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REPUBLIQUE DE CROATIE / REPUBLIC OF CROATIA /
REPUBLIK KROATIEN / РЕСПУБЛИКА ХОРВА́ТИЯ

The Constitutional Court of the Republic of Croatia
La Cour Constitutionnelle de la République de Croatie
Das Verfassungsgericht der Republik Kroatien
Конституционный суд Республики Хорватии
Ustavni sud Republike Hrvatske

Anglais / English / Englisch / английский

REPUBLIC OF CROATIA
CONSTITUTIONAL COURT

ANSWERS TO THE QUESTIONNAIRE FOR THE XVIth CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

(Vienna, 12 – 14 May 2014)

Subject:

"Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives"

Zagreb, 2 October 2013

CONTENT

Main abbreviations and acronyms

Constitution – Constitution of the Republic of Croatia
Convention – Convention for the Protection of Human Rights and Fundamental Freedoms
EU Charter – Charter of Fundamental Rights of the European Union
CCRC – Constitutional Court of the Republic of Croatia
ECJ – Court of Justice of the European Union
ECtHR – European Court of Human Rights

I. CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW AND EUROPEAN LAW

1. Is the CCRC obliged by law to consider European law in the performance of its tasks?

Yes. The CCRC is obliged by law to consider European law in the performance of its tasks, and does so in its everyday work. The CCRC bases its work on the provisions of the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter referred to as "the Constitutional Act on the CCRC"), the only law in Croatia so far that has the force of constitutional law.[1]

As regards the Constitution,[2] the obligations of the CCRC must be observed separately in relation to Convention law, on the one hand, and EU law, on the other hand.

1.1. Convention Law

Croatia became the 40th full member of the Council of Europe on 6 November 1996. Croatia ratified the Convention on 22 October 1997.[3] The Convention entered into force in respect of Croatia on 5 November 1997, together with Protocols Nos. 1, 4, 6, 7 and 11. In 2003, 2005 and 2010, respectively, Protocols Nos. 13, 12 and 14 entered into force in respect of Croatia.[4]

The Convention constitutes a self-executing international agreement in Croatia.

Croatia has provided for a monistic approach to international treaties within its legal system. The first sentence of what is today Article 141 of the Constitution reads:

> "Article 141
>
> International agreements in force which have been concluded and ratified in accordance with the Constitution and made public shall be part of the internal legal order of the Republic of Croatia and shall have precedence in terms of their legal effects over the [domestic] statutes. ..."

Since the Constitution recognises that the legal force of international agreements is higher than the ordinary laws of parliament, in the case of the non-compliance of a national law with

[1] Constitutional Act on the Constitutional Court of the Republic of Croatia *(Ustavni zakon o Ustavnom sudu Republike Hrvatske)*, Official Gazette no. 99/99, 29/02, 49/02 - consolidated text. The first Constitutional Act on the CCRC was published in Official Gazette no. 13/91.

[2] Constitution of the Republic of Croatia, Official Gazette nos. 135/97, 113/00, 28/01, 76/10. In this Report, the CCRC uses the official consolidated text of the Constitution which is published in Official Gazette no. 85/10. In that text, the numbers of the original Articles of the Constitution have been changed.

[3] The Act on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols nos. 1, 4, 6, 7 and 11 Thereto (Official Gazette – International Agreements no. 18/97).

[4] *See* Official Gazette – International Agreements nos. 13/03, 9/05, 2/10.

such an international agreement, courts and other bodies vested with state and public authority are obliged to apply the international agreement. This rule also applies to the Convention.

Accordingly, the Convention formally has sub-constitutional status in the constitutional order of the Republic of Croatia. In spite of that, the Convention in Croatia actually has a quasi-constitutional status, which has been recognised by the CCRC in its case-law.

Namely, the CCRC established for the first time the non-compliance of a national law with an international treaty in 1998.[5] Two years later, in decision no. U-I-745/1999 rendered in proceedings of the abstract review of the constitutionality of the Expropriation Act,[6] the CCRC for the first time reviewed the conformity of a domestic law directly with the Convention, not with the Constitution, and it repealed some provisions, finding that they were not in conformity with Article 6 of the Convention. In this decision, the CCRC held that any non-compliance of a national law with the Convention simultaneously means the non-compliance of this act with the rule of law, the principle of constitutionality and legality, and the principle of legal monism (Articles 3 and 5 and what is today Article 141 of the Constitution). In this way, the CCRC in fact replaced constitutional review with a review of the consistency of a domestic law with the Convention and by doing so secured a quasi-constitutional status for the Convention in the domestic legal order.

To sum up, the effectively quasi-constitutional status of the Convention in the Croatian legal order is primarily the result of the CCRC's specific approach to the Convention and its particular understanding of the obligations for Croatia that emerge from it. Starting from the conception of legal monism and the constitutional demand for the direct application of the Convention, this approach of the CCRC cumulatively covers the following standpoints:

– national constitutional courts and the ECtHR perform similar tasks at different levels;[7]

– Article 1 of the Convention, as a normative framework for the most important aspects of the entire Convention system including the principle of subsidiarity, is paramount in determining Croatia's obligations under the Convention;

– the ECtHR's judgments transcend the boundaries of a particular case;

– the Convention is the "constitutional instrument of European public order" and the ECtHR is the creator of "European constitutional standards".[8]

[5] The subject was the review of the compliance of the Croatian Railways Act *(Zakon o hrvatskim željeznicama)* with the Constitution, where the CCRC considered the impugned provisions in the light of Article 8 of the UN International Covenant on Economic, Social and Cultural Rights. *See* CCRC Decision (*Odluka*) no. U-I-920/1995 and U-I-950/1996 of 15 July 1998 (Official Gazette no. 98/98).

[6] *See* the CCRC Decision no. U-I-745/1999 of 8 November 2000 (Official Gazette no. 112/00).

[7] Voßkuhle speaks of *europäische Verfassungsgerichtsverbund*, considering that the system of different levels of European and national constitutional courts "can be understood as a *Verbund* of constitutional courts – a system of multilevel cooperation", Voßkuhle, Andreas, The Protection of Human Rights Within the European Cooperation of Courts, Paper presented to the Venice Commission (Venice, 8 March 2013), CDL-JU(2013)00, Strasbourg, 22 March 2013.

1.2. The EU law

Croatia became the 28th full member of the European Union on 1 July 2013.

Chapter VIII ("European Union") of the Constitution came into force on the date of the accession of the Republic of Croatia to the European Union. This Chapter includes what are today Articles 143 - 146 of the Constitution, and regulates the legal grounds for membership and transfer of constitutional powers to the EU (Article 143), the participation of Croatian citizens and institutions in EU institutions (Article 144), the relations between national law and EU law (Article 145) and the rights of EU citizens (Article 146).

The implementation of EU law is within the scope of what is today Article 145 of the Constitution, which reads:

> "Article 145
>
> The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.
>
> All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
>
> Croatian courts shall protect subjective rights based on the European Union acquis communautaire.
>
> Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly."

The CCRC has had no opportunity in its jurisprudence so far to interpret the above-mentioned constitutional provisions. It is considered in legal theory that the "[s]tated principles create specific obligations for ordinary national courts and for the Constitutional Court".[9] The positions of legal theory concerning the significance and achievements of particular provisions of what is today Article 145 of the Constitution are stated below.[10]

Article 145 § 1 of the Constitution "constitutes a declaration of two principles formulated in the case-law of the ECtHR – the principle of equivalence and the principle of effectiveness. Both these principles are embedded in the very foundations of the EU legal order and are well

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[8] In Decision no. U-III-3491/2006 *et al* of 7 July 2010 (Official Gazette no. 90/10), the CCRC changed its original legal opinion and its former practice with regard to the obligation of the Croatian Academy of Sciences and Arts to sell, under more favourable conditions for the tenants, the flats which became its property *ex lege* in the process of the transformation of former social ownership. It explained this change of opinion as follows: "Taking this [i.e. original] stand, the CCRC did not view these cases broadly enough in the light of so-called European constitutional standards, i.e. in the light of the ECtHR's view about the scope and content of the Convention right to the peaceful enjoyment of possessions. The CCRC has been applying these standards in its case-law since July 2009 (Decision no. U-IIIB-1373/2009), accepting the fact that the Convention is the 'constitutional instrument of European public order' (*see Loizidou v. Turkey* ...)".

[9] Tamara Ćapeta; Siniša Rodin (2011) Basic of EU Law *(Osnove prava Europske unije)*, 2nd edition, Zagreb: Narodne novine d.d., p. 150.

[10] Ibid., pp. 151-153.

established in the case-law of the ECtHR. These procedural principles are binding for ordinary and constitutional courts."

Article 145 § 2 of the Constitution "can be understood as a norm that implicitly allows for the direct effect and supremacy of EU law over Croatian law. These principles are embedded in the very foundation of EU law and constitute its original and autonomous legal order". Therefore , Article 145 § 2 of the Constitution "must not be superficially understood as a mere conflict-of-law rule, but rather as the acceptance by constitutional law of the fundamental principles on which EU law is based. These principles permeate the national legal orders of the Member States, and without their acceptance, membership in the EU is not possible". Article 145 § 2 of the Constitution "opens up the Croatian legal system to the legal order of the EU and, by doing so, differentiates it from the legal order of international law. Among other things, it constitutes the national legal expression of the principle of the direct effect and supremacy of EU law over national law, but also includes the other principles of EU law, which are crystallised in the jurisprudence of European law".

Article 145 § 3 of the Constitution "should be understood as a special expression and additional elaboration of Article 141 of the Constitution, which lays down that international treaties are a component of the domestic legal order and have primacy over domestic law".

Article 145 § 4 of the Constitution "prescribes the so-called direct administrative effect". This means that the obligation to apply directly EU law binds not only Croatian courts, but also state bodies, bodies of units of local and regional self-government, and legal persons vested with public authority.

The jurisprudence of the CCRC concerning EU law is still very modest due to the short period in which Croatia has been a full member of the EU.

2. Are there any examples of references to international sources of law, such as

a) the European Convention on Human Rights,
b) the Charter of Fundamental Rights of the European Union,
c) other instruments of international law at European level,
d) other instruments of international law at international level?

The CCRC often refers in its decisions to different European and international sources of law. Examples, within each group, are classified in chronological order.

2.1. European Convention on Human Rights

EXAMPLE 1 — Decision no. U-I-3843/2007 of 6 April 2011 – abstract review of the constitutionality of the 1999 Execution of Prison Sentences Act.

> "8. Also relevant for reviewing the grounds for the proposal is the Convention for the Protection of Human Rights and Fundaments Freedoms of the Council of Europe (...), which is part of the internal legal order of the Republic of Croatia (Article 134 of the Constitution).
>
> Article 14 of the Convention reads:

'Article 14
PROHIBITION OF DISCRIMINATION
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 1 of Protocol No. 12 to the Convention reads:

'Article 1
General prohibition of discrimination
1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

8.1. The case-law of the European Court of Human Rights in Strasbourg (...) with respect to the prohibition of discrimination has also been taken into account in these proceedings of constitutional review, and it is cited in the appropriate places in the statement of reasons of this decision."

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EXAMPLE 2 — Decision and Ruling no. U-I-4170/2004 of 29 September 2010 (CODICES: CRO-2010-011) – abstract review of the constitutionality of the 1997 Social Welfare Act.

"5. The Constitutional Court rendered the decision and ruling in the pronouncement on the grounds of the provisions of the Constitution of the Republic of Croatia (...) and of the relevant international documents, which are part of the internal legal order of the Republic of Croatia (Article 140 of the Constitution – Article 141 of the consolidated wording of the Constitution, Official Gazette no. 85/10).

These are the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (...) and the UN Convention on the Rights of Persons with Disabilities (...). It also took into account the stands in the relevant case-law of the European Court of Human Rights in Strasbourg (...).

(...)

5.2. The relevant provisions of international documents

Article 14 of the Convention reads:

'Article 14
PROHIBITION OF DISCRIMINATION
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 1 of Protocol No. 12 to the Convention reads:

'Article 1
General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

Article 5 of the Convention on the Rights of Persons with Disabilities reads:

'Article 5

Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'

(...)."

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EXAMPLE 3 — Decision no. U-III-1902/2008 of 20 May 2009 – constitutional complaint (meetings and companionship between mother and her child)

"RELEVANT CONSTITUTIONAL AND CONVENTION LAW

6. ... Article 8 of the Convention reads:

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health ... or for the protection of the rights and freedoms of others."

2.2. Charter of Fundamental Rights of the European Union (EU Charter)

EXAMPLE — Decision no. U-I-448/2009 *et al* of 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

"44.4 However, one right laid down in Article 10 para. 2 point 2 of the Criminal Procedure Act does not belong to the categories referred to in the previous item. This is the 'right to human dignity'.

The Constitutional Court recalls that human dignity is protected in absolute terms, is non-derogable and is an incomparable value.

Article 1 of the Charter of Fundamental Rights of the European Union (Official Journal of the European Union, C 83/389, 30. 3. 2010) reads: 'Human dignity is inviolable. It must be respected and protected.' In the European Union human dignity is the first indivisible and universal value.

The Constitutional Court recalls Protocol No. 13 to the Convention which proclaims 'the inherent dignity of all human beings'. It also recalls the main presumption on which the European Court bases its interpretation of human rights, and which is contained in the case of *Refah Partisi (The Welfare Party) and Others v. Turkey* (judgment, 31 July 2001, nos. 41340/98, 41342/98, 41343/98 and 41344/98): '43. ... Human rights form an integrated system for the protection of human dignity'."

2.3. Other instruments of international law at European level

EXAMPLE 1 — Ruling no. U-I-448/2009 *et al* of 19 July 2012 – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

"22. (...) Concerning the European Arrest Warrant referred to by the proponents, the mandatory content of that warrant is laid down in 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Official Journal L 190, 18/07/2002, pp. 1-20); Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Official Journal L 81, 27.3.2009, pp. 24-36). The Constitutional Court notes that information contained in the warrant must be sufficient to allow the competent judicial authorities of the executing state to adopt a decision on the execution of the warrant, that is, on surrendering the wanted person without asking for additional information from the issuing judicial authority. (...)."

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EXAMPLE 2 — Decision no. U-I-4633/2010 of 6 March 2012 – abstract review of the constitutionality of the 2008 Health Protection Act.

"IV. RELEVANT PROVISIONS OF ... THE INTERNATIONAL CHARTER

(...)

6. (In considering the merits of the proponent's proposal the Constitutional Court found as relevant) parts of Articles 4 and 9 of the European Charter on Local Self-government (Official Gazette - International Agreements nos. 14/97 and 4/08), which read:

'Article 4

Scope of local self-government

The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.

(...)

Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy. (...)

Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.'

'Article 9
Financial resources of local authorities
(...)
Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.
(...)'."

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EXAMPLE 3 — Decision no. U-III-64744/2009 of 3 October 2010 – constitutional complaint (inadequate accommodation in the Prison Hospital – violation of the constitutional right to human treatment and respect for human dignity).

"IV. THE RELEVANT LAW
12. (...)
Besides the above relevant regulations, the Constitutional Court also takes into account the European Prison Rules from 2006 (published in the Croatian Annual of Criminal Law and Practice (*Hrvatski ljetopis za kazneno pravo i praksu*), vol. 13 no. 2/2006, pp. 727-743, original text in English at: www.coe.int), which were accepted by the Committee of Ministers of the Council of Europe with the recommendation Rec (2006) 2 of 11 January 2006.
Part III of the European Prison Rules, entitled 'Health care', contains rule 46.1, which reads: 'Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals, when such treatment is not available in prison'."

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EXAMPLE 4 — Decision no. U-III-3138/2002 of 7 February 2007 – constitutional complaint (alleged discrimination of Roma children in some primary schools in Croatia).

"4. For the purposes of the present proceedings, the Constitutional Court ... examined the relevant provisions of ... the Framework Convention for the Protection of National Minorities (Official Gazette – International Agreements no. 14/97), and the European Charter for Regional or Minority Languages (Official Gazette – International Agreements no. 18/97), which are international agreements ratified in the Republic of Croatia, so they are part of the international legal order of the Republic of Croatia and are above law in terms of legal effects (Article 140 of the Constitution).
The Constitutional Court also considered the Recommendation R 1203 (1993) of the Parliamentary Assembly of the Council of Europe on Gypsies in Europe, adopted at the 24th sitting of the Assembly on 2 February 1993; the Recommendation R 1557 (2002) of the Parliamentary Assembly of the Council of Europe on the legal situation of the Roma in Europe, adopted at the 15th sitting of the Assembly on 25 April 2002; the Recommendation R 4 (2000) of the Parliamentary Assembly of the Council of Europe on the education of Roma/Gypsy children in Europe of 3 February 2000; the General Policy Recommendation no. 3 of the European Commission against Racism and Intolerance (ECRI): Combating racism and intolerance against Roma/Gypsies (Strasbourg, 6 March 1998); the European Parliament resolution on the situation of the Roma in the European Union (P6_TA(2005)0151, Brussels, 28 April 2005); the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Decision no. 566, Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area,

PC.DEC/566 of 27 November 2003, adopted at the 479th Plenary Meeting of the Permanent Council of the Organisation for Security and Co-operation in Europe (PC Journal no. 479, Agenda item 4)."

2.4. Other instruments of international law at international level

EXAMPLE 1 — Decision and Ruling no. U-I-2414/2011 *et al* of 7 December 2012 – abstract review of the constitutionality of the 2011 Act on the Prevention of Conflict of Interest.

"INTERNATIONAL LAW

1) UN Convention against Corruption

11. The UN Convention against Corruption was adopted at the 58th session of the UN General Assembly on 31 October 2003. It entered into force on 14 December 2005. For the Republic of Croatia it has also been in force since 14 December 2005 (Act on the Ratification of the United Nations Convention against Corruption, Official Gazette – International Treaties no. 2/05 and Publication Concerning the Entering into Force of the United Nations Convention against Corruption in the Republic of Croatia, Official Gazette – International Treaties no. 1/06; hereinafter: CaC/05).

12. The CaC/05 clearly states the difference between the criminal sphere of combating corruption and preventive (ethical and administrative law) measures that serve the purpose of promptly preventing the occurrence of conflict of interest, or of effectively addressing existing or newly occurred conflict of interest.

The relevant provisions for these Constitutional Court proceedings can be found in Chapter II of the CaC/05 entitled 'Preventive measures'. The Government also referred to them in the Proposal of the APCI (*see* point 5.1 of the statement of reasons of this decision and ruling). These provisions are quoted in the appropriate places in the statement of reasons of this decision and ruling.

Chapter III of CaC/05 titled 'Criminalisation and law enforcement' does not apply in the area of preventing conflict of interest. It regulates criminal liability for corruptive criminal offences that are not subject to regulation by the APCI.

(...)."

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EXAMPLE 2 — Decision no. U-I-295/2006 *et al* of 6 July 2011 – abstract review of the constitutionality of the 2005 Public Assembly (Amendments and Revisions) Act.

"B. INTERNATIONAL TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

19. Relevant in the review of the grounds for the proposals is ... Article 21 of the International Covenant on Civil and Political Rights which reads:

'Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

Finally, also relevant is Article 20 paragraph 1 of the Universal Declaration of Human Rights which reads:

'Article 20

1. Everyone has the right to freedom of peaceful assembly and association ...'"

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EXAMPLE 3 — Decision and Ruling no. U-I-4170/2004 of 29 September 2010 (CODICES: CRO-2010-011) – abstract review of the constitutionality of the 1997 Social Welfare Act.

"5. The Constitutional Court rendered the decision and ruling in the pronouncement on the grounds of the provisions ... of the relevant international documents, which are part of the internal legal order of the Republic of Croatia (Article 140 of the Constitution – Article 141 of the consolidated wording of the Constitution, Official Gazette no. 85/10).

These are ... the UN Convention on the Rights of Persons with Disabilities (Official Gazette - International Agreements, nos. 6/07, 3/08 and 5/08). ...

(...)

Article 5 of the Convention on the Rights of Persons with Disabilities reads:

'Article 5

Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'"

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EXAMPLE 4 — Decision no. U-IX/3911/2009 of 24 September 2009 - appeal against the decision of the National Judicial Council concerning appointment and relief of judicial office.

"The Constitutional Court recalls the fundamental principles of judicial office, having in mind the relevant provisions of the Judiciary Act (Official Gazette , nos. 150/05, 16/07 and 113/08), relevant international documents (UN Universal Declaration of Human Rights included in Resolution no. 217A (III) of 10 November 1948; UN Resolution 'Basic Principles on the Independence of the Judiciary' of 1985; UN Resolution 'Human Rights and Judiciary' of 22 October 1993 no. 50/181, and 20 November 1993 no. 48/137; Declaration on the rights and responsibilities of individuals, groups and national bodies for promoting and protecting of the accepted human rights and freedoms, entailed in the Resolution of the UN General Assembly no. 53/44 of 8 March 1999; the Council of Europe Recommendation no. R(94)12 of 13 October 1994 on the independence, efficiency and role of judges; The Bangalore Principles of Judicial Conduct; the principles in the 1998 European Charter on the statute for judges and the like) and guidelines of the Code of Ethics for judges passed by the Supreme Court of the Republic of Croatia on 26 October 2006 (Official Gazette no. 131/06)."

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EXAMPLE 5 — Decision no. U-III-1801/2006 of 20 May 2009 – constitutional complaint (child abduction – application of the Hague Convention on the Civil Aspects of International Child Abduction).

"Substantiating the allegations in the constitutional complaint, the applicants maintain that the above rulings violated the Hague Convention on the Civil Aspects of International Child Abduction (Official Gazette - International Agreements, no 4/94; hereinafter: The Hague Convention). Article 11 of the Hague Convention stipulates that the judicial or administrative authorities of the Contracting States (including also the Republic of Croatia) shall act expeditiously in proceedings for the return of children.

The Hague Convention binds the Republic of Croatia within the meaning of Article 134 of the Constitution. The provision of Article 6 of the Hague Convention stipulates that one or more central authorities shall be designated to 'discharge the duties which are imposed by the Convention upon such authorities'.

Pursuant to the provision of Article 7 paragraph 2 of the Hague Convention the central authority shall: 'either directly or through any intermediary, take all appropriate measures: a) to discover the whereabouts of a child who has been wrongfully removed or retained; (...) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (...) f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access; g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (...).'

Article 8 paragraph 1 of the Hague Convention reads:

'Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.'

Articles 29 and 30 of the Hague Convention read:

'This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.'

(...)

The provisions of the Hague Convention requiring the designation of a Central Authority for discharging the duties which are imposed upon it by the Convention does not influence the competence of the courts, because this authority is established only with the purpose of providing help to persons the Convention is intended to protect.

Therefore, the Vukovar County and Municipal Courts were not right saying that the applicant could not directly approach the court with her proposal for the return of the wrongfully removed child. If all other requirements were met in order for the court's

jurisdiction to be established in the specific case, the court proceedings should have been conducted.

By declining the jurisdiction to proceed, the above Courts violated the applicant's right of access to a court guaranteed in Article 29 paragraph 1 of the Constitution, ..."

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EXAMPLE 6 — Decision no. U-III-3138/2002 of 7 February 2007 – constitutional complaint (alleged discrimination of Roma children in some primary schools in Croatia).

"4. For the purposes of the present proceedings, the Constitutional Court ... examined the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Službeni list SFRJ no. 9/91 and item 32 of the Decision on the publication of multilateral treaties to which the Republic of Croatia is a party on the basis of notifications of succession, Official Gazette - International Agreements no. 12/93), the Convention on the Rights of the Child, ... which are international agreements ratified in the Republic of Croatia, so they are part of the international legal order of the Republic of Croatia and are above law in terms of legal effects (Article 140 of the Constitution)."

3. Are there any specific provisions of constitutional law imposing a *legal* obligation on the CCRC to consider decisions by European courts of justice?

With regard to the jurisprudence of the ECtHR, there are no specific provisions of constitutional law imposing explicitly a legal obligation on the CCRC to consider judgments and decisions rendered by the ECtHR (as, for example, in the Kosovo Constitution).[11] The CCRC derives the legal obligation to consider the ECtHR's judgments and decisions by interpreting the text of the Constitution in its entirety. In addition, the CCRC considers that the Convention is in itself a direct legal basis giving rise to the legal obligation to consider judgments and decisions rendered by the ECtHR.

What is today Article 145 of the Constitution is relevant with regard to the jurisprudence of the ECJ (*see* the explanation above in Section 1.2).

4. Is the jurisprudence of the CCRC influenced *in practice* by the jurisprudence of European courts of justice?

Yes. This is clear from the entire jurisprudence of the CCRC, where some examples of CCRC decisions are contained in this report and the Appendix to it.

[11] Article 53 [Interpretation of Human Rights Provisions] of the Kosovo Constitution reads: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

It should first be noted that under the influence of some decisions adopted by the CCRC, in which the CCRC directly applied the Convention interpreted through the case-law of the ECtHR, Croatian constitution framers amended Article 16 of the Constitution and introduced the principle of proportionality as a constitutional institute in the constitutional and legal order of the Republic of Croatia.[12] They also amended Article 29 of the Constitution about the right to a fair trial, thus harmonising it with Article 6 § 1 of the Convention.[13]

Below are some examples illustrating how the jurisprudence of the CCRC has been influenced in practice by the jurisprudence of the ECtHR.

EXAMPLES
(Note: the examples are classified in chronological order)

EXAMPLE 1 — Decision no. U-I-448/2009 *et al* of 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

> "2) Constitution of the 'criminal charge' in the law of the Convention
> 30. When reviewing the applicability of guarantees from the criminal title of Article 6 of the Convention to pre-trial proceedings or their stages, the Convention first establishes the existence of 'criminal charge' (Fr. *'accusation en matière pénale'*) within the meaning of Article 6 of the Convention. This concept interprets the substantive, and not the formal aspect. This was mentioned in the case of *Deweer v. Belgium* (judgment, 27 February 1980, application no. 6903/75):
>
> > '44. ... the prominent place held in a democratic society by the right to a fair trial ... prompts the Court to prefer a 'substantive', rather than a 'formal', conception of the 'charge' contemplated by Article 6 par. 1 ... The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.'

[12] Article 16 of the Constitution was supplemented in 2000 with a new § 2: "Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case." The supplement in Article 16 was to the greatest extent affected by the Decision of the CCRC no. U-I-1156/1999 of 4 February 2000 (Official Gazette no. 14/00) in which the CCRC repealed several provisions of the 1999 Restriction on the Use of Tobacco Products Act *(Zakon o ograničavanju uporabe duhanskih proizvoda)*, founding its decision solely on the principle of proportionality, although this principle was not explicitly recognised in the Constitution. In this decision, the CCRC also carried out a proportionality test modelled on the case-law of the ECtHR.

[13] Before the 2000 Amendments to the Constitution, Article 29 indent 1 prescribed: "Anyone suspected or accused of a criminal offence shall have the right: – to a fair trial before a competent court established by law …" Due to the deficiency of this constitutional provision regarding the right to a fair trial, the CCRC took the legal position that "although the subject-matter constitutional guarantee is referred to in an article that primarily regulates the rights of persons during the *criminal* procedure, in terms of quality the same rights belong to all other participants in legally regulated procedures conducted before competent bodies established by law". Such a legal position was expressed by the CCRC in a number of its decisions (for example, U-III-504/1996 of 8 July 1999, U-III-435/2000 of 17 May 2000, etc.), hence it affected the amendment to Article 29 of the Constitution in 2000. Article 29 § 1 of the Constitution today reads: "Everyone is entitled to a fair trial before an independent and impartial court established by law which shall decide within a reasonable time upon his rights and obligations, or upon the suspicion or the charge of a criminal offence." The amendments to Article 29 of the Constitution corresponded to the Decision of the CCRC no. U-I-745/1999 of 8 November 2000 (Official Gazette no. 112/00).

31. The concept of a 'criminal charge' within the meaning of Article 6 of the Convention was explained by the Convention in the case of *Foti and Others v. Italy* (judgment, 10 December 1982, applications no. 7604/76, 7719/76, 7781/77 and 7913/77):

> '52. ...one must begin by ascertaining from which moment the person was 'charged'; this may have occurred on a date prior to the case coming before the trial court (...) such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened... Whilst 'charge', for the purposes of Article 6 § 1 (...) may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (*see*, inter alia, the *Eckle* judgment of 15 July 1982, ... § 73).'

Therefore, the criminal charge for the purposes of Article 6 of the Convention is defined as an 'official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. However, there are other measures or actions that may constitute a criminal charge for the purposes of Article 6 of the Convention if they carry the implication of such an allegation and which likewise substantially affect the situation of the suspect in the same manner as the official notification.

At that moment, the appropriate procedural guarantees from the criminal title of Article 6 of the Convention are activated 'in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions' (judgment in *Kuralić v. Croatia*, judgment, 15 October 2009, application no. 50700/07, § 44). Therefore, pre-trial proceedings are very important for the preparation of the trial because they 'determine the framework in which the offence charged will be considered at the trial' (report in the case of *Can v Austria*, 1984, § 50).

For example, in the case of *Hozee v. The Netherlands* (judgment, 22 May 1998, application no. 21961/93) the Convention established that the 'charge' occurred at the moment when the personal situation of the applicant was for the first time 'substantially affected' by the actions of investigative bodies. Fiscal penalties imposed on the applicant's company and not on him personally indicated that there was no reason for him to suppose that he was under investigation in his personal capacity, which is why he became 'substantially affected' when questioned for the first time as a suspect. This is the moment when he was 'charged' for the purposes of Article 6 of the Convention.

32. Other relevant legal positions of the Convention are provided further in the text of the statement of reasons of this decision."

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EXAMPLE 2 — Decision no. U-III-64744/2009 of 3 November 2010 – constitutional complaint (inadequate accommodation in the Prison Hospital – violation of the constitutional right to human treatment and respect for human dignity).

> "13. ... In its case-law the European Court takes the stand that prisoners generally retain all the fundamental rights and freedoms guaranteed by the Convention except the right to freedom, whose restriction falls under the protection of Article 5 of the Convention. Already in the case of *Kudła v. Poland* (judgment, Grand Chamber, 26 October 2000, application no. 30210/96), the European Court stated that the execution of a lawfully pronounced sentence must not exceed the 'inevitable element of suffering or humiliation'

connected with this form of legitimate treatment by the State of prisoners, and that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being must be adequately secured (§§ 93-94.). The European Court firmly upholds that 'prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention' (case of *Hirst v. the United Kingdom*, judgment, Grand Chamber, 6 October 2005, application no. 74025/01, § 69).

The Constitutional Court bears in mind the decisions of the European Court from this aspect, especially those that refer to the position of prisoners with various health problems, such as for example the tetraplegia of a prisoner/thalidomide victim (case of *Price v. the United Kingdom*, judgment, 10 July 2001, application no. 33394/96, § 25), the paraplegia of a prisoner (case of *Engel v. Hungary*, judgment, 20 May 2010, application no. 46857/06, §§ 27-30), extreme old age of 86 of a prisoner in bad health (case of *Farbtuhs v. Latvia*, judgment, 2 December 2004, application no. 4672/02), leukaemia (case of *Mouisel v. France*, judgment, 14 November 2002, application no. 67263/01, § 40), or those cases that refer directly to the Republic of Croatia. Concerning the latter, the Constitutional Court recalls, for example, the judgement of the European Court in the case of *Testa v. Croatia* (judgment, 12 July 2007, application no. 20877/04), in which, with reference to the applicant in that case, it stated '…all inmates should be afforded prison conditions which are in conformity with Article 3 of the Convention' (§ 62); 'the lack of requisite medical care and assistance for the applicant's chronic illness coupled with the prison conditions which the applicant has so far had to endure for more than two years diminished the applicant's human dignity'; 'the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on her health can qualify the treatment to which she was subjected as inhuman and degrading' (§ 63). Also, in the case of *Cenbauer v. Croatia* (judgment, 9 March 2006, application no. 73786/01) the European Court confirmed its principle in the case of *Kudła v. Poland*, that the State has the positive obligation to take all the necessary steps to secure the health and well-being of prisoners, from the aspect of the practical demands of imprisonment (§ 44).

Although the prohibition of torture, inhuman and degrading treatment in Article 3 of the Convention and Article 23 para. 1 of the Constitution cannot be interpreted as laying down a general obligation of the State to release a prisoner on health grounds or to place him in a civil hospital, nevertheless the assessment of the compatibility of an applicant's health with his prolonged imprisonment, which takes into account the medical condition of the prisoner, before and during his imprisonment, the adequacy of the medical assistance and care provided in prison, and the advisability of maintaining the further execution of imprisonment, is viewed with consideration of the state of health of the prisoner (case of *Sławomir Musiał v. Poland*, judgment, 20 January 2009, application no. 28300/06, § 88) and may not be implemented so that the prisoner has the burden of proving such incompatibility."

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EXAMPLE 3 — Decision and Ruling no. U-I-4170/2004 of 29 September 2010 (CODICES: CRO-2010-011) – abstract review of the constitutionality of the 1997 Social Welfare Act.

"14. The views of the European Court were also relevant for the assessment of the conformity of Article 55 of the Social Welfare Act with the Constitution, especially the views referring to the interpretation and application of the Convention provisions which regulate the prohibition of discrimination. Relevant are the quoted Article 14 of the Convention and Article 1 of Protocol No. 2 to the Convention, which, just like Article 14 para. 1 of the Constitution, contain the grounds on which discrimination is prohibited (so-called discriminatory grounds).

14.1. In its decisions the European Court stated the following with reference to the meaning and content of Article 14 of the Convention: 'Article 14 safeguards individuals, placed in analogous situations, from discrimination' (case of *Van der Mussele v. Belgium*, judgment, 23 November 1983, application no. 8919/80, § 46); 'For the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (case of *Abdulaziz Cabales and Balkandali v. the United Kingdom*, judgment, 28 May 1985, applications nos. 9214/80, 9473/81 and 9474/81, § 72; also the case of *Unal Tekeli v. Turkey*, judgment, 16 November 2004, application no. 29865/96, § 50).

When considering the case-law of the European Court connected with the prohibition of discrimination, the Constitutional Court also bore in mind decisions in which the European Court took the stand that the Contracting States enjoy a 'margin of appreciation' in the application of Article 14 of the Convention. The case-law of the European Court usually allows a wide margin to the State when it comes to general measures of social strategy, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation' (case of *Stec and Others v. the United Kingdom*, judgment, Grand Chamber, 12 April 2006, applications nos. 65731/01 and 65900/01, § 52)."

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EXAMPLE 4 — Decision no. U-III-3138/2002 of 7 February 2007 – constitutional complaint (alleged discrimination of Roma children in some primary schools in Croatia).

"4. ... The Constitutional Court ... considered legal opinions of the European Court of Human Rights on the meaning and scope of Article 3 of the Convention, and Article 2 of the Protocol (P1-2), alone and in conjunction with Article 14 of the Convention (the *D.H. and Others v. the Czech Republic* judgement of 7 February 2006, application no. 57325/00; the *Bekos and Koutropoulos v. Greece* judgement of 13 March 2006, application no. 15250/02; the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* judgement of 23 July 1968, applications nos. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64, etc.)."

5. Does the CCRC in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

Yes. The CCRC in its decisions regularly refers to the jurisprudence of the ECtHR, while it has not regularly referred to the jurisprudence of the ECJ until now because the Republic of Croatia joined the European Union only on 1 July 2013.

Starting from the conception of legal monism, the effectively quasi-constitutional status of the Convention in the Croatian legal order and the constitutional demand for the direct application of the Convention, the CCRC has so far referred to the ECtHR and its case-law in more than 1000 decisions and rulings. Among the decisions and judgments of the ECtHR to which the CCRC has referred in its decisions and rulings, there are incomparably more of those that the ECtHR passed in relation to other States Parties to the Convention than those that it passed in relation to Croatia. In other words, the CCRC has accepted the binding interpretative authority of all the judgments and decisions of the ECtHR, irrespective of the States in relation to which they were passed if these judgments and decisions could have implications for Croatian domestic law, policy or practice (the effect of the judgments of the ECtHR *erga omnes*).

5.1. In its case-law to date the CCRC has adopted several ways of integrating in its decisions the legal opinions of the ECtHR. It applies them in the abstract review of the constitutionality of laws, in individual constitutional complaints and in other proceedings that the CCRC implements within its jurisdiction. Most often the CCRC integrates the ECtHR's case-law into its decisions in the following ways (we refer to the examples of CCRC decisions contained in the Appendix to this report):

a) describing the principle adopted by the ECtHR in its approach to a specific Convention rule or institute (e.g. taxation) and referring to the relevant case-law – *see* examples 3, 4, 7, 9, 13 and 14 in the Appendix;

b) directly citing in their entirety the legal opinions of the ECtHR from a particular judgment or decision – *see* examples 1 and 10 in the Appendix;

c) describing in detail the whole case before the ECtHR and directly citing the relevant legal opinions of the ECtHR in the respective judgment or decision – *see* example 2 in the Appendix;

d) showing the development of a particular legal institute in the case-law of the ECtHR as the ECtHR itself showed it (for example, the development of "legitimate expectations" in the light of Article 1 of Protocol No. 1 to the Convention) – *see* example 11 in the Appendix;

e) showing a legal opinion of the ECtHR with a listing of several cases from its case-law in which it applied that opinion – *see* example 5 in the Appendix;

f) showing the legal opinions of the ECtHR in connection with the positive obligations of the States Parties – *see* examples 7 and 10 in the Appendix;

g) expressing a legal opinion of the CCRC and at the same time referring to a relevant judgment or decision of the ECtHR expressing an identical opinion – *see* example 6 in the Appendix;

h) interpreting the structure of the relevant provisions of the Constitution in keeping with the interpretation of the structure of comparable Convention provisions given by the ECtHR – *see* example 12 in the Appendix.

5.2. When the CCRC integrates the ECtHR's case-law in its decisions in the various ways shown above, this case-law is shown in Croatian. However, in many of its decisions the CCRC also uses the following techniques:

a) besides the ECtHR's legal opinion given in Croatian, the original text of the opinion is also given in parentheses in English - *see* example 13 in the Appendix;

b) besides the ECtHR's legal opinion given in Croatian, the key concept or some sentences or its most important part is given in parentheses in English – *see* examples 6, 10 and 11 in the Appendix;,

c) besides the ECtHR's legal standpoint given in Croatian, the key concept is given in parentheses in English and in French – *see* example 15 in the Appendix.[14]

6. Are there any examples of divergences in decisions taken by the CCRC and the European courts of justice?

In its Decision no. U-III-3304/2011 of 23 January 2013, the CCRC clearly indicated what the attitude of domestic courts should be towards the judgments and decisions of the ECtHR:

> "32. ... the domestic case-law must be built so as to observe the international legal obligations that for the Republic of Croatia arise from the Convention. It must be in conformity with the mentioned relevant legal positions and case-law of the Convention, because for the Republic of Croatia they represent binding standards of international law."

Therefore, there are no intentional divergences from the judgments and decisions of the ECtHR by the CCRC. Nevertheless, as in other States Parties of the Convention, there are errors in assessment on the part of the CCRC, as well as the misapplication or misinterpretation of the Convention and ECtHR's case-law.[15]

If it once violates the Convention, the CCRC tries not to repeat the mistake, that is, it makes an effort to align its case-law with that of the ECtHR. However, the alignment process is difficult in cases related to issues of jurisdiction on the part of the CCRC.

For example, following the finding of a violation of the right to a reasonable length of enforcement proceedings, the CCRC managed to interpret its jurisdiction by including the

[14] An overview of the way of integrating the jurisprudence of the ECtHR in the decisions of the CCRC was prepared by Jasna Omejec, President of the CCRC, in the Report "Ways and Means to Recognize the Interpretative Authority of Judgments against Other States - the Experience of the Constitutional Court of Croatia", Conference on "Strengthening subsidiarity: integrating the European Court's case-law into national law and judicial practice", Skopje, Macedonia, 1-2 October 2010, organized by the European Commission for Democracy through Law (Venice Commission) in co-operation with the Ministry of Justice of 'the former Yugoslav Republic of Macedonia' (in the framework of the Chairmanship of the Committee of Ministers of the Council of Europe), Venice Commission document CDL-JU(2010)019, Strasbourg, 5 November 2010, pp 10-11.

[15] For example, in the case of *Antonić-Tomasović v. Croatia* (judgment, 10 November 2005, no. 5208/03) the ECtHR explicitly established: "37. As to the complexity of the case, the Court disagrees with the Constitutional Court's finding and the Government's argument that the case was complex due to the fact that the issues mandated an opinion from a financial expert ...".

supervision of the reasonable length of enforcement proceedings and thus aligned its case-law with the positions of the ECtHR, which was confirmed by the ECtHR in the case of *Karadžić v. Croatia* (judgment, 15 December 2005, no 35030/04):

> "38. The Court observes at the outset that, prior to the decision of 2 February 2005, constitutional complaints had systematically been declared inadmissible in enforcement proceedings where the competent court had already issued an enforcement order (...). In such cases the Constitutional Court considered that it lacked jurisdiction to address the question whether the excessive length of enforcement proceedings amounted to a violation of the complainant's constitutional rights, since the actual decision on the merits of his or her case had already been given by the competent court. In these circumstances, the Court concludes that, before 2 February 2005, a constitutional complaint under section 63 of the Constitutional Court Act could not be regarded as an effective remedy in cases of this type.
>
> 39. In its decision of 2 February 2005, however, the Constitutional Court changed its practice. It decided to examine, when scrutinising the length of enforcement proceedings, also the time that had elapsed after an enforcement order had been issued. In doing so, the Constitutional Court expressly relied on the Court's case-law and, in particular, the *Hornsby* judgment (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 511, § 41). The Court therefore considers that, since 2 February 2005 and the change in the relevant practice of the Constitutional Court, a constitutional complaint under section 63 is to be regarded as an effective remedy in respect of enforcement proceedings".[16]

However, there are still cases where its jurisdiction to decide on constitutional complaints, laid down in the Constitution and the Constitutional Act on the CCRC, does not allow the CCRC to align its own jurisprudence with that of the ECtHR. This is because the CCRC does not see any room for further interpretation of the Constitution and the Constitutional Act on the CCRC that would result in the widening of its jurisdiction in the direction demanded by the ECtHR, or because any further interpretation aimed at the widening of its jurisdiction would expose the CCRC to justified criticism that it goes beyond the boundaries of the Constitution and Constitutional Act on the CCRC.[17]

[16] Similarly, in the case of *Raguž v. Croatia* (judgment, 10 November 2005, no. 43709/02) the ECtHR stressed the following: "36. (...) In the present case, when deciding on the applicant's complaint, the Constitutional Court only took into consideration the length of the proceedings before one court instance, i.e. the instance where the proceedings had been pending at the time of lodging of the constitutional complaint, but failed to examine the previous period, i.e. the time during which the applicant's case was pending at first instance. This approach of the Constitutional Court is different from that of the Court and is not capable of covering all stages of the proceedings. It is therefore incompatible with the protection of rights in this respect offered by the Court (...). 37. ... Accordingly, there has been a violation of Article 13 of the Convention in the present case". After the *Raguž* judgment, the CCRC changed its former case-law by examining the lenght of judicial proceedings as a separate issue.

[17] Article 129 indent 4 of the Constitution reads: "The Constitutional Court of the Republic of Croatia: – shall decide on constitutional complaint against individual decisions taken by state bodies, bodies of local and regional self-government, or a legal persons with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution ..." Article 62 of the Constitutional Act on the CCRC reads: "(1) Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the CCRC taking it into consideration in its decisions?

When speaking of the effect on the Croatian judiciary of the ECtHR case-law, a distinction must be made between the judicial branch of power, i.e. the system of ordinary courts, and constitutional judiciary, i.e. the CCRC. While ordinary courts still struggle with the direct application of the Convention (the same also applies to the State Attorney's service),[18] the CCRC has developed an extensive practice in this area and applies the Convention regularly, basing its decisions to a large extent on the case-law of the ECtHR.[19]

Article 2 § 1 of the Constitutional Act on the CCRC explicitly requests the CCRC to "guarantee compliance with and application of the Constitution of the Republic of Croatia". This legal basis, which has the force of constitutional law, forms the starting point for the deliberation of the CCRC in cases before it. The CCRC also takes into consideration the entire framework of constitutional law, international law and the legislation relevant to the issue in question.[20]

In spite of the tensions in the relation between ordinary courts and the CCRC, the binding decisions of the CCRC are a useful instrument for correcting the deficiencies of the direct application of Convention law by ordinary courts.

Namely, Article 31 of the Constitutional Act on the CCRC prescribes:

> "Article 31
>
> (1) The decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them.
>
> (2) All bodies of the central government and the local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.
>
> (3) The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court.
>
> (4) The Constitutional Court might determine which body is authorized for the execution of its decision, respective its ruling.
>
> (5) The Constitutional Court may determine the manner in which its decision, respective its ruling shall be executed."

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suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right). (2) If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted. ..."

[18] Concerning the ordinary courts, Article 115 § 3 of the Constitution prescribes: "Courts shall administer justice according to the Constitution, law, international treaties and other valid sources of law."

[19] Since the Republic of Croatia became a full member of the European Union only on 1 July 2013, this kind of conclusion still cannot be drawn in relation to the jurisprudence of the ECJ.

[20] *Cf.* Decision of the CCRC no. U-III-3304/2011 of 23 January 2013, § 27.

Concerning protection of human rights and fundamental freedoms in the proceedings instituted by a constitutional complaint, the Constitutional Act on the CCRC contains special provisions on the obligation to accept the legal opinions of the CCRC:

> "Article 77
>
> (1) When the constitutional complaint is accepted and the disputed act repealed, the Constitutional Court shall state in the reasons for the decision which constitutional right has been violated and what makes the violation.
>
> (2) When passing the new act from Article 76, paragraph 2, of this Constitutional Act, the competent judicial or administrative body, body of a unit of local and regional self-government, or legal person with public authority, is obliged to obey the legal opinion of the Constitutional Court expressed in the decision repealing the act whereby the applicant's constitutional right was violated."

In this situation, the fact that the CCRC takes into consideration in its decisions the jurisprudence of the ECtHR is undoubtedly transformative because its decisions gradually fill the legal framework of Croatia with constitutional contents aligned with the requirements of the Convention.

Finally, the decisions of the CCRC are a useful instrument for the formation of relevant public awareness on constitutional and Convention requirements, which is one of the most important tasks of the constitutional judiciary in transition countries.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

– No, if "influence of the jurisprudence of national constitutional courts" refers to cases of judicial or jurisprudential dialogue through judgments such as, for example, the one between the Supreme Court of the United Kingdom in the case of *R. v. Horncastle & Others* [2009] UKSC 14 (on appeal from: [2009] EWCA Crim 964) (in which the UK Supreme Court declined to follow the Chamber judgment of the Fourth Section of the ECtHR delivered on 20 January 2009 in the cases of *Al-Khawaja and Tahery v. the United Kingdom* 49 EHRR 1) and the responses of the ECtHR in the Grand Chamber's cases *Al-Khawaja and Tahiri v. the United Kingdom* (judgment [GC], 15 December 2011, nos. 26766/05 and 22228/06).

– Yes, if "influence of the jurisprudence of national constitutional courts" refers to cases of direct or indirect influence on the decisions of national courts related to rulings of the ECtHR in the concrete case in which the constitutional court's decision was adopted, and which was later considered by the ECtHR.

EXAMPLE — ECtHR Decision in the case of *Ljubica Galović against Croatia* (5 March 2013 no. 54388/09) and the previous CCRC Ruling in the case of *Ljubica Galović and Others* no. U-III-135/2003 of 30 April 2003.

On 4 May 1999 the owner of a flat brought a civil action against the applicant, her son and her daughter-in-law as well as her two grandchildren in the Opatija Municipal Court (*Općinski sud u Opatiji*) seeking their eviction from the flat at issue. On 7 December 1999 the Opatija

Municipal Court gave judgment for the plaintiff. It ordered the applicant and the other defendants to vacate the flat.

In the above Ruling of 30 April 2003, the CCRC postponed the enforcement of the first-instance judgment of 7 December 1999 pending its decision on the defendants' constitutional complaint. This ruling of the CCRC had a direct influence on a new criterion being accepted for deciding on the reasonable length of proceedings before national courts in the case-law of the ECtHR.

In fact, the applicant before the ECtHR complained that the length of the civil proceedings, in the stage before the CCRC, was incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention. The ECtHR rejected this complaint pursuant to Article 35 § 4 as inadmissible under Article 35 § 3 (b) of the Convention because the applicant had not suffered a "significant disadvantage":

> "The Court first notes that the part of the proceedings before the Constitutional Court lasted for some six years and two months. That period, during which the applicant remained in a state of uncertainty as regards the determination of her civil rights and obligations, may, in the light of the criteria established in this Court's case-law on the question of 'reasonable time' (the complexity of the case, the applicant's conduct and that of the competent authorities, and what was at stake for the applicant), raise an issue under Article 6 § 1 of the Convention, having regard in particular to what was at stake for the applicant.
>
> 71. However, it cannot but be noted that the length of the proceedings at the same time benefited the applicant because the Constitutional Court postponed the enforcement of the judgment ordering her eviction until it had ruled on her constitutional complaint. That being so, the issue arises whether the applicant suffered a 'significant disadvantage' within the meaning of Article 35 § 3 (b) of the Convention as a result of the alleged violation.
>
> (...)
>
> 74. In the present case the Court notes that because of the duration of the proceedings before the Constitutional Court the applicant, instead of being evicted from the flat in the enforcement proceedings, remained living in it for another six years and two months. That fact, in the Court's view, compensated for or at least significantly reduced the damage normally entailed by the excessive length of civil proceedings. The Court accordingly considers that the applicant did not suffer a 'significant disadvantage' in respect of her right to a hearing within a reasonable time (see, *mutatis mutandis*, *Gagliano Giorgi v. Italy* no. 23563/07, §§ 57-58, 6 March 2012)."

II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

1. Does the CCRC in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Yes. The CCRC, when deciding on cases, takes into account the available jurisprudence of other European or non-European constitutional courts, and it refers in its decisions to jurisprudence that is applicable in the constitutional order of the Republic of Croatia if it finds this relevant for the particular case.

In its practice so far, the CCRC has most frequently referred to the jurisprudence of the German Federal Constitutional Court *(Bundesverfassungsgericht - BVerfG)*. Besides the BVerfG's legal opinion given in Croatian, the CCRC also quotes in its decisions in parentheses the original text of the opinion in German.

In some cases, when it is important to establish the existence of common ground in the legal orders of the States Parties of the Convention, the CCRC uses a comparative overview of the case-law of their constitutional courts.

EXAMPLES
(Note: the examples are classified in chronological order)

EXAMPLE 1 — Decision no. U-III-3304/2011 of 23 January 2013 – constitutional complaint concerning the execution of the judgments of the ECtHR (reopening disciplinary proceedings on account of the ECtHR judgment *Vanjak v. Croatia* of 14 January 2010, application no. 29889/04).

> "32. ... every judgment against the Republic of Croatia in which the Convention found a violation of the Convention – for the competent domestic bodies – constitutes a new fact. The force of such a new fact was best described by the German Federal Constitutional Court when on the occasion of the judgment of the Convention in *M. v. Germany* (17 December 2009, application no. 19359/04) and several similar judgments that followed in its judgment in Security Prison I of 4 May 2011, it found as follows:
>
> > '1 The decisions of the European Court of Human Rights, which contain new aspects for the interpretation of the Basic Law are equivalent to legally relevant changes that might lead to the prevailing effects of the final and binding decisions of the Federal Constitutional Court itself.'
> >
> > *(1 Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechtserheblichen Änderungen gleich, die zu einer Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können.')* - BVerfG, Urteil des Zweiten Senats vom 4. Mai 2011 - 2 BvR 2365/09-2 BvR 740/10-2 BvR 2333/08-2 BvR 1152/10-2 BvR 571/10, Absatz-Nr., 1-178
>
> The Constitutional Court finally recalls Article 31.3 of the Constitution, which explicitly allows for the possibility of reopening criminal proceedings if this is prescribed by the law 'in accordance with international treaties'."

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EXAMPLE 2 — Decision no. U-I-448/2009 *et al* of 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

> "44.4. ... In its interpretation of constitutional values, the Constitutional Court accepts the legal position of the German Federal Constitutional Court that human dignity is a central point that must be used as a starting point for balancing all other constitutional values. This position was expressed in the judgment *Lebach* (BVerfGE 35, 202 /Lebach/ - Urteil des Ersten Senats vom 5. Juni 1973 auf die mündliche Verhandlung vom 2. und 3. Mai 1973 - 1 BvR 536/72):

'In the case of conflict, both constitutional values must be balanced, as far as possible; if this cannot be achieved, then it must be decided, on the basis of the special characteristics and circumstances of the individual case, which of the interests must be abandoned. In such a case, both constitutional values must be observed in relation to their relationship towards human dignity as a central point in the value structure of the Constitution.'

('Beide Verfassungswerte müssen daher im Konfliktsfall nach Möglichkeit zum Ausgleich gebracht werden; läßt sich dies nicht erreichen, so ist unter Berücksichtigung der falltypischen Gestaltung und der besonderen Umstände des Einzelfalles zu entscheiden, welches Interesse zurückzutreten hat. Hierbei sind beide Verfassungswerte in ihrer Beziehung zur Menschenwürde als dem Mittelpunkt des Wertsystems der Verfassung zu sehen.')"

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EXAMPLE 3 — Decision no. U-I-295/2006 *et al* of 6 July 2011 – abstract review of the constitutionality of the 2005 Public Assembly (Amendments and Revisions) Act.

"E. NATIONAL LAW AND PRACTICE OF THE COUNCIL OF EUROPE MEMBER STATES

22. Present national legislations in the Council of Europe member states lack clear and firm 'common ground', and therefore there is no common European approach and clear European consensus with regard to restricting the right to freedom of public assembly in the proximity of premises holding seats of the highest bodies of public power.

The relevant data are presented in Enclosure 1 to this decision.

(...)

ENCLOSURE 1

NATIONAL LEGISLATION AND PRACTICE REGARDING THE RIGHT TO FREEDOM OF PUBLIC ASSEMBLY IN THE COUNCIL OF EUROPE MEMBER STATES

(...)

2) Case-law of constitutional courts of the Council of Europe member states

6. The Constitutional Courts of the Council of Europe member states dealt with the right to freedom of public assembly from different aspects.

7. The well-established view of the Federal Constitutional Court of Germany is that mere suspicion or presumption that there will be disorders is not a sufficient reason for imposing a ban on a public assembly. In decision no. BVerfG, 1 BvQ 22/01, 5. 1. 2001 (1-22) this Court reviewed the proposal to order a temporary measure and to repeal the order of the Higher Administrative Court of the Nordrhein-Westfalen Land relating to the ban on a specific public assembly. The German Constitutional Court refused the proposal stating that the freedom of assembly is one of the guarantees that goes along with the principle of the rule of law, including also the limitations imposed on that freedom listed in Article 8 paragraph 2 of the Basic Law. In accordance with the case-law of the Federal Constitutional Court bans may only be imposed with the purpose of protecting the fundamental legal values: the mere threat to public order could not be considered sufficient. *('18. Zu den rechtsstaatlichen Garantien gehört die Versammlungsfreiheit einschließlich ihrer in Art. 8 Abs. 2 GG aufgeführten Grenzen. Nach der Rechtsprechung des Bundesverfassungsgerichts kommen Versammlungsverbote nur zum Schutz elementarer Rechtsgüter in Betracht, während die bloße Gefährdung der öffentlichen Ordnung im Allgemeinen nicht genügt (vgl. BVerfGE 69, 315 <353>). Zur Abwehr von Gefahren für die öffentliche Ordnung können aber Auflagen erlassen werden.'*)

7.1. In the latest decision of 22 February 2011 the German Constitutional Court extended the obligation to protect the right to freedom of public assembly and expression also onto some legal subjects whose work is grounded on the rules of civil (private) law. This relates to the impact of the fundamental rights on third persons (Dritwirkung), which in the specific case the Court substantiated by the fact that not only public companies, which are entirely publicly owned, are bound by the fundamental rights but also companies that are in public-private ownership, if they are controlled by the public sector. This case concerns the ban on access to Frankfurt Airport, which was imposed on the applicant of the constitutional complaint – an activist of the 'Anti-Deportation Initiatives' – by the Fraport AG Company (a joint-stock company that manages Frankfurt Airport, and is in public-private ownership). The applicant's appeal against the Fraport AG Company was rejected before all civil courts at all instances.

The Federal Constitutional Court repealed all the judgments with the explanation that the disputed ban is in breach of the freedom of assembly, because it prohibits the applicant, with no concrete risk estimation and for an unlimited time, from holding any kind of gatherings in the premises of the entire Frankfurt Airport. Such a civil ban is disproportionate. In principle, civil-law authorisations, to which category the prior authorisation of Fraport AG to hold assemblies belongs, and which it renders pursuant to a discretionary assessment, cannot be interpreted in a manner that exceeds the constitutional boundaries imposed on the government authorities competent to ban assemblies. Accordingly, a ban on assemblies is acceptable only if there is imminent and foreseeable danger to the legal values that are equivalent to the freedom of assembly. This, however, does not prevent the separate treatment of the potential danger of assembling in an airport – which is organised as a place for the general communication traffic – and also taking into account the rights of other holders of fundamental rights. In so doing, the particular vulnerability of an airport in its primary role of a location where air traffic takes place can justify the limitations which – starting from the principle of proportionality – might not be taken into consideration in an open street.

Furthermore, the German Federal Constitutional Court also found that the applicant's rights to expression were violated, because the use of airport premises to express one's opinion cannot be restricted for the protection of legal values in a manner different than in a public street. These restrictions must be in accordance with the principle of proportionality. This excludes a general ban on distributing fliers in the public premises of the airport, as well as access to spaces that are arranged as public forums, and a general ban making general access to these spaces conditional on issuing a licence.

The above judgment of the German Federal Constitutional Court is also important because it directly connects the freedom of public assembly with all the places of the 'usual communication traffic' of people. Such gatherings cannot today be limited only to public traffic spaces, but holding an assembly must also be guaranteed in other areas that are increasingly supplementing these spaces, such as shopping centres or other places where people meet. This rule applies regardless if whether there are autonomous areas or are connected to infrastructural objects, or if they are indoor or outdoor places.

8. The Constitutional Courts of the majority of the Council of Europe member states that imposed the measure of an absolute legal ban on the freedom of public assembly in the proximity of buildings holding seats of the highest bodies of state power have so far not reviewed the compliance of these legal solutions with the national constitutions.

According to available data, the only exception is the Constitutional Court of Latvia. It reviewed the constitutionality of Article 9 paragraph 1 of the Assemblies, Processions and Demonstrations Act at the request of 20 representatives of the 8th sitting of the Latvian

Parliament (the Saeimas). Article 9 paragraph 1 of the Act stipulated that it is prohibited to organise meetings and demonstrations closer than 50 metres from the residence of the President and the buildings of the Saeima, Cabinet, Council of Local Authorities, courts, public prosecutor, police, prison and foreign diplomatic and consular offices. In the organisation of meetings and demonstrations close to these buildings, the relevant institutions, except foreign diplomatic and consular offices, may also indicate special places closer than 50 metres. In decision no. 2006-03-0106 of 23 November 2006 the Latvian Constitutional Court accepted the request. Despite the finding that the disputed legal ban has a legitimate aim (securing the undisturbed work of the above institutions and preventing the threat to public security), the Latvian Constitutional Court repealed this provision for non-compliance with the Constitution because it found it not proportional with the aim it was sought to achieve (point 29 of the judgment)."

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EXAMPLE 4 — Decision no. U-III-5200/2011 of 31 May 2011 – constitutional complaint (evidence obtained illegally may not be admitted in criminal court proceedings).

"German constitutional court case-law deals with the issue of a constitutional complaint related to the search of premises in decision BVerfGE 103,142 (151) and concludes that these presumptions are violated if there are no real, plausible reasons for the search. A decision must show that the investigating judge carefully examined the presumption of the violation of a fundamental right."

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EXAMPLE 5 — Decision no. U-I-3843/2007 of 6 April 2011 – abstract review of the constitutionality of the 1999 Execution of Prison Sentences Act.

"19. The Constitutional Court deems it beyond doubt that the addressees of a legal norm cannot truly and distinctively know their rights and obligations and foresee the consequences of their behaviour if the legal norm is not sufficiently definite and precise. The requirement for the definiteness and precision of a legal norm 'constitutes one of the fundamental elements of the rule of law' (judgment of the European Court in the case of Beian v. Rumania, 6 December 2007, application no. 30658/05, § 39: *'... constitue l'un des éléments fondamentaux de l'Etat de droit'*) and is crucial for the development and preservation of the legitimacy of a legal order. It ensures that the democratically legitimate legislator can independently and by law elaborate the fundamental rights and freedoms, that the executive and administrative powers can resort to clear standards in laws and subordinate legislation on which to base their decisions, and that the judicial power and courts can control the legality of the legal order (judgment of the German Federal Constitutional Court 1 BvR 370/07 of 27 February 2008, § 209). When this requirement is not respected indefinite and imprecise laws delegate, in a constitutionally impermissible manner, part of the legislator's authority to the subjective resolution of the administrative and judicial powers."

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EXAMPLE 6 — Decision no. U-I-722/2009 of 6 April 2011 – abstract review of the constitutionality of the 2008 Free Legal Aid Act.

"3.1. During the consideration of the case the Court also examined the relevant case-law of the European Court of Human Rights (...) in relation to the Republic of Croatia (...), of the Federal Constitutional Court of the Federal Republic of Germany (...) and of the Supreme Court of the USA, which are referred to in the relevant parts of the reasons of the Decision and Ruling."

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EXAMPLE 7 — Decision and Ruling no. U-IP-3820/2009 *et al* of 17 November 2009 – abstract review of the constitutionality of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

"8. ... In the view of the Constitutional Court, the Special Tax Act may be approached using the legal opinion of the Federal Constitutional Court of the Federal Republic of Germany (BVerfGE 21, 12, judgment of the First Senate of 20 December 1966 - 1 BvR 320/57, 70/63) that it is in practice impossible, in the case of a tax that is all-encompassing, to find a formulation delimiting the unchallenged part from the challenged part of the act, i.e. that delimitation is possible 'only on the theoretical level'.

(...)

13.3. The above principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located on the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

The standards for determining this borderline in constitutional-court case-law, formulated by the Federal Constitutional Court of the Federal Republic of Germany, are today considered the ruling guidelines for the work of European constitutional courts:

> 'This principle of the social State may certainly be of importance for the interpretation of basic rights, as well as for the interpretation and constitutional evaluation of laws that restrict basic rights pursuant to a proviso of law. It is, however, not capable of limiting basic rights in the absence of specification by the legislature, i.e., directly. It places a duty on the State to provide for a just social order (cf., e.g., BVerfGE 5, 85 [198]; BVerfGE 22, 180 [204]; BVerfGE 27, 253 [283]; BVerfGE 35, 202 [235 f.]); in fulfilling this duty, the legislature is endowed with a broad margin of discretion (BVerfGE 18, 257 [273]; BVerfGE 29, 221 [235]). In other words, the principle of the social State sets a task for the State but does not say anything as to how this task is to be accomplished in detail - in any other case, the principle would come into conflict with the principle of democracy: the democratic order established by the Basic Law would, as the system of a free, political process, be decisively restricted and curtailed if political decision making were to be made subject to a constitutional obligation that could only be met in a specific, stipulated manner. Due to this openness, the principle of the social State cannot erect any direct limitations on basic rights.' (BVerfGE 59, 231 /Freie Mitarbeit/ - ruling of the First Senate of 13 January 1982 - 1 BvR 848, 1047/77 916, 1307/78, 350/79 und 475, 902, 965, 1177, 1238, 1461/80).'

('Dem Sozialstaatsprinzip kann Bedeutung für die Auslegung von Grundrechten sowie für die Auslegung und verfassungsrechtliche Beurteilung von - nach Maßgabe eines Gesetzesvorbehalts - grundrechtseinschränkenden Gesetzen zukommen. Es ist jedoch nicht geeignet, Grundrechte ohne nähere Konkretisierung durch den Gesetzgeber, also unmittelbar, zu beschränken. Es begründet die Pflicht des Staates, für eine gerechte Sozialordnung zu sorgen (vgl. etwa BVerfGE 5, 85 [198]; 22, 180 [204]; 27, 253 [283]; 35, 202 [235 f.]); bei der Erfüllung dieser Pflicht kommt dem Gesetzgeber ein weiter Gestaltungsspielraum zu (BVerfGE 18, 257 [273]; 29, 221 [235]). Das Sozialstaatsprinzip stellt also dem Staat eine Aufgabe, sagt aber nichts darüber, wie diese Aufgabe im einzelnen zu verwirklichen ist - wäre es anders, dann würde das Prinzip mit dem Prinzip der Demokratie in Widerspruch geraten: Die demokratische Ordnung des Grundgesetzes würde als Ordnung eines freien politischen Prozesses entscheidend eingeschränkt und verkürzt, wenn der politischen Willensbildung eine so und nicht anders einzulösende verfassungsrechtliche Verpflichtung vorgegeben wäre. Wegen dieser Offenheit kann das Sozialstaatsprinzip den Grundrechten keine unmittelbaren Schranken ziehen.')"

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1.1. In some cases, the CCRC applies a comparative overview of the relevant legislation of the member states of the Council of Europe.

EXAMPLES
(Note: the examples are classified in chronological order)

EXAMPLE 1 — Decision no. U-I-4469/2008 of 8 July 2013 – abstract review of the constitutionality of the 2007 Act on the Takeover of Joint Stock Companies.

"B. COMPARATIVE GERMAN AND AUSTRIAN LAW

15. ... 'When deciding on the appropriateness of the exclusion of voting rights, the gravity of the sanction imposed on the offeror should be considered on one hand, and on the other hand, the value of the desired aim (protection of minority shareholders). In order to assess such appropriateness, the approach used by other countries must also be considered. The European Union, in Article 17 of Directive 2004/25/EC, leaves the determination of the sanctions to the Member States, and no conclusion can be drawn from it either for or against the exclusion of voting rights. The exclusion of voting rights is a standard sanction in the countries of what is known as the German legal circle. Within the EU, this includes Germany, Austria and Slovenia. Different legal systems, such as French or English law, do not envisage this sanction. Therefore, this sanction as such is not unknown in other legal systems, especially those that are close to the Croatian system. In order to view it in the right light, the form in which it is known there must be considered, as well as the manner in which these countries protect in their constitutions the right to invest capital.

Germany:

German law regulates the exclusion of voting rights in § 59 of the Securities Acquisition and Takeover Act (*Wertpapiererwerbs - und Übernahmegesetz* - WpÜG). With regard to the sanction itself, German law is stricter that Croatian law because it does not just prescribe the exclusion of voting rights as does ATJSC, but the loss of all rights from shares, with the exception of the right to a dividend and to part of the assets after the liquidation of the company. It is considered that this sanction complements other sanctions (fines) and that it therefore represents a part of the system that ensures the correct conduct of the offeror. Some authors consider that this sanction is appropriate, effective and dissuasive in

conformity with Directive 2004/25/EC (Article 17). It is appropriate *(verhältnismäßig)* because it is applied only as a sanction for the violation of duties related to the bid, and because the loss of rights does not include the loss of the right to dividends and to part of the assets after the company is liquidated. On the other hand, some authors criticise this provision precisely because, in their view, it is not appropriate and they call into question its constitutionality.

The proponents point out that § 37 WpÜG (1) provides for the possibility that the German Supervisory Authority *(Bundesanstalt fur Finanzdienstleistungsaufsicht - BaFin)* exempts the offeror from the duty to publish the bid, on the basis of his written proposal, if this proves to be justified in view of the manner of attainment, the objectives being pursued with the attainment of control, a drop below the control threshold subsequent to the attainment of control, the shareholder structure of the target company, or the actual possibility of exercising control, taking into account the interests of the applicant and the interests of the holders of shares. German legal science stresses that this possibility of exemption provides the 'necessary checks and balances', because the control threshold can be overstepped even without any action being undertaken by the offeror and in that case the obligation of publishing the bid would constitute 'unacceptable difficulties'. It is also emphasised that the possibility of exemption has great practical importance and that in the first year from the coming into force of the WpÜG, as many as 43 proposals for exemption were already filed.

It can be read in the writing of some German authors that the loss of rights attached to shares would be contrary to the Constitution if there was no exemption from the duty to publish a takeover bid. However, it must be taken into account that § 37 WpÜG is not the only exemption from the duty to publish a takeover bid. Thus, for example, pursuant to § 36 WpÜG, shares that were acquired by way of inheritance, gratuitous dispositions among spouses or relatives in direct line and up to the third degree, or by way of division of marital estate, the change of legal status or change in shareholder structure within a company remains unconsidered when calculating the percentage of voting rights on the basis of which the control threshold is determined. The literature stresses that, although only § 37 WpÜG is titled 'Exemption from duty', WpÜG also provides for other exemptions and exceptions which are viewed in their entirety. The specific quality of § 37 is that, unlike other exceptions, it is based on a discretionary decision of the Supervisory Authority *(BaFin),* in the framework of cases determined by law. And the possibility of such a discretionary assessment, even though it provides flexibility and adaptability to the needs of the case, is also subject to criticism in German law. These considerations must particularly be kept in mind when speaking of the principle of appropriateness and exceptions in Croatian law (...).

Austria:

In Austrian law, the suspension of voting rights is regulated by § 34 of the Takeover Act *(Übernahmegesetz - ÜbG).* This act was amended for the purpose of aligning it with Directive 2004/25/EC ... In the present form, § 34 ÜbG resembles Article 13.3 ATJSC in the way it prescribes the suspension of voting rights if the offeror fails to publish the takeover bid.

As the proponents point out, § 34 (2) ÜbG prescribes that the Supervisory Commission *(Übernahmekommission)* may rescind the suspension of voting rights in cases where the breach of the law does not in fact threaten the financial interests of the shareholders of the offeree company in specific cases or if the threat can be eliminated by imposing conditions or guarantees. However, just as is the case in the German law, this is only one of the exceptions in the suspension of voting rights. Thus, for example, § 24 ÜbG ...

states that this duty does not apply if the offeror, in spite of having acquired the control threshold, does not have a decisive influence over the company. (...)"

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EXAMPLE 2 — Decision no. U-I-448/2009 *et al* of 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

"a) Judicial protection against unlawful (arbitrary) criminal prosecution and investigation

39. Lawful pre-investigative and investigative actions, including police actions, are the basic preconditions of and the best preparation for the fair trial that may follow.

The question is therefore whether the legislator has the constitutional obligation to prescribe a legal remedy against unlawful (arbitrary) criminal prosecution and investigation and thus ensure for anyone suspected of committing a criminal offence judicial protection against such prosecution or investigation?

39.1. The Constitutional Court notices that countries that have accepted the state attorney investigation have contradictory legal solutions in relation to judicial control of investigation in criminal procedure. Examples are German and Austrian laws on criminal proceedings. While, according to the German legislator, the rights of the defendant may not be violated by the institution of investigative proceedings or by consequences of investigative actions, or by a decision on the suspension of investigation because of which a person is not entitled to be informed that he or she is suspected of having committed a criminal offence, the Austrian legislator envisages certain legal remedies in pre-trial proceedings as well (*see* point 39.4 of the statement of reasons of this decision). (For more details Đurđević, Z: 'Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspekt' (Judicial control of criminal prosecution and investigation: comparative and constitutional aspects) Croatian Annual of Criminal Law and Practice, Zagreb, vol. 17 no. 1/2010, pp. 7-24.)"

2. If so, does the CCRC tend to refer primarily to jurisprudence from the same language area?

No. The CCRC refers to the jurisprudence of the constitutional courts of other countries relevant for the specific case, regardless of whether the jurisprudence is from the same or a different language area (Croatian belongs to the Slavic languages).

Besides the legal opinion of the Constitutional Court of a certain country given in Croatian, the original text of the opinion is also given in parentheses in the language of that country (*see* examples from the previous question).

3. In which fields of law (civil law, criminal law, public law) does the CCRC refer to the jurisprudence of other European or non-European constitutional courts?

In all fields of law. In other words, the CCRC does not differentiate between fields of law when referring to the jurisprudence of the constitutional courts of other countries. What is important is that specific jurisprudence is regarded as applicable in the constitutional order of the Republic of Croatia and relevant for the case in question.

4. Have decisions of the CCRC noticeably influenced the jurisprudence of foreign constitutional courts?

The CCRC does not have any verified findings concerning the influence of its decisions on the jurisprudence of foreign constitutional courts.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

In addition to referring to the jurisprudence of the constitutional courts of other European and non-European countries, and besides participation in institutionalised global and regional international forms of cooperation between constitutional courts, the CCRC's cooperation includes study visits and other types of meetings with other constitutional courts on expert topics in the field of constitutional court judicature.

Very successful cooperation with the constitutional courts of other European and non-European countries is achieved through the Venice Forum. For example, the CCRC established cooperation with other courts through the Venice Forum in case no. U-IP-3820/2009 *et al* of 17 November 2009, in which it refused the proposals to review the conformity with the Constitution of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

> "3.3. In these proceedings the Constitutional Court availed itself of the Venice Forum, a special programme of the Commission for Democracy Through Law of the Council of Europe (the Venice Commission), through which it requested data on the corresponding measures that the Council of Europe member states took because of the global economic and financial crisis, and which are comparable with the legal measure whose constitutionality is being challenged in these proceedings.
>
> By 10 November 2009 the Constitutional Court received the declarations of 21 member states of the Council of Europe (Austria, Bulgaria, Czech Republic, Estonia, France, Georgia, Germany, Ireland, Latvia, Lithuania, Luxemburg, Macedonia, Monaco, Netherlands, Poland, Portugal, Rumania, Slovakia, Slovenia, Spain and Turkey) and also of Belarus, Brazil and the Republic of South Africa."

III. INTERACTIONS BETWEEN EUROPEAN COURTS IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the CCRC?

The existing jurisprudence of the CCRC does not contain any elements to gauge such impact.

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

The existing jurisprudence of the CCRC does not contain any elements to gauge such impact.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the CCRC?

The existing jurisprudence of the CCRC does not contain any elements to gauge such impact.

However, the CCRC closely follows the development of the case-law of the ECtHR and ECJ in relation to the interpretation and application of the *ne bis in idem* principle. Croatia is among the group of States Parties of the Convention facing such problems due to the specific interpretation of this principle in the ECtHR's case-law. This has been noted by the ECJ. Thus, Advocate General Cruz Villalón concluded that "a lack of agreement concerning a right in the system of ECHR" (the Convention - note of the CCRC) "clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence. That widespread existence and well-established nature could even be described as a common constitutional tradition of the Member States."[21]

For example, in its case *Maresti v. Croatia* (judgment of 25 June 2009 no. 55759/07), the ECtHR found that the applicant was prosecuted and tried for a second time for an offence of which he had already been convicted and for which he had served a term of detention (violation of Article 4 of Protocol No. 7).[22]

Similarly, in the case of *Tomasović v. Croatia* (judgment of 18 October 2011 no. 53785/09), the applicant's constitutional complaint, alleging a violation of the *ne bis in idem* principle, was dismissed by the CCRC on 7 May 2009 (before the *Maresti* judgment was delivered) on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. On the other hand, in the *Tomasović* judgment, the ECtHR found a violation of Article 4 of Protocol No. 7. It pointed out that the applicant was prosecuted and

[21] Opinion of Mr Advocate General Cruz Villalón delivered on 12 June 2012. Case C-617/10 - Åklagaren v Hans Åkerberg Fransson. Reference for a preliminary ruling: Haparanda tingsrätt - Sweden. European Court Reports 2013, § 86.

[22] The relevant part of the *Maresti* judgement reads: "63. As to the present case the Court notes that in respect of the minor offence and the criminal offence the applicant was found guilty of the same conduct on the part of the same defendant and within the same time frame. ... The events described in the decisions adopted in both sets of proceedings took place at the Pazin coach terminal at about 7 p.m. on 15 June 2006. It is obvious that both decisions concerned exactly the same event and the same acts. 64. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which he was also convicted."

tried for a second time for an offence of which she had already been convicted.[23] Moreover, in the *Tomasović* judgment the ECtHR concluded for the first time that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.[24]

In sum, the evolution of the case-law of the ECtHR shows that, at the moment, Article 4 of Protocol No. 7 to the Convention precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final. The current state of the case-law, particularly in the rulings of the ECtHR since the case of *Zolotukhin v. Russia* (judgment of 10 February 2009 no. 14939/03), is evidence of the existence of a conclusive statement of the law from Strasbourg.[25]

On the other hand, in the Case C-617/10 *Åkerberg Fransson*,[26] the ECJ delivered its judgement in the preliminary ruling procedure, upon request from the Haparanda District Court in Sweden, concerning the principle of *ne bis in dem* in cases regarding administrative and criminal sanctions for tax evasion in the light of Article 50 of the EU Charter.[27]

It is assessed that the noted differences in the interpretation of Article 4 of Protocol No. 7 by the ECtHR and Article 50 of the EU Charter by the ECJ (particularly in the light of the Opinion of the Advocate General)[28] would have an impact on the future jurisprudence of the CCRC.

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[23] The relevant part of the *Tomasović* judgement reads: "27. As to the present case the Court notes that in respect of the minor offence the applicant was found guilty of possessing 0.21 grams of heroin on 15 March 2004 at about 10.35 p.m. As regards the proceedings on indictment, she was found guilty of possessing 0.14 grams of heroin on 15 March 2004 at about 10.35 p.m. 28. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which she was also convicted." Moreover, the ECtHR noted "that in her constitutional complaint the applicant clearly complained of a violation of the *non bis in idem* principle. However, the Constitutional Court expressly held that double prosecution for the same offence was possible under the Croatian legal system. In these circumstances, the Court finds that the domestic authorities permitted the duplication of criminal proceedings in the full knowledge of the applicant's previous conviction for the same offence." (§ 31)

[24] This legal stand is contrary to the original ECtHR's ruling in *Oliveira v. Switzerland* (judgment of 30 July 1998, Rep. 1998-V; fasc. 83), which received strong criticism and now appears to have been abandoned.

[25] *Cf.* Opinion of Mr Advocate General Cruz Villalón, § 79. *See* note 21.

[26] Case C-617/10 - Judgment of the Court (Grand Chamber) of 26 February 2013 (request for a preliminary ruling from the Haparanda tingsrätt - Sweden) - Åklagaren v Hans Åkerberg Fransson, OJ 2013/C 114/08 of 20. 4. 2013.

[27] The ECJ confirmed that the principle of *ne bis in idem* prevents the levying of two subsequent criminal sanctions for the same act, whilst the same principle permits an administrative sanction followed by a criminal sanction (§ 34). The ECJ also confirmed that sanctions that are administrative by name may in fact be criminal, depending on their legal classification, the nature of the offence and the degree of severity of a potential penalty. However, instead of providing clear guidance as to whether or not the administrative sanction was criminal, the ECJ left it to the national court to decide, thereby still leaving the door open as to the applicability of the principle of *ne bis in idem* in taxation cases (§ 36).

[28] *See* note 21.

APPENDIX

EXCERPTS FROM DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Note: the examples are classified in the order of the articles of the Convention

I. ARTICLE 3 OF THE CONVENTION

EXAMPLE 1 — Decision no. U-III-2501/2008, 16 October 2008 – constitutional complaint concerning refusal of the applicant's request for asylum in the Republic of Croatia (exposure to the risk of ill-treatment in Bosnia and Herzegovina after extradition - the principle of "non-refoulment").

> "7. The Constitutional Court also had the legal opinion of the European Court of Human Rights in mind. The European Court states, in the reasons for the judgment in the case of *Saadi v. Italy* no. 37201/06 of 28 February 2008, that 'Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies… As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department … At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 *(Fatgan Katani and others v. Germany no. 67679/01 of 31 May 2001), …* and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence. In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment' *(Labita v. Italy no. 26772/95).*"

EXAMPLE 2 — Decision no. U-I-988/1998 *et al*, 17 March 2010 – abstract review of the constitutionality of the 1998 Pension Insurance Act.

> "14.5. In this light we must answer the following question: ... is there a general minimum of pension benefits which, if exceeded, would entail a violation of human rights enshrined in the Constitution?
>
> The Constitutional Court did not address this issue in its previous case-law. On the other hand, the European Court has a developed case-law on this subject. It has adopted the principle that the total amount of an individual's pension, together with all the State and public benefits and discounts that the potential victim of the violation of the Convention enjoys, may – because they are not sufficient – under some circumstances, in a specific case, open the question of inhuman or degrading treatment by the State within the meaning of Article 3 of the Convention, if that amount, accessible to the individual, is not sufficient protection from 'impairing physical or mental health' or from 'degradation incompatible with human dignity' to a measure that would be serious enough to fall within the framework of

Article 3 of the Convention (compare the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia,* 18 June 2009, application no. 45603/05, pp. 6 -7; decision in the case *Aleksandra Larioshina v. Russia,* 23 April 2002, application no. 56869/00, p. 4, and the judgment in the case of *Kutepov and Anikeyenko v. Russia,* 25 October 2005, application no. 68029/01, §§ 61-63).

Thus in the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia* the European Court examined the admissibility of the applicant's allegation that the amount of her pension is below subsistence level, which constitutes a threat to her right to life within the meaning of Article 2 of the Convention. The Court found that the authorities did not mistreat the applicant in any way. The essence of the applicant's objection was that the State pension on which she depended for survival was insufficient for her basic human needs.

Examining the application's admissibility, the European Court took into account, besides the amount of the pension itself, also the sum of the applicant's other monthly receipts (in Russian roubles - RUB): - her pension (RUB 1,460), - social aid (RUB 590) and - compensation for limited ability to work (RUB 410), but also the following privileges that the applicant enjoyed: - 50% discount on utility bills; - free public urban and suburban transport; - 50% discount on interurban rail and air transport; 50% discount on telephone and radio bills; free medical assistance; free dental prosthetics (except precious metals and cermets); - 50% discount on medical prescriptions; - free sanatorium treatment and - free suburban and interurban transport to the place of the treatment. The European Court further took into consideration that the applicant had received one sum of RUB 500 indigence aid, and that her family also benefited from the discount on utility bills. Finally, the European Court also took into consideration that part of the applicant's benefits, on her request, was monetised (pp. 2-3 of the decision).

Although the European Court found that the applicant's monthly income 'was not high in absolute terms', it declared inadmissible the applicant's objection that her rights were violated because her income was below subsistence level, with the explanation that the applicant had not proved that 'the lack of funds translated itself into concrete suffering'.

In the *Kutepov and Anikeyenko v. Russia* the European Court pointed out the following:

> '61. The second applicant further relied on Article 2 of the Convention in that the present amount of his old-age pension was insufficient to maintain a proper living standard.
>
> 62. The Court recalls that the Convention does not guarantee, as such, the right to a certain living standard. It further notes that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the second applicant's pension has caused such damage to his physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention, or that he faces any 'real and immediate risk' either to his physical integrity or his life, which would warrant the application of Article 2 of the Convention in the present case ...'"

II. ARTICLE 5 PARAGRAPH 1 OF THE CONVENTION

EXAMPLE 3 — Decision no. U-III-1897/2008, 20 May 2008 – constitutional complaint (extension of detention after the court of first instance had passed judgment).

"5.4. With reference to the second part of Article 102 paragraph 1 indent 3 of the Criminal Procedure Act, under which if detention is ordered for reasonable suspicion that a person has committed an offence 'special circumstances' justifying such suspicion must be shown, it is necessary to recall the opinions of the European Court of Human Rights in the application of Article 5 para. 1c of the European Convention on Human Rights. According to these opinions, detention cannot be grounded only on reference to an equal offence and danger of reoffending, or only on reference to the defendant's past history and personality or only on previous conviction, but all the circumstances of a particular case must be taken into account, including the defendant's personal circumstances and character, the amount of the damage, his perseverance and the frequency of his offences and the like (judgments of the European Court of Human Rights in the cases *Clooth v. Belgium*, § 40; *Muller v. France*, § 44; *Matznetter v. Austria*, § 9), because only thus can the public interest for depriving a person of freedom be seen to prevail over his right to freedom. This is especially important when detention is extended on the grounds on which it had originally been ordered, because in such cases the reasons for the continuation of detention, as the measure that interferes most deeply with the fundamental right to personal freedom, must be qualitatively stronger."

III. ARTICLE 5 PARAGRAPH 3 OF THE CONVENTION

EXAMPLE 4 — Decision no. U-III-3698/2003, 28 September 2004 – constitutional complaint (reasonable suspicion as a legal ground for continued detention on remand).

"8.... The Constitutional Court also points out the legal opinion taken by the European Court in the application of Article 5/3 of the European Convention, whereby reasonable suspicion, however grave the criminal offence, is after a lapse of time in itself not sufficient legal ground for continued detention on remand. The case of *Kemmache v. France* of 21 October 1991 contains the following legal stand: where an arrest is based on reasonable suspicion that the person concerned has committed an offence, persistence of that suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings. The above legal opinions of the European Court were repeated in the case of *Nikolova v. Bulgaria*, of 5 March 1999, and in many other judgments."

IV. ARTICLE 6 PARAGRAPH 1 OF THE CONVENTION

1) JUDICIAL IMPARTIALITY

EXAMPLE 5 — Decision no. U-III-5423/2008, 28 January 2009 – constitutional complaint (objective judicial impartiality).

"6.1. ... The European Court of Human Rights deems that a judge is presumed impartial until proved otherwise. However, in a particular case the facts may give rise to objective negative appearances of a judge's (im)partiality which justify legitimate expectations that the judge will excuse himself from the trial. Such facts exist, for example: a) when a judge taking part in the trial decided, in prior proceedings, about issues that are

closely connected with the issue he will have to settle when giving judgment (judgment in the case of *Hauschildt v. Denmark* of 24 May 1989, § 51-52); b) if he, after participation in passing the first-instance judgment, participates in deciding on appeal (judgment in the case of *De Haan v. Netherlands* of 26 August 1997, § 51, 54); c) if he was on the out-of-trial panel of judges that confirmed the grounds for indictment and was after that a member of the chamber of judges at the trial (judgment in the case of *Castillo Algar v. Spain* of 28 October 1998, § 47-49). In the case of *Piersack v. Belgium* (judgment of 1 October 1982, § 30-31), the fact that the judge who presided over the panel at the trial had earlier been at the head of the public attorney's office competent for prosecution in the case was also found as a negative indicator of the criminal court's impartiality."

EXAMPLE 6 — Decision no. U-III-282/2008, 2 June 2010 – constitutional complaint (subjective and objective judicial impartiality).

"6. ... A judge's impartiality in criminal proceedings is not ascertained, but to exclude (Article 36 para. 1 CPA) or excuse (Article 35 para. 2 CPA) him from the trial circumstances that indicate bias must be found (judgement of the European Court of Human Rights in the case of *Kyprianou v. Cyprus* of 15 November 2005, § 122).

The existence of these circumstances is established by a subjective test, where it is necessary to examine the judge's personal beliefs and behaviour indicating whether he has personal bias (Engl. *'personal bias'*) against the party in the case (judgment of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 47), and by an objective test, where it is necessary to examine whether there are objectively ascertainable facts that may raise doubts as to a judge's impartiality (so-called negative indicators of the 'appearance of impartiality', judgment of the European Court in the case of *Sramek v. Austria* of 22 October 1984, § 42). In this examination the misgivings of the party in the proceedings that he was the victim of a judge's bias is 'important but not decisive'; what is decisive is whether these misgivings can be objectively justified (Engl. *'objectively justify'*, judgement of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 48). If this is possible, there is legitimate doubt as to the judge's impartiality and he must be excused from the trial in that case, regardless of the level of the proceedings at which this was discovered."

2) REASONABLE LENGHT OF PROCEEDINGS

EXAMPLE 7 — Decision no. U-IIIA-474/2003, 3 June 2003 – constitutional complaint against the unreasonable time of proceedings (positive obligations of the contracting states).

"5.5.... It must be said that in several of its judgments the European Court of Human Rights explicitly found that the contracting states are bound to organise their legal orders in a way that enables courts to comply with the requirements provided for in Article 6 para. 1 of the European Convention, reiterating the especial importance of this requirement for the proper and regular conduct of judicial proceedings (*see* for example judgments of the European Court in the cases of *Bucholoz v. Germany* of 6 May 1981*, Guincho v. Portugal* of 10 July 1984, *Unión Alimentaria Sanders SA v. Spain* of 7 July 1989, *Brigandi v. Italy* of 19 February 1991 etc.)."

3) RIGHT OF ACCESS TO COURT

EXAMPLE 8 — Decision no. U-III-443/2009, 30 April 2009 – constitutional complaint (the right to judicial protection against a parliamentary decision on the election or appointment of the highest state officials).

> "8.1.a) The Constitutional Court notes that neither the Constitution nor the relevant laws explicitly provide for a legal remedy against the election or appointment of the highest state and judicial officials nor provide for a circle of people empowered to submit a legal remedy against these. On the other hand, they do not explicitly exclude this. In this sense the new legal view of the European Court of Human Rights must be mentioned, expressed for the first time in the Grand Chamber judgment in the case of *Vilho Eskelinen and others v. Finland* of 19 April 2007 (application no. 63235/00), which reads:
>
> > "61. The Court recognises the State's interest in controlling access to a court when it comes to certain categories of staff (*Engl. staff*). However, it is primarily for the Contracting States, in particular the competent national legislature, not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way ...
> >
> > 62. To recapitulate, in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest… It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified."

V. ARTICLE 8 OF THE CONVENTION

EXAMPLE 9 — Decision no. U-III-980/2007, 14 May 2009 – constitutional complaint (parents-children relations).

> "5. The Constitutional Court notes that the European Court of Human Rights, when it applies the relevant provisions of the Convention (...) in its decisions that refer to the right to family life, which, among other things, also includes parental rights and the right to care, pointed out the state's obligation for the parents to be involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests in proceedings involving child care (*mutatis mutandis, W. v. the United Kingdom,* judgment of 8 July 1987, § 63-65*,* and *Elsholz v. Germany,* judgment of 13 July 2000, § 52*).* Also, in deciding on the execution of parental rights the state must establish a fair balance between the interests of the child and of the parents, where special importance must be given to the best interests of the child, which, depending on their nature and gravity, may prevail over the interest of the parents *(mutatis mutandis, Sahin v. Germany,* application no. 30943/96, judgment of 8 July 2003, § 65, § 66, and *Elsholz v. Germany,* § 50, ibid.)."

EXAMPLE 10 — Decision no. U-III-1801/2006, 20 May 2009 – constitutional complaint (child abduction – application of the Hague Convention on the Civil Aspects of International Child Abduction).

"7.... Furthermore, the European Court found that the positive obligations Article 8 of the Convention imposes on the Contracting States with respect to reuniting parents with their children that have been abducted, they must be interpreted in the light of the Hague Abduction Convention (*§1 Karadžić v. Croatia, Judgment of 15 November 2005, § 75 H.N. v. Poland, Judgment of 13 September 2005).* The national bodies incorrect interpretation of some provisions of the Hague Abduction Convention does not free the state from the responsibility for the violation of the provision of Article 8 of the Convention (*§ 80 and 81 Monory v. Romania and Hungary, Judgment of 5 July 2005).*"

VI. ARTICLE 1 OF PROTOCOL NO 1 TO THE CONVENTION

EXAMPLE 11 — Decision no. U-IIIB-1373/2009, 7 July 2009 – constitutional complaint before the judgement became final (legitimate expectations).

"7.... The Constitutional Court also brings to notice the accepted legal opinion of the European Court of Human Rights (hereinafter: European Court) which recognises that the legitimate expectations of the parties must under certain conditions be considered 'property' under the protection of Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (..., hereinafter: Convention), which regulates the protection of ownership.

The European Court first mentioned the concept of 'legitimate expectation' in the context of Article 1 of Protocol No. 1 to the Convention in the judgment in the case of *Pine Valley Developments LTD and others v. Ireland* of 29 November 1991 (application no. 12742/87). In this case the applicants were entrepreneurs whose principal business was the purchase and development of land; in 1978 they bought land on the site in reliance on an outline planning permission for industrial warehouse and office development, which the Irish Supreme Court later found *ultra vires* and therefore *ab initio* a nullity because it contravened relevant laws. In that case, the Court found that a 'legitimate expectation' arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was 'a component part of the applicant companies' property' (§ 51 of the *Pine Valley* judgment and § 45 of the judgment of the Grand Chamber in the case *Kopecký v. Slovakia* of 28 September 2004, application no. 44912/98, 2004-IX).

In the *Kopecký v. Slovakia* judgment the Grand Chamber of the European Court condensed the views explained in the *Pine Valley* judgment and in the newer *Stretch v. the United Kingdom* judgment of 24 June 2003 (application no. 44277/98, § 35). It explicitly stated that in the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the 'legitimate expectation' is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights (§ 47 of the *Kopecký* judgment).

Furthermore, the European Court of Human Rights in many of its decisions reiterated that the applicants do not have a 'legitimate expectation' if it cannot be found that they have a 'currently enforceable claim that was sufficiently established'. Thus in the Grand Chamber Decision on the admissibility of the application in the case of *Gratzinger and Gratzingerova v. the Czech Republic* of 10 July 2002 (application no. 39794/98, 2002-VII), in which the applicants failed to meet one of the essential statutory conditions for realising their claim, the Grand Chamber of the European Court found that their application was not sufficiently

established for the purposes of Article 1 of Protocol No. 1 to the Convention. 'The belief that the law then in force would be changed to the applicants' advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol No. 1. The Court considers that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The Court accordingly concludes that the applicants have not shown that they had a claim which was sufficiently established to be enforceable, and they therefore cannot argue that they had a 'possession' within the meaning of Article 1 of Protocol No. 1' (§§ 73 and 74 of the *Gratzinger* decision and § 49 of the *Kopecký* judgment).

The Constitutional Court already referred to the above legal opinions of the European Court in its decision no. U-I-2921/2003 *et al* of 19 November 2008 (Official Gazette no. 137/08), so it remains here to again find them in conformity with Article 48 para. 1 of the Constitution, and thus also applicable in the constitutional order of the Republic of Croatia.

The Constitutional Court additionally notes that conditional claims or applications that were refused because the party did not meet statutory conditions, or a relevant legal act, are not considered property that would constitute ownership rights for the purposes of Article 48 para. 1 of the Constitution. The European Court takes the identical stand (*see* summary of relevant stands in the cases: *Mario de Napoles Pacheco v. Belgium*, decision of the European Commission of 5 October 1978, application no. 7775/77, DR 15, p. 151 in the English edition; *Malhous v. the Czech Republic,* Grand Chamber decision of 13 December 2000, application no. 33071/96, ECHR 2000-XII; *Prince Hans-Adam II v. Germany,* Grand Chamber decision, application no. 42527/98, ECHR 2001-VIII, § 85; *Nerva v. the United Kingdom,* judgment of 24 September 2002, application no. 42295/98, Report on Judgments and Decisions 2002-VIII , § 43).

In the case under examination here the applicants' request for a building permit was not refused for not meeting the statutory conditions. On the contrary, in this case the applicants' request for a building permit was well founded so they were issued with one; in this way their right of construction was recognised in a final and legally effective document and they began to build. For the needs of construction they partly invested their own money and partly took a bank loan with set deadlines for returning the loan during several years.

Starting from the above legal opinions of the European Court, which it too had accepted in its previous practice, the Constitutional Court finds that in this case the applicants had a 'legitimate expectation' that the conditions in the building permit, on the grounds of which they assumed a financial burden, would be met, considering that it was based on reasonably justified confidence in a final and legally effective administrative act which had a valid statutory foundation. Thus there is no doubt that their claim was sufficiently well established and thus also 'enforceable', which qualifies it as 'property' for the purpose of Article 1 Protocol No. 1 to the Convention.

The Constitutional Court therefore concludes that the above legitimate expectation in itself constitutes the applicants' ownership interest so the legally effective building permit is in this case a component part of the applicants' property that falls under the guarantee of Article 48 para. 1 of the Constitution and Article 1 of Protocol No. 1 to the Convention."

EXAMPLE 12 — Decision no. U-III-3491/2006 *et al*, 7 July 2010 – constitutional complaint (three rules of Article 1 of Protocol No. 1 to the Convention).

"15.3. Like Article 48 of the Constitution, so Article 1 of Protocol No. 1 to the Convention contains three clearly defined rules. The European Court analysed and applied

them for the first time in the judgment in the case of *Sporrong and Lönnroth v. Sweden* of 23 September 1982, applications no. 7151/75 and 7152/75." (Further in the statement of reasons, an explanation of the "three rules of P1-1" is given - note of the CCRC.)

EXAMPLE 13 — Decision no. U-I-988/1998 and others, 17 March 2010 – abstract review of the constitutionality of the 1998 Pension Insurance Act.

"14.3. ...The right to a social benefit from the pension insurance sub-system based on generation solidarity is also protected under Protocol No. 1 to the Convention ...

The European Court of Human Rights in Strasbourg (hereinafter: the European Court) has in many of its decisions and judgments pointed out that the Convention 'does not as such guarantee a right to a State pension or to a similar State-funded benefit' (decision on admissibility in the case of *Neill and others v. the United Kingdom,* 29 January 2002, application no. 56721/00).

However, '… where a right to such benefits based on a contributory scheme is provided for in domestic legislation, such right may be treated as a pecuniary right for the purposes of Article 1 of Protocol No. 1 so as to render applicable that provision' (decision on admissibility in the case of *Neill and others v. the United Kingdom,* 29 January 2002, application no. 56721/00; judgment in the case of *Gaygusuz v. Austria,* 16 September 1996, application no. 17371/90, Reports 1996-IV, §§ 39-41)."

EXAMPLE 14 — Rulings no. U-IP/3820/2009 *et al*, 17 November 2009 – abstract review of the constitutionality of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

"14.1. The European Court starts from the principle that every taxation is *prima facie* interference in the right to the peaceful enjoyment of possessions guaranteed in Article 1 of Protocol No. 1 to the Convention ... 'since it deprives the person concerned of a possession, namely the amount of money which must be paid' (judgement of the Grand Chamber of the European Court in the case of *Burden v. the United Kingdom,* 20 April 2008, application no. 13378/05, § 59).

However, the Convention does not deprive the state of its taxation powers: the state has the right to apply laws to ensure the payment of tax. This interference of the state in the property of people is in general justified under Article 1 para. 2 of Protocol No. 1 to the Convention, which explicitly provides for the 'right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. From the aspect of the supervision carried out by the European Court 'states, in principle, remain free to devise different rules in the field of taxation policy' (judgement *Burden*, § 65).

Nevertheless, the European Court, similarly to the Constitutional Court in proceedings instituted by constitutional complaints, in specific cases reserves the right of judicial control over state interference into the private property sphere of individuals through taxes, 'since the proper application of Article 1 of Protocol No. 1 is subject to its supervision' (judgment *Burden*, § 59).

This means that taxation should be regulated so that it satisfies the general requirements of the Convention: it must be prescribed by law, must be in the public or common interest, and tax regulations or measures of tax policy must be 'reasonable' and 'proportional' to the goal that they are intended to achieve. In other words, the regulation of tax rights and liabilities shall be considered contrary to the principles of the Convention if there is no objective and reasonable justification for them, that is, if they do not have a

legitimate goal and there is no reasonable proportionality between the measure applied and the goal that it is intended to achieve."

VII. THE CONVENTION TERM "PRESCRIBED BY LAW" (ARTICLES 8 TO 11 OF THE CONVENTION)

EXAMPLE 15 — Decision no. U-I-659/1994 *et al*, 15 March 2000 – abstract review of the constitutionality of the 1993 National Judicial Council Act.

"19.5. Since the Republic of Croatia is one of the signatories of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter: the European Convention), the Court deems important to point out that no law shall be considered 'law' in terms of the European Convention for the mere fact of its existence. The European Court of Human Rights provides for much more stringent criteria which must be compiled with for a 'law' to be considered 'law' in the syntagm '*prescribed by law*', or in French '*prevues par la loi'*." (Further in the statement of reasons, the views of the European Court in the judgments *Sunday Times, Silver and Others* and *Malone v. the United Kingdom* are given - note of the CCRC)."