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**CONSTITUTIONAL COURTS
AND THE JUDICIARY:
PROTECTING HUMAN RIGHTS TOGETHER**

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REPORT

**“THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA
AND THE RIGHT TO A FAIR TRIAL”**

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Introduction

The Constitutional Court of the Republic of Croatia (CCRC) is a special, autonomous body within the constitutional order of the Republic of Croatia which is independent from all three branches of power. That further means that CCRC controls all three powers of the government in constitutional matters and it enjoys certain legal superiority in relation to them. Because of the nature of its powers, CCRC is often called "the fourth branch of power". The Court is composed of thirteen judges elected by the Croatian Parliament for a term of eight years. Judges are elected by two-thirds majority of the deputies of the Croatian Parliament from among notable jurists, especially judges, public prosecutors, attorneys and university law professors pursuant to the procedure and method set forth by a constitutional act. The judges themselves elect the President of the Court from amongst themselves by secret ballot, for a term of four years.

The Court has a wide range of competences. Here will be mentioned the most important ones. The Court decides on the constitutionality of laws enacted by Croatian Parliament and may repeal a law if it finds that it is unconstitutional. The Court also decides on the constitutionality and legality of regulations passed by the executive branch of power (the President of the Republic, the Croatian Government and ministries) and by the public administration, as well as by local units. The Court may repeal or annul any such regulation if it finds it unconstitutional or illegal. On the other side, the Court protects human rights and fundamental freedoms in proceedings instituted by a constitutional complaint. In these proceedings the Constitutional Court may quash any judgment passed by any Croatian national court, including judgments of the Croatian Supreme Court, and any individual act passed by any other authorized body, if it finds that this act violates the constitutional right of the citizen in question. The Court decides on the impeachment of the President of the Republic, decides on electoral disputes and supervises the constitutionality and legality of elections and the referendum.

With regard to the constitutional review, the Constitutional Act on the Constitutional Court of the Republic of Croatia provides three situations: (1) the initiative for the institution of the constitutional proceedings, (2) ex officio proceedings established by the CCRC and (3) the request of the authorized body. In relation to the first situation, it should be noted that everyone, regardless of the legal interest, has the right to initiate the constitutional proceedings for the constitutional review. This initiation does not oblige the Court. However, the CCRC case law developed in direction of establishing the proceedings for every proposal. Another situation, ex officio proceedings means that the Court may establish the proceedings on the constitutional review of any law or by-law on its own motion. There are no limits whatsoever on its side when deciding so. With regard to the request of the authorized bodies, one fifth of the deputies of the Croatian Parliament, working body of the Croatian Parliament, president of the Republic are authorized to request the constitutional review. Other bodies like the Government of the Republic of Croatia, the Supreme Court, the Ombudsman or local units may request the constitutional review under specific conditions.

In spite of the fact that the Croatian legal history recognizes the existence of the constitutional judiciary in the socialism (from 1964 to 1990), Croatia's constitutional judiciary in the sense of the European model of the constitutional justice is quite young. Its development could be regarded in two phases. One of them is from 1991, when the Court was established until 2000 and another from 2000 up to today. Just briefly, in the first phase, CCRC in the most of the reviewed cases found the violation of the constitutional principle of the equality before the law. It meant that, regardless of the issue at stake, either it was about ownership, labour or criminal cases, the Court established the violation of the equality before the law. Such approach of the Constitutional Court blocked the development of the constitutional interpretation and its work was chained by the principle of legality. The interpretation was reduced to the following: "what is legal it is immediately constitutional and

vice-versa". In public, the Court was perceived like the last instance court which was reviewing the legality of the judicial actions but not like the Constitutional Court whose task is protection of the constitutional principles and values. Such decisions were in many cases deprived of the interpretation of the constitutional values in the social, legal, cultural or political context of the Croatian society. It led the public to perception that the Constitution is only a political and declaratory act deprived of its normative essence. This rather formalistic approach, the Court changed at the end of nineties when it started applying the convention standards established by the European Court on Human Rights case-law. This change referred to the right to fair trial as well.

The right to fair trial within the Croatian constitutional order

The right to a fair trial is one of the most important procedural human rights. In Croatian system, it is placed on the constitutional level as well as on the legal level. Also, many other international conventions which contain this right as well.

The development of the interpretation of the right to fair trial in Croatia started with the Constitutional Court's direct application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) , particularly its Article 6 par. 1 which provides that:

"in the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Croatian Constitution from 1990 did not contain the right to fair trial as it is provided by the ECHR. Nevertheless, some aspects of the right to fair trial from the Convention have been already foreseen by the Croatian Constitution for the criminal proceedings but for the rights and obligations of the civil nature, the Constitution from 1990 was silent. This does not mean that the Croatian Constitution lacks the relation to these aspects at all. The constitutive parts of the fair trial are expressed in the obligation of the public hearing and adversarial principle in the procedural laws. However, on the constitutional level they were not unified as such.

In order to reveal the possibility of the CCRC to review the compliance of the law with the ECHR, it should be noted that the Croatian Constitution in its Article 141 foresees that international agreements which are signed and ratified by the Croatian Parliament become a part of internal legal order and by their legal force are above the law. The European Convention on Human Rights has such position within the Croatian legal order.

So, in 2000 the CCRC was challenged to review the Act on Expropriation on the basis of its inconsistency with the Article 6 of the Convention in connection to some constitutional values, such as the rule of law and principle of constitutionality and legality.

The Act on Expropriation provided the competence of the administrative body to decide both on the proposal for the expropriation of the property and on its compensation. The Act, however, by the opinion of the proponent did not provide a proper judicial control, i.e. did not contain possibility of protection of civil rights before the court which would fulfil the procedural criteria requested for the courts. Namely, the proponent claimed that the Administrative Court of the Republic of Croatia which was competent for the judicial control

of such acts could not be deemed as the court in the sense of the Article 6 of the Convention. Therefore, the proponent thought that approach given in the Act on Expropriation was against the Article 6 of the Convention as well as of its Protocols since it disabled the citizens to protect properly their civil right before the independent and impartial court established by the law.

The CCRC needed to answer several question on the issue at stake. First, whether the CCRC was competent to review the compliance of the laws with the international agreements, such as the European Convention on Human Rights; then, which requests and guarantees contains the Article 6 of the Convention; are the rights and obligations which stem from the Expropriation Act the rights of the civil nature; and whether the Croatian legal solution on the issue of the expropriation responded to the requests from the Article 6 of the Convention.

In the concrete case, the CCRC realized that it was competent to review the compliance of the regular law with the ratified international agreement as it was a logic consequence of its competence to review the compliance of the lower legal act with the higher ones and with the Constitution.

Further on, the Court took into account that that the right to fair trial contains several aspects: the right on the independent and impartial tribunal established by the law; the right to fair procedure, the right on public hearing and public announcement of the decision and the right to decision within reasonable time.

With regard to the expropriation, the Court realized that deciding on it is deciding on the civil rights and obligations. It concerns the deprivation or limitation of the property right which is a basic subjective civil right and is protected by the Constitution not only as the constitutional right but also as one of the highest values of the Croatian constitutional order. The Court further on noticed that the administrative bodies when deciding on expropriation and compensation could not meet the aspect of the independent tribunal. The Court, however noted that this deficiency could have been overcome if the case would be subsequently reviewed by the court which was deemed as the court of full jurisdiction, i.e. the court which was independent in establishing the points of the fact as well as in conduct and estimating the evidence.

In that regard, the Court had to start from the fact that the Act on Expropriation did not provide other judicial control but the one before the Administrative Court in the form of the administrative dispute. So, it was necessary to examine whether the Administrative Court of the Republic of Croatia which belongs to judicial power could be deemed as the independent and impartial tribunal established by the law, i.e. court of the full jurisdiction.

Examination on it directed the Constitutional Court to review the position of the Administrative Court within the legal order of the Republic of Croatia. Its conclusion was that the Administrative Court could not be deemed as the court of full jurisdiction because in the existing legal order, since this Court was reviewing the administrative acts on the basis of the facts which were established within the administrative procedure. The Administrative Court, in principle, does not establish the facts and does not conduct the evidence. This dependence of the Court on the factual establishment within the administrative procedure has marked the administrative dispute as the dispute on the legality of the administrative act. In spite of the fact that the Law on Administrative disputes gives the possibility to the Administrative Court to solely establish the facts in several situations, it was noted that this possibility does not bind it to do so. With regard to the issue of the public hearing and adversarial principle, the CCRC also realized that the Administrative Court basically decided behind the closed door. Again, the Court may decide to hold a public hearing if it deems it

necessary or if the party in the dispute requests for it. Still, the Court is not bind with the request of the party to hold a public hearing and has a full discretion to accept the proposal or deny it.

The Constitutional Court repealed the disputed provisions of the Expropriation Act as they did not comply with the requests given by the Article 6 of the Convention. The Administrative Court established as it was then could not be deemed as the independent and impartial tribunal established by the law. These deficiencies of the Act violated the right to fair trial of the citizens as they were impeded to acquire a proper judicial protection of their constitutional right to property.

Such approach of the Constitutional Court could be deemed as the exercise of the judicial activism. Namely, it gave to the European Convention the so-called "quasi-constitutional position". It means that ever since, everybody can call himself or herself on the violation of the convention rights solely or in connection to the constitutional rights. Beside this consequence, the success of this decision could be seen not only through the change of the Expropriation Act according to the demands of the Constitutional Court, but it paved the way to the Constitutional amendments in 2000 which introduced the right to fair trial on the track of the Article 6 of the Convention. I say, on the track because unlike the Article 6 of the European Convention, the scope of rights and obligations given in the Article 29 of the Croatian Constitution is broader than by the Article 6. Namely, the Article 6 covers the rights and obligations of civil nature, while the Croatian Constitution talks about "right and obligations".

The right to fair trial has been gradually developed by the European Court on Human Rights (hereinafter: ECtHR) case law which the Constitutional Court fully accepted and follows it in interpretation of its constitutional principle of the right to fair trial. With regard to the civil cases, they are: the access to a court, the right to legal aid and advice, the principle of equality of arms, the right to adversarial and public hearing, the right to fair hearing, the right to public pronouncement of judgments, the right to tribunal established by law, the right to impartiality and independence of the court, the right to a fair trial in reasonable time, the right to effective enforcement of the judgements, prohibition of the arbitrariness, the principle of legal certainty. The right to fair trial is essentially concerned with whether the applicant was afforded ample opportunities to state his or her case and contest the evidence that he or she considered false, and not with whether the domestic courts reached a right or wrong decision.

The CCRC developed far richer case-law with regard to the fair trial in the individual cases submitted via constitutional complaint as the remedy for the protection of the human rights and violations of the individuals. However, this presentation will refer to the constitutional review bearing in mind the competences of the Jordanian Constitutional Court.

Another case from the CCRC recent case-law refers to the Enforcement Act. The disputed provision provided that all the pending proceedings which were initiated before 1996 under the law which was at force before 1996 will be suspended within three months from the day of the coming into force of the Enforcement Act of 2010 unless the enforcement creditor submits a well-founded proposal on the basis of which proceedings may be continued. The proponents of the review deemed that the disputed provision unconstitutionally limited the rights of the enforcement creditor because such a provision did not define the term "well-founded proposal on the basis which the proceedings may be continued" and it did not contain the elements which such proposal should have, although the sanction for non-compliance implied the loss of the rights, i.e. the suspension of the proceeding which impedes the creditor to collect his claim at all.

The CCRC realized that the legislator directed the provision only to those proceedings which lasted more than 15 years. Also, it realized that the proposal had to be filed within three

months; otherwise the proceedings would be suspended. To the CCRC it was unclear which procedural measure the creditor should have taken in order to comply with the provision – either to submit a new proposal for the enforcement or the proposal for the continuation of the enforcement. The Constitutional Court realized that the disputed provision was insufficiently defined and precise and citizens thus could not really and specifically know what their rights and duties were, and moreover, even predict the consequences of their conduct.

Such a regulatory solution led citizens in question to a deprivation of the right of access to a court, as one of the aspects of the right to a fair trial guaranteed by the Constitution. The Court realized that the proceedings are suspended without reasons which would be in conformity with the requirements of legal certainty being given for such actions. Moreover, the citizens were left without the possibility of collecting their claims because of suspension of the proceedings.

In that regard, the Court held that the right to the access to the court must be guaranteed not only formally, but also has to be possible to be realized in the concrete case. The Court deemed that the laws regulating the proceedings before courts must contain clearly and precisely described legal requirements, the meeting of which is required from the participants in the proceedings, in particular if a failure to meet the legal requirements would result in the loss of rights and the suspension of the proceedings. The violation of the access to the court as one of the fair trial aspects was established.

A very similar situation was caused by the Act on the Rights of the Croatian Defenders from the Homeland War that enacted provision by which all the proceedings on the acquisition of rights which were not final were suspended. It meant that the citizens who had the cases either before the administrative bodies or before the court could not obtain the decision due to the legislative measure which impeded further dissolution. Most of the proponents claimed that their cases were not finalized due to the unreasonable duration of the procedures mainly caused by the slow administrative work. Because of that, they were deprived of their legitimate right to obtain the solution for their requests. The Court examined the allegations of the proponents from the aspect of right to a reasoned decision which is also a part of the right to a fair trial. Namely, the Court found unacceptable that the legislator intervenes into pending cases in a way which disables the citizens in obtaining the solution for their claims. Thus it was violated not only the right to fair trial but also every possibility for the citizen to hope for the positive solution of their claims. Such a legislative measure was deemed as inappropriate interference into work of the administration and judicial power.

At the moment, the Constitutional Court is challenged with a number of cases which stem from the civil law procedures. Namely, the Act on Civil Procedure foresees the conditions under which somebody may file a revision, the extraordinary legal remedy before the Supreme Court of the Republic of Croatia. The "catch" is that the Supreme Court legally authorized to reject the examination of the submitted revision by simple allegation that the questions that are raised in it are not relevant for the unification of the case-law and they are not obliged to elaborate reasons which led them to such conclusion. The Constitutional Court receives more and more constitutional complaints aimed on violation of the right to a reasoned decision in connection to the access to the court, as important aspects of the right to fair trial. The allegations are mostly directed in explanations that the citizens stay in legally uncertain situation of why their legal questions on the issues of the material application of law could not be deemed as important. The legal provision which empowers the Supreme Court not to reason the decision on rejection is challenged before the Constitutional Court as well. The proponents deem it as the legalized arbitrariness. The main approach to this issue will be, for sure the examination of the right to fair trial.

Having in mind that the Jordanian Constitution incorporated some aspects of the right to fair trial in the criminal cases (Article 8 and Article 101), the attention should be drawn on the

major decision in the field of the right to fair trial in that regard. It concerned the review of the Criminal Procedure Act which by its solution has moved away from the traditionally mixed type of the criminal procedure. Namely, it meant that the legislator separated the investigation from the criminal procedure and transferred it to the preliminary proceedings where the criminal prosecution and investigation were cumulated in the hands of the state prosecution. The new Law has changed the course of the proceedings with the criminal cases. In a very detailed decision on 150 pages, the Court found numerous violations of the right to fair trial which forced the Court to establish certain obligations toward the legislator after repeal of the disputed provisions. These obligations were aimed in removal of structural deficiencies in the normative structure of preliminary proceedings, i.e. in building into it a mechanism of effective judicial protection against arbitrary prosecution and investigation, providing a legal remedy for delay in proceedings and other irregularities in the work of state attorneys which lead to ineffectiveness of preliminary or of particular pre-investigation or investigation activities and measures, so that this remedy complies with the requirement of the effective national legal remedy in Article 13 of the ECHR. Furthermore, the Court asked to balance the regulation of criminal procedure by consistently basing it on determined precise and general rules, where all departures from these rules must be clearly recorded exceptions justified under constitutional law.

In general, the Constitutional Court dealt with issues of the presumption of innocence, defence rights, i.e. notification of the charge and adequate time to prepare defence, unlawful and unreliable evidence and trial within the reasonable time. It must be noted that the right to fair trial in the frame of the criminal cases is much broader from the mentioned aspects, but the previous ones were the major issues noticed in the constitutional review of the Criminal Procedure Act. For the Constitutional Court it was rather difficult to assess some aspects since the review was made in an early stage of the Act's implementation, so the Court could not reach for the established case-law which could have helped it in revealing the range of some provisions.

All of these aspects that were mentioned show how the legislation of the Republic of Croatia is many times challenged before the Court due to its inconsistency with the right to fair trial. The presented case law shows how the state is not immune in attempts to influence the course or even the result of the judicial proceedings violating thus the right to fair trial.

Conclusion

The right to a fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms. It is an important aspect of the rights which enables effective functioning of the administration of justice. The right to fair trial enshrines the principle of the rule of law, upon which a democratic society is built.

The precondition for the realization of the fair trial is a stable legal order which implies the knowledge of the judges about it. The role of the Constitutional Court of the Republic of Croatia in that regard is tremendous.