Opatija Inter-University Centre of Excellence

Working paper

WP E2/2011

DEVELOPING JUDICIAL CULTURE OF FUNDAMENTAL RIGHTS

Siniša Rodin

Croatia: Developing judicial culture of fundamental rights

Siniša Rodin [1]

Introduction

Commitment to protection of fundamental rights has always been a central topic in the state- and identity building process of modern Croatia. After the decades of communist rule, the idea of fundamental rights offered an opportunity for definition of national identity. However, what followed in the 90's can best be described as bifurcation of normative and identity-building traits. On the one hand, all relevant legislative instruments, starting from the Constitution itself, enshrined powerful normative guarantees of fundamental rights. On the other hand, political discourse and practice relied on historic references of Croatian statehood, beginning from the 7th century, and to the right of Croatian people to establish an independent nation state. [2]

The Constitution itself, in a separate chapter, introduced an extensive bill of rights, to be protected by a reformed constitutional court, which was vested with power of abstract, concrete and accessory (constitutional complaint) constitutional review. Since 1991, the Constitutional Court has undergone a significant evolution in its approach to protection of fundamental rights. Starting from the early approach to application of international law which I have earlier characterized as "dualist inertia", [3] the Constitutional court has become a sophisticated interpreter of fundamental rights and a national leader in application of the European Human Rights Convention. However, while the EHRC standards have become a standard trait in reasoning of the Constitutional Court and an instrument occasionally used to quash decisions of ordinary courts, concerns were expressed that human rights jurisprudence of the Constitutional Court is formalistic and not genuinely motivated by protection of fundamental rights. [4] In that context, I will suggest that the Constitutional Court seems not to use case law of the ECtHRts as persuasive authority in argumentation, but quotes de-contextualized normative parts as a justification of decisions in individual national cases. In other words, practical recourse to fundamental rights is mainly instrumental.

This is not to say that Croatian authorities did not react positively in order to meet requirements of the ECHR. However, it is my suggestion that, the reactions were of "trouble-shooting" nature and not systematic, and that, substantively, did not genuinely contribute to strengthening of fundamental rights guarantees.

In the first part of this chapter I will first address the issue how jurisdiction of the Constitutional Court in respect of fundamental rights changed due to the demands of the ECHR. I will proceed with discussion of how the Constitutional Court addressed three issues:

---

[1] Jean Monnet Chair, University of Zagreb, Faculty of Law

[2] Croatian Constitution, Preamble

[3] Rodin, S., *Stabilization and Association Agreement – A Hostage of Dualist Inertia* - in Bruha, T, Vrček, B and Graf Wass von Czege, A. (Eds.), Croatia on the Path to the EU: Political, Legal and Economic Aspects, Europa-Kolleg, Hamburg 2003, pp. 37-47

[4] For Art. 6(1) of the Convention see e.g. Rodin, S. *Pravo na nepristrani sud u praksi Europskog suda za ljudska prava i Ustavnog suda Republike Hrvatske,* Novi Informator No. 5869-5870 (2010) p. 1 et seq.; for Art. 10 of the Convention see Đurđević*,* Z., *Pravo na slobodu izražavanja i Čl. 10 Konvencije*, in Kompatibilnost hrvatskih zakona i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, 2011 (in print)

indirect discrimination, right to an impartial judge, and principle of proportionality. Finally, I will present my conclusions.

22.1 Admissibility of Constitutional Complaint

The main mechanism for protection of fundamental rights before the Constitutional Court is the constitutional complaint procedure. The mechanism itself has been introduced by Arts. 28-30 of the Constitutional Court Act (1991). [5] Popularity of the Constitutional Complaint procedure and lack of meaningful docket control provisions imposed an ever increasing case burden on the Constitutional court. According to the statistical information provided by the Constitutional Court, some 39.261 constitutional complaints were seized by December 2009, and 32.067 were decided in the same period. [6] The influx of constitutional complaints has not subsided despite of significant restrictions of access to the Constitutional Court.

Reaction to the increased influx of cases was restriction of access to the Constitutional Court. First, a 2002 Amendment to the Constitutional Court Act dismissed a possibility of filing constitutional complaints against legislation, even in cases where an individual would be directly concerned. [7] Second, the Constitutional Court itself restricted access to its docket by developing what is today its standing position, that constitutional complaint is admissible only for protection of rights which are explicitly listed in chapter III. of the Constitution titled Protection of Human Rights and Fundamental Freedoms. That approach rendered claims for protection of certain constitutional values, particularly those under Art. 3 of the Constitution (fundamental constitutional values) inadmissible on their own right. In its current practice the Constitutional Court declares inadmissible constitutional complaints based on Art. 3, as those "do not contain human rights and fundamental freedoms that are protected by the Constitutional Court in constitutional complaint procedure, within meaning of Art. 62(1) of the Constitutional Court Act." [8] However, in July 2010 (decision U-III-3491/2006), the Constitutional Court applied Art. 3 rule of law guarantee in order to assert property rights of the Croatian Academy of Sciences and Arts, which is a State establishment of public interest. This created an awkward situation in which the rule of law guarantee is afforded to state establishments while there is still no confirmation that the same path will be followed in case of individuals.

Access to the Constitutional Court was further restricted when the Parliament, in response to an increasing influx of cases, created jurisdiction of ordinary courts to decide on right to trial within reasonable time guarantee. Admittedly, the Constitutional Court Act originally did not envisage jurisdiction of the Constitutional Court in cases of breach of right to fair trial within reasonable time. Much later, on 15 March 2002, reacting to the increasing number of cases addressed to the European Court of Human Rights claiming violation of Art. 6 (1), and more directly in response to the judgment of the ECrtHR in *Horvat v. Croatia*,[9] the Parliament adopted the Constitutional Court Amendment Act.[10] The amendment addressed the issue of

---

[5] Official Gazzette 13/91

[6] http://www.usud.hr/uploads/PRIMLJENI-RIJESENI%20PREDMETI-311209.pdf, visited on January 9th 2011

[7] See Art. 62 of the Constitutional Court (Amendment) Act (2002), Official Gazette 29/2002 of 23 March 2002.

[8] For recent decisions see e.g. U-III-1095/2006 and U-III-1090/2008, point 9 of the decision

[9] Decision No. 51585/99 of 26 July 2001. Particularly § 48 of the judgment

[10] Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu (Constitutional Law Ammending and Supplementing the Constitutional Law on Constitutional Court). Official Gazette 29/2002 of 22 March 2002

the non existence of adequate legal remedies in cases of excessive length of legal proceedings a violation of Arts. 13 and 6(1) of the Convention. Accordingly, a new Art. 59a of the Constitutional Court Act was adopted,[11] extending recourse to the Constitutional Court via a Constitutional Complaint Procedure. The Complaint Procedure became available even before exhaustion of other existing legal remedies in cases where the lower courts did not decide a pending matter within reasonable time, as well as in cases where individual rights were manifestly infringed and the individual could suffer "grave and irreparable consequences." The same article also vested the Constitutional Court with power to specify for the lower courts the time within which a decision on the merits has to be delivered and with power to award "adequate compensation" to victims of unduly lengthy proceedings.

Subsequently, in 2002 in *Slaviček v. Croatia*,[12] the ECrtHR clarified that recourse to the Constitutional Court under the newly introduced provisions amounted to a remedy that had to be exhausted within the meaning of Art. 35(1) of the Convention.

While the amendment relieved the ECrtHR of some pressure, Art. 6(1) cases now started to accumulate before the Croatian Constitutional Court. In essence, the cure to the trial within reasonable time problem addressed the symptoms and not the disease which was plaguing the courts of ordinary jurisdiction. As such, a backlog of Art. 6(1) cases re-emerged before the Constitutional Court.

Reacting to that development the Parliament created jurisdiction of ordinary courts to decide Art. 6(1) cases. Accordingly, in late 2005 Article 6(1) infringement cases were placed into the jurisdiction of ordinary courts pursuant to the new Arts. 27 and 28. [13] Since then, infringements of the right to trial within reasonable time are in jurisdiction of ordinary courts. While it can be argued that transfer of jurisdiction to ordinary courts contributed to more efficiency, it also detracted from power of the Constitutional Court to set standards in this area. In any case, as the latest information shows, the backlog of pending civil cases before ordinary courts is still on the rise. [14]

22.2 Indirect discrimination

Concept of indirect discrimination was, until recently, completely alien to Croatian legal system. It has been first introduced by Gender Equality Act [15] and, subsequently, in Non-discrimination Act, [16] both instruments implementing EU equality *acquis*. However, the application of the concept before ordinary courts is incoherent and intransparent. [17] It is also ignored by the Constitutional Court. [18] Improper application of equality standards by Croatian

[11] Art. 59a became Art. 63, following publication of the consolidated version of the Act.

[12] Application No. 20862/02 of 4 July 2002.

[13] Zakon o sudovima (Law on Courts), Official Gazette 150/2005 of 21 December 2005

[14] Interim report from the Commission to the Council and the European Parliament on reforms in the field of judiciary and fundamental rights (negotiation Chapter 23), Brussels, 2 March 2011, COM(2011) 110, at p. 4

[15] Zakon o ravnopravnosti spolova (Gender Equality Act), Official Gazette 116/2003 as amended 82/2008

[16] Zakon o suzbijanju diskriminacije (Non-discrimination Act), Official Gazette 85/2008

[17] See e.g. judgment of the Supreme Court No. Revr 277/07-2

[18] Keyword search of the Constitutional Court's web site using keywords "indirect discrimination" (Croatian: inidrektna diskriminacija; posredna diskriminacija) does not return any results

courts gave rise to the *Oršuš* case which came to be one of the most important recent litigations before the ECtHRts.

The *Oršuš* saga concerned children belonging to Roma minority who were, allegedly, due to their poor knowledge of Croatian language and, allegedly, according to the applicable professional standards, placed in Roma-only classes in a number of elementary schools in Međimurje County in northern Croatia. That practice was challenged on grounds of violation of Article 2 of Protocol No. 1 to the Convention taken alone or in conjunction with Article 14 of the Convention. After having exhausted legal remedies before ordinary courts applicants brought a constitutional complaint before the Constitutional Court. The Constitutional Court, *inter alia*, found that:

> "...none of the facts submitted to the Constitutional Court leads to the conclusion that the placement of the complainants in separate classes was motivated by or based on their racial or ethnic origin." [19]

By using the words "motivated by or based on", the Constitutional court clearly indicated that concept of discrimination, in its view, depends on existence of discriminatory intent.

Soon after the judgment of the Constitutional Court was passed, the First Section of the ECrtHR delivered a judgment upholding the decision of the Croatian Constitutional Court. [20] Similarly to the Constitutional Court, the First Section defined discrimination on grounds of intent rather then on grounds of discriminatory effect and in that way failed to recognize the concept of indirect discrimination that has already been embraced by the decision of the Grand Chamber in *D.H. v. Czech Republic*.[21] However, the Grand Chamber of the ECtHRts, after having established indirect discrimination of Roma children, reversed the First Section judgment on March 16, 2010, invoking its earlier position adopted in *D.H. v. Czech Republic*.

Leaving the internal conflict concerning the understanding of discrimination which is present within the ECtHRts aside, [22] relevance of the Oršuš saga lies in the fact that Croatian legal tradition has difficulties in accepting the concept of indirect discrimination and shifting the burden of proof in discrimination cases. Discrimination is traditionally linked to intent, which is difficult to establish, concept of indirect discrimination is traditionally unknown, as well as the shifting of burden of proof in discrimination cases. It does not come as a surprise that it was intent on what the Constitutional Court relied at in *Oršuš* case. [23]

My second objection to the Constitutional Court's attitude is that the decision not to accept indirect discrimination was a deliberate policy choice. While the Constitutional Court, throughout its opinion, relies on elements of ECtHRts case law, e.g. on extrapolated segments of the judgment of the ECtHRts First Section judgment in *D.H. v. Czech Republic*, in order to justify its conclusion that statistical data is not sufficient to establish discrimination, it completely ignores practice indicating possibility of relying to the concepts of shifting of

---

[19] Decision No. U-III- 3138/2002, of 07. 02. 2007, published in the Official Gazette No. 22/2007 of 26 February 2007 (translated by the ECrtHR, Grand Chamber, Oršuš and Others v Croatia, Application no. 15766/03, § 60 of the judgment). Underlined by author.

[20] Judgment of 17 July 2008

[21] *D.H. and Others v. the Czech Republic* (Application no. 57325/00), Judgment of 13 November 2007

[22] According to my interpretation, there is disagreement between judges from post-communist States and judges from "old democracies." To this point see: Rodin, S., *Functions of Judicial Opinions and the New Member States*, in The Legitimacy of Highest Courts' Rulings in Hulls N. and Bomhoff J. (eds.), den Haag : Asser Press, 2009

[23] Decision No. U-III-3138/2002 point 7.3 of the decision

burden of proof and indirect (or *de facto*) discrimination, for example *Nachova* [24] or *Zarb Adami*, [25] which was pleaded by the applicant. In other words, the Constitutional Court had two paths available, both present in the reasoning of the ECtHRts. Between the two, it chose one which ignored indirect discrimination and shift of the burden of proof.

Third, in *Oršuš*, the Constitutional Court invoked the "beyond reasonable doubt" standard, aledgedly applied by the ECtHRts in order to support the finding of ordinary courts that there was no inhuman and degrading treatment of Roma pupils.[26] However, as the ECtHRts emphasized in *Nachova*,

> "...The Court has held on many occasions that the standard of proof it applies is that of "proof beyond reasonable doubt", but it has made it clear that that standard should not be interpreted as requiring such a high degree of probability as in criminal trials. It has ruled that proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." [27]

In other words, the Constitutional Court, instead of shifting the burden of proof, introduced a much stricter standard requiring the applicants to satisfy a criminal law standard. In doing so, the Constitutional Court relied on a selection of cases that corroborate its concept of discrimination, leaving aside case law leading to the contrary conclusion.

22.3 Right to impartial judge

A similar selective reading of the ECtHRts case law can be detected in area of application of the right to an impartial judge under Art. 6(1) of the Convention where certain interpretations of the Convention introduced by the Constitutional Court also depart from the reading given by the ECrtHR.

Apparently relying on *Mežnarić v. Croatia* (Application no. 71615/01, Judgment of July 15, 2005) the Constitutional Court developed a doctrine according to which participation of the same judge in a criminal trial chamber and his or her previous involvement in decision on detention in respect of the same person, almost automatically leads to infringement of the right to an impartial judge, as guaranteed by Art 6(1) of the ECHR. [28] At the same time, the Supreme Court holds a more flexible opinion according to which the described situation, on

---

[24] Nachova and Others v. Bulgaria *Applications nos. 43577/98 and 43579/98* Judgment of 05. July 2005. In Nachova the ECtHRts refused to shift the burden of proof in a racially motivated violence case but distinguished that situation from discrimination in non-violent cases, e.g. employment. See § 130 of D.H. v. Czech Republic (Grand Chamber).

[25] Zarb Adami v. Malta, *Application no. 17209/02*, judgment of 20. 06. 2006

[26] The Constitutional Court relied on beyond reasonable doubt standard expressed by the ECtHRts in Ireland v. UK, judgment of January, 18, 1978, Series A, br. 25, pp. 64-65, § 161

[27] See § 166

[28] Decision of the Constitutional Court No. U-III-41640/2009 of April 29, 2010. As the Constitutional Court specified in point 4.2. of its judgment, "... in the concrete case, judge E.D. acted as a judge of the County Court in Pula which delivered the contested judgment (No. K-69/07-140 of March 19, 2008). The same judge, however, was a member of the non-trial chamber of the County Court in Pula that delivered the decision No. K-69/07-38 (Kv-385/07) of November 23, 2007, concerning extension of detention in respect of the appellant" (translated by author). For an exhaustive analysis of this line of cases decided by the Constitutional Court in which the Constitutional Court found violation of Art. 6(1) of the ECHR, see Rodin, S., *Pravo na nepristrani sud u praksi Europskog suda za ljudska prava i Ustavnog suda Republike Hrvatske*, Novi informator No. 5869-5879 of June 5, 2010

its own right, may, but does not necessarily have to compromise the impartiality of a judge. [29] Seemingly, the position of the Supreme Court reflects the case law of the ECrtHR more accurately. What is however more important is the fact that the two courts diverge on interpretation of the ECHR and relevance of the case law of the ECrtHR.

22.4 Case law of the Constitutional Court

By its decision No. U-III-41640/2009 of April 29, 2010, the Constitutional court upheld a constitutional complaint and annulled and remanded a judgment of the Supreme Court [30] and a corresponding judgment of the Pula County court. The Constitutional Court assessed that the two judgments infringe applicant's right to impartial judge, as guaranteed by Art. 29(1) of the Constitution [31] and Art. 6(1) of the Convention. The reasoning of the Constitutional Court heavily quotes the ECtHRts case law, and reaches a conclusion that, apparently as a matter of an irrebuttable presumption, the mere fact that the same judge was deciding on the merits and, previously, on detention concerning the accusations of the same person, compromises impartiality of a judge. [32] The judgment came as a sixth in a line of cases where the Constitutional Court attempted to interpret the Constitution in light of the Convention based on its understanding of ECtHRts case law following Mežnarić v. Croatia. A brief analysis of the six cases shows that some of them were decided in line with the reasoning of the ECtHRts and some were not.

In the first one, decided in early 2008, [33] the Constitutional Court found that impartiality of the judge was compromised by the fact that the same judge was sitting in the first instance panel and, later on, in the appeal panel in the same case. [34] The second, decided in early 2009, [35] found the breach in the fact that the same judge was deciding at the lower instance, and then again, as a judge of the Supreme Court. In addition the Court found material breaches of criminal procedure having been committed by the same judge. [36] While these two judgments were, by and large in line with the Convention case law, in the third decision, the Constitutional Court established a breach on grounds that the same judges were deciding on detention, and on the merits. [37] The same was the situation in case decided on July 7th, 2009. [38] In a contrast, in its decision of July 29, 2009, [39] the Constitutional Court decided that a judge who acted as a president of a non-trial chamber of a county court, and deciding on detention, who ordered surveillance and phone tapping in respect of the same person, is

---

[29] Judgment of the Supreme Court of June, 2, 2010 No. I Kž-84/10-8 in case against Branimir Glavaš and others http://www.vsrh.hr/CustomPages/Static/HRV/Files/VSRH_I-Kz-84-2010-8.pdf visited on July 31, 2010. In words of the Supreme Court, "… that fact, standing alone, in absence of other negative indicators of his or her impartiality which were absent in this case, can not be a reason to recuse a judge on grounds of Art. 36(2) of the Criminal Procedure Act, …" (translated by Author).

[30] Judgment of the Supreme Court No. Kž-574/08-6 of January 21, 2009

[31] The constitutional provision giving effect to Art. 6(1) of the ECHR

[32] Point 4.2 of the Decision

[33] Decision of the Constitutional Court No. U-III-2383/2005 of February 13, 2008

[34] *Id.,* point 5 of the decision. This judgment is in line with the ECtHRts case law.

[35] Decision of the Constitutional Court No. U-III-5423/2008 of January 28, 2009

[36] *Id*. point 6.2 of the decision.

[37] Decision of the Constitutional Court No. U-III-3872/2006 of July 7, 2009, § 5.1

[38] Decision of the Constitutional Court No. U-III-3880/2006

[39] Decision of the Constitutional Court No. U-III-3543/2009

impartial. In essence, what follows from this line of cases is that requirements under Art. 6(1) of the Convention do not preclude the same judge to decide on multiple procedural and protective measures, but do preclude a judge to decide on protective measures and on the merits.

While in reaching its conclusion the Constitutional Court, apparently, relies on the Convention law, I would argue that the case law of the ECtHRts leads to a different conclusion. In other words, the doctrine adopted by the Constitutional Court is an autonomous doctrine and does not follow the reasoning of the ECtHRts.

22.5 Case law of the European Court of Human Rights

The leading case on right to an impartial judge, concerning Croatia, was the above mentioned *Mežnarić v. Croatia*, where the ECtHRts established violation of Article 6(1) on grounds that a judge of the Constitutional Court previously acted as a legal council of the applicant's opponent in an earlier stage of proceedings. This situation has to be distinguished from one in the CCt's decision of April 29, 2010, since in Mežnarić there was a clear conflict of interest, while in the latter mentioned case there was not. In other words, in the 2010 case there was no subjective element of paritiality, which can only lead to the conclusion that the CCt's decision was based on an objective element test, i.e. whether any legitimate doubt in impartiality is excluded. [40]

According to the CCt's understanding of the ECtHRts law [41], the objective criteria compromise impartiality of a judge in the following situations:

- when a judge was previously deciding on issues that are closely related with the decision on the merits (*Hauschildt v Denmark*, judgment of May 24, 1989. § 51-52);
- when, after having decided in a first instance the same judge sat on appeal (*De Haan v the Netherlands,* judgment of August 26, 1997. §§ 51, 54);
- if the same judge participated as a member of non-trial chamber deciding on the indictment and, following that, as a member of a trial chamber (*Castillo Algar v Spain,* judgment of October 28, 1998, §§ 47-49);
- if the same judge presided a judicial criminal panel after having acted as an officer of prosecution in the same case (*Piersack v Belgium*, judgment of October 1, 1982., §§ 30-31).

However, on a closer look, none of the cited cases can be applicable to situations involving participation of the same judge in making a decision on detention and, subsequently, on the merits of a criminal case, situations which are, according to the Constitutional Court protected by Art. 6(1) guarantee.

In *Hauschildt v Denmark* the ECtHRts found a violation of Art. 6(1) because the same judge made fifteen decisions concerning detention and solitary confinement in respect of the same person and acted as a member of the trial chamber, later on. [42] However the ECtHRts made clear in § 50 that the fact, that the same judge was acting in pre-trial decisions and on the merits, taken alone, is not sufficient to reach a conclusion on partiality of a judge.

---

[40] The ECtHRts refers to *Fey v Austria*, (judgment of February 24, 1993, Series A no. 255, p. 12, §§ 27, 28 i 30) and *Wettstein v Switzerland* (Application no. 33958/96, § 42, ECHR 2000-XII)

[41] Decision of the Constitutional Court No. U-III-41640/2009 of April 29, 2010, see point 4.1 of the decision

[42] See § 20 of the judgment

In *Fey v Austria,* [43] the ECtHRts applied the same reasoning to Austrian inquisitorial system. Invoking Hauschildt, the Court concluded, in § 30 of the judgment, that the same reasons have to be relevant in an inquisitorial system like Austrian. The decisive factor is the scope and nature of pre-trial measures that a judge has power to take. In other words, as long as the role of a judge is separate from a role of the prosecution, there will be no violation of Art. 6(1).

In *De Haan v the Nethrerlands,* the established violation of Art. 6(1) was based on the fact that the same judge was deciding on the merits in the first instance and subsequently on appeal. This case has to be distinguished from situation in CCt's decision of April 29, 2010, since in *De Haan*, both instances were deciding on the merits, while in the Croatian case the first decision was not.

In *Castillo Algar v Spain* the ECtHRts found a violation of Art. 6(1) on grounds that two out of three judges who were deciding on the merits of accusations previously acted within a chamber that confirmed the indictment, where, according to Spanish law the indictment is considered a *prima facie* evidence of guilt.

Finally in *Pieresack v Belgium*, there was collusion of state attorney's role and a role of a judge in one person and the ECtHRts did not have difficulties to establish a violation.

All the four judgments cited by the Constitutional court are based on the objective test. One of them (*Piersack*) concerned collusion of roles of a judge and prosecutor, and the other two (*De Haan* and *Castillo Algar*) concerned participation of the same judge in different stages of proceedings, both stages concerning decision on the merits. The remaining case (*Hauschildt*) concerned a violation on grounds of additional circumstances, unrelated to pre-trial participation of the judge. The question remains what these judgments have in common with the facts of the case decided by the Constitutional Court on April 29, 2010.

Apparently, the Constitutional Court quotes but does not necessarily follow the reasoning of the ECtHRts, the main difference being an almost automatic exclusion of a judge who participated in pre-trial decision making. Interestingly, the Croatian Supreme Court is of different opinion and follows the reasoning of the ECtHRts to effect that participation in pre-trial decision making on detention does not automatically preclude a judge from deciding on the merits. [44]

22.6 Principle of Proportionality

Principle of proportionality is not indigenous in Croatian legal system. It was, for the first time, introduced by Constitutional amendment of November 9, 2000 [45] and inserted as section 2 of Art. 16 of the Constitution. Since then, the proportionality provision reads:

> "Each restriction of liberties or freedoms has to be proportionate to the nature of the need for restriction in each individual case."

Unclear as it is, the provision does not follow the syntax of the ECHR: prescribed by law, having a legitimate aim and necessary in a democratic society. Apparently, the bare constitutional provision leaves enough space for interpretation that any social exigency could

[43] Judgment of February, 24, 1993., (Series A no. 255)

[44] Judgment of the Supreme Court No. I Kţ 84/10-8 of June 2, 2010.

[45] Odluka o proglašenju promjene Ustava Republike Hrvatske (Decision on Pronounciation of Amendment of the Constitution of the Republic of Croatia), Official Gazette No. 113 of November 16, 2000

justify restriction of rights and liberties, as long as state action can be taken to be a least restrictive alternative.

The provision has been extensively applied by the Constitutional Court, not always in a coherent way. During the mandate of the first president of the Court, judge Jadranko Crnić, the Constitutional Court developed a position that principle of proportionality is a universal constitutional principle. The same position continued during the mandate of president Smiljko Sokol. [46] However, the original position gradually eroded. On the other hand, in its recent practice, the Constitutional Court introduced the legitimate aim requirement, although not the appropriateness review. [47]

Today, the web site of the Constitutional Court reveals 41 cases involving the issue of proportionality. Seven of them were constitutional complaints which resulted in an outcome favorable for the applicant. Another seven were abstract constitutional review cases that resulted in declaration of unconstitutionality. Remaining cases were dismissed.

It would go beyond the aims of this chapter to discuss the entire proportionality law of the Constitutional court in detail. I find it more appropriate to present a case study which sheds light on the attitude of the court towards application of proportionality test.

On November 15, 2007, the Constitutional Court adopted a decision [48] rejecting a constitutional complaint brought against a decision of High Misdemeanor Court [49] affirming an administrative decision. [50] The contested decision was adopted in misdemeanor proceedings against the applicant who was charged for illegal boat chartering and fined by a fine of approximately 1.100 € and confiscation of a yacht. The applicant claimed infringement of proportionality under Art. 16(2) of the Constitution, since the value of the confiscated vessel is significantly higher then the seriousness of the offence. In a short passage, the Constitutional Court dismissed the proportionality argument saying that:

> "… confiscation of a vessel by which an infraction was committed is based on Art. 1008 section 2 of the Maritime law, providing for mandatory confiscation of a vessel by which the offence was committed. Accordingly, Art. 16(2) of the Constitution is not applicable to constitutional review of the contested measure."

In his dissenting opinion judge Krapac stated:

> "… when powers of the Constitutional Court are understood properly, in context of criminal lawmaking and their application, principle of proportionality, despite of its public-law rationality, represents a limited instrument of constitutional review. Where the legislature, motivated by public consensus (expressed through public media) about repression of attacs against certain social values …. prescribed sanctions as restrictive norms, that norms may not be controlled by the constitutional court according to principle of proportionality, since they have to be measured against criminal policy which is in competence of the legislature…" [51]

---

[46] See e.g. decision No. U-I-673/1996, of April 21, 1999, Official Gazette 39/1999

[47] Decision No. U-III-3491/2006 of July 7, 2010, Official Gazette 90/2010

[48] Decision No. U-III-4584/2005. The decision was adopted by the chamber composed of judges Klarić (president), Hranjski, Kos, Krapac, Matija, Mrkonjić, Potočnjak, Račan, Rajić, Sokol, Šernhorst and Vukojević

[49] Case No. Gž-5194/05 of September 20, 2005

[50] No. PRI 342-35/05-03/48, urbroj: 530-03-02/03-05-7 of August 31, 2005

[51] Translated by autor

On the other hand, judge Sokol in his dissent considers proportionality test applicable, as a matter of principle, however, not in the present case. In his opinion, it has to be invoked in abstract constitutional review proceedings, which have to be instituted in order to challenge the contested law. According to his opinion, this can not be done in course of the constitutional complaint procedure. Judge Sokol's position is probably based on Art. 62(1) of the Constitutional Court (Amendment) Act of 2002 [52] which excluded the formerly existing possibility to bring a constitutional complaint against regulatory acts. Namely, since 2002 amendment a constitutional complaint is permissible only against individual acts. As a matter of comparison, constitutional complaint against regulatory acts is permissible in Germany since 1957 [53] and confirmed in continuous line of cases decided by the Federal Constitutional Court. [54]

Finally, judge Potočnjak dissented by invoking his earlier dissent [55] taking position that Art. 16(2) has to be applied.

Generally, it can be said that the Constitutional Court does not apply the proportionality as a fully developed test. Moreover this case is a good example of its selective application, that is, non-application in certain procedural situations, notably when an infringement originates from a regulatory act. In other words, there is a bifurcation between application of the test in constitutional complaint proceedings and abstract constitutional review, the two avenues of protection being understood as separate by the Constitutional Court. What is also visible is a dissonance of judges' opinions as to in which substantive areas proportionality is or is not applicable, leading to the conclusion that the principle is not understood as being universally applicable.

Conclusion

There are significant differences between interpretation and application of fundamental rights standards between the Constitutional Court and the ECtHRts. The intensity of judicial review applied by the Constitutional Court is weak and remains mainly at level of rationality review. The Constitutional Court does balance public interest with fundamental rights but has not developed standards of enhanced scrutiny (e.g. strict scrutiny analysis). Differences in interpretative approach sometimes lead to interpretations that depart from regional and/or global fundamental rights standards.

As far as substantive standards are concerned, there are problems of reconciling divergent standards of the ECHR and those arising under implemented EU law. For example, the ECtHRts itself is still struggling to accept the concept of indirect discrimination and shifting of burden of proof in discrimination cases. While these concepts are systematically applied by the European Court of Justice and are enshrined in relevant EU primary and secondary law, within the ECtHRts there is a doctrinal rift between the Grand Chamber which since recently [56] endorses the same standards as the ECJ, and trial chambers which have a different approach. This difference has contributed to the doctrinal confusion that budens Croatian courts when it comes to deciding equality cases.

---

[52] Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu, (Constitutional Court Amendment Act) Art. 25, Official Gazette 29/2002

[53] BVerfGE 6, 32

[54] See e.g. BVerfGE 80, 137 (Reiten im Walde)

[55] Decision No. U-III-59/2006 of November 22, 2006, Official Gazette 132/2006

[56] See cases D.H. v. Czech Republic and Oršuš v. Croatia cited above

The case law of the Croatian Constitutional Court also reveals a problem of selective reading of the Convention. As it can be seen from the examples above, the Court inclines to follow cases that correspond to its own precepts of equality, public policy and judicial independence. Whether this can be taken as an infant decease or as a more fundamental problem, remains to be seen. One tendency is, however clearly visible. While the vocabulary of fundamental rights is becoming increasingly visible, there is still no evidence that Croatian judiciary has properly embedded the human rights vocabulary into a liberal understanding of State. There is a little evidence of fundamental rights having a bite when they confront with what is understood as a "state interest." All three case studies witness to that effect. Proof of discrimination is subject to a difficult-to-establish criminal law standard, proportionality analysis is inapplicable in areas where state (public) interest is said to exist, and concept of impartiality of a judge is understood rather mechanically, without proper consideration being given to other relevant interests.

While it can not be said that Croatian judiciary or the Constitutional Court are hostile to fundamental rights, the fact remains that their proper social function still needs to be discovered. In absence of liberal tradition, judicial reasoning remains formalistic, and fundamental rights guarantees are not understood as liberal *Abwehrreche*, defending the core of individual liberty as against State intrusion, but merely as guarantees of positive law prescribed by the State. [57]

[57] Rodin, S., *Discourse and Authority in European and Post-Communist Legal Culture* 1 CYEL&P (2005) 1-22; Ćapeta, T., *Courts, Legal Culture and EU Enlargement*, 1 CYEL&P (2005) 23-53; Uzelac, A., *Survival of the Third Legal Tradition? Supreme Court Law Review* (2010), 49 S.C.L.R. (2d), 377-396