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THE REACTION TO NEGATIVE CRITICISM OF COURT JUDGMENTS

REPORT

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1. INTRODUCTION

The public and public opinion play an important role in social life and development.

The actors of social life, especially in politics, often use public opinion to support their views, serve as a guideline for important decisions, justify why existing conditions must be changed or to explain conduct of a certain kind.

On the other hand, the public often tries to influence and sometimes even to dictate the behaviour of those actors, and to do this it usually makes use of the media to carry its messages. Public opinion always gets media attention and one can often read or hear that the public is against something or supports it, which puts public pressure on decision-makers.

This kind of public pressure influences the behaviour and work, and sometimes even the fate, of the institutions and individuals it targets in varying degrees, regardless of whether it is justified or not or whether the public is right or wrong.

There is no doubt that the public directly influences people's habits and behaviour as well as the creation of a subject's public image. Thus subjects exposed to public opinion must take good care to explain and justify their activities and decisions as soon as public pressure appears in even its mildest forms, so as to acquire or retain their "good image".

At the same time, public opinion has a direct influence on decision-makers. There is no doubt that they want to ensure public support, which provides their decisions with legitimacy or at least creates an appearance of legitimacy. Even a faulty or wrong decision can seem well-founded and just if it concurs with public opinion. Sometimes the power of public opinion can place the decision-maker before a serious dilemma: whether to make an unpopular decision or to yield to public pressure and secure public support, from which it might later secure some kind of benefit.

Although much has been written about public opinion, there is no uniform definition of the concept. Dewey sees public opinion as a view of public affairs formed and supported by members of the public. Lippmann defines public opinion as pictures in peoples' heads, images about themselves, about others, about their needs, aims and relations.[1]

Public opinion is usually seen as the opinion a relatively large number of persons in a particular society (the "general public") have about a particular issue. It develops when many people think the same about that issue and are aware that their opinions agree.

When public opinion is assessed it is always necessary to remember that "having an opinion about something" does not necessarily mean "knowing anything about it". Public opinion can be formed on the basis of prejudice, disinformation, unconfirmed rumours, lack of information and many other indirect factors.

Furthermore, public opinion is not static and always completely clear; it is connected with particular circumstances, persons, objects and various other factors. Its creation is a complex process that can include interdependent relations, opposed interests, group membership, social position and many other relationships. Some of these factors can be

[1] See: Skoko (2006): 98 – 99. John Dewey (1859 – 1952), American philosopher, educator and social reformer (*The Public and its Problems* /1927/); Walter Lippmann (1889 – 1974), American writer and journalist (*Public Opinion* /1922/)

influenced or even controlled. Because of this, Lippmann said that the 20th century brought the technology for *the manufacture of consent,* i.e. it created conditions in which public opinion could be controlled even in world proportions. And controlling public opinion also implies controlling public behaviour in general.

Consequently, the existence of public opinion about a subject or controversial issue does not mean that it is right.

Nevertheless, everybody considers public opinion very important. Public opinion polls strongly influence the creation and implementation of policy and the total behaviour of political leaders. Political bodies begin their working day by meeting with their communication strategy experts in an attempt to discover how the nation is "breathing", to come up with an effective answer to the wishes and needs of the general public and even to create its taste. Thus public opinion is no longer only the subject of events but also their object, confirming Lippmann's theory about "the manufacture of consent".

Although this concept is difficult to define and does not always have only one meaning, from the aspect of its participation in and influence on social events the general public may be broken up into smaller groups.

Thus, for example, there is the division into:

1. nonpublics – who are not concerned with a certain issue or organisation and who therefore do not undertake anything,
2. latent or hidden publics - who observe a common issue as the consequence of an organisation's activities but are not aware of their connections to a situation,
3. aware publics – who observe and understand the issue, but do not act, and
4. active publics – who confront the issue, recognise it and organise themselves so as to discuss it and do something about it.[2]

Publics can also be grouped by how they behave toward messages and issues.

- apathetic publics - who are inattentive and inactive on all issues,
- all-issue publics - who are active on all issues,
- single-issue publics - who are (usually fervently) active on a particular issue or a limited number of kindred issues,
- hot-issue publics - who respond and become active only after the media have revealed almost all the actors, and the issue has become one of widespread public discussion.[3]

Public relations and public opinion are not important only for political institutions but for judicial ones (in the broader sense) as well. This is especially true when their decisions directly or indirectly affect the rights and/or interests of a large number of people. The situation is especially complex when the decision is unpopular and when the public expresses its negative stand either before or after the decision has been made.

2. EXPOSE OF THE CONSTITUTIONAL COURTS TO PUBLIC OPINION AND POSSIBLE CRITICISM

Under present conditions the countries that accepted the Kelsenian model of constitutional justice gradually also accepted and developed other competences for their constitutional courts, besides the defence and interpretation of the constitution. Many other

[2] Tafra-Vlahović (2007): 37.
[3] Cutlip *et al.* (2003): 268 – 269.

competences were added to the basic one of controlling the constitutionality of legislation passed by the legislative authorities.

With reference to the above, Lopez Guerra differentiates between four broad groups of competences assumed by contemporary constitutional courts in the countries that started from the original Kelsenian model or consolidated system of constitutional jurisdiction:

1. control of the constitutionality of statutory law,
2. resolution of conflicts between territorial entities within the state,
3. defence of fundamental rights recognized in the constitution,
4. intervention in legal procedures considered particularly important for the political life of the State (control of the constitutionality of political parties, control over electoral procedures and the like).[4]

By the nature of things, all these competences of constitutional justice to a greater or lesser extent always include political elements. However, one of the particular aims of constitutional justice is to avoid political undertones. The constitutional court is given the jurisdiction to decide about an issue primarily by legal, not political reasoning.

Nevertheless, in practice it is sometimes difficult to establish what is a political and what is a legal issue, because every legal issue also has political consequences for the addressees of a certain norm. This results from the nature of the constitution as the political and legal document with reference to which decisions are made, and which represents a "link between law and politics" (Luhmann).[5] It is thus impossible to completely remove all political reasoning from constitutional justice and to reduce it to pure legal reasoning.[6] On the other hand, the portion of political reasoning must be brought within appropriate boundaries that will prevent the constitutional court from becoming a special political authority and misusing its basic judicial function. A special aspect of this problem is very pronounced in transition countries (which include Croatia) and is a result of decreasing confidence in political institutions and the transformative role of the constitutional court.

Constitutional courts guarantee compliance with and the application of the constitution in their countries. They are empowered to control the constitutionality of all the norms passed by governmental bodies and repeal acts of parliament and governmental decisions and regulations. Some constitutional courts may quash the judgments of regular courts, impeach the president, control political elections and execute various other powers.

Because of this, the activities of constitutional courts are potentially, and also in actual fact, very often exposed to public opinion. This can be expressed as pressure before and during constitutional court proceedings and as assessments (positive or negative) made after the court has reached its decision.

This especially refers to the constitutional control of laws and subordinate legislation regulating relations of special public interest, because they affect a wide circle of people and/or strongly impact their rights and interests.

Thus the constitutional court may have to control the constitutionality of a regulation which the public has already "decided" is unconstitutional and a media campaign is already underway clearly telling the court what is expected from it. The constitutional court can easily

[4] Lopez Guerra (1994): 14.

[5] See: Vrban (2011): 419.

[6] Because of this, candidates for the election or appointment of constitutional court judges are always required to have, besides the necessary legal experience, also a high degree of awareness and feeling for the political effects of constitutional court decisions, and are not elected or appointed only from among the judges of regular courts and attorneys, but also from among high government officials, professors and politicians, true, still only those that belong to the legal profession. Harutyunyan/Mavčić (1999): 235.

predict that it will be applauded if it decides in accordance with these expectations, but if it decides otherwise it will be criticised in the range from having made a wrong decision through incompetence and unprofessional conduct to corruption of the judges.

Whatever the reasons for creating public opinion in a particular situation and the measure to which it is based on objective information, knowledge and expertise, such pressure is objectively not easy to withstand. An additional difficulty is if a large number of people share this public opinion and are all sincerely convinced that they are right and are acting justly, and that their will must not be ignored.

How should the constitutional court act in this situation?

To answer this question, I will paraphrase a Hollywood film: *It is not difficult to do what is right; it is difficult to decide what is right. And when you have decided, then there is nothing else you can do!*[7]

It is therefore not difficult to say how the constitutional court should act when its professional finding and conviction differ from public opinion. Considering their scope and time effects, constitutional court decisions are too important for expert opinion to back down before public opinion, however widespread and strong it may be, if these two opinions do not coincide or are even opposed.

I consider that this stand needs no further exemplification.

However, this brings us to the next question: how to react when the decision of the constitutional court is subjected to the criticism of opposing public opinion?

3. REACTIONS OF A CONSTITUTIONAL COURT TO CRITICISM OF ITS DECISIONS

No decision maker of any kind, including constitutional courts, can avoid occasional criticism. When proceedings before a constitutional court are a continuation of earlier contradictory proceedings, there is sure to be criticism because this is a zero-sum game in which the gain of one side means the loss of the other. But criticism can appear in other kinds of proceedings, as well, especially when the case is one of great public interest, regardless of the reason why and of whether public opinion is united or broken up into opposing camps.

Bearing this in mind, every constitutional court should prepare a strategy for preventing predictable criticism in advance, before the decision has been made, and for reacting to criticism that is expressed after the decision has been made.

Yet techniques for achieving this are very limited because many of the activities that are more or less permitted in other areas (negotiations, lobbying…) can by the nature of things not be used in constitutional court proceedings.

If criticism can be expected, it is best to take appropriate preventive measures to forestall it before the unpopular decision has even been made or to decrease and mitigate it after it has been made.

To do so, the constitutional court must first assess public opinion in a particular case, consider who makes up the active public and whether to address it, and whether to deal with the latent and aware public at the same time before they, too, become active.

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[7] *The Confession* (1999), directed by David Hugh Jones.

After that the constitutional court must decide whether it would be useful to organise a public consultation during the proceedings to secure complete expert arguments about what is proper and suitable in the particular case. Moreover, depending on the subject of the proceedings and the scope of public interest and engagement, the public consultation could be organised with the public at large, the interested public or only the expert public.

During the proceedings the constitutional court, i.e. its judges, should as a rule not make statements and talk publicly about the case, because this could be seen as prejudging the decision and could later lead to even stronger criticism.

The public's reception of a constitutional court decision that does not meet its expectations greatly depends on how it has been substantiated and how the media reported about it.

The decision's statement of reasons is especially important, because the content and intensity of the criticism hinge on its quality. The statement should be an expert explanation of the decision, not an apology for its substance. A good statement prevents negative criticism by experts or enables preparing a proper answer to it if it is groundless.

In the case of the general public and the media, however, the situation can be different. Sometimes a quality statement with clear reasons and expert arguments does not prevent the public from criticising a decision that is not to its taste. And the media, unlike the constitutional court, need not oppose public opinion even when they know that it is not right. Thus they not infrequently, in their own interests (bigger circulation, better sales, more viewers), support negative public opinion unreservedly even when the constitutional court was obviously not wrong.

Under such circumstances, how to react can become a serious issue.

In the first place, the constitutional court should ensure that the regular activities connected with the public nature of its work, although not directly connected with the specific case, are performed on time: public proclamation of the decision, publication of the decision in the official gazette and on the website, official public statement about making the decision.

Some constitutional judges deem that this is always enough and that the constitutional court, in view of its importance, standing and professional superiority, should and even may never do more under any circumstances, and should especially not react to criticism of its decisions.

However, other constitutional judges hold more moderate opinions and think that it is wrong to ignore all criticism and absolutely "respond by silence", because this has a contrary effect to the purpose and aim of constitutional justice: it forms a public perception about an elitist group that does not answer to anyone for anything, which generally weakens people's confidence in democratic institutions.

Therefore, if a decision of the constitutional court is criticised, it is first necessary to decide whether to react to the criticism, and this depends on its content and how serious it is.

The constitutional court must certainly react in a fitting way to criticism that is seriously inaccurate and unjustified, taking care not to infringe on the freedom of expression or prevent the expression of criticism as such. This refers to the kind of criticism that attacks the court's decision by using falsehoods and/or deception, which can significantly harm the court or adversely affect the performance of its constitutional tasks.

It is appropriate to respond to criticism:

- if it results from not understanding how the system works, or the role of the constitutional court, or if it is partly based on that kind of misconception,
- when the criticism is serious and will probably have a significant negative social influence,
- when it contains inaccuracies or is deceptive.
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In making a final decision about whether to react to criticism and how to do so, it is necessary to assess:

- can the answer additionally clarify the procedure or the reasons for making the decision,
- will the answer rectify the wrong, inaccurate or deceptive informing of the public,
- will the answer have the adequate meaning and serve to inform the public,
- could the answer be misunderstood as having been given in the court's own interest (justification, apology…),
- can the answer contribute to the public's better information about an important issue that was the subject of the proceedings or is connected to them in some way.

The practical techniques or manners that are at the disposal of constitutional courts for reacting to criticism of their decisions are well known:

- request to publish a correction,
- public statement,
- press conference,
- interview,
- writing and publishing expert materials.
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The decision about which of the above reactions to public criticism to chose in a particular case may depend, among other things, on the relationship between the constitutional court and the media.

If the subjects are of great public interest and the media are campaigning by reporting about them every day, the communications of the constitutional court or statements of its judges could be misquoted, interpreted or the media could denigrate the court in some other way. This kind of treatment could adversely affect understanding, assessing and accepting the court's decisions.

There are three basic explanations for such a negative media presentation:

1. a mistake,
2. they believe that they are writing (telling) the truth (and are ready to defend this),
3. they have bad intentions.

If a medium has made a mistake and the court can show that this is the case, then a correction must certainly be made and the medium requested to publish it in an appropriate manner. Some media do this gladly, making corrections in a text to indirectly show their journalistic care for correct information.

If the media believe that what they have published is the truth, they should be shown in an appropriate and substantiated manner that this is not so.

If, however, there is a bad intention, the court should stay calm, prepare an answer and show that the media presentation is incorrect and unjustified.[8]

Whatever the case, the following two rules must be borne in mind when dealing with media attacks and assessing how to react to them:

1. if you react too strongly, you risk informing the people (part of the public) who had not even seen it about the attack against you;
2. if you are conducting a war against the media, your reaction cannot give you victory – if it is a good reaction, it may possibly help you lose with a smaller difference.

There are various options as to who should address the public in the name of the constitutional court:

a) always and only the president of the constitutional court; by the virtue of duty the president represents the constitutional court so need not consult the other judges when addressing the public, which may depend on the occasion, subject and specific circumstances;
b) each judge of the constitutional court, on his/her own initiative (which could be a bad variant) or in agreement with the president and/or other judges (which is certainly to be recommended);
c) the judge who was involved in the specific case (the reporting judge; on his/her own initiative or in agreement with the president and/or other judges);
d) a special person authorised for public relations by the constitutional court (spokesperson; this could be one of the judges, the secretary general or a PR official; he/she always addresses the public in agreement with the president and/or other judges)[9];
e) a combination of several or all of the above options.

4. EXPERIENCES OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Unlike some other constitutional courts, the Constitutional Court of the Republic of Croatia (further in the text: the Constitutional Court) does not belong to the judiciary but is a constitutional body independent of all the bodies of state power. Because of this, it is a kind of "fourth" power in addition to the classical separation of powers into legislative, executive and judicial.

The Constitutional Court guarantees compliance with and application of the Constitution of the Republic of Croatia[10] and is empowered to control the constitutionality of the acts of all the three branches of government. It is empowered to repeal laws passed by the Parliament, regulations and other subordinate legislation brought by the Government and its ministers, and quash judicial decisions, including also the decisions of the Supreme Court. Under certain conditions the Constitutional Court may impeach the President of the Republic. Furthermore, it is the supreme controller of the regularity of all electoral proceedings (parliamentary, presidential, local) and of the national referendum.[11]

The public nature of the Constitutional Court's activities is realised through:

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[8] Essex (2008): 161.
[9] For example, the spokesperson for regular Croatian courts is always one of the judges in that court.
[10] *Narodne novine*, no. 85/10 (consolidated wording). Accessible in English at www.sabor.hr/Default.aspx?art=2405.
[11] The jurisdiction of the Constitutional Court is provided for in Article 129 of the Constitution (consolidated text).

- the publication of its decisions,
- the printing of collections of decisions,
- the presence of representatives of the press and other media at sessions and public and consultative discussions in the Constitutional Court,
- television and radio broadcasts,
- delivery of official communications to the media,
- holding press conferences,
- publication of the Constitutional Court's case-law and important data on its web page (www.usud.hr).
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Furthermore, in this context it is important to emphasise that proceedings to review the constitutionality of a law before the Constitutional Court may be instituted in two ways:

- by a request of the statutory proponents (one fifth of the representatives or a working body of the Parliament, the President of the Republic, and under certain conditions some other proponents as well – judges, ombudsman etc.)
- by a proposal (in the nature of an initiative) submitted by any natural or legal person, without the obligation to prove any kind of personal interest (*actio popularis*).
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On several occasions the Constitutional Court decided in cases that were of great public interest. Sometimes public opinion was strongly expressed even before the proceedings were instituted and during them, and some of the decisions made by the Constitutional Court met with an extremely negative public reaction.

As a rule, however, the Constitutional Court did not officially react to the negative public opinion about its decisions. Instead, the president and the judges of the Constitutional Court made use of particular occasions to additionally clarify the reasons for making the decisions: by giving interviews, delivering papers at professional and scholarly meetings and the like. Exceptionally, in the case of inaccurate quotations and interpretations that had to be corrected, the Constitutional Court sent communications to the media.

I shall continue by showing four characteristic examples of public criticism of decisions from the more recent practice of the Constitutional Court.

4.1 Review of the constitutionality of the Pension Insurance Act[12]

The proceedings were instituted on the initiative of several natural persons who disputed, among other things, the constitutionality of the provisions of the Pension Insurance Act whereby men and women were entitled to a retirement pension at different ages.

In the proceedings the Constitutional Court found that these provisions contravened the Constitution because they departed from the highest values and fundamental guarantees of the constitutional order of the Republic of Croatia *("… equal rights … gender equality … are the highest values of the constitutional order of the Republic of Croatia and ground for interpreting the Constitution."* /Article 3 of the Constitution/; *"All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of … gender … All persons shall be equal before the law."* /Article 14 of the Constitution/). At the same time, as harmonising these provisions of the Pension Insurance Act with the Constitution required a reform of the immense, extremely complex and very sensitive system of pension insurance,

[12] Decision U-I-1152/2000 and others of 18 April 2007, accessible at: www.usud.hr (in English as well).

which could not be implemented in a short time, the Constitutional Court laid down that they shall go out of force on 31 December 2018.

In the statement of reasons of the decision the Constitutional Court, among other things, gave a survey of the legal stands and conditions concerning the age for entitlement to a pension in the national legislations of Council of Europe and European Union member states, and compared them with conditions in Croatia. It, furthermore, referred to the case-law of the European Court of Human Rights in Strasbourg and gave a detailed presentation of the facts, circumstances and legal standpoints expressed in the Grand Chamber judgment in the case of *Steck v. the United Kingdom.*[13]

Although the decision of the Constitutional Court was well substantiated, detailed and clear, it caused real public upheaval. The reaction of non-governmental women's rights organisations (B.a.b.e., Roda and others) was especially vehement, calling the decision "scandalous", "hypocritical", "socially insensitive", "feministic" and the like.

Moreover, carried forward by the criticism of non-governmental organisations, media comments additionally stoked up public criticism and anger.[14] They misinformed the public by saying that the Constitutional Court had laid down that in future women would be entitled to a pension at the age of 65, which is the age required for men, instead of at the age of 60.[15] In its decision, however, the Constitutional Court did not define the age necessary for entitlement to a pension at all, because this is a matter for the legislator. It only found that setting a different age for entitlement to identical rights, depending on the sex of the addressee, does not comply with the Constitution and that the age must be the same for persons of both sexes, without defining what the age must be.

The Constitutional Court, however, made no direct official reaction to the criticism.

4.2 Review of the constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act (Special Tax Act)[16]

In July 2009 the Croatian Parliament passed an act introducing a special (additional) tax on salaries, pensions and other receipts as a measure for mitigating the economic and financial crisis, with a time limit for expiry on 31 December 2010.

The President of the Republic submitted a request for the review of the constitutionality of the Special Tax Act. Besides the President's request, in a short time the Constitutional Court received 110,662 proposals (initiatives) to institute proceedings to review the constitutionality of the Special Tax Act. The act caused great public dissatisfaction and some trade unions, citizens' associations and other organisations organised a campaign in which they published a standard form for a proposal to institute proceedings and took charge of collecting and filing the proposals with the Constitutional Court. In addition, the media relentlessly criticised the Special Tax Act, expressed their one-sided and exclusive standpoints and suggested what the finding of the Constitutional Court should be.[17]

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[13] Judgment of the Grand Chamber nos. 65731/01 and 65900/01 of 12 April 2006.

[14] For example: "A New Strike at Women's Status" (*Novosti*, 7 May 2007).

[15] For example: "Women, too, to be Pensioned at 65" (*Glas Slavonije*, 19 April 2007), "The Constitutional Court decided that both men and women will be pensioned at 65, finding the present provisions 'sexist" (*Vjesnik*, 20 April 2007).

[16] Decision and Ruling U-IP-3820/2009 and others of 17 November 2009, accessible at: www.usud.hr (in English as well).

[17] For example: "Professional Advice to the Constitutional Court: the encumbrance must fall" (tportal.hr, 16 October 2009).

In this way the Constitutional Court and its judges were under very strong pressure during the very proceedings.

Because of the great public interest and the pressure mentioned above, the president of the Constitutional Court held a press conference[18] during the proceedings at which she pointed out that in its decision-making generally, and in this case as well, the Constitutional Court will not implement the policy of any political party, trade union or non-governmental organisation, but that the only criterion for its work would be the Constitution interpreted in accordance with European legal standards.

With this in mind, the Constitutional Court implemented very exhaustive proceedings in which it:

- acquired the declaration and working materials of the Croatian Parliament (which enacted the Special Tax Act),
- acquired the declaration of the Government of the Republic of Croatia (which proposed the Special Tax Act),
- acquired the written expert opinions of expert advisors of the Constitutional Court,
- held a consultative public session with the participation of representatives of the proponent of the request, invited proponents, representatives of the Croatian Parliament, representatives of the Government of the Republic of Croatia and invited scholars in constitutional law, financial law, social policy and political philosophy,
- convened several consultative working meetings about some specific issues connected with certain aspects of the disputed Special Tax Act with expert advisors of the Constitutional Court from the Labour and Social Law Department and European Public Law Department of the Faculty of Law of Zagreb University,
- through the Venice Forum acquired the declarations of 21 member states of the Council of Europe and three non-member states showing the corresponding measures that they had taken because of the global economic and financial crisis, and which were comparable with the legal measures in the Special Tax Act,
- used the relevant case-law of the European Court of Human Rights in Strasbourg and the case-law of the Federal Constitutional Court of the Federal Republic of Germany, which is of universal importance for clarifying tax-policy issues in a welfare state, i.e., for clarifying the legislator's obligations in the application of the principles of equality and equity in taxation.

Guided by the reasons that were given for disputing the constitutionality of the Special Tax Act, in the proceedings of review the Constitutional Court applied the proportionality test in which it sought to answer the following questions:

a) What is the legislator's goal in passing the Special Tax Act and is this goal legitimate?
b) Does the Special Tax Act contribute to the realisation of the legitimate goal and is it part of the totality of public polity measures all of which together act towards its realisation?
c) Is the tax in the Special Tax Act proportional to the goal that the legislator wanted to achieve?
d) Is the tax in the Special Tax Act an excessive burden for its taxpayers?

[18] 19 August 2009.

e)

After the proceedings the Constitutional Court delivered a decision in which it found that, with reference to the reasons for which it was disputed, the Special Tax Act does not contravene the Constitution. In the reasons for the decision the Constitutional Court explained in detail the reasoning that led to the decision on 45 pages of text. The decision was also explained in short orally at a public session of the Constitutional Court in the presence of many journalists.

However, the decision all the same brought about great dissatisfaction and criticism, in which few people referred to the statement of reasons and to reasons based in constitutional law.

In this case the media gave an especially negative view of the work of the Constitutional Court.[19] Trade unions reacted just as fervently.[20]

The Constitutional Court did not directly react to the criticism because it considered that the public had been properly informed about the course of the proceedings and completely and clearly informed about the reasons for making the decision. The president of the Constitutional Court referred to it much later at a press conference called to mark the end of the second year of her term as president.[21]

4.3 Finding about the existence of constitutional requirements for calling a national referendum[22]

In May 2010 the Government of the Republic of Croatia submitted a proposal to the Croatian Parliament for amendments to the Labour Act whereby, among other things, a collective agreement remained in force after the expiry of the period for which it had been signed, if the parties did not manage to make a new agreement, but only for the next six months (under the act in force at that time, this time limit did not exist and an existing collective agreement remained in force even after its expiry until a new agreement was made).

The trade unions opposed these changes and started a campaign to collect voter signatures for calling a referendum at which citizens could declare themselves about whether they supported the legal provisions (then) in force. In this campaign 717,149 valid signatures were collected, which was more than the statutory minimum (10% voters), and the Organisation Committee submitted a request to the Croatian Parliament to hold a referendum.

Then the Government of the Republic of Croatia gave up the amendments of the above legal provision and withdrew the bill from parliamentary procedure.

However, the Organisation Committee requested that the Croatian Parliament should nevertheless hold the referendum, despite the Government's withdrawal from amending the law. The public and the media supported that request and created strong political pressure, and the trade unions used rather belligerent slogans.[23]

[19] For example: "A Gift to the Prime Minister from Jasna Omejec and ten Constitutional Judges" (*Jutarnji list*, 18 November 2009), "State Finances outweigh Justice" (*Novi list*, 18 November 2009), "The State is More Important than Justice" (*Glas Slavonije*, 20 November 2009), "A Strictly Controlled Court" (*Novi list*, 21 November 2009).
[20] For example: "The Court Confirms Extortion" (from: Business.hr, 18 November 2009), "Constitutional Judges return the Debt to the HDZ which Appointed Them" (from: *Večernji list*, 19 November 2009).
[21] Press conference of the president of the Constitutional Court of the Republic of Croatia, 7 July 2010.
[22] Decision U-VIIR-4696/2010 of 20 October 2010, accessible at: www.usud.hr (in English as well).

[23] For example: "If there is no Referendum our Answer will be Deadly", Danas.hr, 20 October 2010.

The Croatian Parliament requested a finding from the Constitutional Court about whether the Constitution required holding a national referendum under the given circumstances.

Aware of the great public interest, the Constitutional Court undertook extensive proceedings in which it, among other things, acquired the declarations of the Croatian Government and the Organisation Committee, expert opinions in writing of the Constitutional Court's expert advisors, and the view of the Venice Commission established in the Code of Good Practice on Referendums from 2009.

On the grounds of its proceedings the Constitutional Court found that in this case the preconditions for holding the referendum had ceased to exist after the bill had been withdrawn from legislative procedure.

In the detailed statement of reasons for its decision the Constitutional Court affirmed that by withdrawing the proposal of the act from legislative procedure the Government had in fact complied with the voters' will expressed in the 717,149 valid signatures and that this act of the Croatian Government had accomplished the objective which the voters had wanted to accomplish by singing for a referendum. In this legal situation, in the view of the Constitutional Court, there would be no legal sense or objective and reasonable justification to hold the referendum.

Although members of the legal profession gave a positive assessment of the decision, it nevertheless stirred up the public. Criticism by the trade unions was especially strong, and they publicly threatened petitioning for extraordinary elections, organising a general strike and protests throughout Croatia, even announced a request for abolishing the Constitutional Court. Some of the media commented the decision negatively, too.[24]

However, the Constitutional Court did not react officially to this criticism. Only later did the president of the Constitutional Court refer to the public criticism in connection with this case in one of her interviews.[25]

4.4 Review of the constitutionality of the Election of Representatives to the Croatian Parliament Act (Parliamentary Elections Act)[26]

Several proponents submitted proposals to review the constitutionality of amendments to the Parliamentary Elections Act, and they disputed, among other things, the constitutionality of the provisions under which voters – members of national minorities, have dual voting rights (they vote both for the "general list" and the special "minority list"), except for members of the Serb national minority who do not have this right (they may vote either for the "general list" or for their special "minority list"), but have the right to three reserved seats in the Croatian Parliament.

As this belonged to the politically very important and especially sensitive issue of national minority rights, and was at the same time a precedent in electoral systems, the Constitutional Court undertook extremely extensive proceedings in which it, among other things:

[24] For example: "Wise Leaders in the Constitutional Court" (*Večernji list*, 22 October 2010), "Trade Unions begin the Defence of Direct Democracy" (*Vjesnik*, 22 October 2010).
[25] TV channel Z1, programme "*Look Forward*", interview to Mladenka Šarić, 28 December 2010.
[26] Decision U-I-120/2011 of 19 July 2011, accessible at: www.usud.hr (in English as well).

- acquired the declaration of the Government of the Republic of Croatia (which proposed the law),
- acquired written expert opinions from the departments of constitutional law of faculties of law,
- held a consultative public discussion with the participation of proponents of the review proceedings, representatives of the Croatian Parliament and Government, the Minister of Public Administration and Minister of Justice, and representatives of the academic community,
- held an expert discussion with members of the Croatian Constitutional Law Association.
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On the grounds of its proceedings the Constitutional Court found that the impugned provisions of the Parliamentary Elections Act were not in conformity with the Constitution because constitutional law does not allow reserved parliamentary seats to be guaranteed in advance by law, in the framework of the general electoral system, to any minority on any grounds (national, ethnic, linguistic …) as this, by the nature of things, infringes equal suffrage within that system. It also found that under the specific circumstances the impugned provisions of the Parliamentary Elections Act about the supplementary vote of national minorities cannot be acceptably justified because it does not ensure a higher degree of national minority integration in political life than that already achieved, and at the same time it infringes the equality of suffrage to a far greater degree than the statutory measures in force earlier. Thus the Constitutional Court repealed the above provisions of the Parliamentary Elections Act.

The decision met with strong criticism by some national minority representatives who found themselves affected by the loss of status the repealed provisions had provided. Considering the sensitive nature of the material, it was no problem to “incite” some national minority members and the international community and use the media to create a degree of political pressure.[27]

However, in this case the Constitutional Court did not officially react either.

5. INSTEAD OF A CONCLUSION

The decisions of constitutional courts are of a nature and have effects that can under certain circumstances bring about negative public criticism.

The constitutional court must not neglect public opinion in the implementation of its jurisdiction because the public is the main support and source of constitutional strength through which people hold their rulers under control. However, public opinion cannot be the decisive factor underpinning the decisions of the constitutional court.

When a constitutional court decision is especially strongly criticised, the reasons for this must be discovered. In doing so it is important to perform an objective analysis to answer two inter-connected groups of questions:

1. What is the reason for the negative public criticism: disinformation and manipulation by smaller groups, insufficient knowledge about and acceptance of the legal and constitutional framework, loss of confidence in institutions or something else?

[27] For example: “A Step Back to the Ghetto”, *Novosti*, 5 August 2011.

2. Whether and how to react to public criticism: in general and in a specific situation, institutionally and informally, in the short and the long term?

To answer these questions it would be useful to have expert and scholarly research about the number and type of media that deal with the rule of law and the legal framework for the work of the institutions of society, the subjects they deal with, titles and sources, frameworks and approaches (journalistic, critical, informative, provocative, sensationalist, academic) and the like. Unfortunately, there is no such research.

It may also generally be said that media programmes and articles dealing with various subjects concerning the rule of law, principles of constitutionality and legality, human rights and freedoms and constitutional justice, in a manner that would be understandable and acceptable for the layman, are very rare, especially media that specialise in such material.

Under such circumstances there is no universal recipe. Constitutional courts will always face the same doubts and risks, from state to state, from court to court, from case to case.

But from each separate case a lesson and experience should be drawn for use in some future case.

However, there is no recipe to guarantee that no mistakes will be made. It is, therefore, perhaps the simplest to accept the rule:

Try again, make a mistake again, but make a better mistake.

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SUMMARY

The activities of constitutional courts are potentially, and also in actual fact, very often exposed to public opinion. This can be expressed as pressure before and during constitutional court proceedings and as assessments (positive or negative) made after the court has reached its decision. When a decision of the constitutional court is criticised, it is first necessary to decide whether to react to the criticism, and this depends on its content and how serious it is. The constitutional court must certainly react in a fitting way to criticism that is seriously inaccurate and unjustified, taking care not to infringe on the freedom of expression or prevent the expression of criticism as such. It is appropriate to respond to criticism: a) if it results from not understanding how the system works, or the role of the constitutional court, or if it is partly based on that kind of misconception, b) when the criticism is serious and will probably have a significant negative social influence, and c) when it contains inaccuracies or is deceptive. In making a final decision about whether to react to criticism and how to do so, it is necessary to assess: 1. can the answer additionally clarify the procedure or the reasons for making the decision, 2. will the answer rectify the wrong, inaccurate or deceptive informing of the public, 3. will the answer have the adequate meaning and serve to inform the public, 4. could the answer be misunderstood as having been given in the court's own interest (justification, apology…), and 5. can the answer contribute to the public's better information about an important issue that was the subject of the proceedings or is connected to them in some way.