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Monitoring judiciary reform and the phenomena and processing hate crimes/hate speech

Report from the round table held on 14th December 2015

Documenta- Center for Dealing with the Past

Center for Peace, Nonviolence and Human Rights - Osijek

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REPORT FROM THE ROUND TABLE HELD ON 14th DECEMBER 2015

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Support to the Strategy of development of judiciary in the area of human rights

During Croatian accession negotiations the European Union paid special attention to the negotiation Chapter 23, where judiciary reform occupied a prominent place. Judiciary reform was one of the four areas negotiated within the Chapter 23. In the process of achieving judicial independence, the emphasis was put on the entry into judicial profession and the career management of judicial officials- interns, counselors, judges and state attorneys. The Union required that the selection procedure of interns, admission of judicial or state attorneys' counselors into state service, appointment and dismissal of judges and state attorneys be based on uniform, objective and transparent criteria. Apart from the entry criteria, introduction of objective and transparent criteria for promotion was also required. Also, the appointment of court presidents was also important for strengthening judicial independence, as well as strengthening independent judicial bodies (State Judicial Council, State Attorneys' Council). This implied a reform of legislative and institutional frame, that is, the reforms aimed at excluding the influence of politics from the appointment procedure in order to transfer this responsibility to the judiciary itself.

An emphasis was put on automatic case allocation, further construction of system of declaration of assets, procedures of ethical code violations, strengthening of the system of disciplinary responsibility of judges and state attorneys, and the issue of criminal immunity of judges. The objective of automatic case allocation was to remove the risk of manipulation in allocating cases and ensure that a completely impartial judge treats the case. Namely, automatic case allocation means random case allocation in a way that the cases are distributed by previously established criteria.

The aim of the European Union regarding the system of declaration of assets was to ensure the preconditions so that the system would bring the expected results, especially regarding preventing corruption in judiciary. The main problem observed was an inadequate control of declarations of assets.

Regarding disciplinary responsibility, the EU requested a wider specter of possible disciplinary sanctions available for the corresponding violation of ethical code and increasing objectivity in the application of disciplinary procedure by separating functions of the alleged violations from the function of deciding on the disciplinary sanction.

Independence and impartiality alone are not enough if professionalism and expertise of judicial officials are lacking. Therefore the European Union dedicated special attention to strengthening the system of training and increasing professionalism in the judiciary. The EU requested an establishment of an independent judicial institution (Judicial Academy) with sufficient financial assets and personnel to carry out training programs. Also, it required an improvement of training plans and programs.

Furthermore, the EU required rationalization of court network for the sake of a more equal distribution and burdening of the courts with cases, as well as reforms in procedural laws to shorten the length of judicial procedures. Also, the courts were to be disburdened by non-judicial issues, and alternative dispute solution was incentivized. In order to achieve a better administration of the judicial system it was necessary to ensure a better statistical follow-up, which required computerization. Finally, an obstacle to the efficiency of the judiciary was observed: inadequate working conditions, that is, inadequate judicial infrastructure.

Judicial reform strategy 2013-2018

Motivated by the near accession of the Republic of Croatia to the European Union, at the session held on 14th December 2012 Croatian Parliament adopted a new Judicial Reform Strategy 2013-2018. The strategy states that independent, efficient, accountable and professional judiciary is necessary for dealing with challenges of globalization and modernization. The main objective of the Strategy is to adopt the highest European standards, while preserving traditions and the existing fundamental values of Croatian legal system.

The new strategy does not have any special innovative solutions compared to the previous one, but it stresses the necessity of further development of earlier directives related to strengthening of professionalism, independence, impartiality and efficiency of Croatian judiciary.

The strategy is based on five general areas as the basis of future strategic plans:

1. Independence, impartiality and professionalism of the judiciary
2. Efficiency
3. Croatian judiciary as part of the European judiciary
4. Human resources management
5. Using the potential of modern technologies

Without getting into details of every area, which is not the purpose of this short analysis, we shall only stress the fundamental goals. One of the fundamental goals is further strengthening of the capacities of the State Judicial Council and State Attorneys' Council, and continuous training of judges and other judicial officials with the aim to increase their impartiality, efficiency and professionalism, which should be achieved through reviewing the role and the tasks of the Judicial Academy and through incentivizing professional evaluation, salary system, material status and pensions.

Some of the further goals are: reform of misdemeanor courts, continuing monitoring of the recent reform of administrative courts, reform of the land registry proceedings, civil proceedings, specialization in small claims, outreach program, reducing case backlog, improving and strengthening the system of free legal assistance, full establishment of probation system in the Republic of Croatia, strengthening capacities of Croatian prison system etc.

The strategy stresses that the rationalization in the judiciary was already carried out in the former strategy by reducing the number of courts and state attorney's offices. The aim of the new strategy is to keep reducing the number of courts and state attorney's offices until the end of 2019.

In the light of full membership of Croatia in the EU, as a strategic goal it is set the founding of services for follow-up and implementation of EU law, specialization of courts and state attorney's offices for cooperation with the EU, preparation for participation of Croatian judicial officials in the work of EU judicial bodies, primarily regarding their education indispensable for quality work with EU rules/legal acts.

Furthermore, the strategy sets goals regarding human resources, such as additional employment of new judicial personnel, distribution of personnel according to the needs of the justice system after implemented rationalization, and specialization of personnel.

The last area stresses the use of the potential of modern technologies in order to increase work efficiency and productivity of employees in the judicial system. Also, development, establishment and implementation of CTS (*Case Tracking System*) in all state attorney's offices is emphasized. The

strategy stresses computerization of Croatian prison system and misdemeanor courts, full functioning of Joint information system for land administration (*ZIS*) and development and implementation of Integrated Land Administration System (ILAS).

Finally we can say that the directives stated in this Strategy are a reflection of all the efforts with the final aim of reforming the Republic of Croatia in a modern European state, that will not lose its traditional legal system, but will adapt it to the acquis. One of the main goals of the Strategy is the creation of a society with the highest standards of democratization, legal security and lawfulness.

How far have we come?

Judicial Reorganization

After judicial reorganization and closure of smaller courts (renamed into permanent services) today we have 116 judicial bodies: the Supreme Court of the Republic of Croatia, 15 County Courts, 24 Municipal Courts, Higher Misdemeanor Court of the Republic of Croatia, 22 Municipal Courts, Higher Commercial Court of the Republic of Croatia, 8 Commercial Courts, Higher Administrative Court of the Republic of Croatia, 4 Administrative Courts, State Attorney's Office of the Republic of Croatia (DORH), 15 County State Attorney's Offices, 22 Municipal State Attorney's Offices and the Office for the Suppression of Organized Crime and Corruption (USKOK)[1]. Significant changes were observed regarding competences for decisions upon appeal. As of 1st April 2015 every County Court in the Republic of Croatia is competent for second-instance decisions upon appeals regarding municipal courts decisions in criminal procedures, and as of 1st February 2016 every County Court will be competent for second-instance decisions upon appeals regarding municipal courts decisions for other civil cases. The results of this reorganization should increase the efficiency of court work and contribute to the specialization of judges, as well as a more cost-efficient resource management.

"Random Case Allocation System"- eSpis

"Random Case Allocation System" in the Republic of Croatia is envisaged by the *Courts Act* (Official Gazette 28/13, 33/15, 82/15), while *Court Rules of Procedure* (»Official Gazette«, br. 37/14) and the *eSpis System Working Rules* (Official Gazette 35/15) further elaborate the above mentioned provisions of the Courts Act. The Article 10 of the *Courts Act* states that cases will be assigned to judges and panels according to a schedule which is determined in advance on an annual basis. A case which, according to such a schedule, has been assigned to a particular judge or panel, may be assigned to another judge or a panel only if the original judge or panel are not able to perform their task. The court president has a duty to deliver the valid annual working schedule to the president of the immediately higher court and the Rules of Procedure of the Ministry of Justice specifies that the courts can use IT and other technologies of automatic data processing, as well as the rules of procedure of courts that use the *eSpis* system. The Minister of Justice takes the decision on the start of using *eSpis* system for each court, after technical and organizational conditions are fulfilled.

The application of the random case allocation principle through a computer system started with the *eSpis* project in 2001 by signing a contract between the Government of the Republic of Croatia and the World Bank on funding Integrated Case Management System (ICMS) project. *Court Rules of Procedure* (Official Gazette 158/2009) that entered into force on 1st January 2010 prescribed the procedure of courts using the *eSpis* system- a uniform IT system for judicial case management. According to the data by the Ministry of Justice, all the regular courts (except administrative and

[1] https://pravosudje.gov.hr/istaknute-teme/reorganizacija/6177

misdemeanor courts and the Municipal Civil Court in Zagreb) are covered by the *eSpis*, and therefore they should apply the computerized annual case schedule system.

For instance, the Osijek County Court published on its website the annual working schedule for 2010-2016[2]; according to the data from annual schedules on first-instance criminal cases and second-instance appeal cases, first-instance and second-instance civil cases are being held according to the Article 26 of the *Court Rules of Procedure* (computer system), while for the investigation judges, judges from USKOK cases, and war crimes the schedule is composed according to the Article 27 of the *Court Rules of Procedure*, and according to the reception of cases by alphabetical order of judges. The same system is used by the Split County Court. Random case allocation represents one of the European standards of impartial and independent court rulings before a court established by law. Its further implementation should be insisted on, especially in criminal cases, often perceived by the public opinion as "politically motivated procedures".

Publishing court rulings and work reports

The *Constitutional Law on the Constitutional Court of the Republic of Croatia* prescribes that the decisions and important rulings of the Constitutional Court should be published in the Official Gazette of the Republic of Croatia. Publishing case law of the Constitutional Court and important data on the official website of the Constitutional Court[3], is prescribed by the principle of public activity of the CCRC. Article 4 of the *Constitutional Court Rules of Procedure* ("Official Gazette", No. 181 of 14th November 2003.), as well as the Art. 29 of the Constitutional Law on the Constitutional Court of the Republic of Croatia (OG 99/99, 29/02, 49/02) prescribe the obligation of publishing decisions and important rulings in the Official Gazette, taken in the procedure of evaluation of constitutionality of laws, or compatibility of other rules with the Constitution and the Law, as well as decisions and rulings taken in extrajudicial procedures for the protection of human rights and fundamental freedoms guaranteed by the Constitution. If more decisions or rulings are based on the same legal bases or same or similar factual state, only one decision, or ruling, shall be published.

The Criminal Code of the Republic of Croatia prescribes the obligation of making the judgment for a criminal offence available to the public[4], generally in the media. Other rules regulate the obligation of making the information public, especially the *Law on the right to access to information* (OG 25/2013, 85/15). The Law on the right to access to information prescribes the obligation of institutions of public authority of making the information public on their websites, in an easily accessible way, laws and other regulations linked to their area of work, general legal acts and decisions they take, that affect the interest of users, with the reasons of the decision takings; analogously, this also applies to courts.

The report of the Supreme Court of the Republic of Croatia on the implementation of the Law on the right to access to information states that during 2010, SCRC published its 8.401 judicial decisions of and 230 decisions of other courts on the Supreme Court website. Today on their website states that there are a total of 170.821 decisions published, but they are anonymised and difficult to search. Also, the frequency and timeliness of their publishing as a rule dates at least a month since the issuance of the decision. Municipal and County Courts extremely rarely publish the whole judicial decisions or rulings.

Regarding the procedure of anonymisation of court rulings, there is no unified practice. The *Rules on the*

2 http://sudovi.pravosudje.hr/zsos/index.php?linkID=23

3 http://www.usud.hr

4 Criminal Code of the Republic of Croatia, Art. 80 (OG 125/11, 144/12) prescribes the **obligation of public announcement of judgment.** In a judgment pronouncing the perpetrator guilty of a criminal offense the court may order upon request of the interested party or State Attorney, and when in the interest of the injured party, that such a judgment be publicly announced at the cost of the perpetrator. By ordering the means, the time, the manner and other circumstances of the public announcement of the judgment, the court shall ensure that these circumstances correspond to the circumstances of the publication of the matter by which the criminal offense was committed.

anonymisation of judicial decisions, as well as the *Instructions on anonymisation of judicial decisions* based on the Art. 6. of the *Court Rules of Procedure*, were adopted by the President of the SCRC on 31st December 2003, and they were published on the SCRC website[5]. The above stated Rules anonymizes the data related to parties to the proceedings, their authorized persons, legal representatives, witnesses and the injured persons. On the contrary, the Higher Commercial Court of the Republic of Croatia, in the framework of the project "Caselaw of the Higher Commercial Court of the Republic of Croatia", carried out according to the National program of fight against corruption 2006 - 2008, enables a review of the most recent case law of the Higher Commercial Court and commercial courts of the Republic of Croatia and mad available to the public the decisions of first and second instance commercial courts. This is a unique example of publishing court rulings without anonymisation. That way the transparency of the work of judges and courts is strengthened; the possibility of public control is given, as well as the availability of database for scientific-research and educational purposes at Law Schools[6].

Making court rulings public is in a conflict of two interests and legal principles- the principle of public activity of public institutions and the right to access information on the one hand, and the right to personal data protection on the other. From the performed research it is clear that the existing legal provisions are not a sufficient legal framework for a uniform procedure and interpretation of the above stated norms. The Article 146 of the *Criminal Code of the Republic of Croatia* prescribes the unauthorized use of personal data. Access to information in Croatia is a constitutional right recognized as such with the last Constitutional reform, although the legal framework exists 10 years ago. With the reform of the Constitution in June 2010, Article 38 was amended with its Item 3: "The right to access to information held by any public authority shall be guaranteed. Restrictions on the right to access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law" (consolidated text, OG 85/10.). Because of the incompleteness in legal and institutional framework, insufficiently developed culture of transparency and lack of respect of legal obligation, the application of the transparency principle in practice is seriously lagging behind the desirable and necessary situation. The consequences are unimaginable for the legality and legal certainty, responsibility of the authorities, efficiency in public spending and achieving public policy objectives. Corruption scandals and lack of trust in authorities and the judiciary are a reality of Croatian society; therefore it is necessary to strengthen transparency in public administration.

With the implementation of the IPA 2009 project "Roll-out of ICMS (*eSpis*) on Selected Municipal Courts" electronic Notice Board service (e-Notice Board) was developed and implemented and thus enabled delivery of writs to the parts in court proceedings by using IT technologies. So far E- Notice Board has been implemented in only some courts. All the municipal courts use it, except for the Zagreb Criminal Municipal Court, five county courts, six misdemeanor courts. The announcements are differing by the application of the instructions on anonymisation. Most of the courts publish their decisions without the anonymisation of the parties' personal data.

Trust in judiciary would significantly grow by making the rulings available to the public, as well as the statistic data of the courts, other reports and generally greater work transparency. The provision of the Article 45 of the *Courts Act* („Official Gazette", No. 28/13, 33/15), in force as of 1st April 2015 prescribes that once a year the President of the Supreme Court of the Republic of Croatia has the duty to present the Report to Croatian Parliament on the situation of the judicial power for the previous year, until 30th April of the current year. The first report on the state of judicial power was presented by the President of the Supreme Court for 2013.

[5] http://www.vsrh.hr/

[6] http://www.sudacka-mreza.hr/sudska-praksa.aspx

Appointment, promotion and dismissal of judges

The role of the judge- *conditio sine qua non* of judicial reform

The constitutional and legislative framework (the Constitution of the Republic of Croatia, the Courts Act, the Law on the State Attorney's Office, the Law on the State Judicial Council, the Law on salaries of judges and other judicial officials) should represent a good legal basis for the establishment of judicial independence. The procedure of selection, promotion, appointment and dismissal of judges and state attorneys, their disciplinary responsibility, should completely exclude the influence of politics or legislative and executive power. The right to a fair trial, and the most important aspects of this right- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, are guaranteed by the *Convention of Protection of Human Rights and Fundamental Freedoms* (Article 6) and the *Constitution of the Republic of Croatia* (Article 29), and the conditions for carrying out a fair trial are: stable and ordered legal system, ongoing professional training of judges, state attorneys, lawyers and other judicial employees. The Code of Conduct for Judges explicitly states the ethical principles in performing judicial duty: independence and impartiality, constitutionality and legality, as well as equal treatment of all the parts in the procedure.

Presentation given by Professor Alan Uzelac, Zagreb Faculty of Law at the round table held on 14th December at Novinarski dom (Journalists' Association):

More than a quarter century has passed since my first participation at a round table dedicated to judicial reform in the context of the protection of human rights. When I was invited to this gathering, I realized that my first serious legal-scientific text, published in 1989 in "Naša zakonitost" journal, was a result of a similar round table, on judiciary and human rights. The title of the text was "Constitutional order without human rights, human rights without constitutional order". And in that text, among other things, I stressed that the impartiality and the institutional independence of the judiciary is guaranteed through the system of division of powers with the doctrine of "checks and balances", the most important instrument for establishing rule of law and safeguard of adequate interpretation of laws and the rule of law. Naturally, only independent, and at the same time highly professional and efficient judiciary can tackle such big challenges. Therefore, today I would like to go back to my first text, by establishing a couple of hypotheses that will refer to the current situation in judicial reform, in light of the developments in the last period, with an emphasis on the steps forward taken in the process of EU accession, and after the accession until today. Here I would like to concentrate on the selection and promotion of judges, but also to some other topics. From my observations on the current situation of judicial reform it will become clear that the situation is not significantly improving and that in the long term it would be necessary to thoroughly review the approach to judicial reform. Therefore, by way of conclusion I will pose questions that I had posed in my first text long time ago, and these questions are dedicated to the constitutional dimension. Namely, as we all know well, these days it is very popular to talk about the necessity of achieving political consensus in order to be able to implement not only legal reforms, but also some reforms affecting the fundaments of the constitution, although we probably all know that such consensus is difficult to achieve. But maybe the issue of constitutional provisions on judicial power, especially those referring to selection, appointment and promotion of judges, should be questioned, too. I shall analyze this issue from the perspective of the question on which current provisions obstruct to a greater extent the establishment of an efficient, impartial, highly qualified and quality judiciary that could deal with all the sensitive social problems, and among them the topic on today's agenda, processing hate crimes and hate speech.

First I would like to start with some questions and hypotheses. The first question is to what extent can we be satisfied with the situation in the judiciary and with the quality and activity of judicial

personnel. As we know well, it is very difficult to answer this question based of objective data and comparisons, because the methodology is still in its initial phase. It has not become practice. However, what we can establish by all means is that there are two diametrically opposing positions regarding the situation in the judiciary. On the one hand in the media and the general public there is a very critical attitude towards judiciary and its carriers, and in the public discourse we can often observe linked terms such as slowness, incompetence, corruption. On the other hand, in the ranks of the judicial authority itself there is often and maybe dominant attitude that there are no significant or big problems with the judiciary, and that the problems, if any, result from the lack of understanding by the public on how the judiciary works and the sensationalistic reporting by the media, too frequent and unprepared law reforms and political pressures on the carriers of judicial power. Thus two fundamentally different discourses are created and there is very few real dialogue between them, which is also starting to be observed as an additional problem, as a phenomenon of separation and hermetical closure of judiciary against public criticism. My hypothesis regarding this issue is that public criticism has always been a democratic corrective and a reflection of judicial activity and that it is good in its essence. The attitudes of the public and the media are not always an impeccable reflection of the real situation and facts, but they are one of main indicators of satisfaction or dissatisfaction with the work of the judiciary, and they are coming precisely from those the judiciary should serve. The judiciary, regardless of a possible erroneous perception of the term "judicial independence" should be aware that its privileged institutional position is precisely in the function of better serving its fundamental social purpose: to be reliable and to offer quality public service for the citizens and all the other under its jurisdiction. Therefore, although it is completely correct that the public opinion and media monitoring of judicial work is often incompetent and inadequate, civil society has the authority and necessity to follow its work. Precisely in order to overcome this mutual distrust, and sometimes even animosity, it is very important to maintain, at gatherings like this one, a dialogue between the representatives of the judiciary and the representatives of the users of judiciary. First of all, this dialogue helps us understand that there really is a problem, and then to identify it and describe it better.

The second question I would pose is how judicial strategy was established and implemented, above all in the period of Croatian EU accession. Preliminarily, I should say that the term "judicial reform" is pretty worn out today and compromised to a great extent. Namely, judicial reform has been the slogan since late 1980's, and as of mid 1990's until today it has constantly been on the agenda in Croatia. We can also observe that the changes in the scope of duties of the judiciary and judicial power were extremely slow in almost all the key aspects. There is no concluding evidence that the functioning of judicial apparatus radically changed. There are some indicators of change, for instance, in my area of study, statistics of enforcement cases that are to a greater extent remitted to notary publics or the Financial Agency, even the direction of these changes can be doubtful. What we can undoubtedly establish regarding judicial reform is that the pressure on its creation and implementation was strengthened in the context of EU accession negotiations. Judiciary and fundamental rights, as the topic of the notorious Chapter 23 of accession negotiations were very prominent in slowing down Croatian EU accession.

I would like to establish three hypotheses on this issue for this round table. First, European interest in Croatian judiciary can serve as an additional indicator of the need for a more significant transformation of our national justice system. If there are deficiencies observed from European and comparative perspective that can endanger the functioning of Croatia as EU Member State, then these deficiencies should be taken seriously. Second, although European pressure had a role of accelerator and catalyst of changes, it was not sufficient to finish reform plans and put them into practice during the negotiations period. The decision on closing Chapter 23 was in the end a political one, and not a conclusion that the situation in the judiciary significantly changed and that the deficiencies in its work

were removed. At the moment of closing Chapter 23, the EU essentially was satisfied with the prospects that changes would continue, that are accepted in principle and at a normative level, and in some places partially implemented. A third hypothesis – the EU pressure, in spite of its in principal positive effect, brought some new problems along. The first problem was that the judicial reform was transformed from an issue of domestic policy into a foreign policy issue. Dialogue with European experts was increasingly being carried out at a political level, while the dialogue with domestic experts, expert public and judiciary as such were decreasing and partially even vanishing. The initiated reforms were very weakly explained and communicated, and the answer to the majority of the questions was often: it has to be like that because this is what the EU requires. And we know well that the EU accession was a political imperative. In that sense the competent ministry, Ministry of Justice, started to function as a Ministry of Foreign Affairs. It also brought to a shift in goal setting. Judicial reforms were implemented to create an impression of change outwards, towards the EU, and in the short term. The mid-term and long-term goals and real changes, to the extent they were attempted, came second. The shift of judicial reforms in the sphere of foreign policy in the period of the last government is visible in the very person of the minister. If we read the CV of the incumbent Minister of Justice, his professional career was mostly of one a diplomat, and certainly not of a judicial official. It is also interesting that even as a diplomat, according to diplomatic criteria, the current Minister Miljenić was the most successful minister. Namely, he is the only minister of justice since Croatian independence who managed to stay in office for the whole period. However, it is doubtful whether his ministerial longevity, and even relative public popularity, is a result of diplomatic success in creating impressions, or a result of a real success in the work of the Ministry he was in charge of, or still temporarily is. Overall, until Croatia joined the EU, and regardless of a relatively lengthy period of negotiations of around seven- eight years, significant reforms regarding Croatian judiciary are to a great extent still left at the level of strategies, adopted, but not yet implemented laws, and half-done changes. I am skipping to a third question. What is the result of judicial reform in the field of ensuring quality judicial personnel, and what is the trend that we can observe since Croatian accession to full EU membership? In the context of EU accession one of the selected direction of changes on which European Commission experts insisted was the introduction of objective criteria of recruitment and appointment of judges and other judicial personnel. On the one hand the EU supported strengthening institutions such as the Judicial Academy and the establishment of the State School for Judicial Officials, as well as a system of initial and continuing professional training and specialization in general. On the other hand, the EU supported a system based, ideally, on objective and transparent criteria, at all levels: from the first employment in the justice system, regularly in the capacity of judicial intern, through the first appointment as judge, until all further decisions on promotion. The then existing system of selection and appointment was qualified in Progress Reports, I quote, inadequate, intransparent, without uniformed objective criteria. Equally, it reflected on the work of Judicial Inspection- transparency of disciplinary procedures against judges, as well as strengthening the capacities of the Ministry of Justice to plan strategic development and reforms. In order to respond to the justified criticism from European ranks, in 2010 several changes were adopted regarding the selection of candidates for judges, selection of judges, decision on their promotion and appointment of court presidents. In short, for future potential candidates for judge a competitive system of selection was introduced in order to enroll in the State School for Judicial Officials. Only through the State School of Judicial Officials can one be appointed as judge. Objective and quantifiable criteria were stressed in the form of a system of points for candidates who participate in the procedure of selection for judge, and the portion of subjective evaluation of candidates is reduced to the interviews before the State Judicial Council. Also, the procedure of selection of court presidents was reformed, and the Judicial Academy lived a short period of relative autonomy and progress. On the bases of all these changes, although they were left unfinished or uncoordinated in many elements, Chapter 23

negotiations were closed, and Croatia joined the EU. However, even partial and incompletely implemented reforms left behind many people who were unsatisfied, first of all those who did not manage to qualify or get promoted according to the new rules, such as for instance judicial counselors who thought they would qualify as judges almost automatically and by force of idleness, and according to the new rules they could not, or did not want to enroll into State School for Judicial Officials. As an anecdote, many of them were comforted by the formula: wait for Croatia to become full member, and then all the so far changes will be easily dismantled, and the system will get back to old and usual ways of functioning? Did these forecasts become reality? It seams that the anecdote on dismantling reforms after EU accession is not totally unfounded. By the way, similar scenario was seen in other acceding countries, such as our neighboring Slovenia. Typically, after the wave of reforms and the accession, there is a backward-going period where reforms are abolished, and afterwards the direction was gradually changing again and things would start to move forward.

In my introductory speech I would like to limit myself only to some examples that can indicate that Croatian judicial reform after the EU accession is also going in the opposite way and that it really threatens with dismantling some of the key elements that were recognized in the accession negotiations and acknowledged as a condition of objective and transparent judicial system. The first example I would give are planned amendments to the provisions of recruitment of interns into judicial bodies and the bar exam. I have already said that precisely through internship and exam, judges, as well as other elite legal professions are recruited. By the way, these amendments have not been finalized due to elections, but they are completely prepared in the Ministry of Justice, waiting for the new Parliament to get formed. In this context, let us hope it would be as late as possible. These amendments would abolish the system according to which as of 2008 the candidates at a bar exam are ranked in order to distinguish their capacities and qualities, and it would go back to the earlier practice where candidates were evaluated with "pass" or "fail". Also, additional professional closure of the process of future judges and state attorneys recruitment is planned, in a hermetical circle of members of judicial elites by introducing rules that would eliminate the so far modest participation of external examiners. This way the doors are again opened for institutionalizing subjective approach through so-called structured interviews that make way for nepotism and selection bypassing objective and professional criteria.

Also in the procedure of the appointment of intern candidate in judicial bodies, practically one of the most important elements for entering future career as a judge, the amendment foresees eliminating all the formerly obtained achievements: first of all list of notes from graduate studies, as a criteria for candidate selection, and again by the same formula the selection is foreseen on the basis of internal test, and again an internal oral examination before an internal commission at the Ministry. By that in principle the work and achievements of some candidates is devalued and the continuity of their work is completely ignored. This sends a message to the future judges that the long-year effort does not matter at all, but that the only thing that matters is to satisfy internal, and highly intransparent criteria.

Another example refers to the practice of the new State Judicial Council regarding the appointment and promotion of judges. Namely, in spite of the circumstance that candidates for judges in the procedure of appointment are evaluated on the basis of several criteria, one of which being so-far work results, and another one on pointes obtained at the structured interview before the Council, since the appointment of the new Council, the practice of ranking candidates by the list and the number of obtained points was abolished. For instance, in the recent judge's appointment, for the most prestigious promotion of a second-instance court of general competence, out of 85 judges the Council named the candidates ranked (that is, even by the very SJC at the interview) 5^{th}, 8^{th} and 13^{th}. In another similar case the Council appointed candidates ranked 18^{th} and 28^{th} from a list of 57 registered candidates. Maybe our Law School could apply this practice in future when evaluating student exams. It is interesting that the new SJC started with this practice regardless of the explicit provision of the Law on State Judicial Council stating that as of 1^{st} June 2011 the decision of the Council, "must be based on points obtained and the

established priority list of the candidates". This pretty clear provision was reinterpreted by the State Judicial Council in the media, and on the basis of their interpretation of the word "based", SJC came to the conclusion that this norm "does not mean that the priority list has a force of ius cogens *and a dictate that would definitely establish the selection according to the ranking on the list of the candidates", but that this only indicates to the Council that, at a time of taking decisions "establishes a reasonable balance between numerical criteria and the criteria that cannot possibly", I quote, "be covered by numerical indicators". In this interpretation the State Judicial Council took use of one recent decision of the Constitutional Court that, true, showed understanding for a higher degree of decision-making of the Council at the moment of appointment. But this decision was taken upon a constitutional complaint to an appointment from 2010, when there was no obligation of basing decision on the obtained points. As we can see, the foot in the door by the SJC has now a door wide opened, and it is yet to be seen whether these new cases will be considered, explicitly contrary to the legal provision, a reasonable balance between adequate and objective criteria. Such cases of renouncing from a strive to objectivize criteria of excellence, however, represent only a small exception compared to the third example- new system of professional recruitment of candidates for judges according to the amendments of the Law on Judicial Academy of September this year. Namely, the amendments that recently entered into force are not only a step backwards, but de facto contain a decision of abolishing the State School for Judicial Officials, that is state school for judges, or, if we wish to euphemize a bit this qualification, by all means its general marginalization. Although the State School was a part of the package that resulted in the closure of Chapter 23 in the context of EU negotiations, instead of strengthening it, the current regime contains three mutually linked elements that altogether bring us to the conclusion that they renounced from this project. The first element is shortening its curriculum from two years to only one year. Since until now the training in the School was extensive, by some evaluation at the level of a mediocre community college, this changes takes away its purpose additionally Another element is the introduction of the possibility that the candidates who, after passing the bar exam, worked for four years in judicial practice, can present themselves directly at the final exam, even without attending this shortened professional training at the State School. Since this change was adapted to a numerous population of judicial counselors, it is to be expected that there will be more candidates who did not attend the School at the final exam, than the ones who will attend it. Moreover, considering the reduced number of the generations that attended the School so far, it is questionable if there will be enough candidates to attend the School and to justify the training course. On the top of that, the State Judicial Council and State Attorneys' Council are no longer competent for the enrolment into the State School, and indirectly they are no longer competent for taking decisions for the recruitment of judges. This task is specifically endowed to a special personnel commission consisting of two judges of the Supreme Court, two state attorneys and one official of the Ministry of Justice. A similar commission would also decide on the final note at the State School that should, or determines, the later appointment for judicial post. It remains to be seen to what extent will this unauthorization of SJC from this part of the process of appointment and professional recruitment be considered compatible with systematic provisions on its competences and functions. But in any case the current changes can be considered an excellent illustration of post-European antireform judicial policy that shows that going back to old habits is not only possible, but, at least in the following and short-term period, real and likely. I would like to conclude with a statement that the previously described problematic dimensions are only a part in the mosaic of themes that should be opened in order to ensure that the personnel structure of Croatian judiciary is up to the future challenges. Some of these issues require not only knowledge and capacity, but also institutional changes that can imply constitutional changes. In the context of the subject that I am talking about today, I would especially stress the need for changing competences, composition and functioning of State Judicial Council. Namely, even out of the themes that were mentioned today, it is evident that in the current constitutional and institutional composition organization the SJC lacks capacity of carrying out some of*

its basic functions. Apart from the appointment of judges, where there is an inherent problem in the very composition of the Council, systemic disfunctionality also exists in the Council's activities regarding disciplinary procedures, and especially in all the issues regarding the appointment of court presidents. Considering disciplinary procedures, it has become evident that without a permanent and professional body that would continuously carry out disciplinary procedures, the procedure is not easy to be performed in a fair, efficient and timely way. Most of the similar bodies in other countries have special disciplinary courts in its structure, or in the framework of its judicial councils, and they have the necessary investigative and other resources, adequate personnel. We cannot say the same for our system, based on more-or-less amateur and sporadic participation of members in the procedures of the State Judicial Council. In the context of appointment of court presidents, the deficiency of institutional organization is even more visible. There is no doubt that the appointment of court presidents is important for the independence od judicial power, but it is even clearer that the major part of the competences of the court presidents are related to court administration, that is, administrative work that is crucial for the efficiency and quality of work of a court and of the judicial system as a whole. However, the same way that the court presidents often do not have adequate resources and budget to improve the work of the court, the State Judicial Council has even more resources to evaluate the credibility of the programs of candidates for court presidents, to continuously check the work of the selected candidate, and undertakes measures to eliminate observed deficiencies. Even more importantly, although it is not a constitutional task of the State Judicial Council because is responsible for the independence, but not the efficiency of judicial power. It is even less responsible to oversee the adequacy of court budget spending. According to their functions, the latter should be dealt with by the Ministry of Justice, as well as the President of the Supreme Court, but neither one of them have a decisive say in selecting and appointing those who should implement their policies. In a situation like this, where responsibility is diffuse and fragmented, and competences are insufficient, it is difficult to achieve the goals of reform, especially if logistic resources are insufficient or inexistent. The Constitutional position, composition and competences of the Judicial Council are no the only issues that require a possible intervention by the constitution-makers. Here we could also add the issue of harmonization of constitutional concept of independent and impartial court with the conventional case law and case law of the European Court of Human Rights that has a bit more different and less formal perception of independent and impartial tribunal. A special issue requiring intervention refers to the change of constitutional provisions on the right to appeal that, as it is, is also not compatible with European and comparative acquis, and it has long-term implications for the work and functioning of domestic judiciary, for instance, provoking all these frustrations caused by frequent abolishment and resending of cases for retrial. There are other topics that I would like to talk to you about, but it seems that my time is up so I would like to thank you for your attention and if you have any questions, I would be glad to answer. Thank you very much.

Public perception of judiciary

During 2015 we have observed a significant number of media articles regarding the situation in judiciary and some court rulings. Therefore we could call this year a year of turbulent judicial events. Already at the beginning of 2015 there was a decision of the Constitutional Court of the Republic of Croatia caused doubts upon constitutional complaint of convicted for war crime committed in Osijek, *Branimir Glavaš et al*[7]. The consequences of the above-mentioned decision, taken by the Constitutional Court four years after the complaint was filed, and its slowness seriously compromised the trust in legal security, are immense for the convicted, who filed the complaints, who, except for Branimir Glavaš already served their sentences, and then for the procedures of enforcement of foreign judgment in other states. In the above-mentioned case, Bosnia and Herzegovina confirmed the judgment of the Supreme Court of the Republic of Croatia and sent Branimir Glavaš to serve his prison sentence. The major consequences refer to the defendants in the criminal procedure that was by the CC ruling returned to the state of a non-final guilty verdict.

Different court rulings followed, by domestic courts and the European Court of Human Rights: review decision of the Supreme Court in the case of Swiss Franks *Franak*, abolishing of non-final verdict in the case *Fimi media*, or Dragan Paravinja, the judgments against Mladen Naletilić – Tuta, Milorad Momić, Zdravko Tolimir, Josip Gucić for war profiteering, Zorica Gregurić for destroying bilingual signs, Željko Sabo, Andro Vlahušić, conditional sentence of Tomislav Horvatinčić, as well as the European Court of Human Rights Grand Chamber judgment in the case of *Dvorski v. Croatia*.

The last public opinion poll on judicial system from July 2010, performed by the Ipsos Puls Agency, showed that a significant amount of population does not trust Croatian judicial system. This distrust was expressed through the absolute majority of citizens who don't believe that judicial bodies (courts and state attorney's office) perform their work according to the law and their social role. Additional element that confirms that the distrust is specifically related to the judicial system, and not a consequence of general distrust in social institution is the fact that judiciary is on the bottom of the list of institutions that enjoys confidence.

According to the EU Justice Scoreboard, published in March 2014, applying the standards of the EU, Croatia is among the least successful states according to the efficiency and perceived independence of its judiciary. The efficiency of judicial system is followed and evaluated according to the length of proceedings, clearance rate and number of pending cases. The Scoreboard also analyzes how justice systems are organized to protect judicial independence in certain types of situations where their independence can be at risk. Five indicators are used to cover the following situations: the safeguards regarding the transfer of judges without their consent, the dismissal of judges, the allocation of incoming cases within a court, the withdrawal and recusal of judges and the threat against the independence of a judge. Quality focuses on certain factors that can help to improve the quality of justice such as training, monitoring and evaluation of court activities, budget, human resources, the availability of Information and Communication Technology (ICT) systems for courts and the availability of alternative dispute resolution methods (ADR).

Of additional concern is the fact that the so far taken measures and efforts in improving the functioning of judicial system do not result in mass perception of positive steps in the functioning of the justice system.

[7] Constitutional suits were filed by Branimir Glavaš, Ivica Krnjak, Gordana Getoš Magdić, Dino Kontić, Tihomir Valentić and Zdravko Dragić against the judgment of the Supreme Court of the Republic of Croatia No.: I Kž 84/10-8 of 2nd June 2010 and the judgment of the Zagreb County Court No.: X-K-rz-1/07 of 8th May 2009.

From the presentation of journalist Slavica Lukić at the round table held on 14th December at Novinarski dom (Journalists' Association):

Trust in the work of the judiciary and legal security- problems and perspectives

Good afternoon everyone. As I can see, I am a minority here, and I will have to be careful what I say because there are lots of lawsuits, and, as I can see, there are many lawyers at the table.

When it comes to the evaluation of the work of the judiciary, there are two basic discourses. One, naturally, dominant among the judges, that Croatian justice system, naturally, still has certain transitional problems, but it does not differ in its essence from justice systems of the countries we are trying to get closer to, and that the difficulties it faces are mostly external, caused by frequent changes of normative framework, frequent changes of laws, and I suppose that they are partly right. Another discourse is very critical towards the work of the judiciary, and it is the discourse of the media, and in great part it is probably the media that create the dominant perception of the citizenry towards the judiciary. But I am afraid that the media are not the only ones who are responsible for that.

According to this year OECD report on the Trust in Government, that measured the degree of confidence of citizens in the police, the judiciary, the political system and the citizens in European countries, Croatia is among five countries with the lowest degree of trust in the institutions. The report was published in October this year. When it comes to trust in the justice system, Croatia is among three European countries with the lowest degree of trust. Only Portugal and Bulgaria have lower trust in judiciary than Croatia. This low level of trust and criticism by citizens towards judiciary partly comes from their personal experience at court. Citizens often call us journalists to tell us about their frustrations and complaints, primarily regarding the length of trials and the right to a fair trial. Also, the citizens base their opinion, on the experience of their family members and friends before courts, and partly the citizens form their opinion on the quality of justice from the image they get from media coverage of what is happening in the justice system. Naturally, the Association of Croatian Judges often stresses that the media are responsible for the lack of trust of citizens in the judiciary. That is, we, the journalists, are responsible because of our sensationalist, tendentious, unprofessional reporting on the work of courts and events related to the judiciary. I have to say that personally I cannot agree at all with such qualification, although of course I don't want to defend the media at any price because, of course, in Croatian media today there is a lot of sensationalism and superficiality, but I consider that the judiciary itself is the main responsible for the dominant critical impression of the citizens towards the judiciary. Here I will try to draw attention to several reasons that seem very important for creating such an image, and several topics that we the journalists covered since Croatia joined the EU. Through these topics in fact the public opinion and the trust of citizens in the judiciary are created. One of these topics that I am sure that strongly created the image of citizens regarding the work of judiciary and legal security in Croatia are so-called big corruption or anti-corruption trials. These are big cases from the competence of USKOK (Office for the Suppression of Organized Crime and Corruption), that started by the end of Croatian EU accession negotiations, and overlapped, whether by coincidence or not, with the time when Ivo Sanader stepped down from his duty of prime minister. They were initiated, I am sure we all remember well, in the last two years of the term of office of Prime Minister Jadranka Kosor. I will only mention a few: Podravka case, HAC (Croatian Highways), Poštanska banka (Postal Bank), involving the top management of big state-owned companies, and then, as a crown of anticorruption trials, cases against the very former Prime Minister Ivo Sanader. They all had in common spectacular arrests in front of TV cameras, leaking investigation information, leaking of USKOK depositions, or leaking other evidence that appalled the public opinion. I am not sure whether the journalists were at the height of their task, but the media were competing who will get more information and who will launch it in a more spectacular way. They were witnessing shocking levels of criminality involving top management of Croatian state-owned companies and top government

officials. Of course, this raised great expectations in the public. By entering the EU the citizens expected that judiciary is reformed at least to a certain extent, that it managed to escape from the pressure of politics, and that it got a new law, Criminal Procedure Code, that would give the State Attorney's Office free hands. So, in short, great expectations were created, that, as times goes by, have not been fulfilled. Thanks to the outcomes of these big anticorruption trials, or better said their length and their current outcomes, a significant amount of dissatisfaction was created in public.

I would select three groups of problems identified. Often after the trials finish, the sentence is not in accordance with the expectations of the public. That, is, the impression is that the sentences are too soft, especially when it comes to persons who are politically of financially very powerful. Recently there was one of such rulings that shocked the public, the sentence against Tomo Horvatinčić for the murder of two Italian tourists, who was sentenced to a conditional suspended sentence 1 year and 8 months , and with a conditional release to 3 years. There is a general and common impression that the sentence is absolutely unfair, and that Horvatinčić is privileged because of being wealthy. Another type of court outcomes when it comes to such cases, and frustrates the public, is when the first-instance court renders a guilty verdict, and then the ruling is quashed at the Supreme Court and sent for retrial. The media gave extensive coverage on such cases. We have the examples of HYPO Bank and FIMI media cases. The third outcome of big corruption cases that also frustrate the public (and are widely covered by the media) were decisions of the Constitutional Court that abolish final sentences, consequence of big and lengthy engagement of the State Attorney's Office. Such sentences are in fact abolished for the violation of constitutional and convention rights and sent for retrial- I would say that this practice of the Constitutional Court is not only discouraging for the public, but also for the State Attorney's Office and regular courts that invested enormous energy and capacities to bring these cases to the end. So, the public gains the impression that, even when some of these big anticorruption cases get a final judicial outcome, the powerful people who are accused/convicted use the Constitutional Court as a sort of a joker. The decisions of the Constitutional Court, although they are not a topic of this round table, but as far as I can hear the opinions of judges, are in fact disturbing and discouraging the fight against corruption, and create among citizens an additional feeling of insecurity and pusillanimity.

What I would stress as a special confusion to the public is a novelty introduced by the Criminal Code that entered into force in 2013. These are the plea agreements, and the replacement of prison sentences with community service. Different and for continental European law unusual court rulings are also consequences of the new CPC, but it seems that in our case law they are becoming worryingly widespread. Namely, it happens too frequently that it is sufficient that the accomplices in corruption in gross corruptive offences during investigation or in court plead guilty and rat on the others to get a privileged status, and with that very often a plea agreement for replacing prison sentence with community service. A symbol and a metaphor of such a sentence is already famous several-months potato pealing by the former Minister of Agriculture Čobanković. As I can recall, it was a case of embezzlement of around 40 million kunas from the state budget. These are some court sentences that created a dominant attitude of the public opinion, citizens of this country, that the laws are there only for the ordinary people, and that the courts are harsh only towards ordinary citizens, and when it comes to the powerful ones, then there are other criteria. Unfortunately, this impression was strengthened lately with the so called practice of release from investigative prison upon bail, another novelty introduced by the new CPC where bail was extended to other conditions for getting out of investigative detention, and not only in cases when there was risk of fleeing, as was the case in the earlier CPC. Of course, there was a series of cases where people who were accused of gross corruption offences would get out of investigation detention after two weeks or several months with enormous bails. These decisions shocked and scandalized Croatian public opinion. I think that Mr. Pripuz is an absolute recorder, since he was in detention for the shortest period of time. What

especially shocked the public was the decision of the Constitutional Court in the case of Milan Bandić and the interpretation of the Constitutional Court of the reasons why Milan Bandić should be released from detention. Even more scandalous is the decision on the return of 15 million kunas of bail to his lawyer, which has been thoroughly analyzed in the legal profession.

The next topic the journalists treated, and it seams to me very important and in some way significantly creates the /attitude of the citizens towards the justice system, and these are the side engagements of the judges. These are their engagements at arbitration panels in different associations, that is, side-jobs out of judicial duty in the narrowest sense. These are not only engagements in arbitration courts, but also lectures, cooperation with lawyers' associations and notary public associations. After the Law on Courts was reformed in 2012, the control of such engagements for us journalists has become somewhat simpler and easier because of an easier access to the declaration of assets of the judges. After getting access to the declarations of assets of certain judges, I studied the declarations of the judges of the Supreme Court, the Administrative Court, that is, higher courts, and I was shocked that some Supreme Court justices earn more than 200.000 kunas a year from side engagements, and this is net income. When I realized that these engagements on annual basis could be measured with the annual salary of Supreme Court justices, then you ask two things: how is it possible, when do these people do the work that we pay them for, their judicial office, and can this high income, not only for Croatian standards, somehow affect their judicial independence and impartiality. For instance, it is interesting that in the first 10 months of 2013 one of the justices of the Civil Department of the Supreme Court earned a net sum of 229.000 kunas for his part-time work. If we divide this by 10 months, it results that he earned 22.900 kunas a month from his part-time works, that is, more than his monthly salary at the Supreme Court. All these payments came from the same source- arbitration court of Croatian Chamber of Commerce. Than you really start to ask when does this man manage to do his work as a judge. In 2012 and 2013 the same judge earned from Croatian Chamber of Commerce 373.518 kunas. A special problem are part-time works and payments gained by judges of the Zagreb County Court, the largest court that tries the most important and the most serious corruption cases, at the arbitration court of Croatian Football Federation. A judge of Zagreb County Court who was this year elected as member of the State Judicial Council, for instance, in 2014 earned 97.000 kunas from Croatian Football Federation. A year earlier he earned 66.000 kunas, that is, in two years this judge earned 163.000 kunas from Croatian Football Federation. Naturally, a question arises to what extent can the County Court be independent in cases of corruption in football. There is a series of cases with final sentence, and some are in investigation phase. Also, close ties of Zdravko Mamić and the President of the Zagreb County Court were widely treated and questioned by the media, and naturally it strongly creates the attitude of citizens towards the judiciary independence. As I stressed, the Zagreb County Court is the largest county court in the country that tries very, very important cases, and the media pointed to all these problematic issues, in my opinion with every right, and neither the judiciary, nor the Association of Croatian Judges managed to give an adequate answer.

The State Judicial Council and recruitment and promotion in judicial profession was something that someone much more competent than me talked about in detail, professor Uzelac. It seems to me that, according to reflections of the judges at this table, after joining the European Union, and thanks to the already mentioned decision of the Constitutional Court, the State Judicial Council allows itself to arbitrarily evaluate candidates and skips the ranking lists according to the evaluation of judicial work. The judges are increasingly unsatisfied, and it seems that the Law on SJC, one of the conditions for closing benchmarks for Chapter 23, requiring that the judges directly elect their representatives at the SJC and therefore move away from politics, showed a series of deficiencies and it is obvious that it will soon have to be changed. We now have the second SJC elected according to that system. It seems to me that the current SJC is still fresh and we have to give it time for some concrete evaluation. But what seemed strange to me as journalist is that in the previous SJC-, is terrible hesitating of State Judicial

Council, and even law schools to suspend professor Boris Buklijaš from the Council after investigation was initiated and he ended up in detention. It was unacceptable hesitating and I am afraid that enormous harm was done to the reputation and the credibility of State Judicial Council.

One of the elements that also strongly affect the creation of attitude towards the work of the judiciary are war crimes trials. I would only like to remind that one of the most unusual war crimes trials is the one for the crimes committed in Grubori. I hope that one day someone will deal with that and in fact analyze in detail all that happened in the attempt to prosecute the responsible for this war crime, before the Hague Tribunal and Croatian judiciary. If I am well informed, these days the Supreme Court should render judgment in the first instance trial. What is especially interesting is that on 17th December it will now be 6 years from the start of investigation against the war commander of the Special Police, Željko Sačić. The investigation is still in course. Let me remind you that in January the indictment was finally issued and than abolished, and the County State Attorney was dismissed because of this, with an explanation that it was not sufficiently elaborated. Eleven months have passed since, and the indictment has not yet been issued.

Impartiality of the judiciary and equality of all before the court is a precondition without which there is no free, open, democratic society and without which violations of human rights become a frequent case. Although to the citizens in the Republic of Croatia the Constitution and positive laws as well as numerous provisions of international laws guarantee these values, we are aware that the existence of laws and institutions still does not mean an effective rule of law. Adopting one legal norm, and especially its real implementation, requires more than formal involvement and must be based on the balance of forces in a society where the society will be capable of forcing the state to attain to its own laws. In the Judicial Reform Strategy, among the participants of its implementation the general public is invited to participate in the development of the judiciary in most different ways, in group or individually, and one of the main determinants of the system of strategic planning and management is an openness to communication with the public. Therefore with our activities we wish to engage in affirmative action and support the strengthening of impartiality and professionalism of the judiciary, the strengthening of independent, autonomy and capacity of the State Judicial Council and State Attorneys' Council, consistent application of objective and transparent criteria in appointment and promotion of judicial official, professional, material and administrative strengthening of the Judicial Academy, incentivizing quality of human resources in the judiciary.

Occurrence and prosecution of hate crimes

Since July 2015 *Documenta* – Centre for Dealing with the Past, Center for Peace, Nonviolence and Human Rights Osijek, and Association Pravda from Bjelovar have been implementing the project *Support to the Strategy of development of judiciary in the area of human rights* who aim is to achieve European standards regarding the independence, impartiality, professionalism and efficiency of Croatian judiciary, as well as to raise social awareness on the importance of the respect of human rights, and to improve the identification of discriminatory practices in the society as well as strengthening marginalized groups exposed to violations of human rights. As of 1st July we continued monitoring war crimes with the support of the European Economic Area and the Kingdom of Norway Grants (EEA/NG). Apart from the continuous war crimes trials monitoring, according to our commitment, we also started to monitor trials and hearings regarding hate crimes according to the Article 87. It. 20. of the Criminal Code, as well as the following criminal offences: torture and other cruel, inhuman or degrading treatment (Art. 104. Criminal Code – CC), violation of the equality of citizens (Art. 125 CC), violation of the freedom of expression of ethnicity (Art. 126 CC), sexual harassment (Art. 156 CC), public incitement to violence and hatred (Art. 325. CC) and the procedures

based on the Antidiscrimination Law.

In the first 6 months of our project activities, we have sent request for information to the Municipal Courts of Zagreb, Rijeka, Split and Osijek on the scheduled hearings regarding the above stated cases. According to the responses obtained, as well as the hearing schedule published on the courts' websites, we were informed that there are only 4 cases registered as hate crimes. We have also monitored the occurrence of hate crimes through the media and direct reports of the incidents to civil society organizations. Below we are stressing some of them for a better picture of the occurrence and frequency of hate crime/hate speech.

- Hate speech in Rijeka- Police officers of the Police Department of the County of Primorje and Gorski kotar[8], in charge of the security of public meetings on the above mentioned date (parade from the Bridge of Croatian defenders to the City Hall, holding of the public discussion at Croatian National Theatre Ivan pl. Zajc Rijeka and the protest in front of the theater against the public discussion), registered ten persons who committed a total of 11 offences of the *Public Order Act*, according to the Article 6 (exceptionally disorderly behavior) and Article 13 (brawling, rowdiness and shouting) and written accusations were submitted against ten persons, aged from 22 - 61 years old. Also, written accusations were submitted against seven persons for the violation of Article 25 of the *Law on the Suppression of Discrimination.* According to the estimates of the police, around 300 people participated in the parade; around hundred people attended the public discussion, while there were around 70 protesters in front of the theater.
- According to he information from the media[9] obtained from the Ministry of the Interior and the Higher Misdemeanor Court, from 2011 until today so far the Police has registered 62 persons for public chanting of the slogan «Ready for the Homeland» and submitted 60 misdemeanor and two criminal reports, while misdemeanor courts have given 13 condemnatory rulings and financial fines of up to 700 HRK.
- On 24th June 2014 Zagreb Pride filed a criminal charge to the Municipal State Attorney's Office in Zagreb (from hereinafter: MSAO Zagreb) against Hrvoje Šarić for the criminal offence of public incitement to violence and crime by publishing a text titled „Fags in concentration camps :D" on Zagreb Pride's Facebook page.
- On 23rd July 2015 UEFA ruled that Croatia will play two matches behind closed doors and have one point deducted from their 2016 EURO qualifying tournament, has ruled. UEFA Control, Ethics and Disciplinary Body (CEDB) decided that Croatian Football Federation (HNS) will pay €100,000 as fine. on 12th June, during the 2016 EURO qualifying match Croatia – Italy, UEFA officials spotted a swastika, the infamous Nazi symbol from World War II, engraved on the pitch of the Poljud Stadium. The Poljud Stadium was also included in the sanction.
- On 29th September 2015 three young men motivated by racism beat a man from Uganda (34) in a tram full of people, not far away from the Zagreb Bus Station. The Police arrested one of the attackers and held him in detention.
- On 14th October the Zagreb Police arrested and detained two 18-year old men who threatened that they will murder a 29-year old Gambian and a 35-year old local in the city center. The incident that the police treat as hate crime happened around 22hs in Draškovićeva Street. Two hooligans, suspected of being *skinheads*, approached their victims at the tram station and started threatening them with murder. They attacked a 35-year old local who got lightly injured.

[8] http://www.primorsko-goranska.policija.hr/MainPu.aspx?id=216699, last accessed on 11th August 2015

[9] Source: http://www.jutarnji.hr/na-sudu-od--2010--samo-13-kazni-za-uzvik--za-dom-spremni-/1413042/

- On 5th December minors broke into a school in Split and drew Nazi graffiti. After the criminal investigation the Police sent a special report to the competent State Attorney's Office.

Occurrence and frequency of hate crimes in the Republic of Croatia

Republic of Croatia regularly informs the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE/ODIHR) on the occurrence of hate crimes. Hate crime data are collected by the Ministry of Interior, the Prosecutor's Office, the Ministry of Justice and the Office for Human Rights and Rights of National Minorities.

In its last report ODIHR[10] published comparative statistical data for the period fro 2009-2014. From these data we can see that there were 197 reported hate crimes: criminal offences and misdemeanors motivated by prejudice to certain group of citizens (aimed social groups that can be identified by certain objective common features such as race, skin color, ethnic origin, religion, sex, disability, sexual orientation and gender identity). Also, according to the statistics, during 2014 the largest amount of hate crimes were motivated by racism and xenophobia.

Year	Hate crimes recorded by police	Prosecuted	Sentenced
2014	22	60	6
2013	35	57	85
2012	17	19	15
2011	57	20	10
2010	34	34	3
2009	32	Not available	Not available

Izvor: http://hatecrime.osce.org/croatia?year=2014

According to the Overview of incidents reported by the civil society, there were several incidents identified as hate crimes:

The *Jewish Community Bet Israel of Croatia* reported one case of the desecration of graves, one case in which an envelope of rat poison was sent to the organization, and a series of threats against the same organization. The *Holy See* reported a burglary of the Split Cathedral involving the desecration of communion bread. The Croatian authorities reported that the police recorded the case, but perpetrators were not yet identified and an anti-religious bias motivation was not registered.

According to the data available for the first semester of 2015, the Ministry of Interior recorded 7 hate crimes, mostly motivated by ethnicity. Until the end of September the number of reports grew to 15. In our opinion, this was due to the above-mentioned events in Rijeka on the occasion of the Military-Police Operation Storm commemoration. Also, courts rendered three final sentences in the first half of 2015.

[10] Source: http://hatecrime.osce.org/croatia?year=2014

Presentation of Deputy Chief State Attorney Andrea Šurina Marton at the round table held on 14th December Novinarski dom (Journalists' Association):

How State Attorney's Offices proceed in hate crimes cases

…Croatian Government adopted the Protocol for Procedure in Cases of Hate Crimes that should ensure the conditions for an efficient and integral work of competent bodies participating in detecting, proceeding and monitoring hate crimes. The Protocol establishes the obligations of these bodies, their cooperation and other activities of the competent bodies. One of these activities is recording the cases of hate crimes by the State Attorney's Office of the Republic of Croatia. Even before the Protocol was adopted in 2006 when the definition of hate crime was introduced in our Criminal Law, the State Attorney's Office of the Republic of Croatia adopted Instructions on Procedure in Hate Crimes Cases that obliges all the lower state attorney's offices to act in hate crimes cases with especial expediency, but also with a special attention, by taking into consideration all the circumstances of a concrete case and then take a relevant decision. The same Instructions order the state attorney's offices to report immediately to the higher SAO or the SAO of RC when they receive a report of hate crime and the actions taken. The annex to the instruction contains guidelines on how to write accusations, that is the factual and legal state. It also says that regardless of the criminal procedural obligation of representation in certain criminal cases, depending on the foreseen sentence, has the liability to represent all the hate crimes offences. Also, the SAOs were warned that they have the duty to pay attention to the corresponding punishment, that is, to appeal if they consider that the court gave an inadequate punishment. As far as the duties of the SAOs are concerned, according to the Art.42 of the Law on the State Attorney's Office their duty is to report to the higher SAO on certain cases of special national interest, or where complex factual or legal issues arise, and sometimes in these cases, because of all of these circumstances, there is a need and duty to report to higher SAO. State Attorney's Office of the Republic of Croatia keeps central record of hate crimes, and it is harmonized on a yearly basis with the Ministry of Interior, and then delivered to the Ministry of Justice. According to the Art. 40, It.1 the State Attorney's Office submits report to the Croatian Parliament on reported criminality in the previous year and the legal problematic in certain areas. SAO's annual reports contain a special chapter regarding hate crimes. It contains the data on the number of received reports, number of indictments issued, number of judgments rendered, number of appeals filed, that is, statistical data and sometimes some new occurrences in this legal problematic, if noted. The State Attorney's Office also cooperates with numerous other bodies that deal with the same legal issues, first of all, the Police, than the Ombudsperson's Office, NGO's, parliamentary committees. State Attorneys participate in almost all the trainings that treat this issue, in workshops, round tables, and conferences. They also participate in working groups. For instance the State Attorney's Office of the Republic of Croatia has its representative in the working group for hate crime monitoring and the Office really dedicates significant attention to these criminal offences."

Hate speech – a stumbling stone in Croatian judiciary

Hate crime is defined as criminal offence of public incitement to violence and hatred

Art. 325 It. 1. Whoever through the press, radio, television, computer system or Internet, at a public rally or otherwise publicly incites or makes available to the public, leaflets, images or other material inciting to violence or hatred towards a group of people or a member of the group on the grounds of their race, religion or ethnicity, origin, skin color, gender, sexual orientation, gender identity, disability or any other characteristics. (Criminal Code NN 125/11, 144/12, 56/15, 61/15)

The same criminal offence introduces sanctioning of publicly condoning, denying or grossly trivializing crimes of genocide, crimes of aggression, crimes against humanity and war, against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group. This criminal offence, introduced in the new Criminal Code, is a consequence of harmonization of Croatian criminal legislation with the legislation of the European Union, that is, the implementation of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[11]. The Article 325 of Croatian law covers all the forms required by the Framework Decision. The Framework Decision gave a possibility to limit the area of punishability in the Item 3- public condoning, denying or grossly trivializing crimes of genocide to limit with its legal means the criminal offences to the laws that were established as such by final court decisions. It also allowed for a limitation in the Item 1- public incitement to violence or hatred, to be limited only to those behaviors that damage or really threaten with damaging public order. Croatian legislator did not introduce such limitations, therefore it left a broader area of punishability, but at the same time this criminal offence is under the chapter of criminal offences against the public order. Therefore the ratio and object of this incrimination is public order, that is a threat to the public order.

According to the *Convention for the Protection of Human Rights and Fundamental Freedoms* the legal provision does not include every speech where some elements of hatred, insults, and discrimination could be recognized, but such speech that incites the others and calls publicly to violence and hatred. Of course, this causes major doubts and difficulties in the application of this provision in court practice: how to distinguish and where is the precise limit between the guaranteed right to the freedom of speech and freedom of expression, and the limitations to this right. According to the Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* everyone has the right to freedom of expression without interference by public authority, but at the same time the Article 17 prohibits the abuse of rights aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the *Convention*. The criteria and the limits are not precisely prescribed anywhere. European Court for Human Rights stressed several criteria to be taken into account when assessing if a statement represents hate speech as a criminal offence: first of all, the purpose of the speech- whether there is an intent of spreading of racist or discriminating ideas by the speech, the speech content- if it is adequate for inciting to violence and hatred, and finally the context of the speech in the sense of establishing the status and the role of the perpetrator, dominant social climate, and the way and the means that the certain statement is expressed through, as well as the target audience. All these criteria should be assessed on a case-by-case basis, to determine with relative certainty whether it is hate speech that could be qualified as criminal offence or is it politically incorrect and inadequate speech, containing some discriminatory characteristics, but not representing criminal offence, but the freedom of speech which is, as such, necessary in a pluralistic and democratic society. What is especially concerning is the presence of hate speech through the media

[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF

or anonymous comments on media websites. According to the new tendencies, the most effective means to fight this uncontrolled spread of hate crimes, as well as the fact that the perpetrators are people of young age, is to hold the editors accountable. If we take a look back to the past and analyze different historical and social contexts, we can see that hate crime was widely used in period of conflict and war when it served as propaganda to legitimize discriminatory and criminal behavior that eventually led to many gross crimes. By knowing the dangers, we must be ready to identify and sanction such behavior. By allowing the hate crime to be one of legitimate ways of communication, we are deepening prejudices, negative stereotypes, stigmas and hatred to certain persons and groups and we are questioning democratic principles and preventing the participation of different groups in the public sphere. One of the significant mechanisms of fighting violence and divisions in a society is to publicly condemn all the crimes and especially hate crime, and it is intertwined with public awareness and actions of authorities as a positive example.

From the presentation at the round table that took place on 14 December 2015 at Novinarski dom (Journalists' Association), Professor at the Law Faculty in Zagreb, Maja Munivrana Vajda:

"What exactly is hate speech? Hate speech as such is not defined with a specific legal and mandatory definition. However, when defining hate speech we usually refer to a specific "soft law" document, namely, Council of Europe Recommendation from 1997 in relation to hate speech, which in a very wide and comprehensive way approaches hate speech and explicitly grounds it on racial hate, xenophobia, anti-Semitism, intolerance etc. Hence, the list is not exhaustive. What makes this topic a stumbling block, which maybe is a bit pretentious to be said, in the Croatian context, and I even think also in the European context is the collision with one of the human rights foundations, namely the right to freedom of speech, which is emphasized with a number of international and local documents. However, in all these documents it is clearly stated that the freedom of speech is not absolute and can be limited in certain situations, and one of these accepted limitations is the sanctioning of hate speech…I would like to point to a particular document from 1966, which is often neglected. That is the International Convention on Discrimination of all forms of Racial Discrimination, which expressly requests the member states to prescribe hate speech as a criminal offence. Croatia is a party to this Convention by notification of succession. The Committee on the Elimination of all forms of Racial Discrimination, which is the implementing body of this Convention stated in its Recommendation from 2013 that the criminal offense should be kept only for the hardest forms of hate speech, hence the expression of opinion in relation to historical facts should neither be prohibited nor punishable. But, it is also clearly stated that the public denial or justification of genocide or crime against humanity should be punishable whenever it encourages racial discrimination or hatred.

Furthermore, European Framework Decision on racism and xenophobia requests the Member States to transpose its provisions in their legislation and to include the following actions as criminal acts punishable by imprisonment: public encouragement of violence and hatred by spreading leaflets, pictures or other materials, public approval, denial or significant trivialization, as well as derogation of the international crimes according to the International Criminal Court, as well as fascist or Nazi crimes according to the Nuremberg Tribunal from 1945[12]. The Croatian legislator included these provisions in the domestic legislation in 2011, which entered into force in 2013, and these forms were incriminated through a punishable offence public encouragement of hatred and violence. In relation to the framework decision our legislator expanded the foundations of discrimination, respectively hate speech

[12] The processes at the Nuremberg Tribunal signified a beginning of a new period in the legislation and the international cooperation. They were founded on a visionary international agreement (London Charter), which established procedural law for international and American courts, established exclusively for the Nuremberg processes. London Charter was signed 8 August 1945.

and sexual orientation, which I consider particularly important in the Croatian context. The European Court for human rights stated that the incitement of hatred against the members of the LGBT community is equally dangerous for the society and the democracy as the incitement of hatred on national and ethnic grounds. At the same time our legislator did not limit the punishment only to genocide and crimes against humanity as founded in the judgment of the international or national court, which in theory means that if anyone commits genocide against the Armenians in Croatia could be punished. However, only if this is committed in a way that is suitable to stimulate violence and hatred against the Armenians in Croatia, which would hardly be the case.

The question is what are the issues that open up through this Croatian legislation, as well as through the practice of our Courts and the State Attorney's Office. First of all, the question is what is public encouragement, more specifically the invitation to hatred?

In a case that was very exposed, and currently has a final judgment, the interpretation of the term "encouragement of hatred" led to an acquittal because the Court established that the action of the defendant was deprived of any imperative to the treatment of others. In a Recommendation from the Committee on the Elimination of All Forms of Racial Discrimination it is stated that the public encouragement or invitation may be explicit, but it may also be implicit by showing examples of racist symbols or by wearing specific uniforms, signs etc. Also, it is important to say that the difference of encouragement as an accessory form of complicity in criminal law, the ones dealing with criminal law would know what this is, and the encouragement and invitation of hatred in the framework of this criminal act does not have to achieve its aim, in other words it is punishable, but not as an attempt for an encouragement, but as a completed criminal act also in instances where it did not create any reaction. But, the risk and the possibility that that kind of behavior would cause a reaction by the others. The following disputable question can be asked: if the incitement of violence is narrowly understood as incitement of others to creating concrete criminal offences then how would we understand what is incitement of hatred? From the judgment of the European Court for Human Rights in the case Vejdeland against Sweden from 2012[13] it is clear that the European Court considered that the incitement to hatred does not necessarily mean violence or other criminal offenses. According to the practice of the European Court for Human Rights the attacks to a person committed by insulting, humiliation and defamation of certain groups could be enough and it seems to me that it is about incitement to hatred more than incitement to violence, and that even the imposition of ideas that spread the idea of hatred and discrimination as well as rejection and hostility could be considered as such criminal offences.

In my opinion, the relation between misdemeanor and criminal offences is also very controversial. Namely, the ones who are dealing with these issues are aware that the concept of hate speech is not only a concept that is a criminal offence, but it is also incriminated in a series of misdemeanor provisions, from which worth mentioning are the Law on the Elimination of Discrimination, the Law on Prevention of Violence at Sporting Events, the Law on Public gatherings, and the Law on Public order and Peace as well as media legislation.

It seems to me that maybe one of the most exposed recent cases of hate speech is sanctioned as a misdemeanor, and in that case the State Attorney expressly stated that the accused fueled hatred. Therefore, I ask the question: what is the difference between fueling hatred and encouraging hatred? Also, what are the criteria, which decide whether there will be misdemeanor proceedings or criminal

[13] Case number 1813/07: http://hudoc.echr.coe.int/eng?i=001-109046

proceedings when there is an overlap of definitions since we all know that after the judgment of the European Court of human rights in the case of *Maresti against Croatia*[14] it is not possible to conduct misdemeanor and criminal proceedings at the same time, because when at the first place a misdemeanor proceeding is initiated it is not possible a criminal proceeding to be initiated after that, and the sanction that is already imposed in the misdemeanor proceeding cannot be calculated as a sanction in the criminal proceedings, which was the case in the past. Also, from the examples I have seen and from the media it is obvious that very often hate speech is included in the law of public order and peace, such as insults and shouting, and I think that in that way the criminality that the hate speech carries in itself is not expressed…

Furthermore, the practice of the European Court for Human Rights is binding for all our judicial bodies even in cases that are not relevant for the Republic of Croatia. The criteria that are applied by the European Court for Human Rights (ECHR) also apply to us. We still have not had any cases in front of the ECHR that relate to freedom of speech, but there is a possibility in the future to have such cases in front of the ECHR. It is worth mentioning that beside the permitted limitations of freedom of speech stipulated in Article 10, paragraph 2 of the European Convention on Human Rights, the European Court for Human Rights also analyses this topic through Article 17 which stipulates that the rights guaranteed by the Convention cannot be used obviously and manifestly on the expense of the others. Hence, freedom in speech cannot be used for the purposes of attacking and insulting the rights of the others, including their right not to be discriminated. In several cases the European Court for Human Rights found that the applicant request to be inadmissible on the basis of Article 17, and therefore did not further consider that case. The case W.P. et all. Against Poland seems to me very indicative maybe also for the future Croatian practice, and does not explicitly relate to freedom of speech, but the right to assembly. It is about an association, which in its foundation and statute had implicit but clear anti-Semitic stance, and it requested to equalize the Polish victims of the Zionism and Bolshevism with the Jews and called for the protection of the victims of the Zionism and Bolshevism from the Jews minority in Poland. The European Court considered that the statute of the association is against Article 17, sanctions; criminal sanctions and also considered that the founder of that association did not violate their right to freedom of assembly. I think that in the Croatian context there are some associations that in their foundation have very clear anti-Semitic and revisionist motives and they clearly present that, but to my knowledge these associations continue to act in Croatia. The European Court for Human Rights mostly dealt with freedom of speech through Article 10 and the permitted limitations that must be provided by the law are necessary in a democratic society. This requirement does not apply only to legislators. It is not only about an abstract evaluation that a certain law is necessary, but the law also obliges each judge who is working on a certain case because it requests the limitation to be necessary in the specific circumstances of the case. Also, the limitation should serve a legitimate aim, and in the context of freedom of speech the following are considered to serve a legitimate aim: the prevention of disorder and crime, as well as the reputation and the rights of the others. When we talk about the second right it is worth mentioning the judgment *Aksu against Turkey*[15] where the Court stated that the negative stereotypes about a certain association, in particular the case related to the Roma population represents a breach of the dignity and the rights of that association as well as a violation of their right to private life, which is as well a right guaranteed by Article 8 of the Convention, and that in such cases on one side the right to freedom of speech should be guaranteed, while on the other side there should be a guarantee to the right to private life. Hence, in the relevant case we are not talking about a

[14] Case number. 55759/07, https://www.pravo.unizg.hr/_download/repository/ESLJP_Maresti_protiv_Hrvatske%5B1%5D.pdf

[15] Case number: 4149/04 and 41029/04 Second Council of the European Court for Human Rights from 22 June 2010: http://hudoc.echr.coe.int/eng?i=001-109577#{"itemid":["001-109577"]}

mechanical assessment, but balance. The primary criterion is the content and the nature of the statement. At the same time if the aim of the speech is to provide protection of human rights that speech cannot be considered as hate speech. Also, an important criterion is the public interest about a certain topic, a debate, for instance, the historical facts are always considered to be of a public interest. It is also important to take into account the way in which the statements are given. For instance, the limit of freedom is not necessary if the statement is given in a poetic way or in a book that would be read by a significantly small number of people. But, on the other side, the state has a legitimate right to limit the right to freedom of speech of the applicant if for example leaflets are distributed in school lockers, and hence the children are not able not guard themselves from that action. The influence that the statements have is also important and in that case the type of the audience needs to be considered and the way the statement is distributed, namely whether it is distributed through the Internet or through an important media that makes the statement accessible to many people. In one case the Court stated that the statement had a big influence because it was mentioned 62 times through the radio, while in another case the Court considered that the group that spread discriminatory messages was marginal and had no influence on the local population, and hence it was unlikely that it would lead to incidents, and therefore there was no reason the Court to limit the freedom of speech. The economic, political and social climate is also one of the criteria, and what needs to be taken into consideration is the existing pattern of discrimination against a certain group. Therefore, it is not the same if for instance in Croatia, the genocide against the Armenians is contested, and if for instance the war crimes against the Serbs in Krajina or if genocide or the crimes against humanity in Srebrenica are contested. The role and the status of the speaker are very important as well as the audience that is addressed. I have already mentioned the children, as a vulnerable group that the Court takes special attention to, and it is very important to consider whether it is a case of political discourse. In the case of political discourse, the states have the freedom to evaluate because of the political discourse for the democratic society. At the same time, the politicians have a big responsibility and hence the European Court constantly emphasizes that the politicians should be cautious in their public speeches not to raise inappropriate tensions. Therefore, the European Court of Human Rights in its judgments allows the limitation of the freedom of speech and it states that the politicians may be punished in their home countries, for instance *Le Pen against France*[16] or *Feret against Belgium*[17], a case where there was hate speech against the immigrants and the Muslims. A very important criterion in cases of negation of a crime is the passage of time. Namely, in a recent case *Perincek against Switzerland*[18] from October this year, and this is one of the rare cases in front of the Grand Chamber of the European Court for Human rights, where 17 Judges were deciding (and I need to say that they failed to reach consensus among themselves, but 7 Judges remained a minority, and therefore it was obvious that we still need to do a lot of thinking and discussions about these questions, both at the European level as well as at the domestic level) one of the criteria was the passage of time. In that case the national of Turkey denied that the genocide against the Armenians occurred, and the Court stated that the statement of Percinek did not breach the right to private life of the Armenians, bearing in mind that from 1915 until today hundred years passed and hence there is a little possibility that there are people from that time who are still alive. The Court also took into consideration the international obligations of a state, if there is an obligation the state to incriminate the hate speech in a concrete form as well as a consensus of the state regarding the question if that was genocide, especially if there is no judgment about that. The Court further continued in their cases to emphasize that the role of the European Court is not to arbitrate in debates about historical facts, thereby pointing out that the negation of the Holocaust and the Nazi crimes are incompatible with the values of the Convention. Finally, what needs to be pointed out is that

[16] Claim number: 18788/09, http://hudoc.echr.coe.int/eng?i=001-98489#{"itemid":["001-98489"]}

[17] Claim number: 15615/07; Feret against Belgium

[18] Claim number: 27510/08; http://hudoc.echr.coe.int/eng?i=001-158235

the Court considers the historical heritage of the states in question, as well as that the states have a moral responsibility to distance themselves from the crimes that they have committed, tolerated or silently accepted…"

HATE CRIME HURTS MORE

In theory there is a detailed description of the various harmful effects that hate speech has on individual, group and social level. First of all, hate speech has a distinct psychological, political, cultural, and social effect on certain individuals or individuals who are direct victims of hate speech as well as members of social groups that those individuals belong to.

Article 87, paragraph 21, Hate crime is a criminal offense committed due to racial affiliations, skin color, religion, national and ethnic origin, disability, gender, sexual orientation, or gender identity of another person. Such action is taken as aggravating circumstance if this Law does not explicitly provide heavier punishment. (CC OG 125/11, 144/12, 56/15, 61/15).

Nowadays we are witnessing that hate speech is not a symptom of the individual, but one of the reliable indicators of a sick society. Spreading hate and intolerance to other members of the society because of their differences (biological, cultural and socially conditioned identity) denies the fundamental legal principles of equity and equality, which underlie every civilized and democratic society. At the same time a social environment is created where discrimination and violence against the "others and the different" is normal and expected. Still, the direct victims experience the worst effects of hate speech. Legal theorist Robert Post[19] categorized the harmful effects on the victims as following:

1. Deontic harm- for endangering and undermining the foundations of the social values and the ideals of social and political equality;

2. Harm to identifiable groups, because the members of these groups are treated with contempt, mocking and violation of their dignity.

3. Harm to individuals, because of the feeling of humiliation, isolation and auto-hatred and the loss of dignity;

4. Harm to marketplace of ideas, relates to limitations of the speech of groups who are target to hate speech;

5. Harm to educational environment, relates to limitations of educational opportunities of the victims of hate speech.

Therefore, we have devoted special attention to the victims of the criminal offences, especially to the victims of hate speech.

From the presentations at the round table that took place on 14 December at Novinarski dom (Journalists' Association), Klaudija Čurina, Law office Zoran Novaković:

In the legal practice of the national courts the position of the victims in the criminal procedure in relation to the right to compensation is only in theory, therefore the victims can exercise their rights only through civil action. The civil action in our country still does not predict any protection of direct

[19] Post, Robert: " Racist, Speech, Democracy and the First Amendment"; http://digitalcommons.law.yale.edu/cgi/view content.cgi? Article=1207&context=fss_papers

and indirect victims, and hence, for example, the family members of a victim of war crimes are questioned about the circumstances of the killing, despite the existence of a criminal judgment, and also their close ones are questioned whether they were members of a paramilitary organizations etc.

There is no protection of victimization on a normative level in the framework of the civil action, and hence we will focus on the criminal procedure, which in that context, especially after the reforms of the criminal procedure in 2008, made a significant shift, although Professor Pavišić has stated that after the adoption of the 2008 reforms in the criminal procedure the victims continued to be forgotten, and that it is *la grande oubliee*[20]. A positive shift exists, although from constitutional-legal perspective the defendants still have more rights than the victims because the rights of the defendants on the constitutional-legal level are already protected, while the Constitution does not mention a category of a victim at all[21]. European Union Directive establishing minimum standards on the rights, support and protection of victims of crime was not implemented within the implementation deadline, although the amending Act of the criminal procedure went through public hearing. That this is the case at the level of the entire society, and not only in the criminal procedure, arises from the provisions of the state budget from this year from which 278.000 kunas were provided for witnesses and victims in criminal cases, out of which 200.000 is for compensations, while later with the rebalance that amount was reduced. The predictions are that in the following years that amount will be even more reduced. Therefore, the position of the victim should not be seen from the perspective of the Law on Criminal Procedure, which presents it in a very wide way, but as the folk would say- where the money is- and unfortunately there is no money. I would first start off with the sources of law that regulate the position of the victim. Beside the national law, the law of the European Union is also important and its influence on the national legal system, as well as international law: The Conventions and the Recommendations of the Council of Europe and of course the practice of the European Court for Human Rights, specific documents adopted inside the UN, Declaration of Basic principles of Justice for Victims of Crime and Abuse of Power, which dates from a long time ago and it is about standards that are nowadays a bit old, but in principle are included in our legal system. On national legal level the basis of the law that regulate the right of the victim is the Law on Criminal Procedure. However, that law is incorporated in other laws that have an organizational nature. The Law on the State Attorney's Office stipulates a significant attention to be paid to victims, and through other regulations, as well as through the Law on Courts and the Law on court proceedings, as well as other Laws. I shall talk about the Law of the European Union because of the fact that I have previously mentioned, namely that the Directive establishing minimum standards on the rights, support and protection of victims of crime is not implemented, and hence beside the general influence that Directives have on the legal system, it is about the so called interpretative influence- meaning that the entire national law should be interpreted in a way that the regulatory aims are fulfilled and beside the fact that it is not implemented, and the so called vertical influence where in the relation between the state and the citizens the provision of the Directive applies directly although it is not implemented in the legal system. That was also the view of the European Court in Luxemburg in the landmark case Tullio Ratti[22].

The Law on the criminal procedure gives a very clear definition of the victim, which is wider than the proposed definition in the Directive, and hence a victim is every person who because of a criminal act suffers physical and psychological consequences, material damage or breach of fundamental rights and freedoms. The law on financial compensation of the victims of the criminal acts provides even wider definition, and therefore acknowledges the direct and indirect victim. Hate crime is widely defined and hence that is every criminal act that is conducted on the bases of race, skin color,

[20] Pavišić, B, and others. *Criminal Procedural Law,* Dušević &Kršovnik, Rijeka, 2011, page.32

[21] Tomašević, G, Pajčić, M, Subjects in the criminal procedure: the position of victim, and the injured party in the new Croatian criminal procedure , *Croatian Yearbook for criminal law and procedure, vol 15, 2/2008, page. 81/8, 1*

[22] Case 148/78 *Pubblico Ministero v Tullio Ratti,* (1979) ECR 1629.

religion, national and ethnic origin, disability, gender, and sexual orientation or gender identity. The Law on criminal proceedings made a significant shift in relation to the earlier regulation and hence the basic right of the victim was put on the level of fundamental principles in the criminal procedure. The right to special treatment of the victims of criminal acts stands among the fundamental principles, as well as the right to informing, meaning that the victims can legally obtain an information during the criminal proceeding, and thereby the rights stipulated in Article 206, a, b Law on Criminal Proceedings especially are especially emphasized. Hence, the have the right to submit a claim to the State Attorney's office in order to be informed of the status of their criminal charge and the right to complain to the higher State attorney office, and also if they consider that the case takes too long in front of the first instance state attorney. Unfortunately, because the Directive is not implemented, the law on criminal proceeding still does not recognize the people with disabilities as victims with special needs of protection. The victims have all the rights according to the general regulations and rights of the victims, however some specific rights that are prescribed in the law on criminal proceeding for special categories are not guaranteed for the victims of hate crime. Since the Preamble of the Directive emphasizes that the victims of hate crime are especially protected category, and is usually prone to secondary and repeated victimizations as they are subjects to intimidation and revenge. Hence the victims would benefit from special protective measures, like for an example, private witness testimonies, and testimonies via video link. The Directive recognizes the people with disabilities as a special category and thus the concept of hate crime includes some specific criminal acts. For example, the victims with disabilities or the victims of sexual violence could be subsumed under our concept of hate crime although in the Directive they are distinct.

It is important to state that the government of the Republic of Croatia adopted a National strategy for the development of the system of support of victims and witnesses throughout the period from 2016 to 2020, which explicitly states that the Republic of Croatia follows the regulations of the Directive. In my opinion, the legal employees, as well as the police should apply the Directive vertically in every case that relates to victims of hate crime, and according to Article 22 it should be applied in accordance with the circumstances of the case. Beside the rights that are stipulated in the general provisions of the Directive and relate to every victim it also applies the rights that belong to persons with special protection, such as, the rights stipulated in Article 45 and relate to the rights of victims of criminal acts against sexual freedom and victims of criminal acts that relate to trafficking of people. In that way the regulatory aim of the Directive shall be achieved although the Directive is not implemented, especially, having in mind that the Directive predicts an individual assessment of the needs, assessment from one case to another in order to be understood what measures need to be taken so that the regulatory aim of the Directive can be achieved and the victims of these kind of crimes to be protected…

In the Criminal Procedure Code there is the right for financial compensation in cases of crimes of violence with intention. The financial compensation is taken from the funds of the state budget in accordance with the Law on financial compensation of the victims of criminal acts. It is interesting to mention that according to this Law a right to financial compensation has any victim no matter whether it is known who was the perpetrator[23] of the crime, and in my opinion that does not correspond with the settled practice of the Supreme Court of the Republic of Croatia, which in many of its litigation decisions concluded that the fact that someone is a victim of a criminal act cannot be decided *in abstracto*[24]. Therefore, in order to preserve the coherence of the legal system this kind of practice of the Supreme Court should be reassessed because on the basis of social solidarity the state provides money no matter whether it was established who was the perpetrator of the criminal act, which is not the case

[23] For example Bukovac Puvača, State compensation to victims of criminal offenses, *Anthology of the Law Faculty* in Rijeka, vol.34 (1), pages. 333-357.
[24] Rev-242/09-2 from 10 March 2010, available at: sudskapraksa.vsrh.hr/supra

in litigation proceedings where the state corresponds to the principle of responsibility of the other. The practice of the Supreme Court of the Republic of Croatia should be compared to the practice of the Supreme Courts of the neighboring states that take the opposite position. For example, the Supreme Court of Slovenia[25] or the Supreme Court of Austria[26], invariably allow the prove of criminal offense in litigations, thereby the Supreme Court of Slovenia in its decisions expressly calls on to our domestic theorists, Professor Triva and Professor Dika, and cites the textbook Triva/Dika[27] when they allow the establishment of criminal acts in litigation proceedings. In relation to compensation for damages for victims on one side it is problematic the dichotomy of the determination of the mentioned Law on financial compensation, and from the other side the Law on responsibility for damages in the midst of terrorist acts and public demonstrations, because the application of the Law on responsibility for damages includes the application of the Law for financial compensation, where there are certain incompatibilities with the regulations of the European Union. Hence, the double legal way is problematic. On one side the Law on financial compensation is a litigation procedure, while according to the ZOST- in a court procedure the defendant state is represented by the State Attorney's Office. It is questionable whether anyone can decide, what procedure should be commenced since the perpetrator is not known, as well as the motives, and how the rights should be exercised at all, hence in the end it can happen that the victim considers it to be a terrorist act, but cannot go with it in a legal way, while can be too late to start a procedure on the basis of the Law on financial compensation because the deadline has already passed[28]. These again are special rights of the victims of criminal acts; hence these are rights that belong to a victim who is actually the aggrieved party in the procedure. I think that these are traditional rights that are not disputable as such, only that it is mentioned in the questioner regarding the application of the Directive that the right to a review of the State Attorney's decision of no acting in certain cases and that that kind of regulation is not the best regulation for the right to review, namely that it is not the best to introduce the injured party as a subsidiary prosecutor, and also other states that served as our role models dropped that kind of regulation[29]. I shall further address the rights of the victims according to the Convention for the protection of human rights and the fundamental freedoms, that for certain violations predict the so called positive obligations of the state, out of which the most important is the right to effective investigation. Any victim of a criminal act who has been a subject to any of the rights prescribed with the Convention is entitled to an effective investigation done by the State in order to be known who the perpetrator of such criminal acts is.

The already mentioned National strategy extensively relies on cooperation of organizations of the civil societies, but having in mind the problems of the reckoned funds it should be emphasized that the task of the civil society is not to take up roles who are inherent to the state, hence not to replace the State, but to add to the State.

As a defendant all the rights are exercised through the State, and therefore his/her rights are protected by the State, and hence the same approach should be taken for the rights of the victims. The State must secure the rights of the victims, and the State should secure the right of the victim to psychological counseling, the right to secured housing etc. These are not areas that should be treated as a projection of some outsourcing that would not call it like that. The civil society should be the one that would additionally contribute to the state, the one that would warn about the drawbacks of the state regulation, and not the one that would take up the role of a state in protecting the victims. It seems that the victim is forgotten not only in the framework of the criminal procedure, but also in the framework

[25] For example II-Ips-196/2011 from 5 April 2012, available at: www.sodisce.si

[26] 6Ob 286/07p from 7 July 2008, available at: https://www.ris.bka.at

[27] Triva- Dika, Civil Litigation Procedural law, VII, Official Gazette, Zagreb, 2004, pages.86-87

[28] Bukovac Puvać, M, pages. 351/354

[29] V, Novokmet, A, Judicial Review of the Initiation of the criminal proceedings –institutional and procedural aspects, *Croatian Yearbook for criminal law and procedure*, vol. 21, 2/2014, pg. 645-978

of the state as such. The State should actually take care of the rights of all its citizens equally no matter whether that person is a defendant or a victim in a certain criminal procedure. It turns out that the defendant still has more rights, especially in light of the recent practice of the Constitutional Court…"

Universal Declaration of Human Rights

All human beings are born free and equal in dignity and rights.

…Without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Everyone has the right to life, liberty and security of person.

CONCLUSION

This round table brought together around 60 representatives of the judiciary (judges, state attorneys, attorneys at law), as well as representatives of other civil society organizations, embassies in the Republic of Croatia, and all of the participants showed an interest in the topics, and with their active and extensive participation showed that the devoted time for discussions was not enough. Therefore, it is inevitable the dialog to be continued in order the knowledge and understanding of the relevant topic to be expanded and that will contribute to strengthening of citizen's perception and trust in the judiciary.

We are advocating for the support of the critics that are directed at improving the society in general, through strengthening of the judiciary, as well as strengthening of the technical and human capacities, the continuous education and appreciation of their opinion through creating laws and legislative changes. We are advocating for strengthening of the jurisprudence, and for scientific research of the relevant and actual topics. We are advocating for the independence of the judiciary, transparent and objective criteria of their appointment, improvement and dismissal, publication of judgments, creating conditions that would secure the dignity of the judicial functions, which surely is one of the most demanding and the most responsible duties in securing the functioning of the legal state. We are advocating for an independence of the State Attorney Office, as a body of the state prosecution of criminal offenses without any influence of other institutions, and especially without any influence of the ruling political structure.

We are advocating for freedom of speech, but we are also advocating for prosecution of acts of hate speech, as well as for strict punishment of hate crime, because the haters do not care about the individual and his characteristics, but the negative symbol is the same for the group to which that individual belongs.

We are advocating for the respect of the victims of criminal acts, through establishment and development of services for support of victims of criminal acts at all stages of the criminal procedure, which is a key to the achievement of justice for victims, and allows the victims to demand their own rights. We are advocating for lifelong support- support of the victims before, during and after the criminal procedure, and include emotional, psychological support and advices in relation to the legal,

financial and practical questions. The Court procedure needs to be pursued in a way not to cause a secondary trauma or victimization, but a return of the identity and the encouragement of applications regarding criminal acts. We are advocating for the full application of the Directive for establishing minimum standards on the rights, support, and protection of victims of crime (Directive 2012/29/EU), which is a big step forward for the victims of the criminal offenses.