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MODERNITY IN SEARCH OF TRADITION: THE FORMATION OF THE MODERN CROATIAN JUDICIARY 1848–1918*

Modern European social and legal systems were formed during the 'long 19th century' from 1780 to 1918. Basic structures, ideas and cultural patterns formed at that time are still embedded in today's reality. This article reconstructs the basic features of the formative period of the modern Croatian judiciary. It was shaped mainly on the basis of Austrian laws but adaptation of these laws depended mostly upon political factors. The old-fashioned judiciary was turned into a rational structure but it has not developed as an autonomous institution.

1. The Postulates: Legal Culture and Legal Tradition

The contemporary harmonization of law raises the question of cultural differences that affect the implementation of rules. Integrative tendencies have complementary and differentiating polarity in national and regional cultures as determinants of different identities within transnational frameworks. Understanding the application and internalization of legal rules by professional lawyers as well as by other individuals as potential or actual actors in the legal process depends upon a variety of factors, the cultural legal matrix being among the most important.

However even the definition of legal culture is a problem. Different approaches point to principal values, institutional models, legal education and legal ideas that influence the formation of legal consciousness and the behaviour of lawyers and other individuals. These and other factors as well as their roles in constituting legal culture still remain to be discussed. Legal culture can be conceptualized at various levels of abstraction (regional, national or sub-national) that do not exclude speaking about a plurality of legal cultures in a single framework. The subject may also be approached through various institutional or social units such as parliaments, governments, courts, faculties of law, works of

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theoreticians and judges, families etc. Research may target a variety of issues such as identification of the factual concept of law or understanding the rule of law in a certain society, foreign influences to a particular legal system, content of legal education and its role in shaping legal discourse, different procedural styles in the courts and their origins in various connected units such as the former Yugoslav federal republics, today's independent states etc. Surely the concept of legal culture opens complex questions and offers a variety of avenues to search for answers.[1]

Apart from the challenging complexity or perhaps disturbing heterogeneity related to the question of legal culture, it seems natural that one of the principal roles in defining legal culture belongs to tradition. Legal culture is founded upon relatively stable patterns that have been built and stabilized over a long period of time. The process of building such patterns is necessarily determined by previous development in the broader legal and social environment as well as by changes in the actual environment. Formation of particular elements of modern legal culture thus appears as a process over time, which has been one of the principal methodological tools of modern historical science.[2]

Modern European societies and legal systems were formed during the so-called long 19th century between 1780 and 1918. During this time basic features were established that directly or indirectly determined or influenced development leading up to the contemporary period. In spite of the growing tendency toward harmonization, certain basic structures, ideas, cultural patterns and even important pieces of regulation such as constitutions and civil codes came into being in the 19th century and are still deeply present in contemporary legal and social systems. Whether a challenging burden or a foundation for further development, the heritage of the past that is embedded in contemporary reality can hardly be understood on the basis of ignorance of tradition.[3]

The transition from archaic social systems to modern societies and the formation of modern legal systems occurred in the 19th century through a variety of dynamics. However particular characteristics in each society have certain common features. The emergence of Croatia's modern society and legal system that began in 1848 was part of that process. Even though the Croatian institutions formed at that time do not show continuity with the contemporary period, the process of their formation laid the foundation and strongly influenced further development as well as affected legal culture.

In this text I will briefly present the formative period of the modern Croatian judiciary. In particular, I will look closely at the organization of the judiciary and judicial independence, the influence of exogenous models and certain differences between the laws on the books and law in action. First I will give an outline of Croatian constitutional and legal development up to the present in order to give an impression of the context of the period under examination. The purpose of this

1 See for example: Gessner 1996; Hesselink 2001; Nelken 1997; Nelken 2004, p. 1-28; Teubner 1998, p. 1-32.
2 Burke 1992, p. 151-153. See also Braudel 1980.
3 See for example: Hesselink 2001, p. 72 *et seq.*; Tilly 1997, p. 13 *et seq.*; Watson 2001.

article is to acquaint a broader segment of academics and practitioners with the main formative features of the Croatian judiciary as deeper determinants of the further development.

2. The Croatian Constitutional Framework from the 19th Century to Today

The position of Croatia up until 1918 was characterized by its extensive autonomy in the framework of the Kingdom of Hungary, which had been part of the Habsburg Monarchy since 1526. This autonomy had medieval roots going back to the beginning of the 12th century. The disappearance of the Croatian kingdom at that time was followed by the development of a distinct constitutional position and special institutions in the territory ruled by the Hungarian dynasty. The institution of the *ban* (chief executive official) inherited from the early medieval period and the legislative *Sabor* (Diet) that first appeared in the 13th century were effective up until 1918. Until 1848 Croatian autonomy was substantiated in a set of written and customary rules (*iura municipalia*) but its reach depended upon political conditions as well. The continuity of the autonomous institutions was preserved only in the Kingdoms of Croatia-Slavonia, which made up a single administrative unit. The coastal region of Dalmatia came under the power of the Venetian Republic at the beginning of the 15th century and then became an Austrian province from 1797 to 1918, with an intermediate period of French rule from 1805 to 1813. Apart from that, the Croatian-Slavonian border zone with the Ottoman Empire (Military Border) was under the jurisdiction of Austrian military authorities from the end of the 16th century until 1882, when it was re-united with Croatia-Slavonia. The official names of the territories were the 'Kingdoms of Croatia and Slavonia' and the 'Kingdoms of Dalmatia, Croatia and Slavonia' (also called the Triune Kingdom). In the 19th century – during the formation of the modern Croatian nation – both of these names interchanged with the national denominations 'Croatia' and 'Croatian kingdom'.

The introduction of modern institutions in Croatia-Slavonia began with the abolishment of feudalism by the Croatian Diet in 1848 and continued during a period of false constitutionality and absolutism imposed throughout the Habsburg Monarchy from 1849-60. This was replaced by provisory constitutionalism that ended in 1867 with the Austrian-Hungarian Compromise. This compromise was then followed by the sub-dual Croatian–Hungarian Compromise in 1868. The latter set down a stable constitutional basis of Croatian-Slavonian autonomy in the framework of Hungary but assigned certain control functions to the 'common government' that was in fact under Hungarian control.

Croatian political institutions ceased to exist in 1918 when the unitary Yugoslav Kingdom was established with the Serbian dynasty at the throne. The new state joined regions that had belonged to different legal systems. Large portions of their inherited regulations in civil and criminal law and in procedure as well as judicial organisation remained in force in six different 'legal regions' until legal unification of the country undertaken during the King's dictatorship from 1929 to 1931. The Austrian influence present in large portions of the inherited regulations

influenced the new laws as well. The Croatian political identity in Yugoslavia re-appeared as the large autonomous unit of the Bannate of Croatia was formed in 1939. However the Yugoslav state collapsed in 1941. Provisory regimes under German and Italian control were established in the occupied territories, among them the fascist Independent State of Croatia (NDH). In 1943 the Yugoslav resistance movement, which was communist at its core, laid down the political and institutional foundations for the federal organisation of the second Yugoslavia, in which Croatia was to be one of the federal republics.

Federalism was adopted by the Yugoslav constitutions from 1946 to 1974, granting constitutional individuality to the republics. In reality, the federal system was integrated by the power of the Communist Party and by the charisma of its leader, Josip Broz Tito, while the institutional systems of the republics were based on unified models that showed no substantial differences. Still, the factual circumstances as well as cultural and legal cultural differences affected different judicial styles and adjudications in the republics in spite of the same or very similar regulations. Parts of the regulations, such as civil procedure, reflected certain influences of previous rules in spite of the different political context of the communist regime. The political crisis that erupted in the 1980s paved the way to the disintegration of the country. This resulted in proclamations of independence from the former republics, beginning with Croatia and Slovenia in 1990. In 2004 Slovenia became a member of the EU while Croatia became an official candidate for accession and began negotiations in 2005.[4]

3. The Birth of the Modern Croatian Judiciary 1849-1860: Modernisation Imposed from Outside

The Croatian judiciary before the reforms of 1849 was based on manor courts and municipal courts merged with the administration in the districts, counties and towns. The highest court in the territory of Croatia-Slavonia was the Ban's Table. Cassational jurisdiction belonged to the Table of Seven in Hungary.[5] That structure was shaped through historical development basically equal to that in Hungary, but different from that in the Austrian lands directly subjected to the will of the emperor and modified through his reforms. The law applied in the Croatian courts in civil and criminal cases was based on written regulations from Hungary and Austria, decisions of the highest courts, and customary law that was developed from the 16th to 19th centuries.[6] The educational basis for this system was the Royal Academy of Sciences in Zagreb, founded in 1776 when it succeeded the Political-cameral school of 1767. The Royal Academy offered two-year courses of law, theology and philosophy (philosophy was a precondition for enrolment in law and

4 On Croatian history in English and German, see Goldstein 1999; Perić 2005; Steindorff 2001. On the Croatian constitutional and legal history from 1848 to 1918 see Čepulo 2006, p. 47-91. On development of legal education in Croatia see Čepulo 2007.
5 Beuc 1985, p. 305; Lanović 1929, p. 325 & p. 323-332.
6 Beuc 1985, p. 353-354 & p. 355-356.

theology). The role of the institution was important but it was constantly plagued with problems and never reached expected standards. However, the Court did not accept demands for the foundation of the university including the faculty of law.[7]

The situation in the Croatian judiciary in 1848 was described as unbearable. Complaints particularly addressed arbitrary adjudications and slow procedure that could last for decades. These conditions were seen as consequences of archaic regulations and the incompetence of the judges, many of whom did not have formal legal education. Additionally, judges were underpaid and, according to some reports, bribery was common.[8]

However the abolishment of feudalism in 1848 was not followed by reforms of administrative and judicial institutions in spite of the fact that they were largely outdated. The only exception was the abolishment of the manor courts and the provisory transfer of their jurisdiction to the county courts.[9] This change did not halt the deterioration caused by the transition of former urbarial lands into the private ownership of former peasants and the consequential rise in the number of litigations between former landlords and peasants.[10] The reason that the Croatian Diet did not reform old institutions can be explained by the short period of its work (only one month) and its concentration on political issues during the escalation of the Croatian–Hungarian conflict that erupted after Hungary attempted to reduce Croatian autonomy. However, another important reason was that the Croatian reformers at that time did not have a clearly accepted concept of modernization. Another explanation was the archaic social structure of the Croatian political elite, dominated by an uneducated and conservative petty nobility that was not prepared for more radical reform. Defence of Croatian autonomy against the Hungarian pretensions of the previous decades was grounded upon traditional legal principles that focused on the autonomy of the counties that had made them the inner cores of political life. In 1848 such defensive concepts reflected the attitude that the traditional municipal institutions (among them the county judiciary and administration) had an important role in the defence of autonomy, which should be preserved through the application of modern principles to their organisations. This concept was similar to the one that emerged through the Hungarian confrontation with the Habsburg Court. The Croatian–Hungarian conflict and the influence of Austro-Slavic ideas among Croatian liberals was reflected in 1848 through the gradual acceptance of the idea that the traditional institutions were archaic and should be replaced by modern institutions modelled on Austria.[11] However, Croatian disappointment when the king imposed the centralist March Constitution in 1849, abolishing Croatian autonomy, returned reformers to the idea of improving traditional institutions as a basis of autonomy and a bulwark against absolutism.[12]

7 Čepulo 1996, p. 56-65. See also Čepulo 2007.
8 Gross 1985, p. 100.
9 Markus 1996, p. 1-2 & p. 143-145.
10 Čepulo 2006a, p. 2-3 & p. 329; Gross 1985, p. 101.
11 Markus 2000, p. 276-277.
12 Čepulo 2006, p. 56-57; Gross 1985, p. 67-69.

Croatian reformers would not have a chance to apply either of the two ideas, as the abolishment of Croatian autonomy under the March Constitution in September 1849 was followed by its abrogation and the introduction of absolutism that lasted from 1852 to 1860. During the period of direct jurisdiction of the Vienna Court Croatian institutions were replaced by imposed Austrian laws. The Court undertook the same project in all lands within the Monarchy. Its goal was twofold: establishing the grounds for a centralized administration of the large and heterogeneous empire and setting normative preconditions for modernization of the entire Monarchy as a foundation for progress. The reforms that culminated in 1852-54 concerned administrative and judicial organisation, civil and criminal law as well as civil and criminal procedure.

The reforms essentially changed the organisation of the judiciary in Croatia-Slavonia. The municipal judiciary founded on the representative assemblies was abolished and replaced by a centralist organisation of the state courts with cassation competences belonging to the Supreme Court in Vienna. At first the judiciary was separated from the administration at all levels, but in 1853 it was re-joined at the first-instance courts and in the Ban's Table. Judges were appointed by the king. Candidates were nominated by the president of the court with the consent of presidents of the higher courts and the Ministry of Justice. The position of judges was basically equal to that of civil servants without efficient grants of independence.[13] In 1853 German was approved as the official internal language of the administration and the judiciary.[14] Croatian would be restored into official use in 1860. The three-degree structure of urbarial courts competent for litigation between former landlords and peasants existed from 1858 to 1862 when that jurisdiction was transferred to the competent courts.[15]

The judicial structure was amended at the beginning of 1860 when the imperial government established the local lay courts in local communes, which were competent regarding small informal claims. The local courts consisted of laymen elected from members of the local council and presided over by the head of the local council. The local communes that were the institutional precondition for the foundation of these courts were established in 1851. Both institutions, the local communes (*Gemeinde*) that enjoyed a rather high degree of autonomy and local courts (*Ortsgerichte*), were transplanted from the German and Austrian tradition. There were no such precursors in the Croatian tradition that did not know for free local communes grounded on a developed economic basis and partly independent from the local landlords. But in spite of their imported origin, local courts proved to be useful in the poor countryside where the relatively uneducated population brought a large number of small claims.[16]

The new regulations significantly improved the professional outlook for advocates. The Austrian Law on Advocates (*Advocaten-Ordnung*), introduced in

13 Beuc 1985, p. 305-306 & p. 318-319; Čepulo 2006a, p. 330-334.
14 Gross 1985, p. 113.
15 Beuc 1985, p. 313.
16 Zuglia, p. 255-257.

1852, obliged most of the lawyers to pass the bar examination based on the new regulations. These also provided for the obligatory institution of advocates' boards in towns even though they were not autonomous bodies, but were controlled by the *ban* that was empowered to appoint and revoke advocates.[17] The Law on Public Notary Service (*Notariats-Ordnung*) established the previously unknown public notary service.[18] The land-registry, established in 1850, was also an important improvement.[19]

However, the farthest reaching reform was the introduction of the *Allgemeine Bürgerliche Gesetzbuch* (ABGB). It replaced the archaic *Tripartite,* which up until that time had been a central point of the Croatian legal system, and influenced its other parts. The rational concept of the ABGB, based on the principles of Roman law and private ownership, replaced concepts based on the Hungarian and Croatian customary law and feudal type of ownership. The Tripartite had determined legal structures for a very long time and shaped the minds of Croatian legal practitioners. For that reason, this 'improvement' clashed with structures rooted in the Croatian tradition and caused a variety of problems, especially in villages.[20]

An important step was the introduction of the General German Law on Exchange (*Allgemeine deutsche Wechsel-Ordnung*) in 1850 as a provisional regulation, which was already valid in the Austrian lands. It was replaced in 1876 by the Commercial Code, based on the same law, enacted in the Common (Hungarian-Croatian) Diet and valid both in Hungary and Croatia-Slavonia.[21]

The other changes were also important, even though they were not as radical, because of the fact that previous regulations valid in Croatia-Slavonia were mainly based on older Austrian sources. The Law on Civil Procedure (*Die provisorische Civil-Process-Ordnung*), introduced in 1853, was based on the king's edicts of 1781 and 1796. It replaced previous regulations that were established in royal edicts, customs and judicial practice. It remained in force until 1929 when it was replaced by the Law of Civil Procedure based on the Austrian law from 1895. The Law on Civil Procedure was followed by the other procedural laws, the most important of them being the Law on Non-contentious Civil Procedure in 1854.[22]

Criminal law was also changed. The Criminal Law on Crimes, Misdemeanours and Offences (*Strafegesetz über Verbrechen, Vergehen und Übertretungen*) from 1852 replaced rules handed down in the king's edicts and in customary law. It was based on the Criminal Code from 1803, with the exception of rules on criminal procedure that were not included. That law was blamed for being too rigid, conservative and outdated, but it remained in force until 1929 with some changes such as the abrogation of archaic and obsolete provisions.[23] The new Law on Criminal Procedure (*Strafprozess-Ordnung*) from 1852 replaced liberal law from 1850 which

17 Čepulo 2006a, p. 334-336; Bayer 1968, p. 53-55.
18 Čepulo 2006a, p. 336-337.
19 Gross 1985, p. 129 *et seq.*
20 Gross 1985, p. 108-109.
21 Čepulo 2006, p. 59.
22 Čepulo 2006a, p. 337; Gross 1985, p. 109; Zuglia, p. 18, 20 & 22.
23 Bayer 1995, p. 152.

was influenced by the 1808 French Code on Criminal Procedure. The new law was also blamed for its conservative nature, especially because it returned to inquisitorial principles and reduced the rights of indicted persons during investigation. It was nevertheless an improvement compared with the procedural rules in the Criminal Code of 1803 and the king's edicts. That law would be replaced by modern regulations in 1875.[24] Rigid criminal regulations at that time were a reaction to the previous tradition and the absolutist principles of government.

Functional problems within the traditional Croatian judicial institutions and the replacement of the social-political paradigm (abolishment of feudalism) required serious institutional modifications. It was impossible for such extensive reforms based on unified models for the entire Monarchy, not adapted to the local conditions and imposed in the interest of the centre, to take place without serious problems. The traditional institutions were deeply rooted in the consciousness of the people. The reorganization of institutional relations caused serious disorder. In 1849 local authorities begged the government to reform the judiciary but reports after reforms began in 1850-1851 indicate that conditions had worsened.

The reports from that time indicate chaotic conditions within the judiciary, reduced accessibility to the courts, greater arbitrariness and arrogance of judges and increased corruption.[25] The new reform undertaken from 1852 to 1854 only partially repaired these problems and established normative conditions that allowed gradual stabilization of the new structures. The deeper problem of judicial reform was the archaic social structure within the population whose way of life was largely unprepared for such changes. Another problem was the lack of educated professional staff necessary to apply new laws that demanded more skill in practice. This problem was solved on a short time basis with transfers from Austria. However this was not a real solution, as the new staff was not familiar with the language or the local traditions and was not interested in a career in the new environment.[26] The long term solution was improving legal education. The Royal Academy of Sciences was disbanded and the *Facultas iuridica* was replaced by the Legal Academy, offering a three-year course based on the new regulations.[27]

The biggest problems however, were caused by inadequate conceptions and the inflexible implementation of the ABGB that challenged prevailing conservative structures in the villages. The most striking conflict was between the concept of private ownership and the conservative institution of the communal joint family extensively present in the Croatian villages. The communal joint family was based on collective ownership, and principles of strong solidarity and patriarchal relations.[28] The spontaneous process of division of collective property of the

24 On the both laws see: Bayer 1976, p. 6-7; Beuc 1985, p. 313; Čepulo 2006a, p. 334 & p. 337-338.
25 Gross 1985, p. 104-105.
26 Gross 1985, p. 110.
27 Čepulo 1996, p. 65-74.
28 The statistics on communal joint families appeared only from 1880, when their number was significantly reduced. According to the statistics from 1880, 21.5% of the total population in Croatia-Slavonia lived in fully preserved communal joint families while another 44% were →

communal joint family to individual properties under private ownership gradually arose starting in 1848. The introduction of the ABGB, which was based exclusively on the concept of individual private ownership and did not recognize communal ownership, accelerated that process. The large and solidary social units of communal joint families were divided on the initiative of their members or on the grounds of a distress-warrant due to financial debts of a single member. These divisions were becoming a serious social problem. Because of that and as a result of the complex nature of the communal joint family the Ban's Table took the stand in 1857 that the communal joint family was a specific institution regulated by the provisions of public law and that it should not be adjudicated under principles of the ABGB. But that decision of the Ban's Table was revised in 1858 by the Supreme Court in Vienna. The cassational court in Vienna insisted on a strict application of the principles of the ABGB and even denied the legal existence of the communal joint family, which was interpreted as an individual family with a large number of members. The Supreme Court wrote some more moderate decisions in 1859 under pressure from the imperial government. The government was concerned that the previous interpretation exposed villages to the prospect of social catastrophe. However, the fundamental nature of the new decisions did not change and the problem was not substantially eliminated. In fact, the problem of communal joint families could be solved only through special legislation, but the authorities avoided this approach, as it was not clear which principles it should be based on. For this reason the uncontrolled process of dissolution of communal joint families was intermittently stopped by provisory bans starting in 1850. Special regulations for communal joint families would be enacted only in the 1870s and 1889.[29] Throughout that time and in fact even up until the communist period, communal joint families survived in certain Croatian regions in their own parallel legal world, which was based on conservative customary principles different from the laws on the books.[30]

Apart from these and other problems with the implementation of the ABGB it remained in force until 1946 and its concepts have strongly affected the legal consciousness of Croatian lawyers up until the present.

4. Provisory Constitutionality from 1860 to 1868: Stabilization of the New Structures

Absolutism was followed by provisory constitutionality based on two royal edicts in 1860 and 1861 and by the convocation of the provincial Diets that were supposed to elect delegates for the Imperial Council (*Reichsrat*) in Vienna. However, the Hungarian and the Croatian Diets refused to elect their delegates, as this would imply an acceptance of the abolition of their constitutions. Both Diets intended to

former members or in the process of division. However, it seems that the numbers were actually even larger. Pavličević 1989, p. 256 *et seq.*
29 Gross 1985, p. 208-227; See also Prišlin Krbavski 2006, p. 275-315.
30 Prišlin Krbavski 2006, p. 330.

continue the processes that had been halted in 1849 and transform their aspirations for more independence into reality. Their starting positions as well as the outcomes varied, however.

In Hungary laws introduced during the period of absolutism were abolished and the ABGB was replaced with the Tripartite that would remain in force until 1946.[31] Something different happened in Croatia-Slavonia. There the valid laws were seen as an ambiguous part of the absolutist 'package' shaped and imposed in the interest of the centre, but also as an obvious improvement compared with former conditions. For this reason, the absolutist laws were generally accepted as a provisional solution until they could be replaced by new laws of the Croatian Diet. As previously indicated some of the accepted laws remained in force until 1918, 1929 and even as late as 1946, while others were replaced by autonomous Croatian legislation that was again modelled mostly upon Austrian laws.

Because of the lack of modern autonomous legislation, the Croatian Diet undertook intensive drafting of new laws. Among the anticipated projects were a return to the municipal county organisation that also implied a return to the municipal judiciary, the Civil Code based on the ABGB, which also provided for the organisation of civil courts combining the Austrian organisational model with the Croatian municipal tradition, and the Criminal Code that provided for the organisation of criminal courts including jury courts with general competence. The legislative work was never completed, as the Diet was disbanded only seven months after its convocation. Still, the Croatian Table of Seven with cassation jurisdiction was established in 1862 by the king's order, which completed the Croatian judicial organisation.[32]

The Croatian Diet convened again in 1865. However it concentrated on the institutional arrangements of the relations with Hungary and Austria and did not seriously discuss institutional reforms. The Diet was disbanded in 1867 after it had protested against the Austrian-Hungarian Compromise, which was concluded without Croatian participation.

The new Diet elected under Hungarian pressure concluded a sub-dual Croatian-Hungarian Compromise in 1868. It delimitated common and autonomous competences, granting Croatia-Slavonia autonomy in administration, religion, education, and judiciary with its own legislation (the Croatian Diet), the government responsible to the Croatian Diet and its own judicial system. Croatia-Slavonia participated in the Common Diet and central government, but on the factual conditions of Hungarian predominance and symbolic Croatian influence. The central government retained control of Croatian autonomy in order to protect the common sphere against possible infringements, but control was in fact executed in the interest of Hungary.[33]

31 Gross & Szabo 1992, p. 135.

32 Čepulo 2006a, p. 340-343.

33 The most important instruments of influence of the central (Hungarian) government were: a) the *ban* appointed by the king on the proposal of the Hungarian Prime Minister, b) the Croatian delegates participating in the Common Diet with individual votes, making them an insignificant minority, c) the 'Croatian-Slavonian Minister' in the central government being →

In spite of the control mechanisms reserved for the central government the Croatian-Hungarian Compromise set up a stable constitutional framework of Croatian autonomy for the first time after 1848 – and it was an elementary precondition for modernisation.

5. Modernisation in the Autonomous Framework 1873-1875: Improvement on a Liberal Foundation

Institutional reforms in the framework of the Croatian-Hungarian Compromise were possible only after the reformist National Party won the elections for the Croatian Diet in 1872. Ivan Mažuranić, a prominent member of the National Party and lawyer experienced in the central administration in Vienna, was installed as the *ban* and president *ex officio* of the Croatian-Slavonian government. He resigned from the office in 1880 but the period was marked by extensive reforms that were enacted during his administration.

Modernisation was inspired by the necessity that archaic Croatian institutions and absolutist laws be replaced by modern and functional laws that would be based on the models present in developed European countries and adapted to the Croatian situation. The theoretical basis of the reform was the German idea of the *Rechtsstaat*. The reformists' main goal was to modernize the undeveloped country in order to place it among the developed European nations. Adapting institutions that had already been proven in the other countries was seen as an adequate means to do this.[34]

The reforms were related to all issues of autonomous Croatian jurisdiction, but reforming the administration and judiciary was seen as crucial. The situation was still poor in both branches and these branches were perceived as a foundation for other reforms as well as instruments that would secure their efficiency. For this reason, the reform programme, initiated immediately after the National Party came to power, began with reforms of the administration and judiciary.

One of the first and the most important laws in the field of the judiciary was the Law on Judicial Power. The law proclaimed separation of the judiciary from the administration, the principle of judicial independence, life appointment of judges, tenure of judges, the principle of incompatibility and exclusive competence of the Diet regarding the organization of the judiciary etc. The law forbade judicial review of constitutionality, but allowed judicial review of the legality of administrative acts

responsible to the Common Diet, d) the definition of public finances as part of the common competences (45% of the income collected in Croatia-Slavonia was allocated to the Croatian budget and 55% to the common budget), e) the submission to the king of laws of the Croatian Sabor through the central government (the central government could complain to the king that the Croatian laws breached the common competence or violated common interest; the king always settled such disputes by accepting Hungarian arguments and denying to sanction the Croatian laws). On the Croatian-Hungarian Compromise see Gross & Szabo 1992, p. 232-239; Čepulo 2000, p. 117-148; Pliverić 1885.

34 Čepulo 2003, p. 181.

reflecting German and Belgian influences.[35] The law was in fact almost a literal translation of the Austrian fundamental law of 1867, but certain provisions from the Austrian model were omitted. The most important omissions were the grant of a trial by jury in cases of harsh punishment, political crimes and press offences and the grant of procedure before the administrative court in cases of violation of individual rights committed by the administration. The consequences of these omissions were the institutionalization of trial by jury in the form of a special jurisdiction deprived of general competences and the absence of the administrative court from the Croatian legal system.[36] The Law on Judicial Power was proclaimed in 1874 with temporarily suspended provisions on the separation of the judiciary from the administration and a grant of tenure to judges. The reasons for such a solution were twofold. The government wanted to replace incompetent judges with educated ones before granting them life appointment. On the other hand, the government was eager to proclaim the law as soon as possible because, according to some incorrect presumptions, it was a precondition for incorporation of the Military Border into civil Croatia-Slavonia.[37]

The judicial reform was in a way connected with the reform of legal education. In 1868 the Legal Academy was extended to a four year course based on a university programme and in 1874 the university in Zagreb was founded with the Faculty of Law. The new institution was to produce fully educated lawyers with formal degrees that were particularly needed in the judiciary.[38]

The Law on Judicial Power was followed by laws that applied its principles. A special law provided that the president of the Table of Seven was to be elected by the judges of that court instead of the previous *ex officio* presidency of the *ban*.[39] The Law on the Disciplinary Responsibility of Judges, their Reassignments and Retirement, based on the Austrian model, required consent of the judge as a precondition for his reassignment or retirement before a certain age and granted the procedure before the council of judges in cases of his disagreement as well as in disciplinary cases.[40] Another law partially restructured judicial organization by changing the seats of the courts and their jurisdiction in order to improve parties' access to justice and efficiency of the courts.[41] That reform was partly induced by the lack of finances that was one of the main problems of the judicial reforms. The Croatian-Hungarian Compromise defined public finances as part of the common jurisdiction so that Croatia-Slavonia could not execute an autonomous fiscal policy and provide money needed for the reforms. For this reason rational organisation of the judiciary was even more important. The problem of finances was also reflected in the Croatian government's decision that special commercial courts would not be established because of a lack of experience and financial means. The solution was to

35 Čepulo 2003, p. 13; Čepulo 1999, p. 249-252.
36 Čepulo 2006, p. 72, Čepulo 1999, p. 241 *et seq.*
37 Čepulo 1999, p. 241 & p. 247.
38 Čepulo 1996, p. 75-93.
39 Čepulo 1999, p. 254-255.
40 Čepulo 1999, p. 242; Čepulo 2006a, p. 351.
41 Čepulo 2006a, p. 352-353.

widen the competent court jurisdiction in areas of intensive commercial activity to the field of commercial law.[42]

With regard to organization, an interesting issue is the destiny of the Bill on Advocates, enacted in the Croatian Diet in 1875 on the basis of the Austrian model. The law was supposed to replace the outdated regulation from 1852 and provide for establishment of an autonomous bar association and autonomy of the profession. The king refused to sanction that law however, accepting the objection of the central government that it was improper to require Croatian domicile instead of Hungarian citizenship as a prerequisite for practicing law in Croatia. The issue concerned the theoretical and political question of the existence of Croatian citizenship but it also had practical implications, as the law denied Hungarian lawyers not residing in Croatia the right to practise in Croatian courts. The Croatian Diet sent the king's objections to its committee and then ignored the whole project. Thus, the old law from the absolutist period which required a Croatian domicile for practising in Croatian courts remained in force.[43]

But apart from the deputies' great satisfaction with the separation of the judiciary from the administration, they blocked the government's attempt to apply that principle to the local courts. The bill proposed by the government on the basis of the recent Austrian law was turning the local courts into an unobligatory form of mediatory court. The deputies' argument against such change was pragmatic. They stressed the fact that the inexpensive and simple organisation and procedure proved efficient enough in the local courts, which dealt with both uneducated parties and lay judges. The Austrian regulations imposed in 1860 on the local courts defined small claims with an amount that in Croatia-Slavonia exceeded the real meaning of that term. For this reason the local courts in Croatia-Slavonia in fact absorbed a very large number of potential litigations that would otherwise have blocked a judicial system with an inadequate number of courts. The price was lower quality of adjudications in cases which in fact were not small claims. On the other hand the number of appeals against decisions of the local courts was very small indicating primarily that the parties trusted the local authorities. Confronted with such arguments the government drafted a compromise solution that did not change the basic position of the local court, but improved procedure and granted better protection to the parties.[44]

The most important reform as regards criminal legislation was the new Law on Criminal Procedure of 1875 based on the Austrian Law on Criminal Procedure of 1873. The Austrian law was itself based on the French Code of Criminal Procedure of 1808 and was generally acknowledged as a good piece of codification.[45] Unlike its Austrian model the Croatian law did not mention the jury courts. Instead, trial by jury was regulated as a special jurisdiction by three *leges speciales* that were also based on two Austrian laws. However in the Croatian regulations trial by jury was a

42 Čepulo 2006a, p. 359.
43 Čepulo 1999a, p. 81; Čepulo 2006a, p. 357-358.
44 Čepulo 1999, p. 256-257.
45 Bayer 1995, p. 152.

special jurisdiction and the competence of the jury courts was reduced exclusively to crimes and misdemeanours committed by the press. Punishments were regulated by the Law on Press Matters, modelled upon the Austrian regulation. It replaced the repressive *Presseordnung* of 1852 that instituted the administrative seizure of journals, which was possible only through judicial procedure under the new regulation. The only jury court was established in Zagreb and had jurisdiction over the whole of Croatia-Slavonia. The reduced version of trial by jury represented a defeat of the deputies' insistence that the competence of the jury court should be similar to that in Austria and should cover offences in the press, serious crimes and political crimes. The government insisted that Croatian society was neither educated nor experienced enough for such an extensive competence of the jury and that only the level of education in Zagreb showed a sufficient basis for establishing the jury court.[46]

Liberal reforms also reflected on the regulation of punishments. The repressive Criminal Law from 1853 was not replaced. However special laws abolished archaic punishments such as beating and shackles, while other laws established parole and the *Irish system* in penitentiaries.[47] Other changes also occurred to improve the material basis of the judiciary, such as building of the new court palaces and prisons.[48]

Apart from the question of small claims, civil procedure was not given much attention. However one important improvement was the law that made enforcement proceedings more effective.[49] The reasons for such low activity regarding civil procedure can be found in the government's concentration on organizational and public law issues as the main priority, but also in the fact that the recent Austrian legislation was not as attractive a model-law as the Criminal Procedure Code of 1873 had been. Another reason might be that regulation of civil procedure was still not very important in the country because economic activity based on private property was rather low. The main problem in civil courts was still the transition of the 'common' plots of feudal lands into the peasants' private ownership. It was only in 1876 that the conditions for that transition were defined by law, which helped to remove the last remnants of feudalism.[50]

The much larger problem that has already been mentioned was the regulation of the communal joint families' property and its division. That problem was solved to some extent during this period. The first special law on communal joint families was enacted in the Croatian Diet in 1870. The law was based on the liberal view that the communal joint family was an archaic institution that was only loosely conditioned and would soon disappear due to its division. The problems that the law produced were complicated even further by the arbitrary behaviour of local magistrates authorised to execute the divisions. Because of the uncontrolled dissolution of the properties and the increased social instability, the law was

46 Bayer 1940, p. 42-48; Čepulo 2002, p. 178 *et seq.*
47 Čepulo 2006a, p. 358; Gross & Szabo 1992, p. 337.
48 Čepulo 2006a, p. 359.
49 Čepulo 2006a, p. 359-360; Zuglia, p. 19.
50 Gross & Szabo 1992, p. 395-396; Prišlin Krbavski 2006, p. 264-265.

temporarily abrogated and further divisions banned in 1872.[51] The new Law on Communal Joint Families of 1874 allowed their optional divisions in an attempt to balance individual and collective interests and bring more order to the process, but it could hardly be controlled.[52] The problem was alleviated to a certain extent, but it persisted and it was only in 1889 that the question of communal joint families was adequately regulated.

6. Exogenous Interests in the Autonomous Framework: Authoritarian Rule and Reduction of Judicial Independence 1883-1903

Ivan Mažuranić's intensive reforms starting in 1873 coincided with a political crisis in Hungary as the weak central government in Budapest became busy with its own problems. The formation of a stable nationalist government in Budapest in 1875 led to fewer reforms in Croatia. Croatian autonomy was seen as a challenge to the unity of the Hungarian state so reforms that strengthened the Croatian position should be limited. For this reason reform activity lost its impetus after 1875 and the *ban*, Ivan Mažuranić, resigned in 1880. He was succeeded by a moderate pro-Hungarian politician who resigned in 1883, faced with overwhelming opposition from the central government. Still, he was trusted enough to execute the incorporation of the Military Border into Croatia-Slavonia in 1882. Part of that process was the incorporation of the judiciary of the Military Border into the Croatian judicial system. It began with the dissolution of the separate departments competent for the Military Border at the Table of Seven and the Ban's Table as well as at the office of the State Attorney.[53]

The new *ban*, appointed in 1883, was Karoly Khuen-Héderváry, a Croatian noble of Hungarian origin. He imposed his own policy by the instrumentalization of the National Party and ruled until 1903 in an authoritarian manner, veiled in a constitutional facade. His task was to secure the dualist structure of the Monarchy and Hungarian predominance by ensuring that the Croatian autonomy did not challenge it. Some time after his installation Khuen-Héderváry prepared the institutional basis for his rule. Among the first and the most important of his projects was the revision of the judicial reforms accepted during the Mažuranić's period.

Already in 1884 grants of judicial tenure in the Law on Judicial Power were suspended for three years and in 1887 for another three years. The Law on Disciplinary Responsibility of Judges, their Reassignment and Retirement was abrogated in 1884 and 'provisionally' replaced by the absolutist Law on the Interior Organisation of the Judiciary of 1853. The latter empowered the *ban* with the authority to reassign judges and to participate in disciplinary proceedings. The principles from that law were made permanent in 1890 in the Law on Personal

51 Gross & Szabo 1992, p. 387-38; Pavličević 1989, p. 219-223.
52 Gross & Szabo 1992, p. 389-390; Pavličević 1989, p. 231-233.
53 Beuc 1985, p. 245 & p. 246; Čepulo 2006a, p. 364.

Relations, Official Duties and Disciplinary Responsibility of Judicial Clerks.[54] These revisions neutralized the main grants of judicial independence, exposing judges to the direct influence of the government.

Apart from that, jury trials were suspended for three years in 1884 and for another two years in 1887, enabling more efficient persecution of the press. The government argued that trial by jury had lost its meaning because all cases prosecuted by the state attorney ended in acquittal. On the contrary, the opposition insisted that trial by jury was necessary as a grant of objectivity in a country where there were no guarantees of judicial independence. Some majority deputies bitterly criticized trial by jury as a populist form of justice and supported the government's idea that in the future jury trials could be abolished and compensated by increasing the number of lay assessors in the competent courts.[55] Instead, lay assessors were completely removed from adjudication in 1888. The government justified this solution by referring to tendencies in other European countries as well as dissatisfactory experiences.[56] Some changes of the Law on Criminal Procedure undertaken at the same time reduced the number of judges in the county courts to odd-numbers and gave the state attorney the right to access the minutes of judicial sessions closed to the public.[57] All amendments were taken from the Austrian legislation but the opposition attacked the government, objecting that the changes made it easier for the government to influence the court. The opposition also complained that the government revisions were concentrated on the more repressive parts of Austrian legislation while the liberal solutions had been neglected.[58]

Trial by jury was reinstated in 1890 but in 1897, following the political crisis of that year, the competence of the jury court was reduced. The jury court, seated in Zagreb, was deprived of jurisdiction for misdemeanours brought by citizens. These actions were transferred to the jurisdiction of county courts. The amendment made access to court easier, but it also opened the door for state officials appearing as private citizens to sue their critics in the press. These procedures were held before single judges who had been divested of the guarantees of judicial independence since 1884.[59] Jury trials were suspended again in 1903, this time without time limit, after an outburst of large anti-governmental demonstrations in Zagreb.[60] Jury trial would be reinstated only after the new government was installed in 1907.

In 1884 and 1886 the organisation of the judiciary was firmly established and did not undergo significant changes until 1918. These changes primarily affected the organisation of the judiciary in the territory of the former Military Border, which was brought into full accordance with the civil judiciary in Croatia-Slavonia. These

54 Čepulo 2006a, p. 366 *et seq.*; Čepulo 2003, p. 66 & p. 67-68.
55 Čepulo 2000a, p. 964-965.
56 Čepulo 2000a, p. 965-966.
57 Čepulo 2006a, p. 367; Ljubanović 1994, p. 245 *et seq.*
58 Čepulo 2006a, p. 368.
59 Čepulo 2000a, p. 966-969.
60 Čepulo 2002, p. 186-189; Čepulo 2000a, p. 969.

changes could be seen in the restructuring of the judicial organisation as a whole, with the establishment of eleven new county courts in 1886.[61]

One important regulation was the new Law on Communal Joint Families of 1889, based on the idea that this traditional institution which guarded social stability should be kept alive. The law introduced certain new restrictions to the division of communal joint families, allowing the process of division to continue in a socially acceptable manner. The law was abrogated by the communist authorities in 1945.[62]

7. Re-liberalisation of the Croatian Judiciary 1906-1917

Khuen-Héderváry left Croatia in 1903 when he was appointed president of the Hungarian government. His leave opened more space for the new democratic parties to participate in the government (Croatian-Serbian Coalition in 1906-1907 and 1917-1918). Democratic tendencies in Croatia and Hungary could be seen in the moderate re-liberalisation of Croatian institutions, but further reforms were halted due to internal political crisis and international tensions on the eve of the First World War.[63]

An important event at that time was the foundation of the Association of Croatian Judges in 1907. The Association was based upon the Austrian model and supported by the respective Austrian association. Its main goal was to improve the professional position of judges, but in spite of these efforts the Law on Personal Relations, Official Duties and Disciplinary Responsibility of Judicial Clerks of 1890 was not revised. The king declined to give legislative sanction to the law enacted by the Diet even though its grants of judicial independence were still below those of 1874.[64] The institutional channels of the *ban*'s influence on judges were limited in 1917 when the 1890 Law was revised. But even then the principle of the separation of the judiciary from the administration was not re-established and the regulation remained below the standard set in 1874.[65]

The revision of jury trials was more successful. The new Croatian government reinstated jury trials immediately after coming to power in 1906 and established the second jury court in the town of Osijek in 1907. It is possible that the government's intentions were more ambitious. The government indicated that some repressive parts of the regulation of trial by jury were not removed because of a fear that they would be blocked by the central government and because such regulations were still necessary in the transition period from repressive regulation to the freedom of the press.[66]

There were also attempts to reform the Civil Code and civil procedure. These attempts reflected changes in Austrian and Hungarian legislation regarding the

61 Čepulo 2006a, p. 365-367.
62 Čulinović 1956, p. 151-155; Prišlin Krbavski 2006, p. 330.
63 Šidak *et al.* 1968, p. 213 *et seq.*
64 Čepulo 2006a, p. 374-376.
65 Čepulo 2003, p. 67-71.
66 Čepulo 2002, p. 189-190.

amendments of the ABGB and enactments of the new laws on civil procedure in Austria (1895) and Hungary (1911).[67] The discussions on reforming civil procedure were stopped with the First World War. The draft of the Civil Code prepared in 1917, consisting of the adoption of the amendments of the ABGB and certain orders of the Austrian government, was not enacted due to the breakdown of the state.[68]

8. Conclusion: Modernization and Judicial Independence in the Context of Centre – Periphery Relations

The process of modernisation of the Croatian judiciary can best be presented through an approach based on centre-periphery relations. This best follows the reforms undertaken from 1873 to 1880, but its features can be observed in the other periods as well.

The reforms in Croatia-Slavonia were based upon Austrian laws and supported by the Austrian-based legal education that itself reflected certain influences of more developed models (German, French, and Belgian). Croatian legislation did not offer its own principle of organisation for the judiciary, but rather depended upon imported Austrian models that were adapted to the Croatian environment. Austrian laws were transferred to the autonomous Croatian legislation after a certain delay. Apart from the modifications necessary to adapt Austrian regulations to the situation in Croatia, particularly regarding the social structure, the broader institutional framework and lack of financial resources, the Austrian models usually lacked certain liberal characteristics related to the position of the individual in administrative and criminal procedures. That approach was partly induced by the central government in Budapest, which was resistant to the reforms in Croatia-Slavonia in general, and their liberal content in particular as a means of strengthening the Croatian autonomy. Scepticism of the Croatian political elite regarding the ability of the undeveloped Croatian society to accept more liberal reforms was another reason. But apart from such restrictions and the lack of financial means, the reforms from 1873 to 1880 set rational normative grounds that included grants of judicial independence in general compliance with the tendencies of the time.

However, grants of judicial autonomy did not develop into stabilized factual patterns. Instead conditions deteriorated due to the abrogation of the principle of judicial tenure that was replaced in 1884 by empowering the government to reassign judges and intervene in disciplinary proceedings. This and some other changes in criminal proceedings neutralized the liberal essence of the reforms from the previous period. The political context of these changes was authoritarian rule veiled in a constitutional facade from 1883 to 1903, which subjected the Croatian political scene to strict control in the interest of the Budapest and Vienna centres. Later re-liberalization of the various parts of the regulation, including a limitation of

67 Čepulo 2006a, p. 376; Zuglia, p. 22.
68 Gavella 1993, p. 339 *et seq.*

the government's influence on the judiciary in 1917, improved conditions. However conditions still remained below the standards set in 1874.

This paper reveals certain deeper cultural and structural determinants of the process by which the modern Croatian judiciary was formed. It indicates that the process of modernizing the judiciary in Croatia-Slavonia depended upon the influence of external centres. In other words Croatia-Slavonia was in a peripheral position. It was peripheral to West European centres that generated ideas and institutional models that were accepted elsewhere. These influences were transferred through the Austrian legislation and doctrine that was used as a direct model or source country. This legal-cultural influence intertwined with Croatia-Slavonia's political dependency upon Vienna, which was largely expressed in the initial phases of the modernization up to 1868. Later changes show how the influence of the Budapest political centre strongly affected modernization in the autonomous framework. Budapest's role was by and large restrictive, tending to diminish the political subjectivity of its autonomous political unit. This was reflected in the tactics of Croatian reformers and the narrower content of liberal reforms, while the principal changes undertaken in the authoritarian political framework intentionally avoided judicial autonomy.

The Croatian-Slavonian judiciary was formed during the 19th century as a rational structure on the basis of Austrian regulations. It has developed through various phases and did not follow a linear line of progress. It did not develop and stabilize as an independent institution due to the absence of normative and factual preconditions. For this reason it has not played a role in shaping the legal culture typical for a judiciary in developed countries, which is among the principal supports in the process of forming the rule of law.

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