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REPORT

**“ENHANCEMENT OF THE RIGHT TO LIBERTY AND SECURITY
THROUGH THE CONSTITUTIONAL COMPLAINT
THE CROATIAN EXPERIENCE”**

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The experience of the Constitutional Court of Republic of Croatia in the field of the protection of the right to liberty and security provides a good example of a country in which the constitutional complaint, as a special remedy for the protection of human rights provided for by the Constitution, has been contributing to the constitutionalisation of both criminal and civil procedural law within the legal order.

The Constitution of the Republic of Croatia¹ and the Constitutional Act on the Constitutional Court of the Republic of Croatia² both foresee the full constitutional complaint,³ the objective of which is the ultimate protection of constitutional rights. The constitutional complaint in Croatia is a remedy of a subsidiary character, since it requires the exhaustion of all available legal remedies for the protection of constitutional rights before it may be filed. Another very important precondition that must be met before a constitutional complaint can be brought, is that the claim of a constitutional rights violation must be brought against the public authority's act that directly affects the applicant's rights and obligations or against the act on suspicion or accusation of a criminal act. The Croatian legal order allows a constitutional complaint to be brought before the exhaustion of the available remedies in cases where the disputed act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences will arise for the applicant if the Constitutional Court proceedings are not initiated⁴.

These presumptions are, in principle, easy to follow in a constitutional complaint which challenges acts of an administrative or civil nature. However, under the criminal law, the Croatian Constitutional Court denied, for a reasonable period of time, access to the Court for applicants whose cases dealt with detention issues.

Unlike the European Convention on Human Rights⁵, the right to liberty under the Croatian Constitution is defined by Articles 22, 24 and 25. Article 22 prescribes that "*human liberty*

¹ The Constitution of the Republic of Croatia (Official Gazette no. 85/2010- consolidated text), Article 129: The Constitutional Court of the Republic of Croatia:

"...shall decide on constitutional complaints against individual decisions taken by governmental agencies, 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..."

² The Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette, no. 49/2002- consolidated text)

³ Article 62 of the Constitutional Act on the Constitutional Court of the Republic of Croatia: "(1) Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right)." (2) If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted.

(3) In matters in which an administrative dispute is provided, in respect of a revision in civil or extra-litigation procedure, remedies are exhausted after the decision has been rendered upon these legal remedies."

⁴ Article 63 of the Constitutional Act on the Constitutional Court of the Republic of Croatia: "(1) The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the 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 Constitutional Court proceedings are not initiated."

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 with Protocols Nos. 1, 4, 6, 7, 12 and 13, Article 5 of the European Convention on Human Rights :

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;8 9

and personality shall be inviolable. No one shall be deprived of liberty, nor may such liberty be restricted, except specified by law upon which court shall decide". Article 24 of the Constitution defines that "no one may be arrested or detained without a written court order grounded in law. Such an order has to be read and presented to the person placed under arrest at the moment of said arrest. The police authorities may arrest a person without a warrant when there is reasonable suspicion that such person has perpetrated a grave criminal offence as defined by law. Such person shall be promptly informed, in understandable terms, of the reasons for arrest and of his/her rights as stipulated by law. Any person arrested or detained shall have the right to appeal before a court, which must forthwith decide on the legality of the arrest." And Article 25 provides that "any arrested and convicted person shall be accorded humane treatment, and the dignity of such individual shall be respected. Whosoever is detained and indicted of a criminal offence shall have the right to be brought before a court within the minimum time specified by law and to be acquitted or convicted within the statutory term. A detainee may be released on bail to defend him-/herself."

As can be seen, the constitutional right to liberty and in connection to it, the issue of its deprivation responds to the guarantees of the European Convention on Human Rights. But, unlike the conventional right, the Croatian Constitution left it to the legislator to define the cases in which detention or the aim for detention will apply.

Already in 1992, a year after the establishment of the Croatian Constitutional Court, the Court clearly explained how the constitutional complaint against the decision on detention or prolongation of detention may be filed *only* upon the finalization of the criminal procedure, namely after the exhaustion of the available remedies against the judgment in the criminal case.⁶ This presumed that the issue of the right to liberty deprived by detention, as a necessary measure to secure the conduct of criminal proceedings, could only be examined within the condemnation judgment, as a final act deciding the issue of criminal responsibility. Although it was rejected on the basis of the non-exhaustion of available remedies as one of the formal constitutional proceedings' prerequisites, the Court's decision implicitly defined a decision on detention as an act of a procedural nature, which could not be deemed an act eligible for a full constitutional complaint in substance.

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- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

⁶ The Solution of the Constitutional Court of the Republic of Croatia: U-III-32/92 from May 27, 1992 (Official Gazette, no. 42/1992).

The views on this Court's approach were divided. There were those who deemed that a decision on detention or its prolongation is certainly an independent decision and thus eligible for complaint because of its nature.⁷ The reasons for such an approach were the following: the decision may be appealed and a decision on detention does not deal with the issue of the existence of a crime or responsibility, but on the issue of whether or not the accused person may defend himself or herself from liberty. On the other hand, there were views that the Court's jurisdiction over the decisions on detention would create a parallel judicial system, which could jeopardize the criminal procedure and thus destroy the system of regular and extraordinary legal remedies.⁸

The Court insisted on rejecting constitutional complaints in detention issues until 1998, when it suddenly accepted jurisdiction in such cases. In its decision on the acceptance of the constitutional complaint, the Court stated the following: "*Contrary to the previous view, the Court considers that, for the purposes of the effective protection of the constitutional right to liberty, human dignity and rights of the arrested person, the constitutional complaint is admissible.*"⁹ In its reasoning, the Court stated that postponing the decision on the violation of the rights caused by the decision on detention until the end of the criminal procedure would not have any effect because examining the existence for the reasons for detention or its prolongation is separate from examining the facts and circumstances of the decision on the merits. It found a violation of the inviolability of the right to liberty and human dignity.

This change of the Court's approach deeply shook the judicial branch and the intangibility of detention as a secure measure carried out by the judicial power for the proper conduct of the criminal procedure. The Supreme Court of the Republic of Croatia even asked for a legal opinion on the limits of the Court's jurisdiction in criminal cases and on the impact of such an approach on the complete finalization of the trial.

Nevertheless, as much as this change was welcome for the proper protection of the right to liberty, this decision lacked constitutional reasoning. In spite of the fact that the Court admitted to the wrongness of its practice, it rightly pointed out that, at the end of the criminal procedure, review of the decision on detention (which was enacted before or during the trial) became obsolete, but the Court provided no reason for why it changed its approach nor did it justify (re)admissibility. Namely, the legal requirements for filing a constitutional complaint were the same between the period of inadmissibility and sudden admissibility. Also, in spite of the fact that the Court proclaimed the violation of the right to liberty in the respective case, it did not review it from that aspect, but from the aspect of legality and regularity of the decision on prolongation of detention.

After such an important turn in the matter of the protection of the right to liberty, the Court did not "rush" into developing the protection of the right to liberty. On the contrary, it adopted a rather restrained approach. From 1998 to 2007, the Court accepted around ten such cases. In a large number of its decisions, the Court reviewed the constitutional complaints not on the basis of the lawfulness of the detention, but on the basis of the legality of the decisions on detention.

After 2007, the Constitutional Court started enhancing the conception of the right to liberty as a primordial right. The standards of the European Court of Human Rights in the interpretation of Article 5 of the Convention were that there was a necessary incentive for the Croatian Constitutional Court to move away from reviewing the constitutional complaints on

⁷ Pavlović, Šime, "*Pritvor i ustavna tužba*", *Odvjetnik*, 68 (1995), p.26, 23-28.

⁸ Pavlović, *ibid.*

⁹ Decision of the Constitutional Court of the Republic of Croatia: U-III-1182/1997 from December 7, 1998 (Official Gazette, no. 156/1998).

the basis of the principle of legality and start with anatomizing the scope of the right to liberty provided by the Article 22 of the Croatian Constitution.

Still, a large part of the constitutional complaints dealing with the issue of the right to liberty deprived by a decision on detention, were rejected as inadmissible. The reason for this situation lies in the Croatian criminal procedural legislation, which prescribes short periods of time for detention - of two months, at the most. Due to the appeal process on the decision in the ordinary criminal procedure, it was common for the constitutional complaint to arrive at the Court just before the expiration of the disputed decision on detention. While the Court decides on the constitutional complaint, it often happened that the decision in many cases would already be invalid and therefore not eligible for review on the merits.

In the Case *Peša v. Croatia*¹⁰, in 2010, the European Court of Human Rights found this practice of the Court to be in breach of the obligation under Article 5.4 of the Convention, as the Croatian Court did not satisfy the requirement "*that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy*" i.e. constitutional complaint. Namely, the Strasbourg Court was of the view that "*the Court's failure to decide speedily on the applicant's constitutional complaints made it impossible to ensure the proper and meaningful functioning of the system for the review of his detention, as provided for under the national law.*"

The Croatian Constitutional Court reacted promptly on this judgement and in the same year established a new Chamber specifically for constitutional complaints¹¹ which would, as a matter of urgency, only deal with constitutional complaints relating to the right to liberty deprivation by the decisions on detention. The purpose of this Chamber is to decide on the merits of the constitutional complaints as soon as they arrive at the Court in order to avoid the expiration of the disputed decisions. Still, this Chamber continued to reject those constitutional complaints which did not satisfy procedural preconditions, such as in cases where the decision was not valid already at the time of its submission for a constitutional complaint, or the constitutional complaint was filed at the time when a new decision on detention was made, or in which the applicant was released in the meantime or convicted and sent to prison.

In 2012, for example, the Court reviewed 92 decisions on the merits and rejected 16 for inadmissibility. Nevertheless, the Strasbourg Court continued to declare violations of the Article 5.4 in a number of cases in which constitutional complaints were rejected due to the existence of a new decision on detention. In the case of *Trifković v. Croatia*¹², the European Court of Human Right declared a violation of Article 5.4 stating that "*By declaring the applicant's constitutional complaints inadmissible simply because a fresh decision extending his detention had been adopted in the meantime, the Constitutional Court did not satisfy the requirement "that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy."*

This forced the Constitutional Court to move forward in protecting the right to liberty. In the decision from the beginning of 2014¹³, the Court explicitly alleged that the practice of the Strasbourg Court in relation to Croatia showed that the Croatian Constitutional Court had to reassess its views on detention issues in the light of Article 5. 4. in cases where the decision

¹⁰ Judgement of the ECtHR, *Peša v. Croatia* (App., 40523/08, October 10, 2010) par. 114 and 126.

¹¹ Amendments on the Rules of Procedure of the Constitutional Court of the Republic of Croatia from May 17, 2010 ("Official Gazette", no. 63/2010) - Decision on the Establishment of the Third Chamber for Deciding on the Constitutional Complaints from 7 September 2010.

¹² Judgment of the ECtHR, *Trifković v. Croatia* (App., 36653/09, March, 18, 2013), par. 139.

¹³ Decision of the Constitutional Court of the Republic of Croatia U-III-5449/2103 from January 13, 2014 (Official Gazette, no. 6/14).

on detention during the period in which the Court makes a decision was no longer valid or did not produce legal effects and the applicant, i.e. detainee was released.

In such cases, the Court opted for the possibility that is provided by the Constitutional Act on the Constitutional Court¹⁴, which foresees a declaration of a violation of rights. Namely, in cases where a disputed act is no longer valid, it is possible to declare a violation of a constitutional right. In the respective case, the Court established a violation of the right to liberty within the period that was covered by the dispute, but by the time of review, the decision was already invalid.

Looking at the substantive aspects of the Court's decisions on the right to liberty, the Court has been especially sensitive in relation to the criminal procedural provision foreseen in Article 123 of the Act on Criminal Procedure¹⁵, which among other reasons for detention prescribes that if there exists reasonable suspicion that a person committed an offence, detention against this person may be ordered if the offences involved are: murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion, abuse of powers in economic business activities, abuse of office or authority, association to commit a criminal offence or any other criminal offence punishable by imprisonment for a term of twelve years or more and if necessary, because of the particularly grave circumstances of the offence.

The constitutionality of this provision, with reference to particularly grave circumstances, has been discussed many times in theoretical works. The particularly grave circumstances of the offence cannot become less so over time and the aim of this detention is not defined in the same manner as for other legal bases for detention. In this regard, the Constitutional Court introduced the condition of "examination of public interest", referring thus itself to the case-law of the Strasbourg Court, which requires an adequate examination of the public interest as well. The professional public welcomed this intervention by the Constitutional Court, because it filled a gap in the legal definition of the prolongation of detention on this legal basis.

The angle of the Court's examination of the cases based on this and other provisions for ordering the detention is the principle of proportionality, legal certainty and protection against arbitrariness.

The Constitutional Court made a significant breakthrough into, I dare say, the rather stable practice of the ordinary courts not to assess the proportionality of the imposed measure, and the practice of mere repetition of legal reasons for the imposition of detention with such poor reasoning that it raised the issue of arbitrariness or even legal uncertainty. The Court demands from the ordinary courts, to analyse all relevant facts and circumstances, especially those connected to the accused person, the public interest for the person to stay in detention and to analyse the course, duration and results of the procedure.

One of the cases in which the Court abolished a judicial decision in relation to the issue of proportionality was the case in which the first instance court justified detention by the grave circumstances under which the crime was committed and by the high-level sanctions prescribed for such an act. The justification of the public interest for the accused to stay in detention, the criminal court reasoned by stating that the public was informed about the act committed and that the public would therefore be disturbed by a possible release. The accused person appealed, claiming that the mere information to the public regarding the act

¹⁴ Article 76. par. 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia: (3) If the disputed act that violated the constitutional right of the applicant no longer produces legal effect, the Constitutional Court shall pass a decision declaring its unconstitutionality, and state in the dictum which constitutional right of the applicant had been violated by that act.

¹⁵ The Criminal Procedure Act (Official Gazette, no. 152/2008, 76/2009, 80/2011, 121/2011, 145/2013, 152/2014).

that was committed did not mean that the public at the same time was particularly interested by it and that the release to freedom would have resulted in such a reaction that would disturb the conduct of the procedure. The view of the Supreme Court was that it simply repeated the views of the first instance court by adding that the aim of detention was to prevent persons whose actions provoke moral conviction to remain at large.

In many cases, the Court established the violation of the right to liberty connected to the violation of the presumption of innocence. In the Court's opinion, the reasons for prolonging detention or investigative prison in many cases were not sufficient to reach the conclusion for a reasonable justification and necessity for the application of that measure thereby assuming the applicant's guilt.

Croatia has recently been exposed to a number of criminal trials of executive or local government officials for corruption. In connection to the latter category, the constitutional complaint against the decision on detention revealed to the Constitutional Court a problem in the legal system in the cases of deprivation of liberty of public officials. In its decision, the Court¹⁶ warned about the shortcomings in the legislative framework with regard to the formal status of official detainees. The legislation was vague with regard to further governing the administrative-territorial unit, as was the case in the concrete constitutional complaint, since the detainee still held power in the local unit. In other words, the prefect did not step down, i.e. she did not want to resign upon deprivation of liberty. The Constitutional Court deemed that in situations where the legislative framework failed to define precisely the consequences of the deprivation of liberty of public officials on further exercise of their public duty, the demands of the rule of law in a democratic society, considered in the light of the constitutional functioning of the judiciary were clear. It means that the danger that the applicant would repeat the crime or that she would finish the attempted one if she continued to exercise the duty of prefect, put before the respective criminal court a duty to solve it so as to remove the danger of a repetition of the act without using the extreme measure of deprivation of liberty, unless it is necessary for other objective and justified reasons, which could set in motion other possible legal bases for detention.

In this regard, the Court stated that judicial bodies were obliged to examine all legal possibilities that exist in the respective law in relation to the application of the most lenient measures, including the measure of prohibition to engage in certain business activities or other activity for the applicant. The Court also deemed that it was within the authority of the judicial bodies to determine the kind and objective of such business activity. The Court also stated that it was not its duty to do so, and that this was the task of other judicial bodies. It therefore announced that it would wait until the next reasoned decision was rendered on the possibility of the applicability of that measure, if the criminal court decided to prolong the detention on that legal basis.

As it can be seen, the Constitutional Court in the concrete case gave a kind of guideline in what direction judicial bodies should go when deciding between the deprivation of liberty and other, sufficient measures, for the smooth conduct of proceedings. Still, the story was not over with that decision of the Constitutional Court. In the next decision on prolongation, the respective criminal court followed the opinion of the Constitutional Court and examined the application of less intrusive measures than detention, but did not apply it. It concluded that the measure of prohibition to engage in certain business activities was not applicable in the case of the applicant, because she was directly elected in the function of prefect at a local unit, which is a public duty and that she governed the territorial unit by carrying out activities that derive from the competences enshrined in local government. Furthermore, the respective court thought that her functions and activities related to it could not be defined as

¹⁶ Decision of the Constitutional Court of the Republic of Croatia U-III-2747/2014 from June 24, 2014 (Official Gazette, no. 83/2014).

business activities, but as those deriving from the executive power of the local unit. Any such prohibition would, in the opinion of the criminal court, raise the issue of the functioning of the executive power within the local unit.

In its assessment, the Constitutional Court started from the standard of the Strasbourg Court set in the case of *Mooren v. Germany*¹⁷, that detention will be "arbitrary" when domestic authorities do not try to correctly apply the respective provisions. It concluded that the criminal court concentrated on the issue of prohibition of the business activity without considering the other part of the provision which enabled prohibition on any kind of professional activity if the procedure is conducted because the crime was committed within that activity. The Court elaborated thoroughly the position of prefect and asked the criminal court to review whether or not the position of prefect could be subsumed under the professional activity and if the answer was positive, to review whether or not such prohibition would respond to its aim. The Court concluded that the right to liberty was violated as the detention was not lawful.

After this overview of the Croatian struggle in the protection of the right to liberty, it may be concluded that the understanding of the right to liberty by Croatian society encounters difficulties as to its scope. It could be said that, for a long period, detention was deemed in great part to be necessary and a safe measure for the smooth conduct of the procedure regardless of its aim. The case-law of the European Court of Human Rights was, without a doubt, the necessary catalyst for the Constitutional Court to develop the constitutional complaint as an effective remedy in this protection. Moreover, the Constitutional Court went in the direction of the other function of the constitutional complaint, which is - referring to the German constitutional jurisprudence - upholding the objective constitutional law and serving its interpretation and development.

In relation to the judiciary, the Constitutional Court, by its decisions, conducts so-called "constitutional teaching", which focuses on the change of the mind-set of competent judicial bodies with the aim of detention in relation to the right to liberty.

Still, this is not an easy task for the Constitutional Court. Croatia is still facing the challenges of a society that aims to be a country based on the rule of law. The Croatian public is exposed to a number of cases of corruption by public figures as the main actors. In such circumstances, the views of the Constitutional Court in many cases affect the position of the judiciary when quashing their decisions. Only well-founded and reasoned decisions of the Court in the protection of the right to liberty diminish this possible projection, leaving at the same time enough space to the respective bodies to further knowledge of the legal norms that deal with the right to liberty.

To conclude, after 25 years of the constitutional complaint's existence in Croatia, it can be freely said that its use by the citizens of Croatia as well as its understanding by the Croatian Constitutional Court contributed tremendously to raising awareness of the importance of human rights and freedoms. Moreover, the constitutional complaint in Croatia is increasingly recognized as an effective national remedy for the protection of human rights.

¹⁷ Judgment of ECtHR, *Mooren v. Germany* (App. 11364/03, July 9, 2009).