

ROLE AND STATUS OF JUDGES IN CROATIA

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I. A Historical Background – System of Justice before 1990

System of justice in the Republic of Croatia has roots in the common traditions and fate of the systems of justice in Central and Eastern Europe. Significant role in its formation may be assigned to the period of mid-XIX century – a period of consolidation of bureaucratic and centralist state apparatus. This was a period during which the feudal and patrimonial elements in the organization of state bodies in this part of Europe were finally abolished and surmounted, and modern centralist elements of the organization of the state administration were introduced. This also apply to judiciary, that was organized on the same premises as the judiciary in the surrounding countries – as well as the judiciary in many other states of the continental Europe – i.e. as a hierarchical system of professional office-holders, closely tied with the state and the centers of political power.¹

Since Croatia was in this period a part of the Habsburg (from 1867 – Austro-Hungarian) monarchy, much was inherited from the legislative and judicial reforms of the enlightened Austrian absolutism that brought models and patterns of behavior, as well as a certain overall “touch and feel” of the system of administration of justice. These common traits may be followed with regard to legislation and legal education: e.g., some pieces of legislation relevant for judicial organization and process at the territory of present Republic of Croatia were taken literally from Austrian sources. However, the prevalence of similarities should not lead to neglect of significant differences. Namely, although tied to various governments, Croatia had a substantial level of autonomy, to the

¹ For typology of the systems cf. Merryman, *The Civil Law Tradition*, Stanford, 1985; Damaška, *The Faces of Justice and State Authority*, New Haven, 1986; for a historical genesis of the Continental judicial systems cf. van Caenegem, *Judges, Legislators and Professors*, Cambridge, 1993.

effect that judicial organization and legislation were delegated and decided upon at a local level. Due to that fact, sometimes legislation was considerably different, and sometimes same legislation (e.g. procedural codes) were effective in Croatia and Austria at the different time – and their functioning in a different historic context led to less-than-perfect match of both judicial systems. On the other hand, Croatian jurists were partly educated in Vienna and the other Central European law schools, Zagreb Faculty of Law (founded in 1776 by Decree of Empress Maria Theresia) followed the tradition of best Austro-Hungarian centers of scholarship, and Croatian courts often used cases and patterns of Austrian courts, just as if they were part of internal law.

After 1918, Croatia split its ties with the Austro-Hungary and became part of the new state form, the State of Serbs, Croats and Slovenes (from 1921 – Yugoslavia). The legal organization of this state was very diverse, and ranged from Austrian (Croatia proper) and Hungarian sources (Medjimurje) to Italian law (Dalmatia) and law of Sharia (Islamic law – in Bosnia and parts of Serbia). Organization and status of judges in this state was never uniform: the state was divided in six “legal areas”. Procedural law was also quite diverse before 1929, when the first common Code of Civil Procedure was enacted – emulating closely the Austrian *Jurisdiktionsnorm* (JN) and *Zivilprozessordnung* (ZPO) of 1898.²

After World War II, 45 years of communist government (1945-1990) had their impact on the status and organization of judiciary. Political pressures exercised on judges, their duty to implement party and state politics, politics of the “unity of power” (as opposed to the separation of powers doctrine), requirements of “moral and political suitability” – all these elements common to all communist regimes could be found at various stages of the existence of SFRY (Socialist Federative Republic of Yugoslavia). At the same time, one should stress that, compared to other socialist countries, the destructive impact that communist party-state had upon legal profession was of considerably lower intensity. With exception of several “revolutionary” post-war years, majority of courts and majority of judges continued to perform their function in a relatively civilized fashion; autonomous private bar organization (*Rechtsanwaltschaft*) continued to exist, and law was taught at universities primarily based on ancient patterns of Roman Law and Civil Code. However, in an overall evaluation, the system of justice had to survive several trends that adversely affected its position and functioning: law was generally neglected as a method of social regulation; social status and prestige of the members of legal profession significantly decreased; courts and their actions were systematically marginalized and isolated. There were two, parallel systems of conflict-resolution: one, informal, at the party level, tended to prevent and resolve every significant dispute by “political consultations”; the other, traditional court system, was greatly adopted to less significant matters, such as small claims, protection of possession, some land-related issues etc. The judges (and courts) in any society tend to have reputation proportional to the role that private ownership and market competition play in society – and, naturally, this role was suppressed and diminished. But, this statement should also be moderated, since this is also a matter of comparison and intensity, and not a matter of quality where precise shades of black and white can be drawn. Yugoslav split with Soviet Union in 1950s and introduction of the doctrine of self-management brought some – although limited – political and economic reform to the effect that certain, although controlled market

² See Triva, Belajec, Dika, *Gradansko parnično procesno pravo [Civil Procedural Law]*, Zagreb, 1986, § 8 (describing the historical sources of Croatian civil procedure). See also Jelinek, *Einflüsse des österreichischen Zivilprozeßrechts auf andere Rechtsordnungen*, in: *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld, 1991.

competition among “self-managed” companies was possible. Other reforms enabled limited private ownership in agriculture and formation of small family businesses – and, consequently, legal expertise had some meaning and importance in respective areas.³

In this report, we are focusing on the status and organization of judges in present Croatia – i.e. the Croatia since its new democratic Constitution of 1990 and since its declaration of independence in 1991. The process of formation of a new, independent state (with an independent system of justice) coincides here with two other events: with war on Balkans (for Croatia – period of 91-95) and the reform of political system (abandonment of the communist political regime). All three events – political independence (formation of nation-state), state of emergency and changes in the political and legal system – did affect the role and status of judges and have to be presented in order to get a full picture. Therefore, our report will not be limited to a descriptive presentation of a legal framework (a usual method of legal positivism – fully legitimate in well-ordered and stable societies but less suitable for the societies in transition). The next two parts – Part II and Part III are written chronologically, depicting the main events in two periods that could roughly be labeled as the years of war (1991-1995) and peace (1996-1999). Finally, in Part IV we will provide some data on current social and institutional position of courts and judges and point to some of the potential sources of problems for the next reformers. System of judiciary in Croatia is now more than ever at a crossroads, where the otherwise not so informative term of “transition” may be a good denominator – the other being the term of “crisis” that is often going to be used in this report.

II. Constitutional position and legal regulation of judiciary 1990-1995: rules and reality

1. Christmas Constitution of 1990: the unfulfilled promise of an independent and autonomous judiciary

Croatian Constitution of Dec 21, 1990⁴ provided a new regulation of organization and status of judicial power. Changes in comparison with previous constitutional position of judiciary were, first, reflected in the reintroduction of the system of division and separation of powers, whereas judicial power is construed as one of the three constituent branches of government. Otherwise, constitutional provisions in the chapter IV (Judicial Power, Arts. 115-121) are relatively scarce – altogether 7 articles, or, to put it in even more precise terms, 322 words. Constitutional warranties include the postulate of autonomy and independence of judicial power, publicity of court hearings, and judicial immunity from prosecution on account of their opinion given in the process of judicial decision-making. There is also a limited recognition of participation of lay judges. However, with regard to the court organization, the Constitution encompasses only the definition of the Supreme Court as the highest judicial body that has to ensure uniform application of law and equality of citizens. Other courts are only covered by a summary clause according to which “[t]he establishment, jurisdiction, composition and organization of courts and court proceedings shall be regulated by law” (i.e. statute).

³ For a description of the state of judiciary at the beginning of ‘90s see Uzelac, *Zavisnost i nezavisnost, prijedlozi uz položaj sudstva u Hrvatskoj* [Dependence and Independence, Some Suggestions Concerning the State of Judiciary in Croatia], *Zbornik Pravnog fakulteta u Zagrebu*, 42 (Suppl. 4) 575 (1992), at 582-590.

⁴ Constitution was published in *Narodne novine* (*Official Gazette of the Republic of Croatia*, hereinafter: *Off. Gaz.*), 56/90 of Dec 22, 1990; amendments *Off. Gaz.* 135/97 of Dec 15, 1997; the amended text of the Constitution was published in *Off. Gaz.* 8/98 of Jan 26, 1998.

However, two last constitutional provisions in the chapter IV that aimed to define the status of judges – their position and the conditions of their appointment – proved to be the most heated issue in practice and doctrine. Pursuant to Article 120, judicial office is designated “to be permanent” (para 1); a judge may be relieved of his judicial office only 1. at his own request; 2. if he has become permanently incapacitated to perform his office; 3. if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office; 4. if in conformity with law it is so decided by the High Judiciary Council of the Republic owing to the commission of an act of serious infringement of discipline (para 2).⁵

Two parts of the quoted Art. 120 turned to be ambiguous and, consequently, tended to be circumvented or misused. First, the constitutional warranty of permanence of judicial office was not taken seriously in two distinct aspects. On one hand, it seemed to be too unbelievable for a formalist tradition of Continental Europe to interpret “permanence” as office until death or voluntary retirement (or declaration of inability) – although first days of the new constitution brought some support of such thesis. For instance, first President of the Supreme Court, a well-reputed old judge and former dissident Vjekoslav Vidović was appointed to this office when he was over 70.⁶ But, only a year later, during first months of the war with Serbia, Vidović was removed from office, apparently because he reached the age for retirement – this time forgetting on purpose that he was already appointed well after the mandatory legal retirement age (and was re-activated when he was already retired).⁷ In fact, his actions as the Supreme Court Judge proved to be too independent for the taste of the new government: he refused to cooperate when the government⁸ pressed him to provide a judicial *placet* to the secret deals of the conflicting sides about the exchange of those captured in military actions and detained and indicted for grave crimes.⁹

The question of the meaning of “permanent office” was not solved until the amendments to the Courts Act of 1996, when it was added that the judges hold their office “... until they fulfill legal requirements for age retirement”. The same amendments provided that the SJC may, upon proposal of the Minister of Justice and in accordance with the opinion of the president of the court, extend the mandate until the judge reach the age of 70. However, this amendment was challenged before the Constitutional Court and subsequently struck because it was regarded that it violated the principle of equality and potentially infringes the independence of judiciary. *Obiter dicta*, the CC ruled that “Constitutional warranty of permanence does not mean that judges are appointed for life ... it is set to protect the independence of judicial power” and therefore “a foreseeable

⁵ Other two paragraphs of Art. 120 refer to the request for protection against the decision to relieve him of office that may be submitted by a judge to the Chamber of Counties of the Croatian Sabor (para. 3); the warranty of immovability (“a judge shall not be transferred against his will”, para. 4); and the incompatibility clause (“a judge shall not hold an office or perform work defined by law as being incompatible with his judicial office”, para. 5).

⁶ Decision on his appointment was passed on 12 December 1990 (*Off. Gaz.* 54/1990).

⁷ Decision on his removal was passed on 14 February 1992 (*Off. Gaz.* 9/92).

⁸ Allegedly, the final word in his removal from office came directly from President Tudjman.

⁹ The desired scenario was the following: government pressed the courts to release temporary from prison the suspects captured in military or para-military actions (ranging from political leaders to common soldiers and proved criminals); they would instantly leave the country and cross over to Serbia. In exchange, the other side would let the detainees go in a similar fashion. The whole responsibility for the “escape” of the personalities that were publicly pronounced as war criminals remained thus with the courts, who “mistakenly” had to approve the temporary release from prison on formal grounds.

and universal limitation of mandate that is applied equally and that is known to all cannot impede the judicial independence.”¹⁰

But, there was another, even more far-reaching catch in the interpretation of the Constitutional provision of clause “judicial office shall be permanent”. Some of the provisions of the new constitutional design were not self-executing – they did not need any additional legislation for their full implementation. Therefore, the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia¹¹ in Art. 2 provided that those constitutional provisions that, pursuant to Constitution, can be applied instantly and directly (i.e. do not require passing of additional legislation) do apply from the date of the enactment of the Constitution. Some constitutional theorists were of opinion that the norm on the permanency of judicial office may be the norm of imminent application, since it was simple and unconditional. The Croatian Parliament (Sabor) was, however, of a different opinion – this provision was interpreted in the way that only the judges appointed according to Art. 121 of the Constitution (i.e. new appointees) shall enjoy privilege of permanent office. This meant, in fact, the suspension of the principle of judicial independence: namely, Art. 3 of the Constitutional Act for the Implementation which had to set the time-limit for enactment of implementing statutes and other acts that were needed for “activation” of those constitutional provisions that could not be imminently applied was amended 11 /eleven/ times, every time prolonging the initial time-limit of one year (expiring in December 1991) – so that, in the end, the last and final time-limit expired more than eight years later, on December 31, 1997. As will be noted later, this long time frame of insecurity had the far-reaching impact on the quality of judicial cadres and contributed largely to the present state of crisis of the state system of justice.

2. State of Emergency – War on Balkans and its Consequences for the Status of Judges

From Summer '91, the situation in former Yugoslavia started to intensify. The disintegration processes in Yugoslav federation were followed by violence and, ultimately, led to war. Naturally, the high ideals of democracy and human rights proclaimed by the new Constitution were put into second row, behind the fight for independence and defense from aggression.

In legal field, it meant departing from the usual democratic way of government in which society is governed by statutes enacted by legislature, and concentration of powers in the hands of executive. Starting from the second half of 1991, a number of Executive Decrees with the Statutory Force were enacted by the President Tudjman.

Some of the said Decrees also related to judicial power. So, the Decree on Organization, Work and Jurisdiction of Judicial Power in the State of Emergency or Imminent Threat to Independence and Unity of the Republic of Croatia¹² provided the return of Martial Courts, that were abandoned only a year before as a relict from the era of non-democratic government. The provisions on jurisdiction of these courts empowered these courts to also rule in some matters concerning civilians, and suspended certain warranties

¹⁰ From the decision of the Constitutional Court in cases U-I-914/1996 and U-I-34/1997 of October 27 1997 (*Off. Gaz.* 115/97 of October 30, 1997).

¹¹ Amended text – *Off. Gaz.* 56/90, 8/91; 31/91; 59/91; 27/92; 34/92, 91/92; 62/93; 50/94; 105/95; 110/99).

¹² *Off. Gaz.* 67/91 of December 12, 1991; amendments were published in *Off. Gaz.* 25/92 and 81/92.

of judicial independence, *e.g.* the warranty of immovability.¹³ Another Decree on Application of the Law on Criminal Procedure in the State of Emergency or Imminent Threat to Independence and Unity of the Republic of Croatia¹⁴ also suspended a number of procedural warranties and introduced simplified martial procedures in Martial Courts.

Although some of the enacted measures may be viewed as rational under circumstances of war, some observers from legal circles regarded them as excessive and partially or wholly unconstitutional. It was also argued that these and other decrees¹⁵ violate the international instruments on human rights, among which are also international standards of the independence of judiciary.

The presidential decrees were challenged before the Constitutional Court by a number of persons and organizations. It was claimed, firstly, that the President may not issue such decrees unless emergency state or the state of war is formally announced; secondly, that such decrees could have been enacted only had the Sabor (Parliament) been prevented from working (and, in fact, Sabor functioned regularly, even being in permanent session)¹⁶; thirdly, that the President may not encroach the constitutional guarantees of human rights and freedoms but only the Parliament¹⁷; and, finally, that such decisions violate the prohibition of retroactive application, since all of them came into power on the day of the issuing of the decree, and in certain instances they were published several weeks or months later.

In this particular case, it was the bite that was too big for the Constitutional Court that had no courage to declare, in the middle of war events, the decrees of the all-powerful president for unconstitutional. In its decision of June 24, 1992, the CC found that 1.) the President may decide by his own discretion whether there is a state of emergency or not, and there is no need to make a separate decision thereupon; 2.) the President may pass decrees from the entire jurisdiction of the Parliament; 3.) the prohibition of retroactivity does not apply to presidential decrees.¹⁸

¹³ For example, according to Art. 11 of the said Decree, “[p]resident and judges of the martial courts will be determined by the military schedule issued by the Minister of Defense, upon proposal made by the Minister of Justice, among judges of Municipal and County Courts”. Art. 16 also empowered presidents of the regular county courts to temporarily transfer judges from this and lower courts to other courts, “as long as the necessity exists”.

¹⁴ *Off. Gaz.* 73/91 of December 31, 1991.

¹⁵ Among other decrees with statutory force the President of Republic issued over 20 different decrees, regulating matters such as police activities, misdemeanors and criminal acts, public gatherings, identity cards, reporting of residence, cultural affairs, science and education, social security, jobs, media; even such areas as the rights of impaired persons, implementation of sanctions for criminal acts, medical care, health, transportation and telecommunications were regulated by presidential decrees.

¹⁶ Art. 101 of the constitution provides: “The President of the Republic shall pass decrees with the force of law and take emergency measures in the event of a state of war or an immediate threat to the independence and unity of the Republic, or when government bodies are prevented from regularly performing their constitutional duties. During the time the President of the Republic is exercising such powers, the Chamber of Deputies may not be dissolved. The President of the Republic shall submit the decrees with the force of law for approval to the Chamber of Deputies as soon as the Sabor is in a position to meet.”

¹⁷ Art. 17 of the Constitution provides that “[d]uring a state of war or an immediate threat to the independence and unity of the Republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the Constitution may be restricted. This shall be decided by the Croatian Sabor by a two-thirds majority of all representatives or, if the Croatian Sabor is unable to meet, by the President of the Republic.”

¹⁸ Decision of June 24, 1992, *Off. Gaz.* 49/92; in a very summary decision, it seems that the objection of violation of human rights has not been addressed at all.

However, after agreement on cease-fire and temporary cessation of hostilities, some of the decrees were abandoned. Interestingly, among those decrees that lasted the longest were the decrees that regulated judicial power. Ultimately, the decrees on judicial power in the state of emergency were abolished only at the end of 1996¹⁹, when Martial Courts were also dismantled and judges returned to their original posts.

3. Courts Act of 1993: Legitimizing the Tacit Removal of “Unsuitable” Judges

Yet, the martial laws were not the worst evil for the status and position of Croatian judges. More disastrous were the interventions that came from civilian sphere. Reforms of 1990 to 1999 in the Croatian system of judiciary may better be qualified as the lack of reform, or as an anti-reform. In fact, the very absence of a feasible and transparent mid- and long range strategy of development was a clear political message to judicial ranks. Therefore, at least until 1997, there was a strong outflow of judges to other branches of judges in the other branches of judicial profession (mostly to ranks of practicing lawyers and notaries public). To make this tendency even worse, it may be objected that most of the judges who left judiciary were again among the best qualified and experienced officers of the court. But, able and well-reputed judges were mostly the ones who had possibility of alternative carrier, and many of them considered that the their current provisional status and uncertain future of their job (which lasted in certain courts seven and more years) is too humiliating for them to stay in office.

A good example of a precarious interim status of Croatian judiciary in the beginning of 90’s is the slow pace of legislative reforms. Constitution initially required one year for all implementing legislation; however, first law to deal with the implementation of constitutional provision on judicial power was the Courts Act (hereinafter: CA), enacted at the end of 1993.²⁰ This Act provides a basic legislative framework for the organization of state judiciary (court districts and court organization), status and obligation of judges, as well as provisions concerning internal court administration and requirements for appointment, discipline and removal of judges. Most of these provisions were not substantially new and were taken over, with some variations, from previous legislation. Perhaps most interesting (and for the practical situation of Croatian judges at that period certainly most important) were the otherwise purely formal and insignificant “transitory and final provisions”.

Namely, in the period from the early 1991 to early 1994, judiciary was apparently belonging to an informal legal and constitutional limbo: though constitutionally well-protected, immovable, independent and autonomous, with a life tenure (or at least with a “until retirement” tenure), judges were in this period probably the least protected and the most fragile species in the professional universe. During this period almost none of the warranties applied, and judges were put into the position of “permanent provisionality”. Constitution provided that a body named “State Judicial Council”²¹ had to appoint,

¹⁹ The Decree on Abolishing the Decrees from the Area of Judiciary, *Off. Gaz.* of December 6, 1996.

²⁰ *Zakon o sudovima* (Courts Act) was enacted on December 30, 1993 and published in *Off. Gaz.* 3/94.

²¹ First constitutional name for this body was the Judicial Council of the Republic, but when the body was actually formed, the name in the new statute was “State Judicial Council” in order to stress that Croatia is no more a part of the federation (a “republic”) but an independent state. Characteristic for the type of behavior of that legislature, this change was performed without changing the name provided by constitution, so some critics claimed that it was unconstitutional. Only later, when Constitution was amended at the end of 1997, the two names were harmonized – in a peculiar attempt to adopt the provisions of the constitution to those of a lower act.

discipline and remove the judges. And, yet, there was no such body – and no precise rules on its composition. Constitution required a life tenure. And, yet, it was regarded that such a tenure has to be given only to judges appointed by the State Judicial Council. Previous legislation was abrogated – and, yet, there were still about a thousand of active judges who were, according to previous rules, appointed with a mandate of 8 (eight) years. In such a vacuum (that was, apparently, not entirely accidental), practice responded in various ways. E. g. , judges continued to be appointed and removed from office by Croatian Sabor (Parliament). In some five years, the mandate of a significant portion of judges expired; some of the judges simply continued to perform their functions (?!); some of them received formal decrees on the expiry of their mandate and consequent cessation of their office; and some were simply notified that they have to empty the premises due to the “new situation”.

Judiciary itself reacted as expected – judges started to change profession massively. Beginning of 90’s was the period of the largest exodus of judges. According to a fragmentary research by the Croatian Legal Center (HPC), only in 1990 and 1991 (first two years) about 200 judges (one sixth to one fifth of all judges) left the judiciary. This number is not final, because it was obtained on the basis of the analysis of the published appointments in the *Narodne novine* (Off. Gaz.) – and, according to some statements, there were also other removals that miraculously escaped the attention of this official publisher of legal news and information.²²

In this, first period, many judges anticipated their “unsuitability” and resigned with short explanations that they want to “open a private law practice”. Some of the judges left in order to candidate for a restored office of a notary public. Many of them simply went to early retirement. Still, a portion of judges waited, hoping to have their mandate extended by Sabor, or, even better, appointed with a tenure by the SJC, once it will be established.

The provisional and transitory provisions of the CA fed the hopes that the limbo of provisionality will soon be over, by providing, in Art. 100 CA, a short time limit for a “final” appointment of all judges that were appointed according to previous law – only six months from the enactment of the CA, i.e. until mid-1994. This time limit was, obviously, too short for substantial arguments on the qualifications of each candidate, but at least promised that the process will be over in a relatively short period. But, not surprisingly, this time limit was transgressed once again – and not only that *all* of the judges were *not* appointed in six months, but the *first* appointments of judges according to new legislation were made in February 1995, over a year after the CA came into effect – and were immediately challenged and struck.

Final and transitory provisions of the CA resolved, however, a crucial question of the status of “old” judges, that was prior to this act only tacitly (and not unambiguously) answered – the issue of the mandate of formerly appointed judges. The solution was simple and radical: all judges that were *not* appointed according to new legislation were

²² According to provisional results of the still unfinished research of the HPC, in the 1990-96 period there were over 2200 dismissals and appointments of judges and state attorneys recorded in the *Off. Gaz. RC* – and this number is still not high enough, since in some periods, seemingly, dismissals were not reported in the *Off. Gaz.*, and – as described *infra* in next note – after SJC took the appointment of judges, there was no systematic reporting on those judges who were dismissed by the very fact that they were not re-appointed in the course of the first appointment of the SJC. From recorded dismissals, there were in the said period 361 removals of judges without any explanation. Compare this to the number of about 1300 judges in whole Croatia.

regarded as discharged from office.²³ Connecting judicial mandate with a *negative fact* (lack of reappointment) was not encouraging for current judges, and there were opinions that such a regime violates the basic rules of judicial independence, even in a transitional and temporary stage, first, because it prevented judges from discharging the full time for which they were appointed, and second, because it lacked the certainty and foreseeability necessary for a due process of law. At least the second proved to be true: practice varied from court to court, and once again many judges were tacitly removed, even without receiving a formal document on the cessation of their mandate. Determination of the moment when the process of a “fresh appointment” was completed was also not sufficiently clear and led to varying practices. Most importantly, unlike an express removal, this “tacit removal” was impossible to challenge, and if any challenge was possible, it was only the challenge of decision by which a particular former judge who applied for a reappointment was not appointed – and, as will be shown later, this was an extremely difficult and, in essence, ineffective and unpromising process.

4. *The Law on State Judicial Council – legal profession as an alibi for political voluntariness*

The defenders of the above described governmental interventions in the judicial area basically invoked two arguments that aimed to legitimize the brutality of the intervention. On one hand, it was claimed that “old” judges are greatly the inheritance of the old, communist regime, and that many of them were compromised by their participation in political processes of the socialist era; on the other hand, it was claimed that judges were in the past disproportionately recruited among Serbs as the political elite of former Yugoslavia, and (especially under conditions of war with Serbia) they should be replaced by “loyal” Croat cadres.

Both arguments had a certain weight – but were, in our opinion, largely overemphasized and therefore wrong. Even had they been true, it might be still questionable whether they could fully legitimize the actions taken. However, it should be stated, on the account of the first argument, that (*see supra*) the judiciary in the former communist regime was, as a whole, largely neutral, although isolated and marginalized; in fact, since the systems of social regulations in “important issues” were to be found elsewhere (in political committees and communist party elite), judiciary was simply not interesting enough to be the target of political manipulations. Naturally, there were some judges and some cases (primarily in criminal proceedings) who had to transmit the orders of state politics. But, there were even times when judges disobeyed communist politics – e.g. several high ranked judges in the 1970’s (like the aforementioned Vidović, president of the Supreme Court Sesardić and judge Primorac) established high criteria of judicial behavior, and – when communist hard-liners struck against liberal and national movement of “Croatian Spring” in 1971– refused to sentence the accused in the political processes and dismissed the charges – until they themselves left the office or were removed.²⁴ Thus, the number of “compromised” and “pro-Communists” judges was low, whereas the large majority did not hold any mortgages from the past – apart from the mere fact that they were

²³ CA provided, in Art. 100/2 that “judges appointed under previous legislation will continue to perform their duties [...] as judges of the respective courts, until the process of appointment in the respective court is completed and the appointed judges resume their office”. The next article, in an understatement, provided only social security and pension issues – but led to the same conclusions: “Judge who was not re-appointed to a judicial office according to provisions of this law shall receive judicial salary and other adequate remuneration for a period of six months after cessation of the judicial mandate, unless they commence work on other job or fulfill the requirements for a full pension.”

²⁴ Indicatively, most of them played crucial roles in the reform of judiciary in the first days of Croatian independence – and again, they were either removed or forced to leave.

appointed in “other times”. Second argument on ethnic composition of Croatian courts is *in se* discriminatory and has to be rejected. If we take it seriously for the purposes of hypothetical exercise, it should be stressed that, in early 90’s, perhaps there was slight overrepresentation of judges of other ethnic groups in Croatia²⁵, but – even if we disregard the policy of positive discrimination – the reaction was so radical that, from 1990 to 1999 the situation was turned upside-down to the extent that some may even speak of “ethnic cleansing” of the judicial ranks: according to the (unpublished and apparently confidential) statistics of the Ministry of Justice from May 1999, in Croatia (including the internationally protected area of Eastern Slavonia with controlled warranties of proportional ethnic participation) 93,6% of Croatian judges were ethnic Croats, 3,1% ethnic Serbs and 3,3% “other ethnic groups”.²⁶

At this stage of our report, it is important to note the importance of the system of appointment, removal and discipline of judges. Old saying says that the road to hell is paved by good intentions – and it is common knowledge that an attempt to make a dream come true may easily create a nightmare. Still, hardly anybody could have anticipated the evolution of the constitutional concept provided for appointment of judges – the concept of a professional body called State Judiciary Council (hereinafter: SJC).

Pursuant to Art. 121 of the Constitution, “[j]udges and public prosecutors shall, in conformity with the Constitution and law, be appointed and relieved of duty by the High Judiciary Council of the Republic, which will also decide on all matters concerning their disciplinary responsibilities. The High Judiciary Council of the Republic shall have a president and 14 members. The president and members shall be proposed by the Chamber of Counties, and shall be elected by the Chamber of Deputies for a term of eight years from among notable judges, public prosecutors, lawyers and university professors of law, in conformity with law.”

The idea of a professional body responsible for conducting “internal affairs of the judiciary” is, naturally, not new. In the period of the nation-building and democracy-building optimism of 1990, this concept was introduced to Croatian Constitution on purpose, as a variation of the Roman system of appointment. The models were the French *Conseil supérieur de la magistrature* and – more importantly – Italian *Consiglio Superiore della Magistratura*.²⁷

But, the idea of the self-government of the judiciary seemed to be too avantguard for the period of transition. One aspect was the already described strategy of delaying its implementation. The other aspect followed in the process of appointment of the representatives of the legal profession, the “notable jurists” from Art. 121 of the Constitution.

The law that had to define the meaning of “notable jurists” and determine the procedure of their appointment was the Law on State Judicial Council (hereinafter: LSCJ), passed on June 2, 1993 and published in Official Gazette on June 18, 1993. According to its

²⁵ According to the 1991 census, Serbs made about 12% of Croatian population (information by the Central Bureau for Statistics).

²⁶ In commercial courts, according to that source, *all* 101 judges (100%) declared themselves as ethnic Croats.

²⁷ For the concept of Italian and French CSM *see* Senese, S., The “Autogoverno” of Italian Judiciary, *CIJL Yearbook: Constitutional Guarantees for the Independence of Judiciary*, 1992, at 61; Badinter, R., *Judicial Independence in France*, *id.* at 53.

transitional provisions, it had to come into effect on the eighth day after the publishing (i.e. on 26 June 1993), except the provisions of Chapters III-VIII that were postponed until the enactment of the respective acts on the organization of courts and the office of the state attorneys²⁸. Since these were the essential provisions on the appointment of judges and state attorneys, their discipline and removal, it meant that most of the law did not have to be applied until the beginning of 1994 (or even 1995 – for state prosecutors).

Although the provisions on appointment of the members of the SJC were not suspended, they were not appointed for next six months after the LSJC came into effect. The time of the appointment coincided with the period of intense parliamentary crisis, during which most of the oppositional parties instructed their deputies to leave the parliament, and for several months parliament enacted laws without debate, only by votes of the Croatian Democratic Community (HDZ) – the ruling party that still held sufficient majority of seats to pass decisions alone.

The LSJC determined the system of appointment of the members of the SJC that did not follow the initial Italian model of judicial autonomy, that combines appointment by position (president of the state) with autonomous choice of judicial delegates – judges selected by election among judges themselves (who hold the majority of positions). Instead, the LSJC provided that all members of the SJC have to be appointed with the 8 years mandate by the Parliament, i.e. by *Zastupnički dom* (House of Representatives) upon the proposal made by *Županijski dom* (House of Counties). To make the system more “representative-like”, Art. 3 para. 2 LSJC provided that “[t]he House of Counties shall, in the process of selection of candidates for the president and the members of the SJC, request that the Supreme Court of the RC, Minister of Justice, State Attorney of the RC, and the national Bar Association nominate persons that are considered to be suitable for the candidates”. This list of candidate-nominating bodies corresponded to the distribution of 15 places among the members of the legal profession: the LSJC gave 8 seats (president and seven members) to judges, 4 seats to state attorneys and their deputies, 2 seats to legal academia (law professors) and one seat to a member of the Croatian Bar Association.

First clash in the process of appointment of the SJC members happened in the Supreme Court, that presented two very different lists of candidates. One was compiled by the President of the SC, who regarded that he had jurisdiction to enact it without consulting the judges of the Supreme Court. Since the applicable statute provided the General Assembly of the Court to be the highest body of the Court, majority of judges met on their own motion and compiled their list of prospective candidates.

The other bodies empowered for nomination also submitted their candidates. In all cases except one, candidates were submitted for the members of the respective part of legal profession (i.e. Bar Association proposed one attorney, law faculties proposed two professors; even Supreme Court – in two variants – proposed only the judges). In the meantime, the leadership of the HDZ and Tudjman himself decided to take things into their hands: an informal commission presided by Tudjman’s counsel for national affairs Pašalić (so called *Pašalić Commission*) drafted its own list of candidates, vastly from people loyal to politics of the ruling party. Since such a body did not have official capacity to propose candidates, an innovative formula was found: such a list was presented by the Attorney General of the RC, Dr. Krunoslav Olujić – so that the Attorney General’s list

²⁸ The Courts Act came into effect on 22 January 1994 and the Law on State Attorneys on October 7, 1995.

did not only list prosecutors, but also judges and a member of the Bar. No need to say, all of the candidates from this list were accepted by both Houses, and the candidates proposed by the legitimate professional bodies designated by law were rejected. In fact, the only candidates who were appointed as members of the SJC without express political influence were two law professors nominated jointly by four Croatian law schools – and these two later turned to be the most vehement critics of the actions of the SJC.²⁹

4. *A Challenge of Constitutionality: Constitutional Court v. SJC*

The process of formation and organization of the SJC continued in the same controversial way. First act passed by the SJC was its Rules of Procedure, enacted at the session of Nov 4, 1994. Immediately, the attention of professional audience was drawn to some of its peculiar provisions, e.g. the provision that “the sessions of the SJC are open to public”, but “shall be held *in camera* during arguments in disciplinary proceedings and the process of appointment and removal of judges, unless SJC decides otherwise”. This provision, as well as the provision on the prevailing weight of the vote of the President of the SJC in the case of split voting, was attacked by the Croatian Association of Judges (hereinafter: CAJ) which initiated the proceeding before the Constitutional Court. On February 15, 1995, the Constitutional Court accepted the arguments of the CAJ and struck the said provisions of the SJC Rules of Procedure, because the SJC both transgressed its powers and violated the rights to equality of the candidates for judicial office, determining the discretionary right of the Council to decide publicly on one, and in closed session for other candidates.³⁰

The SJC commenced its actions on the day after publishing of the said CC decision. It started straight from the top of the judicial hierarchy. Its first appointment dealt with the judges of the Supreme Court – and, no need to say, proved to be highly controversial. On February 16, 1995, under signature I-1/1995, the Supreme Court issued its first appointment.³¹ The issue which arose dealt with the procedure of appointment, and primarily concerned not the judges who *were* appointed, but the judges who *were not* appointed (and who were, thereby, dismissed from their office). In the process of appointment, the SJC still held the opinion that it has, seemingly, full discretion with regard to the appointments. Therefore, the appointments were made almost without any discussion and explanation; moreover, the SJC did not even request the necessary opinion on personal record and abilities of the particular Supreme Court judges by the President of the Court.

²⁹ One of them, Professor Davor Krapac, head of the Department for Criminal Procedure at Zagreb Law School, published some of his observations (wrapped in a comparative study) in a paper and reacted on the number of occasions during. *See* Krapac, D., *Nezavisnost sudaca kao postulat pravne države: njemačka iskustva, hrvatski problemi* [Independence of Judges as a Postulate of the Rule of Law: German Experiences, Croatian Problems], *Politička misao*, Vol. 34 (1/1997), 63-111.

³⁰ *See* Off. Gaz. 11/95. At the same day, the CC ruled on another petition, submitted by the SC President Milan Vuković. He argued that the provisions of the Law on SJC according to which the SJC has to appoint the President of the Supreme Court upon proposal of the Government violated the constitutional principle of separation of judicial and executive powers. The CC rejected this petition concluding that the principle of separation of powers does not mean absolute disconnection, but the mutual control of the branches of government. It pointed to several examples of perplexing of the various branches, including the position of the Constitutional Court itself, that is neither part of judicial, nor of executive, nor legislative branch of government. For political background of this Vuković’s petition *see infra*, Part III.2.

³¹ Although appointments of judges were previously (while they were in the jurisdiction of *Sabor*) published in the Official Gazette (*Narodne novine*), this and some subsequent appointments were never officially published. Only later has the SJC resumed the previous practice of publishing.

The opinion of well-informed professional circles and the large part of the critical public was that those who were appointed were not always judges of the best professional standing, whereas it was obvious that several well-reputed and highly recognized judges, examples of personal qualities and independence (such as Judge Vladimir Primorac or Judge Ružica Horvatinović) were *not* re-appointed precisely because of their strong opinion on the necessity of the judicial independence and opposition to some of the most notorious proponents of the governmental intervention in the sphere of judicial power. Large part of the judges who lost their jobs were notable members of the Croatian Association of Judges, among others also the acting President of the Association Dr. Petar Novoselec (who was also the editor of the *Iudex*, professional journal of the Judges' Association, which thereby ceased to exist) .

Among those who submitted their application but were not appointed was also Ivica Crnić, the acting Minister of Justice, who took this duty while he was a Supreme Court judge and expressed his wish to return to his previous office upon expiry of his mandate as MoJ.³² Several weeks later, on March 3, 1995, Minister Crnić submitted his resignation to the Prime Minister Valentić, explaining it in an open letter (largely ignored and unpublished in the state-controlled media) by his failure to counter the actions of the President of the SJC Potrebica and the President of the Supreme Court Vuković that, in his view, were highly destructive for the position and status of judges, judicial power and the government of the rule of law in general.

Soon after the appointments (i.e. dismissals) of Supreme Court judges were made, they were challenged by the constitutional complaint (*Verfassungsbeschwerde*) before the Constitutional Court. The 13 candidates for the Supreme Court judges alleged that the appointments were illegal for various procedural and substantial errors, especially because there was no substantial discussion on the qualities of the candidates.

The SJC rejected the allegations of the constitutional complaints, arguing that the Constitutional Court had no jurisdiction to rule on this issue. Its position was that the Council is “neither a body of executive, nor judicial power”, and that, therefore, its appointments cannot be challenged because they did not fit the description of “any act of judicial or executive power or other body with public authorities” that is considered to violate fundamental rights and freedoms of any person.³³

In its decision of March 29, 1995, the Constitutional Court rejected the jurisdictional argument and established that the way in which SJC performed appointments was illegal, and struck down the whole list of appointments, ordering the SJC to repeat the process of appointments within three months. Explaining such decision, the majority of the

³² Ivica Crnić was one of those who insisted on professional abilities and proved experience of the candidates. In mid-1993 he tried to reach the consensus of legal profession on potential candidates for the members of the SJC by a series of polls among courts, state attorneys, bar association and other professional organizations. Ultimately, this effort did not have any success and for SJC members were appointed judges and attorneys who were largely viewed as “politically correct” and obedient to the line represented by M. Vuković and his close associate M. Potrebica, who became president of the SJC. Thereby Crnić belonged to the political line opposed to those of the majority of the DSV, including, especially, Vuković and Potrebica. However, when his appointment to SJC was refused, he did not join the application to challenge the appointment of Supreme Court judges before the Constitutional Court (see *infra*, next paragraph).

³³ See Art 28 para. 1 and 2. of the Constitutional Law on the Constitutional Court (defining who may submit constitutional complaint before the CC).

Constitutional Court (with one dissenting opinion³⁴) established that the performed appointments violate the right to equality of candidates and the equal right to access to public offices. These violations consisted in the course of appointments, where no written opinion was given on particular abilities of the candidates, and as stated in the explanation, “were given only orally (and not in a very qualitative way)”.³⁵ Another illegality in the process was the fact that, although Ministry of Justice opened contest for 37 judicial posts in the SC, the SJC decided to appoint only 25 judges. The appointment itself went very hastily – first, the President proposed that 25 places will be filled; second, he presented a list of 25 candidates which seemed suitable to him; third, the SJC voted and accepted the list; fourth, a vote was made for the rest of the candidates, and all of them were not appointed. All voting was done by majority of votes – only two votes against were of the SJC members from the ranks of the law professors. For all these reasons, the Constitutional Court ruled that the SJC violated the candidates’ right to equality and equal access to public offices and expressed its hope that the SJC will change its behavior and engage in substantial arguments on candidates’ abilities in the future.

The SJC did not follow the advice of the CC ruling. On the contrary, in its decision of April 27, 1995, the SJC repeated the process of appointment – and passed exactly the same decision. The new decision was challenged before the CC once again, this time by 10 candidates (three decided to give up).

Again, the CC annulled the appointments of the SJC. However, interestingly, the contents and the arguments of the decision changed, reflecting perhaps the change in the political situation (resignation of the MoJ that caused balance to be shifted in favor of the hard-liner stream of the SJC) which forced the CC to partially retreat from its initial standing. Namely, this time the CC did not strike down the whole decision, but only the part that dealt with the petitioners – 10 non-appointed candidates. This time, the CC did not insist on its prior position according to which the SJC was not empowered to voluntarily change the number of appointments from 37 to 25, and even used this fact to reject the allegations that the appointments violated the provisions on representation of ethnic minorities – arguing that there were anyway 12 open slots for future judges that could ensure appointment of judges of other ethnic groups.

The CC remained with its prior position with respect to the necessity of the written opinion of the president of the court. This time the SC President Vuković did, however, issue the opinion – but it was the opinion that was brought to the SJC session and read to the members prior to voting. Some parts of the CC explanation described and criticized the particularities of such a “written opinion”. So the CC established that “[i]nstead of the evaluation of the overall work and activities, only one or two judgments were selected from the work of particular judges, and they were used as the ground for the opinion on their unsuitability for judicial office”. Even more, such judgments were mostly the decisions of collegiate bodies, so that the CC argued that it could not have been the reason for evaluation of work of particular member of judicial senate – and

³⁴ Judge Bartovčak considered that, although the rights of 13 applicants were violated, that does not affect the other appointments, and considered that the CC should not have struck the whole list of appointments, but only establish violation with respect to the applicants and order repetition of the process with regard to them.

³⁵ Furthermore, the Court established that “[T]he consequence of such error was that, at the meeting of the SJC, there was no substantial discussion on professional and other qualities of the candidates for the Supreme Court, there were no reasons why some of them are proposed for appointment, and some not, so the passing of the decision was reduced to a mere voting without any arguments.”

especially not the assumptions on voting and dissenting opinions of such members. Also, the “opinion” had, without criteria and arguments, quoted the participation of only two judges in political processes before 1990 as aggravating circumstance, and, finally, “lack of criteria was obvious for some other candidates who submitted constitutional complaints [/names of four candidates/] insofar that in the opinion on their work there are hardly any arguments appropriate for objective evaluation of their professional ability, independence and suitability for performing judicial office”.³⁶

Some other arguments of the constitutional claims were, however, rejected. So the CC determined that the decisions on appointment do not need to be explained (have grounds of the decision) and that there was, therefore, no violation of the constitutional right to appeal and judicial review of the legality of individual acts, nor the violation of the right to be heard (the right to a fair trial). Eventual violation of the right to be heard because the lack of possibility of particular candidates to react and comment on the “opinion” and the evaluation of their work was not even taken into consideration at this occasion.

Perhaps the most significant part of the decision was the rejection of the most fundamental and far-reaching argument raised in one of the constitutional complaints. Six candidates jointly challenged the appointments because the SCJ itself was not elected in conformity with the Constitution, in a way prescribed by law. It was argued that one of the constitutional rights of the candidates is to have his application decided by the legally nominated and selected body, in a procedure that warrants the full equality of the candidates and their equal access to judicial office under conditions provided by law. The CC refused to consider this argument, because it implies the challenge of the decision of the House of Representatives who elected the SJC members, and, in the view of the Constitutional Court, it did not have jurisdiction to examine such decision.

The change of attitude of the whole CC (a “softer”, less consequent and more compromising approach to SJC and its appointments of judges) may, almost anecdotally, be illustrated by the fact that the decision was again passed with one dissenting opinion, issued by the same judge who dissented in the first case. But, since the majority this time departed from its initial view and accepted, essentially, his position (the whole decision should not be struck, but only its part dealing with candidates who submitted complaints), this time he abandoned his prior position and arguments and opposed to any striking of the controversial appointments.

The final result of the repeated annulment was thereby weak: the CC this time only ordered the SJC to repeat the appointments based upon the opinion of the President of the SC that shall conform to formal requirements set by law and that is communicated to the members of the SJC in advance. This requirement was not difficult to fulfill – and although this might have been a signal to the SJC of the CC’s willingness to compromise, it seems that the SJC construed it as a signal of weakness: it simply repeated the process and rejected the controversial candidates once again.

Further appointments of judges were no less disputable. So, the CC annulled the SJC decision on the appointment of judges at Commercial Court in Zagreb³⁷ of February 8,

³⁶ From the CC decision in cases no. U-III-520/1995 U-III-530/ 1995 U-III-534/ 1995 U-III-537/1995 U-III-540/1995 of Nov. 30, 1995.

³⁷ One annulled SJC appointment (CC decision of 18 March, 1997) considered the application of the acting president of the Commercial Court Ante Gverić, who was in the course of the first appointment both

1996 (CC decision of 18 March 1997); another annulled appointment was the appointment of a judge at the District Court in Split.

Although the vast majority of the submitted complaints were sustained, there was also contrary examples. So the CC rejected the application of the discharged former President of the Administrative Court, as well as the application of the discharged former President of the High Commercial Court.³⁸

Altogether, the annulments of appointments did not have much impact neither on the activities of the SJC nor on the final outcome of the appointments. However, they raised the public awareness of the SJC profile and drew the attention to their activities.

III. Some Features of the Crisis of Croatian Judiciary in the Second Half of 1990's

1. Forging a Presidential Oligarchy: Court Presidents as Political Disciplinarians

After the episode with the short presidency of the first post-communist President of the Supreme Court Vjekoslav Vidović,³⁹ and even shorter presidency of the next president, his deputy Zlatko Crnić who died in a tragic car crash only several months after his appointment for president, the era of professional, politically neutral presidents of the courts seemed to be over. Next president of the Supreme Court Milan Vuković was a political appointee – a practicing attorney who had previously no judicial experience, but became a known political figure for his representation of defense in political prosecutions of communist regime, among other of President Tudjman, who himself determined him to be holder of highest judicial posts. In early December 1991, he was appointed judge of the Constitutional Court⁴⁰ – but, that was the short appointment, because he left this court less than a year later, allegedly on personal request by President Tudjman, to become the President of the Supreme Court at the end of November 1992.⁴¹

As the President of the SC, Vuković never acted as *primus inter partes*, what was – according to doctrine and legal literature – the regular role of the court president. Instead, from the beginning he deviated from the usual patterns of behavior, showing that he consider his principal role to be “disciplining” the judges, or even more – forcing the court and particular judges to fulfill his orders. His relation to fellow judges was disastrous – they regarded him as legal ignorant, whereas he labeled them as remnants of the old regime, unable to perceive their role of pursuing national interests and apply the law in a “flexible” way that would concur with high objectives of the ruling party and President Tudjman. On the other hand, Vuković was never shy of media, especially the state-controlled ones. He gave multiple statements and interviews, never failing to appear in the front row of any state manifestation. In his official biography, he stressed his

discharged from his presidential office and from his position as judge. The other appointment considered another candidate in the process (CC case U-III-152/1996, decision of March 26, 1997). In the explanation of the both decisions, the CC again established that “it is contrary to rule of law (Art. 3 of the Constitution) to root the opinion on mere statements, without enumeration of grounds, and present the moral figure of the candidate is characterized in utterly negative context.”

³⁸ See decisions U-III-185/1995 and U-III-186/1995 of 5 July 1995.

³⁹ See *supra*, notes 6-7 and the accompanying text on the discharge of Vjekoslav Vidović from the office of the Supreme Court President.

⁴⁰ *Off. Gaz.* 66/91 of Dec 9, 1991.

⁴¹ *Off. Gaz.* 82/1992 of Dec 1, 1992.

closed ties with the Catholic Church, and his Croat ethnic origin “both from his mother’s and father’s side”. Talking about his perception of judicial power, he always put “human qualities” and “honesty” before professional qualities and knowledge of judges. He emphasized the need to free judiciary from those judges who acted in political processes and were compromised in the past – but this policy was not consistent, since among those judges who he preferred were some of disputable past, whereas at the same time he contributed to dismissal of some of judges with clear record, even with known reputation of dissidents.

Perhaps the most famous statement that Vuković made was given in the context of the debate on war crimes on the territory of former Yugoslavia. Faced with accusation that some Croatian units committed atrocities in military operations, he publicly announced that “Croats could not commit war crimes”, since “Croatian people was a victim of aggression and conducted a just war”. That statement was frequently emphasized by Vuković’s opponents, but did not have any personal or political consequences to him until it was not raised at the level of an international problem.

As President of the Supreme Court, Vuković created clear fronts of friends and enemies. Although he was appointed from the position of Constitutional Court judge, his relation with the CC was tense (as noted above under ??? – the CC struck several appointments made upon his proposal as unconstitutional, and rejected his petition against the LSJC). Other target of his attacks was the Ministry of Justice, both under Minister Crnić and subsequent ministers Šeparović and Ramljak.

On the other hand, Vuković had a very close relationship to the SJC, and many observers regarded that Ante Potrebica, President of the SJC, a pale person practically without any judicial experience⁴² was actually his choice (or even his marionette), and Potrebica often confirmed these theses by his actions. He was especially instrumental in the “lustration” of the judicial cadres shaped according to Vuković’s schemes. In such a way, many judges in the Supreme Court who expressed criticisms of his methods, or simply were not enough obedient, lost their job in the course of the first (non)appointment.⁴³

Speaking of Vuković’s methods, some of his statements show that he imagined the court system to be the a simple hierarchical pyramid with the Supreme Court (i.e. its president) on the top.⁴⁴ During his (first) mandate of the SC President, he issued several ordinances (mostly informal) to judges, e.g. prohibited judges to appear in seminars and in other scientific activities without his express approval; cut the budget for continuing education of judges and for professional literature (e.g. he prevented the SC from buying several copies of the collection of papers on the independence of judiciary).⁴⁵ He also prohibited judges and lower courts to publish any judgements or other judicial decisions and argued

⁴² Potrebica was appointed as the judge of the Supreme Court while he was an assessor in the Supreme Court.

⁴³ See *supra*, Part II.3 and II.4.

⁴⁴ In fact, Vuković submitted in spring 1997 a draft of the new Courts Act, that mirrored the same ideal. According to this draft, powers in the system of justice would be concentrated in two institutions, in the hands of the Supreme Court (that would cease to decide in most of the concrete cases and focus on “principled issues” and court administration) and in the State Judicial Council. This proposal was, however, not accepted.

⁴⁵ In a less saving mood, a number of renovations of court buildings, starting with the Supreme Court building in Zagreb, were performed at the same time.

that to be the task of the Supreme Court (but has never contributed to formation of an effective system in which at least the Supreme Court decisions would be accessible).

In such a model of judicial power, special role was attributed to presidents of the courts at every level. They had to keep a low profile and be “loyal” *vis-à-vis* Vuković and his associates at the SJC and mirror his example in their courts. Some of the court presidents who were forerunners of such policies and who had especially good record in execution of the political dictate of Vuković (and, through him, the hard-liner wing of the ruling party, HDZ) were also appointed as members of the SJC. No need to say, Vuković himself was a member of the SJC during his mandate(s) of the SC President. In such a way, original constitutional concept of the Judicial Council as a body of judicial *autogoverno* was brought to travesty: instead of a representative body of the legal profession, important decisions on judicial human resources were made by a body that had neither representativeness, nor democratic origin and accountability.

Poor professional and human qualities of some of the such elected court presidents were presented to public sometimes in a very radical way. Several of them were protagonists of scandals that transgressed the borders of judicial profession. E.g., Ante Šarić, the president of the Municipal Court in Split (who was, according to some newspapers, the main responsible for judicial *chistka* in that city), was personally responsible for non-enforcement of several judicial decisions by which the evicted tenants of non-Croat origin had to be returned to their homes, and when this affair became public, wrote a letter in which he accused the judges who passed such decisions to be “traitors of the state”. Other court president, Petar Kljajić, got into the headlines when he publicly attacked the police and tried to use his influence to exculpate his son for his misconduct. Only after some time, when public outrage went too far, were these two forced to submit their resignations.

2. The “Olujčić case”: appointment and removal of the President of the Supreme Court

Although he had a strong support from hard-liner wing of the ruling party and President Tudjman himself, Vuković could not hold his position of the President of the Supreme Court for longer time. After his statements on war crimes became an international problem, it was decided that he will change his place in a next reshuffling of leading office-holders. He himself issued statements at the end of April 1995 that he has no intention to leave his office; at the same time he initiated proceedings before the Constitutional Court⁴⁶. But, only several weeks later, Vuković submitted his request for dismissal from the position of the President and judge of the Supreme Court. His next post was his last one – the position in the institution with which he had so intense confrontation during his presidency – he became a judge of the Constitutional Court.

New candidate for the president of the Supreme Court upon proposal of the Government of the RC was the Head of the HIS, the chief coordination of Croatian secret services. It was Dr. Krunislav Olujčić – the same person which, while holding the post of the Chief State Attorney, made controversial proposal for the members of the SJC. He and Vuković shared the political background – connection to the ruling party – but belonged to its quite different wings. There was also a strong personal animosity between them. Unlike Vuković, who came to judiciary from the law practice, Olujčić was a former law professor in Osijek, where he taught family law. In legal community, he was

⁴⁶ See *supra*, note 30.

at the time regarded as perhaps corrupt and careerist, but his legal skills were generally not denied. Therefore, Vuković seemingly vehemently opposed the idea of Olujić replacing him at the steering wheel of the Supreme Court – and counted on his good relations with President Tudjman against the Government and Prime Minister who were about to propose Olujić. He even initiated the already noted procedure with the Constitutional Court challenging the authority of the Government to propose the Supreme Court President. Anyway, he remained in minority, both politically and with his legal arguments – and, confirming his reputation of loyalty with the ruling party, he resigned when he was asked for it.

In such a way, Olujić was proposed as the SC President at the end of April 1995. The SJC delayed his appointment for about a month, but ultimately appointed him on May 18, 1995. It should be noted that, in spite of the fact that the members of the SJC were elected (in previously described questionable way)⁴⁷ upon his own proposal, Olujić had never established a good relationship with the members of SJC and its president Potrebica, who remained to hold the side of Vuković.

As the president of the Supreme Court, Olujić suddenly changed his policy and way of behavior. Considering himself protected by constitutional and legal guarantees of the independence of judicial power (this time having a final “permanent” mandate), he undertook some moves that were unpopular with the ruling Tudjman’s party HDZ. As first, instantly after his appointment, he cancelled his membership in the HDZ (refusing to “freeze” it like the other political appointees). He also did not play the expected role while he performed the most important political role of the SC president; namely, the SC President is by law designed to also be the president of the National Electoral Commission. In such a capacity Olujić acted at parliamentary elections that took place on October 29, 1995. At the said elections, the ruling party suffered considerable losses, and it seemed that Olujić gave signals that he had no intention to help offset these losses. Finally, Olujić was also not shy of media, which published a number of interviews in which Olujić criticized Vuković and Potrebica.

Understanding the importance of the position in the SJC, Olujić insisted that he fills in the place that remained vacant when Vuković went to Constitutional Court (and in such a way *ex lege* lost his place in the SJC). But, the SJC hesitated to appoint him for almost a year, finally appointing him as a SJC member in April 1996. But, the SJC only seemingly yielded, and it remained covertly or overtly hostile to him. This included the members from the ranks of the state attorneys (previous Olujić job) as well as those from the ranks of judges – mostly presidents of the courts hierarchically subject to the Supreme Court. Maybe they realized that Olujić’s political credits ran out, and maybe they did not like his extrovert and perhaps a bit too narcissistic style. In any case, it seems that Olujić faced a silent boycott from his subordinate fellow court presidents during his mandate – and they also contributed to its untimely termination.

In the second half of 1996, it became evident that the ruling party would like to see Olujić leave his post. According to his own words, he was approached by some highly ranked officials and offered a pleasant sinecure in diplomacy – an ambassadorial post or so – in exchange for his request for dismissal. Olujić refused all offers and was determinate to stay in his “permanent” and “protected” office at the Supreme Court.

⁴⁷ See *supra* Part II.3 *in fine*.

Olujic's disobedience and sudden high-principled adherence to the rule of law and foundations of *Rechtsstaat* were too much for his former political mentors. Allegedly, it was President Tudjman himself who made decision that he has to be removed at any cost.

On November 11, 1996, less than year and half after his appointment, the same body that proposed him – the Government – initiated with the State Judicial Council disciplinary proceedings against the President of the Supreme Court, Dr. Krunoslav Olujic.⁴⁸

In the government's petition, it was alleged that Olujic severely offended the honor of judicial office and insofar committed a severe disciplinary offense, for which he should be removed both from his duty of SC president and the judge of this court. It also requested that the disciplinary proceedings be confidential, and that Olujic should be suspended from the office.

The allegations and evidence that government submitted was quite unusual, as almost everything in this case. It was alleged that the President of the Supreme Court "1. during 1996 had several sexual relations with persons of minor age⁴⁹ [...]; 2. that he had friendly contacts with B. Č., a previously convicted person, and that he used his influence to help his interests". As evidence, the Government offered the audio tapes of Olujic's phone conversations with B.Č. and S.Š. obtained by a secret operation of the Office for Protection of Constitutional Order, one of several Croatian secret services (that was also supervised by Olujic while he was the head of HIS). The wiretapping was allegedly performed during routine operation of surveillance of unlawful activities⁵⁰ whereas the targets were the two men with whom Olujic spoke, and not Olujic himself (he just "jumped into" the wired telephone lines). The required permission to wiretap (issued according to law by the Minister of Interior) related therefore only to the two mentioned persons, and not to the President of the Supreme Court.

The disciplinary proceedings against Olujic were organized hastily.⁵¹ On 21 November 1996 the President of the SJC appointed a senate of five members to decide on the request for his suspension. Five days later the Government's request was for the first time notified to other members of the SJC and to Olujic himself, and he was served a decision on his suspension only ten minutes later. The decision on suspension, as well as subsequent decision that rejected Olujic's appeal thereupon, was made *in camera*, in a procedure that was closed even to the accused and his attorneys. Only in a later procedure in which the SJC had to finally decide (in *plenum*) on his responsibility, the representatives of the defense had access and the right to speak – but the procedure as such remained closed to public in spite of the petition of Olujic and his attorneys to make it public.

⁴⁸ According to allegations of Olujic himself, the Government decided that after decision of the National Security Council presided by President Tudjman who himself made proposal to initiate the proceedings, and later decision by the Presidium of the HDZ.

⁴⁹ At some time, it seemed that the alleged persons were of male sex, but this was subsequently revoked.

⁵⁰ Police alleged that B.Č. was tapped due to his previous criminal record, and S.Š. because of the "protection of national security against persons who have expressed Moslem-fundamentalist opinions."

⁵¹ The induced speed of the procedure may be seen from the fact that this was only second disciplinary proceedings conducted against a judge by the SJC, and the first one, that dealt with an issue of minor importance in comparison with this one, lasted in the first instance about a year. This procedure lasted in the first instance some three months.

During the disciplinary procedure, another peculiarity arose – namely, amidst of the SJC hearing, one of the members of the SJC, President of the County Court in Pula, Ivan Milanović, offered to testify as a witness against Olujić. He changed the role and excluded himself from the SJC only after he heard the complete defense and interrogation of the accused – in which he himself actively participated and posed him questions – another questionable practice that was, naturally, attacked by the representatives of the defense.

In the course of the proceedings, another jurisdictional battle took place. Olujić and his attorneys requested exclusion of the SJC President and two members of the Council, State Attorney Hranjski and attorney Marić, “because they were principally responsible for the delaying of his appointment for SC President; because of their notoriously spoiled relationship, caused by differences in the perception of the notion of independence of judiciary and the methods of appointment of judges by the SJC”. The body competent to decide upon challenge of SJC members was not expressly determined by law. The request was addressed to the House of Counties, the upper house of the national parliament Sabor that was otherwise competent to rule in second instance on SJC decisions on appointments. However, this body rejected the jurisdiction for challenge. This time, the Constitutional Court, finally called to resolve this issue, confirmed the position of the House of Counties and ruled that the body to decide upon request for challenge of President and members of the SJC is the SJC itself⁵² – and the SJC consequently rejected the request⁵³. Another Olujić’s petition that was rejected was the constitutional complaint against the decision on his suspension – the CC determined that it has no jurisdiction to rule on it, since procedure for final determination of his civil rights is not over, and the decision on his suspension is only of provisional nature.⁵⁴

The main oral hearing commenced a day after the CC ruling on jurisdiction for challenge of SJC members, i.e. on January 9 and lasted until January 14, 1997 when the SJC decision was announced. It was determined that Olujić is guilty for a part of Government’s allegation, i.e. that he has communicated and mediated in favor of the previously convicted persons; charges for his sexual misconduct were rejected as unfounded. However, this determination was sufficient to convict him for disciplinary offense and discharge him from duties in the SC.⁵⁵ This decision was confirmed by the House of Counties that decided as appellate body, and Olujić thereby ceased to be the SC President on February 19, 1997.⁵⁶

In such a way, the post of the Supreme Court President was vacant again. After experience with Olujić, this time the Government was determinate not to repeat the same mistake once again. Therefore, it resorted to proven solutions: Supreme Court got a new old President. On February 25, 1997, the SJC appointed Milan Vuković for the second time as the President of the SC.⁵⁷

But, “Olujić case” was thereby not over. Olujić made use of his last means – he submitted again a constitutional complaint against the decision on his final removal from

⁵² CC decision U-IV-947/96 of January 8, 1997, *Off. Gaz.* 2/97.

⁵³ With respect to Potrebica and Hranjski; attorney Marić, after the petition for his exclusion was made, withdrew “from principled reasons”.

⁵⁴ CC decision U-III-949/96 of January 23, 1997, *Off. Gaz.* 8/97.

⁵⁵ SCJ decision I DP-2/1996 of 14 January 1997.

⁵⁶ House of Counties decision of February 19, 1997, *Off. Gaz.* 22/97.

⁵⁷ *Off. Gaz.* 28/97; Vuković resumed his duty on February 28, and on the same day he was discharged from his position of the judge of the Constitutional Court.

the Supreme Court. Unlike other actions in this case, which were taken in an unusually speedy way, the constitutional complaint had to wait for over a year before the decision was announced. When a large part of public had already thought that this matter is closed, on April 17, 1998 the CC ruled that the disciplinary proceeding against Olujić violated his constitutional rights and annulled decisions on his discharge made by the SJC and the House of Counties, returning the procedure to the SJC for retrial.⁵⁸

The Constitutional Court found that the disciplinary procedure against Olujić could not be subsumed under the notion of the fair trial guaranteed (in respect to criminal or quasi-criminal proceedings) by Art. 29 of the Constitution. Especially, the procedure explicitly violated the rule that illegally obtained evidence may not be used in judicial proceedings. The CC determined that, although permissions to wiretap existed, they did not relate to Olujić but to his partners in phone conversations, so the tapes should not have been used in the process against him. The Court also criticized the practice of a SJC member appearing as a witness in the course of the procedure, stating that Judge Milanović, had he intention to appear as a witness, should have excluded himself at the beginning, and not in the middle of the proceedings. His appearance in double capacity also violated the notion of a fair trial, so the CC.

However, in otherwise very clear and short CC decision, the last paragraph, inserted *obiter dicta*, produced certain stunning and confusion. Namely, the CC added that “[t]he constitutional position of the Court [...] is that the decision made does not affect the rights of the current president of the Supreme Court of the RC, who was appointed in due process according to Constitution and law after final conclusion of the disciplinary proceedings against the applicant”.⁵⁹ Since the dispositive part of the said decision simply and unconditionally annulled the decision on Olujić’s removal from his position, many observers concluded that, according to such a position, Croatia presented a constitutional paradox, namely a unitary state with two concurrently acting Presidents of the Supreme Court.

The SJC waited some five months before the retrial against Olujić – allegedly because, by repetition of disciplinary procedure, it had to admit that he actually *was* the President of the Supreme Court in that moment. In the repeated procedure, the Government changed incriminations and narrowed the factual grounds to the “appearance of Olujić in public with persons of criminal past”, what “violated severely the honor of judicial duty”. Instead of illegal evidence, that was excluded from the file, Government offered two additional witnesses, and the SJC decided to hear three more. Olujić once again challenged the President and three members of the SJC; the request was denied.

It was therefore no surprise that the new decision of the SJC, although formally rooted on different premises, was substantially same as the old one: on October 7, 1998, the SJC once again discharged Olujić. This decision was confirmed by the House of Counties on November 10, 1998 and thereby became final only a day before the expiration of the statute of limitation in this disciplinary proceedings.⁶⁰ Next day Olujić announced that he will continue to fight and submit again a constitutional complaint before the Constitutional Court, and, if necessary, go on and submit his case to the European Court

⁵⁸ *Off. Gaz.* 58/98.

⁵⁹ From the CC decision, *id.*

⁶⁰ *Off. Gaz.* 149/98 of November 17, 1998.

of Human Rights in Strasbourg.⁶¹ No further decisions were passed in this case until the closing day of this report.

3. Second Mandate of M. Vuković: the Continuation and the Peak of Judicial Crisis

The return of Milan Vuković to the Supreme Court did not bring any improvement to the state of Croatian judiciary. His behavior remained unchanged, as well as his relation to other institutions. This also applies to his relations with the Ministry of Justice, that was marked by steady conflicts. Although Crnić resigned, his successor in the position of the Minister of Justice, his previous deputy Miroslav Šeparović, was no more enthusiastic about the Vuković's ideas of the reform of justice.

The result of the described state of uncertainty in the judiciary, marked by constant outflow of able judicial cadres to other branches of legal profession, as well as of a series of scandals and frequent changes in the pole positions of the national judiciary was the permanent worsening of the state of affairs in judicial sphere. Once barely noticeable by the general public, judicial problems were now raised to the headlines of newspapers and to the heated issue of political debates. It became notorious that judiciary is in crisis – both with respect to the speed of judicial process, and with respect to the quality thereof.

During his next mandate of the President of the Supreme Court, Vuković once again tried to impose his vision of the necessary tools for the reform. His ideas were again focused on the Supreme Court and his *ceterum censeo*, the formation of the new intermediate court that would have to lift the burden from the SC, the new High County Court. Therefore, in May '97 he submitted his new draft of the reformed Courts Act. However, this draft was of so poor quality that the Ministry of Justice did not even want to take the responsibility for it, and thus, after a series of objections, it was declared to be a non-paper that only accidentally reached the public and the parliament.

Vuković was persistent and continued to insist on his views. In the beginning of 1998 he almost managed to break through, assisted by his old allies, the SJC President Potrebica and the *gleichgeschaltete* majority of the SC judges. This last attack coincided with the new reshuffling of the HDZ government, whereby the Minister of Justice M. Šeparović⁶² was replaced by the former Croatian Ambassador to Austria, also former professor of Zagreb Law School, Dr. Milan Ramljak.

But, Ramljak was even less impressed by the Vuković's proposals. Learned to make decisions based on hard facts, he tried to assemble some data that would provide

⁶¹ On December 6, 1997, Croatia became a party to the European Convention for Protection of Human Rights and Fundamental Freedoms. Thereby, cases such this one could also potentially fall under jurisdiction of the European Court, *e.g.* because of the violation of Art. 6 of the Convention. *See* Uzelac, Hrvatsko procesno pravo i jamstvo pravičnog postupka iz EK [Croatian Procedural Law and the Right to a Fair Trial Under the ECHR], *Zbornik Pravnog fakulteta u Rijeci*, Vol. 19 (Suppl.), 1998, pp. 1005-1030.

⁶² Embodying the curious connection of pole positions in judiciary with secret police, new position to which M. Šeparović was appointed to was the director of HIS, the coordination of national secret services. At this position he replaced Miroslav Tudjman, the son of President Tudjman. But, he did not remain long in this position. Several months later he submitted his resignation, allegedly while he could not give his consent to wiretapping of journalists. Perhaps as a kind of revenge, Šeparović was subsequently arrested under suspicion that he disclosed confidential data on wiretapping of journalist and other exposed individuals to *Nacional*, a weekly paper that often managed to get grasp of embarrassing data from national secret services. The charges against him were dropped after a few months of investigation.

empirical basis for the reform, instead of relying on more or less educated guess of previous attempts. In April 1998, the Sabor (Parliament) gave him a task to prepare basis for the future reforms. In next six months, Ministry of Justice compiled various data from the courts and the other available statistics and submitted, in November 1998, the first relatively public and informative survey of the state of Croatian judiciary.⁶³ As the greatest problems of the judiciary, the report specially addressed the duration of the proceedings, and the backlogs of old cases. Among the urgently needed measures, the Ministry proposed the passing of new law on judicial salaries that would radically raise judicial income, and the finalization of the process of appointment of new judges who would fill in the vacant slots. Other proposed measures included eventual introduction of two-shift work in certain courts; reform of procedural legislation; introduction of new institutions that would lift the burden of cases from courts; and strengthening of the controlling role of the Ministry with respect to judicial administration, that would involve stricter responsibility of the “leaders of judicial bodies” (evidently meaning presidents of courts). The ideas of introduction of new courts (*i.e.* the Vuković’s idea of the introduction of the High Appellate Court), so the Ministry, would have to be “left to doctrinal debates and comparative analysis of material”. When Vuković repeated his requests in this direction at the conference of Croatian Judges in Trogir same month (Nov 98), Ramljak iterated that it will not happen “as long as he is the minister”.

In the meantime, the crisis of judiciary continued, making bigger and bigger waves in national and international public. The decisive strike came from the very top of the state hierarchy: in January 1999, during his traditional annual address to people, unusually large and high placed position was given to the problems of judiciary. Among other statements, the address requested “stricter responsibility for performance of judicial duty, including a principled application of disciplinary measures for poor work and other forms of undue process.

In only a few days following publication of Tudjman’s address of January 21, 1999, a tempest arose in the whole national judiciary.

On the following day (Jan 22,99) the speaker of the ruling party announced “changes at the very top of the Office of the State Attorney and the Supreme Court”. As a loyal “soldier of the party”, Milan Vuković next day “offered his resignation to a position in the Supreme Court”, adding that his return to the Constitutional Court would “contribute to a harmonious relation of this court and the Supreme Court, what was particularly criticized by Tudjman. Naturally, after only a few days, Vuković was again (for the second time) appointed to the Constitutional Court, although a majority of Constitutional Court judges (six of eleven) sent a letter to the Parliament opposing to Vuković’s nomination, because “he himself prevented judiciary from regular work.” Some of the judges even went further and added, off the record, “Vuković showed in his public statements that he does not know the Constitution enough to be the Constitutional Court judge”. The Croatian Association of Judges also protested, requiring in a public letter from Vuković “to declare publicly his sudden decision to waive his mandate of the SC President”. In spite of such protests, Vuković became the CC judge again on March 1, 1999. At the pole position of the Supreme Court his successor was Marijan Ramušćak, a less compromised former judge – but still with the strong record of membership in the ruling party, that included his position as the

⁶³ MoJ Report entitled “The State of Croatian Judiciary – An Analysis and the Proposal of Measures” of October 1998.

Governor (Župan – head of local government and self-government) of one of the Counties.

Approximately at the same time, the State Department issued its regular report on the state of human rights in the previous year. In the report on Croatia, issued on February 26, 1999, problems of judiciary were especially emphasized. Under heading “Denial of Fair Public Trial”, the State Department concluded that “[l]ow pay for judges, combined with cumbersome and opaque selection procedures by the State Judicial Council, and its apparent reluctance to process all applicants for open positions, left the courts with at least a 30 percent shortage in the number of judges. The judicial system also suffers from a massive case backlog. Cases involving average citizens drag on for years, while criminal libel suits or other cases affecting high-level government officials are heard within weeks under ‘urgent proceedings’”.⁶⁴ Summarizing, the State Department concluded that “[t]he judicial system is subject to executive and political influence, and the court system suffers from such a severe backlog of cases and shortage of judges that *the right of citizens to address their concerns in court is seriously impaired*. Cases of interest to the ruling party are processed expeditiously, while others languish in court, further *calling into question the independence of judiciary*. The court sometimes *deny citizens fair trials*.”⁶⁵ In a perplexed and highly volatile situation in national judiciary, this might be a symbolic event that marked the peak of the judicial crisis.

4. *The last days of party judiciary: cosmetic reforms and lame-duck appointments*

Seemingly, the Ministry of Justice won the first round against Vuković. Admittedly, after Tudjman approved in his speech the need to increase judicial remuneration, Ramljak managed to realize one of the promises from his report – the promise to radically raise judicial salaries. After numerous complaints of judicial officeholders, and after another radical raise of salaries of officeholders in the other branches of state government (MPs, members of executive) in which judges were circumvented, the Parliament enacted on January 27, 1999 the Law on Judicial Salaries. The judicial income was this time brought into relation with the income of MPs (as a percentage of the income of Speaker of the House)⁶⁶, and the raise was in average from about 50% (for judges of lower courts) to 200% (for the judges of Supreme Court). Naturally, this also changed the differences of judicial salaries among judges themselves, bringing the relation of lowest and highest judicial salary from about 1:2 to more than 1:3.

Apparent victory of moderate forces led by Ramljak was not of a long range. Only a couple of months later, Minister Ramljak published the text of his resignation from the position of Vice-Prime Minister and the Minister of Justice. In the explanation of his resignation submitted in mid-March and disclosed on April 11, 1999, Ramljak stated that he vehemently opposed the new plans on reorganization of ministries that, *inter alia*, foresaw the formation of strong parallel structures of power around President Tudjman. Ramljak argued that such parallelism leads to blurring of responsibility and formation of opaque structures that push the legal structures and the Government itself to the margins. Under such conditions, Ramljak stated that he “refuse to bear responsibility for the area he covered as Vice-Prime Minister and MoJ” and therefore had to resign. His

⁶⁴ The U.S. Departments of State’s Report on Human Rights in Croatia for 1998, Issued by the Office for Democracy, Human Rights and Labor of February 26, 1999, Section 1, at e). Published at http://www.usembassy.hr/issues/hrights_eng.htm (Feb 99).

⁶⁵ *Id.*, from the introductory summary.

⁶⁶ This also caused some critics to argue that judicial branch is again made symbolically dependent of legislature.

resignation marked the end of the mostly futile attempts of short-lived MoJs. Namely, the next minister, appointed only half a year before the expected parliamentary elections, obviously was a person that only had to fill in the vacancy.⁶⁷

Although Ramljak left, he gained a kind of satisfaction by late acceptance of one of the amendments prepared while he was in office – the amendment of the Law on State Judicial Council enacted in May 1999. Several of the changes directly addressed some of the malformations of the operations of the SJC; some other addressed the issues of appointment of judges, strengthening the role of the Ministry of Justice against the court presidents. So, one of the amendments provided that the president or the member of the SJC may be removed if he “unjustifiably does not perform or improperly performs his duty”⁶⁸. The proposal for such removal could be given by the bodies authorized to propose candidates – but this time it was explicitly provided that they can only give proposals “with regard to candidates they proposed” – what implied a tacit admitting that the practice of the appointment of members of SJC was illegal. Another new provision obliged the SJC to express grounds in the written decisions on the removal of judges and court presidents.⁶⁹ In the process of evaluation of candidates for judicial duties, the previous practice of some court presidents that blocked the procedure by refusing to make proposal for opening new judicial duties was disabled, insofar that Ministry could after amendment open contest also *ex officio*. The amendment also provided for the formation of the personal judicial senates as obligatory consultative bodies for the presidents of courts in the process of evaluation of judicial work. Finally, large part of the new amendment completely reorganized the disciplinary proceedings conducted by the SJC, changing many features that made travesty from the process against K. Olujić.⁷⁰

But, this change *ex post facto* came far too late – in the moment when the process of screening of judiciary was almost completed. By the way, the next judges on the row for removal were not at all those appointed by the SJC – but the judges of the Constitutional Court.

The Constitutional Court, in spite of some problematic decisions made during the period of the turbulence of war, acquired in the second half of ‘90s mostly positive reputation in professional legal circles and in the democratic public. Great part of the sympathies were due to the struggle for professional standards that the CC voiced against the SJC and its

⁶⁷ Short mandate of the Minister Zvonimir Šeparović (not to be confused with one of his predecessors, Miroslav Šeparović) will be marked by three features: intense and mostly self-induced polemics of Minister Šeparović with the Hague International War Crimes Tribunal for Former Yugoslavia; arrogant behavior of his wife Branka who publicly threatened some judges, calling them from his husband’s office (what caused the reaction of the Association of Judges that condemned it as improper behavior); and by his unexpected and utterly hopeless running for presidential office in January ’00.

⁶⁸ Art. 2 of the Amendments (*Off. Gaz.* 49/1999 of May 20,1999), changing Arg. 9 of the SJC.

⁶⁹ *Id.*, Art. 3. (amending Art. 13).

⁷⁰ For example, national government was no more empowered to give initiative, but the Minister of Justice; removal as a disciplinary sanction could now be determined only if committed under “particularly grave circumstances, and with a particular persistence”. Appellate procedure and bodies that have jurisdiction to conduct disciplinary proceedings are also determined in a more precise and consistent way. Although many changes were motivated by the previous problems caused by actions of acting presidents of the SJC and SC Potrebica and Vuković, one of the changes approved Vuković’s previous constitutional initiative, providing that the President of the Supreme Court has to be appointed upon proposal made by the House of Counties (*Zupanijski dom*), instead by the Government. Or, perhaps it was a prediction of the results of future elections, because the lower house of the parliament (that elects the government) had its mandate expiring in October 99, whereas the mandate of the upper house lasts until 2002.

political mentors. However, majority of judges of the acting court in 1999 (eight out of eleven) were appointed in 1991⁷¹, during one of the rare periods of political unity in the parliament, and their eight year mandate had to expire on December 6, 1999. Although the Constitution did not prevent them from applying for the second mandate (and some of the judges in fact submitted their application), among the eight judges appointed by the Parliament were no former judges. The process of their appointment also did not go smoothly. Pretending to have intention to find a political consensus, the HDZ finally pushed through the parliament its own list, composed of five exposed HDZ figures (among them at least two who had quite disputable record in the professional and general public), two candidates of the opposition and only one neutral expert. The list was submitted and accepted by HDZ majority as a whole, without opportunity to discuss the abilities of individual candidates or vote on them.⁷² Such a decision even provoked some constitutional complaints that put the outgoing judges in an awkward position to rule *in causa sua* and either confirm the apparently problematic appointments or strike it and thereby cause an institutional vacuum. Since, at the same time, the mandate of the House of Representatives expired (in October 99) and President Tudjman died (on December 9), the “old” Constitutional Court did not want to take responsibility for paralyzing of another pillar of state power and the new constitutional judges ultimately resumed their duty in December ’99. To some observers, it looked as if the fall of the last remaining bastion of judicial independence.

5. Post scriptum: Parliamentary elections 2000 and their impact on the system of justice

When the formation of a loyal, party-appointed apparatus of state system of justice almost seemed to be completed, a sudden and almost unexpected far-reaching change in the balance of political powers occurred. Partly due to the fast pace of illness and death of President Tudjman, partly due to the accumulation of public discontent with the policies of the ruling party and arrogant behavior of its office-holders, the results of the Parliamentary elections that took place on January 3, ’00 were more sweeping than the majority of political analysts expected. After a decade of undisputed and occasionally authoritarian government of the HDZ, this party was so thoroughly defeated that the first events after elections even indicate the possibility of its dismantling and disappearance from the political scene. The polls also indicate that the results of the coming presidential elections will follow the new trends.

Such course of events brought very quickly the question of consequences of such transition of powers on the judicial power. Even before the formation of the new government and completion of the presidential elections, first pages of newspapers were occupied by the issue of judicial power under new state of affairs. Without even been officially asked for it, the President of the Supreme Court Ramušćak and the State Attorney Živković gave statements that they do not intend to submit their resignations. They, so they expressed, “were not appointed primarily for their political background, but for their expertise, and therefore they intend to remain in their offices according to law.”⁷³ The discussion on this issue continues.

⁷¹ Decision of the parliament of the December 5, 1991, *Off. Gaz.* 66/91.

⁷² New appointment was made on October 22, 1999 (*Off. Gaz.* 112/99).

⁷³ See e.g. their statements that appeared at the front page of daily journal *Jutarnji list* of January 10, 2000 and the interview of the State Attorney in the same newspapers of January 14.

IV. Current State and Future Prospects of Croatian Judiciary

1. Introductory remark

In the previous two Chapters (*supra II and III*) this report attempted to outline the real state of affairs with regard to the status of judges and judiciary as the whole, as well as to provide the authentic picture of the realization of the high ideals of separation of powers and the independence of judiciary proclaimed by the 1990 Christmas Constitution. Since the reality often departed from the proclamation, it was necessary to focus more on individual events and occurrences and their protagonists, and less on the normative framework that was frequently circumvented and betrayed. However, hoping that the latest events will bring law in books and law in practice closer to each other, in this last Chapter we will briefly outline the current state of judiciary, and the problems that it will face in the years to come.

2. Courts and Judges: Numbers and Perspectives

Currently, Croatia has a relatively simple system of courts that consist of the courts of regular jurisdiction (Municipal Courts and County Courts) that rule in all kinds of cases, both civil and criminal, that have not been given into jurisdiction of the specialized courts. The latter presently comprise only one type of specialized courts, i.e. commercial courts. Once existent labor courts were abolished in the beginning of nineties and merged into the overall system of regular courts; the military courts shared the same destiny (with the described '92-'96 revival period). As a separate court that decides as a reviewing instance in administrative matters there is one Administrative Court.⁷⁴ The highest court is the Supreme Court, that has the final saying in all types of jurisdiction.

The basic figures on Croatian courts may be summarized in the tables below:

Table I: Number of courts and judges⁷⁵

Type of court	No of courts	No of judges
Supreme Court	1	27
Administrative Court	1	26
County Courts	17	313
Municipal Courts	99	808
High Commercial Court	1	19
Commercial Court	8	101
TOTAL	127	1294

Table II: Number of cases⁷⁶

	1996.	1997.
New cases	1.171.273	1.292.838
Resolved cases	1.184.605	1.192.517
Unresolved cases	931.216	1.031.540

⁷⁴ The Administrative Court receives actions against final decisions passed in the administrative proceedings. Since it usually only reviews legal questions, and therefore does not present the court of full jurisdiction, some observers have posed the question of the compatibility of such a court with the requirement of Art. 6 of the EHRC. *See* Garašić, O upravnom sporu pred Upravnim sudom RH u svjetlu čl. 6 EK [On Administrative Disputes before the Administrative Court of the RC in the Light of the Art. 6 EHRC], *Zbornik Pravnog fakulteta u Rijeci*, Vol. 19 (Suppl.), 1998, pp. 967-1004.

⁷⁵ Data are given according to the statistics of the Ministry of Justice, status as of May '99.

⁷⁶ Data from the Report of the MoJ of November 2, 1998.

According to the above statistics, there are currently 127 courts in the Republic of Croatia; some of the courts are still in the process of formation (e. g. Commercial Courts in Dubrovnik and Zadar) but were still not formed due to the lack of budgetary means.

The above number of courts is certainly not small. It was significantly increased in the reorganization of January 1999⁷⁷, partly because of the wish to adopt new territorial divisions of counties to the court districts. It might lead to more accessible courts, but it may also lead to certain problems; *e.g.*, in cases in which revision before the Supreme Court is not permissible, the last instance is, in regular jurisdiction, the County Court. Since there are 17 different County Courts, it may lead to quite varying practice in the application of law. This problem will especially be emphasized after the amendments to the Code of Civil Procedure in October 1999⁷⁸, whereby the threshold amount of dispute for the revision (third-instance recourse) was raised from 3.000,00 kn (about US\$ 400) to 100.000 kn (about US\$ 13.000,00) in regular proceedings and from 8.000,00 kn (about US\$ 1.000,00) to 500.000 kn (about US\$ 66.000) in commercial disputes.⁷⁹

Another problem with the court structure may be seen in the lack of specialization. Under current regime, Municipal Courts have a tremendous concentration of cases of quite disparate nature – both of extremely low and high amount; both of family and labor nature etc. This may have contributed to the poor quality and to the low quality of judicial decisions – and therefore may require a certain higher level of specialization in the future.

Speaking about the statistics on the number of judges and courts, one should emphasize that the data on judges do not include some 350 Magistrates' Judges in about 100 Magistrates' Courts, who were, after the enactment of the CoA, also pronounced to be full-fledged judges – with all judicial privileges like the immovability, independence and life tenure (plus the appointment by the SJC).

Statistical Office also provides data on the proportion of women in various courts. According to somewhat antiquated data (1998), more than half of judges are women. They make almost 65% of all first-instance judges, but only about 40% of Supreme Court judges. These features have made some analysts to speak about “feminization” of Croatian judiciary, especially in lower ranks; others argue that the lower proportion of women in higher ranks proves certain discrimination and reluctance to give them access to more prestigious and better-paid higher position. In general, it seems that the issue of the sex of judges has not gained a particularly important role in the debates on the state of judiciary.

It should be stressed that the above number of judges may be viewed as provisional, since they could and should be even greater, since the foreseen (“systematized”) posts in courts count to the 1555 (946 in the Municipal, 343 in the County, 175 in the Commercial, 33 in the Administrative, 20 in the High Commercial and 38 in the Supreme

⁷⁷ See the Law on the Territory and Seats of Courts of January 14, 1994 (*Off. Gaz.* 3/94).

⁷⁸ *Off. Gaz.* 112/99 of October 29, 1999.

⁷⁹ This is another example of urgent, but poorly prepared half-hearted measures for the reform of judicial proceedings. Characteristic is the impulsiveness of the reform: the pendulum of judicial policy has to be swung to quite the opposite side (and therefore the increase of about 3000-6000%); its partiality (only several numerical values were changed without adoption of other institutes) and the complete lack of vision on other possible consequences of the reform (such as the impossibility to submit the large part of cases to uniform review of legality).

Court). That would lead to conclusion that some 20% of judicial posts is still open and vacant.

On the other hand, the statistics on the number of cases and their duration are much less reliable and were often the subject of dispute; according to their personal opinion on the state of judiciary, various interpreters argued that the numbers are higher or lower. The often mentioned figures used in public discussions were the number of more than a million of unsolved cases⁸⁰, and – *exempli gratia* – the fact that only in the Municipal Court in Zagreb (admittedly by far the largest of 99 municipal courts) there were over 10.000 cases older than 10 years. More indicative could perhaps be the findings of the MoJ research of November 98 that showed that the most critical situation is to be found at the largest and most important courts (Municipal and Commercial Courts in Zagreb, Split and Rijeka) whereby the figures showed the rather negative tendency and prospects. Similar were the statistics on the appellate courts and the Supreme Court. So, the data for the Supreme Court demonstrate in the '94-'97 period constant decrease in the number of received cases, but also the constant increase of the number of unresolved cases. Therefore, it can be said that hardly anyone contests the evaluation that the situation is critical – that the courts are swamped with cases and that they in most cases cannot provide resort to citizens in the reasonable time.

It can be argued that the noted statistics, although disquieting, still does not show the worst side of the current judicial crisis. As hard as it may be to provide representative data for the quantitative evaluation of the speed of judicial proceedings, it is much harder to provide any reliable statistics on the quality of adjudication and the accuracy of judicial findings. In current discussions, it seems that the qualitative side is often neglected, and even traded in exchange for favorable statistics that would show the progress by the individual judge, the court or the system as a whole. On the other hand, the public (particularly professional) has the perception of the constant decrease of this quality, as well as the perception of a high degree of disorder in the court system in general.⁸¹ Another indication of the poor quality of adjudication may also be viewed in the fact that there is no systematic practice of publication of court decisions; some sources publish carefully selected short excerpts of some decisions of some courts, but there are neither systematic and public methods of access to the full text of judicial decisions, nor methods to get to even shortened versions of every judgement of higher courts or the Supreme Court.⁸² Finally, one should emphasize that the judicial problems do not end with the issuing of the final judgment – on the contrary, some of the most expressed problems in legal practice deal today with the enforcement of judicial decisions, that often make *res judicata* to look like a provisional and occasionally worthless solution of a social dispute.

⁸⁰ This feature was reproduced *e.g.* in the annual address of President Tudjman of January 21, 1999.

⁸¹ The quoted MoJ research of Nov 98 provides *obiter dicta* some indication of such a disorder: it is noted that “the control of lower courts by higher courts are rare and insufficient”; “there is the problem of work discipline because some judges irregularly appear at their jobs”, “presidents of the court do not transfer every letter addressed to the MoJ to the addressee”, “some courts have ‘dead offices’ that do receive but do not hear cases”, “sessions of judicial departments are irregular in some courts”, “the most complex cases are sometimes given to youngest and the least experienced judges so that the older may fulfill their statistical tasks”, “presidents of the court do not send their evaluation of judges even after repeated requests” etc. *Id.* at 25-27.

⁸² Some courts even issue “confidential legal practice” that consist of the judicial decisions “for internal use of judges only”.

3. *An Insight into the Future: Some Obstacles of the Reforms to Come*

Any next government that would take seriously the problems of judiciary will face a difficult task.

It seems impossible to even think of starting serious reforms without the revision of a number of appointments, particularly of those obviously incompetent to perform their duty, or those whose public and professional record is smudged by the questionable practices and politically motivated unethical conduct. However, although appointments of such persons were frequent, there are hardly any instant institutional means of their replacement.

The State Judicial Council, perhaps the first body that would have to be reviewed and replaced, has a constitutionally protected position⁸³ and the mandate of the majority of its members expires only in June 2002. Since this body concentrates the powers of appointment, discipline and removal both of judges and state attorneys, and the powers to appoint presidents of the courts, it seems that, without changing the legislation, it is even impossible to replace those responsible for the poor administration of justice in the past years. Therefore, it is likely that the whole system of appointing and replacing judges will have to be redesigned, and the future composition and functions of the SJC are uncertain.⁸⁴

Another problem with regard to judicial office-holders is of a more far-reaching range, and has to do with a widespread misconception of the lack of judicial personnel. Even the quoted State Department Report⁸⁵ spoke of the “shortage in the number of judges”. But, in a comparative assessment, it can be concluded that Croatia with 1555 systematized judicial posts⁸⁶ for a population of about 4,5 million inhabitants has about 35 judges per 100.000 inhabitants⁸⁷ – considerably more than *e.g.* Germany that has about 21 000 judges on the population of about 82 million, *i.e.* about 25 judges per 100.000.⁸⁸ The comparison with some other states would lead to even harsher disproportion.

Combining the number of judges with the data on their age and income may invoke some more upsetting conclusions. After intense and mostly indiscriminate “lustration”, justice in Croatia is currently young and inexperienced. In September 1998, in Municipal Courts 18,4% of judges had less than 2 years of judicial experience, and 43,1% less than six years experience. In municipal courts in urban centers, half of the judges are below 35 years age: *e.g.* in Zagreb 7% of judges are below 30, and 41% in the age of 30-35; in Rijeka, 22% of judges are <30 and 27% from 30-35; in Split 21% of judges are <30 and 43% from 30-35.⁸⁹ Since judges are appointed with the permanent office, and since the number of judges objectively is not too small – rather, on the contrary, there may be a

⁸³ A member of the Council may be discharged before expiration of his mandate only for limited reasons in the procedure in which participate both Houses of Parliament. *See* Art. 9 of the LSJC.

⁸⁴ Some of the critics have already proposed the abolishing of the SJC and returning to the system of direct appointment of judges by the Parliament (*see* the statement of V. Primorac in *Vjesnik* of September 22, 1998). There may, however, be other possibilities, such as changes in the composition of the SJC that would guarantee its competence and representativeness for the legal profession.

⁸⁵ *See supra* note 64.

⁸⁶ This figure is without Magistrates' Judges, that also have formal powers and privileges of judges.

⁸⁷ Even if we take into account only the actually appointed judges, this figure would be high - about 29 per 100.000.

⁸⁸ Germany is here selected as an example of the state with a high number of judges *per capita*, an operable budget for judiciary and relatively well-functioning judicial system.

⁸⁹ MoJ report, *supra* note 63 at 16.

surplus of judges – it means that the perspectives to get a judicial job in several future decades are going to be rather difficult. Additional problem will be judicial salaries: the rather generous raise granted by the exiting Government in the last months of its mandate caused considerable budgetary problems. After paying judicial salaries, the MoJ did not have means, in certain cases, to pay postal expenses, so some of the courts could not operate for weeks due to the lack of resources. In the announced saving package of the next government, one of the first measures to be taken will be the cut in salaries of the state office-holders. Whereas this will be relatively easily possible with the salaries of the MPs and ministers, it remains to be seen whether and how such cuts will be possible without violation of the principle of judicial independence (or at least the judicial perception thereof). Naturally, nobody is contesting the need to adequately remunerate judges – but in the world of limited resources, the means spent for this purpose may also stand in the way of other necessary investments in the judiciary, such as introduction of information technologies, employment of able assisting working force and similar measures that are also urgently needed.

4. Conclusion: Trials and Tribulations of the Justice in Transition

Conventional wisdom says that it is easier to push the paste out of the tube than to return it back. Applied to the problems of the national system of justice, this wisdom is even more true. The sensitive machinery of state judiciary is hard to construct – it takes time and efforts to educate and train the judges, organize courts and put everything into a workable whole that can in an adequate way respond to challenges of the constant inflow of cases. Once this machinery breaks down, it is quite difficult to repair it.

The countries in transition therefore face a process of reforms that have, in order to succeed, to be persistent, determined, and well planned and prepared. In stable, well-ordered societies, a paradox that most of the reformers have to encounter is that, in the attempts to improve the quality of judicial services and assure strong, independent and competent judiciary, very few reforms have good chances unless they breach some of the same principles. The odds are that, in the universe of autonomous, independent and immovable judges almost every reform will be interpreted as illegitimate intrusion of the executive into the judicial reservation. A unique opportunity in countries in transition lied precisely in the weakness of the inherited structures. In the situation in which judiciary was viewed as only one emanation of the unity of state power, the space for reforms was wider – and therefore the likelihood of swift results was higher.

Unfortunately, in 1990-99 such space in Croatia was wasted, in spite of constant warnings of legal scholars.⁹⁰ The quality of judicial office-holders deteriorated by the series of political appointments of incompetent, morally questionable and/or inexperienced judges and equally political removals of able, experienced and strong-opinioned judges.⁹¹ In the parallel movement to ensure both the political positions and

⁹⁰ See e.g. a series of papers by Professor Mihajlo Dika: Dika, Pravo na nezavisnog suca [The Right to an Independent Judge], *Odjetnik*, (5-6/1990), pp. 18-42; *id.*, O razvitku instituta sudske (sudačke) nezavisnosti u zapadnoevropskom civilizacijskom krugu [On Development of the Institute of Judicial Independence in the Western-European Cultural Circle], *Zbornik Pravnog fakulteta u Zagrebu*, Vol 42 (Suppl. 1992), pp. 511-533; *id.*, Organizacijska samostalnost i funkcionalna nezavisnost sudbene vlasti u RH [Organisational Autonomy and Functional Independence of the Judicial Power in the RC], *Privreda i pravo*, Vol 33 (1-2/1994), pp. 19-46.

⁹¹ On the failures of Croatian process of lustration in a comparative perspective see Uzelac, Lustracija, diskvalifikacija, čistka. O procesnim i ustavnopravnim problemima izbora sudaca u prijelaznom razdoblju [Lustration, Disqualification, Chistka – On Procedural and Constitutional Problems of the Selection of Judges in Countries in Transition], *Index*, Vol. 3 (1995), pp. 413-434.

the obtained privileges, structures that prevent responsibility and democratic accountability are created. Such structures, as well as the constitutional proclamations of judicial independence, may have been adequate safeguards for the judiciary that would have deserved them. But, in the present situation, these structures will be another impediment that will be difficult to overcome. First, easier chance is lost; it remains to be seen how the second, more difficult attempt to establish workable system of justice that would correspond to the challenges of the next millenium will proceed.