Institution building: a comparative approach to justice systems

Global, European and Croatian problems and their relevance for divided societies

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Outline

- **Judiciary**
  - Is there a global perception of judiciary?
  - Global divisions of justice systems
    - traditional approach: common law and civil law
    - an alternative approach: relationship towards society (users)
- **Divided societies and development of legal systems**
  - Why is a functional judiciary important?
    - external perspective: an analysis of European findings regarding Croatia
    - internal perspective: corruption and length of proceedings
  - Some structural divisions: where is the real problem in legal harmonisation?
- **Legal procedures: can they be reformed?**
  - Getting a touch and feel of the Mediterranean judicial process
    - Some Croatian examples and dana regarding judicial proceedings
  - A shock therapy through eleven shocking targets
    - For whom is the shock therapy shocking?

Judiciary – a global perception

- ***Justice system – is it changing at all?***

Plus ça change, plus c'est la même chose?

19th century

21st century

Judiciary – a global perception

- ***Justice system – is it changing at all?***

Plus ça change, plus c'est la même chose?

19th century

21st century

Divided Societies, IUC Dubrovnik, 24 April 2008

Legal systems: global divisions

A classical approach: Civil Law versus Common Law

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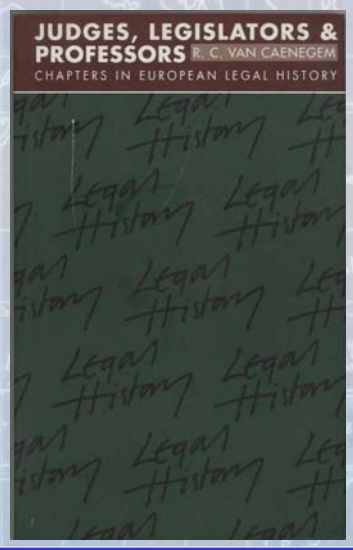
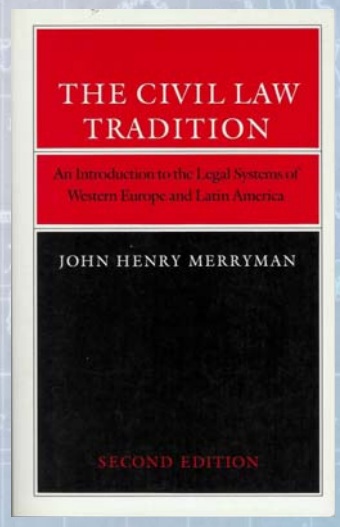
Common law & Civil law tradition





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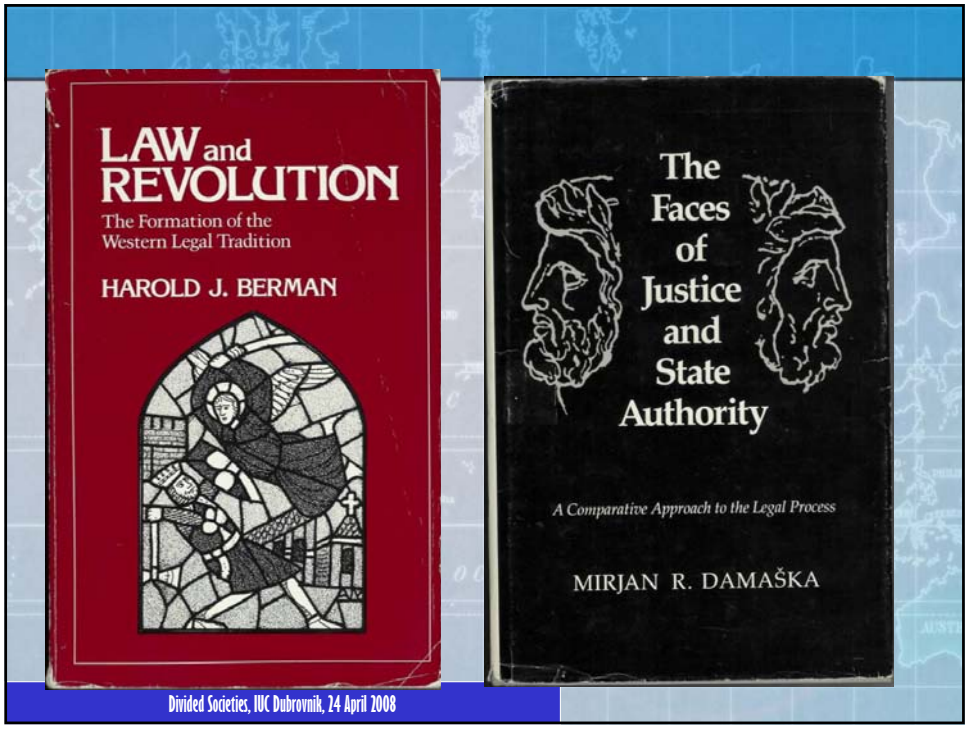

LAW and REVOLUTION
The Formation of the Western Legal Tradition
HAROLD J. BERMAN
The Faces of Justice and State Authority
A Comparative Approach to the Legal Process
MIRJAN R. DAMAŠKA
Divided Societies, IUC Dubrovnik, 24 April 2008

Justice systems: an alternative approach
Divided Societies, IUC Dubrovnik, 24 April 2008

Global challenges for justice systems

- **Lack of Transparency**
- **Lack of Foreseeability**
- **Lack of Harmonisation**
- **Lack of Appropriate Time Management**
- **Lack of Openness to the Needs of Users**
- **Lack of Evaluation of the Impact of Norms on Real Life**
- **Lack of Adaptation to Changes in Society**

For Whom Do the Courts Work?

"Old" Civil Procedure

- Shaped from the top (Napoleon);
- Principally addressed to judges and lawyers as state agents;
- Quality as consistency check;
- "Modernisation" as a process of introducing improvements favorable to professionals, not to users;
- Oriented towards norms, not results.

19th century

"New" Civil Procedure

- For what society?
- Should civil procedure be addressed to the society?
- How to turn the focus of civil procedure to citizens as its principal users?
- "Ideal procedure": just decision in appropriate and foreseeable time.

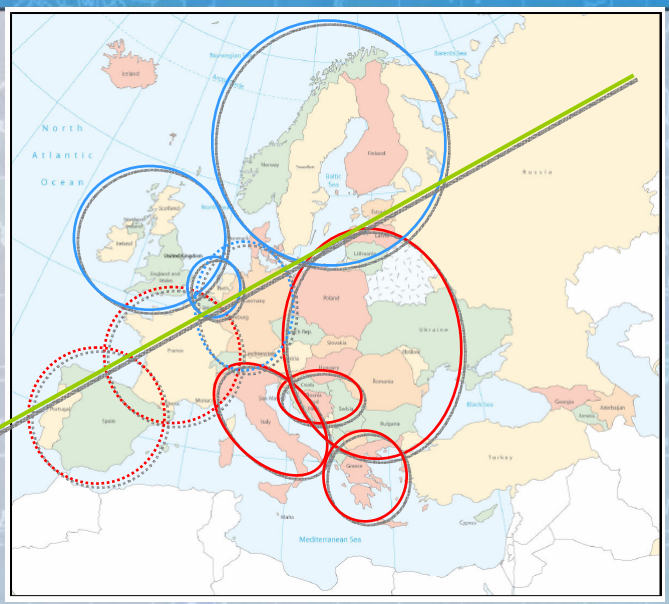
21st century

Two approaches to court performance analysis

	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 judgments	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 ability to *resolve cases*	To measure ability to effectively *resolve disputes*

Uzelac, p. 14 (PPJ book)

A new division: North/Mediterranean



Importance of legal institutions

External importance: international organisations, accession processes
Internal element: developments in the society
- economic growths
- political culture (human rights, good governance)

European justice systems and the EU

Article 65 ECT (incorporated in 69d of Reform Treaty)

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying:
- the system for cross-border service of judicial and extrajudicial documents,
- cooperation in the taking of evidence
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Brussels, 20 April 2004
COM(2004) 257 final

Opinion on Croatia's Application for Membership of the European Union

Vis-à-vis: Avis on judiciary

Functioning of the Judiciary 16

In the second half of the 1990s, Croatia's judicial system lacked independence and efficiency, and had staff shortages. While considerable improvements have been made and the independence of the judiciary has been established, major challenges remain to be addressed. The main problems are the widespread inefficiency of the judicial system and the amount of time needed to hand down and enforce judgments as well as weaknesses related to the selection and training of judges. Moreover, too many issues are brought before courts that could in principle be decided by other means. All these factors combine to cause a very large backlog of cases. An additional problem is that the courts and parts of the state administration do not always respect or execute in a timely way the decisions of higher courts. Citizens' rights are therefore not yet fully protected by the judiciary in accordance with the provisions of the Constitution.

There is a **backlog** of about 1.38 million cases, indicating serious constraints in the judiciary's ability to handle the work load. In order to shorten court procedures and alleviate the work load in courts a number of measures have been announced recently: while the Codes of Criminal and Civil Procedure have been amended to simplify and speed up procedures, it remains to be seen what the real impact will be. Further steps are needed in this area. In criminal cases, the main investigative authority should move from the courts to the State Attorney's Office. Non-disputed inheritance cases should be processed by public notaries rather than courts. First steps in this direction have been taken with the adoption of the Inheritance Act. The Act on Amendments to the Court Registers Act seeks to simplify, speed up and reduce the cost of the procedure for registration in the Court Register. Finally, the Mediation Act foresees in alternative dispute resolution, but Croatian citizens are not yet familiar with the institute of mediation, so tangible results cannot be expected soon.

Brussels, 20 April 2004
COM(2004) 257 final

Opinion on Croatia's Application for Membership of the European Union

Vis-à-vis: Avis on judiciary

19

The **enforcement of judgements** in the criminal area is under the authority of execution judges and is regulated separately from the enforcement of other types of judgments referring to different, especially financial, claims. The biggest part of the backlog of cases within the Croatian judiciary is connected with registration cases and the enforcement of civil judgments, especially those imposing financial obligations on debtors or requiring certain types of action from them. Plans to reform the Enforcement Act should therefore be pursued with vigour.

26

minority (political parties, schools, cultural organisations) can work without any obstacles. In the Danube region, most of the provisions of the Erdut Agreement and the Government Letter of Intent have been implemented, with the important exception of proportional representation of Serbs in the judiciary. The State, still needs to make additional efforts to integrate the Serb community into Croatian society at all levels.

27

There is a very high number of cases pending in the ECHR against Croatia. This appears to reflect (i) procedural problems in the Croatian judiciary including the extent to which the Constitutional Court is able to act as an effective domestic remedy on human rights issues and (ii) substantive human rights concerns, regarding some legislation, particularly laws governing property issues related to the war.

Brussels, 20 April 2004
COM(2004) 257 final

Opinion on Croatia's Application for Membership of the European Union

Vis-à-vis: Avis on judiciary

66

In the field of **intellectual and industrial property rights**, Croatia is a party to the WTO TRIPs Agreement and to the main international conventions in this area, including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Croatian legislation provides for a specific border regime in relation to intellectual and industrial property rights. However, effective enforcement, including the fight against piracy and counterfeiting, remains a key challenge for Croatia. Particular attention should be given to providing law enforcement with sufficient resources and expertise and to improving the effectiveness of the judiciary. As regards *administrative structures*, the former State Intellectual Property Office (SIPO) had a staff of 88 employees and seems to be seriously understaffed in some sectors which need rapid strengthening. In January 2004 SIPO was merged with the former State Institute for Standardisation and Metrology to become the State Office for Intellectual Property, Standardisation and Metrology.

81

The capacity of the Tax Administration requires important further strengthening, especially regarding collection and control functions. The administrative capacity of the Customs Administration covering excise duties is insufficient and important efforts will be needed, in particular to introduce a more adequate organisational structure and service, with sufficient and trained staff. To increase the effectiveness of the fight against tax fraud, the complicated nature of the procedures to prosecute fraud, combined with the weakness of the Croatian judiciary, needs to be addressed.

Brussels, 20 April 2004
COM(2004) 257 final

Opinion on Croatia's Application for Membership of the European Union

Vis-à-vis: Avis on judiciary

93

There is no regulatory impact assessment to evaluate the effect of legislation on the **business environment**, although the introduction of such a procedure is in preparation. The quality of legislation and rules affecting business as well as the efficiency of the administration and judiciary in Croatia will need further improvement to provide a favourable business climate.

101

government departments with environmental responsibilities. However, only 32 inspectors are available to cover sectors other than water quality, physical planning and noise, which is clearly insufficient. The number of prosecutions for breaches of environmental law indicates that enforcement levels are low. This can be attributed to various factors, such as the lack of human and financial resources attached to this activity, the weaknesses in Croatia's legal system and judiciary, and deficiencies in the legislation that prevent efficient enforcement.

108

Concerning the **fight against fraud and corruption**, Croatia has signed and ratified the Council of Europe's Criminal and Civil Law Conventions on Corruption. Its national legislation has been partly aligned with the provisions of the 1995 Convention on the Protection of the Communities' Financial Interests and its protocols. Further improvements are needed regarding the definition of fraud (both expenditure and revenue), active and passive corruption, criminal liability of heads of businesses and liability of legal persons. At the enforcement level, more attention should be given to the effective prosecution of corruption cases. Action plans to prevent and combat corruption in the relevant law enforcement agencies (border police, police, customs, judiciary) need to be developed.

Divided Societies, IUC Dubrovnik, 24 April 2008

EU Progress report for Croatia (XI/2006)

Judicial system

Some headway has been made in reducing the *backlog of pending cases*. The total number of pending cases was 1.23 million at the end of June 2006, compared to 1.64 million last year. In this context various short-term steps were taken such as continued redistribution of cases from over-burdened to less burdened courts, extra overtime for judges and the use of notaries for the execution of non-disputed decisions. However, the backlog remains significant. The impact of some of these measures has been mitigated by resistance from the parties to the cases. Also, the State continues to contribute to the backlog by continuing to engage in litigation where there is little chance of success.

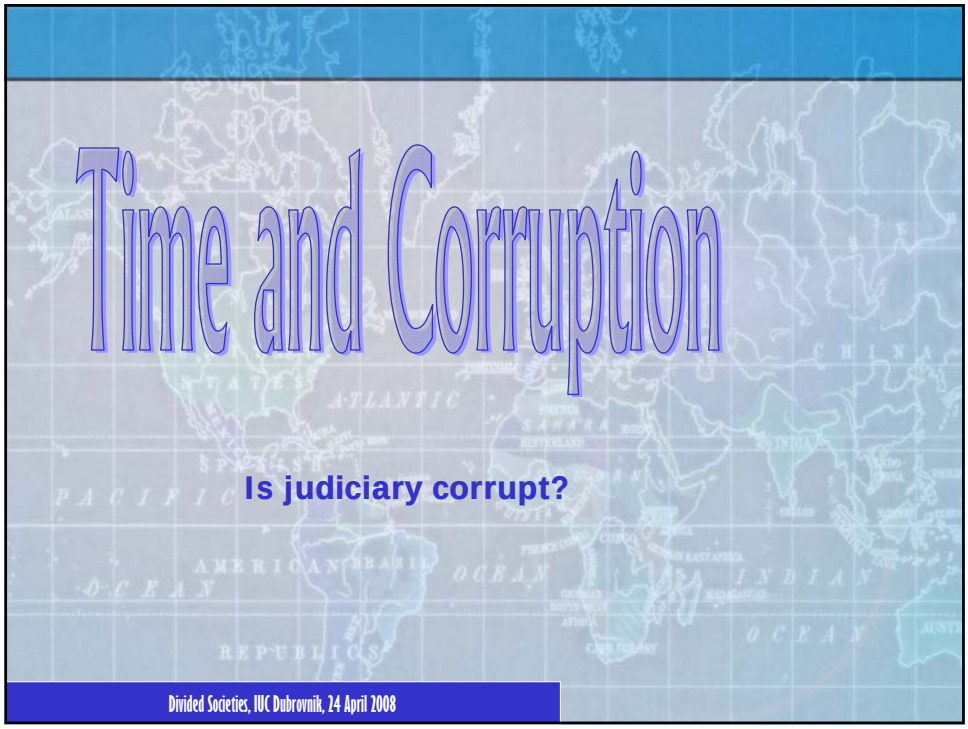
officials need to improve. Croatia is still some way from enjoying an independent, impartial,

Particular progress was made in reducing the backlog of *enforcement* cases, including through the use of notaries for the execution of non-disputed decisions. However, enforcement cases still make up around one quarter of all pending court cases and procedures for the enforcement of court decisions need to be further reformed. Execution and enforcement cases are the main problem in 93% of the courts. Croatia needs to consider taking the enforcement process out of the hands of the courts, for instance through the use of special enforcement officers vested with public powers. Courts and parts of the state administration themselves do not always respect or execute in a timely manner the decisions of higher courts. This practice is contributing to cases against Croatia before the ECtHR.

EU Progress report for Croatia (XI/2007)

The excessive length of proceedings remains a serious problem in Croatia, however. The backlog remains high and considerable efforts will be required especially taking into account the very high annual in-flow of cases. The ECtHR continues to issue judgements against Croatia for violations of the European Convention of Human Rights regarding the length of proceedings. The State continues to contribute to the backlog by engaging in litigation even when there is little chance of success. Parties continue to abuse procedural rules in order to delay a final decision and its enforcement. Little use is made of existing possibilities for judges to control the number of hearings and the length of the procedure and they often fail to sanction abuse by the parties and their lawyers. It is too early to assess the effect of the shift in jurisdiction from the Constitutional Court to second instance courts for individual complaints regarding the length of proceedings. There remains no effective remedy for the length of proceedings in administrative cases. Streamlining of the court document delivery system and tackling divergences in case law across the country is also required.

There has been limited progress in the rationalisation of the court network. The pilot mergers of misdemeanour courts with municipal courts launched in 2006 did not achieve the desired results in terms of efficiency. In April 2007, the Ministry of Justice therefore adopted a plan for the merger of courts of the same type, which would see the number of courts reduced from 253 to 130. However, so far the Government has only put forward legislation to merge twenty municipal and misdemeanour courts into five of each type. There are no clear indications of the next steps and calendar for the rationalisation of the other courts. Although judges and prosecutors strongly support the rationalisation process, the commitment from the Government is limited, particularly when it comes to decisions on closure of courts.



Two models of corruption

Direct, result-oriented corruption

- Traditional
- Affects the outcome
- Possible in discretionary decision-making
- Always perceived as corruption
- Relatively easy to establish

Can you solve this case in this way?

Indirect, time-management corruption

- Subtle
- Affects timing, not necessarily the result
- Possible irrespective of the decision-making
- To be prevented only by clear timing standards
- Not perceived as corruption
- Difficult to ascertain

Can you speed it up?

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Submissions

- **Foreseeable timeframes and appropriate time management are the best tools in the fight against corruption;**
- **Opposition to any external time management may be a cover for corrupt practices;**
- **Judges/j.o. may and must be responsible for improper time-plans and inappropriate case administration;**
- ***Nemo iudex in causa sua:* who has to judge judicial time management? Best view is the view from the distance.**
- **Justice is too serious a matter to be left to legal professionals only.**

Structural Problems

How to compare justice systems?

Lawyers as they ever were?

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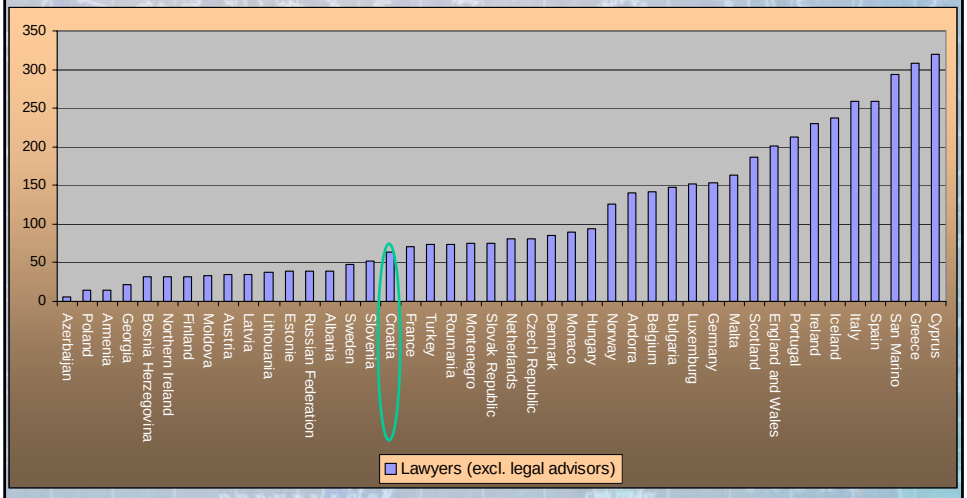
Lawyers in Europe



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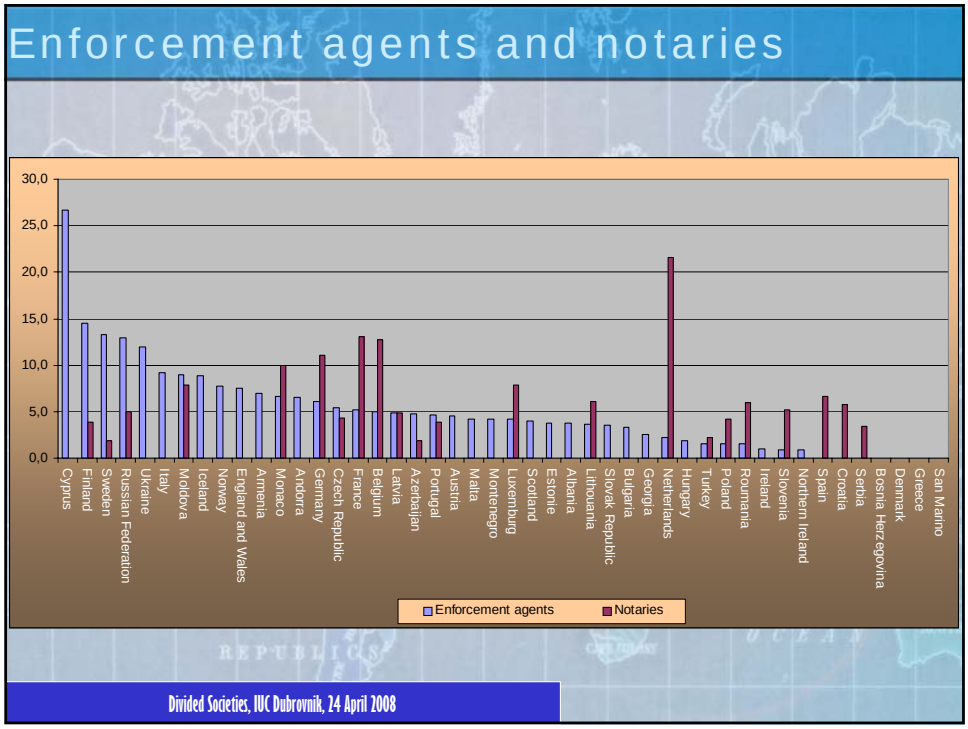
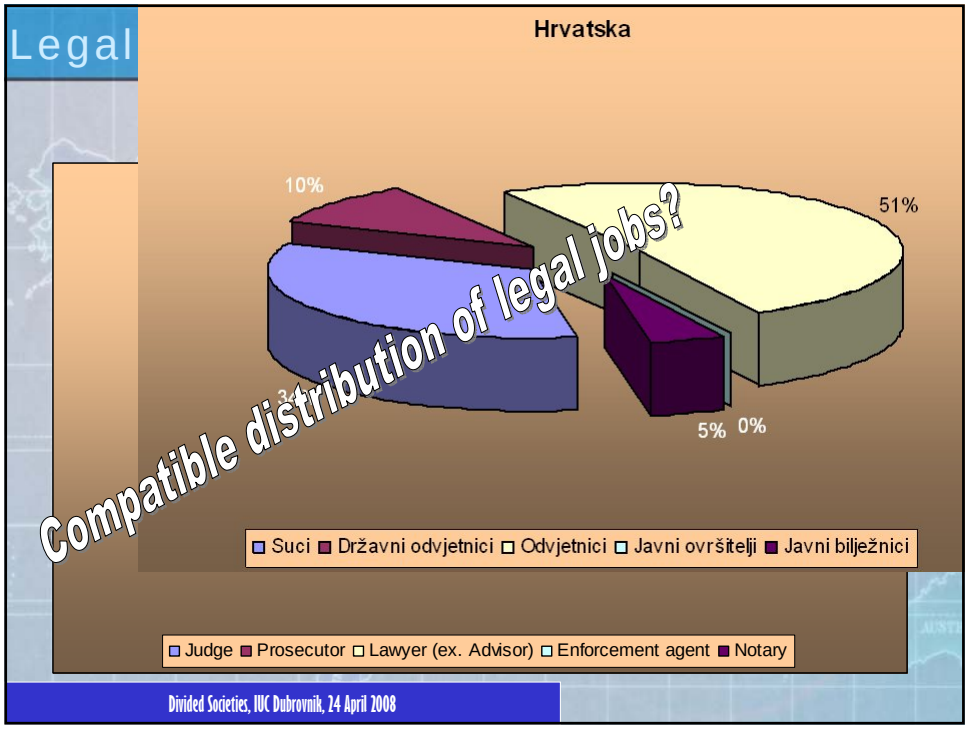

Enforcement agents and notaries
30,0
25,0
20,0
15,0
10,0
5,0
0,0
Cyprus
Finland
Sweden
Russian Federation
Ukraine
Italy
Moldova
Iceland
Norway
England and Wales
Armenia
Monaco
Andorra
Germany
Czech Republic
France
Belgium
Latvia
Azerbaijan
Portugal
Austria
Malta
Montenegro
Luxemburg
Scotland
Estonie
Albania
Lithouania
Slovak Republic
Bulgaria
Georgia
Netherlands
Hungary
Turkey
Poland
Roumania
Ireland
Slovenia
Northern Ireland
Spain
Croatia
Serbia
Bosnia Herzegovina
Denmark
Greece
San Marino
Enforcement agents
Notaries
Divided Societies, IUC Dubrovnik, 24 April 2008


Legal
Hrvatska
10%
51%
5%
0%
Compatible distribution of legal jobs?
Suci
Državni odvjetnici
Odvjetnici
Javni ovršitelji
Javni bilježnici
Judge
Prosecutor
Lawyer (ex. Advisor)
Enforcement agent
Notary
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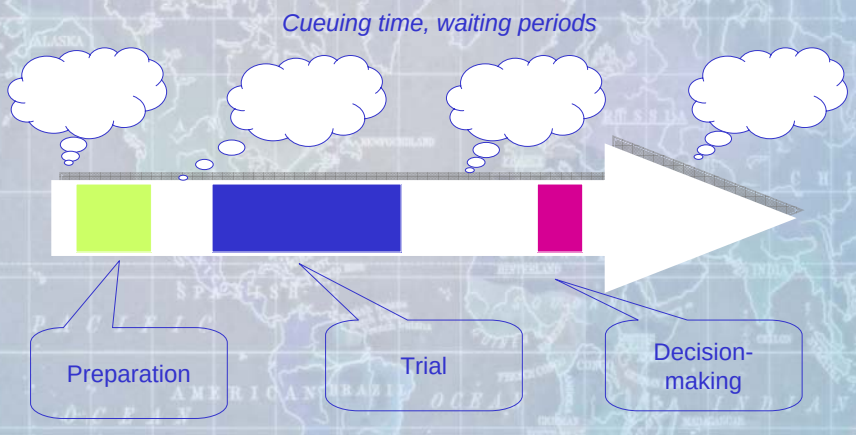
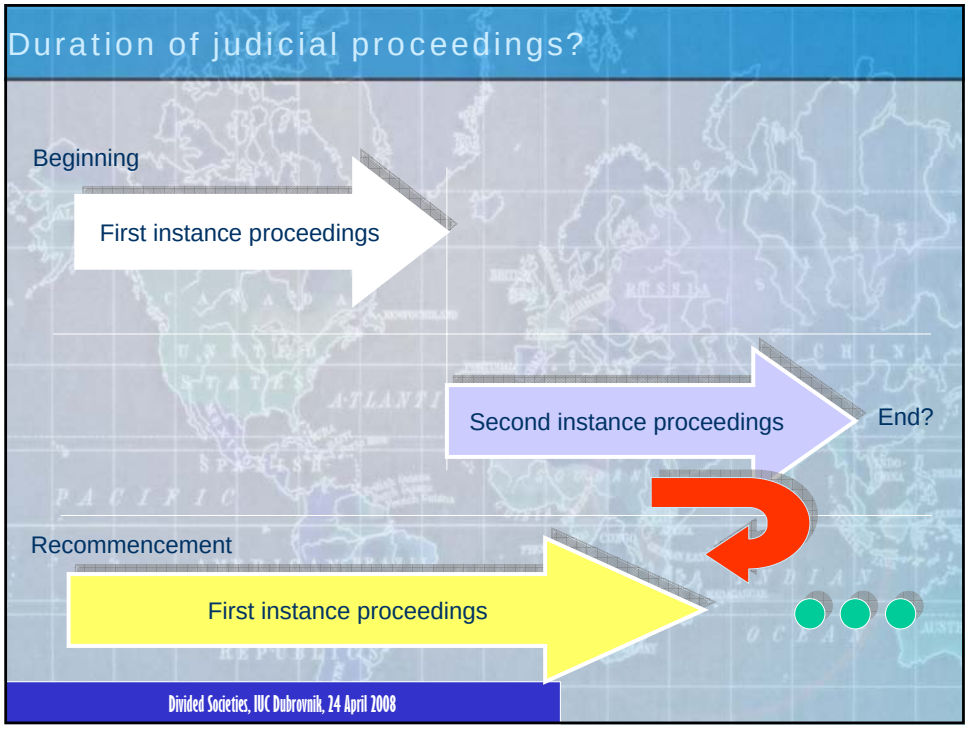
Judicial process - comparisons

The scheme of judicial proceedings




Duration of judicial proceedings?
Beginning
First instance proceedings
Second instance proceedings
End?
Recommencement
First instance proceedings
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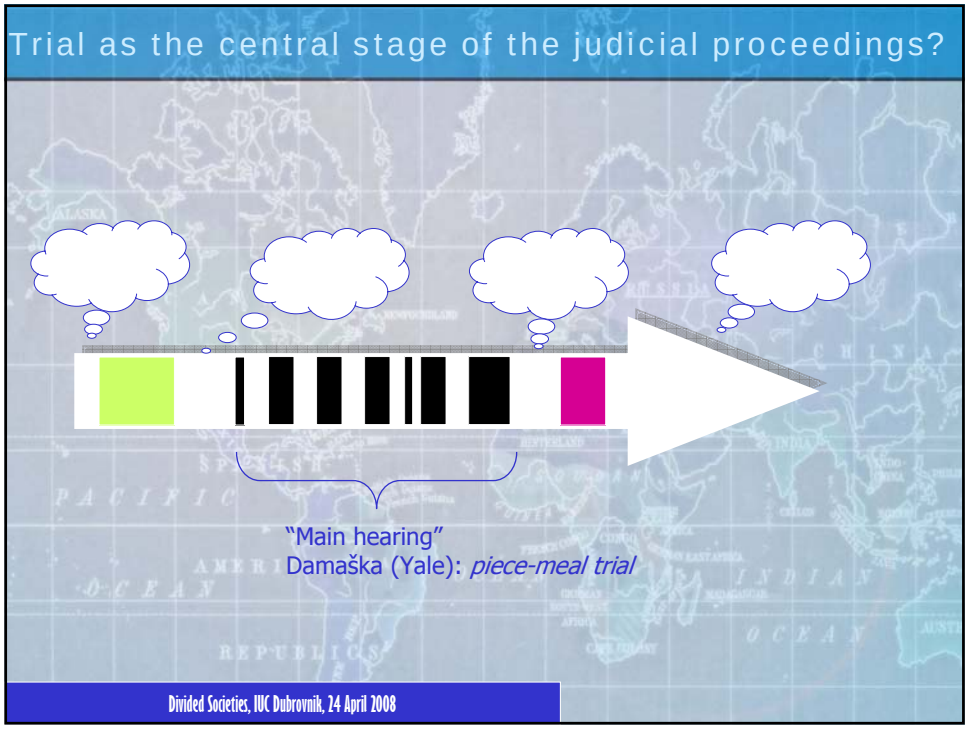
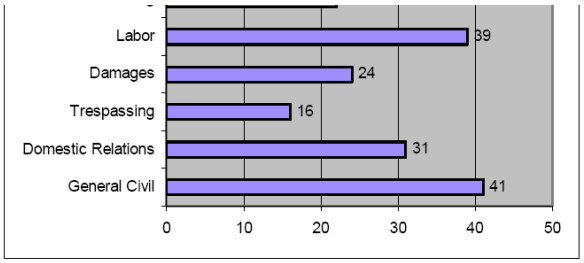

Trial as the central stage of the judicial proceedings?
"Main hearing"
Damaška (Yale): *piece-meal trial*
Divided Societies, IUC Dubrovnik, 24 April 2008

Some findings of research

Of the cases reviewed, 366 or 26 percent of them were appealed to the County Court and a motion to re-hear was filed in 25 or 1.8 percent of the cases. Fifty-one percent of the appealed cases were damages cases, followed by labor cases (14 percent) and general civil cases (13 percent).

Per case type, 61 percent of trespassing cases were appealed, followed by housing (41 percent); damages (37 percent); and labor (30 percent). It took an additional 444 days (appealed filed date to date the County Court decision was returned to ZMC) to complete the appellate process.

Of the 366 appealed cases, 74 or 20 percent of those cases were remanded and returned to the Court for re-hearing.[12] General civil cases had the highest return rate of 37 percent, followed by domestic relations and housing (31 percent); labor (23 percent); damages (13 percent); and trespassing (6 percent).



research conducted in 2001 by the Nacional Center for State Court – International Program Division

Length of proceedings: Zagreb MC avg.

FIRST INSTANCE PROCEEDINGS IN CIVIL CASES

29,2 m. (2,43 y.)

filing | 1st order | 1st hearing | final hearing | written judgment | service

3,3 m. | 4 m. | 16,5 m. (3,4 hearings) | 4 m. | 1,4 m.

appeal rate: 26% (14-61%)

preparation (pre-hearing stage) | *hearing* | *decision-making (post-hearing stage)*

SECOND INSTANCE PROCEEDINGS IN CIVIL CASES

14,8 m. (1,2 y.) – No hearing whatsoever!

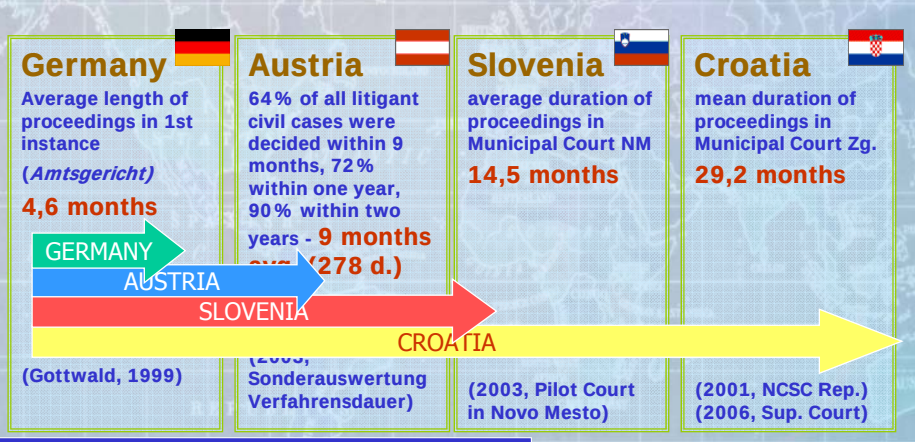
appeal success: 20% remanded (6-37%)

Source: NCSC report, 2001.

TOTAL TIME: 3,6 Y.+ ???

Average length of the civil proceedings

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



Maximum duration?

- **Supreme Court 2006:**
  - **Action Plan on Reduction of "Old" Cases**
  - **"old case": civil case pending over 5 years**
  - **Civil Litigation (2005)**

Annual Influx /2004/	Outstanding /31.12.2005/	"Old Cases" /31.12.2005/
160.790	214.694	40.811

Cases > 5 y: 25% of the annually incoming cases

Report on the ECHR case-law on length

Violation of the reasonable time (Art. 6) - summary

Type of case	*Issues*	*Length*	*Decision*
Criminal cases	Diverse	More than 5 y.	*Violation*
Civil cases	Priority cases	More than 2 y. (min: 1y10m)	*Violation*
Civil cases	Complex cases	More than 8 y.	*Violation*
Administrative	Priority	More than 2 y.	*Violation*
Administrative	Regular, complex	More than 5 y.	*Violation*

Non-violation of the reasonable time (Art. 6) - examples

Type of case	*Issues*	*Length*	*Decision*
Criminal cases	Regular cases	3y6m (total in 3 instances); 4y3m (total in 3 lev. + investigation)	*No violation*
Criminal cases	Complex	8y5m (investigation and 3 levels)	*No violation*
Civil cases	Simple cases	1y10m in first instance; 1y8m on appeal; 1y9m Court of Cassation	*No violation*
Civil cases	Priority cases (labour)	1y7m in first instance (labour); 1y9m on appeal; 1y9m Court of Cassation	*No violation*

The values from the above table only relate to the analysed cases and cannot be taken as a fixed rule for future cases which will be considered in the light of their particular circumstances, according to the established criteria of the Court. Still, they may be useful for the purposes of general assessment and analysis.

Comparison of the lengths of proceedings

Average

First instance (trial)

Germany – 5 m.

Austria – 9 m.

Slovenia – 18 m.

Croatia - ?

30 m. (2,5 y)

Maximum

% proceedings > 3 y.

Austria – 1,5 %

Finland – 4 %

France – 12 %

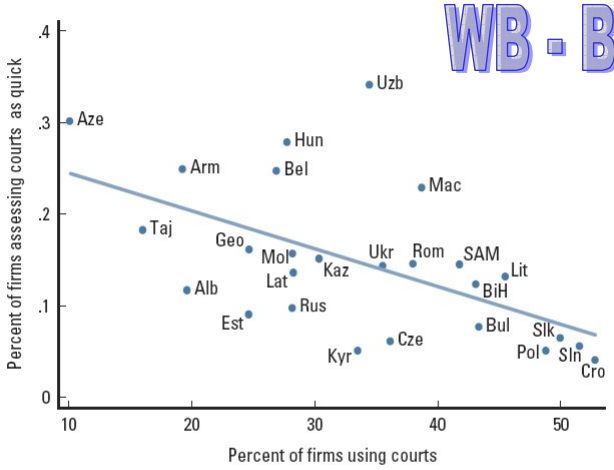
Slovakia – 15 %

Slovenia – 32 %

Croatia?

> 5y. – 25%

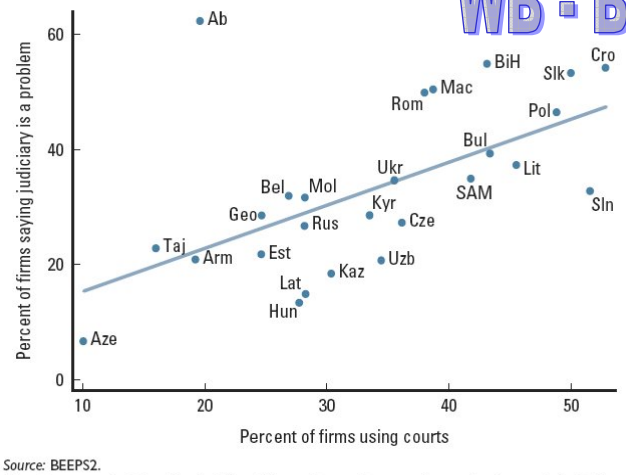
Figure 3.18 Pressure on the courts slows them down, 2002



Source: BEEPS2.

Note: See appendix 3 for details. Alb = Albania; Arm = Armenia; Aze = Azerbaijan; Bel = Belarus; Bul = Bulgaria; BiH = Bosnia and Herzegovina; Cro = Croatia; Cze = Czech Republic; Est = Estonia; Geo = Georgia; Hun = Hungary; Kaz = Kazakhstan; Kyr = Kyrgyz Republic; Lat = Latvia; Lit = Lithuania; Mac = Macedonia, FYR; Mol = Moldova; Pol = Poland; Rom = Romania; Rus = Russian Federation; Slk = Slovak Republic; Sln = Slovenia; Taj = Tajikistan; Ukr = Ukraine; Uzb = Uzbekistan.

Figure 3.19 Courts are viewed as less problematic where they are less relevant, 2002



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Legal procedures

The need for a shock therapy?

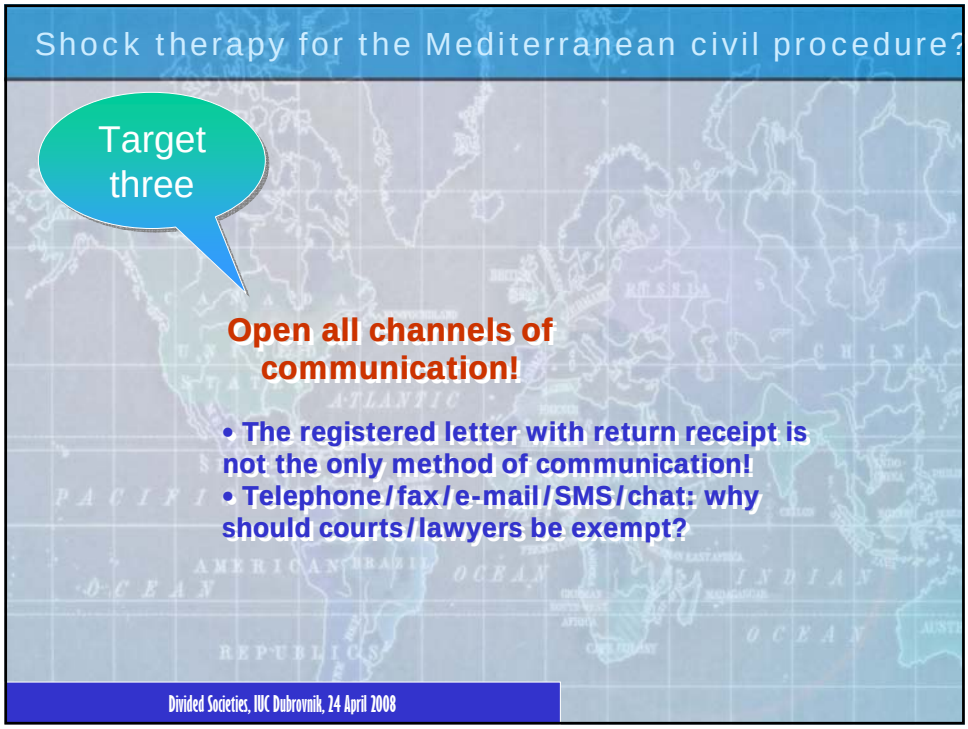
Shock therapy for the Mediterranean civil procedure?

Target one

Instant dismissal of ill-founded claims!

- **"Manifestly ill-founded"** - frivolous, vexatious: standard that is not unusual!
- Applicable to claims as much as to appeals!

Shock therapy for the Mediterranean civil procedure?
Target two
Getting a trial date when filing your suit!
• Why not?
Divided Societies, IUC Dubrovnik, 24 April 2008


Shock therapy for the Mediterranean civil procedure?
Target three
Open all channels of communication!
• The registered letter with return receipt is not the only method of communication!
• Telephone/fax/e-mail/SMS/chat: why should courts/lawyers be exempt?
Divided Societies, IUC Dubrovnik, 24 April 2008

Shock therapy for the Mediterranean civil procedure?

Target four

No tolerance for delaying tactics!

- **Default judgment after each default!**
- **Evidence submitted late should be disregarded!**

Shock therapy for the Mediterranean civil procedure?

Target five

Collecting of evidence is the principal responsibility of the parties!

- **If evidence is not submitted, the judge should decide based on the burden of proof rules!**
- **The court assists the parties in collecting of evidence only for the reasons of fairness!**

Shock therapy for the Mediterranean civil procedure?

Target six

The court should decide civil cases in no more than two hearings!

- **CoE Recommendation 84(5)!**

Shock therapy for the Mediterranean civil procedure?

Target seven

No case should proceed without a set calendar!

- **UNCITRAL Notes on Organising Arbitration Proceedings!**
- **French "contract" between judge and lawyers!**
- **Case management is planning!**

Shock therapy for the Mediterranean civil procedure?

Target eight

The trial should be oral and no written protocol should be kept!

- **The Mediterranean civil procedure is still a Roman Canon procedure!**
- **No exchange of documents should be allowed at oral hearings!**
- **Written protocol is hopelessly antiquated!**
- **UNCITRAL: "record" instead of "written form"!**

Shock therapy for the Mediterranean civil procedure?

Target NINE

Enforceability should be detached from res iudicata status!

- **Provisional enforceability as a rule! (Vorläufige Vollstreckbarket)**
- **Enforceability should be conceived as a risk-assessment mechanism!**

Shock therapy for the Mediterranean civil procedure?

Target ten

The right to appeal in civil cases is not a human right – therefore it can be limited or excluded!

- **CEPEJ Framework Programme!**
- **The constitutional rights depend on their interpretation: applicable to appeals, too!**

Shock therapy for the Mediterranean civil procedure?

Target eleven

The appellate courts are not the courts of cassation!

- **The appellate courts should adjudicate, not administrate!**
- **The appellate/Supreme Court judges should not be immune from seeing the parties and/or lawyers!**
- **Fair and public hearing principle applies to courts of appeal as well!**

Future of judicial process

- Orientation towards users – striving towards consumer satisfaction
- Harmonization: not of laws, but of standards
- Common criteria for time management and monitoring of procedural duration
- Comparison of results, not comparison of abstract rules: learning to understand each other
- Research into social impact of legislative changes in the area of civil procedure
- Rennesaince of case administration and court management – uniform statistical methods
- "Joint area of justice": mutual trust in European justice systems has to be rooted in facts, not in wishful thinking

For whom is the shock therapy shocking?

Other questions?

Thank you for your attention!