

Gent Colloquium  
**The Judiciary in War Times: the Case of Balkans**  
*Short Intervention*

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The title of my contribution kindly given to me by the organizers of this colloquium is “The judiciary in war times: the case of Balkans”. However, I have to begin my intervention with a disclaimer – the main topic of my brief presentation will deal neither precisely with war, nor precisely with Balkans.

I declare a reservation because reference to “war” seems to be too narrow, and the reference to “Balkans” too broad. My national report, presented today in the frame of the regional report given by my colleague and friend Paul Oberhammer, dealt solely with the role and status of judges in one of the post-socialist and post-Yugoslav countries that officially does not like to be referred as “the Balkans” – namely the Republic of Croatia.

Balkans is, for those of you that might not know it, principally known for providing name and inspiration for unpopular term “balkanization”. I submit to you that its definition is equally vague as the definition of “discretion” – you see it where you want to see it, some say. Some say it extends to suburbs of Zagreb, my home city; some say it ends in suburbs of Vienna; some very inspired theorists may even be tempted to extend it to the territory of the size of the Charles V empire. Therefore, avoiding to speak in imprecise terms, I would restrain my remarks to Croatia, and to the period covered in my national report, i.e. the past ten years (1990-2000 period), being the period both of war and peace. This period is also the period of one particular political regime – the regime that departed from socialism, but was still incapable of developing a full-fledged democracy.

This particular example may be interesting for you perhaps because it is of broader significance. Perhaps it will be interesting to you precisely because it is only a very specific and isolated example. Perhaps I say, because I don’t know, and I leave this entirely to your discretion. I would simply like to share with you a couple of cases, so to say a couple of gossips and scandals from my own national system of justice.

This sharing of some unpleasant and potentially embarrassing details about national system of state power on an international conference has until recently been officially viewed in my country as a kind of high treason. However, I would not like to embarrass anyone or anything. It simply seems to me that we could all profit from sharing some piquant stories about and around our own courts – this gives sometimes an insight into “law in action”, into specific procedural flavor of particular system(s) of justice. And some stories that I would like to tell about the trials and tribulations of a system of justice in transition may shed new light on certain aspects of the notion of “discretion”.

Just a few words of background: you may all know that Croatia emerged as a new independent state from former Yugoslavia in 1990-91. It is certainly one of the countries in transition – but unlike some other transitional countries, it had a unique opportunity (or unique problem) to achieve three things at the same time: to change political system from socialist to post-socialist; to establish a new independent state; and to lead, and, eventually, win a war. This also affected the national system of justice, unfortunately (to utilize an understatement) not always bringing only improvements.

Let me first try to deal with some widespread prejudices about socialist courts and judges. Croatian judges prior to 1990 were, with some exceptions, relatively well-trained and independent professionals. This independent position was not due to the strength of courts, but on the contrary - to their weakness. Namely, whereas in theory judiciary was not recognized as a separate branch of government, because socialist state rejected the doctrine of the separation of powers, it was generally politically insignificant, and therefore politics mostly let it alone.

You may ask why: well, all or mostly all socially, politically and economically important decisions were made elsewhere, mostly in the central committees of the communist party, and were transmitted by other mechanisms of social regulation. In the system of limited private ownership, courts in civil jurisdiction dealt with minor cases, and therefore they were granted a limited autonomy.

A shield by which judges often protected themselves during socialist times was the doctrine of self-restraint. Judges were generally very reluctant to openly admit that they had the least amount of discretion – because it could give incentive to the executive to exercise pressure to make them use their discretion in one, and not the other way.

Well, with the new democratic constitution enacted in 1990, everything changed. Suddenly, doctrine of separation of powers was recognized, and the judiciary became the “third power”. Judges obtained constitutional guarantees of their independence, their immovability, and the permanence of their office. But, courts soon became politically and socially interesting and significant, and this significance and importance nearly destroyed them.

Starting with the discovery of the importance of courts under new circumstances, the new holders of political power gradually started to violate the new constitutional guarantees, to the point that, at some moments, the whole system was turned into travesty. As promised, I would like to give you some examples and illustrations, that could be – following the language of this colloquium – categorized not as “judicial discretion” – i.e. “discretion by judges” – but as “discretion with judges” or “discretion about judges”.

First example is an example from constitutional law. After beginning of the war in Croatia, in Summer and Autumn 1991, the President of the State (F.T.) issued a number of Executive Decrees with the Statutory Force, that either replaced or supplemented laws passed by the parliament in a number of areas. Presidential decrees dealt even with judiciary: some of them provided for resurrection of martial courts (empowering them to rule not only in military matters, but also in some matters concerning civilians). These decrees also suspended a number of procedural guarantees, such as the warranty of immovability of judges. Naturally, the decrees were almost immediately challenged before the Constitutional Court. But, the Constitutional Court rejected all petitions, showing a good display of discretion about discretion – it ruled that the President may (as perhaps Charles V could) 1.) decide by his own discretion whether there is an emergency state, and without declaring it, he may issue emergency decrees with statutory force; 2.) that he may, by the force of his decrees, impose limitation on human rights; and 3.) that the prohibition of retroactive application does not apply to his decrees. This was the decision with one of the shortest explanations, and rather a creative one: namely, it was in part directly contrary to the Art. 17 of the Constitution, that expressly provides that constitutional rights may be restricted by the President only if Parliament is not able to be in session – and throughout this period parliament was in permanent session.

This example may show how radical consequences the emergency situations may have on legal reasoning. I am positive that many members of the constitutional court were later ashamed of this decision. Luckily,

our Constitutional Court does not produce precedents, and the same court later played a positive role and issued decisions of much higher quality. And, as the war ceased, some five years later, in 1996, the decrees, and with them Martial Courts as well, were abolished. In a sense, this most direct consequence of the state of war was the least evil for the system of justice. I will continue with the greater evil.

Example two deals with the great exodus of judges. Namely, in spite of the guarantees granted to judges by the new constitution, in the beginning of '90s judicial job was never less attractive, and a very substantive number of judges was forced to leave judiciary, or was removed. One may even speak of a great cleansing of judiciary, and this cleansing was made on very discretionary grounds.

Just a few words on the system of appointing and removing judges in Croatia. The new Constitution provided a new institution that should deal with the personal issues of judiciary – the body called The State Judicial Council. This body was conceived as the body of legal profession – similar to Italian *Consiglio Superiore della Magistratura*. But, although this body should represent the legal profession and guarantee judicial independence, it is in our case appointed by the Parliament. And, in 1994, the Parliament appointed members of the State Judiciary Council primarily among judges, state attorneys and lawyers that were considered to be obedient to the government of the President Tudjman. To make things worse, a statute passed in the meantime provided that judges who are not reappointed would lose their job simply for the lack of appointment. The new Council understood its role to be completely “discretionary” and started to appoint judges from the lists that were obviously politically – and not professionally -- motivated. It even wanted to guarantee the discretion by closing its deliberations to public. But, eventually, the Constitutional Court struck down the provision that enabled discretionary closing of the proceedings for public. And, more importantly, it also struck the whole series of appointments made by this Council as unconstitutional, because such appointments were not grounded and did not correspond to the objective criteria of knowledge and efficacy of individual candidates. However, since the Constitutional Court could not replace the struck decisions, it only returned the appointment of judges to the State Judicial Council. The Council after that simply repeated the same appointments, slightly changing the procedure in irrelevant details. In such a way, even the very first appointment of the SJC, the appointment of Supreme Court Judges

made in the beginning of 1995, is still not completed, because it was three times repeated and three times struck down as unconstitutional.

Final example is perhaps the most radical one: in 1996, the President of the Supreme Court, who was appointed to this office as a loyal political appointee, but who subsequently started to show signs of disobedience (i.e. judicial independence) was submitted to disciplinary proceedings and eventually removed from office. He was first accused of sexual misconduct, and later this qualification was changed into "possession of friends with criminal past". Accusations were based on the evidence collected by wiretapping performed by one of the secret services, that allegedly did not wiretap the President of the SC, but his partners in conversations. The whole procedure was a travesty: for instance, during the procedure, one of the members of the State Judicial Council was a judge who first questioned the accused, and then offered himself to the Council as the witness against him. Anyway, this removal was later struck as unconstitutional, but it did not prevent the SJC to repeat the procedure and remove the accused President of the Supreme Court once again from office.

I would now stop with examples (although my national report has many others, together with explanations) and turn to the future. I would like to turn your attention to the following paradox. In the past years, it is undoubtfull that some judges were appointed as political marionettes. Many of them actively collaborated in the process of cleansing of judicial ranks from "too activist" and "too independent" colleagues. But, since recently we have a new government that is willing to do reforms in the area of judiciary. However, the same judges who previously contributed to the violation of judicial independence, now hide behind constitutional guarantees and invoke their constitutional rights and their protected constitutional position. Even if we disregard some very obvious examples, it is the fact that the judicial positions are now largely occupied by judges of poor capabilities, and that many of them are young and inexperienced – e.g. about 25 % of the judges are in the age of under 35y. Also, the quality of higher courts is not impressive. Especially at the level of court administration, in many courts there is a class of political appointees, starting with the presidents of the courts, who were appointed primarily with the purpose to rule over their fellow judges and transmit the orders of the political regime. Generally, it can be stated that the quality and efficiency of the judiciary is not better than in was ten years ago, during last years of socialism. This is corroborated by statistics, that

show that a larger number of judges now has a larger backlog of cases and larger delays.

The current state of affairs is therefore full of irony: namely, those who in the past years advocated judicial independence and strong professional standards now advocate reforms; and those who profited from political appointments are now proponents of strict judicial autonomy and independence. And, since it is easier to push the paste out of the tube than to return it back, now we have two equally unacceptable alternatives: either, for the sake of judicial independence, we will again have to violate judicial independence. Or, we will be forced to accept the approach offered to us by the Roman emperor Caligula: it is enough to find a horse, give it the title of consul, put a wig on it, fancy robe and glasses, and everyone will have to bow to the horse and address it as "Your Honor". Thank you.