



Zagreb, January 17th 2022.

European Association of Judges

Working Group on Situation in Members States

President

Stephan Gass

Dear Stephan,

Unfortunately in Croatia after some time judiciary is facing possible steps which will in our opinion be step back in the reached guarantees of independence of judges.

The issue which is reason why we are asking your opinion are amendments to the Law on Courts which are introducing permanent checks on judges by security services.

We strongly believe the proposal is contrary to Articles 115., 121., 123. and 124. of the Constitution of the Republic of Croatia, which defines the judiciary as independent and judges are personally entrusted with the judicial duty, which means that judicial power is exercised by judges who exercise that power independently and autonomously.

The provision is also discriminatory in relation to judges as officials of the judiciary, because within the equality of the three state authorities of the same, periodic inspections are not provided for or prescribed for the holders of executive and legislative power.

The review by the security services that would apply to all judges, regardless of the procedural rules proposed in this regard in the Draft Law on Courts, but in itself, unquestionably calls into question and may call into question the constitutional category of judicial independence.

It seems, unfortunately, that in relation to the independence of the judiciary and the rule of law, legal regulations have recently (little by little) been re-established that allow for the political instrumentalization of the judiciary with the inevitable consequence of narrowing the independence of the judiciary.

Only when independent courts effectively limit and control political power is there a threefold division of power, so we wonder - are we going back to such legal norms back in time to the re-election of judges or can we talk about a certain lustration of judges voiced by some politicians? .

In the years following the creation of the Republic of Croatia, clear and firm standards have been established that predictably show who cannot or does not deserve to be a judge, and in this sense a procedure is prescribed in which, as practice has shown, individuals and the public interest.

Namely, a security check by the security services that would apply to all judges found as appointed judges on the day the ZID ZS came into force, as proposed in the Transitional and Final Provisions of the ZID ZS, may in fact be a disguised lustration that who will make the final decision on possible security barriers (according to completely unknown criteria and implemented by part of the executive branch) certainly threatens the independence of judges and can have a number of negative consequences (for example, someone who is a judge for decades will no longer be suitable, etc.?) .

We believe that the proposed solution is not acceptable, and for the possible "unsuitability" of judges or their "security threat" there are other institutions and procedures (disciplinary, misdemeanour, criminal, tax, etc.).

General and non-discriminatory security screening of judges, in addition to the reasons already stated, is inadmissible for these reasons as well.

Security services have special methods of data collection that are in many ways insufficient in their probative value in any judicial or disciplinary proceedings, and it is not clear how security checks undertaken could contribute to the transparency of the judicial system.

Regarding comparative argumentation, which we must not ignore, it is emphasized that a similar system does not exist in any EU member state and is therefore a body of the Council of Europe, the Advisory Council of European Judges (CCJE) in its Opinion No. 24. in independent and impartial judicial systems "of 5 November 2021 in point 22 pointed out:

The CCJE wishes to emphasize that checks on judges are highly problematic because they can be instrumentalised to eliminate politically "undesirable judges". If such checks are nevertheless carried out in the Member States, they should be carried out by independent institutions. Judicial councils must play an important role in this process in order to defend the independence of judges. "

The consistency of this view is reflected in the CCJE's opinion on the same issue that arose in the case of Slovakia, so the document number CCJE-Bu (2014) of 1 June 2014 states:

"1. The permanent mandate of judges, which is a fundamental component of their independence, is jeopardized when the procedure for vetting judges can be initiated without reason and with concrete and reasonable doubt.

2. The lustration of permanent judges is not in line with international standards. Slovakia has been committed to the rule of law for many years, and is no longer in a state of post-revolutionary change from a totalitarian regime to a state of democracy, when, in exceptional cases, lustration may be acceptable.

3. It is in principle not acceptable for information gathered by the secret services to be used in proceedings to assess whether judges are fulfilling their obligations as clearly regulated by law. Any attempt to use materials collected against judges in the usual way collected by the security services calls into question the independence of the judiciary.

4. The influence of the security services, which are part of the executive branch, on the assessment of the performance of judicial duties and their careers is contrary to the principle of separation of powers. "

It is not clear why the Republic of Croatia would be in a different position in 2021 and why these principles would not apply to it as well.

Last but not the least CCJE in Opinion 18(2015) para 49. states:

"..... The CCJE considers that, while an insight by external investigators can help to see shortcomings in a particular institution, such as the judiciary, it is vital that, the activities of inspectors should never interfere with the development of judicial investigations and trials. The right of other powers of the state to be informed of or to investigate the system of justice should in all cases be exercised having regard to the limits imposed by judicial independence and (where provided for by law) by the secrecy of judicial investigations. Inspections should never concern individual cases, in particular cases that are pending trial."

In the Conclusions of the same Opinion CCJE declares:

"11. The other powers of the state should recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil those functions. Analyses and criticisms by one power of state of either of the other powers should be undertaken in a climate of mutual respect (paragraph 42).

12. The judiciary must be aware that there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers. Therefore, all courts within the judicial power must take care not to step outside the legitimate area for the exercise of judicial power (paragraph 40).

13. Decisions of the legislative or executive powers which remove basic safeguards of judicial independence are unacceptable even when disguised (paragraph 44)."

The relevant articles we are citing in addition.

Constitution of Republic of Croatia

Article 118.

Judicial power is exercised by the courts.

The judiciary is autonomous and independent.

Courts judge on the basis of the Constitution, laws, international treaties and other valid sources of law.

Article 121.

Judicial duty is entrusted personally to judges.

Jurors and court advisers participate in the trial, in accordance with the law.

Judicial duty is permanent.

Article 123.

The judge will be relieved of his / her duties:

- if he so requests,
- if he permanently loses the ability to perform his duty,
- if he is convicted of a criminal offense that makes him unworthy of performing the duties of a judge,
- if, in accordance with the law, due to a serious disciplinary act, the State Judicial Council so decides,
- when he turns seventy.

A judge has the right to file an appeal against the decision on dismissal of a judge within 15 days from the day of delivery of the decision to the Constitutional Court of the Republic of Croatia.

The judge has the right to appeal against the decision of the State Judicial Council on disciplinary liability, within 15 days from the day of delivery of the decision, to the Constitutional Court of the Republic of Croatia. The Constitutional Court decides on the appeal in the manner and according to the procedure as determined by the Constitutional Act on the Constitutional Court of the Republic of Croatia.

In the cases referred to in paragraphs 3 and 4 of this Article, the Constitutional Court is obliged to decide within 30 days of receiving the appeal. The decision of the Constitutional Court excludes the right to a constitutional complaint.

A judge may not be transferred against his or her will unless the court is abolished or the court is reorganized in accordance with the law.

A judge may not perform a service or job that the law has determined to be incompatible with the judicial office.

Article 124.

The State Judicial Council is an autonomous and independent body that ensures the autonomy and independence of the judiciary in the Republic of Croatia.

The State Judicial Council, in accordance with the Constitution and the law, independently decides on the appointment, promotion, transfer, dismissal and disciplinary responsibility of judges and court presidents, except for the President of the Supreme Court of the Republic of Croatia.

Decisions referred to in paragraph 2 of this Article shall be made by the State Judicial Council in an impartial manner, and on the basis of criteria prescribed by law.

The State Judicial Council participates in the training and development of judges and other judicial staff.

The State Judicial Council has eleven members and consists of seven judges, two university professors of legal sciences and two members of parliament, one of whom is from the opposition.

The members of the State Judicial Council elect a president from among themselves.

Court presidents cannot be elected as members of the State Judicial Council.

Members of the State Judicial Council are elected for a period of four years, provided that no one may be a member of the State Judicial Council more than twice.

The scope, structure, manner of election of members and manner of work of the State Judicial Council shall be regulated by law.

Proposed Amendments to Law on Court.

Article 15.

New Article 86a is added.

(1) The president of the court is obliged to submit a request for the renewal of the conducted case for each judge thorough security checks every five years from the date of taking office.

The request is submitted to the competent security intelligence agency through the competent ministry for judicial affairs.

(2) The renewal of the basic security check shall be carried out in accordance with the law governing it security checks, unless otherwise provided by this law.

(3) The report on the conducted security check shall be submitted to the President of the Supreme Court of the Republic of Croatia.

(4) It shall make a final assessment of the existence of security barriers on the basis of the submitted report a special panel of five judges of the Supreme Court of the Republic of Croatia appointed by the General Session of the Supreme Court of the Republic of Croatia. The procedure for electing members and the manner of work of this council determined by the Rules of Procedure of the Supreme Court of the Republic of Croatia.

(5) On the established existence of security barriers, the President of the Supreme Court of the Republic Croatia informs the president of the court in which the judge holds judicial office, the president immediately the higher court, the competent panel of judges and the minister in charge of justice.

(6) The procedure for submitting a request for the renewal of a basic security check by an ordinance prescribed by the Minister in charge of justice. "

Article 34 (Transitional provisions)

(1) For all judges appointed and holding judicial office on the day of entry to the force of this Act, and in respect of which no security check has been carried out or in relation to which a security check was conducted more than five years ago, court presidents are required to submit through the ministry in charge of justice to the competent security and intelligence Agency a request for a thorough security check within 60 days of the date of entry into force of the ordinance referred to in Article 15 of this Act.

(2) On the procedure of submitting the request for the implementation of the basic security check, submission of security inspection reports, final assessment of the existence of security barriers and notification of the existence of security barriers, the provisions shall apply Article 15 of this Law.

It is also worth mentioning that on Venice Commission web page has been published that MOJ asked VC to give its opinion on the issue we are elaborating in this request.

In this sense urgency is of outmost importance.

I am not involving colleague Duro Sessa in this to avoid any suspicion of conflict of interest having in mind his position at EAJ and IAJ.

Sincerely Yours,

Damir Kontrec

President of Association of Croatian Judges

