



CENTER OF LEGAL COMPETENCE
Verein zur Förderung der rechtlichen Ostkompetenz Österreichs

BAND 1

Richterbild und Rechtsreform in Mitteleuropa



Herausgegeben von
Paul Oberhammer

Schriftenreihe des
CENTER OF LEGAL COMPETENCE

CLC

Band 1

Wien 2001

Manzsche Verlags- und Universitätsbuchhandlung

Richterbild und Rechtsreform in Mitteleuropa

Herausgegeben von

Dr. Paul Oberhammer

ao. Universitätsprofessor in Wien

Mit Beiträgen von

Dr. Aleš Galič, Ljubljana

Univ.-Prof. Dr. Burkhard Heß, Tübingen

ao. Univ.-Prof. Dr. Paul Oberhammer, Wien/Halle (Saale)

Dr. Alan Uzelac, Zagreb

Dr. István Varga, Budapest

Dr. Fryderyk Zoll, Kraków

Wien 2001

Manzsche Verlags- und Universitätsbuchhandlung

Role and Status of Judges in Croatia

Alan Uzelac

I. Historical Background – The System of Justice before 1990

The system of justice in the Republic of Croatia has its roots in the common traditions and fate of the systems of justice in Central and Eastern Europe. A significant role in its formation may be assigned to the period of the mid-nineteenth century – a period of consolidation of the 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 organization of the state administration were introduced. This also applies to the judiciary, which was organized on the same premises as the judiciary in the surrounding countries – as well as that in many other states of Continental Europe – ie as a hierarchical system of professional office-holders, closely tied to the state and the centers of political power.¹⁾

Since Croatia was a part of the Habsburg (from 1868 – Austro-Hungarian) monarchy in this period, much was inherited from the legislative and judicial reforms of the enlightened Austrian absolutism, which 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 can be followed with regard to legislation and legal education: eg, some pieces of legislation relevant for the judicial organization and process in the territory of the 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 effect that judicial organization and legislation were delegated to and decided upon at a local level. Due to this, the legislation was sometimes considerably different from the Austrian, and sometimes the same legislation (eg procedural codes) was effective in Croatia

¹⁾ For a typology of the systems of *Merryman*, *The Civil Law Tradition* (1985); *Damaška*, *The Faces of Justice and State Authority* (1986); on the historical genesis of the Continental judicial systems of *van Caenegem*, *Judges, Legislators and Professors* (1993).

and Austria at different times – and their functioning in different historic contexts led to a less-than-perfect match of both judicial systems. On the other hand, Croatian jurists were partly educated in Vienna and other Central European law schools; the Zagreb Faculty of Law (founded in 1776 by Decree of Empress *Maria Theresia*) followed the tradition of the best Austro-Hungarian centers of scholarship, and Croatian courts often used cases and patterns of Austrian courts, just as if they had been part of internal law.

After 1918, Croatia split its ties with Austria-Hungary and became part of a new federation, the State of Serbs, Croats and Slovenes (since 1929 – Yugoslavia). The legal organization of that state was very diverse and ranged from Austrian (Croatia proper) and Hungarian sources (Medjmurje) to Italian law (Dalmatia) and the law of Sheria (Islamic law – Bosnia and parts of Serbia). The organization and status of judges in this state were never uniform: the state was divided into six “legal areas”. Procedural law was also quite diverse until the first common Code of Civil Procedure was enacted in 1929 – 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 the judiciary. Political pressure 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 the various stages of existence of the SFRY (Socialist Federal Republic of Yugoslavia). At the same time, one should stress that, compared to other socialist countries, the destructive impact that the communist party-state had upon the legal profession was of considerably lower intensity. With the exception of several “revolutionary” post-war years, the majority of courts and judges continued to perform their function in a relatively civilized fashion; autonomous private bar organizations (*Rechtsanwaltschaft*) continued to exist, and law was taught at universities primarily based on the ancient patterns of Roman Law and the 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; the social status and prestige of the members of the legal profession significantly decreased; courts and their actions were systematically marginalized and isolated. There were two parallel systems of conflict-resolution: the informal one, at the party level, tended to

²⁾ See *Triva/Belajec/Dika*, *Građansko parnično procesno pravo* [Civil Procedural Law] (1986), § 8 (describing the historical sources of Croatian civil procedure); see also *Jelinek*, *Einflüsse des österreichischen Zivilprozessrechts auf andere Rechtsordnungen*, in *Habscheid* (ed) *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen* (1991).

prevent and resolve every significant dispute by “political consultations”; the other one, the traditional court system, was greatly adopted to less significant matters, such as small claims, protection of possession, some land-related issues etc. Judges (and courts) in any society tend to have a reputation proportional to the role that private ownership and market competition play in that society – and, naturally, this role was suppressed and diminished. But this statement should also be moderated, since the matter in question is one of comparison and intensity, and not a matter of quality where precise shades of black and white can be drawn. The Yugoslav split with the Soviet Union in the late 1940s and the introduction of the doctrine of self-management brought some – although limited – political and economic reform to the effect that at least some, although controlled, market competition among “self-managed” companies was possible. Other reforms made limited private ownership in agriculture and the formation of small family businesses possible – and, consequently, legal expertise had some meaning and importance in these areas.³⁾

In this report we are focusing on the status and organization of judges in present-day Croatia – ie 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 the war on Balkans (for Croatia – from 1991 to 1995) and the reform of the political system (abandonment of the communist political regime). All three events – political independence (formation of a nation-state), the state of emergency and changes in the political and legal system – affected the role and status of judges and have to be explained 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 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 the current social and institutional position of courts and judges and point to some of the potential sources of problems for future reformers. The 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” which is often going to be used in this report.

³⁾ For a description of the state of the judiciary at the beginning of the 1990s see *Uzelac*, *Zavisnost i nezavisnost, prijedlozi uz položaj sudstva u Hrvatskoj* [Dependence and Independence, Some Suggestions Concerning the State of the Judiciary in Croatia], *Zbornik Pravnog fakulteta u Zagrebu* 42, Suppl 4, 575 (1992) 582–590.

II. Constitutional Position and Legal Regulation of the Judiciary 1990–1995: Rules and Reality

A. Christmas Constitution of 1990: The Unfulfilled Promise of an Independent and Autonomous Judiciary

The Croatian Constitution of December 21, 1990⁴) provided a new regulation of the organization and status of judicial power. Changes in comparison with the previous constitutional position of the judiciary were, first of all, reflected in the reintroduction of the system of division and separation of powers, whereas the judicial power is understood as one of the three constituent branches of government. Otherwise, the constitutional provisions in chapter IV (Judicial Power, Arts 115–121) are relatively scarce – altogether seven articles, or, to put it in even more precise terms, 322 words. The constitutional warranties include the postulate of autonomy and independence of judicial power, publicity of court hearings, and judicial immunity from prosecution on account of an opinion given in the process of judicial decision-making. There is also a limited recognition of participation of lay judges. However, with regard to court organization, the Constitution encompasses only the definition of the Supreme Court (hereafter SC) as the highest judicial body that has to ensure the uniform application of law and the 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” (ie statute).

However, the two last constitutional provisions in chapter IV that aimed to define the status of judges – their position and the conditions of their appointment – proved to be the most controversial issue in practice and doctrine. Pursuant to Art 120, the 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 offense 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)

⁴) The Constitution was published in *Narodne novine* (Official Gazette of the Republic of Croatia, hereafter: OffGaz) 56/1990; amendments OffGaz 1997/135; the amended text of the Constitution was published in OffGaz 1998/8.

⁵) The other 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).

Two parts of the quoted Art 120 turned out to be ambiguous and, consequently, tended to be circumvented or misused. First, the constitutional warranty of permanence of the judicial office was not taken seriously in two distinct aspects. On the one hand, it seemed too unbelievable for a formalist tradition of Continental Europe to interpret “permanence” as an office until death or voluntary retirement (or declaration of inability) – although the first days of the new Constitution brought some support to such a thesis. For instance, the first President of the SC, a well-reputed old judge and former dissident, *Vjekoslav Vidović*, was appointed to this office when he was over 70.⁶) But, only one year later, during the first months of the war with Serbia, *Vidović* was removed from office, apparently because he had reached the age of retirement – this time forgetting on purpose that he had been appointed well after the mandatory legal retirement age (and re-activated when he had been already retired).⁷) In fact, his actions as SC Judge proved to be too independent for the taste of the new government:⁸) he refused to co-operate when the government pressed him to provide a judicial *placet* to the secret deals of the conflicting sides concerning 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 judges hold their office “[...] until they fulfill the legal requirements for retirement because of age”. The same amendments provided that the State Judicial Council (hereafter: SJC) may, upon proposal of the Minister of Justice (hereafter: MoJ) and in accordance with the opinion of the president of the court, extend the mandate until the judge reaches the age of 70. However, this amendment was challenged before the Constitutional Court (hereafter: CC) and subsequently struck because it was regarded that it violated the principle of equality and potentially infringed the independence of the judiciary. *Obiter dicta*, the CC ruled that “[t]he constitutional warranty of permanence does not mean that

⁶) The decision on his appointment was passed on December 12, 1990 (OffGaz 1990/54).

⁷) The decision on his removal was passed on February 14, 1992 (OffGaz 1992/9).

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

⁹) The desired scenario was the following: the government pressed the courts to release temporarily 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 its detainees go in a similar fashion. The whole responsibility for the “escape” of persons that were publicly pronounced as war criminals thus remained with the courts, who “mistakenly” had to approve the temporary release from prison on formal grounds.

judges are appointed for life [...] it is set to protect the independence of judicial power" and therefore "a foreseeable and universal limitation of mandate that is applied equally and that is known to all cannot impede the judicial independence."¹⁰⁾

Yet, there was still another, even more far-reaching catch in the interpretation of the constitutional provision that "judicial office shall be permanent". Some of the provisions of the new constitutional design were 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⁾ provided in Art 2 that those constitutional provisions which, pursuant to the Constitution, could be applied instantly and directly (ie did not require the passing of additional legislation) did apply since the date of the enactment of the Constitution. Some constitutional theorists were of the opinion that the norm on the permanency of judicial office might be a norm of imminent application, since it was simple and unconditional. The Croatian Parliament (Sabor) was, however, of a different opinion – the provision was interpreted in such a way that only judges appointed according to Art 121 of the Constitution (ie new appointees) should enjoy the 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 the enactment of implementing statutes and other acts that were needed for the "activation" of those constitutional provisions that could not be imminently applied, was amended 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 below, this long time frame of insecurity had a far-reaching impact on the quality of judicial cadres and contributed largely to the present state of crisis of the state system of justice.

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

In summer 1991, the situation in former Yugoslavia started to become aggravated. The disintegration processes in the 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

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

¹¹⁾ Amended text – OffGaz 56/1990, 8/1991; 31/1991; 59/1991; 27/1992; 34/1992, 91/1992; 62/1993; 50/1994; 105/1995; 110/1996).

the second row, behind the fight for independence and defense from aggression.

In the legal sphere, this meant the departure from the usual democratic way of government in which a society is governed by statutes enacted by legislature, and the concentration of powers in the hands of the executive. Starting in the second half of 1991, a number of executive decrees with statutory force were enacted by President *Tudjman*.

Some of the said decrees were also related to the judicial power. Eg, the Decree on the Organization, Work and Jurisdiction of the Judicial Power in the State of Emergency or Imminent Threat to Independence and Unity of the Republic of Croatia¹²⁾ provided the return of courts-martial, which had only been abandoned one year earlier as a relic from the era of non-democratic government. The provisions on the jurisdiction of these courts empowered them to also rule in some matters concerning civilians, and suspended certain warranties of judicial independence, eg the warranty of immovability.¹³⁾ The Decree on the 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 courts-martial.

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⁾ violated the international instruments on human rights, among which there were also international standards of independence of the judiciary.

The presidential decrees were challenged before the Constitutional Court by a number of persons and organizations. It was claimed, firstly, that the President was not allowed to issue such decrees unless the state of emergency or the state of war had formally been announced; secondly, that such decrees

¹²⁾ OffGaz 1991/67; amendments were published in OffGaz 1992/25 and 1992/81.

¹³⁾ For example, according to Art 11 of the said decree, "[p]resident and judges of the courts-martial will be determined by the military schedule issued by the Minister of Defense, upon proposal made by the Minister of Justice, among the judges of municipal and county courts". Art 16 empowered presidents of the regular county courts to temporarily transfer judges from these and lower courts to other courts, "as long as the necessity exists".

¹⁴⁾ OffGaz 1991/73.

¹⁵⁾ Among other decrees with statutory force the President of the 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.

could have been enacted only if the Sabor (Parliament) had been prevented from working (and, in fact, the Sabor functioned regularly, even being in permanent session);¹⁶⁾ thirdly, that the President was not allowed to encroach on the constitutional guarantees of human rights and freedom but only the Parliament;¹⁷⁾ and, finally, that such decrees violated the prohibition of retroactive application, since all of them came into force on the day they were issued, whilst in certain instances they were published several weeks or months later.

In this particular case, it was a bite that was too big for the CC. It did not have the courage to declare, in the middle of the war events, the decrees of the all-powerful President unconstitutional. In its decision of June 24, 1992, the CC found that 1. the President may decide on 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⁾

However, after the agreement on cease-fire and temporary cessation of hostilities, some of the decrees were abandoned. Interestingly, among those decrees which lasted longest were those that regulated the judicial power. Ultimately, the decrees on judicial power in the state of emergency were abolished only at the end of 1996,¹⁹⁾ when courts-martial were also dismantled and judges returned to their original posts.

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, OffGaz 1992/49; in this very summary decision, it seems that the objection of the violation of human rights has not been addressed at all.

¹⁹⁾ The Decree on Abolishing the Decrees from the Area of Judiciary, OffGaz of December 6, 1996 (1996/103).

C. Courts Act of 1993: Legitimizing the Tacit Removal of "Unsuitable" Judges

Yet, the martial laws were not the worst evil for the status and the position of Croatian judges. More disastrous were the interventions that came from the civilian sphere. The reforms of 1990 to 1999 in the Croatian system of judiciary may better be described as lack of reform, or 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 the judicial ranks. Therefore, at least until 1997, there was a strong outflow of judges to other branches of the judicial profession (mostly to the ranks of practicing lawyers and notaries public). To make this tendency even worse, it may be objected that most of the judges who left the judiciary were among the best-qualified and experienced officers of the court. However, able and well-reputed judges were mostly those who had a possibility of an alternative career, and many of them considered the current provisional status and uncertain future of their job (which in certain courts lasted seven or more years) as too humiliating for them to stay in office.

A good example of the precarious interim status of the Croatian judiciary in the beginning of the 1990s is the slow pace of legislative reforms. The Constitution initially required one year for all implementing legislation; however, the first law to deal with the implementation of a constitutional provision on judicial power was the Courts Act (hereafter: CA), enacted at the end of 1993.²⁰⁾ This act provides a basic legislative framework of the organization of the state judiciary (court districts and court organization) and the status and obligations 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 had been taken over, with some variations, from previous legislation. Perhaps most interesting (and certainly most important for the practical situation of Croatian judges during that period) were the otherwise purely formal and insignificant "transitory and final provisions".

Namely, from early 1991 to early 1994 the 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 an "until retirement" tenure), in this period judges were probably the least protected and most fragile species in the professional universe. During this period almost none of the warranties applied, and the judges were put into a position of "permanent provisionality". The Constitution provided that a body named "State Judicial Council"²¹⁾ had to

²⁰⁾ The Zakon o sudovima [Courts Act] was enacted on December 30, 1993 and published in OffGaz 1994/3.

²¹⁾ The first constitutional name for this body was "High Judiciary Council of the Republic", but when the body was actually formed, the name in the new statute was

appoint, discipline and remove judges. But there was no such body yet – and there were no precise rules for its composition. The Constitution required life tenure. Yet, it was regarded that such tenure had to be given only to judges appointed by the SJC. The previous legislation was abrogated – and, yet, there were still about a thousand active judges who had been, according to previous rules, appointed with a mandate of eight years. In such a vacuum (that was, apparently, not entirely accidental), practice responded in various ways. Eg, judges continued to be appointed and removed from office by the 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 had to empty the premises due to the “new situation”.

The judiciary itself reacted as expected – judges started to change profession massively. The beginning of the 1990s 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 (the 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 OffGaz – 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 wanted to “open a private law practice”. Some judges left in order to run for a restored office of a notary public. Many simply went to early retirement. Still, a portion of judges waited, hoping to have their mandate extended by the Sabor, or, even better, to be appointed with tenure by the SJC, once established.

“State Judicial Council” in order to stress that Croatia is no longer a part of the federation (a “republic”) but an independent state. Characteristically of the behavior of that legislature, this change was performed without changing the name provided by the Constitution, so some critics claimed that it was unconstitutional. Only later, when the Constitution was amended at the end of 1997, the two names were harmonized – in a peculiar attempt to adapt the provisions of the constitution to those of a lower act.

²²⁾ According to the provisional results of the still unfinished research of the HPC, in the period from 1990 to 1996 there were over 2,200 dismissals and appointments of judges and state attorneys recorded in the OffGaz – and this number is still not high enough, since in some periods, seemingly, dismissals were not reported in the OffGaz, and – as described *infra* in note 23 – after the 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. Out of the recorded dismissals, there were in the said period 361 removals of judges without any explanation. Compare this to the total number of about 1,300 judges in Croatia.

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

The final and transitory provisions of the CA resolved, however, a crucial question of the status of “old” judges, which had been only tacitly (and not unambiguously) answered prior to this act – the issue of the mandate of formerly appointed judges. The solution was simple and radical: all judges that were *not* appointed according to the new legislation were regarded as discharged from office.²³⁾ Connecting the judicial mandate with a *negative fact* (lack of reappointment) was not encouraging for current judges, and there were opinions that such a regime violated the basic rules of judicial independence, even in a transitional and temporary stage, firstly, because it prevented judges from discharging the full time for which they had been appointed, and secondly, because it lacked the certainty and foreseeability necessary for a due process of law. At least the latter 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. The determination of the moment when the process of a “fresh appointment” was completed was not sufficiently clear either and led to varying practices. Most importantly, unlike an express removal, this “tacit removal” could not be challenged, and if any challenge was possible, it was only that of a decision by which a particular former judge who had applied for a reappointment was not appointed – and, as will be shown below, this was an extremely difficult and, in essence, ineffective and unpromising process.

²³⁾ The CA provided in Art 100 para 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: “A judge who was not re-appointed to a judicial office according to the provisions of this law shall receive a judicial salary and other adequate remuneration for a period of six months after cessation of the judicial mandate, unless he or she commences work on another job or fulfills the requirements for a full pension.”

D. The Law on the State Judicial Council – the Legal Profession as an Alibi for Political Arbitrariness

The defenders of the above-described governmental interventions in the judicial area basically invoked two arguments that aimed to legitimize the brutality of the interventions. On the one hand, it was claimed that "old" judges were for the most part a legacy of the old, communist regime, and that many of them had compromised themselves by their participation in political trials of the socialist era; on the other hand, it was claimed that judges had in the past been disproportionately recruited among Serbs as the political elite of former Yugoslavia, and (especially under conditions of war with Serbia) these should be replaced by "loyal" Croat cadres.

Both arguments had a certain weight – but were, in our opinion, largely overemphasized and therefore wrong. Even if they had been true, it might be still questionable whether they could fully legitimize the actions taken. However, it should be stated, on 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 the communist party elite), the judiciary was simply not interesting enough to be a target of political manipulations. Naturally, there were some judges and some cases (primarily in criminal proceedings) that had to transmit the orders of state politics. But there were even times when judges disobeyed communist politics – eg several high-ranked judges in the 1970s (like the aforementioned *Vidović*, president of the SC *Sesardić* and judge *Primorac*) established high criteria of judicial behavior, and – when communist hard-liners struck against the liberal and national movement of "Croatian Spring" in 1971 – refused to sentence the accused in the political trials and dismissed the charges, until they left office themselves or were removed.²⁴) Thus, the number of "compromised" and "pro-communist" judges was low, whereas the large majority did not hold any mortgages from the past – apart from the mere fact that they had been appointed in "other times". The second argument on the ethnic composition of Croatian courts is *per se* discriminatory and has to be rejected. If we take it seriously for the purposes of hypothetical exercise, it should be stressed that, in the early 1990s, perhaps there had been a slight overrepresentation of judges of other ethnic groups in Croatia,²⁵) but – even if we disregard the policy of positive discrimination – the reaction was so radical that, from 1990 to 1999, the situation was turned

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

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

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 of May 1999, in Croatia (including the internationally protected area of Eastern Slavonia with controlled warranties of proportional ethnic participation) 93.6 % of the Croatian judges were ethnic Croats, 3.1 % ethnic Serbs and 3.3 % "other ethnic groups".²⁶)

At this stage of our report, it is necessary to note the importance of the system of appointment, removal and discipline of judges. As the old saying goes, 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 the appointment of judges – the concept of a professional body called State Judicial Council.

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 the Croatian Constitution on purpose, as a variation of the Roman system of appointment. Models were the French *Conseil supérieur de la magistrature* and – more importantly – the Italian *Consiglio Superiore della Magistratura*.²⁷)

But the idea of self-government of the judiciary seemed to be too avant-garde 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" mentioned in 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 the State Judicial Council

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

²⁷) For the concept of the Italian and French CSM see *Senese*, The "Autogoverno" of Italian Judiciary, *CIJL Yearbook: Constitutional Guarantees for the Independence of Judiciary* (1992) 61; *Badinter*, *Judicial Independence in France*, *CIJL Yearbook* (1992) 53.

(hereinafter: LSCJ), passed on June 2, 1993 and published in the OffGaz on June 18, 1993 (N° 1993/58). According to its transitional provisions, it came into effect on the eighth day after the publishing (ie on June 26, 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 attorneys.²⁸) 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 apply until the beginning of 1994 (or even 1995 – for state prosecutors).

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

The LSJC determined a system of appointment of the members of the SJC that did not follow the initial Italian model of judicial autonomy, which 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 had to be appointed with an eight years mandate by the Parliament, ie by the Zastupnički dom (Chamber of Deputies) upon proposal made by the Županijski dom (Chamber of Counties). To make the system more “representative-like”, Art 3 para 2 LSJC provided that “[t]he Chamber 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, the Minister of Justice, the State Attorney of the RC, and the national Bar Association nominate persons that are considered to be suitable as candidates”. This list of candidate-nominating bodies corresponded to the distribution of the 15 seats among the members of the legal profession: the LSJC gave eight seats (president and seven members) to judges, four seats to state attorneys and their deputies, two seats to the legal academia (law professors) and one seat to a member of the Croatian Bar Association.

The first clash in the process of the appointment of the SJC members happened in the SC, which 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 SC. Since the applicable statute provided the General Assembly of the Court to be the

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

highest body of the Court, the majority of the 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 the legal profession (ie the Bar Association proposed one attorney, the law faculties proposed two professors; even the SC – 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 headed by *Tudjman*'s counsel for national affairs *Pašalić* (the so-called *Pašalić Commission*) drafted its own list of candidates, which consisted mainly of people loyal to the politics of the ruling party. Since such a body did not have the official capacity to propose candidates, an innovative formula was found: the list was presented by the Attorney General of the RC, *Dr Krunislav Olujić* – so that the Attorney General's list did not only list prosecutors, but also judges and a member of the Bar. No need to say that 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 members of the SJC without express political influence were two law professors nominated jointly by the four Croatian law schools – and these two later turned to be the most vehement critics of the actions of the SJC.²⁹)

E. A Challenge of Constitutionality: Constitutional Court v SJC

The process of formation and organization of the SJC continued in the same controversial way. The first act passed by the SJC were its Rules of Procedure, enacted at the session of November 4, 1994. Immediately, the attention of the professional audience was drawn to some of its peculiar provisions, eg, the provision that “the sessions of the SJC are open to the public”, but “shall be held *in camera* during arguments in disciplinary proceedings and the process of appointment and removal of judges, unless the SJC decides otherwise”. This provision, as well as the provision on the prevailing weight of the vote of the President of the SJC in case of a split voting, was attacked by the Croatian Association of Judges (hereinafter: CAJ), which initiated proceedings before the CC. On February 15, 1995, the CC accepted the arguments of the CAJ and struck the said provisions of the SJC

²⁹) One of them, Professor *Davor Krapac*, head of the Department of Criminal Procedure at the 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, 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.

Rules of Procedure because the SJC had 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 on other candidates.³⁰⁾

The SJC commenced its actions on the day after the 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 SC – and, no need to say, proved to be highly controversial. On February 16, 1995, under signature I-1/1995, the SC issued its first appointment.³¹⁾ The issue that 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 was of the opinion that it had, 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 the personal record and abilities of the particular SC judges by the President of the Court.

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 judicial independence and opposition to some of the most notorious proponents of the governmental intervention in the sphere of judicial power. A large part of the judges who lost their jobs were notable members of the CAJ, among others the acting President of the Association Dr *Petar Novoselec* (who was also the editor of *Iudex*, the professional journal of the Judges' Association, which thereby ceased to exist).

³⁰⁾ See OffGaz 11/1995. On the same day, the CC ruled on another petition, submitted by SC President *Milan Vuković*. He argued that the provisions of the LSJC according to which the SJC has to appoint the President of the SC 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 mutual control of the branches of government. It pointed to several examples of perplexing of the various branches, including the position of the CC itself, which is neither part of the judicial, nor the executive, nor the legislative branch of government. For the political background of *Vuković's* petition see *infra*, Part III. B.

³¹⁾ Although appointments of judges had previously (while in the jurisdiction of Sabor) been published in the OffGaz, this and some subsequent appointments were never officially published. Only later the SJC has resumed the previous practice of publishing.

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

Soon after the appointments (ie dismissals) of the SC judges had been made, they were challenged by a constitutional complaint (*Verfassungsbeschwerde*) before the CC. 13 candidates for SC judges alleged that the appointments were illegal for various procedural and substantial errors, especially because there had been no substantial discussion on the qualities of the candidates.

The SJC rejected the allegations of the constitutional complaints, arguing that the CC had no jurisdiction to rule on this issue. Its position was that the Council was "neither a body of executive, nor judicial power", and that, therefore, its appointments could not 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 CC rejected the jurisdictional argument, established that the way in which the SJC had performed the appointments was illegal, and struck down the whole list of appointments, ordering the SJC to repeat the process of appointments within three months. Explaining the decision, the majority of the CC (with one dissenting opinion)³⁴⁾ established that the performed appointments violated the right to

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 a consensus of the legal profession on potential candidates for members of the SJC by a series of polls among courts, state attorneys, the bar association and other professional organizations. Ultimately, this effort did not have any success, and 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, were appointed SJC members. 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 the SJC was refused, he did not join the application to challenge the appointment of SC judges before the CC (see *infra*, next paragraph).

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

³⁴⁾ Judge *Bartovčak* considered that, although the rights of 13 applicants were violated, that did not affect the other appointments, and considered that the CC should

equality of the 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, the opinions "were given only orally (and not in a very qualitative way)".³⁵⁾ Another illegality in the process was the fact that, although the Ministry of Justice opened contest for 37 judicial posts in the SC, the SJC decided to appoint only 25 judges. The appointment itself was carried out very hastily – first, the President proposed that 25 places 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 no one of them was appointed. All the voting was done by majority of votes – there were only two votes against by the SJC members from the ranks of the law professors. For all these reasons, the CC ruled that the SJC had violated the candidates' right to equality and equal access to public offices and expressed its hope that the SJC would 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 ten 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 the balance to be shifted in favor of the hard-liner stream of the SJC) that 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 the representation of ethnic minorities – arguing that there were, anyway, twelve 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 a written opinion of the president of the court. This time the SC president

not strike 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."

Vuković did, however, issue the opinion – but it was an 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 decisions of collegiate bodies, so that the CC argued that it could not have been the reason for evaluation of the work of a particular member of the judicial senate – and 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 an aggravating circumstance, and, finally, "lack of criteria was obvious for some other candidates who submitted constitutional complaints 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 (give grounds for 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 a violation of the right to be heard (the right to a fair trial). The possibility of a violation of the right to be heard because of the lack of possibility for particular candidates to react to and comment on the "opinion" and the evaluation of their work was not even taken into consideration on 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 had not been elected in conformity with the Constitution, in a way prescribed by law. It was argued that one of the constitutional rights of the candidates was to have their application decided by a 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 implied the challenge of the decision of the House of Representatives who had elected the SJC members, and, in the view of the CC, 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 the SJC and its appointments of judges) may,

³⁶⁾ From the CC decision in the cases U-III-520/1995, U-III-530/1995, U-III-534/1995, U-III-537/1995, U-III-540/1995 of November 30, 1995.

almost anecdotally, be illustrated by the fact that the decision was again passed with one dissenting opinion, issued by the same judge who had 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 had 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 should conform to the formal requirements set by law and be 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. Thus, the CC annulled the SJC's decision on the appointment of judges at the Commercial Court in Zagreb³⁷⁾ of February 8, 1996 (CC decision of March 18, 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 were 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 either on the activities of the SJC or on the final outcome of the appointments. However, they raised the public awareness of the SJC profile and drew the attention to its activities.

³⁷⁾ One annulled SJC appointment (CC decision of March 18, 1997) considered the application of the acting President of the Commercial Court *Ante Gverić*, who was discharged both from his presidential office and from his position as a judge in the course of the first appointment. The other appointment considered another candidate in the process (CC case U-III-152/1996, decision of March 26, 1997). In the explanation of 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 an utterly negative context."

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

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

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

After the short presidency of the first post-communist President of the SC *Vjekoslav Vidović*,³⁹⁾ and the even shorter presidency of the next president, *Vidović's* previous 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. The next president of the SC *Milan Vuković* was a political appointee – a practicing attorney who had previously had no judicial experience, but had become a well known political figure for his representation of defense in political prosecutions of the communist regime, among other of President *Tudjman*, who himself determined him to be a holder of high judicial posts. In early December 1991, he was appointed judge of the CC⁴⁰⁾ – but it was a short appointment, because he left this court less than a year later, allegedly on personal request by President *Tudjman*, to become President of the SC at the end of November 1992.⁴¹⁾

As President of the SC *Vuković* never acted as *primus inter partes*, which – according to doctrine and legal literature – would have been the regular role of the court president. Instead, from the beginning he deviated from the usual patterns of behavior, showing that he considered 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 legally ignorant, whereas he labeled them as remnants of the old regime, unable to perceive their role of pursuing national interests and to apply the law in a "flexible" way that would concur with the 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 close 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 the judiciary from those judges who had acted in political trials and been compromised in the past – but this policy

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

⁴⁰⁾ OffGaz 66/1991.

⁴¹⁾ OffGaz 82/1992.

was not consistent, since among those judges who were preferred by him were some of disputable past, whereas at the same time he contributed to the dismissal of some judges with clear records, even with the 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 the accusation that some Croatian units had committed atrocities in military operations, he publicly announced that "Croats could not commit war crimes", since "the 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 consequence for him until it was raised to the level of an international problem.

As President of the SC *Vuković* created clear fronts of friends and enemies. Although he was appointed from the position of CC judge, his relation with the CC was tense (as noted above under II. D, the CC struck several appointments made upon his proposal as unconstitutional, and rejected his petition against the LSJC). Another target of his attacks was the Ministry of Justice, both under Minister *Crnić* and the 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 SC who expressed criticism of his methods, or simply were not obedient enough, lost their jobs 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 a simple hierarchical pyramid with the SC (ie, its president) on the top.⁴⁴) During his (first) mandate as SC President, he issued several ordinances (mostly informal) to judges, eg, prohibited judges to appear in seminars and other scientific activities without his express approval; cut the budget for continuing education of judges and for professional literature (eg, he prevented the SC from buying several copies of the collection

⁴²) *Potrebica* was appointed judge of the SC while he was an assessor in the SC.

⁴³) See *supra*, Part II. C and II. D.

⁴⁴) In fact, in spring 1997, *Vuković* submitted a draft of the new Courts Act, which mirrored the same ideal. According to this draft, powers in the system of justice would be concentrated in two institutions, namely in the hands of the SC (that would cease to decide in most of the concrete cases and focus on "principled issues" and court administration) and in those of the SJC. This proposal was, however, not accepted.

of papers on the independence of the judiciary).⁴⁵) He also prohibited judges and lower courts to publish any judgments or other judicial decisions and argued that to be the task of the SC (but never contributed to the formation of an effective system in which at least the SC decisions would be accessible).

In such a model of judicial power, a special role was attributed to the 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 records in the execution of the political dictate of *Vuković* (and, through him, the hard-liner wing of the ruling party, HDZ) were also appointed members of the SJC. No need to say, *Vuković* himself was a member of the SJC during his mandate(s) as SC President. In such a way, the 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.

The poor professional and human qualities of some court presidents elected in this way were presented to the public sometimes in a very radical way. Several of them were protagonists of scandals that transgressed the borders of the judicial profession. Eg, *Ante Šarić*, the president of the Municipal Court in Split (who was, according to some newspapers, mainly responsible for the judicial *chistka* in that city), was personally responsible for the 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, he wrote a letter in which he accused the judges who passed such decisions to be "traitors of the state". Another court president, *Petar Kljajić*, appeared in the headlines when he publicly attacked the police and tried to use his influence to exculpate his son from misconduct. Only after some time, when the public outrage went too far, these two were forced to submit their resignations.

B. The "Olujčić Case": Appointment and Removal of the President of the Supreme Court

Although he had a strong support from the hard-liner wing of the ruling party and President *Tudjman* himself, *Vuković* could not hold his position as President of the SC long. After his statements on war crimes had become an international problem, it was decided that he should change his place in the next reshuffling of leading office-holders. He himself issued statements at the

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

end of April 1995 that he had no intention to leave his office; at the same time he initiated proceedings before the Constitutional Court.⁴⁶⁾ But only several weeks later, *Vuković* submitted his request for dismissal from the position as President and judge of the SC. His next post was his last one – a position in the institution with which he had had so intense confrontation during his presidency – he became a judge of the CC.

The new candidate for the president of the SC proposed by the Government of the RC was the head of the HIS, the chief coordination of Croatian secret services. It was Dr *Krunislav Olujić* – the same person that, while holding the post of Chief State Attorney, had made a controversial proposal for the members of the SJC. He and *Vuković* shared the political background – connection to the ruling party – but belonged to quite different party wings. There was also a strong personal animosity between them. Unlike *Vuković*, who came to the judiciary from the law practice, *Olujić* was a former law professor in Osijek, where he had taught family law. In the legal community he was at that time regarded as perhaps corrupt and a 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 SC – 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 CC, challenging the authority of the Government to propose the SC President. Anyway, he remained in the 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.

Thus, *Olujić* was proposed as 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 had been elected (in the previously described questionable way)⁴⁷⁾ upon his own proposal, *Olujić* had never established a good relationship with the members of the SJC and its president *Potrebica*, who remained to hold the side of *Vuković*.

As President of the SC, *Olujić* suddenly changed his policy and 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 *Tudjman*'s ruling party HDZ. 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

⁴⁶⁾ *Supra*, note 30.

⁴⁷⁾ *Supra*, Part II. C in fine.

designed by law to also be the president of the National Electoral Commission. In such a capacity, *Olujić* acted at the parliamentary elections that took place on October 29, 1995. At these said elections, the ruling party suffered considerable losses, and it seemed that *Olujić* gave some signals that he had no intention to help offset these losses. Finally, *Olujić* was not shy of media either; a number of interviews were published in which he criticized *Vuković* and *Potrebica*.

Understanding the importance of the position in the SJC, *Olujić* insisted that he should fill in the place that remained vacant when *Vuković* went to the CC (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. The SJC yielded only feignedly, and it remained covertly or overtly hostile to him. This included the members from the ranks of the state attorneys (*Olujić*'s previous job) as well as those from the ranks of judges – mostly presidents of courts hierarchically subject to the SC. Maybe they realized that *Olujić*'s political credits had run 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* leaving 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, for example – in exchange for his request for dismissal. *Olujić* refused all offers and was determined to stay in his “permanent” and “protected” office at the SC.

Olujić'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 the decision that he had to be removed at any cost.

On November 11, 1996, less than a year and a half after his appointment, the same body that had proposed him – the Government – initiated disciplinary proceedings with the SJC against the President of the SC Dr *Krunislav Olujić*.⁴⁸⁾

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

⁴⁸⁾ According to allegations of *Olujić* himself, the Government decided that following a decision of the National Security Council presided by President *Tudjman* who himself made a proposal to initiate the proceedings, and a decision by the Presidium of the HDZ.

The allegations and evidence that the government submitted were quite unusual, as almost everything in this case. It was alleged that the President of the SC "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 audiotapes of *Olujic's* phone conversations with B. Č. and S. Š. obtained by a secret operation of the Office for the Protection of the Constitutional Order, one of the several Croatian secret services (that had also been supervised by *Olujic* while he had been the head of HIS). The wiretapping had allegedly been performed during a routine operation of surveillance of unlawful activities,⁵⁰⁾ whereas the targets had been those two men with whom *Olujic* had been speaking, and not *Olujic* himself (he had just "jumped into" the wired telephone lines). The required permission to wiretap (issued according to the law by the Minister of the Interior) related therefore only to the two mentioned persons, and not to the President of the SC.

The disciplinary proceedings against *Olujic* were organized hastily.⁵¹⁾ On November 21, 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 the 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 his suspension, as well as the 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 the public in spite of the petition of *Olujic* and his attorneys to make it public.

During the disciplinary procedure, another peculiarity arose – namely, amidst of the SJC hearing, one of the members of the SJC, the President of the County Court in Pula, *Ivan Milanović*, offered to testify as a witness against *Olujic*. He changed his role and excluded himself from the SJC only after he had heard the complete defense and interrogation of the accused – in which he

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

⁵⁰⁾ The police alleged that B. Č. had been 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 these were only the second disciplinary proceedings conducted against a judge by the SJC, and the first ones, which had dealt with an issue of minor importance in comparison with this one, had lasted about a year in the first instance. This procedure lasted some three months in the first instance.

himself had actively participated and posed 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. *Olujic* and his attorneys requested the 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 the 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, which was otherwise competent to rule in second instance on SJC decisions on appointments. However, this body rejected the jurisdiction for challenge. This time, the CC, finally called to resolve this issue, confirmed the position of the House of Counties and ruled that the body to decide upon the request for challenge of the President and the members of the SJC was the SJC itself⁵²⁾ – and the SJC consequently rejected the request.⁵³⁾ Another petition of *Olujic* that was rejected was a constitutional complaint against the decision on his suspension – the CC determined that it had no jurisdiction to rule on it, since the procedure for final determination of his civil rights was not over, and the decision on his suspension was only of provisional nature.⁵⁴⁾

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

Thus, the post of the SC President was vacant again. After the experiences with *Olujic*, this time the Government was determined not to repeat the same mistake. Therefore, it resorted to proven solutions: the SC got a new old

⁵²⁾ CC decision U-IV-947/96 of January 8, 1997, OffGaz 2/1997.

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, OffGaz 8/1997.

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

⁵⁶⁾ House of Counties decision of February 19, 1997, OffGaz 22/1997.

President. On February 25, 1997, the SJC appointed *Milan Vuković* President of the SC for the second time.⁵⁷⁾

But the "*Olujčić* case" was thereby not over. *Olujčić* made use of his last means – he submitted a constitutional complaint against the decision on his final removal from the SC. 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 the public already thought that this matter had been closed, on April 17, 1998 the CC ruled that the disciplinary proceedings against *Olujčić* had violated his constitutional rights, and annulled the decisions on his discharge made by the SJC and the House of Counties, returning the procedure to the SJC for retrial.⁵⁸⁾

The CC found that the disciplinary procedure against *Olujčić* 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 had 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 *Olujčić* but to his partners in phone conversations, so the tapes should not have been used in the trial 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 had the 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, according to the CC.

However, in this otherwise very clear and short CC decision, the last paragraph, inserted *obiter dicta*, produced a 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 *Olujčić'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 SC.

The SJC waited some five months before the retrial against *Olujčić* – allegedly because, by a repetition of the disciplinary procedure, it would have to admit that he actually *was* the President of the SC in that moment. In the

⁵⁷⁾ OffGaz 28/1997; *Vuković* resumed his duty on February 28, and on the same day he was discharged from his position of judge of the CC.

⁵⁸⁾ OffGaz 58/1998.

⁵⁹⁾ From the CC decision, id.

repeated procedure, the Government changed the incriminations and narrowed the factual grounds to the "appearance of *Olujčić* in public with persons of criminal past", which "violated severely the honor of judicial duty". Instead of illegal evidence, which was excluded from the file, the Government offered two additional witnesses, and the SJC decided to hear three more. *Olujčić* 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 the same as the old one: on October 7, 1998, the SJC once again discharged *Olujčić*. This decision was confirmed by the House of Counties on November 10, 1998 and thereby became final only one day before the expiration of the statute of limitation in these disciplinary proceedings.⁶⁰⁾ On the next day *Olujčić* announced that he would continue to fight and again submit a constitutional complaint before the CC, and, if necessary, go on and submit his case to the European Court of Human Rights in Strasbourg.⁶¹⁾ No further decisions were passed in this case until the closing day of this report.

C. The Second Mandate of *M. Vuković*: the Continuation and the Peak of the Judicial Crisis

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

The result of the described state of uncertainty in the judiciary, marked by a constant outflow of able judicial cadres to other branches of the legal profession, as well as by 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 the judicial sphere. Once barely noticeable by the general public, judicial problems were now raised to the headlines of newspapers and to a heated issue of political debates. It became notorious that the judiciary was in a

⁶⁰⁾ OffGaz 149/1998.

⁶¹⁾ On December 6, 1997, Croatia became a party to the European Convention for Protection of Human Rights and Fundamental Freedoms. Thereby, cases like this one could also potentially fall under the jurisdiction of the European Court, eg, 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, 1005.

crisis – both with respect to the speed of the judicial process and with respect to the quality thereof.

During his next mandate as President of the SC, *Vuković* once again tried to impose his vision of the necessary tools for the reform. His ideas were again focused on the SC and his *ceterum censeo*, the formation of a new intermediate court to lift the burden from the SC, the new High County Court. Therefore, in May 1997, he submitted his new draft of the reformed Courts Act. However, this draft was of such 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 had 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 *gleichgeschaltet* majority of the SC judges. This last attack coincided with the new reshuffling of the HDZ government, whereby the MoJ *M. Šeparović* was replaced by the former Croatian Ambassador to Austria and former professor of the Zagreb Law School, Dr *Milan Ramljak*.⁶²

However, *Ramljak* was even less impressed by *Vuković*'s proposals. Having learned to make decisions based on hard facts, he tried to assemble some data that would provide an 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 a basis for the future reforms. During the next six months the 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 proceedings and the backlog of old cases. Among the urgently required measures, the Ministry proposed the passing of a new law on judicial salaries that would radically raise the judicial income, and the finalization of the process of appointment of new judges to fill in the vacant

⁶²) Embodying the curious connection of pole positions in the judiciary with the secret police, the new position to which *Šeparović* was appointed was the director of HIS, the coordination of national secret services. In 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 because he could not give his consent to the wiretapping of journalists. Perhaps as a kind of revenge, *Šeparović* was subsequently arrested under the suspicion of having disclosed confidential data on the wiretapping of journalists and other exposed individuals to *Nacional*, a weekly paper that often managed to grasp at embarrassing data from national secret services. The charges were dropped after a few months of investigation.

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

slots. Other proposed measures included a possible introduction of two-shift work in certain courts; reform of procedural legislation; the 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 the judicial bodies" (evidently meaning presidents of the courts). The ideas of introduction of new courts (ie, *Vuković*'s idea of the introduction of a High Appellate Court), according to 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 in the same month (November 1998), *Ramljak* iterated that it would not happen "as long as he was the minister".

In the meantime, the crisis of the judiciary continued, making bigger and bigger waves in the 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 the people, an unusually large and high placed position was given to the problems of the 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."

Only a few days after the publication of *Tudjman*'s address of January 21, 1999, a tempest arose in the whole national judiciary.

On the following day (January 22, 1999) 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* "offered his resignation to a position in the Supreme Court" on the next day, adding that his return to the CC would "contribute to a harmonious relation of this court and the Supreme Court", which was particularly criticized by *Tudjman*. Naturally, after only a few days, *Vuković* was again (for the second time) appointed to the CC, although the majority of the CC judges (six out of eleven) sent a letter to the Parliament opposing *Vuković*'s nomination, because "he himself prevented the judiciary from regular work." Some of the judges even went further and added, off the record, that "*Vuković* has shown in his public statements that he does not know the Constitution well enough to be a 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 a CC judge again on March 1, 1999. At the pole position of the SC his successor was *Marijan Ramušćak*, a less compromised former judge – but still with a strong record of membership in the ruling party that included his position as governor (*župan* – head of the local government and self-government) of one of the counties.

Approximately at the same time, the US 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, the problems of the judiciary were especially emphasized. Under the 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 the judiciary. The courts sometimes deny citizens fair trials."⁶⁵) In a perplexed and highly volatile situation of the national judiciary, this might be a symbolic event that marked the peak of the judicial crisis.

D. The Last Days of the Party Judiciary: Cosmetic Reforms and Lame-Duck Appointments

Seemingly, the Ministry of Justice won the first round against *Vuković*. Admittedly, after *Tudjman* had 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 the 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 the 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 the SC).

⁶⁴) The US Department 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 I, at e). Published at http://www.usembassy.hr/issues/hrights_eng.htm (February 1999).

⁶⁵) US Department of State's Report, from the introductory summary.

⁶⁶) This also caused some critics to argue that the judicial branch had again been made symbolically dependent on the legislature.

Naturally, this also changed the differences of judicial salaries among judges themselves, bringing the relation of the lowest and highest judicial salaries from about 1:2 to more than 1:3.

The apparent victory of the 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 MoJ. 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 the reorganization of the ministries which, *inter alia*, would lead to the formation of strong parallel structures of power around President *Tudjman*. *Ramljak* argued that such parallelism would lead to the blurring of responsibility and formation of opaque structures that would push the legal structures and the Government itself to the margins. Under such conditions, *Ramljak* stated that he "refuse[d] to bear responsibility for the area he covered as Vice-Prime Minister and MoJ" and therefore had to resign. His 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 some kind of satisfaction by the late acceptance of one of the amendments prepared while he was in office – the amendment of the LSJC enacted in May 1999. Several of the changes directly addressed some of the malformations of the SJC's operations; 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 a member of the SJC might be removed if he "unjustifiably [did] not perform or improperly perform[ed] 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 could only give proposals "with regard to candidates they proposed" – which implied a tacit admitting that the practice of the appointment of members of the 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 who had blocked the procedure by refusing to make a

⁶⁷) The short mandate of 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 her husband's office (which caused a reaction of the Association of Judges that condemned this as improper behavior); and by his unexpected and utterly hopeless running for presidential office in January 2000.

⁶⁸) Art 2 of the Amendments, OffGaz 49/1999, changing Art 9 of the LSJC.

⁶⁹) Art 3 of the Amendments, amending Art 13.

proposal for opening new judicial duties was made impossible, insofar that the Ministry could after the 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, a large part of the new amendment completely reorganized the disciplinary proceedings conducted by the SJC, changing many features that had made the proceedings against *K. Olujić* a travesty.⁷⁰⁾

Yet, this change *ex post factum* came far too late – in the moment when the process of screening of the judiciary was almost completed. By the way, the next judges to be removed were not at all those appointed by the SJC – but the judges of the CC.

The CC, in spite of some problematic decisions made during the period of the turbulence of war, acquired in the second half of the 1990s a mostly positive reputation in professional legal circles and in the democratic public. A great part of the sympathies were due to the struggle for professional standards which the CC fought against the SJC and its political mentors. However, the majority of the judges of the acting court in 1999 (eight out of eleven) had been appointed in 1991⁷¹⁾, during one of the rare periods of political unity in the parliament, and their eight-year mandate was to expire on December 6, 1999. Although the Constitution did not prevent them from applying for a second mandate (and some of the judges in fact submitted their application), among the eight judges appointed by the Parliament there were no former judges. The process of their appointment did not go smoothly either. Pretending to have the 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 a 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 the HDZ majority

⁷⁰⁾ Eg, the National Government was no longer empowered to give initiative, but the MoJ; removal as a disciplinary sanction could now be determined only if the offense had been committed under "particularly grave circumstances, and with a particular persistence". The appellate procedure and bodies that have the 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 the 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 SC has to be appointed upon proposal made by the House of Counties (*Županijski dom*), instead of by the Government. Or, perhaps, it was a prediction of the results of the approaching elections, because the lower house of the Parliament (that elects the government) had its mandate expiring in October 1999, whereas the mandate of the upper house lasts until 2002.

⁷¹⁾ Decision of the Parliament of December 5, 1991, OffGaz 66/1991.

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 them and thereby cause an institutional vacuum. Since, at the same time, the mandate of the House of Representatives expired (in October 1999) and President *Tudjman* died (on November 9), the "old" CC did not want to take responsibility for the paralyzing of another pillar of the state power and the new constitutional judges ultimately resumed their duty in December 1999. To some observers, it seemed to be the fall of the last remaining bastion of judicial independence.

E. *Post Scriptum*: The Parliamentary Elections 2000 and their Impact on the System of Justice

When the formation of a loyal, party-appointed apparatus of the state system of justice almost seemed to be completed, a sudden and almost unexpectedly far-reaching change in the balance of political powers occurred. Partly due to the fast progress of the illness and the death of President *Tudjman*, partly to the accumulation of public discontent with the policies of the ruling party and the arrogant behavior of its office-holders, the results of the Parliamentary elections that took place on January 3, 2000 were more sweeping than the majority of political analysts had expected. After a decade of undisputed and occasionally authoritarian government of the HDZ, this party was so thoroughly defeated that the first events after the 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.

This course of events brought on very quickly the question of the consequences of such a transition of powers on the judicial power. Even before the formation of the new government and the completion of the presidential elections, the front pages of newspapers were occupied by the issue of the judicial power under the new state of affairs. Without even having been officially asked for it, the President of the SC *Ramušćak* and the State Attorney *Živković* gave statements that they did 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.

⁷²⁾ The new appointment was made on October 22, 1999 (OffGaz 112/1999).

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

IV. Current State and Future Prospects of the Croatian Judiciary

A. 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 the judiciary as a whole, as well as to provide an authentic picture of the realization of the high ideals of separation of powers and independence of the 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 the judiciary, and the problems it will face in the years to come.

B. Courts and Judges: Numbers and Perspectives

Currently, Croatia has a relatively simple system of courts that consists of the courts of regular jurisdiction (municipal courts and county courts), ruling in all kinds of cases, both civil and criminal, that have not been given into the jurisdiction of specialized courts. The latter presently comprise only one type of specialized courts, ie commercial courts. Once existent labor courts were abolished in the beginning of the nineties and merged into the overall system of regular courts; the military courts shared the same destiny (with the described 1992-1996 revival period). The Administrative Court is a separate court which decides as a reviewing instance in administrative matters.⁷⁴⁾ The highest court is the Supreme Court, which has the final saying in all types of jurisdiction.

⁷⁴⁾ The Administrative Court receives actions against final decisions passed in administrative proceedings. Since it usually only reviews legal questions, and therefore does not present a court of full jurisdiction, some observers have posed the question of the compatibility of such a court with the requirements 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 Art 6 EHRC]*, Zbornik Pravnog fakulteta u Rijeci, Vol 19 (Suppl), 1998, 967.

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

Table I: Number of courts and judges⁷⁵⁾

Type of court	Number of courts	Number of judges
Supreme Court	1	27
Administrative Court	1	26
County Courts	17	313
Municipal Courts	99	808
High Commercial Court	1	19
Commercial Courts	8	101
Total	127	1,294

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

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 (eg, the commercial courts in Dubrovnik and Zadar) but have still not been formed due to the lack of budgetary means.

The above number of courts is certainly not small. It significantly increased in the reorganization of January 1999⁷⁷⁾, partly because of the wish to adopt new territorial divisions of counties to the court districts. This might lead to more accessible courts, but also to certain problems; eg, in cases in which revision before the SC is not permissible, the last instance is, in regular jurisdiction, the County Court. Since there are 17 different County Courts, this 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 1999,⁷⁸⁾ whereby the threshold amount of dispute for the revision (third-instance recourse) was raised from 3,000 kn (about US-\$ 400) to 100,000 kn (about US-\$ 13,000) in regular proceedings and from 8,000 kn

⁷⁵⁾ Data are given according to the statistics of the Ministry of Justice, status as of May 1999.

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

⁷⁷⁾ See the Law on the Territory and Seats of Courts of January 14, 1994 (OffGaz 3/1994).

⁷⁸⁾ OffGaz 112/1999.

(about US-\$ 1,000) 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 the 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 of judicial decisions – and therefore may require a certain higher level of specialization in 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 have been, after the enactment of the CoA, also pronounced to be full-fledged judges – with all judicial privileges like immovability, independence and life tenure (plus appointment by the SJC).

The Statistical Office also provides data on the proportion of women in various courts. According to somewhat antiquated data (1998), more than half of the judges are women. They make almost 65 % of all first-instance judges, but only about 40 % of SC judges. These features have made some analysts speak about "feminization" of the Croatian judiciary, especially in lower ranks; others argue that the lower proportion of women in higher ranks proves a certain discrimination and reluctance to give them access to more prestigious and better-paid higher positions. 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 the judiciary.

It should be stressed that the above numbers of judges may be viewed as provisional, since they could and should be even greater, since the foreseen ("systematized") posts in courts count to 1,555 (946 in the municipal, 343 in the county, 175 in the commercial courts, 33 in the Administrative, 20 in the High Commercial and 38 in the Supreme Court). This would lead to the conclusion that some 20 % of the judicial posts are still open and vacant.

On the other hand, the statistics on the number of cases and their duration are much less reliable and have often been the subject of dispute; according to their personal opinion on the state of the judiciary, various interpreters argued that the numbers are higher or lower. Often mentioned figures used in public

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 (hence the increase of the revision threshold 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 a uniform review of legality).

discussions were the number of more than a million unsolved cases,⁸⁰⁾ and – *exempli gratia* – the fact that only in the Municipal Court in Zagreb (admittedly by far the largest of the 99 municipal courts) there were over 10,000 cases older than ten years. More indicative could perhaps be the findings of the MoJ research of November 1998 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 SC. Thus, the data for the SC demonstrate in the 1994–1997 period a constant decrease in the number of received cases, but also a 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 in most cases cannot provide resort to citizens in a reasonable time.

It can be argued that the noted statistics, although disquieting, still do 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 the 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 the professional) has the perception of a constant decrease of 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

⁸⁰⁾ This figure was reproduced, eg, in the annual address of President Tudjman of January 21, 1999.

⁸¹⁾ The quoted MoJ research of November 1998 provides *obiter dicta* some indication of such a disorder: it is noted that "the control of lower courts by higher courts is 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. MoJ Research at 25–27.

get to even shortened versions of every judgment of higher courts or the SC.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* look like a provisional and occasionally worthless solution of a social dispute.

C. An Insight into the Future: Some Obstacles to the Reforms to Come

Any future government taking the problems of the judiciary seriously 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 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 SJC, perhaps the first body that ought to be reviewed and replaced, has a constitutionally protected position,⁸³⁾ 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

⁸²⁾ Some courts even issue "confidential legal practice" that consists of the judicial decisions "for internal use of judges only".

⁸³⁾ A member of the Council may be discharged before the expiration of his mandate only for limited reasons in a procedure in which both Houses of Parliament participate. 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.

concluded that Croatia with 1,555 systematized judicial posts⁸⁶⁾ for a population of about 4.5 million inhabitants has about 35 judges per 100,000 inhabitants⁸⁷⁾ – considerably more than, eg, Germany that has about 21,000 judges on the population of about 82 million, ie, 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 two years of judicial experience, and 43.1 % less than six years of experience. In the municipal courts in urban centers, half of the judges are under 35 years of age: eg, in Zagreb 7 % of the judges are under 30, and 41 % at the age of 30–35; in Rijeka, 22 % of the judges are under 30 and 27 % from 30–35; in Split 21 % of the judges are under 30 and 43 % from 30–35.⁸⁹⁾ Since judges are appointed with permanent office, and since the number of judges objectively is not too small – rather, on the contrary, there may be a surplus of judges – it means that the perspectives to get a judicial job are going to be rather bad for several decades. An additional problem will be the 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 lack of resources. In the announced saving package of the next government, one of the first measures to be taken will be a cut in the 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 contests the need to adequately remunerate judges – but in a 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.

⁸⁶⁾ This figure is without magistrates' judges, who also have formal powers and privileges of judges.

⁸⁷⁾ Even if we take into account only the actually appointed judges, the figure is high – about 29 per 100,000.

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

⁸⁹⁾ MoJ report, *supra* note 63 at 16.

D. 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 put it back in. 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 respond to the challenges of the constant inflow of cases in an adequate way. Once this machinery has broken 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 reformers have to encounter is that, in the attempts to improve the quality of judicial services and assure a 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 an illegitimate intrusion of the executive into the judicial reservation. A unique opportunity in countries in transition lay precisely in the weakness of the inherited structures. In a situation in which the 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 1990–1999 such space was wasted in Croatia, 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 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 a judiciary that would have deserved

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

⁹¹⁾ On the failures of the 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], *Iudex*, Vol 3 (1995) 413.

them. But in the present situation these structures will be another impediment difficult to overcome. The first, easier chance is lost; it remains to be seen how the second, more difficult attempt to establish a workable system of justice that would correspond to the challenges of the next millennium will proceed.