Centar za demokraciju i pravo Miko Tripalo

RECOMMENDATIONS OF THE CENTRE FOR DEMOCRACY AND LAW MIKO TRIPALO FOR INCREASING THE TRANSPARENCY AND ACCOUNTABILITY OF THE CROATIAN JUDICIARY

Under numerous international comparisons, the Croatian court system shows unfavourable results concerning the duration of proceedings and public perception of the interference of political and economic interests in the judiciary.[1] The inefficiency of the judiciary is also reflected in the high number of judges relative to the number of inhabitants and high budget expenditures for the judiciary relative to the gross domestic product. Public confidence in the judiciary is low, the judiciary is not sufficiently transparent, and there are indications that a part of judicial circles is connected with political structures. Those authorised to initiate disciplinary proceedings against judges who violate the principles of judicial ethics are very reluctant to exercise their powers.

At the same time, the judiciary enjoys complete independence not only in deciding individual court cases but also in appointing judges, initiating disciplinary proceedings against them, and electing the majority of members of the State Judicial Council (SJC).[2]

To address these weaknesses, we provide here several recommendations for increasing the transparency of the court system, strengthening mechanisms of accountability of judges, and making the election of the State Judicial Council more democratic. Although the recommendations, in general, do not directly address the issue of efficiency and costs of the court system, it is reasonable to assume that their adoption would help in improving performance in these aspects as well.

We start from the position that constitutional changes should only be undertaken when other legal remedies have been exhausted. We therefore aim for those necessary reforms that can primarily be implemented by the judicial institutions themselves, and if not, then by amending the corresponding laws. The proposed changes are designed so as not to compromise the independence of the judiciary, but to strengthen transparency and accountability mechanisms in the court system.

While in this paper we look primarily at the question of transparency and accountability in the judiciary, other important issues also merit attention, such as the burden imposed on the judiciary by a large number of cases often initiated by other state bodies, and of the weak IT systems and other infrastructure. Centre Miko Tripalo intends to organise discussions on these topics in the future.

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[1] We thank Dr. Alan Uzelac, who commented on the text on several occasions, pannelists (professors Mihajlo Dika, Vedran Čulabić, Viktor Gotovac and Ivo Josipović), participants in the debate held in September 2021, those who responded to the survey we conducted in late 2020 and early 2021, as well as those who helped us to compile the survey.

[2] For the historical context of such institutional arrangement see a speech by Radovan Dobronić, the new President of the Supreme Court, at the session of the Parliamentary Committee for justice on September 9, 2021.

I. Selection of judges

There is great distrust among the public and the legal profession towards the fairness of the procedures for electing judges. The Constitutional Court has also pointed out the shortcomings in these proceedings. In this respect, we make three recommendations:

Recommendation 1: SJC should make all its interviews with candidates for court positions permanently available to the public via video streaming.

Recommendation 2: The SJC should publish all documents under consideration in the process of selecting candidates for higher courts, except documents designated as confidential.

Recommendation 3: The SJC should allow time for attorneys, prosecutors' offices, academic institutions, and civil society organisations to express their opinions on the candidates before the selection and publish those opinions on the SJC website.

Method of implementation: the SJC may apply all three recommendations by itself, or they may be implemented by amendments to the law.

II. Transparency of disciplinary proceedings

In disciplinary proceedings against judges, the SJC has decided to apply in general procedural rules of criminal proceedings. However, it also stipulated in its rules of procedure that the sessions dealing with disciplinary proceedings are closed to the public (unless the judge subject to the proceedings requests that the session be public). The SJC publishes only very limited information on the outcome of individual proceedings, while its website does not contain systematic information on the reasons for their initiation, the duration of the proceedings, and their outcome

To strengthen the transparency of disciplinary proceedings, we recommend the following:

Recommendation 4: The corresponding law should prescribe that the disciplinary proceedings are public.

Recommendation 5: The law should prescribe the obligation of the SJC to inform Parliament annually about all disciplinary proceedings.

Recommendation 6: The law should oblige the competent minister to inform Parliament once a year about how he used his authority to initiate disciplinary proceedings against judges.

Method of implementation: The SJC could apply the first two recommendations on its own but given the current practice it may be necessary to amend the law. Amendments to the law are necessary for the third recommendation.

III. Security checks

In response to recent developments in the judiciary, the government proposed amendments to the Law on Courts that would introduce regular security checks of all judges. The proposal is that presidents of courts must request security checks from security agencies for all judges who have not

passed such a procedure over the last 5 years. They should do this within a month after the Parliament has approved the amendments to the law.

The security agencies would send their findings to the President of the Croatian Supreme Court and the Minister of administration and Justice, but not to the presidents of courts who, according to the draft law, had to request these reports. This is contrary to the law on security checks, which stipulates that it is the official who requested security checks who should receive the results.
The decision on whether there is a security obstacle for each judge would then be made by the General meeting of the Supreme Court. Following this, the President of the Supreme Court would inform several instances about the findings: the president of the court in which the judge holds the judicial post, the president of the directly higher court, the State Judicial Council, and the minister in charge of justice affairs. The text of the amendment s does not say anything about what will happen next, but the explanation indicates that the president of the lower court may initiate disciplinary proceedings but does not have to.

In our view, the proposal has not been thought through in many aspects and it is not evident that it would contribute to improving the situation in the judiciary.

First, there may be up to a thousand such judges. According to the Law on Security Checks, they must be carried out within 30 to 120 days from the submission of the request, depending on the level of the checks. The proposed amendments do not specify which level of checks the security agencies will apply, but according to the Law on Security Checks, it follows that they should decide on this by themselves. In the absence of any explanation in the notes to the proposed amendments, it is difficult to see how checking such a large number of judges in such a short time can lead to reliable results. The same situation will be repeated 5 years later, when, according to the proposal, such a large number of checks will have to be repeated.

Second, according to the Security checks Act, a person who is subject to the checks must give his or her consent, for each level of the procedure separately. The proposed amendment does not say what happens should the judge not give his consent. The explanatory notes to the prosed amendments do not provide information on whether some other law stipulates that such consent will not be required. It is useful to recall in this context that in the past a significant number of judges did not declare their property until the law was changed to stipulate that failure to comply provides ground for initiating disciplinary proceedings.

Third, the security agencies have their methods of collecting information, many of which do not satisfy meet the criteria that must be met by evidence in criminal and disciplinary proceedings. Security checks can only result in indications that require additional investigative actions to provide the necessary legal basis for taking decisions in disciplinary proceedings. The proposal for amendments, however, does not specify who will take such investigative actions. Overall, the proposing authority did not explain why it expects that security checks could result in a sufficiently solid basis for initiating disciplinary proceedings.

Fourth, in the situation of insufficient transparency of the court system, increasing the role of security agencies in supervising the judiciary is counterproductive: by their nature, the security agencies cannot contribute to greater transparency.

Recommendation 7: The proposed amendments to the law should give up non-discriminatory security checks of all judges.

IV. Initiation and preparation of disciplinary proceedings

The officials authorized to initiate disciplinary proceedings (presidents of courts, court councils, and the justice minister) show a weak inclination to initiate them. The exception is only where the legislator has directly prescribed the obligation to initiate proceedings, which is primarily the case for judges failing to meet the quantitative indicators of performance.

Furthermore, it is not clear whether those authorised to initiate procedures have sufficient resources and authority to initiate investigative procedures for establishing evidence that could lead to a successful conclusion of disciplinary proceedings. The responsibility of judges is significantly wider than the criminal responsibility (e.g., preserving the reputation of the judiciary), and it is necessary to provide resources and authorisation for the investigation to establish facts that will meet the necessary criteria for the adoption of sanctions in disciplinary proceedings. The current law provides for the possibility of forming fact-finding investigation committees in the SJC, but that body can form such a committee only after the authorized officials have already filed a request for disciplinary proceedings against a particular judge; the facts should be established before this.

The capacity of the SJC itself to conduct such procedures appropriately and efficiently and within a reasonable period is also under question. In the last changes to the law, the legislator reduced the recognised working hours for members of the State Judiciary Council to perform their duties from 50% to 20% of their judicial work obligations. At the same time, the number of employees in the SJC's professional service is symbolic relative to the tasks of the institution.

In Bosnia and Herzegovina, based on proposals from international organisations, there is an Office of the Disciplinary Prosecutor within the High Judicial and Prosecutorial Council that has considerable resources and authority. Every BiH citizen can turn to the office if he thinks the judge violates the legal provisions of the laws and codes binding on judges.

Recommendation 8: The legislator should provide for the establishment of a special office in the office of the President of the Supreme Court for conducting investigations in cases of indications that disciplinary proceedings against a judge should be initiated. **The office should be allowed to act also on the basis of complaints submitted by citizens. The President of the Supreme Court would then initiate disciplinary procedure based on the findings of this office.**

Method of implementation: amendments to the law.

V. Transparency of court rulings

The current system for publishing court rulings is incomplete in several aspects:

- The Supreme Court decisions are published in principle (with some exceptions), but the publication is often delayed from several weeks to several years.
- Despite the mandatory provision, the published decisions of the Supreme Court in the cases of the second instance still do not include the related decisions of the lower court, making it difficult to understand the published decisions of the Supreme Court.
- Decisions of county courts are only exceptionally published, and they decide themselves which they will publish. themselves. Currently, only about 1% to 5% of the decisions of these courts are available to the public.
- Municipal court decisions are generally not published on the internet, and public access to the court files is very difficult.

- While a significant number of court rulings are available in the "SupraNova" system, it is available only to judges, but not to the public, and neither professional stakeholders, such as lawyers and parties who need such insight to effectively use the legal means necessary to access the highest judicial institutions.

In its report for 2020, the President of the Supreme Court advocated the integration of the e-file system and "SupraNova" to achieve "open and comprehensive public access to the Register of judgments". However, the report did not set any deadline, it did not provide information on steps the Supreme Court itself had taken on this issue over the past years or would take them in the future. The report also did not indicate what steps to this end would have to be made by other institutions.

There are views that publishing all judgments would require large resources for anonymisation and that such resources are not available. The lack of resources could therefore become a serious obstacle to achieving progress in the publication of judgments within a reasonable time. The question arises on how the current situation can be improved in the short term like for example by giving access to the existing database of all court rulings and judgments, in which the rulings are not anonymized, to attorneys and parties proving legitimate interest.

Some EU countries allow journalists to reach unanonymised court rulings and judgments, as well as all materials used in the trial, with very few exceptions.

Recommendation 9: The proposed amendments should set a mandatory deadline for the publication of all court rulings on the courts' web pages. It should also provide for the coordination of all institutions that have to be involved in this process.

Recommendation 10: The Government should draw up a plan to ensure necessary resources and facilities for the publication of judgments.

VI. Access of lawyers, journalists, and civil society organisations to non-anonymised judgments

There is an electronic database in the court system called "SupraNova" that includes all judgments in a non-anonymized form, but it is only available to employees in courts and the Ministry. Since the non-anonymised decisions to a large extent are not published, attorneys cannot get a real insight into the case law.

Recommendation 11: Following the principle of public accessibility of justice, the law should ensure that lawyers, journalists, civil society organizations, researchers, as well as citizens who have legitimate interests are granted complete and rapid access to all unanonymised court rulings in the "SupraNova" system.

Method of implementation: amendments to the law.

VII. Anonymisation of the published court rulings

The Supreme Court issued a decree that all judgments published on the Internet must be anonymised. This is not the practice of all EU countries (Ireland, Italy, Cyprus, and Malta have restricted the anonymisation to particularly sensitive topics and only in cases of justified requests by the parties), while other countries allow exceptions when it comes to public figures, etc.

Recommendation 12: The Supreme Court should organise a public discussion on the principles of anonymisation of court rulings to review the existing decree and then amend it.

VIII. Assignment of cases to the judges

Internationally, the practice of random assignment of cases to individual judges is closely linked to the principles of fair trial and is motivated to avoid corruptive behaviour in the courts. In countries with similar legal traditions, such as Germany or Slovenia, the right to a legitimate judge (i.e., a judge determined by random selection and not by the discretionary decision of a certain body) has the status of a constitutional guarantee. In Croatia, most cases are allocated using a computer algorithm, but there are exceptions. The reasons for deviating from the algorithm are not published. Such practice may lead to unfair trials.

The proposed amendments to the law will abolish the so-called manual assignment of cases in courts that were so far not using the automatic algorithm (some cases were allocated alphabetically). However, the proposed legal text will remain ambivalent because it mentions the objective of equal distribution of cases and the need to take into account their complexity without specifying that these criteria will be incorporated into the automatic algorithm.

Recommendation 13: The proposed amendments should directly determine that the objective of equal distribution of cases, considering their complexity, is to be incorporated into the automatic algorithm.

IX. Recording of court hearings

The current method of drafting the minutes of court hearings is the subject of frequent criticism. Although the practice of electronic recording of debates has begun to be introduced, there is often no necessary equipment, or judges do not accept the recording.

Recommendation 14: Introduce mandatory electronic recording of hearings wherever requested by one of the parties.

X. Availability of statistical and analytical data on the work of the judiciary

Statistical data on the efficiency of the judiciary has been unstable in recent years. Some useful categories of data have started to disappear, and new statistical categories reflect poorly what they should show.[3] Unjustified changes in the methodology make comparability of data difficult, and independent checks on the integrity of published data practically do not exist. Only a part of the statistical data is defined in the Ordinance on the operations in the e-file system.

One of the most important indicators, i.e., the average duration of court proceedings can no longer be found in publicly available statistical data collections. The proportion of judgments confirmed in appeal proceedings is an important indicator of the quality of work of first instance courts. However, while the Supreme Court publishes such statistics for appeal proceedings at the county courts, the

[3]See Professor Dr. SC. Alan Uzelac: TRANSPARENCY AS OPENNESS. About the chronic deficit in the relationship between the judiciary and the public. Introductory presentation at the round table of the Croatian Academy of Arts and Sciences on June 15, 2021 (soon in the Croatian Academy of Arts and Sciences).

High misdemeanour Court, and the High Commercial Court, it does not publish it for the Supreme Court as well as for the High Administrative Court.

Recommendation 15: The Ministry responsible for the justice system should draft amendments or adopt a new Regulation on statistics of the court system and organise public consultations.

XI. Judges suing newspapers, journalists, and others for insults

Some judges brought charges and received verdicts against journalists and newspapers for suffering mental pain, including considerable monetary compensation, even when their name was not directly mentioned in the press article.[4] Currently, there is a large number of such outstanding cases, with substantial compensation claims.[5]

On the other hand, the 2016 Guidelines for the interpretation and application of the Code of Judges' ethics suggest the following: "Judges are expected to refrain from responding to public criticism. Sometimes individuals, as well as members of the executive and legislative authorities, publicly present their views on mistakes and limitations of judges and their individual final decisions or criticise the work of judges. Judges should refrain from dragging themselves into public debates about their work, because by accepting ' silence on political issues' they also accept that they will not publicly respond to the provocative criticism. It's much better and smarter to ignore a scandalous attack than increasing the power of the launched attacks by responding."

The practice of lawsuits and judgments with substantial damages in favour of judges severely damages the reputation of the judiciary.

Recommendation 16: A harmful practice in which judges sue the journalists and the press for insults and inflicted psychological pain caused by articles related to their judicial functions should be eliminated, either by self-regulation among judges themselves or by imposing the obligation for judges to file such complaints only after obtaining the approval of the President of the Supreme Court. The new law should also stipulate that the compensation awarded in such disputes should not benefit the judges, but the state budget.

XII. Management of court proceedings

The slowness of the Croatian judiciary raises the question of whether the existing case management system is good enough to enable the judicial authorities to supervise effectively, fairly, and impartially the work on cases allocated to judges and to follow and intervene promptly in case of unjustified delays in proceedings. There are also indications that statistical data on the duration of proceedings are incomplete and sometimes give the wrong impression about the actual duration of proceedings.

Recommendation 17: The government should ask the OECD to conduct an analysis of the effectiveness of the existing system of management in the Croatian judiciary, or it should engage a public or private audit institution for this task.

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[4]The EU Commission also warned of the widespread lawsuits against journalists aimed at intimidation: "For example, in Croatia, the extensive use of SLAPPs had a strong impact on Media outlets, in particular smaller or local ones, as well as on freelance Journalists." See 2021_rule_of_law_report_en.pdf. p. 19.

[5]According to the Croatian Society of Journalists (HND), thirty-three lawsuits filed by fifteen judges on a total amount of HRK 2,212,500 in compensation are claimed against the Hanza media alone.

XIII. Election of members of the SJC

The State Judicial Council is a body that appoints all judges (except the president of the Supreme Court) and is the only institution that can decide in disciplinary proceedings against judges. Its composition is therefore essential for the functioning of the judiciary.

Elections for the SJC are organised by the Supreme Court. The law allows up to six candidates on the list selected by the judges from the Supreme Court, up to fifteen candidates on each of the three lists for judges from the three groups of county courts, and the same number on the lists for the candidates from the specialised courts, and the municipal courts. The law however does not specify how the candidate list is determined, which method of voting is used, nor which majority is needed to be elected. To become a candidate, one need only apply. A motivation statement is not required.

In the 2015 elections, the candidates were selected from the list in each electoral unit, but all judges voted for candidates on all lists thus determined. After the voting, the number of votes for each candidate was published. No candidate was supported by the absolute majority of judges, with one candidate being elected with only 387 votes, out of 1800 judges at the time, while the candidate with the largest number of votes still got less than half of the judges allowed to vote, only 678 votes. The number of judges who cast the votes was not published, nor were the names of non-elected candidates for a particular seat. It was also not published how the lists were compiled if more candidates submitted their application than was allowed by law.

After amending the law in 2018, in the last elections judges were allowed to vote only for candidates from their electoral unit.

After the elections, the Supreme Court did not publish in a way accessible to the public how many candidates were on the lists, how the lists were compiled if a larger number of candidates applied than allowed by law, how many judges voted in each electoral unit and how many votes received the elected candidates. No information was provided on whether the second or more voting rounds were held. The SJC decision to call elections for members indicated only one day for holding elections on 31 January 2019, without giving a date for a runoff.[6] There is no indication that a preferential voting system was used in voting. Available information, therefore, suggests that a relative majority was sufficient to be elected.

With such a large number of eligible candidates, elections can be won with a very small number of votes. (Theoretically, among fifteen candidates one can become a winner with only 7% of the votes.) A system with a large number of candidates and in which a relative majority is sufficient for being elected, easily favours a connected group of judges, if such a group exists.

To increase transparency and make the election of members of the SJC more democratic, we propose the following:

Recommendation 18: To increase transparency in the candidacy process, each candidate for the membership in SJC should submit a statement indicating why he is running for the position and his or her CV.

[6]The rules of procedure of the Supreme Court of the Republic of Croatia state that candidates for election must get the votes of the majority of judges but do not state what happens if there are several candidates. The second vote is envisaged only in case the two candidates received the same number of votes. Voting is normally public at a court session unless the court decides otherwise.

Recommendation 19: As with elections for higher court positions, the law should provide that all documents submitted by candidates should be published on the website.

Recommendation 20: The selection procedure should provide for the possibility for associations of lawyers, academic institutions, and civil society organisations to give their assessment of candidates, which will then be made public on the Supreme Court's website before each round of voting.

Recommendation 21: The elections in all electoral units should be performed with preference voting, or at least with two rounds of voting.

Recommendation 22: To make the elections more democratic, the law should reintroduce the voting system that applied until the legislative changes in 2018. Before these changes, the candidates were determined on the lists for each group of courts, but judges from all the courts were allowed to vote for all slots on the lists. This should be combined with a preferential voting system, or at least by voting in two rounds.

Method of implementation: Recommendations 17 to 20 can be applied by decisions of the Supreme Court of the Republic of Croatia or new legislation, while the last can be applied only by amending the law.

XIV. Electoral units for the DSV

The law has determined SJC includes two Supreme Court judges, three county court judges (elected in three electoral units), one judge from the specialised courts, and one from the municipal courts.[7]

Disparities in such representation are enormous when considering that there are more than 1.000 judges in municipal courts choosing one SJC member, while four hundred judges in county courts choose three members, and about forty judges in the Supreme Court choose two members of the SJC.

Recommendation 23: Consideration should be given to the possibility that all judges are one electoral unit voting on one list with the preferential system, or within several rounds, to avoid electing judges who enjoy poor support.

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[7] The Constitution determined that in addition to seven members from the judiciary, the SJC includes two political appointees and two law professors.