

ACCELERATING CIVIL PROCEEDINGS IN CROATIA - A HISTORY OF ATTEMPTS TO IMPROVE THE EFFICIENCY OF CIVIL LITIGATION

1. Introduction

The general consensus is that the excessive duration of court proceedings is one of the fundamental and most important symptoms of the crisis in the judicial system of the Republic of Croatia. Although the Croatian judicial system may suffer from other, less obvious and less measurable, disfunctionalities, ranging from the lack of experience and knowledge of trial judges, which may result in decisions of poor quality, to difficulties in securing impartial and fair trials for particular categories of parties and cases, ensuring a fair trial within a reasonable period of time has emerged at the beginning of the third millennium as the most pressing and most obvious problem.

I start this paper by pointing to several of the factors that have stimulated discussion of the need to accelerate proceedings. Such factors help to explain why the speed of legal proceedings has emerged at the very centre of the public discussion of reforms of the judicial system.

Next, I attempt to define the basic notions necessary for understanding the meaning of 'acceleration' in the context of this paper. After having distinguished the two ways in which the problem of reasonable time can be understood, this paper presents a short history of the problem of the duration of court proceedings in Croatia in the light of its legal and political traditions.

The second part deals with current projects aimed at accelerating court proceedings. Six acceleration strategies that can be recognized in the various attempted reforms will be analysed. In particular, I will present the current reform of the law of civil procedure: the 2003 Amendments of the Code of Civil Procedure, enacted with a view to accelerating and streamlining procedure.¹ Some of the most impor-

¹ The 2003 Amendments of the Code of Civil Procedure were prepared several years prior to the initiation of the legislative process in the national Parliament (*Sabor*) in October 2002. The Amendments were finally enacted in July 2003 and published in *Narodne novine* (*Official Gazette*) 117/2003. They are applicable as from December 1, 2003.

tant innovations will be described, such as the new, increased sanctions for disrespect of procedural discipline that are aimed at strengthening the role of judges, provisions for concentrating proceedings by limiting *inter alia* the right to present new evidence and make new factual assertions, departure from the inquisitorial principle in favour of an adversarial obligation to produce evidence, etc. At the end of this paper, a critical assessment will be made of the achievements of past and current attempts to reduce delays and improve the speed of the proceedings.

2. Duration as a fundamental problem of the judicial system? Several theses about the origins of the fixation on the time dimension of the trial

The judicial system in the Republic of Croatia is certainly burdened with many serious problems. However, the issue of the duration of court proceedings has moved to the forefront in recent years.

The simplest explanation for why this topic has assumed such a central position in public debate may be found in the fact that lengthy proceedings are indeed a first-class problem in Croatia. There is a lot of truth to this explanation. But closer analysis will show that several additional aspects play a prominent role in stimulating discussion of the need to accelerate proceedings. Let us note several additional external aspects that have, perhaps, made an even bigger contribution to the popularity of this topic than any objective analysis of the length of civil legal proceedings:

- Several judicial statistics published in the 1990s pointed out that the number of unresolved cases has more than doubled despite the fact that there has been no increase in the number of cases initiated;²
- Certain cases in which court proceedings lasted several decades have come to the centre of public media attention;³
- After Croatia became a member of the Council of Europe in 1997, the first cases in which the European Court of Human Rights found a violation of human rights in Croatia were concerned directly with the right to a trial within a reasonable time;⁴

² According to the data of the Ministry of Justice, in 1989 there were 1.240.000 new cases in Croatian courts; about 485.000 cases were considered as backlog. Five years later, in 1994, there were only 1.086.000 new cases, but the number of backlogged cases rose to 640.000. In 1998, the influx of new cases was at 1.006.000, and the backlog stood at 895.000. In 2001, there were about 1.200.000 new cases, but the backlog was over a million, i.e., 1.020.413. These data do not include cases pending in the petty offence courts. See *Statistical Overview for 2001 of the Ministry of Justice*, Zagreb, March 2002 (not published).

³ E.g., the Rajak case - a case initiated in 1975, and still pending at first instance in 2000. The case finally came before the European Court of Human Rights - see *infra* next note.

⁴ Cases *Rajak v. Croatia* (49706/99), *Mikulić v. Croatia* (53176/99), *Horvat v. Croatia* (51585/99), *Fütterer v. Croatia* (52634/99), *Kutić v. Croatia* (48778/99), *Cerin v. Croatia* (54727/00) and similar cases.

- The duration of proceedings appears to be a neutral and a-political question that can divert the attention of the general and professional public from other, sensitive questions in the judicial area such as, for example, issues of lustration, corruption, incompetence, bias and the (social and political) responsibility of judges and government officials for the quality of national justice;⁵
- Placing the duration of the proceedings at the centre of attention not only creates the illusion of serious reform but can also serve as an argument for the redistribution of social wealth in favour of particular classes of Government servants (investments in the justice sector, improving the salaries of judges and a quantitative increase in judicial personnel).⁶

A more in-depth analysis of each of these elements would require a separate paper. A cursory attempt to consider some of them will be made below.

3. Two concepts of the duration of the proceedings – What does ‘acceleration’ mean?

The concept of the acceleration of proceedings does not belong to the classical, and generally accepted, notions of procedural law. The traditional standpoint of procedural theory deals with proceedings *sub specie aeternitatis* – in a purely normative sphere of ‘positive law’. Actual problems facing the judicial system are easily categorized by proceduralists as simply a matter of general and legal sociology. It is therefore necessary to determine what is to be considered as the ‘acceleration of court proceedings’ for the purposes of this paper.

In the first place, the question of the duration of court proceedings might be defined as an integral part of a fundamental procedural human right – the right to a fair trial within a reasonable time, as determined by Article 6 of the European Convention on Human Rights and other international human rights instruments. Applying the method of analysis through binary variables, we could distinguish two elements of the right to a fair trial: the efficiency and the quality of the proceedings (the ‘E-element’ and the ‘Q-element’).

The issue of the duration of proceedings appears within the frame of the E-element along with another issue linked closely to the efficiency of the trial, i.e., the expense of proceedings (expenditures on court actions and the sums necessary to achieve a particular purpose).

The duration of proceedings can however be analysed in two different ways: in a horizontal and in a vertical direction. Horizontal analysis will compare individual proceedings and their types, focusing on the differences between them, while a

⁵ For the history of these sensitive issues, see A. Uzelac, ‘Role and Status of Judges in Croatia 90-99’, in P. Oberhammer (ed.), *Richterbild und Rechtsreform in Mitteleuropa*, Vienna, Manz, 2001, p. 23-66.

⁶ In fact, judicial salaries were very significantly raised at the beginning of 1999; as for investments, expenditures budgeted for court buildings and the creation of new posts are planned to be increased substantially in 2003. Both moves were justified by the need to speed up proceedings.

vertical analysis will explore the course of proceedings, from their commencement to their termination, focusing on the duration of particular segments within a particular process.

Horizontal analysis further demonstrates that the problem of acceleration can appear in two forms. First, there may be a need to deal with the insufficient speed of proceedings in all (or at least in a great majority) of court cases. Efforts can thereby be concentrated either on different types of courts (courts of general jurisdiction, specialized courts) and the types of proceedings conducted within such courts (e.g., summary proceedings, regular proceedings), or to courts' actions according to their territorial jurisdiction (a comparison of court proceedings in different parts of the State territory or a comparison according to some other territorial criterion, e.g., according to the division of the courts as between urban and rural areas).

Even if a majority of the proceedings in a particular jurisdiction (or a majority of types of proceedings) are not counted among those that are excessively long (according to any criteria), this does not exclude the appearance of isolated individual cases of especially lengthy proceedings. If they appear in a particularly negative context (of extreme duration, with an urgent social need to resolve them), such cases may also stimulate the need for intervention.

Vertical analysis, on the other hand, focuses on the course of the court proceedings, trying to establish a model that would determine which stages of proceedings correspond to standards of appropriate duration and speed, and which parts are burdened with unnecessary delay.

The occurrence of delays may be of a rather different intensity and density. Thus, the problem of acceleration in this context may also appear in two different forms: solving deeply rooted inefficiencies ('dragging') in proceedings at all stages or removing individual delays ('bottlenecks') that appear in the otherwise relatively satisfactory course of the proceedings.

This analysis of the notion of duration provides a context for the further course of this paper and can be outlined in the following table:

Elements of fair trial – acceleration in the context of efficiency				
Efficiency (E-element)	Duration	Horizontal analysis	Majority/all proceedings	Type of proceedings
				Territorial jurisdiction
		Single incidents ('cases')		
	Vertical analysis	Lengthiness of all stages of the proceedings		
Delays in proceedings ('bottlenecks')				
	Expenses	costs and expenditures		
Quality (Q-element)	impartial and fair adjudication: proper application of law, accurate fact-finding, etc.			

In Croatia, the duration of proceedings appears to be an issue in terms of virtually all the stated meanings. Although there are no reliable statistical data about this issue, the general opinion – or even the prevailing one – is that a majority of court

proceedings does not unfold at the desired speed.⁷ Although the degree of slowness is not the same with regard to different types of proceedings,⁸ it exists to a greater or lesser extent in relation to practically all kinds of proceedings. Territorially, this problem exists as well, with greater delays in larger towns than in provincial courts (where occasionally even surplus capacity may be found).⁹ On the other hand, as the tip of the iceberg, several prominent cases of notoriously lengthy trials featured prominently in public discussion, particularly in the context of judgments of the European Court of Human Rights against the Republic of Croatia.

By examining individual Croatian court proceedings from the beginning to the end (vertical analysis), it is evident that improvements in speed could be realized at practically all stages. However, delays appear more often at some stages of proceedings than at other stages. One of the major issues is the concentration of first instance (trial) proceedings – they are often carried out at numerous hearings which are distant in time from each other. Problems also appear with respect to the delivery of communications in proceedings, which opens extensive possibilities to abuse formal requirements and to obstruct the process. After the conclusion of the first instance hearings, delays often happen in the process of drafting and delivering written copies of the judgment – a process that regularly lasts at least several months.¹⁰ Bottlenecks also appear in appellate proceedings, which often last even longer than first instance proceedings. When an appeal is heard, the result is often the annulment of the judgment and the ordering of a retrial at the first-instance court. This repetitive situation can happen several times in the same case, theoretically without limit. These and similar neuralgic points in the course of proceedings have largely motivated the 2003 Amendments of the Code of Civil Procedure (see *infra*, chapter 7).

4. The procedural and political tradition as background to the problem of the inappropriate duration of court proceedings

Some of the causes of problems in relation to the duration of court proceedings are to be found in the legal and procedural traditions of the Croatian judicial system, as well as in the specific historical circumstances under which it has developed.

⁷ This is supported by a survey of 12 countries and territories of southeastern Europe conducted in February 2002 by the Swedish International Institute for Democracy and Electoral Assistance (IDEA). It showed that in Croatia (unlike any other of the countries researched) courts enjoy the lowest public trust among all domestic institutions (only 17% of the citizens trust the courts, compared to 60% with trust in the Church, 55% with trust in private enterprises and 37% with trust in universities). See <<http://www.idea.int/balkans/survey.cfm>>.

⁸ E.g., delays in commercial disputes are not always as dramatic as those in some proceedings before courts of general jurisdiction.

⁹ There are examples of courts that exist only on paper, although their judges have been appointed and receive salaries. However, because of the lack of need for some such courts, their actual opening has been postponed indefinitely.

¹⁰ In some cases courts would even deliver the judgment to the parties several years after the conclusion of the hearing. See *infra*, chapter 7.3.6.

In the second half of the nineteenth century, during the period that was decisive for the formation of the institutions of the modern liberal State, Croatia developed as an autonomous constituent part of the Habsburg Monarchy (later: Austria-Hungary). This led to a large extent to the reception of legislative models from other areas of the then complex community of States, e.g., of laws enacted in Vienna. But that process did not develop harmoniously, in full, or without delays.¹¹ Some of the key pieces of procedural legislation (or the commentaries on them) were adopted in Croatia after they had already been superseded in Austria.¹²

For example, the Temporary Rules of Civil Procedure for Hungary, Croatia, Slavonia, Serbian Vojvodina and Tamiški Banat were adopted in Croatia in 1852, almost seventy years after the enactment of their Austrian model and principal source of inspiration, the General Rules of Court Procedure (*Allgemeine Gerichtsordnung*) of 1781. The major commentary on the Temporary Rules of Civil Procedure for Hungary etc. was published in Croatia in 1892,¹³ only a few years before a completely different procedural model – the *Zivilprozessordnung* of Franz Klein – was adopted in Austria.

The same Austrian *Zivilprozessordnung* of 1895 was accepted in Croatia thirty years later, during the process of unification of procedural law that took place in Yugoslavia in 1929. The standard commentary on the Yugoslavian Code of Civil Procedure (which was practically a literal translation of the Austrian *Zivilprozessordnung*) was a translated Austrian commentary.¹⁴ It was published in the Kingdom of Yugoslavia in 1935, almost forty years after the first publication of this commentary in Austria. Ominously, it was also the year in which Georg Neumann, its author, died.

As a consequence, the model of civil proceedings conceived by its creator, Franz Klein, in Austria – a model of quick, efficient, simple and concentrated proceedings, in which an activist judge holds a public hearing and then pronounces his judgment immediately¹⁵ – never became a complete reality in the territory of Croa-

¹¹ For the delayed reception of foreign models in the ‘periphery’ see D. Čepulo, ‘Središte i periferija’ (‘The Center and the Periphery’), *Zbornik Pravnog fakulteta u Zagrebu*, 50/6, 2000, p. 889-920.

¹² Some useful, although very short and overly simplified, remarks on the reception of Austrian law in Croatia can be found in W. Jelinek, ‘Einflüsse des österreichischen Zivilprozessrechts auf andere Rechtsordnungen’, in W.J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld, Giesecking, 1991, p. 41-89 (p. 72-74, 85-86). See also A. Uzelac, ‘Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien: Fall der Bestellung des Gerichtspräsidenten in der Republik Kroatien und daraus zu ziehende Lehren’, *Jahrbuch für Ostrecht: Sonderband ‘Justiz in Osteuropa’*, volume 43, 1. Halbband, München, Beck, 2002, p. 77-79.

¹³ See Rušnov-Šilović, *Tumač građanskom parbenom postupniku*, Zagreb, Kugli & Deutsch, 1892.

¹⁴ G. Najman (Neumann), *Komentar Zakona o sudskom postupku u građanskim parnicama*, Beograd, Planeta, 1935. This commentary was largely a translation of G. Neumanns’ *Komentar zum österreichischen Zivilprozessordnung*.

¹⁵ For Klein’s reforms and their meaning today see R. Sprung, ‘100 Jahre Österreichische Zivilprozessordnung’, in W.H. Rechberger and T. Klicka, *Procedural Law on the Threshold of a New Millennium – Das Prozessrecht an der Schwelle eines neuen Jahrtausends*, Wien, Manz, 2002, p. 11-30.

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

Other circumstances also contributed to these developments: The law on civil proceedings of 1929 was in force barely eleven years before World War II, and a socialist revolution and communist rule left their mark on the courts and their procedures. Although procedural legislation in the Socialist Federal Republic of Yugoslavia continued to follow earlier models, it was adjusted in some respects to socialist political doctrine. The inquisitorial elements and judicial activism of the Austrian procedural legislation stopped being interpreted as a warrant for concentration, publicity, directness and efficiency and became instead an instrument of socialist paternalism with the primary purpose of protecting the State from party autonomy and the uncontrolled actions of civil society. Since it was impossible to remove the party's initiative in civil proceedings completely (in contrast to some other branches of the law that were systematically cleansed of 'civil' and 'capitalist' concepts) civil procedural law continued to develop partly on the foundations of classical procedural patterns.¹⁶ However, a consequence of the suspect 'civil' and 'private' nature of proceedings was the marginalization of court proceedings. They were reduced to the level of a second rate mechanism of social regulation, aimed at resolving 'secondary' problems only, disputes related to the relics of private property disputes in a society in which collectivist doctrine otherwise dominated.

As a consequence, the speed and efficiency of judicial proceedings were not high political priorities until the abandonment of socialism and change in the social system in the nineties. Quite the opposite, the relative length of proceedings and the high level of formalism were used in some cases as a tool to protect judges (who did not under socialism enjoy full guarantees of independence and who were subject to re-election by political bodies) from political persecution and the rage of the communist elites in power.

On the other hand, the previous, already generous system of pleading that enabled the change of claims and issues in the course of the proceedings and the reconsideration of first-instance court rulings, was further loosened. The party dissatisfied by the outcome of the proceedings had many opportunities to bring about a

¹⁶ For the development of civil procedural law in Croatia see, e.g., S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo (Civil Procedural Law)*, Zagreb, Narodne novine, 1986, § 1-5.

retrial through appeal and other legal remedies. On the basis of the socialist understanding of the 'principle of material truth', virtually unlimited possibilities of introducing new facts and evidence were established at first instance and appellate proceedings.¹⁷ In addition, there was an established practice of the appellate courts limiting themselves to revoking a decision and sending the case back for retrial. Theoretical justification was found in the principle of immediacy (direct, personal evaluation of evidence) although very little of this principle remained in practice. Possibilities of State intervention through so-called 'requests for protection of legality' (*zahtjev za zaštitu zakonitosti*) by the State Attorney were introduced into civil proceedings. All this, taken together, served as a specific shock absorber for political blows against justice. But, on the other hand it surely did not contribute to the authority of judicial decisions and the firmness of court decisions, even with respect to those that were formally considered to be *res iudicata*.

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

Thus, the typical distribution of jobs in families of lawyers was the following: the spouse who took care of the children went into judicial employment, while the other, bread-winning spouse supported the family by practising law as a private attorney. Even if this typical perception has an anecdotal character, the numbers are incontestable: in the ranks of judges of the courts of first instance at the beginning of the 90s in Croatia, women were significantly more numerous than men.¹⁸

When Croatia left the Yugoslav Federation in 1991, through a painful process marked by war and instability, there was a radical turn away from socialist collectivism. The doctrines of Marxism, of 'social property' and self-management were abandoned, and the prevalence of private ownership was re-established. That was a completely new situation for the national Judiciary. In the first place, there were much greater expectations, they had much greater responsibility and much more important tasks. Yet, some things did not change. For example, the attitude of politicians towards the Judiciary remained unchanged and – especially under war conditions – it was expected that judges would serve the interests of the political regime. For a period of six to seven years, the newly introduced constitutional principles of the independence of justice, tenured appointments and the separation of powers were not applied in practice. Many judges were appointed and dismissed in that period, again not according to objective and well-defined criteria of competence and responsibility, but according to their closeness to the centres of power, and po-

¹⁷ See *infra*, chapter 7.2.1.

¹⁸ According to statistical data for 1998, about 65% of trial court judges were women. However, at the same time, they constituted only about 40% of the judges of the Supreme Court.

litical and ethnic affiliation. A prolonged period of uncertainty and political purges led to the departure of the better and more proficient judges to other private legal work where they expected to find more peace, higher incomes and a greater level of personal and professional freedom. On the other hand, those judges who did not have a choice, or were ready to live under conditions that were considered by others to be unbearable, remained in the system. Newly appointed judges – there were many of them, in some courts over two thirds – were mostly young and without experience. Not infrequently they were appointed according to criteria of political and ethnic ‘appropriateness’, or under the influence of an unavoidable dose of nepotism, a common characteristic of southern European countries.¹⁹

The efficiency of the justice system (which has in any case never really embraced the rule *justice delayed, justice denied*) as a consequence radically changed for the worse in the nineties and later. General indicators of the backlog in courts demonstrate that the number of unresolved cases almost tripled between 1990 and 2000.²⁰

Such indicators, along with the emerging interest of the public media in the problems of justice and a series of judicial scandals, stimulated a public awareness that reform might be necessary. Reform of the judicial system was among the pre-election promises of the coalition of parties which won the elections at the beginning of 2000. There were indeed many legislative and other projects from 2000 onwards concerned with reform of the judicial system. However, assessments of what was achieved were rather different. Many critics reproached the Government for the lack of concrete effects from the changes, and pointed to the further accumulation of cases and the lack of clear concepts and strategies for the judicial sector. Others objected to every governmental action in this area as a violation of the constitutional principle of the independence of justice. The debates about what needs to be changed and what should be the fundamental features of judicial reform are not even close to an end at the time of writing of this paper.²¹

The reforms that were undertaken vacillated between extremes – the major laws enacted in the mid-nineties changed several times (e.g., the Law on Execution and the Law on Bankruptcy) while others, e.g., the Code of Civil Procedure, are practically unchanged since the time of the Yugoslav Federation. Part of the reason for this is the political resistance of the Judiciary to the reforms, especially if such reforms were aimed at interfering with political appointees – certain judges appointed and used by the regime of President Tuđman. Even after the political changes, earlier structures did not change much but, with the support of certain political groups (partly also within the governing coalition), they resisted with success any changes

¹⁹ For this development see A. Uzelac, *Role and Status of Judges in Croatia 90-99*, *supra* note 5; see also A. Uzelac, ‘Lustracija, diskvalifikacija, čistka. O procesnim i ustavnopravnim problemima izbora sudaca u prijelaznom razdoblju’ (‘Lustration, Disqualification, Chistka: Procedural and Constitutional Issues of the Appointment of Judges in Transition’), *Iudex*, 1, 1995, p. 413-434.

²⁰ See *supra* note 2.

²¹ For some of the critical elements of the attempted reforms see A. Uzelac, *Ist eine Justizreform in Transitionsländern möglich?*, *supra* note 12.

that might influence their status. Discussions about reform of the judicial system were therefore politicized to a great extent even where it might have been expected that professional and impartial analysis would prevail.

Official documents on the reform of the judicial system can therefore be read even today as a catalogue of wishes and an unsystematic list of items that have legal and political priority. A systematic strategy of changes that would lead to the acceleration of civil proceedings is hardly to be found in these documents. However, for the purposes of this paper I will try to group and order the sometimes chaotic reform attempts and present them as different 'strategies', even if they were occasionally a product of mere coincidence.

5. Actual projects intended to accelerate civil proceedings – A typology of reform strategies

Accelerating proceedings is as complex as every other far-reaching reform in the judicial system. Simple and unilateral interventions are not sufficient when we face long-lasting and fundamental problems. Both procedural and organizational changes may be necessary at the same time. Similarly, changes in Croatia were also intended to deal not only with procedural rules (which, although burdened with some inadequate provisions, cannot be exclusively blamed for current inefficiencies).

I would like to try to group the various projects in this area into six strategies for the acceleration of proceedings. In my opinion, all can be recognized in actual initiatives, even if they are not apparently part of the general scheme of reform. These strategies are:

- the reform of procedural rules (changes in procedures and well-established routines for resolving judicial cases in order to streamline and shorten proceedings);
- transfer ('outsourcing') of tasks that are currently dealt with by the courts to other State and social services and other professional groups (especially public notaries) and transfer of tasks that are not central to the judicial function to other persons within or outside the courts;
- stimulating parties to resolve their disputes out of court, by settlements reached independently or with the assistance of third persons (mediators), or through arbitration;
- changes in the organization of the judicial system at the national level (the system of judicial jurisdiction), and at the level of individual courts (reorganization of court administration);
- technical and logistical improvements (introducing new technologies, especially in the IT area, reorganization of the delivery service and court registers);
- programmes of training (intensifying quality criteria in the recruitment of personnel in the judicial sector, permanent education and advanced, specialized and continuing training).

This rather extensive list basically covers all possible ways in which a certain country might address problems of inefficiency in its judicial system. In what follows, I will pay special attention to strategies related to changes in procedural regulations. Other strategies of acceleration will be elaborated elsewhere. I will commence with a brief overview of reforms of procedural regulation aimed directly at improving the speed of judicial proceedings.

6. Reform projects intended to accelerate court proceedings

Changes related to the acceleration of civil proceedings in Croatia are to be found mostly in three large procedural laws: the Code of Civil Procedure, the Law on Enforcement and the Law on Bankruptcy. As stated earlier, changes in these laws did not follow a fully logical course. The most important and fundamental law, the Code of Civil Procedure, was not significantly changed until the time of the writing of the draft of this paper. Instead, until 2003, the ex-Yugoslavian Procedural Code from 1976 remained in force, subject only to insignificant changes.

On the other hand, the two other laws had completely different destinies. Not only were they changed much earlier than the Code of Civil Procedure but completely new regulations were enacted – in 1996 the Law on Enforcement replaced the Law on Execution Proceedings²² and the Law on Bankruptcy succeeded the Law on Forced Settlement, Liquidation and Bankruptcy.²³ Having been passed, both laws were significantly changed by amendments barely two to three years after the new law was passed. New changes – partly consisting in the abandonment of some previous changes – were passed as a part of the imminent package of judicial reform.²⁴ These changes, although significant, will not be discussed here.

7. Reform of the rules of civil litigation – 2003 Amendments

In the Yugoslav Federation, civil proceedings were generally regulated by federal legislation. Therefore, the Code of Civil Procedure that was (and still is) applicable in Croatia is a former federal law from 1976. The situation was similar in other successor countries of ex-Yugoslavia, but most of them have already undertaken a significant reform of proceedings and/or passed new procedural laws. For various reasons, reform of civil litigation in Croatia was postponed for a long time. The ‘old’ Procedural Code, with minimal adjustments, was in force even in 2003. In the end, it remained practically the only large piece of ‘systemic’ legislation that was not significantly changed after the declaration of independence in 1991. After almost ten years of the unofficial circulation of draft proposals (but without a broader public

²² *Ovršni zakon* (Enforcement Act), Official Gazette 57/96, 29/99 and 42/00.

²³ *Stečajni zakon* (Bankruptcy Act), Official Gazette 44/96, 161/98, 29/99 and 129/00.

²⁴ See Amendments to the Law on Bankruptcy, Official Gazette 123/2003; The amendments to the Enforcement Act were adopted in Parliament on 15 October 2003. They had not yet been published in the Official Gazette at the time this text was submitted for publication.

and professional debate, except on isolated and largely marginal subjects),²⁵ the first draft was presented to Parliament only at the end of 2002.²⁶

The absence of any real legislative projects in this area during some 12 years of Croatian independence should not be taken as proving that the Code of Civil Procedure of 1976 enjoyed general acceptance by lawyers and the general public. Its inadequate provisions and its old-fashioned approach were often mentioned in the context of the extensive duration of court proceedings. Criticism was mainly directed at the extensive opportunities it offered to parties (and their representatives) to abuse procedural formalities and obstruct – or even block – the course of proceedings. Other criticism related to the lack of procedural discipline (i.e., the lack of sanctions for inactive parties and belated submissions) and the absence of planning of the proceedings. It was also pointed out that specific formal requirements have in the course of time lost any real meaning in practice (e.g., the condition that first instance trials be held by a panel of three persons, two of them being lay judges).

Novelties in the rather voluminous text of the 2003 Amendments²⁷ can be discussed under several headings. The following chapters deal therefore with the following issues (or groups of issues): changes regarding organizational aspects (the composition of court panels and *in rem* court jurisdiction); changes relating to evidence-taking and related basic procedural principles (abandonment of the inquisitorial authority of the trial court, limitations on the introduction of new evidence and factual submissions in the course of a trial); new measures to strengthen procedural discipline (including the controversial issue of mandatory party representation); and reforms of the system of legal remedies.

7.1 *Changes regarding the composition and in rem jurisdiction of the courts*

7.1.1 **Abandoning the principle of collegiate adjudication – Introducing the monocratic principle at first instance proceedings**

One of the least controversial changes that provoked almost no discussion abolished the principle of collegiate trial and lay participation in first-instance courts.²⁸ The principle of collegiate trial, although raised in socialist Yugoslavia to the level of a constitutional principle, has become a mere caricature of the original intentions of the Legislature during the last twenty years. In civil litigation, it survived until the 2003 Amendments, although in a restricted form. Apart from certain cases that were

²⁵ E.g., about the issue of mandatory representation by licensed attorneys in civil proceedings. See *infra*, chapter 7.3.5.

²⁶ See *Izvešća Hrvatskog sabora* (Reports of the Croatian Parliament), number 352, January 15, 2003, p. 19-24, <<http://www.sabor.hr>>.

²⁷ The Amendments have 287 articles (amending the original text of the Code of Civil Procedure that contained 512 articles), so that one may freely speak of a substantially new piece of legislation.

²⁸ The principle of collegiate adjudication lays down that trial courts should sit in panels composed of more than one member. In civil litigation, the regular composition of the trial court comprised one professional judge and two lay judges.

heard by a single judge, since 1990 parties could waive their right to lay members of the tribunal.

In practice, collegiate trial was characterized by the participation of two laymen who were mainly recruited from elderly and unemployed citizens, i.e., from the circles of those who had spare time and to whom the small compensation for taking part in court proceedings was not irrelevant. On paper, lay judges had all the rights and duties of professional judges, but in practice their role was reduced to a mere formality – they became passive and uninterested observers of the proceedings. If the original concept of a ‘democratic trial’ in which citizens could actively participate and even control judges had a certain justification and attractiveness, the way in which proceedings were conducted in practice made the active and meaningful participation of lay judges impossible. They could hardly get a comprehensive picture of any aspect of a case that dragged on through several hearings over a period of one or more years, and were dominated by a written exchange of party pleadings. However, as their presence was prescribed by law, from the formal perspective it opened various possibilities of abuse and procedural tactics for delay, especially because every defect in the composition of a court (e.g., the absence of one or more lay judges from a hearing) was a reason for the nullification of the judgment.

The 2003 Amendments of the Code of Civil Procedure completely reversed the previous rule: a single judge was established as the rule in the first instance, while collegiate bodies were to be exceptional. Additionally, in appellate proceedings a single judge might exceptionally reach a decision instead of the panel of three judges. He would have jurisdiction to rule conclusively on appeals against mere procedural decisions and on less important issues (disturbance of possession, costs of proceedings, issuance of payment orders). Three member panels instead of five member panels would now decide the same questions in proceedings of secondary appeal (‘review’, ‘revision’, *revizija*) before the Supreme Court.²⁹

7.1.2 The stabilization of the *in rem* jurisdiction of the courts as a means of avoiding jurisdictional disputes

Another change of a mixed organizational and procedural character relates to the relativization of the *in rem* jurisdiction of the courts. Under the 2003 Amendments, under specific circumstances, a court that would otherwise not have *in rem* jurisdiction could become competent to validly resolve the dispute at hand (e.g., a commer-

²⁹ See the amendments to Article 41 Code of Civil Procedure. In the legislative debate, the drafters of the changes referred to Recommendation number R (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases of the Committee of the Ministers of the Council of Europe. Cf. Article 6: ‘[...] states should consider taking any or all of the following measures: a. not making use of more judges than necessary to deal with cases [...]’. According to this recommendation, a single judge can be used for the following matters: applications for leave to appeal, procedural applications, minor cases, where the parties so request, where the case is manifestly ill-founded, family cases, and urgent cases.

cial court would become competent to deal with matters falling within the jurisdiction of a municipal court and *vice versa*). Within the Croatian justice system, the role of specialized courts is not too significant – it is limited in civil proceedings to commercial courts as a counterpart to the courts of general jurisdiction. Notwithstanding, under the rigid rules of the past every change in the *in rem* jurisdiction of the courts led to a lack of jurisdiction. The challenge based on lack of jurisdiction could be invoked at any stage in the proceedings – moreover, the court was obliged to rule on them *ex officio*. This created a significant opportunity for the obstruction of a whole series of proceedings. Practically every decision by which a court found lack of *in rem* jurisdiction led to delays in proceedings that could last for several years. At the same time, the rules on the *in rem* jurisdiction of the courts changed frequently so that many cases had to be transferred by one kind of court to another. This transfer of cases generally happened without the participation of the parties. It is significant that it was jurisdictional ping-pong of exactly this kind which brought about at least part of the most disastrously inefficient proceedings. Some such cases in relation to the Republic of Croatia had their epilogue before the European Court of Human Rights that found violation of the rule of fair trial within a reasonable time under Article 6 of the Rome Convention.³⁰

The official explanation of the new amendments therefore expressed the view that the

‘legal and political importance of the rules of *in rem* jurisdiction are not such as to justify the quashing of judgments even after several years of proceedings and that the significance of competence issues, as issues that do not concern the essence of things, should be reduced to the minimal possible extent’.³¹

Thus, the 2003 Amendments provide that courts may decline jurisdiction for this reason only prior to the commencement of substantive arguments, i.e., at a preparatory hearing or – if such a hearing is not held – at the first hearing. After substantive oral pleadings at the first hearing, the parties are precluded from raising *in rem* jurisdictional objections – the jurisdiction may be considered ratified and the court can therefore continue and reach a final decision of the dispute regardless of the possible initial lack of *in rem* competence (e.g., a municipal court becomes competent to make a judgment in cases where commercial courts are competent). This proposal was partly attacked in parliamentary discussions because of the possibility that a ‘non-specialized’ court would decide cases where special expertise was necessary. However, it was also considered that the positive effects of this measure might considerably surpass any possible lack of specialist expertise which, in matters of the civil and commercial justice, has a very limited importance.

³⁰ See, e.g., the Rajak case, *supra* notes 3 and 4.

³¹ From the explanatory notes attached to the draft 2003 Amendments (Ministry of Justice materials dated November 2002, unpublished).

7.2 *Changes with regard to the introduction, selection and taking of evidence*

7.2.1 **General principles: relinquishing the inquisitorial principle in producing evidence, abandoning the principle of the material truth**

Much more significant changes relevant both to practice and to procedural theory deal with the process of evidence-taking. Expressed in terms of procedural principles, the powerful inquisitorial authority of the court in gathering evidence is intended to be almost entirely abandoned and replaced by the rule that evidence is produced, more or less exclusively, on the initiative of the parties (adversary principle).³²

By this course of reform Croatia would, at least on paper, move away from the activist concept of the system of justice as partially inherited from Austrian civil procedure and Franz Klein. However, this demands additional explanation. The main motivation for the changes in this field was again the attempt to accelerate proceedings, i.e., to remove possible generators of delays and the long duration of proceedings. This may sound curious since the original inquisitorial authority, as conceived in Klein's reforms, was aimed precisely at producing quick, inexpensive and efficient hearings unburdened with formalities. However, it seems that in Croatian reality, inquisitorial authority perverted the original intentions, and became a significant generator of the deceleration of proceedings. Among other arguments, it has been pointed out in particular that inquisitorial authority provided a leeway for procedural abuse and the obstruction of proceedings.

The explanation lies partly in procedural forms and practices, and not in the text of the Procedural Code. The general rule about the possibility of taking evidence *ex officio* was in law provided as an optional authorization, i.e., as a right, and not a duty, of the court. However, this possibility has often been interpreted in practice as an obligation. For example, higher courts would regularly quash judgments on appeal if the appellant referred to evidence that had not been taken at trial if such evidence might be considered relevant, irrespective of whether such evidence had been introduced (or even mentioned) by the parties. Such an approach was supported by the doctrine of the primacy of the 'material truth'. This concept was legitimized by the provision that established the 'court's duty to completely and truly establish disputable facts' (Article 7 paragraph 1).

Absolute priority of the 'material truth' above the efficiency of the trial and legal certainty partly originated in the socialist period. By adhering to the principle of the 'material truth', the socialist system found an ideological justification for political control over the justice system: the 'material truth' always had precedence over 'unnecessary, even damaging procedural formalisms'.³³ Such an approach resulted

³² See the changes in Article 7 Code of Civil Procedure: the rule that 'the court can take the evidence not proposed by the parties if it is important for decision-making' is deleted and replaced by a general rule that 'parties have the obligation to state the facts on which they base their applications and to propose the evidence necessary to determine those facts'.

³³ On the political background of the theory of the material truth see A. Uzelac, *Istina u sudskom postupku (The Truth in Judicial Proceedings)*, Zagreb, Pravni fakultet, 1992.

in the weakening of the authority of court decisions – they had an ever-provisional nature because of the wide possibilities for their contestation, *inter alia* due to the failure to exercise the indispensable judicial activism in gathering evidence and fact-finding. However, although such an approach was largely rooted in socialist ideology, the inquisitorial psychology and inquisitorial consciousness among judges – especially those in higher ranks of the judicial hierarchy – survived socialism.

It may be somewhat peculiar to note that the actual text of the socialist law offered several possibilities for a completely different approach. Among other things, in spite of the possibility of taking evidence *ex officio*, rules on expenses did not allow that evidence be produced if the expenses of evidence-taking were not paid in advance by the parties.³⁴ But this opportunity to limit the inquisitorial authorities to the mere stimulation of party-driven evidence-taking was disregarded. In practice, even in such situations higher courts would consider on appeal that establishing the truth had priority and would revoke decisions because of the failure to ‘truly and completely establish the facts of the case’.

The alleged failure to introduce some pieces of evidence at first instance was never compensated for at the appellate stage. The possibility of a hearing of evidence at second instance created by the Code of Civil Procedure was in reality abrogated in practice – such hearings never became reality in Croatia. This was partly due to the theoretical justification that the appellate court should not be turned into a trial court. Therefore, even under positive law second instance hearings could have only a limited scope for rehearing evidence taken at first instance, while new evidence was barred at second instance.

So the appellate courts found a universal answer to every factual doubt – returning a case for retrial. For higher courts, this was a comfortable and practical solution for a number of reasons. The annulment of a judgment would in statistical terms be considered a successfully resolved issue in the evaluation of the performance of appellate judges. By quashing a judgment, they would also confirm their commitment to a search for truth. At the same time, responsibility for the final resolution of the dispute was avoided, i.e., transferred back to the court of first instance. Striking down a ‘mistaken’ decision also reconfirmed their epistemological superiority and their legal authority over first instance judges. The possibility of the unnecessary annulment of a judgment (e.g., if the retrial would result in the same findings, which happened quite often) did not, *sub specie aeternitatis*, cause tragic consequences. If the annulled judgment was correct and the ‘omitted’ evidence did not modify the previous findings, the court of first instance could issue a new judgment with the same content, and justice would be considered to have been done.

The only nuisance, of little significance from the perspective of the higher court, consisted in the fact that rejection of the decision meant that the actual social conflict was far from being over. In practice, higher judicial authorities never had any real contact with real parties, and never had the opportunity to experience at first-hand their feelings with regard to such a restarting of the clock and the repetition of the often traumatic (and expensive) trial. Decisions about appeals were

³⁴ Article 153, paragraph 3 Code of Civil Procedure.

reached at closed sessions of appellate court panels, without the presence of the public – without the presence even of the parties and their lawyers. This may have affected the percentage of decisions annulled, which has remained high. Procedural rules also did not contain any limitations on the number of annulments and retrials allowed within the same proceedings. Not infrequently cases occurred in which judgments were quashed two, three or more times, many times for factual reasons.

Practice in the lower courts tried to adjust to these approaches and demands of the higher courts. In the evaluation of trial judges, annulled decisions had a negative impact and meaning, resulting in poor grades and less prospect of advancing to higher judicial posts. In order to avoid the annulment of their decisions on factual grounds, first instance judges developed a procedural style that insisted on every, even remotely relevant, piece of evidence. Court hearings were postponed several times if such evidence was not obtained, and consequently the proceedings dragged on for months and years. In combination with the unlimited possibility of introducing new facts and evidence and the low level of procedural discipline,³⁵ the inquisitorial style and psychology became one of the most important generators of inefficiency in court proceedings. The amalgamation of all these elements led to a type of procedure that was very distant from its proclaimed ideal – a quick, cheap, public, direct and concentrated procedure.

For all these reasons, the 2003 Amendments envisaged a quite radical turn away from judicial authorities producing evidence *ex officio*. According to the rules, the court would have to restrict its evidentiary efforts to the evidence proposed and produced by the parties. In other words, the court would be prohibited even from taking any evidence unless it was relied upon by the parties, except in the case where such evidence prevented illegal dispositions by the parties. It was considered that only by adopting such a solution could the *onus probandi* be clearly transferred to the parties. As stated in the legislative debate ‘in the future [after adoption of the 2003 Amendments] the truth [in judicial proceedings] would only be what the parties could prove before the court’.³⁶ Henceforward, in the process of fact-finding, the court would maintain only a controlling function, and an activist approach would be permissible only if there was a legitimate belief that the parties in the civil proceedings by their actions would be violating mandatory law or acting against public morality.³⁷

It remains to be seen how the strengthening of the adversarial structure of civil litigation will be applied in practice. It is also uncertain if, how and when these changes will contribute to the acceleration of proceedings. The new procedural rules could certainly reduce the likelihood of the annulment of decisions for failure to take certain pieces of evidence; but that applies only to evidence that was not proposed by the parties in the proceedings. This is an important psychological step, but

³⁵ For these elements see *infra*, chapters 7.2.2 and 7.2.3.

³⁶ From the speech of the Minister of Justice made while introducing the changes to the Parliament, *Izvoješća Hrvatskog sabora* (Reports of the Croatian Parliament), number 352, 15 January 2003, p. 21.

³⁷ See Ministry of Justice materials entitled ‘On the Reform of the Justice System and its Directions’, June 2002, unpublished, p. 52.

it may prove insufficient to remove altogether the inquisitorial consciousness of the judges. The possibility of a tolerant judicial attitude towards vexatious and irrelevant evidentiary proposals still remains, and there is even a chance – now parties know that they cannot rely on judicial activism in evidence taking – that such evidentiary proposals will occur more intensively. On the other hand, no sanctions are prescribed for a court that in opposition to the text of the law continues ordering evidence *ex officio*, and there are no guarantees that higher courts will break with past practice rather than make minor changes in the explanation of annulment decisions. As regards the potential negative sides of a consistent application of the new text, it seems that after the 2003 Amendments come into effect courts will be prevented from acting and ordering evidence even in cases where Equity would so require (e.g., in cases in which socially vulnerable parties appear without lawyers and adequate knowledge and resources).³⁸

In any case, it is clear that a mere change in the text of the law will not by itself lead to substantial improvements. Efficiency can be raised, and proceedings can be accelerated in a proper and just way, only if amendments in the law are accompanied by a comprehensive change in approach and awareness – meaning a real shift from an inquisitorial towards an adversarial style of procedure. For that purpose, comprehensive programs of education and training will be necessary for all legal professionals (judges, lawyers, experts, etc.). It is quite likely that a longer period of adjustment will be needed to experience actual changes and their results.

7.2.2 The concentration of proceedings – The obligation to introduce and present evidence at the preparatory hearing and at the main hearing

The amendments to the Code of Civil Procedure introduced changes to the role and concept of several procedural institutions with the intention of concentrating proceedings.

The first change relates to the requirement that the defendant submit a written statement in reply to the claimant's allegations. Prior to 2003, such a written statement of defence was optional, while after the changes come into effect, this will be mandatory in most cases.

The obligation to submit a written statement of defence under the Amendments has a dual function: to strengthen procedural discipline and to concentrate proceedings. In the first place, if a defendant fails to provide a written statement of defence, a default judgment may be entered against him even at this early stage. In addition, the defendant's obligation to answer in writing should gain importance because of the new obligation of the defendant to express his/her position in rela-

³⁸ As a specific compensation, it is provided that the judge may, when this is needed for the correct resolution of the dispute, 'advise the parties about the need of submitting factual allegations and proposing certain evidence', along with an explanation for why this is considered to be necessary. See new Article 219, paragraph 2 Code of Civil Procedure. Whether this will be enough (because it depends on the discretion and good will of the court) or too much (if a failure to advise the parties would be considered to be a ground for appeal) is yet to be seen.

tion to the suit in full when replying and to enclose the documents he/she refers to, if it is possible.

The second change relates to the role of the preliminary hearing or the first main hearing. The Amendments have not changed past conceptions of the preliminary hearing as an optional stage in proceedings.³⁹ But the new rules have strengthened the obligation of the parties to state all facts and propose all evidence in their written statements of claim and defence, either at the preliminary hearing, or, at the latest, if the preliminary hearing is not held, at the first oral hearing on the merits. Sanctions against the delayed presentation of facts and evidence under the new concept, however, do not include exclusion of the right to present them altogether, but only the obligation to pay all the costs that would arise from such delayed statements. The court is to rule on such costs immediately, irrespective of the outcome of the case.⁴⁰

Although these measures were optimistically announced as a great step towards the concentration of proceedings, it has yet to be seen what their real effect will be. Delayed statements of facts and evidentiary motions will still not be disregarded.⁴¹ The threat to award expenses may prove insufficient, especially if judges hesitate to make use of it. Another problem may occur when determining the amount of damages caused by delayed motions for evidence. If costs are difficult to determine, it could further undermine the efficiency of the proceedings, and if strong proof of such costs is required, under certain circumstances this may in practice eliminate any advantage in using it. A somewhat stronger solution that would enable the court to determine deadlines for introducing new facts or proposing evidence would surely be more efficient, but at the present stage in the reform of the civil proceedings it was not accepted. It is therefore questionable whether the new rules will really contribute to the concentration and acceleration of first instance proceedings. Undoubtedly, the current practice of conducting proceedings through a large number of hearings at long intervals over the course of one, two or more years, can be considered among the main obstacles to the acceleration of the proceedings. It is also a precondition for the meaningful realization of some of the other procedural principles that the Code of Civil Procedure be particularly based on the principles of directness and free evaluation of evidence.

³⁹ The fact that, after the changes, a single judge can rule in the great majority of civil cases, will lead in practice to the elimination of preliminary hearings, since they are held only if the trial is conducted by a panel of judges.

⁴⁰ See the new text of Article 299 Code of Civil Procedure.

⁴¹ As stated in the explanatory material to the 2003 Amendments, '[...] a radical limitation of that right [*of beneficium novorum* in first instance proceedings] was avoided. It was assessed that by that, because of the general level of legal culture in Croatian society, abolition of the right to present new facts and evidence would seriously jeopardize the correctness and the accuracy of adjudication and legal certainty in general'. See Explanatory Material, II.4 *in fine*.

7.2.3 Abolishing the right to introduce new facts and evidence in second instance proceedings

Ideological proclamations that the search for truth is the supreme goal of civil proceedings resulted in expansive possibilities for introducing new facts and evidence throughout the trial, even in the course of appellate proceedings. This latitude provided a substantial potential for slowing down proceedings and their recurrent remand to some earlier stage – almost to the very beginning – in the case of newly discovered facts and evidence.

As already stated, the possibility of introducing new elements in first instance proceedings was practically unlimited – new facts and evidence could be introduced, practically without any sanction, at any time between the commencement of the suit and the conclusion of hearings. ‘The privilege of relying on new facts and evidence’ (*beneficium novorum*) existed, however, also in respect of legal remedies. As for the appeal, the right to introduce novelties was very widely prescribed in the Code of Civil Procedure, in principle even without limitations, as long as the new facts related to the period covered by the first instance judgment. Although even older procedural theory admitted that such a right ‘has a negative effect on the concentration and acceleration of the proceedings, [...] weakens the discipline of the parties, makes possible the abuse of procedural rights’ etc., it was widely asserted that the search for the truth makes it indispensable. Under the old rules, the court would have to take into consideration any relevant facts and evidence, even if introduced only by means of appeal.⁴² The only negative consequence consisted in the obligation of the party that introduced them to compensate for the costs incurred in accordance with the *culpa* principle. A rare limitation was introduced in 1990 through the rule that evidence may not be introduced on appeal if such evidence had been proposed at first instance proceedings but not been produced because of the failure of the party to advance the costs.

The 2003 Amendments went one step further and generally excluded new facts and evidence altogether from appellate proceedings. In that way, appellate procedure was reduced to the control of the proceedings of the lower court based upon evidence and facts presented at the trial. The only remaining opportunity for introducing new evidence and facts exists through a special legal remedy, the motion for retrial (*prijedlog za ponavljanje postupka*). The main reason for these changes was, as stated in the explanatory materials to the 2003 Amendments, to combat the practice whereby

‘fraudulent parties, by concealing some facts or evidence during first instance proceedings and stating them only on the appeal, succeeded in securing the annulment of the contested judgment and having the case returned for retrial’.⁴³

⁴² See S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo*, supra note 16, § 143/20, 156/8.

⁴³ Explanatory Material to the 2003 Amendments, p. 45 (commentary to Article 195 of the Amendments).

Abolishing the right to rely upon new facts on appeal will surely be an important step towards removing possible abuses. These changes could contribute more significantly to the general efficiency of the trial if appropriately accepted and applied in practice. However, some other potential problems in relation to appeals and motions for retrials will still have to be overcome. The impossibility of introducing new facts on appeal could lead to an increased use of motions for retrial. The motion for retrial is a remedy that can be sought only after appeal, if the appeal was launched for procedural reasons. For example, retrial based on new facts will have to wait until appellate proceedings are over. The effectiveness of this reform will depend to a great extent on the ability of the judicial system to resist a potential wave of motions for retrial. Otherwise, instead of acceleration, the opposite effect could be reached with additional negative consequences (e.g., a further reduction in the authority and firmness of *res iudicatae*).

7.3 *The strengthening of procedural discipline*

7.3.1 **New sanctions for the abuse of procedural rights**

The main political slogan on the reform of civil proceedings related to the need to strengthen procedural discipline. According to the prevailing assessment of the reformers, the long duration and inefficiency of the trial are determined to a significant extent by the ability of the parties in proceedings to use their procedural rights to obstruct and even block the proceedings and to remain unpunished for such behaviour. The cause of the current abuses was not completely uncontroversial in the legislative debate: while some assigned the main guilt for obstruction to the parties (more precisely, to their lawyers), others argued that the greater fault lay with the judges who had failed to use existing mechanisms to fight abuse. In any case, one of the main ideas behind the reform was to emphasize the right and duty of the court to ensure procedural discipline, if necessary by stronger measures for fighting procedural abuses.

The new text of the law supplements the old, general formula that parties have a duty to use their rights conscientiously with new instruments aimed at enforcing such a duty. The court is now authorized to fine parties or their representatives for 'significant abuses of their procedural rights'.⁴⁴ If a decision to impose such a fine is made, however, the sanctioned party may appeal the decision and thereby suspend its enforcement. But, as an indirect sanction, the court can oblige the abusing party to pay expenses caused by the party's fault independently of the outcome of the litigation, and such a court decision may be executed immediately, without delay.

At first sight these amendments may to a certain extent invoke the Anglo-Saxon concept of *contempt of court*. It seems, however, that in this respect the reform still went only half way. In other words, an appeal that may suspend enforcement in the case of fines could significantly limit the efficiency of this measure. Although maximum fines are not small (up to about € 1500 for individuals), their minimum is

⁴⁴ See the text of Articles 9 and 10 Code of Civil Procedure.

relatively low (less than € 100). From past experience in similar situations, judges are reluctant to impose fines in civil proceedings, and if they use them, the minimum amounts are preferred. It can be supposed that a similar practice will continue with respect to the new fines, especially because it will surely be quite a while until the broad legal standard of 'significant abuses of procedural rights' will be clarified by case-law and legal theory.⁴⁵ For a resolute application of the new sanctions, a judge of impeccable ability, will and discipline is needed. In the present circumstances, this condition will probably not easily be met.

7.3.2 Avoiding vexatious motions on the delegation of court jurisdiction and challenges to judges

In relation to the fight against abuses of procedural rights, a more practical impact may be obtained from some other, minor changes aimed at reducing or disabling some of the delaying tactics which are widespread in practice.

One such change relates to petitions to delegate court jurisdiction (motions to have a case adjudicated by another competent court, e.g., because of reasons of convenience and costs). Until now, the competent court has been obliged to suspend the proceedings until a decision on such a motion was made by the highest court of the specific branch of that jurisdiction. In practice, this might cause delays of several months due to the case-load of the Supreme Court or the High Commercial Court. As some parties used such a motion only to gain time, new rules provide for the continuation of the trial while these courts decide on such motions.

The second, similar change excluded ungrounded challenges to judges, or general requests for the exclusion of all the judges of a certain court, or repeated challenges. The judge who is challenged may now exceptionally continue to act if he/she considers that the challenge is manifestly ill-founded and aimed at obstructing the proceedings.⁴⁶

7.3.3 New rules of delivery

In the opinion of many, one of the most important sources of inefficiency has been inefficient rules and practices relating to the delivery of written communications. Problems in the application of these rules have provided parties with abundant opportunities to obstruct proceedings by avoiding delivery.

Admittedly, the rules of delivery in the Code of Civil Procedure originated in the nineteenth century. They were better adjusted to rural areas than to the new cir-

⁴⁵ All the more so because the concept of the 'abuse of rights' is unclear. Some even argue that this term is a *contradictio in adiecto*, since 'rights' refer to actions that are generally permissible and available to parties, and therefore these parties cannot be punished if they make use of them. See 'Abuse of rights in the Civil Proceedings', *Newsletter of the Forum of the Zagreb Law School*, 2002, p. 2 (available at <<http://www.zakon.pravo.hr>>).

⁴⁶ Changes to Articles 73 and 74 Code of Civil Procedure. If a petition is manifestly ill-founded and vexatious, the court is also authorized to fine the applicant and rule immediately on the costs incurred by the other party.

cumstances of urban life. Also, rules about delivery insisted to a large extent on personal delivery of the communication to the addressee, while some other types of delivery, e.g., substitute, presumed or fictional deliveries were provided only for very exceptional cases. However, it should be noted that the abuse of existing rules was intensified in practice through extreme formalism in their application and reluctance to use some of the alternative methods offered by the law.⁴⁷

One more reason led to inefficiency in delivery in spite of elaborate rules of court delivery; in practice it was carried out by postal employees. As postmen, they were not trained in the application of the rules of court delivery. They, therefore, often confused postal rules with rules of court delivery, resulting in irregularities. Court bailiffs, who existed as well, were not adequately trained, equipped and motivated either for the adequate carrying out of their job.

For example, in the typical situation of delivery in cities, delivery was carried out on 'a working day, by daylight' when there was often no one at home, if both spouses were employed and the children went to school. Other persons who were allowed to receive delivery in place of the addressee were often not helpful – the concierge has practically died out in residential buildings in Croatia, and neighbours in urban areas (if they could be found at all) were rarely ready to assume the risk of accepting court deliveries. In such situations, a letter which could not be delivered would be returned to the court and the delivery would be repeated – even an unlimited number of times – while the proceedings as a rule came to a halt.

All these reasons induced the authors of the Amendments to change the rules of delivery quite extensively. The new law thus introduces a series of new articles authorizing alternative modes of delivery.

One new type of delivery anticipated by the law is delivery through a public notary. This possibility is conditioned upon a request from the party who will bear the expenses of notarial delivery. The second possibility consists in delivery to an address agreed on by the parties (including delivery to a person stated in the agreement). However, for the validity of such an agreement concluded before the filing of a suit, a written form and a certified signature of the defendant are required (except in commercial agreements). The third possibility consists in using private delivery services ('legal entities registered in this country or abroad for the delivery of written shipments'). However, for their usage a previous written agreement is also required, as is the case for the delivery to an agreed address. During the proceedings (but not before!) parties may agree that pleadings be directly exchanged between parties by registered mail. If both parties are represented by attorneys-at-law, such a manner of communication can be established by the court.⁴⁸

The new delivery methods created by the 2003 Amendments were surely designed to accelerate civil proceedings. It seems likely, however, that the changes were again incomplete.

⁴⁷ E.g., the power of the court to determine the delivery of communications 'in another place and/or in another time' from those prescribed by the law. Article 140, paragraph 2 Code of Civil Procedure (now amended as paragraph 3).

⁴⁸ See the new Articles 133a to 133d Code of Civil Procedure.

Although only their use in practice will be able to verify their usefulness, it seems that certain of the changes are in fact more restrictive than permissive. It can even be argued that some rules go less far than what had been established by the practice of individual courts. Postal delivery remains the prevailing method of delivery, and among other possibilities, delivery by a notary public is openly favoured but at the expense of the parties and without any real guarantee of success.⁴⁹ As concerns the remaining three methods (agreed address, private delivery services, direct exchange of pleadings) the requirement of a prior written (and certified) agreement between the parties might seem more of an obstacle than an encouragement. Even more importantly, if there is no prior agreement in writing (which is most likely the case in most litigation), the new rules do not recognize the validity of delivery through today's very widely-spread, reliable and standard commercial delivery services (DHL, FedEx and similar organizations), thereby potentially reversing the case-law of some courts that had already begun to recognize them as an alternative of equal force to postal delivery. There is also no progress towards the recognition of other social realities, e.g., new technological means of communication (e-mail), not to speak of some already old-fashioned ones (fax).

For these reasons it will be interesting to see whether these new provisions have any positive effect in accelerating proceedings. In my view, the chances for progress are greater with respect to some other changes, e.g., provisions about the delivery to persons performing a registered activity (companies, institutions, merchants) to whom it will be possible to carry out a constructive delivery (delivery to a notice-board of the court) if delivery is not possible at the registered address. Another provision intended to strengthen procedural discipline is the express obligation of the party to inform the court about every change of address during proceedings and later, up to six months after the coming into force of the legal validity of the decision.⁵⁰

In general, it still seems that the changes in relation to delivery are potentially the most controversial (and maybe the weakest) part of the reforms directed at accelerating judicial proceedings. It may easily happen that some past systemic difficulties could even become greater after the introduction of these changes - for example as the result of a combination of extensive, technical and highly formalized rules of delivery and the use of regular postal employees who are not trained in applying them. Expectations that delivery will become inexpensive and would become efficient after the new changes may therefore turn out to be an illusion.

⁴⁹ So far, public notaries in Croatia have not had any role and/or experience in the delivery process. Given the wide range of their other functions, and plans to make this range even wider by new laws (hearings in inheritance proceedings, actions in enforcement proceedings) it is not likely that delivery will be at the center of their interest in the future. Therefore, it is not likely that notaries public will become good bailiffs or *huissiers de justice*.

⁵⁰ New Article 145 Code of Civil Procedure.

7.3.4 Sanctions against procedural inactivity by parties, default judgment

The strengthening of the accusatory structure of civil proceedings and procedural discipline and the attempt to concentrate the main hearing also found their reflection in the possibility of attaching negative consequences to inactivity on the part of the defendant. Until 2003, default judgments could be given only at the preliminary hearing or the first main hearing provided that the defendant had failed to contest the claim until that time, either orally or in writing. By introducing a universal obligation to submit a defence by way of a written statement, a new type of default judgment was made possible. This new default judgment (*presuda zbog ogluhe*) will replace the old default judgment (*presuda zbog izostanka*) in all cases in which the defendant is ordered to submit a written statement of defence but fails to do so within the time-limit determined by the court. Both default judgments will be based on the presumption that a passive defendant acknowledges the claimant's factual allegations.⁵¹

A defendant's obligation to submit his defence will consequently be shifted to an earlier period, i.e., generally to 15 to 30 days after he has received the statement of claim. The intention of the amendment was to stimulate an early presentation of their case by both parties, and to accelerate procedures, in particular if there are no serious legal and factual issues to be resolved, but the suit is the consequence of other circumstances (the defendant's negligence, difficulties in securing payment, etc.).

Indeed, as the obligation to reply to the claim still does not entail an obligation to submit all available defence arguments and evidence in favour of the defendant's allegations, it can be presupposed that the current, very permissive practice with respect to late pleadings will not be significantly changed. There is also no guarantee that, just as today, 'empty shells', i.e., statements of defence that do not contain any substantial argument, but merely a denial of the claim, or even purely procedural matters (e.g., an application for the adjournment or prolongation of deadlines, an announcement that 'a comprehensive reply to the claim will be given later on', etc.) will be rejected (i.e., refused to be considered as a substantial presentation of the defence). The continuation of such practices could significantly restrict the effect of the changes on the concentration and acceleration of the proceedings.

The negative consequences of the defendant's inactivity will further be limited to the very initial stages of the proceedings, as default judgments can be given only prior to the joinder of issue. Subsequent defaults can be penalized only indirectly, if the court reaches a judgment based on unilaterally presented facts and evidence. The efficiency of such indirect sanctions for passivity of the parties in the proceedings will depend to a great extent on whether the adversarial principle will really be accepted and implemented by judges and the courts.

⁵¹ See Article 180 of the 2003 Amendments (new Article 331b).

7.3.5 The issue of party representation – The fight over the legal monopoly of registered attorneys

The most disputed point in the discussions that surrounded the reform of civil procedural law related to the right of representation and self-representation in civil proceedings. The main issues were whether parties should be admitted to appear in person before the court, and who should be entitled to represent them.

The Code of Civil Procedure of 1976 was very permissive with regard to representation and self-representation, enabling parties to defend their interests directly and without any representative. In choosing a representative, the party was permitted to retain any person, regardless of his/her qualifications and affiliation to a profession or professional group, as a representative in the proceedings. From the very announcement of the reform of civil procedural law, the Croatian Bar Association lobbied energetically for the introduction of a monopoly on representation (i.e., that only registered attorneys-at-law might be selected as representatives) and for the introduction of mandatory representation (*Anwaltszwang*) in potentially all types of litigation. This position encountered resistance, especially among representatives of corporate lawyers who would also have been affected had the proposal succeeded. The debate lasted several years and was reflected in the professional periodicals.⁵² Irreconcilable opinions and the impossibility of reaching a satisfactory or even a compromise solution regarding this question was one of the main reasons why reform of civil procedural law was delayed for several years.

In the end, the current provisions and the *status quo* was in practice maintained in most courts, with only marginal limitations being introduced. The possibility of self-representation remained, but the circle of persons who could be representatives in litigation was narrowed. As a rule, if a party engages a legal representative, that legal representative must be an attorney-at-law whose monopoly in claiming fees for such a function was confirmed. Yet, as an exception, individuals have retained the right to appoint legal representatives from within the circle of their close relatives (spouses and children/parents). Legal persons (companies) further retained the right to be represented in legal proceedings by their corporate lawyers, or even any other of their employees.⁵³

Although many arguments were offered to prove that qualified and professional representation would significantly strengthen procedural discipline and accelerate civil proceedings, it seems that the point has not as yet been proven. The majority of such arguments were tainted by the clear self-interest of their proponents, and impartial observers seem not to be convinced as to the final outcome. In reality, despite the absence of any obligation to engage an attorney in civil litigation, parties in Croatian civil proceedings have so far in most cases engaged lawyers if they were

⁵² Among others see M. Giunio, *Pravo i porezi*, 9, 1997, p. 24-29; M. Hanžeković, *Pravo i porezi*, 11, 1997, p. 1127-1129; J. Kos, *Pravo i porezi*, 12, 1997, p. 38-42; M. Kovač, *Tvrtka*, 9, 1996, p. 51-53. For a synthesis of the discussions about mandatory representation see A. Uzelac, 'Obvezatno odvjetničko zastupanje' ('Mandatory representation by attorneys'), *Pravo u gospodarstvu*, 37, 2, 1998, p. 149-185.

⁵³ See the amended Articles 89-91 Code of Civil Procedure, including the new Article 89a.

able to afford legal services. On the other hand, there may be some truth in the argument of those who claimed that the participation of lawyers in the litigation process does not necessarily have an accelerating and simplifying effect on proceedings. Spectacular results could therefore hardly be expected even if an absolute duty to engage a lawyer in litigation had been imposed. Party representation of a high quality will become indispensable not as the result of a statutory requirement and the creation of a professional monopoly but only if and when inquisitorial psychology and attitudes are abandoned, and adversarial elements accompanied by the intended concentration of the proceedings are implemented.

7.3.6 Procedural discipline in relation to the court

Mutual accusation turned out to be a very popular strategy for explaining inefficiencies in the judicial system as between the different groups of legal professionals (attorneys, judges, experts etc.). Amendments to the Code of Civil Procedure, although supported by a slogan that demanded increased party discipline (and/or discipline of their lawyers) and fighting against procedural abuses, in fact admitted that nobody is immune from responsibility – not even courts or judges. Consequently, several new norms address procedural discipline.

Particularly typical cases of delays in civil proceedings (typical also as cases of the disrespect of procedural norms) were linked to legal deadlines in the process of the giving of judgments. Although the law prescribed that judgments had to be made and communicated orally to the parties immediately after the conclusion of the main hearings, this happened only in extremely rare cases. The pretext for failing to observe this norm was an exceptional option that allowed the postponement of decision-making ‘in more complex cases’ in which judgment would not be announced orally, but only delivered to the parties in writing. According to the same provision, a written judgment should be finalized and sent to the parties within eight days of the conclusion of the main hearings.⁵⁴ However, this deadline – generally considered unrealistically short – was almost never respected. Instead, dispatching the judgment to the parties took place often months, even years, after the end of the hearing.

The 2003 Amendments tried softer methods to achieve acceleration and to raise the procedural discipline of the trial judges. The time-limit for finalizing and dispatching the judgment was extended from eight to thirty days, with the possibility of another extension of up to thirty days. The decision on the extension will have to be made by the Chief Justice (Court President). The consequences of failure to meet these deadlines are not further elaborated in the Amendments, thereby indicating that the only option for rectifying such an omission will be disciplinary proceedings initiated against judges who do not observe them. Whether this will be a sufficient sanction greatly depends on the future actions of the Court Presidents who are authorized to initiate disciplinary proceedings, and on the support of the

⁵⁴ See Article 335 Code of Civil Procedure.

State Judicial Council, which decides on the disciplinary responsibility of the judges.

7.4 *Reform of the system of legal remedies*

7.4.1 **Changes in relation to appeal**

Considering that delays occur most often in appellate proceedings, it might be said that the biggest news in the 2003 Amendments lies in the fact that, unexpectedly, the appeal itself has undergone very few changes.

I already mentioned the changes relating to the right to introduce new facts and evidence at appellate proceedings and the exceptional possibility that a single judge will make decisions at appellate proceedings.⁵⁵ This is probably the most far-reaching breakthrough in appellate proceedings. The majority of the other changes are only of a limited character. Smaller changes in the list of fundamental procedural errors ('reasons for absolute nullification of the judgment') were mostly caused by other amendments, e.g., as regards the composition of the court tribunal at the trial stage. Some errors that a court had to take notice of *ex officio* in appellate proceedings now have to be invoked by the parties, as another measure of strengthening procedural discipline and the adversarial structure of proceedings.

However, in two important aspects the changes did not go deep enough to penetrate to the neuralgic points of the process – those that may be counted among the important causes for the duration and efficiency of appellate proceedings. One change, at least on the formal level, may even be seen as a capitulation in comparison with the previous law.

As demonstrated in some of the cases against Croatia before the European Court of Human Rights,⁵⁶ the reason for violations of the right to a fair trial within a reasonable time often relate to the fact that appellate courts generally restrict their intervention to annulling the decision of the lower court and remanding the case for retrial. Although the number of annulled decisions may diminish as a result of the reduction of the inquisitorial powers of the court, enough space is left for the old inefficient practices to survive. Higher courts still can (and must) return the case to the court of first instance when factual and/or procedural errors are found, and the number of times that a case may be returned for rehearing is still not limited. The possibility of holding second instance hearings, which had long existed in theory, although it was rather infrequently used in practice, has now simply been deleted from the text of the law. One might state that this move presents a recognition in practice of the defeat of efforts to open the doors of appellate courts to the public, and to introduce direct, transparent, and responsible justice into appellate courtrooms.

Thus the change that might have been effected, but is still missing, relates to the possibility of hearing the voice of the parties at second instance proceed-

⁵⁵ See *supra*, chapters 7.2.3 and 7.2.1

⁵⁶ See, e.g., the Mikulić and Rajak cases (*supra* note 3).

ings on a regular basis. Admittedly, as a replacement for the second instance hearing, the 2003 Amendments provided that the 'court of second instance, when it finds it necessary, may summon parties or their representatives to a session of the panel of the appellate court'.⁵⁷ But that remains only an option, and the court does not have to use it. It is not likely that appellate judges will summon the parties more often than they ordered second instance hearings – and that was almost never. Even if such 'half-open'⁵⁸ sessions of the court will be held more frequently, the rights and the roles of the parties and their representatives at those sessions remain unclear.

7.4.2 Changes in other ('extraordinary') legal remedies

Amendments to the Code of Civil Procedure did not abolish entirely the special legal remedies that may be launched against *res iudicatae* (the so-called 'extraordinary' legal remedies). The most significant change consists in abolishing one such remedy – the so-called 'request for the protection of legality' (*zahtjev za zaštitu zakonitosti*) by the State Attorney. This legal remedy was introduced after World War II into Croatian law as a result of the reception of Soviet law, and was clearly motivated by the doctrine of (socialist) state paternalism and the protection of State ('public') interests in private law disputes.⁵⁹ In the past three decades, this remedy has lost part of the background of State (public) interests and has become more an objective tool to harmonize the law and prevent illegalities. But, by strengthening the adversarial elements and the parties' role and position (as well as their responsibility for the course of proceedings) this legal remedy became systemically unsuitable and potentially dangerous. The official explanation for deleting the rules on the request for protection of legality was the 'removal of State controls' in civil proceedings, but it also pointed to some practical problems that had been caused by the fusion of the services of the State Defender's Office (the State Attorney who represents the State as a party to civil proceedings) with the service of public prosecution and the representation of public, general interests in all types of cases. As regards the acceleration of civil proceedings, not very much can be expected from abolishing this legal remedy because it was not used widely in practice.

The second extraordinary legal remedy that could bring the case before the Supreme Court ('revision', secondary appeal) also experienced important alterations. This legal remedy against final judgments of appellate courts was changed in a direction that is, to a certain degree, contrary to the attempt to accelerate proceedings.

⁵⁷ New Article 362 paragraph 2 Code of Civil Procedure.

⁵⁸ As opposed to the so-called 'closed' sessions of the appellate judges where neither parties nor the general public have access. Deciding in closed sessions was the rule in second instance proceedings in Croatia. I fear that nothing will really change in this respect.

⁵⁹ See S. Zuglia, *Građansko procesno pravo Federativne Narodne Republike Jugoslavije (Civil procedural law of the Federal People's Republic of Yugoslavia)*, Zagreb, Školska knjiga, 1957, p. 570-573 (note 5 on p. 573). S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo, supra* note 16, § 153.

Until the 2003 Amendments, secondary appeal was admissible only if a set of conditions provided by the law was met, e.g., with respect to the amount in dispute or the type of case. The Supreme Court could neither admit cases not covered by those conditions, nor refuse to hear a case if it was admissible under the express rules of the law. The Amendments have for the first time introduced a discretionary power to decide on the admissibility of revision. This power is provided only in a positive, not in a negative direction, i.e., the court can decide to hear a case if it would otherwise not be admissible, 'if the decision on the merits depends on the solution of some issue of substantive or procedural law that is important for harmonizing the application of the law and/or the equality of the citizens'.⁶⁰ The justification for introducing such a discretionary power was found in the constitutional position of the highest Croatian court that, among other things, should also take care for the uniform application of the law. Although the official explanation of the new rules emphasizes the reaffirmation of the constitutional powers of the Supreme Court as the only goal, pointing to similar Austrian models,⁶¹ it seems likely that some other factors also contributed to the widening of the scope of 'revisable' cases. Part of the motive may be that in 1999, under previous changes in the Procedural Code, the monetary thresholds for this remedy were raised considerably, allowing only the most valuable cases to be heard.⁶² An impression was thereby created in certain circles that a majority of cases remained outside the reach of the third instance, and as a reaction, a way to loosen the tight rules was found.

While the new provisions might contribute to the harmonizing activities of the Supreme Court in certain cases, certain doubts remain as to the application of the *certiorari* system. The bill presented to Parliament provided that the Supreme Court was to decide on the admissibility of this recourse. However, at the last moment, the provision was altered, so that leave to apply for revision must now be obtained from the appellate courts, i.e., the very judges who passed the judgment. It seems that the change was prompted by the fear that new 'exceptional' revisions would slow down, or even block, the Supreme Court's activities. However, since the decision lies with the appellate courts only now, new dangers loom in that the various courts and judges will have different approaches. The outcome cannot be predicted and might range from a total absence of admissible cases to a great influx (or even a flood) of new 'revisions'.

8. Conclusion

In this text I have provided an account of recent efforts to accelerate civil proceedings in Croatia, focusing on the reform of civil procedural law. However, this analysis of the legislative reforms and their background may demonstrate another fact:

⁶⁰ Amended text of Article 382, paragraph 2 Code of Civil Procedure.

⁶¹ See Explanatory Notes, at 2(II).

⁶² By amendments from 1999 (Official Gazette 112/99) the threshold of admissibility was raised from 3.000 Croatian Kunas to 100.000 Croatian Kunas (from € 400 to over € 13.000) and in commercial disputes from 8.000 Croatian Kunas to 500.000 Croatian Kunas (from about € 1000 to almost € 70.000).

that mere changes in legal provisions are hardly sufficient to produce effective changes in the existing situation. The history of the development of Croatian civil procedure (and other branches of law) offers more than enough examples of failed reforms – imported models that have started to live a life of their own, sometimes entirely different from the original plans and aims.

New amendments to the Code of Civil Procedure, planned as the most far-reaching reform of the law of civil litigation in the past fifty years, raise doubts as to what their real achievements are likely to be in practice even before they are officially adopted and implemented. There are two main reasons for this. Firstly, the provisions of the new legislation have ultimately gone only half-way, changing many details, but leaving unaffected some of the principal causes for delays and the unreasonable duration of process. The second reason relates to the fact that the changes basically attempted to establish – or perhaps, in rather stronger language, form – the same rules and principles that were already contained in the old law, but that were not implemented in practice. In so doing, one starting point remained unclear – whether the lack of respect and obedience for one set of legal provisions could be cured by changes in these provisions alone.

Yet, it would be wrong to conclude that, whatever happens, acceleration is impossible. The ideal of a fair trial within a reasonable time is too valuable to be abandoned. However, deep structural changes may be necessary to effectively guarantee this human right – changes in people, institutions and routines. As presented in this text, the period of transition from patterns of the socialist State to modern liberal democracy may be considerably longer and more difficult in the area of the judicial system. In Croatia, as in many other countries in transition, the path towards a highly competent, responsible and efficient Judiciary is often beset by paradoxes. The new approach, sensitive to the needs of citizens for an efficient Judiciary, needs new judges, ready to embrace it, as well as radical change in the state of mind of every other participant in the judicial process. On the other hand, it is exactly the ideology of a modern liberal State that has helped the survival of the old patterns and psychology, by stretching the principle of the independence of the Judiciary to the dominating layer of jurists formed and educated under wholly different circumstances, when slowness of justice was considered to be a virtue, and acceleration a dangerous exception. The vicious circle of self-reproducing patterns of delays and inefficiencies has to be broken. Whether Croatia will enjoy the human right to a speedy and effective justice system ultimately rests on the ability of the country to break that circle.