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## REFORM OF THE JUDICIARY IN CROATIA AND ITS LIMITATIONS

### Appointing presidents of the courts in the Republic of Croatia and the outcomes

#### I. Challenges of Triple Transition

##### a. Introduction

Of all the areas that call for reforms, the judiciary might be the one that poses the most problems and the largest number of unanswered questions in Croatia. The degree of credibility enjoyed by the present-day judiciary amongst the public of contemporary Croatia is the lowest ever: in February 2002, the judiciary was the public institution least trusted by citizens; comparatively, out of all the countries of South and South-Eastern Europe, Croatian citizens only placed more trust in their judiciary than the citizens of Bulgaria – even in Republika Srpska, the credibility of the courts ranked twice as high.<sup>1</sup> However, part of the negative rating of the Croatian judiciary can be accounted for by the unprecedented amount of media attention it has been receiving lately; never before has the situation in the judiciary ranked first on the list of problems that stand in the way of the international integration of the Republic of Croatia; never before has the interest of the general public – *the man-in-the-street* – for legal practices been so intensive and long-lasting.<sup>2</sup>

These very facts clearly indicate that the system is in crisis.<sup>3</sup> Further support for such an inference can be found in the unending sequence of judicial

- 1 See: The public opinion poll conducted in 12 countries and areas of South-Eastern Europe by the Stockholm institute IDEA (carried out by the PULS a agency in Croatia) in January/February 2002. In Croatia, the credibility of the courts was the lowest of all the institutions (17% as compared to 60% regarding the Church, 55% regarding private enterprise or 43% regarding the Army). In comparison, the credibility of the courts in Montenegro and Romania ranked at 35% and 38% respectively. In Serbia, the credibility of the courts was only slightly higher (22%), which, nevertheless, exceeded the credibility of local authorities, trade unions and the parliament. See: [http://www.idea.int/balkanssurvey.cfm](http://www.idea.int/balkanssurvey.cfm;);
- 2 For recent cases see, for example: Rajić, V., “U Hrvatskoj za 12 godina – devet tužitelja!?”, *Panorama*, 13.04.2002; Crnić, I., Perica, S.: “Nedopustivo je da suci potiču nasilje”, *Večernji list*, 22.04.2002.; Dežulović, B., “Zašto sudovi od 03.01. 2000. nikoga nisu osudili za ratni zločin i za pljačku u pretvorbi?”, *Globus*, iss. 588 of 15.03.2002.
- 3 The crisis, of course, is not a peculiar Croatian phenomenon. On the crisis of the judiciary in Serbia and Montenegro, see: Vasić, R., Reform of the Judiciary in FRY (in this book). Also see:

scandals, in the rapid coming and going of leading figures in the judiciary and in statistical data that reveal the inefficiency of the courts.<sup>4</sup> The atmosphere of crisis is, perhaps, further emphasized by the fact that the judiciary has proved unable to cope with some key social problems, such as organized crime, political terrorism, war crimes and irregularities in the process of privatizing the economy. Let alone some more subtle problems, such as striling a subtle balance within some specific constitutional rights, e.g. the individual's right to privacy, dignity and respect on one hand, and the right to freedom of expression and speaking publicly on the other: the outcome of the process which ought to confirm the functioning of the rule of law almost invariably borders upon absurdity.

## b. The Present Course of the System for Organizing the Judiciary – Development Toward an Independent State

The sources of the Croatian judiciary's crisis date back to the distant past and contain several elements. It is generally considered nowadays that the period when the Croatian judiciary was best organized and when it functioned the most smoothly was the period of the late nineteenth century and the beginning of the twentieth century – the period when Croatia was among the countries that belonged to the Habsburg Monarchy, i.e. Austria-Hungary.<sup>5</sup> Recent historical research, however, reveals that modernization processes – both in the judiciary and in other spheres of social and political life – advanced slowly, partially and with considerable procrastination. Concerning the adoption of modern paradigms, including human rights and the rule of law, Croatia was on “the periphery of the periphery”.<sup>6</sup> The efficiency of the judiciary of that time rested on a strict bureaucratic hierarchical model and clerical ethics of submission to state authority. The best examples of the potential of that model were the meticulously organized and maintained cadastres from the beginning of the twentieth century, the accuracy and thoroughness of which continue to infuse judicial circles with nostalgia. Such a model of the judiciary was followed by periods of turmoil and legal and political instability. Limited attempts to introduce standardized models for some branches of law in the area of the Kingdom of

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Zuckerman, A. A. S. (ed.) *Civil Justice in Crisis*, Oxford, 1999. (regarding the crisis of the judiciary in a broader comparative context).

4 An outstanding feature dominated public discussions about the judiciary, that of “one million unresolved cases” in Croatian courts. In the meantime, this figure has continued to rise, so that it is estimated that the judiciary is burdened with about 1.300.000 unresolved cases.

5 See: Jelinek, D., “Einflüsse des österreichisch-schlesischen Zivilprozeßrechts auf andere Rechtsordnungen”, in: *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld, 1991.

6 See: Čepulo, D., “Središte i periferija: europske i hrvatske odrednice Mažuranićevih reformi ustrojstva vlasti i građanskih prava (1873–1880)”, *Zbornik Pravnog fakulteta u Zagrebu*, 50/6:2000, pp. 889–920.

Yugoslavia were often seen as an undesirable centralist manoeuvre, which resulted in fragmentary reforms that only partially achieved their goal.

The period of socialism contributed to the further deterioration of the remaining virtues of the judicial system – professionalism, efficiency and a relative impartiality and independence. Testimonies remain of some “revolutionary” periods when judges and courts worked under political pressure, and when tampering with personnel and the dismissal of judges who refused to comply with the political dictate were customary? Indeed, such political interventions in the judicial sphere (and particularly their most radical manifestations, e.g. rigged trials) were neither numerous nor intense in socialist Yugoslavia, nor could they be compared to the Stalin era in the Soviet Union and to other countries of real socialism. However, on the whole, the judiciary was neglected and marginalized, because the majority of social problems were being resolved outside of its institutions, through party mechanisms of the League of Communists and other non-institutional channels.

### c. Triple Transition – Croatia During the Tudjman Period

On top of such obviously not very fertile soil came another layer; the impact of state and legal independence gained in 1991. That was the period referred to as transitional,<sup>8</sup> for the sake of the compatibility of terms with broader Middle-European and East-European trends. Namely, it derives from the aforementioned that during the entire period of modernization of the Croatian judiciary, from the mid-nineteenth century up to this day, there has virtually been no period that – in one sense or another – could not be called transitional.<sup>9</sup> On the other hand, when speaking of transition after 1990, it has been present in at least three aspects: as a transition from being part of a federal state (the former SFRY) into an independent unitary state (the Republic of Croatia), as a transition from a one-party to a multi-party system and as a transition from socialism’s economic self-management to a market economy. This process of triple transition coincided with a period of social instability, extra-ordinary (martial and para-martial) conditions, and even open war. While the period of open conflict lasted for five years in Croatia (1991-1995), the period of social and communal instability was considerably longer.

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7 Intensive political purges began in the aftermath of World War II and continued during the stifling of the liberal and nationalist movement in Croatia in 1971.

8 The term “countries in transition” has largely been adopted, also on the structure of legal reforms and international organizations, e.g. The Council of Europe. See for example: *The role and responsibilities of the lawyer in a society in transition*, Strasbourg, 1999.

9 The term “transition” (from *Lat. transire* – to cross) encompasses the meaning of “transitional period”, i.e. a period of time marked by movement from one (state, order, type of organization) which is being abandoned but has not ultimately disappeared, towards another, which is desired or aimed at, but not yet existent. If transition is defined in this way, a large part of Croatian history could correspond to this description.

It might be an exaggeration to say that the latest stage in the development of the Croatian judiciary – the period that roughly coincides with President Franjo Tudman’s term of office – was the most disastrous for the already fragile construction of building of a Croatian judiciary. The current weaknesses in the functioning of the judiciary definitely date back to much earlier. Nevertheless, it is indisputable that, during that period, many interventions were made in all spheres of the judiciary, especially with regard to courts and state prosecutors, that have additionally encumbered an already difficult situation and obstructed or hindered transition processes, not only in the judicial sphere. Summarizing the results of research that was published elsewhere,<sup>10</sup> it is worth warning of five particularly problematic trends in the period 1990–2000: a) clandestine and open pressures on the judiciary aimed at extorting “appropriate” rulings; b) the creation of a prolonged threatening atmosphere of uncertainty and the pursuit of a personnel policy that directly or indirectly led to the brain drain of quality staff and staff of different ethnicities; c) the support and promotion of those individuals among the judges and public prosecutors who promulgated a “policy of national awareness” (and even a nationalistic policy), and who were able to actively encourage discriminatory trends, especially in the areas of ethnic conflict; d) a destabilization that brought about a general decline of quality and efficiency in the judicial system; e) the creation of corporate power structures that seemingly represented a source of the “autonomous” legitimacy of the judiciary, while in reality they nourished an ideological and political framework in spite of the social and political changes, and also the denial of legal and social responsibility for the crisis and avoiding creating preconditions to overcome it.

This text will concentrate on the tentative reforms of the Croatian judiciary that have taken place since 2000, primarily those that are relevant for the position and role of the presidents of the courts.

## 11. “The Presidential Oligarchy” and the History of its Dismantling

### a. The Double Role of the Presidents of the Courts Prior to 2000

One of the methods by which the political power attempted to intervene in the judicial sphere in the last decade of the twentieth century consisted of appointing judges who were loyal to the regime (i.e. judges loyal to the then

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<sup>10</sup> Uzelac, A., “Role and Status of Judges in Croatia”, in: Oberhammer, P. (ed.), *Richterbild und Rechtsreform in Mitteleuropa*, Vienna, 2001, pp. 2345 (further: Uzelac: Role). Uzelac, “A Hrvatsko pravosuđe u devdesetima: od državne nezavisnosti do institucionalne krize”, *Politička misao*, pp. 3-41 (further: Uzelac: Pravosuđe).

ruling party, the HDZ and its policy) and to the leading posts in the judicial hierarchy. Among those posts, a particularly prominent position was that of the presidents of the courts. In spite of the fact that, according to the law, the position of presidents of the courts was defined as a temporary post of particular judges who, in addition to their regular judicial duties (or instead of them), also conducted duties pertaining to court administration, before long the presidents of courts' political logic made them aware of being able to, when necessary, rise above their role (*primus inter pares*) and serve as intermediaries in protecting the interests of political rulers. For the purposes of political instrumentalization, the posts that were of special interest were those of prominent presidential posts (for example, that of the President of the Supreme Court), but also the ones in superior courts, larger courts or in courts situated in regions of special interest. The history of changes that took place surrounding the post of President of the Supreme Court of RC (Republic of Croatia) profusely illustrates the interventionist atmosphere – the readiness for political incursions into judicial affairs that often turned the concept of independence of the judiciary into travesty. Certain presidents of courts supplemented this picture with scenes from local folklore that, even in a relatively controlled state press, often reached newspaper pages in the form of judicial scandals that were being followed like television soap operas.

#### b. The Institutionalization of the Presidential Oligarchy Through the Activities of the Council of the State Judiciary

A chosen team of presidents of the courts had the lead in implementing political interventions in the course of their activities in the Council of the State Judiciary (SJC). That body, which according to the 1991 Constitution had been conceived as the incarnation of the autonomy of the judicial profession, five years later, when it eventually came into being, became the core of political interventionism and one of the principal generators of the crisis of the judiciary. The manner in which the SJC became a lever at the hands of the executive power (and occasionally the direct executor of decisions on personnel changes in the judiciary that were issued by President Franjo Tudman) was relatively simple. The Parliament (*Sabor*), controlled by representatives of one party, during one of the short-lived periods when the majority of the oppositional parties boycotted its activities in protest against the undemocratic treatment they suffered, appointed the SJC with an eight-year term: instead of legitimate candidates from the profession, the judges and state prosecutors who were sure to support a certain party option and serve, when necessary, as transmission channels for political dictates from state and party power centres, were appointed.

According to the constitutional provisions, the majority of the Council of the State Judiciary was to be made up of judges (8 out of 15); the second category were to be state attorneys (4 members); members of other professions (Law professors and lawyers) were in an extreme minority (one fifth, i.e. 3

members).<sup>11</sup> The constitutional idea about a body of judicial autonomy rested on the assumption that the persons who judge or decide on other important issues would be the most sensitive to potential breaches of their substantial autonomy in decision-making. In order to prevent such autonomous tendencies of a potentially inappropriate rebellious attitude of an independent judiciary, the eight-year mandates in the Council of the State Judiciary were given almost exclusively to presidents of the courts and chief state attorneys, for whom the courtrooms were no longer their primary occupations and who already enjoyed a dual position, which, at least partially, consisted of implementing the administrative commands of other government bodies.

In such a constellation of power, the Council of the State Judiciary began its activities in early 1995, during one of the periods when, at the state level, tendencies of the authorities towards authoritarian conduct were on the increase. Its effect on the situation in the judiciary was much more disastrous than it could possibly have been during any other period. Namely, at the very beginning of its mandate, the SJC was supposed to appoint all the judges throughout the state – according to the disputed interim provisions concerning its activities, adopted in 1993.<sup>12</sup> Those who were not appointed lost their posts. Thus, an ideal space for arbitrariness, political interventionism and nepotism was created, because judges who were not appointed, were *de facto* going to be dismissed from their posts, without any further explanation. Accordingly, the Council of the State Judiciary was given the responsibility of deciding on the arbitrary dismissal of judges and state attorneys only at that moment, because otherwise, a regularly appointed judge could be dismissed only through a relatively complex disciplinary procedure, in the course of which a hearing would have been obligatory, as well as a full written disclosure of grounds for dismissal. The SJC, in view of the majority of its members at that time, could not allow for such a possibility, so that, practically from the very beginning of its activities, it started adopting controversial decisions that blatantly reflected the political nature of its role.

Since it came into being, the Council of the State Judiciary brought about a seemingly paradoxical constellation in relations among the leading institutions of the national judiciary (which, besides the SJC, comprise the Supreme Court, the Constitutional Court and the Ministry of Justice). The standard expectations from the SJC and the Supreme Court should be that they encourage and promote professional autonomy, while the Constitutional Court and the Ministry of Justice (as bodies that are, at least partially, political in character) should represent the interests of the state and the political leadership. In the second half of the nineties in Croatia, the situation was reversed: while the Supreme Court

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11 The norms concerning the number of members and their election are laid down in the Act on the Council of the State Judiciary (*National Gazette*, issue 58/93, 49/99 and 129/2000 – further referred to as: ASJC) See Art. 4 par. 2 of the ASJC (prior to the appendix from 2000).

12 The Law itself, the ASJC, adopted in 1993, came into force on June 26, 1993, but the majority of its provisions were not implemented until the adoption of the Courts (January 1994), so that factually, the first appointments conducted by the SJC took place in February 1995.

(through its politically installed presidents) and the SJC (dominated by state attorneys and presidents of the courts) supported *raison d'etat* as opposed to the professional criteria of independence and quality, the Constitutional Court and the Ministry of Justice (at least during the terms in office of some of the numerous ministers who were continually being shifted), were striving to block the channels of political voluntarism and to diminish the negative effects of personnel policy in the judiciary, pursued by the SJC.<sup>13</sup>

The Ministry of Justice made several futile attempts to obtain some influence over the SJC's activities, through amendments to laws regulating the judiciary. On the other hand, the moment the first appointments of judges were made (i.e. when the first "tacit" dismissals took place), the SJC's decisions were subjected to constitutional appeals that resulted in the abrogation of a large number of those decisions by the Constitutional Court, due to the violation of the constitutional rights of the party in the proceedings. However, in practice no abrogation of the SJC's decisions actually brought about the annulment of their negative effects. Namely, upon the abrogation of its decisions, the SJC would, as a rule, repeat its procedure, whereby it would invariably (and frequently committing the same violations and by applying the same arbitrariness) select the same candidates. The best examples of this kind of power struggle between the SJC and the Supreme Court were those regarding the most prominent post in the judiciary: the post of president and judges of the Supreme Court.<sup>14</sup>

Prior to the beginning of 2000, the Constitutional Court's victories over the SJC were predominantly merely formal, without real results. Although the legal profession approved of the Constitutional Court's decisions, their mediocre or non-existent practical success often had a discouraging effect. Even the most respected and most learned of the judges, who were dismissed by the SJC for adhering to ideals of an independent judiciary and rule of law, often did not have the strength to persevere in their struggle for their position, during which the constitutional appeals they initiated and won were followed by the SJC's repeated procedure, with the same defeating outcome. Thus, out of the 18 candidates who were not appointed, initially thirteen judges launched the first constitutional appeal against the SJC's decisions on (non) appointments; following the annulment of the decision, which did not bring about their reap-

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13 The very first appointment effectuated by the SJC was indicative of the nature of this body. For instance, according to its decision 1-1/1995 of February 16, 1995, the appointment of the Supreme Court judges was conducted. According to that decision, disregarding the qualifications and recommendations of the profession, solely the judges proposed by the then president of the Supreme Court were appointed: 17 judges of the Supreme Court were therefore dismissed by not being re-appointed, among whom was also Vladimir Primorac (deputy-president of the Court and the candidate with the most commendable professional record for future president of the Supreme Court), as well as the then president of the Judges' Association, Petar Novoselac. See for more details in: Uzclac, Role, pp. 37-40.

14 Regarding the case of the dismissal of Krunoslav Olujić, president of the Supreme Court, in a disciplinary action based on illegal eavesdropping conducted by members of secret services, see: Uzclac, Role, pp. 45-51; Uzclac, Pravosuđe, pp. 26-31.



pointment, ten judges launched a second constitutional appeal; only five judges persisted in their third constitutional appeal.<sup>15</sup>

### c. The Constitutional Court Decision of March 15, 2000

Having annulled a few dozen of the SJC's individual decisions concerning the appointment of judges, the Constitutional Court began – after several years of delay – to revise the constitutionality of the regulations according to which the unconstitutional appointments had been carried out. At first, it seemed to be yet another abortive move made by the Constitutional Court. However, the decision of March 15, 2000<sup>16</sup> essentially differed from all the previous ones, due to its thorough and radical approach and also due to elaborate explanations concerning the discovered irregularities. This decision marked, for the first time, the course which the reforms of the judiciary could and ought to take, and therefore became the objective and the first solid point of support during the reforms that followed in the years to come. Other favourable circumstances coincided with this decision – primarily the death of president Tudman and the change of government at the beginning of 2000.

According to the aforementioned decision, the Constitutional Court repealed as unconstitutional several provisions of the Act on State Judiciary Council<sup>17</sup> (hereinafter referred to as: ASJC). Among the repealed provisions were also those Concerning the appointment and dismissal of the presidents of the courts, including the president of the Supreme Court; most of the provisions regarding the procedure for appointing judges; finally, procedures concerning the disciplinary procedure. Among other things, the SJC's right to appoint presidents of the courts was revoked, and the Chamber of the Counties of the Parliament no longer had the capacity to recommend the President of the Supreme Court and the State Attorney of the RC; provisions concerning disciplinary action, whereby the SJC decides on the disciplinary accountability of the judges were repealed; so too were the norms concerning the activities of the Council of the State *Judiciary* in the course of selecting candidates for judicial posts.

At this point, it is interesting to note that a large part of the Constitutional Court's arguments in favour of this decision is based on interpretations of rulings made by the European Court for Human Rights. Specifically, the Constitutional Court invoked decisions from the cases of the *Sunday Times* against Great Britain, *Silver et al.* against Great Britain and *Malone* against Great Britain.<sup>18</sup>

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15 See the Supreme Court decisions of March 29, 1995. (NN 22/95); The decision of November 30, 1995. (NN98/95; the decision of February 3, 2000 (NN2012000).

16 Rulings on the cases U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996 and U-I-589/1999 (NN 3112000 of 22.03 2000)

17 The Law on the Council of the State Judiciary, NN 58/93, 49/99, 129/2000.

18 *Sunday Times* – A-311, of 26. 04. 1979; *Silver* – A-61, 25.03.1983. *Malone* – A-82, 02. 0X. 1984.; cf. Harris/O'Boyle/Warbrick, *Law of the European Convention on Human Rights*, London, 1995, pp. 285-301.

The essence of these rulings is contained in the argument that “a law that allows for significant uncertainty regarding the final effect of its regulations cannot be treated as a law deriving from the principle of the rule of law, nor can it be treated as a law that embodies the principle of legal certainty.”<sup>19</sup> In the same way, the Constitutional Court repealed a number of provisions pertaining to the ASJC, having established that “the consequences [of the disputed provisions] are incongruous with the legitimate expectations of the parties that are being subjected to them”; the application of the Act of the Council of the State Judiciary in practice over nearly seven years, according to the Constitutional Court of RC, drifted so far away from the legitimate expectations of the professional and general public, that “it [i.e. SJC] acted against the purpose and the aim for which it had been established.”<sup>20</sup> Based on such a conclusion regarding the effects of the disputed law, the court repealed a number of provisions as unconstitutional, due to violation of the principle that law has to be sufficiently precise and foreseeable in its consequences, i.e. the rule that “a law which allows for a right of discretion must define the scope of that right.”<sup>21</sup> With its decision, the Constitutional Court also addressed the issue of the division of powers between the courts, the Council of the State Judiciary, the legislative power and the respective ministry. In addition, the decision addressed the nature of the different tasks and functions that the courts carry out, particularly the division between matters related to judging (adjudication) in the narrow sense of the word (the application of law in individual cases) and other duties that the courts pursue so as to ensure quality, efficiency, punctuality and independent decision-making.

According to that decision, the refuted provisions were to expire on October 31, 2000 (which was later postponed until December 31, 2000),<sup>22</sup> whereby a rather short time-frame was allowed for conceiving the reform strategy and introducing the necessary amendments. Within the above-mentioned time limit, it was necessary to adopt a law that would prescribe new, constitutional norms, because otherwise a significant legal gap could open up.

#### d. Constitutional Changes in 2000

Only a few months after the Constitutional Court’s decision, at a time when the legal changes of the ASJC and the Courts Act were well under way, the process of constitutional reform was initiated.<sup>23</sup> Although their original

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19 Ruling of the Constitutional Court of the Republic of Croatia of March 15, 2000, ad 19.4.

20 *Ibid.*, ad 19.3.

21 The Constitutional Court here explicitly cites the *dictum* from the ruling in the case of Silver brought before the European Court for Human Rights.

22 See the decision of the Constitutional Court of the Republic of Croatia of 11. 10. 2000, (NN 10712000 of October 31, 2000.).

23 Amendments to the Constitution of RC of November 9, 2000, (NN 113/2000 of November 16, 2000); amendments to the Constitution of March 28, 2001 (NN 28/2001 of April 2, 2001).

objectives lay elsewhere (limiting the possibility of the President of the Republic exercising autocratic power and the introduction of the parliamentary system of governance,<sup>24</sup> the constitutional changes did not circumvent the judiciary. These changes were almost exclusively brought about by the Constitutional Court's decisions and the motive to find a way to alter the main generators of political interventionism in the sphere of the judiciary.

Firstly – in spite of some other proposals<sup>25</sup> – according to the constitutional amendments, the SJC was retained as the central body of judicial self-management. The reason for this might have been the belief that it was necessary to launch evolutionary, rather than revolutionary, changes; another reason might have simply been a shortage of time and the fact that the focus of constitutional reforms was outside the sphere of the judiciary. Be it as it may, in the five amended paragraphs (paras. 55-65), the general constitutional concept of the judiciary as an independent branch of state power was retained: a concept whose organizational and substantial autonomy was protected by a body representing the legal profession, the Council of the State Judiciary. Furthermore, the possibility of thoroughly revising the process of appointing the members of the SJC was disregarded, because according to the new constitutional system, the representatives of the profession did not directly elect its members, since the representatives of the legislative power made the final decisions in this respect. The only change in the new system consisted of shifting competence for this matter onto the other chamber of parliament.<sup>26</sup> However, the final outcome came in the form of regulations that considerably changed relations and the institutional system of the functioning of the judicial power. The constitutional changes explicitly regulated those matters concerning the organization of the judiciary that used to be regulated by ordinary laws and subordinate regulations (or were not regulated at all). Some previously existing norms were clarified, in order to avoid difficulties regarding their interpretation and application.

The changes involved the following areas: *the judges' mandates* (duration of office and trial period, immunity), *procedural guarantees* (the right to a fair trial in accordance with Art. 6 of the European Convention, in particular regarding the transparency of the procedure), *the procedure of dismissal and*

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24 For reform of the system of government through constitutional changes in 2000, see: Smerdel, "Ustrojstvo vlasti Republike Hrvatske / nova ustavna rjesenja i njihovi izgledi, *Zbornik Pravnog fakulteta u Zagrebu*, pp. 5-21.

25 The most serious of all objections regarding the ASJC and the proposal to dismantle this body and reinstate the institution of appointing and dismissing judges and state attorneys by the Assembly as "a greater guarantee of objectivity, as opposed to fifteen random figures of the SJC, currently pursuing the policy of the party in power, which might soon be replaced by the policies of the ruling parties," were made by Vladimir Primorac as early as September 1998 – see Primorac, *Pravorijek, cit.* (note 7), pp. 54–56.

26 Instead of the Chamber of the Counties, this matter was transferred to within the competence of the Chamber of Representatives, before, in the second round of constitutional changes, the Chamber of Counties was dissolved and all competences were transferred onto the Assembly in plenary session.

*disciplinary responsibility* of judges, and of *the reorganization of the Council of the State Judiciary and the office of the President of the Supreme Court*. Also, due to changes in the competences constitutionally granted to the respective chambers of the Assembly, the previously existing competences of the Chamber of the Counties in the process of appointing certain judicial bodies and officials were mostly discontinued. Some of the changes were directed towards strengthening the position of the judges. For example, *the retirement age of judges* was raised to seventy years of age.<sup>27</sup> The second area tackled professional training and raising the degree of accountability of appointed judges – for instance, *a five-year trial period* was provided for those judges appointed for the first time (*Richter auf Probe*), after which the judge was granted a permanent mandate. Furthermore, provisions concerning the *immunity of judges* were amended.<sup>28</sup>

Nevertheless, the most important changes concerned the mutual relations and competences of the highest institutions in the judiciary – the SJC, the Constitutional and the Supreme Court. As for the SJC, two essential changes were introduced, aimed at dispersing the core of political interventions. On one hand, state attorneys were no longer present in the SJC (for them, another body was provided for by the constitution, the Council of State Attorneys).<sup>29</sup> Thereby, the number of SJC members decreased from 15 to 11, members being judges, lawyers and university law professors. Furthermore, the incompatibility of membership in the SJC with court presidency was explicitly provided for.<sup>30</sup>

Regarding the struggle for normative and factual supremacy between the SJC and the Constitutional Court in the process of appointing and dismissing judges, the constitutional amendments gave broader powers to the Constitutional Court. Following these changes, the Constitutional Court no longer indirectly exercised its control over constitution, by means of constitutional appeal, but rather directly, as a new second instance body which decided on appeals against decisions made in the course of procedures of dismissal and disciplinary responsibility of judges. This new system, which was derived from paradoxical practice over the preceding years, was itself marked by a somewhat paradoxical outcome – an institutional mechanism that protected the internal and organizational judicial independence, in which the main role was played by a body that was not itself conceived of as a body of judicial autonomy. However, this was not and has not remained the only paradox in the intricate relations between the judiciary, the state, society and Croatia.

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27 The new Art. 120 item 3. 5. of the Constitution of RC (see Art. 58 of the Constitutional Amendments, NN 113/2000).

28 See arts. 55–59 of the Constitutional Amendments from November 2000.

29 See the new Art. 121a of the Constitution regarding the regulation on personnel changes in the SJC introduced by Art. 59 of the Constitutional Amendments (2000).

30 Art. 121 item 3 of the Constitution explicitly proscribes that “the presidents of the courts cannot be appointed members of the Council of the Judiciary.”

## 111. Strife Related to Reform – Oligarchy as the Avant-garde of the Independent Judiciary

### a. The Legal Framework for the First Steps of Reform – Changes and Supplements to the Act on the Council of the State Judiciary and the Courts Act

Activities related to the adoption of constitutional amendments coincided with those on the revision of two laws, which had partly been declared unconstitutional by the Constitutional Court – the Courts Act and the Act on the SJC. Within a short space of time, it was also necessary to adhere to the legal deadline set by the Constitutional Court.<sup>31</sup> In view of the usual lack of coordination of activities that were carried out by different ministries and the fact that the authors of both laws did not know what the final draft of the constitutional amendments would say on the judiciary virtually until the last minute, it was only due to a fortunate coincidence and mutual adherence to the framework defined by the Constitutional Court's decisions that statutory and constitutional amendments were more or less consistent.<sup>32</sup> Eventually, the constitutional amendments were adopted and enacted at the session of the Assembly held on November 9, 2000; only a month later, the same body was to vote on two comprehensive sets of amendments to legislation dealing with judicial power. Amendments were published in the *Official Gazette* on December 22,<sup>33</sup> and came into force on the last day of that year, only one day prior to the expiry of the validity of the provisions declared unconstitutional by the March decision of the Constitutional Court.

Although the changes to these two laws were adopted in the form of amendments (statutory revisions and supplements), they were so numerous as to justify the use of the term “new legislation.” The intensity of the changes was dictated not only by constitutional amendments, but also by the number of regulations that had been abolished – namely, the Constitutional Court had partly or completely ruled out twenty-odd<sup>34</sup> articles of the ASJC. On the other hand, although the Courts Act was not declared unconstitutional by the CC, it was also comprehensively amended, with significant interventions in its structure.

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31 See *supra*, footnote 23 and the text above it.

32 The author of this text participated, as a member of the working group of the Ministry of Justice, Administration and Local Self-Administration, in activities concerning the draft Amendments to the CA and ASJC, so that **part** of the assessments are thus made on the basis **of** personal reflections.

33 See *NV* 129/2000.

34 Some of the regulations of the Act on the SJC that were partially or completely ruled out by the above-mentioned regulation were **arts.** 9, **12**, 13, 16, 17, 18, 20, 21, 23, 24, 25, 26, 28, 29, 30, 31, 32, 34, 35, and 31.

## b. The Main Changes Introduced by Reform

The starting points on which this reform was based could be summarized in a few contentions:

- In spite of the intensity of political interventions in the process of appointing judges over the previous years, it is not possible to reform the judiciary by means of large-scale lustration and summary dismissals; therefore, judges should be guaranteed permanent office and independence in their work.
- A large part of adverse events in the judiciary could be attributed to the underdeveloped and incomplete systems of professional self-administration in the courts, which facilitated the abuses on the national level; therefore, a system of bodies of self-administration on lower levels ought to be developed.
- An extremely negative impact on judicial independence was exerted by the bodies of judicial administration, in particular by some presidents of courts, who used to extend their mandate and influence directly or indirectly the process of selecting judicial cadres; therefore, it was necessary to properly separate their administrative functions from the functions of self-administration in the courts in order to prevent the bodies with administrative competences from usurping the competences of other bodies.
- The appointment of judges and other officials in the judiciary was, for a long period of time, strongly influenced by voluntarism and arbitrariness, which was partly due to the vague regulations concerning the appointment of judges; therefore, the system of appointment ought to be improved, among other things by clarifying criteria and applying more transparent procedures.
- The average quality of judges has deteriorated, due to all the aforementioned circumstances, *inter alia* due to the influx of a large number of young and inexperienced staff, and practically speaking, due a total absence of programs for continuing professional education and training; therefore, the need for this kind of education of judges ought to be emphasized, amongst other things, by making it compulsory.

Of all these aspects, novelties concerning the consistent separation of the functions of self-administration and administration in courts attracted the most significant amount of public interest. Although the establishment of judicial councils on the level of courts of appeal was met with general approval, the majority of practical, and also principled difficulties and frictions arose regarding provisions referring to the appointment of the presidents of the courts.

c. Explanation of Changes Concerning the Presidents of the Courts:  
the Triple Division of Functions Exercised in the Courts –  
Adjudication, Judicial Self-administration and Judicial Administration

One of the conclusions of the Constitutional Court's decision of March 15, 2000 referred to the system of appointment of the court presidents. The SJC had, at that time, the power to appoint and dismiss not only judges, but also the presidents of the courts. Starting from the constitutional concept of the SJC as a body of self-administration of the judicial profession, the Constitutional Court considered that the ASJC unconstitutionally extended the competences of this body by permitting it to decide on the appointment of the presidents of the courts, whose duties are primarily of an administrative, and not of a judicial nature. Citing the provisions defining the position and mandate of the presidents of the courts, it was emphasized that the function of the president of the court is "a temporary administrative function, completely separate from the duties which that same person pursues in the capacity of a judge". As the constitutional mandate of the SJC is limited to appointments concerning the exercise of *judicial duties*, all the paragraphs of the ASJC referring to the appointment of the presidents of the courts were declared unconstitutional, as they were incompatible with the constitutionally defined scope of (at that time) Art. 121 item 1, of the constitution. Although the crucial part of the justification of such a decision referred to the unconstitutional change in competence of the constitutionally established institutions, the context of the decision made it clear that it had been essentially motivated by the opinion of the court that a broader constitutional principle had been violated both in the law and in practice up to that moment: the principle of the division of power, including the principle of the rule of law, especially in areas concerning the third branch of governance – the judiciary.

The new organization of the system of appointing the presidents of the courts derived from the aforementioned decision of the Constitutional Court, as an attempt to consistently implement how administrative and judicial functions in the courts were differentiated. As a result, all the paragraphs concerning the presidents of the courts were transferred from the ASJC to the Courts Act, which, actually, used to contain all the paragraphs defining the position and the function of the presidents of the courts. As it was stipulated in the justification of the proposal, the intention was to bring about "the separation of judicial and administrative functions (pursuing justice in the narrow sense of the word), on one hand, and duties concerning judicial self-administration and administration, on the other, in the personal and functional sense."<sup>35</sup>

Citing the decision of the Constitutional Court, according to which the fundamental constitutional principle of the division of power was violated in

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35 Excerpt from "The justification of the Legislative Proposal of the Law on Revisions and Supplements to the Courts Act submitted to the Croatian Parliament" (further referred to as: Amendments to CA – Elaboration), ad II, p. 3 item 1.

several paragraphs of the ASJC – particularly by the large concentration of power in the presidents of the courts, with little or minimal possibility of control<sup>36</sup> – the justification warned of a “factual merge between those who carry out duties of judicial administration and the members of the Council of the State Judiciary” which “provoked further systemic tensions along the *court presidents – SJC – Ministry of Justice axis*.”<sup>37</sup> On such grounds, and in order to “prevent the possibility of concentrating competences and powers in (only) one body... with the main objective to establish a system of mutual checks and balances”<sup>38</sup> the purpose of the amendments to the Courts Act was to emphasize and extend the incompatibility between different types of duties in the institutional sense and to functionally separate the activities that were being conducted in the courts. Therefore, the initial presumption was that the *three types of activities* in the courts could be distinguished.

The first activity is *adjudication*, i.e. duties that belong to the core of the judicial function. As when the law is applied to a particular case, the purpose of pursuing justice is by its very nature the central concept of judicial independence in its most narrow, substantial sense. Ever since the early Roman concepts, dispensing justice has been a privilege entrusted to individual judges (*iurisdictio est etiam iudicis dandi licentia*) even when they work within collegiate bodies. As a markedly individual activity, it can be controlled exclusively within prescribed legal procedures (e.g. legal remedies) – yet in such cases, the control is retroactive and oriented toward the outcome, and not toward the judge’s personality. Precisely because adjudication cannot be a process regulated by organizational regulations, these regulations have to be formulated in such a way that will provide guarantees for a lawful, efficient and fair trial. The judge must be free of all illegitimate pressures, including those that may derive from the ranks of his own colleagues (the aspect of internal independence).<sup>39</sup>

Without interfering in the sphere of adjudication, the amendments to the CA and ASJC concentrated on the two other functions – the function of *judicial (court) administration* and *judicial independence*.

Under the Courts Act, activities related to *judicial (court) administration* were defined as “activities related to the proper functioning and management

36 Cf. Amendments to CA, p. 3.

31 *Ibid.*, p. 5.

38 *Ibid.*, p. 3 (the Amendments to CA here quote the Decision of the Constitutional Court of RC of March 15, 2000).

39 For a typology of different kinds of judicial independence cf. Sheetret/Deschenes (eds.), *Judicial independence: the contemporary debate*, Dordrecht; Boston, 1985, pp. 598–599. Also see Dincg, “The Rule of law and the Independence of the Judiciary: An Overview of Principles”, *CJIL Yearbook: Constitutional Guarantees for the Independence of the Judiciary*, 1992, pp. 24–31; Dika, “O razvitku instituta sudske (sudačke) nezavisnosti u zapadnoevropskom civilizacijskom krugu: pokušaj rekonstrukcije povijesne geneze”, *Zbornik Pravnog fakulteta u Zagrebu*, 42/4 (suppl.): 1992, pp. 511–533; 888, Uzelac, Alan, Zavisnost i nezavisnost: neka komparativna iskustva i prijedlozi uz položaj sudstva u Hrvatskoj, *Zbornik Pravnog fakulteta u Zagrebu*, 42/4 (suppl.): 1992, pp. 575–594.



of the court.”<sup>40</sup> Accordingly, those are primarily organizational duties of an administrative nature that, in addition to representing the court as an institution, involve providing conditions for efficient and accurate work and, generally, supervision over the regular functioning of the court as a state institution.

In addition to these activities, an intermediate area between adjudication and court administration may be singled out – that of activities that overcome purely administrative tasks, although they are not part of the process of adjudication: tasks related to the *self-administration of the courts*. Namely, in order to attain full independence of judicial power, especially from the perspective of what is referred to as *organic* or *collective independence*, a certain number of functions have emerged out of the agglomerate of duties that are outside the judiciary’s competence in the narrow sense, in which the judges themselves ought to make the final decisions. These are the activities related to recruitment, selection and appointment of future judges, as well as activities related to promotion, disciplinary responsibility and dismissal of existing judges.<sup>41</sup>

#### d. Legislative Changes Concerning the Appointment of the Presidents of the Courts

In the Amendments to the Courts Act, the two largest parts were, therefore, devoted to those who carry out the aforementioned two types of activities. The first chapter deals with the newly formed judicial councils as the principal bodies of judicial self-management and self-administration (and, at the same time, as bodies which, through their well-clarified assessments, opinions and proposals, ought to secure the rationality of the decision-making of the SJC as the supreme organ of judicial self-administration on the national level). Also, a new chapter was introduced, concerning the institution of court presidents as those who carry out duties related to judicial administration.<sup>42</sup>

Although nothing was changed in the law, as far as the general definition of the duties pertaining to the presidents of the court in the law was concerned,<sup>43</sup> with the establishment of judicial councils, some duties that used to be carried out by the court presidents were placed under the competence of the new bodies. Besides, the existence of clearly defined bodies of judicial self-administration and personal incompatibility<sup>44</sup> further reduced the factual mandate and power

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40 Cf. Art. 25 of LC and the list of duties given there.

41 See the Elaboration of LC, ad II, pp. 5–6.

42 See Art. 19 of the amendments to the CA (the new Part Three “Judicial Councils” and the new articles 31.a to 31.n); see Art. 36 of the amendments to the CA (the new chapter Six/A “The President of the Court” and arts. 73.a to 73.j).

43 The previous Art. 48. par. 1 of the CA, which defines the president of the court as “a judge who, in addition to this duty, also effectuates duties of court administration,” was merely transposed to Art. 73a. par. 1. Art. 25, which defines the duties of court administration, and was not even rephrased.

44 The court presidents cannot, according to this amendment, be members of judicial councils, although they can participate in their activities (which is parallel to the constitutional incompatibility of the function of the president of the court with membership in the Council of the State Judiciary.)

of the court presidents.<sup>45</sup> The biggest changes referred to the system of appointing the court presidents. According to the new system, the appointment of the court presidents was made with the collaboration of two bodies – the judicial councils and the Ministry of Justice. Namely, in spite of the fact that placing the duties of court presidents in the administrative sphere allowed for the possibility that the presidents of the courts be appointed by individual acts of the supreme body of judicial administration, it was laid down that the candidacy procedure and recommendations in the course of the selection of candidates be within the competence of the principal body of professional self-administration, so as to ensure that those judges who are candidates for these posts receive the professional support of fellow judges.

In detail: after the Minister of Justice announces the vacancy of the post of court president, the judicial councils have the task of establishing which of the candidates fulfil the requirements for this post. The competent judicial council must gather all the data concerning the candidates that could potentially be relevant in making the decision (e.g. assessment of their ability and performance as judges). If necessary, it can seek the opinion of another judicial council as well. On the grounds of the information and references gathered, the judicial council has to deliver a detailed assessment of each candidate. Based on all this data, the judicial council decides which candidates meet the requirements for appointment and propose to the Minister of Justice to appoint one of them.

Upon receiving the proposal, the Minister of Justice is due to effectuate the appointment within 30 days. He can also choose not to appoint any of the proposed candidates, in which case the procedure is to be repeated. The Minister is bound to adhere to the list of candidates and cannot appoint an individual who is not on that list; nevertheless, the proposals of the judicial council are not binding, but only have an advisory role. In spite of this, the contents of the proposal and the opinion of the judicial council is of exceptional importance because it has a twofold impact – it provides a convincing justification and has the authoritative support of the representative delegates of the judicial profession. Therefore, the professional support and the political act of appointment should, according to this system, be on the same side. In exceptional cases, should the appointment not comply with the judicial council's proposal, the Minister of Justice bears both the professional responsibility for the explanation of such non-compliance and the political accountability for this act. Furthermore, in case of a repeated procedure, the minister is bound to make a decision, because then he must seek the assessment of the candidates from the General Assembly of the Supreme Court, and, in case this assessment is favourable regarding one or more candidates, he has to appoint one of the candidates proposed by the judicial council.<sup>46</sup>

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45 For more *see*: Uzclac, A., "Novelc Zakona o sudovima i Zakona o Državnom sudbenom vijeću – elementi reforme organizacijskog sudbenog prava", *Pravo i porezi*, 3/2001, pp. 30–33.

46 Provisions concerning the appointment of the presidents of the courts contained in the new articles of the Courts Act, 73b–73c.

Among other significant novelties in the office of court presidents, it is important to mention the shortening of their term of office from eight to four years, as well as specific details concerning their dismissal. Namely, the court president cannot be arbitrarily dismissed before his term expires, unless specific, exhaustively defined irregularities in his activities are established in the course of a procedure of administrative supervision over his work.<sup>47</sup> Reasons for dismissal under new amendments strike a balance between two tendencies – the tendency to ensure the punctuality and efficiency of work in the courts on one hand (negligence in conducting duties, failure to launch disciplinary procedures), and on the other, to avoid illegitimate interference with the substantive judicial independence (interfering with the adjudication of concrete cases, violation of the rules dealing with the allocation of cases). A particular improvement is contained in the obligation of the court presidents to timely launch disciplinary proceedings against a judge if a disciplinary offence is committed. The latter norm came as a response to a long-standing situation in practice where striking examples of negligence and abuse of office remained unpunished, because, according to the previous law, authority to initiate disciplinary proceedings was diffusely deployed, so that, prior to 2000 (except for some cases of political dismissals) there were no effective disciplinary proceedings conducted against judges.

The Amendments regulated the procedure of dismissing court presidents with complex provisions, incorporating many guarantees against arbitrary dismissals. Upon receiving negative findings in official supervision, a court of a higher instance or the Ministry of Justice, must propose corrective measures, while the president of the court has the right of appeal against the supervision report and can seek a repeated insight analysis of the activities of the court administration from the Supreme Court, which must deliver a report on its supervision in written form. Only if, after having fulfilled all these conditions and with an additional statement of the president of the court and with the opinion issued by the judicial council, irregularities in pursuing duties that “are harmful to the regular and correct effectuation of duties and functions of the court” are established, can the minister dismiss the president of the court.<sup>48</sup> This dismissal refers only to his presidential function, and not to his judicial function; the Amendments to the CA contain as many as three redundant formulations whereby it is emphasized that the dismissed presidents will continue to carry out judicial duties in the same court.<sup>49</sup> With the complex dismissal procedure, the possibility of that occurring in practice has also been diminished – namely, the accumulation of conditions for dismissal and the participation of a large number of bodies in the dismissal procedure resulted not only in a high degree of protection of the court presidents, but also – according to some assessments – to a high degree of unlikelihood that any dismissals might take place at all.

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47 Courts Act, Art. 73.g par.1.

48 See Art. 73.i of the Courts Act regarding the provisions of Art. 73.g and h.

49 Cf. Art. 73.a par. 5, Art. 73.g par. 3 and Art. 73.i par. 1.

### e. Attempts to Undermine Reform: Constitutional Challenge to the Constitutional Court's Decision

Amendments to the Courts Act and the Act on the Council of the State Judiciary were aimed at implementing two parallel processes – that of reforming the system of appointing court presidents so as to bring it into harmony with the Constitutional Court's decision before the validity of the abolished norms expired, and that of adjusting the constitutional system to the new political realities, which called for the strengthening of constitutional guarantees for the division of power, increasing the authority of the government and diminishing the possibility of new political totalitarianisms and authoritarian behaviour of executive power (the President of the Republic in particular). The speed at which these processes had to unfold had some negative effects. Due to the lack of coordination between the constitutional and statutory changes, in the final stages of parliamentary procedure, certain changes were urgently made to the otherwise balanced legal drafts, which occasionally led to unbalanced results. Although those were not major flaws, and in some instances involved only nominal and technical terms, they were violently opposed by enemies of the reform. Naturally, the primary enemies of reform derived from the ranks that were supposed to be directly affected – the presidents of the courts who had, with their activities, greatly contributed to the crisis of the judiciary in the nineties.

The most vigorous protests against the new provisions of both laws came from the Croatian Judges' Association, led by its president (who was at the same time president of the County Court in Bjelovar), Vladimir Gredelj. With staunch and forceful criticism and accusations that “the new authorities were trying to restrict the independence of the judiciary,” the Croatian Judges' Association launched its own constitutional procedure against both laws as early as the end of January 2001 (less than one month after they came into force).<sup>50</sup>

The initiative for abstract control over the constitution of the Amendments to the Courts Act and the Act on the Council of the State Judiciary had a somewhat paradoxical structure. Namely, Gredelj and his association (largely dominated by the presidents of the courts, some of whom had played a prominent role in provoking the crisis) took a critical stance toward the Constitutional Court's earlier decision that had initiated the reform – they reluctantly acknowledged it, denying its causes and recommendations. There was also some defiance against the authority of the Constitutional Court, in the same way that the former SJC and the former Supreme Court had defied constitutional complaints prior to 2000. Now, the initiative before the Constitutional Court was aimed at challenging the construction of the adopted amendments, by resorting to the same arguments that the Constitutional Court had brought forward against the earlier versions of the Act on the Council of

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<sup>50</sup> The application to check the constitution of the legislation in the case U-I-19012001 of January 26, 2001 (further referred to as: Proposal).

the State Judiciary and the Courts Act. The intention was, *de facto*, to force the Constitutional Court to contradict its own previous decisions, by turning their enemies' weapons on themselves.

Therefore, the written arguments in support of the comprehensive objections of the Association (17 pages of densely typed text) were basically taken over from the Constitutional Court's decision of March 15, 2000. The initiative in one part invoked "the rule of law... which requires that the laws be general and equal for all, with foreseeable legal consequences to the addressees of the legal norm,"<sup>51</sup> and in the other it invoked interference with the constitutional scope of the constitutional bodies' authority (which is again a copy of the argument from the cited decision). Everything was supplemented with general invocations of the principles of the rule of law and a whole range of international acts on the independence of the judiciary.

The initiative contested a large number of amendments to the Courts Act. *Inter alia*, the authors of the initiative challenged the constitutionality of the following provisions of the act that introduced the changes: Art. 18 (general legal opinions of court departments and their binding force), Art. 19 (the dismissal of judicial council members), Art. 20 (the appointment of the president of the Supreme Court), arts. 28 and 30 (the evaluation of discharging judicial duties), Art. 36 (the appointment of court presidents) and Art. 44 para. 1 (a transitional provision on the selection of members of the judicial councils and on the appointment of court presidents). By far, these eight provisions covered more ground than indicated by the number of contested norms. Thus the contested Art. 19. was an article introducing a whole new chapter on judicial councils, and Art. 36. introduced a whole new chapter on court presidents (contested in reference to several crucial parts dealing with the fundamental concept of their appointment). A large number of refutations were probably in part motivated by the wish to conceal behind a range of objections those parts which the applicants held mostly closely to heart (provisions concerning the appointment of court presidents), and also, partly, by the wish to practically annul all the advances that had been made in the first steps of reform to the Croatian judiciary – i.e. by the wish to completely obstruct any reform to the judiciary.

#### f. The Epilogue to the Reform: a Pyrrhus Victory of Constitutionality

At first sight, the initiative launched by the Croatian Association of Judges backfired disastrously on its proponents. With its decision of July 12, 2001,<sup>52</sup> the Constitutional Court ruled out most of the proposals made by the

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51 Proposal, p. 1.

52 **The** Decision and Ruling of the Constitutional Court of Croatia number U-I-190/2001 of July 12, 2001 and **the** dissenting opinion of Judge Klarić, *Official Gazette* no. 67 of July 24, 2001.

Association, particularly the part that was of greatest importance to its proponents. The only provision of the law that was annulled by the Constitutional Court of RC concerned the norm that had been incorporated into the Courts Act in the final phase of the legislative procedure, on the initiative of the then Assembly deputy (who was later on to become Minister of Justice), Ingrid Antičević-Marinović. Namely, she managed to enforce the amendment according to which individuals who did not hold a judicial mandate could, exceptionally, be on the shortlist of candidates for presidents of courts “provided they were prominent lawyers who met the requirements for the judicial office in that court”.<sup>53</sup> The intention of this supplement was to enable a number of distinguished judges who had been dismissed or banished from the judiciary during the lustration processes in the nineties to run for candidacy for presidents of the courts. Some of them were undoubtedly highly respectable figures with proven organizational abilities, qualifying for appointment. However, as the parliamentary amendment had been written in haste and without adequate consultations with experts, it had remained incomplete and contradictory and was therefore repealed by the Constitutional Court.<sup>54</sup>

On the other hand, however, the Constitutional Court approved all the provisions that were not of substantial importance for applicants. Among them were norms governing the evaluation of judges; the appointment of the president of the Supreme Court etc. In particular, the Constitutional Court rejected the initiative regarding two objections that were of outstanding importance for the applicants.

The first of the objections was directed at the alleged unconstitutionality of the rule that the presidents of the courts were to be appointed by the Minister of Justice, which the Croatian Association of Judges viewed as “expanding the mandate of the executive outside the limits set by the Constitution.” Supported by some collateral arguments, the core part of the argument was contained in the thesis that the constitutional system of *checks and balances* was not applicable to judicial power.<sup>55</sup> In the applicant’s opinion, every arrangement according to which the executive power appoints the presidents of the courts represents a violation of the principle of the separation of powers and the independence of the judiciary. The Constitutional Court rejected this argument and took the stance that the new reform was a balanced system in which the judges were appointed by the SJC as a body which represented neither the executive nor the legislative power, while the court presidents were selected from the judicial profession by “the Minister of Justice who was also limited by the authorities of the bodies of judicial self-administration (i.e. judicial councils) to name and propose candidates to the Minister of Justice.”<sup>56</sup>

53 Art. 73.c par. 2 of the CA.

54 See *Decision and Ruling, cit.* (note 55), items 15–18.

55 See *Proposal, cit.* (note 5), p. 15.

56 See Art. 101. par. 1 of the ASJC.

The second objection, which was of even more vital importance for those presidents of the courts who were desperately clinging to their positions, concerned the validity of the transitional provision under which the appointment of the new court presidents should be completed within three months after the enactment of the Amendments, i.e. by early April 2001. Namely, the positioning of the presidents of the courts began after the SJC began functioning in 1996, whereby the presidents were appointed eight-year terms. Therefore, under the regular course of events, even those court presidents whose terms in office had already begun could have falsely claimed at least three to four years of office, and some of them even more. Ever since the new government took over in January 2000, there had been a controversy as to how long the coalition was going to last, having been created as an agglomerate of six divergent parties. That controversy was particularly fomented and intensified from the old centres of political and economic power created during the war and the period of authoritarian rule that followed the war. During the entire decade in which the state was governed from one centre, such systemic centres of corporate power were created in all social spheres that were able to resist the surge of democratic change – and numerous highly ranking judicial figures and institutions were part of them. It is, therefore, not surprising that the staunchest and fiercest struggle was waged over the issue of whether the enactment of the law entailed the expiry of the court presidents' mandates, i.e. whether the Minister of Justice was entitled to appoint the presidents of the courts prior to the expiry of their "acquired right to an eight-year term" (which would, estimated by the customary length of term of the Ministers of Justice over the previous decade, require three to four new Ministers of Justice).<sup>57</sup>

In an attempt to prove the natural right of the court president to a mandate *a bout de soufflé*, it was argued that the new president should not have been appointed because the adopted amendments did not expressly specify that the appointment of the new presidents (who were to be appointed within three months after the enactment of the law) would entail the termination of the duties of the old ones. It was quoted that the Minister of Justice may lose the right to appoint the court presidents of the courts, unless nomination was effectuated within the legal deadline (although in many similar cases such deadlines were interpreted as advisory or recommended). According to the third argument, each dismissal of the presidents of the courts would constitute a grave encroachment on the independence of the judiciary (as if many presidents of the courts in the very recent past had not actually been the protagonists of such encroachments). The historical irony lies in the fact that the authors of such argumentation completely ignored the fact that the same Courts Act had in 1996 contained in its transitional provisions the norm according to which a whole range of prominent judges had been relieved of their duties by not being appointed by

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<sup>57</sup> Over a period of 10 years (1992–2002) seven or eight Ministers of Justice were shifted from this post in Croatia.

the Council of the State Judiciary (although all the judges who had been dismissed in this way could still count on carrying out the rest of their eight-year terms according to the former regulations).<sup>58</sup> This time, unlike in 1996 (when the newly reorganized Judges' Association did not deem it necessary to intervene),<sup>59</sup> not a single judge was existentially threatened: all that was at stake for the bitter enemies of the new system of appointments was the social prestige and social power that derived from the presidential function in a court.

Neither did the Constitutional Court accept the objections to the provisions regarding the three-month deadline for the nomination of the presidents of the courts. In a very brief explanation, it was stated that the legislator had a margin of appreciation in this area. It was particularly emphasized that the need for renewed appointments according to new, fundamentally different regulations governing this sphere, did not mean the automatic dismissal of the current court presidents, because their term did not expire *ex lege*, but only if, in the course of the new procedure, the current president should not be reappointed. Indicating that the new nomination and appointment procedure did not mean (and should not mean) a radical purge, the Constitutional Court particularly emphasized the role of judicial councils as the main guarantees against procedural abuses.<sup>60</sup>

The conclusion that follows is that the initiative for constitutional appeal by which the Croatian Association of Judges attempted to obstruct the course of judicial reforms ended in a severe defeat of its proponents. This may be true on the normative level. However, on the factual level, the situation was completely different. The fact is that the very procedure of constitutional appeal slowed down, and greatly postponed reforms. Victory in the field of constitution achieved by reform can therefore in many respects be viewed as a Pyrrhus victory.

#### IV. Lessons to be Learned from an Unfinished Reform: the (Im)Possibility of Change

##### a. The Independence of the Judiciary versus the Rule of Law

There was just over six months between the enactment of the amendments to the CA and the ASJC and the ruling of the Constitutional Court on their constitution. During that period, the entire process of reform had been virtually paralysed. This was also the main reason why the appointments of new court presidents within the legal time limit were out of the question. Besides, an atmosphere had been created among judges that presented no encouragement

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<sup>58</sup> See Art. 101 par. 1 of the ASJC.

<sup>59</sup> Cf. interview with Sanja Zoričić Tabaković, "Isprika za čistku", *Feral Tribune* no. 858.

<sup>60</sup> Cf. The Decision of July 2, 2001, item 23.



for the submission of applications for the office of court presidents. In July 2001, when the decision of the Constitutional Court was finally announced, it was already too late for any serious actions, because the summer holiday season had already begun. Rumour of an “attack against the independence of the judiciary” that had originated from the circles that feared the loss of their privileges had taken its toll: legal uncertainty hovered over the whole process of appointments.

Even the seemingly benign clumsiness in the course of adopting the Law that brought about the abrogation of the provisions referring to the possibility of exceptional candidacy outside the judicial profession for the post of presidents of the courts, contributed to the delay. Namely, this entailed the repetition of many open calls for candidates due to the fact that the propositions had been changed. That is why the nomination procedures, once they had finally begun (in the autumn of 2001) did not progress at the desired pace. By April 2002, the real procedure for nomination of the presidents of the courts was not even half completed. According to the available data from the Ministry of Justice, Local Administration and Administration, out of more than 250 courts in Croatia, only 115 court presidents had been nominated by that time. Out of a total of 104 municipal court presidents, only **38** had been nominated by that time.<sup>61</sup> The nominations that were made, predominantly confirmed the existing presidents of the courts (in the initial 108 nominations, 81 “old” court presidents were reappointed). Out of the 27 “new” court presidents, 18 were appointed to vacant posts and only 11 of them were replaced (a new president having taken the post over from the previous one).

The new presidents were appointed only in some courts that were facing difficulties and/or had problematic presidents: thus, new presidents of the county courts were appointed in Zagreb, Rijeka, Pula, Varaždin and Karlovac. Of the decisions that had been made, the opinions of the judicial councils were largely taken into account and upheld. However, the fact remains that the whole process unfolded with considerable delay – and that had precisely been the intention of those who had obstructed the process. Nevertheless, even the relatively small number of dismissed court presidents did not appease the enemies of the reform process. The most recent incident related to the nomination of the presidents of the courts dates back to April 2002. Namely, after the Minister of Justice had appointed a new person to the post of president of the court in Vrbovac<sup>62</sup> the previous court president Milan Kranjec refused to step down and transfer his duties to the new president of the court, arguing that “obedience to the Minister would damage the reputation of the judicial power.” The president in question did not withdraw even after his conduct was condemned by the President of the

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<sup>61</sup> Data obtained from the Ministry of Justice, Local Administration and Administration on April 10, 2002.

<sup>62</sup> A small town **40 km** northeast of Zagreb, with a population of 4149 inhabitants (1991).

Supreme Court, Ivica Crnić, as instigating violence.<sup>63</sup> After several days of dispute, the new president took over her duty with the help of the police.<sup>64</sup> Throughout this infamous episode, the president of the Vrbovac court enjoyed the active support of the president of the Judges' Association V. Gredelj, who contested the constitution of the nomination as if the Constitutional Court had never dealt with this issue.

## b. The Role of International Organizations or *Venire Contra Factum Proprium*

International organizations also played a prominent role in contributing to the confusion in the process of nomination, in particular the Council of Europe. Namely, spreading the amnesia concerning the real reasons and incentives for reform whilst some of the protagonists of the procedure for constitutional appeal were simultaneously spreading rumours in international circles that "the independence of the judiciary was being violated in Croatia". In response to such rumours, various delegations attempted to establish the real nature of the upsetting news.<sup>65</sup>

Since the complex constellation of relations within the Croatian judiciary is difficult to follow even for observers at home, it is no wonder that some of the fact-finding delegations tended to simplify the problems and oversee their causes. The paradigm of "the independent judiciary" is powerful in many organizations for the promotion of the rule of law and democracy, and they have a natural tendency to regard everyone who pursues a judicial function as a victim, and every reformer as a perpetrator of human rights violations. It sometimes takes more than an average amount of attention, information and ability to penetrate into the essence of existing relations and to understand that the most fundamental and the most genuine requirement of the rule of law can at some moments be contained in the need to conduct a profound and thorough reform of the judiciary, and *vice versa* – that the absence of reform can pose a dire threat to the rule of law.<sup>66</sup>

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<sup>63</sup> Such an evaluation from the President of the Supreme Court, who, according to the hierarchical organization of the judicial administration should be his superior (as the Minister of Justice), was met by the renegade president of the court with the comment that he was "embittered" and that such an attitude represented "the violation of the rule of law" which is "harmful to the respectability and the dignity of the judicial power and the judicial profession." Cf. *Večernji list* of April 22, 2002.

<sup>64</sup> *Vjesnik* of April 24, 2002.

<sup>65</sup> For example: *Expert meeting on laws covering the judicial branch* – a meeting held between the mission of experts of the Council of Europe and the representatives of the Ministry of Justice on May 3 4, 2001.

<sup>66</sup> Some of the paradigmatic problems with semi-informed interventions from abroad in this area can be found for example in the report of the Venice Commission from April 2001 (Note on the Amendments to the Constitution of Croatia adopted on November 9, 2000 and March 28, 2001, Strasbourg, April 12, 2001, document CDL (2001) 35). See particularly item 5, pp. 4–5.

### c. Prospects for Fundamental Reform: Factual or Counter-factual Presumptions?

Owing to all this, it can be inferred that there has never been such a pressing need for reform in Croatia as there is at present, and yet, prospects for fundamental and consistent reform have never been more uncertain, at least in the short run. Every national judicial system tends to reproduce itself to a great extent, replicating its habits and patterns of behaviour. Legislative changes will inevitably happen. There will be many projects and institutional shaping. However, the judiciary, as well as many other spheres, is made up of humans and their mental systems. The possibility of influencing those who carry out judicial functions decreases with the increase in social awareness of the importance of the judiciary's role. The time when it was easy to tamper with the structure of the judiciary – the time when it was customary to dismiss judges and appoint those who were obedient to power-holders – is more or less over, but the harm that was inflicted during that period is difficult to repair. The only possible solution at present is painstaking and gradual efforts towards an upgrading of the efficiency, quality and professional training of judges, and the development of a broad dialogue within the legal profession, as well as between the legal profession and other segments of society. Though it seems that in the short run it will be impossible to achieve the changes that are desperately needed by citizens and businesses, in the long run, such an approach may perhaps be fruitful and lead to the establishment of a truly competent and qualified judiciary, which will ensure transparency, forceability and the rule of law. The only thing that remains for incurable optimists is to presume that this task is feasible and that it will be possible to accomplish it in the foreseeable future.

#### summary

There is a little doubt about a fact that the system of justice in the Republic of Croatia currently experiences a deep crisis. Among various reasons for the present difficulties, one should particularly note the devastating effects of the last decade of the XX century, the decade of war, instability and authoritarian government in Croatia. However, although the reform of the system of justice currently enjoys top political priorities, its implementation meets difficulties from the very outset. The beginning of the comprehensive reform was marked by the decision of the Constitutional Court on March 2000, when the Court struck several provisions of the laws that regulated the role and status of judges, criticizing as unconstitutional the practice of the State Judicial Council in the appointment of judges. Among other annulled provisions, the Court also ruled that the SJC does not have constitutional powers to appoint the court presidents. At the end of 2000, the constitutional amendments and changes to the Courts Act and the Act on State Judicial Council introduced a new system of appointment and removal of judges and state attorneys. However, the new system

encountered a strong opposition among those who were personally affected by the reform. This paper emphasizes the paradoxical turn in the roles played by the key actors: those judicial circles that could be attributed with a major responsibility for the poor state of judicial institutions have now been converted into "victims of judicial independence" that invoke intervention by international human rights organizations (sometimes not without any success). The lack of determination for fundamental reforms mixed with systemic difficulties inherent to any judicial reform, as well as with post-socialist misunderstanding of the principles of separation of powers and independence of judiciary may lead to poor chances for the success of the reformist endeavors.

*Key words: Reform of the judicial system, judicial administration and self-administration, efficiency of justice, judicial independence.*

## b. The Main Changes Introduced by Reform

The starting points on which this reform was based could be summarized in a few contentions:

- In spite of the intensity of political interventions in the process of appointing judges over the previous years, it is not possible to reform the judiciary by means of large-scale lustration and summary dismissals; therefore, judges should be guaranteed permanent office and independence in their work.
- A large part of adverse events in the judiciary could be attributed to the underdeveloped and incomplete systems of professional self-administration in the courts, which facilitated the abuses on the national level; therefore, a system of bodies of self-administration on lower levels ought to be developed.
- An extremely negative impact on judicial independence was exerted by the bodies of judicial administration, in particular by some presidents of courts, who used to extend their mandate and influence directly or indirectly the process of selecting judicial cadres; therefore, it was necessary to properly separate their administrative functions from the functions of self-administration in the courts in order to prevent the bodies with administrative competences from usurping the competences of other bodies.
- The appointment of judges and other officials in the judiciary was, for a long period of time, strongly influenced by voluntarism and arbitrariness, which was partly due to the vague regulations concerning the appointment of judges; therefore, the system of appointment ought to be improved, among other things by clarifying criteria and applying more transparent procedures.
- The average quality of judges has deteriorated, due to all the aforementioned circumstances, *inter alia* due to the influx of a large number of young and inexperienced staff, and practically speaking, due a total absence of programs for continuing professional education and training; therefore, the need for this kind of education of judges ought to be emphasized, amongst other things, by making it compulsory.

Of all these aspects, novelties concerning the consistent separation of the functions of self-administration and administration in courts attracted the most significant amount of public interest. Although the establishment of judicial councils on the level of courts of appeal was met with general approval, the majority of practical, and also principled difficulties and frictions arose regarding provisions referring to the appointment of the presidents of the courts.