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Constitutional Court as Mediator of Social Phenomena

I. INTRODUCTION

The rule of law requires strict conformity with the constitution and laws by all state bodies and officials as well as citizens themselves. Formal conformity with laws is not sufficient from the position of the rule of law. The constitution and laws must have a certain content, including: separation of powers and guarantees of human rights and freedoms, and a system for protecting such rights before the competent authorities as well as normative requirements through which the idea of constitutional rule is expressed, which serve to derive institutional systems essential for the existence of a democratic political order and its development. Only when such conditions are fulfilled does the principle of constitutionality gain its full purpose and content within a democratic constitutional system.

From the aspect of efficiency of the legal system, the key question is how to ensure supervision over the respect of said principles in daily actions of the state bodies and in the behaviour of citizens. The task, if it relates to citizens, is relatively simple because the system of judicial and administrative bodies, through the resolution of disputes or the use of sanctions in the event of conduct prohibited by law, can ensure respect of the legal order and even involuntary enforcement of any decisions issued.

Subjecting the competent state authorities, ie, legislative and executive bodies, to the constitution and law in general is one of the most difficult and central issues of the political and constitutional law theory, on which the concept of separation of powers and mutual supervision of its actors, as well as supervision of the competent authorities by the Constitutional Court and regular courts, is erected.

Law is indubitably one of social regulators. Actually, it is the most powerful and important social regulator. Yesterday, a certain set of rules was regarded as acceptable; tomorrow, it will be a different set of rules, and the earlier ones will become part of the legal tradition. Life is always more complex and layered, always a step ahead of its regulators. For a society to be stabile, it is essential that its regulators recognise and react to any new phenomena in a timely fashion, so that the gap between life and law does not become excessive, thus jeopardising legal security and social stability.

Decisions of the constitutional court—in view of their binding nature—create compulsory rules of conduct in a social community, giving life to the values embedded in the constitution. Starting from social reality, Zorkin, however, cautions: "The constitution is what it is supposed to be. Life is what exists. It is not possible to achieve absolute harmony between the necessary and the existing. But you have to use all your efforts to optimise the relationship between the two and you must be aware that 'optimal' does not mean 'ideal'."[1]

The desired optimal co-relationship is not, however, easy to achieve. Quite to the contrary, in certain "extraordinary" situations (eg, global crises or significant transitional periods, which all post-communist countries faced, including the Republic of Croatia, at one time), there is, not infrequently, lack of confidence in the fundamental values and institutions of society. Lack of confidence, intolerance and resistance towards the competent state authorities grow, especially if certain laws or measures do not meet the expectations of the public. The irrationality, ie, real foundedness of such expectations is of secondary significance. The community becomes highly politicised, so any decision that is not regarded as the "right" decision based on the expectations of a certain interest group or public opinion becomes the subject matter of harsh discussions and attacks and, not infrequently, the authority and authenticity of the institution that adopted it is challenged.

The constitutional court is not spared that fate. Quite to the contrary, in such situations (which holds true for Croatia, too), the constitutional court is asked to assume responsibility and to use its authority as an independent and autonomous body to confirm the constitutionality/lawfulness of the selected model or, the opposite, to proclaim it unconstitutional as contrary to the fundamental constitutional values. That is a very sensitive situation for the constitutional court because it can hardly render a decision that will reconcile all mutually opposing expectations.

Constitutional courts have the task of preventing arbitrariness of power and serious structural deviations in a way to formulate—to use Dworkin's thesis—"one right answer" via their reading of the constitutional text.[2] Within the framework of post-socialist and post-communist European states, that would be the best possible interpretation of the relevant constitutional standards at a specific point in time during a difficult transition. The constitutional court in such circumstances finds itself in an ambivalent situation. In view of the deeply entrenched distrust of the public in the functioning of all institutions of power, it is not possible to expect that citizens will have great confidence in the functioning of and in decisions of the constitutional court. On the other hand, the constitutional court is still expected to solve social disputes and to offer that one right answer (in the opinion of each of the parties involved). In other words, the constitutional court is expected to be a social mediator of sorts and to use its decision to mediate in complex and sensitive economic, social,

[1] See Zorkin, V., The State and a Crisis of Confidence. Constitutional standards and laws may not be in sharp contradiction with reality. (Зорькин, Валерий: Кризис доверия и государство. Конституционные нормы и законы не должны вступать в жесткое противоречие с реальностью), "Российская газета" - Федеральный выпуск № 4887 от 10 апреля 2009 г, www.rg.ru/2009/04/10/zorkin.html

[2] To put it simply, Dworkin holds that the area of discretion of judges is seriously limited because in a mature legal system it is always possible to find the "right answer" for serious cases within the existing system. See Dworkin, R. A Matter of Principle, Harvard University Press, 1985; Liberalism, Harvard University Press, 1985. See also Omejec, J., *Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova*, in: Twentieth Anniversary of the Constitution of the Republic of Croatia, Series: Modernisation of Law, volume 12, editor: Professor Arsen Bačić, LL D, The Scientific Committee on State Administration, Judiciary and the Rule of Law of the Croatian Academy of Sciences and Arts, Zagreb, 2011, pp. 61-85.

moral, worldview and other issues that are creating a schism between its citizens and/or institutions, or the public in its totality.

In further text, I shall present several examples from the case-law of the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court), in which the Croatian Constitutional Court was expected to be such mediator or, to be more precise, to "take a stand" and offer one "right" answer to the matter in dispute. However, before that, only a few main points on the competence of the Croatian Constitutional Court and its development.

II. CROATIAN CONSTITUTIONAL COURT AS THE MEDIATOR

As opposed to some constitutional courts, the Croatian Constitutional Court is not part of the judicial branch, but a constitutional body independent of all other bodies of state authority. In that regard, in addition to the classic division of powers into the legislative, executive and judicial branches, it accounts for a "fourth" branch.

The Constitutional Court guarantees respect and implementation of the Constitution of the Republic of Croatia[3] and is authorised to repeal laws adopted by the parliament, regulations and other subordinate legislation of the Government and its ministers, and also court decisions, including those of the Supreme Court. The Constitutional Court may, in certain cases, release the president of the Republic of his/her duties. Further, it is the supreme controller of the lawfulness of all electoral proceedings (parliamentary, presidential, local) and of the state referendum.[4]

In terms of its transformative role, development of the constitutional court in the Republic of Croatia can be divided into two periods:

- the first period from 1991 to 2000, and
- the second period from 2000 to 2013

Immediately at the beginning of the second period, the Croatian state had to face all problems of a transitional society in a post-socialist country burdened with the consequences of war in its development. Free from fear of losing the state, the society had to openly confront the politically instable rule of elites, especially when accompanied by a fragile and highly weak democratic potential of political institutions. Collective awareness of the general legal insecurity and legal uncertainty in the country began to form. Legal disorder contributed directly to the weakening of the concept of responsibility in a constitutional democracy, regardless of which type of responsibility we are talking about: political or democratic, hierarchical or pluralistic. A deep economic and financial crisis that swept over the country, especially in the last several years, clearly showed that the concept of the welfare state is too expensive for our state to be able to realise it effectively. A special kind of nervousness arose in the country, arising from the "fatigue of the nation" from long-term more or less unrealised expectations. [5]

[3] Official Gazette No. 85/10 (revised text). Available in English at www.sabor.hr.

[4] The mandate of the Constitutional Court is stipulated in Article 129 of the Constitution (revised text).

[5] If we accept the thesis that the task of resolving the most sensitive conflicts in society was delegated to the constitutional judiciary in European post-socialist and post-communist states and that it was a process of "juridification" of political decisions, it could be stated that the transformative role of the Constitutional Court of

III. EXAMPLES OF DECISIONS OF THE CROATIAN CONSTITUTIONAL COURT

1. Crisis tax or harač*, plunder*

In its decision and ruling no.: U-IP-3820/2009, U-IP-3826/2009 and others of 17 November 2009,[6] the Constitutional Court rejected the request and did not accept proposals for the review of constitutionality of the Act on Special Tax on Salaries, Pensions and Other Receipts Act (hereinafter: Crisis Tax Act).

The Crisis Tax Act provoked many political discussions by and between all branches of government and a turbulent reaction of citizens who saw it, in the midst of the economic crisis and recession, as an additional attack on their living standard. They held that it was contrary to Article 51.1 of the Constitution, which provides that everyone must participate in the defrayment of public expenses, in accordance with their economic capability, and Article 1 of the Constitution, which states that the Republic of Croatia is (also) a welfare state. Therefore, although its short name was "Crisis Tax Act", the public remembers it as *harač*, which means plunder. Dissatisfaction of the public is clearly visible from the fact that, in addition to the request submitted by the president of the Republic, over one hundred thousand (or exactly 110,657) individual proposals were submitted by citizens and legal persons.[7]

The objections of the applicant and the proponent were based on their claims that the Crisis Tax Act does not respect the principles of justice, equality and proportionality in the defrayment of public expenses because it burdens and jeopardises to the greatest extent the existence of citizens with the lowest income.

Starting from the Republic of Croatia as a welfare state, the Constitutional Court placed the Crisis Tax Act in the context of the highest constitutional values and a comprehensive approach to the Constitution, which is why its provisions must be observed as a whole:

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the Republic of Croatia had deviated in time from the one in other post-communist and post-socialist European states. It seems that the constitutional judiciary in the Republic of Croatia assumed the transformative role, but also the role of a "filter" through which the state re-routes political high-tension conflicts into the legal dimension, only in the second period of its development. Reasons lie, to the greatest extent, in the fact that the Republic of Croatia was formed during special wartime conditions. See in more detail Omejec, J., *Odgovornost ustavnog sudstva za ustavne norme*, in: *Ustavna demokracija i odgovornost*, Series: *Modernizacija prava*, Book 19, editor: prof. dr. sc. Arsen Bačić, Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary, and the Rule of Law, Zagreb, 2013, pp. 71-99.

[6] Official Gazette No. 143/09. See also the website of the Constitutional Court (www.usud.hr).

[7] For several months the Constitutional Court was literally swamped with the registration of all the proposals and since an individual service of the decision and ruling to each applicant would require extensive additional administrative work and substantial financial costs, the service was regarded as performed on publication of the decision and ruling in the Official Gazette, and it included a special part – Addendum I next to the decision and ruling with a list of the names and addresses of all proponents.

"11. ... In these proceedings of constitutional review the Constitutional Court has the obligation to examine, first and foremost, whether the Special Tax Act complies - in the light of the constitutional concept of the Republic of Croatia as a social state (Article 1 of the Constitution) – with the basic principles and highest values of the constitutional order, the most important of which for this case are the following:

- equality, social justice and the rule of law as the highest values of the constitutional order (Article 3 of the Constitution),
- the principle of prohibiting discrimination (Article 14.1 of the Constitution),
- the general principle of the equality of all before the law (Article 14.2 of the Constitution),
- the special principle of tax equality and equity (Article 51.2 of the Constitution),
- the general principle of proportionality (Article 16.1 of the Constitution) and
- the special principle of proportionality in the defrayment of public expenses (Article 51.1 of the Constitution).

When reviewing the constitutionality of a law the Constitutional Court starts from a comprehensive approach to the Constitution and it views its provisions as an integral whole. This also means that the Constitutional Court examines two classic groups of rights enshrined in the Constitution (the group of personal, civil and political rights, and the group of social, economic and cultural rights) as an integral whole, ie, as coordinated and equally important protected benefits."[8]

The Constitutional Court conducted an objective justification test (Article 16 of the Constitution) in order to review whether the objections of the proponents were justified. The Constitutional Court weighted the legitimate aim, as determined (a particularly important public interest to preserve the financial stability of the state), and the measure affecting the individual right concerned. The Constitutional Court found that the individual burden imposed on persons obligated to adhere to the standard (special taxpayers) was not excessive, ie, that the challenged measure (special tax) was proportionate to the aim because of which it was introduced (stability of state finances via an increase of revenue). The Constitutional Court took into consideration that the state had taken a number of other measures during the economic crisis to achieve the same aim. In other words (although it did not state so expressly), that there is no longer any other, less cumbersome, measure to achieve the aim. It also took into consideration that it was a temporary measure (it was in force for one year), to last until the state budget was stabilised, and that it did not include socially most vulnerable citizens.[9]

In view of the foregoing, the Constitutional Court found that the prescribed measure did not represent an excessive individual burden imposed on its citizens, ie, that at a general level "it was not an excessive burden on the persons obligated to adhere to it to the extent that it would have to be regarded as unbearable".

[8] The Constitutional Court also reminded that in the area of public policies the legislator enjoys a lot of freedom in assessment, but also exclusive responsibility for the purposefulness of the prescribed legal measures. Therefore, the Constitutional Court is not authorised to review the purposefulness and justifiability of the general tax system or individual tax forms in the Republic of Croatia, including a special tax introduced by the Crisis Tax Act, provided that the ruling offered by the legislator remains within the constitutionally acceptable framework.

[9] The Constitutional Court acknowledged the appraisal made by the legislator that the citizens concerned in the matter have income that does not exceed HRK 3,000 and that the tax burden is diversely allocated (citizens whose total income ranged from HRK 3,000 to HRK 6,000 paid the tax at a rate that was lower than those with income over HRK 6,000).

2. Termination of pregnancy

In the ruling no.: U-I-60/1991 and others of 21 February 2017,[10] the Constitutional Court did not accept proposals for the instigation of the procedure for review of conformity of the Act on Medical Measures for the Realisation of the Right to Freedom of Choice in Childbearing (hereinafter: Act),[11] submitted by seven proponents.

As a matter of principle and from a general point of view, the Croatian Constitutional Court held that the matter involved a deeply moral, worldview, ethical, philosophical, medical, scientific, religious, and legal issue that creates deep schisms and debates in all societies, which is why the approach to the matter cannot and may not be one-sided.

The "heart of the problem", especially if it is observed primarily from the legislative aspect, lies in the fact that it is an attempt to resolve a primordially moral and worldview issue by regulating it via a (coercive) legal standard. However, moral views (especially if they are intertwined with someone's religious beliefs) can be in conflict, even mutually exclusive. It is a matter of morals, ethics, and faith, as understood and examined by each individual further to his/her right to self-determination.

Termination of pregnancy is, first and foremost, a moral issue that concerns not only the conscience, right and dignity of a woman (who wants or intends to terminate her pregnancy), but is also reflected in the position of a particular social community towards the ethical acceptability or unacceptability of someone's act (public morality), philosophical and ethical positions on the right to protection and the right to dignity of a human being even before birth, etc. It is illusory to expect that legal regulation of the matter would resolve all dilemmas and schisms that the matter incites in society. Therefore, the complexity and sensitivity of the relationship between law and morality is reflected in and encumbers the resolution of the issue of termination of pregnancy.[12]

The Constitutional Court held that it could be stated that at national and global level two mutually morally opposed "tribes" had formed: those against the "right to abortion", who chose to refer to themselves as "pro life", and those who advocate abortion, who call themselves "pro choice"; the two groups are accepted with such names even in international documents. [13]

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[10] Official Gazette No. 25/17. See also the website of the Constitutional Court (www.usud.hr).

[11] Official Gazette No. 18/88, 31/86, 47/89 and 88/09.

[12] In concise terms, advocates of the position "pro life" believe that life begins at the time of conception, that the embryo is a human being that must enjoy all human rights, including the right to life. A mother's body is "only a place where the unborn child grows and feeds", so the woman does not have the right to decide herself about the life of the unborn child. Termination of pregnancy is murder, a violent end to another man's life.

Advocates of the position "pro choice" hold that the right of the woman to termination of pregnancy is a fundamental human right arising from the right of the woman to life, self-determination, dignity, and health. Restrictive laws that prohibit termination of pregnancy only expose women to increased health risks and they are discriminatory. They will not dissuade women from terminating (unwanted) pregnancies; they will just force them to use alternatives, thus jeopardising their life and health. Since a woman's right to reproductive self-determination is a fundamental human right, they hold that the prohibition of termination of pregnancy is impermissible.

[13] For example, in Article 1 of the Universal Declaration of Human Rights it is stated that "all human beings are born free and equal in dignity and rights". In Article 3, it is stipulated that "everyone has the right to life, liberty and security of person".

The Constitutional Court further claimed that in the interpretation and implementation of international documents there was a certain corpus of case-law, in particular case-law of the European Court of Human Rights in Strasbourg (hereinafter: ECHR). However, the case-law concerned also does not provide an answer to the question when an unborn human being becomes a person. Quite to the contrary, the ECHR points out that certain progress has been made, but that we can still not talk about the existence of generally accepted positions that would be binding on all states as shared heritage.[14]

In terms of the constitutional courts themselves, having examined decisions of other constitutional courts, the Constitutional Court concluded that they are united and consistent in their position that the answer to the question when life begins is within the competence of the legislator, provided that the legislator finds the answer to it is essential or purposeful in terms of the permissibility or impermissibility of termination of pregnancy. In other words, that the answer to the question enters the area of responsibility of the legislator, and not of the constitutional court as the guardian of the constitution and of values protected in the constitution (legislative reservation). In its appraisal of the constitutionality of the selected legislative model, they start from the wide-ranging freedom of the legislator in the establishment of an equitable balance between the right of a (pregnant) woman to self-determination, freedom of choice, protection of dignity and privacy, on the one hand, and public interest to protect the life of an unborn human being (as a special constitutional value), on the other.

On the basis of the complex and controversial problem of termination of pregnancy as presented in detail in the decision and here briefly, the Constitutional Court found that in the case at hand it was expected from the Constitutional Court (ie, as could be concluded from the objections of the author of the challenged Act) to resolve the problem and decide when life

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In Article 2.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), it is stated that everyone's right to life is to be protected by law.

In Article 1 of the Convention on Human Rights in Biomedicine, it is stated that the purpose of the Convention is to protect the dignity and identity of all human beings, while Article 2 stipulates that the interests and welfare of the human being shall prevail over the sole interest of society or science.

[14] In the appraisal of national legislation, ie, legal solutions applicable in individual cases, the ECHR starts with Article 2 of the Convention, which protects the right to life of everyone, but an unborn (child) is not regarded as a "person" directly protected under Article 2 of the Convention. Further, it takes into consideration that there is no consensus regarding the matter among Member States, so it is not desirable, or possible, to talk in abstract terms whether an unborn child is a person within the meaning of Article 2 of the Convention.

Therefore, even under the presumption that it can be viewed that the foetus enjoys the rights guaranteed by Article 2 of the Convention, an assessment of a violation of his rights depends on personal circumstances of the case, ie, whether the national legislation concerning termination of pregnancy strikes an equitable balance between the need to protect the foetus on one hand and the rights and interests of the woman on the other. The ECHR examines termination of pregnancy in relation to the rights and interests of women within the framework of Article 8 of the Convention.

Further to the foregoing, in its examination of national legislation, the ECHR conducts the objective justification test to determine whether the state, within the wide framework of its freedom of assessment, has achieved a proper balance between the protection of individual rights and public interest, ie, between the right of the woman to freedom of choice, protection of her dignity and privacy, and public interest to protect the life of an unborn human being.

The ECHR acknowledges that in most states of the Council of Europe there is (some) consensus towards liberalisation of the termination of pregnancy and that most states in their legislation resolve the opposing rights of the foetus and of the woman (mother) in favour of easier access to termination of pregnancy.

begins and, thus, act as an arbiter between the two sides: the one believing that life begins at conception, so that an unborn human being is protected by Article 21 of the Constitution from the moment of conception, and excluding the "right of the woman to termination of pregnancy", and the one believing that life begins at birth, so that an unborn human being is outside the scope of protection of Article 21 of the Constitution, in which case the rights of the woman prevail.[15]

It pointed out once again that the question "when life begins" is not within the competence of the Constitutional Court. The Constitutional Court has a mandate to examine legislation governing the issue of termination of pregnancy in order to determine whether it is in conformity with the constitutional principles and values, ie, whether it strikes an equitable balance between the opposing rights and interests, which are inevitable in complex questions such as this one (the right of a woman to decide herself whether to end a pregnancy and the interest of society to protect the life of an unborn human being).

Just like in the first example (Crisis Tax Act), the Constitutional Court started from the fact that the Constitution makes an integral whole. Therefore, the provisions of the Constitution must be interpreted in a way to take into consideration the comprehensive legal order consolidated in the Constitution, so that its interpretation arises from the totality of relations established by the Constitution.

Starting from the said position, the Constitutional Court established that an unborn human being, as a value protected by the Constitution, enjoys constitutional protection within the meaning of Article 21 of the Constitution to the extent it is not in conflict with the woman's right to privacy. The right to life of an unborn human being in that sense is not protected, so that it has priority or greater protection in comparison to the woman's right to privacy. The legislator has the freedom of discretion in striking a fair balance between the woman's right to decide and to privacy, on the one hand, and public interest to ensure protection of an unborn human being, on the other.

In conclusion, in examining the constitutionality of the challenged Act in the light of the foregoing, the Constitutional Court found that the legislative solution according to which termination of pregnancy may be performed at a request of the woman before the end of the 10^{th} week of pregnancy is in conformity with the Constitution (after that term, subject to a consent by the competent authorities, it is permissible only if it is based on medical indications that there is no other way to save the woman's life or not to endanger her health during pregnancy, birth or after birth, if it can be expected that the child will be born with serious physical or mental defects, if conception was the result of certain criminal offences [Article 22 of the Act], ie, where there is immediate danger to the life or health of the pregnant woman or if the procedure to terminate pregnancy had already been started [Article 25 of the Act]).

The Constitutional Court found that the challenged legislative solution did not disturb a fair balance between the constitutional right of the woman to pregnancy (Article 35 of the Constitution) and human liberty and personality (Article 22 of the Constitution), on the one

[15] Article 21 of the Constitution reads:

"Each human being has the right to life.

There shall be no capital punishment in the Republic of Croatia."

hand, and public interest to ensure protection of unborn human beings guaranteed by the Constitution as a constitutionally protected value (Article 21 of the Constitution), on the other.

However, bearing in mind the "age" of the challenged Act (it was adopted back in 1978, which means it is almost 40 years "old"), which was adopted before the 1990 Constitution (ie, when the "old" Constitution was still in force), the Constitutional Court established that the challenged Act was not formally aligned with the Constitution (it includes certain legal institutes or terms that no longer exist in the constitutional order of the Republic of Croatia) and instructed the legislator to adopt a new act within two years.

Even more so, since after the adoption of the 1990 Constitution, a completely new legal and institutional framework for health, social, scientific and educational systems was adopted. These systems are based on a different set of value bases and principles, they are in line with the Constitution and with international standards, and with progress in science and medicine, followed by changes in the systems of health care, education, and the social policy.[16]

3. Barring the nomination of offenders

In the ruling no.: U-I-246/2017 and others of 4 April 2017,[17] the Constitutional Court did not accept proposals for the instigation of a procedure for the review of conformity of Article 1.2 of the Act on Amendments to the Local Elections Act (hereinafter: challenged Act) with the Constitution.[18]

The objections that disputed the conformity of the challenged article of the Act, which barred persons sentenced finally to imprisonment of at least six months in duration (including a conditional sentence) for the criminal offences set out in the Act from being nominated for election, with the Constitution, revolved, to put it briefly, around the claim that the legislator did not respect the positions stipulated in principle in international documents concerning elections, [19] standards developed by the ECHR in its practice in the application of Article 3 of

[16] The Constitutional Court stated that it was up to the legislator, as part of its wide freedom of assessment, subject to essential legislative changes arising from the above reasons, to stipulate educational and preventive measures in the new Act to make termination of pregnancy an exception. The legislator is free to determine measures that it finds purposeful to promote sexually responsible behaviour and the responsibility of both men and women in the prevention of unwanted pregnancies through educational and preventive programmes (eg, reproduction and sexuality education). The legislator may, in order to enable women to make their own decisions about pregnancy and motherhood, set a reasonable period of deliberation before a decision on termination of pregnancy or continuation of pregnancy is made (eg, counselling centres and health care during pregnancy and birth, employment rights of pregnant women and mothers, availability of pre-school facilities, centres that provide adequate contraception and information about safe sex, and centres with counselling before and after pregnancy). It is up to the legislator whether the new act will regulate the issue of the costs of termination of pregnancy (whether and under what circumstances the woman bears the costs or whether the costs are secured from the state budget), the question of conscientious objection of physicians who do not wish to terminate pregnancies, etc.

[17] Official Gazette No. 35/17. See also the website of the Constitutional Court (www.usud.hr).

[18] Official Gazette No. 121/16.

[19] Especially the Preliminary Report on Exclusion of Offenders from Parliament, Opinion No. 807/2015, CDL-AD(2015)019, Strasbourg, 30 June 2015, European Commission for Democracy through Law (Venice Commission).

Protocol No. 1 to the Convention, or the position of the Constitutional Court set out in the decision and ruling no.: U-I-1397/2015 of 24 September 2015.[20]

In that decision, the Constitutional Court established that from the catalogue of criminal offences against official duty (set out in Title XXVIII of the Criminal Act)[21], including, but not limited to the following criminal offences: illegal intercession, accepting a bribe, offering a bribe, trading in influence, etc., the legislator singled out only the criminal offence of abuse of office and official authority, regardless of the form and seriousness of the offence and/or the length of the punishment meted out. In relation to that criminal offence, the prohibition of nomination at the election of members of the Croatian Parliament included all persons convicted by a final court judgment for any offence of abuse of office and official authority to a conditional sentence or prison sentence of any duration, provided that they are not rehabilitated. In relation to all other criminal offences against official duty, however, the prohibition of nomination lasted from the finally issued sentence of imprisonment (only those over six months in duration) to the date of enforcement of the prison sentence.

Starting from the foregoing, in that decision the Constitutional Court quashed the challenged provision of the Act on Amendments to the Act on the Election of Representatives to the Croatian Parliament in view of its manifest disproportionality.[22]

Starting from its position in the earlier decision, the Constitutional Court established that, as opposed to the legislative solution from that decision, in the case of the challenged Act the legislator included almost all criminal offences against official duty set out in Title XXVIII of the Criminal Act in the law concerned. However, it held that it was not up to the Constitutional Court to examine whether the catalogue of criminal offences stipulated in the challenged Article 1.2 of the Act that, if committed, prohibit the nomination of offenders, is too wide (or narrow), provided that such restrictions are based on clear legal standards that can pass the objective justification test in terms of the legitimate aim to be achieved. It maintained its finding that the legislator, by stipulating the catalogue of criminal offences as described in Article 1.2 of the challenged Act, acted in accordance with the positions and instructions from the earlier decision and ruling of the Constitutional Court.

Further, the Constitutional Court found that the challenged prohibition of nomination at local elections of persons who committed criminal offences (as enumerated) and who were sentenced to imprisonment of at least six months by a final court decision satisfies the constitutional and European legal standards, ie, that it is in conformity with the earlier decision of the Constitutional Court on the following grounds:

- it is prescribed by law;
- it has a legitimate aim – to prevent an active role of convicted persons in public life and politics as a way of regaining citizens' trust in public office in the protection of the legal order and democracy;

[20] Official Gazette No. 104/15.

[21] Official Gazette No. 125/11, 144/12, 56/15 and 61/15. - corrigendum.

[22] Official Gazette No. 19/15.

It found, to put it concisely, that it produces "manifestly disproportionate effects in relation to the legitimate aim to be achieved through it... by barring perpetrators of (even) the mildest forms of the criminal offence of abuse of power and authority referred to in Article 291.1 CA/11 from the electoral competition".

- it is proportionate – it relates to a wide circle of perpetrators in relation to the enumerated criminal offences;
- it is limited by time (although this is not expressly prescribed), because under the Act on the Legal Consequences of Convictions, Criminal Records and Rehabilitation[23], it lasts until rehabilitation.

Further to the foregoing, the Constitutional Court found that the challenged provision of the Act is proportionate to the legitimate aim that needs to be achieved through it (Article 16 of the Constitution).

4. Conversion of loans in CHF

In the ruling no.: U-I-3685/2015 and others of 4 April 2017,[24] the Constitutional Court did not accept proposals for the instigation of a procedure for review of conformity of the Act on Amendments to the Act on Consumer Loans[25] and the Act on Amendments to the Act on Credit Institutions (hereinafter: the challenged acts) with the Constitution.[26] The proposals were submitted by several natural persons and credit institutions. It found that the challenged acts, as one-off intervention measures of the legislator, were essential for the realisation of legitimate aims to be achieved through them.

The challenged acts set a foundation for the resolution of the issue of loans denominated in Swiss francs and loans denominated in Croatian Kuna with a foreign currency clause in Swiss francs (hereinafter: loans in CHF).[27]

In its review of the material conformity of the challenged acts with the Constitution, the Constitutional Court started from the position that the Constitution of the Republic of Croatia belongs to the group of so-called socially-aware constitutions and that the Republic of Croatia is set up as a welfare state (Article 1 of the Constitution), having a positive obligation to encourage economic progress and social wellbeing of its citizens and to take care of the economic development of the country (Article 49.3 of the Constitution). Further, it also took into consideration the requirements of social justice as one of the components of a welfare state, which obligates the state to engage itself—legislatively and implementation-wise—in the establishment and maintenance of a fair social order. The concept of a welfare state imposes an obligation on the state to take care of a fair social order where, in the performance of that obligation, the legislator has wide freedom in decision-making (it referred to an earlier decision and ruling no.: U-IP-3820/2009, U-IP-3826/09 and others, which is the subject matter of the first example in this paper).

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[23] Official Gazette No. 143/12.

[24] Official Gazette No. 39/17. See also the website of the Constitutional Court (www.usud.hr).

[25] Official Gazette No. 102/15.

[26] Official Gazette No. 102/15.

[27] The challenged acts served to implement the conversion of loans in CHF into loans denominated in EUR, or HRK with a foreign currency clause in EUR, in order to put the beneficiaries of loans in CHF in the same position in which they would be had they been granted such loans from the start. The conversion was made at the exchange rate that was equal to the exchange rate used by credit institutions on that day for loans of the same type and term denominated in EUR, or HRK with a foreign currency clause in EUR.

The conversion did not include loans in CHF of legal persons and loans in CHF that were implemented in full by the date of entry into force of the challenged acts either by voluntary or involuntary repayment of debt and those that were converted into some other currency.

The Constitutional Court found that it follows from detailed statements provided by the Government of the Republic of Croatia and the Ministry of Finance that after regular repayment of loan instalments, after ten years, the monthly instalments of the beneficiaries of loans in CHF rose around 60% to 80%, while the principal rose by around 30% to 40%, which put the beneficiaries of loans in CHF in an unequal and debt-dependant position in relation to credit institutions.

In this situation, the Constitutional Court concluded that the state (legislator), respecting the principle of a welfare state, on which the constitutional law order of the Republic of Croatia lies, in the situation involving a debt crisis in which Croatian citizens found themselves on account of loans in Swiss francs, had a positive obligation to take certain economic measures, ie, to become involved on the market to ensure the realisation of fundamental social rights and social security and to equalise, or diminish, extreme social differences arising from the appreciation of the Swiss franc.

In order to review justifiability of the proponents' objections concerning the disproportionality of the challenged measure, ie, concerning its non-conformity with Article 16 of the Constitution, the Constitutional Court had to respond to the following questions:

- which aim did the legislator want to achieve by adopting the challenged acts and is it a legitimate aim,
- is the measure (conversion) prescribed in the challenged acts proportionate to the aim to be achieved, ie, does the challenged measure impose an excessive burden on credit institutions?

In relation to the legitimacy of the aim, the Constitutional Court found that the challenged acts had a legitimate aim: to improve social protection, to prevent the continuation of unfair business practices of credit institutions, and to prevent the deepening of the debt crisis.[28]

[28] Both the Government, in the proposals of the challenged acts, and the Ministry, in its statement, provided the following reasons for the existence of that interest:

- to rehabilitate the escalating debt crisis,
- to ensure regular payment of loans in an amount and subject to terms that do not put the beneficiaries of loans in CHF in a position that is unequal and debt-dependant in relation to credit institutions,
- to ensure an equal relationship for the beneficiaries of loans in CHF with beneficiaries who had agreed on the protective mechanism in EUR, which would, at the same time, protect the fundamental human right of the beneficiaries of loans in CHF to a life of dignity,
- to ensure protection and implementation of the fundamental principles of the law of obligations (the principle of equality of parties to obligations, principle of duty to co-operate, principle of equal value of performances, principle of good faith and fair dealing, and the principle of no abuse of rights),
- to encourage citizens indebted in Swiss francs to increase personal spending,
- to alleviate the workload of courts (by decreasing the number of proceedings before courts, requesting repayment of the difference between the agreed and variable interest rate that the credit institutions imposed unilaterally during the term of repayment, by conversion of loans in CHF, on the one hand, and on the other hand, the beneficiaries of loans in CHF would no longer be exposed to possible court expenses).

In relation to the second question (whether the challenged measure, ie, conversion, was proportionate to the legitimate aim to be achieved), the Constitutional Court had to establish whether the measures prescribed in the challenged acts were appropriate and necessary (ie, that there was no other, less cumbersome or restrictive measure), and whether they imposed an excessive burden on the credit institutions as the parties addressed by them.

The Constitutional Court found that the challenged measure, ie, conversion, was suitable for achieving the legitimate aim because, based on the data submitted by the Ministry of Finance and the Croatian National bank, which the proponents did not question in their proposals, it follows clearly that the conversion did not have distortive effects on the operation of banks or the monetary policy of the Republic of Croatia and that its negative effects were significantly less than the projected ones. Further, that the state of indebtedness in the Republic of Croatia after the conversion of loans in CHF did not "become either more expensive or more difficult". It established that the calculation of the effect of the costs in the amount "of HRK 8 billion" was made by the credit institutions themselves and submitted to the Ministry of Finance individually, without taking into account the benefits that the conversion had yielded in favour of the credit institutions.

In terms of the necessity of the challenged measure, ie, whether some other, less restrictive measure had existed, the Constitutional Court establishes that the challenged acts were a fourth measure that the Government conducted in order to facilitate the position of the beneficiaries of loans in CHF as the credit institutions were not sufficiently interested in duly addressing the problem of finding an optimum solution for loans in CHF.[29]

The Constitutional Court found that the challenged acts were essential, ie, that there was no other, less restrictive measure in the case of loans in CHF.[30]

In order to determine whether the challenged measure, despite its appropriateness and necessity, represents an excessive burden imposed on the addressees (banks), the Constitutional Court previously examined the legal and economic position of the beneficiaries of loans in CHF before the adoption of the challenged acts, on the one hand, and potential benefits to credit institutions as the result of the conversion, on the other.

It found that, in the period from 2005 to 2008, the beneficiaries concluded loan agreements in CHF that, on the one hand, incorporated provisions on the foreign currency clause on the basis of which the principal was tied to the Swiss franc, which made it dependent on the relationship between the Swiss franc and the Croatian kuna and, on the other hand, provisions on a variable interest rate that was also dependant on the amount of the

[29] The first measure was taken in 2011 when the Government signed the Memorandum on Measures to Alleviate the Position of Housing Loan Beneficiaries with credit institutions; the second and, at the same time, the first legislative measure was taken in 2014 when the interest rate for housing loans in Swiss francs as of January 2014 was fixed at 3.23% in the event of an increase of the exchange rate over 20%, and the third measure was taken in January 2015, when the interest rate was fixed at HRK 6.39 for one Swiss franc.

[30] The Constitutional Court emphasised in particular that in the "Croatian case" there was no even the slightest measure of prevention of exchange risk in the form of timely warnings to consumers, as was conducted by the Austrian Financial Market Authority (hereinafter: FMA). Namely, in 2003, the FMA began to conduct, systematically and successfully, a number of activities to protect consumers against harmful effects of foreign currency loans indexed in Swiss francs by warning consumers that they were dealing with "high-risk products". The said activities of the FMA were concluded when loans in CHF were prohibited in 2008.

principal, since it is determined in a percentage of the amount of principal that was determined by the credit institutions by a unilateral decision, without any specifically set parameters.

Further, it established that the costs of conversion and the operative costs in relation to calculations and communication with consumers were borne by the credit institutions, while in one part the costs of conversion were also borne by the consumers.[31]

Implementation of the conversion of loans in CHF led to a "significant improvement" in part of the credit portfolio of the credit institutions because the placements in Swiss francs that were reimbursable in part and those that were not reimbursable were cut in half when a comparison is made between the period before and after the conversion. The costs of the conversion were a recognised tax liability for the credit institutions, ie, their profit tax for 2016 was reduced (as the result of transfer of loss in 2015). The credit portfolio conversion enabled the return of approximately 55,000 beneficiaries of loans in CHF "back" to the market as well as regular payment of their financial obligations, while the costs connected with foreign currency exchange and with borrowing transactions for non-financial assets acquired via borrowing were eliminated.

The conversion of loans improved the solvency of the beneficiaries of loans in CHF (as the result of partial debt write-off and prepayments), which led to an improved quality of housing loans. The effects of the conversion on international foreign currency reserves were less than expected. All business banks in the Republic of Croatia generated gross profit of HRK 30.35 billion in the period from 2007 to 2014.

Some of the costs of the conversion were borne by the state, since the conversion is a recognised tax liability for the credit institutions, thus enabling them to "return" 20% of the estimated costs of the conversion (of HRK 8 billion), ie, HRK 1.52 billion. The state thus enabled the credit institutions to lose the problematic credit portfolio, while the effects of the increase in value of the mechanism in Swiss francs in most cases and to the greatest extent represent unrealised profit for the credit institutions and are not the result of actual incoming flow of money in the said currency, and neither was the initial outgoing flow of money of the credit institutions in Swiss francs but in Croatian kuna.

Further to the foregoing, the Constitutional Court held that it is not possible to conclude that the challenged measure (conversion) encumbers the credit institutions excessively, to an extent that could be regarded as unbearable, ie, that the challenged acts fulfil the requirements of proportionality provided in Article 16 of the Constitution.

[31] For example, the costs of amending contracts, costs in the form of compensation of damages or compensation of lost profit in the form of non-realised exchange differences, difference in the initial principle as the result of purchase/sale of foreign currency, and at the time of disbursement of loans, the amount of interest, fees, and costs charged from those initially agreed in repayment plans, then the difference of higher interest rate for loans in EUR in relation to loans in Swiss francs, and the exchange difference on the amount of prepayment paid and, finally, the effect of appreciation of EUR in relation to HRK as of the period the beneficiary was granted the loan that was actually paid in HRK.