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THE RULE OF LAW AND THE CROATIAN JUDICIAL SYSTEM: COURT DELAYS AS A BARRIER ON THE ROAD TO EUROPEAN ACCESSION

1. Introduction – 2. The role of national judicatures in meeting the conditions for joining the EU – 3. On the central importance of the problem of the length of court proceedings in Croatia – 4. Comparison of the state of affairs in the judicial system in the EU member countries and in the candidate countries – 5. Current projects for accelerating court proceedings in civil matters – a typology of reform strategies – 6. A reform without a reform – current directions of change in procedural legislation – 6.1. Litigation procedure – 6.2. Enforcement procedure – 6.3. Bankruptcy proceeding – 7. Resigning to inefficiency? New constitutional mechanisms for avoiding applications to the European Court of Human Rights – 8. Conclusion – recommendations of measures for harmonisation with EU standards.

1. *Introduction*

It is universally held that the length of court proceedings is one of the fundamental and most important symptoms of the crisis in justice in Croatia. In the Croatian justice, however, there are some other if less obvious and less quantifiable dysfunctions, from lack of experience and knowledge in trials that result in poor-quality results, to difficulties in providing unbiased and just adjudication for some categories of parties and types of cases. Nevertheless, the problem of providing for fair trials in reasonable time has, at the beginning of the third millennium, come to the surface as the most concrete and most striking problem on the way to creating a state of law and order and the rule of law.

The EU enlargement process involves the inclusion of new states that have to a large extent overcome the difficulties of the transition, among which is the

creation of an effective system for the protection of rights granted to citizens. A functioning judiciary is a precondition for the accomplishment of the political and legal ideals on which the EU is based – the ideals of the rule of law. As a community of not only economic but also political and cultural values, the EU assumes that its member states have the ability to implement proclaimed political views, and that the rights granted by the law of the Community can, if necessary, be effectively protected in the courts of the member states. Since the harmonisation of EU law is based on the principle that the legal instruments of the Community are by and large being implemented by the national courts, the functioning of these courts is a *sine qua non* for the functioning of the legal system of the Community in the territories of the new members.

2. *The role of national judicatures in meeting the conditions for joining the EU*

Although the EU is increasingly taking on characteristics that, if it were not for certain resistances and historical sensitivities, could well publicly be labeled as "federalism", its legal order is to a great extent implemented through national institutions, primarily the national courts. Accordingly, in the EU, national judicatures are losing their national or local character and becoming part of the wider European system of justice, the national courts becoming European courts[1].

Integration processes in the EU so far have not negated the specific features of organisation and procedure of national justice systems. In principle, national procedural autonomy has been acknowledged for each state – that is, the right to organise its own judicial system in the manner it considers most appropriate. No matter how a particular justice system is organised, the protection of rights granted to individuals and legal persons (and rights recognised by EU law) must be effective. This idea was, in various forms and manners (though with some inconsistencies), expressed also by the European Court in Luxembourg[2].

The emphasis of Luxembourg decisions that have commented on and directed the activities of the national courts in the EU in the context of the application of European law has most often been on the achievement of substantial harmonisation in the application of the law of the Community and, particularly, on suppressing discriminatory effects through procedural mechanisms likely to vitiate the basic premises of the EU, such as the free movement of people, services and goods. The importance of harmonisation at the level of the *results* of procedures, irrespective of the organisational and procedural differences of the national systems, is heightened by the fact that all the countries of the Union participate in a uni-

[1] See Ćapeta, *Sudovi Europske unije. Nacionalni sudovi kao europski sudovi*, Zagreb, Institut za međunarodne odnose, 2002.

[2] Doctrine calls this thought and its variations in different ways: the principle of effective judicial protection, the principle of minimal effectiveness. Cf. *ibid*, pp. 104-65.

versal system of reciprocal recognition of judgements and other final decisions made in other member states, so that a judgment made in Lisbon can, without any further check, be simply acknowledged in Berlin as a judgement of value equal to those of the German courts, and vice versa. In addition, every EU citizen has to be provided with a roughly equal level of protection of his/her rights wherever his/her might happen to be in the EU, irrespective of which court it is that is determining his/her rights. For this reason, one of the postulates of European integration is that an equal or maximally equivalent degree of protection of subjective rights should gradually be attained in all the countries of the EU.

As for countries aspiring to become EU members, the question of the capacity and effectiveness of the judiciary appears additionally at a much more elementary level – at the level of meeting the basic political criteria that demand future members to be stable democracies, with institutions capable of guaranteeing fundamental human rights and putting into effect the principle of the rule of law. Thus in the process of the accession of those countries that will join the EU in the first wave, an important role was assigned to the reform of their judiciaries, and their progress in the creation of a competent and independent judiciary was monitored most attentively at local and international level[3].

One of the indicators of the readiness of national judicial institutions for full membership is contained in the practice of the European Court of Human Rights (ECHR) in Strasbourg with respect to the candidate countries. As a kind of political lobby to further integration, the Council of Europe (CoE) has so far covered practically all the potential candidates for future membership, and the jurisdiction of the ECHR for individual applications with respect to CoE members has enabled a comparison, among other things, of the level of human rights protection attained by the national judiciaries. A particular place in this context is given to the practice of the ECHR with regard to the right to a fair trial (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms), regarding access to justice, as well as equality of arms and, particularly, the right to a trial within a reasonable time. Another strictly legal element may be added to the political importance of the ECHR in the future, for the EU is seriously considering the possibility of acceding to the European Convention as a separate entity. At the same time, the rights that are protected by the Convention have already been included in the drafts for a future European Constitution. The level of protection of fundamental rights under the Constitution would in no case be below that of the rights guaranteed by the Convention[4].

[3] See e.g. the reports dedicated to the judiciaries of the countries of the first round of candidates deriving from monitoring the accession programme by the *Monitoring the EU accession process: Judicial independence*, Budapest, Open Society Institute, 2002; and *Monitoring the EU accession process: Judicial capacity*, Budapest, Open Society Institute, 2002.

[4] See Smerdel (2000). Actually, the future EU Human Rights Charter will become, according to

In any event, even within the current membership of the EU, the integration process is increasing the importance of having a highly competent and effective judicial system. With the Amsterdam Treaty of 1999, home and justice affairs were shifted from the third to the first pillar of the Union, that is, into an area that is of immediate concern to the Union. Implementing this shift, the Tampere Summit of 1999 provided for concrete measures by which the EU should be made by May 2004 "an area of liberty, security and justice". Cooperation in the area of home and justice affairs is thus made a matter of common European concern, and political priorities have set the deadlines for harmonisation that will expire in the not very far future.

3. *On the central importance of the problem of the length of court proceedings in Croatia*

As a candidate country for EU membership, Croatia too will have to attend very carefully to the challenges of harmonisation in the judicial area. It is beyond any doubt that the administration of justice in Croatia is currently burdened with a series of grave problems. In this paper we shall deal in particular with the problem of the length of judicial proceedings that, in spite of all the other problems, has assumed a highly prominent position.

The reasons for taking up the topic of the length of judicial proceedings in public discourse were completely independent of the process of joining the EU, motivated in the first place by a number of inherent reasons and incentives, some of which, the most blatant, we shall outline in succinct form.

Several sets of judicial statistics published in the Nineties indicated that the number of unsettled cases, alongside a constant influx of new ones, had more than doubled[5]. In addition, some highly exacerbated cases in which the procedure in court had lasted several decades came into media focus[6]. After Croatia became a member of the CoE in 1997, the first cases put before the ECHR in

the current proposal, a component part of the Constitution of the EU, and it does contain the guarantee of a fair trial in a reasonable time drafted in line with the current wording of Article 6 of the European Convention.

[5] According to the 2001 Statistical Review of the Ministry of Justice, in 1989 there were 1,240,000 new cases before the Croatian courts; about 485,000 cases were considered to be the backlog. Five years later, in 1994, there were only 1,086,000 new cases, but the backlogs had risen to 640,000. In 1998, the influx of cases was 1,086,000, but there were 895,000 cases in arrears. In 2001, there were 1,200,000 new cases, but the number of backlogged cases had exceeded a million – 1,020,413. In 2003, the backlog is estimated at about 1,200,000. These data do not include misdemeanour courts. *Statistical Review*, Justice Ministry, 2001, not published.

[6] For example, the Rajak case, which after 25 years of litigation came to the ECHR – see the next note.

which violations of human rights were found, related precisely to the infringement of the right to a trial within a reasonable time[7]. In addition, it would seem that there are other tactical reasons for the focus on the question of length of procedure. At least apparently, it is value free, a non-political question, which can draw the attention of the general and professional public away from other, more sensitive matters, such as the questions of corruption, incompetence, bias and (social and political) responsibility for the quality of justice[8]. Putting the duration of procedures at the centre of interest may not only easily create an appearance of serious reform, but can also serve as an argument for the redistribution of the social product to the benefit of some classes (by claiming larger investments in the judiciary, particularly in the wages of judges, and through the quantitative enlargement of judiciary personnel)[9].

This brief catalogue of arguments shows that current public interest in the length of court proceedings is, in essence, somewhat superficial. This will be also shown by the analysis in this paper, by pointing out that the reforms that are undertaken are only partial, and the will to put them into effect is at least questionable, even among those who consider themselves inveterate reformists. The fundamental problems of the lack of efficiency in the justice system – the need to set up a political system in which the citizens will have confidence in the judiciary as a guarantee for their personal, political and economic rights[10] – are mainly absent from discussions about accelerating judicial proceedings. But irrespective of this, the length of proceedings is a serious problem, which we shall deal with in this paper, while other judicial problems in the creation of the rule of law will be touched on only incidentally.

4. *Comparison of the state of affairs in the judicial system in the EU member countries and in the candidate countries*

It is no easy matter to compare judiciaries in terms of their level of efficiency

[7] The following cases: Rajak (49706/99), Mikulić (53176/99), Fütterer (52634/99), Kutić (48778/99), Cerin (54727/00) and so on (see http://hudoc.echr.coe.int).

[8] See Uzelac, «Role and Status of Judges in Croatia 90-99», in Oberhammer, (ed.), *Richterbild und Rechtsreform in Mitteleuropa,* Vienna, Manz, 2001, pp. 23-66.

[9] In 1999 the wages of judges were significantly improved, assuming that this would essentially contribute to the speed and quality of justice. In 2003 the same justification was used to support plans to increase the budgets for court buildings and equipment, and employ new judges. This was preceded by a campaign by the president of the Supreme Court, Ivica Crnić, who repeatedly stated that "precisely through the provision or non-provision of the conditions for the work of the courts can we see exactly how much the Croatian government cares about achieving the rule of law", at the same time expressing the view that in the Croatian judiciary no radical changes were necessary. See *Panorama*, supplement to *Vjesnik*, October 19th, 2002.

[10] According to the results of a research into the political agendas of twelve countries of South-East Europe carried out by the Stockholm International Institute for Democracy and Electoral

and quality. Because of the already mentioned national procedural autonomy both within and without the EU, organisation, competence and procedural rules of courts show such a degree of diversity that it is almost impossible to subject them to a simple methodology of comparison. Judicial statistics are adjusted to national specificities, and it is very difficult thus to compare them even if they relate to countries of the same legal and cultural sphere. No uniform criteria for comparison have been worked out. The elaboration of such criteria is only just appearing on the agendas of the international institutions interested in judicial reform, such as the World Bank and the newly founded European Commission for the Efficiency of Justice (CEPEJ) of the CoE[11].

As a result, the assessment of the current situation is possible only indirectly, on the basis of indirect indicators and isolated examples. For this reason, such assessment is necessarily subjective, and may become the subject of political appraisal and political negotiations.

At a professional level, it is broadly accepted that, at the beginning of the third millennium, the degree of harmonisation of the procedural rules and the organisation of the judiciary even with respect to the current members of the EU is at a fairly low level. The harmonisation of procedures – for the moment only at the level of rapprochement – is achieved only indirectly and in marginal areas. Admittedly, the Amsterdam Treaty has transferred cooperation in the area of justice and home affairs from the third to the first pillar of the Community, stressing the need for uniformity in the EU as an area of "liberty, security and justice". However, the aspiration towards uniform standards has so far been limited to the mutual recognition and execution of judicial decisions, i.e., to facilitating access to the court for those EU citizens that are in the territory of other member states, with the ultimate intention to give all EU citizens equal access to bodies of state power everywhere in Europe, as they have to their own national bodies. For this purpose, the Brussels I and II conventions on the execution of judicial judgements were passed; directive 1348/2000 about the service of process in judicial and extrajudicial matters, and directive 743/2002 about general rules for encouraging cooperation in the area of home and justice affairs. Also in preparation are standard forms – the so-called European Enforcement Title – for facilitating the filing of enforcement pursuant to judicial decisions made in uncontested matters in the territory of another member country. In order to stimulate cooperation and facilitate the access of citizens to courts, European Day of Civil Justice was

Assistance, in Croatia citizens trust the judiciary the least among all social institutions – only 17% (poll carried out in February 2002). A more detailed analysis according to category of respondent shows that those who are crucial for modern liberal democracy (who have the most experience with the judiciary), the educated middle class between 30 and 60, show the lowest percentage. See http://www.idea.int/balkans/survey.cfm.

[11] See http://www.coe.int/cepej.

established in 2003, as an event to be organised in the member countries (and candidate countries) at the end of each October.

With all these activities, judicial practice, procedural style and, in particular, the degree of efficiency of the machinery of justice are all still very different in the countries of the EU. If we stick only to the general evaluation of the speed and user-friendliness of procedures, extremes can be found in the EU as well, from the rapid and simple procedure in e.g. Germany, to the complex and lengthy procedures of Italy. In particular, with regard to Italy, the problem of length of court proceedings is still far from being settled, and the number of cases in which Italy has been found liable for infringements of the right to a trial within a reasonable time at the ECHR is alarming.

As far as the state of the justice systems of the candidate countries is concerned, here the assessments are also divergent, but, on the whole, not very good. A study of the judicial capacity in the first ten candidate countries resulted in the collective evaluation that "in any country judicial reform is bound to be fraught with obstacles, difficulties and delays – and more so in Central and Eastern European countries, after half a century of communist rule during which courts and the law itself were debased and used as mere instruments of power"[12]. As for the assessment of reforms, it is pointed out that evaluations from national reports reveal

> a vivid illustration of a number of paradoxes: profound structural reforms are needed in all these countries in order to provide the judicial system with the capacity to fulfil its constitutional mission according to the requirements of a democratic society. Such reforms require a strong and lasting political will from Governments and Parliaments – but one may ask if such a will really exists, or even how consistent the EU itself has been in calling for such commitment[13].

The fact that the Croatian problems with the judiciary are not unique is not in itself consolatory. Even when it is compared with countries in which judicial problems rank high, the Croatian judiciary is bringing up the rear, as is vividly illustrated by the results of public opinion research that have shown that only in Croatia do the courts occupy the last place in the public's trust in social institutions[14]. This is also shown by recent surveys carried out at the request of Transparency International: the question "from which institutions would you first of all eradicate corruption" respondents placed health care first, and the courts immediately afterwards. Seventy percent of citizens involved in the survey had the impression that corruption is to be found in the judiciary. Recently it became public that the national budget has already paid out over a million kuna in dam-

[12] *Monitoring the EU accession process: Judicial capacity*, cit., p. 7.
[13] *Ibid.*
[14] See note 10 above.

ages to parties for violations of human rights to a fair trial within a reasonable time (of this about 110,000 euros because of decisions of the ECHR and about 200,000 kuna as a result of decisions of the Constitutional Court of the Republic of Croatia). According to all these indicators, even with tolerant behaviour on the part of competent actors, it is to be expected that essential progress in the reform of the judiciary will be among the main conditions that need to be met before joining the EU. This is all the more so because after May 2004 – the deadline proclaimed at the Tampere Summit in 1999 for Europe to become an area of freedom, security and justice – the threshold for new members will certainly be higher than it is today.

5. *Current projects for accelerating court proceedings in civil matters – a typology of reform strategies*

Acceleration of court proceedings is, as a rule, just as complex as every other far-reaching reform in the judicial system. Simple, unilateral interventions are not adequate where long-lasting, fundamental problems are concerned. In Croatia, too, changes directly or indirectly related to acceleration are being planned (and to a smaller extent carried out) in a number of areas, not only with respect to reforms of procedural legislation (which, although overburdened with some inadequate provisions, is not the main cause for the lack of court efficiency), but also in respect of organisation and human resources, and projects directed at the users of judicial services.

Hence, we would attempt to group the heterogeneous acceleration projects into six strategies, which can, in our opinion, be identifiable in current initiatives. These are:

- procedural reforms (modification of court procedures and dispute resolution routines for the sake of their streamlining and simplification);
- the transfer of assignments currently carried out by the courts to other state and social services and private professions (particularly to the notaries), and the transfer of assignments which are not at the centre of the judicial function to other persons inside or outside the court;
- encouraging parties to resolve their disputes by arbitration or by settlement reached either through direct negotiations or with the help of mediators;
- changes in the organisational structure of the justice system at the national level (the system of jurisdiction) and at the level of individual courts (reorganisation of the court administration);
- technical and logistic improvements (introducing new technologies, particularly IT; reorganisation of the delivery and register departments);
- programmes for improving the quality of judicial personnel (tightening up quality criteria during recruitment, a system of on-going education and further professional training).

This fairly extensive list in essence more or less covers all the possible ways in which a given country might combat the problems of inefficiency in its justice system. In the following sections, we shall devote particular attention to strategies that relate to attempts to speed up the civil proceedings in the narrow sense (current and heralded reforms of procedural codes applicable to litigation, execution and bankruptcy laws). A presentation and assessment of changes in relation to other types of procedure (criminal, administrative and so on) is beyond the scope of this paper, while the organisational, personnel and other aspects have also been partially dealt with in other works[15], and are partially contained in an expanded version of this paper[16].

6. *A reform without a reform – current directions of change in procedural legislation*

Changes aimed at accelerating court procedures in Croatia are concerned most of all with three large procedural codes: the Code of Civil Procedure (hereinafter: CCP), the Law on Enforcement and the Bankruptcy Law. As stated earlier, the process of amending these laws was not completely logical and expected. The most important and fundamental law, the CCP, was not essentially changed until 2003. In force was the slightly modified former Yugoslav Code of Civil Procedure of 1976 – although the draft of a comprehensive reform was prepared back in the mid-Nineties. Only in the Autumn of 2002 was this draft sent to parliamentary procedure, and finally adopted in July 2003[17].

On the other hand, the two other laws had a very different fate. They were not modified much earlier than the CCP, but completely new legislation was passed: as early as 1996 the Law on Enforcement[18] replaced the Execution Procedure Law, and the Bankruptcy Law[19] the Act on Forced Settlement, Liquidation and Bankruptcy. Both new laws were again essentially amended only two or three years after their enactment, and another round of amendments – which partially consist of the abandonment of some features introduced by preceding amendments – is part of a new package of laws that were passed by the Parlia-

[15] Uzelac, «Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien. Fall der Bestellung des Gerichtspräsidenten in der Republik Kroatien und daraus zu ziehende Lehren» in *Jahrbuch für Ostrecht, Sonderband: Justiz in Osteuropa*, Vol. 43, No. 1, Halbband, 2002, pp. 175-206; Uzelac, «Reforma pravosuđa i njena ograničenja. Slučaj imenovanja predsjednika sudova u Republici Hrvatskoj i njegove pouke», in *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 52, No. 2, 2002, pp. 289-318.

[16] Uzelac, «Beschleunigung des zivilgerichtlichen Verfahrens in Kroatien», in *Project MOEL – CLC*, Vienna, 2003 (in print).

[17] *Narodne novine* (hereinafter: *Off. Gaz.*) 117/03.

[18] *Off. Gaz.* 57/96, 29/99, 42/00.

[19] *Off. Gaz.* 44/96, 161/98, 29/99, 129/00.

ment in 2003 in the last few months before the elections.

All in all, it would seem that the changes in procedural legislation in the last ten years have ended in hopeless chaos. There is widespread awareness that court procedures fail to satisfy the need for efficient and timely protection of citizens' rights. But in spite of many announcements of reforms, in spite of the flood of new legislative drafts and new legal provisions, or even new laws, basic routines and basic structures have hardly been changed. To back up this claim, we shall attempt to pick out some of the basic tendencies of past and future reforms. The purpose of this survey is limited to the most important elements of the numerous normative changes, because inessential details may stand in the way of an overall picture of the essential. And this essential might be summed up as follows: numerous legislative changes, tentatively called a "reform", have not yet led to real and fundamental change capable of bringing about a system of justice appropriate to the needs of modern liberal democracies in the foreseeable future.

6.1. *Litigation procedure*

The underlying intention of the reform of civil proceedings was to achieve acceleration of the litigation procedure by tightening up measures to enhance procedural discipline, i.e., to put an end to strategies of procedural abuses. Although both concepts – of abuse of the procedural rights and procedural discipline – are controversial[20], it would seem that a good part of the changes rests on the administrative and apparently paternalistic logic according to which the problem of court delays can be mostly blamed on the behaviour of the parties, and hence the solution should be an increase in the penalties the court can impose during the process if it considers that some action by the participants is aimed at delaying or blocking the procedure.

The most far-reaching structural change in the context of speeding up proceedings is somewhat ambivalent, and partly contrary to other changes that give the court more authority in the procedure. For the sake of accelerating the proceedings and reinforcing the liability of the parties (and their counsel), the judges are generally deprived of the authority to order evidence *ex officio*[21]. This aban-

[20] See the assessments of one of the rare public presentation of the drafts of the new CCP held in the Law Faculty in Zagreb under the title of «Abuses in civil procedure», in *Bulletin of the meeting*, http://www.pravo.hr (May 2003).

[21] The previous first and second paragraphs were deleted from article 7 of the CCP. According to them, the court was supposed "to determine completely and truthfully the disputed facts on which the claimant's claim is granted". For this purpose, the court was authorised, though not obliged, to order taking evidence *ex officio* if it considered that this evidence was important. Instead, the court now has the same position in relation to both facts and evidence: producing evidence (and finding facts) may be ordered *ex officio* only if there are doubts regarding the legal permissibility of parties' actions, i.e., if the court considers that the parties in a suit (which, as a rule, only relates to the private interests of the parties) attempt to evade the mandatory regulations

dons the previous inquisitorial principle in evidence-taking, and limits the process of fact-finding to the evidence submitted (or requested) by the parties. It is somewhat paradoxical that the reform attempts to achieve acceleration by means opposite to those that are commonly used in similar reforms for this purpose – most trends in other countries endeavour to speed up procedures by strengthening and not by limiting judicial activism.

Many other changes from the voluminous draft of the new CCP are mainly of a partial nature. The concentration of the hearing at the trial stage will not easily be put into effect if it is left to the optional financial sanctions and possibility of reimbursement of costs caused by postponing hearings. The power to pronounce a default judgment is strengthened only in cases when the defendant failed to submit a written statement in reply within the time limit when a new default judgement (*presuda zbog ogluhe)* may be made. Any subsequent failure by parties to appear at the hearings will continue, it would seem, to be unsanctioned.

Since the judges of the superior courts were particularly involved in the shaping of the final draft, it is unsurprising that the smallest changes were made precisely with respect to the appellate procedure. For the sake of procedural discipline, the possibility of invoking new facts and evidence on appeal will be limited. But, apart from that, there are hardly any changes: decisions on appeals will still be made *in camera*, without the regular presence of the parties and their counsel. The legal possibility of carrying out a second instance public hearing, so far unused in practice, has been deleted from the text of the law. The possibility of the multiple issuing of judgements on the same case and of sending them back for retrial – without any final solution by the second instance – has not been changed.

Overall, it would seem that the so-called reform of litigation procedure will just assert continuity, rather than discontinuity with the generally dissatisfactory practice. A dozen years earlier, perhaps, it would have been enough as a first step. Today, one can express the fear that the disturbance and destabilisation of the system that three hundred articles of amendments may cause will outweigh the benefits. One of the likely scenarios – that we nevertheless hope will not happen – is that, after a certain period of time in which the degree of legal certainty and efficiency in the justice system will be even lower than hitherto, the courts will find a manner to go back to their present routines, including their earlier perception of the appropriate length of proceedings.

and achieve effects that violate the rights of third parties and of public morality. In other words, the court can no longer determine the production of evidence if it is necessary solely for determining facts on which claims that only affect the rights and obligations of private parties in litigation are based – and this concerns the majority of civil litigation.

6.2. *Enforcement procedure*

Current plans for reforms of the enforcement procedure[22] show an acute absence of any clear vision, even regarding the diagnosis of the origins of the problems. Instead of deformalising complex procedures and reinforcing some of the most important enforcement methods – above all, the traditionally and statistically most important enforcement on movable property – current plans look to a completely different scenario. The current plan of reform provides for a kind of "outsourcing" of the enforcement from the courts to other services. Although the idea of taking the caseload of the courts and shifting some of their tasks in execution of their judgments to other actors and private services is a step in the right direction, almost everything else in the intended reform is bewildering. The main pillar of the reform consists in transferring jurisdiction for issuing writs of enforcement to public notaries. One might observe that this would lead to the transfer of perhaps the only activity that should have remained in courts (and that, in practice, caused the fewest difficulties). On the other hand, the area in which the inefficiency of enforcement is greatest remains untouched. The symbolically and practically most important type of enforcement is the seizure and sale of movable property (which can almost be taken as a metaphor for any enforcement of court decisions). This method of enforcement is left with the courts – where it least belongs. This is the logical result of the first and fundamentally mistaken law policy assessment: that enforcement can in its entirety, or at least to a great extent, be successfully transferred to the notaries. It would seem that the drafters of the reform, blinded by the relative success that the notaries have had in their work to date, have overlooked the fact that the logic of the functioning of the notaries is completely opposite to the logic that a successful bailiff needs to follow. Public notaries provide legal certainty, while bailiffs (enforcement agents) should provide efficiency; notaries operate by following abstract formal rules, while bailiffs have to be guided by the logic of economic rationality; public notaries carry out a sedentary office-bound job, while bailiffs have to be mobile and operational.

All in all, if these plans of reform are implemented (having been hurriedly and without any real discussion made law because of electoral promises to do something in this field, but with a delay that can call them at least partially into question[23]), only negative results can be predicted. The execution process might become even slower and more formalised than it has been so far, because of the

[22] Amendments to the Law on Enforcement were adopted by Parliament on 15th October 2003, but were still not published officially at the time of the last revision of this text. See the final text of the draft at http://www.sabor.hr (agenda of the 37th Session, p. 31).

[23] The transfer of some of the activities in enforcement to the jurisdiction of the notaries is put off for a period of one year after the law comes into force. This will perhaps allow an opportunity to reconsider this plan, and abandon it.

completely unnecessary shuffling of files from courts to notaries and back again. If this scenario comes into being, the most likely outcome will be that the new amendments will follow the fate of some previous reforms that were undertaken only to be repealed as unsuccessful after a few months or years.

6.3. *Bankruptcy proceeding*

The reform of the bankruptcy procedure shares the fate of the reform of enforcement procedure. Bankruptcy proceedings in Croatia are also inefficient: their duration is excessive and it is difficult to achieve bankruptcy's basic functions – the liquidation of the insolvent debtor and the just satisfaction of his creditors. In Croatia, the bankruptcy law was radically reformed for the first time the same year as the enforcement law, when a new law on bankruptcy was enacted[24]. After the old socialist legislation, the new law mirrored to a great extent the new German bankruptcy law. This, however, did not help to establish effective and just bankruptcy law. In the first five years of the application of the law, bankruptcies were seldom carried out, and if they were, it was with great difficulties. Two sets of major amendments aimed at "contributing to the general functioning of the procedure" and the suppression of "undesirable tendencies in practice" did not help much either[25].

The political environment played a great, although not the only role in the inefficiency of the bankruptcy procedure. Right up to 2000, bankruptcies were politically rather unpopular, and were thus discouraged. The general policy of the government at that time even encouraged an overt disregard of the law in order to avoid filing for bankruptcy to save jobs at any cost. The government elected in 2000 attempted to change this view, but the wave of bankruptcies that followed had political consequences that, once again had a negative effect. Thus, a consistent application of the law and of the strict policy on bankruptcies where the conditions for them were ripe was not achieved.

The incapacity to apply the law in the area of bankruptcy led to attempts to solve the problem by making further changes in the law[26]. The justification for the latest set of amendments, among other things, is based on the assessment that the bankruptcy procedures were too complex because of the great number of bankruptcy bodies; that not even the explicit duties the law enjoined were actually respected; that bankruptcy procedures were unnecessarily lengthy, they were dragged out and became an end in themselves, and the bankrupt estate was often spent mainly on the costs of the procedure; that the secured creditors,

[24] Bankruptcy Law, in *Off. Gaz.* 44/96, 161/98, 29/99 and 129/00.

[25] Dika, «Bitne značajke druge novele SZ», in *Stečaj i ovrha - aktualnosti*, Zagreb, Organizator, 2001, p. 4.

[26] Amendments to the Bankruptcy Law were accepted in July 2003. See *Off. Gaz.* 23/2003.

particularly the banks, were often not interested in a rapid conclusion of the bankruptcy proceeding, since very high interests continued to accrue to their secured claims; that some legal grounds for the refutation of the illicit transactions of the bankrupt debtor were too stringent and that it was difficult to prove them; that the position of the privileged creditors in the bankruptcy process was not defined clearly enough, particularly the relation between the enforcement proceedings filed to collect the secured claims and the bankruptcy proceedings, and so on[27].

However, planned changes in this round will not be of a far-reaching character. An attempt will be made to accelerate the proceedings by abandoning the institution of the bankruptcy panel of judges and confiding all of its jurisdiction to a single judge. In addition, the draft also envisages the setting of deadlines for making certain key decisions in the procedure and their implementation[28] and makes minor adjustments, especially between the bankruptcy and the enforcement proceedings carried out to collect the secured debt[29]. For this reason, in this case, too, it is hard to expect that the inefficiency and/or self-sufficiency of bankruptcy proceedings from the assessment of the drafters of recent amendments will change in the near future.

7. *Resigning to inefficiency? New constitutional mechanisms for avoiding applications to the European Court of Human Rights*

The inefficiency of trials in Croatia had an epilogue in procedures before the ECHR in Strasbourg. From 5th November 1997, when Croatia became a member of the CoE and thus recognised the jurisdiction of this court, the greatest number of applications relating to Croatia filed in Strasbourg relate precisely to infringements of the right to a fair trial in a reasonable time, as defined in article

[27] See the explanatory notes in the draft of the Amendments to the Bankruptcy Law from April 2003 (http://www.vlada.hr, 39th session; www.sabor.hr, 32nd session) p. 2 (not numbered).

[28] This is a strategy that was shown to be unsuccessful in some earlier laws. For instance, in the Family Law, art. 269/2 provides for the holding of the first hearing in marital and family matters within a period of fifteen days from the day the suit is received in the court. Article 270 orders the making of the second instance decision within a period of thirty days from the day of launching the appeal. In practice, both provisions provoked more laughter than practical results, because they were not feasible and hence were entirely ignored in practice. On the whole, most of the deadlines the legislators set with great optimism, have been interpreted as so-called "instructive deadlines", i.e., as an orientation target, that may be exceeded without affecting the validity of the actions taken. Disciplinary procedures because of exceeding such "targets", although theoretically possible, have never been taken. In fact, as almost none of the judges stuck to such deadlines, the responsibility for the breach of the law was attributed to the legislator, who enacted a law that is not capable of being implemented.

[29] These adjustments derive, it would seem, more from the practical incapacity to come to logical results by interpretation, than from real deficiencies in the previous wording.

6 of the Convention. The case of *Rajak v. Croatia* was filed with respect to a suit that was started in 1975 and 25 years later was practically at the stage where it had started. However, the largest number of applications filed on this basis related to cases started before the beginning of the 1990s, relating to individual new areas that the courts were only painfully getting acquainted with, such as, for example, "financial engineering" (i.e. financial fraud), damages directly or indirectly related to military operations or terrorist actions, the transformation of social into private property (with the ancillary questions of denationalisation and the fate of tenants' rights), rights of political succession and so on. In most such cases, the procedure at the time the case was referred to the ECHR had not started in the real sense of the word. Some other cases in which there was a violation of the right to a trial in a reasonable time were not so drawn out but related to the sensitive area of family relations, and showed the inability of the courts to provide timely trials in cases that were legally proclaimed urgent and in which the legally protected interests required particular expeditiousness[30].

When it was seen that the length of court proceedings could bring down an avalanche of procedures against Croatia, comparable with the number of claims filed on the same basis against Italy, the state started to work on the problem with legal interventions. Since the attempts to speed up procedure described above had to show effects only in the long term, or did not show the expected success over the short term, an attempt was made to dampen the negative political consequences of Strasbourg judgments. Thus, in 1999 a new Constitutional Law concerning the Constitutional Court[31] was passed. In it, the provisions concerning a constitutional complaint because of violations of human rights were amended with a provision according to which "The Constitutional Court may, exceptionally, examine a constitutional complaint prior to exhaustion of other available remedies, if it is satisfied that a contested act, or failure to act within a reasonable time, grossly violates a party's constitutional rights and freedoms and that, if it does not act a party will risk serious and irreparable consequences".

After this, one of the defences that the state would adduce in a procedure before the Strasbourg court always related to the question of the exhaustion of legal remedies as defined by article 35 Paragraph 1 of the Convention. The Government claimed that, because of the failure to exhaust domestic legal remedies all cases in which there had previously been no constitutional complaint filed because of the length of the procedure should be declared inadmissible.

This defence, however, did not initially bear the desired result. In the case of Horvat[32] versus Croatia, the ECHR ruled that a constitutional complaint defined

[30] For example, the determination of paternity in the case of Mikulics (http://hudoc.echr.coe.int).
[31] *Off. Gaz.* 99/99.
[32] *Horvat v. Croatia*, 51585/99, judgement of 26th July 2001 (http://hudoc.echr.coe.int).

in this way was not an effective legal remedy for the protection of the right of the person making the application. It was found that the admissibility of this kind of complaints depended on the discretionary assessment of the Constitutional Court, which would allow the suit only "exceptionally", applying its own understanding of inadequately determined legal standards such as "gross violation" and "serious and irreparable consequences". The Constitutional Court also had no other sanctions available to it than a mere determination of a violation. For this reason, in this and in other similar cases, applications regarding the violation of the right to a trial in a reasonable time would still be considered admissible, even without a procedure being concluded before the Constitutional Court.

Another set of amendments came not quite three years after the passing of this Constitutional Court Law[33]. These once again revised the provisions about the filing of a constitutional suit because of violation of the right to trial within a reasonable time. The new provision of article 59a that became, in the revised text, article 63 of the Constitutional Law, did away with the exceptional nature of the complaint, so that it became possible to submit it always when the party appealed against a violation of the right to trial in a reasonable time. The discretionary elements in the decision making were removed, and thus the possibility of assessing whether violations and consequences were "grave" or "irreparable". It was also provided that, if a constitutional complaint was accepted, the Constitutional Court "shall determine a time-limit within which a competent court shall decide the case on the merits" and in addition "shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights"[34]. Such a compensation, according to the law, would have to be paid out of the national budget within three months of the application of the party for payment.

New provisions on constitutional complaints soon led to changes in the attitude and practice of the European Court. From the decision in the case of Slaviček[35] the Court adopted the understanding that the constitutional suit of article 63 of the Constitutional Court Law is an effective legal remedy and that, for this reason, the person who submitted an application to the court because of violation of the right to trial in a reasonable time has to exhaust this remedy too. Furthermore, since the case of Nogolica[36] the court has considered that this legal remedy must be exhausted even in those cases that were filed in Strasbourg before the most recent amendments to the Constitutional Law. In these deci-

[33] Amendments to the Constitutional Law on the Constitutional Court, *Off. Gaz.* 29/02, revised text in *Off. Gaz.* 49/02.

[34] Art. 63/1 and 2 of the Constitutional Law. In the provision that relates to the just compensation, the law goes even beyond the Convention, because it assumes that compensation has to be paid in every case where a violation of the right to trial within a reasonable time was found.

[35] *Slaviček v. Croatia*, 2086/02, admissibility decision, 4th July 2002.

[36] *Nogolica v. Croatia*, 77784/01, admissibility decision, 5th September 2002.

sions, which are in line with the efforts of the court in Strasbourg to limit the inflow of cases, there was a reference to the introduction of similar legal remedies in other countries, such as Italy and Poland[37].

In the short term, the new practice of the ECHR will certainly lead to a fall in the number of Croatian cases submitted to the court in Strasbourg, which started to rise vigorously in 2002. Indeed, since in the 1998-2001 period, 307 suits were filed against Croatia and in the first ten months of 2002, there were 560 new applications. The cases were mainly filed because of violation of the right to trial within a reasonable time. The press began to talk of a stampede of Croats on Strasbourg[38]. It is dubious, however, whether in the long run the obligation to file a constitutional complaint under article 36 will prove to be an effective legal remedy, or whether – as the former chairman of the Constitutional Court Jadranko Crnić stated – the new practice will turn out to be a "requiem for the Constitutional Court"[39]. In fact, the Constitutional Court, even before the amendments to the Constitutional Law, had experienced a considerable increase in the number of its cases[40]. If the annual number of over 2000 constitutional complaints – a number that, according to statements from the Court, stretches its work to the limits of its capacity – increases by at least some percent of the several tens of thousands of cases in which an application for the acceleration of the procedure and a demand for a just compensation might be made[41], it could easily happen that the actual Constitutional Court itself would be just one more link in the chain of violations of the human rights to a trial within a reasonable time. All the more so since its endeavours to maintain a restrictive attitude to constitutional complaints even after the new amendments, have already suffered a debacle[42].

8. *Conclusion – recommendations of measures for harmonisation with EU standards*

At the moment, attempts to accelerate court proceedings in Croatia are going in many different directions, both at the organisational and at the procedural

[37] See the view of the ECHR in *Brusco v. Italy*, 69789/01. The court also referred to changes in Polish law after the case of *Kudla v. Poland*, 30210/96.

[38] See the *Panorama* supplement, *Vjesnik*, October 19th, 2002, p. 14.

[39] Crnić, «Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu RH.», in *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 52, No. 2, 2002, pp. 259-88.

[40] Statistics show a significant rise in the number of constitutional complaints: 25 filed in 1993; 642 in 1995; 925 in 1999; 1910 in 2001 and about 2500 in 2002. *Ibid.*, p. 272.

[41] An often quoted case is that of the Zagreb Municipal Court, where there were at one time (in 1998) 10,463 cases that had been pending for over 10 years.

[42] In the case of *Šoć v. Croatia* (47863/99), in a judgement of 9th May 2003 the ECHR has already determined that CC's rejection of a constitutional complaint to a violation of reasonable time with the justification that the procedures alleged to have lasted unreasonably long have in the meantime being completed, itself violates the right to an effective legal remedy from article 13 of the European Convention.

level. Optimistic announcements from the Ministry of Justice argued that the new measures would eradicate delays and backlogs in the Croatian justice system by 31st December 2007, "if not earlier"[43]. Yet it seems that the structural difficulties with which the Croatian judicial system is faced are much more serious. The current plans for reforms, though, in principle, they have the support of both the government and international institutions, and are not wanting in resources, have little chance of real success, primarily because of the lack of a clear vision and conception of the changes. In part, this shortcoming is not so illogical – the absence of vision is partially just a symptom of the lack of any serious and sincere wish for fundamental reforms. A good part of the legal establishment and the ruling elites are not ready for the shock that an efficient and well-functioning legal system might lead to, although all the power structures nominally support it. Problems in the adjustment of the legal system to a social structure that is based on the political principles of liberal democracy and the market economy escape the sphere of the normative – they are of an institutional nature, starting with human resources and the social structure, as well as the structure of awareness of all those who should see to it that the law is implemented. These are primarily the legal professionals – the judges, attorneys, notaries and others who take part in the functioning of the judicial system. Their structure and psychology change slowly, and structural and institutional advances since the period of socialism have been almost insignificant.

For the sake of achieving a level of efficiency in the legal system that would bring Croatia closer to European integration, incidental legislative changes are not sufficient. Instead, it is necessary to elaborate a broader plan that would aim at three linked strategic objectives. These are:

1. A stable legislation of high quality. Laws and other general legal instruments should be the outcome of a rational process. Legal provisions should be appropriate, consistent and easily applicable, and equally intelligible to those whose behaviour they are to regulate and to the courts and other bodies that have to apply them. To the extent that this is possible, the normative environment should be stable – frequent changes that introduce legal uncertainty and additionally contribute to lack of efficiency are to be avoided.

2. A competent and efficient judiciary. Judicial institutions, in the first place the courts, should be qualified to a high degree to carry out the tasks assigned to them. Judicial officials and employees should have adequate education, capabilities and training, and the division of jurisdiction, the organisation of work in the judicial institutions and the logistics should be appropriate. Good and efficient work should also raise the degree of public trust in justice and the legal institu-

[43] From the document *Judicial Reform*, cit., http://www.vlada.hr/Download/2002/12/07/016-01.doc, p. 21.

tions in general.

Respect for the results of legal proceedings and efficient implementation of court and other decisions grounded in the law. The efficiency of the legal system is illusory if the decisions made in the procedure prescribed by law are not effectively implemented. Irrespective of any possible political or social dissatisfaction with the consequences of the decisions made, which is inevitable in some cases (bankruptcies, for example), decisions founded on law have to be carried out effectively, because otherwise a dangerous legal inequality is created and the elementary principle of the government of the rule of law is called into question.

In the list of recommendations below measures are proposed that should be undertaken to achieve these strategic objectives. Most of the measures proposed are connected with strategic objective number two, which is the centre of future endeavours, and is linked by synergy with the first and third: a well-functioning judiciary will more easily overcome the drawbacks and failings of the legislative process, and, with its integrity and the public trust in it, will contribute to the results of procedures being respected.

1. *Enabling strategic planning and action regarding the efficiency of the legal system.*

A primary objective should be to establish reliable empirical methods of monitoring the problems in the judiciary. For this reason the government and the non-governmental sector should support research into the problems of the functioning of the judiciary on a scientific and professional basis. The monitoring of the work of the judicial system at qualitative and quantitative levels should be reformed, considering that today's statistics are not well adjusted to modern demands. Pursuant to a new methodology, it is necessary to define criteria for the efficient work and the evaluation of the judicial services. Finally, the legislative process should be linked with the requirements of future implementation, setting up the missing link between ideas and their feasibility (which sometimes includes proper informing of the bodies that apply the law about the desired aims and results that some new legal instruments wish to achieve).

2. *Reorganisation and restructuring of the judicial bodies and services according to rational criteria.*

The current irrational organisation and structure of the judicial bodies and services should, following a new empirical methodology, be adjusted to the demands for efficiency and quality of work. Recommendations in this area would relate to, for example, the adjustment of the number of judicial bodies, their area and subject-matter jurisdiction to the needs of the efficient operation of the system as a whole. There should be a clear delimitation of the fields of the work of courts and judges as against other services and professions. The framework criteria for legal services should be adjusted to European criteria and national requirements. The current roles and functions of certain judicial services and

professionals (judges, court advisers, attorneys, notaries and so on) should be re-examined. As part of such re-examination, a kind of outsourcing of some of the tasks currently undertaken by courts should be implemented, following the example of other transition countries: some of the assignments that the judicial bodies carry out now may be shifted to the jurisdiction of appropriately qualified and supervised private professions.

3. *Systematic monitoring of the course of proceedings, suppression of delaying tactics, repetitions and periods of inactivity and general increase in the speed and efficiency of legal procedures.*

Efficiency is inconceivable without appropriate case management. Much of the backlog can be ascribed to obsolescent methods of court administration, which should be comprehensively reformed. For this purpose, the potential of information technology should in particular be used, for they would make the centralised monitoring of legal proceedings and the management of court cases possible. Such a system, which would require a competent body at national level, would enable a rapid and appropriate reaction to emergencies (for example, the sudden increase of the inflow of particular cases brought about by a change in legislation, or by other reasons). In addition, it would enable further concentration and acceleration of legal proceedings in routine and formulary matters (which would be more or less automated, with a minimum input of work by senior judicial officials, particularly judges). This work should cover not only first instance proceedings, but also hearings at appeals and superior levels – which is actually the area in which the current reform of litigation proceedings has done and achieved the least.

4. *Increasing the motivation to work efficiently and the responsibility of all participants in the proceedings.*

The manner of recruitment, promotion and motivation of judges and other judicial employees followed to date has not led to striving for excellence and efficiency. Systematic motivation for efficiency should be created, ranging from strengthening responsibility for inefficient work of poor quality, to introducing rewards (greater chances for promotion and similar incentives) for exceptional achievements. In addition, measures should be undertaken to reduce the contributions of other participants in the process – particularly attorneys and forensic experts – to the delays in legal proceedings. These measures would include the restructuring of the manner of awarding lawyers' fees to the winning party (to discourage dragging out cases over a number of hearings) and special sanctions for expert witnesses that do not submit their findings and opinions in an orderly way and in time.

5. *Ensuring a high level of competence of all persons who carry out judicial functions.*

Citizens can have confidence in the judiciary only if it is clear that the highest

functions in it are performed by individuals of the highest quality. Without high quality judiciary personnel it is hardly possible to have efficient decision making. In order to turn current trends around, it is necessary to completely reform the system of selection and promotion of judges and other employees in the judiciary. The basic feature should be a high level of objectivity in recruitment and the obviation of all discretionary decisions that, because of the long tradition of nepotism and political influence, have marked practice to date. In this context, it is particularly necessary to carry out a thoroughgoing reform of the current bar exam, introducing strictly anonymous testing to result in the precise ranking of candidates, the success of whom should be monitored via a Gauss curve. These conditions would also include an obligatory training programme for further professional education and the training of judiciary employees. Finally, through all these essential structural changes one should shape the contours of a new Croatian judiciary, which requires new people, prepared for a changed function and the imperative of efficient work. For the successful performance of duties on the bench it is necessary to have an adequate combination of experience and enthusiasm. For this reason mobility in the legal profession needs stimulating. Those who lack readiness to work in an environment that requires efficiency should be stimulated to retire or change jobs, while their posts should be assigned to new qualified personnel.

Today, the recommended measures may sound somewhat utopian. However, the great project of harmonising national standards with the highest standards of the Old Continent is somewhat utopian – it requires a great deal of changes, including some that for some are as significant as tectonic changes. The process that this paper has attempted to anticipate will be neither rapid nor easy, but without accomplishing it, it will be impossible for Croatia to join in the European community successfully. It will equally be impossible to realise Croatia's own ambitions to establish a state that observes civilised standards in the area of the rule of law.

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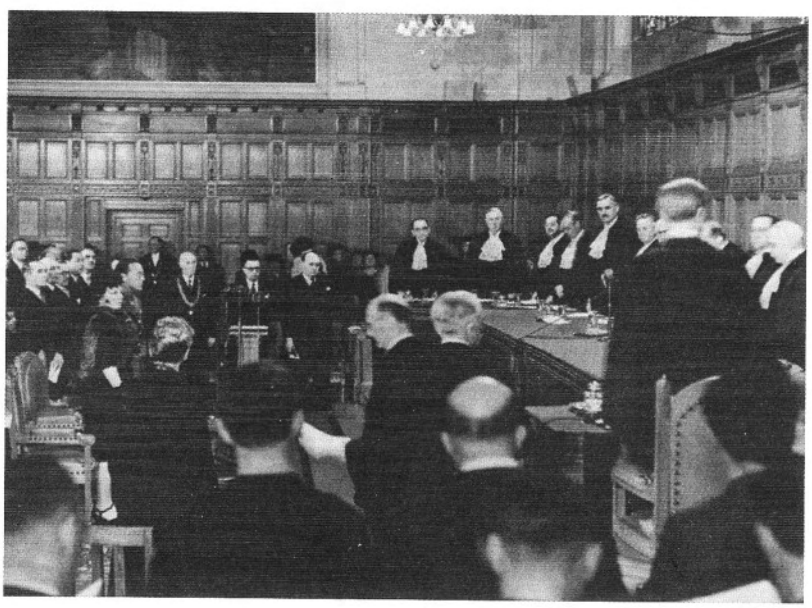
EUROPE and the BALKANS
INTERNATIONAL NETWORK

A EUROPEAN SPACE OF JUSTICE

Edited by Justin Orlando Frosini
Michele Angelo Lupoi and Michele Marchesiello



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THE INTERNATIONAL NETWORK "EUROPE AND THE BALKANS" WAS ESTABLISHED AT THE END OF 1993 WITH THE FINANCIAL SUPPORT OF THE EUROPEAN UNION (HUMAN CAPITAL AND MOBILITY PROGRAMME) AND RELIES ON THE COLLABORATION OF SOME OF THE BEST-KNOWN EUROPEAN AND NORTH AMERICAN SCHOLARS. THE INITIATIVE WAS CONCEIVED AS A UNIVERSITY PROJECT, AIMING TO MAKE ACADEMIC RESEARCH MORE RELEVANT TO THE WIDESPREAD NEED FOR INFORMATION.

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ISBN 88-8063-494-1

€ 25,00

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This publication is published with the financial support from:
European Commission,
Tempus Programme,
Title of the project "A European Space of Justice"

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ISBN 88-8063-494-1

Via P. Costa, 33, 48100 Ravenna
Tel. (0544) 217026 Fax 217554
e-mail: longo-ra@linknet.it
www.longo-editore.it

Printed in Italy

Contents