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PUBLIC AND PRIVATE JUSTICE: THE CHALLENGES OF RATIONAL ASSESSMENT OF PERFORMANCE IN THE CONTEMPORARY JUSTICE SYSTEMS

1. Challenges of Assessment: How to make Hard Statements on a Soft Ground?

On November 8, 2006 the Commission of the European Communities issued the Croatia 2006 Progress Report.[1] The purpose of the report was to review Croatia's capacity to assume the obligations connected to future EU membership. Among the areas which deserve more attention in the process of accession to the EU, a prominent place was given to the reform of the judicial system. The Report noted that the judicial reform strategy 'has begun', with 'some progress' in reducing the case backlog, but that 'reform is at an early stage and the judicial system continues to suffer from severe shortcomings'.[2]

The report indicated some areas for improvement. The actions that need to be taken were summarized as follows:

- to reduce significant case backlog;
- to reduce the length of court proceedings;
- to improve case management;
- to rationalize the court network;
- to ensure proper enforcement of judgements;
- to reform legal aid;
- to ensure impartiality in the procedures for the appointment, training and disciplining of judicial officials.

In conclusion, the Report stated that 'Croatia is still some way from enjoying an independent, impartial, transparent and efficient judicial system'. This statement was a serious warning, all too clear for the otherwise very diplomatic language of

1 COM(2006) 649 final.
2 Commission 2006, p. 8.

this document. The Report further warned that the establishment of such a judicial system 'will be an important indicator of Croatia's readiness for eventual [EU] membership …'.[3]

In this paper, we will neither deal with the rather interesting findings of the Croatia 2006 Progress Report, nor with the particular Croatian problems with the administration of justice.[4] Instead, the intention is to use the EU Commission statements on Croatia to raise some general methodological issues connected with every public debate devoted to the functioning of a concrete justice system.

These general methodological issues are best comprised by the following questions:

- To what extent can an assessment of a national justice system be legitimized as objective, well-founded and rational?
- What are the criteria for the rational assessment of a particular justice system?
- Are contemporary European justice systems comparable, and, if so, what should be the basis for comparison?

We would submit that the answers to these questions are neither trivial nor self-evident. While in so many other areas convergence has led to standardization and harmonization, contemporary justice systems in Europe and elsewhere may still be viewed as fortresses of parochialism. Every outside observer who ventures to undertake comparative research of judicial systems and their functioning may become perplexed by immense differences and colourful variations in institutional settings, approaches and terminology.

Indeed, in such a situation it is easy to disregard unpleasant assessments as biased and unfounded. In fact, the assessments from the cited 2006 Progress Report were mostly described by Croatian opinion-makers as political statements, and it appears that the reactions to them were largely political. While the political factor is not to be underestimated, the question remains whether political actions taken to produce the *impression* of reform are sufficient to cause any real change, and, indeed, whether – without objective means of evaluation and assessment – one can even be sure whether *any* change has in fact taken place.

To clarify, let us use the following hypothetical example.[5] We start with the initial political assessment that the court network should be rationalized. On our agenda we have a proposal that two or more specialized courts should merge with other courts. Without clear criteria of assessment, any action taken to meet this objective may be presented either as an important improvement (i.e. as a positive

3 Commission 2006, p. 8.

4 More on these issues can be found in the paper by Enderlin *et al.* in this volume.

5 Although hypothetical, this example bears some similarities with the findings of the EU CARDS 2002 Twinning programme for Croatia. See 'Support to a more efficient, effective and modern operation and functioning of the Croatian court system', Activity B 1.1., Distribution and size of the courts, <http://www.pravosudje.hr> and <https://quickplace2.tietoenator.com/QuickPlace/cards2002/Main.nsf> (last consulted 20 March 2007). See also Enderlin *et al.* in this volume.

change), as no improvement at all (i.e. as a neutral action or the maintenance of *status quo*) or even as a negative change. So, for instance, a change in territorial jurisdiction that reduces the number of courts may be presented as the effective use of resources that enhances access to justice, or as reshuffling that effectively changes nothing, or even as a waste of effort, time and money that impairs access to justice for the citizens. As all of these arguments might be encountered in the public debate, the neutral/objective/rational assessment of the justice systems inevitably raises the question of which criteria we might use to achieve a well-informed consensus for our choice.[6]

Of course, the result of the discussion on criteria might ultimately lead to relativism – to the conclusion that all of the possible methods of assessment are, in fact, subjective, and that no firm, universal criteria can exist in this area. Lawyers always have been prone to relativism, so this result would be no surprise. Statements like 'delays have always existed, and will exist in courts', 'two lawyers, three opinions' demonstrate this affection for 'soft' grounds – an affection that may be deeply rooted in the very nature of the legal profession. Therefore, especially if one encourages the debate among legal professionals, there is a high likelihood the debate will end in an agreement to disagree.

The attraction of relativism does not end here. This polite consensus of relativists is not only a kind of professional deformation of a legal *Fachidiot* who likes to be in the position to advocate, with equal conviction and vigor, two diametrically opposite theses. There may be another, deeper existential reason – the one rooted in self-interest. As many jokes about lawyers demonstrate, the interests of justice cannot unequivocally be equalized with the interests of justice professionals. Thus, while legal certainty might be among the ideals of justice, legal uncertainty produces more work and therefore more profit to attorneys around the globe. It may explain why there are, on average, among legal professionals so few sincere proponents of more comprehensive reforms. On the other hand, legal professionals are among the most influential opinion-makers and, ultimately, they are invited to be the driving force and implement the very reforms that they meet with scepticism. Their position, regularly, is that they are the only real experts who are acquainted with the functioning of the justice system, while everyone else is, at best, benevolent but uninformed, i.e. an *amateur*.[7]

6 The issue of territorial jurisdiction was found to be important for access to justice in the report produced for CEPEJ by B. Hess, D. Chemla and A. Lindgren. Some criteria for the allocation of courts and cases were noted, but the conclusion was 'that in most countries issues relating to territorial jurisdiction followed traditions, cultures and historical reasons and that, as a consequence, in most countries, both the number of courts and their location remained the same throughout several decades'. Hess, Chemla & Lindgren 2003, p. 36, at 17.

7 The commitment to reforms also depends on the methods of selection and recruitment of judges and other judicial professionals. Paradoxically, this commitment may be higher in places where the justice system functions better. If the selection and the role of legal professionals suffers from far-reaching flaws, the likelihood that those who have profited from it will be against the change is higher. For an evaluation of this statement in respect to Croatia, see Uzelac 2000, p. 23-66; Uzelac 2003, p. 303-329.

The purpose of this text is to come to a rather different conclusion. First, we hope to demonstrate that objective criteria of evaluation and assessment in the justice area are, in fact, imaginable and – in spite of the fact that current methodologies and approaches are far from perfect – have good chances to evolve in the next few years. Second, we contend that, for establishing, monitoring and adjusting these criteria, a special task force is needed, which should come from the outside, and not from inside the closed circles of judicial institutions. Justice is too precious to be left to justice professionals only. As the saying *nemo iudex in causa sua* indicates, an outside view of the dispute is the only guarantee for a proper assessment. In the same sense, an outside view of the functioning of justice is the only guarantee for its proper evaluation. Which outside view? This text will be devoted in part to the issue of 'insiders' and 'outsiders' in the justice system, and there we will suggest the need for establishing a new discipline of *justice system administration* as a special professional, scientific and academic field of research (the science of justice system assessment) which is clearly distinguishable, both in personal and systemic respect, from the day-to-day administration of justice.

2. Assessment and Reform

The notion of 'judicial reform' mentioned in the Croatia 2006 Progress Report, is now familiar to a number of jurisdictions across Europe and the globe.[8] Most countries, in fact, undertake some reforms of their national justice systems, for diverse reasons, either internal or external. Internal, national reasons include some generally accepted observations, statements and goals within a particular system, such as the need to accelerate proceedings and/or improve their quality; the wish to cut the costs of the system for the state or for the citizens; or the desire to enhance communication among the actors of the justice system; or to adjust to on-going social changes. Among the external factors, there are those resulting from the process of international integration (such as the EU), involving the need to adjust to a new layer of normative acts (e.g., EU directives) and/or to the intervention of the supra-national courts (such as the European Court of Human Rights in Strasbourg, Court of Justice in Luxembourg or international tribunals in the Hague or Rome). Finally, as the process of globalization advances, some of the reasons are mixed, as cross-border relations and transactions with an international element become increasingly apparent in every jurisdiction, and all national jurisdictions face the same global threats of pollution, war and terrorism.

The ever-increasing need for reforms in justice brings along the need for a universally acceptable methodology and makes greater the need to establish universal assessment criteria. Without objective and rational criteria of assessment, it is hard to imagine rational reform plans for the justice system.

8 For a comprehensive bibliography on the topics of legal and judicial reform see Decker & Messick 2005.

There are several elements that, taken together, make the assessment rational. Here is a brief summary of some key features for evaluating whether the assessment is objective:

- transparent starting points;
- defined goals;
- clear criteria and performance indicators;
- impartiality and integrity of assessors;
- continuing analysis, dialogue and discussion;
- institutional structures for assessment;
- long-term planning and monitoring;
- commitment to the goals of the process.

Each of these elements would deserve a more elaborate presentation. However, this is not something that we attempt in this paper. For the time being it suffices to say that not all of these elements of rational justice reform are present in the justice systems that undergo the most intensive changes. We may comfortably make such a statement at least in respect to the more limited geographic area of Central and South-Eastern Europe – the area that is sometimes connected to the notion of 'countries in transition'. Croatia may be a representative example, especially in the light of the fact that, irrespective of the statements in the Progress Report, it is still among the more advanced and more active countries in the region (and the only one with the EU Candidate status). The Progress Report may have been too kind when speaking of the beginning of the 'judicial reform strategy', as the existing strategy, belated for at least a decade, was announced and accepted by the government only at the end of 2005[9] and approved by the parliament in February 2006.[10] Although this document attempts to declare goals and define an action plan for its implementation, it is still very far from the idea of transparent starting points; defined methodology; broad discussion and dialogue of all stakeholders; and reliable ways of steering the process and monitoring its achievements.[11]

3. Dual Approaches: 'Insiders' and 'Outsiders'

The elements of a rational approach are not the only relevant aspects that influence the process of assessment. All key features enumerated *supra* are decisively determined by unspoken starting premises – by the perspective of those who shape and undertake the evaluation process. In a slightly simplified, model-type manner,

9 The government submitted the text of the Strategy to the Sabor (parliament) on 6 October 2005. This was not the first text of this kind – already during the late 1990s the then Minister of Justice issued a similar document, without much impact.

10 Proceedings of the 18. session of February 3, 2006 (Croatian *Sabor*). For the text of the strategy and the discussion about it, see Barbić 2006, p. 73-162.

11 On several problematic aspects of justice reform in Croatia *cf.* Uzelac 2004, p. 105-130; Uzelac 2004a, p. 283-313; Uzelac 2002, p. 37-80.

we would like to distinguish two main types of approaches to the evaluation of justice systems.

One approach is to focus on the judicial institutions and their personnel. This approach predominantly takes into account the interests of judicial bodies that conduct legal proceedings – the courts, other tribunals, and their collateral parts and services – as well as the interests of those who are in charge of these bodies and work in them – the judges, the administrative staff of the courts and, to a certain extent, others who visit courts on a more or less regular basis (e.g. lawyers or experts). Therefore, we will call this approach the '*insiders*'' *approach*, or a traditional, *institution-oriented approach*. As indicated in the name, this is the approach that prevailed in the past, and for most countries still is the dominant (if not only) approach to the evaluation of justice systems.

The other approach is to concentrate on the social role and function of judicial institutions. If we regard the purpose of the justice system as the resolution of legal disputes (at least limited to the more numerous, although publicly less visible civil cases), then the methods of evaluation should investigate the extent to which the courts have managed to fulfil the needs of those for which they ultimately work: the parties. The reference to 'parties' here should not be, as often in the institution-oriented approach, identified with the party representatives (professional lawyers), but with the citizens and legal persons who ultimately are (or should be) the *domini litis,* the masters (or owners) of the litigation. Therefore, this approach – the *'outsiders'' approach,* or the *user-oriented approach,* evaluates the interests of the public as a whole, and assesses the performance of the justice system as a public service shaped to fulfil an important need of the citizens: the need for justice. Although in matters of justice one may easily gain the impression that nothing has changed much over the centuries, this approach is, in fact, relatively novel, and has its roots only in the second half of the 20th century.[12] In most European countries, this approach is still unknown or suppressed, but it is slowly evolving, often mixed with the other, institution-oriented approach.[13]

Let us discern several typical differences between the two approaches.

The *institution-oriented approach* mainly monitors the difficulties that are burdening the institutional players and the institution as such. So, e.g., the principal way of monitoring court performance is to monitor its *caseload* (and, more generally, *workload*), with a view to ensure the smooth *case flow* and avoid *backlogs* of cases.[14] The performance indicator stemming from this way of monitoring is the ability to assimilate the incoming cases, measured by the ability to have the output rate of

12 See Uzelac forthcoming.

13 On European national systems of administration of justice as systems that 'should operate, and should be seen to operate, as a public service to all EU citizens', see Zuckerman 2006, p. 61.

14 For definitions of the terms *caseload* and *workload* see Compendium of 'best practices' on time management of judicial proceedings, CEPEJ document CEPEJ(2006)13 of 8 December 2006, p. 23. The term *backlog*, defined in the same document as 'quite ambiguous', is used here in a more narrow sense – as the difference between the number of cases received and the cases disposed of in a certain period of time.

closed cases as close as possible to the input rate of new cases. A very similar methodology may be applied for the evaluation of the work of particular units within the court, or the performance of individual judges. The success of the process is evaluated by the product, and, ultimately, the product delivered is the decision by which the case is closed for the particular court.

Of course, just as in any factory, there may be instances of 'failed products'. In the courts, this corresponds to the decisions that are struck down or changed on appeal. In order to avoid such failures, special attention is paid to the uniform application of law and the consistency of judicial decisions, which has precedence over the substantive result of the adjudication and its impact on the parties.

Also, in general, the way the case is disposed of is not decisive in this method of evaluation – a decision declining jurisdiction on technical grounds is regarded as equally effective (if not more!) as a complex judgement on the merits after thorough examination of all legal and factual issues. As cases are monitored only from the perspective of an individual institution, there is no need to have an insight into those parts of the proceedings that have preceded, or that will follow. Both for the first-instance court and for the appellate court, what matters is *their* part of the proceedings, and thus, e.g. a case that is followed by an appeal is in principle viewed as *two* cases (one case of the first-instance court, and the other of the appellate court). In short, the logic of this approach is to evaluate and measure the *resolved cases,* and not the *resolved disputes.*

On the other side, the *user-oriented* approach would assume the perspective of those who are under the jurisdiction of the judicial institutions – of those whose disputes these institutions are supposed to resolve. The concerns of this approach are *time, costs* and *final result and effect* of the judicial proceedings. The performance indicators that would correspond to this approach should, therefore, take into account *what is at stake* for the parties in the proceedings; *what are the costs* of dispute resolution for the parties; *the length* of the process of dispute resolution; and, finally, the *effectiveness* of the whole process and the time needed to *finally implement* the judicial decision. This approach thus attempts to evaluate and measure the efficiency of *dispute resolution* and its ability to realize the purpose of the process in the eyes of its principal stakeholders – the *users* of the justice system.

The main features of the two approaches are contained in the following table:

	Institution-oriented approach (insiders' approach)	*User-oriented approach (outsiders' approach)*
Perspective	*Institutions*: courts, tribunals, other judicial bodies *Stakeholders:* Judges, administrative personnel	*Users*: parties to proceedings (citizens, businesses), other interested parties *General public*
Indicators	Court caseload Court workload Backlogs of cases Success of appeals Consistency of judgements	Transparency and foreseeability Time needed to obtain legal protection of claims Costs of proceedings Efforts engaged Reasonableness and justifiability of end result
Purpose	To measure the ability to *resolve cases*	To measure the ability to effectively *resolve disputes*

4. Public Justice Assessment Examples: *CEPEJ* v *World Bank*

We will provide two illustrative examples of these two model approaches. Our intention is not to prove that the concrete evaluation mechanisms that exist in particular countries and particular courts can be clearly attributed to only one approach. On the contrary, due to the fact that the collection of data and statistical evaluation of the justice systems is regularly done by the Ministries of Justice, which should, in theory, as political bodies represent both the insiders (legal professionals) and the outsiders (public), it should be expected that the available performance monitoring has both components. Yet, the following two examples indicate that official performance monitoring in Europe still suffers from an apparent imbalance in favour of the insiders' approach, with important *lacunae* in regard to data that would reflect the user's perspective. In such a situation, the compilation of data and monitoring from the outsiders' perspective is left to external bodies, which are often not close enough to the sources of information and therefore cannot systematically fill in the vacant space.

The first example deals with the ability of the European justice systems to monitor one of the most essential indicators from the perspective of the users of the justice system – the *length of judicial proceedings*. Notorious statements, like 'justice delayed, justice denied' and the well-publicized right to trial within a reasonable time, would imply that one of the first tasks of the bodies responsible for the organization, conduct and oversight of judicial proceedings is the monitoring of their timeframes. Yet, even the first pilot evaluation of European judicial systems, developed by the European Commission for the Efficiency of Justice (CEPEJ), demonstrated that this is not the case.[15] During the evaluation process, complete and accurate data was collected on institutional issues, e.g., numbers of courts and legal professionals. However, when it came to length of proceedings, the results were completely different. The report on the results of the evaluation scheme stated

[15] More on the first round of CEPEJ Evaluation in Uzelac 2006, p. 41-72.

that '… the processing time of cases brought to court has become one of the key issues regarding the efficiency of justice' and emphasized that 'it has been a main point of attention for the CEPEJ, which has adopted a Framework Programme on this issue'.[16]

However, when analyzing the collected data on the processing time of three common types of court cases – robbery cases, employment dismissal cases and divorce cases, the Report had to conclude that 'only a few countries were able to report on the length of all three types of cases', in particular noting the lack of the ability to report on the total length of the proceedings.[17] The same thing happened in the next evaluation round in 2006 – as noted during the collection of data, 'especially with length of proceedings, most of the Member States could not present (reliable) data'.[18] This failure to collect or dispose of the information that is essential for the length of and delays in the relevant types of proceedings led the Task Force on the Timeframes of Proceedings (TF-DEL) to adopt the *Time management checklist* as the first document produced by this working group of the CEPEJ.[19] The purpose of this checklist was to give practical help to all those justice systems that still need to collect appropriate information and analyze relevant aspects of the duration of judicial proceedings. In fact, this problem was seen in a large majority of Council of Europe countries.

On the other hand, an example of evaluating justice systems from the perspective of users may be found in the World Bank studies of doing business in various countries.[20] The World Bank attempted to develop indicators of the business environment and applied them to all countries of the world, from Albania to Zimbabwe, presenting them in one, publicly accessible, database. The World Bank's focus is on the assessment of business regulations and laws, but also on the assessment of their implementation – as explained on the home page of the database, it should 'provide objective measures of business regulations and their enforcement'.[21] Under the topic 'Enforcing Contracts', the World Bank expert team is rating countries according to three criteria:

- number of procedures from the moment the plaintiff files a lawsuit in court until the moment of payment;
- time in calendar days to resolve the dispute, and

16 CEPEJ 2005, p. 52.

17 CEPEJ 2005, p. 54.

18 Meeting report of the Working party on the evaluation of judicial systems (CEPEJ-GT-EVAL), 4th meeting, 1-3 March 2006, document CEPEJ-GT-EVAL(2006)1E / 10 March 2006, at 26. See <http://www.coe.int/cepej> (last consulted 20 March 2007).

19 See *Time management checklist. Checklist of indicators for the analysis of length of proceedings in the justice system,* adopted by the CEPEJ at its 6th plenary meeting (7-9 December 2005), Strasbourg, Council of Europe Publishing, 2006, p. 4.

20 *Doing business in 2004. Understanding Regulation*; *Doing business in 2005. Removing Obstacles to Growth*; *Doing business in 2006. Creating Jobs*. *Doing Business in 2007. How to Reform* (all publications by the World Bank, the International Finance Corporation and Oxford University Press).

21 <http://www.doingbusiness.org> (last consulted 20 March 2007).

- cost in court fees and attorney fees, where the use of attorneys is mandatory or common, expressed as a percentage of the debt value.[22]

Some of the collected data are summarized in the World Bank reports. Thus, the report for 2004, *inter alia* notes 'the striking differences in the efficiency of contract enforcement across countries', and provides the example of Slovenia, where 'the creditor must complete 22 procedures and spend 1.003 days to get paid'. This is contrasted to Tunisia, where 'it takes only 14 procedures and 7 days to take a debt recovery case from filing to enforcement of judgement. The costs of the debt recovery were compared as well – assessed with $ 360 or 7.2% of the claim amount for Slovenia.[23]

The approach of the World Bank obviously starts from the user's perspective, and strikingly resembles the intent of the CEPEJ Time management checklist, insofar as it inquires into the total time, cost and effectiveness of the legal proceedings. Yet, the results of the evaluation appear to be somewhat puzzling, both on the negative and on the positive side. So, among the good news for 2006, the World Bank report announced that 'Serbia and Montenegro, the country with the third longest delay in 2003, went from 1.028 days to 635 days',[24] and concluded that this country successfully 'cut nearly 400 days off the time it takes to go through the court'.[25] The explanation for this revolutionary change was found in the legislation: 'Two new laws – on civil procedure and enforcement of judgements – were passed. These contain strict time limits. For example, a debtor has only 3 days to file an appeal after the judge rules. The judge then has 3 days to decide its merit. Previously this back-and-forth could take 10 months'.[26] It was also noted that Slovenia reduced delays. But, browsing the same database in 2007, the statistics demonstrate that the number of required procedures for Slovenia rose to 25, and the total time for enforcement of the claim to 1.350 days. All in all, comparing the data for former Yugoslav republics, the result would be the following:

Country	Bosnia & H	Croatia	Macedonia	Serbia	Slovenia
Procedures	36	22	27	33	25
Total time	595	561	385	635	1.350
Costs (% of debt)	19.6	10	32.8	12.7	15.2

In itself, nothing is wrong with the data presented. Yet, the result contradicts sharply the intuitions of every person knowledgeable in the field of dispute resolution in Central and Eastern Europe. The usual perceptions about the level of development which corresponds to the effectiveness of court practices might be deceptive, although it is still very improbable that court proceedings in Macedonia

22 <http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/> (last consulted 20 March 2007).
23 *Doing business in 2004*, *supra* note 20, p. 42.
24 *Doing business in 2004*, *supra* note 20, p. 62.
25 *Doing business in 2004*, *supra* note 20, p. 61.
26 *Doing business in 2004*, *supra* note 20, p. 62.

last 3.5 times less (and are twice as expensive) as court proceedings in Slovenia. However, the level of volatility of the collected data raises serious doubts. Knowing that real changes in the functioning of the judiciary happen rarely and slowly, the data about cutting the average judicial timeframes from 1000 to 600 days is hard to believe. The distrust in the presented facts is only strengthened by the references to the basis for the conclusion – the introduction of 'strict time limits'. As demonstrated by the situation in some post-Yugoslav countries, the normative changes and strict regulation of the timing of court actions in the legislation has hardly ever produced tangible effects.[27] Without realistic measurement and reporting, the pure legislative time limits are, to use the language of the CEPEJ Framework Programme, the *bogus solutions* that one should beware of.[28]

Therefore, the approach of the World Bank, though in principle acceptable and well-directed, suffers from far-reaching deficiencies.[29] The primary source of these problems may be the distance from the real facts of the adjudication, as the concrete, reliable data on duration of judicial proceedings and other aspects should be collected directly at the source – in the courts and other judicial institutions. Thus, the approach of the CEPEJ Time management checklist does not have any alternative. Six indicators for the analysis of the length of proceedings in the justice system[30] are aimed principally at all those who shape, oversee and execute the administration of justice: legislators, policy-makers, Ministries of Justice, court administrators and judges – precisely because no full insight and reliable information are possible without their co-operation. All other institutions and agencies, especially those who have such resources and will as the World Bank, may contribute by their particular findings, but cannot replace the lack of activity by the

27 E.g. all family laws passed in Croatia from the mid 1990s to today contained the 'strict time limit' that the first hearing *must* be held within 15 days from filing. See Article 269/2 ObZ (1998), NN 162/98; Article 265/2 ObZ (2003), NN 116/03. In spite of this rule, the available data shows that the average (median) time from filing to the first hearing was in total 108 days – data for the Municipal Court in Zagreb. See *National Center for State Courts, International Programs Division, Functional Specifications Report for Computerization in Zagreb Municipal Court of the Republic of Croatia, Municipal Courts Improvement Project – Croatia*, Sponsored by the U.S. Agency for International Development Delivery Order # 801, AEP-I-00-00-00011-00, September 2001 – unpublished, p. 12 (hereinafter referred to as: NCSC Report). See also Uzelac forthcoming, p. 4.

28 See CEPEJ Framework Programme: *A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe*, 11 June 2004, CEPEJ (2004) 19 REV 1 at 23.

29 Somewhat more reliable information, that provides 'a strong complement to Doing Business (DB) indicators', are to be found in the Business Environment and Enterprise Performance Survey (BEEPS), developed jointly by the World Bank and the European Bank for Reconstruction and Development (EBRD). The BEEPS, unlike the DB indicators, does not assess the contents of various government policies, rules and procedures, but only how concrete businesses (firms) assess such policies and their impact on their everyday business. See Anderson & Gray 2006, p. 30; Anderson, Bernstein & Gray 2005.

30 The indicators are: 1. ability to assess the overall length of proceedings; 2. established standards for duration of proceedings; 3. sufficiently elaborate typology of cases; 4. ability to monitor course of proceedings; 5. means to promptly diagnose delays and mitigate their consequences; 6. the use of modern technology as a tool for time management in the justice system. See *Time management checklist, supra* note 19.

responsible bodies – they can supplement, but not substitute internal assessment and monitoring mechanisms.[31]

5. Assessing Private Justice – Alternative Dispute Resolution as a *Litmus Test* for Public Justice

Nowadays, alternative dispute resolution is often mentioned in the context of justice reforms. However, we may legitimately ask whether the use of alternative dispute resolution is at all relevant for the assessment of the functioning of the justice system. Admittedly, the use of the alternative dispute resolution mechanisms – arbitration and mediation[32] – has today a significant political support, both at national and international level. This is best demonstrated by a number of positive statements in various documents of international bodies, starting with the recommendations of the Council of Europe,[33] by the programmatic documents of the European Union in the field of mediation,[34] and by many recently enacted mediation laws in various countries.[35]

But, what is behind the encouraging declarations at the high political level? When advocating mediation, arbitration and other private methods of dispute resolution, the emphasis is often on the positive impact that such alternative dispute resolution (ADR) mechanisms may have on clearing backlogs of public *fora,* discharging judges from their burdens and, consequently, reducing the length of court proceedings.[36] For these assertions, however, there is so far no conclusive proof.

The first example of the weakness of the habitual approach to assessing alternative dispute resolution as a way of discharging the courts relates to

31 Another argument to the same effect can be derived from the fact that every particular initiative inevitably only raises issues in the interest of a single group of users. In the case of the World Bank, the users of the justice systems that it dominantly represents are businesses, in particular those active in international trade. Others – private persons, citizens and non-commercial organizations – and their viewpoints are necessarily left aside, and it is questionable whether there is any representative organization that would take into account their interests.

32 In this paper we will intentionally include arbitration under the term of ADR, in the sense of *private justice* that is complementary to state mechanisms of dispute resolution. This inclusion is strictly functional, and made without prejudice.

33 See Recommendation R (98) 1 on family mediation; Recommendation R (99) 19 concerning mediation in penal matters; Recommendation R (2002) 10 on mediation in civil matters.

34 See Green Paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final; Draft Directive on certain aspects of mediation in civil and commercial matters, SEC (2004) 1314; European Code of Conduct for Mediators. See more on the internet pages of the EJN – European Judicial Network in Civil and Commercial Matters, <http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm> (last consulted 20 March 2007).

35 New legislation on mediation is numerous and comes both from the 'old' EU members, like Austria – see *Mediationsgesetz,* BgBl. No. 29 of 6 June 2003; 'new' members like Poland – *see* The Law of July 28, 2005 (Polish Mediation Law); or candidate countries like Croatia, see Zakon o mirenju, NN 163/2003.

36 Similarly in the CEPEJ Framework Programme, *supra* note 28, at 31.

arbitration. As civil dispute resolution depends on the private initiative of the parties, a very simple, market-oriented logic (or, in the more sophisticated language of the law and economics movement, the theory of the rational choice of forum) may imply that the overburdening of courts and their inability to deliver satisfactory results within a reasonable time would stimulate parties to seek an alternative that could bypass the clogged courts and result in a decision of equal force. So, in the standard Croatian civil procedure textbook, one could read the following submission:

> 'The rise in the use of arbitration may be interpreted as a symptom of the critical conditions in the public justice system. *Srećko Zuglia,* our teacher and Nestor of the science of civil procedural law, advocated the statement according to which the intensity of the activity of arbitral tribunals is functionally dependent on the quality of performance of the public judicial fora; the more the public courts work reliably, efficiently, and cost-effectively, the less the parties have reasons to *run from these courts* and use instead private venues, the arbitral tribunals that enjoy their trust'.[37]

Immediately, however, the authors note that this rule 'was not verified in Croatia for a series of specific reasons'.[38] These reasons were, in another text, explained by the practice of evading responsibility (which had originated in socialism and was continuing in the transition period):

> 'Those compatriots of ours who have been appointed as managers of companies continue to believe strongly that adroitness in outsmarting and overcharging one's business partners is the key to success. This conviction is reinforced by the continuous experience that they are not held responsible for their misbehaviour...'.[39]

This explanation for the lack of expected arbitration practice was later called in one law and economics study the *Triva-conjecture*.[40] This conjecture was stretched to cover all or most transition countries, and some other institutional factors were added as possible explanations for 'the puzzling underuse of arbitration', such as lack of knowledge about arbitration, legal illiteracy, shortage of lawyers and adequate legal advice, and lack of proper enforcement of arbitral awards.[41] However, no concrete empirical evidence was found to conclusively explain the puzzle – 'as it turns out the successes yielded by the rational choice of forum approach are very limited'.[42]

The underlying methodology that often leads to similar findings about the 'puzzling underuse of arbitration' is based on the comparison between the numbers of cases and decisions in the systems of public and private justice. When applied to arbitration, this comparison will indeed lead to devastating results. So, in several

37 Triva & Dika 2004, § 178/3, p. 854.
38 Triva & Dika 2004, § 178/3, p. 854.
39 Triva 1991, p. 24. See *infra* note 40).
40 Schönfelder 2005, p. 3. See <http://www.tu-freiberg.de> (last consulted 20 March 2007).
41 Schönfelder 2005, p. 3-22.
42 Schönfelder 2005, Abstract, p. II.

arbitration meetings and conferences in Croatia in the end of the 1990s and the beginning of the 2000s it was popular to contrast the figure on the annual influx of about 1.500.000 new cases in the public court system, and some 20-30 cases initiated before private arbitration tribunals in the same period.[43] Massive information campaigns and intensification of promotional activities were announced as a reply to this situation, and some new initiatives did in fact take place. Yet, the overall figures on the use of arbitration did not dramatically change at all until today.

Very similar is the situation in the field of mediation. Mediation, as already noted, became popular in public discourse as a promising method to settle civil and commercial disputes later than arbitration. Propagation of arbitration happened on a larger scale in particular in the last five to six years (symbolically starting in 2002, when three international organizations issued their key documents on dispute settlement by mediation).[44]

In spite of the considerable institutional support, the real figures about mediation still turn out to be much more modest and much less reliable.

Within the first two rounds of the evaluation of the European justice systems, the CEPEJ *inter alia* collected data about the use of mediation. In the first questionnaire, questions 97 to 101 asked about the numbers of registered mediators, public budget devoted to mediation, numbers of incoming and resolved mediation cases and the areas in which mediation is most practiced and successful.[45] However, after processing the data, the reporters learned that the collected information regarding mediation is 'limited' in value, and that 'the information collected can not be used for cross country comparison'.[46] Therefore, only some figures on public budgets for mediation and the number of accredited mediators were included.[47] The report, however, stated that 'the report shows that many countries are in the process of developing mediation practices'.[48] But, two years later, in the next report, the situation was not significantly different. Based on the problems diagnosed in the first evaluation round, the questions were rephrased, supplemented and formulated in a deliberately open way.[49] Nevertheless, the report once again contained only some individual information, concluding that 'it is difficult to gather coherent statistical data taking into account the number and type of mediation

43 For official statistics on public justice see <http://www.pravosudje.hr> (last consulted 20 March 2007); for some data on arbitration cases in the second part of the 1990s see Uzelac 1998, p. 115-119.

44 Three organizations are: the United Nations (cf. 2002 UNCITRAL Model Law on International Commercial Conciliation); the European Union (cf. 2002 Green Paper of the Commission); and the Council of Europe (2002 Recommendation on Mediation in Civil and Commercial Matters). We hereby refer only to the last wave of interest for ADR. The history of mediation is, of course, much longer – on some historic examples see the reports on the history of ADR by Wijffels 2005; Verkijk 2005; Verkijk 2005a; Van Orshoven 2005 and Oberhammer & Domej 2005.

45 CEPEJ 2005, p 104.

46 CEPEJ 2005, p. 76.

47 CEPEJ 2005, p. 135.

48 CEPEJ 2005, p. 76.

49 CEPEJ 2006. See questions 101 to 104, p. 193-194 and explanatory notes on p. 213-214.

proceedings'.[50] Only 16 countries were able to provide some 'more precise information', and according to these, in 2004 there were 181 mediation procedures in Bosnia and Herzegovina, 4 in Bulgaria, 130 in Croatia, 433 in Hungary, 569 in Liechtenstein, 6 in Luxembourg, 4414 in Netherlands and 694 in Portugal.[51] At the same time, the figures on the total numbers of civil cases in the public courts of those countries was measured in the hundreds of thousands (e.g. 417 000 in Croatia, 635 000 in Hungary, 680 000 in Bulgaria and 628 000 in Portugal).[52]

Under the habitual approach, exemplified *supra* by the statements of Zuglia, based on the collected data, in assessing the current use of both arbitration and mediation in Europe, one must arrive at catastrophic conclusions. Even though alternative dispute resolution need not necessarily have the same figures and results as the mainstream dispute resolution, from the perspective of relieving the public court system from its burden of backlogs, the existing ADR mechanisms appear to be no alternative at all. Of course, one might always argue that mediation is a relatively novel trend in dispute resolution and therefore deserves some grace period before assessment. Still, we are sceptical about this argument and the prospects of a dramatic change in future figures. Arbitration, at least, is not an entirely new method of dispute resolution – it has been dynamically evolving on an international scale at least since the 1950s, when the New York Convention was adopted by the UN.[53] Although arbitration services and arbitration laws have been developing over the last 50 years, this has not been accompanied by any exponential rise in the figures relating to arbitration cases. Still today the most prominent arbitral institutions in the world have an annual caseload of only a few hundred cases.[54]

We would, therefore, suggest a change in approach. The very method of evaluation of the private justice mechanisms may be a *litmus test* for the dominant view on all types of dispute resolution mechanisms (including the public justice system). The assessment of alternative dispute resolution based on numbers of cases, and the goal of advancing private justice primarily as a method of steering cases from the public courts, is again a symptom of the *institution-oriented*, *insiders' approach* described *supra* in this paper. This approach is even less appropriate when applied to private justice, and therefore the outcome of the evaluation can be even weirder than the conclusions of the World Bank about contract enforcement in some countries. Among other things, here are three reasons for this conclusion.

50 CEPEJ 2006, p. 151.

51 CEPEJ 2006.

52 CEPEJ 2006, p. 89.

53 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 10 June 1958. This Convention, as one of the most universally accepted instruments of the UN, is ratified today by some 142 countries (data for February 2007).

54 One of the most prominent institutions for international arbitration, the International Court of Arbitration of the International Chamber of Commerce, has announced in February 2007 under the heading 'ICC arbitration tops records in 2006' that it had received in 2006 'a total of 593 new cases… equaling the record set in 2002'. See <http://www.iccwbo.org/court/arbitration/> (last consulted 20 March 2007).

First, this approach disregards the interests of the users: it disregards the specific weight and importance of the matters handled in the process as well as the social importance of the particular cases and the values that are at stake for the parties. This is visible already on a very superficial level, e.g., when comparing the amounts in disputes regarding monetary claims. As arbitration is most developed in resolving international commercial disputes, the amounts adjudicated there can be voluminous.[55] Even in the national arbitral *fora*, the relatively minor number of cases can still involve socially relevant issues, and matters that can determine the fate of social processes and even the means of existence for hundreds or thousands of persons.[56]

Second, the numerical comparison of cases solved through public and private dispute resolution mechanisms may be problematic. Irrespective of its social importance and value, one successfully resolved case in the public court is not necessarily equally valuable to one dispute resolved by mediation. The cases resolved in adjudication have a tendency of multiplying. As the result of an adjudicatory process is imposed from above, the likelihood of not accepting it is greater, and new processes will often follow (e.g., launching of legal remedies, initiation of new suits, etc.). On the other hand, a successful ADR process has a much higher level of acceptance and can bring an end to current litigations, as well as prevent future ones. Also, on the side of expenses, litigations regularly last significantly longer and bring with them considerably higher costs, which should not be disregarded. Finally, the effect of the successful implementation of ADR mechanisms may have a general impact on avoiding disputes in formalistic *fora* of public justice. Parties with the experience of ADR might wish to adhere to autonomous methods of dispute resolution as often as possible in their future dealings with their partners.

Third, when assessing the success of private justice mechanisms according to the numbers of cases that were steered from the public courts to them, it is often forgotten that private justice does not exist in order to 'receive' or 'steal' cases from the public courts, but to offer services that are freely available to their potential users. Regularly, the cases are neither administratively distributed nor mandatorily referred to mediation and arbitration.[57] Therefore, from the side of the users, the private dispute resolution services should be evaluated on the basis of their

55 E.g. according to the 2005 Statistical Report of the ICC Arbitration Court, in 54.3% new cases the amount in dispute exceeded one million US dollars. See <http://iccwbo.org/court/arbitration> (last consulted 20 March 2007), as well as the full report in the *ICC International Court of Arbitration Bulletin,* 17/1, 2006.

56 The statistics show that in 2001 the leading Croatian national arbitral institution, the Permanent Arbitration Court at the Croatian Chamber of Commerce in Zagreb 'had only 0.6% of the caseload of the largest commercial court in the country (the Commercial Court in Zagreb), but at the same time the aggregate value of its cases was about 25% (i.e., one quarter) of the annual aggregate value of the same court', i.e. about 300 million euros. The dominant part in this amount was related to domestic disputes relating to privatization of state companies. See Uzelac 2003a, p. 7.

57 For some arguments in favour of the voluntary nature of mediation, see the paper of Verkijk in this volume.

availability and their effectiveness. Under the assumption that such services exist, that they are accessible, and that their functioning and effects are known, *any* figures will be exactly appropriate, as the goal in itself is not to impose any system on the users, but to fulfil the needs that they themselves experience.

Therefore, the only failing that may be indicated by the lack of alternatives to public justice can, in fact, be attributed to public justice itself. The shaping of the landscape of dispute resolution services is, ultimately, the duty of those who shall see to it that the citizens' needs are fulfilled – the public authorities. The architecture of the dispute resolution services should take into account that each dispute resolution service has its place, purpose, and limitations, and act accordingly, enabling the development and free initiative both on the side of service providers and their users.

6. Conclusions – Towards a True Public-Private Partnership?

As demonstrated, the assessment of how well the contemporary justice systems function is still a considerable challenge. On one side, we have more or less benevolent impressions, backed by everyday experience, but dependent on subjective, personal points of view. The assessments based on this methodology, although possibly accurate, derive their force from the institutional position of the assessor. Yet, they are an easy target for those who dislike their results or their recommendations. Just as in the case of the Croatia 2006 Progress Report, the findings may be perceived as 'political' and, therefore, the reactions on them can be political, too. Without the firm ground of solid and generally accepted indicators for assessment, it is also easy to distort the real nature of ongoing processes in the justice system, and create an impression of change while nothing is changing (or where changes go in the negative direction).

On the other side, current attempts to develop objective indicators to assess the justice systems of Europe still need to be thoroughly evaluated and discussed.[58] Important steps forward were made under the auspices of some international organizations, such as the World Bank and the CEPEJ. These organizations are also pioneers in attempts to promote the *user-oriented approach* – the approach that centers on the users of the justice system. However, so far they were more successful in collecting information that originates from the *institution-based approach* – the comparative data on existent structures (e.g. numbers of courts, legal professionals etc.), simply because the current national justice systems, still deeply impregnated by the insiders' approach, mostly do not monitor processes and collect information that provide an objective picture which would be relevant from the users' perspective (e.g., data about the length of legal processes, including their enforcement). Just as the data originating from the *institution-based approach* is not sufficient to assess and compare the functioning of the justice systems, the fragmentary and unreliable data on legal processes may cause the *user-oriented*

[58] Regarding evaluation of ADR more was achieved in the Anglo-American circle, where the limitations of old, traditional evaluation criteria are recognized. See e.g. Tyler 1989, p. 20.

approach to arrive at false conclusions which may ultimately compromise the goals and projects of those who use them. Therefore, a lot of ground-laying work still has to be done, assisted by the community of independent researchers and academic institutions which may help in the process of formulating adequate methodologies and performance indicators for the future, and in the testing of the soundness of the current ones and their use. Strategic planning and thinking about the justice systems has to be done with the support of impartial and professional experts in the analysis of the administration of justice, who study justice systems and judicial procedures as one important social service, just as the botanist scientifically studies plants, or myrmecologist studies ants.

The private justice mechanisms are an especially good example of the weaknesses of the current assessment exercises. The use of institutional indicators applied on private dispute resolution methods produces particularly weak results, and usually also indicates misunderstanding of the proper function and use of these methods. The appropriate evaluation of ADR (arbitration and mediation) at the level of national justice systems would need elaboration of a complex system of indicators which would take into account general features of the justice system, the culture of dispute resolution and the institutional and extra-institutional space for mechanisms of private justice. Public justice and private justice are not adversaries, competitors or alternatives to one another. For both public and private justice there is no alternative. They should both be taken as partners in the same venture – the fulfilment of the fundamental needs of the users of the justice system.

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