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'Constitutional Justice and Social Integration'
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**Questionnaire reply by the
Constitutional Court of the Republic of Croatia**

A. Court description

A description of the Croatian Constitutional Court can be found in the CODICES database of the Venice Commission.

B. Social integration

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

In its jurisprudence so far, the Constitutional Court has encountered some challenges in various areas of the law, most frequently concerning violations of human rights of a social and economic nature derived from the context of historical¹ and current injustices and sufferings.

Specifically, in the area of the right to asylum (with regard to only some fifteen cases so far) the Court deliberated upon alleged human rights violations in proceedings conducted pursuant to asylum applications and/or determining a restriction of movement for asylum seekers placed in the Reception Centres for Aliens. Concerning aliens in the Republic of Croatia, the Court also dealt with the issue of meeting the procedural guarantees of a minor born outside the Republic of Croatia in a citizenship recognition procedure (decision CRO-1996-3-015)² and of an alien in a procedure deciding on his status of alien with permanent residence (decision CRO-1999-1-001).

In the area of taxation law, the Court reviewed the constitutionality of the legal provision exempting a certain circle of addressees from paying value added tax for the provision of healthcare services (decision CRO-2004-2-008), of the legal authorisation to introduce a tax for not using real property, which is a tax that is punitive by nature (decision CRO-2007-2-006), and of the introduction of a special temporary tax to deal with the economic crisis in the country (decision CRO-2009-3-011).

¹ After the Republic of Croatia won independence and during the Homeland War in the Republic of Croatia, there were cases concerning Government measures aimed at the care of and finding accommodation for a large number of refugees, compensation for and restitution of property confiscated during the communist regime in the former Yugoslavia, and as a consequence of the privatisation of "social ownership"; there were also cases typical of a transition society, especially in the field of housing, which concerned the purchase of flats by tenancy rights holders, the acquisition of the status of protected tenants and their protection, etc. (for example, decisions: CRO-1996-3-017, CRO-1997-1-002, CRO-1997-3-031, CRO-1998-3-014, CRO-1999-1-005, CRO-2000-2-011, CRO-2005-1-004, CRO-2005-1-006, CRO-2006-1-005, CRO-2008-1-001, CRO-2010-1-006, CRO-2010-2-008, CRO-2010-2-010).

² Identification of a decision in the CODICES database of the Venice Commission.

In the area of social security, the Court deliberated on: the adjustment of pensions to trends in wages and salaries of the working population (decision CRO-1998-3-011); the different legal regulation of pensionable ages for acquiring the right to statutory old-age or early retirement pensions and of the entitlement to a survivor's pension for the mother and father of a deceased insured person determined exclusively on the grounds of the addressee's gender (decision CRO-2007-2-008); the "acquired" rights to pension and changes in the pension insurance system (decision CRO-2010-1-002); the acquisition of the right to parental leave and to shorter working hours until the child reaches the age of 7 and part time work to care for a child with major disabilities (decisions CRO-2002-1-010 and CRO-2002-2-015); the authorised beneficiaries of child allowance (decision CRO-2008-1-005); the limitation of exercising the right to personal disability allowance due to the age of the beneficiary at the moment when the disability occurred (decision CRO-2010-3-011); the extent to which the scope of healthcare provision may be narrowed in the case of non-payment of contributions (decision CRO-1998-3-018); the interdependence of human rights, or the effect of non-compliance with civil law on the effective legal remedy for the protection of patients' rights to healthcare (decision CRO-2008-1-006), etc.

Further, the Court deliberated, for instance, on: the issue of positive discrimination or the priority given to national minority representatives during employment in public bodies (decisions CRO-2008-2-008 and CRO-2009-1-004); the right to vote of national minorities (decisions CRO-2001-1-005, CRO-2011-2-008 and CRO-2003-3-016); the official use of a minority language (decision CRO-2008-1-002) and the issue of organising education in a minority language (decision CRO-1999-3-018); the alleged discrimination of Roma children in some primary schools (decision CRO-2007-2-0); differences in access to secondary and higher education for applicants (decision CRO-2007-1-004); and parents' rights to participate in the process of creating teaching materials, especially those concerning different parents' "convictions" or "beliefs", in the specific case of sexual education (decision CRO-2013-2-008).

1.2. How were issues of social integration or conflict transformed into legal issues?

The Constitution is the most relevant legal act in the context of social integration. It is the legal basis for involving everyone in the social processes in the state, laying down the conditions and limits of such involvement. The Constitution provides a regulatory framework consisting of general principles and guaranteed human (constitutional) rights that are significant for social integration, about which the Constitutional Court³ deliberates within the framework of its jurisdiction defined by law, thus acting to ensure a stable, safe and just society based on respect for, and protection of, human rights, especially equality and non-discrimination, tolerance, respect for diversity, equal opportunities, solidarity, social protection and the participation of all people, including particularly vulnerable groups and individuals.

In the Republic of Croatia social inclusion is the constitutional category. Article 1 of the Constitution defines the Republic of Croatia as a social state.⁴ Article 3 of the Constitution stipulates *inter alia* that equality, peace-making, social justice, respect for human rights and the rule of law are the highest values of the constitutional order of the Republic of Croatia and grounds for interpreting the Constitution. In this connection Article 14 provides that everyone in the Republic of Croatia enjoys freedoms and rights, regardless of his/her race,

³ Under Article 2 paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02, 49/02 – consolidated text) the Constitutional Court guarantees the respect and application of the Constitution, and grounds its work on the provisions of the Constitution and Constitutional Act.

⁴ Constitution of the Republic of Croatia, Official Gazette Nos. 135/97, 113/00, 28/01, 76/10 and 5/14.

colour, gender, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics. Paragraph 2 of the same Article stipulates that all persons are equal before the law. The right to equality is subject to limitations stated in Article 16. However, every limitation must be proportional to the nature of the need to do so in each individual case and undertaken for the protection of the freedoms and rights of others, legal order, public morals and health.

Furthermore, the Constitution guarantees numerous human rights, such as: the right to work and access to each work place under equal conditions (Article 54); the right to social security and social insurance (Article 56); the right to assistance for weak, infirm or other persons unable to meet their basic subsistence needs as a result of their unemployment or incapacity for work (Article 57 para. 1); the right of persons with disabilities to special protection of the state and to be included in the social life (Article 57 para. 2); the right to health protection (Article 58); the right of access to education under equal conditions and the right to free compulsory education (Article 65). In relation to special vulnerable groups of the society the Constitution in Article 62 provides for the positive obligation of the state to protect maternity, children and youth, and to create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life. Moreover, the members of national minorities are guaranteed equality, freedom to express nationality, free use of their language and script and cultural autonomy (Article 15). The Constitution also entails prohibitions such as the prohibition of employment for children before reaching the age specified by law and prohibition to be forced or allowed to do any work that is harmful to their health or morality (Article 64 para. 2).

The constitutional framework of the social inclusion is further concretized in the case-law of the Constitutional Court, international instruments and/or legislation such as: the Constitutional Act on the Rights of National Minorities (Narodne novine, Nos. 155/02, 47/10, and 80/10), the Asylum Act (Narodne novine, Nos. 79/07, 88/10 and 143/13), the Gender Equality Act (Narodne novine, No. 85/08), the Health Protection Act (Narodne novine, Nos. 50/08, 71/10, 139/10, 22/11, 84/11, 12/12, 35/12, 70/12, 144/12, 82/13 and 159/13), the Compulsory Health Insurance Act (Narodne novine, Nos. 80/13 and 137/13), the Protection of Patients' Rights Act (Narodne novine No. 157/13), the Social Welfare Act (Narodne novine, No. 157/13), the Pension Insurance Act (Narodne novine, No. 157/13), the Labour Act (Narodne novine, Nos. 149/09, 61/11, 82/12 and 73/13), the Vocational Rehabilitation and Employment of Disabled Persons Act (Narodne novine, No. 157/13); the Primary and Secondary Education Act (Narodne novine, No. 87/08, 86/09, 92/10, 105/10, 90/11, 16/12, 86/12 and 101/13) and Foster Care Act (Narodne novine, Nos. 90/11 and 78/12).

The legal recognition of the right to "social integration" implies the setting of goals and programmes that bind the Government to a certain (in)activity in order to ensure the fulfilment of these rights, including the recognition of the right of citizens to request particular action from the government in order to transform the formally recognised legal equality of rights into de facto equality.

Social integration issues concern rights of a socio-economic nature, for example in the area of healthcare, housing, education, decent work and social security.

These issues are sometimes brought before the Constitutional Court already shaped to a certain extent into legal issues by being presented as violations of particular social rights, rights to equality and non-discrimination, and other rights which arise for the addressees from the Constitution, and international law and/or legislation. All rights have their positive and negative aspects, meaning that they determine what the Government should and should not do. Therefore, when transforming social integration issues into legal issues, the Constitutional Court takes as its starting point the constitutional law grounds for challenging a particular Government measure, or a particular action or failure to act of the Government. Since there are positive and negative obligations that arise for the Government and for the state authorities concerning the inclusion of all members of society into social (including economic and political) processes, all the aspects of these obligations serve to transform specific life issues of social integration into issues of (constitutional) law, and enable the

Constitutional Court to review the fulfilment of these obligations in the light of general principles (for example, equality, social justice and the rule of law) and the duty to fulfil, respect and protect guaranteed human rights. In other words, the first thing that the Constitutional Court determines in any such case is what the obligation of the Government is towards the applicant (or applicants) who initiated the constitutional proceedings, and whether this entails a positive or negative obligation of the Government. The Court takes a different approach depending on whether there is a positive or a negative obligation. Namely, a positive obligation means the obligation to fulfil a right (sometimes in a private law relation) and includes two sub-obligations: the obligation to fulfil and the obligation to protect a particular right. The obligation to fulfil a right implies the obligation of the National Government to take suitable legislative, administrative, budgetary, judicial and other actions aimed at the full and unhindered exercise of these rights (for example, the establishment and operation of the education, pension and healthcare systems, etc.). The obligation to protect rights means that the National Government must prevent the violation of these rights by third parties, including institutions, companies and individuals (for example, the establishment and operation of legal mechanisms for the exercise and protection of rights). A negative obligation means the duty to respect human rights, or the obligation of the National Government to refrain from interfering in the exercise of these rights (such as, for example, through forced and arbitrary evictions and forced medical treatments).

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

No, the number of cases related to social integration is pretty much the same, and constantly (before and now) more dominant in the field of social security.

Example 1

Decision No. U-I-283/1997 of 12 May 1998 (**CRO-1998-3-011**) - abstract control of constitutionality 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 (Narodne novine, No. 20/97).

"When initiating the procedure of the review of constitutionality of the disputed Act, the Constitutional Court found it questionable whether the circumstance that the Government of the Republic of Croatia restricted for a certain period of time the total funds for payment of pensions (without interfering at the same time in the regulations on regular adjustment of pensions) means that pensioners do not have the right, or that they have lost their right to annuity equalization for that period, as well. Namely, the Court rightfully suspected that after the Government decrees ceased to be in force, the relevant bodies failed to meet their obligation to carry out the adjustments (and then find a way to indemnify the pensioners for the losses incurred) for all the time the regulations on adjustment of pensions with wage trends of the working population of Croatia have been in force. By leaving this principle, through the enactment of the disputed law - for the same category of citizens: the current pensioners - such changes have occurred in the amount of pensions that reasonable doubt arises as to a violation of the principles provided for in Article 3 of the Constitution: the rule of law and social justice.

In reviewing the constitutionality of the disputed act the Constitutional Court found it is not disputable that the legislator has the competence to determine such system of pension and disability insurance as he deems reasonable, in a manner prescribed by Constitution and laws. However, in view of the disputed Act, he interferes with the rights of pensioners who had retired according to another system of computation of pensions. That system was a unity with rights and obligations of pensioners and was in force during the entire time of effectiveness of the decrees and decisions restricting the amount of pensions. In this context

the Court found in breach of the Constitution also the provision of Article 3 of the Act on Adjustment.

Furthermore the Constitutional Court found indisputable the right of the legislator to regulate the level of economic and social rights entailed in the Constitution (which are not, however, absolute) in accordance with economic strength of the state. On the other hand, the use of this right may not bring into question the fundamental constitutional rights and principles (equality, social justice and the rule of law).

The Constitutional Court deems that the claim of the proponents concerning the existence of reasonable doubt that by enacting the disputed Adjustment Law, the legislator turned the temporary state created earlier by the contested decrees of the Government of the Republic of Croatia and decisions of the Pensions Fund into a permanent state with negative impact on the amount of pensions is founded. Current pensioners bear the negative consequences without any chance of indemnification for the loss they incurred due to the restrictions set forth in the disputed decrees and decisions. In rendering the decision on the constitutionality of the disputed provisions the Court found essential that the legal solutions in the disputed Act changed the social status of pensioners to such an extent that this fact leads to social discrimination of citizens.

For the reasons given above the disputed provisions of the Act on Adjustment are in breach of fundamental provisions of the Constitution (Articles 3 and 5).

(...)

Based on data contained in the expertise ... It was found that pensions have almost twice as slow increased as wages in the period from July of 1993 to December of 1997.

What is more, it was established that (average) pensions in 1997 amount to a half of average wages, which indicates that the standard of living of pensioners is by 50 percent lower than the standard of living of workers with an average wage, and that the provisions of the disputed Act fail to provide any possibilities for improvement

The Constitutional Court found on the basis of the afore stated facts that after the Government Decrees ceased to be valid the relevant bodies failed to adjust the pensions with the regulations concerning adjustment with wage trends of the working population of the Republic of Croatia were in force, which was rendered impossible by the contested provision of the Adjustment Act.

Hence, the Constitutional Court determined that the mentioned provisions of the disputed Act contravene the principles ensued in Articles 1, 3, 5 and 14, paragraph 2 of the Constitution of the Republic of Croatia (The Republic of Croatia is a social state; social justice is one of the highest values of the constitutional order of the Republic of Croatia; in the Republic of Croatia laws shall conform with the Constitution; all are equal before the law)."

Example 2

Decision No. U-I-1152/2000 of 18 April 2007 (**CRO-2007-2-008**) - abstract control of constitutionality of the Pension Insurance Act (Narodne novine, Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04 and 92/05; hereinafter: ZOMO)

"The Constitutional Court refers to identical views of the European Court of Human Rights, expressed in points 34 to 36 of the judgment *Stec vs. United Kingdom*, delivered by the Grand Chamber on 12 April 2006 in respect of applications of several applicants (Nos. 65731/01 and 65900/01). In this judgment the ECtHR dealt with the prohibition of gender discrimination in the UK retirement system (hereinafter: the Stec judgment.).

9. If the above legal views are applied to the legal arrangement in the disputed Articles 30, 31, 66 and 78 para. 2 ZOMO, the Constitutional Court does not find any reasons acceptable in constitutional law for finding constitutional the different pensionable ages for entitlement to a statutory old-age or an early old-age pension, or entitlement to survivor's pensions for the mother and the father of a deceased insured person, or for the application

of different initial factors for calculating an early old-age pension based exclusively on the difference in sex of the addressees of ZOMO.

Thus the Constitutional Court has repealed the disputed Articles 30, 31, 66 and 78 para. 2 ZOMO for breach of Articles 3 and 14 of the Constitution.

10. (...)

Therefore, in points 11 and 12 below we will show the legal views and national legislations concerning the statutory and early pensionable ages in member states of the Council of Europe and the European Union, while point 13 will describe conditions in the Republic of Croatia."

Example 3

Decision and Ruling No. U-IP-3820/2009 *et al.* of 17 November 2009 (**CRO-2009-3-011**) - abstract control of constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09; hereinafter: ZOPPPM)

"13.3. (...)

In short, therefore, the substance of the concepts of the social state, the principle of social justice, even constitutionally recognised social justice are abstract in nature, although of different levels of abstraction. This can be seen from the fact that the writer of the Constitution left it to the legislator to regulate and elaborate all the constitutionally defined social rights, and this authority is usually explicit because the Constitution explicitly requires the enactment of a law for the application of some "social" norm. Therefore the constitutional provisions about the social state and social justice, even about constitutionally recognised social rights, cannot be applied directly. For them to be applied, they must first be elaborated in a law and very often they must be further specified in subordinate legislation for the operation of the relevant law.

(...)

13.5. In conclusion, although the Special Tax Act does not contribute to equalising social differences as one of the basic values of the social state, it does make it possible for other aspects of the social state to remain untouched under conditions of economic crisis. It helps to preserve various social benefits that are financed from the government budget, which are an expression of the state's care for the socially most vulnerable individuals and groups, i.e. for those who were because of the circumstances of their life or because of social neglect hindered in personal or social development.

Therefore, starting from the large number of taxpayers who are exempt from paying the special tax because of low salaries and pensions, and from the fact that the special tax introduced by the Special Tax Act also serves to preserve the achieved degree of social benefits under conditions of economic crisis, which may be considered as an expression of the legislator's social sensitivity, the Constitutional Court finds that the Special Tax Act complies with the requirements the writer of the Constitution placed before it when he defined the Republic of Croatia as a social state (Article 1 of the Constitution) and social justice as the highest value of its constitutional order (Article 3 of the Constitution).

It is not possible to gauge whether the legislator set an appropriate boundary (HRK 3,000.00), under which the monthly salaries, pensions and other net receipts of taxpayers will not be liable to the special tax, by regarding the problem from the general aspect of the Republic of Croatia as a social state (Article 1 of the Constitution). The special constitutional principles of tax equality and equity are relevant in this case, and they centre around the demand for the proportionality of the tax burden in accordance with the economic capabilities of every individual (Article 51 para. 1 of the Constitution), as a special expression of the general principle of proportionality (Article 16 of the Constitution). This is also the framework within which the Constitutional Court has the competence to examine tax legislation up to the borderline defined by the democratic constitutional order as an order of a free political process.

(...)

16. In conclusion, the Constitutional Court reiterates that it is not possible to achieve complete proportionality, equality and equity in any tax system. For example, under Article 8 of the Income Tax Act, which has a systemic character, taxpayers pay income tax under different rates (paragraph 1), and the income tax is increased by the surtax on income tax which is introduced by the units of local self-government (paragraph 2). In actual fact, however, some units of local self-government have not introduced this surtax, and in others its amounts differ significantly, so if the problem is viewed on the national level the total tax liability undoubtedly does not comply with the requirement of the absolute tax equality of all taxpayers.

Pursuant to the above, the Constitutional Court finds that the great importance of the Special Tax Act for the stability of public revenues in Croatia at this moment outweighs the requirements of achieving absolute equality and equity in levying the special tax. The temporary levying of the special tax is based on a qualified public interest, so the several differences that the Special Tax Act creates among its addressees, although subject to criticism, are not on a level that would make it necessary at this moment to proclaim the Act does not comply with the Constitution.

It follows that the special tax introduced by the Special Tax Act may in its existing form be temporarily kept in the legal order of the Republic of Croatia. The final deadline for the legal effect of the Special Tax Act, and thus also for levying the special tax (31 December 2010), has been reasonably set and the Government of Croatia shall even within this period monitor and continuously examine the further necessity for its existence so as to possibly modify it or repeal it earlier."

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

The 1990 Constitution together with all its previous amendments is currently in force in the Republic of Croatia. Almost half of its provisions relate to human rights (see the reply under point 1.2). Heading III of the Constitution entitled *Protection of human rights and fundamental freedoms* embraces the list of all guaranteed human rights. It is divided into three sections: 1. *General provisions* (Articles 14 - 20); 2. *Personal and political freedoms and rights* (Articles 21 - 47); and 3. *Economic, social and cultural rights* (Articles 48 - 69).

Civil and political, economic, social and cultural rights guaranteed in the Constitution correspond to the rights guaranteed in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as to the Convention and the European Social Charter at the regional level. In other words, these international agreements influenced not only the type of constitutionally guaranteed human rights but also their classification under Heading III of the Constitution.

In addition, under the influence of some decisions adopted by the Constitutional Court, in which it directly applied the Convention interpreted through the case-law of the ECtHR, Croatian constitution framers amended Article 16 of the Constitution and introduced the principle of proportionality as a constitutional institute in the constitutional and legal order of the Republic of Croatia.⁵ They also amended Article 29 of the Constitution about the right to

⁵ Article 16 of the Constitution was supplemented in 2000 with a new paragraph 2: "*Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.*" The supplement in Article 16 was to the greatest extent affected by the Decision of the CCRC no. U-I-1156/1999 of 4 February 2000 (Official Gazette No. 14/00) in which the CCRC repealed several provisions of the 1999 Restriction on the Use of Tobacco Products Act (*Zakon o ograničavanju uporabe duhanskih proizvoda*), founding its decision solely on the principle of proportionality, although this principle was not explicitly recognised in the Constitution. In this decision, the CCRC also carried out a proportionality test modelled on the case-law of the ECtHR.

a fair trial thus harmonising with Article 6 paragraph 1 of the Convention.⁶ Also this second amendment is important for the social integration issues due to interdependence of all human rights (see CRO-2008-1-006, example no. 8 after the replies to the third group of questions).

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

Yes, the Constitutional Court is open to all existing international sources relevant to social integration. These include entire regional (European) and general (global) international law, binding international instruments and instruments of the so-called soft law as well as the case-law of international courts and other bodies (but also non-binding international legal sources, i.e. foreign law and jurisprudence, in particular case-law of foreign constitutional courts and other courts vested with constitutional court jurisdiction).

International sources are particularly important when the Constitutional Court decides on cases with special importance to the public, when it wishes to learn more about a particular issue that is currently before it, or to interpret the scope of certain guaranteed human right, or to enhance credibility of a statement of reasons of its decision or to find out (and follow) the trends in the development of legal science.

Namely, the Constitutional Court deems that in today's world and globalised legal context it cannot operate with no knowledge and study of international (and foreign) law and case-law, and without entering into transnational dialog on the importance, realisation and protection of human rights that are crucial for social integration.

2.3. Does your Court directly apply international instruments in the field of social integration?

Yes, the Constitutional Court directly applies different international instruments⁷ in the field of social integration. Croatia is a party to large number of regional and global international

⁶ Before the 2000 Amendments to the Constitution, Article 29 indent 1 prescribed: "*Anyone suspected or accused of a criminal offence shall have the right: – to a fair trial before a competent court established by law ...*" Due to the deficiency of this constitutional provision regarding the right to a fair trial, the CCRC took the legal position that "although the subject-matter constitutional guarantee is referred to in an article that primarily regulates the rights of persons during the criminal procedure, in terms of quality the same rights belong to all other participants in legally regulated procedures conducted before competent bodies established by law". Such a legal position was expressed by the CCRC in a number of its decisions (for example, U-III-504/1996 of 8 July 1999, U-III-435/2000 of 17 May 2000, etc.), hence it affected the amendment to Article 29 of the Constitution in 2000. Article 29 § 1 of the Constitution today reads: "*Everyone is entitled to a fair trial before an independent and impartial court established by law which shall decide within a reasonable time upon his rights and obligations, or upon the suspicion or the charge of a criminal offence.*" The amendments to Article 29 of the Constitution corresponded to the Decision of the CCRC No. U-I-745/1999 of 8 November 2000.

⁷ These are for example: the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, the 1990 Convention on the Protection of Migrant Workers and their Families, the 2006 Convention on the Protection of all Persons from Enforced Disappearance and the 2006 UN Convention on the Rights of Persons with Disabilities. Among regional instruments there are for example the Convention for the Protection of Human Rights and

agreements in the field of human rights. Moreover, the Constitutional Court applies (as already mentioned under point 2.1) also instruments of the so-called soft international law. In its case-law the Court mostly refers to the Convention⁸ as well as the jurisprudence and legal views of the ECtHR. Many decisions of the Constitutional Court are partly modelled after the judgments and rulings of the ECtHR and within the constitutional interpretation the Court shapes its jurisprudence by applying the principles of proportionality, legal certainty and the like which enable more enhanced protection of the fundamental human rights and freedoms.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

In its decisions the Constitutional Court regularly refers to all international instruments it finds relevant for delivering individual decisions.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

The Constitutional Court does everything possible in the constitutional law to interpret the domestic law, including also the Constitution, in accordance with the international obligations and standards. The Constitutional Court makes no intentional divergences from the international standards. In the event of any conflicts of standards at national and international level, the Court solve them, as a rule and within its jurisdiction, by harmonising the national standard with the international standard in the proceedings and manner stipulated in the Constitution and Constitutional Act.

Nevertheless, as in other states, there are errors in assessment on the part of the Constitutional Court, as well as the misapplication or misinterpretation of the international standard (e.g. the Convention and ECtHR's case-law).

If it once violates the Convention, the Constitutional Court tries not to repeat the mistake, that is, it makes an effort to align its case-law with the practice that is in line with the international standard.

Example 1

Decision No. U-I-222/1995 of 9 November 1998 (**CRO-1998-3-018**) - abstract control of the constitutionality of the Health Insurance Act (Official Gazette Nos. 75/93, 1/97, 109/97, 13/98 and 88/98).

"The provisions of Article 59.2 and 3 of the Health Insurance Act read:

Fundamental Freedoms of the Council of Europe, the European Social Charter, the Framework Convention for the Protection of National Minorities and the European Charter on Regional and Minority Languages.

⁸ Article 134 of the Constitution stipulates that international agreements in the Republic of Croatia are in legal terms above the domestic statutes, but below the Constitution. However, in its decision No. U-I-745/1999 of 8 November 2000 (CRO-2000-3-017), the Constitutional Court explicitly acknowledged the Convention a quasi-constitutional status. The decision was passed in the procedure of abstract control of constitutionality of the Expropriation Act, in which several provisions of the Act were repealed. In this decision the Constitutional Court for the first time reviewed the conformity of a domestic law directly with the Convention, not with the Constitution. In this decision, the Court held that any non-compliance of a national law with the Convention simultaneously means the non-compliance of this act with the rule of law enshrined in Article 3, the principle of constitutionality and legality in Article 5, and the principle of legal monism of national and international law enshrined in Article 134 of the Constitution.

'The use of healthcare paid from the funds of the Institute of a person obliged to pay contributions who is found not to have paid a contribution shall be narrowed down to the right to use emergency medical assistance.

The right to use health protection in full shall be established on the day when all the due and non paid funds are paid to the Institute, in conformity with the provisions of the Civil Obligations Act.'

(...)

Health protection, as a fundamental human right, implies all forms of provision of medical assistance with a view to achieving the health of a person. The right of insured persons to healthcare includes primary healthcare, specialist-consultancy and hospital care within a single healthcare system.

The narrowing down of healthcare in the meaning of the impugned Article 59.2 to the right to use emergency medical assistance, and the full denial of other forms of healthcare mean that this provision does not conform with the constitutional guarantee of healthcare which Article 58 of the Constitution guarantees to all citizens.

The obligation to pay contributions for mandatory health insurance established by law is controlled by the Croatian Institute for Health Insurance, and contributions in the meaning of the provision of Article 42.1 of the Health Insurance Act are paid by the legal or natural person with whom the insured person is employed, which includes the members of his or her family. The Institute is authorised, in the case where a contribution has not been paid by way of the organisation authorised to conduct payment transactions, to request, on the basis of a final court decision, the collection of the unpaid contributions and the transfer of funds from the account of the person obliged to pay the contribution to the account of the Institute.

It follows from the above that the healthcare beneficiary is not obliged personally to pay the contribution amounts and thus affect the fulfilment of full healthcare. It follows that the impugned legal provision narrows down the beneficiary's healthcare guaranteed by the Constitution because the employer, as the person obliged to pay contributions, does not fulfil his or her legally established obligation.

The disputed provision of Article 59.2 and 3 of the Health Insurance Act is also not in conformity with the provision of Article 21 of the Convention concerning Occupational Safety and Health and the Working Environment no. 155 (which is referred to in the Decision on the publication of the conventions of the International Labour Organisation, of which the Republic of Croatia is a signatory on the basis of succession notification – Official Gazette – International Agreements, No. 2/94), which reads:

'Occupational safety and health measures shall not involve any expenditure for the workers.'

This Convention provision is part of the internal legal order of the Republic of Croatia and in terms of legal effect it is above the law in the meaning of the provision of Article 134 of the Constitution. The cited provision guarantees healthcare for all beneficiaries without personal expenditure, and this means that the scope of healthcare for beneficiaries may not be conditioned by the payment of contributions by the employer.

The lack of conformity of the provision of Article 59.2 and 3 of the Health Insurance Act with the above mentioned provision of international law represents an infringement of social justice, of respect for human rights, and a violation of the principle of the rule of law, referred to in Article 3 of the Constitution as fundamental values of the constitutional order of the Republic of Croatia.

Since insured persons have no authority to influence the person obliged to pay contributions, and they bear the detrimental consequences if the obliged person does not pay due contributions, this narrowing down of healthcare by way of the impugned Article is not in conformity with the provision of Article 58 of the Constitution of the Republic of Croatia."

Example 2

Ruling Nos. U-I-402/2003, U-I-2812/2007 of 30 April 2008 (**CRO-2008-2-008**) - abstract control of constitutionality of the Constitutional Act on the Rights of National Minorities (Narodne novine, No. 155/02)

"4.4. Under Article 140 of the Constitution, international agreements concluded and ratified in accordance with the Constitution and made public, shall be part of the internal legal order of the Republic of Croatia, and shall be above law in terms of legal effects. Among the international treaties that are part of the internal legal order of the Republic of Croatia is also the Framework Convention for the Protection of National Minorities (Ratification law, Narodne novine – međunarodni ugovori/International Agreements, No. 14/97, entered into force on 17 October 1997; hereinafter: the Framework Convention).

In accordance with Article 1 of the Framework Convention, the protection of national minorities and the protection of the rights and freedoms of persons belonging to those national minorities forms an integral part of the international protection of human rights and as such falls within the scope of international cooperation. Article 4 paragraphs 2 and 3 of the Framework Convention lays down:

2. The parties shall undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

Article 15 of the Framework Convention stipulates that the parties shall create conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

5. In Article 1 of the Constitutional Act, as the fundamental act on the rights of national minorities in the Republic of Croatia, the Republic of Croatia obliged itself to respect and to protect the rights of national minorities and other fundamental human rights and freedoms, the rule of law and other highest values of its constitutional and international legal order, of all its citizens in accordance with the Constitution of the Republic of Croatia and international agreements enumerated in this Article.

In accordance with Article 3 paragraph 1 of the Constitutional Act the rights and freedoms of persons belonging to national minorities, as fundamental human rights and freedoms, shall be an inseparable part of the democratic system of the Republic of Croatia and shall enjoy the necessary support and protection, including positive measures to the benefit of national minorities.

(...).

6. The disputed Article 22 of the Constitutional Act reads:

(1) In a local or regional self-government unit (hereinafter: the self-government unit) where a proportional representation of minority members is required according to the provisions of this Constitutional Act, such minority representation shall be secured in the unit's executive body.

(2) The members of national minorities shall be granted the right to representation in the state administration and judicial bodies, taking into consideration the participation of members of national minorities in the total population at the level on which the state administration or judicial body has been formed, and taking into account their acquired rights.

(3) The members of national minorities shall be granted the right to representation in the administrative bodies of self-government units in accordance with the provisions of special acts regulating local and regional self-government and in accordance with acquired rights.

(4) In filling vacancies referred to in paragraphs 2 and 3 of this Article, preference under the same conditions, shall be given to the representatives of national minorities.

7. The representation of the members of national minorities in bodies of state administration and judicial bodies is, in addition to the provisions of the Constitutional Act, also regulated in separate acts.

7.1. The System of State Administration (Revisions and Amendments) Act (Narodne novine, No. 79/07) revised Article 8 paragraph 1 which now reads:

National minority members shall be granted the right to representation in the central bodies of state administration proportional to their share in the total population of the Republic of Croatia, and in the offices of state administration in the units of local (regional) self-government proportional to their share in the total population of the unit of local (regional) self-government.

When applying for a public vacancy the national minority members in paragraph 1 of this Article shall have the right to call upon the realisation of their rights in compliance with the provisions of the Constitutional Act on the Rights of National Minorities.

7.2. Article 74 of the Courts Act (Narodne novine, Nos. 150/05) reads:

(7) In the appointment of judges account shall be taken of the representation of judges belonging to national minorities, in accordance with the provisions of Article 22 paragraph 2 of the Constitutional Act on the Rights of National Minorities (Narodne novine, No. 155/02).

(8) When applying for an announced position of a judge national minority members shall have the right to call upon the realisation of their rights in compliance with the provisions of the Constitutional Act on the Rights of National Minorities.

7.3. Article 42 paragraph 2 of the Civil Servants Act (Narodne novine, Nos. 92/05 and 142/06) stipulates that the civil service admission plan shall ascertain also admission to the civil service of national minority members and shall envisage the employment of the necessary number of civil servants belonging to national minorities in order to achieve the representation in compliance with the Constitutional Act on the Rights of National Minorities and with the act regulating the state administration system.

7.4. In the Public Prosecutions (Revisions and Amendments) Act (Narodne novine No. 16/07) Article 63 was supplemented with paragraphs 4 and 5 that read:

(4) In the appointment of deputy public prosecutors account shall be taken of the representation of national minority members in accordance with the provisions of Article 22 paragraph 2 of the Constitutional Act on the Rights of National Minorities (Narodne novine, No. 155/02).

(5) When applying for an announced position of a deputy public prosecutor, national minority members shall have the right to call upon the realisation of their rights in compliance with the provisions of the Constitutional Act on the Rights of National Minorities.

(...)

9. In the instant constitutional court procedure it was necessary to answer the following question:

- does the disputed positive measure, prescribed for the benefit of the members of national minorities, comply with the constitutional principle of the prohibition of discrimination?

Starting from the above provisions of the Constitution and the Framework Convention and pursuant to Article 2 paragraph 4 sub-paragraph 1 of the Constitution, the legislator was empowered, within its constitutional authority to regulate economic, legal and political relations in the Republic of Croatia, to grant the members of national minorities the right of representation in the state administration and judicial bodies, and laid down the legal framework for the realisation of these minority rights in Article 22 of the Constitutional Act.

Namely, in realising the constitutional and international commitments stated in Article 1 of the Constitutional Act, the disputed provisions of Article 22 of the Constitutional Act entitle the members of national minorities to representation in the state administration and judicial bodies in accordance with the provisions of special acts, taking due account of the participation of members of national minorities in the total population at the level on which the state administration or judicial body has been formed, and taking into account their acquired rights, and in filling vacancies in these bodies preference, under the same conditions, is given to the representatives of national minorities.

The above preference is in fact a separate positive measure that implies intentionally giving priority to a specific group or groups (ethnic, gender, social, political etc.) with the aim of removing factual inequality and differentiating persons according to the stated or other characteristics, thereby preventing different forms of open (direct) and concealed (indirect) discrimination, provided that the legislator has established that such discrimination in their respect exists.

However, the stipulated preference in the employment of members of national minorities is not automatic or unconditional and it is only applied if the stipulated requirements are met, and its application secures the proportionality in representation of the members of national minorities in administrative and judicial bodies in a manner which insures their equal position with other citizens of the Republic of Croatia. Therefore, the stipulated preference in employment (Article 22 paragraph 4 of the Constitutional Act) should be seen as a separate measure to the benefit of the members of national minorities (minority groups) with the aim of enabling them to effectively participate in public affairs through their employment in the state administration and judicial bodies, within the meaning of Article 4 paragraphs 2 and 3 and Article 15 of the Framework Convention.

Regulation of the above positive measure in the employment of the members of national minorities falls within the legislator's free assessment zone and is to be considered justified and allowed as long as the reasons why it was introduced persist, which is in the first place decided by the legislator, i.e. until it starts to violate the principle of proportionality laid down in Article 16 of the Constitution, which is in the first place the subject of constitutional court control.

Therefore, as long as the positive measure in Article 22 of the Constitutional Act can be considered justified, allowed and proportional, it shall not be taken as a form of discrimination prohibited in Article 14 paragraph 1 of the Constitution.

10. Pursuant to the above, seen from the aspect of the relevant constitutional provisions and the provisions of the relevant international agreements, the proponents' allegations about the unconstitutionality of the disputed provisions of Article 22 of the Constitutional Act are not well founded, nor has the Constitutional Court found reasons or circumstances indicating the non-compliance of the disputed provisions of the Constitutional Act with the Constitution."

Example 3

Decision No. U-III-64744/2009 of 3 October 2010 (**CRO-2010-3-014**) – constitutional complaint (inadequate accommodation in the Prison Hospital - violation of the constitutional right to human treatment and respect for human dignity).

"IV. RELEVANT LAW

12. (...)

Besides the above relevant regulations, the Constitutional Court also takes into account the European Prison Rules from 2006 (published in *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 13, no. 2/2006, pp. 727-743, original text in English at: www.coe.int), which were accepted by the Committee of Ministers of the Council of Europe with the recommendation Rec (2006) 2 of 11 January 2006.

Part III of the European Prison Rules, entitled "Health care", contains rule 46.1, which reads as follows: "Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals, when such treatment is not available in prison."

(...)

13. (...)

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

(...)

In this sense the Constitutional Court finds that what the director of the Prison System Authority and the governor of the Prison Hospital said at the preliminary meeting of 14 June 2010 at the Constitutional Court showed that the quality of the medical aid provided for the applicant was on a satisfactory level. However, they also confirmed that the applicant, as a tetraplegic, was placed on the second floor of the hospital building without a lift, that he was in a room in which the number of beds made it almost impossible for him to use his wheelchair, that he was often left to the mercy and help of other inmates in that room to perform his basic needs such as washing, shaving, dressing and relieving himself (the last especially up to the moment in which he, according to the governor of the Prison Hospital, “got used to” the hospital regime of the “reflex bowel movement”) and that he could not go out of doors at all without being physically carried in his wheelchair by the hospital staff or other prisoners.

This situation, which lasted for a long time, from 5 September 2008 to 5 March 2010, could not only have made the applicant feel humiliated, because of his complete dependence on other people, but is an objective expression of inhuman treatment (compare judgment of the European Court in the case of *Engel v. Hungary*, § 27). Although it was obvious from the very moment when the applicant was received in the Prison Hospital that this hospital does not have the facilities to care for persons with special needs, especially persons tied to a wheelchair who cannot move alone, the applicant spent eighteen months in that hospital, until 5 March 2010, when he was transferred to the Penitentiary in L. - P. During all that time, besides the spatial limits of the Prison Hospital itself, the excessive number of patients in the rooms, dependence and the inability to go out of doors, because there is no lift in the Prison Hospital and the applicant was placed on the second floor of the hospital, the applicant also had to suffer the discomfort of adapting to a regime of personal hygiene and cleanliness that is completely unsuitable for persons with special needs – despite the explicit statutory provisions that prisoners who are disabled shall be ensured accommodation suitable for the kind and degree of their invalidity (Article 75 of the Execution of Prison Sentences Act).

14. Therefore, for the reasons given in the preceding points, the Constitutional Court finds that, due to inadequate conditions of accommodation and life, which was also reflected in the quality of medical care in the Prison Hospital, and which in total represent inhuman treatment, the applicant’s constitutional rights in Articles 23 and 25 para. 1 of the Constitution were violated, and also in Article 3 of the Convention.

15. The Constitutional Court links the above findings concerning the applicant’s treatment in the Prison Hospital with two facts: a) that the representatives of the Ministry of Justice said at the preliminary meeting at the Constitutional Court that this ministry had been aware, from the days when the Prison Hospital was under construction, of the problem of the non-existence of a lift, but that so far no funds have been found in the budget to make one, and b) that the representative of the Ministry of Health and Social Welfare informed those present that public-health supervision over the prison system in the Republic of Croatia is at present weak and ineffective.

In connection with this, the Constitutional Court observes that the Government of the Republic of Croatia has the duty to harmonise and supervise the concerns of the state administration (Article 9 of the State Administration System Act, consolidated wording, Narodne novine, no. 190/03). These concerns of the competent ministries – the Ministry of Justice and the Ministry of Health and Social Welfare – include, among other things, performing administrative supervision and other administrative and professional matters (Article 1 para. 1 of the same Act).

16. This is why the Constitutional Court, in this decision, instructs the Government of the Republic of Croatia to establish efficient supervision over the quality of health protection in the entire prison system and to enable, in an appropriate time not longer than three years, the unhindered movement of persons with special needs, and especially, because of the obvious need for a lift, to ensure the funds necessary for making one in the Prison Hospital."

Example 4

Decision No. U-III-3138/2002 of 7 February 2007 (**CRO-2007-2-005**) – constitutional complaint (alleged discrimination of Roma children in some primary schools in Croatia).

"4. For the purposes of the present proceedings, the Constitutional Court ... examined the relevant provisions of ... the Framework Convention for the Protection of National Minorities (Official Gazette – International Agreements no. 14/97), and the European Charter for Regional or Minority Languages (Official Gazette – International Agreements no. 18/97), which are international agreements ratified in the Republic of Croatia, so they are part of the international legal order of the Republic of Croatia and are above law in terms of legal effects (Article 140 of the Constitution).

The Constitutional Court also considered the Recommendation R 1203 (1993) of the Parliamentary Assembly of the Council of Europe on Gypsies in Europe, adopted at the 24th sitting of the Assembly on 2 February 1993; the Recommendation R 1557 (2002) of the Parliamentary Assembly of the Council of Europe on the legal situation of the Roma in Europe, adopted at the 15th sitting of the Assembly on 25 April 2002; the Recommendation R 4 (2000) of the Parliamentary Assembly of the Council of Europe on the education of Roma/Gypsy children in Europe of 3 February 2000; the General Policy Recommendation no. 3 of the European Commission against Racism and Intolerance (ECRI): Combating racism and intolerance against Roma/Gypsies (Strasbourg, 6 March 1998); the European Parliament resolution on the situation of the Roma in the European Union (P6_TA(2005)0151, Brussels, 28 April 2005); the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Decision no. 566, Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area PC.DEC/566 of 27 November 2003, adopted at the 479th Plenary Meeting of the Permanent Council of the Organisation for Security and Co-operation in Europe (PC Journal no. 479, Agenda item 4)."

Example 5

Decision No. U-I-3851/2004 of 12 March 2008 (**CRO-2008-1-005**) - abstract control of constitutionality of the Children's Allowance Act (Narodne novine, Nos. 94/01, 138/06 and 107/07)

"6. In these constitutional court proceedings the Constitutional Court also took into account the provisions of the Convention on the Rights of the Child (*Sl. SFRJ – Međunarodni ugovori*, No. 15/90, hereinafter: the Convention), adopted into the legal order of the Republic of Croatia under the Decision on Publishing Multilateral International Agreements to which the Republic of Croatia is a Party on the grounds of Notification on Succession (*Narodne novine*, No. 12/93.).

Thus Article 2/1 of the Convention provides that the States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3/2 of the Convention provides that the States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(...)

10. Examining the disputed legal provision in relation to the relevant provisions of the Constitution, the Constitutional Court finds that Article 8/2 Children's Allowance Act does not comply with the Constitution.

Starting from the fact that children's allowance is state aid to the person who is actually caring for, supporting, looking after and raising children, the legislator in Article 6/1 Children's Allowance Act laid down who has is the beneficiary of this allowance, while Article 8/1 Children's Allowance Act prescribes which children this allowance is paid for – natural children, step children, grandchildren and parentless children.

After regulations of this kind, the Constitutional Court finds that there is no reason acceptable in constitutional law nor any need for the additional regulation in the disputed Article 8/2 Children's Allowance Act (sub-paragraphs 1 to 4) of the cases in which the fosterer has the right to the children's allowance for grandchildren and other children who have a parent. It is understandable in itself and clearly emerges from Article 6 and Article 8/1 Children's Allowance Act that the children's allowance for children whose parents cannot care for them for various reasons, i.e. whom they cannot support, shall be paid to the person who has taken on the duty of bringing up and supporting these children.

11. In the view of the Constitutional Court, withholding the right to a children's allowance from the people who are really bringing up and supporting children that their parents cannot or will not support is directly contrary to the interests and welfare of the child. The disputed legal provision also contravenes the constitutional obligation of the state to take "special" care of parentally neglected children (Article 63/5 of the Constitution). Implementing this principle of constitutional law requires creating optimum conditions for protecting the rights of the child, which means bringing the child up and ensuing his or her support, if this is not provided by the parents, and the reason why parental care is missing cannot be decisive in any event, nor whether the parents have lost their parental rights because of child neglect.

On the other hand, the Convention, which demands that the signatory states honour and ensure the rights of the child laid down in the Convention, does not allow acting against the interests of the child, which also means not recognising pecuniary aid intended for supporting the child because the parents are not capable or able to take care of the child."

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", Staatszielbestimmungen, ... ?

In the cases of social integration the Constitutional Court applies all kinds of constitutional law, that is, fundamental rights, constitutional principles, doctrines developed in its case-law and objective laws (see reply under point 1.2.).

However, in addition to the "substantive" constitutional law, the procedural constitutional law is equally important institute, since it makes it possible, among other things, for the social integration issues to access the Constitutional Court by determining the circle of persons competent to initiate the constitutional court proceedings.

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

In the practice individuals call upon,⁹ and can call upon on all kinds of constitutional provisions, including the constitutional case-law. The Constitutional Court is the one who qualifies in the constitutional law the invoked constitutional violations.

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

Neither the Constitution nor the Constitutional Act define *expressis verbis* the Constitutional Court's direct competence to deal with social groups in conflict. However, given that the background of every issue in constitutional law embraces certain form of conflict (both, between social groups/individuals and between objective interests and/or protected human rights and values of the constitutional order), the Constitutional Court has also dealt with such "problems" and has addressed them within the limits of its jurisdiction defined in the Constitution and Constitutional Act.

Under Article 125 of the Constitution, the Constitutional Court:

- shall decide upon the compliance of laws with the Constitution,
- shall decide upon the compliance of other regulations with the Constitution and laws,
- may decide on the constitutionality of laws and the constitutionality and legality of other regulations though they are no longer in legal force, if no more than a year elapsed between the date they went out of force and the date when the request or proposal to institute proceedings was lodged,
- shall decide on constitutional complaints against individual decisions taken by state bodies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia,
- shall monitor the execution of constitutionality and legality and shall report to the Croatian Parliament¹⁰ about the observed violations thereof,
- shall decide upon jurisdictional disputes between the legislative, executive and judicial branches,
- shall decide, in conformity with the Constitution, on the impeachment of the President of the Republic,
- shall control the constitutionality of programs and activities of political parties and may, in compliance with the Constitution, ban non-compliant parties,
- shall control the constitutionality and legality of the elections and the national referendum and shall resolve electoral disputes falling outside the jurisdiction of the courts,
- shall perform other duties specified by the Constitution.

One of these other duties, stipulated in Article 125a of the Constitution, relates to the supervisory control over passing regulations for executing the Constitution, laws and other

⁹ For example, under Article 40 para. 1 in connection with Article 39 para. 1 of the Constitutional Act, a proposal of natural or legal person for the review of constitutionality of a law or the constitutionality and legality of other regulation must contain the naming of the provisions of the Constitution or the law for which the proposal asserts to be violated. Under Article 65 of the Constitutional Act, constitutional complaint whereby the procedure of concrete control is initiated must contain, among other things, also the constitutional right that is claimed to have been violated, with the indication of the relevant constitutional provision guaranteeing this right.

¹⁰ Article 104 of the Constitutional Act.

regulations. In accordance with this Article of the Constitution, if the Constitutional Court finds that the competent body has not passed a regulation for executing provisions of the Constitution, laws and other regulations, and was obliged to pass such a regulation, it will so inform the Government, and on the regulations which the Government is obliged to pass it will so inform the Croatian Parliament.¹¹

As the Constitutional Court has put it (and not only related to the Constitutional Court): "The procedures stipulated in the Constitution and their institutional bearers determined in the Constitution guarantee that the constitutional demand for the rational resolution of social problems will be fulfilled."¹²

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

The Constitutional Court in all its cases acts within the boundaries defined in the Constitution and Constitutional Act. The manner of solving the cases depends on the type of constitutional court proceedings stipulated for dealing with the respective cases.

In the proceedings of abstract control the Constitutional Court delivers: decisions in which it repeals a law (or some of its provisions) if it finds that the law (or some of its provisions) is not in line with the Constitution;¹³ or other regulations (or some of its provisions) if it finds them in breach of the Constitution and the law;¹⁴ decisions declaring the unconstitutionality of a law, or unconstitutionality and illegality of another regulation, if the laws or other regulations went out of force;¹⁵ and decisions annulling another regulation or some of its provisions.¹⁶

In the proceedings of concrete control the Constitutional Court by a decision accepts a constitutional complaint or refuses it as ill-founded.¹⁷ In the decision accepting the constitutional complaint the disputed individual act is repealed,¹⁸ but also some other act brought in this matter can be repealed, as a whole or in part, if the applicant's constitutional right was also violated by this other act.¹⁹ If the disputed act that violated the constitutional

¹¹ Article 105 of the Constitutional Act.

¹² Decision No. U-VIIR-4696/2010 of 20 October 2010 (CRO-2010-3-012), paragraph 23.

¹³ Article 126 paragraph 1 of the Constitution.

¹⁴ Article 55 paragraph 1 of the Constitutional Act.

¹⁵ Article 126 paragraph 3 of the Constitution and Article 56 paragraphs 1 and 2 of the Constitutional Act.

¹⁶ Article 126 paragraph 2 of the Constitution i Article 55 paragraph 3 of the Constitutional Act which reads: *The Constitutional Court may annul a regulation, or its separate provisions, taking into account all the circumstances important for the protection of constitutionality and legality, and especially bearing in mind how seriously it violates the Constitution or the law, and the interest of legal security:*

- *if it violates the human rights and fundamental freedoms guaranteed by the Constitution,*
- *if, without grounds, it places some individuals, groups or associations in a more or a less privileged position.*

¹⁷ Article 73 paragraph 2 of the Constitutional Act.

¹⁸ Article 75 of the Constitutional Act.

¹⁹ Article 74 of the Constitutional Act.

right of the applicant no longer produces legal effect, the Constitutional Court passes a decision declaring its unconstitutionality, and states in the pronouncement which constitutional right of the applicant had been violated by that act.²⁰ Furthermore, in the decision accepting the constitutional complaint for not deciding in a reasonable time, the Constitutional Court may determine appropriate compensation for the applicant for the violation of his constitutional right.²¹

Proceedings initiated in response to constitutional complaints, especially when they embrace large number of identical issues, show to the Court the scope and importance of certain constitutional law questions for the society. They also open the door for the proceedings in accordance with Article 38 paragraph 2 of the Constitutional Act which provides that the Constitutional Court itself/*proprio motu* may decide to institute proceedings of abstract constitutional control.

Moreover, under Article 45 of the Constitutional Act²² the Constitutional Court can temporarily suspend the execution of individual decisions in the proceedings of abstract control, and under Article 67 paragraph 2 of the Constitutional Act²³ in the proceedings of concrete control with the aim of preventing the grave and irreparable consequences.

Finally, the Constitutional Court can itself determine which body is authorised for the execution of its decision, respective the ruling.²⁴ The Constitutional Court sometimes uses these competences for example to award monetary compensation in the proceedings of abstract control and when it rejects proposals for the constitutional review of a law because for example the new law was enacted thus making the disputed law out of legal force (decision CRO-2013-1-004), or to order in a decision accepting a constitutional complaint for specific general (decisions CRO-2009-1-003 and CRO-2010-3-014) and/or individual measures to be carried out.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

Yes, its competence to act preventively stems from the Constitution and Constitutional Act, and it is limited by the Court's activism and self-restraint. For example, under Article 38 paragraph 2 of the Constitutional Act, the Constitutional Court can itself decide to institute proceedings to review the constitutionality of a law and the review of constitutionality and legality of other regulations, especially when it finds out that certain regulation opens some significant issue in constitutional law in the field of social integration or leads to inequality and discrimination and the like. By acting *proprio motu* and by removing the regulation or some of its provisions from the legal order the Constitutional Court can prevent possible tensions (between social groups, interests and/or values) that might result from the

²⁰ Article 76 paragraph 3 of the Constitutional Act.

²¹ Article 63 paragraph 3 of the Constitutional Act.

²² Article 45 of the Constitutional Act reads: *The Constitutional Court may, until the final decision, temporarily suspend the execution of the individual decisions or actions undertaken on the grounds of the law or the other regulation, the constitutionality respective the legality of which is being reviewed, if their execution might cause grave and irreparable consequences.*

²³ Article 67 paragraph 2 of the Constitutional Act reads: *the Constitutional Court may, on the proposal of the applicant, postpone the execution of court of justice decision until the decision is made, if the execution would cause to the applicant such damage, which could hardly be repaired, and the postponement is not contrary to the public interest nor would the postponement cause to anyone greater damage.*

²⁴ Article 31 paragraphs 4 and 5 of the Constitutional Act.

application of this regulation. In the same way, under Article 61 of the Constitutional Act, the Constitutional Court can (but need not to) end the proceedings if the applicant withdraws the request, respective the proposal, and shall do so in the cases when the requirements for the conduct of proceedings cease to exist. In other words, the Constitutional Court can continue the proceedings if it deems that it opens some important issue in the constitutional law, regardless of the withdrawal (preventive action), but with a restriction that the proceedings will nevertheless be suspended if the requirements for the conduct of proceedings cease to exist.

Moreover, the Constitution and Constitutional Act provide the Constitutional Court with two competences of preventive nature, which are: supervisory control over passing regulations for executing the constitution, laws and other regulations²⁵ and monitoring the execution of constitutionality and legality and reporting the Croatian Parliament on the observed unconstitutionality and illegality.²⁶ "When in the proceedings of the review of constitutionality of laws and constitutionality and legality of other regulations or in response to a constitutional complaint the Constitutional Court may not, for different reasons, take a stand on the specific law or regulation, or on the disputed enactment that violated someone's human right or fundamental freedom, but it deems that they open a question of validity and efficiency of the constitutional, legal or other regulation, it may inform the Croatian Parliament on "the observed unconstitutionality and illegality".²⁷

²⁵ Article 105 of the Constitutional Act reads as follows:

- (1) If the Constitutional Court finds that the competent body has not passed a regulation for executing provisions of the Constitution, laws and other regulations, and was obliged to pass such a regulation, it shall so inform the Government of the Republic of Croatia.*
- (2) If the Constitutional Court finds that the Government of the Republic of Croatia has not passed a regulation for executing provisions of the Constitution, laws and other regulations, it shall so inform the Croatian Parliament.*
- (3) The report in paragraph 1 of this Article shall be delivered in written form to the Prime Minister of the Republic of Croatia, and the report in paragraph 2 of this Article to the Speaker of the Croatian Parliament.*
- (4) The Session of the Constitutional Court shall decide about the publication of the reports in paragraphs 1 and 2 of this Article in the Official Gazette Narodne novine.*

²⁶ Article 104 of the Constitutional Act reads as follows:

- (1) The Constitutional Court shall monitor the execution of constitutionality and legality and report to the Croatian Parliament about any kind of unconstitutionality and illegality it has observed.*
- (2) The report in paragraph 1 of this Article shall be established by the Session of the Constitutional Court.*
- (3) The report in paragraph 1 of this Article shall be delivered in written form to the Speaker of the Croatian Parliament, who shall so inform the Croatian Parliament.*

²⁷ Krapac D., *Postupak pred Ustavnim sudom Republike Hrvatske, Ustrojstvo i proceduralni elementi ustavnog nadzora /Proceedings before the Constitutional Court of the Republic of Croatia, Organisation and procedural elements of constitutional review /*, Narodne novine, Zagreb, 2014, p. 307.

3.6. Has your Court ever encountered difficulties in applying these tools?

As a rule it has not. There have been some difficulties related to the failure of competent bodies to deliver the requested declarations and other materials needed in the constitutional court proceedings, and there have been certain pressures on the Court during some particular proceedings (decisions CRO-2010-3-012 and CRO-2013-2-008) and some problems in the execution of the Constitutional Court decisions (e.g. decisions CRO-2008-1-006 i CRO-2010-3-014).

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?

The circle of persons authorised to initiate different kind of proceedings is regulated in the Constitutional Act.²⁸ The constitutional court protection is mostly given in the proceedings of the review of constitutionality of laws and constitutionality and legality of other regulations (abstract control), as well as in the proceedings in response to constitutional complaints lodged against individual enactments of a state body, a body of local and regional self-government, or a legal person vested with public authority, which allegedly violated human rights or fundamental freedoms (concrete control) and as a rule after all legal remedies have been exhausted (two exceptions are stipulated in Article 63 paragraph 1 of the Constitutional Act).

The procedure of abstract control of legal norms can be initiated by a request of one fifth of the members of the Croatian Parliament, a committee of the Croatian Parliament, the President of the Republic of Croatia, the Government of the Republic of Croatia, the Supreme Court of the Republic of Croatia or another court of justice, the People's Ombudsman and the representative body of the unit of local self-government in certain cases stipulated in the Constitutional Act.²⁹

"Under Article 38 paragraph 1 in connection with Articles 43 and 44 paragraph 2 of the Constitutional Act, every natural and legal person can propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations, and the Constitutional Court at its session will adopt the ruling whether to accept the proposal and institute the proceedings."

This is, in the *Kelsen's* sense, the broadest guarantee of the comprehensive abstract constitutional control of legal norms because the applicant need not be a victim of a violation of his/her constitutional rights and freedoms, and he/she appears before the Constitutional Court as the applicant of some kind of *actio popularis*.³⁰

As already stated above, the Constitutional Court can itself initiate the proceedings of abstract control.

Regarding the proceedings of the so called modern concrete control, under Article 62 paragraph 1 of the Constitutional Act everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and

²⁸ For example, Articles 35 - 38 (abstract control), Article 62 (constitutional complaint) and Articles 88, 91 and 95 (control of the constitutionality and legality of the elections and the national referendum and electoral disputes) of the Constitutional Act.

²⁹ Articles 35 - 37 of the Constitutional Act.

³⁰ Krapac D., *Postupak pred Ustavnim sudom Republike Hrvatske, Ustrojstvo i proceduralni elementi ustavnog nadzora /Proceedings before the Constitutional Court of the Republic of Croatia, Organisation and procedural elements of constitutional review /*, Narodne novine, Zagreb, 2014, p. 89.

regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right).

Moreover, according to Article 63 of the Constitutional Act, the Constitutional Court will initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when a court of justice did not decide within a reasonable time about the rights and obligations of a party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if the Constitutional Court proceedings are not initiated.

However, sometimes there can be some problems in accessing the Court although not in relation to the circle of persons competent to lodge a constitutional complaint but when in a certain case the competent authority failed to proceed or when there is no individual enactment against which the constitutional complaint can be lodged.

Example 1

Decision and Ruling No. U-I-4170/2004 of 29 September 2010 (**CRO-2010-3-011**) – abstract control of constitutionality of the Social Welfare Act (Narodne novine, Nos. 73/97, 27/01, 59/01, 82/01, 103/03, 44/06 and 79/07).

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

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

(...)

5.2. The relevant provisions of international documents

Article 14 of the Convention reads as follows:

“Article 14

PROHIBITION OF DISCRIMINATION

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

Article 1 of Protocol no. 12 to the Convention reads as follows:

“Article 1

GENERAL PROHIBITION OF DISCRIMINATION

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

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

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

“Article 5

EQUALITY AND NON-DISCRIMINATION

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

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

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

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

(...)

6. The Republic of Croatia, as a social state (Article 1 of the Constitution), undertook to create conditions for the protection and special care of persons with increased needs who have difficulties in becoming part of social life and to ensure that they have the social, material and other necessities for the realisation of this aim. This definition of the state as social requires setting up a social security system in which rights will be systematically and optimally exercised and measures undertaken to surmount social risks, such as illness, disability, unemployment, inability to work and the like.

Article 58 of the Constitution contains the State's obligation to ensure for some categories of individuals, who are unable to work, the right to assistance in the satisfaction of the basic needs of everyday life and to take special care of the disabled. The rights and obligations in this field are regulated more closely by laws and other regulations.

(...)

7.1. Under Article 3 of the Social Welfare Act, social welfare services are considered to be activities of special interest for the Republic of Croatia which ensure that assistance is available and provided to the socially deprived, the infirm and other vulnerable individuals who cannot meet the basic needs of everyday life on their own or with the help of their family members due to unfavourable personal, economic, social and other circumstances (paragraph 1); in order to prevent, mitigate and eliminate causes and cases of social deprivation, social welfare services are available and provided to families, especially children and other individuals unable to look after themselves (paragraph 2).

The social welfare system, in the part that refers to disabled persons, grants them the right to certain kinds of financial aid to help them overcome the difficulties resulting from their physical and health condition, such as: one-off assistance, allowance for assistance and care, personal disability allowance, jobseeker's allowance; or the right to certain social welfare services, such as: the right to care outside one's own family, assistance and care at home, counselling and help in overcoming special problems and other forms of help in accordance with the relevant regulations.

(...)

17. The Constitutional Court finds no objective or reasonable justification for limiting the right to a personal disability allowance by the beneficiary's age at the time when the disability was incurred (the age limit is the 18th birthday), as was done in Article 55 of the Social Welfare Act. Since this legal situation causes inequality among people with the same status, the impugned legal provision is discriminatory in nature. Furthermore, in the opinion of the Constitutional Court, this different treatment is contrary to the public interest and decreases the importance of the principles protected by the Constitution of the Republic of Croatia.

18. Starting from the constitutional and convention standard that rights and freedoms, enshrined in the Constitution and Convention and other relevant international documents, must be exercised without discrimination and that the protection of the right to equality and the prohibition of discrimination must be effective, the Constitutional Court finds that Article 55 of the Social Welfare Act in the part reading: "insofar as the onset of such an impairment or condition preceded the individual's 18th birthday" is not in conformity with Article 14 taken with Article 58 of the Constitution."

Example 2 (in connection with example 3)

Decision No. U-I-1152/2000 of 18 April 2007 (**CRO-2007-2-008**) - abstract control of constitutionality of the Pension Insurance Act (Narodne novine, Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04 and 92/05.; hereinafter: ZOMO)

"20. On the other hand, the applicant Ana Merkaš deems that Article 21 para. 1 point 1 ZOMO contravenes the Constitution because she, as the common-law widow of the deceased insured person, does not have the right to a survivor's pension. This is an issue of the legal equality of common-law widows/widowers with married widows/widowers in entitlement to a survivor's pension after the death of the spouse.

The Constitutional Court notes that ZOMO entitles divorced spouses to a survivor's pension (if the court has granted them the right to maintenance), but not the common-law widow/widower of a deceased insured person (even in cases when the court has granted them the right to maintenance).

(...)

In the Republic of Croatia the family is under the special protection of the state, so it represents a protected constitutional benefit. Marriage and common-law marriage are constitutionally recognised family unions. In family matters, the Constitution makes no difference between marriage and common-law marriage. Both unions are recognised in the Constitution and both are regulated by law.

It follows from the above that not recognising entitlement to a survivor's pension for the common-law widow or widower of a deceased insured person leads to inequality between two constitutionally-recognised family unions, which contravenes equality as a highest value of the constitutional order of the Republic of Croatia, provided for in Article 3 of the Constitution.

In accordance with the above, starting from Article 61 of the Constitution which recognises two kinds of family unions, and taking into account the legal nature and purpose of a survivor's pension in the pension insurance system, which is based on the obligation of the insured person to support family members (see first paragraph of point 19.1 above), the Constitutional Court finds that ZOMO should regulate entitlement to a survivor's pension not only to married widows, but also to common-law widows and widowers.

Thus the Constitutional Court will, under its powers in Article 128 sub-para. 5 of the Constitution and Article 104 of the Constitutional Act, report to the Croatian Parliament about this instance of unconstitutionality, i.e. about the need for the necessary amendment of ZOMO so as to entitle common-law spouses to a survivor's pension within the pension insurance scheme regulated by ZOMO."

Example 3 (in connection with example 2)

Notification No. U-X-1457/2007 of 18 April 2007 (**CRO-2007-2-007**) - observed unconstitutionality in the pension insurance system related to the entitlement to a survivor's pension for family members regulated in the Pension Insurance Act (Narodne novine, Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04 and 92/05).

"The above legal provisions clearly show that the Pension Insurance Act does not recognise a common-law widow/widower as a deceased insured person's family member. Therefore, the Pension Insurance Act does not entitle a widow/widower who lived in a common-law marriage with a deceased insured person to a survivor's pension, even in cases when the court granted them the right to maintenance.

(...)

In the Republic of Croatia the family is under the special protection of the state, so it represents a protected constitutional benefit. Marriage and common-law marriage are constitutionally recognised unions. In family matters, the Constitution makes no difference between marriage and common-law marriage. Both unions are recognised in the Constitution and both are regulated by law.

Starting from the provision of Article 61 of the Constitution, which recognises two kinds of family unions (marriage and common-law), and taking into account the legal nature and

purpose of a survivor's pension in the pension insurance system, which is based on the obligation of the insured person to support family members (see first point of this Notification), the Constitutional Court finds that the Pension Insurance Act should regulate entitlement to a survivor's pension not only for married widows, but also for common-law widows and widowers.

4. In examining the issues concerning the entitlement to a survivor's pension of common-law widows/widowers, the Constitutional Court bore in mind the fact that the Family Act (Narodne novine Nos. 116/03, 17/04 and 136/04) regulates the legal effects of a common-law union between a woman and a man, and that in inheritance relations, pursuant to the law, the common-law spouse, who is in the same position as a married spouse regarding inheritance right, is also entitled to inherit the testator (Article 8/2 of the Inheritance Act, Narodne novine No. 48/03).

Although the above acts are not directly applicable in the pension insurance system regulated by the Pension Insurance Act, they represent the framework for regulating the right to a survivor's pension for widows/widowers in that system.

5. Finally, the Constitutional Court stresses that the Act on the Rights of Croatian Homeland War Defenders and Members of their Families (Narodne novine No. 174/04, hereinafter ZPHB) explicitly recognises the position of a close family member for common-law widows/widowers, and therefore also the right to a survivor's pension.

6. Starting from the fact that the rights recognised in ZPHB (including the right to a survivor's pension) are funded from the State Budget (Article 106 ZPHB), it could be said that the common-law spouse (also), as a close family member of a deceased, captured or missing Croatian defender, is entitled to some kind of state pension. The Constitutional Court therefore finds even stronger grounds to recognise, in the pension insurance system regulated by the Pension Insurance Act, the common-law spouse of a deceased insured person as a family member, because this system is financed by the contributions paid by the insured persons.

In connection with this the Constitutional Court notes that, pursuant to Article 2 paragraph 4 indent 1 of the Constitution, the Croatian Parliament is empowered to regulate all issues regarding the right of a common-law spouse to a survivor's pension (e.g. which union of a man and woman would be considered a common-law marriage within the meaning of the Pension Insurance Act, the manner of proving it, under which special conditions would the right to a survivor's pension be recognised to a common-law spouse, to what extent etc.).

7. In accordance with the above, the Constitutional Court notifies the Croatian Parliament about the need to amend the Pension Insurance Act with the purpose of regulating the legal conditions for entitlement to a survivor's pension of a common-law widow/widower, as a member of the deceased insured person's family."

Example 4

Ruling No. U-I-5612/2011 *et al.* of 23 January 2013 (**CRO-2013-1-004**) - abstract control of constitutionality of the Public Bailiffs Act (Official Gazette Nos. 139/10, 150/11 and 70/12) and the Act on Amendments to the Public Bailiffs Act (Official Gazette No. 150/11) - general measure of determining the right to redress by dismissing the proposals for the review of constitutionality of an act.

I. The proposals to institute proceedings to review the conformity with the Constitution of the Public Bailiffs Act (Official Gazette nos. 139/10, 150/11 and 70/12) and the Act on Amendments to the Public Bailiffs Act (Official Gazette no. 150/11) are hereby dismissed.

II. In the part in which the Act on Amendments to the Public Bailiffs Act (Official Gazette no. 150/11 and 70/12) and the Act Repealing the Public Bailiffs Act (Official Gazette no. 112/12) have a direct and immediate effect on the legal status of persons who the

Ministry of Justice of the Republic of Croatia appointed public bailiffs pursuant to the Public Bailiffs Act (Official Gazette no. 139/10), the Constitutional Court of the Republic of Croatia, pursuant to Article 31.4 and 5 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02 and 49/02 - consolidated text), establishes:

- each of the total of seventy-one (71) persons who the Minister of Justice of the Republic of Croatia appointed public bailiffs pursuant to the Public Bailiffs Act (Official Gazette no. 139/10), the personal names of whom are listed in point 17 of the statement of reasons of this ruling, have the right to redress in the lump sum net amount of HRK 18,000.00 for the reasons set out in point 22 of the statement of reasons of this ruling.

- the redress from point 1 of this item of the operative part will be paid from the state budget within three (3) months from the day a request is filed with the Ministry of Justice of the Republic of Croatia for payment.

III. The redress from point II of this operative part does not affect the general right of each person appointed public bailiff, who has been affected by the Act on Amendments to the Public Bailiff Act (Official Gazette nos. 150/11 and 70/12), and the Act Repealing the Public Bailiffs Act (Official Gazette, no. 112/12), to seek in court proceedings damages incurred pursuant to the general rules of the law on obligations. The redress shall not be included in the calculation of that possible court indemnity."

Example 5

In rulings Nos. U-I-763/2009, U-I-1895/2009, U-I-1047/2010, U-I-1376/2010 of 7 July 2010 (**CRO-2011-1-002** - see para 2 of the statement of reasons for a decision of the same number of 30 March 2011 given in a full text) on the constitutional review of the Agricultural Land Act (Narodne novine, Nos. 152/08, 25/09, 153/09 and 21/10) the Constitutional Court established the following temporary measure:

II. Under Article 45 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette Nos. 99/99, 29/02 and 49/02 - consolidated wording) the execution of all the individual decisions made and actions being conducted by the Agricultural Land Agency and other competent bodies on the grounds of disputed articles in point I of the pronouncement for this Ruling and the Decree on the Foundation of the Agricultural Land Agency shall be temporarily suspended until the Constitutional Court of the Republic of Croatia makes its final decision about the conformity with the Constitution of the provisions of the Agricultural Land Act in point I of this Ruling.

III. Under Article 31 paragraph 5 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette Nos. 99/99, 29/02 and 49/02 - consolidated wording) until the Constitutional Court of the Republic of Croatia passes the decision in point I of the pronouncement for this Ruling the privately-owned agricultural land shall be disposed of in accordance with the general provisions regulating the disposition of real property."

Example 6

In its Decision No. U-VIII-1271/2000 of 27 November 2003 the Constitutional Court found that the applicant had been unlawfully evicted from a flat in Zagreb owned by the Republic of Croatia, and that it was factually and legally impossible for her to move back to the impugned flat since a third person had in the meantime acquired the legal right to this flat.

Therefore the Constitutional Court ordered the Government of the Republic of Croatia to secure the applicant with the new flat (individual measure):

"II. The Government of the Republic of Croatia shall secure, in the manner and conditions in accordance with law, that the consequences of the City of Zagreb City Department for Construction, Utility and Housing Affairs ruling are removed.....

III. The order in point II of the pronouncement shall be carried out within one (1) year from the publication of this decision of the Constitutional Court of the Republic of Croatia in the Official Gazette."

Example 7

Decision No. U-III-64744/2009 of 3 November 2010 (**CRO-2010-3-014**) - decision to accept the constitutional complaint (living conditions in the prison hospital of the applicant who suffered from a spastic paraplegia) in which the Court ordered the following general measure:

"III. Under Article 31 paras. 4 and 5 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (...), the Government of the Republic of Croatia shall:

- within an appropriate term, which shall not exceed three years, enable prisoners with special needs unhindered movement within the Zagreb Prison Hospital;
- organise and efficiently supervise the quality of health care in the entire prison system."

Example 8

Decision and ruling Nos. U-I-4892/2004, U-I-3490/2006 of 12 March 2008 (**CRO-2008-1-006**) - abstract control of constitutionality of the Patients' Rights Protection Act (Narodne novine, No. 169/049:

"12. By referring the patient to the identical provisions of the Health Care Act, which also do not secure the patient's right to lodge a request concerning the use of the discretionary powers of the person responsible for proceedings in his treatment, Article 35 of the disputed Act, as the main law passed for the protection of patients' rights, violates the constitutional guarantee in Article 19/2 of the Constitution. When the Constitution lays down that "*judicial review of decisions made by administrative agencies and other bodies vested with public authority shall be guaranteed*", then this means at least the following:

a) the right to seek this control cannot be completely subject to the free assessment of the administrative agencies and bodies vested with public authority (in this case the persons responsible for the work of health-care institutions); b) the legislator must, at least for those individual acts of these bodies that have the nature of a constitutive administrative act, ensure judicial control of legality "which is not exhausted in the right to institute an administrative dispute, because the meaning of this guarantee also stretches to the obligation [of the Administrative Court of the Republic of Croatia] to decide on the legality of this act in the manner prescribed" (Decision of the Constitutional Court No.: U-III-2019/2004 of 9 June 2005); c) the legislator, although in principle free to determine the scope and contents of a legal remedy in accordance with its specific purpose, must nevertheless provide for at least a minimum possibility for the person, who has been supplied with the legal remedy, to effectively make use of it to protect his rights and legal interests before a legally determined court, because there can be no guarantee of judicial control of the legality of individual acts of administrative bodies and bodies vested with public powers if the scope and contents of the legal remedy are so limited that their free evaluation is completely beyond its control.

13. The Constitutional Court finds the legislator's omission to regulate Article 35 of the disputed Act in accordance with the demands of the Constitution especially grave. Patients are a category of people especially in need of legal protection because they are very

dependent on health-care institutions, which during treatment decide on their rights under the disputed Act, and where by the nature of things situations often arise when it is not only necessary to quickly ensure the protection of the anticipated rights of a patient who would be exposed to immediate and inevitable danger without the appropriate medical treatment, but also situations when it is necessary to take some lasting and irreversible measures to save the patient's life and health.

In regulating the protection of patients' rights, having proclaimed, listed and prescribed them, the legislator must clearly, precisely and completely regulate the procedure for deciding about them and not leave them completely to the unlimited discretion of the responsible persons or commissions.

14. Pursuant to the above, it is the view of the Constitutional Court that the complaint, prescribed in Article 35 paragraphs 1,2 of the disputed Act, is not a legal expedient that could be effectively and efficiently used to realise the constitutionally guaranteed right to health care (Article 58 of the Constitution) because no individual act is brought, in accordance with the provisions of Article 19 of the Constitution, on the grounds of a complaint grounded in law (paragraph 1), nor is any judicial control later ensured of the legality of the individual acts of bodies that are vested with public powers (paragraph 2)."

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

As a rule yes, given the current case-law of the Constitutional Court, i.e. the constitutional court proceedings that resulted in either diminishment or complete suspension of social conflicts (for example decisions: CRO-2007-2-007, CRO-2009-3-011, CRO-2010-3-012, CRO-2013-2-008, CRO-2013-2-015 i CRO-2013-2-016).

4.2. Does your Court *de facto* act as 'social mediator', or/and has such a role been attributed to it?

As the Constitutional Court has put it: "Contrary to the legislator, the Constitutional Court, as the "guardian of the Constitution", has the duty to watch over the realisation of the highest values of the constitutional order of the Republic of Croatia in such a way, that it uses its special institutional powers to compensate for the weaknesses of the insufficiently developed democratic state founded on the proclaimed rule of law, and this also includes its insufficiently developed and imperfect legal framework. By resolving the complex social conflicts that appear because of the insufficiently developed and imperfect legal order, the Constitutional Court fulfils its constitutional task of creating a balance between normatively expressed values and the positive legal rules that make up the framework of the State.

The powers of the Constitutional Court to "observe the realization of constitutionality and legality and notify the Croatian Parliament on the instances of unconstitutionality and illegality observed thereto" (Article 128 /129/ indent 5 of the Constitution) must be interpreted in this light, but also the powers of the Constitutional Court provided for in Article 31 para. 5 of the Constitutional Act ..."³¹

Neither the Constitution nor the Constitutional Act provide the Constitutional Court with the role of the social mediator (see reply under point 3.3.), but the Court has factually played that role when it decided on certain cases within its jurisdiction (for example, decision: CRO-1998-3-011).

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

³¹ Decision No. U-VIIR-4696/2010 of 20 October 2010 (CRO-2010-3-012), para 25.

In such cases, the Constitutional Court decides under the Constitution and Constitutional Act whether the issue falls within its jurisdiction or within the jurisdiction of one of the three branches of government (legislative, judicial or executive). In its case-law the Court regularly makes clear distinction between the politics and the constitutional law (although this is not always easy, for example, it is sometimes difficult to distinguish the social policies from the protection of social rights), and it decides only on the issues within its jurisdiction. In doing so it balances between activism and judicial self-restraint.

Example 1

Decision and Ruling No. U-IP-3820/2009 *et al.* of 17 November 2009 (**CRO-2009-3-011**) - abstract control of constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09; hereinafter: the ZOPPPM)

"DECISION AND RULING

I. The request to review the conformity with the Constitution of Article 1 para. 1, Article 3 and Article 5 para. 1 of the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09) is hereby refused.

II. The proposals to institute proceedings to review the conformity with the Constitution of the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09) are hereby not accepted.

III. The Constitutional Court finds that the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09) has been in conformity with Article 14 of the Constitution since the day when it entered into force (1 August 2009), this conformity being the legal effect of the entry into force of the Special Tax on Receipts from Independent Activities and Other Receipts Act (Narodne novine, No. 119/09).

IV. The Government of the Republic of Croatia shall within its constitutional powers:

a) in the period up to 31 December 2010 monitor and continuously examine the further necessity for a special tax of the kind introduced by the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09), and

b) proposes to the Croatian Parliament the adjustment of the special tax depending on a decrease in the intensity of the economic crisis in the Republic of Croatia in the period up to 31 December 2010, or its repeal even before this time.

V. In the case in point IV b) of this pronouncement, taxation equality must be ensured of all the taxpayers under the Special Tax on Receipts from Independent Activities and Other Receipts Act (Narodne novine, No. 94/09) and the taxpayers under the Special Tax on Salaries, Pensions and Other Receipts Act (Narodne novine, No. 94/09).

VI. This decision and ruling shall be published in Narodne novine.

(...)

13.4. (...)

The difficult conditions under which hundreds of thousands of Croatian citizens are living indicate the serious problems that are at this moment confronting the constitutional concepts of the social state and market economy in Croatia, and also the demanding tasks that lie before government bodies and other bodies vested with public powers, and also before the Croatian citizens themselves, in the process of resolving them.

The Constitutional Court, however, may not take on the role of a legislative, executive or judicial entity and make decisions or implement measures instead of them, it may not judge about whether it would have been better or more appropriate if the competent bodies had chosen and accepted some other solutions instead of the ones they did. If the Constitutional Court did this, it would take on the role of a quasi-legislative body contrary to all the provisions of the constitutional order of the Republic of Croatia.

(...)

13.5. (...).

It is not possible to gauge whether the legislator set an appropriate boundary (HRK 3,000.00), under which the monthly salaries, pensions and other net receipts of taxpayers will not be liable to the special tax, by regarding the problem from the general aspect of the Republic of Croatia as a social state (Article 1 of the Constitution). The special constitutional principles of tax equality and equity are relevant in this case, and they centre around the demand for the proportionality of the tax burden in accordance with the economic capabilities of every individual (Article 51 para. 1 of the Constitution), as a special expression of the general principle of proportionality (Article 16 of the Constitution). This is also the framework within which the Constitutional Court has the competence to examine tax legislation up to the borderline defined by the democratic constitutional order as an order of a free political process."

15.5. (...)

On this issue the Constitutional Court must practice restraint considering the roles and responsibilities of the legislator and of the Constitutional Court. The Constitutional Court would cross the permitted boundaries of its competence if it entered into examining the justification, appropriateness and rationality of the standards that guided the Government of the Republic of Croatia in proposing, and the Croatian Parliament in passing, the decision to apply the special tax to every receipt from Article 4 of the Special Tax Act separately, but not their sum made in one month.

The Constitutional Court must especially practice restraint on this issue because it is certain that had the other solution been accepted (taxing the total monthly receipt made from different sources which are taxed under different tax rates) it could have been challenged before the Constitutional Court from the aspect of Article 51 of the Constitution by using equally valid arguments as those that were, in these proceedings of constitutional review, used against the solution that was accepted (i.e. taxing each receipt according to each source separately). This is a sufficient sign that this issue enters into the area of the free assessment of the legislative authorities in regulating the tax policy.

Therefore the Constitutional Court will limit itself to the finding that the special tax is an extraordinary tax form with the characteristics of an analytical (schedular, partial) system of taxing each individual receipt. The choice of this system belongs to the free decision of the legislator.

Example 2

Decision No. U-VIIR-4696/2010 of 20 October 2010 (**CRO-2010-3-012**) - control of the constitutionality and legality of the elections and the national referendum (see point II. of the pronouncement for the decision):

I. The Constitutional Court finds that on 3 September 2010, being that the Government of the Republic of Croatia withdrew from legislative procedure the Proposal for the Labour (Amendments) Act, with the Final Proposal of the Act, which it had in official document class: 110-01/10-01/01, register no.: 5030104-10-1 of 28 May 2010 introduced in legislative procedure, the requirements ceased to exist to call the referendum requested by 15.95% (717,149) voters in the Republic of Croatia in connection with the referendum question: "Are you in favour of retaining the existing legislation on the extended application of the legal rules contained in collective agreements and on the termination of collective agreements?"

II. No proposal of an act that contains an answer opposite to the answer "YES" to the referendum question, given in point I of this pronouncement, may be introduced in legislative procedure before one year has expired from the day of the publication of this decision in Narodne novine, unless a referendum is first called and held about that proposal of an act on the grounds of the valid signatures of the 15.95% (717,149) voters gathered between 9 June 2010 and 23 June 2010.

(...)

25.1. On the other hand, the Constitutional Court cannot shut its eyes before the obvious fact that the relevant provisions of the Referendum Act do not suitably resolve the issue of the legal effects of withdrawing the Proposal of the Labour (Amendments) Act (or any other

proposal of an act) from legislative proceedings in relation to the will of the voters expressed in their support to request calling a referendum. These legislative deficiencies make it objectively possible to disregard or betray the will of the voters, and thus also to devalue the fundamental values of a democratic society based on the rule of law.

Considering that the relevant provisions of the Referendum Act have not been completely elaborated, which makes it possible to disregard the purpose for which the voters gave their signatures in this case, the Constitutional Court has the constitutional obligation to institute – in its interpretation of the Constitution and of the Referendum Act in the light of the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution) – a rule for this particular case. This is, therefore, not a general rule that would hold for all cases of the same kind, because a rule of that kind may only be passed by the Croatian Parliament as the highest representative body of citizens and the holder of legislative power in the Republic of Croatia (Article 70/71/ of the Constitution)."

Example 3

Decision No. U-II-1118-2013 *et al.*, of 22 May 2013 (**CRO-2013-2-008**) - abstract control of constitutionality and legality of the Decision to Introduce, Monitor and Evaluate the Implementation of the Health Education Curriculum in Primary and Secondary Schools, class: 602-01/12-01/00431, reg. no: 533-21-12-0005 of 31 January 2013 of the Minister of Science, Education and Sports (Narodne novine, No. 17/13) and its integral part: the Health Education Curriculum (preventive action of the Court - point II of the pronouncement of the decision).

"DECISION

I. Proceedings were instituted to review conformity with the Constitution and the law, and a decision was adopted to repeal the Decision to Introduce, Monitor and Evaluate the Implementation of the Health Education Curriculum in Primary and Secondary Schools, class: 602-01/12-01/00431, reg. no: 533-21-12-0005 of 31 January 2013 of the Minister of Science, Education and Sports, published in the Official Gazette no. 17 of 13 February 2013, and which came into force on 21 February 2013, and its integral part: the Health Education Curriculum.

II. Pursuant to Article 31.5 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02 and 49/02), the Constitutional Court establishes that, before the adoption of the Health Education Curriculum in a procedure aligned with the requirements of the Constitution, the content of health education shall be taught in classes in primary and secondary schools in the Republic of Croatia according to the programme that was being taught up to the beginning of the 2012/2013 school year.

III. This decision shall be published in the Official Gazette.

(...)

12.2. Accordingly, a positive obligation of the state exists in the area of the public school system, within the meaning of Article 63.1 and 2 of the Constitution and Article 2 of Protocol no. 1 to the Convention. From the responsibility of parents to ensure the rights of their child to a full and harmonious development of its personality stems the obligation of the state, when forming teaching programmes, to respect the different convictions of parents and their constitutional right and freedom to decide independently on the upbringing of their own children. This constitutional obligation of the state may only be implemented when the parents are included in the process of forming the teaching content.

Therefore, enabling parents to participate in the process of creating teaching content is the constitutional obligation of the state, of a procedural nature, and is especially important for teaching content relating to the differing "convictions" or "beliefs" of parents, in the sense described in point 12.1 of the statement of reasons of this decision.

Finally, it has already been said that the responsibility of parents, within the meaning of Article 63.2 of the Constitution, is limited by the right of the child to a full and harmonious development of its personality. This also means that parents do not have the right to keep their children ignorant and prevent them from learning basic information or content important

for the full and harmonious development of their personality. In this sense, it is the task of the public school system to be neutral and, in a balanced teaching programme, in cooperation with the parents, to provide children with basic information, which must be presented in an objective, critical and pluralistic manner.

(...)

13.2. (...)

Briefly, the content of health education for all schools in the territory of the Republic of Croatia, as conceived for the 2012/2013 school year, was created in a curriculum of national importance, which the competent Ministry adopted in the form of a regulation with binding legal force. The Constitutional Court deems it to be unacceptable that the coming into force of a regulation with such content and such legal force was not preceded by obtaining the opinion of parents' councils (Article 137.4 of the Education Act) nor was the National Council for Education and Teacher Training included in the process, nor was any public debate conducted within a democratically organised institutional procedure (at least) on the content of that education programme, about which it may reasonably be assumed that it would arouse controversy in the social community. In view of the later course of events, it is clear that the coming into force of that regulation was not even preceded by full preparation in a technical, organisational and educational sense. In this light, it is especially unacceptable that the coming into force of the regulation occurred at a time when the school year, in which it was to be implemented (2012/2013) had already begun.

Example 4

Decision and Ruling No. U-I-988/1998 *et al.* of 17 March 2010 (**CRO-2010-1-002**) - abstract control of constitutionality of the Pension Insurance Act (Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07 - decision of the Constitutional Court, 79/07 and 35/08)

"14.6. The last question connected to the legal nature of the right to a pension in the pension insurance sub-scheme based on generation solidarity is the following: is the legislator empowered, under constitutional law, to revoke particular rights from this sub-system?

The Constitutional Court reiterates that under Article 2 para. 4 sub-para. 1 of the Constitution, the Croatian Parliament is empowered to independently decide on the regulation of economic, legal and political relations in the Republic of Croatia. If this constitutional authority of the legislator is taken together with Article 56 para. 1 of the Constitution, it emerges that the Croatian Parliament is empowered to independently decide on how the rights of employees and members of their families to social security and social insurance, which also includes pension insurance, should be regulated.

There is, therefore, no doubt that the legislator is constitutionally empowered to change the laws regulating the pension insurance sub-scheme based on generation solidarity so as to adapt it to changed economic and social conditions in the country or to stabilise it, i.e. to create preconditions for a long-term viable pension scheme. This also includes redefining the catalogue of the entitlements in the pension insurance sub-scheme based on generation solidarity.

(...)

14.7. The Constitutional Court notes that the legislator's freedom to redefine the catalogue of entitlements in the pension insurance sub-system based on generation solidarity is subject only to general constitutional limitations, i.e. by the legislator's obligation to take constitutional requirements into account when regulating the "rights of employees and members of their families to social security and social insurance", especially those flowing

from the principle of the rule of law and those that protect general constitutional goods and values, especially the individual's human rights and fundamental freedoms enshrined in the Constitution.

In the domain of pension insurance based on generation solidarity these demands are most clearly expressed in the legislator's obligation, when redefining the catalogue of insured pension rights, not to damage the very essence of the "right to a pension", and the new statutory measures must not produce constitutionally prohibited discriminatory effects.

The Constitutional Court deems it important to specially emphasise that the possible loss of a certain amount (percentage) of the earlier pension or of another benefit from pension insurance, which may result from the new statutory measures redefining the pension rights acquired earlier, does not a priori mean that the essence of the "right to a pension" has been damaged, as long as this loss of part of the earlier benefit from pension insurance resulted from the general redefinition of insured rights in the pension insurance scheme based on generation solidarity, and is proportional in its effects. This is a general, broadly defining principle. Everything else depends on the circumstances of a particular case."