Survival of the Third Legal Tradition?

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I. INTRODUCTION: SOCIALIST LEGAL TRADITION WITHOUT SOCIALISM

The famous 1969 book by John Henry Merryman[1] starts with a chapter on three legal traditions. In the very first sentence, Merryman claimed that: "[t]here are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law."[2] While writing mainly on civil law systems (and demonstrating how they contrast with the common law tradition), he provided only a few remarks on the (then) "young, vigorous legal tradition" of socialist law.[3]

It was stated that socialist law stems from civil law, that it "still displays its essentially hybrid nature", and that understanding civil law is essential to an understanding of socialist law.[4] Yet, to both Merryman and other comparative lawyers, it was perfectly clear — until the fall of the Iron Curtain in the 1990s — that socialist law is a tradition that is neither a subspecies of civil law, nor some kind of counterpart of the common law tradition. It was unequivocally classified as a *third legal tradition*.

In a nutshell, the features of the socialist legal tradition were described as follows: it is based on the view that the purpose of all law is instrumental — that is, that the law must serve economic and social policies. The systems of that tradition attempt to overcome socially and economically unjust ideals of bourgeois law, insofar as they clearly state their ideological basis (unlike other legal traditions, which allegedly hide it). Finally, in such a tradition, law is ultimately conceived as a tool of

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[1] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford: Stanford University Press, 1985) [hereinafter "Merryman, *Civil Law Tradition*"].

[2] *Id.*, at 1.

[3] *Id.*, at 4.

[4] *Id.*, at 3-4.

leading political elites (or, to express it in the terms of the Marxist doctrine, of "classes").

Since the fall of the Soviet Union, most comparative lawyers have changed their perspective. Merryman himself has reduced his typology from three traditions to two traditions, stating that "[u]ntil the fall of the Soviet empire, Soviet-style Marxist-Leninist 'Socialist Law' was treated as a separate group, but today these legal systems appear to be rejoining the Civil Law world."[5]

Such an attitude was quite understandable. The very notion of "socialist" law created a link between a specific type of regime, including the ideology of this regime, and its legal tradition. One could easily conclude, therefore, that, with the fall of the (Soviet-type) regime and the abandonment of its (Marxist-Leninist) ideology, the tradition of "socialist law" had come to an end. Such an outside impression was reinforced by the self-understanding of the post-Communist societies that had generally rejected their heritage of socialism and Marxism. Within the ex-socialist (Eastern) societies, the new ideology was to "back to normality" (*i.e.*, they claimed that, after a period of being astray, they were now happily returning to the Western tradition of once-despised bourgeois capitalism which they, allegedly, had belonged to long before the Communists had grasped political power). Of course, that was not instantly possible. Thus, a new term for a mixed form of "old" and "new" features has been produced — the notion of the "countries in transition". This term of transition was applicable to all sectors of society, including law. Allegedly, the "socialist legal tradition" was rapidly fading, and if anything peculiar remained in a particular former socialist legal order, it was attributed to the not-yet-fully-completed transition process — the unfinished return to the cradle of its original, generally civil law, tradition.[6]

In my opinion, this perception was — and still is — oversimplified. Now, two decades after the beginning of the "transition", some features of the "old" tradition have proven to be surprisingly resilient

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[5] John Henry Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* (The Hague: Kluwer Law International, 1999), at 8 [hereinafter Merryman, "*Loneliness*"].

[6] Recent scholarship has questioned the accuracy of such a statement, proving that the bourgeois concepts of private property (as expressed in the respective Civil Codes) were perceived as foreign and something of an irritant in some Central and Eastern European ("CEE") countries until the mid-20th century. See Dalibor Čepulo, "Tradicija i modernizacija: 'iritinatnost' Općeg građanskog zakonika u hrvatskom pravnom sustavu" [Tradition and Modernization: "Irritability" of the Austrian Civil Code in Croatian Legal System] in Igor Gliha *et al*., eds., *Liber amicorum Nikola Gavella* (Zagreb: Pravni fakultet, 2007), at 1-50.

and unaffected by change. The essence of a "transition" requires that it cannot last indefinitely. It is therefore legitimate to ask whether the comparativists' obituary for the socialist legal tradition has been premature.

Has the "socialist legal tradition" survived? In order to answer this question, it must first be qualified. To begin with, it depends on the reply to the question of whether or not the socialist legal tradition can exist without the socialist ideology and the socialist state. If both notions are interpreted in their customary sense — that is, of general adoption of Marxist-Leninist doctrine and the state being based upon the principles of socialism (*e.g.*, representation of the interests of the working class) — I claim that it is possible. Of course, it may seem contradictory to speak about the non-socialist (and pronouncedly anti-Communist) countries as the countries of the living socialist legal tradition, but the whole problem there may be in the wrong choice of terminology. Neither the notion of the common law tradition, nor that of the civil law tradition, is based dominantly upon a particular political philosophy or ideology; neither is more or less "bourgeois" or "capitalist". They each describe a specific blend of features, or, as Merryman stated, "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught".[7] Even as such, Merryman's definition can be taken to be too abstract and too broad, as the most pronounced elements that he presents as the salient features that divide the civil law and the common law are mainly of a technical nature: the preference for judge-made law (*stare decisis*) versus the preference for legislative statutes and/or executive action; the preference for jury trial and lay participation versus the use of professional jurists; the preference for collections of court decisions versus the use of academic writings and systematic treatises and/or codifications. The leading authors on civil / common law distinctions were legal historians, not political scientists.

II. THE OVERARCHING PRINCIPLE: THE INSTRUMENTALIST APPROACH TO LAW

If there is an element of ideology or philosophy in the foundations of the legal traditions, it is the ideology or philosophy of the lawyers — that

[7] Merryman, *Civil Law Tradition*, *supra*, note 1, at 2.

is, of the judges, the advocates and the law professors — and not the ideology of society at large. The ruling ideologies have a natural impact on the specific ideology of jurists, but this particular ideology can still be different, and sometimes even significantly different. This is particularly true for the socialist legal tradition, even during the period when it undoubtedly existed, at the peak of the bipolar world of East and West. No matter how much the Soviet doctrine insisted on adding socialist attributes to existing legal notions, thereby creating idioms such as "socialist legality", "socialist law", or "socialist justice", this ideological content was only the tip of the iceberg; the real functions of the law and the legal institutions (*i.e.*, courts and tribunals) were more affected by the features that could exist independently from the ideological labels that had been accepted by the ruling elites. We have to be reminded of an early negative socialist approach to legal concepts. According to that approach, all law, just like the bourgeois states that had created it, was (viewed as) a relic of capitalism, and, like capitalism, it had to be gradually abolished. History has demonstrated that this approach was partly right — socialist lawyers were never fully "socialist" in essence; they were only putting a thin layer of ideological justification on their actions in order to assure their own ideological legitimacy in the eyes of the political regime. In the course of time, however, legal institutions and lawyers in the previously socialist countries have developed a specific blend of features that has a "uniquely shared something"[8] which creates the notion of "legal tradition". Yet this "uniquely shared something" was not socialist in essence, and, as a result, it could also survive the fall of socialism.

Hence the term "*socialist* legal tradition" might have been a false pick in the first place. Even Merryman's list of characteristic features of the socialist legal tradition may reveal elements that are separable from the socialist/Marxist ideology in its conventional meaning.

The very first and fundamental element of the socialist legal tradition — "the socialist's attitude … that all law is an instrument of economic and social policy" — is, in fact, ideologically neutral. Economic and social policy can be defined by the regimes of different ideological origins. Even the very first definition of law (a part of the introductory course at every law school in socialist countries), which provided that law is "the

[8] *Id.*

will of the ruling class",[9] was only slightly adapted after the introduction of the multi-party democracies.[10] In the new situation — in which the law was still defined, conceived and exercised as the will of the ruling political elites — it was no less instrumental in its nature than it had been before.

Over time, this instrumentalist conception of law has produced a number of distinct features in socialism, in the respects of both routines and practices, as in the respects of values and attitudes. In the following text, I will briefly outline or "sketch" some of these features in post-socialist legal systems, focusing on how society (and legal professionals) understand the role of the legal process, on how law is being applied in practice, and on the procedural practices and routines that are more or less different and distinct from the legal traditions of both common law and civil law.

I will mainly be using examples from the jurisdiction that is most familiar to me. This does not mean that my assessments would not be applicable to other countries that once belonged to the circle of socialist one-party regimes. The former Yugoslavia was among the most liberal and progressive of the ex-Soviet countries. It is therefore safe to assume that the features of the socialist legal tradition that I identify in the former Yugoslavia are rooted even deeper in the other jurisdictions.[11]

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[9] See *Pravni leksikon* [Legal Lexicon] (Beograd: Savremena administracija, 1964), at 692; *Pravna enciklopedija*, vol. 2 [Encyclopaedia of Law] (Beograd: Savremena administracija, 1985), at 1234. The doctrinal concepts of the Marxist-Leninist theory of law were spread by Soviet textbooks that were broadly translated in the other countries of the Communist block, in particular by Sergej Aleksandrovich Golunskiy & Mikhail Solomonovich Strogovich, *Teoriiya gosudarstva i prava* [Theory of Law and State] (Moscow: Iuridicheskaya izd., 1940). See also Hugh W. Babb (trans.), *Soviet Legal Philosophy* (Cambridge: Harvard University Press, 1951).

[10] So, *e.g.*, even long after the fall of the one-party socialist political regime, the leading textbooks hardly changed their definition of law.

[11] Yet it is also true that the relatively soft nature of the political regime could have dimmed, even further, the connection between particular elements and the fact that they were developed during the dominance of Marxist-Leninist ideology. Thus, many phenomena that are very peculiar to the "third tradition" were wrongly believed to be normal everywhere. For an example, see *infra*, note 14.

III. FUNDAMENTAL FEATURES OF THE THIRD LEGAL TRADITION: POLITICAL EXPECTATIONS OF COMPLIANCE AND THE STRATEGY OF AVOIDANCE OF FINAL ADJUDICATION

1. Legal Process as the Tool for the Protection of the Interests of Political Elites

The connection between law and politics has existed in every legal tradition. Only in one, however, was it self-understood that the law, lawyers and all legal structures only existed in order to serve and protect the ruling elites and their political ideologies (whether they wished to admit this or not). In the socialist times, it was an overt starting point that law had to serve the interests of the proletariat, formulated though the leadership of the Communist Party. Legal professionals, especially judges and law professors, had to be skilful technicians who would always find an adequate legal form and justification for the desired (and already known) outcome. It should come as no surprise, therefore, that those who were the most successful under that definition could be readily adopted by the new political elites when they came to power after the fall of Communism.

The declarative adoption of the principles of the separation of powers and the independence of the judiciary brought very little change. When important political goals and "higher interests" were concerned, it was considered rather normal that law would have to bend to politics. In the former Yugoslavia (and today's Croatia), there is a straight line between Josip Tito's statement directed to judges that they "should not keep to the black letter law like a drunken man to a fence",[12] Franjo Tudjman's statement that the principal task of Croatian judges is to serve the "national interests",[13] and a very recent statement by the Croatian Prime Minister that condemned a judge for a premature verdict.[14] The latter is

[12] One of the very few of Tito's citations (attributed to his reactions to the liberal and nationalist movement in Yugoslavia in 1971) that survived his political heritage and became notorious in the political culture of Croatia. See <http://www.moljac.hr/biografije/tito.htm>.

[13] See more on Tudjman's relationship to the Croatian judiciary in Alan Uzelac, "Role and Status of Judges in Croatia" in Paul Oberhammer, ed., *Richterbild und Rechtsreform in Mitteleuropa* (Vienna: Manz, CILC, 2000), at 23-66 [hereinafter "Uzelac"].

[14] In May 2009, when a court sentenced a Member of Parliament (and well-known local politician) for war crimes, the authoritative Prime Minister Sanader, because of his fear that the sentence might have an impact on the results of the local elections, angrily criticized the court for its inappropriate timing. He repeatedly stated that pronouncing a prison sentence for a politician eight days before a local election was "against democratic standards", and that "no court in the world would do such a thing". Since the old (*i.e.*, socialist) perception of law as the instrument of political power continued to permeate the public mind, these statements by Prime Minister Sanader (who has

also paradigmatic for the false presentation (even if based on true beliefs) that legal instrumentalism is the global standard.[15]

2. Fear of Decision-Making: Evading Responsibility to Pass Final Judgments as a Guiding Principle of Socialist Justice

On the other side of the spectrum, another salient feature developed as a spontaneous reaction of legal professionals to the political and public perception of their role and status during the socialist times. To be an obedient tool in the hands of political power-holders was not an easy job, especially if, at the same time, the law and its lawyers were still on the list of antiquated bourgeois mechanisms that would eventually die out and disappear with the further development of Communism. The key players could change, and poorly protected, dependent judges who only fulfilled their expected role when ruling in favour of the old elites could fall as collateral victims of the altered political circumstances. This was a situation in which a decision that had once been desirable could become undesirable, and the safest way to go forward was to make no decision at all — at least not a decision that would finally settle the issue at stake.

Therefore, most of the socialist judiciary has developed, over time, numerous methods aimed at evading responsibility for decision-making. Unlike the heroic figure of the common law judge, who strives to contribute to legal history through prudent, brave and well-reasoned judgments, socialist judges, in the fear of eventual retribution, always desired to remain as anonymous as possible. In this respect, they were akin to their counterparts from civil law traditions. This went even further, however: a safer alternative to an anonymous decision was no decision at all, and, hence, no settlement of the issue for which to bear responsibility, either one way or the other.

The first method that judges employed in order to achieve this strategy was to further strengthen one of the virtues of civil law world: the virtue of judicial formalism, which holds that, whenever possible, cases should be decided on mere formal grounds, without entering into their merits. Hence, various formal objections and trivial procedural issues were always welcome as a means to dismiss a case on formal grounds, or

an international reputation as a democratic reformist) did not invoke much public opposition. The initial statement, pronounced on May 9, 2009 at a ceremonial highway opening, was reported in all national newspapers and news portals. See, *e.g.*, *Vjesnik*, May 11, 2009, at 3.

[15] *Id.*

as a trigger to transfer the case to some other authority (or to a less fortunate colleague).

Indeed, this was not always possible; there was, however, a cure for that, too. If a judge felt uncomfortable with some case, there were ample opportunities to postpone, protract and/or prolong it. Some of these opportunities were even offered by the parties themselves. Non-appearance at scheduled court hearings, various objections and proposals that needed lengthy examination, failure to submit briefs within the set deadlines, requests for more time — all of these and more were met by the judge with great benevolence as a chance to adjourn the hearing, gain time and — who knows? — perhaps find a way to get rid of the case.

Further on, the collection of evidence was an inexhaustible source, if needed, for delays. Under the official procedural doctrine, it was the sacred duty of the judge to find "material truth".[16] Correct fact-finding was the principal task of the court; if the parties failed to submit relevant evidence, it was not the end, but the beginning, of the judicial quest. While searching for evidence, the judge could follow the proposals of the parties, or find facts *sua sponte*. In practice, it meant that every new evidential proposal of a party could (and even should) lead to an adjournment. If parties were lacking in imagination, the judge could order some more evidence *ex officio*, gaining again at least several months of time. If some issues required the opinion of an expert (and it was always on the safe side to ask for an expert opinion, even for the simplest and most obvious cases), the court-appointed expert had to be engaged. Such experts were not well known for their speed, and it was rarely required of them to deliver their opinions in a short (or even a well-defined) period of time.

After closure of the hearings, decisions were rarely pronounced publicly. Rather, as the judicial job was mainly conceived of as a judgment-writing job, the closure of the hearing would only mark the start of the period within which a judge would study the file, deliberate on the issues and eventually draft the judgment — a process that regularly lasted for months, and, in some cases, even for years.[17]

Even if an occasional judgment were to be passed on the merits and communicated to the parties, this was not the end of the process. During

[16] For an extensive analysis, see Alan Uzelac, *Istina u sudskom postupku* (Zagreb: *Pravni fakultet*, 1997).

[17] The exact data for the socialist period is unknown, but it was revealed that, in 2000, the average time spent on writing simple civil judgments in a Zagreb court was 119 days (10 times more than the official maximum limit).

socialist times, the right to appeal was skilfully raised by socialist lawyers to something of an absolute — even constitutional — right.[18] This was met with approval by the political potentates, because they wanted to maintain yet another layer of control over the process, and the right to appeal could neatly deal with the possibility of any judicial decisions that were not in conformity with their expectations. Yet it was also a comfortable way for judges to remove from themselves the pressures of deciding (and thereby settling) an issue, as their non-final judgments were regarded as only provisional in nature. At least in civil cases, the appealed judgments were never enforceable until the higher court had decided upon them, and this appeal process could also last several years. When in charge of the case, the appellate judges also had several strategies for avoiding finality and enforceability. One of the most common of these tactics was the remittal of the case to the lower court for retrial — something that would send it back to square one again. This merry-go-round could go on as long as was needed, preferably until the pressing social need for a decision ceased to exist.

3. The Social Status of the Socialist Judiciary: Low, but Comfortable

The foregoing description of the former socialist judiciary is, of course, somewhat exaggerated. After all, not all of the cases had the potential to be politically sensitive or complex. On the contrary, matters of true importance were not handled at all by the courts. The big decisions were reserved for the higher echelons of the political elites and were handled, therefore, by the executives of the Communist Party. In the same way, economically important disputes could hardly arrive at the courts, as trade and industry in the socialist world was nationalized, and the vast majority of companies were owned by the state. In the context of international trade, eventual disputes were handled by international commercial arbitration or by political negotiations. There were some limited exceptions, such as in the former Yugoslavia, for example, where the doctrine of self-management and social ownership gave more autonomy to economic players, but proper adversarial litigation was not very popular; here, the political elites propagated agreed solutions, often silently

[18] See the Yugoslav Constitution (1974), art. 215 (*Službeni list SFRJ* — Off. Gaz. 9/1974). The text of this provision has been rewritten into the new constitutions of the successor countries. See, *e.g.*, the Croatian Constitution, art. 18 (*Narodne novine* — Off. Gaz. 56/90, 135/97, 8/98, 113/00, 124/00).

mediated by the Communist Party.[19] From time to time, the internal or external political battles would require court action, which was designed to display the winners and condemn the losers. However, depending on the intensity of the conflicts and the nature of the regime (*i.e.*, harsher or softer), this happened only periodically, more or less often, and required the engagement of only a small number of party-loyal legal professionals. What remained were many petty cases, from minor crimes to neighbourhood disputes. As private ownership was restricted, civil cases regularly dealt with smaller amounts and objects of limited value.

In this environment, the judiciary obviously did not enjoy a very high social esteem, as the importance of its work was marginal. Monitoring the course of judicial processes, an outside observer could hardly notice the difference between the judiciary and any other clerical position in the state administration. Even the status of judges was practically the same. According to the political doctrine of the unity of state power, the executive and the judicial branch of the government were responsible to the legislature;[20] this meant that judges were elected to a timely and limited mandate by Parliament.[21] Judges had to be "politically suitable",[22] meaning that, in practice, there were checks of their political and personal backgrounds when they were elected, and also that there were methods to remove them if they began acting in ways that could be regarded as politically improper. The remuneration of judges and other

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[19] In Yugoslavia, for example, many issues had to be arranged by so-called "self-managed agreements" (*samoupravni sporazumi*), which were concluded between companies that were called "self-managed associations of associated labor" (*samoupravna organizacija udruženog rada*).

[20] The doctrine of the unity of state power was inferred from the Marxist-Leninist doctrine on the dictatorship of the proletariat as the transitional stage between the capitalist class society and the classless Communist society. It was imported to all countries of the former socialist bloc. In former Yugoslavia, see *e.g.*, Jovan Đorđević, *Politički sistem* [Political System] (Beograd: Savremena administracija, 1980), at 582-84; Veljko Mratović, Nikola Filipović & Smiljko Sokol, *Ustavno pravo i političke institucije* [Constitutional Law and Political Institutions] (Zagreb: Pravni fakultet *et al.*, 1986), at 390.

[21] In federate states, such as the former SFRJ (Socijalistička Federativna Republika Jugoslavija), judges were also elected by various municipal, regional or provincial assemblies (depending on the rank of the court for which the judge was being elected).

[22] The condition of "moral and political suitability" was among the legal requirements under the Law on Regular Courts; see arts. 11, 75 and 87 (Zakon o redovnim sudovima, *Narodne novine* — Off. Gaz. 5/77, 17/86, 27/88, 32/88, 16/90, 41/90, 14/91 and 66/91). It was abandoned in 1990 (see amendments published in Off. Gaz. 16/90), only one month before the Communist Party lost in the first democratic elections. See more in Alan Uzelac, "Zavisnost i nezavisnost: Neka komparativna iskustva i prijedlozi uz položaj sudstva u Hrvatskoj" [Dependence and Independence: Some Comparative Experiences and Proposals Regarding the Status of Croatian Judges], Zbornik Pravnog fakulteta u Zagrebu, 42:4 (Suppl. 1992), 593, at 583-87.

legal professionals in state service was rather moderate, just like the pay of most of the state bureaucrats.

That said, it also has to be stated that the judicial job in socialism was regularly not an uncomfortable job, especially to those who could adapt to the requirements. In the living social memory of common people, the word "judge" still sounded important. The universities and law schools still taught that judicial positions represented the peak of a legal career. In the circles of regular court-goers, judges were still admired as powerful figures who deserved their respect, admiration and occasional gifts. On the other hand, judicial actions were often reduced, in practice, to mere paperwork. Nonetheless, the more insignificant the judicial functions were, the more comfortable the judicial job would become.

The need for a speedy resolution of a case was relative to the importance of the case. Most of the cases were not too important, so the pressure for a timely decision was not particularly strong. Also, the pressure from beneath was relatively weak. The socialist judiciary preferred unrepresented parties, often with very little legal knowledge. On the other hand, the "socialist" layer that had been placed over the constructions of civil law origin had created complex mixtures that were non-transparent and confusing, and this made for cases appropriate to the slow and thorough treatment of the sophisticated legal professional. When lawyers represented the parties in a case, they did not attempt to speed the judges, as they also benefited from the slow pace of the process.

Therefore, the judicial job was not an unpopular job. The number of judges differed among the different socialist countries. In some countries, especially within the inner circle of the Soviet empire, these numbers were suppressed and rather low. On the other hand, the self-managed Yugoslavia had maintained the profession of lawyers as private professionals, and the ratio of judges was much closer to the (relatively high) average numbers found in Austria and Germany. The legal occupation functioned in many families as a family business. The judicial job was typically reserved for the family member who took care of the household and the children, while the bread-winning spouse would work as a private lawyer. This led to a feminization of the judiciary. In Croatia in the early 1990s, for example, about two-thirds of the judges of the lower courts were women.[23]

[23] See Uzelac, *supra*, note 13, at 23.

IV. OLD AND NEW TOGETHER: NEW BLEND, OLD TRADITION

When the change arrived in the 1990s, it seemed that the courts and the judiciary would have a new start. In fact, all of the "socialist" labels were removed, and the references to Marxist-Leninist doctrine were deleted. This was not difficult because, as has been described previously, the socialist legal world was, by its nature, not socialist. The instrumentalist approach was easily adaptable to any new doctrine; so, on that account, no dramatic change of paradigm was needed.

The change of ideology did, of course, have an imminent impact on the change of attitude towards the law, the justice system and the judiciary. The political acceptance of the separation of powers doctrine gave some additional weight to judges, although "the independence of the judiciary" continued, in political practice, to be more a phrase than a reality. This newly gained importance was, in some respects, readily embraced by the judiciary; with it, demands for better pay and improved conditions of work became louder, and did, in fact, have some practical effect in most countries. The nature of the judicial job, however, and the salient features of the past tradition did not change — both the instrumentalist approach and the fear of final decision-making survived.

What had really changed was the social context in which the legal infrastructure operated. Under the new circumstances, courts became removed from the shade of the relatively unimportant decision-making in petty cases. With the privatization of economic resources and the pluralization of political life, a growing number of important social issues began to arrive at the courts.

The result was massive inefficiency: court backlogs and judicial delays started to accumulate throughout the countries of the former Socialist bloc. The length of the proceedings was among the most visible symptoms of residual similarity to the legal systems of the third (*i.e.*, socialist) legal tradition. This inefficiency was especially manifest in the context of new political associations. In the past two decades, practically all of the countries in Central and Eastern Europe have joined the Council of Europe;[24] membership represents adherence to democracy and the rule of law. It also implies membership in the *European Convention on Human Rights*[25] and submission to the jurisdiction of the European Court

[24] Currently, the only exception is Belarus.

[25] *Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 005, 213 U.N.T.S. 221, signed in Rome on November 4, 1950, entered into force on September 3, 1953; see <http://www.conventions.coe.int> [hereinafter "ECHR"].

of Human Rights.[26] From the very first cases that were brought before that Court, it became evident that a large majority of the former socialist countries had a serious problem with one right in particular: the right to a trial within a reasonable time. Soon, the "new members" of the Council of Europe flooded the dockets of the Strasbourg Court, overshadowing the previous record-holder in ineffective adjudication, Italy.[27]

One may argue that it is only natural that the transitional judiciaries have had difficulties with their transformation and that such delays are an inevitability, albeit a temporary one, under these circumstances. Yet several facts speak against this explanation. The first is connected with the length of the adjustment period. Two decades may seem to be a bit too long, especially if we keep in mind that some of the most fundamental reforms in history were introduced within time frames of months and years, rather than decades.[28] The other fact is that changes in the judicial sector were not proportionate to the changes in the rest of the society. For instance, it can be stated that the issue of Soviet-era delays and backlogs was even more present in some of the most successful of the transition countries, among which are some that have entered the European Union as the most progressive reformist nations (*e.g.*, Slovenia or Poland). The third fact is that this period did not go without attempts to reform the system. On the contrary, strategies for the reform of the judiciary, twinning projects with the most advanced countries of the West, international study visits and international legal assistance projects were so numerous that they practically became a new, propulsive industry. The effect, however, in spite of this massive engagement of resources, was rather moderate.[29]

Indicatively, the rare exceptions — that is, the former socialist countries that experienced fewer problems with judicial ineffectiveness — were connected to cases of a sort of "colonization" of the judicial sector.

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[26] The European Court of Human Rights, with a seat in Strasbourg, was established by art. 19 of the ECHR. From the entry into force of Protocol 11 (ETS No. 155) on November 1, 1998 the member states of the Council of Europe accept without exceptions the right of individuals claiming to be victims of a violation of the Convention to apply directly to the Court.

[27] For example, the countries with the highest number of cases before the European Court of Human Rights in 2008 were Russia, Turkey, Romania and Ukraine. Italy held fifth place, followed by Poland and Slovenia.

[28] Consider, for example, the introduction in Austria of a modern and speedy civil procedure, based on the procedural model of Franz Klein, at the end of the 19th century.

[29] For example, in 2002, the public spending per capita for courts in Croatia was the same as — or higher than — it was in France. According to data collected by the European Commission for the Efficiency of Justice ("CEPEJ"), the countries with the highest number of judges relative to the number of inhabitants are Slovenia and Croatia (up to 50 judges per 100,000 in 2006). See *European judicial systems. Edition 2008 (data 2006): Efficiency and quality of Justice* (Strasbourg: Council of Europe, CEPEJ, 2008), at 40 and 110.

These were the countries in which the whole judicial sector was either replaced by "imported" personnel or put under a strong program of tutelage from the outside.[30] Additionally, it seems that the salient features of the socialist legal traditions were even better at continuing to hold strong within the more developed ex-socialist jurisdictions, where the Communist regime had been softer and legal professionals were more influential and more numerous (*e.g.*, Slovenia and Croatia, which are the most developed parts of the former Yugoslavia). From this, we can conclude that the survival of the third legal tradition is not just a temporary, transient phenomenon.

Although the two aforementioned features of the third legal tradition are, perhaps, the most fundamental, there are a number of other features that are typical and characteristic. In the following text, I will first enumerate and, without entering into details, then briefly explain nine mutually intertwined elements that create a specific procedural blend, especially in the context of civil procedure. They are:

(1) deconcentrated proceedings, and a lack of trial in the proper sense;

(2) orality as a pure formality;

(3) excessive formalism;

(4) the pursuit of material truth;

(5) lack of planning and procedural discipline;

(6) appellate control as an impersonal and anonymous process;

(7) multiplicity of legal remedies that delay enforceability;

(8) endless cycles of remittals; and

(9) disproportionate efforts for reaching ephemeral and socially insignificant results.

The style of proceedings that were inherited from the socialist times, comprising in these nine elements, continued to live and develop despite the eventual (and in fact rather frequent) changes of procedural legislation. In any event, the new procedural laws were not so difficult to

[30] Examples include East Germany, in which most of the legal professionals (including the members of the legal academia) were transferred over from the western part of the country after the reunification or *Wende*, and Bosnia, where the international protectorate led to intensive control of the actions of the local courts, including the importation of foreign judges at the highest level. In both cases, the problems relating to the length of proceedings were virtually eradicated.

circumvent. Even during the Soviet era, some of the Central and Eastern European countries (such as the former Yugoslavia) had, essentially, a form of civil procedural law that was based on the foundations of oral, imminent and concentrated proceedings. The law that was in actual practice, however, was never interpreted or applied in this way. The ideal of a concentrated oral trial that would be managed by an active judge was turned into a travesty. Admittedly, the oral hearings did take place and they were regularly among the necessary procedural requirements. Yet these oral hearings were, in fact, only an opportunity to exchange documents and new evidentiary proposals. For example, in the typical course of a civil case, the oral hearings would last only about 15 minutes, and would then be adjourned for several months or even years.[31] At the oral hearing, it was regarded as impolite to enter into oral arguments (although this was occasionally tolerated if, for example, a lawyer needed to impress his or her client). In most cases, the parties would barely say a few words during the hearing, and the whole encounter between them and the court would be dominated by the judge's dictation of the protocol to the court typist. Therefore, most lawyers regarded (and still regard) their in-person appearances at hearings to be a waste of time. In order to collect their fees, firms generally tend to send only their most junior associates (who regularly know little or nothing about the case) to the hearings. For legal practitioners who cannot afford the luxury of employed interns, or who have too many hearings to cover, it has been a very normal and natural practice to appear at the hearing only to kindly ask the judge to note the lawyer's presence in the protocol and then to request permission to leave in order to appear at another hearing (or even several of them) scheduled in the same court at the same time. This same practice is still very broadly in use in most of the Croatian courts.

In the life of a civil case, it was not unusual to hold 10 or more such hearings within a period of several years. This style of proceeding, called a "piecemeal trial" by Mirjan Damaška,[32] is, in fact, no trial at all. Nonetheless, it continues to live and is still regarded as normal — a vivid proof of the vitality of the third legal tradition.[33]

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[31] See, *e.g.*, *supra*, note 17.

[32] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 51.

[33] According to the review conducted by a U.S. expert team in 2000 in the largest Croatian court, there were, on average, about 3.4 hearings per "trial" (but sometimes up to 20), and these hearings were held approximately 145 days apart. See National Center for State Courts, International Programs Division, *Functional Specifications Report for Computerization in Zagreb Municipal*

Why do hearings regularly need to be adjourned? The answer can be found in the well-established habits of the (previously) socialist judiciaries: excessive formalism, a lack in procedural discipline and an adherence to the material truth doctrine continue to play the most important roles. If court summonses have not been served onto all of the invited parties in a formally impeccable way, it is a reason for adjournment; if they have been served without fault, but some of the invited choose to not appear anyway, it is a reason for adjournment;[34] if an invited party requests time for the submission of further briefs, it is a reason for adjournment. Now, even if the hearing has commenced and evidence has been presented, a party could still come up with a new proposal for the taking of evidence, and it would again be a very good reason for adjournment. The adjournments can continue as long as any of the parties have new suggestions and proposals (*i.e.*, until the imaginations of each of the actors run dry of inspiration).

It is rather interesting to note that it is only within the third legal tradition that judicial activism has been regarded as an element that delays the proceedings; it is also only within this environment that the peculiar strengthening of the adversarial principle and the active roles of the parties, aforementioned, has been regarded as the optimum means to achieve faster proceedings and less delay.[35] The rationale, although diametrically opposed to the trends in the Western world, is, in fact, correct: it is an attempt to empower judges to use the right to decide on the basis of burden of proof rules, instead of allowing endless, unsuccessful attempts to find certainty based on the evidence that is taken *sua sponte.* Still, the result of the reforms has been rather moderate.[36] The rare judges who use burden of proof rules in an attempt to speed up the process thereby expose themselves

Court of the Republic of Croatia (Zagreb: USAID Project #801 AEP-I-00-00-00011-00, September 2001), at 13.

[34] From time to time, under very strict and limited conditions, the court could enter a default judgment; this default judgment, however, could then lead to a successful motion for *restitutio in integrum* which, in most cases, the court would also tend to be generous about granting.

[35] In the same way, the limitation of the judge's powers to take evidence *ex officio* was a decisive element in the changes introduced by the amendments to the Croatian *Code of Civil Procedure* of 2003 (Off. Gaz. 117/03) [hereinafter "CCP"] in an attempt to accelerate civil proceedings. See Alan Uzelac, "The Rule of Law and the Croatian Judicial System: Court Delays as a Barrier on the Road to European Accession" in Justin Orlando Frosini, Michele Angelo Lupoi & Michele Marchesiello, eds., *A European Space of Justice* (Ravenna: Longo Editore, 2006) 87.

[36] In Croatia, for example, the judiciary found that the way to get around the ban on evidence *ex officio* was to suggest to the parties which evidentiary proposals they should raise, and thereby maintain the "material truth" approach.

to the risk of having their judgments quashed by the higher courts for "improper fact-finding".

The higher courts themselves are another story. Their way of work has not been changed in the new social circumstances beyond the collapse of the Communist regimes; rather, it has been reinforced. The unlimited right to appeal has continued to exist as one of the postulates of the legal system, and it applies to even the smallest and the most trivial of cases. The appellate courts have continued to decide such appeals with the same bureaucratic passion for slow process and excessive formalism. As the courts and their actions became more exposed to public criticism, the instinctive response was to strengthen the anonymity and impersonal nature of the decision-making. As a result, it became impossible in some types of cases for the parties and their lawyers to approach the court of appeal in person, let alone to see the faces of the judges who were in charge of their appeals.[37]

Being separated, in this way, far from the parties and the reality of a case, the appellate judges concentrated mainly on its technical details. Even their very distance from the case served as a good excuse to avoid the responsibility for final decision-making. Such appeals were therefore remitted to the lower courts for re-examination as often as possible,[38] and, frequently, the only justification that was given was that the first-instance court should try harder to look for additional evidence in order to find the "material truth". The same case could be returned to the lower courts several times over, in a process that could create an "endless cycle of remittals".[39] While the appeal was pending, the execution was, of course, automatically stayed. This created the impression that a non-final judicial decision is, as expressed by the spokesperson of the largest appellate court in Croatia, a "legal nothing".[40] Thus, the avoidance of

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[37] Through the 2003 amendments to the CCP, *supra*, note 35, the public hearings in litigious civil cases — which were, in practice, extremely rare — were abolished completely.

[38] According to Croatian Ministry of Justice statistics (Statistički pregled 2008 [Statistical Survey], <http://www.pravosudje.hr>, at 4/7), the ratio between cases at appeal that were remitted and those that were finally decided by the appellate courts is 3.5 to 1 (data for successful appeals in 2006-2008 period).

[39] In several judgments of the European Court of Human Rights in respect of various countries of Central and Eastern Europe, this was described as a systemic problem — a "serious deficiency in the judicial system". See A. Grgić, "The Length of Civil Proceedings in Croatia: Main Causes of Delay" in Alan Uzelac & C.H. van Rhee, eds., *Public and Private Justice* (Antwerpen/Oxford: Intersentia, 2007) 158, at 158-59.

[40] In a communiqué of May 3, 2007, Judge Krešimir Devčić, who acted as the spokesman for the County Court, reacted to a newspaper article that analyzed several judgments of Judge Marijan Garac in which he had consistently refused to convict suspects for organized crime. He stated that non-final judgments that were subsequently quashed by the Supreme Court "in their totality do

responsibility for final decision-making, this time at the higher level of judicial hierarchy, has continued to mark the legal landscape of the countries of the third legal tradition to this day.

V. WHY WILL IT NOT FADE AWAY? CONCLUDING REMARKS ON THE VITALITY OF THE THIRD TRADITION

My description of the main features of the third legal tradition is not a flattering one. In any case, it is questionable whether this attitude about the nature and the role of law and lawyers fulfils the expectations of those whose interests they are bound to protect. Indeed, the level of trust that is enjoyed by the courts and the judiciary in Central and Southeastern European countries is rather low.[41]

Still, the third tradition has shown, thus far, that it is astonishingly vital, as it has hardly changed in spite of various reform projects. If some change has occurred, it has not been substantial — *plus ça change, plus c'est la même chose*. Why is this? An interesting paradox could be noted here — the fact that the very attempts to bring the justice system closer to the Western rule of law standards have actually strengthened the status quo.

One Western standard that the judiciaries of the socialist legal tradition have most readily embraced is that of judicial independence. This standard was developed further, beyond the guarantees of independent decision-making in individual cases. The element that the judicial elites of the post-Communist countries were particularly keen about was that of organizational autonomy and self-management of the judicial branch of government. It was perfectly compatible with the Soviet-era tradition in which legal professionals formed a closed circle of individuals with the same interests (often familially interconnected); it was also a magic wand that could assist in the continuation of the old attitudes and practices by creating a protective veil against any public criticisms (even legitimate ones).

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not exist as a relevant fact". For "referring to a non-existent legal argument", the judge publicly invited the state attorney to commence a criminal action against the journalist and the journal that had published the comment. The original article was published in *Globus* of May 4, 2007, no. 856, at 38-42; the communiqué delivered to the journalists was referred to in several newspapers, see, *e.g.*, online: <http://www.jutarnji.hr/sud-trazi-kazneni-progon-novinara-globusa-zbog-clanka-o-sucu-garcu/172994/>; for reactions of the Croatian Journalists' Association see online: <http://www.hnd.hr/hr/novine/show/51633/>; the full text of the communiqué is in the archives of the author.

[41] In Croatia, for example, the courts are consistently among the least trusted social institutions, and the judiciary sector constantly occupies the highest places on the index of perceived corruption.

Thus, the judiciaries of the third legal tradition — often with the generous help of Western partners — have formed impenetrable barriers to substantial changes. First, the current judicial elites, who are mostly inherited from the socialist period, have taken full control of the process of appointments to the judicial and prosecutorial posts by adopting the system of appointment (in which a body composed mainly or exclusively of judges or prosecutors has a decisive or exclusive role in the recruitment of magistrates). Such bodies, usually called High Judicial Councils (or the like), have spread fast throughout all of the Central and Eastern European countries, securing control by ensuring that only those who meet the expectations of the traditional elites will be appointed to high judicial posts.

Second, there are new professional associations of judges that have started to operate as specific trade unions. They uncritically protect every member of the profession, and they silence any critical analysis of judiciary and judicial decisions, while invoking judicial independence wherever reforms that could compromise their status are announced.

Third, the political leverage of legal professionals (and, in particular, judges) has also increased, because judicial decisions now play a part in political games (and also because judges are occasionally engaged as the controllers of the general and local elections). As a result, some of those who belong to the judicial oligarchies are, again, neatly incorporated into the structures of political power. Further on, the professional legal elites began to be increasingly engaged in the drafting of the new legislation. As a consequence, the traditional influences of law professors and experts from the executive are constantly under attack, and are claimed to be excessively theoretical and too far separated from practice. In fact, by controlling the drafting process, the judicial elites can effectively prevent the changes that could jeopardize their status and power. Even in the executive branches of governments, in the ministries of justice, it has become customary to employ a significant number of judges and prosecutors on temporary bases. This results in a situation where the projects prepared by the executive are no longer written from the perspective of the public good, but are instead the products of, to put it mildly, a double loyalty.

Finally, the most recent development is related to the establishment of the number of professional schools for judges, lawyers, prosecutors and notaries. Again, it is almost exclusively the representatives of the old judicial elites who educate (or socialize) the prospective candidates for judicial functions. This has the effect of excluding even the option to

hear (let alone be influenced by) a range of open and critical discussions that are coming from legal academia.[42] Taking all of these developments into consideration, we can safely assume that the survival of the third legal tradition is cemented for at least the next couple of decades, in spite of the ever-louder public criticisms and ever-stronger international pressures against it.

Here, at the very end of this paper, I would like to take a look at the foregoing developments from a different, slightly more optimistic perspective. The two great legal families of civil law and common law are undoubtedly converging.[43] In certain aspects, it is not even clear whether their differences are still significant for any practical purpose. In another text, I have expressed the view that, at least for Europe, the dichotomy between civil law and common law has ceased to be the most important point of systemic divergence.[44] Instead, it was submitted that another division, between Mediterranean and Northern European countries,[45] now plays a much more prominent role. Thus, the countries of the third legal tradition may also be subject to another convergence — a convergence of the ex-socialist legal tradition and the part of the civil law tradition that, in my submission, forms the circle of "Mediterranean systems". In this way, we may be invited to find new categories for the future: the categories that will again frame the most fundamental differences of legal systems in the form of a bipolar opposition. This, however, is a topic for another essay.

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[42] In Croatia, this process started with the establishment of the Judicial Academy (which, in fact, is an organizational unit of the Ministry of Justice, with no academics in the permanent staff or teaching force). It has continued with the announcements of the Notarial Academy and the Attorneys' Academy, both of which are planned as extensions of their respective professional organizations.

[43] See John Henry Merryman, "On the Convergence (and Divergence) of the Civil Law, and the Common Law" in Merryman, *Loneliness*, *supra*, note 5, at 17.

[44] See Alan Uzelac, "Reforming Mediterranean Civil Procedure: Is There a Need for Shock Therapy?" in C.H. van Rhee & Alan Uzelac, eds., *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ*, Ius Commune Series (Antwerp/Oxford/Portland: Intersentia, 2008) 71.

[45] This division is a model, not a factual description. The labels used here do not necessarily correspond to geographic locations of individual justice systems.