

# Turning Civil Procedure upside down: From Judges' Law to Users' Law

A. Uzelac

There are many ways to characterise changes in civil procedure. However, in spite of multiple fine tweaks to European national procedural laws that happen practically on an annual basis, it is difficult to distinguish whether we have in fact undergone a major change of paradigm in the last two centuries, or since the time Napoleon promulgated the *Code de procédure civile* in 1806. Even today, the standard textbooks on civil procedure in European countries – notwithstanding numerous interim reforms – refer to the model of procedure that was first introduced in the nineteenth century as the ‘modern’ civil procedure, and contrast it to the Romano-canonical procedures of Middle Ages.<sup>1</sup>

In fact, when we now attempt to look into the future of civil procedure, it is a good idea to devote some time to thinking about the question whether the civil procedure we now have *substantively* differs from the civil procedure at the time of Napoleon (or – for belated Central European followers of patterns of modernization – at the time of Franz Klein). Have the accumulated changes to national legislations since the French Code of Civil Procedure produced a new and radically different model, or – to borrow the words of Alphonse Karr – *plus ça change, plus c'est la même chose*? Naturally, there may be dramatic differences in appearances: the court houses do not look what they used to, and the wigs and robes are nowadays used less often, although not abandoned. Yet, the central figure of civil procedure is, just as in the past, the figure of the judge today. Of course, in comparison with their colleagues who acted two hundred years ago, current judges have a somewhat different status and stature. However, civil procedure is presently also generally perceived as the law that is made for judges and by judges – in two words, civil procedure *is* the Judges' Law.

Is this inevitable, and are there real needs for an alternative? In this paper, we will submit that the ‘modern’ civil procedure of the nineteenth and twentieth centuries still carries a number of features that are inappropriate for contemporary societies. In this sense, the model and style of civil procedure that is, for most countries, still dominant in the contemporary practice of law is not ‘modern’ any more. It is in fact, an

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<sup>1</sup> For a standard presentation of the historical development of European civil procedure see Engelmann 1969; for a newer perspectives see Van Rhee 2005. See also digested versions in leading textbooks of national civil procedures, e.g. Rosenberg, Schwab & Gottwald 1993, p. 16-28; Fasching 1990, p. 13-27; Vincent & Guinchard 1996, p. 34-42.

‘old’ model of civil procedure, as opposed to the ‘new’ civil procedure of the future, the features of which still have to be discovered and discussed.

The dominant features of the ‘old’ civil procedure may be summarized as the picture of a civil procedure that is shaped from above – this is a pyramid that dispenses justice through the judicial branch, from top to bottom, where, accidentally, this justice meets the subjects of the state power – the citizens. Typically, even today, the law of civil procedure in Europe, just as in the times of Napoleon, is an abstract codification that is produced by one centre that warrants the abstract consistency and uniformity. This centre (often – and for good reasons – represented by learned university professors) transforms some of the ideas of state political centers into logical normative constructions that might (but also might not) affect the behavior of the principal agents of civil procedure – the judges and the lawyers. The abstract consistency of norms and rules is, in this model of civil procedure, more important than the impact on real life. Therefore, a paradigmatic judge of this procedural model would rather be more concerned about the consistency of the arguments contained in his written judgment than about the parties’ need to reach an appropriate resolution of their conflict at the right moment.<sup>2</sup> The same logic is followed (and even intensified) by the judges of higher ranks whose loyalty to the system and despise for the parties grow as they advance in the judicial hierarchy.<sup>3</sup> Thus, the quality of judicial work, as demonstrated in official statistics of contemporary ministries of justice, is measured by the percentage of decisions upheld on appeal, and not by the abilities to put an end to social conflicts.<sup>4</sup>

Of course, within such a model of civil procedure reforms do happen, and not infrequently. The court buildings are renovated, in the courtrooms is IT equipment installed, court personnel is increased (as well as the judicial salary) and the libraries of court decisions are enriched every day. Yet, the thrust of such ‘modernization’ is in introducing improvements that are favorable to insiders (judges and lawyers) but brings little improvement for the parties.

Let us again examine the question: ‘*Which procedure suits which society?*’ Taking into consideration the background of ‘modern’ civil procedure, one may find it refreshing that this question is directed to ‘society’, as the typical addressees of the ‘old’ civil procedure often belonged to the State (including judges as state officials, and the lawyers as authorized agents to the process). Therefore, the orientation of this question may be interpreted as the one that looks into the ‘new civil procedure’ of

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<sup>2</sup> For some critical observations on the nature of European continental law see Merryman 1985; a more moderate presentation is to be found in: Van Caenegem 1993.

<sup>3</sup> For a description of an ideal type of hierarchical judiciary see Damaška 1986. See also Uzelac 1993, p. 515-550.

<sup>4</sup> An example of such an approach is the *Index of successfulness of judicial work* employed by the Croatian Ministry of Justice, in which the success is measured by the percentage of judicial sentences that are not quashed on appeal.

the twenty-first century, which is – as we would like to submit – still a plan for the future, and not the existing reality.

The principal characteristic of the ‘new’ civil procedure is the change in approach – turning the focus from judicial professionals to citizens as principal users of civil proceedings.<sup>5</sup> Putting the focus on citizens civil procedural law means concentrating on meeting their needs. These needs, as the needs for an ‘ideal procedure’, are the needs for decisions, not for actions – and the decisions that will be just, fair, and come in appropriate and foreseeable time.<sup>6</sup>

The need for a change in perspective has not gone unnoticed by legal scholars. It would certainly not be out of place to argue that the International Association of Procedural Law has always been one of the principal organizations supporting venues for discussion of topics regarding efficient legal protection, access to justice and a fair trial within a reasonable time.<sup>7</sup> The fact that these topics occurred and reoccurred is, however, not evidence of the fact that the paradigm of the ‘old’ civil procedure has been abandoned and replaced. Quite the contrary, we will in the following text try to demonstrate that the contemporary civil procedures in Europe still more or less suffer from seven essential deficits:

- lack of transparency;
- lack of foreseeability;
- lack of harmonization;
- lack of appropriate time management;
- lack of openness to the needs of the users;
- lack of proper evaluation of the impact of norms on real life; and
- lack of adaptation to changes in society.

The concrete examples that will be used are related to the issue of the relation between norms and reality, and aim to demonstrate that the methods of classical, conservative civil procedural doctrine are unable to diagnose and recognize vital features in national civil procedures. I have

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<sup>5</sup> In conventional civil procedure it is uncommon to speak about the ‘users’ of the judicial procedures. Rather, the laws and legal books refer to ‘parties’, ‘lawyers’, ‘experts’, according to pre-existing roles assigned to particular players in the process. The term ‘justice system users’ has been introduced only in recent years, where it first found its broader application in the UK. On the transnational level, this term finds an important place in the work of the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ), see <<http://www.coe.int/cepej>> (consulted in March 2008).

<sup>6</sup> This approach is epitomized in the title of the EU-CEPEJ Conference *Towards an ideal trial: a few examples of the most successful judicial proceedings in Europe* organized in Brussels, 18-20 November 2004. It is also represented in the Framework Programme of the CEPEJ, *A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe*, CEPEJ (2004) 19 REV 1 (<<http://www.coe.int/cepej>> (consulted in March 2008)).

<sup>7</sup> We will limit our remarks to the fact that the efficiency of legal protection was a constant topic of the conferences of the International Association of Procedural Law (IAPL), and gave rise to the main title of two books that resulted from them: Habscheid 1985 (papers from the Würzburg Congress in 1983) and Gottwald 2006 (papers from the Warsaw Conference in 2004).

chosen the examples from the area that I am most familiar with – the area of Central and (South-)Eastern Europe.

The statement that all of the civil procedural laws of the countries that have emerged from former Yugoslavia follow the Austro-Germanic model of civil procedure seems to be widely accepted.<sup>8</sup> Even now, practically every post-Yugoslav successor state claims that its civil procedural law is more or less directly derived from Franz Klein's Austrian ZPO of 1895 (the only, and curious exception is, perhaps, Bosnia and Herzegovina, which has, as a territory under direct European protectorate, undergone the most far-reaching changes). If you ask any Croatian, Serbian or Slovenian judge or law professor about his national model of civil procedure, he will argue that his model of procedure is Austrian and/or German. Those better informed will even corroborate this self-understanding with a story about the first unified Yugoslav codification of civil procedure in 1929, imposed by King Aleksandr and executed by his Minister of Justice, who – as a loyal former student of the Royal University of Vienna – simply ordered that Austrian law be translated and enacted as uniform law for all, formerly disjointed, territories.<sup>9</sup>

In spite of this mutually flattering perception, we may ask whether the statement about the shared model of civil procedure is accurate, and even whether it was ever accurate – at least from the users' perspective (and not the perspective of learned ex-Yugoslav judges and professors who admittedly, at least some of them in some periods, did in fact read German law books and did study law in Austria).<sup>10</sup>

If we start with the assumption that civil procedure is the art and science of undertaking procedural actions in a specific period of time, the procedures belonging to the same model of civil procedure should be at least comparable in their length. Therefore, if countries like Germany, Austria, Slovenia and Croatia share the same procedural tradition, then the typical duration of judicial proceedings should typically be the same or similar.

Yet, already rather anecdotal and fragmentary data may reveal a completely different picture. Even if we only concentrate on first instance proceedings, the data will be rather different. The average length of the proceedings before a German Local Court (*Amtsgericht*) was, at the end of the twentieth century, assessed at 4,6 months.<sup>11</sup> A more recent study on the length of proceedings showed that, in Austria, 64% of all civil cases were

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<sup>8</sup> See e.g. the assessment of Jelinek 1991, p. 41-89.

<sup>9</sup> See Triva, Belajec & Dika 1986, p. 32.

<sup>10</sup> And, for those who did not read German, the leading commentary of Yugoslav civil procedure in the 1930's and the 1940's was the commentary of the Austrian *Zivilprozeßordnung* of Georg Neumann, adopted to the article numbering of the Yugoslav Code of Civil Procedure and translated into Serbian more than 30 years after its first edition in Austria. See Najman 1935.

<sup>11</sup> According to an assessment of Peter Gottwald from 1999. See Gottwald 1999, p. 212. In higher, Regional (District) Courts (*Landgerichte*), according to the same author, the average duration of first instance proceedings was 6.9 months, and 10.8 months in cases of judgments after adversarial hearings. Gottwald 2004, p. 127.

decided within 9 months (72% within one year and 90% within two years), and that the average length of trials in civil cases was 278 days or 9,2 months.<sup>12</sup> Turning to Slovenia and Croatia, information on the average length of proceedings was more difficult to obtain, as the official statistics still only collect figures on the percentages of cases that are completed within one year.<sup>13</sup> However, a sufficient indicator may be the fragmentary data on individual courts. For example, the District Court in Maribor<sup>14</sup> declared its average duration of proceedings as 18 months. Finally, according to the results of one case survey, the largest court in Croatia – the municipal court in Zagreb – had, in 2001, a mean duration of proceedings of 28,1 months.<sup>15</sup> Although some changes may have occurred since then, it is not likely that they are dramatic. At least, when, in 2005, the new President of the Supreme Court surveyed the same Zagreb court, he established that this court still has, *sub judice*, more than 10.000 cases that have been pending for over ten years.<sup>16</sup>

Would it be fair to say that such differences in the average duration, which are trivial for some people, affect the characterization of the procedural model? We think yes – at least when we look at the procedure through the eyes of the users. For them, the familiarity of procedural models is assessed according to justice and effectiveness, not by criteria of procedural norms and practices. However, even in a more conservative assessment, radically different timing may affect the balance of procedural principles, and bring about a fully different function and use of the nominally, same procedural institutions.

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<sup>12</sup> See *Sonderauswertung Verfahrensdauer*, 2003 (from the Austrian Answer to the Pilot scheme for evaluating judicial systems. See <<http://www.coe.int/cepej>> (consulted in March 2008) – Evaluation of Judicial Systems, 2002, Replies by Countries, reply to question 64).

<sup>13</sup> E.g. the Statistical Report of the Croatian Ministry of Justice only reflects that there were 42,5% cases that were pending over 12 months in the Municipal Courts in 2002, but with no further breakdown (e.g. cases pending over 2 or 3 years). See *Statistički pregled*, Zagreb, 2004, p. 25.

<sup>14</sup> According to the data provided for the CEPEJ files – see *Network of Pilot Courts. Synthesis of the replies on the situation of the timeframes of proceedings*, CEPEJ-TF-DEL (2005) 4 Rev 4, 10 October 2005 (<[www.coe.int/cepej](http://www.coe.int/cepej)> (consulted in March 2008)). The data probably regard the court with a relatively good performance, as it is assigned by the state to be a member of the Pilot Court Network of the CEPEJ.

<sup>15</sup> See National Center for State Courts, International Programs Division, *Functional Specifications Report for Computerization in Zagreb Municipal Court of the Republic of Croatia, Municipal Courts Improvement Project – Croatia, Sponsored by the U.S. Agency for International Development Delivery Order # 801, AEP-I-00-00-00011-00*, September 2001 (hereinafter referred to as: NCSC Report).

<sup>16</sup> As a reaction to this finding, the Supreme Court launched at the end of 2005 a programme for resolving the backlog of old cases. In civil cases, the ‘old cases’ were defined as cases lodged with a court before 31.12.2000 (i.e. cases that were pending for more than five years at the end of 2005). On 31.12.2005, there were 64.623 of such civil cases. After nine months, the number of old cases was reduced to about 50.000 (which is still about one third of the average annual influx of civil cases). Source: Presentation of K. Buljan, Plitvice, 11 December 2006 (CEPEJ Bilateral Activity *Reducing excessive duration of judicial proceedings and court backlogs in Croatia and Slovenia*).

As proof for this statement, we would like to rely on the earlier cited research conducted by the National Center for State Courts (NCSC) that was conducted at the Municipal Court in Zagreb in 2000-2001.<sup>17</sup> Although now almost five years old, this research is interesting for a number of reasons. It is a rare study based on a continuing study of empirical data; it was undertaken by an experienced American professional organization and it is the only research that displays such a degree of details and insight. And, finally, it is research that was never repeated, officially completely ignored, and never broadly publicized. Still, we think that this is perhaps the most promising example of judicial time management analysis, which could serve as a model for study and analysis of judicial timeframes in the future.

Below are some findings on the case processing time at the Zagreb Municipal Court:

I. Total duration of first instance proceedings

Based on a sample of 1,402 cases, the mean duration of all proceedings at the MCZg was estimated at 843 days or 2,3 years, calculated from the date of filing the complaint (statement of claim) until the date of the judgement. The maximum processing time for a civil case recorded in the sample was 3,889 days or 10.65 years, but based on the comparison of case type, such a maximum was not an isolated feature. In total, 19,4% of all civil cases at the court lasted more than four years. One detail may be particularly stimulating for a discussion about the relation between norms and reality: the maximum percentage of cases not terminated by the court related to trespass cases (*Besitzstörung*) that are otherwise by law defined as urgent cases, with a very limited scope of issues. 24% of such cases were processed by the trial court and took more than four years (and, it is also interesting to note that these cases were the cases with the highest rate of appeal, i.e. 61%).<sup>18</sup>

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<sup>17</sup> See above, note 16.

<sup>18</sup> See NSCS Report, p. 11.

Case Type	Number of cases	Mean (days)	Median (days)	Minimum (days)	Maximum (days)	Percentage of cases terminated in --		
						Less than one year	Less than 2 years	4 years or more
All Cases	1,402	843	557	7	3,889	38.9%	58.2%	19.4%
General Civil	488	787	510	18	3,679	45.1	59.9	16.9
Domestic Relations	116	362	191	7	2,142	73.0	85.2	5.2
Trespass	25	798	314	8	2,697	52.0	56.0	24.0
Damages	504	1,016	708	28	3,889	24.3	51.3	23.9
Labor	174	773	379	52	3,256	48.3	62.6	21.3
Housing	95	946	735	28	3,346	24.5	48.9	23.4

*Table 1. Case processing time at Zagreb MC from filing of complaint to verdict (sampled cases)*

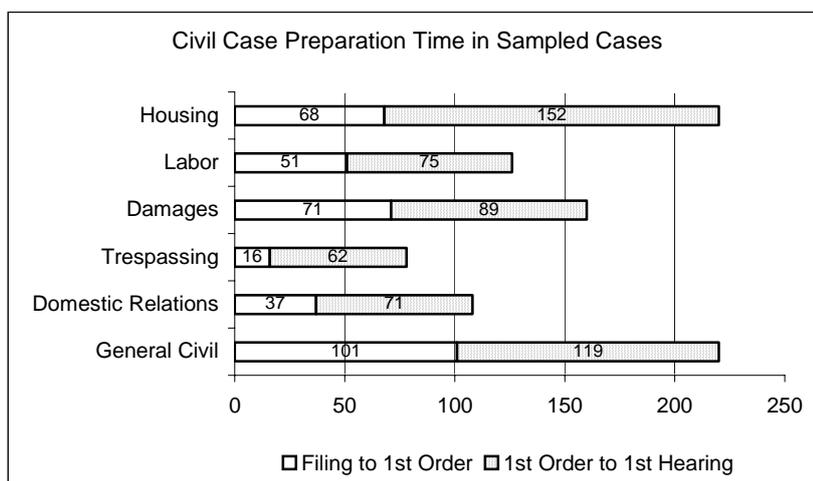
## II. Duration of individual stages of judicial proceedings

### A. Preparatory stages

When the case is filed with the court, the first task of the court is to serve the complaint to the defendant and then, by its first order, set the date for the first hearing. The time between filing and the first hearing is known as the preparatory stage (pre-trial stage), although in fact very little preparation is done during this time, both on the side of the court and on the side of the litigants. As shown by the analysis, the mean time between the initial filing and the first hearing was 172 days (5,7 months) or 20 percent of the case processing time, while general civil cases had an even longer preparation time of 212 days (7 months). It may again be interesting to note that domestic relations cases (family cases) needed in average some 37 days from filing to set the date for the hearing, and a further 71 days until the first hearing (in total: 108 days). These cases were, both at that time as also today, by law designated as urgent cases, with the strict rule that the first hearing *must* be held within 15 days from filing (Article 269/2 ZBPO).<sup>19</sup>

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<sup>19</sup> NCSC Report, p. 12.



## B. Main hearing

There were also several striking findings in the analysis of the main hearing. Generally, the mean time between the first and the last hearing was found to be almost 500 days (16.5 months). But, also interesting may be the information on the average number of hearings and the time between them. The court held during this stage an average of 3.4 hearings or about one hearing every 145 days (5 months). Again, the maximum average number of hearings was in trespass cases (5.4), and the absolute maximum number of hearings in one sampled case was 17. This particular research, although very comprehensive, was not able to collect data on the duration of hearings. However, based on other evidence, we may assume that the average duration of a single hearing would be between 15 and 30 minutes. All this data may be contrasted with the procedural principles taught in the civil procedural courses at Zagreb University at about the same time: the principle of concentration of proceedings (requiring that proceedings be completed, if possible, within one hearing); the principle that the time between the hearings be as short as possible to preserve the freshness of impressions; the principle of efficiency (requiring a minimum engagement of time and effort to obtain the final result). An interesting conclusion may also be drawn in respect to the specific arrangements for commercial proceedings aimed at speeding up the proceedings. In these proceedings the general rule on a stay of the proceedings – *das Ruhen des Verfahrens* – caused mainly by the inactivity of both parties, does not apply, but the judges will adjourn the hearing and immediately set a new date for it. In theory, this is a more effective course of proceeding, as the mandatory stay of three months is avoided. However, if on average, the time between the hearings is approximately 5 months, then the default rules on a stay of the proceedings turn to be more effective than the ‘speedy’ arrangement for commercial cases (because these rules require the party’s initiative for the

recommencement of the case within the next month, otherwise the case will be dismissed).<sup>20</sup>

In about 30 percent of cases, the judges engage experts (expert witnesses). Out of these cases, experts were used in 88% of cases for damages (mainly traffic accidents). Expert participation in the process would increase its average time to 1,049 days or almost three years. The legal time-limit for filing an expert report with the court is 30 days; however, the average time experts need is 158 days.<sup>21</sup>

### C. Post-hearing stages (decision-making)

The closure of the hearing does not mean that the case is resolved. Admittedly, the law required in 2001 that the judges pronounce their decision immediately, and only in more complex cases did they have 8 days at their disposal to make the decision and a further 8 days to complete the text of a written judgment. In this survey, it was established that judges spend, on average, 119 days (or 4 months, i.e. 14 percent of the case processing time) writing the judgment. After this time, the Court should serve the written judgment to the parties. In comparison to other actions, statistically this one is finalized quite expeditiously – the average time between completion of the written decision and its service was 32 days.

### III. Second instance proceedings

The end of first instance proceedings does not imply the end of the litigation for all cases. In more than one-quarter (26%) of all sampled cases an appeal was raised with the County Court. The appellate process does not have any valid reasons to last a very long time; in the appeals proceedings, the parties are not being heard, evidence is not being taken and no oral hearings whatsoever take place (although prior to 2003, the option to hold such hearings did exist legally; it was however never used). Still, the appeal proceedings would, in average, last over a year, or more precisely 444 days, from the launching of the appeal until the case was returned to the first instance court.

For every fifth case, the appellate decision would not lead to the resolution of the dispute. In 20% of the appealed cases (and 37% civil cases in general), the decision was remanded and returned to the first instance court for rehearing. This would mark the beginning of a new process that could lead to a new appeal, and eventually even a new remanding and rehearing.<sup>22</sup>

Putting all these elements together, we may conclude that the life cycle of one average civil suit in the most important Croatian court of general jurisdiction would look as follows:

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<sup>20</sup> NCSC Report, p. 13.

<sup>21</sup> NCSC Report, p. 13-14.

<sup>22</sup> NCSC Report, p. 14.

Proceedings	Stage	Segment	Details	Total
	Preparation (pre-hearing)	Filing to 1st order	3,3 m.	7,3 m.
		1st order to 1st hearing	4 m.	
First instance proceedings	Main hearing	3.4 hearings	16,5 m.	16,5 m.
	Post-hearing	Final hearing to written judgment	4. m	5,4 m.
		Written judgment to its service	1,4 m.	
Second instance proceedings	Deliberations	From the appeal to the return of the decision to 1 <sup>st</sup> instance	14,8 m.	14,8 m.
<b>TOTAL</b>				<b>44,0 m. (3,6 y)</b>

The information in this table is not fully accurate as the appeal may result in a restarting of the trial in a rather large number of cases (5,2% of all cases or 20% of all appealed cases). But, though incomplete, the above table may sufficiently reveal the flavor of the national civil procedures at the beginning of the twenty first century. On this basis, a further discussion about the differences and similarities of procedural models can be initiated in order to arrive at the question whether such a procedural style still essentially belongs to the model of ‘Austro-German proceedings’.

Nevertheless, on this spot we would like to leave the particular example of post-Yugoslav proceedings and turn our attention to the general situation in European countries. The example of the 2001 case review study in the Zagreb Municipal Court was chosen for a specific reason. This was, namely, one of the rare, almost model examples of studies that was able to present a full set of information on the duration of judicial proceedings, almost a portrait of the law in action. The methodology was quite simple but extremely effective; in the sample of cases, the individual actions (events) in the proceedings were recorded from the commencement of the case until its final determination. Subsequently, the analysis of the timeframes between individual events could lead to prompt replies on, e.g.

the minimum/mean/median/maximum duration of preparatory stages, or e.g. the time from the first hearing until the delivery of the judgment. For a country such as Croatia, it seems that this report came too early – it was misunderstood, feared, neglected, never used or repeated, and finally forgotten.

Two years later, in 2003, the European Commission on the Efficiency of Justice (CEPEJ) was established, and one of its first activities was a pilot evaluation of the European judicial systems.<sup>23</sup> Among over 100 questions, one whole section was devoted to questions on the timeframes of judicial proceedings. The experts who worked on the pilot questionnaire wished to concentrate only on a few basic and presumably easy questions, such as those on the duration of four typical types of proceedings, two from the civil and two from the criminal law area (divorce, employment dismissal, robbery, homicide). But, both the first round (in 2004, based on data for 2002) and the second, revised round of evaluation (first publicly reported on 5 October 2006)<sup>24</sup> demonstrated a striking lack of ability to reply to such ‘easy’ questions in most European jurisdictions. The unanimous view of the Council of Europe experts was that this part of the evaluation scheme often produced fragmentary data, and even where data was given, it was of poor quality, often displaying a lack of understanding of the essence of the questions. In particular, for the vast majority of countries, it was impossible to provide intelligible and solid replies to the questions on the integral duration of cases – from the initiation to the final solution of the case.

This result was stunning, especially having in mind that the methodology of these questions simply followed the logic of the case law of the European Court of Human Rights in Strasbourg. When assessing the length of the proceedings in individual cases brought before it, the Court has always emphasized that it evaluates both the duration of the individual stages of the proceedings and the integral length of the proceedings, from the start until the end, even taking into account the time needed for the eventual enforcement of the final decisions. It was all but expected that the central bodies of the State would be unable to answer the questions that are most important and most obvious from the perspective of the individuals who are under the State’s jurisdiction. The fact that the States involved in this evaluation were internationally bound to protect the right of individuals to a trial within a reasonable time and were obliged to compensate victims of past violations and prevent their future occurrence, could only be taken as an aggravating circumstance.

Starting from this finding, the CEPEJ has assigned one of its working groups the task to ‘*examine the timeframes for judicial procedures in the member States, namely to provide an analytical tool for use by member*

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<sup>23</sup> See results of the first round – *European judicial systems – facts and figures* adopted by the CEPEJ in December 2004 (published in print by Council of Europe Publishing and available in electronic version at <<http://www.coe.int/cepej>> (consulted in March 2008)).

<sup>24</sup> *European Judicial Systems. Edition 2006 (2004 Data), Strasbourg, 2006.*

*states with a view to possible reforms*'.<sup>25</sup> As the result of this mandate, the CEPEJ adopted at the end of 2005 the *Checklist of indicators for the analysis of lengths of proceedings in the justice system (Time management checklist)*.<sup>26</sup> This checklist had in particular the purpose 'to help justice systems to collect appropriate information and analyze relevant aspects of the duration of judicial proceedings with a view to reduce undue delays, ensure effectiveness of the proceedings and provide necessary transparency and foreseeability to the users of the justice systems'. The first of the six indicators of the *Checklist* was the ability to assess the overall length of proceedings, and the first sub-issue in this group was 'identifying the court proceedings from the users' perspective'. Other indicators dealt with other insufficiencies established in this exercise; the need to establish standards for the duration of proceedings and ensure foreseeability of the timeframes, the need to establish a sufficiently elaborated typology of cases with regard to time-consumption, the need to monitor the course of proceedings and to record the duration of its stages, and the need to promptly diagnose delays and mitigate their consequences.

The mission of the CEPEJ is still not finished. In the area of the length of the proceedings there are several other projects that will soon produce its first results. *Inter alia*, a first systematical study of the practice of the ECHR in the area of the length of proceedings (together with the systematization of reasons for the established delays) was adopted in December 2006.<sup>27</sup> At the same time, the CEPEJ has accepted a regional time management study on the practices of Nordic countries that have perhaps the most developed approach to issues regarding the length of compared proceedings to other European countries.<sup>28</sup> A draft study on best practices in time management was also compiled and accepted.<sup>29</sup> And in the future, the CEPEJ may also establish a monitoring body for judicial timeframes in Europe and devote more time to the study of the feedback received from the 46 member countries of the Council of Europe.

All these efforts will perhaps have an impact on procedural practices in European countries in the imminent future. On the other hand, one should not wholly exclude the possibility that the CEPEJ's efforts would result as the NCSC's study in Croatia – in the archives of historical forgetfulness. Yet, I would like to argue that the approach of the CEPEJ, just as the approach of the NCSC's study in Croatia, is the approach of the 'new' civil procedure as defined in the beginning of my contribution. As

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<sup>25</sup> Terms of reference of the Task Force on timeframes of proceedings (CEPEJ-TF-DEL), agreed at the 4th Plenary of the CEPEJ – see Meeting Report, CEPEJ (2004) 33; see also the first Meeting Report of the Task Force (all available at <<http://www.coe.int/cepej>> (consulted in March 2008)).

<sup>26</sup> *CEPEJ Time management checklist*, CEPEJ (2005) 12 REV (Strasbourg, 2005).

<sup>27</sup> *Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights*, Strasbourg, 2006 (CEPEJ(2006)15).

<sup>28</sup> *Time management of justice systems: a northern European study*, Strasbourg, 2006 (CEPEJ(2006)14).

<sup>29</sup> *Compendium of 'best practices' on time management of judicial proceedings*, Strasbourg, 2006 (CEPEJ(2006)13).

such, this approach encapsulates the future of civil procedure – the future that will perhaps need more time to become the present.

This paper will end by summarizing the main features of the new paradigm (the civil procedure of the future) through seven principal issues where it differs from the past (and still dominant) model. In short, these are the elements that ‘turn civil procedure upside down’.

First, orientation towards users; the central task of civil procedure should be the satisfaction of the needs of the users, thereby, the term ‘user’ means primarily the parties, and eventually also the society to which these parties belong. It does not mean the officials in charge of the proceedings (judges, prosecutors), and it does not include the parties’ lawyers either (as their interests may partly also go against the needs of their clients).

Second, harmonization of standards should be more important than harmonization of rules and laws; the normative underpinning of civil procedure is important, but the same legal provisions may have radically different faces in legal life.

Third, the procedural models should be compared through the comparison of their results, and not only through the comparison of abstract rules. The users’ view of the administration of justice starts with the desired results, not with superficial textual similarities.

Fourth, legislative change should always be accompanied by research of its social impact. Civil procedural rules have an impact on the lives of the users, and on society as a whole. Every change in the rules should be made with a view to improve this social impact.

Fifth, case administration and court management are as important for a well-functioning civil procedure as the correct adjudication. Proper implementation of civil procedural rules (functional civil procedure) must be accompanied by appropriate handling of the environment in which civil procedure takes place (organization of justice). This also implies uniform empirical methods of data collection, monitoring and statistical evaluation.

Sixth, the creation of a common judicial area needs real comparability instead of self-deceiving declarations. If Europe is to become an ‘area of justice’ in which every citizen enjoys the same level of legal protection in every country, then this has to be monitored on the basis of objective methods. Mutual trust cannot be built on wishful thinking – it has to be rooted in facts.

## Bibliography

### **Caenegem van 1993**

R. van Caenegem, *Judges, legislators and professors*, Cambridge: Cambridge University Press, 1993.

### **Damaška 1986**

M. Damaška, *The Faces of Justice and State Authority*, New Haven: Yale University Press, 1986.

### **Engelmann 1969**

A. Engelmann, *A history of continental civil procedure*, South Hackensack: N.J.: Rothman Reprints, 1969.

### **Fasching 1990**

H.W. Fasching, *Lehrbuch des Österreichischen Zivilprozeßrecht: Lehr- und Handbuch für Studium und Praxis*, Wien: Mans, 1990.

### **Gottwald 1999**

P. Gottwald, 'Civil Justice Reforms: Access, Cost, and Expedition. The German Perspective', in: A.A.S. Zuckerman (ed.), *Civil Justice in Crisis*, Oxford: Oxford University Press 1999, p. 207-234.

### **Gottwald 2004**

P. Gottwald, 'Defeating Delay in German Civil Procedure', in: C.H. van Rhee (ed.), *The Law's Delay*, Antwerp: Intersentia 2004, p. 121-129.

### **Gottwald 2006**

P. Gottwald, *Effektivität des Rechtsschutzes vor staatlichen und privaten Gerichten*, Bielefeld: Giesecking, 2006.

### **Habscheid 1985**

W.J. Habscheid (ed.), *Effektiver Rechtsschutz und verfassungsmässige Ordnung. Die Diskussionsberichte zum VII. Internationalen Kongress für Prozessrecht, Würzburg 1983. Effectiveness of judicial protection and constitutional order. The discussions of the VIIth International Co*, Bielefeld: Giesecking, 1985.

### **Jelinek 1991**

W. Jelinek, 'Einflüsse des österreichischen Zivilprozeßrechts auf andere Rechtsordnungen', in: W.J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld: Giesecking, 1991, p. 41-89.

**Merryman 1985**

J.H. Merryman, *The civil law tradition*, Stanford: Stanford University Press, 1985.

**Najman 1935**

G. Najman, *Komentar Zakona o sudskom postupku u građanskim parnicama*, Belgrade: Planeta, 1935.

**Rhee van 2005**

C.H. Van Rhee (ed.), *European traditions in civil procedure*, Antwerp: Intersentia, 2005.

**Rosenberg, Schwab & Gottwald 1993**

L. Rosenberg, K. Schwab & P. Gottwald, *Zivilprozeßrecht*, München: Beck, 1993.

**Triva, Belajec & Dika 1986**

S. Triva, V. Belajec & M. Dika, *Građansko parnično procesno pravo*, Zagreb: Narodne novine, 1986.

**Uzelac 1993**

A. Uzelac, 'Evropsko sudstvo: između birokratske organizacije i korporativne svijesti [European Judiciary: Between a bureaucratic organization and corporate consciousness]', *Zbornik Pravnog fakulteta u Zagrebu*, 1993, p. 515-550.

**Vincent & Guinchard 1996**

J. Vincent & S. Guinchard, *Procédure civile*, Paris: Dalloz, 1996.