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REFORMING MEDITERRANEAN CIVIL PROCEDURE: IS THERE A NEED FOR SHOCK THERAPY?

1. The Myth about the Unity of Civil Procedures in Continental Europe

Virtually every basic course in comparative law starts with the division of legal systems into two families, the *common law* and the *civil law*. As paradigmatically described by John Henry Merryman in 1969,[1] the countries of the European Continent belong to one united legal tradition – the tradition that is marked by a common procedural style and philosophy. The perception that this division of legal traditions corresponds to the common features and common style in Continental European civil procedure is still widespread, although already relativised by Merryman himself in the second edition of his book in 1985.[2] It was, and still is, broadly adopted not only by scholars from the other side of the globe, but also by the lawyers in the various jurisdictions which, by their own self-understanding, belong to the Continental European family.

In this paper, I will not challenge the historical accuracy of the arguments about the common traditions of the Continental European legal systems. Rather, I will start with the submission that the developments in the past several decades have contributed to the fact that the countries of Continental Europe – at least in respect to the real functioning of their judiciaries – do not any more form a uniform group which can, by its common features, be contrasted to some other group of *common law* countries or any other group of countries. Although some features of minor importance may have remained, there are other, far more important differences than the superficial remnants of the *civil law/common law* dichotomy. Today, there is no uniform style of civil procedure in Europe.

1 See Merryman 1985.

2 In the new concluding chapter, Merryman diagnoses the 'apparently dramatic impact' of various movements, as the civil law tradition 'has entered a new and dynamic stage of its development'. He also states that 'it would be inaccurate to assume that the civil law tradition is losing its vitality', foreseeing changes in the future catalogue of subtraditions. Merryman 1985, p. 158.

On the one hand, the developments in the European Union have strengthened the need for unity in the standards applied to its national judiciaries. The integration in the EU so far does not mean a uniformity of national laws or the court systems. On the other hand, the principle of equal standards of protection of civil rights and obligations inevitably raises the issue of approximation of civil procedures.[3] The desired goal is to award throughout Europe the same level of protection of rights to each person.[4] Consequently, the approximation of standards should be of a substantial, and not of a formal nature. In other words, the formalities of civil procedure are not the primary target – it is the uniformity of results that is focused on, manifesting itself in the fact that one can obtain judicial decisions of roughly the same quality within more or less the same timeframe in different jurisdictions.

For this objective to be achieved, the issues that have not traditionally enjoyed priority in the theory and practice of civil procedure now come to the forefront – the issues of efficiency and timeliness of legal protection. The common goal of equal protection of rights throughout the EU territory is possible only under the assumption that all members of the European Union have comparably functional judiciaries. This primary objective and the assisting role of civil procedural rules is best expressed in the request of the European Reform Treaty to eliminate 'obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States'.[5]

Now, what is the current situation regarding the 'proper functioning of civil proceedings' in Europe? The systematic study of the functioning of European judicial systems is still in a relatively early stage. It has not been started under the auspices of the European Union, but under the auspices of 'Greater Europe' and its efforts to secure common principles of the rule of law and human rights. Since 2003, the European Commission for the Efficiency of Justice (CEPEJ) has started to collect comparative data about key indicators of the functioning of judicial systems in 47 Member States of the Council of Europe.[6] The ongoing biennial evaluation rounds[7] have so far not revealed sufficient information for final conclusions, but in connection with other CEPEJ activities and data from other sources, it will soon be possible to produce a clearer picture of the European judicial landscape. Even if the ranking of judicial systems was never said to be the goal of the CEPEJ, it should be expected that the stream of information that will become available will eventually

3 See Storme 1994.

4 See, for instance, the Presidency Conclusions of the Tampere EC meeting at § 5 – the formation of the 'genuine area of justice, where people can approach courts … in any Member State as easily as in their own'.

5 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty), Art. 69d p. 2(f).

6 The CEPEJ was established on 18 September 2002 by Resolution Res. (2002)12 of the Committee of Ministers of the Council of Europe with the aim to improve the efficiency and the functioning of justice in the Member States of the Council of Europe. See <http://www.coe.int/cepej> (last consulted December 2007).

7 CEPEJ 2005; CEPEJ 2006. More on the evaluation rounds in Uzelac 2006.

enable us to distinguish between properly functioning justice systems and those that suffer from systemic dysfunctionalities.[8]

Short of arguing that such a conclusion can already be reached on the basis of the CEPEJ work that has been completed until now, we will, in this paper, try to anticipate future findings. The submission is that, within the legal systems of Europe, irrespective of their belonging to *common law* or *civil law* traditions, we may distinguish two groups of countries, based on the criterion of 'properly functioning'.

The two groups of countries would include the group in which, in spite of some minor issues, the justice system by and large functions with no major problems regarding the quality and the speed of legal proceedings; and the group of countries that show continuous features of slow, unreliable and ineffective dispute resolution.

Omnis definitio periculosa est. To name particular countries in this negative context inevitably brings along further perils. However, with an apology for potential injustice caused by generalization, we will reluctantly undertake this possibly reckless step and provide a tentative black-and-white division of civil justice systems that, of course, operate in the world of thousands shades of grey.

Our division is inspired by two concrete examples of almost notorious dysfunctionalities in the systems of civil justice. The first relates to the long-lasting series of difficulties that were encountered by Italian authorities in respect of the safeguarding of the human right to a trial within a reasonable time; the second arises partly from our own personal experience, and partly from the neutral expertise regarding the backlogs and delays in post-Yugoslav countries. Although the problems in Italy and post-Yugoslav states are perhaps not in all aspects representative for other countries, there is sufficient evidence that certain similarities exist, also in respect of the civil procedure of a number of other countries in Southern and South-Eastern Europe – both countries that are 'old' members of the EU (for instance, Greece, and – to a somewhat lesser extent – Portugal, Spain, and France), and 'new' and candidate members (for instance, Bulgaria, Romania, Albania, ex-Yugoslavia).

Solely for the purposes of this paper, in order to have an indicative designation of the group of systems for which we suggest radical changes in civil procedure, we will refer to 'the Mediterranean systems' and 'Mediterranean civil procedure'. This designation is by no means absolutely precise, and it is also inevitably inaccurate in a strict geographical sense. A number of countries that do not belong territorially to the Mediterranean may also belong to this group, for instance, Central European countries such as Hungary, Slovakia, the Czech Republic and

[8] In a similar sense, in recent practice the European Court of Human Rights started to note (even in the dispositive part of Court judgments) the occurrence of 'systemic problems connected with the malfunctioning of domestic legislation and practice' in particular fields – see *Broniowski* v. *Poland*, case no. 31443/95, judgment of 22 June 2004. Widespread problems arising out of systemic malfunctioning of the legislation and judiciary were noted also in many cases against Italy (for instance, *Scordino* v. *Italy*, case no. 36813/97, judgment of 29 March 2006, at 229-237).

Poland, post-Soviet countries such as the Ukraine or Russia and even some Western European countries such as Belgium. However, a typical and a very representative core group of legal systems that share the same procedural style *is* in fact situated in the Mediterranean, and this gives us the right to use this name.

Still, we have to bear in mind that this name is more a designation of an ideal type than the name of an absolute descriptive category. If we would attempt to provide an empirical description and comparison of European systems of civil justice, many more developments would have to be taken into account. For that, a very thorough research into numerous reforms and attempts of reforms initiated in the recent past would have to be undertaken.[9] At present, this is not our intention.

The notion of 'Mediterranean civil procedure' can perhaps best be defined when contrasted to those systems that do not belong to it. In this context, we will not utilize any particular name, but geographically, the closest match would be Northern and North-Western Europe. Concretely, we refer to the Scandinavian countries (Finland, Norway, Sweden, Denmark, Iceland), the British Isles (UK, Ireland), the Netherlands, and – with some reservations – the Germanic countries (Germany, Switzerland, and Austria). The common characteristic of all of these systems does not lie in commonality of procedural forms, but rather in the adoption of policies and practices that have by and large secured effectiveness, legal security, and a high level of legal certainty. These policies and practices are also the point of reference for the 'shock therapy' proposed in the second part of this paper.

At the level of an ideal type, it would be possible to elaborate a number of elements that separate 'Mediterranean' and 'non-Mediterranean' civil procedure. Some of the main elements, such as the differences in position of the users of the justice system, have already been touched upon elsewhere.[10] Summarizing the main points, 'Mediterranean' procedure is characterized by:

- the dominance of the internal perspective, and the relative absence of an interest for the fulfilment of the needs of the users of the justice system;

- an orientation towards the past; keeping the *status quo* and an opposition to reforms;

- a pronounced difference between the self-perception of legal professionals and other 'insiders' and the perception of the public;

- a high level of formalism; an abstract and impersonal approach to civil procedure; civil procedure contains a number of technicalities that makes it difficult to understand for 'outsiders';

9 A good overview of some new developments aimed at defeating delays in civil procedure (as well as their historical background) can be found in Van Rhee 2004. See also Zuckerman 1999; Van Rhee 2005.

10 See Uzelac forthcoming (Turning Civil Procedure Upside Down).

- an overall disinterest for the planning and/or timing of judicial processes; a discussion about delays is focused on the institutional issues of 'backlogs' and 'excessive work', and not on a deficiency in providing legal protection to interested parties.

We will avoid going into further elaboration of these features, as many points of separation between 'Mediterranean' and 'non-Mediterranean' systems will be evident *per negationem* from the targets described in the following part of the paper. At the same time, the presentation of the targets themselves will be the best test for the individual systems of civil justice; those who feel the target as 'shocking' thereby prove that their system is indeed 'Mediterranean'; those who think that they are natural and already more or less accomplished in the judiciaries to which they belong may be sure that they are on the other, safe side.

2. Shock Therapy in Eleven Steps: a Strong Cure is the Only Cure

In a number of countries in South and South-Eastern Europe, justice reforms are being announced every several months or years. The usual goal is to reduce delays, expedite, and raise the efficiency of judicial proceedings. A number of these reforms relate to civil procedure, since delays and inefficiencies are the most present and notorious in respect to civil dispute resolution. However, very few of such reforms have apparently achieved decisive positive results. In spite of many changes, the general environment of inefficiency has remained; *plus ça change, plus c'est la même chose*. Here, the examples of Italy and Croatia can be illustrative. Both countries have been undertaking extensive reform steps in the past decade, basically motivated by outside pressures – in the Italian case, the pressures come from the European Court of Human Rights and the Council of Europe; in the Croatian case the pressures arises out of the process of accession to the European Union.[11] In both cases so far, it appears that the ultimate goal is still far from being achieved; Italian cases still last unreasonably long and often end up before the European Court of Human Rights; and as regards Croatia, the EU reports on its progress in the accession process are still most critical in the area of judicial reforms.[12] Many other examples of announced reforms with poor results in other countries may be linked to these two.

Various arguments may be used to explain the lack of tangible progress. Reasons for the absence of fundamental change can, for example, be found in the lack of political will, objective obstacles in the process, the long-term nature of changes in the judicial system, and the lack of proper planning and monitoring etc. Most of such arguments are partly or entirely true. We would, however, like to draw attention to another aspect, linked to our basic submission about the fundamental differences of European legal systems. If, indeed, this submission is true, we may speak about the *two paradigms* of European civil justice systems. If one of them,

11 See Uzelac 2004 and 2004a.

12 See Commission 2006; Commission 2007 (re Chapter 23).

rooted in the past, needs fundamental change, such change, like every change of paradigm, cannot be achieved by partial means; by a little 'tweaking' of legal norms or occasional adjustments in particular areas. If one strives to change the paradigm, only radical, far-reaching steps have chances of succeeding. In this sense, we will speak about a 'shock therapy', although its purpose is not to be shocking, but to provide a real cure, which in this case can only be provided by strong means.

In the following text, we will present and explain some necessary steps in reforms of the civil justice systems that will do something more than just scratch the surface, although these are neither all or the only steps. The reform steps will be presented methodologically through eleven objectives in order to avoid a technical debate about the rules that in practice can achieve results different from the desired ones. By concentrating on targets, we also suggest that reforms should go further than a mere change of legislation – they should be planned, monitored and constantly adjusted to the goal that was set at the outset.

The targets are:

1. instant dismissal of manifestly ill-founded claims and appeals;
2. setting the trial date at the very beginning of the proceedings;
3. opening all channels of communication among the parties, the judge and the court;
4. minimal threshold of tolerance for delaying tactics in the proceedings;
5. collection and presentation of evidence as a principal responsibility of the parties;
6. the trial stage should be completed in no more than two hearings;
7. planning of the process and setting of the calendar for future actions in the proceedings at the outset of the case;
8. reinforcing orality in the proceedings;
9. instant enforceability of court judgments made in first instance;
10. limitation of the right to appeal solely to cases that deserve appeal;
11. introduction of adversarial hearings in appellate courts and excluding the possibility of remittals.

We will briefly explain these targets and provide some illustrative examples.

2.1. Instant Dismissal of Manifestly Ill-Founded Claims and Appeals

The civil courts should generally decide disputes between parties that act in good faith. But, just as Clausewitz defined war as 'merely a continuation of politics', civil litigation can be defined as a continuation of business relations between the parties. According to the basic postulates of the law and economics movement, it is hard to expect good faith and loyalty to the fundamental principles of civil procedure if it pays off to act otherwise.

One of the characteristic features of Mediterranean civil procedure is its opposition to any filtering mechanisms that would separate cases that deserve input of judicial time and resources from cases that are, right from the start, obviously ill-founded. This attitude towards filtering cases can historically be brought into con

nection with another attitude – the aversion towards discretionary decision making. Judicial discretion is in this paradigm often viewed as behaviour that inevitably leads to arbitrariness, and therefore also endangers legal certainty as the fundamental value of decision-making. Objections to discretionary decision-making can also be brought into connection with the efforts to limit judicial power and put it under strict hierarchical control. Of course, it is also often a sign of distrust in the holders of judicial authority and suspicion about their possible hidden agenda. In any case, Mediterranean civil procedure would insist on formal treatment of every case, and this would involve its full-fledged review of every legal and factual aspect. The result of such a review is often a reasoned formal decision on the merits – a decision which is open to appeal; it can regularly become ineffective before the appeal has been decided.

This feature is, of course, well known to Mediterranean lawyers. Even though they might know that the case they bring before a court cannot be won, they are certain that by bringing it before the court they can win time – in fact, much time. Winning time can, under some circumstances, produce equal results as winning the case, as the need for a judicial decision may disappear in the course of several years (the period that can regularly be counted on). In this manner, time-management sometimes even becomes the most important aspect of the legal profession, and the art of a vexatious conduct of proceedings one of the most revered legal skills.

On the other side of the divide, filtering practices gradually become ever more important for the procedural economy – but also for the procedural style and routines. One prominent example may be found in the practice of the European Court of Human Rights, which owes a lot of its functionality to the power to declare inadmissible, in a rather summary manner, every individual application if it is considered to be 'manifestly ill-founded' or 'an abuse of the right of application'.[13] This principle is not unknown to national legal systems, for which it is among the best practices recommended by the Council of Europe.[14]

In the initial stages of the proceedings, the criterion of 'manifestly ill-founded' can be connected to the obligation of the claimant to substantiate his claim. Claims that are unclear, not substantiated with adequate factual allegations, and not supported by sufficient evidence might well fall into this category. And, although practically all systems have rules on the formal requirements regarding the content of the statement of claim, what is important is not the formal rule – the *prima facie* review of the case should also instantly lead to a rejection of poorly substantiated claims in practice.[15]

13 See Art. 35(3) ECHR.

14 Rec. 85(5) on the principles of civil procedure designed to improve the functioning of justice, Principle 2.1: 'When a party brings manifestly ill-founded proceedings, the court should be empowered to decide the case in a summary way and, where appropriate, to impose a fine on this party or to award damages to the other party.' See also Principle 2.2. and 2.3. See Council of Europe 2008.

15 Cf., for instance, the Croatian Code of Civil Procedure which formally requires the claimant to set forth all facts and evidence at the very beginning of the case, in the statement of claim, but in practice does not sanction late submissions.

The practice of summary rejection of claims that do not have any prospects of succeeding may be even more important in the next stages of legal proceedings. While a too zealous filtering of cases when starting civil proceedings might result in the refusal of the human right of access to court, this consideration is less important regarding the filtering of appeals and other legal remedies. Vexatious appeals are also among the most visible features of Mediterranean civil procedure.

Already in 1995, the Council of Europe noted problems caused by an increase in the number of appeals, by ineffective or inadequate second instance procedures, and the abuse by parties of the right to appeal. It recommended, *inter alia,* considering among the measures to prevent such abuses

> 'allowing the second court to dismiss in a simplified manner, for example without informing the other party, any appeal which appears to the second court to be manifestly ill-founded, unreasonable or vexatious; in these cases appropriate sanctions such as fines may be provided for'.[16]

The likelihood to greatly increase the efficiency of proceedings by introducing some filtering mechanisms was recognized by the European Commission for the Efficiency of Justice (CEPEJ). One of the announced lines of action in its Framework Programme,[17] devoted to 'ensuring an appropriate use of appeals and other applications', expressly mentions the introduction of filtering mechanisms, as well as the possibility of imposing sanctions against persons introducing manifestly abusive processes.[18] Implementing this line of action, the Compendium of Best Practices in Time Management mentioned the examples of filtering and deflective tools that could be applied to limit the number of cases to be filed in courts, *inter alia* the example of the Norwegian *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'.[19]

2.2. *Setting the Trial Date at the Very Beginning of the Proceedings*

An old Croatian proverb says: 'the morning shows how the day will be'.[20] Where time management in judicial proceedings is concerned, this proverb may be very relevant. The sooner the civil procedure kicks off, the better the chances are to have

16 Recommendation No. R (95)5 of the Committee of Ministers concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases, 7 February 1995. See Council of Europe 2008.

17 CEPEJ 2005a. See Line of Action 8.

18 *Ibid.*, p. 70 & 71.

19 CEPEJ 2005a, 5.3.

20 *Po jutru se dan poznaje.* Translation according to <http://en.wikiquote.org/wiki/Croatian_proverbs> (last consulted December 2007).

the matter settled within appropriate time and *vice versa*. The waiting time between the submission of the statement of claim and the first steps undertaken by the court often signals not only the level of backlogs and the length of the 'queue' of files that wait to be processed, but also the manner in which the rest of the case will be dealt with.

According to one rare report on the duration of proceedings in Croatian courts, the mean time between the initial filing and the first hearing in the largest and the most important court of general jurisdiction in Croatia was 172 days or 20 per cent of the total time in the first instance in 2001. In general civil cases, the mean time between the filing and the judicial order on setting the date for the first hearing was 101 days, and a further 119 days had to pass until the first hearing would actually take place.[21] In this average case preparation time of about seven months, no substantial analysis of the case would take place, as the activities of the court would be limited to the assignment of the case to the judge, cursory review of a few formal points (for instance, court jurisdiction or party capacity) based on the written submissions of the claimant and the delivery of the notice of hearing to the parties. Therefore, in an average period of about 200 days, over 95 per cent of time would be waiting time, as noted in the Report:

> 'File creation, case assignment and recordation, and hearing scheduling are the other primary tasks that occur during this time. Although these tasks are very crucial to case processing, they usually take one or two days to complete and would not account for significant case delay. The time delay occurs between the date the case file was forwarded to the judicial officer and the actual completion dates of case assignment and hearing scheduling. For example, the President may receive a new case file the day after the initial filing, but it may take several days to months before the President can actually review the case for assignment. Another example, the assigned judge may receive a new case file a day after assignment, however, it may take several days to months for the judge to actually review the case'.[22]

The need to study waiting time in courts with a view to reduce or eliminate it was the focus of the activities of the CEPEJ.[23] The Compendium of Best Practices noted the need to pay 'separate attention to standstill time due to inactivity […] of the courts',[24] and the Time Management Checklist emphasizes that for purposes of proper time management data about the length of every individual stage of the judicial process, such as, for instance, the duration between the instigation of proceedings and the court hearings, needs to be collected.[25] Some examples of case

21 See NCSC Report 2001, p. 12.

22 *Ibid*.

23 See the CEPEJ 2004, Line of Action 11 – better organizing trials to reduce waiting time, which also states that 'the courts should organize the hearings in such a way that the uncertainty as to the time when the persons called to courts are actually requested to appear before the judge is reduced as much as possible'.

24 CEPEJ 2006a, 3.1.

25 See CEPEJ 2005a, Indicator Four.

management systems that can monitor all steps in the proceedings and diagnose instantly waiting times have also been recorded.[26]

The possibility to have the case assigned and the date for the preliminary hearing determined simultaneously with the first procedural action (for instance, submission of the statement of claim) or within days after it might seem unnatural or even impossible in the Mediterranean system of civil procedure. However, technically or conceptually, it should be equally normal as it is normal to have the date for a medical examination set at the same time of or soon after approaching the hospital. The date setting for the hearing can be facilitated by various court services or special professionals, for instance, through the use of a bailiff (*huissier de justice*) who can arrange the hearing date with the court clerk (*greffier*) directly, even prior to the service of the statement of claim to the court and/or the defendant. We may also ask why the court would not be open for instant emergency hearings in especially urgent cases, just as hospitals have their emergency services open round the clock.

The opportunity to have the case heard by the court as soon as the proceedings are initiated is of tremendous importance, both at the practical and the symbolic level. An early hearing can help avoid further complications, or even make further proceedings unnecessary. It also satisfies the human desire (and human right) to be heard – to have 'a day in the court' – in the moment when this is most required and needed. This is also the moment when provisional regulation of the conflict and preliminary review of the case can effectively prevent further harm. The first sight of the dispute often provides correct insights that may correspond to the final outcome, and therefore it is essential to ensure that this *prima facie* encounter of the case and the judge happens as soon as possible. The practice of the Dutch *Kort Geding* proceedings – a rapid semi-summary procedure – might be the best illustration of a procedure which secures a hearing on the merits, completion of the proceedings and an enforceable decision in the form of preliminary relief, all within a timeframe that is twice as short as the time needed to get the first hearing in the Croatian example.

2.3. *Opening all Channels of Communication among the Parties, the Judge and the Court*

The rules of Mediterranean civil procedure regarding service and communication between the court and the parties are typically hopelessly antiquated and outdated. In the times that the postal services of most countries discontinue telegraph services due to the global acceptance of e-mails,[27] there are still national procedural codes that rely exclusively on conventional postal services (known among the users of the Internet as 'snail-mail') and only occasionally allow for telegrams or telexes. As to

26 So the example of the Turku Regional Administrative Court (Finland), see CEPEJ 2006a, *ibid*.

27 In the US, Western Union discontinued telegram services from the 31 January 2006, citing that in 2005 there were 1,000 times less telegrams than in 1929 (20,000 versus 20 million). In the Netherlands, the last Telex machine ceased to work on 9 February 2007.

the reforms, considerations in the debate are focused at best on another means of telecommunication that will soon become history – the facsimile (fax).

The formality of certain aspects of communication between the parties and the court plays, naturally, an important role. The usual explanations for the higher threshold of formalities include the need for legal certainty, the need to seriously warn the parties about the consequences of their actions, easier proof of notice and the need to record the steps undertaken in the proceedings. These arguments certainly have some weight, but they are not absolute.

While it should be admitted that a few steps in civil proceedings necessarily require certain formalities (for instance, the service of process), there are two ways in which one might attempt to challenge the perception inherent to the Mediterranean civil procedure, namely that any communication between the court and the parties other than communication by registered letter with return receipt is suspect and virtually dangerous.

The first line of questioning of this perception would allow for a limited number of strict formal actions, mainly those at the beginning and the end of the process. On the other hand, one may argue that all the intermediary actions, including all communications aimed at planning and the preparation of the hearings require efficiency instead of solemnity. In fact, many litigators in the Mediterranean system of civil procedure often abuse some of such unnecessary formalities, for instance, by evading the notice of hearings, court service of documents and/or delivery of judgments with the purpose to delay or stall the proceedings. Most of such, in practice, often successful attempts, can be prevented by a simple phone call. It is interesting to note, that in the Mediterranean countries, the absolute predominance of antiquated methods of court-to-party communications goes hand in hand with the, generally, very high level of acceptance of new communication means in their population.[28] Thus, while court hearings in such an environment are often adjourned because of 'snail-mail' communications which require weeks, the court users enjoy all of the privileges of instant communication in their private lives, with practically zero 'down time'. Therefore, we may ask why, for simple notifications of hearings, the parties should not be notified by a judge (or rather a court clerk) using the same methods as they would use for confirming a date for an appointment with a dentist or a tailor? Or, why would it not be required from the parties (or at least their lawyers) to ask for extensions of time limits (if any) or inform about relevant changes in their relations in the most straightforward manner of a direct two-way communication?

The second line of questioning might go a step further and inquire whether all of the paper-based methods of communication might be appropriately replaced by their much faster functional equivalents. At least in the commercial environment,

[28] So, for instance, in the beginning of 2008 Croatia was with 114.9 per cent of mobile phones users per capita above the average in the EU, which was 113.5 per cent. See <http://www.total portal.hr/article.php?article_id=169913> (last consulted December 2007). According to the same source, the countries with the highest use of mobile telephony in Europe were Cyprus (161 per cent), Montenegro (141 per cent), Italy (140 per cent), Greece (130 per cent), Spain (121 per cent) and Portugal (121 per cent).

electronic communication has now been recognized globally.[29] It is accepted not only for routine organizational communications, but also for the transactions that require a high level of formality and a high level of security regarding the authenticity, confidentiality and record of the communication. Today, a large number of countries has enacted some kind of legislation on electronic signatures,[30] and it is also generally being held that, for all purposes, secured electronic communication is more secure than the communication protected by conventional means of authentication.

Successful examples of the use of IT technology for communication in judicial proceedings can be found in many European countries. They include also the examples of all-electronic on-line submission of claims initiating judicial proceedings, as for instance, in the case of the Austrian *E-Justiz* project that has completely changed the way the collection of monetary debt functions (so-called *Mahnverfahren*).[31] Such examples also prove that it is more than possible to impose and fully implement the use of new technologies among lawyers, who are traditionally not extremely proficient in their use.

2.4. Minimal Threshold of Tolerance for Passive Behaviour and Delaying Tactics in the Proceedings

Fighting delays and backlogs is very often declared to be the primary target of reforms in the Mediterranean judiciaries. Yet, the practice and many rules demonstrate a very high latitude for the use of delaying tactics. Requests for adjournments, extension of time limits and additional opportunities to present submissions or introduce new evidence are generously tolerated and granted, in spite of some of the latest attempts to limit or even sanction such requests. Noting that procedural discipline is very important for the efficient and timely course of the judicial process, the CEPEJ included a strict policy of minimizing adjournments among the best practices of judicial time management.[32]

One of the typical delaying tactics in Mediterranean litigation is, curiously, not only an express request for adjournments, but sheer passivity in the process. Therefore, we will concentrate here on the consequences of the parties' default, while

29 See the UNCITRAL model legislation in the area of electronic commerce – 1985 Recommendation on the Legal Value of Computer Records, 1996 Model Law on Electronic Commerce and 2001 Model Law on Electronic Signatures.

30 In Croatia, see, for instance, Law on Electronic Signature, Off. Gaz. 10/2002.

31 *Mahnverfahren* is the summary proceedings for debt collection similar to the former payment orders. Developed since 1986, in Austria it is now mandatory for all claims not exceeding € 30,000. The process of *Mahnverfahren* is completely automated, as both the claim and the decision are being processed in an on-line system. See more at <http://www.justiz.gv.at> (last consulted December 2007). For a similar, although not mandatory system in some German provinces, see, for instance, <http://www.mahnverfahren.nrw.de> (last consulted December 2007).

32 CEPEJ 2006a, 4.5.

other practices that tolerate delaying behaviour will be elaborated in the framework of other targets.[33]

An analysis of the provisions that regulate passive behaviour of the parties can provide good indicators of strictness or latitude towards delaying tactics. In Croatia, for example, there was a lot of talk about the need to accelerate civil litigation.[34] However, in spite of several amendments to the Code of Civil Procedure, there was very little substantial change in the legal requirements for passing default judgments. The only noticeable development was the possibility to pass a default judgment in case the defendant did not submit his statement of defence within the time limit determined by the court.[35] This rule is now applied in most cases instead of issuing a default judgment (*presuda zbog izostanka*)[36] when the defendant does not approach the court at the first oral hearing. The conditions for default judgments are, however, rather strict; any kind of reaction by the defendant, including a sheer unsubstantiated negation of the claim, makes it impossible for the court to make any decision. Moreover, the court has to check whether the claimant's claim is well-founded, provided that his factual allegations are true, which also opens the possibility to raise substantive errors of law upon appeal against the default judgment. The default judgment may be pronounced only in the very introductory stages, and the silence of the defendant in later stages will not trigger any automatic negative decision of the court. In other words, it is enough that the defendant answers the claim with two words – 'I disagree' – and he will thereby prevent any future default judgment against him, even if he would never submit any further brief, and even if he would in the meantime fail to attend every next hearing without any excuse or explanation.[37]

When a default judgment is pronounced, this creates a test as regards the tolerance for passivity and delaying tactics. In principle, the defendant may attack the default judgment on appeal, but he can also ask for the revocation of the judgment for reasons of equity, arguing that his default was justifiable. This kind of *restitution in integrum* is in Croatian practice rather common, and the courts often show abundant understanding for such actions, accepting all sorts of 'excuses' as justifiable.

The tolerance for passive behaviour of the parties is also manifested in respect of the claimants. The failure of the claimant to appear at a court hearing will in most cases not result in negative consequences for the outcome of the case. In regular civil proceedings, the court will only declare that the case rests (*mirovanje postupka, das Ruhen des Verfahrens*) for the next three months, after which period a continua-

33 See target five (introduction of evidence), target six (limitation of the number of hearings) and target seven (setting of a procedural calendar).

34 See more in Uzelac 2004.

35 Croatian Code of Civil Procedure, Art. 331b on the special default judgment (*presuda zbog ogluhe*) introduced by an amendment to the Code of Civil Procedure in 2003. This provision does not apply in most family matters and in some other cases in which the parties cannot freely dispose of their rights.

36 Code of Civil Procedure, Art. 332.

37 Why a Croatian court does regularly consider that it is bound to hold hearings, even without the defendant, is explained *infra* under 2.5.

tion and a new hearing will take place, should the claimant so request. Another awkward feature of such procedural style is that the tolerance for passive claimants is even greater in 'urgent' proceedings. For instance, in family or commercial disputes, the law prohibits resting of the case. Instead, if claimants fail to appear at the hearing, the court adjourns it and sets a date for a new hearing. Only if the claimant does not appear at the subsequent hearing, is it presumed that he has dropped his claim. Interestingly, in doctrine this is still viewed as one of the ways to accelerate the proceedings (compared with regular cases), although in practice, most courts set the date for the next hearing only after more than three months have passed.[38] Thus, an 'urgent' system in priority cases where no resting of the case is admissible would often be less effective than the system provided for 'regular' cases.[39]

A thorough reform of the default judgment rules would have to keep in mind the overriding objective of minimum tolerance for delaying strategies of the parties. Therefore, a number of solutions can be considered, alternatively or in combination, with the reform of the other rules. Among other things, one could reduce the requirements to be met in case of default judgments, impose stricter requirements for their setting aside, and even consider empowering the court to make default judgments in case that, after refuting the claim, the defendant fails to appear at subsequent hearings, effectively until the end of the trial stage. Equally, a passive attitude of the claimant should also be sanctioned by an instant dismissal of the claim.

2.5. The Collection and Presentation of Evidence as the Principal Responsibility of the Parties

Nowadays, many civil procedural systems in Europe argue that they are rooted in the principles of adversarial trial, but modified with some inquisitorial elements. However, the understanding of what is 'adversarial' and 'inquisitorial' may be different. One aspect differentiates the obligations of the judge and the parties in the taking of evidence; the other aspect is in the judicial activism regarding the conduct of the proceedings and the choice of the best methods for reaching the ultimate goal in the proceedings. It is undisputable that some type of judicial activism may be beneficial for the efficiency of judicial proceedings. But, on the contrary, in the Mediterranean understanding of judicial activism, the extensive powers of the judge often turn into the main generator of delays.

The Mediterranean model of judicial activism takes the active role of the judge as an excuse for the passivity of the parties. The active authority of the judge to order the taking of evidence can, in the most radical version, be understood as an

[38] According to the NCSC report, in the Municipal Court in Zagreb there would be on average one hearing every 145 days (5 months). See NCSC Report 2001, *ibid*.

[39] This was also supported by some empirical findings, according to which the mean length of 'regular' civil proceedings is not much different from the length of proceedings that are by law considered to be 'urgent'. So, for instance, the mean length of cases of trespass was even slightly higher than the length of 'regular' cases (798 days compared to 787 in the case of 'regular' cases). A similar situation exists as regards labour cases (773 days mean). *Ibid.*

alibi for the wait-and-see attitude of the parties. This feature may be most visible in ex-socialist judiciaries, which adhere to the doctrine of the 'pursuit of the material truth'. In these systems, it was understood to be the obligation of the judges to take evidence *ex officio* even in the absence of any proposals by the parties. Such inquisitorial consciousness led to a rather passive role of the parties and their representatives. It can best be illustrated by the practice in post-Yugoslav countries where lawyers frequently only attend the beginning of the hearing to have their appearance noted on the record. With a kind permission of the acting judge, they soon leave to allegedly attend another hearing at the same time. This was not regarded as unusual, because it was expected that the judge would anyway conduct the process alone – questioning witnesses, examining evidence, etc. The judges from their side contributed to such behaviour, suppressing any attempts by parties' counsel to take any more initiative than absolutely necessary. So, for instance, every attempt to cross-examine the witnesses, present in some length oral arguments, argue the points of law, etc. would be instantly rebuked as an unwanted departure from the regular routine.

As this style of conducting the proceedings contributed to inefficiency, some reforms were initiated. Against this background it is easy to understand why the course of Mediterranean reforms of civil procedure was going in the direct opposite direction from those in Northern Europe. The latter (successfully) attempted to raise efficiency by introducing more inquisitorial elements and emphasizing the active role of the judge;[40] the former were reducing the authorities of the judge, providing that evidence should be taken only at the parties' initiative.[41]

The relatively poor results of such changes, as well as the lack of any far-reaching change in the procedural style of the civil courts, can be explained by the flaws in the very concept of such 'reintroduction of adversariness'. The change mostly happened on the formal level, i.e. the judge was formally relieved of the duty (and power) to take evidence *ex officio*.[42] However, he maintained the duty to 'warn the parties about their duty to state facts, propose concrete evidence, and explain to the parties why he considered this necessary'.[43] But, if the party would only indicate some sources and propose the taking of evidence (for instance, after being warned by the judge that there was a need to propose evidence), the obligation to locate the evidence, summon witnesses, ensure submission of documents, etc. would generally still be with the judge.

40 On the international level, the favourable effects of the active role of the court for the efficiency of the proceedings, including the right of the court to call for evidence *ex officio*, is recognized by the Council of Europe Recommendation 84(5), Principle 3, and in the ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 22.2.2.

41 See, for instance, the 2003 Code of Civil Procedure amendments in Croatia which generally prohibited the taking of evidence *ex officio* (with a number of exceptions).

42 It is important to note that the law itself never conceived the *ex officio* introduction of evidence as an obligation, but as an option for the judge. Yet, in practice, it was interpreted otherwise. If a judge would not order the taking of evidence, the losing party could use this fact on appeal where the judgment would be reversed for reasons of insufficient evidence.

43 Art. 219, p. 2 of the Croatian Code of Civil Procedure.

Thereby, the 'reintroduction of adversariness' effectively remained only on the surface, missing the main point in the effective division of labour between the judge and the parties – the duty of their loyal collaboration. The principal responsibility for the results of the taking of evidence should be with the parties, and they have to contribute to it actively from the very beginning to the end. The court, however, has the responsibility to direct the evidentiary process, assisting only if necessary, for reasons of practicability and fairness. An appropriate reform of the evidentiary rules in Mediterranean civil procedure should not stop at the level of proposing evidence – it should go a step further and deal with the collection of evidence. From the beginning, the parties and the judge should agree on the evidence to be presented, and on the consequences of the failure to provide such evidence at the hearing. Regularly, the parties should not only take the initiative, but also effectively ensure that the evidence is collected, although the court may occasionally help them when a certain piece of evidence cannot be obtained without official support or a court order. The bottom line should be that, in principle, no major delays should occur if some proposed piece of evidence (for instance, a document or a witness) is not available at the trial.[44] In such a situation, the judge should decide according to the burden of proof rules. As shocking as this might be to a Mediterranean lawyer, this type of approach can certainly be the best generator of change: necessity is the best teacher. So, the imminent prospects of losing the case (for instance, if the proposed party witness would not appear at the hearing) could instantly change the 'social discipline of citizens' and reverse the trends of their non-appearing when called as witnesses.

2.6. The Trial Should be Completed in no more than Two Hearings

The advantages of an oral, public and concentrated hearing as the main stage of civil proceedings are almost without exception praised in the standard textbooks of civil procedure. In this respect, however, there is a manifest gap between theory and reality. In Croatia, for instance, in spite of the clear legal basis and academic teaching of civil procedure, the 'main hearing' differs very much from the theoretical ideal. Instead of a concentrated trial, it is a series of short meetings between the court and the parties over a period of many months. It is not uncommon for this stage to last several years, with 'hearings' being held every few months. The sample findings in a Zagreb Court showed, an average of 5,4 hearings in trespass cases (regarded as urgent). Hearings were held every 126 days on average.[45]

The concentration of hearings is among the most essential preconditions for an efficient civil procedure, as demonstrated by a number of successful reforms, from Franz Klein to the 1993 Reforms in Finland.[46] It is also advertised in various pro-

44 See also Council of Europe Rec. 84(5) on the principles of civil procedure, Principle 1.3: 'When a witness is absent, it is for the court to decide whether the case should continue without his evidence'.

45 NCSC Report 2001, p. 12.

46 For overall reform of civil procedure in Finland, which may serve as a good example of a shock therapy that changed the process from 'an endless series of hearings where the court →

grammatic documents. The need for concentration is very clearly expressed in the first principle of the Council of Europe Recommendation on civil procedures designed to improve the functioning of justice:[47]

> 'Normally, the proceedings should consist of not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time and, in principle, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances'.[48]

The recipe for a trial in two hearings (one preparatory and one for the taking of evidence) may indeed seem shocking for a Mediterranean lawyer accustomed to a series of hearings which take place as more or less informal encounters for the exchange of documents and the occasional taking or proposing of new evidence. For them, two-hearing proceedings might even seem impossible; however, combined with proper planning and preparation (see *infra* at 2.7) and a real adoption of the principle of orality (see *infra* at 2.8), as well as with the introduction of a less tolerant attitude towards delays and the appropriate means of communication (see *supra* at 2.2 and 2.3), this target becomes much less elusive.

2.7. Planning the Process and Setting the Calendar for Future Actions in the Proceedings at the Outset of the Case

Civil procedure should not be a journey without a timetable. All developments in the past two decades in the most advanced jurisdictions tend towards more planning and stricter control of time management in the judicial process. Setting a timetable for procedural actions brings about a double advantage. On the one hand, it helps reducing the overall length of the proceedings, avoiding delays. On the other hand, it brings another necessary virtue: the virtue of predictability. In its Framework Programme, the CEPEJ paid special attention to the need for improving the foreseeability of the timeframes, stating that

> '… one of the most awkward problems for court users is that they are unable to predict when proceedings will end. Bringing an action often means embarking on a process that is expected to be long but whose exact length is impossible to predict. Accordingly, users tend to consider that the impression of a never-ending process applies to all cases. Users need foreseeable proceedings (from the outset) as much as an optimum time'.[49]

collected the material for the judgment in a piecemeal fashion', to a 'well-planned court session'; see Laukkanen 2008, p. 215-216.

47 Recommendation No. R (84)5 of the Committee of Ministers, Strasbourg, 28 February 1984. See CEPEJ 2008.

48 See Principle 1.1.

49 CEPEJ 2004, p. 49.

The same ideal of well-prepared and planned proceedings is contained in the ALI/UNIDROIT Principles, where it is provided that the court 'should fix a time-table for all stages of the proceeding, including dates and deadlines'.[50] Among the best practices on time management of judicial proceedings, the CEPEJ noted various examples of how realistic timeframes can be set in collaboration with all justice stakeholders.[51] The timeframes may already be set as targets at the level of the court, or even at the national level, in the sense in which, Lord Woolf proposed that 'for all fast track cases there will be fixed timetables of no more than 30 weeks'.[52]

However, setting targets in an abstract manner is not sufficient. Many examples in Mediterranean jurisdictions demonstrate that even the strict legislative time limits for particular types of proceedings can graciously be ignored.[53] It is essential that in every particular case the judge agrees with the parties on the precise calendar for parties' submissions and on the number and dates of hearings. Such a calendar, although subject to eventual revisions by consensus, should also be enforced, and so should the agreed upon deadlines, too.

This ideal can again seem very strange to many Mediterranean civil procedures, for which the abolition of adjournments *sine die* might already seem a revolutionary novelty. Yet, this is the practice that has proven to be the only guarantee for efficiency, not only in the small claims or fast track processes, but also in cases of extreme importance, value and complexity. At the international level, this has been proven by the practice of international arbitration in commercial matters. For such cases, the United Nations Commission on International Trade Law (UNCITRAL) has, in 1996, prepared the Notes on Organizing Arbitral Proceedings with the purpose of assisting arbitration practitioners by listing the issues 'on which appropriately timed decisions on organizing arbitral proceedings may be useful'.[54] In addition, it is noted that special preparatory consultations or a special meeting ('preliminary meeting', 'preparatory conference' or 'pre-hearing review') can be useful to increase the predictability of the proceedings. Arbitrators and parties should agree on the scheduling of written submissions, the order of deciding the issues, the time-limits for the submission of documentary evidence, the consequences of late submissions, the dates for hearings, the order of presentation of parties' arguments and evidence, as well as the length of the hearings. The dates set can be fixed or definitive.[55] In any case, such well-planned procedures should, for

50 Principle 14.3.

51 CEPEJ 2006a, 1.5.

52 Lord Woolf 1996, Overview, p. 9.

53 One example from Croatia: for more than a decade Family Law provided that the first instance court should hold the first hearing within 15 days from the receipt of the statement of claim, and that the appellate court has to decide on the appeal within 60 days from its receipt (Arts. 265 and 266). In practice, the average time until the first hearing was about 100 days, and the appeals were rarely decided in less than a year. See NCSC Report 2001, *ibid*.

54 UNCITRAL 1996, p. 1.

55 See UNCITRAL 1996, p. 77: 'Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only 'target dates' as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be →

all of the participants, as well as for the general public, create a clear picture of future steps and be foreseeable not only one step ahead, but also in respect to the timing of the final decision. In this regard, civil litigation has a lot to learn from arbitration. Arbitrators, who are appointed, empowered and paid by the parties, are the best example of adjudicators who attempt to fulfil the expectations of those who have given them a mandate to decide. Knowing and respecting the needs of the parties, experienced arbitrators care not only about fairness and the appropriateness of their decisions, but also about the efficient and foreseeable conduct of the proceedings.

2.8. Reinforcing Orality in the Proceedings

The ideal of the concentrated trial outlined *supra* at 2.6. does not significantly contribute to the efficiency and fairness of the process if the style of the proceedings at the hearings does not make full use of the advantages of an oral presentation. As already noted, for a Mediterranean lawyer, a court hearing is the opportunity to exchange documents with the other party, to have an informal chat with the judge or the lawyer of the other party, to request an extension of time limits or, ultimately, to charge another fee to his client. For all other purposes, the hearing is considered to be a waste of time.

We may have some sympathy for such an understanding of the hearings, although it has more to do with the written Romano-canonical procedure than with the modern idea of a trial. In fact, a number of factors does contribute to such an understanding.

Some of them are derived from judicial activism, tolerance for delaying behaviour and the lack of proper planning and preparation of the process (see *supra* 2.5 and 2.7). Tolerating late written submissions and even the insistence on a confirmation of the oral arguments presented at the hearing in writing are closely connected with these factors. Strict policies of enforcing time limits and the exclusion of all written submissions at the hearing or imminently before it, may be the only effective counter-measures.

Some other factors are apparently of a more technical nature, but also have a strong impact on the procedural style. One such factor consists of the manner in which the court composes the protocol of the hearings. If the hearing has to be interrupted every few minutes in order to have the text of the protocol dictated by the judge, and if the skills and the energy of the judge have to be spent mainly on the accuracy and completeness of the written record of the trial, all advantages of a lively, immediate debate are gone forever. Orality under such conditions inevitably dissolves in monotonous, repetitive and boring technicalities.

If, therefore, the protocol tends to suffocate the oral trial, one should consider the option of its replacement or even its elimination. Here, again, the possible ways out are different. On the one hand, it should be considered whether the protocol can

confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice'.

be shortened to the absolutely necessary minimum. On the other hand, the change of the technique underlying the current protocols should be considered. The protocols can be changed in two directions. Firstly, the intense training of court employees in charge of producing the record could step up the pace of the process,[56] but this would be costly and require comprehensive organizational changes. Secondly is a change of the method of recording, whereby the customary paper record can be replaced by an audio-visual record of the trial. As such, recording of the trial is technically and financially not too demanding. Nevertheless, problems may arise because of the need to extract transcripts of such recordings, which requires more time and expense. However, this problem can be resolved through appropriate rules that reduce the need for such transcripts, and with appropriately sharing the costs.

In Mediterranean civil procedure, reinforcing orality might require a combination of all of the preceding measures. But only when the courtroom will become a well-prepared stage for serious oral debate and substantive decisions, will a deeper change of the Mediterranean style of 'hearings' become possible.

2.9. The Instant Enforceability of First Instance Judgments

Another element of Mediterranean civil procedure is the lack of respect for first instance judgments. This is caused by the fact that, at the time they are issued, first instance judgments are never effective. They are regularly open to appeal, and the appeal almost always has a suspensive effect – it delays enforceability until the decision of the higher court. Therefore, first instance judgments, although the result of a process that might have lasted several years, are often regarded as only an indicative and provisional outcome which should not be taken seriously, because the appeal against it automatically relieves the losing party from the obligations imposed by it. Filing an appeal is regarded as a right of the party[57] and the formal requirements for it are generally very relaxed.[58]

The automatic suspension of enforceability in the case of launching an appeal is often urging the parties to use it as a delaying tactic. If the appellate decision needs several years to be reached (and there is still a likelihood that the result will be a remand of the case to the first instance court – see *infra* at 2.10 and 2.11) then an appeal, even with slight chances of success, is a rather effective means to buy time.

Admittedly, first instance courts may have erred in their judgments. But even with a relatively high appeal success rate, statistically it is still more likely that the appeal will fail. In Croatia, there are some indications that the average success rate

56 For instance, by training court reporters able to make *verbatim* records in real time, as is the practice in common law jurisdictions.

57 See more *infra* at 2.10.

58 For instance, under the Croatian Code of Civil Procedure the only necessary data that need to be supplied when filing an appeal against a civil judgment are an indication of the judgment appealed of and the signature of the appellant. In such a manner, even a one-sentence appeal ('I challenge the judgment') with no further explanation does trigger a fully-fledged appellate procedure. See Code of Civil Procedure, Art. 351/1.

of appeals is about 25 per cent, depending on the type of case. In some types of cases, where jurisprudence has stabilized, the rate is only about 10 per cent.[59] Therefore, if the risk of enforcing erroneous decisions would be distributed fairly, then it should rather be borne by the losing party at first instance, instead of by the winning party.[60]

The softening of the Mediterranean dogmatic approach characterized by an absolute non-enforceability of first instance judgments would certainly contribute to these judgments being taken more seriously. It would bring an important change of attitude and prevent the abuse of appeals. One useful example of a pragmatic and not too strict approach to enforceability of first instance judgments can be found in German civil procedure, which broadly uses the possibility to provisionally declare the first instance judgment enforceable.[61] The other example can be found in the new European Regulation on a small claims procedure, which provides that small claims judgments will be enforceable notwithstanding an appeal, without the need to provide any security.[62]

Naturally, hardly any legal system does not allow for a stay of the enforcement of first instance judgments. Some flexibility and prudently used discretion regarding the use of the authority to declare the judgment enforceable or not pending appeal is useful and necessary. However, the court's discretion should not turn into an alibi for suspending the enforcement of every appealed judgment. It is important that the means available to enforce judgments that are likely to withstand subsequent control by higher instances are effective and that they are also broadly used in practice. Only in that case would the dogma of unenforceability of judgments that are not *res iudicata* cease to produce an influx of vexatious appeals.

2.10. The Limitation of the Right to Appeal Solely to Cases that Deserve Appeal

The other, more stringent tool to avoid the abuse of appeals is the limitation of the right to appeal as such. Not every case that ends before the civil court is of the same complexity and importance; consequently, not every case deserves to be reviewed on appeal, and in particular, not in the same manner and scope. This procedural truism has to be borne in mind in particular under circumstances of slow and ineffective appellate processes, such as in the Mediterranean countries.

Already in its Framework Programme, the CEPEJ noted that 'without prejudice of the right to an effective remedy, appeal options could be limited'.[63] That the

59 According to the NCSC report, in the very numerous cases for compensation of damages (mainly traffic accidents) in Zagreb the rate was about 13 per cent in 2001. *Ibid.* p. 14.

60 Such a distribution of risk is recommended, for instance, by the ALI/UNIDROIT Principle 33.1. according to which the judgment is enforceable pending appeal, with only exceptionally the option for the court to grant a stay of enforcement on a motion of the other party.

61 See §§ 708-709 German ZPO. Such provisional enforceability (*vorlaufige Vollstreckbarkeit*) can be ordered with or without the imposition of security by the court.

62 See Regulation (EC) No. 861/2007, Art. 15.

63 CEPEJ 2004, p. 69.

right to appeal, unlike in criminal cases, is not absolutely guaranteed as a human right in civil proceedings was also confirmed by the European Court of Human Rights, for instance, in the Omar case, where it was noted that 'the right to a court … is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal'.[64]

In common law countries, the option of appeal in civil matters was never considered to be an absolute (or even standard) right of the parties. But also on the European Continent, most major jurisdictions restrict the right to appeal in matters of minor importance to a considerable extent. For instance, in France, the right to an appeal is excluded in all claims concerning sums not exceeding € 3,800.-; in Germany, appeal is not admissible in cases where the value exceeds € 600.- Euro.[65]

Some Mediterranean jurisdictions have a completely different attitude towards appeal options. The standard textbooks of civil procedure still proudly declare that the procedural principle *de minimis non curat praetor* in current law does not apply.[66] The thresholds for small claims were traditionally low in these jurisdictions, sometimes extremely low.[67] But, irrespective of value, even in the smallest of small claims, appeal was and is admissible. Admittedly, such appeal could only concern issues of law; however, in practice this did not at all influence the style and length of the proceedings. So, in Croatia there is still no information available on the number and proportions of small claims, as the courts do not statistically distinguish such cases from other cases. According to some indications, the length of small claims cases – including appellate procedure – is not very different from the length of 'regular' cases in the same courts.

There is also a special obstacle to the reform of the appeals system in certain Mediterranean countries. For instance, in post-Yugoslav states, the appeal is still regarded to be a constitutional right in all cases, and this right is phrased in an extremely broad way. The Croatian Constitution guarantees 'the right to appeal against first instance decisions made by courts or other authorities'.[68] This provision is regularly interpreted as a provision that bans an exclusion of appeal in any kind

64 *Omar* v. *France*, Reports 1998-V, p. 1840, § 34.

65 For references to these and other jurisdictions, see the website of the European Judicial Network, <http://ec.europa.eu/civiljustice> (last consulted December 2007).

66 See Triva & Dika 2004, § 7/4, § 25/1; § 26/1, § 171/1. The authors plead for a compromise between the principle of procedural economy and the desire to provide legal protection of adequate quality, noting that, ultimately, the result depends on 'the practical interpretation of the law, on the consciousness and professional ability of the judges'. The latter statement appears as a kind of critique of the exclusion of factual issues from appeals against small claims judgments, because of the alleged danger of arbitrariness caused by the lack of control by the higher court. *Ibid.* p. 819.

67 In Croatia, from 1992 to 1999 small claims were considered to be claims not exceeding 50 kuna (equals € 7,- at the end of 1999). After 1999, this value is raised to 5,000 kuna (€ 700). The inflation contributed to the fluctuations – in 1992, the small claims threshold was raised from a € 6 to a € 450 equivalent, but due to hyperinflation it soon became much less. However, from 1994, inflation was stopped, so over 5 years the € 7 equivalent limit was held. The new European Small Claims Procedure considers small claims as those not exceeding € 2,000 – see Regulation (EC) No. 861/2007.

68 See Art. 18, para. 1.

of proceedings – civil, administrative or other – or even prohibits a departure from the principle of the universality of appeal (i.e. the right to appeal on both issues of law and issues of fact). Since the Constitution does not limit the right to appeal to 'final decisions', it may be construed as such that this right also exists in respect of procedural orders.[69] In practice, not every procedural decision is subject to appeal, but still a very large number of them are.

It is interesting to refer to an almost forgotten historical fact here; the constitutional right to appeal in the post-Yugoslav countries is derived from the very early years of the socialist period. In that period, it was equally phrased broadly, notwithstanding that, at the same time, some instances of a rather radical exclusion of appeal, even in criminal cases, were never challenged either on constitutional or other grounds.[70] Today, when constitutional rights are taken more seriously, and after over half a century of dogmatic adherence to the unlimited right to appeal, the ideas to reduce or exclude appeals in a significant number of cases may indeed sound shocking. However, in the perspective of European developments, such a shock may soon become inevitable.

2.11. The (Re)introduction of Adversarial Hearings in Appellate Courts and Excluding the Possibility of Remittals

The final proposal for a shock therapy may at first sight seem to be in contradiction with the preceding two. The filtering and/or exclusion of appeal options indeed aim at reducing the number of appeals. This means bringing less work to courts. However, a reaffirmation of the principles of oral and public trial at the secondary level may certainly produce completely different results: more cases and more work for the court. One should, however, not forget that discharging the courts and judges is not the ultimate goal. What should be aimed at is providing the best level of protection for the rights of citizens. It means guaranteeing dispute resolution in an optimum timeframe and at affordable costs. In this respect, both the target to discharge the courts from unnecessary and clearly unfounded cases, and the target to impose on courts more demands regarding criteria of quality in serious cases have the same purpose – better standards of justice for the citizens. In the same sense, the European Court of Human Rights noted in the *Delcourt* case that:

> '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

[69] Admittedly, the Constitution provides that 'only exceptionally' the right to appeal may be excluded 'if other legal remedies are ensured' (Art. 18, para. 2). It is possible to argue that the 'other legal remedies' also encompass appeal against a final decision, so that for procedural orders an exclusion of appeal is permissible. Nevertheless, even though this interpretation is arguable, the drafters of procedural legislation still mainly wish to be on the safe side, excluding appeal against procedural orders only in rare cases (for instance, if the orders deal solely with organizational matters, such as the scheduling of hearings).

[70] So, for instance, in the early years of the socialist Yugoslav state the Supreme Court had the right to take any serious case from the lower court and decide it in the first and last instance. This authority (the right of 'devolution') was in particular used against political enemies.

> 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)'.[71]

If we seriously consider the dictum of the *Delcourt* case, it would mean that the same guarantees of access to court, equality of arms, public and fair hearing and the right to a decision within a reasonable time generally apply to appeal proceedings. Naturally, there is a number of exceptions to this rule, developed in the European Court of Human Rights practice, but all exceptions do not touch upon the validity of the main rule. All courts – lower and higher – must ensure that the users of the justice system enjoy their right to a fair and public hearing within a reasonable time.

This obligation should be borne in mind when encountering some peculiar features of the Mediterranean appeals procedure. In this context, we will again use the example of post-Yugoslav civil proceedings.

A first feature of appellate procedure in these countries is its total anonymity and lack of any direct contact between the court and the parties (and even contact between the court and the parties' lawyers). In the beginning of the 1990s, the common civil procedural law that existed in the Socialist Federal Republic of Yugoslavia did allow for exceptional hearings in appellate cases; however, in practice this happened almost never, so in the 2000s, even that rarely used option was completely deleted from procedural legislation.[72] All civil appellate procedures are currently conducted strictly on the basis of written files, and appellate judgments are never pronounced orally.

There are two consequences of this style of proceedings. First, for the parties everything that happens before the appellate court is covered by a veil of ignorance; the appellate proceedings as such are in their entirety a 'black box' for the parties. The judges, when deciding in a panel, generally rely on the presentation of the reporting judge who is assigned to present the appeal at a closed panel session, attended by judges only. His presentation and filtering of the problems cannot be challenged by anybody outside the closed circle of panel members. Second, no imminent evidence-taking is possible on appeal, except a consultation of the relevant documents. The appellate judges can rarely control the correctness of the parties' allegations about the factual errors. Thus, the most likely outcome of a successful appeal is the remittal of the case to the first instance court for reconsideration.[73] Once remitted to the lower court, the case can again be appealed, and again remitted. There is no limit regarding the number of times that a case can be remitted, and indeed it does happen that a case is remitted for three or more times, over a period of many years.

71 *Delcourt* v. *Belgium,* A 11, p. 14-15 §§ 25.

72 So, for instance, in Croatia the option permitting the appellate courts to hold hearings was deleted in 2003 amendments to the Code of Civil Procedure. Instead, the new law introduced the rule that the court may, if it considers this necessary, invite the parties' lawyers to the closed meeting of appellate judges. Again, this option is in practice almost never used.

73 For Slovenia, for instance, the ratio of reversed and remanded judgments is 30 per cent to 70 per cent, and almost every fourth appeal (23 per cent) results in a retrial (data presented by Mile Dolenc at the Slovenian Jurists Days, Portorož, 13 October 2005).

The introduction of adversarial, oral proceedings in the appellate courts could therefore serve several purposes. On the one hand, the oral trial before the appellate court can avoid the practice of successive remittals that was found to be 'one of the most common reasons causing simple civil cases to last' for Croatia and a number of other countries.[74] On the other hand, this is not the only advantage: the introduction of some forms of oral proceedings in the appellate courts might lead to a change of style and approach in the higher courts. If the judges do not see the parties but only the file, their approach to the case is most likely formalistic, with little regard for substantive justice and the real needs of the parties. Such a way of proceeding tends to see the purpose of the appeal as administrative, and not adjudicative. Although the appeal should generally not be a repetition of the trial, the style of the higher court has a symbolic meaning. The higher court serves as a role model for the lower courts, and its attitude and style are likely to have a spill over effect on the practice of lower courts.[75] Therefore, more oral and adversarial elements and a concentrated hearing in appellate proceedings might lead to more concentration and a more proper trial at first instance as well.

3. Concluding Remarks: Can We Do It?

We would like to conclude this paper with a repeated disclaimer. Careful reading of the preceding eleven targets reveals clearly that the model of 'Mediterranean civil procedure' is not a model based on any concrete territorial jurisdiction. Many systems of civil procedure currently undergo fundamental changes, so what was true for them yesterday, is not necessarily true today. However, it is also true that a lot of the old spirit has remained in some countries. Their feelings towards undertaking real and far-reaching changes are at best mixed. The Mediterranean procedural style has its winners and losers. As much as it can annoy the users and have a negative impact on a number of spheres of life, it also has those who like it and those who use it to their convenience. Especially for the 'insiders', i.e. for legal professionals, the style of slow, formal, impersonal proceedings with a diffuse responsibility and delaying effects can have significant advantages. There are lawyers who do not need to strive while fighting vigorously to realize their one-shot opportunity in court. There are high court judges who are spared from meeting the parties or their lawyers in court. All of them might tend to think that changes are not necessary, or that, even if they are necessary, they are not possible. Nonetheless, some examples of countries that have succeeded to turn the page, introducing real, concrete, substantive changes that sounded 'shocking' to many, prove that a change is possible and that such a change can dramatically improve the situation for the public benefit.

74 Grgić 2007, p. 158. The problem of successive remittals has also been identified in other post-Yugoslav countries, in Central European countries such as Poland, Hungary, Romania and Bulgaria, as well as in the successor countries of the former Soviet Union.

75 Therefore, in Croatia the abolition of secondary hearings went hand-in-hand with a further reduction of the use of orality and concentration in the proper trial stage.

Therefore, we hope that the preceding eleven targets may be useful as a guide, even for those who do not identify themselves with a Mediterranean procedural system. These targets may be useful in particular as a test for the scope and fundamental nature of current changes in procedural legislation and practice. And, of course, the more shocking these targets sound to the particular reader, the more certain we can be that this reader really resides in the Mediterranean.

Bibliography

ALI/UNIDROIT 2004
ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, Cambridge: Cambridge University Press, 2004.

CEPEJ 2004
CEPEJ, *Framework Programme: A New Objective for Judicial Systems: the Processing of Each Case within an Optimum and Foreseeable Timeframe*, CEPEJ (2004)19 Rev2, Strasbourg, 15 September 2004, <http://www.coe.int/cepej> (last consulted April 2008).

CEPEJ 2005
CEPEJ, *European Judicial Systems 2002 – Facts and Figures on the Basis of a Survey Conducted in 40 Council of Europe Member States*, Strasbourg: Council of Europe Publishing, 2005.

CEPEJ 2005a
CEPEJ, *Checklist of Indicators for the Analysis of Lengths of Proceedings in the Justice System (Time Management Checklist)*, CEPEJ (2005)12 Rev, Strasbourg: Council of Europe Publishing, 2005.

CEPEJ 2006
CEPEJ, *European Judicial Systems. Edition 2006 (2004 Data)*, Strasbourg: CEPEJ and Council of Europe Publishing, No. 1, 2006.

CEPEJ 2006a
CEPEJ, *Compendium of 'Best Practices' on Time Management of Judicial Proceedings*, CEPEJ (2006)13, Strasbourg, 8 December 2006, <http://www.coe.int/cepej> (last consulted April 2008).

Commission 2006
Commission of the European Communities, *Croatia 2006 Progress Report*, SEC (2006) 1385, Brussels, 2006.

Commission 2007
Commission of the European Communities, *Croatia 2007 Progress Report*, SEC (2007) 1431, Brussels, 2007.

Council of Europe 2008
Relevant Council of Europe Texts in the Field of Efficiency and Fairness of Justice, <http://www.coe.int/t/dg1/legalcooperation/cepej/textes/ListeRecRes_en.asp> (last consulted April 2008).

Deguchi & Storme 2008
Deguchi, M. & Storme, M., *The Reception and Transmission of Civil Procedural Law in the Global Society,* Antwerp-Apeldoorn: Maklu, 2008.

Grgić 2007
Grgić, A., *The Length of Civil Proceedings in Croatia: Main Causes of Delay*, in: Uzelac, A. & Van Rhee, C.H. (eds.), *Public and Private Justice. Dispute Resolution in Modern Societies*, Antwerp: Intersentia, 2007, p. 153-172.

Laukkanen 2008
Laukkanen, S, 'The Influence of Foreign Laws on the Development of Finnish Law of Procedure', in: Deguchi, M. & Storme, M., *The Reception and Transmission of Civil Procedural Law in the Global Society,* Antwerp-Apeldoorn: Maklu, 2008, p. 215-216

Merryman 1985
Merryman, J.-H., *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford: Stanford University Press, 2nd ed., 1985.

NCSC Report 2001
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.

Storme 1994
Storme, M. (ed.), *Rapprochement du Droit Judiciaire de l'Union Européenne: Approximation of Judiciary Law in the European Union*, Dordrecht: Nijhoff (Kluwer), 1994.

Triva & Dika 2004
Triva, S. & Dika, M., *Građansko parnično procesno pravo (Civil Procedural Law),* Zagreb: Narodne novine, 2004.

UNCITRAL 1996
UNCITRAL, *Notes on Organizing Arbitral Proceedings*, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> (last consulted April 2008).

Uzelac 2003
Uzelac, A., 'Reform of the Judiciary in Croatia and Its Limitations (Appointing Presidents of the Courts in the Republic of Croatia and the Outcomes)', in: Vujadinović, D. et al. (eds.), *Between Authoritarianism and Democracy: Serbia, Montenegro, Croatia: Vol. I – Institutional Framework*, Belgrade: CEDET, 2003, p. 303-329.

Uzelac 2004
Uzelac, A., 'The Rule of Law and the Judicial System: Court Delays as a Barrier to Accession', in: Ott, K. (ed.), *Croatian Accession to the European Union*, Zagreb: IJF, 2004, p. 105-130.

Uzelac 2004a
Uzelac, A., 'Accelerating Civil Proceedings in Croatia – A History of Attempts to Improve the Efficiency of Civil Litigation', in: Van Rhee, C.H. (ed.), *The Law's Delay, Essays on Undue Delay in Civil Litigation* (Ius Commune Europaeum, 47), Antwerp: Intersentia, 2004, p. 283-313.

Uzelac 2006
Uzelac, A., 'Kann die Effizienz der Justiz gemessen werden? Versuch eines Vergleichs der europäischen Justizsysteme', in: Gottwald, P. (ed.), *Effektivität des Rechtsschutzes vor staatlichen und privaten Gerichten,* Bielefeld: Gieseking, 2006, p. 41-72.

Uzelac forthcoming
Uzelac, A., *Turning Civil Procedure Upside Down*, Contribution to the Ghent Symposium on the Bicentennial of the Code de procédure civile, University of Ghent, 27 October 2006, forthcoming.

Uzelac & Van Rhee 2007
Uzelac, A. & Van Rhee, C.H. (eds.), *Public and Private Justice*, Antwerp: Intersentia, 2007.

Van Rhee 2004
Van Rhee, C.H. (ed.), *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Ius Commune Europaeum, 47), Antwerp: Intersentia, 2004.

Van Rhee 2005
Van Rhee, C.H. (ed.), *European Traditions in Civil Procedure* (Ius Commune Europaeum, 54), Antwerp: Intersentia, 2005.

Lord Woolf 1996
Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London: HMSO, 1996.

Zuckerman 1999
Zuckerman, A.A.S., *Civil Justice in Crisis. Comparative Perspectives on Civil Procedure,* Oxford: Oxford University Press, 1999.