and lawyers. This would be useful to allow us to note theproblems each of them has and to work together to overcome them.

Second preparatory meeting

In course of August 2019, there was regular communication with the Program Council members that helped the abstract to be drafted.

The second meeting of the Working Group 3, Judiciary and Fundamental Rights, took place on 30 August 2019 at the Skopje Faculty of Philosophy. Mileva Gjurovska, National Coordinator of NCEU-MK, Konstantin Minovski, Coordinator of the Working Group, Aleksandra Deanoska, Expert, Gordan Kalajdziev, Expert, Olja Ristova, Expert, and Nikola Jazadziski, Project Assistant, were present. This meeting defined the details of creating the first draft agenda for the sixth session.

Sixth Session of Working group 3 – Judiciary and Fundamental Rights

SETTLEMENT AS A MEASURE FOR A MORE EFFICIENT JUDICIARY

The sixth session of NCEU-MK Working Group 3, Justice and Fundamental Rights (Chapter 23), took place on 11 September 2019 at the MPs Club in Skopje. The considered topic was: "Settlement (plea bargaining) as a measure for a more efficient judiciary". The session, as usual, was attended by the regular expert audience, as well as guests; there were more than 50 participants. Stakeholders from academic community, judges, public prosecutors, NGOs, and an expert from the Slovak Republic were present.

National Coordinator, **Mileva Gjurovska**, opening this last session of the First Cycle of NCEU-MK,

expressed gratitude to all participants and supporters of the Convention during the last two years. A review was also made of what had been done so far, noting that the National Convention managed to become an institutionalized platform for the exchange of views and different opinions coming from all stakeholders. Gjurovska concluded that the institutions must gain legitimacy in the eyes of citizens, which was the attitude of citizens towards its work. Institutions must be a service for the citizens, not a service for political parties, when used to promote political careers of certain individuals.

Gordan Kalajdziev, Professor at Skopje Faculty of Law who led the government working group that drafted the relevant law. He believed that, given the time that had been allowed by the political situation, this working group drafted a relatively good text that would be applicable.

He noted that we were currently in the process of testing certain institutes, which was unusual for countries with a continental law system. European law and international human rights law offered an entirely different concept where emphasis was placed on the fairness of the proceedings. The prosecution lacked transparency and all was left to the integrity of these bodies.

He emphasized the disappointment with the prosecution in Macedonia, because there was no confidence by the public in the capacity of the Macedonian prosecution to do this plea-bargaining especially behind closed doors. With regard to the settlement or plea-bargaining, there have been many dilemmas in taking over some of the forms of such settlement and how it would apply to our judiciary system given the leniency of the sentences that our system has had traditionally. He noted the increase in sentences in our system as trendy, as they have always occurred following some major event in the country, regardless of fairness. Kalajdziev also commented the latest high-profile corruption scandal, the "Racket" case, where, according to him, some suspects were offered a cooperative role, but only by an oral agreement that has not been registered. He noted that there was no clear guideline in the relevant law at what stage and when the status of a collaborator of justice would be offered to a suspect who participated in a criminal act and wanted to help, unlike a witness who had testified and wanted an easy way out. According to him, our state has offered too much to the collaborators of justice, because then the state automatically guarantees that they would not be prosecuted. This was not the case in other legal systems. This was also the reason why the prosecution rarely has used this tool, because then those suspects were automatically not accountable for their actions.

Next speaker was Co-chair **Muhamed Halili**, who suggested that on this session it would be better to speak only about settlement in criminal proceedings, as there were settlements in various domains of the law.

Professor **Boban Misoski** was the next speaker. He highlighted the problems and dilemmas that the government working group that drafted the law had in regard to the settlement, while mainly emphasizing that the main dilemma was whether to allow the option of settlement or plea bargaining for all criminal acts or only for those for which a sentence of up to 10 years in prison was provided by the relevant law. It was decided that there should be an option for all criminal acts, with the intention of offering the involved parties more freedom and speeding up trials. He also noted that, in hindsight, the decision should have to be more restrictive in order to build a legal culture. Misoski emphasized that the defendant should know all the legal consequences of a guilty plea as such, because in these cases there was no possibility of appeal.

In our country, the USA principle of the trial court's non-participation in a settlement was accepted, so a judge could impartially assess whether the settlement was made voluntarily, knowingly and not under pressure and threats.

Pleading guilty as a condition of the settlement was a prerequisite during the main hearing, at the first hearing to be more specific, because the public prosecutor's indictment has already been made very specific at this stage, and it would be known exactly what the defendant has been charged with. According to him, the first hearing was a place where there should be a settlement or plea-bargaining as such, because afterwards the defendant was in a privileged position to see all the evidence at the disposal of the prosecution; so if it would be clear that he would be convicted, he could then settle for a shorter prison sentence. He also highlighted some of the problems we currently had in context of the Law on Criminal Procedure, supporting them up by evidence from the case law. Frequently when using this tool, the involved parties would only go through the procedures prescribed by the competent law, without assessing the actual situation. However, he believed that this would be improved by the amendments to the law that need to be adopted in the near future.

Judge **Olja Ristova** noted that when it came to judiciary reform, the goal would be to have an independent, professional, and efficient judiciary. It was precisely the efficiency, the speedy resolution of cases and the speedy access to justice for the citizens, which was crucial for restoring confidence in the court system.

She pointed out that when the law was adopted, the intention was to solve up to 80% of the ongoing court cases at this stage of the proceedings by using the settlement or plea bargaining. According to data for 2017 and 2018, the number of court cases solved by settlement was less than 50%, but all of them were solved by the trial judges accepting merely the draft settlement as such. It goes without saying that if a settlement procedure is initiated, in almost 99% of cases it ends up being accepted by the trial judge. Still, the low percentage of cases solved by settlement indicated a problem in the implementation of the relevant law. From her experience, Ristova underlined several reasons for underutilization of the settlement from the perspectives of both lawyers and prosecutors. According to the Guidelines for Prosecutors, for criminal offenses up to 5 years in prison, prosecutors may independently enter into a settlement if there is interest from the other party; for offenses up to 10 years in prison, prosecutors need the written approval of their head prosecutor; and for those cases when the sentence is more than 10 years in prison or for those cases prosecuted by the Department of Organized Crime, the involved prosecutions officers must obtain the approval of the State Public Prosecutor. One of the problems that arose for those cases that were up to 5 years in prison, was that sometimes it was difficult to find a defendant willing to do so, but also prosecutors were not obliged by the law to call the defendant and offer settlement. The major problem emerged in those cases where there was a sentence of more than 10 years, and a consent by the hierarchically higher prosecutor was required. Even in cases after this procedure had been followed, if the higher prosecutor did not agree with the length of the proposed sentence, the settlement could not be reached and the case continued as prescribed by the Law on Criminal Procedure. Lawyers, on the other hand, have noted that even when seeking a settlement and using the proper channels such as addressing the public prosecutor in writing, they often have received no response or explanation whatsoever. In those cases when they received a letter, it was usually to inform them that the investigation had been completed and the indictment had been made as such. Judge Ristova stated in her speech that, if the settlement were used as envisaged, a larger number of cases could be resolved faster and more efficiently.

Slovak expert **Tomasz Stremy** noted that, in Slovakia, the settlement has been in use since 2006 after the adoption of the New Criminal Code. Regarding the frequency when the settlement was used in Slovakia, from the presented data one could notice an increase from 2006 when the measure was introduced until 2012 or 2013 when there were several high-profile cases in Slovakia; after this the number of case so settled decreased. This resulted from the changes that were made, as to when the prosecutor had to seek the approval from a higher institution, which in turn contributed to a delay in the given case for several months in context of the criminal proceedings. Stremy emphasized the benefits from the use of settlement and other forms of restorative justice.

According to data presented, it could be concluded that Slovakia had a relatively high number of prison population compared to other most developed European countries.

There was an obvious difference in the number of prisoners in countries such as Slovakia, Macedonia, Serbia and others where the number of prisoners is higher as compared to the number in countries such as Austria, Germany, France, and others. It was precisely those countries where there were more prisoners per capita, which were underutilizing the modules of restorative justice. Stremy noted that the settlement and the forms of restorative justice such as house arrest, compulsory work, and fine, could save time and money. In Slovakia, authorities calculated how much a prisoner cost the state, so Stremy proposed to use alternative measures of restorative justice such as a house arrest to save money. He noted it was rather unreasonable to put tax evaders in jail, given that it cost the state more money and as addition to the damage they had already done, the state was even at a greater loss.

Next, the floor was given to Co-chair **Frosina Taseska**, who emphasized that it was very interesting to hear the experience and the implementation of these measures in Slovakia. Regarding the house arrest, she stated that 400 tracking bracelets were bought and that there was tracking software for them; still they were not put in place for practical use, which again represented a step backwards in context of implementation.

Attorney-at-law **Toni Menkinovski** stated that EU membership was a good thing that would also impose obligations and responsibilities which the state should implement and the institutions should master correctly and to act according the guidelines set. In addition to the statement by Slovak expert Stremy, he emphasized that it was necessary to have better statistical information, for example, regarding the costs of one arrested person so that the state knew how much that would cost and what would that mean when settlement would be reached. In practice, in our country, settlement was a good thing, but also imposed responsibilities and problems. From a trial lawyer's point of view, Menkinovski talked of the problems regarding settlement that the lawyers faced. In his words, most problematic when settling, was the public prosecution, due to the perception that it was not enough independent. There were cases, especially regarding the organized crime, when, though it was not according to the Law on Criminal Prosecution, certain defendants had settled and went to prison while eventually other co-defendants that did not settle received acquittal; this overshadowed the entire process. Although he considered the settlement a good thing, he stated the need for analytical approach to the settlement concept and the need to be elaborated better in order to have a better legal function.

In the ensuing discussion, many participants gave their opinion on the subject as well as on the offered recommendations. The choice of the considered topic was welcomed mostly because speedy and efficient closing of cases was especially important in order to have more efficient administration of justice, but also to raise the reputation of the judiciary system on the whole. Therefore, work on improvement and adjustment was necessary in order to enable more efficient function of the settlement as such. One very important subject imposed itself; i.e., that the public prosecutors did not have the proper working conditions.

The absence of prosecution investigation centers contributed greatly to the delay of the proceedings; so instead of having the evidence collected by prosecution investigators in the shortest time possible, prosecutors had to contact the Ministry of the Interior and other investigation and forensic institutions, something that could last for months.

The improvement of the working conditions in the public prosecution system was crucial both for using the settlement measure and in general for more efficient judiciary system. Finally, the offered recommendations were discussed and accepted with small changes.