Follow-up on the recommendations in the 2022 Report

1. Reconsider the newly introduced periodic security checks:

No new developments following the Constitutional court's decision to suspend the corresponding provisions in the law.

The Venice Commission rightly opposed the introduction of such checks, but unfortunately also stated that Croatia does not need new instruments for accountability. [1] It did not provide any reasoned opinion for this conclusion, except for simply enumerating the existing instruments, while not explaining why they should be considered effective based on the current experience in Croatia. The Commission also ignored the highly negative reputation of the Croatian judiciary in public, which should have prompted it to provide a more careful assessment. Instead, it concluded its report with a cryptic sentence that the government should "develop an alternative strategy to ensure judges' integrity, based on other existing mechanisms." It left unexplained what could be the meaning of the "strategy" if no new mechanism is to be introduced and the government does not have any direct role in the current system of the disciplinary proceedings.

The Centre Miko Tripalo argued against the security checks primarily because these reports cannot be used as permissible evidence in the disciplinary proceedings, which makes them effectively meaningless for the stated purpose.[2] Moreover, the Constitutional Court recently made the use of such reports ineffective even in decisions on promoting judges.

2. Strategic lawsuits against journalists.

There was no substantive progress in 2022, as the cases continued to propagate, including those initiated by judges which have high impact. In a recent case, a retired judge got a compensation from a journalist higher than journalist's 8 months pension.[3] Members of the judiciary have otherwise claimed that the issue has been addressed by limiting compensation decided by courts to about a quarter of this amount.[4]

The President of the Supreme Court tried to open the issue of SLAPPs at a roundtable in July 2022, but his initiative was opposed by several attending Supreme Court judges, as were his other initiatives on this occasion, including those for reviewing the regulation on out-of-court remunerated activities of judges. No progress on these issues has been visible since then. Civil society organizations have proposed various measures, including that judges can sue journalists only upon obtaining permission from president of the court[5], and that all the sentences against media and journalist be immediately published in a non-anonymized form.[6]

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[1] Opinion No.1073/2021,CDL-AD(2022)005,Or. Engl.
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW,(VENICE COMMISSION),CROATIA, Strasbourg, 21 March 2022.

[2] https://tripalo.hr/en/comments-to-the-proposed-amendments-to-the-law-on-the-state-judicial-council/

[3] HND: Članovi se solidarizirali s novinarkom Blažević, platili joj 50.000 kuna sudskih troškova | 24sata

[4] For another case of judicial abuse of journalists, even if he finally managed to defend himself, see Sudac tražio 65.000 kuna jer je zbog teksta u novinama 'dobio hemeroide i išao psihijatru'. Sutkinja ga pokopala | Telegram.hr

[5] https://tripalo.hr/wp-content/uploads/2021/12/Preporuke-CMT-za-povecanje-transparentnosti-i-odgovornosti-hrvatskog-sudstva_11zon.pdf

[6] https://gong.hr/2022/12/09/samo-neovisno-i-odgovorno-pravosude-zasluzuje-povjerenje-gradana-i-gradanki/

Accountability of judges

The government's legislative action to impose regular security checks on all judges was an ad hoc reaction to scandal in which a criminal fugitive published convincing proof of bribing three judges. The purpose was to calm the public.

In the context of e-Consultation, Centre Miko Tripalo (CMT) argued that the accountability framework needs to be strengthened in a different way, specifically by establishing a special office within the Presidency of the Supreme Court that would be allowed to start investigations based on complaints from citizens that would be entitled to seek assistance of government institutions in these investigations.[7] Based on its findings, the President of the Supreme Court, the only person in judiciary who has democratic legitimacy, would then submit the case to the State Judicial Councill (SJC). Such mechanisms would address the demonstrated unwillingness of presidents of the courts to initiate disciplinary procedures. Moreover, the current law explicitly discourages presidents of courts to act by stipulating that he/she can be dismissed if it has abused his power of initiating a disciplinary proceeding.[8]

In addition, CMT argued that disciplinary proceedings against judges should be made public.

In its reply, the Ministry of Justice and Public administration argued that the law already now allows the SJC to appoint investigative committees. [9]

However, given that under the law the presidents of courts play the role of prosecutors, the possible appointment of an investigative committee after the case has already been submitted to the SJC, which acts as a court, comes too late in the procedure, and cannot be used to establish evidence for initiating and arguing the case, although it might be used for defending the accused. Over the last 12 years the SJC established such a committee only twice.[10]

The Ministry in its reply argued that citizens can submit complains to presidents of courts because of undue delays in cases or of improper or inappropriate behaviour of a judge (Article 4 of the law).

This possibility does indeed exist, but the effectiveness of such complaints is unknown as no statistics on the number and the outcomes of such complaints is regularly published. Exceptionally, in the last two annual Reports of the Supreme Court it is stated that there were about four and a half thousands such complaints in each year (which is almost three per one judge). The Reports considered that these numbers are negligible and prove that users of court services do have confidence in the judiciary. Their argument was that the number of complaints divided by the number of cases was small.[11]

In the meantime, another case of directly bribing a judge, who was well-known in public for highly controversial repeated rulings in an unrelated high profile criminal case, was discovered. The judge resigned, but the case again affected the reputation of judiciary.[12]

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[7] https://tripalo.hr/wp-content/uploads/2022/12/Centar-MT-english-comments-3-1.pdf
[8] Article 85 of the Law on the SJC.
[9] Strukturiranje dokumenta (gov.hr)
[10] Information provided to the CMT by the SJC.
[11] See IZVJEŠĆE PREDSJEDNIKA VRHOVNOG SUDA REPUBLIKE HRVATSKE O STANJU SUDBENE VLASTI ZA 2020. GODINU, page 31-32.
[12] https://www.jutarnji.hr/vijesti/crna-kronika/tko-su-uhiceni-sutkinja-koja-je-oslobodila-horvatincica-lice-sa-stranica-crne-kronike-i-jedan-odvjetnik-15244212

Allocation of cases in courts

The amendments to the Law on Judiciary eliminated the possibility of discretionary allocation of cases in some Courts that up to that point had not switched to the automatic random allocation. Centre Miko Tripalo (CMT) in its comments in the context of e-Consultations, welcomed the change.[13]

However, subsequently CMT discovered that the Ministry of Justice using By-law on *e-File* introduced another method of allocation for some cases that is based on a circular allocation according to alphabet and the date the file is registered by the receiving by court.[14]

The date of registration can however be influenced by various actors, particularly in cases where the appeals to higher courts are not sent electronically. The By-law in fact prescribes that appeals to several higher courts should be sent manually, i.e., in hard copies and not electronically. Samo of these courts do not use the random allocation at all, and exclusively rely on the circular method.

The rationale used for selecting types of cases for the two alternative method of allocation in various types of courts are nowhere clearly explained, nor is the logic visible from the lists included in the By-law.

CMT also pointed out that the By-law did not clearly specify how the Ministry calculates the so-called "final probability" in the random allocation. The algorithm is supposed to use several factors (load, workload, total load, real load), of which only one is adequately defined. Moreover, the factors used for the initial allocation are different from those that are to be used in re-allocating the cases with the purpose equalizing workload among judges, which is prescribed to take place every three months. In our view, the frequent re-allocation of cases can also affect the degree of randomness.

CMT requested from the Ministry documents that define the calculation of the "final probability", as well as those that define the variables referred in the text and used in the process of allocation.

The reply received from the Ministry did not include the requested documents while the accompanying letter did not bring any additional light to these issues.

In late August 2022 CMT requested intervention from the Public Commissioner for Information, asking him to order the Ministry to deliver the requested documents. In January 2023 the Commissioner cancelled the Ministry's reply and requested that it provides a new one.

Subsequent discussion at a round table organized by CMT revealed that the IT technology did substantially reduce the risks of disorderly allocation of cases, particularly at lower-level courts.[15] There was also agreement that parts of the By-law lack clarity. In practice, the quarterly relocation just for equalizing the workload seems to taking place rarely, despite being mandated by the By-law (it does take place in cases of longer absence of judges and similar).

In CMT view, the alternative circular allocation mechanism needs to be incorporated in the law if it is indeed necessary. Moreover, the By-law, which was subject to numerous rounds of amendments that adversely affected its quality, needs to be re-written, with a view to improve its clarity.

[13] https://tripalo.hr/wp-content/uploads/2022/12/Centar-MT-english-comments-3-1.pdf
[14] https://narodne-novine.nn.hr/clanci/sluzbeni/2015_03_35_725.html
[15] https://tripalo.hr/okrugli-stol-kako-se-u-sudstvu-u-republici-hrvatskoj-dodjeljuju-predmeti-u-rad/

Appointment and selection of judges, prosecutors and court presidents (incl. judicial review)

Amendments to the Law on the State Judicial Councill (SJC) enlarged the discretion of this institution in selecting candidates. This was done by increasing the number of points the SJC can grant on the basis of the oral interview, and by increasing the possible distance between the total points of the selected candidate and others who got more points based on all the criteria, including those that the SJC granted on the basis interviews. The Constitutional Court on several occasions ordered the SJC to repeat the procedure as the SJC did not provide sufficient explanation for the selection. Later, it granted compensation to some wronged candidates, without cancelling the elections.

Centre Miko Tripalo (CMT) in its contribution to the public debate via e-Consultation pointed out that in conditions where the public has little trust in the judiciary, increasing the discretionary powers of the SJC will not contribute to strengthening this trust.[16]

CMT in this context proposed several measures to strengthen transparency in electing the judges:

a. The SJC should make all its interviews with the candidates for judicial positions permanently available to the public via video streaming.

b. The SJC should publish all documents considered in the process of selecting candidates for higher judicial positions, except those classified as confidential.

c. Before selecting candidates for higher judicial positions, the SJC should allow time for the bar associations, prosecutors' offices, academic institutions, and civil society organizations to express their opinions on the candidates. The received opinions should be published and should help the SJC in making its decision.

CMT also proposed that for better transparency SJC should make disciplinary proceedings open to public, except possibly in the investigative phase.

In its reply to the CMT comments, the Ministry of Justice declined the publication of documents of candidates arguing that their personal data need to be protected. It invoked the same argument for not making the disciplinary proceedings public. It declined to legislate the possibility that bar associations and others be given opportunity to express opinion on candidates by stating that such opinions could not be quantified and therefore could not be used in the process of selection. The Ministry made such argument even though it just proposed that the discretionary powers of the SJC to disregard quantified indicators be increased.[17]

[16] https://tripalo.hr/en/comments-to-the-proposed-amendments-to-the-law-on-the-state-judicial-council/

[17] https://esavjetovanja.gov.hr/ECon/Dashboard?StatusFilterId=&organizationFilterId=&TextFilterValue=sudbenom&WasOpenedDate=

Efficiency of the justice system: Other

In the public debate on the National plan for development of judiciary, Centre Miko Tripalo (CMT) submitted the following comment:[18]

The proposal of the National Plan did not address the problem of high budget costs of the Croatian judiciary relative to the GDP: according to EU data, by costs of the judiciary, Croatia is at the top of the list among EU countries. The number of courts and the excessive multi-layer structure of the court system significantly affect the level of costs. Croatia currently has sixty-seven courts, while some countries in the EU, known for the efficiency and high international reputation of their judicial system, have a significantly smaller number (Ireland, for example, 7, and the Netherlands, 15). Moreover, Croatia has a complex vertical structure of courts with five levels (municipal, county, several high courts, the Supreme Court and the Constitutional Court, the last one also being involved in adjudicating individual cases). This not only increases costs but also affects the length of the proceedings and the uniformity of the case law. It would therefore be worth examining the possibility of reducing the number of courts and simplifying their vertical structure. For example, the number of the second instance (now county) courts could be reduced to four, and all the high courts could be integrated into the Supreme Court. Without prejudicing the findings, we suggest that the National Plan foresees doing a study on this topic.

The proposal was not accepted.

CMT also pointed out the harmfulness of the current practice in which less than 5% of decisions of the county, i.e., second-level courts, are published, and an even smaller percentage of the first-level, municipal, courts. The Supreme court even made a step back and stopped publishing all rulings in cases where individuals sue the government for not ensuring fair adjudication in reasonable time. These rulings demonstrate often dysfunctional behaviour of judiciary.

The absence of publication of rulings contributes to the disparity in the case law and makes it difficult for the parties to initiate a judicial review, which is permitted if the practice differs between the second-level courts. The deadline for publishing all court decisions set for 2027 is inconsistent with the urgency of the need and should be shortened considerably. Furthermore, we proposed that lawyers, law professors, and journalists be granted full access to the existing electronic files of court decisions, which can now only be accessed by judges and officials of the Ministry of justice.

We warned that the existing rule imposed by the Supreme Court that all published rulings must be anonymized does not necessarily follow from the General Data Protection Regulation and that several EU countries anonymize court rulings only in cases of justified requests by parties, or in specific cases such as family relations and general security, while other countries acknowledge public interest by exempting the court cases of public interest from the anonymization. We proposed therefore to review the present decision on the full anonymization of the published decisions.

The Ministry admitted that the practice of anonymization varies among EU countries, but it did not accept the proposal.

[18] https://tripalo.hr/en/comments-on-the-draft-proposal-on-the-national-plan-for-the-development-of-the-judicial-system-from-2021-to-2027/

Efficiency of the justice system: The length of proceedings

By budget costs relative to GDP, Croatian judiciary system is among the most expensive in the EU, it has the largest number of judges and other judiciary personnel relative to population, while the length of civil proceedings is among the longest. [19] [20] The weak efficiency results in a large number of outstanding cases despite the fact that the inflow of new civil litigious cases per judge is much below the EU average.[21] This reflects the absence of accountability, weak financial incentives, and low skill level of judges (39% percent of civil cases do not pass on appeal).

In early 2022 the Government proposed, and the Parliament legislated amendments to the Law on Civil lawsuits. The most important novelty was introduction of time-limits for several individual phases and the total duration of civil lawsuits.

Participating in the public debate on the proposed amendments via eConsultations platform, the Centre for Democracy and Law Miko Tripalo (CMT) pointed out that the government at that time was not (and today it still is not) publishing statistics on the duration of these phases and the total duration of cases up to finality.[22] For assessing the proposed time-limits, one would need to know not only their average time-length in the recent years and their distribution. Only on such basis, one could set reasonable time-limits and possibly prescribe their gradual reduction in the future.

Furthermore, we pointed out that the proposed time-limits were at least twice as long as what could be considered reasonable.[23] (For example, the time limit for a civil lawsuit in the first instance court was set at three years.) Setting such long time-limits would make sense only if their exceedance would automatically trigger a process of identifying the causes and establishing the responsibilities. The proposed amendments however did not envisage any subsequent action.

It was pointed in public debate that currently such time limits exist in the area of labour law, but are widely not observed. [24]

Specifically, we proposed that in case of exceeding the time-limits, the president of competent court must submit a report to the Minister and the President of the Croatian Supreme Court assessing whether there are reasons for initiating disciplinary proceedings, and if not, whether other actions are needed to keep trials within a reasonable time limits in the future. The same would apply to all cases that Croatia lost due to violations of the right to a fair trial within a reasonable time.

The CMT submitted the same proposal during the debate on amendments to the Law on State Judicial Council.[25] The government in its reply stated that it accepts the proposal, but that the issue should be addressed in acts dealing with the judicial administration. [26] At this moment, we are not aware whether some steps have been taken.

The Ministry did not accept our proposal to open debate on the system of court statistics.

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[19] https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3146. On the low

[20] Special file - Report "European judicial systems - CEPEJ Evaluation report - 2022 Evaluation cycle (2020 data) - European Commission for the Efficiency of Justice (COPE) (coe.int)

[21] Based on the EU Legal Score Board tables on the incoming litigious civil cases and number of judges, both per population.

[22] https://tripalo.hr/wp-content/uploads/2022/02/CMT_comments_Law-and-civil_Lawsuits.pdf

[23] Ibidem.

[24] Microsoft Word - 04 UZELAC ZPP na putu prema novoj paradigmi_fin.docx (alanuzelac.from.hr)

[25] https://tripalo.hr/wp-content/uploads/2022/05/komentari-CMT-na-novelu-rev-1-english-2.pdf

[26] https://esavjetovanja.gov.hr/ECon/EconReport?entityId=20334

Remuneration of judges

Judges do not receive performance bonuses, but the regulations on extra-court earnings are liberal. The law explicitly allows remuneration from lecturing, publishing, and membership in various boards.[27] The membership in arbitrage boards is not mentioned, but high court judges interpreted a reference in the Law on arbitrage as permission to engage in this activity as well. Compensation in such boards can often be high, but so is the risk of conflict of interest and corruptive influences. Judges in general consider that they do not have obligation to report on these activities to president of their court or seek permission from the State Judiciary Council (SJC), which currently gives permissions only for renting out summer houses, and similar. Finally, the SJC does not require that judges report the sources of their extra-court incomes, only the total amount.

Some highly positioned judges claimed that possibility of earning income outside of courts is in line with the EU Council position, which reportedly allowed "that judges may engage in other activities but should be guided by ethical principles." The Councill in fact said that "(t)o avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence."[28]

Introducing performance bonuses would otherwise be a reasonable option, given the low efficiency of courts and the fact that the salaries are on a low side in international comparisons.[29] However, for such bonuses one would need performance standards set based on solid statistics, which is currently not the case. This reflects the fact that judges are not obliged to report on how many ours in a month they worked on individual cases. Neither are the office hours recorded.

Regarding the fines or recovery from judges: Croatia loses a lot of lawsuits because its courts did not provide fair judgements in a reasonable time. In principle, the ensuing costs could be recovered from judges who disorderly conducted the case. Centre Miko Tripalo asked 4 largest state attorney offices whether they tried to recover any fines from judges over the last 5 years. Three offices replied that they do not keep such statistics, while one admitted that they did not have any such case.

We also identified 10 extreme cases of long delays for which the Constitutional Court explicitly criticized courts for disorderly handling the cases. We asked these courts whether they subsequently took some disciplinary or other measures to remedy the issue. In none of these cases did we find any evidence that corrective actions of any kind had been taken.

The ECHR considers that the Croatian procedure for accelerating unreasonably long law-suits and providing compensation is not an effective legal remedy. [30] The same conclusion was reached by the Constitutional court, which in March 2021 requested that the government address the issue.[31] No step taken so far.

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[27] Law on Judiciary, Art. 93.

[28] CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, para. 21.

[29] Special file - Report "European judicial systems - CEPEJ Evaluation report - 2022 Evaluation cycle (2020 data) - European Commission for the Efficiency of Justice (CEPEJ) (coe.int)

[30] https://uredzastupnika.gov.hr/UserDocsImages//dokumenti/Analize%20presuda%20i%20odluka//Analiza%20Mari%C4%87%20Kirin%C4%8Di%C4%87.pdf

[31] https://narodne-novine.nn.hr/clanci/sluzbeni/full/2021_03_21_493.html

Election of the State Judicial Council

In the context of e-Consultations on the amendments to the Law on the State Judicial Council (SJC), the Centre for Democracy and Law Miko Tripalo (CMT) pointed out that the system of electing members of the SJC is non-transparent: The Supreme Court, which organizes the elections and appoints the Election Board, does not make publicly available the names of all candidates who applied for the election. [32] The Election Board does not publish the results of the preliminary voting in the election units. It does not publish the Rules for the Work of the Candidacy Boards, and it does not publish its instructions to the Candidacy Boards.

According to the law, there could 15 candidates per each position in the final voting, but the law does not say what happens if the number were larger.

In reality the number of final candidates is smaller. For reasons that are difficult to explain, in 2022 there were only 2 individuals on the final list of candidates from the first-level courts, while there were 9 candidates in the 2018 elections. For one group of provincial courts, there was only one candidate on the list. In another group, the number of candidates fell from 5 to only 2. In the group of high courts, the number fell from 5 to 3, and in the Supreme Court from 5 to 4 (two get elected).

The final election is based on only one round of voting, where a relative majority is sufficient to be elected. With one candidate in the election unit, as it happened in the last election, he/she can be elected by a single vote in his favour.

The CMT pointed out that such system allows that one can be elected with a very small number of votes. This favours organized minorities that can influence the composition of the SJC. To address these and other transparency issues in the elections, the CMT proposed the following:

First, each candidate should submit a statement on his purpose for running and the objectives he wants to achieve. Second, as with the elections for higher judicial positions, the law should provide that all candidate documents submitted for election be published on the website. Third, the amended law should provide for the possibility that chambers of lawyers, academic institutions and civil society organizations give their opinion on candidates before the voting. Fourth, the amended law should stipulate that the candidates in all electoral units should be elected by two rounds of voting, or alternatively by a system of preferential voting. Fifth, with the aim of democratizing the elections, we suggested reintroducing the voting system that was applied until the legislative reform in 2018, when all the judges voted for candidates from all the electoral units.

In its replies the Ministry accepted that CVs of the candidates be published, and indeed this was done ahead of the elections held in late 2022.

The Ministry however declined the publication of other information, invoking the personal data protection. [33] Just as for the election of judges, it declined the options that bar association, civil society and similar organizations be given opportunity to comments on candidates ahead of elections. Regarding the voting system, it stated that the current one was chosen to facilitate a more balanced territorial representation.

[32] https://tripalo.hr/en/comments-to-the-proposed-amendments-to-the-law-on-the-state-judicial-council/
[33] https://esavjetovanja.gov.hr/ECon/Dashboard?StatusFilterId=&organizationFilterId=&TextFilterValue=sudbenom&WasOpenedDate=

Significant developments in perception of independence of the judiciary

We would like to use this opportunity to point out that the established approach of the Commission to the public opinion on judiciary needs to be made somewhat more complex.

The 2022 staff working document for Croatia reported, as in the previous years, that "the level of perceived judicial independence in Croatia continues to be very low both among the general public and companies." This is then followed by a description of minor changes in this indicator over last 5 years, while skipping the fact that this indicator for Croatia is the worst among the EU countries. More importantly, no explanation for such performance is offered.

Croatia has granted to all judges a life-time employment from the first entry into the profession and has given to the judicial hierarchy full self-governance in respect to hiring, promoting, and disciplining of judges. In such an institutional set-up, it is highly unlikely that any politicians from the outside of courts can put pressure the judges. This however does not mean that judges might not be politically biased.

However, the EU Flash Barometer survey designed by the Commission's General Directorate gives to respondents only one option to express their negative opinion on the judiciary, and this is about independence and existence of political interventions and pressures. In absence of other options, this is what respondents chose.

We therefore suggest that the Commission's flesh survey addresses other possible causes of unfavourable public opinion about the judiciary. You may wish to consider asking public whether it sees that part of judges is behaving below ethical standards, or is engaged in corrupting activities, if it appears as connected with political elites and as protecting these elites or is directly engaged in political activities. It would also be of interest to explore whether Croatian public sees the disciplinary proceedings in the judiciary as effective and transparent, or as ineffective and non-transparent. This could help in explaining the issue of highly unfavourable rating of the independence of Croatian judiciary system that is currently reported in the EU Legal Scoreboard.