Peti dnevi evropskega prava

Fair trial
versus
Uniform Application of Law

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Is there a conflict?

- Theory: unlimited control requires unlimited resources
  - multiple checking of legal errors
  - multiple instances & broad access to higher courts
  - multiple possibilities of legal recourse against judgments
- Practice: jurisdictions with broader range of legal remedies have more significant problems with the efficiency of their justice systems
  - "delays, backlogs, [over]burdened courts..."

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... and the winner is ....

Fair trial

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Human rights perspective

Fair trial rights
- equality of arms
- reasonable time

ABSOLUTE RIGHTS

Uniform application of law
(enotna uporaba prava)
- principle of legality

NOT A HUMAN RIGHT AT ALL
NOT ABSOLUTE

OVERLAPPING AREAS & COMMON ELEMENTS:
- principle of equality
- foreseeability
- legal certainty (*Rechtssicherheit*)
- exclusion of arbitrariness
- access to courts

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Access to Court?

- The right of access to a court is not an absolute right!
  - may be waived or reduced (e.g. arbitration; immunity)
- There is no right to access the court of second instance!
  - under ECtHR jurisprudence, appeal options may be limited
- There is no right to access the Supreme Court!

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ECtHR

'The Court reiterates that the right to a court, of which the right of access is one aspect, is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal.' [Omar v. France: Reports 1998-V, p. 1840, § 34]

'Article 6 para. 1 (art. 6-1) of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (art. 6)' [Delcourt v. Belgium: A 11, pages 14-15 §§ 25]

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Council of Europe Recommendations

- Recommendation No R (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases

Article 3 - Matters excluded from the right to appeal
In order to ensure that only appropriate matters are considered by the second court, states should consider taking any or all of the following measures:
a. excluding certain categories of cases, for example small claims;
b. requiring leave from a court to appeal;
c. fixing specific time-limits for the exercise of the right to appeal;
d. postponing the right to appeal in certain interlocutory matters to the main appeal in the substantive case.

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Council of Europe

Chapter IV - Role and function of the third court
Article 7 - Measures relating to appeals to a third court
a. The provisions of this recommendation should, where appropriate, apply also to the "third court", where such a court exists, that is a court which exercises control over the second court.
…
b. In considering measures concerning third courts, states should bear in mind that cases have already been heard by two courts.
c. Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims.
d. States could consider introducing a system whereby the third court could deal with a case directly, for instance by means of a referral for a preliminary ruling or a procedure which bypasses the second court ("leapfrog" procedure). Such procedures may in particular be suitable for matters involving points of law in which an appeal to the third court would be likely in any event.
e. Decisions made by the second court should be enforceable, unless the second or the third court grants a stay of execution or the appellant gives adequate security.
f. States which do not admit a system of leave to appeal to the third court or which do not admit the possibility for the third court to reject part of an appeal, could consider introducing such systems aiming at limiting the number of cases meriting a third judicial review. The law could define specific grounds which would enable the third court to limit its examination only to certain aspects of the case, for instance when granting leave to appeal or rejecting, after a summary consideration of the case, some parts of the appeal.

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CEPEJ Framework Programme

- **"A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe"**
  - **18 lines of action**

Line of Action 8: acting on the number of cases dealt with by the court by ensuring an appropriate use of appeals and other applications[12]
69. Without prejudice of the right to an effective remedy, appeal options could be limited. The ECHR has confirmed that, subject to certain guarantees, such a limitation is not contrary to the Convention[13].
70. Filtering mechanisms could be introduced – as regards the Supreme Court. Here too, such mechanisms should be accompanied by appropriate guarantees.

71. The possibility of imposing sanctions against persons introducing manifestly abusive processes could also be studied.

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Compendium of best practices

- Time management in judicial proceedings Best Practices – CEPEJ(2006)13: adopted at the 8th plenary 8.12.2006.

5.3. Filtering and deflective tools to limit the number of cases to be filed in courts
Filtering and deflective rules should be applied to appeals without prejudice of the right of effective remedy. The Recommendation (95) 5 concerning the appeal systems and procedures in civil and commercial cases, point out several criteria ad methods for filtering the cases to be heard by second instance courts with the aim of reducing their workload.
Example
§ Norway (Frostating Lagmannsrett Court of Appeal) – this court filters the less serious cases through a preliminary examination process made by three judges. If all three agree that the appeal clearly will not succeed, then they can deny referral to an appeal hearing. As a result, the District Court's judgment is final. To have an effective procedure, a team of three judges is always ready to consider an appeal when it arrives. Most cases are therefore examined and filtered in two or three days.

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Croatia and Slovenia: internal debate

- Access to the Supreme [Constitutional] Court:
  - "TO LIMIT OR NOT TO LIMIT????"
- Arguments:
  - excessive backlog;
  - extreme burden of cases;
  - overworked judges;
  - delays in proceedings.

→ **Wrong arguments!**

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dr. pravnih znanosti,
zredni profesor na PF
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Ne le preveč zaprta, tudi preveč odprta vrata na Vrhovno sodišče ogrožajo njegovo ustavno vlogo

- right intent, wrong metaphor
- the change of selection mechanism does not mean closing the doors of the court
- introduction of a singular causal criterion of admissibility effectively broadens the access to Supreme Court
- filtering should be a technique of summary rejection of manifestly ill-founded appeals

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Croatian experience

- CCP Amendments 2003
  - Secondary appeal (*revizija*) – Art. 382.
    - Mandatory jurisdiction (sec. 1)
      - In cases over 100.000 kuna a.i.d. (cca € 15.000)
      - In work dismissal cases (worker as appellant)
    - Jurisdiction per "leave to appeal"
      - Permission may be granted by second instance court if it considers that there was "an important issue of law relevant for uniform interpretation and equality of citizens"
      - Permission is granted ex officio; should be reasoned; does not bind the Supreme Court; no recourse is available against refusal of the permission
    - Excluded cases
      - "if revision is expressly excluded by law": in small claims (< 5000 kn i.e. € 700) and some other categories (divorce; extra-contentious j.)
  - Preliminary results
    - 2003-2006: 15 permissions by lower courts; 7 considered admissible by the S.C.; in 4 cases revision was successful, in 3 not.
- Constitutional Court decision on unconstitutionality
  - "Supreme Court cannot fullfil its constitutional function"
  - Case of several thousands suits for Christmas money (1.000 kn) by public servants

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General constitutional issues

- constitutional right to (secondary) appeal?
  - a psychological, not a constitutional problem
  - may be resolved by a broader construction
  - innovative possibility of "other legal protection"
- Supreme Court and the Constitutional Court: what is their proper role?
  - dependent on the model of Supreme Court
  - Croatian Constitution: "guaranteeing uniform application of law and equality of citizens"
    - Public role or private role? Language: public role.
  - delimitation with the functions of the Constitutional Court
    - different focus, but in principle - no hierarchy (fourth instance)
    - some overlapping is not necessarily harmful, general difference:
      - **Constitutional complaints**: individual rights should be in the foreground; **Revision:** public law elements should have precedence.

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Other important procedural issues

- successive remittals as a serious systemic problem
  - ECtHR; see also Calvez Report, p. 58

> *"The delay was caused mainly by the re-examination of the case. Although the Court is not in a position to analyse the juridical quality of the case law of the domestic courts, it considers that, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system" [Wierciszewska v. Poland*, judgment of 25 November 2003]
>
> (also: Zagorec v. Croatia; Puž v. Slovenia, Ferlič v. Slovenia; Preložnik and co. v. Slovak Republic; Kukharchuk v. Ukraine; Carstea and Gracu v. Romania);

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Other important procedural issues

- lack of orality and possibilities to re-hear the case on appeal;
  - if avoiding remittals mean necessity of an oral hearing, so be it!
- lack of internal case-management and court administration elements to speed-up the process
  - assignation of cases
  - dealing with collective claims
  - planning in advance and effective calendar for the case
  - assistance in research and drafting of decisions
  - delivery and publication of judgments

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Post scriptum: ex-Yugoslav historic context and "uniform interpretation"

- Common elements of recent East-European legal tradition still influence the landscape of their judiciaries!
  - state paternalism
  - socialist collectivism
- Ghosts from the past:
  - State attorney's role (*zahteva za varnost zakonitosti*)
  - Mandatory "legal opinions" of the court departments in the higher courts (*in abstracto* rulings)
  - burearocratization of judicial functions
  - inquisitorial consciousness in evidentiary matters ("no stone should be left unturned")
  - [collective decision making, lay participation]
- Escaping decision-making responsibility
  - public distrust as a stimulant for transfer of responsibility to further "controlling mechanism"
  - vicious procedural circle (repetitive remedies)

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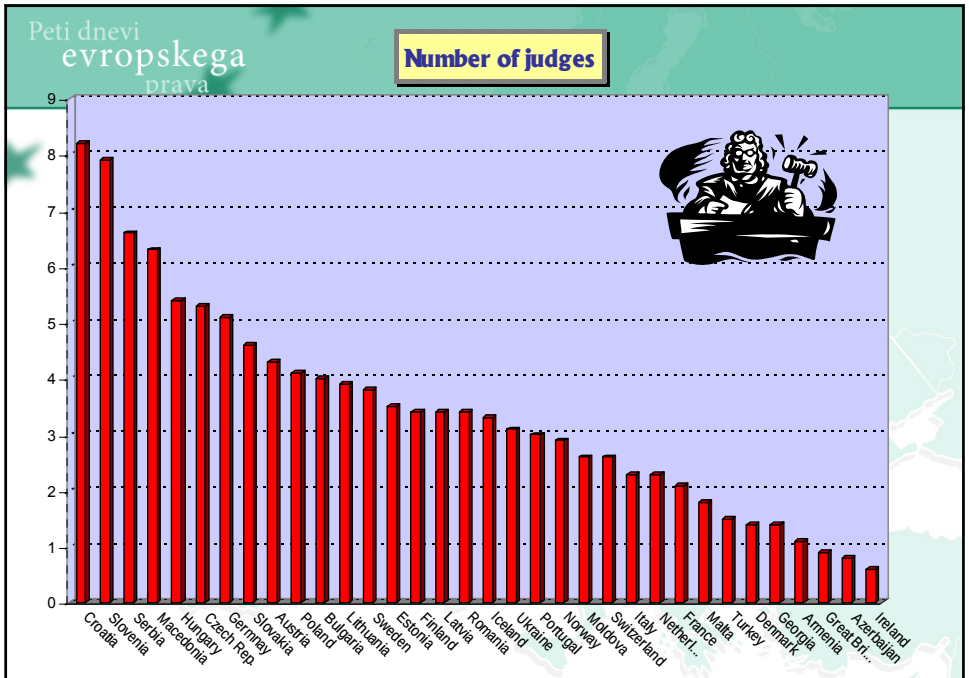

Judges per 500.000 inhabitants

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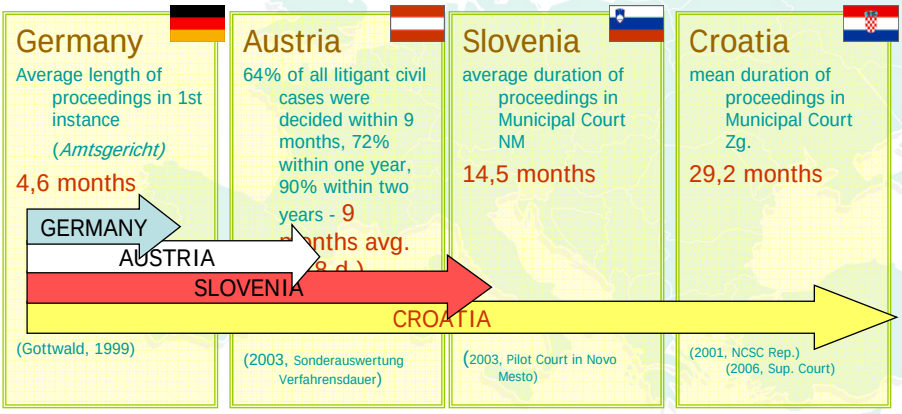
Average length of the civil proceedings

- Normative background:
  - Croatian-Slovenian relying on German and Austrian models?



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Conclusions

- The uniform interpretation of law is good, but...
  1. higher/highest courts should concentrate on important legal issues and overall integrity of the legal system (equality in law, non-discrimination);
  2. the establishment of a functioning judicial system has a priority, manifestly ill-founded claims should be discouraged;
  3. options for legal remedies may therefore be limited;
  4. filtering mechanisms and summary decisions may be introduced, however with some caution and accompanied with close monitoring;
  5. improving the quality of adjudication at the first instance is the key factor;
  6. process should be concentrated, reinstallation of orality and immediacy plus judicial activism and planning of the process
  7. reasonable/optimum timeframes of proceedings are absolute *conditio sine qua non...*

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THANK YOU!
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