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Changing Faces of Post-socialist Supreme Courts: Croatia and Slovenia Compared

A. Uzelac and Ales Galic

Abstract While both Croatia and Slovenia belong to the circle of successor countries of the former Yugoslavia, and share common roots and traditions, developments pertaining to legal reforms since the 1990s proceeded at different speeds and, partly, in different directions. This paper compares developments in the two states, focusing on the change in the role of the supreme courts in the context of civil procedure where the most profound changes in recent times happened in the evolution of the role of the secondary (further, final) appeal on points of law. At different points in time both supreme courts experienced a crisis that resulted in considerable delays and backlogs. Different strategies to control the influx of cases to the highest tribunals were subsequently employed, with different levels of success. While Slovenia, in the reform of civil procedure enacted in May 2008, generally embraced the view that the question of whether a particular issue of law has general significance is quite different from the question of whether the lower court has decided on it incorrectly in the case at hand, Croatia is still struggling with the introduction of filtering mechanisms that would transform the role of the highest court and emphasize its public function and purpose. Both countries, however, are at best only halfway into new approaches and still have a hybrid (mixed) system of secondary appeals.

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© Springer International Publishing AG 2017

C.H. (Remco) van Rhee and Y. Fu (eds.), *Supreme Courts in Transition in China and the West*, Ius Gentium: Comparative Perspectives on Law and Justice 59, DOI 10.1007/978-3-319-52344-6_10

Layout: T1_Standard Book ID: 436359_1_En Book ISBN: 978-3-319-52343-9
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1 Introduction

In this contribution the authors discuss several features of the supreme courts in Croatia and Slovenia.[1] Since both of these countries, which gained independence in the beginning of the 1990s, belong to the circle of successor countries of the former Yugoslavia, this chapter may be, to a certain extent, representative for other countries (Serbia, Bosnia and Herzegovina, Macedonia, Montenegro and Kosovo) established in the territory of the Socialist Federal Republic of Yugoslavia (SFRY) after the wars of the 1990s in the Balkans. However, in spite of many similarities, common roots and traditions the developments pertaining to legal reforms since the 1990s proceeded at different speeds and, partly, in different directions. Therefore, this chapter focuses on the developments in the two states that were traditionally considered the most developed, and also on the same two that first became members of the European Union (Slovenia in 2004 and Croatia in 2013). To that extent, the developments in these two countries may (but not necessarily) serve to predict possible future developments in other post-Yugoslav countries.

The main topic of the chapter is the change in the role of the supreme courts in the context of civil procedure. Admittedly, the supreme courts also play an important role in criminal cases. However, the court's jurisdiction, and to a certain extent also the judges on the court, is sharply divided into a 'civil' part and a 'criminal' part. The most profound changes in recent times happened in the area of civil jurisdiction of the highest courts, so we will mainly refer to them, in particular to the evolution of the role of secondary (further, final) appeal on points of law—'revision' (*revizija*).[2]

2 Some Historical Remarks on the Origins and Functions of Supreme Courts in Post-Yugoslav Countries

The supreme courts in Croatia and Slovenia have, indeed, deep historical roots. Nevertheless, for an understanding of their present status and problems, deep historical research is not necessary. The reason is to be found in the discontinuity between the court structures today and the previous court structures put in place following the end of WWII. Even prior to 1941, the judiciary in the Kingdom of Yugoslavia was largely fragmented, and the country, in spite of the centralist aspirations of the royal government, largely consisted of six different legal areas

[1] In this text, the authors have used some material that appeared in previous papers written by them dedicated to related topics—see Galič (2014a, b, c); Uzelac (2014a, b).

[2] The notion of *revizija* in the Croatian and Slovenian languages is difficult to translate. In this text, we will *mutatis mutandis* refer to 'further/secondary/final appeal on points of law lodged with the Supreme Court', but for the sake of brevity, expressions like 'final review', 'secondary appeal' or 'revision' will also be used interchangeably.

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with diverse traditions and separate judicial institutions.[3] Until 1929 there were also six supreme judicial instances, which only later were formally 'unified' into a single Court of Cassation with very limited jurisdiction, which, in fact, consisted of the departments of the existing highest courts in Zagreb, Belgrade, Novi Sad, Sarajevo and Podgorica. In parallel, separate supreme courts, which maintained the tradition of feudal judiciaries,[4] continued to operate. For Croatia, Slovenia and Dalmatia the highest court was the Septemviral Court (*Stol sedmorice, Curia septemviralis*) in Zagreb.[5]

The highest courts in pre-WWII Yugoslavia were relatively weak. This was in particular due to the political situation in which both Croatia and Slovenia functioned with more or less autonomy first under Austrian and Hungarian rule, and later under the royal rule of Serbian kings, which affected the status of the judicial institutions as well. The supreme courts of that age were never genuinely 'supreme', and in their form and function they mirrored the complex relationships within the lands of various composite state unions—the Lands of the Crown of Saint Stephen (Austro-Hungary), the Ottoman Empire, and the kingdoms of Serbia and Montenegro. As in the rest of the court structures of that age, the operation of the supreme courts was determined through the prism of the relationships between the aristocracy and the rural population, and elements of customary, religious and feudal law played an important role in their organisation and functioning. Some modern elements regarding the organisation of the judiciary in the territories of south-eastern Europe were introduced during the brief Napoleonic rule from 1809 to 1814[6] and later through the reforms of 1848,[7] but they fell short of establishing strong and independent judicial institutions, and a legal tradition of independent supreme courts that develop and uniformly interpret the law. To that extent, where rule and function are concerned, the genesis of the current supreme courts in Croatia and Slovenia was more affected by the developments in the period of socialist Yugoslavia (FNRY-SFRY).

The development of the supreme courts in the 1945–1990 period did not consistently hold to one track. The main feature of the legal system of royal Yugoslavia

[3]Originally, the Constitution of Vidovdan (1921) and the Law on Organisation of Courts of 24 September 1924 stipulated that there would be only one Court of Cassation for the whole Yugoslavia, with its seat in Zagreb. Yet, such a singular court was never established.

[4]On early developments see Petrak (2013, pp. 224–229).

[5]Other supreme courts were the Court of Cassation in Belgrade (with a department in Novi Sad), the Supreme Court in Sarajevo, and the Large Court (*Veliki sud, Curia magna*) in Podgorica. See Čulinović (1946, pp. 95–96).

[6]Petrak (2013, p. 229).

[7]Cf. Čepulo (2006, pp. 325–383). Čepulo, however, notes that the development 'was not linear' and that the judiciary 'neither in respect of regulation nor of reality managed to reach the degree of independence as the judiciary in independent European countries of developed legal tradition' (p. 381).

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85 —its particularisation—was successfully addressed by the complete reshaping of
86 the legal system (which included the general invalidation of all pre-war law).[8] The
87 new state was a federation, but its substantive and procedural law were increasingly
88 harmonised, no matter that many legislative powers remained in the hands of its
89 constituent units—the republics and provinces. The status of the courts was also
90 changed, away from the principles of judicial independence. According to the
91 ruling ideology, and under the influence of Soviet doctrine, it was declared that the
92 old, bourgeois courts assisted the ruling class in the exploitation of the 'masses', for
93 while they proclaimed formal equality before the law, they supported and main-
94 tained factual inequality.[9] To the contrary, the courts in the new federation realised
95 the 'true equality of citizens' by replacing the 'bureaucratic' judiciary with a
96 'people's judiciary' that had a 'representative character' and was not 'independent
97 from the people', i.e. it could be controlled, suspended and replaced by the organs
98 that represented the people.[10] Consequently, the doctrine of separation of powers
99 (which was not implemented in the former period)[11] was replaced by the doctrine of
100 unity of powers, in which the judges of all courts were appointed with a mandate
101 limited in time by the 'representative bodies' (local, regional and national people's
102 assemblies) to which they were responsible for their work and actions.[12]
103 Immediately after WWII, the political instrumentalisation of the courts was visible
104 in various forms. Among others, the supreme courts in the federal state had the
105 'right of devolution and delegation', which enabled them to take a pending case
106 from any court in their territory and deal with it themselves in the first and final
107 instance or, alternatively, transfer jurisdiction to any other court.[13] The break with
108 the Soviet Union in the 1950s lightened the hand of the political control of the
109 judiciary,[14] but never removed it completely. The courts were largely marginalised,
110 as most important cases in the state-run economy were dealt with at the political
111 level. The socialist courts in the 1960–1990 period developed in practice a series of
112 features that protected them from problems with the political authorities:

[8]See the Act on Invalidity of Laws and Regulations Enacted before 6 April 1941 and During Enemy Occupation of 23 October 1946. By that law, all pre-war legal rules were declared null and void, and could only be applied exceptionally, as ancillary sources of law.

[9]Čulinović (1946, pp. 20–21).

[10]Čulinović (1946, pp. 23–24) (quoting Kardelj).

[11]One of the examples is the fact that, in spite of the constitutional guarantees, judges in the Kingdom of Yugoslavia never gained permanent appointments, as special legislation on this matter was never enacted (Čulinović 1946, p. 106).

[12]See e.g. Art. 230, Yugoslav Constitution of 1974, which also provided that the corresponding representative bodies had to elect judges *inter alia* in a procedure that had to secure their 'moral and political appropriateness' (*moralno-politička podobnost*).

[13]Ibid, p. 192 and 214. See Arts. 63(1) and 57(1) of the Law of 17 June 1946.

[14]Consequently, the direct means of control, such as the right of devolution and delegation, ceased to exist.

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113 hyper-formalism, slow and repetitive court procedures, avoidance of responsibility
114 for final decision-making and a complex network of means of recourse.[15]
115 At the highest level in socialist Yugoslavia the role of the Supreme Court (which
116 after 1974 was renamed Federal Court) was never very strong. In the last period of
117 the existence of SFRY it had minimal powers, limited in civil matters to economic
118 disputes regarding monopolies in the federal market (which was the task that it
119 ultimately failed to fulfil). The apex of the judicial pyramid was in most cases the
120 supreme courts in the constituent federal units, among others the supreme courts in
121 Ljubljana and Zagreb. The main role of the supreme courts was to protect (socialist)
122 legality and control the courts within their territory.[16]
123 However, the supreme courts were not the only state bodies entrusted with safe-
124 guarding legality. Already in 1945 it was announced that the 'supreme control over
125 correct application of the law' by all state bodies is within the authority of the State
126 Public Prosecutor,[17] whose prosecutorial role included the right to submit 'supervisory
127 appeal' (*nadzorna žalba*) against all final and binding court decisions and judgments.
128 This universal type of recourse in the 'public interest', modelled after the Soviet-style
129 supervisory review of the procurator (*протест прокурора в порядке надзора*), was
130 renamed a year later[18] as the 'request for the protection of legality' (*zahtjev za zaštitu*
131 *zakonitosti*). Still, in everyday practice, after the brief revolutionary period the most used
132 means of recourse before the supreme courts was 'revision' (*revizija*). Revision in the
133 Yugoslav legal system was conceived as a further appeal on points of law, available to
134 the parties against most judgments and decisions of the courts of appeal. Revision as a
135 means of recourse existed also in the procedural law of pre-WWII Yugoslavia where it
136 was copied from the Austrian Code of Civil Procedure. Though it was frequently
137 tweaked in practically every reform of civil procedure, revision in civil cases soon
138 became the central occupation of the supreme courts.
139 The rise of *revizija* may be taken as the indicator that the functions of the supreme
140 courts were evolving. In spite of the continuing declarations of commitment to the
141 systemic issues (protection of legality), the supreme courts soon switched their centre of
142 interest from matters of public interest and focused on their activities as
143 just-another-appeal-opportunity for the individual litigants. As to the institutional
144 issues, since 1963 another sort of courts—constitutional courts—were established in the
145 federation and its constituent units, and took on the main role as gatekeepers of con-
146 stitutionality and legality.[19] As public prosecutors were simultaneously entrusted with
147 safeguarding the uniformity in the application of the law and the protection of legality,[20]

[15]See more in Uzelac (2010, pp. 377–396); for similar features in Poland and other post-socialist central European countries see Manko (2013).

[16]Čulinović (1946, p. 214). The Constitution of 1946 defined the role of the supreme courts as 'assessing the legality of final decisions' (Art. 123), but also provided that higher courts have the authority to control the lower ones (Art. 116(3)).

[17]Art. 1 of the Decision of the Presidium of AVNOJ, No. 1331 of 3 February 1945.

[18]Art. 127 of the 1946 Constitution of FNRY.

[19]See Art. 146(2) of the 1963 Constitution.

[20]Art. 142(1) of the 1963 Constitution.

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it seemed that the supreme courts had lost their 'supreme' position and prominence among the bodies competent for the systemic preservation of legality. Beginning in the 1960s, the federal and national constitutions defined the role of the supreme courts in the republics in a diffuse and technical fashion, listing several functions that included ruling or regular and special means of recourse, decision-making in administrative disputes, resolution of conflicts of jurisdiction, and the issuing of general statements and legal interpretations for the purpose of the uniform application of the law.[21] As noted in the last provision, the public function of the supreme courts was in the pre-1990 period constitutionally linked only to an activity that was closer to (quasi)legislation than to adjudication. General opinions of the supreme courts, binding for all judges who participated in their passing, were issued in an abstract manner, at departmental or plenary sessions different from the panels that had jurisdiction to rule in the concrete case.

In regular civil litigation, the supreme courts became through revision a customary 'third instance' which was broadly available to the parties. In theory, *revizija* as further appeal was a limited and—since 1976—extraordinary means of recourse that could be launched only to correct legal errors and the gravest procedural mistakes. However, the most important filter for access to the supreme courts did not distinguish the importance of the appealed issues, but only the value of the appealed claims. This value was, however, in most of the pre-1990 period set considerably low, which was further depreciated in the times of high inflation in the 1980s. The actual practice of the use of this means of recourse was also rather generous. The lawyers who represented the parties were generally only repeating the arguments from their previous appeals, repackaging them to fit the conditions of admissibility. Among these conditions were some that were regularly used to camouflage the inadmissible reasons (errors of fact) as admissible (procedural errors in stating reasons of the judgment), so that access to the supreme court was generally wide open to the litigants, who could even file their secondary appeals unrepresented (or represented by legally illiterate representatives).

This situation was also reflected in legal scholarship. Leading Yugoslav textbooks on civil procedure maintained the idea that the purpose of adjudication by the supreme courts is both to protect individual interests (individual purpose) and to preserve legal certainty by ensuring the uniform application of the law (public purpose).[22] Yet the reality was different. Admittedly, the supreme courts decided a large number of cases on the merits. This, however, did not really contribute very much to legal certainty and predictability in the decision-making of the lower courts.[23] Supreme court judges were overburdened with routine matters and could not devote enough time and attention to important cases that raised complex legal questions. While drafting decisions, under pressure of time and the influx of new cases, they could not focus on good and thorough reasoning in their decisions. Due to the large caseload, the supreme courts were not even able to keep track of their

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[21]See e.g. Art. 140 of the 1974 Croatian Constitution.

[22]Ude (1988, p. 337), Poznić (1987, p. 324), Triva et al. (1986, pp. 540 and 558).

[23]Cf. Bobek (2009 pp. 33–34).

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188 own case law, which thus became inconsistent and unpredictable as well.[24]
189 Unpredictability attracted more litigation and generated a vicious circle with an
190 increasing number of cases flowing into the courts of all levels. As the judgments of
191 the supreme courts were rarely published, they could rarely serve any purpose that
192 went beyond individual litigants.

193 3 Developments Since the 1990s and Ongoing Reforms

194 Croatia and Slovenia declared their independence in 1991 and introduced a number
195 of fundamental constitutional and social changes. For the role of the judiciary, the
196 most important is the abandoning of the doctrine of unity of state power and (re)
197 embracing the doctrine of separation of powers, according to which judicial power
198 forms a separate branch of government, headed by the supreme court. As the
199 'republican' supreme courts were most important among the regular courts in
200 federal Yugoslavia, no major reforms of organisation were needed in former con-
201 stituent republics, so the supreme courts of Croatia and Slovenia continued to
202 operate in the new political environment. Some change in their role and function
203 could, however, be anticipated from their definition in new national constitutions.
204 Both courts were now clearly defined as the 'highest courts' and entrusted with
205 'securing uniform application of law and equality of everyone in its application'.[25]
206 Still, real changes in the approach to their role, procedures and organisational
207 design were slow and needed over a decade to be realised, with a number of open
208 issues still remaining to be resolved.

209 Between both countries, which started their independent ways outside of a joint
210 state union,[26] some divergences started to occur, though the general course of
211 reforms was more or less the same. In its civil procedure, Slovenia maintained the
212 'request for the protection of legality' (*zahteva za varstvo zakonitosti*)[27] while
213 Croatia (following the path of some other transition countries) abandoned it alto-

[24]Bobek (2009, p. 44).

[25]See Art. 116 of the Croatian Constitution.

[26]At least until the Slovenian (2004) and Croatian (2013) entry into the EU.

[27]This extraordinary appeal, which can be filed by a public prosecutor, has been retained in a restricted form. It can be filed only in cases where access to the Supreme Court via revision (secondary appeal) is not available to the parties (e.g. matters of enforcement of judgments, non-contentious proceedings, bankruptcy, provisional measures, disputes with a value of claim not exceeding 2000 €). The request for protection of legality can be filed where it is in the interest of safeguarding the uniformity of the case law or development of the law. It should be noted that—unlike in certain European procedural models where the public prosecutor can also submit a special remedy in civil proceedings (e.g. France, Italy, the Netherlands)—the judgment of the Supreme Court following the request for the protection of legality may lead to remanding or reversing the impugned decision, hence affecting the civil rights of individual parties in the case at hand.

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214 gether in 2003[28] (though some attempts to reintroduce it continue to the present
215 day).[29] But the practical relevance of the intervention of public prosecutors and
216 other state organs was only minor already from the 1980s and 1990s, and the largest
217 share of civil cases in the supreme courts in all post-Yugoslav countries consisted of
218 those initiated by private parties.[30]

219 One area that is relevant for access by private litigants to the supreme courts
220 relates to the capacity of the parties and the conditions for pleading in the pro-
221 ceedings before the supreme courts. A factor that may decisively affect access to the
222 supreme courts is the rules on representation, where both Croatia and Slovenia
223 introduced new regulations. Until the end of the 1990s, the Yugoslav Code of Civil
224 Procedure was rather permissive. Any party could appear unrepresented in any civil
225 proceedings in the courts of all levels (including the Supreme Court). If a party
226 wished to appoint a representative (a proxy), it could appoint practically any legally
227 capable natural person.[31] Gradually, both Slovenia and Croatia raised the level of
228 limitations on party representation in civil proceedings. Slovenia introduced them in
229 1999, and Croatia in 2003 and 2008.[32]

230 In Slovenia, the choice of representatives at the lowest levels of civil litigation
231 has remained in principle unlimited. However, for higher courts (county courts,
232 higher courts and the Supreme Court) since 1999 only proxies that have passed the
233 state judicial exam are permitted. In particular, for secondary appeal (*revizija*) and

[28]See Art. 239 of the Code of Civil Procedure (CCP) Amendments (Off. Gaz. 117/2003). In criminal and misdemeanour proceedings, however, the request for the protection of legality was maintained. In 2014, according to the Annual Report of the Chief State Attorney, 32 such requests were launched before the Croatian Supreme Court. In the same year, the Court granted 29 and dismissed one (DORH Report 2014, pp. 96–97). In administrative proceedings, a similar means of recourse (*zahtjev za izvanredno preispitivanje zakonitosti pravomoćne presude i rješenja*) is also available to the Chief State Attorney—see Art. 78 of the Law on Administrative Litigation (Off. Gaz. 20/2010, 143/2012, 152/2014). In 2014, 18 such requests were submitted to the Supreme Court against the rulings of the High Administrative Court (DORH Report 2014, pp. 150).

[29]So, e.g. the Croatian State Attorney's office raised a proposal to reintroduce the request for the protection of legality in the working group on the reform of the Code of Civil Procedure in 2015.

[30]In Slovenia, where the prosecutorial right to launch a request for the protection of legality was preserved, there are only about 30 such requests per year (there were e.g. 27 in 2008 and 33 in 2013).

[31]One limitation related to the prohibition of engagement of representatives who practice law illegally (barrack-room lawyers, *nadripisari,* Germ. *Winkelschreiber*). The other was connected to the principle of protection of 'socially-owned property' from the Yugoslav socialist constitutions. Namely, in litigation above a certain value (50,000 dinars) 'organisations of associated labour' (=state-owned enterprises) had to be represented by legally qualified persons who had passed the state judicial exam (in-house counsel included).

[32]The reason for a decade-long delay in Croatia was the battle for the introduction of mandatory representation by private lawyers led by the Bar Association, opposed heavily by the association of corporate (in-house) counsels.

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234 other special means of recourse only private attorneys (self-employed advocates)
235 may plead the case.[33]

236 Similar developments occurred in Croatia, a bit later and with a few variations.
237 The old rule restricting the representation of socialist state enterprises to legally
238 qualified persons was extended to all legal persons.[34] In principle, the parties were
239 permitted to choose only private lawyers as their representatives in litigation pro-
240 ceedings. However, every party retained the right of self-representation, irrespective
241 of his or her legal qualifications. The in-house counsels (but, for smaller cases, also
242 other employees) maintained the right to represent corporations (legal persons),
243 while a small circle of close relatives (parents, children, siblings, spouses) were still
244 permitted as proxies in litigation.[35] While these limitations applied to litigation at
245 all levels of jurisdiction, another additional restriction was introduced in 2008
246 specifically for party representation before the Supreme Court. As in Slovenian law,
247 only a person who had passed the state judicial exam could submit an application
248 for revision (*revizija*). This rule also applied to the parties, who could no longer
249 appear before the Supreme Court unrepresented, unless they were legally qualified
250 themselves.[36]

251 Compared to some other European countries (e.g. France), the limitations on the
252 pleadings and representation before the supreme court are still relatively modest in
253 both jurisdictions.[37] Seemingly, their introduction has not caused any tangible
254 improvement in either the efficiency of the proceedings or stricter selection of the
255 incoming cases. Every now and then, there are new voices in favour of further
256 strengthening of the representation rules. Yet, these proposals may be motivated
257 more by the wish to extend professional monopolies and secure the market for legal
258 services for privileged professionals, and less by serious plans to assist the supreme
259 courts in fulfilling their functions. In any case, even the relatively low threshold of
260 restrictions has caused some concern regarding the human right of access to justice
261 before the highest levels of jurisdiction.[38]

[33]See Arts. 86 and 87 of the Slovenian CCP. As in Croatia, the party may lodge a secondary appeal at the Supreme Court without an advocate if the party is legally qualified (a completed state judicial exam is required).

[34]Currently, only persons who have passed a state judicial exam may represent legal persons in cases above 50,000 kunas (about 7000 €).

[35]See Arts. 89a to 91 of the Croatian CCP, as amended in 2003. Some additional exceptions are provided for in labour law cases.

[36]Art. 91a of the Croatian CCP, as amended in 2008 (Off. Gaz. 84/2008).

[37]Especially compared to jurisdictions where, as in France, only a small number of specially licensed lawyers (members of the 'Supreme Court Bar') may appear before the highest tribunal. In all post-Yugoslav countries, every lawyer, member of the national Bar, may represent the parties (alongside several other categories of persons who have passed the state judicial exam).

[38]In Croatia, after the introduction of stricter representation rules before the Supreme Court, there were multiple initiatives submitted by over 25 applicants (including several companies and a political party) questioning the constitutionality of such limitation. The Constitutional Court rejected their arguments—see USRH 4365/2008 of 26 March 2013.

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Another change that may have had some impact on the role and function of the highest tribunals related to the broader availability of case law (in particular at the level of the supreme courts). While in earlier years the judgments of the supreme courts in Croatia and Slovenia were rarely published (usually limited to several sentences extracted from the judgments), in the more recent era of computerisation, electronic databases made the practice of supreme courts widely available.[39] Certainly this was a positive development, which might have focused a bit the approach of the parties and their lawyers when accessing the supreme courts. But the volume of case law of both courts has simply been too great to be properly 'absorbed' (noticed, studied, analysed, commented on and followed).[40] To that extent, the practice of litigation and the perception of the role of the highest tribunals have changed insignificantly in spite of the voluminous material available online (and, partly, also due to this material, because the broader publicising of the supreme court decisions often revealed their insufficiencies and trend towards acting like 'just another appeals court').

The attitude inherited from the former period, which had its ideological roots in socialist legal ideology, changed very slowly. In particular, four of its main components played a prominent role: the adherence to the principle of the material truth;[41] the perception that there should be as many levels of 'control' as possible;[42] the general animosity towards the position of the judiciary (and the supreme courts as its highest proponent); and the denial of the importance of case law. Since some of the mechanisms of social control that existed in the times of socialism had ceased to exist (*inter alia*: the commanding role of the Communist Party, the planning of the economy and the political imperative of a conflict-free society), more and more cases started to reach the supreme courts. The consequence was a serious crisis: the supreme courts, plagued with large numbers of cases even before the 1990s, in the post-socialist transition period became overwhelmed with their caseloads, and started to produce and further increase significant backlogs and delays.

Some statistical indicators may demonstrate this development. In Croatia, for instance, in the 2005–2014 period the number of secondary appeals (revisions) filed annually with the Supreme Court increased threefold (from 2175 to 6940 cases), while the backlog increased over 13 times (from 1071 to 14,700 cases), in spite of the doubling of the productivity.[43] The Slovenian situation was, until the reforms

[39]See e.g. <www.sodnapraksa.si for Slovenia>; <www.vsrh.hr> (databases Supra and SupraNova, last accessed 12 March 2016).

[40]According to the Annual Report of the Croatian Supreme Court, at the end of 2014, the internet database (<http://sudskapraksa.vsrh.hr/supra/>, last accessed 12 March 2016) contained 153,522 court decisions, out of which 149,688 were Supreme Court decisions (VSRH Report 2014, p. 93).

[41]This was an expression of judicial paternalism, but also of the ideological view that courts (that is: the State) are omnipotent and should be able to find the truth to provide for substantive justice and to affirm 'socialist legality' without any hindrances. See e.g. Uzelac (2004, p. 300).

[42]Cf. Uzelac (2010, p. 390).

[43]Statistical information of the Supreme Court (presentation by Supreme Court President B. Hrvatin at Zagreb Faculty of Law, 2015). See also VSRH Report (2014, p. 89).

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295 undertaken in 2008, similar. The number of revisions filed with the Supreme Court
296 rose from 672 in 2002 to 1490 in 2008 (an increase of 220%). At the same time, the
297 backlog reached 2235 cases (the situation at the end of 2008). In 2008, the average
298 expected duration of proceedings regarding revisions in civil cases in Slovenia was
299 23 months.

300 Obviously the critical situation had to be cured, but the cure was hard to find. In
301 both countries a conventional, quantitative treatment was attempted. An apparently
302 logical measure was the increase in the number of the judges of the supreme courts.
303 In 1999, the Croatian Supreme Court had 26 judges; this number was increased in
304 2014 to 43 judges.[44] In Slovenia, the number of supreme court judges reached its
305 peak in 2007 when the Court was staffed with 43 judges.[45] All in vain: the simple
306 quantitative measures did not help much in managing the caseload, but instead
307 made tracking and harmonisation of the case law of the highest tribunals more
308 difficult. On top of that, taking into account the relatively small population of both
309 countries (2 million for Slovenia and 4.4 million for Croatia), it could be established
310 that not only at the bottom of the judicial pyramid, but also at the top, both countries
311 were already among those with the highest number of judges per capita in Europe.[46]

312 In the attempt to find a systemic solution for the challenges to supreme juris-
313 dictions, the focus of attention shifted to the fundamental issues. The role and
314 function of the supreme courts started to be questioned, in particular in the context
315 of civil cases. Both countries constitutionally defined their supreme courts as
316 highest courts, and described their principal constitutional duty as securing the
317 uniformity of the law. The huge caseloads and delays posed an obstacle for
318 meaningful harmonisation of case law. As in socialist times, the importance of the
319 uniform application of the law was acknowledged, but in the sea of mainly routine
320 decisions of mediocre quality that kept repeating the old jurisprudence with con-
321 siderable delay, a clear guideline for the lower courts was difficult to find.
322 Therefore, another path of reforms focused on measures that should help the
323 supreme courts realise their constitutional role by concentrating on the cases that
324 were important for the development and harmonisation of case law from the sys-
325 temic perspective. The main area of change was the reform of the admissibility

[44]This is an increase of 73%. See statistical surveys of the Ministry of Justice (2000–2014), web pages of the Supreme Court (<www.vsrh.hr>, last accessed 12 March 2016). The composition is: 28 judges in the civil department, 15 judges in the criminal department, plus the president and vice-president.

[45]At present, this number is 31 in five chambers (8 in civil, 3 in commercial, 8 in administrative, 5 in labour and social, and 7 in the criminal department). On the background and reasons for this decrease see more below.

[46]One supreme court judge is appointed in Slovenia and Croatia per 50–100 thousand inhabitants. In most European countries, one supreme court judge serves between 200 and 500 thousand people (e.g. 200,000 in France and Italy, 250,000 in Sweden and Norway, over 400,000 in Belgium and the Netherlands). See more in Uzelac (2014b). In addition, the Slovenian judiciary with about 1000 judges and the Croatian judiciary with about 2000 judges hold the top positions in general judges-per-capita European statistics—see CEPEJ Report (2014, pp. 158–166).

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326 criteria, grounds and proceedings in further (secondary) appeals cases launched
327 before the supreme courts.
328 Until the most recent reforms, secondary/final appeals (‘revisions’) in Yugoslav
329 and post-Yugoslav reforms were available to the parties as a matter of individual
330 right. Admittedly, there were some limitations: revision was considered an
331 extra-ordinary legal remedy, which prevents neither the enforceability of the
332 judgment nor its becoming *res iudicata*. Still, as demonstrated by the previously
333 cited figures, it was in practice commonly used.[47] The regular grounds for sec-
334 ondary review consisted of errors in substantive and procedural law; most of the
335 so-called ‘absolute violations of procedure’ could be invoked and only those ‘rel-
336 ative violations of procedure’ which were committed in the proceedings in the
337 appellate court. Findings of fact could not be subject to review in the supreme court,
338 but, as in the pre-1990 era, there were several ways of introducing them never-
339 theless by using back-door strategies. One such strategy was through the concept of
340 legal standards (general clauses), which were considered to raise questions of law
341 (and therefore an issue that could be raised upon revision), another through the
342 alleged ‘inconsistencies in the grounds of the judgment’ (which were among the
343 procedural errors that could be raised as grounds). The decisive admissibility cri-
344 terion for revision was solely the amount in dispute (whereby this was set rather
345 low, with the result that access to the supreme court was widely available).
346 Raising the statutory amount in dispute below which secondary appeal to the
347 supreme court is not available as of right was obviously the easiest choice, and
348 indeed these were the reforms that were soon undertaken in both countries. In 1991,
349 when Slovenia and Croatia seceded from Yugoslavia, the limit for secondary
350 review was 8000 dinars (about 615 German marks or about 300 €). Soon it began to
351 rise. Under the Slovenian Code of Civil Procedure of 1999, it was 1 million
352 Slovenian tolars (at the time about 5000 €). After 2008, this limit was set at
353 40,000 €, which remains the current level.[48] In Croatia, the level of 8000 dinars was
354 retained until the beginning of 1993, when this value was, due to extremely high
355 inflation of about 1000% at the annual level, set at the equivalent of 16 German
356 marks (about 8 €). After that time it rose to the equivalent of about 3000 € (3
357 million dinars in 1993) which, due to inflation, soon fell to about 400 €; after 1999,
358 the limit was set at 100,000 kunas (about 13,000 €), where it stabilised until 2011,
359 when it was doubled and set at the current level (equivalent to about 26,000 €).[49]
360 The tinkering with the monetary threshold for revision certainly helped in
361 reducing the number of cases arriving at the supreme courts, but it was not without
362 problems. Firstly, it is questionable whether cases of high amounts are really cases
363 that raise important issues of law. Rather, as shown in some cases referred to later in

[47]For instance, in Croatia in 2011 there were 153,415 civil litigations, 49,553 civil appeals and 6229 revisions, meaning that the rate of secondary reviews before the Supreme Court reached 10% of all appeal decisions. See Uzelac (2014a, p. 250).

[48]Art. 367(2) of the Slovenian CCP.

[49]See various amendments to Art. 382 of the Croatian CCP. Both in Croatia and in Slovenia the thresholds are higher in commercial cases (about 70,000 € in Croatia and 200,000 € in Slovenia).

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364 this text, important issues of law may arise even in cases of small value, while a
365 number of 'big' litigations contain only routine legal issues and dilemmas that were
366 settled in case law long ago. Even worse, when monetary thresholds fluctuate often,
367 the legal equality of the litigants may seem to be at stake—cases initiated only a
368 short time ago were routinely handled by the supreme court (and still are *sub*
369 *iudice*), but new litigants are deprived of this privilege. As cases in Slovenian and
370 Croatian courts often last for years, and the rules regarding the amount in dispute
371 are not always fully transparent (and the courts tend to apply them in an overly
372 formalistic manner),[50] satellite litigation and violations of due process may occur
373 while deciding on the value-related admissibility of the secondary appeals. Some of
374 these have led to human rights violations established in the proceedings before the
375 European Court of Human Rights in Strasbourg.[51]

376 Rather than focusing on quantities, one path of reform efforts concentrated on
377 the idea of streamlining the divergences in the case law of the lower courts, with the
378 purpose of making secondary appeal instrumental for the harmonisation and uni-
379 fication of the case law at the national level. In 2003, Croatia introduced for the first
380 time, in parallel with 'classic' or 'ordinary' revision before the Supreme Court,
381 another form of secondary appeal—the 'extraordinary review' (*izvanredna reviz-*
382 *ija*). This new form of review was based neither on value nor on a closed list of
383 technical criteria, but on the constitutional function of the Supreme Court—safe-
384 guarding the uniform application of the law and the legal equality of citizens. Since
385 2008, as typical (but not exhaustive) grounds that would fit such conditions, the law
386 states some examples relevant for the uniform application of the law. They are:
387 contradictory case law in different courts of appeal; departure of the appeals courts
388 from the well-settled case law of the Supreme Court; as well as the need to develop
389 the case law (in particular if this is necessary to bring it into line with international
390 standards or decisions of the Constitutional Court or European tribunals).[52] In
391 Slovenia, a very similar set of grounds was introduced in 2008, for the overarching
392 purpose of 'securing legal certainty, uniform application of the law, or development

[50]On an excessively formalistic and restrictive approach as to the calculation of the amount in controversy, see e.g. the decision of the Croatian Constitutional Court No. RH U-III-2646/07 of 18 June 2008 and the decision of the Slovenian Constitutional Court No. Up-418/05 of 11 January 2007.

[51]So, e.g. in *Egić v Croatia*, ECHR 32806/09, judgment of 5 June 2014, the European Court of Human Rights found violation of the right of access to the Supreme Court, noting that, owing to the omission by the municipal court to address the issue of the amount in dispute, the applicant, who reasonably believed that she could avail herself of the appeal on points of law, 'was left in the dark' as to whether she had the right to make use of this means of recourse (pp. 56–57). See also *Vusić v Croatia*, ECHR 48101/07, judgment of 1 July 2010, where violation related to legal certainty was found, due to the fact that the Supreme Court twice decided in the same case, once holding it admissible and the second time inadmissible as to the amount in dispute.

[52]See Art. 382(2) of the Croatian CCP (as amended in 2003 and 2008). In the 2008 amendments, another example was the possibility of conflicting interpretations of statutory law, but this ground, since 'too vague and extensive', was deleted in 2011.

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of case law'.[53] Just as in Croatia, Slovenia also maintained the value-based secondary appeal simultaneously with the new, public-purpose oriented form of review.

The events in Croatia from 2003 to the present day show, however, that the mere introduction of the new form of secondary appeal, based on the new understanding of the role and function of the Supreme Court, is not in itself sufficient to change the day-to-day practice. While the previous means of recourse, oriented at individual litigants and the legal correctness of judgments in their cases, continued to exist (though with higher value thresholds), new forms of appeal opened the doors of the Court in principle even wider. How to prevent this new availability from paralysing the Supreme Court? The response to this challenge was found in the filters aimed at diminishing and controlling the influx of applications, such as, for example, the introduction of a special leave to appeal system (the system that makes the admissibility of the secondary appeal dependent on special court permission). But the search for the adequate filtering mechanism has been long and is still not over yet.

Initially, Croatian law introduced the rule that leave to further appeal had to be given by a court of appeal, and that such a decision had to be contained in its appellate judgment, with full statement of reasons. Some categories of cases were expressly excluded: so, for instance, no leave to further appeal on points of law could be given in small claims cases and other cases in which 'regular' secondary review was expressly barred by law.[54]

From the perspective of controlling the influx of cases it was a smart regime. However, it showed major flaws in practical application. As the courts of appeal were designated as final instances for leave to submit secondary review, divergences among them soon started to occur. In general, the courts of appeal were very reserved about allowing appeals against 'their' judgments (*inter alia*, also due to performance measurement systems that penalised judges who had a high number of judgments that were struck down or reversed). The reasons were also stated rather differently, and the Supreme Court often disagreed with the appellate courts as to whether a particular issue was 'important' or not. Moreover, when some issues of law which were really important (and rather prominent in the public media) occurred, the Supreme Court was not in a position to take them on board—because they were expressly barred.

One of such important issues that could not come within the reach of the Supreme Court related to the payment of special annual wage supplements (so-called Christmas money) to state employees. When the Government ceased to apply the relevant collective agreement in 2000, and refused to execute these relatively small payments to state employees (about 150 € per person), thousands of them submitted their claims to various courts, and the courts of appeal developed conflicting case law. As these cases were legally treated as small claims cases, no

[53] Art. 367a of the Slovenian CCP, introduced by amendments in 2008 (Off. Gaz. 45/2008).
[54] See Art. 382(2) of the Croatian CCP, effective from 1 December 2003 to 3 January 2007.

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appeal to the Supreme Court was available, and several thousand petitioners started to turn to the Constitutional Court instead. Not surprisingly, upon petitions that questioned the constitutionality of the new rules on revision, the Constitutional Court found that the new legal regulation of secondary review (*revizija*) did not enable the Croatian Supreme Court to fulfil efficiently and effectively its constitutional role.[55]

In reply to the critique by the Constitutional Court, new amendments regarding secondary appeal were passed in 2008.[56] The access to 'extraordinary' revision was significantly reshaped. The impossibility to grant leave to further appeal to the Supreme Court in small claims cases and other excluded matters was removed. Further on, permission to appeal was taken out of the hands of the courts of appeal, and put into the hands of the Supreme Court. The existence of an 'important' issue of law had to be evaluated by a panel of three judges, who could dismiss the secondary appeal as inadmissible by a decision that had to contain the full statement of reasons. In 2011, this power was given to a panel of five judges of the Supreme Court, who can dismiss the secondary appeal without stating the reasons if they find that the issues raised are not of importance for the uniform application of the law and the equality of citizens.[57] This change was motivated by the continuing rise in the number of 'extraordinary' revisions, and the desire to raise the efficiency of the filtering mechanisms.

However, the provision that enabled the Supreme Court to dismiss the secondary review without a full statement of reasons was attacked before the Constitutional Court, and subsequently declared unconstitutional.[58] The Constitutional Court found 'no valid reasons' for avoiding a reasoned decision, and stated that such a regime deprives not only the parties, but also the general public, not to mention the whole system of lower courts, from getting an insight into the reasoning of the Supreme Court on the importance of particular legal issues for the national legal system. However, the Court recognised the prevalence of the public purpose (the dominance of public/general interests) in the concept of 'extraordinary' revision,[59] and added that the reasons for its dismissal as 'unimportant' 'might vary in length' and that they eventually may be 'compressed into a single sentence, if such a

[55]See Constitutional Court decision U-I-1569/2004, U-I-305/2005, U-I-1677/2004, U-I-320/2005, U-I-1702/2004, U-I-464/2006, U-I-1904/2004, U-I-3351/2006, U-I-2677/2004 of 20 December 2006 (Off. Gaz. 2/2007), p. 11. The Constitutional Court emphasised in particular that, due to ever-increasing limitations for access to the Supreme Court, the Constitutional Court itself was put in the position of playing the constitutional role of securing equality before the law. In doing so, it was flooded with the petitions of thousands of citizens who should have had an option to address the highest court in the national judicial hierarchy. See also Dika (2010, p. 259).

[56]Off. Gaz. 84/2008.

[57]See new provision in Art. 392b of the Croatian CCP.

[58]See Constitutional Court decision U-I-885/2013 of 11 July 2014.

[59]Ibid., para. 10.1.

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sentence clearly sets out relevant arguments'.[60] Based on such a decision, new legislative changes in the regime of secondary appeal are contemplated.

The Slovenian approach to the design of filtering mechanisms was somewhat different. The reform of the secondary appeal had a longer preparatory phase, marked by an intense public and professional debate. Leave to appeal as a pre-condition for secondary review in the interest of the uniformity of the law was universally supported, but opinions differed as to whether leave to appeal has to be granted in a single step (together with the decision on the merits) or whether it should be subject to a separate proceedings in which admissibility is examined, followed by another set of proceedings on the merits if leave is granted. Some scholars expressed great scepticism as to the separation of the procedure concerning the issue of leave and the issue of merits. They argued that it was impossible to know whether a certain legal question was important unless it was established that the lower court had decided on it incorrectly.[61] Yet, the new reform enacted in May 2008 embraced the opposite view, which argued that the question whether a particular issue of law has general significance (in the sense of novelty, uniformity in application or complexity) is quite different from the question whether the lower court has decided on it incorrectly in the case at hand. Therefore, a special two-phase procedure has been established, both phases happening within the jurisdiction of the Supreme Court. In the first phase, the applicant has to seek permission to appeal from the three-judge panel of the Supreme Court and raise only the issues that are relevant for that purpose.[62] The Supreme Court decides whether to grant leave for secondary appeal on points of law. If the Supreme Court grants leave to appeal, then in the second phase the party must, within another set time limit, submit a fully and extensively reasoned final appeal on points of law (*revizija*). This appeal is decided by the Supreme Court in camera, in a panel of five judges.

An important part of the selection mechanism in Slovenia was the fact that the Supreme Court was released from the obligation to state reasons for the rejection of motions for leave to appeal.[63] From the perspective of efficiency, and from the perspective of the ability to concentrate on cases identified as 'important', this looked like the optimal solution. But just as in Croatia, the introduction of discretionary powers together with the lack of a duty to explain their use caused heavy criticism in doctrine and practice, some of which could be described as 'demagogical' and 'populist'. So, for instance, it was argued that new rules on

[60]Ibid., para. 12.

[61]Ude (2007, p. 1085), Wedam-Lukić (2007, p. 10).

[62]See the Slovenian CCP, as amended in 2008, Arts. 367a *et seq*. The applicant needs only to show that there is no uniform case law or that the impugned judgment departs from the uniform case law or that it raises complex legal issues of general importance where guidance from the Supreme Court would be welcome.

[63]See Art. 367c(2) of the Slovenian CCP.

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admissibility 'would lead to arbitrariness and open the gates for inevitable violations of fundamental rights of the parties.'[64] Further arguments against such a regime, including those derived from the right to be heard, were raised in the petition for the control of the constitutionality of the new regulation of secondary appeals.

However, the Slovenian Constitutional Court ruled on this initiative in a way that was entirely different from the Croatian Constitutional Court (and some other post-socialist constitutional courts).[65] It clearly rejected the view that the omission of reasoning in the Supreme Court's rulings denying leave to appeal amounts to a violation of the right to be heard or the requirement that judicial decisions should not be arbitrary.[66] In order to reach this result, the Constitutional Court first thoroughly explained that the goal of the reform was to strengthen the public purpose role of the Supreme Court. Consequently, procedure on the issue of leave, which is preoccupied with the question of whether the case raises issues of public importance, does not per se really concern the civil rights of the applicant.[67] Rather, it is 'a *sui generis* preliminary procedure' in which a party 'attempts to raise an issue of public interest which goes beyond the specific case and interests of the parties to the specific proceedings … Its consequence is a decision that does not significantly affect a party's individual position.'[68]

The Constitutional Court also affirmed that the omission of reasoning in decisions rejecting leave to appeal is an essential element of the new system. Only in this manner can the goal of reducing the workload of supreme court judges be achieved. The requirement to provide reasoning on the merits of orders dismissing leave to appeal would undermine the purpose of the regulation of the appeal to the Supreme Court and consequently the significance of that court would be weakened.[69] Only if the number of cases is manageable and it is possible to maintain an overview in terms of substance is it reasonable to expect that supreme court judges will fully concentrate their research, discussions and deliberations, and thus create well- and thoroughly-reasoned judgments in cases which they have accepted for review.[70]

The diametrically opposite decisions of the constitutional courts in Croatia and Slovenia—one striking down the crucial provision on discretionary filtering, and

[64]Feguš (2009, p. 6).

[65]See decisions by courts in the Czech Republic (Judgment of the Constitutional Court of the Czech Republic of 11 February 2004), Poland (judgment of the Polish Constitutional Court of 31 March 2005) and Armenia (Decision of the Armenian Constitutional Court of 9 April 2007). See more in Galič (2014a, pp. 304–305).

[66]Decision of the Slovenian Constitutional Court, U-I-302/09, 12 May 2011.

[67]Ibid.

[68]Ibid. Only once leave to appeal is granted and the applicant then files an appeal on points of law does the procedure in the Supreme Court need to comply with all the requirements concerning access to court and a fair trial, including the obligation of the court to reason its decision on the merits.

[69]Ibid.

[70]Galič (2014a, pp. 305–306).

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531 the other affirming it as an inherent part of the new system—had their practical
532 aftermath and very concrete impact on the caseloads of both courts. While the
533 backlog in the Croatian Supreme Court continued to rise even to the present day,[71]
534 which also affected the length of proceedings,[72] the Slovenian Supreme Court soon
535 experienced considerable relief and managed to reduce its backlog and delays.
536 Before the coming into force of the reform in 2008, there were over 2200 back-
537 logged cases.[73] In the next four years, the backlog continually decreased, to reach
538 only about 700 at the beginning of 2014.[74] The number of filed revisions fell from
539 about 1500 in 2008 to about 450 in 2013.[75] Since the introduction of filtering
540 through the special motion for leave to appeal, the number of motions has also
541 become manageable, with a tendency to decrease.[76] The number of motions in
542 which leave was granted was about 90 annually.[77] The success of final appeals was
543 also relatively high: for instance, out of all 341 secondary appeals filed in civil cases
544 in 2013 (irrespective whether based on leave or as of right),[78] the appeal was
545 accepted as well founded in 109 cases, which led to reversals in 45 cases, and to
546 remanding of the judgment in 64 cases.

547 Perhaps most importantly, in spite of the introduction of two-phase proceedings,
548 the length of the overall proceedings was shortened. While the average expected
549 duration of proceedings was 23 months in 2008, it was 14 months in 2013 (and
550 10 months in commercial cases). For decision-making on the motions for leave to
551 appeal, the Slovenian Supreme Court needs about four months. And, because both
552 its backlog and its delays fell sharply, the Supreme Court was able to reduce its
553 workforce: through the policy of non-employment of new staff, retirements and

[71]See n. 43 above and the text above it.

[72]According to a lecture by the Supreme Court President on 23 October 2013, the average duration of unresolved *Rev* (secondary appeal) cases was 845.12 days (or 28 months).

[73]Situation on 31 December 2008 (1956 civil and 279 commercial cases).

[74]On 1 January 2014, there were 627 civil and 114 commercial unsolved cases on the docket.

[75]In 2008: 1250 civil and 240 commercial cases; in 2013: 341 civil and 103 commercial cases.

[76]There were 535 motions in 2011; 501 in 2012 and 437 in 2013.

[77]The Supreme Court decides in a panel consisting of three judges whether to grant leave to appeal. The judge-rapporteur's role here is decisive. It is interesting to note that the ratio between leave granted/leave denied varies significantly between individual Supreme Court judges. Whereas certain judges have a nearly 50% acceptance rate, other judges have merely a 25% acceptance rate. The average acceptance rate was 40% in 2012 (excluding cases where a motion was already inadmissible for procedural reasons). The same trend continued in 2013: again, some judges had a very high acceptance rate of 50%, whereas one judge-rapporteur had an acceptance rate of merely 12%. It should be noted that the judge-rapporteur in the leave proceedings retains the same role in the later proceedings on the merits (meaning that he or she will prepare the draft judgment, report the case in the Supreme Court's session and prepare the text of the final judgment).

[78]It may be safely assessed that the Supreme Court in the latest period deals with about 90 revisions where leave was granted, and about 250 revisions which were filed immediately (based on the criterion of the amount in controversy). Out of these 250, about 70 were inadmissible for procedural reasons. Hence, the Supreme Court deals at present on the merits with about 180 secondary appeals (revisions) in which the private purpose of the Supreme Court's adjudication is in the foreground, and about 90 cases which pursue the public purpose.

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transfers to other bodies (e.g. the Constitutional Court), the number of supreme court judges was reduced from 43 in 2007 to 31 in 2014.[79] Therefore, it seems that the Slovenian concept of managing the caseload of its highest tribunal is working well, at least at present.

4 Conclusion

The role of the supreme courts in Croatia and Slovenia was considerably transformed in recent decades. In some aspects we can speak of a change of paradigm, at least with regard to the understanding of what a desirable function of the supreme courts should be. Once, it was the predominantly private function: the purpose of supreme court litigation was to secure legally correct adjudication in individual cases. Now, most people agree that supreme courts should mainly serve the public function: their purpose should be to secure the uniformity, consistency and development of the case law by giving guidance for the lower courts, intervening only where this is necessary in the public interest.[80] But this paradigm shift is in reality still incomplete, and often faces opposition and criticisms. For many practitioners educated in the former period, an understanding of the changing role of the supreme courts is difficult: for them, the real change is from a 'doors wide open' to a 'doors wide shut' policy. Such arguments have a catchy, populist flair, and resonate well with policymakers and legislators.

Partly for this reason and partly for other reasons, the supreme courts in both Slovenia and Croatia are still only halfway into their new function. Their role is at best hybrid, and this is clearly visible from the mixed system of secondary appeals in which both recognise appellate review 'as of right' for individual cases of higher value, and appellate review based on leave (permission) which depends on public-interest considerations. Such a hybrid system is, in the opinion of the authors of this chapter, unstable and difficult to balance. One question is whether we have made up our minds: a half-hearted embrace of the paradigm shift from supreme courts pursuing individual interests to pursuing a public purpose may be reconsidered, and the 'good old days' of supreme courts as 'just another appeal instance' may return. The other question is whether a hybrid system, with two separate tracks and functions within the, basically, same means of recourse, enables all the actors—judges, parties and their lawyers—to recognise what is actually required and expected from them. The fluctuations in the Slovenian rates of motion for leave acceptance, and the Croatian practice of lawyers who still mainly only 'repackage' their appeals in Supreme Court proceedings (even if they plead for leave in the

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[79]In comparison, the number of supreme court judges in the civil department of the Croatian Supreme Court rose 50%—from 18 in 2008 to 27 in 2015, but this increase was of little or no avail as the number of received cases was continually above the number of resolved cases.

[80]On the paradigm shift see Galič 2014a, Chaps. 2 and 3.

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‘extraordinary’ revision procedure), show that there is only one step from a ‘hybrid’ system to a ‘confused’ system.[81] Finally, the constant raising of the statutory threshold for ‘automatic’ leave to appeal may legitimately give an impression that leave to appeal can be ‘bought’ by rich applicants and powerful commercial corporations—and this is definitely not a message that should be given in the context of the right of access to the highest tribunals in the country.

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To that extent, the authors of this chapter think that further reforms are needed and desirable, and that they should lead in the direction of acceptance of a pure, public-purpose oriented system. Paradoxically, it seems that Croatia is currently closer to such changes: the continuing rise in the Supreme Court caseload, and the conservative attitude of the Constitutional Court that did not allow unreasoned decisions on leave to appeal, force new reforms of the secondary appeal system. Currently, a new legislative project that includes changes to ‘revision’ proceedings is underway, and representatives of the Supreme Court are enthusiastic about raising the ‘extraordinary’ revision (appellate review with public purpose) to the rank of ‘ordinary’ (and only) type of recourse to the Supreme Court in civil cases. For Slovenia, the relative success of the 2008 reform and the progressive attitude of the Constitutional Court most likely will not stimulate decisive reforms in the near future. However, in both countries, there may be other still undiscovered issues,[82]

[81]The impression of a ‘confused’ system may also be stimulated by the way the supreme courts interpret the (non-binding) examples of ‘important’ issues. In one Croatian case, the Supreme Court held the secondary appeal inadmissible and ‘unimportant’ in spite of the clear inconsistency of case law (the different assessment of similar legal positions of two siblings), because the divergent case law occurred within the same court, moreover within the same chamber of the same court. See VSRH Rev-788/12, 22 May 2012; the Court pointed to other mechanisms of securing the uniform application of the law, such as binding opinions of the court sections (here: civil department), which are another relic of socialist law.

[82]One of such issues may be the position of secondary appeal as a remedy that is launched against final and binding judgments. With the rise of the public purpose function, the proceedings of ‘revision’ depend more and more on the discretion of the Supreme Court. However, in the case law of the European Court of Human Rights related to *nadzor* proceedings in Russia, the ECtHR held that the right to a court in Art. 6(1) ‘would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party’. This principle commands full implementation of judgments that have acquired *res iudicata* status. This is not the case ‘if a Contracting State’s legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official’ (*Ryabikh v Russia*, ECHR 52854/99, 24 July 2003, pp. 55–56). Admittedly, discretionary leave to appeal is granted upon application of a party, but selection is based on public and not individual interests, and therefore essentially lies in the hands of the judge as a state official. This may be the reason to reconsider the status of *revizija* as an extraordinary means of recourse, or reflect on the effects that Supreme Court judgments may have in the event the review is well founded. So far, from the Strasbourg perspective, because the ECtHR interpreted the post-socialist ‘secondary appeals’ autonomously as regular (ordinary) means of recourse, it could be less of a problem (unless the court, due to narrower and conditional access criteria for private applicants, changes its position). See *Yanakiev v Bulgaria*, ECHR 40476/98, 10 August 2006. Internally, however, it raises a very important issue of what should be understood as *res iudicata* from a procedural and (euro-)constitutional viewpoint.

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and further changes of law and practice, with an impact on access to the supreme courts and their role and functions, seem inevitable.

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Layout: T1_Standard Book ID: 436359_1_En Book ISBN: 978-3-319-52343-9
Chapter No.: 10 Date: 4-1-2017 Time: 4:47 pm Page: 22/22

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