The Government is Making Public Debate Meaningless and is Ignoring the Shortcomings of Judicial Laws

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One year after the adoption of the constitutional amendments in the field of justice, the drafting of the set of judicial laws (Law on Judges, Law on the Public Prosecutor's Office, Law on the High Judicial Council, Law on the High Prosecutorial Council and Law on the Organisation of Courts) is coming to an end. Members of the prEUgovor coalition submitted comments on the draft texts during the public debate that lasted from 12 December 2022 to 15 January 2023. The Government of Serbia adopted the proposed laws as early as on 17 January, but it is questionable whether the submitted comments were considered at all, which makes the public debate meaningless.

A total of 58 documents containing the comments submitted by various organisations and individuals were published on the website of the Ministry of Justice, but no mandatory reports - which might have explained why certain comments were (not) taken into account - were published on the public debates that were conducted regarding the above five laws. Also, it is not known whether the opinions of all competent institutions were obtained in this short period of time, since they were not published either.

The provisions that were the subject of the public debate are numerous and significant, and the deadline for aligning the laws with the constitutional amendments is set to expire on 9 February. The prescribed deadline for publishing the report on the public debate is usually 15 days (30 January 2023). For this reason, the parliamentary discussion could easily begin, and even end, without the people's deputies knowing why the suggestions received during the public debate were not accepted, even if the Ministry of Justice does fulfil its obligation.

We hereby appeal to the deputies to consider the comments that were submitted during the public debate and offer amendments to improve the five proposed judicial laws. In line with the above, as well as with the suggestions of the Venice Commission, this quick reaction represents an attempt of the prEUgovor coalition to point out problems that might be more obvious to readers from Serbia than to experts who look at the norms from the point of view of international standards. The shortcomings observed of the texts and the recommendations for their improvement are however presented only briefly. Based on the expertise of the members of the coalition, comments were made with the view of improving the fight against corruption and the protection of fundamental rights included in Chapter 23 of the accession negotiations between Serbia and the European Union.

Viewed from the standpoint of anti-corruption, some of the main shortcomings of the presented drafts are a direct consequence of deficient constitutional amendments, primarily those referring to the immunity, composition and the method of electing members of the judicial councils. On the other hand, the current texts of the proposed laws[1] can be significantly improved in a way that would largely achieve the objectives of judicial reform within the norms of the amended Constitution. Greater independence, i.e. autonomy must also bring greater responsibility of judges and public prosecutors for the decisions they make, especially in cases of violations of ratified international treaties and laws.

Draft Law on the High Prosecutorial Council and Draft Law on the High Judicial Council: Risks of corruption have not been eliminated

The Draft Law on the High Prosecutorial Council and the Draft Law on the High Judicial Council were written in parallel, and their shortcomings are therefore the same. Certain provisions differ without always providing a proper explanation for this, such as e.g. those referring to the quorum required for holding sessions and taking decisions.

The budget is one of the assumptions of an independent judiciary. As a start, the amount of funds should be sufficient for smooth and efficient work, while the budget should be managed by the judicial councils and no longer by the Ministry of Justice. The **budget adoption mechanism** (Article 4 of both drafts) stipulates that the judicial council proposes its budget after the consultations with the Ministry of Finance. In case of failure to reach an agreement, the Government cannot change the proposal made by the Council, but can rather state in the explanation of the proposal of the annual budget of the Republic of Serbia why it finds the Council's proposal unacceptable. People's deputies are thus able to see what it was that the judicial council requested, as well as the Government's opinion thereon. However, at the parliamentary session at which the budget is to be adopted, representatives of the Government have their own representative, who may convince the legislators of the correctness of their positions, while representatives of the Council are currently not guaranteed such an opportunity.

The laws stipulate that, in the future, judicial councils will be presided over by members elected from among the ranks of professionals (judges and public prosecutors), while vice-presidents will come from among members that were elected by the National Assembly. There is frequent speculation that the two groups of council

1 Although this text was written while the Laws were still in the draft stage, the suggestions also apply to the proposed laws.

members could have opposing views on important issues. Therefore, the question of **situations when the vice-president has the right to replace the president of the Council** (Article 9) becomes quite important. It is stipulated that this can be done when the president is absent or incapacitated. However, the law does not define the concepts of "absence" and "incapacity", so a situation may arise in which it will be disputed whether the vice-president of the Council had unjustifiably taken over the duties of the president without having the right to do so. This can be particularly contentious in situations where the president is truly absent or incapable of taking an action, but the deadlines for taking said action have not yet expired, or when the president is not obliged to act at all (and does not want to do so) but the vice president takes advantage of the president's absence and takes said action.

In the constitutional amendments, the **immunity of the members of the Council (Article 11)** was already established too broadly. Based on this provision, a member of the Council cannot be prosecuted even when voting in the Council had something to do with a criminal offence, e.g. when a member of the Council knowingly abused his/her office to help elect a specific candidate even though said candidate was not the best choice ("acquiring some sort of benefit"), or to prevent the election of another candidate, who was the best choice ("serious violation of the right of another"). This widely opens the door to corruption in the judicial councils' decision-making and represents the biggest problem of this judicial reform. The immunity of members of the Council is wider than that of people's deputies; namely, they cannot be deprived of their freedom without the consent of the Council even when they are caught committing a criminal offence that carries a prison sentence of at least five years, which is not the case with people's deputies.

Inconsistent and unclear provisions on the incompatibility of function of members of judicial councils

The draft laws don't fully follow the concept that members of the Council should have only one job (that of a Council member), so Article 13 allows the possibility for elective members of the Council to engage in teaching activities in the form of employment, but only as professors of the Faculty of Law. This illogical exception should not exist because a member of the Council who is a prominent lawyer can also teach (e.g. courses that have to do with law) at another faculty (e.g. faculty of economics).

The rules on salaries and compensations (Article 14) are also inconsistent. The judicial councils still have some *ex-officio* members, and they are guaranteed salary compensation. This is illogical. Since this is an ex officio position, compensation could be calculated in the regulations that determine the salary (e.g. that of the Minister of Justice or the Supreme Public Prosecutor), and not as salary compensation based on membership in the Council.

The provisions on the incompatibility of functions (Article 15) are not in line with the Law on Prevention of Corruption, and many are also unclear. Consequently, they can be a source of problems and even abuse through discretionary interpretation. The provision according to which a member of the Council cannot "act politically in some other manner" (in addition to the prohibition of membership in a political party) is particularly unclear. It is also illogical to prohibit Council members from engaging in other paid work. If the purpose of the prohibition is for members to fully devote themselves to the Council, they should be prohibited from engaging in any other work, be it paid or unpaid. If the goal of the prohibition of paid work is to reduce the number of situations that could cause a conflict of interest, then the norm is not correctly formulated.

It is not entirely clear whether the Ethics Committee of the Council will be deciding which functions, jobs or private interests are contrary to the dignity and independence of a Council member and are harmful to the Council's reputation by setting rules that will be valid in the future, or by reviewing individual cases. The competences of the Ethics Committee partially overlap with those of Agency for the Prevention of Corruption.

Transparency of the work of judicial councils is not sufficiently ensured

Transparency of the work of the Councils is not sufficiently ensured (Article 18, paragraph 1 and Article 23). Council sessions are generally public, and the Council decides, in an act, when they are not to be. However, the legislators did not set sufficient restrictions for determining the need for secrecy. Councils must publish annual reports, but there is no prescribed deadline for their submission, no definition of their detailed content, and no obligation to publish said report in searchable form.

The **procedure for the election of judges and prosecutors to the judicial councils** can be improved. There is a legal gap in Article 26, in the event that there are no candidates from one of the categories of courts/public prosecutor's offices from which Council members are elected. Also, there is validity to the criticisms by representatives of professional associations, who have noted that the existing "electoral units" are such that they threaten the secrecy of voting, and that it would be more appropriate for all judges and prosecutors to have the opportunity to vote for all candidates.

The current provisions on the presentation of candidates, although designed for the purpose of their better presentation, may lead to the disruption of the regular work of courts and prosecutor's offices during these

elections beyond the extent that is necessary. The provision under paragraph 7 (the right of the candidate to present him/herself to each judge/public prosecutor (voter) individually) is particularly unclear.

The **dismissal of Council members** (Article 54 and Article 56) is not adequately regulated either. One of the reasons for dismissal is if a member fails to participate in the work of the Council without a justified reason, but it is not prescribed how it will be determined whether the reason for non-participation was justified and what "level" of non-participation will be deemed relevant. On the other hand, the reason that already existed in the working versions of these laws was omitted; according to that reason, a member could also be dismissed if he/she did not perform his/her duties in accordance with the Constitution and the law, which seems to be far more important than non-participation.

Paragraph 1 of Article 56 stipulates that the office of an elected member of the Council *may be terminated* under certain conditions. All the listed reasons concern situations where the office would have to be terminated once the existence of the reason has been established. In the second paragraph, it is prescribed that a proposal for termination of office may be submitted by a member of the Council. None of the provisions offers an opportunity to other natural and legal persons to point out circumstances due to which a member of the Council should be dismissed, or the duty for the Council to consider such arguments. This significantly reduces the possibility of public supervision of the work of the Council and the responsibility of its members.

The danger of arbitrary decision-making in the election of "prominent lawyers"

The conditions for the election of a member of the Council from among the ranks of prominent lawyers by the National Assembly (Article 44) contain several provisions that are not sufficiently elaborated and therefore can be interpreted in different ways in practice. In the proposed law, item 9) of paragraph 1 prohibits the election of a candidate who had exerted undue influence on judges and public prosecutors, i.e. on public prosecutor's offices and courts, but it is not clear how it will be determined that such influence had been exerted and what should be considered exercise of undue influence to begin with. A narrow interpretation would lead to considering as ineligible only those candidates who were identified as having exerted undue influence in earlier decisions of judicial councils. Such an interpretation would be best to ensure legal certainty; however, its acceptance would also make it possible to elect a candidate who did exert undue influence on judges and public prosecutors, but his/her actions were never considered by the judicial councils. Also, item 10) of paragraph 1 (in the proposed law), which prohibits the election of a candidate who had advocated positions that threatened the autonomy of the public prosecutor's office or the independence of the judiciary is subject to free assessment as to whether a certain position is truly of such a nature that it threatens autonomy and independence.

The provision under paragraph 3 is particularly unclear. It stipulates that, during the election process, "special emphasis is [to be] placed" on professional or scientific work "of significance for the work of the judiciary". It would have been clearer if the existence of such work was prescribed as one of the requirements for the election. It also could have been prescribed as an additional selection criterion in the event that there are several candidates who equally meet the other requirements. Without this specification, it has remained unclear how "special emphasis will be placed" on such work.

As regards public competitions (Articles 48 and 49), the biggest weakness of the public competition procedure is that it is not clear how the Committee will assess the fulfilment of certain requirements for the election of candidates. The provision under paragraph 4, according to which the Committee can obtain data about the candidate from the authority or legal entity in which the candidate has worked, is not sufficient for such an assessment. Namely, many other institutions or persons may have information indicating that a candidate does not meet the requirements, for example because his/her views are such that s/he advocates against the independence of the courts, or because they believe that the candidate is not worthy of such an office. Article 48 does not make it clear how the Committee will obtain such information, or whether it will consider it said information is submitted to it without being having been requested. It is also unclear how the "participation of the general and expert public", stipulated in paragraph 8, will be ensured when considering applications.

The manner of deciding on the list of candidates (twice as many as the number of Council members from the number that is to be elected, and solely based on individual proposals by members of the Committee for the Judiciary) leaves the public without the opportunity to determine why certain candidates were given an advantage over other competitors. At the same time, one should not forget the possibility that individual members of that particular parliamentary committee (e.g. attorneys) may be in a conflict of interest when deciding on candidates because of their professional activities.

Due to the prescribed method of election, there is a real possibility that the election of prominent lawyers to the judicial councils will turn into a purely political decision of the majority, first in the Committee and then in the National Assembly. The rules of voting in the National Assembly committees are governed by the Rules of Procedure of the National Assembly; however, the law could prescribe a modified way of decision-making, which would be appropriate in this case. One of the

elements of a possible solution would be to prescribe the obligation of each member of the committee to declare his/her opinion about each candidate.

Draft Law on Public Prosecutor's Office and Draft Law on Judges: Shortcomings and non-compliance with other regulations

In the draft of the Law on the Public Prosecutor's Office, shortcomings were noted regarding the provisions governing management (Article 4) and hierarchical powers (Article 6). Among other things, there is the prohibition of "pressure on the participant in the proceedings conducted before the public prosecutor's office" and "undue influence on the public prosecutor's office by the executive or legislative authorities". The entire method of submission of a request that would constitute **undue influence**, as well as acting thereupon, will be prescribed by an act of the High Prosecutorial Council, which at the moment leaves open the question of the quality of the procedure itself.

The provision referring to the obligation of state authorities, local self-governments, holders of public powers and legal and natural persons to provide submissions and statements to the public prosecutor (Article 9) contains unnecessary repetitions and **provisions that may come into conflict with the Criminal Procedure Code** (Articles 19 , 44, 145, 180, 282, 298). What is new in relation to the Criminal Procedure Code is the obligation for natural persons to provide the requested submissions. Also, it is not certain whether there is a sanctioning mechanism. On the other hand, there is no mechanism to protect natural persons who believe that the prosecutor is unjustifiably requesting their documents.

The provisions referring to the transparency of the work of the public prosecutor's office (Article 11) constitute a certain progress compared to the current law which provides that transparency is ensured only in accordance with the by-law, while it is now stipulated that it will be ensured *in accordance with the law and the act on administration in the public prosecutor's office*. Still, the wording does not guarantee sufficient **transparency of the work of the public prosecutor's office** because the obligations are not specified (what must be published, in what way, at what intervals, and so on). As regards work on specific cases, there are no significant changes compared to the current regulations. It can therefore be expected that the decision about information that will be made public will be based on the discretionary assessments of public prosecutors of what is "in the interest of the proceedings". When it comes to the transparency of work, Article 90 does not provide sufficient guarantees regarding the procedure for the election of the Chief Public Prosecutor (which is regulated in greater detail by an act of the High Prosecutorial Council).

General mandatory instructions are regulated better than they used to be (Article 16), but it is necessary to also explicitly state that such instructions are to be issued only when necessary, i.e. when no other means can ensure legality, effectiveness and uniformity in acting. The instructions will be published, except when their publication might threaten the interests of national security, which is difficult to imagine.

The **competence takeover** (Article 20) by the immediately higher public prosecutor's office is not fully regulated in the new draft law either, as competence can be taken over not only in order to conduct the proceedings more efficiently, but also for "other important reasons". Thus, in practice, it will remain unlimited and subject to discretionary decisions.

In Article 44, the **content of the personal file** does not provide for the entry of data concerning the incompatibility of the function of a public prosecutor with other offices, jobs or private interests.

Competences relating to the supervision of the implementation of acts on administration in the Public Prosecutor's Office (Article 46) are not sufficiently precisely divided between the Ministry of Justice and the High Prosecutorial Council.

There are unclear provisions in Article 54, which deals with the **political activities of prosecutors**. The holder of the office of public prosecutor is "obliged to refrain from public expression of political views and participation in public debates of a political nature, unless it concerns issues related to public prosecutor's office, constitutionality and legality", but these concepts can be interpreted in various ways in practice, including some where a prohibition would not be appropriate. This could mean e.g. that a public prosecutor would not have the right to express an opinion, in the capacity of a resident of a settlement, that a new parking lot should be built, because such a position would constitute an opinion on urban planning policy. The problem of insufficiently clear prohibition of "political activity" also exists in the Draft Law on Judges (Article 31), in addition to the prohibition of membership in political parties. This term can be interpreted in different ways, and such a prohibition is not prescribed in the Constitution.

In the Draft Law on Judges (Article 31) and the Draft Law on Public Prosecutor's Office (Article 71), **conflict of interest issues** are regulated in a different way compared to the Law on Prevention of Corruption, which also applies to public prosecutors. Therefore, there is either a collision of norms, or their unnecessary repetition.

Article 84 of the Draft Law on Public Prosecutor's Office governs the procedure for verifying the fulfilment of the requirements of candidates for prosecutors. However,

it is not prescribed how the **worthiness of candidates** will be verified. Article 88 provides for the collection of information on the fulfilment of the criteria, where such information can be collected from the "authorities and organisations" in which the candidate worked in the legal profession. However, it is not clear whether it will be possible to collect information from attorneys or private companies, and whether their opinions will have the same value as the opinions of state authorities on candidates' earlier work. The Draft Law on Judges does not set even general rules for determining the indicators for assessing the expertise, competence and worthiness of judges by a by-law of the High Judicial Council.

The **provisions on the termination of the mandate** of prosecutors (Article 103) contradict other rules contained in the same Law (completion of working life); also, for an unknown reason, there is a difference between the number of years required for the retirement of the supreme public prosecutor and chief public prosecutors.

The accountability of judges and public prosecutors is now partially improved

Provisions on liability for damages caused by judges and public prosecutors represent a major and positive innovation in the draft laws. However, for them to be truly implemented, it is necessary to specify them by listing the authorities and deadlines.

In Article 7, the Draft Law on Judges stipulates the possibility, in some situations, of collecting from a judge the amount of damages that had been paid by the Republic. However, there is no prescribed obligation to request remuneration. There is only the possibility, which leaves room for discretion in the decision of the Ministry of Justice.

Bearing in mind the new competences of the High Judicial Council and the High Prosecutorial Council, we believe that, in order to respect the principle of the independence of judges, i.e. the autonomy of public prosecutors, it is more advisable to stipulate in both draft laws that the High Judicial Council/High Prosecutorial Council will first address the judge/public prosecutor with a request to refund the damages that had been paid by the Republic of Serbia, and only if the judge/prosecutor refuses to do so, submit a request to the State Attorney's Office, which will then be obliged to initiate proceedings before the competent court.

The Draft Law on Judges and the Draft Law on Public Prosecutor's Office provide a long list of grounds for the initiation of misdemeanour proceedings against a judge/public prosecutor. However, a situation where a decision of the Constitutional Court or another court in the Republic of Serbia, the European Court of Human Rights or another international court determined that human rights and fundamental freedoms had been violated during the court/prosecution proceedings, and that the judgment/decision of the prosecution was based on such a violation, or that the judgment/decision of the prosecution had not been made as a consequence of the violation of the right to a trial held within a reasonable period of time, has been omitted as grounds for disciplinary offence.

Both draft laws stipulate that another law cannot prescribe a disciplinary offence for a judge/holder of public prosecutor's office, which is in direct conflict with Article 6 of the Law on Prevention of Domestic Violence. There is also a serious disciplinary offence missing: a situation where the decision of the judge/public prosecutor has resulted in the death or serious bodily injury of the party or victim, i.e. witness in the proceedings.

The proposed laws must regulate the responsibility of judges and public prosecutors in cases of murder of women and children in Serbia, so as to prevent the occurrence of death as a consequence of the decision of a judge/public prosecutor. We recall that the police and centres for social work are responsible for their own (in)action or wrongdoing, but judges and prosecutors - who had been directly responsible for the lost lives of women and children - are not.

Gender (in)equality when evaluating the work of judges and public prosecutors

As regards the period of evaluating the performance of judges/public prosecutors, the Draft Law on Judges and the Draft Law on Public Prosecutor's Office are not aligned with Article 33, paragraph 4 of the Law on Gender Equality, which prohibits gender inequality during leave from work due to pregnancy, maternity leave, leave for the purpose of caring for a child and leave for the purpose of providing special child care. It is also unclear why there is a difference in the evaluation periods of judges (once every five years) and public prosecutors (once every three years).

Recommendations:

Procedural:

- The Ministry of Justice should publish reports on the public debate conducted on five judicial laws, with an explanation of why certain comments were, or were not, taken into account.
- People's deputies should consider the comments that were submitted during the public debate and, based on them, propose amendments to improve the five proposed judicial laws that have reached the National Assembly.
- The National Assembly should ask the Agency for the Prevention of Corruption for an opinion on the corruption risks in the proposed laws, considering that the Ministry of Justice has failed to fulfil this obligation.

Substantive:

- In order for the people's deputies to have at their disposal all the arguments for the adoption of the budget of the judicial councils, representatives of the Councils should be given the opportunity to justify their proposals, especially if the Government does not agree with them.
- There is a need to precisely define what will be viewed as absence and incapability of presidents of the judicial councils, or to more precisely determine what tasks can be performed by the vice president of the Council (e.g. tasks related to fulfilling statutory obligations and prescribed deadlines) without the consent of the president.
- Amend the provisions on the immunity of the members of the judicial councils in the part that refers to the deprivation of liberty of a member of the Council, modelled on the provisions of the Law on the National Assembly.
- The proposed laws should be aligned with the Law on Prevention of Corruption, in the part that refers to the conflict of interest of judges, public prosecutors and members of judicial councils.
- Given that the existing "electoral units" for the election of members of judicial councils from among the profession are such that they endanger the secrecy of voting, all judges and prosecutors should have the opportunity to vote for all candidates. Create a possibility of hiring external experts for the election commission and election committees (Articles 29 and 37), which would be useful especially if not enough judges and public prosecutors are interested in this type of work.
- In the proposed Law on Judges and Law on Public Prosecutor's Office, disciplinary offences prescribed by other laws should be provided as special grounds for determining disciplinary responsibility. Also, a situation where the decision of a judge/public prosecutor has resulted in the death or serious bodily injury of the party or the victim, i.e. witness in the proceedings should be prescribed as a serious disciplinary offence.
- The proposed Law on Judges and Law on the Public Prosecutor's Office should be aligned with the Law on Gender Equality so that it is clear that the time during which a judge/public prosecutor was absent from work due to pregnancy, maternity leave, leave for the purpose of caring for a child or leave for the purpose of providing special child care will not be taken into account when evaluating her/his work

About prEUgovor

Coalition prEUgovor is a network of civil society organisations formed in order to monitor the implementation of policies relating to the accession negotiations between Serbia and the EU, with an emphasis on Chapters 23 and 24 of the Acquis. In doing so, the coalition aims to use the EU integration process to help accomplish substantial progress in the further democratisation of the Serbian society.

Members of the coalition are:

Anti-Trafficking Action (ASTRA)
www.astra.rs

Autonomous Women's Centre (AWC)
www.womenngo.org.rs

Belgrade Centre for Security Policy (BCSP)
www.bezbednost.org

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