Chapter 10
Croatia: Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence

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10.1 Origins and History of Civil Procedure in Croatia[1]

In the second half of the nineteenth century Croatia developed as an autonomous constituent part of the Habsburg Monarchy (later, Austria-Hungary). This led to a large extent to the reception of legislative models from other areas of the then complex community of states, for example, of laws enacted in Vienna. But that process did not develop harmoniously, in full, or without delays.[2] Some of the key pieces of procedural legislation (or the commentaries on them) were adopted in Croatia after they had already been superseded in Austria.[3]

For example, the Temporary Rules of Civil Procedure for Hungary, Croatia, Slavonia, Serbian Vojvodina and Tamiški Banat were adopted in Croatia in 1852, almost 70 years after the enactment of their Austrian model and principal source of inspiration, the General Rules of Court Procedure (*Allgemeine Gerichtsordnung*) of 1781. The major commentary on the Temporary Rules of Civil Procedure for Hungary *et al.* was published in Croatia in 1892,[4] only a few years before a completely different procedural model – the *Zivilprozessordnung* of Franz Klein – was adopted in Austria.

The same Austrian *Zivilprozessordnung* of 1895 was accepted in Croatia 30 years later, during the process of unification of procedural law that took place in Yugoslavia in 1929. The standard commentary on the Yugoslav Code of Civil Procedure (which was practically a literal translation of the Austrian *Zivilprozessordnung*) was a

[1] The historical part of this text relies on Uzelac 2004.

[2] For the delayed reception of foreign models in the 'periphery', see Čepulo 2000, pp. 889–920.

[3] Some useful, although very short and overly simplified, remarks on the reception of Austrian law in Croatia can be found in Jelinek 1991, pp. 72–74, 85–86. See also Uzelac 2002, pp. 177–179.

[4] See Rušnov and Šilović 1892.

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translated Austrian commentary.[5] It was published in the Kingdom of Yugoslavia in 1935, almost 40 years after the first publication of this commentary in Austria. Ominously, it was also the year in which Georg Neumann, its author, died.

As a consequence, the model of civil proceedings conceived by its creator, Franz Klein, in Austria – a model of quick, efficient, simple and concentrated proceedings, in which an activist judge holds a public hearing and then pronounces his judgment immediately[6] – never became complete reality in the territory of Croatia (and in the wider region).

Delays in the reception of the original Austrian model and the prevailing practice of earlier written, formal and secret proceedings seemingly led to a specific mixture of forms that were not fully in keeping with the original Austrian models. This development was intensified by certain political facts – first, the fact that the Austrian *Zivilprozessordnung* and its *Jurisdiktionsnorm* were accepted only 10 years after Croatia had broken free from all governmental and legal ties to Austria and, second, the fact that the unification of civil procedural law in the Kingdom of Yugoslavia took place during the dictatorship of King Alexander I of the Serbian royal house of Karađorđević. So, although legal doctrine was changed and legal teaching adjusted to the new procedural principles, the law in action continued its own autonomous way, developing a *stylus curiae* that still contained a great degree of the use of writing, seclusion and indirectness.

Other circumstances also contributed to these developments. The law on civil proceedings of 1929 was introduced barely 11 years before World War II. In addition, the revolution left its mark on the courts and their procedures. Although procedural legislation in the Socialist Federal Republic of Yugoslavia continued to follow earlier models, it was adjusted in some respects. The inquisitorial elements and judicial activism of the Austrian procedural legislation were no longer only a warrant for concentration, publicity, directness and efficiency but also became an instrument of paternalistic control with the primary purpose of protecting the state from party autonomy and the uncontrolled actions of civil society. However, it was impossible to remove the party's initiative in civil proceedings completely, so civil procedural law continued to develop partly on the foundations of classical procedural patterns.[7] However, a consequence of the suspect 'civil' and 'private' nature of proceedings was the marginalisation of court proceedings. They were reduced to the level of a second-rate mechanism of social regulation, aimed at resolving 'secondary' problems only, disputes related to the relics of private property in a society in which a collectivist doctrine otherwise dominated.

As a consequence, the speed and efficiency of judicial proceedings were not high political priorities until the changes in the 1990s. Quite the opposite, the relative length of proceedings and the high level of formalism were used in some cases as a

[5] Najman 1935. This commentary was largely a translation of G. Neumanns' *Komentar zum österreichischen Zivilprocessordnung*.

[6] For Klein's reforms and their meaning today, see Sprung 2002.

[7] For the development of civil procedural law in Croatia, see, e.g., Triva et al. 1986, § 1–5.

tool to protect judges (who did not enjoy full guarantees of independence and who were subject to re-election by political bodies) from political persecution and the rage of the ruling elites.

On the other hand, the previous, already generous system of pleading that enabled the change of claims and issues in the course of the proceedings and the reconsideration of first instance court rulings, was further loosened. The party dissatisfied with the outcome of the proceedings had many opportunities to bring about a retrial through appeal and other legal remedies. On the basis of the Socialist understanding of the 'principle of material truth', virtually unlimited possibilities of introducing new facts and evidence were established at first instance and in appellate proceedings. In addition, there was an established practice of the appellate courts limiting themselves to revoking a decision and sending the case back for retrial. Theoretical justification was found in the principle of immediacy (direct, personal evaluation of evidence) although very little of this principle remained in practice. Possibilities of state intervention through so-called 'requests for protection of legality' (*zahtjev za zaštitu zakonitosti*) by the State Attorney were introduced into civil proceedings. All this, taken together, served as a specific shock absorber for political blows against justice. But, on the other hand, it surely did not contribute to the authority of judicial decisions and the firmness of court decisions, even with respect to those that were formally considered to be *res iudicata*.

Such a state of affairs certainly did not raise the awareness of judges of the need for the efficient management of proceedings and for ensuring a reasonable duration for pre-trial, trial and post-trial routines. This was reflected in the expectations of candidates for judicial service, the recruitment and the selection of judges. Through several decades of Socialist rule, the judicial profession was considered by graduate lawyers as a relatively poorly paid and bureaucratic branch of the civil service. Its advantages were seen in providing a relatively non-demanding job, with no pressure to do the work urgently, and a lot of free time.

Thus, the typical distribution of jobs in families of lawyers was the following: the spouse who took care of the children went into judicial employment, while the other, bread-winning spouse supported the family by practising law as a private attorney. Even if this typical perception has an anecdotal character, the numbers are incontestable: in the ranks of judges of the courts of first instance at the beginning of the 1990s in Croatia, women were significantly more numerous than men.[8]

When Croatia left the Yugoslav Federation in 1991, through a painful process marked by war and instability, there was a radical turn away from the collectivist doctrines. The doctrines of Marxism, of 'social property' and self-management were abandoned, and the prevalence of private ownership was re-established. That was a completely new situation for the national Judiciary. In the first place, there

[8] According to statistical data for 1998, about 65 % of first instance judges were women. However, at the same time, they constituted only about 40 % of the judges of the Supreme Court. These ratios remained the same until today: at the end of 2009, out of 1,886 judges, 1,251 were women, which make exactly two thirds (66 %).

were much greater expectations, judges had much greater responsibility and much more important tasks. Yet, some things did not change. For example, the attitude of politicians towards the Judiciary remained unchanged and – especially under war conditions – it was expected that judges would serve the interests of the political regime. For a period of 6–7 years, the newly introduced constitutional principles of the independence of justice, tenured appointments and the separation of powers were not applied in practice.

Many judges were appointed and dismissed in that period, again not according to objective and well-defined criteria of competence and responsibility, but according to their closeness to the centres of power, and political and ethnic affiliation. A prolonged period of uncertainty and political purges led to the departure of the better and more proficient judges to other private legal work where they expected to find more peace, higher incomes and a greater level of personal and professional freedom.

On the other hand, those judges who did not have a choice, or were ready to live under conditions that were considered by others to be unbearable, remained in the system. Newly appointed judges – there were many of them, in some courts over two-thirds – were mostly young and without experience. Not infrequently they were appointed according to criteria of political and ethnic 'appropriateness', or under the influence of an unavoidable dose of nepotism, a common characteristic of southern European countries.[9]

As a consequence, the efficiency of the justice system (which has in any case never really embraced the rule 'justice delayed is justice denied') radically changed for the worse in the 1990s and later. General indicators of the backlog in courts demonstrate that the number of unresolved cases almost tripled between 1990 and 2000.[10]

10.2 Current Procedural Structures: Distribution of Powers Between the Judge and the Parties

The judicial branch of government in Croatia consists of various courts. Civil litigation is handled by the courts of general jurisdiction, but for commercial cases the commercial courts, as specialised courts, have *in rem* jurisdiction. There are also the newly established administrative courts that decide on administrative suits, and misdemeanour courts (competent for petty crimes).

The courts of general jurisdiction in civil matters are the municipal courts (as courts of first instance) and the county courts (operating mainly as appellate courts, with very few types of cases that are decided at the first instance). The commercial courts also

[9]For this development, see Uzelac 2000; see also Uzelac 1995, pp. 413–434.

[10]See above.

have 2 layers – commercial courts, as the courts of first instance, and the High Commercial Court, as the appeals court in commercial matters. There are currently about 67 municipal courts, 21 county courts and 13 commercial courts. At the top of the judicial hierarchy is the Supreme Court. In civil cases the Supreme Court is competent to decide in the third and last instance upon the remedy called *revizija* (revision).

The total number of judges in Croatia is 1,924 (as of 31 December 2011). Except in the misdemeanour courts, there are also 518 judicial counsels, who generally work in the same manner as judges in smaller cases.[11] Previously, most of the new judges were recruited among the judicial counsels, but since the establishment of the new School for Magistrates, the system has been changing (after 2013, judicial appointments will be made exclusively through the School for Magistrates).

In procedural theory,[12] the relationship between the powers of the judge and the powers of the parties is often discussed. The relevant procedural principles in this discussion can be grouped in two pairs: first, the principle of party disposition and the principle of *ex officio* judicial activity; and second, the adversarial and the inquisitorial principles. The first pair of principles concerns the initiative for the commencement and further development of the proceedings as well as their completion, while the second pair concerns the initiative for the collection of material relevant for decision-making such as facts and evidence (see below).

As to the principle of party disposition, it denotes that the parties are principally responsible for commencement of the proceedings, as well as for the determination of the subject matter of the proceedings. Civil litigation is commenced by the submission of a statement of claim to the competent court. Another important moment is the communication of the statement of claim to the respondent – it is the moment from which the civil suit is pending (*lis pendens* or litispendence). The service of the statement of claim is effected under the supervision of the court, mainly by means of postal delivery. The statement of claim should also indicate the facts upon which the claims are grounded, and specify the relief sought. The court is bound by the claims raised in the proceedings, and the judge may not award a relief that was not sought, or adjudicate more than what was requested by the claimant (*nemo iudex ultra et extra petita partium*).

On the other hand, the development of a civil suit, the setting up of the procedural calendar, the terms for hearings and the ordering of procedural steps should all be fixed by the court, at least in theory. However, control of judicial decisions will not take place *ex officio*, and appeals and other remedies may only be raised by the dissatisfied party. The court is also responsible for finalisation of the proceedings, and is bound to decide on the merits when the case has been sufficiently discussed among the parties. The parties are, however, free to settle the case, or end it by

[11]Statistical information (*Statistički pregled*) of the Ministry of Justice for 2011; see http://www.mprh.hr (last consulted in June 2012). See also the web pages of the Supreme Court, http://www.vsrh.hr (last consulted in March 2012).

[12]All of the following explanations of Croatian civil procedure are derived from the current edition of the standard textbook of civil procedure, Triva and Dika 2004.

waiver or admittance of the claim (in the latter cases, the court will issue a 'dispositive judgment' – a judgment based on party dispositions).

In standard doctrine of civil procedure, it is often argued that the powers to collect substantive material needed for decision-making are evenly distributed between the judge and the parties. It is also argued that civil procedure is mostly founded on the adversarial principle, which is in regard to various matters modified by judicial inquisitorial powers and duties.

The scholarly definitions of the inquisitorial and adversarial principles in civil procedure relate to the level of powers regarding the collection of procedural material (*Prozeßstoff*). The procedural material consists of everything needed to make a decision on the merits. The procedural material is composed of (1) facts (factual allegations), (2) evidence, (3) legal rules and (4) non-normative rules (rules of experience, empirical knowledge).

1. *Facts*: As a general rule, the introduction of facts is governed by the adversarial principle. The judge should limit examination to the facts that are alleged by the parties. Furthermore, the judge should not take any evidence relating to facts that are not in controversy (i.e. facts admitted by the other party). However, there are two types of exceptions:
   (a) Particular types of cases (e.g. family law cases) are expressly defined as cases in which party dispositions do not have binding effect on the judges, including factual allegations, which should in principle be supported by the taking of evidence. In these types of cases, the inquisitorial powers of judges are dominant.
   (b) Even in regular civil (and commercial) cases, judges are authorised to find facts not alleged by the parties (as well as facts admitted in the procedure) if they suspect that the parties are attempting to reach effects that are contrary to mandatory rules of law (e.g. tax fraud, violation of third parties' rights) or to public morality.
2. *Evidence*: The introduction of evidence is also governed by the adversarial principle, in the same way as the definition of the facts that are to be found in the procedure. The judge may, in principle, only order the taking of evidence requested by the parties. However, in cases where the judge may establish the facts *ex officio* (see above), he or she may also order the taking of evidence *ex officio*, in particular if such evidence is needed for facts that are investigated due to a decision of the court.
3. *Law*: The legal pleadings of the parties are not binding for the court. The judge has the duty to apply the relevant legal provisions, irrespective whether they were invoked by any of the parties. The rule *iura novit curia* applies to all domestic legal sources, and even to foreign law. However, the parties may help the judge by submitting duly authenticated foreign documents which prove foreign law. This is, however, not regarded as the taking of evidence, as foreign law is treated as law, not as fact. To that extent, legal matters are entirely under the inquisitorial powers of the judge.

4. *Rules of experience: Mutatis mutandis*, the rules applicable to legal rules are also applied to rules of experience. The judge has to establish them *ex officio*, assisted – if needed – by experts appointed by the court. The parties may propose the experts to be appointed, but the appointment itself is always made by the court. Experts act as neutrals (there are no party-appointed experts). In this respect, again, the inquisitorial principle is dominant.

The actual practice in civil procedure is somewhat different from the theoretical scheme outlined above. Especially, the self-understanding of the Judiciary and legal scholars regarding the adversarial nature of civil proceedings may be questioned in the light of the considerable powers exercised by the judges in the course of the proceedings (or, better, in the light of the considerable passivity of the parties and their lawyers). It is true that the court is in principle limited to the facts and evidence alleged by the parties (*iudex iudicare debet secundum allegata et probata partium*). Yet, the active way of handling the procedure (in which judges should not only assist the legally illiterate, unrepresented parties, but also explain their initial ideas and perceptions in regard to the substance of the dispute – *richterliche Aufklärungspflicht*) enables judges to suggest which supplementary allegations parties should make. In case law, there are reported cases which even suggest that higher courts regarded the absence of such suggestions as procedural errors which led to the annulment of the decisions.

The extra-inquisitorial powers of the judge are in practice particularly visible in the process of the taking of evidence. Formally, the judge should be limited to the evidentiary proposals of the parties. In practice, however, this is more or less the case, but the active role of the parties is often limited to a mere proposal of the document that has to be procured, or the witness or expert who has to be heard. The search for the individual items of evidence is usually left to the court. As the judges are often reluctant to apply the burden of proof rules and continue to wait for evidence to be supplied (or the witnesses to appear), the search for evidence prolongs the procedure and contributes to the length of the proceedings.

Another inquisitorial aspect is in the style of conducting oral hearings. The judges definitely dominate the courtroom, dictating the protocol, questioning all participants in the process, conducting the hearing of the witnesses and experts, etc. In many oral hearings the parties and their lawyers act in a rather passive way, sometimes limiting their interventions to a mere assertion of their presence in the courtroom. The burdens of going forward and the burden of proof are thus, even in clear civil cases, in practice to a great extent transferred to the judge. However, the passivity of the parties often triggers a less-than-active behaviour on the part of the judges, in particular with respect to case management. The tolerance for late evidentiary proposals is considerable, as well as the tolerance for the non-appearance of witnesses, and even the parties themselves. Altogether, this leads to many adjournments and postponements, so that the theoretical ideals of a concentrated trial and the principle of immediacy are very rarely realised in practice.

10.3 Recent Reforms in Croatian Civil Procedure

10.3.1 Reforms of the Code of Civil Procedure

The awareness of the serious systemic deficiencies of civil procedure (delays, backlogs, inefficiencies), as well as the emerging interest of the public media in the problems of justice, and a series of judicial scandals, stimulated the reform of procedural legislation. Reform of the judicial system was among the pre-election promises of the coalition of parties which won the elections at the beginning of 2000. There were indeed many legislative and other projects from 2000 onwards concerned with reform of the judicial system. However, assessments of what was achieved were rather different. Many critics reproached the government for the lack of concrete effects derived from the changes, and pointed to the further accumulation of cases and the lack of clear concepts and strategies for the judicial sector. Others objected to every governmental action in this area as a violation of the constitutional principle of the independence of the Judiciary. The debates about what needs to be changed and what should be the fundamental features of judicial reform are not even close to an end at the time of the writing of this paper.[13]

Some changes and trends can, however, be distinguished. The Croatian Code of Civil Procedure, although still only an amended version of the Yugoslav Code of Civil Procedure of 1976,[14] has been subject to more or less significant changes in the 2000s.[15] The most significant reforms were introduced by the amendments to the Code of Civil Procedure in 2003. These amendments tried to introduce a more adversarial style of litigation by diminishing the rights and duties of the judges to introduce evidence *ex officio*, and by strengthening procedural discipline through higher sanctions for the parties that aim to delay the proceedings by the use of various vexatious tactics. These amendments, together with those enacted in 2008 and 2011, also changed the structure of legal remedies, excluding the possibility of secondary appeal (*zahtjev za zaštitu zakonitosti*) by the public prosecutor (state attorney), and by changing the role of recourse to the highest court (*revizija*). Yet, in practice, the changes did not cause significant changes in the style and speed of civil litigation. The procedural changes were more incremental than substantial. This can partly be brought into connection with the fact that many intended reforms were met by the resistance of legal elites. After more ambitious legislative plans, the adopted changes to procedural legislation often went only half-way. These changes were

[13]For some of the critical elements of the attempted reforms, see Uzelac 2002.

[14]Yugoslav Code of Civil Procedure – *Zakon o parničnom postupku* was originally published in the Official Gazette (Službeni list SFRJ) No. 4/77. It was amended by changes published in Official Gazette Nos. 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91.

[15]For the reception of the Yugoslav Code of Civil Procedure and the further amendments, see Croatian Official Gazette (*Narodne novine*) Nos. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08 and 57/11.

further diluted due to their slow and incomplete adoption among judges and legal practitioners, which further obstructed the realisation of the desired goals and resulted in only cosmetic changes, often limited to special courts or types of proceedings.

A good example may be the way in which the intention to reduce the passive behaviour of the parties by relieving the judges of the right to take evidence on their own motion was circumvented through the obligation of judges to warn the parties about their duty to introduce evidence. In case law, there are reported cases in which the higher courts considered the failure of the lower court judges to warn the (lawyer-represented) parties of their right and duty to propose additional evidence as a reason for quashing the first instance judgment.[16]

Another example is the failure of the plans to concentrate the proceedings by reducing the number of hearings and introducing a ban on new facts and evidence after the preliminary hearing. These reforms, although planned as a general regime for all civil suits, were finally introduced only as special rules for small claims proceedings. Thereby, once again, the reforms, which were perhaps suitable as a basis for the overall reform of procedure before ordinary courts, were 'tested' only in the confined area of small claims. The fact that the same courts have to apply both sets of rules also contributed to the fact that in many courts the special rules on the preclusion of new evidence after the preliminary stage of the proceedings are still ignored. An interesting point is also the apparent contradiction between the new rules on small claims (which, due to the fact that they lead to preclusion only after a preliminary hearing, in fact require *two* oral hearings) and the European Union (EU) small claims procedure introduced by Regulation No. 861/2007 in cross-border cases, which basically foresees a written procedure.[17]

A similar marginalisation of the reformist ambitions happened as regards plans to eliminate successive remittals upon appeals. The practice of successive remittals was proclaimed to be one of the systemic deficiencies of Croatian civil procedure in several cases decided by the European Court of Human Rights.[18] Successive remittals frequently occur in practice.[19] Therefore, the reforms (also those stimulated by

[16]This was, *inter alia*, confirmed in discussions that the author of this text held with the judges of the Zagreb Commercial Court during his lectures in July 2011.

[17]The changes of the procedural rules in small claims were introduced by the Code of Civil Procedure Amendments of 2008 (*Narodne novine* 84/2008).

[18]See *Vajagić v. Croatia* (ECtHR case 30431/03, judgment of 20 July 2006, at 44): 'The Court observes that the delays in the proceedings were caused mainly by the successive remittals. Given that a remittal of a case for re-examination is usually ordered as a result of errors committed by lower instances, the Court considers that the repetition of such orders within one set of proceedings discloses a deficiency in the procedural system as applied in the present case (see, *mutatis mutandis*, *Wierciszewska v. Poland*, No. 41431/98, § 46, 25 November 2003)'. See also *Zagorec v. Croatia*, 10370/03, judgment of 6 October 2005; *Čiklić v. Croatia*, judgment of 22 April 2010, 40033/07. On this issue, see also Grgić 2007, p. 159.

[19]According to the statistics of the Ministry of Justice, it can be estimated that about 20 % of all appealed judgments in civil cases get remitted (see Statistical Survey of the Ministry of Justice 2010, 31), and it is likely that this percentage is at least equal upon second appeal.

the EU in the context of the accession negotiations between Croatia and the European Commission) originally aimed at ordering the higher courts to decide on the merits in all cases that were previously remitted to the first instance. Again, after initial ideas to introduce a universal rule that would prohibit more than one remittal, such a provision was in 2011 only adopted in commercial cases, family law cases and employment/work dismissal cases.[20] It is too soon to estimate what effect (if any) this change will have in practice, but the half-hearted, unwilling approach to reform is visible again. It can be underlined by the fact that the ban on successive remittals was already a semi-reform, as a more determined and far-reaching step would address the very frequency of the quashing of judgments upon appeal (as this is something that happens all too often).[21]

10.3.2 Attempts to Stimulate Mediation and Other Methods of Alternative Dispute Resolution

One of the directions of the procedural reforms in the 2000s was directed towards stimulation of mediation and other alternative methods of dispute resolution. This trend corresponds to the general growth in the popularity of mediation in European countries.

Of course, conciliation and mediation were not entirely new discoveries. Throughout the Croatian history of civil procedural legislation – starting from the 1930s onwards – attempts to reach a settlement between the parties were recognised as desirable. The 1977 Code of Civil Procedure contained a specific provision on court settlement[22] which not only allowed the parties to conclude a binding and enforceable settlement during civil proceedings at first instance, but also encouraged the judges to inform the parties of this option, and assist them in concluding such a settlement. The only limit was in the nature of the disputes, as court settlements were not permitted in disputes regarding rights that the parties could not freely dispose of.

However, this option was in practice not widely used. According to statistical surveys of the Ministry of Justice, in the total number of cases before the courts of general jurisdiction, only about 2–3 % were terminated by court settlements (3–4 %

[20] See Amendments to the Code of Civil Procedure of 2011 (*Narodne novine*, 57/2011, Arts. 437a, 497b Code of Civil Procedure and Art. 52 of the Amendments, introducing a new Art. 266a in the Family Law).

[21] If an appeal in civil proceedings is successful, the ratio of cases remitted and cases decided on the merits by the appeals court is at least 2:1. See data for 2008–2010 for county courts' decisions upon appeal in civil procedure, Statistical Survey of the Ministry of Justice for 2010, 31, table 4/7. Some improvement is visible as the ratio of remitted cases is decreasing while the ratio of re-adjudicated cases grows.

[22] See Art. 321 of the Code of Civil Procedure.

in cases before the commercial courts).[23] Some out-of-court settlements may have been reached in about 30–40 % of cases which did not end with a final judgment but 'otherwise' (procedural decisions, withdrawal of the claim); this can, however, not be confirmed. In cases that ended with a final judgment, about 10 % were cases in which the respondents admitted the claim.[24] Even if all of these cases are considered as a form of consensual conclusion of litigation, most cases still end with judgments issued after a full-fledged trial.

In the light of such statistics, it seemed that there was ample room for improvement. Indeed, in 2003 Croatia was among the first countries in South-eastern and Central Europe that adopted a Law on Mediation.[25] According to the concept of this law, mediation is conceived as a process in which a third person, a neutral, assists the parties in a dispute to reach a settlement. The mediator should not be the acting judge or other person entrusted directly with decision-making in the same case.

With the assistance of some foreign organisations, mainly from the USA, an initial group of about 20 people was sent to mediation training. They were among the core who founded the national mediators' association, the HUM. As in Slovenia, a significant part of those who took mediation training were judges, although some others – attorneys, corporate lawyers, academics and even some non-lawyers – were trained as well. Several organisations established their mediation centres.[26] These mediation centres are generally meant to provide out-of-court, independent mediation services on a commercial basis.

The practice of mediation, however, has not developed according to expectations, in spite of the political support and continuing efforts to improve its legislative framework.[27] Most successful was the programme of court-annexed mediation, in which the judges-mediators at the courts offered their services free of charge, based on the recommendations given to the parties by the judges who considered particular cases as fit for mediation. If we exclude family mediation in divorce cases (which is mandatory, and which has a long tradition), mediation attempts started to take place in proceedings in several larger commercial courts and in the courts of general jurisdiction, as well as in some appellate courts, such as the High Commercial

[23] Statistical surveys of the Ministry of Justice for 2001–2007. In 2001, there was 2.8 % of settlements, and in 2007 2.1 %. In later surveys, the necessary information is not included.

[24] *Ibidem*.

[25] See Official Gazette (*Narodne novine*) 163/2003.

[26] For example, mediation centres at the Croatian Chamber of Commerce (*Hrvatska gospodarska komora*); Croatian Association of Employers (*Hrvatska udruga poslodavaca*); Croatian Insurance Office (*Hrvatski ured za osiguranje*); Croatian Chamber of Small Business (*Hrvatska obrtnička komora*); Croatian Bar Association (*Hrvatska odvjetnička komora*).

[27] The Ministry of Justice expressed strong political support for ADR in a 2004 document 'The development of alternative ways of resolving disputes – The strategy of the Ministry of Justice'. The Law on Mediation was amended in 2009 (Official Gazette 79/09), and in January 2011 a wholly new Law on Mediation was passed (Official Gazette 18/2011). Several pilot projects were initiated, funded mainly by foreign donors – e.g. by the British Foreign & Commonwealth Office. In 2006, a pilot project at the Zagreb Commercial Court and 8 municipal courts was initiated.

Court. According to official statistics, in 2009 there were 156 and in 2010 125 cases terminated by way of a mediated settlement, which was about 0.1 % of the total number of disposed litigious cases (about 66,000).[28] In the total number of attempted mediations, about 30 % were successful.[29] These figures, although not impressive, are still far better than the (publicly rarely available) figures from private mediation centres, which, although occasionally also offering free services and *pro bono* mediation, generally do not have more than ten cases on an annual level.[30] Some specialised projects, such as the project on conciliation in individual labour disputes (conducted in association with Dutch experts), did not have a major impact either.[31]

10.4 The Transfer of Case Management Powers from the Parties to the Judge

In the previous text, I made clear that the course of procedural reforms in Croatia was by no means a simple and straightforward one. This process was particularly ambiguous when it came to the transfer of case management powers. Some of the reforms precisely tried to take away some case management powers (and duties) from the judges, and transfer them to the parties. If the authority to take evidence *ex officio* is to be understood as a case management power, then these powers were, starting from the Code of Civil Procedure amendments of 2003, transferred from the judges to the parties. Until the reforms of 2003, the court was empowered to order the taking of any evidence that it deemed relevant for the establishment of the facts that had to be proven. After 2003, the power to order the taking of evidence *ex officio* was reduced to evidence needed to establish facts indicated by the court on its own motion. Along the same line, in 2007 family law procedure was amended, introducing more dispositive powers on the side of the parties (e.g. by introducing limited options for binding admissions and settlements in alimony cases).

On the other hand, some case management powers of the judges were reinforced. As noted above, among the principal goals (and slogans) of the procedural reforms in the 2000s were 'strengthening party discipline' and 'prevention of procedural abuses'.[32] Various instruments were inserted into the Code of Civil Procedure, with the purpose of giving the judge tools to sanction and punish attempts to prolong the proceedings. Such tools included general bans on certain procedural actions (e.g. general challenges of judges), the limitation of actions that were often used to prolong the proceedings (e.g. requests for delegation of jurisdiction), discretionary

[28] See Statistical Survey of the Ministry of Justice for 2010, p. 21. It seems that this figure was so low that it was not even further reported in the statistics for 2011.

[29] *Ibidem*.

[30] See in more detail Bilić 2008; Uzelac et al. 2010; Vukelić 2007.

[31] On this project, see Jagtenberg and De Roo 2006.

[32] See further in Uzelac 2004.

powers of judges to refuse certain procedural motions if they were regarded to be vexatious, and a broader ability to impose fines for contempt of court (accompanied by a substantial increase in the number of fines).

Both trends of reshuffling the powers between the players in the process were motivated by the political wish to reduce the length of proceedings, and to enable cutting the considerable backlog of cases (in particular the backlog of so-called 'old cases', i.e. those lasting for over 3 years).

In the domain of formal case management, there were no significant changes, as – in theory – the powers to conduct the proceedings, adjourn the hearings, order the schedule of issues to be decided, set deadlines, etc. (*formelle/materielle Prozessleitung*) were in the hands of the judges. Yet, in practice, these powers faced considerable obstacles, also in the still present ideology that the purpose of civil litigation is to find the 'material truth' (*materielle Wahrheit*). Therefore, indirectly, other reforms in specific areas helped to reinforce the legal role and active position of the judge – e.g. rules on service of documents (amended extensively, most recently in 2008) and rules on deadlines for the submission of new facts and evidence (amended in 2003, with new rules for small claims in 2010).

10.5 Effects of the Reforms: Efficiency, Quality and Costs

The empirical data regarding the effects of the shifts in case management powers are insufficient to give conclusive answers. In particular, there were never systematic measurements regarding the length of civil procedure in general, and in specific types of cases and courts in particular.[33] Since 2005, there has been a special target project for the reduction in the number of so-called 'old cases' (defined as cases pending for over 3 years). It has achieved certain results,[34] yet there have also been signs of reverse trends (growth in the number of old cases). Another project – unsupported by publicly available exact figures – related to cases that have lasted over 15 years, which should have absolute priority in case-processing. It seems that the number of such cases is still significant, particularly in larger courts.

More extensive data exist only on court backlogs. In this respect, after a period of continuing growth in court backlogs (1990–2005), in the years after 2005 the

[33] The only available indicators demonstrate that the average length of civil cases is at least about 2.5 years. These data relate to some measurement of the length of litigation from the beginning of 2000, made by foreign experts who were involved in Croatian judicial reforms. No later information on the average length of litigation is available from any reliable sources, but it seems that this average has not been significantly decreased.

[34] The Ministry of Justice emphasised that in a period of 2 years (in 2008–2009) the number of 'old' cases (those pending before the courts for more than 3 years) dropped from 149,250 to 84,251 (a decrease of 43 %). See Strategic Plan of the Ministry of Justice for 2011–2013, July 2010, http://www.mprh.hr, p. 6 (last consulted in June 2012). This number is, however, still high (compare it to the annual influx of civil cases of about 140,000 – about 120 to 130,000 civil and 15 to 20,000 commercial cases).

government reported significant cuts in backlogs. It is, however, very difficult to attribute these cuts to successful reforms in the area of case management powers. It is likely that the thrust of the cuts has been obtained through outsourcing of certain activities that were previously within the jurisdiction of the court (inheritance cases, collection of uncontested debts, enforcement).

The general impression, which still has to be backed by concrete figures, is that – in practice – the changes are insufficient, so that the procedural style and practices have remained the same to a large extent. Some improvements may be due to certain technical procedural changes which now require more active efforts of the parties (the obligation to submit a written answer to the statement of claim, the re-introduction of default judgments, abolishing new evidence upon appeal, targeting particular vexatious strategies, etc.), but they still have to be demonstrated by research and tangible evidence.

When we discuss which measures have not had the expected results, it seems that one of the apparently major changes (highly commented on in the literature and in the media) – abolishing the right to take evidence *ex officio* – has had the least results in practice. The principal reason for this may be that it was silently by-passed in the day-to-day work of the courts. In particular, the higher courts required that the first instance courts give instructions to the parties to pay attention to their duty to submit factual allegations and present evidence, so that little has changed. Also, the obligation of the parties to propose evidence is still discharged by the mere allegation of the existence of particular sources of information. The courts are reluctant to use burden of proof rules, and therefore they wait for a long time for the appearance of witnesses or for the official procurement of documents, which contributes to the loose style of the proceedings. As noted above, the reforms aimed at more stringent case management by the introduction of a preparatory phase after which new evidence is precluded, were largely marginalised due to the opposition of judicial elites, and limited to small claims, and therefore their impact was also largely insignificant.

As to the impact that the above-described reforms related to case management had on the impartiality of the judges, it seems that the increased pressure on efficiency led to a more active involvement of presidents of courts in ensuring that no undue delays and backlogs occurred. In some cases this involvement caused these presidents to be challenged, which resulted in some interesting cases before the Strasbourg Court of Human Rights.[35] Although the Strasbourg Court by narrow margin found that court presidents do not discharge functions that can affect adjudication, this has not put an end to this issue. It is also a relevant issue in the light of the leading role of the President of the Supreme Court in the fight against delays, *inter alia* by using his right to transfer and delegate jurisdiction in concrete cases from overburdened courts to less burdened ones.

All the reforms have not, however, changed the public image of the Judiciary very much. Businesses and the public at large still regard the present situation as negative. For the public, the Judiciary is perceived as slow and ineffective. The

[35]See *Parlov-Tkalčić v. Croatia*, 24810/06, judgment of 22 December 2009.

reforms are being greeted favourably, but there are still no definite signs of significant improvement in the public rating of the Judiciary.

10.6 Relevance of the Croatian Reforms for Other Jurisdictions

The developments of reforms in Croatia show that an effective reform of the Judiciary may be very difficult, if not impossible, without strong instruments and political resolve to change the course of affairs. Even in the situation when reform is of the utmost political interest for the nation, the changes may lead to poor or even counter-productive results. In the context of the EU accession process, reforming slow and inefficient courts indeed had the highest level of political priority. Many laws were changed, all with the view to prove that the criteria and benchmarks set by the European Union are being met. Still, the negotiation chapter on the Judiciary (Chap. 23) was the hardest nut in the whole negotiation process. Was the closure of that chapter, which took place after 7 years of negotiations, on 30 June 2011, and the signing of the accession treaty on 9 December 2011, proof that the judicial reforms (including those pertaining to civil procedure) were successful? Neither European negotiators nor the Croatian public seriously think that great steps forward were made; if anything, it is only proof that some (though often hesitant and half-hearted) attempts were made. It may also be a sign that the lack of clear standards and tangible indicators of the reforms prevent the harmonisation of approaches and a rational assessment of achievements. This should motivate scholars of comparative civil procedure to further research and debate on the methodology of comparative assessment of national civil justice systems.

In particular, the history of developments in the field of civil procedure in Croatia sends a clear message that legislative changes are not sufficient (and sometimes even not appropriate) to change court processes. Legislative transplants from other countries (e.g. the reception of the Austrian ZPO) may in practice function very differently than in their original environment. The relationship between the powers of the judge and the powers of the parties provides a good example. The judge who is 'omnipotent' (at least on paper) may be the cause of procedural inefficiency and impotence. The lack of powers on the side of the parties may lead to a lack of responsibility, and trigger abundant options for delaying the proceedings. In such a setting, unlike in Western European countries, less can be more, and more can be less: less powers for the judge may give the judge more tools for effective case management; and, more powers for the parties may motivate them to act responsibly and co-operate with the court in the fulfilment of a joint mission: the fair and timely resolution of the dispute. For Croatia, striking an appropriate balance between the powers of the court and the powers of the parties may still be a task for the future, but the country's quest for this balance (shared with a number of other Southern European jurisdictions) may be observed by spectators from other jurisdictions as a laboratory that provides important examples of a few successful and a large number of unsuccessful experiments.

Appendices

Appendix 1: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Croatia

Year of Reference: 2011

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	4,290,612[36]
Per capita GDP (gross domestic product)	€10,394[37]
Average gross annual salary	€12,646[38]

2. Total annual budget allocated to all courts €225,955,724[39]

3. Does the budget of the courts include the following items?[40]

	Yes	Amount
Annual public budget allocated to salaries	✓	€147,758,459
Annual public budget allocated to computerisation	✓	€13,294,887
Annual public budget allocated to court buildings	✓	€13,814,864
Annual public budget allocated to training and education	✓	€1,650,201
Annual public budget allocated to legal aid[41]	Partly	Approx. €530,000
Other	✓	Budget for justice expenses €32,551,399

[36] According to census 2011, Croatian Bureau of Statistics, http://www.dzs.hr (last consulted in July 2012).

[37] The per capita GDP according to the CBS Statistical Yearbook 2011 (data 2010), 201 (11-1).

[38] Average monthly gross earnings per person in paid employment in legal entities (multiplied by 12), *CBS Statistical Yearbook 2011*, 160 (7-1).

[39] http://www.budget.gov.hk/2011/eng/pdf/head080.pdf (last consulted in July 2012).

[40] Extracted from the latest CEPEJ report containing data provided by of the Ministry of Justice (edition 2010, data 2008) available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Croatia.pdf (last consulted in July 2012).

[41] From *Ministry of Justice Legal Aid Report for 2010*. This is the total planned budget for 2011; actual total budgetary expenses for 2010 were only €226,000.

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	N/A	N/A
Other than civil cases	N/A	N/A
Total of legal aid cases	3,267[42]	Approx. €9,500[43]

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases[44]
Professional judges (full time equivalent and permanent posts)	Total Number: 1,883[45] (1,924 in 2011)[46] **Components:** Municipal Courts 868 Misdemeanour Courts 424 County Courts 379 Commercial Courts 114 High Commercial Court 28 Administrative Court 32 Supreme Court 38	N/A (except for misdemeanour courts, administrative and commercial courts; other courts and judges are not specialized and deal both with civil and criminal cases)

(continued)

[42] Based on the *Ministry of Justice Legal Aid Report for 2010*. This info relates to the number of referrals (awarding legal aid), not to the actual number of users or cases. It comprises both civil and administrative cases. *Pro bono* representation by the Bar is excluded from the table.

[43] Based on the Ministry of Justice data on actually paid expenses of legal aid for 2010; 'calculated' legal aid expenses (based on the possible expenses of the providers) were approx. €280,000 (see p. 6 of the Report).

[44] Judges sitting in civil cases include those in matrimonial cases and land disputes cases.

[45] Croatian Report for the CEPEJ, situation 31 December 2008.

[46] Ministry of Justice Statistics for 2011, p. 5 (situation at the end of 2011).

(continued)

	Total number	Sitting in civil cases
Professional judges sitting in courts on an occasional basis and paid as such	None	None
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	judges-jurors – about 4,776 are listed but they act only occasionally	None
Non-judge staff working in the courts (full time equivalent and permanent posts) – misdemeanour courts not included.	484 court counsel 156 interns 5,211 others	N/A
Rechtspfleger	202	202[47]

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): 1,076,155[48]

Municipal		County		Administrative	
Litigious	153,415	Civil appeals	73,359	Adm. Suits	13,276
Inheritance	12,748			Other	244
Enforcement	171,209	Commercial			
Non-contentious	108,998	Litigious	27,560		
Land registry	473,774	Enforcement	18,691		
TOTAL Munic.	920,144	Bankruptcy	4,879		
		Com. appeals	9,002		

[47] Senior court counsel who independently deal with land registry cases (source: Maganić 2011).

[48] Source: Ministry of Justice Statistical Survey for 2011, 20.

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases[49]	Pending cases on 1 January of the year of reference (2009)	183,975	N/A	N/A	N/A
	Pending cases on 31 December of the year of reference	175,906	N/A	N/A	N/A
	Incoming cases	120,455	N/A	N/A	N/A
	Decisions on the merits	66,328	N/A	N/A	N/A
Average length of first-instance proceedings[50]		Official data not available. According to an estimate, the average length at the Municipal Court in Zagreb in 2000 was 29.2 months (2.43 year). Source: NCSC Report.			

Appendix 2: Data on Civil Cases in a Selected Court or Courts to Be Answered by a Judge or Judges of That Court

Municipal Court in Varaždin, 2006[51]

1. What types of civil cases does your court decide? Please include a brief definition of the types of cases

[49] Source: Ministry of Justice Statistical Report for 2009, at 4/2 (in later reports data on decisions on the merits is not included).

[50] The average length of the proceedings refers to the average time taken by an action from the date of commencement to the date of trial at the Court of First Instance.

[51] Source: SATURN Centre questionnaire on common case categories, judicial timeframes and delays, replies by Pilot Courts, CEPEJ-SATURN (2007)3, doc. of 22 November 2007 (ref. year: 2006).

Type of cases

CRIMINAL CASES:
Deciding on criminal proceedings of authorised prosecutors on whether the accused is guilty of the criminal act or not. In connection to that, procedures and decisions on security measures for the appearance of the accused at the main hearing and on the revocation of conditional sentences, as well giving opinions or making proposals on extraordinary legal remedies.

CIVIL CASES:

1. Disputes between physical entities, and between physical and legal entities in connection to damage compensation, rights in rem, labour law and family law;
2. Non-contentious proceedings regarding boundary disputes concerning plots of land, cancellation of joint ownership, settlement of co-ownership relations, securing evidence, etc.

ENFORCEMENT CASES:
Cases in which certain obligations are executed based on the enforcement/execution of authentic documents which the enforcement debtors did not comply with out of their own free will within the set time frame.

2. What is the volume of cases and their proportion to the caseload that your court decides on an annual basis? Reference year 2006

	Caseload of the court				
Common case categories	Cases pending on 01-01-2006	Incoming cases	Decisions	Pending cases on 31-12-2006	Percentage of cases pending for over 3 years
Civil law cases (total number)	**2112**	**12117**	**12180**	**2049**	**7.05 %**
1. Small claims	26	158	161	23	13.04 %
2. Contract	31	15	19	27	18.51 %
3. Tort (esp. car accidents, medical liability, liability of other professionals)	226	92	132	186	15.05 %

(continued)

(continued)

	Caseload of the court				
Common case categories	Cases pending on 01-01-2006	Incoming cases	Decisions	Pending cases on 31-12-2006	Percentage of cases pending for over 3 years
4. Inheritance	18	13	17	14	
5. Labour	155	177	186	146	1.36 %
6. Litigious employment dismissal	47	70	79	38	2.63 %
7. Land registry	51	9,228	9,055	224	7.14 %
8. Enforcement of judgments and other enforceable titles	1.501	2,098	2,332	1,267	6.78 %
9. Divorce	28	161	98	91	0.15 %
10. Child custody	1	60	52	9	–
11. Actions for support and maintenance	28	45	49	24	–

3. Do you consider some of the types of cases as complex cases? If yes, please indicate which cases are regarded as complex, in terms of time and efforts needed.

No.

4. Do you consider some of the types of cases as urgent cases? If yes, please indicate which cases are regarded as urgent, and how this does affect the time of processing.

Small cases, labour cases (especially litigious employment dismissal cases), family cases (especially when children are concerned).

5. Do you have information on the average or median duration of particular types of civil cases? If yes, please provide information on average/median duration of these cases.

No average/median, only percentage of cases decided within a given period.

6. Are there targets in respect of the time needed to process each type of case in your court? If yes, please define how these targets are established (e.g. minimum and maximum time; average or mean time; percentage of cases completed within a certain period of time, etc.).

In family cases, there are legislative targets, but they are mostly ignored (e.g. Art. 265 Family Act: first hearing must take place within 15 days from submission of the statement of claim; Art. 266: appeals have to be decided and decisions dispatched within 60 days from the time of lodging the appeal).

7. Do you discuss the timetable and the expected duration of the proceedings with the parties and other participants in the proceedings? If yes, please give examples.

No.

8. Do you monitor cases that are considered to last excessively long? If yes, please explain which cases are considered to be excessively lengthy (e.g. cases pending more than 3/4/5 years), what their proportion is in your caseload, and which measures have been introduced for speeding up these cases.

Cases pending over three years are considered urgent, as they are categorized as 'old' cases. They are being monitored by the Supreme Court. For figures, see table below.

9. Do you monitor the duration of the proceedings in the following terms? If yes, please provide data. If you have a different way of monitoring, please give information on the categories used.

Common case categories	Applicable	Percentage cases decided within a period of:						
	Yes	Average length in days	<1 month	>1 month and <6 months	>6 months and <1 year	>1 year and <2 year	>2 year and <3 year	>3 year
Civil law cases (total number)	☐x	**N/A**	**29.89 %**	**18.57 %**	**17.42 %**	**19.98 %**	**9.84 %**	**4.27 %**
1. Commercial litigious and regular litigious civil claims	☐x	N/A	19.25 %	32.29 %	23.60 %	22.36 %	1.86 %	0.62 %
2. Contract	☐x	N/A		15.78 %	42.10 %	36.84 %		5.26 %
3. Tort (esp. car accidents, medical liability, liability of other professionals)	☐x	N/A	10.60 %	27.27 %	24.24 %	12.12 %	9.09 %	16.66 %
4. Inheritance	☐x	N/A		23.52 %	47.05 %	17.64 %	5.88 %	5.88 %
5. Labour	☐x	N/A	10.22 %	23.12 %	37.63 %	22.04 %	4.83 %	2.15 %
6. Enforcement of judgments and other enforceable titles	☐x	N/A	33.66 %	14.15 %	14.58 %	21.61 %	11.75 %	4.24 %
7. Litigious divorce	☐x	N/A	31.96 %	45.36 %	23.71 %			
8. Child custody	☐x	N/A	35.84 %	58.49 %	5.66 %			
9. Actions for support and maintenance	☐x	N/A	24.48 %	46.94 %	18.36 %	4.08 %	2.04 %	4.08 %
25. Criminal law cases (total numbers)	☐x	N/A	**27.64 %**	**27.23 %**	**13.82 %**	**15.45 %**	**5.69 %**	**10.16 %**

10. Do you collect and analyse information on the duration of the particular stages in the proceedings? If yes, give some examples regarding the duration of particular stages of the proceedings. Ideally, give us information on the ideal/average/mean duration of the preparatory stage (from the commencement to the first oral hearing on the merits), the trial stage (from the first oral hearing to closure of the proceedings) and the post-hearing stage (from the closure of the proceedings to judgment). If you cannot give data, but have another way of monitoring, please give information in terms of the categories used.

The data collected only deals with first instance proceedings, starting with the day of receiving the writ or act initiating the proceedings, and ending with the day of dispatching the written court decision (first instance judgment).

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Essays on the Role of the Judge and the Parties

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