Judicial reforms in transition: Legacies of the past and dominant political actors in post-communist countries

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ABSTRACT

The breakdown of authoritarian regimes in Eastern Europe and the incremental democratisation of such regimes is surely one of the most crucial events in the last two decades. In these contexts, the functioning of justice systems has become, more and more, one of the key aspects of the transition process. The establishment of an independent, fair and efficient judicial system is an important instrument for a country breaking with its authoritarian past. Courts become crucial actors in the transition process as they contribute to develop new legislations, to adapt old rules to the new context and to prevent the arbitrary use of power. In this context, the paper analyses the process of judicial reform in Slovenia, Croatia and Serbia. The paper aims to explore how those theoretical approaches (namely legacies of the past approach and new institution approach), developed by democratic transition studies, and focused on the internal factors of democratization, fare against the evidence from the democratising process of the judiciary in such countries. Particular attention will be focused upon the relationship between the executive and the judiciary and the strategy of the different actors involved in the reform process. The policy dynamics connected to the reforms of the judiciary will be reconstructed using international organization records, newspaper articles and witnesses gathered through semi-structured interviews collected during onsite visits in the analysed countries.

NOTE

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1. Introduction

Over the last two decades the breakdown of authoritarian and totalitarians regimes in Eastern Europe and the slow democratisation of such regimes is, without doubt, one of the most significant political and historical events of the last century. In these contexts, the functioning of justice systems has become, more and more, one of the key aspects of the transition process. The establishment of an independent, fair and efficient judicial system is in fact an important instrument for a country breaking with its authoritarian past. Courts became crucial actors in the transition process as they contribute to develop new legislations, to adapt old rules to the new context and to prevent the arbitrary use of power (Larkins 1986, Kryger, Czarnota and Sadurski 2006). In this context, the goal of legal and judicial reform is to transform the legal systems from their previous role as mechanisms for autocratic rule to an instrument for the rule of law. In particular, judicial institutions created in non-democratic contexts need to be reformed in order to make them adequate for new democratic contexts and tasks (Dietrich 2002, Gargarella 2004).

In the context of the east enlargement, the EU together with other international actors, organized and implemented several programs and activities aiming at supporting and promoting the reform of the judiciary as one of the core aspect of the rule of law supremacy. Notwithstanding, the experience of some of those countries highlighted that the reform of the judicial system represents a crucial policy field, extremely resilient to changes and particularly threatened by political actors influences.

This paper analyses the process of judicial reform in three post-communist countries (Slovenia, Croatia and Serbia) belonging to the Former Yugoslavia. These countries, although with some differences, had experienced a long, difficult and unfinished process of judicial reform. The first aim of the paper is to give an account of these difficulties considering the different political domain of each country.

The paper aims also to show how the main theoretical approaches applied by comparative judicial scholars to analyse judicial reform in transitional countries, mainly based on domestic factors, fare against the evidence in the case studies. Thus, the paper will revise two main analytical perspective: one assuming the primacy of historical and cultural legacies (Linz 1975, Toharia 1976, Magalhaes 1999), the second giving relevance to the strategic reasons of the political elites in shaping judicial institution reforms[2] (Ginsburg 2000, Magalhaes, Guarnieri and Kaminis 2006, Hirschl 2004). The aim is to show that these approaches provide only partial explanations of the patterns of judicial reforms under study. In fact, if both the "legacies of the past" and the "political elites interests and strategies" approaches have been powerful in explaining judicial reforms outputs in Southern European countries, and to some extent in Latina America[3], they are not exhaustive in depicting the complexity of the post-communist countries; especially in the three case studies belonging to Former Yugoslavia and characterized by on-going transitions, unfinished state-building and ethnic divisions. For this reason, in order to better understand the reforms on-going in these countries, we

[2] These theoretical approaches are deeply analysed in the work of Guarnieri and Magalhaes (2006): here the authors apply the approaches to judicial reforms to Southern European countries (Italy, Spain, Portugal and Greece) in the transition period.
[3] See Stotzky 1993, Garro 1993, Garcia 1994, Nagle 2000, Magalhaes, Guarnieri and Kaminis 2006, Finkel 2004.

make use also of the concept of "judicial institutionalization" (Bumin, Randazzo and Walker 2005) that will be presented in the following pages.

2. Judicial reforms in transition: main theoretical approaches

Within the comparative judicial studies literature, two are the main theoretical approaches used by the scholars to explain judicial reforms in transitional countries (Magalhaes 1999, Ishiyama and Ishiyama 2000, Herron and Randazzo 2000, Piana 2005). The first approach argues for the importance of the institutional and cultural legacy of the preceding undemocratic regimes that conditions the adoption of democratic institutional arrangements. The second perspective emphasizes new political actors' self-interest strategies and considers the outcome of the reforms as the product of bargaining among the main political players (Ishiyama and Ishiyama 2000).

The "legacy of the past" explanation derives from the interpretations developed in some seminal research on democratic transitions (Linz and Stepan 1996; Bartole and Grilli di Cortona 1997; Morlino 1998). According to this suggestion, the social, cultural and institutional legacy of the past regime deeply influences the outcome of the transition and its future consolidation. The legacies of the past concept could assume different connotations: values, identities, norms and rules, institutions, and routines of action that survive during the transition (Grilli di Cortona 2006). Although it may sometimes seem easy to identify clear evidence for the legacy of the previous regime, it is however hard to identify the effects that they have had on the democratisation process. The different impact these legacies may have depended upon some specific conditions, such as the duration and the "transformative effect" of the undemocratic regime and the continuity/discontinuity of the transition (Grilli di Cortona 2006). With reference to the judicial system, this theoretical approach was originally applied by Toharia (1976)[4], in his work on the magistracy during the Franco's regime in Spain. According to Toharia in the context of authoritarian regimes, the judiciary enjoys some limited guarantees of independence. The regime influences the nomination of judges on a higher level, to which it entrusts the management of the corps. The judiciary is 'isolated' and its action limited to cases with no political relevance, whereas significant cases are directly controlled by the executive power (Guarnieri 2003, 24). On the other hand, in the context of totalitarian regimes[5], the judiciary is totally controlled and integrated into the political system, and its guarantee of independence strongly reduced. The decisions made by the judiciary must not clash with the regime. The magistracy is actually mobilized in support of the regime by integrating judges into the regime's political organizations. In this case guarantees of independence are non-existent and the recruitment and career systems deeply controlled. According to this view, it could be expected that in post-totalitarian countries, due to the deep politicization of those structures

[4] Toharia took inspiration as well from an idea developed by Linz (1964) regarding the characteristics of the judiciary in authoritarian regimes.
[5] Guarnieri (1996, 454) specifies that when talking about totalitarian regimes he mainly refers to the Nazi Germany and to the communist regimes of the Stalin era.

and their constant subordination to the executives during the undemocratic regimes, judicial systems remain weakly professionalized and resilient to change. On the other hand, in post-authoritarian cases one expects that judicial systems maintain some technical and professional standards in decision-making, as the traditional criteria of recruitment and socialization of judicial personnel coexist with political ones. Consequently, the democratization of the judiciary would be quicker and easier. Given such distinction, although the Yugoslavian federative republic belonged to the authoritarian type, if one looks at the Linz' (1964) definition, we notice that the judiciaries in the three case studies show post-totalitarian traits rather than post-authoritarian ones. Could the legacies of the past explanation tell us the entire story about this difference? We will try to show that looking at legacy of the past in our case studies, we need to specify exactly which period we analyse (only the authoritarian regime or also the period before) and which legacies we consider: which policy arena? which institutions? which norms and practices?

The second perspective, according to which the outcome of judicial reforms represents the result of struggles between self-interest political actors, emerges from the Rational Choice literature[6]. As Magalhaes points out, given the relevance and centrality of judicial institutions in the moment of transition, these are modelled according to the strategies of the dominant political actors, which try to maximise the congruence between the new structures and their own interests. What is at stake here is either the maintenance of the *status quo* or the creation of new institutional structures. However, these institutions must be such as to guarantee political survival to the elites that led the transition phase. Political actors are interested in controlling the design of judicial institutions for two reasons: the reform of judicial institutions determine the extent to which political actors can affect the composition of courts, allowing or preventing their influence over judicial appointments; secondly, the rules regarding status and career influence the responsiveness of judiciary to political actors. Such norms define how an elite in power can concretely influence the system of punishments and rewards for judicial careers that can be used to influence judicial behaviour, independence and the policy preferences of judges. Thus, the control over these kinds of rules increases the congruence between judicial institutions and actors interests and preferences (Guarnieri and Pederzoli 2002).

The preferences of the parties and their strategies about the design of judicial institutions are also shaped by the degree of uncertainty about electoral results. This last perspective is further developed by Ginsburg (2003), in his work on constitutional courts in new democracies and by Hirschl (2004), in his contribution on the origin of the new constitutionalism. Summarizing the Ginsburg analysis, political parties in power will be more willing to create strong courts when the political future is uncertain, as they fear that they will likely be in minority and thus may require extra protection to ensure that the other parties will not be able to abuse them. On the contrary, where a ruling coalition believes it will be strongly in power in the future, the courts will likely be weaker because the dominant party would not want to limit its own powers.

[6] This hypothesis, which has also been developed in the field of the Rational Choice approach, is based on the well-known utilitarist paradox according to which the actors' main goal is to maximise their personal interests. As Guarnieri and Magalhaes suggest (2001), the issue n.28 of *Comparative Political Studies*, 1995 (especially the essays from Crawford e Lijphart, Comisso, Geddes and Hanson), represents a good example for the empirical application of this approach to post communist transformations. Two authoritative contributions to this approach are those of Di Palma (1990) and Przeworski (1991).

On a similar line, Hirschl (2004) adds that the empowerment of judicial institutions (in his work he refers exclusively to the high courts) is best understood as the by-product of the strategic interplay between three key groups: threatened political elites who seek to preserve or enhance their political hegemony by insulating the policy making process; economic elites who may view the constitutionalization as a mean to promote a neo-liberal agenda of open market; and judicial elites and national high courts that seek to enhance their political influence and international reputation. Hirschl specifies also that this judicial empowerment is likely to occur when the judiciary public reputation for professionalism and political impartiality is high and when judicial appointment is controlled by hegemonic political elites.

Although both the Ginsburg and the Hirschl analysis are fascinating and fit well in explaining the empowerment of judiciary that occurred for example in the post-authoritarian judicial reform in Spain and Portugal, they are not fully telling in the countries selected. In fact, according to our analysis, although in the three countries the last seven years have been characterized by electoral uncertainty and political fragmentation, political elites never tried to empower judicial institutions as a mean to preserve or enhance their political hegemony. Although formal constitutional guarantees of judicial independence were more or less adopted in all the three countries, in practice political elites always managed to weaken the judiciary and to control courts activity.

In a nutshell, assuming that both the theoretical explanations are not fully convincing about judicial reforms in Slovenia, Croatia and Serbia (since empirical evidences for them are weak), we believe that a deeper explanation for this situation could be found considering also the level of "judicial institutionalization" in the three countries. In fact we claim that the low level of institutionalization, that characterized judicial system in these countries, helps explaining why the post-transition judicial reforms can be entirely accounted for neither the legacies of the past template (as developed by Toharia) nor by the one based on strategic judicial empowerment (as suggested by Ginsburg and Hirschl).

In fact, in Yugoslavia, neither before the socialist period, nor after the desegregation of the federation the judicial system acquired the status of *viable* and stable institution (Huntington 1968). Thus, concerning the legacies, when the socialist regime took power, a fully established and institutionalized judicial system did not exist. The majority of the judicial institutions and norms were in fact settled out during that period. For this main reason, and for other grounds that we will account in the following pages, in the cases under exam judicial reform outcomes deeply differ from the typical post-authoritarian outcomes. Besides, concerning the strategic judicial empowerment, it is quite clear that in presence of weak, not-professionalized and instable judicial institutions, political elite cannot use them as a mean to preserve or enhance their political hegemony.

2.1 Judicial institutionalization in democratizing countries

In order to analyse the output of judicial reforms in democratizing countries we have to keep in mind first of all that we are addressing the development of an historically dependent judiciary into an institution that could operate forcefully to enact neutral justice (Larkins 1996).

What seems to be relevant in order to understand the judicial reform patterns in transitional countries is the degree to which courts are able to attain the qualities of a viable institution (Huntington 1968); in other words, the process of institutionalization *"by which organizations and procedures acquire value and stability"* (p. 12). Lanzalaco (1995) argues that the institutionalization could be conceived as a "continuos variable" referred to a rule, a norm, an organization that acquires different status on that variable.

According to the recent work of Bumin, Randazzo and Walker (2005), examining in a comparative perspective the institutional development of the judiciary in thirty-nine post-communist and in Latin America states[7], in order to understand judicial reform within a transitional country it is first of all necessary to consider the level of institutionalization of the judiciary in such a country. In fact, the judiciaries are able to play a significant role in the democratisation process, only if they develop a certain levels of organizational sophistication and autonomy. Only in this case judicial institutions become strategically relevant within the political system and could represent a mean for political elite to safeguard their interests. Many scholars[8] have proposed different indicators to measure the level of institutionalization. Huntington (1968) argues that the level of institutionalization of any particular organization can be defined and measured by its adaptability, complexity, autonomy and coherency. *Adaptability* can partly be deduced from longevity, but also entails functional adaptation, in fact "*an organization that has adapted itself to changes in its environments and survived one or more changes in its principal functions is more highly institutionalized*." (ibidem p.15). Organizational *complexity* may involve "*both multiplication of organizational subunits (hierarchically and functional), and differentiation of separate type of organizational subunits*." (ibidem p.18). The organizational complexity is strictly related to adaptability as, according to Huntington, primitive and simple political systems and organizations are usually overwhelmed in the modernization process. *Autonomy* refers to the extent to which organisational and procedures exist independently of other groups, organizations and behaviors. According to Huntington "*a judiciary is independent to the extent that it adheres to distinctly judicial norms and to the extent that its perspectives and behavior are independent of those of other political institutions*" (p.20). *Coherence* has to do with the degree of consensus within the organization on its functional boundaries and on procedures for resolving disputes that arise within these

[7] The authors choose several indicators of the component features of institutional viability and employ factor analysis to produce a viability score.

[8] The literature on the organizational institutionalization is broad; Lanzalaco (1995) in his work proposes to differentiate between the "classical" or "old" school of institutional studies (among those Weber, Durkheim, Veblen, Ayres, Selznick, Huntington, etc.), and the neo-institutional school, developed during the 80s (Scott, Di Maggio, Powell, March and Olsen, etc.). An other development of the institutional studies is represented by those studies that applied the neo-classical economical theory to explain the organisational institutionalisation (Riker, North, Ostrom, Schotter, Williamson). This distinction between "old" and "new" institutionalism has been discussed by many scholars.

boundaries (Randall and Svåsand 2002). Autonomy becomes a means to coherence, enabling organization to develop a distinctive esprit and style and prevents the intrusion of disruptive external forces.

Furthermore, Bumin Randazzo e Walker (2005) [9] argue that a clear differentiation of the judiciary from its environment is the principal indicator of institutionalization; this establishes clear boundary lines that mark its distinctiveness role. An institutionalized judiciary should be properly insulated from the other branches of the government. *Autonomy* is operationally indicated by the "*presence of procedures protecting independence of the institution vis-à-vis other political actors and institutions"* (p.6); This definition of autonomy is in line with the Huntington one. Institutional development can also be expressed by the existence of established guidelines and the ability to establish these procedures without interference On this aspect Selznick (1957) specified that the presence of internal norms and regularized procedures for decision-making are one of the factors that mainly contribute to organization's durability. This aspect is strictly related to the professional socialization of the judiciary. When recruitment and socialization of judicial personnel are based on regularized professional criteria then durability of the judicial institutions is likely to occur, allowing the adaptation of such institutions to domestic political changes (Freddi 1976). One could argue that all these features match with the *coherence*, as defined by Huntington.

Courts are enabled to undergo the process of institutionalization only if political and legal stability allows the court to develop properly, contributing to judicial effectiveness. This implies that the stability of the domestic political environment, that is the absence of high political fragmentation, the absence of ethnic cleavages and a finished state-building, became fundamental variables to explain the development and the institutionalization of the judiciary. This is not the case of the countries selected. The analysis of the main steps of the judicial reform in each country shows that starting from the Yugoslav federation desegregation (1990), the process of judicial institutionalization was continually undermined by the political instability that characterized all the area, impeding the courts to reach an adequate level of *complexity*, *autonomy* and *coherence*.

The main reason seems to be that in these countries, especially in Serbia and Croatia, the 1990s decade represent a sort of step back for what concerns the judicial institutionalization as these countries experienced ethno-authoritarian hybrid regimes in which a sort of ethno-political justice replaced socialist legality (Cohen 1992). This happened also in Slovenia although to a limited extent and only at the beginning of the 90s.

This stalling situation, in term of institutionalization, implied that when the ethno-authoritarian regimes fallen down in Serbia and Croatia (2000), any of the above mentioned three dimensions for the judicial institutionalization (*complexity, autonomy and coherence*) were not fully reached. Although some progresses were undoubtedly accomplished in the last fifteen years, it is necessary to make a clear distinction between the formal adoption and the implementation of judicial institutions and reforms. A common feature of the countries is in fact the adoption of rules, norms and institutions that seem to empower the judicial system vis-à-vis the other political institutions, but that remain mainly only on the paper. Thus, the only

[9] Bumin, Randazzo and Walker make explicit reference to the work of McGuire (2004) on the U.S. Supreme Court process of institutionalization.

formal establishment of judicial institutions and norms cannot be considered as a valid indicator of judicial institutionalisation.

Even in the last decade, the process of judicial institutionalisation continued to be threatened by domestic political instability and fragmentation. In this context political actors rather than empowering courts in strategic way, as the comparative judicial studies literature suggest, continued to maintain the judiciary as a sort of "inferior power", claiming for the lack of profesionalization and efficiency. Under this attacks, the magistracy seems to be still unable to fill the gap in the socialization and professionalization of the corps, missing a fully institutionalisation.

Taking inspiration by the Huntington (1968) seminal work (and to some extent by the Bumin, Randazzo and Walker recent proposal) this paper focuses on the level of *complexity, autonomy* and *coherence* developed in the three countries. The *durability* is not considered at this stage since with reference to judicial system not so relevant changes in the organisational principal functions can be measured. Table 1 summarises the definitions of each dimension and the macro-variables[10] that we propose to analyse in order to reach an assessment of judicial institutionalization.

Table 1. Dimensions of judicial institutionalisation analysed in each country

Dimension	Definition	Macro-Variables
Complexity	Organisational structure of the judicial system (both hierarchical and horizontal structure)	- Hierarchical structure - Courts Diffusion on the territory (horizontal structure) - Stages of appeal - Specialized courts
Autonomy	Courts and judges independence from other institutions	- Constitutional guarantees - Role of a self-governing body - Executive power on judicial administration - External influence on the selection process - Courts jurisdiction
Coherence	Level of professional socialization, norms internalization, Esprit de corps	- Role and status of the judges unions - Nature of professional socialization - Organisation of the training system: University and post-university - Main judicial values

The following section will present the analysis of the judicial reform patterns in the countries selected, with a particular attention to the empirical aspects listed in Table 1. Thus, the focus will be on the main features of judicial organization and administration, on the existence of a self-governing body (and its functioning), on judicial recruitment, on the existence of a judges representative (and its effective role), and finally on the more recent development of the judicial reform. The sources of empirical data are primarily reports and records of international organizations monitoring judicial reforms (such as Aba-Ceeli, EUMAP, and the EU) and information gathered through semi-structured interviews to strategic actors collected during on-site visits in the countries. In some cases also newspaper articles have been used.

In the concluding section a comparative assessment of the judicial institutionalization in the three case studies will be carried out, trying to show how the analysis of the institutionalization dimensions could offer

[10] The dimension definitions and the selection of the empirical aspects are drawn on the work of Guarnieri and Pederzoli (2002).

broader reflections about the application of the two already mentioned main analytical perspectives (legacies of the past and elites strategic bargaining).

3. Patterns of judicial reforms in Slovenia, Croatia and Serbia

Before analyzing the reforms paths during the 90s and in the last seven years, some features of the judicial organization during the Socialist Federative Republic of Yugoslavia will be presented.

3.1 Background conditions

In the Balkan region the Romanist civil law tradition was introduced only after centuries of Ottoman domination, especially in the countries of the Southern Balkans. Although Slovenia and Croatia were the two regions less touched by the Ottoman domination, the strong Hungarian traditions and usages avoided the fully penetration of Romanist civil law in the area until the beginning of the XIX century (Benacchio 1995). Moreover during the XIX century, the unstable socio-political system reigning in the countries belonging to that area delayed the common development and modernisation of the political and administrative institutions (Hosch 2006). After 1918, the new State of Serbs, Croats and Slovene (in 1921 it became Yugoslavia) was formed. The legal organization of this state was very diverse, partially ranged form Austrian and Hungarian sources, from Italian law and from the Sharia (Islamic law, especially in Serbia and Bosnia). Never were the organization and the status of judges in this state uniform, as the state was divided in six "legal areas" (Uzelac 2000). The first common codified legislation was enacted only in 1929 (Code of Civil Procedure).

Thus, when Balkan countries entered the Soviet sphere of influence, a fully institutionalised judiciary system did not yet exist. Many judicial institutions (Constitutional Court, High courts and tribunals) were in fact created during the soviet experience. Although Yugoslavian socialism increasingly differed from the soviet model as a result of decentralization and greater respect for local autonomy (Bianchini 1986), the organization of justice in the Yugoslavian model had many features in common with the soviet one. This model spread across the Eastern Block countries in the period following the Second World War and it followed the judicial experience of the Soviet State. Judicial organization took most inspiration from the principle of the "unity of power" and its corollary. Judges were selected through an election system that granted them *pro-tempore* representative powers, thus making them responsible for the body that elected them. Jurymen participated with magistrates in the different instances of judgment. No judicial control was exercised over the constitutionality of any normative acts. Even after Tito's rejection of Stalinism, in Yugoslavia the organization and function of justice never detached from the basis of the socialist right (Ajani 1996).

The Yugoslavian Socialist Republic Constitution of 1974 perfectly matches the principles described above and generically proclaims the principle of independence of judges. It also confirms equal authority for jurymen and magistrates. In spite of this, in practice, the principle of independence of judges was often weakened by the constant interference of party in the administration of justice. From election to confirmation, judges and their work were in fact controlled by party organizations. However, Uzelac (2002) highlights that

in socialist Yugoslavia political intervention in the judicial sphere were not intense as during the Stalin era in the Soviet Union. Overall the judiciary was neglected and marginalized, as the majority of social problems were solved through party mechanisms and other non-institutional channels.

Although in the 50s several measures were taken to regulate the action of judges and courts, judges' decisions were usually still limited to dismissal of public officers, and the incrimination of opponents or intellectuals criticizing the dominant ideology. Two parallel systems of conflict-resolution were in place during the Socialist Republic: one, at the party level tended to prevent and resolve every significant disputes by political talks; the other, the traditional court system, was in charge of less important matters, such as small claims and land-related issues, etc. (Uzelac 2000). Party members and political exponents were granted absolute immunity. In the 60s and 70s judges were frequently publicly recalled for not being rigorous enough in cases related to verbal offences against the party. Tito himself delivered a speech in relation to this topic in 1967.

In spite of this, some of the experts interviewed affirm that during the SFRY[11] the condition of the judiciary was better than during the 90s. The experts underline in particular the fact that judges were more professional and skilled as the influence exercised by the party was focused on "political cases", while ordinary justice especially during the 1960s, functioned quite well. Speaking about Serbia one of the expert interviewed affirmed:

> "Within Communist period the judiciary was really professional and skilled. The Communist elite was interested only in short trials, in the so-called political sensitive issues, that were trials against everyone who offended Tito, or the party or everyone who had political aspirations…A part from this type of trials, the party was not interested in litigations and in ordinary justice.. thus the judges didn't perceive (about ordinary justice) a strong pressing of the executive. Then the '90 came and the idea of Milošević was to ruin everything. The first mechanism to ruin everything was decreasing salaries. Thus many good judges left the judiciary and became private legal representative." (Interview with the President of Centre for Liberal Democratic Strategies, October 2006, Belgrade).

Although one could argue that this "parallel system" of conflict resolution was quite common in the authoritarian regimes (see Toharia 1976), the main difference concerning the Yugoslavian system of justice laid in the full party control over the appointment and career procedure. An evaluation concerning the political suitability of individuals was a major criterion in the initial selection and re-election of judges. Although party interference operated in a rather subtle and indirect manner during the SFRY (Socialist Federative Republic of Yugoslavia), the legal system continued to function as an instrument for the suppression of political dissidence (Cohen 1992), social status and prestige of judges significantly decreased and consequently they progressively became less professionalized in terms of their qualifications.

Nevertheless, the fact that many of the judicial institutions, like the federal Constitutional court, the State Constitutional courts and the State Supreme Courts, were established during these years, suggests that at least the level of *organizational complexity* (Huntington 1968) was improved during the SFRY; while *autonomy* and *coherence* remained low. In fact, the judiciary was not clearly distinct from other political

[11] The country was proclaimed in 1943 and named Democratic Federal Yugoslavia. In 1946, it became the Federal People's Republic of Yugoslavia and in 1963 the Socialist Federal Republic of Yugoslavia (SFRY). In 1991 was then renamed Federal Republic of Yugoslavia.

organizations and its role was marginalized. Moreover, although in the Federal Republic Constitution as well as in the Constitution of each republic judicial independence was formally guaranteed, in practice procedures protecting independence of the institution vis-à-vis other political actors were never implemented.

During the 90s, after the desegregation of the FRY, the first relevant change that each states had to face was to establish the primacy of the national legal system, eliminating any references to the federal one. Slovenia and Croatia were the two states that more quickly started this process. Some scholars (see in particular Cohen 1992) evidence that the Yugoslavian desegregation had a significant impact also on the administration of justice. The most important change was the changing locus and character of political influence as well as new obstacles to the development of an independent and depoliticized judiciary, especially in Serbia and Croatia. In what follows, the main steps of the judicial reform[12] since the 1990s until today will be presented.

3.2 Judicial reforms in Slovenia

The Slovene legal system belongs to the continental legal systems, under the influence of German law and legal order, as the territory was a part of the Austrian Empire for a long time. The legal system was transformed according to the socialist models, when the territory joined the Yugoslav republic. The impact of the institutes such as socialized property, socialistic self-management, protection of workers and lower social class can still be found in the legal system today(Čarni and Košak 2006).

The Republic of Slovenia became an independent and sovereign state on June 1991[13]. Slovenia experienced a relatively smooth democratic transition, as the independence was the result of gradual political and social changes starting from the 80s (Toš and Miheljak 2002, Lusa 2007).

The relatively "unproblematic" transition was the results of some advantages in respect to the other countries of the area: firstly the high degree of national homogeneity that diminished the need to the ethnification of politics; secondly the high economic development compared with other Yugoslav countries; and, finally, the neighbouring with two Western European countries: Italy and Austria (Toš and Miheljak 2002). The first democratic election took place in April 1990 and the winner was the DEMOS coalition formed by opposition parties emerged between 1988 and 1990. The reformed communist party won the presidency (Baskin and Pickering 2005). After the DEMOS coalition broke down, the fragmented party system consolidated into four strong parties: the United List of Social Democrats (Left-oriented); the Liberal Democracy of Slovenia (moderate-left); the centre-right Slovenian Democratic Party, and the Christian democratic Party.

Some months after the independence, the Constitution of the Republic of Slovenia was adopted, introducing the principle of the separation of powers and defining the task of the judicial branch. In addition to these basic provisions, the constitution determines that the judges shall independently exercise their duties and lays out the basic principles on the organisation and jurisdiction of the courts, the participation of

[12] Given the space limits, I will present here only a brief summary of the three case studies focusing on the more relevant aspects for the paper topic.

[13] On 23 December 1990, 88% of Slovenia's population voted for independence in a plebiscite, and on 25 June 1991 the Republic of Slovenia declared its independence.

citizens in the performance of judicial functions, the election of judges, the Judicial Council, and other relevant principles (Supreme Court of the Republic of Slovenia 2007). During the first years after the independence (1991-1994) there was not a comprehensive reform of the judiciary, as the judiciary was quite functioning and it was not perceived as one of the more urgent need for the country. In fact, Slovenian political elite chose to focus on the restructuring of national economy. With this aim three important laws were passed: law on society ownership, law on nationalization (to give back the nationalized properties) and law on privatization. These three laws have had a direct impact of the judiciary as at that time, due to the high political relevance of the application of such laws, the pressure of the political parties over the judiciary started to increase.

Coehn (1992) argues that, at the beginning of the 90s, some cases of what it defines the ethno-political justice occurred even in Slovenia. The fact that some Slovenian political leaders were disillusioned communist and former political dissidents, persecuted and imprisoned by the communist regime, brought to some cases of unjustified dismissal and replacement. However, this happened to a minor extent in comparison to the other countries. Thus, if one looks at the constitutional guarantees and at the judicial framework provided by the Constitution after the transition, it could be argued that this specific dimension of the level of *autonomy* improved in respect to the Federal Republic period.

JUDICIAL ORGANIZATION AND ADMINISTRATION

The most important laws regulating the functioning of the judiciary were passed in 1994: the Constitutional Court Act[14], the Judicial Service Act[15] and the Courts Act[16]. These are still today the laws that regulate the organization and the functioning of the Slovenian judicial system. It has to be underlined that the provisions defining the powers of the Slovenian Constitutional Court were included in the 1991 Constitution. However the Court itself, with the new post-independence powers, was not established until 1994 with the passage of the Constitutional Court Act. Thus, from 1991 to 1994 the Constitutional justice worked in a sort of legislative vacuum.

The 1994 Judicial Service Act and the Courts Act introduced important changes, especially in organizational terms. The first instance courts were divided in county courts of first instance and in district courts of first instance. This separation of the basics courts caused the left of many judges because the salary was extremely reduced. The number of judges decreased, the number of cases increased as the economic reforms implied an high number of trials and proceedings on economic and financial matters. According to the Judges Association, in this period originated the high Slovenian backlog that still is the major problem of the country. The representative of the Judges Association argues that during this phase the position of the judiciary vis-à-vis other institutions started to be undermined and the political interference over economic-sensitive cases increased (cases regarding enterprises denationalization, restitution of confiscated goods, etc.):

[14] Official Gazette of the Republic of Slovenia,2 April 1994.
[15] Official Gazette of the Republic of Slovenia,13 April 1994.
[16] Official Gazette of the Republic of Slovenia, 13 April 1994.

"In this period the new political elite started to attack the judiciary trying to diminish the reputation of judges among the population. The new economic situation produced a new board of capitalists that made use of the opportunity of a not enough regulated economy developing an attitude of predominance towards the judiciary. They perceived themselves as untouchable even if they committed civil and criminal offences. They perceived the judiciary as on the floor." (Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana.)

Today there are 43 County courts and 11 District courts and 2 stages of appeal, first to the High courts and the second one to the Supreme Court of the Republic of Slovenia. The Supreme Court is the highest appellate court in the state. It works primarily as a court of cassation[17]. There are also four specialized Labor Courts, a Social and Labor Court, and a Social and Labor Court of Appeal. In 1998, an Administrative Court was established as a specialised court with divisions in four cities. Organizational *complexity and sophistication* is thus quite developed and in line with all other Western European countries. Formally, Judicial Council, the Ministry of Justice and the president of courts shared the main function of the judicial system governance. The courts presidents, assisted by the personnel councils, manage individual courts while the Judicial Council and the Minister of Justice share the administrative tasks at national level. This mixed system of judges administration between judicial and political bodies should distribute control and accountability across various branches and institutions. According to the EU reports, the system has proven to be quite functioning and effective, while other sources (see in particular EUMAP 2001) and the representative of the Judges Association claimed that courts depend on the executive for a variety of services (organization an operation of courts, personnel, material and infrastructure support, etc.) and that the Ministry retains a key role in appointing and removing the court presidents. In the following pages, further information on this aspect will be provided.

SELF-GOVERNING BODY

The 1991 Constitution established also the Judicial Council (Art. 130-131) as an autonomous state body. The Judicial Council is composed of eleven members elected for a non-renewable five-year term; five of them elected by the National Assembly on the proposal of the President of the Republic from among university professors of law, attorneys and other lawyers[18], and the other six members are elected by judges holding permanent judicial office from among their own number[19]. The Supreme Court elects one member among them.

The position and the competence of the Judicial Council were defined only in 1994, when the Courts Act has been settled out. Article 28 established in fact that the Council shall propose candidates to the National Assembly to be elected to judicial office; to propose the dismissal of a judge; decide on the incompatibility, give an opinion on the status, rights and duties as well as judicial personnel; and exercise other administrative functions (Courts Act 1994). The Italian "*Consiglio Superiore della Magistratura*"

[17] The Supreme Court is the highest appellate court in the state. It works primarily as a court of cassation. It is a court of appellate jurisdiction in criminal and civil cases, in commercial lawsuits, in cases of administrative review and in labor and social security disputes. It is the court of third instance in almost all the cases within its jurisdiction. The grounds of appeal to the Supreme Court (defined as extraordinary legal remedies in Slovenian procedural laws) are therefore limited to issues of substantive law and to the most severe breaches of procedure (Čarni and Košak 2006).
[18] Two professors, two advocates and one lawyer.
[19] One judges of the Supreme Court, two judges of the high courts and three judges of a first level courts.

inspired the Slovenian Council model.[20] However unlike the Italian one more competences remain in the hands of the Ministry or of the National Assembly. From its first establishment, in 1994, the Council worked quite well, it acquired a good level of legitimacy in its relation with both with the National Assembly and the other political institutions, and with the judge's representative. Only some cases of discordance between the Council and the National assembly on judge's appointment have been reported by the international observer (EU Regular Reports, EUMAP 2001) and by the experts interviewed.

SELECTION PROCESS

The Judicial Council is entitled to propose the candidate for the first appointment to the National Assembly. Among other conditions (see Court Act) the candidates for judges have to be lawyers with the state's law exam, with at least 3 years of work in law after the exam.

The selection process for all levels involves judicial, executive and legislative input. The personnel councils within the courts formulates a reasoned opinion on the suitability of the candidate and sends it to the Judicial Council. In electing a candidate, the Judicial Council shall not be bound by the opinions of the personnel council or the Ministry. The National Assembly decides the appointment of a candidate to the position of Supreme Court Judges.

The National Assembly has rarely rejected the candidatures proposed by the Judicial Council; this is an evidence of a certain balance between the Council and the Parliament that in other countries has not been yet achieved. Court Presidents are appointed by the Minister of justice from among the candidates proposed by the Judicial Council. If the candidate is rejected, he/she may request the Administrative Court or to the Constitutional Court to review the decision.

JUDGES UNION

Slovenia is the only country belonging to the Former Yugoslavia in which a judges association was established already during the Federal Republic. It was created in 1971 and before the independence it represented a place to discuss about salary, duties and judges problems. In this phase it was normal that all judges belonging to the association. In 1978 there was one of the first negotiation with the government about the judges salary and the association was treated as negotiating partner. This was a great success, but there were also important consultations in 1983/1984 when some judicial reforms were settled out, as well as in 1979 and 1984[21]. Today the Judges Association is fully recognized and legitimated but in the view of politicians and academics it is considered as a sort of "judges trade union". In fact, the bulk of the Association activity is linked to salary bargaining.

RECENT DEVELOPMENTS

Overall Slovenia acknowledged significant progress in the establishment of an independent judiciary, as the 1991 Constitution and the above-mentioned legislation incorporate the necessary formal

[20] Interview with the Vice-President of the Judicial Council of Slovenia, 2007 April 12th, Ljubljana.
[21] Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana.

elements to guarantee judicial independence. However, there are still area of concern, including the involvement of the executive in the judicial administration, the lack of public trust in the judiciary the absence of mechanisms ensuring intra-judicial integrity and external accountability (EUMAP 2001). From 2002 the Court Act was amended three times and according to the Judges Association, all these amendments were directed to increase the power of the government in the appointment of court presidents and in the cases distribution.

" The Minister said that it is necessary to control the case distribution as Slovenia has many appeals to the ECHR due to the backlog and to the high delays. To tell the truth, the reason for these amendments is that many politicians are involved in civil, economic or criminal trials and they whish to influence the resolution of these trials. Because the Presidents are appointed from the Ministry (and not from the HJC) many of them are afraid in opposing the Minister wishes." (Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana.)

According to the international observers monitors (EUMAP, EU and Cepej), despite the progress made in the past decade, public trust in the judiciary remains low. Some parliamentarians have also called for abolition of judges' life tenure. Some commentators argue that lack of political support could hamper the efficiency of the courts and undermines public support for the judiciary and its arguments. On the other side, the Judge Association admits that the inefficiency of the courts is a real problem and they are committed to find some solution for the organisational problem that hampered the functioning of the judiciary.

Table 2. Main judicial reforms outcomes in Slovenia.

Judicial organisation and administration	**Constitutional guarantees of judicial independence**	**Self-governing body**
The 1994 Court Act and Judicial Service Act introduced the most relevant changes. Frequently amended until now.	The 1991 Constitution introduced adequate constitutional guarantees. The 1994 Constitutional Court Act made them effective.	Established by the 1991 Constitution. It was operative shortly after.
Selection	**Judges Union**	**Judicial training**
According to the Constitution and the Court Act the High Judicial Council and the National Assembly shared the power of judges selection.	Established in 1971. Fully legalised but considered as a mere "trade union" both by the political elite and by the public opinion.	Not yet effective and functioning.

The poor organisation of the judicial training represents another issue of concern. Despite the fact that EU financed a twinning program finalised to the establishment of the Judicial Training Centre, it is not yet in place. Currently, a Department within the Ministry of Justice is in charged of the judicial training but this Department does not have a Director because there are no judges prepared to be "training director" and because of problems concerning the status of a potential director. According to the Judges Association, there are only six young persons working in the Department that have never enter the judiciary nor passed the judicial exams. Thus it is very difficult to speak with them about judicial training. Currently, the Centre has its headquarter inside a hotel and no training programs have been still settled out. The absence of an efficient training institution is an indicator of a low level of internal coherence. Slovenian judges admit that they have to insist on the socialisation in order to develop an adequate *esprit de corps* and to improve the

professionalization of judges. Judges Association organizes each year a general conference with an high level of participation, in 2007 they focused all the program on "judicial training" trying to involve also the Ministerial representative. They are convinced that this type of events (common conferences, seminars and courses) could have a direct impact on the professionalization and consequently on the functioning of the judiciary as a whole. In the last year the number of Slovenian judges participating also in international conferences and networks is increased, although the members of the Judges Association admit that the language skill of the Slovenian judges is still really poor.

3.3 Judicial reforms in Croatia[22]

In Croatia, like in Serbia, the first post-Yugoslav elections opened the door to nationalistic forces led by the Croatian Democratic Union (HDZ) under the leadership of former Partisan General and political dissident Franjo Tudjman. The HDZ won the 1990 election for its anti-communist expression of Croatian identity[23]. As long as Serbs occupied Croatian territory, Tudjman was able to monopolize power in Croatia. It tolerated and supported moderate Serb groups in Croatia in an effort to demonstrate its political openness, but its real monopoly of power provided a context for corrupt practices among the HDZ political and administrative elite (Baskin and Pickering 2005).

In December 1990 the new Constitution was passed which was a mixed presidential parliamentary system with strong presidential powers. He was able to tailor the new Constitution to his own ambitions in a perfect authoritarian style. For the whole decade of the 90s Croatian politics was in fact characterised by an authoritarian style of governance, accompanied by international isolationism and suspect towards any type of supranational organisation like the EU (Jović 2006).

After the war, with the return of all Serb occupied territory and changes in the electoral laws, the diverse opposition to the HDZ made significant electoral gains in a number of cities and regions. With Tudjman's death in the run-up to elections in 2000, a moderate six-party opposition coalition headed by the Social Democratic Party led by Racan won control of the parliament on a campaign that included accession to the EU.

Concerning the specific features of the judiciary, Uzelac (2000) describes as, from a formal legal standpoint, the 1990 Constitution provided a new regulation and status for judicial power. The changes were mainly reflected in the introduction of the division and separation of powers and in the warranties for the autonomy and independence of judicial power. The Constitution included also some vague provisions about

[22] A complete analysis of the judicial reform process in Croatia during the 1990-2000 can be found in various contributions by Professor Uzelac, Law School of Zagreb. See in particular Uzelac (2000, 2001, 2005)

[23] As Baskin and Pickering (2005) argue: "*It was viewed as the most serious alternative to the atheistic socialism of the ex-Communists or Party of Democratic Change (SDP, later called the Social Democratic Party). A majoritarian electoral system allowed the HDZ's 46% of the popular vote become 67.5% of the seats in parliament. The losing Coalition of National Accord, which was composed of former Communists and Liberals, fragmented and formed a series of smaller parties…. The war began in 1990-91 with the refusal of the Serb Democratic Party (SDS) leadership to join the broad governing compact led by HDZ in 1990. This refusal strengthened exclusivist tendencies within the HDZ and reinforced its image as the most serious defender of Croatia against Serb aggressors*." (p.12)

the status of judges; judicial office was defined as "permanent" but with some exceptions that made the interpretation of this provision difficult and opaque[24].

Coehn (1992) reminds as, less than six months after taking power, Tudjman had already replaced 280 judicial official. The controversial laws adopted following the Constitutional provisions gave the Minister of Justice wide latitude over the appointment and especially over the removal of personnel. Top officials in the Ministry would be able to decide whether judges had the proper human and civil qualities to fulfil their responsibilities. Some members of the legal community objected that the vagueness of the new laws threatened the independence at the same degree as the Communists used ideological criteria. One of the most striving examples is the one of the President of the Supreme Court Vidović that, during the first month of the war with Serbia, was removed from office apparently because he reached the age of retirement, although the law not exactly established this. The reason for this removal was that he refused to cooperate with the government in cases of captured prisoners and detained for grave crimes. Thus, new provision appeared to have as its aim the purging of former communist judges and prosecutors, allowing their replacement by new judges supportive of the Tudjman government. This means again a further decreasing of the professional qualifications and skills of judges, undermining the already low level of *autonomy* and *coherence*. The state of emergency declared during the 1991 Balkan war, meant a concentration of powers in the hands of executive and a number of Executive Decrees enacted by Tudjman. Among those related to judicial system, the Decree on Organization, Work and Jurisdiction of Judicial Power provided the return of Martial Courts.

Uzelac (2000) highlights that judicial reforms during the 90s may be better qualified as the lack of reform, or as an anti-reform. The absence of a mid-long range strategy of development was a clear message to the judiciary. Therefore, until the end of the 90s, there was a strong outflow of judges to other legal professions. Most of the judges that left the judiciary were among the best qualified and experienced; this contributed to decrease again the Croatian judiciary profesionalization.

JUDICIAL ADMINISTRATION AND ORGANIZATION

A hierarchy of legal system arranged in four levels characterizes the judiciary in Croatia. The Courts Act enacted in 1993 provides a basic legislative framework for the organization of the judiciary. Courts of General Jurisdiction are the first level. These courts adjudicate in all disputes except in those where law explicitly determines the jurisdiction of another court. These courts are organized hierarchically in three instances and are divided into regions. Municipal Courts are courts with first instance jurisdiction in both civil and penal cases.

It is important to recognize that a right to appeal is a constitutional right of every citizen and a right of every legal entity, according to the practice of the Constitutional Court. Supreme Court is a court of full jurisdiction with respect to court decisions and it can void them, confirm them or revise them. The Supreme

[24] Article 120: a judge may be relieved of his judicial office only 1. at his own request; 2. if he has become permanently incapacitated to perform his office; 3. if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office; 4. if in conformity with law it is so decided by the High Judiciary Council of the Republic owing to the commission of an act of serious infringement of discipline (Uzelac 2000).

court is the highest court in Croatia and as the last instance it decides on extraordinary legal remedies against valid court decisions of the courts of general jurisdiction (dismissed appeal), and all other courts in Croatia. The Supreme Court is also an appellate court in all cases where municipal court was the first instance (Kuecking and Žugi 2005). Supreme Court has significant administrative tasks and functions concerning the judiciary as a whole. However, also the Ministry of Justice mantain a significant control over the court administration.

However, the most interesting data about judicial organization in Croatia concern the rationalization of the territorial organization that seems still to be a relevant problem. On this aspect one of the interviewed reminds as Croatia was the country with the higher number of judges pro-capita and also of courts.

"At the beginning of the 90s, when Tudjman started to restructuring Croatia, tried to suppress the regionalism and irredentism aspirations of some local communities and areas (reacting to the centralism of the state) throughout the establishment of different sub-regions or provinces (Inner Croatia, Slavonia, Dalmatia and so on). The idea was to prevent the irredentism of such areas, thus 20 counties were created and consequently even the number of municipalities increased. The rational approach evocated by some within the Minister of Justice was to separate the territorial division of the public administration from the territorial division of the courts, but the political reaction was obviously negative: as many counties as many local courts. Thus, each municipality had its own court." (Interview with a Professor of the Law Faculty- University of Zagreb, 2007 10th April, Zagreb)

In addition, in his view, what happened was that Minister of Justice accused for the judiciary inefficiency, answered to these accusations creating new courts, also where they were not needed. This over number of courts contributed to seriously undermine the functioning and the efficiency of the judiciary as a whole; this had also a negative impact over the public perception of the judiciary. This suggests that the simply hierarchical and horizontal development of the judiciary, considered as an indicator of *organizational complexity*, gives us only a partial explanation about the real level of institutionalization. Moreover, it seems that the only *organizational complexity*, without *autonomy* and *coherence*, does not have a decisive influence on the fully institutionalization of the judiciary.

SELF-GOVERNING BODY AND SELECTION PROCESS

The idea of a professional body responsible for conducting "internal affairs of the judiciary" and with relevant functions in the selection process was introduced in the Croatian Constitution in the period of the nation building and democracy building optimism of 1990. The models were the French *Conseil supérieur de la magistrature* and – more importantly – the Italian *Consiglio Superiore della Magistratura.* But the idea of the self-government of the judiciary seemed to be too avant-garde for the period of transition as its implementation was delayed for many years.

In the period from 1991 to 1994, judiciary was in an informal limbo: judges were constitutionally well protected but on the practice they were put into a position of permanent provisionally (Uzelac 2000, 2001, 2005). The 1993 Court Act, according to the Constitution, provided that a body named "State Judicial Council" had to appoint, discipline and remove judges. However, until late 1994 there was no such body and no rules on its composition. In such a vacuum, according to Uzelac (2000) practice responded in various

ways. "*Judges continued to be appointed and removed from office by Croatian Sabor (Parliament). In some five years, the mandate of a significant portion of judges expired; some of the judges simply continued to perform their functions (?!); some of them received formal decrees on the expiry of their mandate and consequent cessation of their office; and some were simply notified that they have to empty the premises due to the "new situation*" (Uzelac 2000).

The Law on State Judicial Council (LSJC) passed in 1993. The LSJC foreseen that all members of the SJC have to be appointed with the 8 years mandate by the Parliament. The law provided also that in the process of selection of candidates for the president and the members of the SJC, Supreme Court of the RC, Minister of Justice, State Attorney, and the national Bar Association nominate persons considered to be suitable for the candidates.

The manner in which the SJC became a "lever in the hands of the executive" power was simple. The time of the appointment coincided with the period of intense parliamentary crisis, during which most of the oppositional parties instructed their deputies to leave the parliament, and for several months the parliament enacted laws without debate, only by votes of the HDZ.

A first clash in the process of appointment of the SJC members happened in the Supreme Court that presented two very different lists of candidates. The other bodies empowered for nomination also submitted their candidates. In the meantime, the leadership of the HDZ and Tudjman himself decided to take things into their hands: an informal commission presided by Tudjman's counsel for national affairs drafted its own list of candidates, vastly from people loyal to politics of the ruling party. Since such a body did not have official capacity to propose candidates, an innovative formula was found: the Attorney General presented such a list. All of the candidates from this list were accepted, and the candidates proposed by the legitimate professional bodies designated by law were rejected. In fact, the only candidates who were appointed as members of the SJC without express political influence were two law professors nominated jointly by four Croatian law schools[25]. The Council began its activity during a period when authoritarian tendencies of the Tudjman regime were increasing. What the SJC did in this period was only controversial and reflected the political nature of its role. From 1995 to 2000 many of the provisions and the appointments made by the SJC were appealed toward the Constitutional Court, mainly by the Judges Association of Croatia and by groups of rejected candidates. The Constitutional Court accepted some of those appeals, but in practice no abrogation of the SJC's decisions were brought about the annulment of these acts. Only in few cases, upon the abrogation of its decisions, the SJC repeated its procedure but, applying the same violation and the same arbitrariness, the same candidates were selected. Prior of 2000, the Constitutional Court's victory over the SJC were merely formal, without concrete results.

JUDGES UNION

The Croatian Judges Association was founded in 1991. In the middle of the 90s the Association tried to oppose the arbitrariness of the SJC but with poor results. A leadership was elected in late 1997 and since

[25] These two later turned to be the most vehement critics of the actions of the SJC.

then the Association has achieved more significant victories, especially regarding the judges salary. About 80% of Croatian judges are member of the Association.

In the last ten years the Association publicly criticized the government for various actions, with a very aggressive approach. Some of the interviewed retained that, given this aggressive and corporative style, the Association was rather counterproductive in the project of judicial reform. Starting from 2000, the Association opposed also many of the government innovations directed to adjust the functioning of the SJC. According to the expert interviewed, this *a priori* opposition to all the changes and innovations in the name of the judicial independence, contributed to undermine the public perception of the Association. Some interviewed argued that it is not a real professional association but rather a trade union. Now the association seems to be more open also to the international collaboration but, according to the opinion of the interviewed, its aim is always the same: maintaining the judges corporativism. Looking at the institutionalization dimensions, this empowerment of the judge representative, a common trend of the Western judiciaries, is a rather positive indicator of institutionalization, although not always functional to the reform goals. Nevertheless, without adequate spaces and opportunities of socialization, the effect of a so strong association becomes visible only in relation to salary and pecuniary matters.

RECENT DEVELOPMENT

The peak of the crisis between the judiciary and the government was reached in 1998-1999. After many cases of political appointment and removal in particular at the high level positions (famous is the case of the Supreme Court Presidents Vuković and Olujić) the public perception of an inefficient and politicized judiciary was widespread. In 1998 a new Minister of Justice was nominated (Milan Ramliak) a professor of the Zagreb law School; short after the Parliament asked him a task to prepare the basis for a comprehensive reform of the judiciary. With this aim, the Minister of Justice, for the first time in the Croatian history publicized various data from all the courts. It was the first public and informative survey on Croatian judiciary that evidenced the high length of proceedings and the backlog of old cases. The decisive strike came from the top of the state: in 1999, in Tudjman annual address to the nation, significant place was given to the problems of the judiciary. Only a few days after a tempest arose in the whole national judiciary, evidencing the absolute need of quick reforms.

In 1999 the Parliament enacted the Law on Judicial Salaries, raising them of about 50% and short after the along waited amendments to the Law on State Judicial Council were enacted. Then the events came to favour the judicial reform developments: the illness and the death of Tudjman and the result of the 2000 parliamentary election in which the HDZ was defeated by the democratic opposition. During 2000 the Constitutional Court repealed as unconstitutional several provision of the SJC; among them those concerning the appointment and dismissal of judges and court presidents. The Constitutional Court imposed some decisions to made also significant change in the Constitution. The most relevant innovations, aimed at reducing the core of political intervention, were the establishment of a separate body for the attorneys and the reduction of the SJC members from 15 to 11, with the incompatibility of membership in SJC with court

presidencies. Other provisions gave broader power to the Constitutional Court in appealing against SJC decision.

The appointment procedure was radically modified with the introduction of the judicial councils that, like in many other European countries, have duties regarding the court administration and the judge's evaluation for the appointment. The changes introduced in 2000, and the subsequent amendments to the Courts Act, formally provided adequate limitations to the political appointment. The SJC should appoint the judges only on the basis of professional criteria provided by judicial councils of each court, but many concerns remain about the lack of clearly defined objective criteria that councils must use. According to the experts interviewed, the difficulty in providing transparent information about judges makes the SJC members preferences stills the most influential criteria. In their view, this was clear with some recent appointments. On the whole, nowadays the public perception of the SJC is a little bit different, it is not yet perceived as a "leaver in the hands of the executive" but only as a sort of "hot potato" for the government, meaning that it became a body of internal lobby and influence.

Given those developments, it could be argued that the degree of *autonomy* has recently improved, but the system needs some years to embed the changes introduced. The Croatian candidature to the EU membership represents a powerful lever to reach at least the adoption of important rules and norms concerning the judiciary. However, the implementation of such norms continues to meet obstacles and remains very slow.

Table 3. Main judicial reforms outcomes in Croatia.

Judicial organisation and administration	**Constitutional guarantees of judicial independence**	**Self-governing body**
The 1993Courts Act provides the framework for the organization of the judiciary. Hierarchical organization; three level of courts and two stage of appeal. Many problem rlated to the over-diffusion of courts on the territory.	The 1990 Constitution provided formal guarantees of judicial independence but these were too vague. Until 2000 these guarantees remained merely on the paper.	The State Judicial Council was established by the 1990 Constitution. Created only in 1995. From 1995 to 2000 a "lever in the hands of the executive".
Selection	**Judges Union**	**Judicial training**
From 1990-1995: legislative vacuum; purges and dismissal of the Communist judges; From 1995 to 2000: political appointment throughout the State Judicial Council. 2000: amendments to the Constitution and to the Courts Act, diminishing the political influence.	It was founded in 1991. It is famous for the aggressive style of the leadership. Political elite and the academics usually define it as the judges trade union. ------	The training system is currently subject to reform. The Judicial Training Centre was established

3.4 Judicial reforms in Serbia

In Serbia the judicial system that emerged from post-FRY transition kept working along the same previous patterns. It was in fact subordinated to the dominant party that was no longer the Yugoslavian Communist Party, but Milošević's socialist party (Miller 2000). The room for independence and the lack of a

totally impermeable and continuous system of control sometimes allowed judges to make decisions against the will of the regime. In Serbia, for instance, in 1996[26] some courts legitimated the victory of the opposition in a local election (Levitsky and Way 2002). The magistrates who made themselves guilty of this act of rebellion were, however, immediately dismissed. As Cohen (1992) suggests, if Milošević in the first stage of his presidency declared his willingness to depoliticize legal matters with respect to the communist ideological criteria, he in truth operated a repoliticization of justice in terms of Serbia's ethnic interests. The most obvious consequence was the accelerated repression and political interference in Kosovo's judicial sector.

Milošević's purge of the entire judicial system started in 1997-1998 and ended in 2000, when the crisis was clearly approaching. During this period, about nine hundred out of 2000 active judges in the entire Serbian judiciary system were dismissed and substituted. The judicial system that emerged from the ten-year Milošević government was weak from a professional as well as from a material point of view. Many of the judges that had somehow opposed the requests coming from the regime had been dismissed and some of them still lived semi clandestinely (Pavlovic 2003). Those who were not removed only acted according to the regime's will. After 1996, no judicial decision was made that could somehow oppose Milošević's party.

During the Milošević decade the level of judicial institutionalization further decreased. If during the federal republic the "double system of conflict resolution" leaved some space for the judges independence, with Milošević in office every type of judicial cases had to be solved with the regime agreement. Thus, the level of adaptability, the differentiation and the autonomy of the judicial system were weakened in respect to the FRY period. Immediately after Milošević's discharge, the first step made by the *ad interim* Koštunica[27] government was to re-establish the old judicial system legislation and to cancel all those decisions, made by Milošević, that had caused dismissal of those judges that had opposed election fraud and manipulation promoted by the regime (especially the 1996 election). What needs to be underlined here is that a potential purge of the judiciary became an urgent issue after the October Revolution. However, the transition leaders decided to reform the system without deeply invading the judicial body[28]. One of the experts interviewed[29] underlines that, if a drastic *lustratia* had been performed, the Serbian judiciary would had been halved. The lack of an adequate number of candidates potentially suitable for taking the role of magistrate represented, according to this interviewee, was one of the reasons for undertaking the organisational reform path without a *lustratia*.

JUDICIAL ORGANIZATION AND ADMINISTRATION

The first significant stage of the judicial system reform seemed to have been reached in November 2001 with the launch of an important set of judicial system-related laws. The set was made of five laws: 1)

[26] The local elections of 1996 saw the democratic opposition win in 36 municipalities, Belgrade included. Milošević did not recognise such victory and suggested to call for new elections. Such action caused a strong reaction from civil society. Such protests stopped only when Milošević was forced to recognise the opposition's victory in the early months of 1997 (Zecchinato 2003).

[27] On 6 October 2000 Koštunica, during his first official speech, affirmed to be willing to create an ad interim government. This lasted until December, when official elections took place and Djindjić was nominated Prime Minister of a majority government in which all the parties of the DOS coalition participated.

[28] The ad interim government actually adopted a 'forced dismissal' policy by inviting judges in relevant positions to leave their office. However, the entity and concreteness of these measures was never such as to be described as a real purge.

[29] Interview with a Serbian jurist, Political Advisor at the Stability Pact for Southern Europe, June 2006, Brussels.

Law on Judges; 2) Law on Public Prosecution; 3) Law on High Judicial Council; 4) Law on courts organization; 5) Law on Seats and Districts of Courts and Public Prosecutor's Offices (all published in the Official Gazette of Serbia, n° 63/2001). Hiber (2005) highlights that the circumstances in which these laws were adopted shows how the democratic alliance faced already in 2001 obstacles in the reform of the judicial system. These sets of laws were not in fact proposed by the government or by the Minister of justice, but by a parliamentary group belonging to the Serbian Democratic Party (DSS, Koštunica's party), which would shortly go over to the opposition. Hiber underlines that such laws were voted by the DOS coalition parties in exchange for a favourable vote to the Work Law approved during the same weeks from Koštunica's party passed at the opposition. Overall, the five laws in their original drafting should have introduced some fairly relevant changes.

According to the Law on the Organization of Courts, the court system of Serbia is divided into courts of general jurisdiction and specialized courts. Courts of general jurisdiction include the Supreme Court, courts of appeal (which still have not been constituted), and municipal and district courts. Specialized courts include the commercial courts and the yet to be constituted Administrative Court. Special panels for prosecuting war crimes and organized crime have been established within the Belgrade District Court. In addition, a Constitutional Court hears and decides matters that involve the constitutionality of laws, regulations, and official acts. The Supreme Court is the highest court of general jurisdiction in Serbia. There are 138 municipal courts and 30 district courts located throughout Serbia. The municipal and district courts are courts of general jurisdiction. District courts also exercise first instance jurisdiction but in matters of a more serious nature. Until the new courts of appeal are constituted, district courts will continue to serve as courts of second instance and hear appeals from municipal court decisions. Decisions of municipal and district courts may be appealed to the appellate courts once these courts are constituted (ABA-Ceeli 2005). Judicial administration function is mainly in the hands of the Ministry of Justice.

Looking at the *organizational complexity* of the Serbian judiciary it could be noticed as the organizational structure, especially considering the hierarchical level, is still uncompleted and frequently subjected to changes. Special courts and panels have been established but persistently threatened by political control and influence.

SELF-GOVERNING BODY AND SELECTION

The introduction of a new self-governed body, which was meant to play an important role in the recruitment process, represented, however, the most relevant change. The Art. 46 of that law established that magistrates would be elected by the National Assembly according to the suggestions of the High Council of the Judiciary (HJC). Such law established that the HCJ should be composed of six permanent and two 'invited' members (a judge and a Public Prosecutor). The President of the Superior Court, the District Attorney, the Minister for Justice, a member elected by the Lawyers Association and two members elected by the National Assembly were part of the six members (Art. 3). The same article established that the National Assembly should elect only the candidates proposed by the HCJ. The law on HCJ, on the other

hand, should have allowed creation of that body. Accordingly and in light of the above-mentioned changes this body should have taken on a relevant role in recruiting and selecting magistrates. The Law on Judges provided for creation of another body, the Grand Personnel Council (GPC). This differed from the HCJ because the latter was in charge of all decisions concerning the dismissal or the termination of the judge's function. This body was made of nine judges of the Superior Court nominated by the president of the court itself.

These data already explains that the only function attributed to the HCJ regarded candidature proposals with the presence of another institution, strictly related to the Ministry, which decided on dismissal/termination issues. The Law on Judges foresaw that the National Assembly was obliged to nominate magistrates only via candidatures proposed by the HCJ. In the case the candidatures proposed by the HCJ were rejected, it had to reconsider them and propose some new ones. Already in July 2002, the Serbian Democratic Party (DSS) proposed a set of amendments to the five laws on the judicial system. The National Assembly adopted such amendments at once. They aimed at changing exactly Article 46 of the Law on Judges, by establishing that the National Assembly could reject candidatures proposed by the HCJ and nominate some other candidates appointed by a special commission within the National Assembly. There was therefore an attempt to create another body, directly connected to the National Assembly, which would allow the parties to control the nominations more directly. In 2003 the Constitutional Court suspended some of the amendments approved for the Law on Judges. At the beginning of 2003 the HCJ had not yet been established because of delays and general problems in achieving an agreement on the choice of the members[30]. At the beginning of 2003 the DSS (Koštunica Party) proposed new amendments aiming at reaffirming the role of the National Assembly in recruitment of magistrates. The attempt to reaffirm the power of the National Assembly over the nomination of judges for the disadvantage of the self-government body represented the thread running through the different amendments. However, some expert judges underline that, a part from the scarce powers given to the HCJ, concerns remained about the HCJ composition itself and about its representatives.

On this aspect one of the expert interviewed affirms:

" Only the Supreme Court elects them (HCJ members), they are badly selected; their colleagues do not elect them. They did not represent all courts of all level and types. There are not clear criteria on the competencies and on the integrity of these judges. The impact of the government over the HJC members remains very strong. They are just looking up and thinking what the Ministry will ask them. Not all of them but the great majority." (Interview with the former President of the Judges Association of Serbia).

The assassination of Djindjić in 2003 worsened the situation. Huge cracks in the fragile Serbian' democracy were discovered, especially in relation to the military and para-military forces and the connection with the organised crime. This year represented another stalemate[31] for judicial reform, since the debate on

[30] As Hiber and the OSCE report describe (2003), at the end of the several disputes regarding the institution of the HCJ the Superior Serbian Court maintained the main power of the choice of the members that would have to compose the HCJ. The judges of the Superior Court are nominated directly by the National Assembly.

[31] Several articles on daily newspapers and basically all the humanitarian agencies' reports highlighted that during the state of emergency, the Serbian government explicitly violated its citizens' human rights. In the days following the murder of Djindjić a particularly serious case was registered: the Parliament dismissed 35 judges without receiving permission from the Superior Court, which was formally necessary. As a consequence of this, the President of the Superior Court resigned (ABA Ceeli 2004; Osce 2003; EU SAP Report 2004).

the 2001 set of laws, which yet had not been applied, was suspended. The first months of 2004, after the new Koštunica government came into office, seemed to give new impetus overcoming the stalling created during the state of emergency. Moreover, the European Commission, in the context of the Stabilization and Association dialogues, has frequently underlined the need for a concrete reform of the judicial system. In April 2004, the government proposed some new amendments aiming at updating the Law on Judges on the basis of the different sentences delivered by the Constitutional Court during the previous years. These new amendments gave back to the HCJ the power to propose candidates for the nomination as magistrates and court presidents. However, in truth, the governments continued to reject several nominations coming from the HCJ until December 2004. The HCJ was then practically prevented from performing its functions. In the same year, the government tried to establish a new body (Court Administration Council) directly controlled by the Minister of Justice that would have become responsible for selecting the court presidents.

The Constitutional Court immediately judged such disposition as unconstitutional and blocked its coming into being. At the end of 2004, the Commissioner for the External Relations of the EU explicitly called for a re-launch of the EU-Serbia relation, in order to give a new democratic impetus to the country. In spite of this favourable chance, at the end of 2004 the EC evaluations on the functioning of the judiciary were always negative.

JUDGES UNION

This Association, which was initially formed by magistrates who had opposed the manipulation of the outcome of the 1996 election, was not legalised for a few years. In 1999, 13 judges were dismissed because of their active involvement in the Serbian Judges Association Following the dismissal of these judges it suspended its activity. It reopened only in 2000, when it finally was registered as one of the legally recognised associations. This association is today the only collective actor that expresses a precise point of view on judicial reform and tries to be a interlocutor of the government. The Serbian Judges Association was never involved in judicial policies, not even concerning salary. Despite considerable challenges, the Association has tried to organize many activities to professionalize judges and to diffuse international practice and standards in Serbia. International donors as USAID and ABA-Ceeli particularly supported them. The only project in which the Association was involved together with a governmental representative is the Judicial Training Centre, fully established throughout international donors funds, especially UNDP, USAID and OSCE. The training program that were activated seemed to be useful and quite effective. According to the interviewed, today there are a part of Serbian judges that, thanks to the various experience of international socialization, acquired new competences and qualifications. Although only a small part of judges have beneficed of those occasions.

The level of institutionalization of this Association is very low. The government does absolutely not considered them. If this organization would be able to work in cooperation with the Ministry of Justice, they would be able to increase significantly the level of *coherence* within the judiciary.

RECENT DEVELOPMENTS

A definitive text for the judicial reform strategy was finally presented by the government in April 2006. The government stressed the adoption of this strategy and affirmed that this represented a relevant step in the judicial reformation process. However, once again the recruitment rules and the self-government functions represented the crucial knots. (Mitev-Shantek 2006). The government approved the strategy to comply with the requests of the EU that was asking for it since 2004; the drafting of the strategy is the direct result of the work done by international donors, some of them working with EU funds, such as GTZ (Germany), and by USA consultants, such as Booze Allen Hamilton. The Judges Association was not involved in the drafting of the strategy, although they prepared documents and papers in order to integrate it. In spite of the approval of the Strategy (May 2006), few of the provisions it contains have since been implemented. On this aspect one of the expert interviewed:

"Judicial reform is not a priority here in Serbia for politicians. Top priority is Kosovo and who will stay in power and or gain power. Everything else is not of big importance. Concerning the adoption of the National Strategy we can say that we almost have consensus about that text. There is something that it could be improve, but it can be considered a good basis to improve the judiciary. The problem is that it is just on paper.. Several months are already passed from the adoption and nothing was done. We can already see in some acts of the government, that they are opposing the aim of the strategy." (Interview with the President of the Judges Association of Serbia).

The new Constitution, approved by a national referendum at the end of October 2006, will bring substantial changes also in relation to the judiciary. The Constitution mentions, for the first time in the Serbian history, the existence of a self-governing body for the judiciary that will be in charge of appointment and promotion procedures. However, no clear provisions about that body could be found in either the Strategy or in other laws. Many of the innovations contained in the Strategy and in the new Constitution need, in fact, additional legislation to allow their implementation.

The Helsinki Committee for Human Rights in its 2006 report[32] evidenced as the judiciary is most stagnant sector of reform in Serbia. In the course of the 2006 the government considered as their biggest success the number of law passed by the parliament. The enforcement of that laws remained totally silent. Political parties (both majority and opposition ones) acted as a sort of cohesive block, aiming at inhibiting the reform process, being afraid of the possible consequences of the reform. In early 2007 some ministers proposed to reelect all the judges by a government's initiative. This caused sharp reaction of public and legal experts.

Corruption and clientelism, widespread within Serbian parties and political institutions, make virtually impossible the establishment of an independent judiciary. As Begović and Hiber (2006) suggest, one of the most explicit anti-reform alliance is the one between judges fearing to be removed from office (either due to incompetence or lack of integrity) and consequently trying to avoid changes and political parties trying to preserve effective control over the judicial system. According to the interviewed, within the judicial system, there is an imaginary thin line between two states of minds: that of judges that are afraid for the political

[32] Helsinki Committee for Human Rights. Annual Report: Serbia 2006. Human rights: hostage to the state regression. Belgrade 2007.

pressure over the judiciary and the other of judges that are not afraid and that see their career linked to the political will. Thus, they accept passively the political will. For sure this is one of the most evident legacies of the past that Serbia is not yet able to overcome. The level of *autonomy* is thus extremely low.

Table 4. Main judicial reforms outcomes in Serbia.

Judicial organisation and administration	**Constitutional guarantees of judicial independence**	**Self-governing body**
The 2001 Law on Courts Organization defined the structure of the Serbian judiciary. In 2003 two special panels on war crimes and organized crimes were created. The establishment of a court of appeal is not yet completed.	The 1991 Constitution formally envisaged guarantees of judicial independence, in practice any guarantees was respected. According to the international observer, even the 2006 Constitution does not yet provide adequate guarantees for judge's independence.	The HCJ was formally created in 2001. However, until 2003, the National Assembly did not elect the HCJ members. The 2006 Reform Strategy envisages that a new self-governing body High Court Council (HCC), constitutionally recognised.
Selection	**Judges Association**	**Judicial training**
HCJ would have been in charge of candidates' proposal, in practice frequent amendments to return this power to the National Assembly and boycotting of the HCJ proposals. Gran Personnel Council in charge of the dismissal competencies.	It was established in the mid 90s but officially recognized only in 2000. However, it has never been involved in consultations or in programs with the government.	Judicial Training Centre was established in 2001 thanks to the international al donor's activity. Only a small part of judges are currently involved in training programmes.

4. Conclusions:

Overall the three countries present low level of judicial institutionalization, with a partial exception for Slovenia where the judiciary seems to have a good level of complexity and autonomy from the other institutions, but still presents a low level of "internal coherence". The magistracy is still unable to provide an image of a professionalized corps with recognized rules and rituals. The bad functioning of the judiciary in terms of delay and backlog further undermines this image. The absence of an adequate structure for the judicial training represents the one of the main obstacles, missing an important source of professional socialization and norms internalization.

In Croatia, the level of organizational complexity, although adequately developed, in particular concerning the hierarchical structure, presents many problem concerning the horizontal diffusion of courts over the territory, causing a negative functioning of the judiciary as a whole. Autonomy improved with the important legislative changes in 2000, although it is still difficult to perceive the concrete effect of these changes. The level of institutional coherence could be seen as high if we look at the "aggressive" behaviour of the judges representative that was also able to gain some success aiming at improving the status of judges. Although, the common opinion among the experts interviewed is that the level of profesionalization and the internalization of recognized norms and practices is still low.

Concerning the Serbian case, the situation is surely the worst compared with other countries. Serbia is still undergoing important steps concerning state building and transition to democracy that influence also

the development of the judiciary. The organizational structure of the judiciary is still uncompleted and frequently subjected to change. The autonomy of the judiciary towards other institutions is near to be absent. Serbia is the country of the Balkan region in which the interference of the political parties over the judicial system functioning has continued to be more visible, also in the institutional choices made by the National Assembly. The level of internal coherence is still low, although it is interesting to notice this sort of two distinct groups of judges within the Serbian judiciary: those more professionalized and trained with international experienced, that claim for the absence of autonomy from the political power and those judges of the "old school" not impressed for the political influence over the judiciary.

Table 5. A qualitative assessment of the judicial institutionalization dimensions in the three countries

	Complexity	Autonomy	Coherence
Slovenia	**High**	**Medium/High**	**Low**
Croatia	**Medium**	**Medium (improving from 2000)**	**Low**
Serbia	**Low**	**Very low**	**Low**

The table is a qualitative assessment based on the empirical description presented in the previous pages.

Concerning the two theoretical approaches considered here, we firstly notice that the poor institutionalization of the judiciary in the case studies, is the *explanans* for the non strategic empowerment of the judiciary. Strategic empowerment as a way to safeguard threatened political elite is more likely to occur when judicial system reaches an adequate level of institutionalization, within a stable political system. In fact, Hirschl (2004) specifies in his work that the strategic empowerment of the judiciary is more likely to occur in presence of professionalized judiciary, holding a good reputation within the public opinion.

Indeed, if one takes to account the legacy of the previous undemocratic regime, using the main distinction between authoritarian and totalitarian experience (Toharia 1975), it would be expected a common pattern of judicial reform typical of the post-authoritarian experience. In this context, the Former Yugoslavian countries are a very interesting case for three main reasons: first of all, although for many features the Yugoslav socialism matches the definition of authoritarian regime (Linz 1975), even with some traits of a "*democratizing and pluralistic authoritarianism*" (Linz 2000), for what concerns the organization and the functioning of the judicial system seems to belong to the totalitarian type. Although the "double-system of justice" was in place also in Yugoslavia, what distinguishes it from the Southern European authoritarian regimes was the high degree of party control over the appointment and dismissal of judges. If in the experience of the Southern European countries during the non-democratic regime the professional recruitment and socialisation criteria of magistrates coexisted with the political ones, it was not the same in Yugoslavia. Southern European countries have been also characterized by a grooving role of the magistracy during the transition. As Guarnieri and Magalhaes (2006) pointed out, in Italy, Spain and Portugal, during the transition process, many of the governance powers of the judiciary system were transferred from the Minister for Justice to the 'revitalised' self -government bodies. The Superior Councils quickly absorbed such

executive, recruitment, nomination, sanctioning powers, etc., that during the regime had been used to neutralise the judiciary's independence. On the contrary, the totalitarian traits of the organization of the judiciary in Yugoslavia impeded the judicial institutions to reach the qualities of viable and stable institutions.

In accounting for the legacies of the past in Former Yugoslavia countries, we are forced to considered also the events of the 90s decade. As the case studies evidence, for some of those countries this was a decade of semi-authoritarian experiences, for others (Slovenia) it represented the early first stage of democratization. In the ethno-authoritarian regimes (Croatia and Serbia) judicial system continued to be controlled by the elite in power; while in Slovenia other issues concerning state-building and the establishment of a mature political system gained priority. For this reason the development of a "stable and viable" judicial system remained still on the back, delaying again the complete institutionalization of the systems.

Finally, if we aim to explain the low judicial institutionalization looking at the legacies of the past, it seems important to take into account also the legacies of the period that precedes the non-democratic regimes, that is the period form the end of 1800 until the Second World War (Grilli 2006). A substantial difference between the countries of the Balkan region and the Southern European ones concerns the fact that in the former ones, as mentioned above, the Romanist civil law tradition was introduced later. Moreover, during the nineteenth century, the unstable socio-political system reigning in the countries belonging to that area delayed the development and modernisation of the political and administrative institutions in different national contexts (Hosch 2006). When Western Balkan countries entered the Soviet sphere of influence, an institutionalised judiciary system did not yet exist. We have already mentioned that the majority of the judicial institutions were created during the soviet experience. While in the Southern European countries, the institutional framework at the basis of the judicial systems had fully developed and had incorporated all the fundamental elements for the civil law before the authoritarian regimes phase. This allowed some norms and habits to survive even during the non-democratic regime phases, preserving a minimum level of professionalism in the magistracy.

In a nutshell, the legacy of the past template seems to be more powerful in explaining the patterns of judicial reforms and the low level of judicial institutionalization in former Yugoslavia countries. Nevertheless, we tried to show how when considering the legacies we should specify exactly the policy arena and the period we analyse. Besides, this work highlights the need to analyse also the period preceding the non- democratic regime.

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