We would like to thank you for the opportunity to participate in the public e-consultation on the proposed amendments to the Law on Courts.

In addition to the comments on the published proposal, we would like to propose other desirable changes to this law for the purpose of increasing the transparency and accountability of the Croatian judiciary, and for making the election of the holders of the judicial function more democratic. We see these reforms as preconditions for improving citizens' trust in the court system and its efficiency.

COMMENTS ON THE DRAFT AMENDMENTS

1. Security checks

The amendments envisage that presidents of courts would have to start mandatory security checks of all judges who have not passed such a procedure over the last 5 years, within a month after the approval of the new law. The Ministry has not provided a sufficiently reasoned explanation for this proposal.

We would like to point out that there are about a thousand of such judges. According to the Law on Security Clearance, such checks must be carried out within 30 to 120 days from the submission of the request, depending on the level of the requested checks. The draft does not specify which level of the verification should be applied, but according to the Security Clearance Law, it follows that it is up to the Security Service to decide on this. In the absence of an explanation, it is unconvincing that security checks of such a large number of judges in a such short time could lead to reliable results. The same situation will be repeated 5 years later, when, according to the proposal, the same large number of security clearances will have to be repeated.

The proposal should therefore establish the number of judges to be subjected to checks and explain how such a large number of checks are possible within the set deadlines.

Moreover, according to the Security Clearance Law, persons who are subjected to this procedure must give their consent for it, and this is for each level of the verification separately. The proposed amendments say nothing about what will happen if a judge does not agree to it. If there is, however, some other law according to which such consent does not need to be sought from judges, the Ministry should explain this.

In this context, it is useful to recall that a significant number of judges did not want to declare their property until failure to comply with this provision of the law was identified as a reason for disciplinary sanctions.

The proposed amendments envisage that the results of the security verification the Security Service would send to the President of the Croatian Supreme Court and the Minister, but not to the presidents of courts who, according to the draft amendments, would have to submit requests for the procedure to be applied. According to the relevant law, it is them who should be receiving the reports.

The General session of the Supreme Court would then have to make the final decision on whether there is a security obstacle for a judge to perform his duties. The President of the Supreme Court would then have to inform about the conclusion the president of the court in which the judge performs his or her judicial duties, the president of the directly higher court, the State Judicial Council, and the minister responsible for justice affairs. The text of the novel does not say what happens next,

but the explanation indicates that the authorized officials could, but not have to initiate disciplinary proceedings against the judge.

Another problem with such a process is the following: Security services have their methods of collecting information, many of which do not meet the criteria that must be met by evidence in criminal and disciplinary proceedings. The results of security checks can only provide indications, but further investigative actions would be needed for creating a sufficiently secure legal basis for initiating the disciplinary proceedings against a judge. The proposed amendments however do not specify who will take these investigative actions. The Ministry should therefore explain on a what grounds it expects that security checks could result in a sufficiently solid basis for initiating disciplinary proceedings.

Therefore, we suggest to the Ministry to reconsider, on the one hand, the purpose of the provisions to subject all judges to the security screening, and on the other hand to resolve the question of who, after the indications provided by the security services, will start and conduct the investigative procedures that may lead to evidence, on which disciplinary proceedings could be initiated. We would like to note in this context that the responsibility of judges is much broader than the criminal responsibility (e.g., preservation of the reputation of the judiciary), and therefore the investigative procedures should be envisaged to address these broader responsibilities.

The problem of proper preparation of disciplinary proceedings could be resolved by establishing a special office within the Presidency of the Supreme Court. The office should be allowed to start investigations based on complaints from citizens. Establishing such an office would at the same time eliminate the need for the proposed security check on all judges.

Such an approach to disciplinary proceedings would be consistent with the objective of increasing transparency of the judicial system, in contrast to reliance on security services which, by their nature, cannot contribute to greater transparency.

2. Assignment of cases to judges

It is positive that the new draft eliminates the “manual” assignment of cases to judges in courts in which the automatic algorithm has not been used so far. However, to avoid the reintroduction of discretionary assignment of cases given that their type and complexity need also be taken into account, the amendments should state directly that these criteria will be incorporated into the automatic algorithm.

3. Supervision of courts

We support the proposal to extend the authorization of the President of the Supreme Court to directly initiate control over all courts.

ADDITIONAL SUGGESTIONS

It is our view that the proposed changes will not be sufficient to significantly improve the situation in the Croatian judiciary. Therefore, we are offering for your consideration the following additional proposals, some of which relate to other laws, primarily the Law on the State Judicial Council (SJC)

1. The selection of judges

Given the great distrust of the public and the legal profession towards the objectivity of the procedures for electing judges, the law should make this procedure more transparent. First, we propose that the law stipulates that all interviews conducted by the SJC with candidates be made accessible to the public via video streaming. Secondly, we propose that the law stipulates that the SJC should publish on its website all the relevant documents used for the selections of higher judges, and then provide for the possibility that attorneys, academic institutions, and civil society organizations may submit their opinions on the candidates, which should also be published on the website. These opinions should help the SJC to select the best candidates.

2. Election of the Members of the SJC

The State Judicial Council is a key body that appoints all judges (except the president of the Croatian Supreme Court) and decides on disciplinary proceedings against judges. Its composition is therefore essential for the functioning of the judiciary. The current system of electing members of the SJC is however non-transparent: The Supreme Court, which organizes the elections, does not make publicly available the names of candidates who applied for the election, nor how the candidate lists was established if more than 15 candidates in the electoral unit applied (the law set a limit of 15 candidates for all election units, except for the Supreme Court, where the number of candidates is limited to five). It does not publish how many votes each candidate received, nor how many judges in participated in the election in various units. The election is based on only one round of voting, where a relative majority is sufficient to be elected. This allows that a candidate receiving only 7% of the votes could be elected (if fifteen candidates had applied). Also, such an election procedure enables organized minorities, if they exist, to decisively influence the composition of the SJC.

First, to increase transparency, we propose introducing an obligation for each candidate to submit a statement on why he or she is running. Second, as with elections for the higher judges, the law should provide that all candidate documents submitted for election should be published on the website. Third, the amended law should provide for the possibility that lawyers, chambers of lawyers, academic institutions, and civil society organizations may give their opinion on candidates, and these opinions should be made public on the Supreme Court's website before the voting. Fourth, the amended law should stipulate that the candidates in all electoral units should be elected by two rounds of voting. Fifth, with the aim of democratizing the elections, we suggest reintroducing the voting system that was applied until the legislative changes in 2018, when all judges voted for candidates from all electoral units. Alternatively, instead of two rounds of voting, some system of preferential voting systems can be introduced.

3. Disciplinary proceedings

In disciplinary proceedings against judges, the SJC applies the procedural rules of criminal proceedings, However, at the same time the State Judiciary Council decided that its sessions on disciplinary proceedings are closed to the public (unless the judge against whom the proceedings are being conducted requests otherwise). The SJC publishes only very short information on disciplinary proceedings, and its website does not present data on initiated disciplinary proceedings, the reasons for their initiation, the duration of these proceedings, and the outcome of the proceedings. Therefore, we propose that the amended law prescribes that the disciplinary proceedings are open to the public and that all documents in these proceedings are published.

4. 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 their public announcement comes a few weeks to several years later. Despite a stipulation in the Law, the Supreme Court when deciding on appeals, does not publish the related decisions of the lower courts, which makes it difficult to understand the decisions published.

The decisions of county courts are only exceptionally published, and the decision on this is left to the courts themselves. In practice, only 1%-5% of decisions of these courts becomes available to the public. Municipal court decisions are not published on the internet at all, and public insight into the court files is very difficult.

Only judges have access to courts decisions integrated in the “SupraNova” system, but this system is not available to the public, and not even to professional participants (e.g., lawyers) and parties who need such an insight for the efficient use of legal remedies that are necessary for approaching the highest judicial institutions with a request for review. 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 access to the Register of judgments". However, no deadline was set, nor was described which steps the Supreme Court itself had taken in recent years to achieve this goal, nor what steps it would take in the future. We suggest that the new amended law set a legal deadline by which all judgments must be published on the courts’ website.

5. Access to non-anonymized judgments by attorneys, journalists, and civil society organizations

The Supreme Court of Justice determined in its regulation that all judgments published on the internet must be anonymized. This is not the practice of all EU countries (Ireland, Italy, Cyprus, Malta limit anonymization to particularly sensitive topics and in case of justified requests by the parties), while other countries allow exceptions when it comes to public figures, etc. However, countries that conduct anonymization, following the principle of public trials, allow access to unanonymised judgments for journalists, because the context of certain judgments cannot often be understood from anonymous judgments. In Craatia, full texts of judgments, not in an anonymized form, are kept in the SupraNova electronic system, but they are only available to employees in courts and the Ministry. Since anonymized decisions are to a large extent not published, attorneys cannot get a real insight into the case law. The amended law should therefore provide journalists, lawyers, civil society organizations, researchers, as well as citizens with legitimate interests with full and speedy access to all unanonymised court rulings in the “SupraNova” system.

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

Certain judges bring charges against journalists and newspapers for causing them suffering mental pain or damaging reputation and then receive considerable monetary compensation. There is currently a significant number of such active actions brought by judges, and the claims for damages are substantial. This is taking place despite the fact the 2016 Guidelines for interpretation and application of the Code of Judges' Ethics explicitly speak against such actions. As this practice damages the reputation of the judiciary, we suggest for the amended law to determine that the awarded damages in such disputes do not benefit judges but should rather be paid into the state budget.

With respect,

For the Centre for Democracy and Law Miko Tripalo