



AMENDMENTS OF THE NGO " HUMAN RIGHTS ACTION" TO THE PROPOSED LAWS ON AMENDMENTS TO THE LAW ON THE JUDICIAL COUNCIL AND JUDGES AND THE LAW ON THE STATE PROSECUTION

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**PROPOSED AMENDMENTS OF THE NGO HUMAN RIGHTS ACTION (HRA) TO THE
DRAFT LAW ON AMENDMENTS TO THE LAW ON THE JUDICIAL COUNCIL AND
JUDGES**

Proposal I - Deletion of the Extension of the Mandate of Judicial Council Members

In Article 9 of the Draft, paragraph 1, point 2 is deleted. It reads as follows:

Continuation of the duties of a Judicial Council member from among prominent lawyers

Article 16č

The president and members of the Judicial Council from among prominent lawyers, whose mandates expire due to the end of the term for which they were elected, shall continue to perform their duties until the election and proclamation of new members of the Judicial Council from among prominent lawyers, but no longer than two years.

Performing duties under paragraph 1 of this Article does not constitute re-election of members of the Judicial Council.

Explanation

Although HRA understands the reasons for prescribing this provision, we believe that such a formulation only encourages negative political practices of failing to agree on the election of Judicial Council members and "trading" functions that should be performed in the general interest, not in the interest of any political party. Such a provision in the law can only encourage deputies to delay the election of new Council members. HRA emphasizes that this solution is not provided for members of the Prosecutorial Council from among prominent lawyers.

Proposal II – Adding a Reason for the Dismissal of a Judicial Council Member Due to the Cessation of Guarantees Against Political Influence

In Article 12 of the Draft, paragraph 1 is added, which reads as follows:

“In Article 20, paragraph 1, at the end of point 2, the period is replaced with a semicolon, and a new point is added, which reads: 3) if during the term of office, it is determined that there are reasons from Article 6, paragraph 2, and Article 16, paragraph 2 of this law.”

Paragraph 1 becomes paragraph 2.

Explanation

For members of the Judicial Council, it should be prescribed that their function terminates if during their mandate it is determined that they no longer meet the guarantees against political

influence, as is already provided for members of the Prosecutorial Council (see Article 16, paragraph 1 of the Draft Law on Amendments to the Law on the State Prosecution).

Proposal III – Right to Appeal Against Transfer Decisions

In Article 60 of the Draft, paragraph 3 is added, which now reads:

"Article 85 is amended and reads as follows:

In case of court reorganization resulting in a reduction of the number of courts, the Judicial Council may transfer a judge to work in another court of the same jurisdiction and the same level without their consent. In the case outlined in paragraph 1 of this article, the judge retains the salary they earned in the court where they worked before the reorganization."

In the case outlined in paragraph 1, the judge has the right to lodge an objection with the Judicial Council against the decision on transfer.

Explanation

The Venice Commission has emphasized the importance of granting judges the right to object to transfers without consent. Therefore, it proposes explicitly stating the right of appeal and clear criteria to be taken into account when making transfer decisions (Venice Commission CDL-PI(2024)012, para. 42 (2. Transfers)). Hence, it is necessary to provide this option to judges to align the two laws further.

Proposal IV – When Evaluating Judges, Also Consider the Decisions of the Constitutional Court and the European Court of Human Rights

In Article 65 of the Proposal, paragraph 1, point 2 is amended to read as follows:

Effectiveness of Judges' Work

Article 90

The effectiveness of a judge's work is evaluated based on the following sub-criteria:

1. Quantity of work;
2. Quality of work;
3. Quality of reasoning in decisions;
4. Preparation for trials, ability to plan and effectively carry out procedural actions, and skills in conducting hearings.

The quantity of work is evaluated based on the number of completed cases.

Based on the quantity of work, a judge will be rated as unsatisfactory if their work results are below 70% of the number of completed cases specified by the indicative criteria for determining the required number of judges unless the judge provides justified reasons (temporary inability to work, inability to obtain timely responses from competent authorities upon the judge's request, etc.).

The quality of work is evaluated based on the ratio of the judge's overturned decisions to the total number of decisions made during the evaluation period and the number of reviewed decisions by the immediately higher court, based on the number of reopened trials or hearings by the appellate court, as well as about the decisions of the Constitutional Court of Montenegro and the European Court of Human Rights.

The evaluation of the quality of work is further regulated by the rules from Article 101 of this law.

The quality of reasoning in decisions is evaluated based on clarity, conciseness, and completeness of the given reasons.

Preparation for trials and the ability to plan and effectively carry out procedural actions are evaluated based on clearly defined actions to be taken at the preparatory hearing and the evidence to be presented with their concentration, based on the judge's ability to organize and effectively perform procedural and other actions by the principles of efficiency and economy of the procedure, and the skill of conducting hearings based on the judge's ability to lead the hearing clearly and understandably while respecting the procedural roles of the parties in the procedure.

Explanation

When evaluating the quality of judges' work, it is important also to consider the decisions of the Constitutional Court and the European Court of Human Rights. These decisions represent an assessment of a judge's work in applying the Constitution and international human rights treaties, which are also sources of law. The same solution is already provided for in the Draft Law on Amendments to the Law on the State Prosecution in Article 41 (regarding the amendment of Article 89, paragraph 7 of the Law on the State Prosecution).

This approach would appropriately motivate judges to follow and apply the practice of the European Court of Human Rights, as well as the practice of Montenegrin courts. The Constitutional Court has the authority to annul final judgments and order actions to be taken, and a judgment of the European Court of Human Rights can also lead to the reopening of proceedings, which has happened several times in Montenegro.

In the publication "Analysis of the Work of the Judicial Council 2008-2013" ["Analysis of the Work of the Judicial Council 2008-2013", Action for Human Rights, Podgorica, 2013, p. 159, covering the period from April 2009 to February 2013. Since then, relevant judgments have been issued such as Radunović and Others v. Montenegro, 2016 (<http://sudovi.me/podaci/vrhs/dokumenta/4943.pdf>), Mugoša v. Montenegro, 2016 (<http://sudovi.me/podaci/vrhs/dokumenta/2212.pdf>), and others available at www.sudovi.me], HRA provided an overview of the judgments rendered by the European Court of Human Rights up to that point, in which it was found that human rights were violated by judgments rendered by the Supreme Court of Montenegro.

Proposal V - Authority of the Disciplinary Prosecutor to Initiate an Investigation

In Article 82 of the Draft, paragraph 2 is added, which reads:

“In Article 112, paragraph 4 is added, which reads:

The disciplinary prosecutor may initiate an investigation to determine the disciplinary responsibility of a state prosecutor on their initiative.”

Explanation

The authority to initiate an investigation to determine disciplinary responsibility for judges should also be entrusted to the disciplinary prosecutor, as proposed about state prosecutors in Article 50 of the Draft Law on Amendments to the Law on the State Prosecution. This allows the prosecutor to act proactively when they receive information from anyone about a committed disciplinary offense, not just from court presidents.

In Bosnia and Herzegovina, the disciplinary prosecutor has the authority to initiate proceedings by submitting a proposal, while anyone has the right to initiate the process with the prosecutor.

In Montenegro, the process is designed so that the disciplinary prosecutor acts on a proposal submitted by other authorized persons. In Croatia, the right to initiate proceedings is also held by the judicial council for evaluation. HRA considers this solution to be good, as it is clear that the council reviewing the judge's work has the best insight into the reasons for initiating disciplinary proceedings against them. In Montenegro, court presidents have initiated proceedings to determine disciplinary responsibility only after reviewing the work of judges by the Supreme Court. However, since the Evaluation Commission is formed by the Judicial Council from its members, HRA believes that the solution already proposed - that any member of the Judicial Council can initiate disciplinary proceedings - also includes members of the Evaluation Commission but does not necessarily limit this right only to them.

Proposal VI – Extension of Statute of Limitations for Conducting Disciplinary Proceedings

Article 86 of the Proposal should be amended to read as follows:

"Article 119, paragraph 1 is amended to read as follows:

The initiation of proceedings to establish the disciplinary responsibility of a judge expires five years from the date of a minor disciplinary offense, seven years from the date of a serious disciplinary offense, and nine years from the date of the most serious disciplinary offense.

...

Paragraph 4 is amended to read:

A pronounced disciplinary sanction is deleted from the records of the judge after the expiration of five years from the date the disciplinary sanction becomes final.”

Explanation

The extension of the deadlines for the initiation of disciplinary proceedings is considered justified given the practice that information about possible offenses is often discovered significantly later after their commission. Extending the period for deletion from the records is deemed justified to ensure a distinction in the advancement process between judges who have never been disciplined and those who have.

**PROPOSALS OF AMENDMENTS BY THE NGO HUMAN RIGHTS ACTION (HRA)
TO THE DRAFT LAW ON AMENDMENTS TO THE LAW ON THE STATE
PROSECUTOR'S OFFICE**

Proposal I – Right to Appeal Against Transfer Decision

In Article 37 of the Draft, paragraph 1 is amended to read:

“Article 84 is amended to read:

In the event of the reorganization of the State Prosecutor's Office, which reduces or abolishes the number of positions of state prosecutors, the Prosecutorial Council may assign a state prosecutor of the same level to another state prosecutor's office without his/her consent.

If no state prosecutor performs prosecutorial duties in a state prosecutor's office, the Prosecutorial Council may assign a state prosecutor from a state prosecutor's office of the same level to that state prosecutor's office without his/her consent, until the reasons causing such a state are eliminated, but for no longer than one year.

A state prosecutor referred to in paragraph 2 of this Article may not be reassigned to work in a state prosecutor's office, upon the expiration of one year, without his/her consent.

In the case referred to in paragraph 2 of this Article, the state prosecutor enjoys the rights provided by Article 85a of this law.

In the cases referred to in paragraphs 1 and 2, the state prosecutor has the right to file an appeal to the Prosecutorial Council against the decision on relocation.”

Explanation

The Venice Commission emphasizes the importance of providing prosecutors the right to appeal to the Prosecutorial Council against relocations without their consent. Therefore, it proposes explicitly stating the right to appeal and clear criteria considered in making the relocation decision (Venice Commission CDL-PI(2024)012, para. 42 (2. Transfers)). Regarding reorganization as a basis for relocation, the Commission indicates that the reorganization process could last for months and result in administrative chaos and unjustified delays.

Proposal II – Evaluation of state prosecutors in the Supreme State Prosecutor's Office

In Article 40 of the Draft, paragraph 1 is amended to read as follows:

“ In Article 86, paragraph 1 is amended by deleting the words 'except for state prosecutors in the Supreme State Prosecutor's Office', so that it now reads:

The work of state prosecutors who have a permanent function, except for the Supreme State Prosecutor, is evaluated in accordance with the Plan for the Evaluation of State Prosecutors,

every four years, to assess their expertise, quantity, and quality of work, ethics, and training needs, as well as for advancement to a higher-level state prosecutor's office."

Explanation

We see no reason why state prosecutors in the Supreme State Prosecutor's Office, as well as judges in the Supreme Court, should not be subject to evaluation. Moreover, the Venice Commission holds the same view (see VC opinion in point 82 from 2014). Regular evaluation, conducted every three years, should include state prosecutors in the Supreme State Prosecutor's Office, who, although they do not advance further in the prosecutorial hierarchy, precisely because of the function they perform within the Supreme State Prosecutor's Office, should be subject to regular control. Additionally, since state prosecutors in the Supreme State Prosecutor's Office, according to the Draft Law, have significant authority in many areas of law application, it is even more important that they demonstrate to younger colleagues through their results shown in regular evaluations why they were chosen, rather than their evaluation ending on the day of appointment to the given function. Also, see Article 74 of the Draft Law on Amendments to the Law on the Judicial Council and Judges regarding the evaluation of judges of the Supreme Court.

Proposal III – Equalizing the conditions for termination of function due to reaching the retirement age for state prosecutors and judges

Article 47a of the Draft is added, which reads:

In Article 103, paragraph 1, item 3 is amended to read:
3) upon reaching the age of 67;

Explanation

It should be stipulated that state prosecutors also meet the condition for the termination of function due to reaching the retirement age when they turn 67, as proposed for judges in Article 76 of the Draft Law on Amendments to the Law on the Judicial Council and Judges.

Proposal IV – The right of a member of the Prosecutorial Council to submit a proposal for establishing the disciplinary responsibility of a prosecutor

Article 49a of the Draft is added, which reads:

“In Article 110, paragraph 1 is amended to read:

If there is a reasonable suspicion that a prosecutor has committed a disciplinary offense, **a proposal to establish the disciplinary responsibility of the prosecutor may be submitted by a member of the Prosecutorial Council.**

Paragraph 2 is amended to read as follows:

If there is a reasonable suspicion that a prosecutor has committed a disciplinary offense, the head of the state prosecutor's office, the head of the immediately higher state prosecutor's office, and the Supreme State Prosecutor shall provide a written notice to the Prosecutorial Council.”

Explanation

Members of the Prosecutorial Council should have the right to initiate disciplinary proceedings, analogous to members of the Judicial Council (see Article 110 of the Draft Law on Amendments to the Law on the Judicial Council and Judges), as they often are the first to become aware of possible disciplinary offenses committed by prosecutors. Granting this right to members of the Prosecutorial Council strengthens the integrity of the judicial system, allowing for a prompt and efficient response to any form of unprofessional behavior.

Proposal V – Extending the statute of limitations for initiating disciplinary proceedings and record deletion

Article 53a of the Draft is added:

“Article 119, paragraph 1 is amended to read:

The initiation of proceedings to establish the disciplinary responsibility of a state prosecutor expires five years from the date of a minor disciplinary offense, seven years from the date of a serious disciplinary offense, and nine years from the date of the most serious disciplinary offense. ...

Paragraph 4 is amended to read:

A disciplinary sanction imposed is deleted from the records on the state prosecutor after the expiration of five years from the date the disciplinary sanction becomes final.”

Explanation

Extending the statute of limitations for initiating disciplinary proceedings for state prosecutors, as well as extending the periods after which a sanction can be deleted from the records, is considered justified given the practice that information about possible offenses is often discovered significantly later after their commission. Additionally, it is justified to extend the period for record deletion to ensure a distinction during advancement between those who have been disciplined and those who have not.