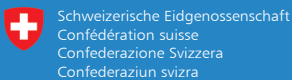


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# The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU

Sanja Barić



Swiss Agency for Development  
and Cooperation SDC



UNIVERSITÉ DE FRIBOURG  
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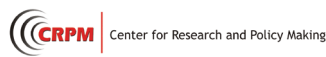
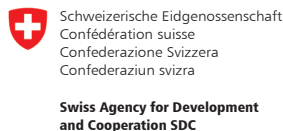
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# Introduction

As part of a general study on the role and impact of constitutional adjudication in transitional countries of South East Europe, this paper analyses the operation of the Constitutional Court of the Republic of Croatia after the dissolution of the Yugoslav federation. It aims to answer the posed research questions as to the extent of the Court's activism in the field of transitional constitutional justice and, consequently, the Court's success/failure in promoting the legal transition from a socialist order to a modern constitutional democracy. In that view, a narrow but paradigmatic selection of the Court's case-law is analyzed. Factors that have contributed to the Court's performance (e.g. political conditioning, personal features) are taken into account, as well as public opinions and attitudes toward its rulings.

The first part of this paper presents an overview of the Court's history, composition and competences, while the next chapter explains three distinct periods of the Croatian constitutional reality, that are detectable from 1991 to 2016. The third part, containing a presentation of particular rulings, tackles: the development of a standard constitutional test (3.1.); post-war justice in relation to popular expectations (3.2.); the clash between social justice and budgetary constraints (3.3.) and the constitutional boundaries of democracy (3.4.). The final part contains an in-depth analysis of incentives for, methods of and threats to the Court's activism/transformative role. It will be argued that while the Court managed to protect core constitutional values and principles (even during the Homeland War), its greatest success is detectable in the process of the Europeanization of the Croatian legal order. Recent overall detrimental social occurrences (the economic crisis and socio-political radicalization) coupled with certain objective shortcomings of the Court have led to a deterioration of its status and have put its very existence in peril.

# 1.

## General Overview of the Constitutional Court of the Republic of Croatia

In the former Socialist Federative Republic of Yugoslavia constitutional courts were established both on the federal level and on the level of the federal units. The Croatian Constitutional Court had been established by the 1963 Constitution, and was retained by the later 1974 Constitution. It was primarily competent for abstract norm control, but it also examined the constitutionality and legality of self-governing general acts. Due to the socialist ideology on the supremacy of elected assembly, when it found a law to be contrary to the Constitution, the Court could not repeal it. Rather, it could declare its inconformity, while the Assembly had 6 months to enact new legislation. It was not competent for deciding on the constitutionality and legality of individual acts. The democratic Constitution of the Republic of Croatia (hereinafter: the Constitution), promulgated on 22 December 1990, in its Basic Provisions, art. 3, states that: “freedom, equal rights, national equality, commitment to peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the human environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.” The whole system of the Republic of Croatia (hereinafter: the RC) has been organized accordingly, including the constitutional position of the Constitutional Court.

The Constitutional Court of the Republic of Croatia (hereinafter: the Court or the CCC) was constituted on 5 December 1991 and started to function on 7 December 1991. Its constitutional position follows the Kelsenian, continental European tradition, designed as an intermediate branch that controls all three branches of government (legislative, executive and judicial). It is neither placed above them in hierarchy, nor is it a part of them in either an organizational or functional way. *The Constitutional Act on the Constitutional Court* (hereafter: the CACC)<sup>1</sup> was amended twice, in 1999 (most importantly, procedural details on constitutional complaint) and in 2002 (revision of active legitimation for abstract review, introduction of new competences for the Court, the Court’s independency of all the state bodies and independent distribution of allocated budgetary means). The internal organization of the CCC is regulated by the Rules of Procedure, enacted and interpreted by the Court itself.

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<sup>1</sup> Ustavni zakon o Ustavnom sudu Republike Hrvatske [Constitutional Act on the Constitutional Court], *Narodne novine*, hereinafter: NN, 49/2002.

## 1.1. Composition and Terms of Duty

Originally, the CCC consisted of eleven judges appointed by the House of Representatives by an absolute majority of votes on the recommendation of the House of Counties (abolished in 2001) for a period of 8 years. In 2001, the number of judges was raised to thirteen and they are now appointed by the Croatian Parliament (*Hrvatski sabor*, a unicameral parliament). The procedure is now conducted by the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament, which publishes an invitation in the Official Gazette to judicial institutions, law faculties, the chamber of attorneys, legal associations, political parties, and other legal persons and individuals to propose candidates for the election of one or more judges of the Constitutional Court (an individual may propose himself as candidate). After performing a public interview with each of the candidates who comply with the formal conditions, the Committee composes a short list of candidates, including reasoning as to why it gave priority to these particular candidates. The term of office is renewable, however, it is still unclear whether only once or without limitation.

A judge of the Court may be a person who is a Croatian citizen and a graduate lawyer with at least 15 years of experience in the legal profession (12 years for a doctor of legal science, added by the 1999 *Constitutional Act*), who has distinguished himself through scientific, expert or public work. The Constitutional judges cannot hold any other public or professional office, but the CACC specifies that academic (scientific and educational) activities may be continued on a part-time basis and to a lesser extent, as well as membership in lawyers', humanitarian, cultural, sport and other similar associations. Since 1991, Croatia has had 33 constitutional judges, former and present, out of which 9 were/are university professors.<sup>2</sup> A judge may not belong to - nor in public activities or behavior express personal support for - any political party. However, in the respective period (from 1991 to date) at least one third of all the judges were, prior to their appointment, publicly well-known members, or supporters, of particular political parties.

General criticism in the 2000s was directed toward the fact that the great majority of judges were elected by the government-of-the-day (right wing, as it happened to be) with few exceptions. Consequently, the 2010 constitutional revision envisaged a change in the required parliamentary support, now requiring a 2/3 majority vote. Given the lack of a detailed appointment procedure, including methods of reaching a compromise, and the generally low level of political culture, in the past 6 years the *Sabor* has been unable to reach a 2/3 majority and appoint a single new judge. Consequently, the Court has only 10 judges now, with four of them finishing their term of office on June 7 and three others on November 26, 2016 (this already includes 6 months of exceptional extension, with no further

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<sup>2</sup> Currently, the president and two judges are university professors, while the first president, Dr. Jadranko Crnić, was also acting as a president of the Croatian Red Cross.



possibility of prolongation). With the current political situation, it is still unclear whether the Court will survive or be euthanized *via facti*, by continuous non-appointment.

## 1.2. Competences of the Croatian Constitutional Court

As a matter of principle, the CCC guarantees compliance with, and application of, the Constitution, and bases its work solely on provisions of the Constitution and the CACC.

It is competent to:

- decide on the conformity of laws with the Constitution and of other regulations with the Constitution and laws;
- decide on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms;
- observe the realization of constitutionality and legality and notify the Croatian Parliament on its observations (added in 2000; see *infra* 4.2.);
- decide on jurisdictional disputes between the legislative, executive and judicial branches and on the impeachment of the President of the Republic;
- supervise the constitutionality of the programs and activities of political parties, and may ban their work;
- supervise the constitutionality and legality of elections and national referenda;
- perform other duties specified by the Constitution (e.g., the President of the Republic takes a solemn oath before the President of the Court).

The first competence is in reality abstract and concrete judicial review, while the second is concretized in the right to direct constitutional complaint by private individuals to the Court. Brief remarks on these are given in the following subchapters, while other competences will only marginally be tackled in this paper.<sup>3</sup>

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<sup>3</sup> For a more detailed presentation of the CCC's competences see Sanja Barić and Petar Bačić, 'Constitutional Courts as Positive Legislators: National Report – Croatia' in Allan R. Brewer-Carías (ed.) *Constitutional Courts as Positive Legislators – A Comparative Law Study* (CUP 2011) 407-444.

### 1.3. Abstract and Concrete Review

The CCC is empowered to perform only successive constitutional review, it does not have any authority to participate in enactment of laws or other regulations, nor can it be seized *a priori*. Moreover, the Court does not give advisory opinions and does not sanction legislative omissions. The latter view has been expressly adopted in the Court's current practice, but the non-binding reasoning of its decisions would point to the need of legislative action in a certain direction.<sup>4</sup> Similarly, the Court finds itself incompetent to decide in the case of alleged inconsistency among two norms of the same level (two ordinary laws).<sup>5</sup> However, there is an obvious inadequacy<sup>6</sup> in the Court's practice regarding its acceptance of jurisdiction in cases of alleged inconsistency among domestic laws and international agreements, and rejection of jurisdiction in cases of alleged inconsistency among domestic ordinary and organic laws. Namely, neither jurisdiction has been listed *expressis verbis* either in the Constitution, or in the CACC. However, under art. 140 of the Constitution, international agreements have higher legal force than domestic laws. Similarly, by interpreting art. 82 (special procedure for enactment of organic laws), the Court pronounced that organic laws have higher legal force than ordinary laws.<sup>7</sup> Organic laws are thus perceived in both a material and procedural sense as having higher legal effect, but unlike Spain or France, the Court did not develop any indirect way of effectively honoring their proclaimed position.

It should also be mentioned that the CCC is not competent for deciding on conformity of international agreements with the Constitution. Although there were interesting arguments raised as to the (un)constitutionality of concordats with the Holy Seat in view of the constitutional provision on equality of religion, the Court had no choice but to dismiss that case.<sup>8</sup>

There are two types of abstract review: review on *request* (the proceedings are instituted by the very petition of the enumerated bodies<sup>9</sup>) and review on *proposal* (anyone can suggest a review, but the motion is subject to previous examination by the Court as to whether allegations give sufficient rise to doubting the constitutionality or legality of a disputed act). The CCC may also proceed

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<sup>4</sup> E.g. U-VII-54/1993, NN 51/1994.

<sup>5</sup> E.g. U-I-94/1992, U-II-137/1995, etc.

<sup>6</sup> Sanja Barić, 'Organski zakoni i Ustavni sud Republike Hrvatske u usporednopravnoj perspektivi' [Organic Laws and the Constitutional Court of the Republic of Croatia in Comparative Perspective] in Hrvoje Kačer, Hrvoje Momčinović and Mladen Žuveła (eds.), *Liber Amicorum in honorem Dr. Sc. Jadranko Crnić (1928.-2008.)* (Novi informator 2009) 251-283.

<sup>7</sup> E.g. U-I-774/2000, NN 1/2001.

<sup>8</sup> U-I-2788/2003, NN 6/2005.

<sup>9</sup> These are: the President of the Republic, 1/5 of the MPs, parliamentary committees, the Government of the RC (in case of regulation), the Supreme Court or any other court in the country, the ombudsman and representative bodies of the local and regional units.

*ex officio* if it considers it necessary to examine a particular piece of legislation or regulation. It has actually acted *proprio motu* only in cases where matters regarding the CCC itself have been obviously unconstitutionally regulated by another act rather than by the CACC.<sup>10</sup>

As of 2002, a concrete review may be instituted by any court of justice in the form of a request for review of constitutionality or legality.

## 1.4. Constitutional Complaint

Approximately 70 out of the 152 articles of the Croatian Constitution directly or indirectly contain provisions on human rights and freedoms. The protection of the constitutionally guaranteed rights and freedoms received a meaningful tool with the institution of constitutional complaint, a remedy that did not exist prior to 1991.

The right to lodge a constitutional complaint is guaranteed to anyone who deems their constitutional rights and freedoms have been violated by an individual act of a state body, a body of local or regional self-government, or a legal person with public authority, which made a decision about their rights and obligations, or about the suspicion or accusation of a criminal act. A complaint has to be filed within 30 days of the delivery of the impugned decision. An additional requirement is the exhaustion of all other available legal remedies. There are two exceptions, the most important being unreasonable duration of regular proceeding.

The CCC is not a court of full jurisdiction. In exceptional cases damages or some other compensation may be ordered. However, it cannot replace an impugned act with a new one. The authority whose act is repealed is obliged to issue another act in place of the repealed one, and it is bound by the legal position of the Court on the violation of the constitutionally guaranteed rights and freedoms of the complainant. Thus, CCC decisions have the imminent force of precedent.

## 1.5. Effects of the Constitutional Court's Decision

The decision and rulings of the CCC are final, enforceable and obligatory; every individual or legal person is bound to obey them. All bodies of the central government and the local and regional self-government, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Court. However, the central responsibility for ensuring the execution of the CCC's decisions lies with the Government of the Republic of Croatia. In addition, the

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<sup>10</sup> U-I-39/2002, NN 10/2002. See also *infra* 3.4.

Court designs the manner of enforcement and it may require any other body to follow its order.

The CCC repeals a law, or its part, if it finds it to be unconstitutional. The repealed law, or repealed legal provision, becomes ineffective *ex nunc*, i.e., from the day of the decision's publication in the official gazette (or later, if the Court decides so). In the case of the examination of constitutionality or legality of regulation or by-law, the Court may either repeal (*ex nunc*) or annul (*ex tunc*) the unconstitutional and/or illegal act.

## 2.

# Macroscopic View: Periodization of the Court's Case-Law

As a common point of understanding,<sup>11</sup> there are three distinct periods in the development of the Croatian democratic constitutional order, detectable both on a general legal level and, particularly, through the CCC's case-law. These are:

- 1) from 1991 till late 1999,
- 2) from 2000 till mid-2013, and
- 3) from 1 July 2013 (the accession of the RC to the EU) to date.

The first period was heavily influenced by the events of the war and post-war rebuilding activities. Consequently, constitutional adjudication focused almost entirely on the "mere preservation of the very constitutional core,"<sup>12</sup> generally refraining from an activist approach. The Court exercised deference toward the executive power during the state of emergency.<sup>13</sup> However, it did protect fundamental principles, such as freedom of speech,<sup>14</sup> the basic core of self-government,<sup>15</sup> and most prominently - the effective right to appeal. In 1993 the Court established that a rejection of application for Croatian citizenship needs to include the reasoning for the decision.<sup>16</sup> More generally, in 1996<sup>17</sup> the Court repealed two provisions of the *General Administrative Procedure Act* pursuant to which the competent bodies, when deciding on a right, do not have to state reasons for their decisions. It was held that the consequence of such a regulation

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<sup>11</sup> Jasna Omejec, 'Odgovornost ustavnog sudstva za ustavne norme' [Responsibility of Constitutional Adjudication for Constitutional Norms] in Arsen Bačić (ed.), *Ustavna demokracija i odgovornost* [Constitutional Democracy and Responsibility] (HAZU 2013) 71, 74.

<sup>12</sup> Jasna Omejec, 'Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova' [New European Transitional Constitutions and the Transformative Role of Constitutional Adjudication] in Arsen Bačić (ed.), *Dvadeseta obljetnica Ustava Republike Hrvatske* [20th anniversary of the Constitution of the Republic of Croatia] (HAZU 2011) 61-85.

<sup>13</sup> U-I-179/1991, 49/1992 (upholding 11 presidential decrees with the force of law although, contrary to art. 90 and 101 of the Constitution, the state of emergency was never officially declared, the Parliament was in session at the time of enactment and decrees entered into force on the very day of their issuance).

<sup>14</sup> U-III-180/1995, NN 21/1995 (imposing a tax on a newspaper represents an administrative act subjected to judicial control).

<sup>15</sup> U-III-260/1996, NN 38/1996 (establishing that the Government has acted *ultra vires*).

<sup>16</sup> U-I-206/1992 et al., NN 113/1993.

<sup>17</sup> U-I-248/1994, NN 103/96.

was that the right to appeal could not be effective and that the principle of equality was violated.

During this first period, the Court acted almost as a regular court of appellate level, performing mostly judicial control of legality rather than using real and proper methods and principles essential to constitutional adjudication. The form of its decisions followed the standard judicial scheme. It very rarely invoked international agreements and it never applied them directly.

The beginning of the second period was marked by the election of the new left-wing government followed by the constitutional amendments at the end of 2000, and in the spring of 2001 constitutional adjudication moved toward “accepting and incorporating the European constitutional standards”.<sup>18</sup> Among other decisions, it established the direct contravention of a domestic law with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the ECHR).<sup>19</sup> The Court started to rely heavily on the jurisprudence of the European Court of Human Rights (hereafter: the ECtHR). To cite the words of its president, Professor Omejec, “it [was] about harmonization of the Croatian constitutional law with the European legal standards... The Court thus [needed] to first, learn itself and understand European and modern comparative constitutional law, but at the same time, it [needed] to interpret our Constitution in light of the former, and moreover it [needed] to simultaneously prepare and render many important decisions.”<sup>20</sup> After the constitutional amendments of 2010, Croatia was formally ready to join the EU.

It would be reasonable to expect the overall description of the third period to be post-transitional and relaxed, with well-established and vastly accepted – politically and publicly – constitutional review. Heated ideological conflicts coupled with the harsh economic crisis put the CCC from 2013 to 2015 in a complicated position. At that point, the tendency of political elites to blame the CCC for their own shortcomings and mistakes proved to be a very seductive and useful tool in day-to-day politics. In addition, certain CCC liabilities, especially in terms of personal capacities and prestige, gave rise to justified criticism (see *infra* 4.3.).

Keeping in mind the briefly described and characterized periods, the next chapter will present several decisions pertaining mostly to the second and third period as they prove to offer more relevant insight as regards the purpose of this study.

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<sup>18</sup> Jasna Omejec, ‘Pravnost hrvatske države’ [Legality of the Croatian State] in Eugen Pusić (ed.), *Hrvatska država i uprava – stanje i perspektive* [Croatian State and Administration – Present State and Perspectives] (HAZU 2008) 75, 129.

<sup>19</sup> U-I-745/1999, NN 112/2000. For a full list of landmark cases see Omejec, ‘Odgovornost ustavnog sudstva za ustavne norme’ (n 11) 82-89.

<sup>20</sup> *Ibid* 88.

### 3.

## Microscopic View: Presentation of Selected Court Rulings

In the 25 years of its operation under the democratic Constitution, the Court has received almost 93,000 applications (in 690 cases it repealed parts or the whole of a legislation and found violation of human rights in relation to 2,800 constitutional complaints).<sup>21</sup> There are certainly numerous rulings that significantly shaped the present landscape of the Croatian constitutional order. The case-law presented below is a very narrow selection of the representative subject-matter fields in which the key notions of this general study - “transformative/transitional role” and “activism” - are found and reflected. It is neither exhausting, nor the only possible selection, but it will suffice to demonstrate the CCC’s position and role in the processes of legal transition.

### 3.1. The Principle of Proportionality: from “reading-in” the Constitution to “Standard Test”

Undoubtedly one needs to start with the famous *Tobacco* case of 2000,<sup>22</sup> decided during the presidency of Professor Smiljko Sokol. In the *Act on Limitations of the Use of Tobacco Products* (which came into force on 8/12/1999) the Court repealed a provision according to which the sale of tobacco products from vending machines was prohibited from 1 January 2000. The analysis was conducted in two steps: existence of legitimate aim and the proportionality test. The disputed prohibition ordered the withdrawal of vending machines, which made it impossible to check whether tobacco products were sold to minors. This measure obviously presented a restriction of entrepreneurial freedoms and ownership rights but was deemed to have legitimate aim – protection of health. Nevertheless, the Court went on to establish that the “[restrictions] violate constitutional rights when it is obvious that there does not exist reasonable proportionality between the aim and the manner and extent of the restriction of an individual’s rights and freedoms.” Namely, the law left only 25 days for entrepreneurs to adjust their activities

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<sup>21</sup> The Constitutional Court of the Republic of Croatia, <[www.usud.hr/hr/statistika](http://www.usud.hr/hr/statistika)> accessed 30 March 2016.

<sup>22</sup> U-I-1156/1999, NN 14/2000.

(in fact, even fewer because of the Christmas holidays). The excessive burden imposed on entrepreneurs could only be offset by prescribing a reasonable period of time, long enough for them to prepare for the new business conditions, or alternatively, by providing a right to compensation. By the subsequent law the application of prohibition was postponed for one year, until 1 January 2001.

The remarkable feature of this ruling is that the Court pronounced the principle of proportionality to be an essential principle of the Croatian constitutional order regardless of the non-existence of such an explicit constitutional provision. At the time, it was only art. 17 of the Constitution that dealt indirectly with the principle of proportionality, providing that “during a state of war or an immediate threat to the independence and unity of the State, or in the event of severe natural disasters, individual freedoms and rights guaranteed by the Constitution may be restricted, but the extent of such restrictions shall be appropriate to the nature of the danger.” The Court ruled that if the Constitution requires the implementation of the principle of proportionality under extraordinary circumstances, then this principle should be even more valid under ordinary circumstances in the country. It was a kind of constitutional “reading-in”, a teleological interpretation under the influence of Strasbourg.<sup>23</sup> As a consequence, nine months later, in November of 2000, art. 16 of the Constitution was supplemented with a new para. 2: “Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.”

In the last 15 years proportionality has become one of the standard tests in the Court’s adjudication. A text-book elaboration of its steps is found in another well-known ruling, of 2011.<sup>24</sup> The 2005 amendments to the *Act on Public Assembly*<sup>25</sup> introduced several restrictions on public assembly including a general prohibition regarding St. Mark’s Square in Zagreb, a historic place with a 13<sup>th</sup> century church in the middle. Three sides of the square are faced by the Croatian Parliament, the Croatian Government and the Court itself, making the seemingly architectonic, cultural and safety reasons a *par excellence* cover for underlying political reasons. It *de facto* prohibited peaceful protest in front of the most important political institutions in the country. The Court stated:

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<sup>23</sup> Moreover, the Court established contravention of art. 1 of Protocol 1 to the ECHR, stating that this, in turn, “presents a violation of the rule of law, one of the highest constitutional values listed in art. 3 of the Constitution”.

<sup>24</sup> U-I-295/2006 and U-I-4516/2007, NN 82/2011.

<sup>25</sup> Zakon o javnom okupljanju [Act on Public Assembly] NN 150/2005. An amendment with the same prohibition was enacted six months earlier and quashed by the Court due to its formal unconstitutionality (lack of qualified majority for its enactment). U-I-3307/2005 et al., NN 139/2005.



Where the legislator decides to pass separate legislation restricting public assembly (...) three principles deriving from general constitutional values must be respected:

1. A positive presumption in favor of holding public assemblies;
2. A positive obligation on the part of the state to protect the right to freedom of public assembly; and
3. The principle of proportionality in restricting the right to freedom of public assembly. (§25)

It went on, step-by-step, to analyze on 40 pages every aspect of proportionality in the wide and narrow sense as applicable to the freedom of public assembly. It concluded that, given the unique quality of the area, the legal prerequisites for holding public assembly in proximity of this premises could legitimately be more rigorous than those applying to other places; however, these restrictions could not be general and *a priori*, they needed to satisfy the limits of proportionality and necessity, they could relate to time, the (fenced) location and the manner of holding assemblies (including the number of participants).

There is another interesting point. The ruling was rendered five years after the original proposal for review was logged, just a few months before the parliamentary elections, when it became obvious the government would change (on the Court's timing strategy see *infra* 4.4.).

### 3.2. “Transitional” and “Post-War” Justice: Constitutionality vs. Popular Expectations

Unlike many post-communist countries Croatia did not enact any lustration laws, mostly because of the imminent war threat. The country needed to organize its defense, it needed all personal resources regardless of previous political affiliation or role, and President Franjo Tuđman insisted on immediate intra-national conciliation. There are, however, Court rulings on other typically transitional legal issues, such as reinstatement of private ownership, including sanctioning criminal activities labeled as “war profiteering” or “crimes related to ownership transformation and privatization”.

As regards the “denationalization” process, in 1996 Croatia enacted the *Act on Compensation for Property Confiscated during the Yugoslav Communist Regime*. The Act was disputed by 64 requests for constitutional review. The Court accepted only two legal claims: discrimination on the grounds of citizenship and unreasonable duration of first refusal time.<sup>26</sup> In short, it repealed provisions

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<sup>26</sup> U-I-673/1996 et al, NN 39/1999 and 42/1999. However, the decision was not implemented for more than three years, until 1/7/2002, due to Parliament's inactivity in enacting the requested legislative provisions. Consequently the Court was forced to postpone five times the loss of legal force of the unconstitutional provisions.

that limited the right to compensation only to Croatian citizens and those that instituted the right of first refusal without any time-limits. It is worth noting the use of the words “reasonable time-limit”. The Court did mention here that “any limitation of human rights is inherently an exception to the rule (...) that needs to be in proportion with the purpose of limitation” (§12.2) but it did not elaborate on the general principle of reasonableness or proportionality in the legal system.

It is more important to emphasize the general constitutional principles of compensation expressly stated by the Court. The fact that the *Act on Compensation* does not fully re-establish the rights of former owners over property does not make the law unconstitutional. In principle, it is for the legislator to determine which property shall be returned, what kind of compensation shall be given and the amount thereof, because no constitutional provision deals expressly with restitution of property or compensation. The Court invoked comparative experiences:

None of the transitional countries that regulate denationalization (in the broadest sense) has economic power to reconstitute or compensate for all of the confiscated property. (...) All these laws are founded on the basic assumption that remedying old injustices may not inflict new, harder ones. (...) Therefore – and especially bearing in mind the significant time lapse from the actual confiscation – there cannot be absolute justice and equality among subjects entitled to restitution or compensation. (§2.5)

The Court, however, did mention the illogical and inefficient chronological order of legislative acts, noting that both the *Act on Privatization* and the *Act on Transformation of Socially Owned Enterprises* were enacted prior to the *Act of Compensation*, significantly reducing the possibility of restitution as the property was already given to new proprietors. Nevertheless, it held itself incompetent since it perceived this to be an issue of contravention between laws, not between laws and the Constitution.

An extremely heated legal and political question related to the sanctioning of war profiteering<sup>27</sup> was reopened by the recent Court decision of July 2015 (the *Hypo case*).<sup>28</sup> The applicant submitting constitutional complaint was Ivo Sanader, former deputy foreign minister (1993-1995 and 1996-2000) and former prime

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<sup>27</sup> The criminal offences of war profiteering relate to perpetrators who, in the period from 30/5/1990 to 15/1/1998, generated disproportionate financial gain illegally by abusing the state of war and the immediate danger to the independence and territorial integrity of the state through criminal offences enumerated in the 2011 *Act on Exemption from the Statute of Limitations of Crimes of War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization* (e.g., by fraud, tax evasion, money laundering, embezzlement, by raising prices in the case of product shortages, selling state property at a price much lower than its value, abuse of position and authority, bribery, etc.).

<sup>28</sup> U-III-4149/2014, NN 89/2015. The same decision quashed another criminal charge against Sanader for bribery committed in 2008 (*Ina-Mol case*).

minister (2003-2009). According to the final judgment, the perpetrator committed a criminal offence in the *Hypo* case during the Homeland War in Croatia in Zagreb and in the Republic of Austria in the period from the end of 1994 to 22 March 1995. In 2010, art. 31 of the Constitution was amended by a new paragraph 4, which prescribes: “The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatization and perpetrated during the period of the Homeland War and peaceful reintegration, wartime or during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law.” Now, in 2015, acknowledging the requirement imposed by the rule of law (states may not interfere retroactively in cases barred by the statute of limitations related to criminal prosecution), the Court established in its decision that the new paragraph of the Constitution had allowed – with *pro futuro* effect – unlimited temporal possibilities for the criminal prosecution of perpetrators of the said crimes, provided that the offences in question were not barred by the statute of limitations on the day of the entry into force of the constitutional amendment (16<sup>th</sup> June 2010).<sup>29</sup> In this manner, the CCC interpreted the constitutional amendment in accordance with the well-known and accepted legal principles of legal certainty and legality, namely, barring the prolongation of statute of limitations in cases where it had already expired.

With this decision the Court faced severe political and public resentment.<sup>30</sup> To name just a few reasons for such a perception: when Prime Minister Sanader abruptly resigned in July 2009, he became a symbol of corruption in Croatia, facing seven different criminal charges, and yet the first final judgment was repealed by the Court; the Court, generally known for its delayed deliverance due to the overwhelming number of constitutional complaints, delivered this case in an unusually short period; this decision was taken half a year after President Josipović, who drafted the Constitutional amendment while still a law professor, lost the presidential elections and a few months before new parliamentary elections. It was a politically burdensome case but the Court undoubtedly needed to intervene as it did, correcting the obvious mistakes of regular courts, regardless of the public sentiment. Thus, the legally founded decision did not help in shaping a positive perception of the Court.

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<sup>29</sup> Neither the County Court in Zagreb, nor the Supreme Court examined whether the crime was barred by the statute of limitations on the date of the entry into force of the amendment, failing to determine whether it was possible at all to conduct criminal proceedings.

<sup>30</sup> A full analysis supporting the Court’s decision in the *Hypo* case is given by Davor Derenčinović, ‘Doprinos Ustavnog suda Republike Hrvatske u definiranju okvira za tumačenje ustavne odredbe o nezastarijevanju ratnog profiterstva i kaznenih djela počinjenih u vrijeme pretvorbe i privatizacije’ [Contribution of the Constitutional Court of the Republic of Croatia to the Framework for Interpretation of Constitutional Provision on Exemption from the Statute of Limitations of Crimes of War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization] (Foundation Public Law Centre 9/2015) <[www.fcjp.ba/index.php/-95733](http://www.fcjp.ba/index.php/-95733)> accessed 15 March 2016.

### 3.3. The Meaning of “Social State”: Social Justice vs. Budgetary Constraints

The basic “dilemma of human rights adjudication”<sup>31</sup> is present in both negative and positive rights cases. The democratic ideal is that all important decisions should be made by the people/their representatives, rather than by unelected and unaccountable judges. At the same time, there are limits to popular decision-making, most prominently human rights limits that need effective judicial protection. In the case of positive rights, Klatt<sup>32</sup> identifies four groups of problems: justification, content, structure and competence. It is a *par excellence* problem of constitutional adjudication, a place of smoldering conflict between parliaments and constitutional courts in both developed and transitional countries. The CCC approached this issue demonstrating awareness of the delicate balance between activism and self-restraint.

In 1992, Nikola Filipović, a judge of the Court, said that: “The Constitutional Court is, after all, an institution that applies the law, but creates no policies”. The first president of the Court, Dr. Jadranko Crnić, was of the same opinion for a long time.<sup>33</sup> Nevertheless, during his presidency, the CCC had adopted a decision that reflected one of his most significant attempts at creating policies by way of strengthening the rule of law and protection of human rights – it repealed provisions of the *Act on Adjustment of Pensions and Other Allowances From the Pension and Disability Fund and Administration of Funds of the Pension and Disability Fund*.<sup>34</sup> In 1993, the Government of the RC ceased to adjust pensions according to the increase in inflation rate and cost of living (or following the principle of wage movements), even though it continued to do so with wages. According to the facts determined during the proceedings, the result of these actions was that wages increased twice as much as pensions in the period from July 1993 to December 1997, that is, in 1997, the average pension was half of the average wage. Consequently, the standard of living for retired persons (pensioners) was half the standard of the working population with average incomes. Therefore, the CCC ruled that “this legal arrangement... changed the social status of retired persons to such an extent that it created social inequality of citizens”, and that is why the contested provisions “contravene basic constitutional provisions of article 3 of the Constitution, which guarantee equality, social justice, and the rule of law; and article 5 of the Constitution, which states that laws are to be in conformity with the Constitution.” The Court did not find questionable the authority of the legislator to regulate the new pension and invalidity insurance

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<sup>31</sup> Sandra Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote’ [2013] Public Law 292.

<sup>32</sup> Matthias Klatt, ‘Positive Rights: Who Decides? Judicial Review in Balance’ (2015) 13 I•CON 354.

<sup>33</sup> Jadranko Crnić, *Vladavina ustava [Rule of the Constitution]* (Informator 1994) 14.

<sup>34</sup> U-I-283/1997, NN 69/1998.

system in line with the economic capacities of the state, but at the same time held that the limits of using these authorities of the legislator must not bring into question fundamental constitutional rights and principles. Consequently, retired persons were to receive the unpaid part of their pensions for the period from 1993 to 1997.

It should be noted that in this case the Court's activism is intertwined with the definition of a social welfare state that has not been made concrete - either by constitution-makers or legislators.<sup>35</sup> The legislative and executive branches turned out to be very hostile towards the CCC and its decision. Vladimir Šeks, one of the leading politicians of the ruling party and vice-president of the Parliament, announced the adoption of a law that would restrict the Court's "activism". At the same time, Zlatko Mateša, the then prime minister, questioned the state's debt to pensioners by saying that the state would go bankrupt if it were to repay the debt. In the end, however, the parliament yielded and - six years later - enforced the Court's ruling.

Another important decision needs to be mentioned. It demonstrates careful self-restraint toward budgetary necessities, further concretization of social justice/social state principles and heavily relies on the ECtHR case-law, as well as on the German Constitutional Court's rulings (see *infra* 4.1.). In confronting the effects of the economic crisis, in July 2009 the parliament introduced the so-called *Crisis Tax (Special Tax on Salaries, Pensions and Other Receipts Act)*. The law was immediately impugned before the CCC by the president of the Republic, Stjepan Mesić.<sup>36</sup> The final decision was taken on 16 November 2009, upholding the law and rejecting all allegations of its unconstitutionality.<sup>37</sup> The Court cited the *Bundesverfassungsgericht's* wording on the concept of social state as "laying down the state's obligation to ensure an equitable social order"<sup>38</sup> but "in the fulfillment of this obligation the legislator has a wide margin of free decision-making".<sup>39</sup> The challenged Act was highly significant for the stability of national public expenditure and this took priority over the requirements for achieving absolute equality and equity in levying the special tax. The temporary levy of the special tax was based on a qualified public interest (preservation of the stability of the national financial system under conditions of economic crisis by acting on the

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<sup>35</sup> Rodin claims that certain constitutional concepts, such as the constitutional concept of a social state, are not "self-explanatory and they demand additional interpretation". Siniša Rodin, 'Ustavni sud definira socijalnu državu' [The Constitutional Court Defines Social State] (1998) 5 Rev. soc. pol. 111.

<sup>36</sup> When the general public was informed of the fact that, under the CACC, possible reimbursement of overpaid tax, in the case that the tax was found unconstitutional, would be granted only to those who formally proposed a review of constitutionality, over the following four months the CCC was overwhelmed by more than 80,000 proposals for constitutionality review submitted by individuals and legal persons.

<sup>37</sup> U-IP-3820/2009 et al., NN 143/2009. Judge Arlović and Matija gave a joint dissenting opinion.

<sup>38</sup> BVerfGE 5, 85 [198]; 22, 180 [204]; 27, 253 [283]; 35, 202 [235 ff].

<sup>39</sup> BVerfGE 18, 257 [273]; 29, 221 [235].

revenues of the state budget for a short time). In the absence of such measures, the state would be unable to perform the tasks with which it was charged under the Constitution. The CCC noted the large number of taxpayers who were exempt from paying the separate tax due to modest salaries and pensions, and the fact that the special tax introduced by the Act also served to preserve the achieved degree of social benefits under conditions of economic crisis (the aim was to preserve various social benefits that are financed from the state budget, which are an expression of the state's care for the socially most vulnerable individuals and groups). It found the Act to be in compliance with the requirements those drafting the Constitution had in mind when they defined the RC as a social state and placed social justice among the highest values of its constitutional order.

### 3.4. The Constitutional Boundaries of Democracy: Popular Initiative

In 2000 popular initiative was introduced in the Constitution, praised for its democratic potential but inherently flawed by a total lack of express substantial limits. Scholars' warnings on possible abuse and need for comparative analysis were ignored.<sup>40</sup> When requested by ten percent of the total electorate in the RC (signatures must be collected within 15 days), a referendum shall be called on proposals to amend the Constitution, a bill or any other issue deemed to be of importance to the independence, integrity and existence of the country. The original procedural limit (turnout of 50% of the electorate) was removed by the 2010 Constitutional Amendment due to the prospective EU membership referendum and expected lower turnout.<sup>41</sup> Thus, any decision on the referendum is legally binding if voted by a majority of those who voted; absentees do not influence the result. The CCC remains the only check, under art. 95/1 of the CACC: "At the request of the Croatian Parliament, the CCC shall, in the case [of popular initiative], establish whether the question of the referendum is in accordance with the Constitution and whether the requirements for calling a referendum in art. 86 para. 1-3 of the Constitution have been met." The Court has to decide within 30 days.

In the same year, 2010, the first popular initiative was instituted against a legislative proposal on removal of the existing legislation on the extended

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<sup>40</sup> Branko Smerdel, 'Neposredno odlučivanje i njegove ustavne granice' [Direct Decision-Making and Its Constitutional Limits] (2010) 10 (11) *Hrvatska pravna revija* 1, 2; Biljana Kostadinov, 'Referendum građanske inicijative i građanska inicijativa – poredbena studija i prijedlozi za uređenje u Hrvatskoj' [Citizens' Initiative Referendum and Citizens' Initiative - a Comparative Study and Suggestions for Regulation in Croatia] in Jakša Barbić (ed.), *Izbori zastupnika u Hrvatski sabor i referendum* [Parliamentary Elections and Referendum] (HAZU 2011) 119, 130.

<sup>41</sup> In fact, the EU referendum was held on 22 January 2012 with a turnout of 43.51% out of which 66.27% voted in favor of accession.

application of the legal rules contained in collective agreements and on the termination of collective agreements. In view of the signatures collected (15.95% of voters) the Government withdrew its Final Proposal from the legislative procedure. Consequently, the Court – seized by the Parliament – decided that the formal requirements for a popular referendum ceased to exist.<sup>42</sup> Namely, “the realization of the will of the people, i.e. voter participation in making political decisions, can be effectively realized in a democratic society by the mere ‘threat’ of holding a referendum” (§23). More notably, the Court emphasized the “extreme importance” of the fact that this was the first case dealing with popular initiative (§20.1). It obliged the Government to hold a referendum if it wished to reinstitute its proposal within a one year, for the following reasons:

Contrary to the legislator, the Constitutional Court, as the ‘guardian of the Constitution’, has the duty to watch over the realization of the highest values of the constitutional order of the Republic of Croatia in such a way (...) to compensate for the weaknesses (...) of insufficiently developed and imperfect legal framework. (§25.1)

The first and only successful popular (constitutional) initiative was introduced in 2013 by the conservative association “In the Name of Family”. In the referendum,<sup>43</sup> held on 1 December 2013, Croatian citizens were asked to decide whether the already existing statutory definition of marriage, as a union between a man and a woman, should be inserted into the Constitution. With a 38% turnout and 66% in favor, it effectively introduced a constitutional ban of same-sex marriage. The Court’s actions in relation to this initiative were among the most remarkable in its whole history. It found legal basis and reason to act twice although it was never seized by the Parliament, the only body competent of instituting constitutional review in case of popular initiative.<sup>44</sup>

In the first instance, the Court acted in view of protecting constitutional procedure. After six months of a heated public campaign on the issue, the left-wing majority in power, strongly opposing the referendum, attempted to prevent it by a creative interpretation of constitutional provisions. The parliamentary Constitutional Committee, contrary to the *Joint public statement of all the constitutional law professors in Croatia on procedural issue related to*

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<sup>42</sup> U-VIIR-4696/2010, NN 121/2010.

<sup>43</sup> In total there have been only three nation-wide referenda in Croatia, the other two being the referendum on independence (1991) and the EU referendum (2012).

<sup>44</sup> The Court rejected several individual requests for review on grounds of their inadmissibility (eg. U-VIIR-5503/2013, NN 138/2013).

*constitutional initiative*,<sup>45</sup> proposed to the plenum that the referendum should be treated as an initial constitutional amendment phase: if positive, the result of the referendum would only institute parliamentary proceedings, while the final decision on the concrete amendment would have to be taken by a 2/3 parliamentary majority.<sup>46</sup> The Court reacted in 4 days issuing an unusual and unprecedented act called “Warning”<sup>47</sup> in which it explained the difference between constitutional initiative and regular constitutional amendment procedure, warning the Parliament of its responsibility for the “constitutionally unacceptable consequences of its actions” if it adopted such a decision. The Parliament took a step back and revised the final wording of the Decision on Call for Referendum according to the Court’s view.

Already in conflict with the Court, convinced that the Court would not stop the referendum and in trying to avoid another political failure, the parliamentary majority renounced the possibility to substantially challenge the initiative. Public doubt as to the constitutionality of the proposed referendum were raised by the Ombudswoman and the Gender Equality Ombudswoman.<sup>48</sup> Unexpectedly, the Court again issued a pronouncement, called “Communication”, two weeks prior to the referendum.<sup>49</sup> It did so *proprio motu*, constructing its power to act on the basis of general jurisdiction in controlling the constitutionality and legality of referenda, holding that its controlling powers do not cease to exist in cases where the Parliament fails to send its request, as it did in this case:

(...) [R]especting the constitutional role of the Croatian Parliament as the highest legislative and representative body in the State, the Court deems that in such a situation its general controlling powers are to be used only exceptionally, when it establishes the existence of such a formal and/or substantial unconstitutionality of question posed to referendum, or such a severe procedural mistake that threatens to infringe the **structural characteristics of the Croatian constitutional state**, i.e. to infringe its **constitutional identity, including the highest values of the constitutional**

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<sup>45</sup> ‘Izjava hrvatskih ustavnopravnih stručnjaka povodom narodne referendumske inicijative Udruge “U ime obitelji” [Joint Public Statement of the Croatian Constitutional Law Professors in View of Constitutional Initiative “In the Name of Family”] (*Hrvatska udruga za ustavno pravo*, 10 June 2013) <[www.huzup.hr/?id=3&pg=1&ak=21](http://www.huzup.hr/?id=3&pg=1&ak=21)> accessed 1 April 2016.

<sup>46</sup> Committee on the Constitution, Standing Orders and Political System, *Prijedlog odluke Odbora za Ustav, Poslovnik i politički sustav o raspisivanju državnog referenduma* [Proposal of the Decision on the Call for State Referendum] (2013) <[www.sabor.hr/prijedlog-odluke-odbora-za-ustav-poslovniki-polit](http://www.sabor.hr/prijedlog-odluke-odbora-za-ustav-poslovniki-polit)> accessed 5 April 2016.

<sup>47</sup> U-VIIR-5292/2013, NN 131/2013.

<sup>48</sup> T-portal, ‘Referendum o braku ide protiv temeljnih vrednota Ustava!’ [Marriage Referendum is Contrary to Fundamental Constitutional Values!] (*T-portal*, 5 November 2013) <[www.tportal.hr/vijesti/hrvatska/296744/Referendum-o-braku-ide-protiv-temeljnih-vrednota-Ustava.html](http://www.tportal.hr/vijesti/hrvatska/296744/Referendum-o-braku-ide-protiv-temeljnih-vrednota-Ustava.html)> accessed 6 April 2016.

<sup>49</sup> SuS-1/2013, NN 138/2013.



**order of the Republic of Croatia (art. 1 and 3 of the Constitution).** Primary protection of these values does not preclude the power of the constitution maker to expressly designate further issues as unacceptable for popular decision-making through referendum. (§5)

Analyzing the right to marriage in the comparative and ECtHR perspective it found this particular question to be constitutionally acceptable. Nevertheless, the great significance lies in three features of its pronouncement. Firstly, it unequivocally established the existence and effects of the Croatian “constitutional identity”, and it firmly expressed its readiness to defend it even against constitutional revision, at least in the ambit of popular initiative. Since in its previous rulings the Court held that it does not have the jurisdiction to substantially review the amendments of the Constitution or of regulations that have the same force as the Constitution,<sup>50</sup> it was a major step forward in defending the constitutional core, i.e. the “structural unity of the constitutional text as a source of objective value order”.<sup>51</sup> In the absence of an express *Ewigkeitsklausel*, it based its conclusion on the interpretation of the highest values of the constitutional order.<sup>52</sup> Secondly, relying on the Venice commission’s views,<sup>53</sup> it warned against “systemic constitutionalizations” that would violate the principle of separation of powers, as well as the system of checks and balances (here it exceptionally allowed the proposed constitutionalization due to “deeply rooted social and cultural features” underpinning the definition of marriage, §9.1). And thirdly, it protected same-sex unions stating that the result of a future referendum “may not have any effect whatsoever on further development of the legislative framework for extra-marital and same-sex unions” since “everyone in the RC has the right to respect and legal protection of her private and family life, and human dignity” (§12). All of these remain under the protection of the Court.

In 2014 and 2015 the Court dealt with and rejected four further popular initiatives. Thus, it found inadmissible the question of increase in the threshold for the official use of the language and script of national minorities (unreasonable question with disproportionate effect and discriminatory intention);<sup>54</sup> it defined that 10% of voters proposing a popular initiative must include only Croatian

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<sup>50</sup> E.g. U-I-597/1995 of 9/2/2000, U-I-699/2000 of 24/5/2000, U-I-1631/2000 of 28/3/2001 and U-I-778/2002 of 10/7/2002.

<sup>51</sup> Eg. § 30 and 38 of U-I-3597/2010 et al., NN 93/2011 (on electoral rights of national minorities).

<sup>52</sup> See also Ana Horvat Vuković, ‘Referendum narodne inicijative 2013. – Ustavni identitet kao osnova ustavnosudskog aktivizma’ [Popular Initiative Referendum of 2013 – Constitutional Identity as a Basis for the Constitutional Court’s Activism] in Robert Podolnjak and Branko Smerdel (eds.), *Referendum narodne inicijative u Hrvatskoj i Sloveniji* [Popular Initiative Referendum in Croatia and Slovenia] (HUUP 2014) 149-177.

<sup>53</sup> Venice Commission, ‘Opinion of the Fourth Amendment to the Fundamental Law of Hungary’, (Opinion 720/2013), CDL-AD (2013) 012, 17 June 2013.

<sup>54</sup> U-VIIR-4640/2014, NN 104/2014 and 130/2014 (correction).

citizens living in Croatia;<sup>55</sup> it rejected the question of outsourcing<sup>56</sup> and of monetization of highways<sup>57</sup> (establishing further procedural criteria for legislative initiative, such as the documentation needed to accompany an initiative, applying stricter control over legislative initiative than in reviewing the constitutionality of laws, and expressly giving prevalence of the Constitution over the EU law). In each of these it expressed a significant measure of activism commanded by continuing legislative inactivity in relation to the subject-matter of referenda and in view of escalating “cultural wars” in Croatia (see *infra* 4.4).

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<sup>55</sup> U-VIIR-7346/2014, NN 156/2014.

<sup>56</sup> U-VIIR-1159/2015, NN 43/2015.

<sup>57</sup> U-VIIR-1158/2015, NN 46/2015.

## 4.

# Sailing the Blue Danube: Incentives for, Methods of and Threats to the Court's Activism/ Transformative Role

The tendency of constitutional courts to build up their reputation and position within political systems is a common characteristic of new democracies. However, since 1989, each of these institutions has developed judicial activism using their own methods. Some constitutional courts have been immediately labeled as activist (for example the Polish, Hungarian, and Czech court).<sup>58</sup> Others have developed their activism gradually in accordance with somewhat difficult conditions of preservation of proclaimed democratic principles and institutions. The Republic of Croatia, that is, the CCC, falls into the second category. Since the concept of constitutional adjudication did exist under the socialist regime in Croatia, the Court had, at least in theory, a chance to show that it did not hold a subordinate position vis-à-vis the legislative branch. However, the judges have mostly been more tactically than strategically oriented,<sup>59</sup> and it is only lately, as shown above, that activism has become more visible and bold.

This chapter intends to identify the Court's motivation and methodology when opting for an activist approach that importantly shaped the Croatian constitutional system (4.1. and 4.2.). Particular faults on the Court's side will be pointed out when appropriate, particularly in view of its membership (4.3.). Finally, it will present the escalating clash with the ruling party, including the issue of a "timing strategy", leading to a dramatic situation as to the Court's future (4.4.).

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<sup>58</sup> See Wojciech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2003).

<sup>59</sup> This kind of "moderate judicial activism" is justified by and associated with two influential sets of factors. The first set includes a number of different "domestic" circumstances: wartime, during which national political leaders expected no contestation of the "unity of state power" principle from other institutions; the initial unquestionable authority of the head of state and the uncritical position taken by the judges; the gradual adjustment of judges to new values such as the rule of law, separation of powers, and "anti-majority" power of constitutional review; a search for a more adequate normative tool that would help elaborate constitutional independence and coordination; constitutional judges having distorted views of "constitutional patriotism", etc. The second set of factors is associated with the type and nature of constitutional review in Croatia. For detailed analysis of CCC activism in the period prior to 2008, see Barić and Bačić (n 3).

## 4.1. Using the Efficient Sails: ECtHR Case-Law and Foreign Precedents

The CCC's most preferred method by far of argumentation in difficult cases is the use of ECtHR case-law and, more rarely, foreign national precedents. Starting from the concept of legal monism, the effectively quasi-constitutional status of the ECHR in the Croatian legal order, and the constitutional demand for the direct application of the ECHR, the CCC has so far referred to the jurisprudence of the ECtHR in more than 1,200 decisions and rulings (90% of which were passed in relation to the other Contracting States). On account of the virtually overlapping substance of the two instruments (the Constitution and the ECHR) the CCC has been (since 2000) gradually accepting the specific principles for the interpretation of the Constitution found in the jurisprudence of the ECtHR.<sup>60</sup> Similarly, it can be seen that there has been gradual acceptance of different judicial techniques used to determine and resolve the constitutionally relevant substance of a specific case (*supra* 3.1.). In the words of the CCC's current president: "this is primarily the result of the CCC's specific approach to the ECHR and its particular understanding of the obligations for Croatia that emerge from it. This approach of the CCC cumulatively covers the following standpoints: national constitutional courts and the ECtHR perform similar tasks at different levels; article 1 of the ECHR, 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 ECHR; the ECtHR's judgments transcend the boundaries of a particular case; the ECHR is the 'constitutional instrument of European public order' and the ECtHR is the creator of 'European constitutional standards'".<sup>61</sup> Moreover, the CCC often relies on Venice Commission recommendations (see *supra* 3.1. and 3.4.), while its most prominent rulings are published in the Commission's bulletin.

Foreign (national) precedents are used more unpredictably.<sup>62</sup> When invoked, the jurisdictions of the continental legal tradition, i.e. German and Austrian, are most often relied upon as Croatia itself belongs to the same tradition. On the other hand, the Court never cites decisions from the common law jurisdictions.

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<sup>60</sup> Croatia became a member of the Council of Europe in 1996, and the ECHR entered into force for Croatia on 5 November 1997.

<sup>61</sup> Ksenija Turković and Jasna Omejec, 'Croatia - Commitment to Reform: Assessing the Impact of the ECtHR's Case Law on Reinforcing Democratization Efforts in Croatian Legal Order' in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016).

<sup>62</sup> For detailed analysis see Sanja Barić and Matija Miloš, 'Foreign Precedents in Constitutional Litigation (National Report: Croatia)' in *Foreign Precedents in Constitutional Litigation – A Comparative Law Study*, (Springer 2016 - to be published) <<https://pravri.academia.edu/SanjaBari%C4%87/Conference-Presentations>> accessed 5 April 2016.

When the CCC uses foreign precedent in a decision, it does not reference the drafting history of the Constitution or its amendments. Instead, in cases where it actually provides a justification for doing so, it is more prone to explanations that refer to the universality of a particular interpretation. For instance, in the *Agricultural Area case*, the Court invokes German case law, arguing that it is universally valid for issues “regarding the role of ownership in the context of a social state, that is, for better understanding the social role of property”.<sup>63</sup> Another example is related to legal notion of “dignity”. In order to define what “dignity” means, the CCC adopted the interpretation developed by the *Bundesverfassungsgericht*.<sup>64</sup> The CCC then proceeds to locate this rather strong affirmation of dignity contained – implicitly - in a number of Croatian constitutional provisions. However, it never explains its starting point: the invocation of the German case law. It only attempts to create a bridge between German and Croatian legal orders by invoking Protocol 13 of the ECHR, which refers to dignity, as well as the case law of the ECtHR.<sup>65</sup> It stands to reason, however, that Germany was chosen because of its well-developed practice on dignity, a far more prominent concept in the Basic Law than is the case with the Croatian constitution.

Some clues about the Court’s motivation in cases where German law is invoked may be inferred from a talk given by Professor Omejec. She discusses some of the laudable characteristics of the Basic Law and the case law of the Federal Constitutional Court. For instance, she points out the value-based undertow of the German constitution. In particular, she notes that, by balancing values, the German Federal Court creates an objective order of constitutional law, rather than remaining focused on individual cases. She further emphasizes that the German case law has an impact beyond Germany because of the Federal Court’s relationship with the ECJ, namely the refusal of the German constitutional guardian to apply any act of the EU unless it meets a satisfactory level of human rights protection. The human rights guarantees established by the Federal Constitutional Court, concludes Omejec, thereby became the “minimum standard for protection of individuals on a European level”.<sup>66</sup> Moreover, in her 2009 paper, Omejec claims that “in relation to the approach and methodology used in deciding as well as in the quality of its decisions, the Croatian Constitutional Court’s leading cases, in general, may be compared to the jurisprudence of the best constitutional courts in Europe, such as the Federal Constitutional Court of

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<sup>63</sup> U-I-763/2009 et al, NN 39/2011.

<sup>64</sup> See p. 35 of the decision. More specifically, the Court invokes the *Lebach case* (1 BvR 636/72) which, although linked to dignity, had privacy at its core.

<sup>65</sup> Specifically, the *Refah Partisi case* (41340/98, 41342/98, 41343/98 and 41344/98).

<sup>66</sup> Jasna Omejec, ‘O važnosti jurisprudencije njemačkog Saveznog ustavnog suda za hrvatsko ustavno sudovanje’ [On the Importance of the Jurisprudence of the German Federal Constitutional Court for Croatian Constitutional Adjudication] (2009) 5763 Informator 1.

Germany or Constitutional Court of Austria.”<sup>67</sup> In 2015,<sup>68</sup> a translation of selected *Bundesverfassungsgericht*’s decisions was published, with Omejec emphasizing in her promotion speech that the “*Bundesverfassungsgericht* is the largest, and according to many, the most powerful Court in the world (...) [its] jurisprudence is a constant source of principles, general rules and methods of constitutional interpretation for constitutional courts all around the world (...) and especially for Croatia as it belongs to the same legal tradition.” It seems clear that the reputation and influence of the German constitutional order are the main reasons for the CCC’s use of, and learning from, its jurisprudence.

Several findings are obvious. The use of ECtHR case-law is seen by the Court as a source of legal wisdom but also an additional credibility element for upholding particularly unpopular acts. The Court uses international case law in order to demonstrate that its own interpretation of the Constitution is not out of line with what was found by other courts and should therefore be considered more acceptable.<sup>69</sup> Additionally, foreign case law may appear in cases where the Court seeks to expand its interpretation of particular constitutional concepts (such as dignity). It would seem that the CCC reaches out for a comparative judicial argumentation as justification of its own conclusions in landmark cases.

## 4.2. Rowing Upstream: “Report” as a Soft Method of Making the Point

By the Constitutional Amendment of 2000 the Court was vested with a new competence (art. 129, line 5): it observes the overall realization of constitutionality and legality in the state and notifies the Croatian Parliament on the systemic instances of unconstitutionality and illegality observed thereto. The instrument used is a non-binding but authoritative “report” that the Court, whenever it sees the need, issues to the president of the *Sabor*. By the end of 2015, it had delivered a total of 81 reports. They present a soft method of dialogue with the legislative branch, leaving to the latter the final decision on whether to take an action in view of the Court’s advice. Some of them had significant impact on the development of constitutional order.

A representative example is the Report of February/2005,<sup>70</sup> in which the Court tackled the right to trial in a reasonable time, pleading for its adequate

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<sup>67</sup> Omejec, ‘Odgovornost ustavnog sudstva za ustavne norme’ (n 11) 91.

<sup>68</sup> Jasna Omejec, ‘Još uvijek ne osjećamo ustavna načela kao dio svog državnog bića’ [We Still Do Not Feel the Constitutional Principles as a Part of Our National Identity], (2015) 6385 Informator 1, 2.

<sup>69</sup> A negative view of this practice was given by dissenters in the *Crisis Tax case*, Arlović and Matija, who pointed out the flaws of the decision, noting that the point should be whether the tax is in line with the Constitution, not best practices from abroad.

<sup>70</sup> U-X-835/2005, NN 30/2015.

regulation. Namely, the long duration of judicial proceedings has been an issue for quite a number of years in Croatia. After its accession to the Council of Europe and consequently to the ECHR, the criticism became more apparent and was the basis for a number of applications to the ECtHR on the grounds of articles 6 and 13 of the ECHR. In an attempt to provide an effective remedy in such cases, the 1999 revision of the CACC introduced the following solution: individuals were allowed to directly approach the CCC if it was completely clear that the impugned act, or the unreasonable prolongation of its issuance, violated constitutional rights and freedoms, and that the rejection of constitutional examination could create grave and irreparable consequences. The provision was revised again in 2002, empowering the CCC to initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time. The unreasonable duration of trial became a protected human right in itself. By the beginning of 2005, over 35% of all constitutional complaints (which themselves form almost 80% of the total Court's workload) were alleging unreasonable duration of proceedings, which in turn extremely burdened the CCC.<sup>71</sup> As a direct consequence of the said Report, the Croatian parliament enacted the new *Judiciary Act*,<sup>72</sup> narrowing the actual jurisdiction of the CCC: it remained the final guarantor of the right to trial in a reasonable time, but it is now competent to decide only in the final stage in relation to duration of proceedings before the Supreme Court. The right to reasonable duration is protected hierarchically within the judicial structure: the immediately higher court is competent to decide on duration of proceedings before the immediately lower court. The adopted solution relieved the pressure on the CCC.

Several reports, although pointing out important shortcomings, either did not receive the serious attention of the *Sabor*,<sup>73</sup> or were interpreted as a sign of the Court's latent hostility toward the ruling coalition (see *infra* 4.4.).<sup>74</sup> Nevertheless, monitoring constitutionality and legality with a *proprio motu* reporting mechanism proved to be a valuable asset for the Court's constitutional safeguarding role and its transformative influence. In one instance, however, the Court seemingly went too far and, as is the case with certain good intentions, paved the way for hellish consequences: the existence of two consolidated texts of the Constitution. The first and official version was adopted by the competent body, the Constitutional

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<sup>71</sup> There is no national remedy in relation to duration of the CCC's procedure (U-III A-1871/2002, NN 49/2003).

<sup>72</sup> Zakon o sudovima [Judiciary Act], NN 150/2005.

<sup>73</sup> Eg. regardless of the 2010 Court's report on the unequal weight of votes in the constituencies, the parliament continues to neglect a suspicious feature of parliamentary elections, i.e. the disproportional size of electoral units resulting in *de facto* unequal voting right (U-X-6472/2010, NN 142/2010).

<sup>74</sup> Most notably *Report on Final Provision of the Family Act* (U-X-3239/2014, NN 83/2014) and *Report on Public Consultation in the Amendment Procedure* (U-X-5730/2013, NN 144/2013).

Committee of the Parliament in 2010. It is used for all purposes in the country and abroad. The second version was prepared by the Court itself in 2011, as an attachment to the *Report on constitutionally unacceptable effects of the consolidated text of the Constitution*<sup>75</sup> and published on the Court's website. In the Report the Court rightly brings to light all the formal mistakes in the official version advising the Committee to issue the new one prepared in accordance with the general rules of legislative/constitutional compiling. Moreover, one day after the publication of its Report, the Court began to refer in its case-law to the numbering of articles of the second version, the Court's version of the Constitution, which did not correspond to the numbering of the official version. Needless to say, the Parliament never accepted the new version, while the Court, after two and a half years, gradually began to renounce its insistence on the second version.

### 4.3. Honorable Justices: Skills and Prestige of Crew Members Do Matter

Apart from political criticism of the Court's latest case-law, discussed *infra* in 4.4., certain faults inherent to the judges themselves need to be mentioned. While in the past most of the Court members were either well-known judges, law professors or lawyers, the vast majority of present judges were not, prior to their appointment, perceived as the legal elite. It is a consequence of the low democratic culture of the political elites in the late 1990s and 2000s, who failed to understand the so-called "insurance theory"<sup>76</sup> and opted for relatively weak candidates in view of electing "their own comrades" but also of curtailing the Court's performance potential.

It would seem that public cannot forget the fact that the CACC was revised in 1999 in order to enable the election of one of the judges.<sup>77</sup> Another judge was contested at the time of appointment for failure to meet the 15-year prior experience requirement. The CCC itself quashed the Administrative Court's decision on the matter.<sup>78</sup> Although rightly decided, it left the public impression

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<sup>75</sup> U-X-1435/2011, NN 37/2011. The first report on consolidated versions in general was issued 5 years earlier. U-X-80/2005, NN 64/2005.

<sup>76</sup> The "insurance theory" implies that constitutional designers will opt for a strong judicial review as an "insurance tool" in case of electoral defeat. A detailed explanation is given by Tom Ginsburg in his *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).

<sup>77</sup> Željka Godeč, 'MOST protiv Jasne Omejec' [MOST against Jasna Omejec] *Jutarnji list* (Zagreb, 11 March 2016) <[www.jutarnji.hr/globus/most-protiv-jasne-omejec--quot-treci-mandat--ne--to-ne-dolazi-u-obzir--cak-i-da-je-radila-besprije-korno--potreban-nam-je-novi-predsjednik-ustavno-g-sud-quot-/1538489/](http://www.jutarnji.hr/globus/most-protiv-jasne-omejec--quot-treci-mandat--ne--to-ne-dolazi-u-obzir--cak-i-da-je-radila-besprije-korno--potreban-nam-je-novi-predsjednik-ustavno-g-sud-quot-/1538489/)> accessed 2 April 2016.

<sup>78</sup> U-III-443/2009, 65/2009.



of “protecting one of their own” and underlined the fact that the appointment procedure does not filter out questionable cases. A third judge was blamed for a tax debt, the processing of which was already barred by the statute of limitation.<sup>79</sup>

The final blow to the present Court's image occurred in 2015 with the two most recent scandals.<sup>80</sup> Namely, one of the judges was under secret surveillance measures for suspicion of being in contact with a famous Croatian football mogul, allegedly in view of repealing the new *Sports Act*. Due to the leak of information from an unknown source, the fact of surveillance was made public almost immediately, preventing the determination of facts and clearing of the judge's name. The second scandal, with a different judge, involved the discovery of plagiarism of a specialist paper, leading to her confession with a public apology. In public opinion the immediate resignation of both judges together with the president was necessary. However, in view of the dissipating number of judges, and parliamentary elections that did not produce a stable majority, the Court was not in a position to lose two or three more judges. It maintained the majority for deciding, protecting the constitutionality and legality of elections at the expense of its moral credibility.

A further obvious feature of the present Court is the almost total lack of separate opinions, both concurring and dissenting. The internal agenda of providing a unique voice<sup>81</sup> is only one of the most probable reasons, questionable in itself for ignoring the very purpose of dissenting opinions in a constitutional democracy. However, when separate opinions are lacking even in cases involving paradigmatic constitutional issues (such as the abstract issue of positive discrimination and its concrete application on gender equality in the electoral process, i.e. quotas for women),<sup>82</sup> doubts as to the judges' legal excellence and self-confidence seem to gain a rightful foundation. It is presently questionable whether the Croatian Constitutional Court is endowed with quintessential characteristics, the very prerequisites for its general credibility, namely “a high degree of social prestige, independence, and authority.”<sup>83</sup>

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<sup>79</sup> Dnevnik.hr, ‘Ustavni sudac državi utajio 270.000 kuna!’ [Constitutional Court Judge Evaded Payment of Tax in the Amount of 270,000kn] (*Dnevnik*, 28 April 2008) <<http://dnevnik.hr/vijesti/hrvatska/ustavni-sudac-drzavi-utajio-270-000-kuna.html>> accessed 5 April 2016.

<sup>80</sup> Andreja Žapčić, ‘Afere plagijat i Mamić’ [Plagiarism- and Mamić-gate] (*T-portal*, 12 November 2015) <<http://m.tportal.hr/404423/Omejec-Cuvajmo-institucije-ove-zemlje-kao-zjenicu-oka.html>> accessed 7 April 2016.

<sup>81</sup> It would seem that the Court follows “passive virtues” as viewed by the USSC Chief Justice Roberts who believes it is better to “speak with one voice by deciding cases ‘on a narrow basis,’ than to issue bold opinions that conclusively resolve large legal issues.” Michael C. Dorf, ‘Chief Justice Roberts Advocates Passive Virtues, Even as the SC’s Docket Reveals Their Subtle Vices’ (*FindLaw*, 20 November 2006) <<http://writ.news.findlaw.com/dorf/20061120.html>> accessed 5 April 2016.

<sup>82</sup> U-I-1397/2015, NN 104/2015.

<sup>83</sup> Wojciech Sadurski, ‘Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?’ (2010) 42 *Isr. L. Rev* 500, 510.

## 4.4. The Waterfall Challenge: Culmination of Conflict with the Political Elites

Since 2011, Croatia has witnessed a gradual but steady rise of social conflict. When the left-wing government came to office in that year, the economic crisis had not been overcome, and persistent poverty and unfulfilled promises caused rising dissatisfaction. Conservative political parties more or less overtly backed different social groups in their protests and actions against the government-of-the-day. Some of them were legal and legitimate (referendum on marriage), some were on the edge of legality/constitutionality or a step beyond (e.g. the unregistered protest of the Homeland War veterans; the proposed referendum on the use of Cyrillic letters). Prime Minister Milanović did not succeed in neutralizing the threats and establishing/maintaining a dialogue;<sup>84</sup> rather he and his team seemed to readily engage in extreme rhetoric, boiled down to the “we or they” mantra.<sup>85</sup> In this realm of “cultural wars”,<sup>86</sup> the Court was often caught “between two fires” and rarely managed to maintain the balance (as in referendum cases *supra* 3.4.). Most of the time it was perceived as tilted to the right which was, in turn, followed by an uncensored avalanche of verbal attacks from the left.<sup>87</sup> At the same time, and apart from the personal issues within the Court (*supra* 4.3.), several of the Court’s actions, or lack thereof, opened the door for serious social and political criticism.

First of all, the present Court is responsible for a suspicious choice of timing for its rulings. The very important 1999 revision of the CACC introduced a one year time-limit within which the Court should render its decision in abstract and concrete review, but also in proceedings related to constitutional complaint. Nevertheless, politically important cases seem to be dealt with in an arbitrary way. For instance, the *Public Assembly case* was decided only after the right-wing government lost the elections. The ruling on the so called *Health Education Modul*,<sup>88</sup> striking the left-wing government by-law for procedural reasons, was rendered between the first and second ballot of local elections, with a

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<sup>84</sup> However, conservative groups never seemed to want a real dialogue as they continued to call the government anti-Croat and anti-people, with the main goal of removing it from office.

<sup>85</sup> After the second round of presidential elections Milanović stated: “Us or them, the choice is clear. Good or bad, light or darkness.” 24sata, ‘Ili mi ili oni, izbor je jasan. Dobro ili loše, svjetlo ili tama’ (24sata, 6 February 2015) <[www.24sata.hr/news/ili-mi-ili-oni-izbor-je-jasan-dobro-ili-lose-svjetlo-ili-tama-405231](http://www.24sata.hr/news/ili-mi-ili-oni-izbor-je-jasan-dobro-ili-lose-svjetlo-ili-tama-405231)> accessed 5 April 2016.

<sup>86</sup> James Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic Books 1991).

<sup>87</sup> The Minister of Education, Jovanović, stated that the CCC “acts like a real political body, whose members never spent a day in the courtroom and whose president could not even meet the criteria for membership until the CACC was tailored for her in 1999.” Jovanović prozvao Ustavni sud i Jasnu Omejec’ (HRT, 25 May 2013) <[www.hrt.hr/211565/jovanovic-prozvao-ustavni-sud-i-jasnu-omejec](http://www.hrt.hr/211565/jovanovic-prozvao-ustavni-sud-i-jasnu-omejec)> accessed 6 April 2016.

<sup>88</sup> U-II-1118/2013, NN 63/2013.

possible influence on its results. Constitutional complaints of two right-wing politicians were accepted within one year before the 2015 elections, in one of them the sentence against a major right-wing party was quashed.<sup>89</sup> If in all of these instances alleged accusations on the Court's timing manipulations were unfounded, there is one certain proof of its arbitrariness. Namely, the Court never decided on the former left-wing president Josipović's application for review of the constitutionality of the *Law on Invalidity of Certain Legal Acts of the former YPA, the former SFRY and the Republic of Serbia*.<sup>90</sup> After he lost the 2015 election, he withdrew the application as obviously pointless. In the words of Omejec "sometimes the best decision is the one never taken."<sup>91</sup> Although this statement was given in relation to the *Abortion case*, which after 25 years has still not been decided, it would seem that in the case of the president of the Republic, this kind of "passive virtue" was indeed taken too far.

The second line of criticism tackles the Court's alleged trespassing of the regular courts' jurisdiction made in several decisions in criminal cases. The Court was accused of "*ultra vires* intrusion in criminal proceedings."<sup>92</sup> The *Hypo* and *Ina-Mol* cases (*supra* in 3.2.) were mostly unfoundedly contested for political subjectivity and "unconstitutional rewriting of the Constitution", while the other two significant cases posed very suspicious examples of the Court's positioning toward factual findings (*Glavaš case*)<sup>93</sup> and interpretation of the purpose and use of bail (*Bandić case*).<sup>94</sup> The former is a border-line example on the very edge of acceptability, while the latter is an obvious misinterpretation and misapplication of the institute of bail.<sup>95</sup> As all three defendants were well known politicians (a former prime minister, an MP and the mayor of Zagreb) sentenced/accused for

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<sup>89</sup> In the *Glavaš case* (U-III-4150/2010, NN 6/2015) related to war crimes, the Court ruled after four years, while in *Hypo* and *Ina-Mol* after 13 months (n 28).

<sup>90</sup> Zakon o ništetnosti određenih pravnih akata pravosudnih tijela bivše JNA, bivše SFRJ i Republike Srbije [Law on Invalidity of Certain Legal Acts of the former YPA, the former SFRY and the Republic of Serbia] NN 124/2011.

<sup>91</sup> Marinko Jurasić, 'Poigravanje s temeljnim ustavnim institucijama prerasta u opasan državni eksperiment' [Playing with the Basic Constitutional Institutions Becomes a Dangerous State Experiment] *Večernji list* (Zagreb, 9 January 2016) <[www.vecernji.hr/hrvatska/jasna-omejec-poigravanje-s-temeljnim-ustavnim-institucijama-prerasta-u-opasan-drzavni-eksperiment-1050698](http://www.vecernji.hr/hrvatska/jasna-omejec-poigravanje-s-temeljnim-ustavnim-institucijama-prerasta-u-opasan-drzavni-eksperiment-1050698)> accessed 6 April 2016.

<sup>92</sup> A former president of the Supreme Court of Croatia claims that "the Constitutional Court is like a punctured ship tilted to the right (...) acting as a fourth appellate level". Krunislav Olujčić, 'Ustavni je sud poput probušenog broda nagnutog udesno' [The Constitutional Court is Like a Punctured Ship Tilted to the Right] (*Novosti*, 7 December 2015) <[www.portalnovosti.com/krunislav-olujic-ustavni-je-sud-poput-probusenog-broda-nagnutog-udesno](http://www.portalnovosti.com/krunislav-olujic-ustavni-je-sud-poput-probusenog-broda-nagnutog-udesno)> accessed 4 April 2016.

<sup>93</sup> See n 89.

<sup>94</sup> U-III-1451/2015, NN 44/2015.

<sup>95</sup> Zlata Đurđević, 'Pravna priroda, pravni okvir i svrha jamstva u kaznenom postupku: mogu li preživjeti odluku Ustavnog suda RH U-III-1451/2015?' [Legal Nature, Legal Framework and Purpose of Bail in Criminal Proceedings: Can They Survive the Constitutional Court's Decision U-III-1451/2015?] (2015) 22 HRV. LJ. K. P. 9.

war crimes or corruption, the Court's rulings triggered severe public resentment. The ruling coalition at the time equivocally labeled the Court as "an enemy on a mission to undermine all the government's efforts and major policies."<sup>96</sup> As a result, and contrary to the known cases of Hungary and Poland, after the last failed elections of two constitutional judges in July 2015, it is the left wing parties that have started to threaten the very existence of the CCC.<sup>97</sup>

The 2015 parliamentary elections brought into office a fragile and inefficient right wing coalition that, in view of the difficult economic tasks and expected austerity measures, has chosen to further nurture social and political hostilities, transferring the focus of the public onto highly-emotional ideological issues (e.g. the abstract notion of national pride, traditional values, lustration, abortion etc.). In this boiling socio-political context it is difficult to predict the Court's future. The 2/3 majority rule, meant to prevent unilateral packing, has become, firstly, a powerful tool for the Court's obstruction, while now, 6 years after its introduction and a few weeks before the final parliamentary vote, it is still unknown what the result of the political compromise needed for the Court's renewal will be.

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<sup>96</sup> Another clash with the ruling party occurred in relation to the *Family Act*, whose Transitional Provisions the Court announced unconstitutional before the Act entered into force and later on the Court decided – for the first time in its history and without explicit authorization in the CACC – to suspend the whole Act until its final ruling. U-I-3101/2014 et al., NN 5/2015.

<sup>97</sup> After losing the 2015 parliamentary elections, the former prime minister, in his speech before the Senate of the University of Zagreb, claimed that "we cannot live without universities, but we can without the Constitutional Court." A few days later, in the Parliament, his coalition partner stated in her speech: "The manner in which the CCC has been making decisions lately forces me to believe that we do not even need it. We are a member of the EU, our citizens can apply to the ECtHR. The judgments of that Court would be more objective and just than those rendered by our Court." Marinko Jurasić, 'Utrnuće Ustavnog suda bilo bi fijasko' [Suspension of the Constitutional Court Would be a Fiasco] *Večernji list* (Zagreb, 10 February 2016) <[www.vecernji.hr/hrvatska/hazu-podrzao-ustavni-sud-utrnuce-ustavnog-suda-bilo-bi-fijasko-1059174](http://www.vecernji.hr/hrvatska/hazu-podrzao-ustavni-sud-utrnuce-ustavnog-suda-bilo-bi-fijasko-1059174)> accessed 6 April 2016.

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# Conclusion

In complex and – more often than not – adverse social and political circumstances the journey of the CCC from 1991 till today has been rough and difficult. Nevertheless, it managed to procure a relevant shield of constitutional principles even in the state of national emergency during the 1990s. A major advancement is visible from 2000 on, particularly regarding the Court's interpretative techniques and depth of argumentation. The influence and dialogue with the ECtHR was a primary incentive for such a development: the CCC started to anchor its rulings on the interpretation of the ECtHR and modestly opened the door for its own.<sup>98</sup> That is not to say that all the CCC's decisions were in line with the Strasbourg *acquis*, nor that it reached a completely satisfying level of performance. Apparent lack of self-confidence and the significant personal burdens of its current membership have in recent years overshadowed even its undoubtedly laudable and bold rulings.

The general role of constitutional adjudication in transitional countries is still not sufficiently known, recognized and accepted by the Croatian public.<sup>99</sup> Firstly, the CCC had already been formed in 1964. It functioned for 36 years without performing real constitutional adjudication, which in turn prevented the positive impression of a newly created constitutional institution, as was the case in many other post-communist countries. Secondly, the Homeland war and rebuilding period delayed transformative activities of the CCC. Consequently, “discussion on the Kelsenian model of abstract review, i.e. on the controlling mechanism over political power performed by the constitutional courts, is completely missing. (...) It would seem that we have never actually articulated, rationalized and accepted the legal and political consequences of such a mechanism.”<sup>100</sup> Thus, “even today many [political factors and the public at large] cannot accept the fact that constitutionalism includes limitations even on the ‘people’ as the bearer of sovereignty; that the concept of constitutional adjudication puts the principle of popular representation under the principle of constitutional supremacy; that the latter concept envisages limits to the arbitrariness of the legislature, executive

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<sup>98</sup> Omejec published a capital book on the ECHR consisting of almost 1500 pages. Jasna Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava [The ECHR through Case-Law of the ECtHR]* (Novi informator 2013). Moreover, four of the judges gained their doctoral degrees during their term, demonstrating their will for professional improvement (again coupled with criticism as to their capacity of performing serious judicial and scientific work at the same time).

<sup>99</sup> Jasna Omejec, ‘Istine i zablude o ulozi Ustavnog suda u svjetlu europeizacije hrvatskog prava’ [Truths and Misconceptions on the Role of the Constitutional Court in the Process of Europeanization of Croatian Law], (2013) 6189-6190 Informator 1, 3.

<sup>100</sup> Ibid.

power and judiciary.”<sup>101</sup> And finally, Omejec’s words resonate as a bitter truth: “We still do not feel the constitutional principles as a part of our national identity, we still do not live our Constitution.”<sup>102</sup>

Regrettably, at the beginning of 2016, public opinion on the CCC is extremely negative.<sup>103</sup> Short-sightedness and the petty interest of political elites coupled with a relentless “cultural war” have fueled this sentiment. The Court would lose a majority for decision making on 7 June 2016 if no judge is elected by that day.<sup>104</sup> Nevertheless, there is a reason for optimism. A Public Call for 10 judges was issued on 20 April and 49 candidates applied (three of them are actual members of Parliament, prominent members of political parties). All the parliamentary parties expressed their commitment to success in selecting the ten new judges.<sup>105</sup>

The CCC’s imperative is to raise its credibility. Its future task is also to elaborate on national constitutional standards that need further clarification in the broad framework of Strasbourg values and Brussels politics (e.g. the meaning of secularity, the basic core of social rights, the role of positive discrimination). The balance between the national constitutional framework and the Union’s dictate is a matter of continuous struggle in the Member States. It is yet to be seen how our Court will respond in future situations and what its relation with Luxembourg will be.

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<sup>101</sup> Omejec, ‘Još uvijek ne osjećamo ustavna načela kao dio svog državnog bića’ (n 68) 3.

<sup>102</sup> Ibid.

<sup>103</sup> Contrary to the cases of the *Sabor*, the Croatian government and individual political parties, there are no official opinion polls that investigate citizens’ attitudes toward the CCC as a state institution. However, the statement on the negative perception is drawn from an overview of social network platforms and on-line forums (right-wing, left-wing and centrist), reader’s comments and reactions to newspapers articles, citizens’ opinions expressed in contact TV shows (on all three national TV networks, through sms, e-mail and live chat), and from the author’s professional and personal experience/contacts.

<sup>104</sup> The legal profession and scientific community publicly and without reservation hold that the CCC, as the constitutional institution, needs to be preserved and that criticism of individual rulings or judges should not result in the Court’s demise (n 97). Different suggestions have been made as to a possible future revision of the selection procedure: prolongation of the mandate to 9 or 12 years without re-election; inclusion of the president of the Republic in the procedure; exclusion of individual candidates without institutional support, etc. Any such revision would also require a 2/3 majority vote in the *Sabor*. As the 7<sup>th</sup> of June approaches, it has become obvious that no political party is willing to thoroughly address the issue of selection procedure. See also Branko Smerdel, ‘Križa Ustavnog suda: narav pogibelji i znanstveni odgovor [The Constitutional Court: The Face of the Crisis and a Scientific Response to the Issue], (2016) 16 (3) Hrv. prav. rev. 1.

<sup>105</sup> The president of the *Sabor*, academician Željko Reiner, expressed on 4 April his belief that the new judges will be appointed by June 2016. Croatian Radio, ‘S Markova trga’ [From St. Mark’s Square] (*Croatian Radio, Channel 1*, 4 April 2015) <<http://radio.hrt.hr/prvi-program/arhiva/s-markova-trga/708/>> accessed 11 April 2016. By the date of this paper’s submission, 12 May 2016, there are only unofficial rumors as to the informal quotas agreed by the political parties and alleged political criterion of future elections, which would – if proved to be true – only further the actual credibility problem of the CCC.

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