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CROATIA'S CONSTITUTIONAL DEBATE ON *DE IURE* AND *DE FACTO* INDEPENDENCE OF THE JUDICIARY: FROM THE RIGHT TO AN INDEPENDENT COURT ESTABLISHED BY LAW TO "THE RIGHT TO A ROGUE JUDGE"?

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ABSTRACT

The paper first analyses recent legislative restructuring of higher courts in Croatia that has limited access to the said courts and their procedural powers. The initiatives for divesting appellate courts and the Supreme Court of their case-law harmonisation powers have been discussed, as well as the character of section meeting opinions that are legally binding on judges of the section concerned, which allegedly raise questions as to the incompatibility with the right to an independent court established by law. This discussion includes the views of AG Pikamäe expressed in the pending case C-554/21 et al. (HANN-INVEST). The paper also reviews legislative interventions in the procedure for appointment of the President of the Supreme Court and a failed attempt to introduce periodic security vetting of all judges with special quasi-disciplinary chamber of the Supreme Court. These processes are then explained by law and economics models of de iure and de facto judicial independence and constitutional arrangements, applied to the case-law of the ECtHR, the CJEU and the Croatian Constitutional Court. The paper concludes that the Croatian legislature has undermined de iure and de facto judicial independence of Croatia's higher courts. On the other hand, the Croatian Constitutional Court has been observing both formal and informal factors of judicial independence and has thus established that: 1. no constitutional or legal check against the executive's interference with independence of the judiciary should be dismantled or construed narrowly, no matter how hypothetical de iure independence of judges may appear; 2. no abstract aspect of the principle of judicial independence may run counter practical and effective enjoyment of individual right to a non-arbitrary judge or the principles of lawfulness and proper administration of justice. It has been inferred from the law and economics model that the Supreme Court has become the

* The views expressed in this paper are those of the author and do not represent nor do they bind the Constitutional Court.

most important institutional actor of judicial independence in Croatia and therefore legislative restructuring of the said court should be put to an end.

Keywords: *CJEU, constitutional arrangements, de iure judicial independence, law and economics, supreme courts*

1. INTRODUCTION: CROATIAN AND EUROPEAN SUPERIOR COURTS, NATIONAL JUDICIARY COUNCILS AND CRISIS OF JUDICIAL INDEPENDENCE

Since the establishment of the Republic of Croatia, the safeguards against interference of the executive with judicial independence have not been observed consistently as essential tenets of new democratic system, as argued by Uzelac, who had labelled the transition from socialist to democratic courts, from 1991 to 2001, as an anti-reform period of cosmetic reforms, lame-duck appointments, and de iure independent State Judicial Council (hereinafter: SJC) that was de facto politically dependent body.[1] In the period from 2002 to 2013, marked by the accession to the EU, some (constitutional and legislative) reforms had addressed the executive's interventions in the judicial system: a decision-making majority of members of the SJC would now be elected by judges themselves; judges would now hold life tenure; and the power to appoint court presidents would be delegated from the Minister of Justice to de iure independent the SJC.[2] In 2014, some time after the accession to the EU, Dallara will portray this accession judicial reform as a success story.[3] However, six years later Čepo will ascertain democratic backsliding in Croatia following the accession, attributing it, *inter alia*, to attempts of the executive aimed at control of the judiciary.[4]

Croatian constitutional framework currently in force is de iure inspired by democratic concept of independent judiciary. The Constitution of the Republic of

[1] Uzelac, A., *Role and Status of Judges in Croatia*, in: Croatian Judiciary: Lessons and Perspectives, Zagreb, 2002, pp. 81 – 140.

[2] Uzelac, A., *Reform of the Judiciary in Croatia and Its Limitations (Appointing Presidents of the Courts in the Republic of Croatia and the Outcomes)*, in: Between Authoritarianism and Democracy: Serbia, Montenegro, Croatia, 2003, pp. 303 - 329; Cerruti, T., *The Political Criteria for Accession to the EU in the Experience of Croatia*, European Public Law, Vol. 20, Issue 4, 2014, pp. 772 - 798; Dallara, C., *Ten Years of eu-Driven Judicial Reforms in Southeastern Europe: The EU Leverage and Domestic Factors at Stake*, Southeastern Europe, Vol. 40, Issue 3, 2016, pp. 385 - 414; Akšamović, D., *Regulatory reform in Croatia: an uphill battle to enhance public confidence*, in Regulating Judges, Edward Elgar Publishing, 2016, pp. 128 - 144.

[3] Dallara, C., *Democracy and judicial reforms in South-East Europe. Between the EU and the legacies of the past,* Springer International Publishing, 2014, pp. 41– 45.

[4] Čepo, D., *Structural weaknesses and the role of the dominant political party: democratic backsliding in Croatia since EU accession*, Southeast European and Black Sea Studies, Vol. 20, Issue 1, 2020, pp. 141–159.

Croatia[5] (hereinafter: the Constitution) does not provide only that judges are autonomous and independent administrators of justice with life tenure and immunity. It directly regulates competences and procedures of the SJC vested with powers to decide on appointment and removal of judges and court presidents, envisaged as an independent body composed by a majority of judges and a few representatives of the legislature or the academia who have no formal influence on its decision-making process.[6] However, de iure checks on appointment, tenure, removal, composition or procedures of judicial bodies cannot be likened to their de facto independence, whereas mere existence of de iure independent national judiciary council does not *per se* guarantee judicial independence. For example, in *Olujić v. Croatia*[7] the European Court of Human Rights (hereinafter: ECtHR) found a violation of Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[8] (hereinafter: ECHR) on account of the lack of objective impartiality of members of the SJC in the procedure for removal of the President of the Supreme Court of the Republic of Croatia (hereinafter: the Supreme Court). In *Gerovska Popčevska v. FYRM*[9] the ECtHR found a violation of the right to an independent tribunal due to involvement of the Minister of Justice in disciplinary proceedings before the national judiciary council. In a number of cases concerning judicial reforms in Poland, the Court of Justice of the European Union (hereinafter: CJEU) found that national laws that enable the President of the Republic to appoint new judges of the Supreme Court, thus forming special disciplinary bodies within the said court that circumvent the competences of national judiciary council, were incompatible with the right to effective judicial protection guaranteed by Art. 19(1) of the Treaty on European Union (hereinafter: TEU) and the right of access to an independent tribunal guaranteed by Art. 47 of the Charter of Fundamental Rights of the European Union[10] (hereinafter: Charter).[11] In *Guðmundur Andri Ástráðsson v. Iceland*[12] the ECtHR found that

[5] The Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

[6] *Ibid.,* Art. 118, 121 - 124 of the Constitution.

[7] *Olujić v Croatia*, 22330/05, 5.2.2009.

[8] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Official Gazette, International agreements, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

[9] *Gerovska Popčevska v. FYRM* , 48783/07, 7.1.2016.

[10] *Charter of Fundamental Rights of the European Union*, 2012, OJ C 326.

[11] See the following key cases: C-585/18 – (*A.K. and Others - Independence of the Disciplinary Chamber of the Supreme Court*), 19.11.2019.; C-824/18 (*A.B. and Others - Appointment of judges to the Supreme Court – Actions*), 2.3.2021.; C-791/19 (*Commission v Poland - Régime disciplinaire des juges*), 15.7.2021.; C-487/19 (*W.Ż. - Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment*), 6.10.2021.

[12] *Guðmundur Andri Ástráðsson v Iceland,* GC, 26374/18, 1.12.2020.

a decision of the Minister of Justice and the Parliament to appoint a judge that was ranked lower on the list of national judiciary council, without objectively scrutinising the criteria for appointment by comparing him to the candidates that had been ranked higher by the national judiciary council, renders the court to which the judge concerned was appointed unlawful. These judicial assessments concerning national judiciary councils can be further contextualised by the EU 2023 Justice Scoreboard[13] which shows that the number of powers vested with the said bodies does not correlate with public confidence in independence of the judiciary. For example, the Bulgarian council has been vested with almost all 15 powers surveyed by the European Commission, whereas the Danish council has been vested with barely three powers, none of which includes procedures for appointment, promotion or removal of judges. Nevertheless, Bulgaria is 25th on the scoreboard of public confidence in independence of the judiciary with only 21% of respondents assessing it as good or very good, in contrast to Danish judiciary that came second in the scoreboard with 85% of respondents perceiving independence of Danish courts as fairly good or very good.[14]

With 72% of respondents perceiving independence of the judiciary as fairly bad or very bad, Croatia consistently holds the position of a Member State with the lowest confidence of general public in independence of the judiciary. The leading reason is, according to 65% of respondents, interference or pressure from the government and politicians, followed by interference or pressure from economic or other specific interests as declared by 58% of respondents.[15] In respect of efficiency, Croatian first-instance courts are antepenultimate on the scoreboard of estimated time needed to resolve litigious civil and commercial cases.[16] It could be argued that the perceived lack of judicial independence does not reflect de facto independence of the judiciary. However, a survey conducted by Vuković and Mrakovčić in 2021 among Croatian legal professionals demonstrates that even those, professionally qualified to reason their perception by objective arguments, did not hold independence of Croatian judiciary with highest regards.[17] Therefore,

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[13] The EU 2023 Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2023) 309, Luxembourg: Publications Office of the European Union, 2023, digital print available at [https://commission.europa.eu/document/download/db44e228-db4e-43f5-99ce-17ca3f2f2933_en?filename=Justice%20Scoreboard%202023_0.pdf], Accessed 7 March 2024.

[14] *Ibid.*, pp. 41, 45.

[15] *Ibid.*, pp. 41–42.

[16] *Ibid.*, p. 11.

[17] Vuković, D.; Mrakovčić, M., *Legitimacy, Independence and Impartiality: How do Serbian and Croatian Legal Professionals Assess Their Judiciaries?*, Europe-Asia Studies, Vol. 74, Issue 6, 2022, pp. 945 – 967.

it appears that the SJC institutional arrangement for independence of the judiciary in Croatia did not perform as expected.

2. LEGISLATIVE RESTRUCTURING OF CROATIAN HIGHER COURTS AND INDEPENDENCE OF THE JUDICIARY

The general dissatisfaction with Croatian courts has created opposing, or even counter-intuitive, theoretical and practical proposals for restructuring decision-making processes at higher courts, especially the Supreme Court which used to cope with a significant backlog of undecided appeals on points of law. When described as counter-intuitive, the impression derives from the assumption that a court can be de facto independent only if it maintains effective jurisdiction and procedural powers to control the executive. However, present academic and legislative initiatives do not reflect this idea. On the contrary, it seems that the lowest ever public confidence in independence of the judiciary, coupled with its inefficiency, has created a well argued trend of divesting higher courts of their powers to adjudicate cases with a view of expediting the proceedings before them. For example, in 2013, Uzelac portrayed civil law judges as „omnipotent judges“ who are „the cause of procedural inefficiency and impotence“.

Uzelac and Galič then argued that the Supreme Court was unable to draw a distinction between the question whether a case had been decided incorrectly by lower courts from the question whether an appeal on points of law raises questions of law that are of „general significance“.[18] Uzelac and Bratković will soon label the Supreme Court as a court of second appeal, while expressing criticism on its policy of declaring inadmissible the vast majority (then 60%) of appeals on points of law.[19] The 2019 amendment of the Civil Procedure Act (hereinafter: CPA)[20] has transformed the appeal on points of law into a sort of legal remedy that could be best described as a motion for leave to apply for judicial review.[21] Bodul argues that the Supreme Court should now act as a court of precedents.[22] Therefore, from

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[18] Uzelac, A.; Galič, A., *Changing Faces of Post-socialist Supreme Courts: Croatia and Slovenia Compared*, Comparative Perspectives on Law and Justice, Vol 59, 2017, pp. 1 – 22.

[19] Uzelac, A.; Bratković, M., *Croatia: Supreme court between individual justice and system management*, in Supreme Courts under pressure: Controlling caseload in the administration of civil justice, Cham, Switzerland: Springer; 2021, pp. 135, 146.

[20] Civil Procedure Act, Art. 67 – 85 of the Civil Procedure Amendments Act, Official Gazette no. 70/2019.

[21] See more in Bratković, M., *Revizija po dopuštenju: izazovi i dvojbe*, in Novine u parničnom procesnom pravu, Zagreb: Hrvatska akademija znanosti i umjetnosti (HAZU), 2020, pp. 179 - 209; Bratković, M., *Novine u uređenju revizije u parničnom postupku*, Zakonitost, Vol. 1, Issue 4, 2019, pp. 16 – 27.

[22] Bodul, D., *Rasprave o novom modelu revizije u hrvatskom procesnom pravu*, Harmonius: Journal of legal and social studies in South East Europe, Vol. 1, Issue 1, 2019., pp. 68 – 79.

September 2019 to December 2022, the Supreme Court had declared inadmissible almost 80% of those motions, thus improving significantly its clearance rate.[23]

Next in line were appellate courts, reformed by the 2022 CPA amendment[24] which prevents them from deciding an appeal on a legal basis different from the one adduced by the parties, without holding a hearing or inviting the parties to submit observations or even new evidence in respect of the intended legal reclassification. Bratković argues that the principle of *iura novit curia* cannot be construed as unlimited law-interpreting powers of the courts becuase they must exercise them in accordance with the principle of adversarial proceedings, especially when an appellate court reverses first-instance judgment.[25] However, as reported by the President of the Supreme Court in 2023, only 12% of all second-instance decisions have reversed first-instance decisions in civil law cases.[26] If appellate courts concur with either factual findings or legal reasoning of first-instance courts in 90% of all cases, there was no structural deficiency in appellate courts system (in terms of unforeseeable judicial hyper-activism) that had necessitated legislative intervention in their competences. Furthermore, there is no general ECHR standard that would require a higher court to hold a brand new hearing or administer new evidence if it finds appropriate to address only a question of law that the parties have not raised. In *Barilik v. Slovakia*[27] the ECtHR dismissed as manifestly ill-founded complaints as to the legal reclassification of a claim for unjust enrichment to compensation of damages by reaching the following conclusions: 1. „leave-to-appeal proceedings and proceedings involving only questions of law may comply with the requirements of Article 6, although the appellant was not given the opportunity of being heard in person by the appeal or cassation court“, 2. „there is no indication that he was in any way restricted from pleading his case on any matter of fact or law that he might have deemed fit before the lower courts, or that the changed legal classification of the case by the Supreme Court could not have been foreseen by him as a diligent party“. In the end, the duty of an appellate court to disclose the legal basis on which the chamber would prefer to decide the case, thus allowing the parties to get to know individual opinions that the judges might have formed, appears ill-fitted with common European standards on secrecy of deliberations *in*

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[23] Report of the President of the Supreme Court of the Republic of Croatia to the Parliament of the Republic of Croatia, April 2023, [https://www.vsrh.hr/EasyEdit/UserFiles/izvjestaji/2023/izvjesce-predsjednika-vsrh-o-stanju-sudbene-vlasti-za-2022.pdf], Accessed 8 March 2024, p. 74.

[24] Civil Procedure Act, Art. 55 of the Civil Procedure Amendments Act, Official Gazette no. 80/2022.

[25] Bratković, M., *Preinačujuća presuda i presuda iznenađenja*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 72, Issue 1-2, 2022, pp. 673–705.

[26] Report of the President of the Supreme Court of the Republic of Croatia to the Parliament of the Republic of Croatia, cit. supra note 23, p. 54.

[27] *Barilik v Slovakia,* 28461/10, 18.2.2014.

camera and the protection that judges must be afforded against pressure exerted by the parties themselves, the court's administration or the executive.[28]

Parallel to legislative restructuring of the decision-making processes at higher courts, the High Commercial Court submitted several orders of reference to the CJEU in the case C-554/21 et al. (*HANN-INVEST*) questioning whether the instrument for securing uniform application of the law, such as binding opinions of section meetings of the said court and functioning of its registry, is compatible with the right to a fair trial and the principle of judicial independence; while corresponding proposals, concerning same powers vested in the judges sitting the sections of the Supreme Court, had been submitted to the Constitutional Court (hereinafter: the CC) in the case U-I-6950/2021. Eventually, contrary to the logic of initiatives to divest appellate courts and the Supreme Court of their procedural powers to interpret the law, the 2022 CPA amendment endorsed a new type of a motion for leave to appeal on points of law on account of alleged violations of constitutional rights and freedoms.[29] Whereas the Supreme Court has been questioned in respect of its powers to interpret the law, it appears that the legislature now aims at delegating the power to decide individual complaints on violations of the Constitution and the ECHR from exclusive jurisdiction of the CC, as prescribed by Art. 129 of the Constitution, to the jurisdiction of the Supreme Court. This could serve as an excuse for future restructuring of the CC and abolishing altogether its competence to decide on violations of human rights and fundamental freedoms in individual cases (to review the courts system).

Amidst this quest for more reserved and procedurally confined higher courts, the legislature decided to intervene in the procedure for appointment of the President of the Supreme Court by the 2018 Courts Act amendment that has limited powers conferred on the President of the Republic in this procedure, thus creating a conflict between two branches of the executive.[30] In 2022 the legislature further amended the Courts Act by introducing periodic security vetting system for all judges under the regime that could not have been observed elsewhere in Europe, which was supposed to create another *quasi*-disciplinary body within the Supreme Court, therefore creating conflict between the executive and the judiciary.[31]

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[28] See, to that effect, *Agrokompleks v Ukraine*, 23465/03, 6.11.2011.; *Parlov-Tkalčić v Croatia*, 24810/06, 22.12.2009., Muller, L. F. (2009), *Judicial Independence as a Council of Europe Standard*, 52 German Yearbook of International Law, p. 461.

[29] Art. 62 of the Civil Procedure Amendments Act; see more in Bratković, M., *Zaštita temeljnih ljudskih prava i revizija po dopuštenju*. Modernizacija parničnog procesnog prava, Zagreb: Hrvatska akademija znanosti i umjetnosti, 2023., pp. 187 – 215.

[30] Art. 31 – 32 of the Courts Act Amendments, Official Gazette no. 67/2018.

[31] Art. 15 of The Courts Act Amendments, Official Gazette no. 21/2022.

3. HOW LAW AND ECONOMICS MODEL OF *DE IURE* AND *DE FACTO* JUDICIAL INDEPENDENCE RESPONDS TO CONFLICTING CONCEPTS OF HIGHER COURTS AND JUDGES

Having noticed that the de iure independence of the judiciary, safeguarded by constitutions and national legislation, does not always correspond (correlate) with de facto judicial independence, several schools of law and economics (economic analysis of law) have attempted to determine what, if not the law, determines de facto judicial independence, and whether these two concepts could be somehow correlated.[32] It must be noted that the schools of law economics, as argued by Hayo and Voigt, have focused on research of de facto judicial independence due to incentives from financial institutions to assess the success of aid and development programs.[33] This could, therefore, in the EU context, disclose real incentives for adoption of the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, the so called Rule of Law Regulation which provides for budgetary restrictive measures against the Member States which violate the rule of law and independence of the judiciary.[34]

The law and economics model assumes that the courts would occupy more independent position towards the executive and the legislature if the government is politically weak. This scenario also develops where political competition between the rivals is the tightest.[35] Hayo and Voigt thus argue that the most important formal factor of de iure judicial independence is the ability of the courts to inflict costs on the executive when it breaches the law. If the costs inflicted by the courts are too high, the government will resort to restructuring decision-making judicial process (weakening the courts), removing some judges or abolishing the courts. In this scenario, when formal factors of de iure judicial independence cannot serve as safeguards against arbitrary interferences of the executive, the informal factors

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32 For general introduction to factors of de iure and de facto judicial independence relevant for law and economics methodology, see Lewkowicz, J.; Metelska-Szaniawska, K., *De jure and de facto institutions: implications for law and economics*, Ekonomista, Vol. 6, 2021, pp. 758 - 776; The methodology is in official use the EU and Council of Europe institutions and agencies, in that respect see more in Van Dijk, F.; Vos, G., *A Method for Assessment of the Independence and Accountability of the Judiciary*, International Journal of Court Administration, Vol. 9, Issue 3, 2018, pp. 1 – 21.

33 Hayo, B.; Voigt, S., *Explaining de facto judicial independence*, International Review of Law and Economics, Vol. 27, Issue 3, 2007, p. 273.

34 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, 2020, OJ L 433I.

35 Hanssen, F. A., *Is There a Politically Optimal Level of Judicial Independence?*, The American Economic Review, Vol. 94, Issue 3, 2004, pp. 712 – 729.

of de facto judicial independence play the most significant role: that being the confidence of the population in the legal system, the degree of democratisation (political pluralism - opposition within the legislature or within the executive) and press freedom (in other words, the costs that the media and the population may inflict on the government when it undermines judicial independence). However, if informal factors decide not to inflict costs on the government which breaches the rule of law, the low confidence in the legal system will dissuade the public from using the courts.[36] Furthermore, Hayo and Voigt suggest that informal factors will not inflict costs on the government if it violates judicial independence when they believe that corruption (state capture) prevails in a society, thus rendering the collective action of informal factors against the government powerless.[37] The collective action of informal factors is also less likely if the society is poor, as only wealthier informal actors may have interest in maintaining the judiciary independent from the executive's interferences with private property.[38]

Hayo and Voigt then tested several variables of de iure and de facto judicial independence in a statistical (parsimonious) model (using empirical data collected from various countries) and expressed the influence of the variables on de facto judicial independence with a coefficient. The results showed that formal laws which guarantee de iure judicial independence raise de facto judicial independence far significantly than any other informal factor of de facto judicial independence (coefficient higher than 0,90). In respect of the informal factors mentioned above, public confidence in the courts was the most essential informal factor for bolstering their independence (coefficient higher than 0,60), while freedom of press was less significant than initially presumed (coefficient higher than 0,20).[39] The variables of de iure judicial independence having the highest correlation with de facto judicial independence were the rules on enforcement of courts decisions and the rules on irremovability of judges, which speaks strongly in favour of the CJEU's intervention in Polish judicial system.

Interestingly, Hayo and Voigt model shows that frequent legislative amendments of legal foundations of higher courts (their jurisdiction, competences, powers,

36 Hayo and Voigt, cit. supra note 33, p. 275; thus because public confidence in the legal system is not generated from de iure judicial independence, but from de facto judicial independence, see Bühlmann, M.; Kunz, R., *Confidence in the judiciary: Comparing the independence and legitimacy of judicial systems*, West European Politics, Vol. 34, Issue 2, 2011, pp. 317 – 345.

37 As to the relevance of corruption for the law and economic models of judicial independence, see Rose-Ackerman, S., *Judicial independence and corruption*, Transparency International, Global Corruption Report, 2007., pp. 15 – 24.

38 *Ibid.,* pp. 275 – 280.

39 *Ibid.*, pp. 282 – 290.

etc.) actually prove low de facto independence of the judiciary and in the end dissuade potential users from using the courts (the use of legal remedies before the highest courts seems more uncertain). In this respect, Hayo and Voigt emphasise that de iure independence of higher courts, whether appellate, supreme or constitutional courts, is crucial as they control all other courts.[40] Therefore, in the context of Croatian judiciary with the lowest perceived independence, it seems that the above analysed legislative restructuring of higher courts, aimed at divesting them of powers to review the cases before them, as well as the above mentioned initiatives to divest them of their powers to harmonise case-law, are actually detrimental to their independence and most likely irrelevant for overall efficiency of the courts system.

Finally, Hayo and Voigt model shows that the most effective de iure guarantees of de facto judicial independence and efficiency of the courts are not legislative interventions in organization of the courts systems or procedure, but rather regulations on salaries of the judges and other material expenses of the courts. This result favours the CJEU's choice of the case C-64/16 (*Associação Sindical dos Juízes Portugueses*)[41] concerning national regulations reducing judges' salaries as an appropriate case for establishing independence of the judiciary as a general principle of EU law underlying the individual right to effective judicial protection.

However, one of the most inconclusive results of Hayo and Voigt study was related to the choice of constitutional model. They assumed that parliamentary model is more favourable to de facto judicial independence than presidential model, so they included in the study a number of veto players in those different models, but no interpretative distinction was found between them. This result could be explained by justice Šumanović's dissenting opinion in the CC's case U-II-5709/2020 (*COVID-19 Pandemic Management Measures*) where he had argued, within Croatian constitutional simple majority parliamentary model, that the government de facto controls the legislature, not *vice versa*. Therefore, he concluded that the government is able to exercise powers uncontrolled by other institutional actors such as the president of the republic or the legislature because they have no significant veto powers. Thus he advocated for wider and more effective powers to be vested in the CC in terms of its jurisdiction, procedure and enforcement of its decisions.[42]

Šumanović's observations add up to conclusions reached by Melton and Ginsburg when they revisited Hayo and Voigt model. They assume that formal checks and balances between the executive and the legislature are less relevant for de facto

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[40] *Ibid.*, pp. 280 – 282.

[41] C-64/16 (*Associação Sindical dos Juízes Portugueses*), GC, 27.2.2018.

[42] U-II-5709/2020 and U-II-5788/2020 (*COVID-19 Pandemic Management Measures*), 23.2.2021.

judicial independence as courts cannot enforce effectively these constitutional arrangements. The study thus shows that regulation of procedures for appointment and removal of judges or other formal factors of de iure judicial independence would be highly correlated with de facto judicial independence only if the regulation in question is adopted by a democratic regime (democratic country where the public has confidence in the legal system and its population or the media would mobilise to defend independence of the judiciary) with appropriate formal guarantees for the control of the executive. This study also finds that formal rules on dispersion of powers between the executive, the legislature and the judiciary in procedures for appointment of judges of supreme courts can improve de facto judicial independence provided, again, that the executive is democratic. For example, in autocratic regime or electoral democracies the model of dispersion of powers only conceals the executive's de facto control over appointment procedures.[43] These results are comparable to the EU 2023 Justice Scoreboard which indicates that the number of powers vested in national judiciary councils does not correlate with efficiency of courts systems or more favourable appearances as to their independence[44]; and thus explain why constitutional arrangements concerning de iure independent national judiciary councils do not effectively improve de facto judicial independence in some countries.[45]

The analysis provided by Melton and Ginsburg also explains why both the CJEU and the ECtHR do not oppose, as a general rule, models that involve the executive or the legislature in procedures for appointment of judges, but rather verify whether formal checks against arbitrary interferences of the executive in judicial independence exist and try to ascertain whether the executive is allowed to exercise powers discretionary and unhindered by other actors, such as the national judiciary council or the legislature. This approach can therefore give varying results. For example, in cases concerning Poland, where national regulation had enabled the President of the Republic to sideline the national judiciary council in procedures for appointment or removal of judges, the CJEU found that such involvement

43 Melton, J.; Ginsburg, T., *Does de jure judicial independence really matter?: A reevaluation of explanations for judicial independence*, Journal of Law and Courts, Vol. 2, Issue 2, 2014, pp. 187 - 217; These results prompted further research on the relationship between democratic development and measurements of de facto judicial independence, see, for example Linzer, D. A.; Staton, J. K., *A global measure of judicial independence - 1948–2012*, Journal of Law and Courts, Vol. 3, Issue 2, 2015, pp. 223 – 256.

44 The Commission's data are further corroborated by another study which sees no correlation between judiciary councils competences in respect of disciplinary accountability of judges and courts efficiency, see Garoupa, N., Ginsburg, T. *Guarding the guardians: Judicial councils and judicial independence*, The American Journal of Comparative Law, Vol. 57, Issue 1, 2009, pp. 103 – 134.

45 See also Ríos-Figueroa, J.; Staton, J. K., *An evaluation of cross-national measures of judicial independence*, The Journal of Law, Economics, & Organization, Vol. 30, Issue 1, 2014, pp. 104 – 137.

of the President of the Republic was incompatible with the principle of judicial independence.[46] On the other hand, in C-896/19 (*Repubblika*)[47] the CJEU did not find problematic the national provisions which confer on the Prime Minister a decisive power in the process for appointing members of the judiciary because the impugned provisions had provided for the involvement of an independent body tasked, in particular, with assessing candidates for judicial office and providing an opinion to the Prime Minister. Therefore, informal factors of de facto independence such as mere appearances as to the independence of the Maltese courts and the nature of Malta's political regime (the objectives pursued by the executive when regulating the courts system) were more decisive, irrespective of the CJEU's effort to reason its ruling by formal factors of de iure judicial independence.

However, Melton and Ginsburg study still supports factual causation between formal factors of de iure judicial independence and de facto judicial independence provided that democratic control of the executive still exists. Therefore, new Voigt, Gutmann and Feld study, which now deliberately includes new variables such as access to the highest court, scope of its powers (competences) and allocation of cases within the said court, confirms again that de iure guarantees of independence of higher courts (constitutional or supreme courts) are more significant for de facto judicial independence than informal factors such as democratisation or GDP *per capita*. The inconclusive results of previous Hayo and Voigt study have also been rectified as, contrary to their earlier hypotheses regarding parliamentary model, new study shows that de facto judicial independence is best guaranteed in semi-presidential constitutional models with a wider array of formal factors of de iure independence, which draws our attention back to justice Šumanović›s criticism of Croatian constitutional arrangements.[48] The identical conclusion in respect of parliamentary model was later shared by Carruba et al. who claim that parliamentary model should not be assumed as more favourable to judicial independence because „the extent to which the governing party controls the legislature" is crucial for the latter.[49] Finally, the latest 2021 study by Hayo and Voigt

46 See the CJEU's case law cited supra note 11.

47 C-896/19 (*Repubblika),* GC, 20.4.2021.

48 Voigt, S.; Gutmann, J.; Feld, L. P., *Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators*, European Journal of Political Economy, Vol. 38, 2015, pp. 197 – 211.

49 Carruba, C. J*., et al.*, *When Parchment Barriers Matter: De jure judicial independence and the concentration of power*, manuscript (on file with authors), 2015, p. 19, available at [https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/parchment.pdf], Accessed 12 February 2024.

confirms that the gap between de iure and de facto judicial independence is the widest in parliamentary models with high corruption index.[50]

In conclusion, Voigt, Gutmann and Feld model indicates, same as the above mentioned European Commission data on empirical insignificance of national judiciary councils for independence and efficiency of the courts, that the most decisive are formal factors of de iure independence of superior courts (rules on access to the said courts, their jurisdiction, powers and composition), whereas constitutional arrangements on dispersion of powers between the legislature, the executive and the judiciary by involvement of some formally independent body such as national judiciary council cannot be enforced anyway without involvement of a competent superior court. In other (the plainest words) – the story is all about legal provisions regulating the Supreme Court or the CC, not the SJC, the President of the Republic, the Government or the Parliament, or checks and balances between them. These conclusions, however, question significantly the CJEU's and the ECtHR's methodology for assessment of independence of the judiciary which primarily focuses on existence of some independent judicial body that would scrutinise the powers exercised by the executive or the legislature in the procedure for appointment of judges, therefore legitimising the political character of the procedure at hand.

4. HOW CROATIAN CONSTITUTIONAL COURT APPROACHES *DE IURE* AND *DE FACTO* INDEPENDENCE OF THE JUDICIARY

4.1. Cases U-I-1039/2021 and U-I-1620/2021: Procedure for Appointment of the President of the Supreme Court

By its order of 23 March 2021 the CC dismissed the proposals to repeal Art 44.a of the Courts Act[51] which has limited powers conferred on the President of the Republic by Art 119(2) of the Constitution to propose to the Parliament a candidate for the President of the Supreme Court.[52] The impugned provision has prescribed

[50] Hayo, B.; Voigt, S., *Judicial independence: Why does de facto diverge from de jure?*, European Journal of Political Economy, Vol. 79, 2023, pp. 1 – 23.

[51] As amended by Art. 31 – 32 of the Courts Act Amendments, Official Gazette no. 67/2018.

[52] It must be pointed out that the CC had actually established that the impugned law does not limit the powers of the President of the Republic because he or she may refuse to nominate the candidates shortlisted by the SJC. However, at the same time the President of the Repulic cannot nominate any candidate other than the one shortlisted by the SJC. Therefore, Kostadinov argues rightly that the impugned law did introduce new limitations to the powers conferred on the President of the Republic and furthermore observes correctly that the CC has in fact establish new constitutional arrangements. However, this paper departs from the views expressed by Kostadinov as to the incentives behind the CC's institutional re-arrangement and disagrees with the thesis that the procedure at hand cannot be

that potential candidates for appointment must submit an individual application and a reasoned court management program to the SJC within the deadline determined by the said body in its public call. The applicants argued that Art. 119(2) of the Constitution did not foresee involvement of the SJC in this procedure as it was envisaged that the President of the Republic would exercise this power discretionary and propose any candidate of his or her personal choice to the Parliament (prerogatives of the head of state). Therefore they contested the compatibility of the impugned provisions with the principle of separation of powers between the executive, the legislature and the judiciary (the SJC).

The CC accepted that the ECHR and EU law do not preclude involvement of political actors in procedures for appointment of court presidents. However, due to the strong differences between the Government (that controls the Parliament by simple majority) and the President of the Republic, the CC decided to occupy more independent position (as described by the law and economics model of judicial independence) by reinterpreting the CJEU's general principles on judicial independence. The CC found that the involvement of the SJC in the procedure at hand and additional conditions provided by the impugned law have a general interest in protecting the independence of the Supreme Court. Thus because, as pointed out in cases C-619/18 (*Commission v. Poland - Independence of the Supreme Court*)[53], C-192/18 (*Commission v. Poland - Independence of ordinary courts*)[54] and C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême*)[55], formal factors such as the duty to submit a reasoned court management program and publicity of the procedure before the SJC enable the General Assembly of the Supreme Court and competent committee of the Parliament to deliver objective opinions on various individual applications. Therefore, it was concluded that constitutional character of discretionary powers vested in the President of the Republic does not prevail, as such, over the legislature's choice which, in the interest of independence of the highest court of law, provides for additional de iure checks and balances designed to scrutinise objectively the exercise of discretionary powers of all political actors involved in the procedure.

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reviewed by courts. If the CJEU and the ECtHR may review the involvement of political actors in the procedures for appointment of judges or court presidents, then the CC ought to do the same. In fact, the CC had implicitly warned that it could disapply the provisions of the Constitution which contravene the right to an independent tribunal established by law, by citing paragraph 148. of the judgment of the CJEU in case C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême*). For more details on observations provided by Kostadinov, see Kostadinov, B., *Croatia in a conflicting cohabitation (Milanović – Plenković)*, Collected Papers of Zagreb Law Faculty, Vol. 71, Issue 2, 2021, pp. 131 – 156.

[53] C-619/18 (*Commission v Poland - Independence of the Supreme Court),* GC, 11.7.2019.

[54] C-192/18 (*Commission v Poland - Independence of ordinary courts),* GC, 5.11.2019.

[55] C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême),* GC, 2.3.2021.

The CC was, however, fully aware that the procedure at hand is still poorly regulated. For example, the law does not authorise the SJC (at least, not explicitly) to exclude from the list the candidates who do not meet minimum requirements prescribed by the law for appointment of a judge of the Supreme Court, in spite of the fact that the President of the Supreme Court appointed in this procedure can be a candidate who has never been a judge, or a judge of a lower court, who will obtain ex lege the status of a judge of the Supreme Court upon appointment by the Parliament. In fact, the law does not provide for duty of any body involved in the procedure to verify these legal requirements. As this legal void raises questions as to the lawfulness of a court composed of a judge or a president that does not meet the requirements prescribed by the law to sit the court concerned, should such candidate be appointed, the CC has added another layer of de iure checks in this procedure by determining that other candidates may submit individual complaints to the CC contesting the decision of the Parliament on appointment of the President of the Supreme Court. In his dissenting opinion, justice Šumanović further pointed out that the procedure at hand may be reviewed by the ECtHR and the CJEU as well. This shows that national courts of the Member States, unlike those in non-EU countries, rely on corrective mechanisms of supranational European courts and institutions when they find that national formal checks of de iure judicial independence are inadequate.

Therefore, the rest of the reasoning of the CC (and some dissenting opinions) had to rely heavily on the public as informal factor of de facto judicial independence. As the General Assembly of the Supreme Court and the SJC are not empowered to review lawfulness of the procedure or influence its outcome by their opinions, regardless of their involvement, the CC was satisfied by the fact that competences of individual candidates, their vision of the functioning of the Supreme Court and entire courts system and the procedure as a whole (the manner in which the executive and the legislature exercise their powers) have become more transparent and scrutinised by the public and the media. In his dissenting opinion, justice Šumanović also advised the General Assembly of the Supreme Court to reason in detail and publish its non-binding opinion on the best-fitted candidate (and other candidates as well).

4.2. Case U-I-6950/2021: Binding Opinions of Section Meetings of the Supreme Court and HANN-INVEST Case (CJEU: C-554/21 et al.)

By its order of 12 April 2022 the CC dismissed the proposal to repeal Art. 40(2) of the Courts Act[56] which provides that the section president or the President of the Supreme Court shall convene judges on a section meeting or a meeting

[56] As amended by Art. 28 of the Courts Act Amendments, Official Gazette no. 67/2018.

of all judges if a judge of the Registry of the Supreme Court finds differences in interpretation between sections, chambers or single-judges concerning questions as of law or where a chamber or a single-judge departs from the legal position previously adopted, while the opinions thus adopted shall be binding on all the chambers or judges of the Supreme Court. The applicants in this case also sought constitutional review of a certain opinion of the Civil Law Section of the Supreme Court concerning statute of limitations period applicable to restitution claims based on null contracts. They argued that the impugned provisions contravene the principle of separation of powers as they enable the Supreme Court to legislate. In their view, the judges partaking section meetings thus deliberate and decide in specific cases which, according to the law, are competent to decide only a single-judge or a chamber of the Supreme Court. However, it must be pointed out that no complaint as to the incompatibility of the impugned provisions with the principle of judicial independence had been raised. The CC had preliminary observed that sections of the Supreme Court, established by the law and further regulated by the Rules of the Supreme Court, composed of judges of the Supreme Court appointed by the SJC, cannot be discarded as „non-courts". The CC then proceeded to conclude that according to Art. 119(1) of the Constitution the impugned provisions have a legitimate aim in the constitutional role of the highest court of law vested with a duty to secure uniform application of the law in judicial proceedings, which cannot be likened to the power to legislate. The CC did, however, further observe the CJEU's positions in cases C-689/13 (*Puligienica Facility Esco SpA*)[57] and C-564/19 (*IS*)[58], in order to clarify the relationship between binding effect of section opinions and Art. 267 TFEU. It has clarified that no provision of national law or rules of court that regulate section meetings may be interpreted as precluding a single-judge or a chamber of an appellate court or the Supreme Court from activating the mechanism of judicial dialogue with the CJEU.

It is now appropriate to contextualise Art. 119(1) of the Constitution within the functioning of the Croatian legal system and European human rights protection mechanisms. Firstly, Art. 119(1) of the Constitution represents de iure guarantee for maintaining viable jurisdiction and functioning of the CC by delimiting its competences from those of other courts reviewed by the Supreme Court. It enables the CC to contain its review exclusively to violations of human rights and fundamental freedoms without having to intervene in plain errors of law that judges might have made.[59] The Supreme Court's power to rectify such errors of lower

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57 C-689/13 (*Puligienica Facility Esco SpA*), GC, 5.4.2016.

58 C-564/19 (IS), GC, 23.11.2021.

59 This stable position reflects the principle of subsidiarity of constitutional review in concreto; see, to that effect, among many, U-III-3230/2020 (*Matijaković*), 1.7.2021.

courts is, in any event, already limited by the law only to the errors that further generate conflicting second-instance decisions or the errors of compelling significance for application of law and equality of all. Taking into consideration the limitations on access to the Supreme Court and its 80% inadmissibility decisions rate as mentioned above, the CC has never established that the appeal on points of law is an effective legal remedy. Therefore, in cases where an appeal on points of law was declared inadmissible, the CC must oftentimes address the errors of law made by second-instance courts when their interpretation of the law, or the lack thereof, runs counter the right to a reasoned decision, the principle of non-arbitrariness or the principle of lawfulness.[60] Should judges or chambers of the Supreme Court render conflicting decisions, the cases concerned would raise serious questions as to possible violations of the right to fair trial (Art. 29 of the Constitution, Art. 6 of the ECHR) that either the CC or the ECtHR must address. It also should be noted that the CC and the ECtHR do enjoy some latitude of deference in respect of alleged violations of the right to a fair trial on account of conflicting case-law, for example, where a court departs from the settled case-law in an isolated case so there are no "profound and long-standing differences" within the courts system.[61] However, there is no such latitude of deference under no circumstances if a court, let alone the Supreme Court, departs from settled case-law where material provisions of the Constitution or the ECHR are applicable; or from predictable rules on the right of access to a court. In that case scenario, the interference with (material) human rights and freedoms or institutional guarantees of the right to a fair trial will always be in breach of the principle of lawfulness which inspires every provision of the Constitution and the ECHR and represents one of the tenets of democratic society founded on the rule of law. In a number of cases against Croatia, for example *Vrbica*[62], *Hanževački*[63], *Ljaskaj*[64] or Žic[65], the ECtHR had already found violations of the ECHR on account of unlawful divergence from settled case-law; with some cases, such as *Cindrić and Bešlić*[66], touching upon the most sensitive questions such as the right to life. The most prominent case concerning conflicting decisions of the Supreme Court must be *Vusić v. Croatia*[67] where the ECtHR explicitly stated: „Conflicting decisions in similar cases stemming from the same court which, in addition, is the court of last resort in the matter, may, in

[60] See, for example, U-III-1043/2017 (*Razumić*), 7.3.2023.

[61] *Nejdet* Şahin *and Perihan* Şahin *v. Turkey*, GC, 13279/05, 20.10.2011.

[62] *Vrbica*, 32540/05, 1.4.2010.

[63] *Hanževački,* 49439/21, 5.9.2023.

[64] *Ljaskaj*, 58630/11, 20.12.2016.

[65] *Žic,* 54115/15 et al., 19.5.2022.

[66] *Cindrić and Bešlić,* 72152/13, 6.9.2016.

[67] *Vusić v Croatia,* 48101/07, 1.7.2010., par. 44.

the absence of a mechanism which ensures consistency, breach that principle and thereby undermine public confidence in the judiciary.". Therefore, instruments for harmonisation of case-law, such as the opinion of a section of the Supreme Court, are fundamental for position that the Supreme Court and the CC occupy within national constitutional framework and European human rights system.

Parallel to the constitutional review proceedings mentioned above, the High Commercial Court sought a preliminary ruling from the CJEU in case C-554/21 et al. (*HANN-INVEST*) in respect of section opinions of the said court and the functioning of its registry, suggesting that Art. 40(2) of the Courts Act was incompatible with the principle of judicial independence.[68] However, in their opinion dissenting to the majority ruling rendered in the CC's case U-I-6950/2021, justices Abramović, Kušan and Selanec will argue in detail that binding section opinions of the Supreme Court and the functioning of its registry, coupled with involvement of a section president and/or the President of the Supreme Court, contravene, *inter alia*, the right to an independent court established by law, for various reasons then repeated by the European Commission at the Grand Chamber hearing held in *HANN-INVEST* case.[69]

In respect of the principle of judicial independence, the above mentioned dissenting opinion raised a question concerning internal dimension of independence of a competent single-judge or a chamber *vis-à-vis* the registry of the court (which deems that interpretation of the law given by a single-judge or a chamber departs from settled case-law), the section president or the president of the court (who could then convene a section meeting or meeting of all judges where disputed questions of law shall be discussed and, eventually, a binding opinion could be adopted by majority vote of all judges). This dissenting opinion was inspired by case *Parlov-Tkalčić v. Croatia*[70] where the ECtHR had reiterated that a judge must be independent not only from the outside pressure, but also from any pressure or undue influence from within the court, in particular, from the president of the court or other judges. In the latter case, however, the ECtHR found no violation of Art. 6(1) ECHR arguing that national laws guarantee numerous de iure factors

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68 It must be emphasized that the orders for reference of High Commercial Court were not, in any way, connected to the arguments adduced by the applicants in constitutional review case U-I-6950/2021 in respect of the Supreme Court and its Civil Law Section opinions, or any specific opinion thereof.

69 For written report from the hearing, see Materljan, I., *Sud EU-a odlučuje o valjanosti hrvatskog mehanizma ujednačavanja sudske prakse: prvi utisci s rasprave nisu baš ohrabrujući*, 12.6.2023., available at [https://www.iusinfo.hr/aktualno/u-sredistu/sud-europske-unije-odlucuje-o-valjanosti-hrvatskog-mehanizma-ujednacavanja-sudske-prakse-prvi-utisci-s-rasprave-nisu-bas-ohrabrujuci-55355], Accessed 14 March 2024.

70 cit. supra note 28.

of independence of judges *vis-à-vis* court presidents and other judges.[71] Similarly, in his opinion of 26 October 2023 delivered in *HANN-INVEST* case, AG Pikamäe finds that the most essential factors to be observed are: the fact that judges of the competent judical formation partake in discussion on a section meeting; whereas other judges may discuss only questions of law and adopt an opinion thereto by majority vote; while final decision on all factual and legal aspects of the case referred may be rendered only by a competent single-judge or a chamber. The most interesting aspect of his opinion was, however, the parallel pulled between section meetings and the preliminary reference procedure. AG Pikamäe compares the position of a single-judge or a chamber having a case referred to a section meeting for adoption of a binding opinion on questions of law to that of a national court seeking a preliminary ruling from the CJEU. The preliminary ruling contains a binding opinion on questions of interpretation of EU law, whereas it is for the national court to ascertain application of the given opinion in a specific case and render a final decision on the merits. Interestingly, unlike the ECtHR, AG Pikamäe did not analyse in detail all formal factors of de iure independence of judges concerned *vis-à-vis* the section president, the president of the court or judges of the registry. He deemed appropriate to observe only that none of them is the body competent to decide on binding opinion to be adopted by section judges or the body competent to render a final decision on the merits.

Latter conclusions of AG Pikamäe were more than sufficient because the questions of judicial independence that were supposedly raised in these two cases deserve over-simplification.

It should be remembered that the right to an independent tribunal established by law is first and foremost conferred upon individuals who seek justice, the accused or the parties to the dispute. It was also established in general interest of a society to maintain democracy and the rule of law because only judges independent from the executive or the legislature can protect individuals from unlawful and arbitrary interferences of the state. In law and economics wording, only an independent judge can inflict costs on the state or other private actors for violating rights of the individuals. A judge may also claim that he or she has the right to be independent from any undue pressure from the executive, the legislature or from within the court. However, that right was not construed in judge's own interest, but in general interest of a democratic society and the parties concerned. From this point of view, internal dimension of judicial independence is undeniably the most intriguing and mysterious aspect of this right because, public hearings aside,

[71] For other similar cases, see *Tadić v Croatia*, 25551/18, 28.11.2023.; and *Krykin v Russia*, 33186/08, 19.4.2011.

inner functioning of the courts is still hidden from the public behind a veil. That applies especially to higher courts where cases are deliberated in private. Therefore, behind this veil improper influences on judges could occur, the kind that parties to the proceedings could not be informed of.

However, in neither of these two cases, no one has ever argued that section presidents, court presidents or registry judges have exerted improper influence on the judges whose cases had been referred to a section meeting. Thus because opinions on disputed points of law are adopted by all section judges or all judges of the court (as noticed by AG Pikamäe in *HANN-INVEST* case, more than 20 judges had discussed the disputed questions of law), while the competent judicial formation will decide the merits of a case on its own. It is true that under the law and economics model discussed above the size of a court can be irrelevant for its independence. For example, the executive could tamper with the composition of a court by appointment of new judges to restructure the majority decision-making process within the court in its favour. Therefore, nothing can be inferred with certainty from the fact that one case has been decided by three judges, whilst other was decided by five or seven, or by all of them. Similarily, administrative bodies within the courts system such as court president can influence the composition of a judicial formation competent to decide a case. Nevertheless, nothing in these two cases, nor in national laws, indicates similar possibility that a section president or the president of the court or the registry could convene a section meeting for the purpose of deliberate restructuring of the competent court to decide the case or influence its outcome. Thus because the chain of decision-making process, from the competent judge-rapporteur to the section meeting, includes too many de facto independent actors as well as formal factors of their de iure independence, such as conditions prescribed by the law that must be met for a section to be convened and to adopt an opinion, while the judicial formation competent to decide a case stays unchanged. Therefore, the purported issue concerning internal dimension of the right to an independent court in these cases is purely theoretical because, in essence, it would imply that our constitutional traditions, the ECHR or EU law confer on a single-judge or a chamber an individual right to be independent from various opinions of 20 or more other judges and their colleagues who had been appointed to that court to interpret the law by same independent judiciary council that had appointed the competent single-judge or a chamber. On the other hand, the public could perceive this "right" as "the right of a judge to go rogue" and rule arbitrarily in disregard of consistent interpretation of the law. Even if the latter theoretical (hypothetical) "right" could be construed, it should not prevail over the right of the parties to proper administration of justice and

observance of the principle of lawfulness, nor run counter the legitimate expectations that they infer from the principle of legal certainty.

In the end, under the law and economics models discussed above, section meetings of the Supreme Court could be understood as formal factors that improve de facto independence of the said court from the executive and significant market actors. It is not only more difficult for them to manipulate larger judicial formations, but the Supreme Court had already used this mechanism to inflict costs on the government and significant market actors in a series of disputes concerning violations of individual rights.[72] Eventually, in the Member State with the lowest public confidence in courts efficiency and independence, section meetings of the Supreme Court that ensure uniform application of the law and consistency of the legal system could also help to improve public confidence in the legal system, which is the most important informal factor of de facto judicial independence.

4.3. Case U-I-2215/2021 *et al.*: Periodic Security Vetting of all Judges

By its decision of 7 February 2023 the CC repealed Art. 86.a of the Courts Act[73] which had introduced a system of periodic security vetting of all judges. The vetting process would have been carried out every five years by the National Security Agency (hereinafter: NSA) upon request of a court president forwarded to the NSA by the Minister of Justice. A refusal to submit to the vetting process would have been a disciplinary offence punishable by the SJC. The content of information to be collected about a judge, his or her family, social contacts, activities and assets would have been regulated by the Government. The law had also envisaged a special *quasi*-disciplinary chamber of the Supreme Court which was supposed to review the NSA reports and determine whether there is a security obstacle in respect of a certain judge. The special chamber of the Supreme Court was supposed to report security obstacles to the SJC which would ascertain whether they constitute a disciplinary offence or an act punishable by criminal law. In other instances, a mere existence of a security obstacle would have prejudiced promotion of the judge concerned. The reasoning of the CC as to the formal factors of de iure judicial independence may be summarised as follows:

[72] See, for example, opinion of the Civil Law Section of the Supreme Court no. Su-IV-56/19-18 of 9 December 2019 concerning duty of the state to compensate unpaid overtime work in public health system; or opinion of the Civil Law Section of the Supreme Court no. Su-IV-33/2022-2 of 31 January 2022 concerning statute of limitations for consumer claims based on unfair consumer credit agreements concluded with several Croatian banks.

[73] As amended by Art. 15 of the Courts Act Amendments, Official Gazette no. 21/2022.

- the legislature had not foreseen any form of independent review of the vetting process carried out by the NSA;
- the notion of a security obstacle had not been regulated with sufficient clarity that would have provided guarantees against arbitrariness on part of the NSA or special chamber of the Supreme Court;
- the legislature had not foreseen any legal remedy against assessment of the said chamber;
- the special chamber of the Supreme Court would have assumed quasi-disciplinary authorities of the SJC in breach of constitutional provisions concerning jurisdiction and powers of that independent body;
- the Government could have decided autonomously the content and scope of extremely sensitive information to be collected about judges, without control of any other independent actor, whereas involvement of the Minister of Justice in the vetting process had not been clarified or regulated;
- the legislature had not foreseen precise rules on the right to access the records and protection of information thus collected.

Therefore, the CC has set a stringent standard concerning the SJC institutional arrangements by indicating that there shall be no tolerance regarding possible delegation of powers of the said body to any other institutional actor, not even within the same branch of power – the judiciary. It has thus demotivated the legislature from restructuring further the Supreme Court.

In respect of informal factors of de facto judicial independence, it must be noted that the Government attempted to justify the impugned law, unprecedented elsewhere in the EU, by low public confidence in the judiciary and alleged widespread corruption within the courts system. The executive relied on law and economics presumption that informal factors of de facto judicial independence such as the public or the media would not react to this violation of judicial independence as they perceive corruption to be widespread in a society, courts included (collective action paradox). Exactly as explained by Hayo and Voigt, no one reacted against the impugned law; instead, the parliamentary opposition decided to support it. The opposition to the impugned law came unexpectedly from within the Government as it was none other but the Minister of Justice who had requested an opinion of the European Commission of Democracy Through Law (Venice Commission) that would later help the CC to obtain competent interpretation on (in) compatibilty of the impugned law with the ECHR. However, the most interesting aspect of this case is that the CC explicitly addressed the collective action paradox

described by Hayo and Voigt: it warned the executive against practices of abusing low public confidence in judicial independence as an excuse for undermining further the independence of the judiciary.

5. CONCLUSIONS

The following conclusions may be inferred from the law and economics model of de iure and de facto judicial independence and legislative reforms or case-law analysed above:

1. The national judiciary council institutional arrangement has proven ineffective within simple majority parliamentary model, given unfavourable informal factors of de facto judicial independence such as corruption, inefficient courts and low public confidence in the legal system. Therefore the SJC should not be vested with additional powers. However, against this background, the SJC's powers must not be delegated to other institutional actors and all formal factors of its de iure independence must be maintained.

2. As informal factors do not support de facto judicial independence, the CC will not dismantle formal checks of de iure judicial independence, regardless of the alleged unconstitutionality thereof or even purely hypothetical effects on de facto judicial independence. The CC would also find permissible a law that does not reflect accurately current constitutional arrangements in respect of the executive, provided that the law concerned has a legitimate aim in strengthening judicial independence.

3. Due to inefficiency of the SJC institutional arrangement and simple majority parliamentary model controlled by the Government, the Supreme Court is the most decisive institutional actor for maintenance of judicial independence - legislative restructuring of its jurisdiction and the proceedings before the said court must cease, as the right of access to the Supreme Court has already become illusory.

4. The process of limiting the law-interpreting powers of the courts is against the essence of the role they play in a democratic society where they, as independent actors, should ensure respect for the principles of lawfulness and rule of law. There should be no further restrictions on appellate courts procedural powers to interpret the law as there is no common European standard that would require so.

5. Higher courts, especially the Supreme Court, must not lose powers to harmonise case-law at section meetings as binding opinions thus adopted enable them to occupy more independent position from the executive or significant market

actors. They also empower the Supreme Court to inflict the costs for violations of the law and thus enforce the law effectively. Harmonisation of case-law could improve public confidence in proper administration of justice and equality of all before the law, which is the most important informal factor of de facto judicial independence.

6. Purely hypothetical issues concerning independence of judges cannot prevail over individual right to a non-arbitrary judge and respect for the rule of law (principles of lawfulness and legal certainty).

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