Post-communist Judicial System: Deep-rooted Difficulties in Overcoming Communist Legacies - with Special Regard to Croatia

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Abstract

Post-communist lawlessness has caused considerable concern and resulted in much misguided theorizing. The paper criticizes some of the more common misconceptions. Among them are the disregard for private law enforcement, the failure to realize the interdependence between the range of rights to be enforced and the cost of enforcement, the mistaken view that the rule of law is basically a matter of public choice and the preference for administrative remedies over judicial remedies. After discarding such attempts at explanation, the paper proposes that the analysis should focus on other issues instead. All of them happen to be related to a legacy of communism. These include the downgrading of civil and constitutional law, the instability of legal rules, as well as the underdeveloped separation of powers and very peculiar causes of court congestion.

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This paper consists of two parts. The first part criticizes some theories of post-communist lawlessness that were proposed by economists in recent years. The second part presents an alternative view at the example of Croatia. It outlines some preliminary hypotheses that may help to understand why progress towards the rule of law has been slow.

A proposition by Hayek (1960, p. 208) may offer a useful starting point: "The importance which the certainty of the law has for the smooth and efficient running of a free society can hardly be exaggerated. There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed there." It may be worth noting that this proposition is meant to refer not only to the modern age, but to a part of medieval times as well. This part presumably began in the eleventh century, which is widely regarded as the time when the rise of the Western World gained momentum.

Empirical growth theory has made some efforts at pinning down the causality proposed by Hayek, but it has not been very successful at that. Gathering relevant data is an arduous job, certainty of law is very difficult to measure and all the available measures are garbled. Irrespective of their popularity, the qualitative assessments produced by various rating agencies and the Freedom House often appear implausible and unreliable. The only numbers that are readily available relate to the judiciary rather than to legal certainty. And these data may seem to disprove Hayek. One surely can count lawyers and other legal professionals. Including the latter is important, e.g. Japan is well-known for its small bar but researchers sometimes fail to realize that Japan has more legal professionals per capita than the USA[1]. All developed Western nations keep large numbers of legal professionals. However, more legal professionals does not always result in more growth, various examples of the contrary are available in the Third World. Quite a number of economists even think that more lawyers means less growth, the existence of a negative correlation was alleged by some. The statistical analyses undertaken to establish this claim are inconclusive for several reasons. Magee, Brock and Young (1989) count lawyers instead of legal professionals, so this procedure is likely to be misleading. Murphy, Shleifer and Vishny (1991) try to avoid this mistake by taking the share of law students in the overall population of college students. However, most of

[1] *Similarly, observers who point out that in the US lawyers are much more numerous than e.g. in Germany or Austria often fail to realize that in these latter countries tax accountants usually are business majors, while in the US this legal service is for the most part provided by law school graduates.*

their results are statistically insignificant and their interpretation is rather debatable[2]. Even if the purported negative correlation happens to exist, it should not be interpreted as indicating causality or disproving Hayek's claim. To recognize how the augmentation of lawyers may increase social welfare and why this may fail to occur, consider one of the possible chains of causation. There is a causal link from lawyers to legal certainty. Rational people litigate only if the outcome is uncertain, this uncertainty may be due either to legal or factual uncertainty. Lawyers earn their money by identifying such uncertainties, legal uncertainty thus results in litigation and a larger body of precedent, precedents gradually remove legal uncertainty. This happy outcome, however, is achieved only if statute law is sufficiently stable and if an accumulation of precedents is appreciated as a legitimate procedure of rule-making. If instead statute law keeps changing at a rapid pace, as is still the case in Croatia, the body of precedent is subject to a rapid depreciation. The body of precedent may be likened to a capital stock. Changing statute law at a rapid pace is like destroying real capital, it deprives the work of lawyers of much of its usefulness for the general public[3] and thus greatly reduces the return on the investment which society makes by educating lawyers. Another reason why the return of the Croatian precedent production continues to be deplorably low is that it is still fairly difficult to find precedents. Judicial decisions and opinions are often not published and even if they are in principle accessible, the development of information systems which support research of precedents is still in its infancy[4].

The argument that a large body of precedent is tantamount to more legal certainty may appear as strange to those who tend to view civil law systems such as the Croatian as systems in which precedent is of minor relevance. The prevalence of this prejudice is to

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[2] *They claim to have found evidence that the allocation of talent provides the crucial chain of causation. More law students means that less talent is available for engineering studies, which they consider more relevant for economic growth. They do not claim to have revealed any other causal nexus, their data actually disprove the (fairly popular) idea that lawyers contribute to rent-seeking and thus reduce the efficiency of investment. "....suggests that lawyers reduce growth creating activities but not through reducing the incentives to invest." (ibidem p. 529) It may be significant that in their data the combined share of law students and engineering students is only 20 percent. The remaining 80 percent of college students should offer a sufficient supply of talents if engineering studies really suffer from a shortage of talent as Murphy et al. seem to be claiming. Also, law students often have talents that differ considerably from those of engineering students. On the other hand, the best talents for engineering might well be found at some other faculties rather than among law students.*

[3] *Increasing the body of precedents and thus legal certainty is a positive externality produced by lawyers while working for their private gain. Instability of statute law reduces or eliminates this positive externality.*

[4] *Udruga Sudačka mreža (an association of judges) has undertaken an important initiative to solve this problem. It is worth noting that in this regard Croatia is lagging behind Bulgaria.*

quite some extent a communist legacy that lingers on[5] because the proponents of this view rarely or never read code commentaries, written in highly developed civil law systems like e.g. the German one. If they were to read such commentaries, they could not help but realize that they refer to precedents quite frequently and not dramatically less often than treatises written in common law countries. Thus, the argument that more lawyers means more legal certainty holds, provided that statute law is sufficiently stable. However, there is another proviso. The stability of statute law does not translate into more growth if the statutory principles whose meaning has been ascertained are such that they inhibit economic growth, or if it is not possible to contract around the provisions that have these detrimental effects. In other words, if a large portion of inefficient provisions are ius cogens, the investment into the judicial system is wasted again. This presumably is a major difference between common law and civil law systems; statute law often tends to be ius cogens, common law tends to offer more flexibility. Examples to illustrate the resulting possibilities of waste may easily be found in the German economic history. If legal certainty supports economic growth, this is presumably so because it supports the division of labor which has long been recognized as the fountainhead of growth. Arguably, a highly developed division of labor is virtually unattainable in the absence of the rule of law. However, not all legal systems support the division of labor. For instance, Germany had a rather developed judicial system and large numbers of well educated lawyers in 1947, but the division of labor in the German economy at the time was roughly comparable to the time of Charlemagne[6]. The legal system did not support the division of labor, but rather inhibited and prevented it, thus preventing growth.

1 Theories of Post-Communist Lawlessness: a Critical Review

Presumably, few economists disagree with Hayek's tenet that legal certainty contributes strongly to economic growth. Economists also claim to be experts on issues of economic

[5] *To be sure, this fallacy is not universally held. For an account that stresses judge-made law see e.g. Kačer (2003, p. 445).*

[6] *This historical comparison is due to Eucken (1950). In 1947, food was rationed in Germany but rations were at starvation level. In order to survive, people needed to engage in subsistence agriculture or acquire additional food on the black market. This was very time-consuming, town dwellers needed to undertake lengthy (railway and bus) trips to the countryside arranging barter deals with peasants. In theory, town dwellers were all required to work in their jobs, but foremen understood that absenteeism was a necessity to assure survival.*

growth, thus the fact that they have been inclined to ignore this causality is a bit of a paradox. Sometimes they cannot avoid dealing with it as, for example, if problems caused by legal uncertainty and missing law enforcement proliferate. After 1995, post-communism forced economists to face these problems. This was the point when most economists lost interest in the economics of transition. Those who remained in the field often turned to strange theories. This theorizing of the late nineties tended to take on an unduly alarmist tone. Sometimes it was claimed that as a result of weak law enforcement most post-communist countries were heading towards total disaster. Nowadays, one can easily realize how misguided such alarmism was. Even the post-communist countries in which law enforcement continues to be extremely weak such as e.g. Ukraine, Albania or Moldova have experienced some economic recovery. These countries have not fallen into a bottomless pit; often they have established a viable sort of crony capitalism. There seem to be only two "chronically sick" European post-communist countries, they are Serbia and Belarus, and even their disease is not as terminal as it is often represented. Both of them were relatively affluent in 1990 and this affluence has not been completely wasted yet, so their story is more about stagnation than about collapse.

The alarmist view was based on two misconceptions. The first misconception concerned the role of private versus public law enforcement. The second was an exaggeratedly negative account of crony capitalism. These misconceptions in turn gave rise to several misguided economic theories of law enforcement. This theoretical section of the paper first sketches the misconceptions and then turns to three false theories.

Misconception one is that law enforcement is narrowed down to public law enforcement, this is the etatist view of law enforcement which ignores private law enforcement. As an empirical matter, however, private enforcement is quite significant even in modern economies, with substantial resources spent on various kinds of self-enforcement and self-protection. Self-enforcement tends to be more cost-effective in protecting contract rights than in protecting property rights. Self-enforcement often relies on the building of reputations, on reputational capital. For instance, the small share of non-performing loans in Western bank portfolios is not due mostly to superb performance of bailiffs but rather to the fact that persons who at some point of their careers default on their loans tend to find themselves cut off from further lending. Meaningful credit information is available and people service their loans as regularly as they can to avoid getting on the black list. In the early years of post-communism such reputational capital was largely non-existent, and even where it had existed to some extent before – and Yugoslav socialism provided more opportunities for building reputational capital than the Soviet-type socialism – the pre-

existing reputational capital was debased by the dramatic change of circumstances. Numerous new enterprises were formed, but their owners were often less interested in building reputational capital because they were often struggling for survival and their future was extremely uncertain. However, after a couple of years, i.e. in the late 1990s, these inhibiting factors became less relevant in the countries that had embarked on transition in 1990 and the usual self-enforcement mechanisms that the normal conduct of business hinges on started to become more powerful. As a result, those legal rules which support business, transactions have increasingly been abided by voluntarily. This phenomenon has been observed in most post-communist countries. A prominent example is Khodorovsky, the former owner of Yukos, who is now being tried. Most likely he had been a great villain, but even he got somewhat more honorable as of late.

Second, for a while quite a number of economists commented on crony capitalism as if it were a recipe for disaster. And what followed after communism was often some sort of cronyism. The very negative account of crony capitalism, which has been so popular among economists, misses out on an important distinction. Public law enforcement does not necessarily mean that the law is enforced as a public good; instead it may be enforced as a private good[7]. Enforcing the law as a private good means that enforcement is haphazard and highly selective and that only a very limited number of people can actually rely on it. This is cronyism. To be sure, countries characterized by crony capitalism will not manage to catch up with the US or affluent Western European countries. However, there is some middle ground between affluence and disaster. In their celebrated analysis Haber et al. (2003) demonstrated at the example of Mexico that crony capitalism can result in rather respectable growth rates, and that it may well improve livings standards more significantly than e.g. socialism managed to do. So even if there is no rule of law proper, i.e. if a government does not protect the rights of most people, but only those of the select few, this may suffice to generate growth provided that at least some of these select few have entrepreneurial zeal and talent.

After these remarks on two widely held misconceptions the stage is set to turn to three false theories. The theories will be named according to their best-known proponents. The first theory was proposed by Roland (2000), the second by Stiglitz and the third by Shleifer and Vishny[8]. Roland's theory will be criticized first. He rightly observes that law

[7] *This distinction seems to have been pioneered by Gambetta's (1993) analysis of the mafia.*

[8] *Relevant writings are numerous, but Hoff and Stiglitz (2004) and Glaeser, Johnson and Shleifer (2001) are particularly illustrative of the type of arguments presented.*

enforcement is costly and goes on to argue that post-communist countries often cannot afford such costs because they lack sufficient tax revenue. From this he infers that the government should protect some part of the economy from competition and keep it under its tutelage. He hopes that, as a result of such protection, this part of the economy will be profitable enough to generate the stream of tax revenue required to finance law enforcement. This theory has several flaws. The most significant flaw in Roland's approach is that he abstracts from the interdependence between the set of rights to be protected and the cost of enforcement. However, this interdependence is enormously important. Protecting private property, contract rights and personal safety but little else does not cost so much, all East European countries can afford it. Enforcement costs, however, grow enormously if a much broader set of rights is to be enforced and in particular, if this set of rights includes so-called social and economic rights, which to quite some extent stand in conflict with private property rights. If a country cannot afford law enforcement, the primary reason is that the set of rights which it tries to enforce is too large and there is too much conflict between these rights[9]. By the way, Germany also offers a good example of the costs that an overextension of the set of rights, social and economic rights in particular, can cause. Germany has been on a decline since the early nineties, but the real decline has been less dramatic than the statistically recorded decline. There is an indication that the German shadow economy has grown significantly. This means a decline of law enforcement, with the costs of enforcing the law growing more and more out of proportion to what a society is ready and able to spend on enforcing it.

A second strand of fallacious theorizing, represented e.g. by Stiglitz, attempts to conceptualize the rule of law as a matter of public choice. This is a sort of constructivist approach to the issue. Stiglitz contemplates under which circumstances citizens vote for the rule of law and which policy measures render it more likely that citizens will vote for rather than against it. E.g. Stiglitz conjectures that citizens tend to vote against the rule of law if they consider the prevailing distribution of wealth as illegitimate. Moreover, he argues that citizens are likely to vote for the rule of law if the return on their investments is high. From this he infers that the government should refrain from the policies that tend to reduce the return on investment. Stiglitz represents monetary stability as a measure which depresses return rates, and argues for a policy of moderate inflation and currency undervaluation. This view may be criticized for a number of reasons which are beyond the scope of this paper. However, the key flaw of his argument lies in the way he poses the problem. Citizens of post-communist countries rarely mean to vote against the rule of

[9] *See Posner (1995) for a succinct elaboration of this point.*

law. There have been numerous parties and politicians whose endeavors arguably are incompatible with the rule of law but they have rarely advertised this, nor have they inserted it in their party programs in an easily discernible way. For instance, it is debatable to what extent Putin's "dictatorship of the law", which has been one of his key slogans, is compatible with the rule of law but one should not assume that these cleavages are common knowledge among Russian voters. Presumably, most Russians rather think that this so-called dictatorship of the law and the rule of law is one and the same thing. Neither are there any anarchist movements attracting a significant number of votes anywhere in Eastern Europe. Even if one were to adopt a narrow view of law as a concept focusing on private property, one cannot claim that the parties which have been explicitly hostile to private ownership have commanded much support among the voters since 1995. Enthusiasm for nationalization is largely a matter of the past. The ex-communist parties including the Russian communists typically no longer make the abolishment of private property and terrorizing the bourgeoisie a key program issue. The real issue in elections is not whether one is for or against the rule of law; it is more about different understandings of the rule of law. In addition, voters often strive for other social goals in addition to the rule of law and fail to realize that these other social goals may be partly or fully incompatible with the rule of law. Voters often hold onto the misconception that the rule of law is tantamount to tough crime-fighting.

Another problem with how Stiglitz poses the problem is that the real difficulty with the rule of law rarely lies in the promulgation of principles; rather it is the host of practical problems of implementation. These problems are far too numerous to be solved within one legislature, they are a matter of decades. Still, another criticism of Stiglitz's theorizing is that people in real life are more pragmatic, more Coasian than Stiglitz thinks. It is not really so important to them whether the big shots acquired their wealth in a legitimate way provided that they create jobs, pay their workers well and behave decently. E.g. in Croatia people do not really care so much about the origins of Todorić's money provided that he allocates his resources prudently and in ways that promote the Croatian economy. Most likely the issue of the legitimacy of privatization policies really is much less relevant than Stiglitz tends to believe. To summarize, Stiglitz's approach is quite misleading. Small wonder that his modeling effort results in extremely implausible conclusions. E.g. in his model the rule of law becomes the more likely the poorer the nation gets. According to him, the rule of law is ultimately unavoidable, those who do not have it become more and more impoverished and that will give rise to the rule of law. Also, he excludes the very possibility of law enforcement as a private good.

A third strand of theorizing, which will be referred to as the Shleifer and Vishny approach, focuses on slack and incompetence in the courts and the subversion of courts and argues for a partial substitution of judicial procedures by government regulation because, in their view, regulatory agencies are less easily subverted and capable of more decisive action against wrongdoings. According to them, regulatory authorities need to play a key role in creating the rule of law. They focus on three major shortcomings of courts, one of them being incompetence. Incompetence of courts, particularly of commercial courts that need to deal with new and complicated fields such as e.g. agency law, certainly is a major problem and even more so if judges lack sufficient incentives to acquire relevant knowledge. However, notice that these disputes can often be put to arbitration, so this offers a ready solution for contract disputes, although not for torts. Arbiters may be selected according to their competence. Creating a regulatory authority may be thought of as a solution for the remaining problems only if the country has a sufficient number of experts to fill the key positions of the regulatory authority. However, if such experts are actually available, one could just as well create a specialized court or a specialized department of an existing commercial court and appoint these experts as judges. The latter is the more expedient solution in particular because such a specialized need not require such numerous expert staff as does a regulatory agency. This is so because in civil litigation the most labor intensive part of work, i.e. the gathering and organization of evidence, can be left to the litigants' attorneys and the choice of a sufficiently competent attorney is up to the litigant. Attorneys are self-employed; they have powerful incentives to acquire the knowledge their clients need. In contrast, a regulatory agency needs to do much of this work of gathering and organizing evidence by itself, and it requires considerable staff to discharge these duties. Hence, creating a specialized court is much easier than creating a regulatory agency capable of handling the issue.

Shleifer and Vishny are also concerned about slack. In civil litigation the building and arguing of a case is largely up to the attorneys[10], thus the relevant incentive problem is not primarily about providing incentives to judges but about whether litigants and their attorneys have sufficiently strong incentives. This may be a problem if gathering relevant evidence is difficult (or if there are major problems of market failure in the market for

[10] *However, in Croatia it is only since the 2003 reform of the civil procedure that civil litigation has primarily been based on the adversarial system. Up to 2003, it had strong inquisitorial elements. In the inquisitorial system the distinction between courts and administrative regulation is somewhat blurred.*

attorney services[11]). Quite a number of civil law countries have failed to react to this problem. The problem can often be solved if the stakes are increased sufficiently and if the attorney is effectively made a co-owner of the stake. This can be done by adding punitive damages to compensatory damages and by allowing contingent fees contracts, these are well-known incentive devices widely used in common law systems. It is not transparent why a civil law country should refuse to adopt them. Awarding punitive damages or a multiple of what would be needed to compensate a winning plaintiff, and contingent fees, i.e. a contract between the plaintiff and his attorney according to which the latter receives a certain share of the award, creates powerful incentives to litigate a case. For sure these are not weaker than even the strongest incentives a regulatory agency can possibly offer to its employees[12]. So the second argument of Shleifer and Vishny is not much better than the first.

There is a bit more to their third claim. It concerns corruption in the courts. It is less than clear how venal Croatian courts are. Hard evidence is virtually unavailable but extremely strange court decisions, that appear explainable only by corruption, are not at all rare. Shleifer's and Vishny's basic argument is the following: Consider behavior that may result in an accident causing large damage, assume that this damage occurs with the probability of only one percent. Thus, the expected value of damages is only one percent of the actual damage if it occurs. One possible approach of the law is prohibiting this behavior outright and employing a police force or a regulatory agency to enforce this prohibition. Alternatively, the law can confine itself to entitling the victim of the accident to damages, and the stake of the victim may be blown up by allowing punitive damages. If there is no police force or regulatory agency supervising the activities that provide the opportunity for the potentially damaging behavior, cases will come to court only if there is a victim. And if there is, the damage is large by assumption. This creates a strong incentive for the defendant to corrupt the court, a lot is at stake for him and, consequently, he will be ready to offer a large bribe. The larger the bribes offered, the more likely it is that judges will

[11] *This seems to be the case in Croatia but not much research has been done on this issue yet. Presumably, the key problem is the adequate provision of quality signals. This is a problem in much of continental Europe. An adequate treatment of these issues is beyond the scope of this paper.*

[12] *Quite a number of jurists are inclined to shudder at the thought of contingent fees. However, this prejudice may need to be reconsidered. In debt-collection, arrangements which are effectively equivalent to contingent fees are perfectly common. If a creditor sells a claim to a debt-collection agency, he often receives only a fraction of the claim's face-value, the debt-collection agency in essence operates on something like a contingent fee contract. If this works well in debt-collection, why not extend such incentive-providing devices to tort law ?*

turn out to be bribable. If instead, there is a police force or a regulatory agency authorized to fine those who engage in the potentially dangerous activity and if the agency employs sufficient personnel to catch most of those who do engage in it, a moderate fine may suffice to deter people from this activity. If the fine is small, the incentive for bribing is small as well, and consequently officials are more likely to resist the temptation to take bribes. Notice that this superiority of regulation depends on a crucial condition. The personnel employed by the agency must be numerous and competent enough to catch misbehavior with a large likelihood, and they must be sufficiently well supervised and paid to resist the temptation offered by small bribes. In the countries with rampant corruption these conditions are often unlikely to be met, so it may be easier to make sure that courts cannot be bribed. In principle, it is not so hard to make the judiciary largely corruption free; judicial organization offers numerous opportunities to limit corruption. Devices for limiting corruption in courts are trial by jury, having judges sit in panels, a well-defined court venue and case-allocation system, publicity of trials, etc. If a country does not use such opportunities for limiting corruptions in the face of widespread corruption, this is presumably due to a lack of political will. However, if there is no political will to fight corruption, regulatory agencies are likely to prove corruptible as well. Key devices for fighting corruption in the public administration are paying officials well and back-loading their salaries, e.g. granting liberal old-age pensions, which an official will lose if he is dismissed because he is found venal. The staff required to run a regulatory agency is much larger than the number of judges and court officers such as bailiffs that are required to run a specialized court. Hence, paying the required personnel well enough to make them unbribable is much more difficult under administrative regulation.

Thus, in summary, the theories expounded by some economists to explain insufficient law enforcement in post-communist countries do not improve our understanding of the real issues. It is worth noting that all of these theories largely neglect communist legacies. The second part of the paper discusses some issues which are more relevant for understanding the real difficulties hindering the rule of law in Croatia. On closer inspection, most of these difficulties turn out to be related to communist legacies. Surely the list of difficulties presented in this paper is incomplete. Law enforcement is a multi-faceted affair and there are no panaceas.

The second part of this paper is organized around the following topics: topic one concerns the neglect of constitutional and civil law, topic two is the instability of rules, topic three concerns the separation of powers, topic four court congestion and its causes.

2 Some Communist Legacies Revisited

2.1 Relevance of Constitutional and Civil Law

As has been pointed out by Croatian legal scholars such as e.g. Gavella (2001), Yugoslav law was a member of the socialist law family, it was not a hybrid between socialist and western law. Two of its most distinctive features were the marginalization of constitutional law and of civil law. Yugoslav communism featured a sort of pseudo-constitutionalism, constitutions for the most were a facade, they had a propagandistic and legitimizing function, but they were not meant to limit government and certainly they did not limit it in actual fact. Thus, constitutional law proper started only in post-communism. However, it is not yet taken very seriously. Post-communist Croatia has witnessed a flood of unconstitutional legislation and administrative rule-making. Quite often the flaws of these rules, their unconstitutionality, could easily have been recognized by a lawyer who was ready to think about them. Thus, most of these mistakes could have been avoided if one had taken some care. The fact that the constitutional court has invalidated thousands of laws and regulations does not indicate judicial activism. The constitutional court actually has leaned towards self-restraint. Thus, the large number of rules declared unconstitutional testifies to the disregard of constitutional principles that has characterized rule-making. Presumably, the framers of these unconstitutional rules did not intentionally violate constitutional principles; they just did not think of them. Thus, the primary issue has been inertia. To make matters worse, rulings of the constitutional court have frequently been ignored, and this is decidedly worse than inertia.

Another feature of communist law was the marginalization of private law; under Yugoslav communism private law was only moderately more significant than in Soviet-type systems. Moreover, in the narrow sphere allowing for private law, its efficiency was greatly reduced e.g. by promoting schemes for divided ownership. The best example of this, of course, was real estate where the principle of superficies solo cedit was abandoned and titling de-emphasized. Symptomatic for this development were the illustrious “nekretnine u izvanknjižnom vlasništvu” (Engl. off-register title properties). Among the lasting results was a decay of land registers. Unfortunately, there have been no vigorous efforts at their improvement until quite recently. Another common feature of Yugoslav and Soviet-type law was that the judicial machinery available for enforcing civil law claims, e.g. debt collection, was debased and rendered unable to collect major amounts of debt within a reasonable time.

The impact of these legacies on post-communist Croatia continues to be felt in much administrative rule-making. The rules created by public administration and regulatory agencies quite frequently amount to nothing less than legislation, in effect they arrogate legislative functions and quite often cover ground which in Western Europe is the domain of civil law, i.e. they substitute civil law by public law. Public administration rather than parliament is the framer of this public law. An example of this sort of administrative rule-making is the Croatian National Bank, which in the course of the 1990s essentially framed a bankruptcy law sui generis for banks. At the time, this may well have been unavoidable because both the parliament and the courts failed to fill the gaps of existing bankruptcy law or take proper account of the special problems raised by defunct banks[13]. These gaps needed to be filled somehow, or severe damage might have occurred. Thus, legislation by the National Bank was presumably necessary to prevent worse things from happening, so it became a legislator by default. Note that the National Bank thus acted according to the advice offered by Shleifer and Vishny. The most serious danger in it is that the assumption of legislative functions by the public administration and the substitution of private law by public law comes to be regarded as more than an emergency measure, required in the immediate aftermath of communism and war. It should be understood that this sort of stopgap is no longer acceptable in more settled circumstances.

3 Instability of Legal Rules

Much of Western Europe, e.g. Germany, suffers from instability of legal rules but this instability is largely confined to public law, administrative law, tax law and social security in particular. In Croatia, however, civil law and criminal law have been highly unstable as well. Instability of law is almost by definition incompatible with the rule of law; in order to rule, law must be certain, whereas instability reduces or eliminates legal certainty. The rule of law means that citizens structure their behavior in a way to avoid the violation of laws. This is clearly impossible if they cannot know the law. The rule of law is a political ideal, which in reality cannot be approximated more than imperfectly. The real danger thus is not that the reality falls short of the ideal, but rather that the ideal is lost out of sight or that it ceases to be regarded as a goal of legal policies.

[13] *Clearly, a run-of-the-mill bankruptcy procedure sometimes is unsuitable for banks, special provisions may be required.*

The persistent legislative over-activism prevailing in Croatia suggests that stability of legal rules is not considered desirable; all law including civil law rather tends to be regarded either as an instrument of shaping society according to the ever-changing priorities and goals of politicians, or as an instrument employed by politicians in order to style themselves as doers, men of action. Creating this image of a man of action seems to be a nearly infallible recipe for popularity in most democracies, e.g. German chancellor Gerhard Schröder has resorted to this device as much as any Croatian politician. Rewriting laws and spending money are the actions that the man of action may take to prove himself. The resulting damages can be kept within tolerable limits if legislative activism is confined to a circumscribed sphere of public law which, hopefully, is of limited relevance for much of society. Confining the men of action to such a circumscribed sphere may be possible if society at large has abandoned utopian inclinations and has become sufficiently skeptical of all grand outlines and holistic designs. Whether this prerequisite is fulfilled in Croatia is debatable; e.g. the idea that the government should propose grand strategies to guide the economic development still seems to enjoy quite some popularity, as illustrated by the frequent calls for a development strategy for the country.

Thus, it may be less than surprising that even civil legislation continues to be amended with irritating frequency. Bankruptcy law is a good example. Since the enactment of a completely new bankruptcy code in 1996, there have been two amendments already and both have been major. Recently, in fall 2004, the Minister of Justice announced the next major revision. Since Croatian bankruptcy law is basically similar to German law, it is natural to compare the Croatian speed of legislation with that in Germany as well. The new German bankruptcy law enacted in 1994 superseded the bankruptcy law dating back to 1877; the latter had not undergone much change during the 120 years from its enactment. The 1994 law was drafted by a committee formed in 1978; the committee worked on its draft for seven years, it was then revised by the ministry of justice and discussed by government for another six years. Parliamentary discussion extended for two years. Between the enactment of the new law and its taking effect there was an interval of five years, during which the old law continued to be applied. This five-year interval was thought of as necessary to give judges and lawyers a chance to get familiar with the new law. Actually, the new law does not work too well; there have been numerous unexpected difficulties when it was finally enforced[14]. This description may suggest to the reader that Germans tend to be overly pedantic, so it may be worth noting

[14] *On this see e.g. Uhlenbruck (2004).*

that the grand US bankruptcy law reform of the 1970s proceeded at a slow pace as well. This is not to argue that Croatia could and should have taken similarly long, this was not possible because much of the legal legacy of Yugoslavia was dysfunctional and needed to be substituted by something else. However, this problem was solved in 1996/97, when key elements of the new civil law were enacted. The two amendments of the bankruptcy code enacted since 1996 have definitely been too much and prepared in too much haste, the second amendment in particular was a quick and dirty move and introduced new defects[15]. Nevertheless, it presumably was the minor evil; some had wanted no less than a total revision of the code that was avoided. Similar stories can be told about other fields of civil law.

The law of civil procedure has suffered similarly under excessive legislative activism. A good example is *"ovršni zakon"* (Engl. distress/execution act, enforcement statute), which since its enactment in 1996 has already suffered two major amendments, both of which have been described as sloppy and inconsistent[16]. In Germany, the key enactment regulating execution dates back to 1877, much of this 1877 law is still in force.

Croatian criminal law was unstable throughout the 1990s as well, since then matters have improved.

The usual pretext for rewriting laws is that there have been some abuses. The possibility of curbing these abuses by reinterpreting the law and through judge-made rules rarely seems to be considered. However, case law may even be capable of resolving quite a number of the incompatibility problems, which inevitably arise if legislation is enacted in great haste. Unfortunately, in Croatia judge-made law still tends to be viewed as a matter of minor relevance. This neglect of judicial precedent and case law has been reflected by the prevailing habit that most appellate court decisions and opinions until quite recently have remained unpublished. Contempt of case law, as well as legislative over-activity, testifies to a persistent influence of legal positivism. The neglect of constitutional principles may similarly be traced to legal positivism since legal positivism amounts to denying that all law must be built on a body of more permanent principles. The persistent influence of positivism would be easier to understand if Croatia were devoid of a tradition of Catholicism. The concept of natural law has been highly important in

[15] *See Dika et al. (2003)*

[16] *See Crnić (2004).*

Catholicism, so in a Catholic country it should be expected to exert some influence and it is sort of a paradox that its influence really has been so weak[17].

4 Separation of Powers

The judiciary is by its very nature a relatively weak power; it depends on support provided by other powers and by society at large. If other branches of government are essentially united and form a unitary power, the judiciary has little chance of asserting itself. Thus, a meaningful separation of powers is crucial. It is rather obvious that in Croatia the separation of powers continues to be underdeveloped. This is mostly due to the new Croatian centralism, which in some respects mirrors the centralism that – even though it had been disguised in various ways – really was a persistent tendency under communism. In post-communist Croatia the hazards of centralism have been enhanced further by a high degree of politicization, which has prevailed in much of the civil service. Understandably, the state of emergency brought about by post-communism and war was not the most suitable environment to stress the separation of powers, but this emergency has been over for quite a number of years. The constitutional amendments of 2001 eliminated the predominance of the president and thus paved the way towards de-concentrating power. However, as of now power is still highly concentrated in the hands of the executive branch of government, in particular the prime minister and the cabinet. Parliamentarianism proper remains underdeveloped and, as a result, the cabinet is in actual fact both the executive branch and the legislator. The weakness of parliament is most clearly revealed by the enduring popularity of abridged (*"hitno"*) legislative procedures[18]. The power of the cabinet has declined somewhat since 2000, but this has only been due to the fortuitous circumstance that all governments since then have depended on fragile coalitions of a multitude of parties. This has been a blessing in disguise. Still, this circumstance is no more than a mediocre substitute for an institutionalized separation of powers. Notice the economic substance of this argument: it applies anti-trust analysis to government. The underlying presumption is that monopoly in government is the most dangerous sort of monopoly.

In modern democracies parties often impose discipline on their parliamentary deputies, deputies usually vote with their party leadership. In Croatia this discipline is even further

[17] *It is no less of a paradox that most economists are unfamiliar with the idea of the law of nature. This idea was central for classical economic thought, as even a casual reading of "The Wealth of Nations" reveals. Or see e.g. Hume (1998[1753], p. 92).*

[18] *For some material illustrating the weakness of parliament see Bratić (2004).*

enhanced by the autocratic structures within most if not all parties. As a result, the traditional separation of powers between executive and legislative branches is bound to be less meaningful than it used to be in the nineteenth century and there is a need for supplements. The most effective supplement is decentralization, federalism. A further group of elements that effectively enhance the separation of powers in EU-members are European institutions, Brussels and the European courts of justice. Although many of the critical remarks raised against Brussels are justified, it seems difficult to understand why so many people fail to realize that Brussels has one overriding advantage: in many EU-members the separation of powers is underdeveloped and EU-institutions make up for this defect. Croatia's current state as a prospective EU-member already provides it with some of these benefits.

While centralism could be justified during the war, it may seem like a paradox that Croatia has done so little to de-emphasize centralism since 1996. This is so because it runs counter to Croatian traditions, Croatia differs from most Central European and East European countries by its lack of a centralist tradition. The absence of such a tradition is a distinction which post-communist Croatia has so far failed to derive an advantage from.

A peculiar circumstance relevant for the topic of this paper is that the Croatian judiciary in some sense has been a victim of centralism twice. First, because centralism tends to promote the unity of powers and legislative over-activism, a continuous reshaping of rules according to the ever-changing priorities of politicians. If, instead, the pursuit of certain goals by means of legislation required lengthy negotiations and difficult compromises with sub-national authorities, the speed of rule-making by parliament and the executive branch of government would be much reduced. And this is precisely what is desirable for enhancing the real role of the judiciary[19].

[19] *This is not the only reason to oppose centralism. Another problem, which also concerns the judiciary and is even more important than the arguments presented in the text, is the paradox of power. The only stable solution to this paradox known is limited government. For an admirably lucid presentation of the issue the reader may again be referred to Haber et al., op cit. who write on p. 5 of their text: „The literature is just beginning to specify the exact configuration of the institutions that force limited governments to respect their own laws regarding individual political and economic rights. ...The literature suggests...that what is key is that individual political actors cannot exceed the authority granted to them by the law. If they do so, they are subject to sanctions that are imposed by other branches or levels of government...These sanctions are not imposed in arbitrary or ad hoc fashion: the sanction mechanisms are themselves prescribed by the law. In the United States, for example, the president is limited by a bicameral legislature, an independent judiciary, state and local governments, and a professionalized civil service...."*

Second, as paradoxically as it may seem, the judiciary has suffered from centralism also because – unlike in most other parts of government – the administration of justice was effectively decentralized along county lines and it occurred in a way that (until the amendment of the code of civil procedure enacted in 2003) concentrated the legislative functions of the judiciary at the county level. This is so because in most civil litigation the chain of appeals ended at the appellate court, appeals to the Supreme Court were so severely limited in number that its case-load was amazingly small. In every developed legal system, irrespective of whether it is of common law or civil law origin, appellate and supreme courts are to some extent legislators. In post-communist Croatia this legislative function was to an unusual extent concentrated on the appellate rather than on the Supreme Court level. However, most counties are simply too small to allow for the development of a sufficiently detailed case law. This arrangement has thus resulted in a lack of legal certainty.

It may seem that this argument is inconsistent as it calls for and rejects federalism at the same time. However, there is no contradiction. The legislative and the executive powers are in need of a more meaningful separation of powers that can be brought about by federalism. The judiciary, in contrast, is weak; there is no good reason to weaken it even further by federalizing it, this is counterproductive and reduces rather than strengthens the separation of powers.

5 Court Congestion

Most economists and similarly a large part of the Croatian society seem to think of the judiciary as overloaded, complaints about court queues are commonplace. This appears to be the most popular complaint about courts, it is thought of as the most serious obstacle to the rule of law. If this were really true, we would be facing a puzzle. If the court queue is the key problem, traders should be expected to exploit the available opportunities to avoid the queue i.e. they should opt for arbitration, but in reality they rarely do so. This is an observation suggesting that much of the common thinking about court queues is somewhat superficial. Moreover, the proposition that the judiciary is overwhelmed by excessive litigation is not really confirmed by the available statistics. This fact is obscured by the habit to represent judicial workload in terms of “matters” (Croat. predmeti). “Predmeti” is a broad term that includes e.g. a broad variety of actions undertaken in the course of a distress procedure as well as making entries in public registers such as the commercial register and the land register. Making such entries usually does not involve a dispute, this

work does not normally necessitate the involvement of judges, it can be delegated to auxiliary personnel provided that appropriately skilled auxiliary personnel is available in sufficient numbers. That this is not yet the case is a major problem of the Croatian judiciary, similar to many other post-communist countries. Data on the speed of the judiciary often report the time needed to process the average "predmet", this measure suggests optimistic conclusions which are much more positive than what the public thinks so the average time needed for processing a "predmet" is not at all long. However, it seems that this measure of judicial efficiency is garbled by the small share of litigation in the overall number of "predmeti" which amounts to millions per year and keeps growing[20].

Rather than focusing on the compositum mixtum of "predmeti", it seems more useful to distinguish between different kinds of activities undertaken by courts and investigate them separately. In subdividing court activities it seems natural to view litigation, and civil litigation in particular, as an important subdivision since a free enterprise economy is primarily ordered by civil law that is why it is more appropriately referred to as a civil law society. Some data on civil litigation are available in the statistical yearbook[21]. Unfortunately, these data do not cover commercial disputes. However, presumably an upper bound on the number of commercial disputes can be found by comparing the available figures on judges in the various jurisdictions and assuming similar case loads. When comparing the resulting estimates on overall civil litigation, including commercial disputes, with East Central European countries two observations are striking. Firstly, the Croatian per capita civil case load is not too high. Secondly, a disproportionate share of civil litigation is accounted for by disputes concerning employment contracts, their share is much larger than in most, if not all East Central European countries. With regard to this share Croatia is similar to Germany, which suggests that Croatian and German employment law are suffering from similar defects[22]. Disregarding employment-related disputes, the civil case load per capita of the Croatian population stands at little more than

[20] *For such data see e.g. Crnić (2001).*

[21] *See e.g. Statistički ljetopis Republike Hrvatske 2002 p. 529. It is a pity that more detailed judicial statistics have not yet been made accessible to the public, even though they do exist.*

[22] *Both Croatian and German labor law essentially allow for discharges of workers only for „good cause". Clarifying the meaning of the expression "good cause" and proving in court that the requirement is fulfilled often amount to a demanding or even impossible task, even if the worker clearly misbehaved. The Croatian labor statute attempts to specify "good cause" to some extent, but in a way which is unlikely to solve the dilemma. Moreover, Croatian and German labor law take a rather restrictive attitude towards temporary contracts, which in some other European countries e.g. Denmark are quite widespread and help avoid many of the problems caused by the "good cause" doctrine.*

half of e.g. the Slovak load. In terms of its per capita civil case load, Croatia is more similar to Bulgaria or Russia than to Slovakia[23]. Thus, contrary to a widespread view (expounded even by the Minister of Justice) Croatians are not very litigious, they tend to avoid courts except if they have a dispute with their employer. In this perspective, it seems difficult to argue that Croatia has arrived at a civil law society. The limited amount of civil litigation suggests an even more limited use of contract remedies. This is symptomatic for the underdevelopment of a civil law society, since contract is the most important instrument supplied by the law supplies to an individual to shape his own position.

Another significant sub-group of *"predmeti"* is constituted by enforcement procedures under the law of civil procedure i.e. under the enforcement statute *(Croat. ovršni zakon)*. While data on civil litigation indicate that the use of judicial remedies is of rather moderate frequency, the number of *"ovrhe"* is high indeed, *"ovrhe"* are a multiple of the number of civil judgments. According to Crnić (2004, p. 4), there are about 300,000 *"ovrhe"* per year. Part of this incongruity is due to the fact that final judgments provide only a fraction of the enforceable titles, giving rise to an *"ovrha"*. According to Crnić, their share is only about 20 percent. Comparing the resulting figure of 60,000 *"ovrhe"* with the figures on overall civil litigation (114,900 suits in 2001[24]) it turns out that civil judgments in a majority of cases are not complied with voluntarily. Since it seems unlikely that all defendants are genuinely insolvent – and initiating an *"ovrha"* would not make much sense either – such a large number of *"ovrhe"* suggests that judgment-debtors as well as most other debtors often expect to get away with non-compliance. Thus, high insecurity about the success of an *"ovrha"* even against a solvent debtor seems to be the only way to explain their large number. Presumably, this is one of the key problems of the Croatian legal system.

Searching for the proximate cause is not an overly difficult assignment. The 1996 reform of civil procedure abandoned some of the debtor-friendly features of Yugoslav enforcement law, but it represented less than a radical shift towards empowering creditors. Well-informed critics such as Crnić (2004) stress the lack of procedural

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[23] *For Slovak data see e.g. Štatistická ročenka Slovenskej republiky 2000 p. 555. Russian resp. Bulgarian data are not readily accessible through their national statistical yearbooks, but some data have been collected from various sources by Varese (2001) resp. Schönfelder (2005).*

[24] *As mentioned above, this figure does not include commercial disputes. However, notice that it refers to disputes, not to judgments. Since the number of judgments is surely smaller than the number of disputes and since some civil litigation does not involve problems of enforcement (think of a divorce which does not result in alimony claims), 115,000 appears like a reasonable upper bound for the number of judgments potentially giving rise to enforcement problems.*

efficiency, characterizing much of *"ovršni zakon"*, and point out that it reduces the chances of creditors to collect[25] considerably. If debt collection procedures were less tedious and more efficient, solvent debtors usually would prefer to comply voluntarily and quite a number of allegedly insolvent debtors would suddenly find out that they are solvent. The Supreme Court has suggested changes towards more procedural efficiency upon several occasions. As mentioned above, there have been two major amendments but they did not proceed along the lines suggested by the Supreme Court. These two amendments were somewhat ambivalent, in some respects they strengthened (judgment-)creditors, in some others they strengthened debtors, and it is difficult to strike a balance. Probably the overall effect on the debtor-creditor balance of powers was not much different from zero. Since this occurred under both HDZ- and SDP-led governments, it seems difficult to avoid the conclusion that protecting debtors' interests rather than creditors' rights continues to be a more pressing concern for most politicians and presumably for numerous voters as well. As long as this state of affairs persists, progress will be limited. One of the unfortunate consequences of this situation is that it makes a fool out of judges and earns them much undeserved criticisms. If a judgment is not complied with and enforceable titles turn out to be effectively unenforceable, the public tends to blame the courts even if they are not at fault because they are powerless. Ultimately, this state of affairs tends to discredit the very idea of the rule of law.

6 Concluding Remarks

Some of the announcements recently made by the Minister of Justice seem to suggest that judicial policies may be continuing on a zigzag course. Apart from announcing a number of welcome changes, which among others would relieve judges from much clerical work and allow them to focus their attention on litigation, her promise to amend bankruptcy law in a way to facilitate reorganization suggests that debtors may actually be strengthened. It also neglects the fact that for the vast majority of bankrupt companies an effort at reorganization is simply a waste of time and resources, they should be liquidated promptly. Among the Minister's favorite ideas is that Croatians litigate too much and should instead engage in out-of-court settlement, which may be facilitated e.g. by mediation. However, mediation seems to be flunking the market test virtually anywhere

[25] *Marković (2003, p. 404) put it like this: „Sudska praksa pokazuje da su ovršni postupci, u pravilu, predugi i da vjerovnici teško ostvaruju svoja prava." (Court practice shows that enforcement procedure, in principle, takes too long, making it very difficult for (judgment-)creditors to collect.)*

in the world. Croatians are not litigating too much. The problem rather is that the value of litigation is greatly debased by the fact that enforcement of judgments is so unreliable. If the latter problem were fixed, Croatians would presumably litigate more but courts would have less work with *"ovrhe"* because debts would more often be served voluntarily. Then, courts could allocate most of their resources to litigation and this would seem like a very reasonable priority.

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