

Por último, es pertinente advertir que las Constituciones de 1824, 1857 y 1917 no establecieron reglas específicas para los poderes judiciales de los Estados de la República y del Distrito Federal. Fue hasta la reforma constitucional publicada en el *DOF* del 17.03.1987, cuando se adicionó el art. 116 de la Constitución para establecer en su fracción III las bases conforme a las cuales las constituciones y leyes locales deben regular a los poderes judiciales estatales. De esas bases, la que resulta de mayor relevancia es la contenida en el párrafo tercero, que prevé que los magistrados locales que sean ratificados en sus cargos adquieren la inamovilidad, pues sólo podrán ser privados de sus puestos a través de los procedimientos de responsabilidad de los servidores públicos que establezcan las leyes estatales. La interpretación que la Suprema Corte de Justicia ha hecho de este precepto constitucional se ha orientado normalmente a asegurar la inamovilidad de los magistrados y, por tanto, a fortalecer la independencia judicial de los poderes judiciales locales.¹¹²

Bases similares a las de los poderes judiciales estatales fueron establecidas para el Poder Judicial del Distrito Federal, primero en el art. 73, fracción VI, base 6.ª y, a partir de la reforma publicada en el *DOF* del 22.08.1996, en el art. 122, apartado C, base cuarta, de la Constitución Política.

112. En el *Semanario Judicial de la Federación y su Gaceta*, Novena Época, octubre de 2000, t. XII, p. 11-34, se publicaron las principales tesis de jurisprudencia del Pleno de la Suprema Corte sobre este tema.

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Legal remedies for the violations of the right to a trial within a reasonable time in Croatia: in the quest for the holy grail of effectiveness

ALAN UZELAC

Professor de Direito Processual Civil da Universidade de Zagreb.

ÁREA DO DIREITO: Civil-Processo Civil

RESUMO: O autor apresenta, neste texto, as experiências croatas relativas à proteção do direito à razoável duração do processo. Critica o comodismo da solução da indenização por prejuízos havidos e propugna pelas necessidades de se combaterem duramente as causas desta inefetividade.

PALAVRAS-CHAVE: Duração do processo – Causas da excessiva duração dos processos – Falta de efetividade – Compensação financeira.

ABSTRACT: In this text the author presents the Croatian experiences relating to the protection of the right to reasonable duration of proceedings. He criticizes the passiveness of the solution of compensation for damages and defends the need fight strongly against the causes of this ineffectiveness.

KEYWORDS: Duration of proceedings – Causes of the excessive duration of proceedings – Lack of effectiveness – Financial compensation.

SUMÁRIO: 1. Introduction – 2. Development of legal remedies for the length of proceedings (2000-2005) – 3. Reformed legal remedies after the amendment to the courts act 2005 – 4. Current situation and possible future course: how long is draining of the leaking boat possible?

1. INTRODUCTION

In this text we will present Croatian experiences with the protection of the right to a trial within a reasonable time guaranteed by art.

6. of the European Human Rights Convention (ECHR). Although the right to a prompt and effective legal protection was a part of the human rights instruments that were in force for several decades,¹ the right to a trial within a reasonable time only became an issue since Croatia became member of the Council of Europe (CoE) in 1997. The submission to the jurisdiction of the European Court of Human Rights (ECtHR) that is implied in the membership of the CoE swiftly led to a number of cases in which the ECtHR found violations of the reasonable time requirement in an ever-growing number of cases.

The surfacing of the judgments finding human rights violations at the international level required an action by the national authorities. Of course, the attempts to reform national judiciary and accelerate judicial proceedings were an important element of such reactions.² However, even irrespectively of their appropriateness and speed, such attempts could only secure significant progress in the long run. As every member state has to ensure that the rights guaranteed by the ECHR are effectively protected within its own national system, it was necessary to establish a domestic mechanism that would enable all under national jurisdiction to complain about the violations of their right to a trial within a reasonable time. This requirement became even more pronounced since ECtHR issued the ground-breaking judgment in *Kudla* case³ that emphasized the obligation of the States to act at domestic level to address problems of excessive length of proceedings. After that case, the ECtHR started to systematically insist on the need to establish effective national remedies for the length of proceedings, applying art. 13 of the Convention to all length of proceedings cases in which such remedies did not exist. This development of the jurisprudence of the Strasbourg court was greatly affected by the significant growth of the caseload of the ECtHR which was largely due to cases complaining of violations of art. 6 ECHR (in

1. E.g. in art. 10 of the Universal Declaration of Human Rights, or in art. 14 of the International Covenant on Civil and Political Rights.

2. See *inter alia* Uzelac, Alan, Accelerating Civil Proceedings in Croatia – A History of Attempts to Improve the Efficiency of Civil Litigation, in: C.H. van Rhee (ed.), *History of Delays in Civil Procedure*, Maastricht, 2004, p. 283-313.

3. See *Kudla v. Poland*, 30.210/1996, 26.10.2000, ECHR 2000-XI.

particular from the new members of the CoE from the European East and South).⁴

This paper presents the development of the Croatian national remedies for the length of proceedings, as well as their current status and functioning. Firstly, we will outline a short history of trials and tribulations regarding the legal means of complaining to the length of proceedings at constitutional and statutory level. These mechanisms were several times changed and further elaborated, partly because of the negative echo coming from the ECtHR cases, partly because of the expansive domestic use of the available remedies, what raised fears of overfilled dockets. The national remedies will be described at the three levels – at the constitutional level (the remedy established by the Constitutional Act on the Constitutional Court in 1999, amended in 2002), at the statutory level (the remedy established by the Courts Act in 2005, abbreviated hereinafter as RPRTT), as well as at the administrative level (requests and appeals based on “silence of administration” under the Administrative Procedure Act and the Administrative Disputes Act). The impact of the aggregate of these remedies on the current situation with respect to length of proceedings will be analyzed from the two perspectives: from the external perspective (perspective of the ECtHR), and from the internal (national) perspective. Both perspectives will include the currently available statistical data on the number of cases and their outcome. Based on these findings, in the last part of this text we will give some synthetic conclusions and assessments regarding the current status and the future of the right to a trial within a reasonable time.

2. DEVELOPMENT OF LEGAL REMEDIES FOR THE LENGTH OF PROCEEDINGS (2000-2005)

a) General

Croatia became a member of the Council of Europe on 05.11.1997. This moment almost coincided with the coming into effect of the new

4. The Court expressly stated that, if States failed to react by establishing effective national remedies “individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise (...) have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened”. *Kudla*, cit., supra (note 3), § 155.

procedural rules provided by the Protocol 11 to the Convention. In any case, as there were no decisions or judgments prior to 1999,⁵ all Croatian cases were decided according to Protocol 11 mechanisms.

The very first case that found a human right violation regarding Croatia was a length of proceedings case. In *Rajak* case,⁶ the proceedings lasted 22 years prior to entry into force of the ECHR, and were still pending some 4 years later when ECtHR made its judgment. Consequently, it was not difficult to find that the length of proceedings in that case was excessive. Since *Rajak*, there was a long line of various cases in which unreasonable length was established, as well as a number of cases in which friendly settlement was concluded. In spite of introduction of the various national remedies (described infra at 2. and 3.), the line of cases finding the length of proceedings violations extended to present days.⁷

According to governmental sources, 92 percent of the human rights violations found before ECtHR regarding Croatia involved the violations of art. 6, § 1 of the ECHR, either alone or in conjunction with other human rights violations.⁸ All in all, the ECtHR statistics for the 1998-2008 period show that out of 151 judgment issued in respect of Croatia during that period, 66 judgments concerned length of proceedings violations and 21 judgment violations of the right to an effective remedy (large majority of the latter dealt with the lack of effective remedy for the length of proceedings). Therefore, it was only natural that both legislative and practical interventions in this area have high political weight and priority.

b) Constitutional Act on the Constitutional Court 1999, art. 59(4)

The first attempt to create a remedy that could address the length of proceedings within the domestic system of protection of constitutional rights happened in 1999 when the new Constitutional Act on the

5. First decision regarding Croatia was the admissibility decision in *Očić v. Croatia* (dec.), 46.306/1999, 25.11.1999, ECHR 1999-VIII.

6. See *Rajak v. Croatia*, 49.706/1999, 28.06.2001.

7. See e.g. *Plazonić v. Croatia*, 26.455/2004, 06.03.2008; *Vidas v. Croatia*, 40.383/2004, 03.07.2008; *Kaić and others v. Croatia*, 22.014/2004, 17.07.2008; *Krnić v. Croatia*, 8.854/2004, 31.07.2008; *Oreb v. Croatia*, 9.951/2006, 23.10.2008.

8. Vlada RH i Ured za ljudska prava, *Nacionalni program zaštite i promicanja ljudskih prava od 2008 do 2011, godine*, Zagreb, 2007, p. 9.

Constitutional Court was enacted (Constitutional Act 1999).⁹ *Inter alia*, the new Act reformed the provisions on the constitutional complaint, which were prior to those changes practically useless as the remedy for the length of proceedings.¹⁰ Therefore, “to end the period without the appropriate protection of the right to a trial within a reasonable time”,¹¹ the Constitutional Act 1999 inserted a new paragraph which had to address specifically the “failures to act within a reasonable time”, which read (Art. 59, 4):

“The Constitutional Court may, exceptionally, examine a constitutional complaint prior to exhaustion of other available remedies, if it is satisfied that a contested act, or failure to act within a reasonable time, grossly violates a party’s constitutional rights and freedoms and that, if it does not act a party will risk serious and irreparable consequences.”

The issue whether the new constitutional complaint was an effective remedy for the length of proceedings arose soon before the ECtHR. In the case *Horvat*¹² the court held that the new remedy was not satisfactory, and that, therefore, no “true legal remedy enabling a person to complain of the excessive length of proceedings” exist in Croatia.¹³ Explaining this finding, the ECtHR in particular relied on several arguments. As first, it noted that the new remedy depends on the discretionary powers of the Constitutional Court to admit it, after a preliminary examination of the complaint. Second, it noted that the two conditions that had to be cumulatively satisfied – “gross violation of the constitutional rights” and the “risk of serious and irreparable consequences for the applicant”

9. See *Ustavni zakon o Ustavnom sudu RH*, NN (Off. Gaz.) 99/1999.

10. The old Act provided that every person who considers that his or her constitutional rights were violated by the decision of any public authorities may launch a constitutional complaint (see Constitutional Act on the Constitutional Court, NN 13/1991). However, this complaint could be launched only *after* a final decision was delivered, and the only remedy was the quashing of the decision and the remittal of the case to the respective authority (arts. 29 and 30).

11. Iva Perin Tomičić, *Zaštita prava na suđenje u razumnom roku u Republici Hrvatskoj s osobitim osvrtom na problem okončanih predmeta*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 28/2:2007, p. 1357.

12. See *Horvat v. Croatia*, 51.585/99, 26.07.2001.

13. *Idem*, § 48.

are both “susceptible to various and wide interpretation”.¹⁴ Finally, the ECtHR came to conclusion that only one case offered by the government as the proof indicates the uncertainty of the remedy in practical terms and does not amount to conclusive proof of the settled case-law which demonstrates the effectiveness of the new remedy.¹⁵

The ECtHR did not even need to enter in this case into the examination of the possible redress that could be offered in the case of success of the complaint, although it might have been another reason for the same conclusions. Namely, even if the complaint under art. 59(4) was granted, it was still problematic how should the Constitutional Court react, since the available means of reaction to a violation have not changed – they were still limited to annulment of the impugned decision and the remittal of the case to the relevant body for retrial.¹⁶

c) Request for administrative supervision as a remedy for the length of proceedings

In the *Horvat* case, the Government also objected to the non-exhaustion of other legal remedies, such as the request for speeding up the proceedings that could allegedly be brought to the attention of the president of the competent court (in the said case, the Zagreb Municipal Court), or the Ministry of Justice. Dismissing those objections, the ECtHR noted that these requests for acceleration of the proceedings “represent a hierarchical appeal that is, in fact, no more than information submitted to the supervisory organ with the suggestion to make use of its powers if it sees fit to do so”. The applicant does not have the status of party in such proceedings and might eventually only be informed whether and how has the supervisory organ dealt with such requests.¹⁷

d) Petition for constitutional review as a remedy for the length of proceedings

In some cases the Government attempted another, pretty far-fetched avenue of objecting to non-exhaustion of domestic remedies, which still

14. See *Horvat v. Croatia*, 51.585/99, 26.07.2001, § 43.

15. *Idem*, § 44.

16. See art. 72 of the Constitutional Act 1999, which was quoted in the admissibility decision in *Horvat case* (see decision of 16.11.2000), but omitted in the final judgment.

17. *Idem*, § 47.

deserves attention for the sake of completeness. In *Crnojević*,¹⁸ *Varičak*¹⁹ and *Freimann*²⁰ the Government argued that the applicants failed to exhaust domestic remedies because they had not filed a constitutional claim challenging the constitutionality of the legislation in question (so-called *inicijativa za ispitivanje ustavnosti zakona*), and in *Aćimović*²¹ it was argued that the remedies were not exhausted because the applicant's abstract challenge of the constitutionality was still pending with the Constitutional Court. The ECtHR observed that the rule of exhaustion of domestic remedies requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. In all of these cases, the ECtHR came to conclusion that a possible positive decision by the Constitutional Court would only lead to annulment of the questioned legislation and enactment of the new legislation, what would not directly prevent or remedy the excessive length of proceedings.²² Therefore, the claims to examine constitutionality with the Constitutional Court were not regarded as effective remedy for the length of proceedings, and, consequently, they need not be exhausted prior to applying to the ECtHR.

e) Constitutional act on constitutional court after 2002 amendments, art. 63

As a direct consequence of the ECtHR jurisprudence, the Government decided to change the legislative provisions on the constitutional complaint as the special remedy for the length of proceedings. The Amendments to the Constitutional Act on the Constitutional Court were enacted in March 2002,²³ revising a number of provisions of that act, *inter alia* also the art. 59 (4), which became art. 63 in the revised 2002 text of the Act.

The new art. 63 reads as follows:

18. *Crnojević v. Croatia* (dec.), 71.614/2001, 29.04.2003.

19. *Varičak v. Croatia* (dec.), 78.008/2001, 11.10.2003.

20. *Freimann v. Croatia*, 5.266/2002, § 19-21, 24.06.2004.

21. *Aćimović v. Croatia* (dec.), 61.237/2000, ECHR 2003/XI, 07.11.2002.

22. *Crnojević*, cit., supra (note 18).

23. Amendments 2002 are published in the Off. Gaz. (NN) 29/2002. They came into force on 15.03.2002. Subsequently, a revised text with re-numerated articles of the Constitutional Act on the Constitutional Court was published in NN 49/2002.

“(1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant’s rights and obligations or a criminal charge against him (...).

(2) If the constitutional complaint (...) under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits (...).

(3) In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights (...) The compensation shall be paid from the State budget within a term of three months from the date when the party lodged a request for its payment.”

The most important novelties of the art. 63 constitutional complaint were, first, the elimination of the discretionary power to admit the complaint by the Constitutional Court; second, the elimination of the vague language and the conditions of “gross violation” and “serious and irreparable consequences”, and, third, the introduction of the combination of the two types of remedies, one designed to expedite the proceedings and the other to afford compensation.

In the first cases that occurred after introduction of the new remedy, the reaction of the ECtHR was generally affirmative. As a matter of principle, the constitutional complaint under art. 63 was recognized as generally effective remedy for the length of proceedings. In *Slaviček*²⁴ case, the ECtHR noted that the new legislation is “clear and specifically designed to address the issue of the excessive length of proceedings before the domestic authorities”. As such, it “removed the obstacles that were decisive when the Court found that [former remedy] did not comply with all the requirements to represent an effective remedy”. Thus – even prior to any existing jurisprudence in which the Constitutional Court would effectively deal with the concrete length cases – the ECtHR decided that the applicants furtheron have to exhaust this remedy prior to turning to the Strasbourg Court, as required by art. 35, § 1 of the Convention.

24. See *Slaviček v. Croatia* (dec.), 20.862/2002, 04.07.2002.

Deciding on the admissibility of the pending Croatian length cases, the ECtHR extended its new approach even to the cases which were lodged with the Strasbourg Court prior to entry of art. 63 into force. In *Nogolica*²⁵ admissibility decision, it was stated that normal rule on the availability of domestic remedies in the moment of applying to the ECtHR may be subject to exceptions justified by specific circumstances,²⁶ and therefore declared the application as inadmissible, applying the precedents from Italian cases lodged prior to enactment of the Pinto law.²⁷

The Croatian model of the constitutional complaint as a combined remedy that unites compensatory and expediting relief was often cited in a positive context along with examples from Austria, Spain, Poland and Slovakia in a number of Italian cases, most notably in *Cocchiarella*²⁸ and *Apicella*.²⁹ The ECtHR argued that “a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution”, especially in the countries whose judicial systems suffer from systemic deficiencies in ensuring that courts hear cases within a reasonable time. In particular, the Court noted that such remedy does not only afford the compensation *a posteriori*, but also “prevents a finding of successive violations in respect of the same set of proceedings”.³⁰ Insofar, criticising the simple and unilateral mechanisms of some countries, the ECtHR listed Croatia among the states “that have understood the situation perfectly”.³¹

f) *The issue of already concluded cases in the practice of the constitutional court under art. 63*

After *Slaviček*, most of the Croatian length cases were declared inadmissible if the constitutional complaint for length of proceedings was not lodged. But, in certain cases the practice of the Constitutional Court exhibited certain limitations and difficulties. So, in the *Šoć*³² and

25. *Nogolica v. Croatia* (dec.), 77.784/2001, 05.09.2002.

26. The Court here cited *Baumann v. France*, 33.592/1996, 22.05.2001, § 47.

27. See *Brusco v. Italy*, (dec.), 69.789/2001, ECHR 2001-IX.

28. *Cocchiarella v. Italy*, 64.886/2001, GC 29.03.2006.

29. *Apicella v. Italy*, 64.890/2001, GC 29.03.2006 (see §§ 63-105).

30. *Cocchiarella*, cit., § 74.

31. *Idem*, § 77.

32. See *Šoć v. Croatia*, 47.863/1999, 09.08.2003.

*Debelić*³³ cases, it was noted that under the jurisprudence of the Constitutional Court the constitutional complaints under art. 63 have to be rejected if the proceedings, the length of which is being complained, were concluded before the Constitutional Court made the decision on the complaint.³⁴ *A fortiori*, the Constitutional Court also had not left opened any chance for success of the constitutional complaints that would be launched only after the (excessively long lasting) proceedings were finally concluded.³⁵

Such practice of the Constitutional Court led the ECtHR to infer that, for the cases that had already been concluded, the art. 63 did not represent an appropriate remedy for the length of proceedings.³⁶

The judgments of the ECtHR convinced the Constitutional Court to change its approach, at least partially. The Court reversed its earlier jurisprudence and started to examine on the merits the constitutional cases which had been initiated while the respective judicial proceedings were pending, irrespective of the fact that the courts in the meantime did render their final decisions.³⁷ Explaining this twist in its practice, the Constitutional Court referred to the fact that in an ever growing number of cases the courts react and make their decisions only after communication of the constitutional complaints.³⁸ Still, if the proceedings were completed prior to launching of the constitutional complaint, as in *Šo*

33. *Debelić v. Croatia*, 2.448/2003, 26.05.2005.

34. Decision of the Constitutional Court of 20.11.2002, U IIIA-1.535/2002.

35. See *Camasso v. Croatia*, 15.733/02, 13.01.2005. In the same case, the Government claimed that the applicant had failed to complain to the Constitutional Court about the length of the proceedings under art. 62 of the Constitutional Court Act, but the ECtHR did not find any evidence that an art. 62 complaint might result in prevention of excessive delay or in an award of damages for delay which had already occurred. *Camasso*, cit., § 24.

36. *Šoć*, cit., § 94.

37. This was the factual setting in *Debelić* case, which, as opposed to *Šoć* case, would be taken into consideration under the new approach of the Constitutional Court.

38. Constitutional Court Decision U-III A-905/2003 of 05.05.2004.

case, the applications were (and still are) continually rejected by Constitutional Court.³⁹

g) *The issue of the length of the enforcement proceedings*

In spite of the well-established practice of the ECtHR according to which, for the purposes of the art. 6, the enforcement proceedings have to be viewed as an integral part of the “trial”,⁴⁰ the Constitutional Court refused to apply the art. 63 to the enforcement proceedings in the first two years of application of the Constitutional Act 2002.

According to its interpretation given in a 2003 decision,⁴¹ the art. 63 would be applicable only in cases where the court has not decided within a reasonable time on the merits of the rights and obligations of the complainant. This opinion was repeated in the subsequent decisions of the Court on the same issue in the next year.⁴²

In the *Pibernik*,⁴³ the ECtHR raised for the first time the issue of non-applicability of art. 63 proceedings to the excessive length of enforcement proceedings. *In passim*, the applicability of the art. 6 guarantees to the enforcement proceedings were affirmed in *Cvijetić*⁴⁴ and *Kvartuč*⁴⁵ cases. Later, in *Karadžić*⁴⁶ and *Majski*,⁴⁷ the ECtHR noted this practice of the Constitutional Court, recognizing however that its jurisprudence changed since a decision rendered in 2005.⁴⁸ In conclusion, it found that “before 02.02.2005, a constitutional complaint under section 63 of the Constitutional Court Act could not be regarded as an effective remedy”

39. See e.g. Constitutional Court Decision U-III A-1270/2003 of 18.06.2004 (for the early practice) and U-III A-3.521/2005 of 19.11.2008 (for continuing applicability of this approach). See also Perin Tomičić, op. cit., supra, p. 1365-1366.

40. *Hornsby v. Greece*, 19.03.1997, Reports of Judgments and Decisions 1997 II, p. 511, § 41.

41. Constitutional Court Decision U-III A/1165/2003 of 12.09.2003.

42. Constitutional Court Decision U-III A/781/2003 of 14.05.2004.

43. *Pibernik v. Croatia* (dec.), 75.139/2001, 04.09.2003.

44. *Cvijetić v. Croatia*, 71.549/2001, § 43, 26.02.2004.

45. *Kvartuč v. Croatia*, 4.899/2002, § 36, 18.11.2004.

46. *Karadžić v. Croatia*, 35.030/2004, § 38, 15.12.2005.

47. *Majski v. Croatia*, 33.593/2003, § 24, 01.06.2006.

48. Constitutional Court Decision U-III A/1128/2004 of 02.02.2005.

in cases in which length of enforcement proceedings was complained.⁴⁹ The change of the jurisprudence of the Constitutional Court was effected with the express reference to the wish to harmonize its practice with the ECtHR case-law, and the *Hornsby* case in particular was expressly quoted in the text of the decision on constitutional complaint of 02.02.2005.⁵⁰

h) *The sufficiency of the amount of compensation*

The amount of compensation that the states should afford to the victims of the violations of the right to a trial within a reasonable time is not strictly determined in the jurisprudence of the ECtHR. Generally, it is accepted that the member states enjoy a certain discretion in setting the level of the compensation, which has to be in line with the general economic conditions and living standard in the respective country. The amount of compensation can also depend on the availability of the domestic remedies that could accelerate the proceedings, in which case the ECtHR was allowing that the compensation awarded under domestic remedy (if this remedy was a combined remedy) would be somewhat lower than the usual compensation awarded before the Strasbourg Court. However, in any case the compensation given in the domestic proceedings was subject to the assessment of the ECtHR whether the amount awarded was adequate and sufficient in the light of the principles established under the Court's case-law, as pronounced in *Scordino*.⁵¹

In the Croatian cases, the compensation awarded to the successful claimants in the art. 63 proceedings was rarely questioned by the Strasbourg Court. However, since 2007 the issue of its appropriateness was raised in several cases.⁵² In *Jakupović* the Constitutional Court awarded the applicant 4,400 Croatian kunas (about 600 EUR) and in *Kaić* 4,000 Croatian kunas (about 530 EUR) in compensation for the proceedings that lasted about nine-and-half (9,5) and seven (7) years respectively. The ECtHR held that such an amount is "manifestly unreasonable

49. *Majski v. Croatia*, 33.593/2003, § 24, 01.06.2006.

50. *Cit.*, supra (note 48).

51. *Scordino v. Italy (n. 1)* [GC], 36.813/1997, § 206, 29.03.2006, ECHR 2006-V.

52. *Jakupović v. Croatia*, 12.419/2004, 31.07.2007; *Kaić and others v. Croatia*, 22.014/2004, 17.07.2008; *Oreb v. Croatia*, 9.951/06, 23.10.2008 (referred to the GC).

having regard to the Court's case-law"⁵³ and found it to be "approximately 20% of what the Court generally awards in similar Croatian cases".⁵⁴ Accordingly, the applicant could still claim to be a victim, and therefore his application was admitted and decided (affirmatively) on the merits.⁵⁵ In both cases, the regard was made of the time that elapsed since Constitutional Court issued its decision to accelerate the proceedings (see *infra* at i.).

i) *Effectiveness of the orders to expedite proceedings*

In *Oreb*⁵⁶ case, the facts were similar as in *Jakupović* and *Kaić* insofar the compensation awarded by the Constitutional Court was regarded to be inadequate (although it was the highest amount among all of the cases in which the adequacy was assessed).⁵⁷ More important element of this case was related to the manifest lack of compliance of the lower court with the order to end the proceedings. Namely, after Constitutional Court found the violation of the right to a trial within a reasonable time, it ordered the Split Municipal Court to adopt its decision in the shortest time, but no later than ten months from the publication of its decision. However, the case was still pending in the first instance more than three years from the receipt of the acceleratory order.

In such circumstances, the ECtHR considered "that the obligation of the States under art. 13 encompasses also the duty to ensure that the competent authorities enforce remedies when granted" noting that "it has already found violations on account of a State's failure to observe

53. *Kaić*, *cit.*, supra (note 8), § 20.

54. *Jakupović*, *cit.*, supra (note 52), § 17.

55. In *Kaić* case the ECtHR awarded additional 1,350 EUR to each of the applicants, whereas in *Jakupović* the additional compensation was 5,900 EUR. In *Jakupović* the alleged violation of art. 13 was dismissed as manifestly ill-founded, noting that "[t]he mere fact that the just compensation awarded to the applicants at the domestic level does not correspond to the amounts awarded by the Court in comparable cases does not render the remedy ineffective" (§ 28). In *Kaić*, a year later, a violation of art. 13 was found. More extensive explanation of this shift in ECtHR case-law in Croatian cases can be found in *Oreb* (see *infra*, at i.).

56. *Oreb*, *cit.*, supra (note 51).

57. Each applicant was awarded 8,600 Croatian kunas (about 1,200 EUR) after 7 years and three months at one level of jurisdiction (after the ratification of the Convention) plus 17 years before the entry of the Convention into force (the original claim was submitted in 1980).

that requirement”.⁵⁸ The Court explained that “the cessation of an ongoing violation is for the Court an important element of the right to an effective remedy”,⁵⁹ and continued to find that

“(…) where the applicants did not receive sufficient compensation for the inordinate length of their proceedings and where the competent court exceeded the time-limit set for it by six months and thereby failed to implement the Constitutional Court’s decision in due time, it cannot be argued that the constitutional complaint the applicants resorted to was an effective remedy for the length of those proceedings. The combination of these two factors in the particular circumstances of the present case rendered an otherwise effective remedy ineffective”.⁶⁰

j) *Effectiveness of the remedies available to expedite administrative proceedings*

Another point of divergence between the jurisprudence of the Constitutional Court and the case-law of the ECtHR was related to the calculation of the period that was to be taken into account in the administrative proceedings. In the beginning, the Croatian Constitutional Court has held that only the conduct of judicial authorities was relevant in the context of the constitutional complaint under art. 63. The duration of the administrative stages of the proceedings was not taken into account when determining the reasonableness of their overall length.⁶¹ Such an approach was different from the ECtHR’s, which has

58. *Kaić*, cit., supra (note 8), § 40. The County Court in Zagreb had a delay of six month in implementation of the Constitutional Court’s decision. In this respect the ECtHR noted that the Zagreb County Court is an appellate court, “which means that the list of possible reasons for the delay non-attributable to the authorities (...) is relatively short”. *Idem*, § 41.

59. *Oreb*, cit., supra (note 52), § 37.

60. *Kaić*, cit. supra (note 8), § 43. Same in *Oreb*, cit., supra (note 51), § 38. Unfortunately, these cases of non-compliance with the Constitutional Court orders are not isolated. In some of these cases, the applicants chose to launch several constitutional complaints in the same case. See e.g. Constitutional Court decision U-III/A/825/2008 of 09.12.2008, which was rendered in the same case in which another decision was already made (Constitutional Court decision U-III/A-4905/2005. Reported in Maganić, A., *Pravna sredstva protiv neučinkovitog suca, Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 30 (2009), 1, note 128.

61. See Constitutional Court decisions U-III-2.467/2001 of 27.02.2002, and U-III/A/3638/2003 of 18.02.2004.

recognized that, when under the national legislation an applicant has to exhaust a preliminary administrative procedure before having recourse to a court, the proceedings before the administrative body have to be included when calculating the length of the civil proceedings for the purposes of art. 6.⁶²

The ECtHR noted the practice of the Constitutional Court in *Počuča*⁶³ and *Božić*⁶⁴ cases. *Inter alia*, the Strasbourg Court noted one complaint that was dismissed on the basis of finding that the proceedings before the Administrative Court had lasted only seven days (whereby the whole process since launching of the applicant’s request addressed to the Croatian Pension Fund lasted over seven years).⁶⁵

In 2007, the Constitutional Court reversed its earlier case-law and started to take into consideration the period of the proceedings before the administrative bodies.⁶⁶ In the reasoning of the decision, the Court referred to “well-settled case-law of the ECtHR” and cited several cases, including *Počuča* and *Božić*.⁶⁷

k) *“Silence of the administration” (appeals and actions for failure to respond) as a means to accelerate administrative proceedings*

The cited 2008 decision of the Constitutional Court *in passim* noted that it will take into account the length of proceedings of the preliminary stages in administrative proceedings only if two conditions are satisfied: first, if the complainant has expressly objected to the unreasonable length of the proceedings before the administrative bodies, and, second, if the complainant proves that he has exhausted another means of legal protection – the actions brought on the basis of the “silence of administration”.

62. See e.g. *Kiurkchian v. Bulgaria*, 44.626/1998, § 51, 24.03.2005.

63. *Počuča v. Croatia*, 38.550/2002, 29.06.2006.

64. *Božić v. Croatia*, 22.457/2002, 29.06.2006. See § 34: “That approach of the Constitutional Court differs from the one of the Court (...) as it does not cover all stages of the proceedings”.

65. See Constitutional Court decision U-III/A/635/2004 of 25.11.2004; *Počuča*, cit., supra (note 64), § 27; *Božić*, cit., supra (note 65), § 23.

66. Constitutional Court decision U-III/A-4.885/2005 of 20.06.2007. See also U-III/Vs/578/2008 of 24.09.2008.

67. *Idem*, p. 4.2.

As to the latter condition, the Constitutional Court was referring to an alternative remedy provided by Administrative Procedure Act and Administrative Disputes Act. These procedures were summarized in the *Štajcar*⁶⁸ case as follows:

Art. 218, § 1, of the Administrative Procedure Act provides that in simple matters, where there is no need to undertake separate examination proceedings, an administrative body is obliged to issue a decision within a period of one month after a party lodged a request. In all other, more complex, cases, an administrative body is obliged to issue a decision within a period of two months after the request was lodged. Art. 218, § 2, enables a party whose request has not been decided within the periods established in the previous paragraph to lodge an appeal, as if his request had been denied.

Art. 26 of the Administrative Disputes Act enables a party who lodged a request with an administrative body to institute administrative proceedings before the Administrative Court (administrative dispute) in the following situations:

1. If the appellate body does not issue a decision upon the applicant's appeal within 60 days the applicant may repeat his request, and if the appellate body declines to issue a decision within an additional period of seven days the applicant may lodge a claim with the Administrative Court.

2. When a first instance administrative body does not issue a decision and there is no right to an appeal the applicant may directly lodge a request with the Administrative Court.

3. If a first instance administrative body does not issue a decision upon the applicant's request within sixty days in matters where a right to an appeal exists, the applicant may lodge his request to the appellate administrative body. Against the decision of that body the applicant may institute administrative proceedings as well, and if that body has not issued a decision there is a right to institute administrative proceedings under the conditions as above under 1.⁶⁹

The ECtHR in principle considered that these provision contained a remedy that should effectively accelerate the administrative proceedings. Therefore, the prospective applicants were required to make use of these

68. *Štajcar v. Croatia* (dec.), 46.279/1999, 20.01.2000.

69. *Idem*, p. 3-4.

proceedings before complaining to the length of proceedings in further Strasbourg proceedings. If this was not the case, the applications were generally held to be inadmissible and were rejected for non-exhaustion of domestic remedies pursuant to art. 35, § 4, of the Convention.⁷⁰

In spite of the general assessment of the “silence of administration” provisions as effective means to suppress the excessive length of the administrative proceedings, in some cases the actions brought for failure to respond did not render adequate accelerating effect. So, e.g. in *Počuča* the applicant did lodge an appeal and brought an action for failure to respond. However, the consequence of appeal in that case was only further silence of the higher authorities, and the consequence of his action for the failure to respond brought before the Administrative Court was, in the beginning, further silence of this court for the next three years, and then the decision that only sent back his case to the same passive authorities with an order to decide on the applicant's appeal, setting the further deadline of 60 days. This deadline was, naturally, not met, but when, eventually (after some four months) the appeal was decided, the only result was the new decision ordering the first instance administrative body to issue a decision, and (some three months later) a negative decision of the body which was again subject to appeal and the further action before the Administrative Court. Such a “merry-go-round” of presumed and actual negative decisions followed by decisions which remit the (never decided) case back for another decision did cast a shadow on the overall effectiveness of the alternative remedy in the administrative proceedings, at least in certain types of cases.

k) The issue of the length of the proceedings before the Constitutional Court

Not only the proceedings on the account of the alternative remedies available in administrative proceedings could themselves become excessively long; the same occasionally happened to the proceedings initiated by the main remedy, the constitutional complaint.

70. See e.g. *Rauš and Rauš-Radovanović*, 43.603/2005, admissibility decision of 02.10.2008. Until this case such applications were dismissed as manifestly ill-founded (which may be taken as a reflection of the old, pre-Kudla jurisprudence of the ECtHR) – so e.g. in *idem*. On this development of the ECtHR practice see *Bašić v. Austria*, (dec.), 29.800/1996, ECHR 1999-II and *Pallanich v. Austria*, 30.160/1996, 30.01.2001.

A good example may be found in *Vidas*⁷¹ case, where the Constitutional Court added insult to the injury (figuratively speaking) when it needed three years and fifteen days to decide on a (not overly complex) complaint regarding the proceedings which lasted almost seven years (out of which five years after ratification of the Convention).⁷² Based on that finding, the ECtHR emphasized that a remedy designed to address the length of proceedings may be considered effective only if it provides adequate redress speedily, or else the effectiveness of the (otherwise effective) remedy for the excessive length of the civil proceedings could be undermined by its own excessive (i.e. unreasonable) duration.⁷³

3. REFORMED LEGAL REMEDIES AFTER THE AMENDMENT TO THE COURTS ACT 2005

a) The reasons for the change of the internationally recognized effective remedy

In spite of all the occasional problems with the practical implementation, the ECtHR has until present time generally recognized the constitutional complaint from art. 63 as an effective remedy for the length of proceedings. Moreover, the Strasbourg court actually praised the model of the Croatian constitutional complaint – especially its combination of acceleratory and compensatory powers – in a number of decisions related to other CoE countries wherever a problem with the effectiveness of the domestic length-of-proceedings remedies occurred. The circle of countries in whose cases the ECtHR openly advertised Croatian model (and the model of some other similar jurisdictions) did not include only the “usual suspects” (such as e.g. Italy),⁷⁴ but also countries of otherwise well-developed legal tradition of efficient adjudication, such as Germany.⁷⁵

71. *Vidas v. Croatia*, 40.383/2004, 03.07.2008.

72. The Constitutional Court received the complaint on 28.03.2002, on which the Court decided in a decision published on 02.05.2005. *Vidas*, cit., § 9.

73. See *Vidas*, cit., § 37.

74. See cases *Scordino (n. 1)*, *Cocchiarella*, *Apicella* (cit.) and a number of others.

75. See *Sürmeli v. Germany* [GC], 75.529/2001, § 100, 08.06.2006, ECHR 2006-VII.

Yet, already at the point of its invention, some knowledgeable commentators warned that the art. 63 remedy may soon become the victim of its own success.⁷⁶ Even before the entry into force of the 2002 amendments, the number of constitutional complaints quickly rose from several dozens to several thousands, the largest number of them being complaints for the length of proceedings.⁷⁷ As demonstrated in the *Vidas* case, the Constitutional Court in its own practice occasionally did surpass the average duration of processing of length of proceedings cases in Strasbourg.

In order to avoid that the proceedings for unreasonable procedural length become themselves unreasonably lengthy, the Constitutional Court incited in 2005 several changes to the Courts Act. The idea (which partly followed Polish and Italian examples) was to introduce a supplementary remedy for the length of proceedings which would be decided by the regular courts, and to leave the Constitutional Court with only subsidiary powers.⁷⁸ In fact, the Constitutional Court advocated a model according to which that Court would have the same role in relation to the new remedy as was the role of the Strasbourg Court in relation to the remedy before the Constitutional Court: in both cases, the examination of the merits would follow only after exhaustion of the “lower level” remedy (if such remedy had existed).

b) The request for the protection of the right to a trial within a reasonable time under 2005 Courts Act

76. Already in 2002 the then President of the Constitutional Court argued that the new amendments will overburden the Constitutional Court with the length-of-proceedings complaints, thereby becoming “the requiem for the Court”. See Crnić, J., 2002. Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu RH, *Zbornik Pravnog fakulteta u Zagrebu*, 52 (2), 259-288.

77. According to the general statistics of the Constitutional Court (see [www.usud.hr]), the number of new complaints regarding unreasonable length of proceedings developed in the following way: 64 in 2000; 43 in 2001; 442 in 2002; 542 in 2003; 925 in 2004 and 1443 in 2005. See also 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, at 121 and 128.

78. See Potočnjak, Ž., *Zaštita prava na suđenje u razumnom roku – neki prijedlozi za unapređenje hrvatskog sustava na temelju stranih iskustava*, *Hrvatska pravna revija*, 5/4:2005, p. 1-15.

The enactment of the new Courts Act happened swiftly, and the new legislation came effectively into force at the end of December 2005.⁷⁹ The Act contained a new chapter entitled “Protection of the Right to a Hearing Within a Reasonable Time” and two articles, arts. 27-28.

“Art. 27

(1) A party to court proceedings who considers that the competent court failed to decide within a reasonable time on his or her rights or obligations or a criminal charge against him or her, may lodge a request for the protection of the right to a hearing within a reasonable time with the immediately higher court.

(2) If the request concerns proceedings pending before the High Commercial Court of the Republic of Croatia, the High Petty Offences Court of the Republic of Croatia or the Administrative Court of the Republic of Croatia, the request shall be decided by the Supreme Court of the Republic of Croatia.

(3) The proceedings for deciding the request referred to in paragraph 1 of this section shall be urgent.

Art. 28

(1) If the court referred to in art. 27 of this Act finds the request well founded, it shall set a time-limit within which the court before which the proceedings are pending must decide on a right or obligation of, or a criminal charge against, the person who lodged the request, and shall award him or her appropriate compensation for the violation of his or her right to a hearing within a reasonable time.

(2) The compensation shall be paid out of the State budget within three months from the date the party's request for payment is lodged.

(3) An appeal, to be lodged within fifteen days with the Supreme Court, lies against a decision on the request for the protection of the right to a hearing within a reasonable time. No appeal lies against the Supreme Court's decision but one may lodge a constitutional complaint.”

Although the Constitutional Act on the Constitutional Court was not changed in any way, the Constitutional Court promptly declared that it will take into consideration new complaints under art. 63 only after

79. See Courts Act (*Zakon o sudovima*), NN 150/2005 of 21.12.2005 (the Act came into force on 29.12.2005). Subsequent amendments were published in NN 16/2007 and 113/2008.

the new “request for protection of the right to a trial within a reasonable time” (RPRTT) was exhausted.⁸⁰

Thereby, a new, de-centralized, multi-layered system of complaints for length of proceedings was established, with a number of potential scenarios. Here are the three most typical (but several more are possible):⁸¹

- if the applicants would complain about the length of proceedings of the trial courts, they should first lodge a RPRTT with the “immediately higher court” (i.e. to the County Court if the Municipal Court was competent, or to the High Commercial Court if the Commercial Court was competent). Subsequently, the decision on the RPRTT could be appealed with the Supreme Court. If the applicant would still not be satisfied, he could lodge a constitutional complaint with the Constitutional Court;

- if the applicant would complain about the length of proceedings of the appeals court, or about the length of the proceedings before higher courts (i.e. Administrative Court or High Commercial Court or county courts when they decide in the first instance), the RPRTT would be decided by the Supreme Court with no appeals options, but the applicant could turn instead to the Constitutional Court;

- if the applicant would complain about the length of proceedings before the Supreme Court, there would be no option of the RPRTT but the applicant could immediately lodge an art. 63 constitutional complaint.

Otherwise, the powers of the courts deciding on the RPRTT are equally formulated as the powers of the Constitutional Court – they also contain both a right to issue an acceleratory order (fixing time-limits for decision-making), as also the right to award compensation for the length of proceedings.”

80. In fact, the Constitutional Court announced on its Internet pages that after coming into effect of the Courts Act it does not decide any more on violations of the right to a trial within a reasonable time “in the first instance” (?!). See [www.usud.hr].

81. E.g. if the applicant complains about the length of enforcement proceedings, or the length of proceedings before the administrative bodies (both examples are not expressly covered by the Courts Act).

c) New de-centralized system in practice: domestic criticisms and problems in the implementation of the remedy

From the beginning, the introduction of the RPRTRT was followed by controversies. Some of them were of the principled nature and dealt with the way how the new remedy was introduced, whereas some others were more practical and considered the implementation issues.

As first, the intensive involvement of the Constitutional Court itself in the drafting of the new provision of the Courts Act was in itself not unproblematic. The Constitutional Court acted in its own cause, what might be seen as a violation of the old rule *nemo iudex in causa sua*. In 2005, the Strasbourg jurisprudence was very positive about the effects of the current legal remedy in which the Constitutional Court played the central role. There were some, but not too many instances in which the Constitutional Court did not manage to fulfil its constitutional obligations. Most importantly, there were no serious studies or objective researches that could neutrally evaluate the impact of the increasing caseload on the institutional capacity of the Constitutional Court and/or offer alternative solutions. The reasons for the introduction of the new remedy was not in improvements of the protection of the human rights – on the contrary, the main motive for change, pronounced bluntly, was to deflect cases from the Constitutional Court and shift the main burden of decision-making on the system of regular courts. In this respect, admittedly, the new system was instantly effective: the number of annual length-of-proceedings applications lodged with the Constitutional Court dropped from 1433 in 2005 to 55 in 2006, which is a decrease of over 95 percent.⁸²

Another objection based on constitutional principles and the rule of law came from the Constitutional Court itself. The long-time President of the Constitutional Court (who retired not long before the enactment of the new legislation) questioned whether the Courts Act, as a piece of “ordinary” statutory law, can change or overrule the mechanisms contained in the constitutional legislation of the higher rank, i.e. in the Constitutional Act on the Constitutional Court.⁸³ He argued that the normative act of the lower rank could not interfere into the area

82. See statistics of the Constitutional Court at [www.usud.hr].

83. See Crnić, J., (Ne)ustavni apsurdni (ne)razumnog roka u primjeni članka 29. Ustava: O bilokaciji nadležnosti, *Hrvatska pravna revija*, 8/3:2008, p. 5.

specifically covered by the hierarchically higher act and therefore has to be treated independently.⁸⁴ The submission made by this critique was, therefore, that two systems of the protection of the right to a trial within a reasonable time should not be mutually dependant, and that the applicants should freely chose either the statutory or constitutional avenue. The acting members of the Constitutional Court ignored, however, these criticisms of their past President and continued to treat the constitutional complaint as only subsidiary remedy.

All principled critiques aside, the new system was swiftly put into effect, which brought about new practical problems and doubts. Some of them were caused by the relatively short and incomplete regulation of the new remedy. One of the issues which was not clear was related to the type of proceedings according to which the courts should rule on the RPRTRT. As the new law was silent on this issue, the customary rules of interpretation would point to the application of the regular litigation rules of the Code of Civil Procedure. This, however, did not seem to be appropriate, as the consequence would be the application of the full set of procedural guarantees, such as the right to adversarial proceedings, full-fledged oral hearings, the right to appeal (by both sides) etc., which would necessarily add to the time needed to decide and turn the new request into the genuine “trial about the trial”. In fact, some state attorney’s offices that represented the Government in the RPRTRT proceedings started to file replies, request oral hearings and launch appeals against the decisions rendered in favour of the applicants. In certain cases, the state attorneys even felt obliged to lodge constitutional complaints if they were not in agreement with the awarding of a compensation or its amount. All in all, the overly formalistic approach had risked to jeopardize the effectiveness of the new remedy.

d) Last legislative tweaking: the 2008 amendments to the courts Act

To eliminate the doubts and confirm the already dominant practice, in the 2008 amendments to the Courts Act⁸⁵ arts. 27 and 28 were partially amended. In § 3 of the art. 27, the law expressly provided for the use of

84. It would also imply disregard of art. 28, § 3, which expressly regulates the admissibility of the constitutional complaint.

85. NN 113/2008 (the amendments came into effect on 11.10.2008).

more flexible rules of non-contentious proceedings,⁸⁶ and the time-limit for the appeal in art. 28, § 3, was shortened from 15 to 8 days.

Soon after these amendments, the Constitutional Court also clarified the issue of the right of the state attorney to complain to the decisions on the RPRT under art. 28, § 3, of the Courts Act. In the decision published in the beginning of 2009⁸⁷ the Court held that the sense and purpose of the protection of the right to a trial within a reasonable time speak against the conclusion that the state would be authorized to contest the redress afforded by the Supreme Court. With some reluctance, this fact was noted by the General State Attorney's Office, which also observed that thereby the Republic of Croatia was deprived of its right to a legal remedy in all cases in which the Supreme Court ruled on the RPRT in the first instance.⁸⁸ *Obiter dicta*, it is interesting to note that the State Attorney did not see any absurdity in letting the State to use against the individuals the remedy that is designed for the protection of individual human rights against the State.

e) New de-centralized system in practice: the perspective of the Strasbourg Court

New remedy for the length of proceedings is still a relatively recent occurrence, and the Strasbourg court has not yet had an opportunity fully to evaluate its effectiveness. It is partly due to the fact that the applicants now have at their disposal a complex, multi-layered system of domestic remedies. This increases the likelihood that they will obtain some kind of redress at the domestic level (see *infra* at 4.a. for concrete

figures), but also requires more time and effort to fulfil the condition of exhaustion of domestic remedies in cases in which the redress provided at the domestic level was inappropriate, ineffective or insufficient.

Still, had the decisive criterion of effectiveness of the domestic system been its potential to deflect cases from the ECtHR, the new model of remedies would have had chances to be considered effective. Although the violations of the right to a trial within a reasonable time are still frequent in the recent jurisprudence,⁸⁹ the influx of the new length cases communicated to the government seems to have been reduced.⁹⁰ The Strasbourg Court so far noted the existence of the new request under the Courts Act in *Cerin*,⁹¹ *Jeans*,⁹² *Čiklič*⁹³ and *Kvartuč*⁹⁴ (and in some of those cases it communicated to the government objections to the effectiveness of the new remedy) but until today no straightforward decision on the status of RPRT as the length-of-proceedings-remedy was issued. From an even more general perspective, it can be observed that the total number of applications against Croatia in 2008 was still held within relatively acceptable limits, at least compared to some neighbouring countries.⁹⁵ Insofar, according to the external perspective, the new model of remedies would seem to be satisfactory, at least in the moment of writing of this paper.⁹⁶ A change of perspective and a more careful introspection might, however, suggest different conclusions.

86. New § 3 of art. 27 read as follows: (3) "The proceedings for deciding the request referred to in paragraph 1 of this section shall be urgent. The proceedings will be conducted under the appropriate application of the rules of extra-contentious proceedings. In general, no oral hearings will take place".

87. Constitutional Court decision U-IIIv/2390/2008 of 18.12.2008, NN 4/2009.

88. *Izvešća o radu državnih odvjetništava u 2008.* (Annual Report of the State Attorneys' Offices for 2008), A-608/08, Zagreb, June 2009, p. 71 (see [www.dorh.hr]). The Report most likely wanted to raise the question whether such jurisprudence of the Constitutional Court violates the constitutional right to appeal, although this might seem to be a rather misplaced argument in the context of the proceedings which should protect the citizens' right to a trial within a reasonable time, and not the right of the state as the formal counterparty in the proceedings.

89. In 2008, out of 16 ECtHR judgments finding a violation, 11 dealt with the length of proceedings and 1 with the right to an effective remedy.

90. While in the pre-2005 period over two thirds of the communicated cases were the length cases, from 2006 to 2008 the portion of the length cases dropped to less than half of all communicated cases (according to data from the Court statistics and the information by the Court registry).

91. *Cerin v. Croatia* (dec.), 45.043/05, 26.06.2008.

92. *Jeans v. Croatia*, 45.190/2007, statement of facts of 07.09.2009.

93. *Čiklič v. Croatia*, 40.033/2007, statement of facts of 10.07.2008.

94. *Kvartuč v. Croatia*, 34.830/2007, statement of facts of 15.12.2008.

95. So e.g. in 2008 according to the statistics of the ECtHR there was in total 793 applications against Croatia, what is, in absolute numbers, 4 times less than the number of applications raised against Slovenia. Among these cases, there were 10 times less cases that were awaiting first examination (163 in respect of Croatia and 1759 in respect of Slovenia). See *ECHR Annual Report 2008*, Strasbourg (2009), p. 129-133 [www.echr.coe.int].

96. I.e. early november 2009.

4. CURRENT SITUATION AND POSSIBLE FUTURE COURSE: HOW LONG IS DRAINING OF THE LEAKING BOAT POSSIBLE?

a) *The high tide approaches (managable high tide or a devastating flood?)*

The Republic of Croatia has since the beginning of its membership in the Council of Europe diligently followed the hints from the Strasbourg jurisprudence. It has to be noted that a very few CoE countries have changed their legislation and the case-law of their highest tribunals on so many occasions and on such a broad scale. For the agility and the responsiveness to international demands Croatian authorities have, with no doubt, to be praised.⁹⁷

Admittedly, some of the reforms were more motivated by internal reasons than by the statements of the ECtHR. The introduction of the RPRTRT was in the eyes of many viewed as a self-defense of the Constitutional Court from the influx of unpopular length cases, or even as a move intended to push the hot potatoes back into the hands of judiciary.

Yet, even the new remedy could be considered as a welcome tool for the maintenance of the important ingredient of the system of protection of the right to a prompt adjudication – its effectiveness. As retrospectively proved by some of the recent Strasbourg cases, in at least some constitutional complaints the effectiveness of the remedy for unreasonable length was undermined by its own excessive duration.⁹⁸ Moreover, the new competence acquired by the regular courts to rule on their own (non-)efficiency could be hoped to produce over time a sobering effect:

97. The vigilance of the Croatian authorities was certainly enhanced by the notable place of the chapter on judiciary and human rights in the European accession negotiations. In the *Avis* (Opinion on Croatia's Application for Membership of the European Union, COM (2004)257final of 20.04.2004) the European Commission listed the "widespread inefficiency of the judicial system" among the major challenges, and noted that "citizens' rights are therefore not fully protected by the judiciary" (p. 16). The same problem continued to play an important role in the accession negotiations. E.g. in the Progress report of november 2007, it was noted that "the excessive length of proceedings remains a serious problem" and that "ECtHR continues to issue judgments against Croatia for violations (...) regarding the length of proceedings". See Croatia 2007 Progress Report, SEC (2007) 1431, p. 49.

98. See *supra* quotes from *Vidas* case (note 70).

faced with the *judgment of the peers*, the courts might autonomously recognize the pressing need to ensure prompt adjudication; deciding about the sins of others, they might be forced to acknowledge their own sins and make an effort to correct them.

The figures for the post-2005 period show that the courts have generally taken the new obligation to rule on their own effectiveness seriously. The criteria for the length of proceedings were somewhat simplified, and therefore the proceedings were relatively short. As noted by the State Attorney's Office in the very beginning of the application of the new legislation, the courts held that the "reasonable length of civil litigation, which by its nature is neither urgent nor complex, and in which there was no contribution to the length by the applicant would be three years, whereas the first instance and the second instance proceedings are viewed as a unique whole".⁹⁹

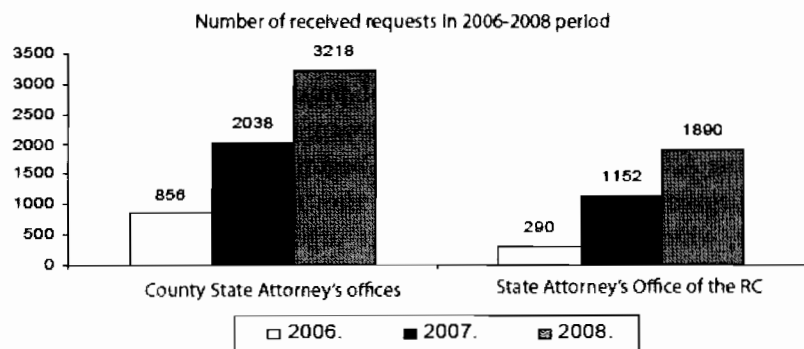
The Supreme Court and the lower courts in most cases awarded compensations that were not dramatically different from the compensations given in Strasbourg, and allegedly in some cases even gave more than the ECtHR would. The courts also regularly fixed a time-period for decision-making in the delayed cases. However, the general effectiveness of the new remedial system is perhaps best demonstrated by the reception of the users of the system – and this reception was almost unexpectedly enthusiastic.

The caseload of the RPRTRTs can best be traced through the annual reports of the State Attorney's Offices that have had the *ex officio* duty to represent the state before the courts.¹⁰⁰ Their statistics are quite indicative, demonstrating a 500% to 600% increase in the 2006 to 2008 period.

99. *Izvešća o radu državnih odvjetništava u 2006* (Annual Report of the State Attorneys' Offices for 2008), Zagreb, June 2007, p. 59 (see [www.dorh.hr]).

100. *Obiter dicta*, one of the main virtues of the new remedy was engagement of the State Attorney's offices; before the enactment of the Courts Act in 2005 the only governmental office responsible for the length of proceedings issue was the Government Agent (in the constitutional complaint cases under art. 59(4) and art. 63, there was no direct representation of the state government, as the cases were regularly solved as a quasi-one-party matter).

Here is the graph demonstrating the continuing growth of the number of requests, both those lodged with the appellate courts and those lodged with the Supreme Court (defended by the county State Attorney's offices and national State Attorney's Office respectively).¹⁰¹⁻¹⁰²



As visible from the graph, the number of cases rose from 1.146 in 2006 to 5.108 in 2008. This is an increase of almost 5 times, whereby the increase of the cases decided in the first instance at the level of the Supreme Court is even bigger, i.e. it is an increase of 6,5 times (650%). The number of the RPRTTs was the main reason why the State Attorney's Offices caseload was increased in 2008, in spite of the continuing trends of decrease in all the other areas of their work (representation in litigation, enforcement and bankruptcy proceedings).¹⁰³

As to the amount awarded, the situation is the following:

Year	Awarded amount (total)	Average amount (total)
2006	5.957.580 kn (0,8 million EUR)	5.200 kn (712 EUR)
2007	17.057.171 kn (2,3 million EUR)	5.350 kn (732 EUR)
2008	35.549.940 kn (4,8 million EUR)	7.000 kn (960 EUR)
TOTAL 06-08	58.564.691 kn (8 million EUR)	6.200 kn (850 EUR)

101. As to the composition of cases represented by the national State Attorney's office and decided by the Supreme Court, 60% of the proceedings were related to the length of proceedings before the county courts, 22% to the High Commercial Court, 16% to the Administrative Court, and 0,48% to the High Misdemeanour Court.

102. See *Izvjješća o radu državnih odvjetništava u 2008*, cit., (note 87), p. 71-72.

103. *Idem*, p. 58-60.

As the State Attorney's report observed, the increase of the compensation amount in the three years period was almost six-fold (from about 800.000 in 2006 to 4,8 million EUR in 2008). The increase in the paid compensation urged the State Attorney to reflect on the ways to alleviate the burden on the state budget and prevent future violations.¹⁰⁴

b) Further development – drawing the “worst case scenario”

It might be too early to draw definitive conclusions out of the presented figures. They are still too ambiguous. If we start with the financial impact to the state budget, the increase in the amount paid as compensation for the inefficiency of the justice system is dramatic, but the total amount paid in the 2006-2008 period (about 8 million EUR)¹⁰⁵ seems still relatively low compared to the overall budget of the justice system, which was about 240 million EUR in 2006.¹⁰⁶

Yet, it is hard to predict the further development. If the growth of the number of cases and the amount of the paid compensation continues at that rate (about doubling each year), in five years (about 2014) the state would have to pay on behalf of its ineffective judiciary more than it pays in total for the whole judicial system.¹⁰⁷

Will this happen? Most likely, in the times of the economic crisis, the government will not be overly generous when availing the victims of the human rights violations the appropriate compensation for the viola-

104. See *Izvjješća o radu državnih odvjetništava u 2008*, cit., p. 72. See more infra, note 110.

105. It should be noted that these amounts cover only the compensations paid via RPRTT system, and exclude the compensations awarded by the art. 63 proceedings, as well as the amounts paid by the state as the result of the ECtHR judgments, as well as the amount voluntarily paid due to friendly settlements with the Strasbourg applicants. All these figures (presumably lower than the above quoted amounts) are not readily available and are therefore hard to report.

106. Quoted according to CEPEJ report *European judicial systems. Edition 2008 (2006 data): efficiency and quality of justice* (EJS 2006), Strasbourg, 2008, p. 20 (the amount relates to total annual approved public budget allocated to all courts, public prosecution and legal aid).

107. It may also be noted that the overall budget of judiciary in Croatia is not low – it is 54 EUR per inhabitant, what is one EUR more than in France, and significantly higher than in Ireland, Poland, Hungary, Greece, Czech republic, Slovakia, Estonia and in a number of other CoE countries. See EJS 2006, p. 44.

tions. It is also not probable that the skyrocketing trend will continue at the same pace.

However, one can hardly deny that there is quite a potential for the further increases. Consulting only the scarcely available statistics on the average length of proceedings, we may reveal some disturbing findings. For instance, as a result of the casual survey of cases pending in the largest Croatian court – the Municipal Court in Zagreb – the mean duration of a civil proceedings in two instances in 2001 was surpassing the “reasonable” limit of three years – it was about 3,6 years. In addition, over 20% of cases in the sample lasted (only in first instance) more than four years.¹⁰⁸ After 2001, the situation did not instantly improve. On the contrary, according to the statistics collected by the Supreme Court, on 31.03.2006 in the Municipal Court of Zagreb about 30% of cases were pending for over five (5) years.¹⁰⁹ Under the (hopefully wrong) assumption that these ratios are representative, one might conclude that only in civil litigation (excluding other branches of jurisdiction, such as enforcement and criminal proceedings) there is a potential that from 187.000 annually pending litigation cases in over 50.000 cases parties could request compensation for the unreasonable length of proceedings. This would bring us dangerously close to the previous rough estimate that in five years the compensation paid could equalize the total budget of the judiciary.

Budgetary considerations aside, there are some further unanswered systemic questions that might have an impact on the effectiveness of the new remedy. Simplified as they might be, the RPRTT proceedings still take some time. More requests for the protection of the right to a trial within a reasonable time mean less time for the court to concentrate on

108. Mean first instance duration at that court was 843 days, i.e. 29,3 months, plus further 444 days (14,8 months) that passed in average between the filing of the appeal and the returning of the decision on appeal back to the first instance court. See National Center for State Courts, *Functional Specifications Report for Computerization in Zagreb Municipal Court of the Republic of Croatia* – Municipal Courts Improvement Project – Croatia, USAID project # 801, AEP-I-00-00-00011-00, Zagreb, September 2001 (unpublished), p. 10-15.

109. According to the statistics presented by Katarina Buljan at Plitvice bilateral meeting of the Croatian and Slovenian Ministries of Justice in December 2006. More precisely, out of total of 94.674 pending cases, 28.351 were older than 5 years.

its main function – delivering the right to a trial within a reasonable time. More work may mean more backlogs, and more backlogs could lead to more violations of the right to a trial within a reasonable time. As the time goes on, the launching of the RPRTTs becomes more customary, and in fact turns into another branch of the industry of legal services. This could lead to more sophisticated requests, which could provoke more sophisticated decision-making, and the consequence would be a more time-consuming process. Complex procedures in several instances have little chances to be effective remedy for unreasonable length. It is a way to close a vicious circle – *circulus vitiosus*.

The de-centralized system of decision-making could be a source of problems in itself. More bodies involved in decision-making may mean less uniformity in the application of the set criteria. Less uniformity may mean more need for intervention of the higher bodies i.e. more appeals. Also, the system in which the higher body decides about the length of proceedings before the lower body contains a systemic incentive to concentrate exclusively on one stage of proceedings, and disregard the overall proceedings as a whole. This would further invoke need for harmonization, meaning more appeals and more constitutional complaints. Again, the *circulus vitiosus* is closed.

For the effectiveness of the system of remedies, one of the decisive elements is its capacity to speed up the proceedings. Insofar, the higher courts may fix time limits to lower courts. But, the sheer fixing of time-limits does not necessarily bring more effectiveness, as demonstrated by a number of examples from law and practice.¹¹⁰ In the case of the RPRTT the authority of the higher court to fix the time-limit is not accompanied by any concrete sanction for the cases in which the lower authority would not comply with the set deadlines. Of course, the sheer authority of the higher court might be sufficient to give a priority to an occasionally dormant or forgotten case. But, the order to finish the case cannot be of much help in the cases of institutional incapacity to deal with the assigned caseload in the timely manner, and even less it can help in the instances of systemic problems that cause delays in certain types or classes of cases. Without an appropriate reaction and sanction for

110. E.g. the legislative fixing of the deadlines for decision-making in the Family Law was over many years entirely ignored and disregarded in practice. See *Obiteljski zakon*, NN 116/2003, 17/2004, 136/2004 and 107/2007, arts. 265 and 266.

disobedience, when the disregard for accelerating orders become a part of the daily routine, the effectiveness of the remedy would be definitely buried.¹¹¹ This is also a place where the *circulus vitiosus* might close.

c) Some indications of future jurisprudence of the ECtHR

So far, the circle is not closed, and will hopefully never be closed. The process of judicial reforms, initiated in the mid-90s, has eventually produced some positive results. Among them, the most important is the reversion of the trend of growth of court backlogs,¹¹² and the close monitoring of “old cases” conducted by the Supreme Court. The introduction of an integral, computerized system of case monitoring and court management (ICMS) may be helpful in the introduction of the advanced time-management policies, as well as further procedural reforms that should deal with some systemic problems, e.g with the delays in the delivery of court documents, lack of concentrated proceedings, successive

111. For that reason, some commentators have supported introduction of further supervisory complaints against judges who do not fulfill their functions timely, accompanied with specific disciplinary sanctions. See Maganić, cit., supra (note 60). The State Attorney's Offices Report also noted that “in the certain cases the length of court proceedings is a consequence of acts or omission of judges that have all elements of incorrect or illegal work in the sense of art. 106 of the Courts Act”; in such cases “the payment of compensation has caused damage to the state which might be requested to be covered by the responsible judge”. *Izvjestice*, cit., supra (note 87), p. 71. The introduction of appropriate sanctions for non-enforcement of judicial decisions (including the non-enforcement by the courts themselves) is also the topic of discussions at the international level. See e.g. the Conclusions of the round Table on “Non-enforcement of domestic courts decisions in member states: general measures to comply with European Court judgments” (Strasbourg, 21-22.06.2007), where strengthening the individual responsibility (disciplinary, administrative and criminal where appropriate) of decision makers in case of abusive non-execution was proposed, along with the introduction of efficient penalties and fines against the state agents that refuse to execute orders. See CoE Committee of Ministers document CM/Inf/DH (2007) 33.

112. The court backlogs were continually on the rise from 1992 (about 550 thousand) to 2004 (1,3 million). Since then the figures are decreasing: 2005 (1,1 million), 2006 (1 million), 2007 (970 thousand) and 2008 (890 thousand). Source: Annual Statistical Surveys of the Ministry of Justice [www.pravosudje.hr].

remittals etc. All this is expected to ameliorate the situation and prevent the “worst case scenario” from coming into life.¹¹³

Still, some worrying signs could be seen in several recent cases of the ECtHR. The possibility that the request for the protection of the right to a prompt adjudication could itself get into a maze and finish in the drawer is demonstrated in the *Cerin* case.¹¹⁴ In this case (which, by the way, was the second length case from the same applicant)¹¹⁵ the court communicated to the State the complaint about the unreasonable duration of the proceedings following one his two requests for the protection of the right to a hearing within a reasonable time. The RPRTRT was lodged on 30.03.2006 with the County Court, but that court decided on 28.11.2007 that it no longer has jurisdiction because the Municipal Court had in the meantime given its decision in the principal proceedings. The County Court transferred the RPRTRT to the Supreme Court, but that court did not make any decision on it prior to the rendering of the ECtHR admissibility decision on 26.06.2008. After communication of this case to the Government, the case was resolved by a friendly settlement. However, a period of over two and half years in which the courts did not respond to a request for acceleration of the proceedings would have left no doubt as to its effectiveness in the eyes of the ECtHR.

In the facts of the *Čiklič*¹¹⁶ case, we can see that even if the court obeys promptly to the time-fixing order, it might not be the end of the case. In that case, a RPRTRT was lodged with the Supreme Court on 03.05.2006. The Supreme Court decided the request 10 months later (!) and ordered the High Commercial Court to give a decision on the pending applicant's appeal within one month. The High Commercial Court rendered its decision on appeal on 26.09.2007, quashing the first-instance judgment and remitting the case back for retrial. In July 2008,

113. Some skepticism is still sound in this matter: see e.g. in this respect the wise remarks of a current judge of the Constitutional Court in Radolović, A., *Zaštita prava na suđenje u razumnom roku – realna mogućnost (pre)skupa avantura ili utopija?*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 29:1(2008), p. 277-280.

114. Cit., supra (note 90).

115. In the first *Cerin* case, a violation of art. 6 was found and the applicant was awarded 30.000 kn compensation for delays in the case that was initiated in 1984. See *Cerin v. Croatia*, 54.727/2000, 15.11.2001.

116. Cit., supra (note 92).

over two years after the RPRT, the proceedings were still pending in the first instance. In this case, we might be reminded of the systemic problem recognized in the earlier jurisprudence of the Strasbourg court, namely of the possibility of the endless cycle of remittals.¹¹⁷ The RPRT, just as all the other remedies for the length of proceedings, seem to be equally helpless in respect to the issues of this type – they can only be resolved by the reforms on the general level.

Therefore, although it is not very likely that catastrophic scenarios will be realized, it is quite likely that we will soon see more ECtHR judgments finding violations of the right to a trial within a reasonable time in Croatian cases. It is also highly probable that the RPRTs will at least in some cases not be found effective as a remedy for the length of proceedings. This, however, should only encourage further reforms. As noted in a draft of the new CoE document, “the rights to trial within a reasonable time and to an effective remedy (...) are fundamental to the Convention system and to the notion of a democratic state governed with respect for human rights and the rule of law. Whilst no Council of Europe member State can be said to have achieved perfection, membership itself implies an obligation to strive constantly for self-improvement”.¹¹⁸

d) The case is not over: a few concluding thoughts

In conclusion, we may only echo the wise saying of the Strasbourg Court:

“The best solution in absolute terms is indisputably, as in many spheres, prevention.”¹¹⁹

Without denying the remarkable successes in establishment of the whole network of remedies for the length of proceedings in Croatia, we

117. See e.g. *Zagorec v. Croatia*, 10.370/2003, 06.10.2005. In that case the first-instance court had given three judgments on the merits, all of them subsequently quashed and remitted by the appellate court. In several cases, the ECtHR ruled that successive remittals “may disclose a serious deficiency in the justice system”. See Grgić, Aida, *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*, Antwerpen-Oxford: Intersentia, 2007, p. 159.

118. See *Draft Guide to Good Practice of the Committee of Experts on Effective Remedies for Excessive Length of Proceedings*, doc. DH-RE (2009) 007, Addendum, p. 2.

119. *Cocchiarella*, cit., supra (note 28), § 74.

would like to remind of the underlying rationale: the individual right to a fair trial in reasonable time. This right imposes on the member states of the CoE the duty to organize their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. The remedies such as constitutional complaints and RPRTs can appropriately cure the individual and isolated occurrences of the disease, but cannot fight the epidemic. For that, persistent structural changes are needed. Some of them are outlined in the documents of other bodies of the Council of Europe, most notably in the documents of the CEPEJ.¹²⁰

In the meantime, we have to be aware that the effectiveness of legal remedies for the length of proceedings is not measured by their ability to deflect the cases from reaching the Strasbourg court, but by their ability to provide appropriate redress in the individual cases. We also have to be aware of the risks that determination of the (un)reasonable length of proceedings becomes “a trial within a trial”. This would be self-defeating, since the purpose of the remedies for the length of proceedings is to shorten the judicial activities, and not to add more formalities and costs to the system.

Finally, we have to recognize that the most effective way of dealing with the lack of effectiveness of judicial system is not in the awarding of compensation, but in the thorough study of the reasons for this lack, and in the constant fight against the discovered causes. Replacing the struggle for efficiency with the passive payment of compensation for inefficiency is not an option: the capitulation is the most costly way of quest for the Holy Grail of effectiveness of the justice system.

120. See documents on judicial time-management of the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ), in particular CEPEJ Framework Programme: A new objective for judicial systems – the processing of each case within an optimum and reasonable timeframe, CEPEJ (2004) 19; Time Management Checklist, CEPEJ (2005) 12 REV; Saturn Guidelines for judicial time management, CEPEJ (2008) 8 [www.coe.int/cepej].

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