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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SEMINAR

on “Economic transition: property rights, restitution, pensions and other issues
concerning the constitutional protection of economic rights of citizens”

Bishkek, 27 – 28 April 2001

**Case-law on the constitutional protection
of economic rights of citizens in Croatia**

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Case law on the constitutional protection of economic rights of citizens in Croatia

1. How a person living in Croatia comes before its Constitutional Court?

In an extremely easy and cheap way: everyone may apply directly to the Court, no intervention of a body is obligatory, no help of advocates is prescribed, there are no Court fees to be paid. Everyone, that is every natural or legal person may write to the Court and ask its protection (art. 36 of Constitutional Act on the Constitutional Court, further: CACC).

2. Croatian Constitutional Court is authorized to perform – in all – eleven functions (art. 129, 123 of the Constitution, further; CONST), but when economic rights are concerned three are possible:

a) propose to the Court to review constitutionality of a law, a "law" being the general act passed by legislator,

b) propose to the Court to review constitutionality and legality of other regulations, it is of sub legal acts, for instance acts passed by the Government, by territorial units, by ministers,

c) to submit constitutional action against individual acts by state bodies, bodies of local and regional self-government units and acts of legal persons with public authorities (art. 59 CACC).

One of the differences between the first two and the third case is that a person who proposes review of constitutionality of laws, or who proposes review of constitutionality and legality of other regulations, does not have to fight for its own interests, he, she or it, if it is a legal person, might fight for general good, without being personally affected.

In case of a constitutional action the Court deals with persons who deem that their own constitutional rights are violated.

3. Which economic rights does Croatian Constitution protect?

There is a chapter in the Constitution called "Economic, social and cultural rights" and there are listed: first, (art. 48, 50 CONST) the right of ownership which also includes guarantee of inheritance; ownership is protected from restrictions and deprivation. It is possible to restrict one's ownership or deprive the owner of it, only in the interest of the Republic, and only by the act of legislator, and only if the owner gets compensation of its market value.

In case U-III-437/1993, ("Narodne novine", 7/96) the Court said: deprivation of property, of land, by decision of a municipal assembly is unconstitutional. In that case assembly of a territorial unit decided to expropriate privately owned land in order to achieve accumulation of water and regulation of brooks. The Court did not allow that.

4. The right to own property is constitutionally guaranteed, ownership as a rule – is inviolable (art. 3 CONST). There are no constitutionally limits or restrictions to it, apart from the principle that ownership implies obligations and that owners and users of property shall contribute to the general welfare (art. 48/2/ CONST).

Such legal system came after we lived for years in a system, which guaranteed only property rights of things, which served to personal use and personal needs. In previous system citizens could own a house or a flat for their personal use, it was prescribed how much land one could own, which and how much of means of production you could own, how many workers you could employ. Everything else was socially owned or state owned, and all these forms of ownership, social, state and private, by 1990 Constitution were to be changed into only one form of ownership, private ownership consisting of possession, use, management and disposal of things. In order to work this right in detail the legislator had to pass Act on Ownership, which has about 400 long provisions.

5. 1990 Constitution did not mention social ownership at all, it introduced only one category of ownership, so after the Constitution came process of transition, of transformation, which is still going on. This process is change towards known and defined owner, either a natural or a legal person. It happens through the procedure, which is finished with registration of owner. There is land register, which includes registration of everything built on the land (this registration is done by municipal courts), and registration of firms (this registration is done by commercial courts).

6. In case U-I-474/1996 ("Narodne novine", 27/98) the Court dealt with transformation of "Zagreb Fair". It was a socially owned enterprise for organization of fairs and exhibitions. The enterprise was founded by City of Zagreb, and in process of transformation became a limited liability company owned by City of Zagreb. The transformation of ownership passed all procedures and was completed, the registration was done. Then came the legislator and passed the Act on Transformation of Zagreb Fair according to which Zagreb Fair had two owners, the City of Zagreb and Republic of Croatia, in a way that 60% of share capital belonged to the Republic of Croatia, and 40% to the City of Zagreb.

The proposal to review constitutionality of the Act said that it violates ownership rights, and the Court found these rights violated. The Court said: the transformation of ownership was completely carried out before the disputed law became valid. The disputed Act, although called the Act on Transformation, did not transform the ownership but altered the shares in property depriving the City of Zagreb of 60% of its shares. From constitutional point of view this was deprivation of property, without legal grounds for the expropriation and without compensation prescribed by the Constitution. The Act was repealed.

7. In case U-I-39/1997 ("Narodne novine", 53/99) the Court protected individual persons in process of privatization: the claimant owned a number of shares in the firm but Privatization Fund renewed proceedings of privatization of that firm. During these proceedings a new value of capital stock was established, the consequence of which was a decrease in ownership rights of the claimant. In that new procedure the claimant did not have the status of the party. The Court said: he also should have been a party in these proceedings, he had to have a possibility of

making a statement about the new facts and new evidence which were the base for renewal of proceedings.

In the case U-III-1056/1994 ("Narodne novine", 23/95) the Court also repealed disputed acts and said that all persons concerned by process of transformation of ownership rights have the right to take part in procedure concerning that transformation, including former owners and the people who were their heirs.

8. As in the case of Zagreb Fair in case U-I-697/1995 ("Narodne novine", 11/97), the State was also on the losing side before the Court. Enterprises have for years built or bought flats for their employees; a lot of money of firms went into it. These flats were socially owned, people in them had tenants' rights. After the Constitution the State passed the law according to which the flats were to be sold to tenants, for prices very convenient to tenants, for considerably lower prices than was the market value of these flats. The sale was performed through contracts, but without much of contractual freedom, because the Law prescribed who has the right to buy flats, that is to conclude such a contract, and at what prices. The firms, which paid for these flats, were far away from getting what they invested when they acquired them.

There were also the flats, which the State did acquire with budget resources; the Republic bought them with means from the Republic budget, the territorial units from budgets of municipalities or counties. When the time came that these flats are also to be sold to tenants the State changed the Law on sale of flats. Now the flats became more expensive and conditions to buy them became stricter.

The Court repealed the Law and said: there are no grounds in the Constitution on which the legislator may put the State in a position essentially different when it sells the same things as do other subjects. Here the State sells the same commodity as other sellers, namely flats burdened by rights of tenants who live in them, and it should not be in a position essentially different from the position of other sellers. If the legislator establishes differences among subjects who are in the same position, these differences must be objectively founded and acceptable from the point of view of the Constitution. Here it is not the case. The Law was repealed.

9. In case U-II-240/1999 ("Narodne novine", 58/99) a decision passed by a territorial unit prescribed that owners of buildings in zones near rubbish dumps have a right to compensation for the decrease in market value of their houses. Persons who owned land with no buildings on it were expressly excluded from such compensation. The Court protected owners of land from point of view of equality and said they are not to be excluded from the right of such compensation.

10. Further on in the Constitution among economic rights protected are (art. 49, 50 CONST) entrepreneurial and market freedoms, equal position of entrepreneurs on the market, there is prohibition of monopolies. Entrepreneurial freedoms, as well as ownership rights, may be – as an exception – restricted in order to protect the interest and the security of the Republic, nature, human environment and public health. The rights acquired through the investment of capital shall not be diminished by law, or by any other legal act. Foreign investor shall be guaranteed free transfer and repatriation of profits and the capital invested.

The same chapter in the Constitution has also provisions concerning social rights, particularly rights concerning labour and social security. (art. 49/3/, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69 CONST).

There is a widely spread opinion that our Constitution promises protection to exceptionally great number of social rights, promises only, because the transitional realities are another story. The fact that Constitution guarantees you work, healthy environment and decent standard of living may mean that in reality you have none of them. But still, even these promises influence the practice of courts, they are guidance for the legislator, they are considered to be aims to be achieved at least gradually.

But as regards economic rights the opinion is that the Constitution should contain only the most essential principles, so that the freedom of economic activities is not subjected to detailed regulation. The whole transition goes from the society in which you could do what was permitted towards the society in which you can do everything but what is forbidden.

11. This process of change has to change very many legal solutions. Some legal provisions now, only several years after, seem unimaginable.

In case U-I-46/1992 ("Narodne novine", 5/95) the Court reviewed the Act regulating media and repealed the provisions which allowed private individuals to publish only their original works, literary, scientific or other, but not works of others. The Court said that it restricts freedom of enterprise, market freedoms and also artistic and scientific freedom.

One decision of local government in case U-II-633/1994 ("Narodne novine", 31/98) regulating public order and peace prohibited all constructional works during tourist season between 15 June and 15 September. The decision was disputed by a construction firm, which claimed violation of its entrepreneurial freedom and equal legal status on the market.

The Court examined what the Constitution and laws authorize local government to regulate – misdemeanors against public order and peace and protection from noise – but in none of them found grounds for complete prohibition of business activities. The disputed provisions were repealed.

In case U-I-28/1993 ("Narodne novine", 32/96) the disputed provision said that without proof of payment of the real estate tax the transfer of ownership of real estate cannot be entered in the land register. The Court held that restricting the ownership in such a way was neither protection of interest or of security of the Republic, nor of nature, human environment or health, that it only helps collecting of taxes, which could be achieved by other ways. So, having found that prescribed restriction of ownership goes beyond Constitution, the Court repealed that provision.

What the Court also had in mind was following: ownership of real estate is acquired with entry in public records, in land register. In Croatia there is a deep gap between factual situation and land register situation, because many transactions were not registered, the land was possessed and used without registrations, and this diminished the confidence in registers. The Court held that all obstacles towards a reliable land registers – and the disputed provision was one of them - are to be removed from legal system.

12. In case U-I-1156/99 ("Narodne novine", 14/00) the basic fact was: the Law on Use of Tobacco Products came into force on 8th December 1999 and it prohibited sale of tobacco products from vending machines from 1st January 2000. The aim of the Law was prohibition of sale of tobacco products to persons younger than 18 years, one cannot control to whom you sell cigarettes when you sell them through vending machines. The Law practically meant that owners of vending machines had about 20 days to close their business.

The Court repealed in the Law the provision that said that sale of tobacco products from vending machines is forbidden from January 1st of year 2000 and the provision that said how much money a person who continues to sell cigarettes after that date shall have to pay as a fine.

The main idea of the Court's decision was: a law that prohibits a previously legal economic activity, or introduces restrictions on it, without leaving a reasonable period of time during which the affected subjects might adjust to new conditions of business, is unconstitutional.

Which constitutionally protected rights and freedoms were restricted?

Among those mentioned in the decision were: ownership, entrepreneurial and market freedom, equal status of all entrepreneurs on the market.

At the time when the decision of the Court was passed there was a provision (art. 17) in the Constitution which concerned the state of war and natural disasters etc. which said: in such states constitutional freedoms and rights may be restricted but the extent of such restriction shall be adequate to the nature of danger and may not result in the inequality of citizens in respect of race, colour, sex, language, religion, national or social origin.

From that provision the Court concluded that it contains the principle of proportionality according to which rights may be limited only as far as it is necessary in order to achieve the effect intended by the state measure. Then the Court further concluded: if the Constitution expressly compels to the implementation of the principle of proportionality under extraordinary circumstances, then this principle should be even more valid under ordinary circumstances.

After that conclusion there were two issues to answer: were the restrictions of rights and freedoms introduced with the legitimate aim, and are they proportional to the legitimate aim?

The aim was protection of health of minors, the aim was legitimate.

But proportionality can exist only if measures undertaken in order to ensure a legitimate aim are not more restrictive than necessary. In that case the Court found them more restrictive, the people who sold tobacco products did need more time to adjust to new conditions of business. The legislator had either to give them reasonable time or prescribe their right to indemnity. From that standpoint the provisions were repealed.

The Croatian Constitution was changed after the Tobacco sale decision was passed. By its text from November 2000. the provision about restriction of rights was amended. it says now: Every restriction of freedom or right shall be proportional to the nature of the need for restriction in each particular case.

13. For a comparison let us look backwards. Croatia has its Constitutional Court since 1963. In the first decades of its work the Court checked whether legislator was authorized by the Constitution to regulate a certain economic issue, and whether the law was passed in the right procedure, with necessary majority, and if the law was not directly in contradiction with the Constitution the decision of the Court was: the law is not unconstitutional, it is a matter of economic policy. Applying the principle of proportionality the Court makes further step into the content of laws, judging how is legislator doing his job. Constitutional Court may also say: this legislation is not precise enough and repeal a provision in a law for that reason.

14. The same principle of proportionality was applied in case U-I-236/1996 ("Narodne novine", 50/00) where the Court also said: restriction of ownership rights, although undertaken towards a legitimate aim, violates constitutional rights when there is no proportionality between the aim and the extent of the restriction. The subject of review was the Law on the Status of Displaced Persons and Refugees. On grounds of that Law accommodation was provided for persons, who were compelled to leave their homes due to the war against Croatia, in houses and flats of other natural or legal persons. The disputed provisions of the Law provided that all procedures of forcible eviction of displaced persons shall be suspended until they can return to their own homes or until they are, subject to their consent, provided with other suitable accommodation.

The Court held that the restriction of ownership (and tenement rights) of persons whose property displaced persons were using was undertaken with a legitimate purpose. However, the extent of the restriction of property dispossessed persons was not proportionate to the purpose: the disputed provisions restricted ownership without any compensation, the time during which ownership was to be restricted was not specified and the restriction of ownership was linked to the consent of evictee. The Law was found unconstitutional.

15. Our legal system still contains solutions in which it is given as the competence to administrative bodies to decide about person's civil rights and obligations. For instance in Law on Expropriation it was given to administrative body to decide first about the proposal for expropriation and then about compensation for the expropriated real estate. The further step in procedure, after two administrative degrees, is Administrative Court, which performs judicial review of administrative acts.

Art. 6. of European Convention for the Protection of Human Rights and Fundamental Freedoms, which concerns right to a fair trial, says that about person's civil rights and obligation should determine an independent and impartial tribunal.

During procedure in case U-I-745/99 ("Narodne novine", 112/00) it was established that Croatian Administrative Court is not a court of full jurisdiction, it does not as a rule independently establish facts but decides on ground of facts which are established by administrative bodies and they, being organized in a hierarchical order, the lower ones being bound by instructions of higher bodies, might not establish the facts impartially. Therefore the Administrative Court is not an independent and impartial tribunal in the sense of Art. 6 of European Convention. The conclusion of the case was: if civil rights and obligations are decided by administrative bodies which do not comply with independence and impartiality, then at least the decisions of these bodies are to be controlled and reviewed by a court of full jurisdiction,

independent and impartial. Since in the case of expropriation it was not so, several provisions of the Law were repealed, but with a suspended effect.

16. Review of constitutionality of Law on Compensation for Property Deprived during the Yugoslav Communist Rule, in case U-I-673/1996 ("Narodne novine", 39/99), was proposed mainly by former owners of that property. Included were also their heirs, who never became former owners. Their idea was that they should get the property back, in natural state, if it still exists.

But the point of the Court's decision was: the fact that the Law did not reestablish entirely the rights of former owners over deprived property does not make the Law unconstitutional, it was up to the legislator's judgment to determine which property to return in nature, and for which compensation shall be paid, and also which amounts of compensation are to be paid.

The main reason for the decision was: because there is no provision in the Constitution which deals with restitution of deprived property, or compensation for it, the legislator is free to decide which property shall be returned in natural state, and for which shall former owners get compensation.

The main problem were the flats which were nationalized 40 years ago, former owners wanted them back, the tenants who lived in them all those years, invested in them and were afraid that they might lose a roof over their heads. What did the legislator do? He gave to tenants the right to buy flats in which they live, and not by market prices but in much cheaper way. But in case of subsequent property transactions the persons who bought the flats in such favourable conditions have to offer them first to former owner and at the price for which they had it bought himself.

What was repealed in the Law?

First the provision, which said: under this Law rights are recognized to natural persons who on the day on which this Law becomes valid have Croatian citizenship.

Also the provisions according to which foreign natural and legal persons were not entitled to the rights under this Law.

The Court also found the provision according to which in case of subsequent property transactions of the flat bought by the tenant the former owner had preemptive rights. That provision was repealed not because it was thought that preemptive rights of former owner are unconstitutional, but because they were introduced without any deadline. Such restriction of ownership had to have an end, otherwise the idea of notion is distorted.

The Court also said: the term "property transactions" is not precise enough. It includes sale, but what about donations, inheritance?

Repealment in this case did not have immediate effect but suspended one. Repealed law or repealed provisions of law cease to be valid on the day of publication of Court's decision, if the Court does not determine another day.

17. The picture of economic relations in Croatia would not be complete if art. 52. of the Constitution were not mentioned. It says: the sea, seashore and islands, waters, air space, mineral wealth and other natural resources, as well as land, forests, fauna and flora, other parts of nature, real estate and goods of special cultural, historic, economic or ecological significance, which are specified by law to be of interest to the Republic of Croatia, shall enjoy its own protection. Law shall regulate the way in which goods of interest to the Republic of Croatia may be used and exploited by bearers of rights to them and by their owners, and compensation for the restrictions imposed on them.

Some of these goods of interest to the Republic can be nobody's ownership, seashore is not owned by anybody, not even the State. The forests and land, for instance, are objects of ownership, but "special protection" of the Republic means very often restrictions for owners when they use that property.

Zagreb, 05. 04. 2001.

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