



STUDY ON EUROPEAN CONSTITUTIONAL COURTS AS THE COURTS OF HUMAN RIGHTS

Assessment, challenges, perspectives

by

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MAIN ABBREVIATIONS AND ACRONYMS

BVerfG	– German Federal Constitutional Court (<i>Bundesverfassungsgericht</i>)
BVerfGE	– Decision of the German Federal Constitutional Court
CCRC	– Constitutional Court of the Republic of Croatia (<i>Ustavni sud Republike Hrvatske</i>)
CFREU	– The Charter of Fundamental Rights of the European Union
CJEU	– Court of Justice of the European Union
CoE	– Council of Europe
Constitution	– Constitution of the Republic of Croatia (<i>Ustav Republike Hrvatske</i>), Official Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14
Constitutional Act on the CCRC	– Constitutional Act on the Constitutional Court of the Republic of Croatia (<i>Ustavni zakon o Ustavnom sudu Republike Hrvatske</i>), Official Gazette nos. 99/99, 29/02, 49/02 – consolidated text
Constitutional rights	– human rights and fundamental freedoms, as well as specific rights which are equivalent to human rights and fundamental freedoms, guaranteed in the Croatian Constitution
ECHR	– Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe
ECtHR	– European Court of Human Rights in Strasbourg
EU	– European Union
GC	– Grand Chamber of the European Court of Human Rights
PACE	– Parliamentary Assembly of the Council of Europe
SAA	– Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, Luxembourg, 29 October 2001
The former SFRY	– the former Socialist Federative Republic of Yugoslavia
The former SRC	– the former Socialist Republic of Croatia, one of the six federal units of the former SFRY
TEU	– Treaty on European Union
TFEU	– Treaty on the Functioning of the European Union

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When speaking of European mechanisms for the protection of human rights, in the first place we refer to the judicial mechanism created within the Council of Europe (European Court of Human Rights in Strasbourg, established by the 1950 European Convention on Human Rights), to the judicial mechanism created within the European Union (Court of Justice of the European Union in Luxembourg) and to the national constitutional courts of the Member States of the Council of Europe and European Union.

This study analyses the three existing levels of judicial protection of human rights in Europe and their relationship, including their institutional, normative, jurisdictional and jurisprudential aspects. Due to its typical characteristics, the model of constitutional judiciary that exists in the Republic of Croatia has been chosen as an example of the model of judicial protection of human rights at the national level.

Keywords: human rights protection, European Court of Human Rights, Court of Justice of the European Union, national constitutional courts, judicial dialogue, judicial techniques for referring to the case-law of other courts

I. INTRODUCTION

Croatian citizens, as well as citizens of many other European countries, today live at the same time in different legal areas: the national one, the one of the European Union (EU), and the legal area of the European Convention on Human Rights (ECHR).

The European human or fundamental rights catalogues, which join the national ones, promote the European idea: they consolidate a common European human rights standard. As a "European common law of human rights", this standard is part of a developing European legal system. "In so far as these norms span across hierarchies and State boundaries, and to the extent that these norms are overarching and shared, they are *constitutional* – at the transnational level. Because multiple high courts assert final jurisdiction over these same norms, the wider, pan-European, system is pluralistic."¹

Accordingly, as Judge Andreas Voßkuhle, President of the German Federal Constitutional Court (BVerfG), pointed out, there is no such thing as a single supreme guardian of the fundamental rights in Europe. What exist instead are European constitutional courts: national constitutional courts or other highest national courts that exercise constitutional jurisdiction (hereinafter: national constitutional courts),² one of the ECHR, and one of the EU. All these

¹ Stone Sweet, Alec. On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court (2009), *Faculty Scholarship Series*, Paper 71, pp. 12–13, at http://digitalcommons.law.yale.edu/fss_papers/71 (Last accessed: 10 January 2016).

² In Europe, Constitutional Courts exist in Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Turkey and Ukraine while Andorra, Poland and Spain have Constitutional Tribunals.

courts perform similar tasks at different levels and have the function of pillars in the European human rights architecture. The European constitutional courts are part of a system of multilevel cooperation: they form a network of European constitutional courts, avoiding rigorous conceptions such as "equal footing" or "supremacy" to denote the relationship between them.³

This study analyses the three existing levels of judicial protection of human rights in Europe and their relationship, including their institutional, normative, jurisdictional and jurisprudential aspects. Due to its typical characteristics, the model of constitutional judiciary that exists in the Republic of Croatia has been chosen as an example of the model of judicial protection of human rights at the national level.

This study on the judicial architecture of human rights protection in Europe attempts to contribute to the endeavours to open up a discussion within the Congress of the Association of Asian Constitutional Courts and Equivalent Institutions on the need of establishing an Asian court of human rights. It is also aimed at increasing awareness of the importance of the constitutional judiciary within Asia.

II. EUROPEAN JUDICIAL ARCHITECTURE OF HUMAN RIGHTS PROTECTION

1. Human Rights Protection at the European Level

1.1. Council of Europe and the European Court of Human Rights (Strasbourg)

Council of Europe (CoE) is an international organisation based in Strasbourg which comprises 47 countries of Europe, with an estimated population of 820 million.⁴ It was set up in 1949 to promote democracy and protect human rights and the rule of law in Europe.

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ECHR), together with its Protocols, is the most famous CoE's treaty securing civil and political rights in Europe. The ECHR is the "constitutional instrument of European public order".⁵ All 47 countries of the CoE are the State Parties of the ECHR.

European Court of Human Rights (ECtHR) is judicial organ established by the ECHR. It is the creator of "European constitutional standards" for it oversees the implementation of the

Further, France has the Constitutional Council. Lichtenstein has the State Court. In Cyprus, Denmark, Estonia, Greece, Iceland, Ireland, Monaco, Netherlands, Norway, Switzerland, Sweden and United Kingdom constitutional jurisdiction is exercised by the respective Supreme Court. Constitutional court matters in Finland are dealt by the Constitutional Law Committee of the Finnish Parliament and the courts and other authorities.

³ Voßkuhle, Andreas. The Protection of Human Rights Within the European Cooperation of Courts, Paper presented to the Venice Commission (Venice, 8 March 2013), CDL-JU(2013)00, Strasbourg, 22 March 2013.

⁴ CoE Member States are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and United Kingdom.

⁵ ECtHR, *Loizidou v. Turkey*, judgment (*prethodni prigovori*), 23 March 1995, no. 15318/89, § 75; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment [GC], 30 June 2005, no. 45036/98, § 156.

ECHR in the States Parties and ensures, in the last instance, that they observe their obligations under the ECHR. It is based in Strasbourg, France and since November 1998 has operated on a full-time basis. The ECtHR is composed of one judge for each State Party to the ECHR, elected for a non-renewable 9-year term by the Parliamentary Assembly of the CoE. The judges select its President, for a period of three years, provided that such period does not exceed the duration of the President's term of office. Since its establishment in 1953, approximately 700,000 applications were forwarded to judicial bodies of the ECtHR. Until today, around 20,000 judgments and 600,000 decisions have been delivered by the ECtHR. Its judgments are binding on the countries concerned.

Thus, "[w]hile it is true that the Council of Europe is an association of states without, apart from its Statute, a formal constitutional document, its core membership conditions nevertheless include a commitment to democracy and the rule of law, the limitation of the exercise of public power by a set of justiciable 'constitutional' rights found in the ECHR, a Court (ECtHR) to settle complaints about their alleged violation, and another institution (the Committee of Ministers) to supervise the execution of the Court's judgments."⁶

1.2. European Union and the Court of Justice of the European Union (Luxembourg)

European Union (EU) currently has 28 Member States, with an estimated population of over 508 million.⁷ These States have delegated some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level.⁸ The EU operates through a system of supranational institutions and intergovernmental-negotiated decisions by the Member States. The German BVerfG refers to the EU as a *Staatenverbund* (association of sovereign states).⁹

Charter of Fundamental Rights of the European Union (CFREU) is the main document on human rights and fundamental freedoms in EU, adopted in 2000 and entered into force on 1 December 2009. It is applied only when the fundamental right issue involves the implementation of EU legislation by the national authorities. However, the interpretation of the rights guaranteed by the CFREU which correspond to rights guaranteed by the ECHR must correspond to the interpretation of the latter by the ECtHR.

Court of Justice of the European Union (CJEU) is based in Luxembourg and ensures compliance with the law in the interpretation and application of the European Treaties of the EU and the CFREU. The CJEU consists of three courts: the Court of Justice (CJ), the General Court (GC), created in 1988, and the Civil Service Tribunal (CST), created in 2004.¹⁰ Each judge and advocate general is appointed for a renewable 6-year term, jointly by national governments. In each Court, the judges select a President who serves a renewable term of 3

⁶ Greer, Steven; Wildhaber, Luzius. Revisiting the Debate about 'constitutionalising' the European Court of Human Rights, *Human Rights Law Review*, Vol 12, No. 4 (2012), 684–685.

⁷ No country has ever joined the EU without first belonging to the CoE.

⁸ EU Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

⁹ BVerfGE 123, 267 [148] – Lisbon Treaty, 30 June 2009.

¹⁰ For purposes of clarity, the general acronym "CJEU" is used in this paper when referring to the whole EU judicial system, which is composed of three above mentioned courts. This is without prejudice to the fact that the focus is actually on the role and case law of the Court of Justice (CJ).

years. Since their establishment, approximately 28,000 judgments have been delivered by the three courts.

1.3. The EU's Accession to the ECHR

In 2010, the CoE issued a document in which it listed all the advantages of EU accession to the ECHR,¹¹ emphasising that the following views were fully shared by members of the EU Convention that had prepared the text of the Constitutional Treaty:¹²

- Accession will further **strengthen the protection of human rights** by submitting the Union's legal system to independent external control. Any individual will be able to bring a complaint about infringement of ECHR rights by the EU before the European Court of Human Rights. The EU would thus be in the same situation as the member States.
- Accession is the best means of achieving a **coherent system of fundamental rights' protection** across Europe. As the Union reaffirms its own values through its Charter of Fundamental Rights, its accession to the ECHR will give a strong political signal of coherence between the EU and 'greater Europe'.
- Accession will **close gaps in legal protection** by giving European citizens the same **protection vis-à-vis acts of the Union** as they presently enjoy vis-à-vis all member States of the Union.
- Accession will result in **all European legal systems being subject to the same supervision** in relation to the protection of human rights. Given the increasingly broad competences of the EU, it is ever more difficult to accept that it should be the only 'legal space' left in Europe which is not subject in the same way as States parties to the Convention to external scrutiny by the European Court of Human Rights.
- Accession will **reassure citizens** that the EU, just like its member States, is not 'above the law' as far as human rights are concerned. This is a **question of credibility**, given that EU member States have transferred important competences to the Union and that ratification of the ECHR is a condition for EU membership.
- Accession of the EU to the ECHR is the best means of ensuring the **harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights** in human rights matters. The ECJ will apply the EU Charter of Fundamental Rights, many provisions of which are based on, but not identical to, those of the ECHR. Combined with the increase in the EU's powers, the Charter's existence will inevitably mean that the ECJ will have to consider more cases involving fundamental rights than in the past. Without accession, this would increase the risk of contradictions in the case-law between the two Courts, in spite of all efforts to the contrary.
- Accession will **resolve the problems resulting from the fact that currently the EU cannot be party to proceedings before the European Court of Human Rights**. When the Court rules on alleged human rights violations resulting from the application or implementation of EU law by the member States, the EU is unable to defend itself properly before the Court. The EU is not bound by the Strasbourg judgment, even though the execution of the judgment may require the EU's contribution."

¹¹ Accession by the European Union to the European Convention on Human Rights – Answers to frequently asked questions, Council of Europe, Strasbourg, 1 June 2010, at http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf (Last accessed: 10 January 2016).

¹² See Final report of Working Group II "Incorporation of the Charter/accession to the ECHR", CONV 354/02, Brussels, 22 October 2002, Section B. "On accession to the European Convention on Human Rights", pp. 11–12, at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf> (Last accessed: 10 January 2016).

However, it should be recalled that the European Commission asked the CJEU for an Opinion on the draft agreement reached in the negotiations.¹³ In its Opinion,¹⁴ the CJEU found a number of elements to criticise (as could already have been expected after the view delivered by Advocate General Kokott in June 2014)¹⁵. As regards the substance of the request for an opinion, the CJEU, after recalling by way of preliminary point the fundamental elements of the constitutional framework of the EU, examined compliance with the specific characteristics and the autonomy of EU law, including in relation to the common foreign and security policy (the CFSP), and also compliance with the principle of the autonomy of the EU legal system, laid down in Article 344 TFEU. It also verified whether the specific characteristics of the EU were preserved in the light of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice (CJ). That examination led the CJEU to conclude that the draft agreement was not compatible with either Article 6(2) of the Treaty on European Union (TEU) or Protocol No 8, relating to that provision, annexed to the EU Treaty.

Accordingly, the Opinion of the CJEU "will generally render future accession highly difficult and delay it in addition, since already the negotiations of the draft agreement proved protracted and complex and since in the draft agreement suggestions by the CJEU which was represented in the relevant Council committee had already been taken into account."¹⁶

The current situation (when it is clear that there will be no EU accession to the ECHR in the near future) places national judges in a very sensitive position.

For example, the CCRC closely follows the development of the case-law of the ECtHR and CJEU in relation to the interpretation and application of the *ne bis in idem* principle. Croatia is among the group of States Parties of the ECHR facing such problems due to the specific interpretation of this principle in the ECtHR's case-law. This has been noted by the CJEU. Thus, Advocate General Cruz Villalón concluded that "a lack of agreement concerning a right in the system of the ECHR clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence. That widespread

¹³ Cf. Report of the Steering Committee for Human Rights (CDDH) to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, Strasbourg, 14 October 2011. This report also contains an Appendix: Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, pp. 5–13, at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH_2011_009_en.pdf (Last accessed: 10 January 2016).

¹⁴ Opinion 2/13 of the Court (Full Court), 18 December 2014, at <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN> (Last accessed: 10 January 2016).

¹⁵ View of Advocate General Kokott delivered on 13 June 2014 (1) – Opinion procedure 2/13 initiated following a request made by the European Commission, at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160929&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=224590> (Last accessed: 10 January 2016).

¹⁶ Reitemeyer, Stefan; Pirker, Benedikt. Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back, 31 March 2015, at European Law Blog <http://europeanlawblog.eu/?p=2731> (Last accessed: 10 January 2016).

existence and well-established nature could even be described as a common constitutional tradition of the Member States."¹⁷

Namely, in its case *Maresti v. Croatia*,¹⁸ the ECtHR found that the applicant was prosecuted and tried for a second time for an offence of which he had already been convicted and for which he had served a term of detention (violation of Article 4 of Protocol no. 7).¹⁹ Similarly, in the case of *Tomasović v. Croatia*,²⁰ the applicant's constitutional complaint, alleging a violation of the *ne bis in idem* principle, was dismissed by the CCRC on 7 May 2009 (before the *Maresti* judgment was delivered). It was dismissed on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. On the other hand, in the *Tomasović* judgment, the ECtHR found a violation of Article 4 of Protocol no. 7. It pointed out that the applicant was prosecuted and tried for a second time for an offence of which she had already been convicted.²¹ Moreover, in the *Tomasović* judgment, the ECtHR concluded for the first time that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.²²

In sum, the evolution of the case-law of the ECtHR shows that, at the moment, Article 4 of Protocol no. 7 to the ECHR precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal. The current state of the case-law, particularly in the judgments of the ECtHR since the case of *Zolotukhin v. Russia*,²³ is evidence of the existence of a conclusive statement of the law from Strasbourg.²⁴

¹⁷ Opinion of Mr Advocate General Cruz Villalón delivered on 12 June 2012. Case C-617/10 – Åklagaren v. Hans Åkerberg Fransson. Reference for a preliminary ruling: Haparanda tingsrätt – Sweden. European Court Reports 2013, § 86.

¹⁸ ECtHR, *Maresti v. Croatia*, judgment, no. 55759/07, 25 June 2009.

¹⁹ The relevant part of the *Maresti* judgment reads, "63. As to the present case the Court notes that in respect of the minor offence and the criminal offence the applicant was found guilty of the same conduct on the part of the same defendant and within the same time frame. ... The events described in the decisions adopted in both sets of proceedings took place at the Pazin coach terminal at about 7 p.m. on 15 June 2006. It is obvious that both decisions concerned exactly the same event and the same acts. 64. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which he was also convicted."

²⁰ ECtHR, *Tomasović v. Croatia*, judgment, no. 53785/09, 18 October 2011.

²¹ The relevant part of the *Tomasović* judgment reads, "27. As to the present case the Court notes that in respect of the minor offence the applicant was found guilty of possessing 0.21 grams of heroin on 15 March 2004 at about 10.35 p.m. As regards the proceedings on indictment, she was found guilty of possessing 0.14 grams of heroin on 15 March 2004 at about 10.35 p.m. 28. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which she was also convicted." Moreover, the ECtHR noted "that in her constitutional complaint the applicant clearly complained of a violation of the *non bis in idem* principle. However, the Constitutional Court expressly held that double prosecution for the same offence was possible under the Croatian legal system. In these circumstances, the Court finds that the domestic authorities permitted the duplication of criminal proceedings in the full knowledge of the applicant's previous conviction for the same offence" (§ 31).

²² This legal stand is contrary to the original ECtHR ruling in *Oliveira v. Switzerland* (judgment of 30 July 1998, Rep. 1998-V; fasc. 83), which received strong criticism and now appears to have been abandoned.

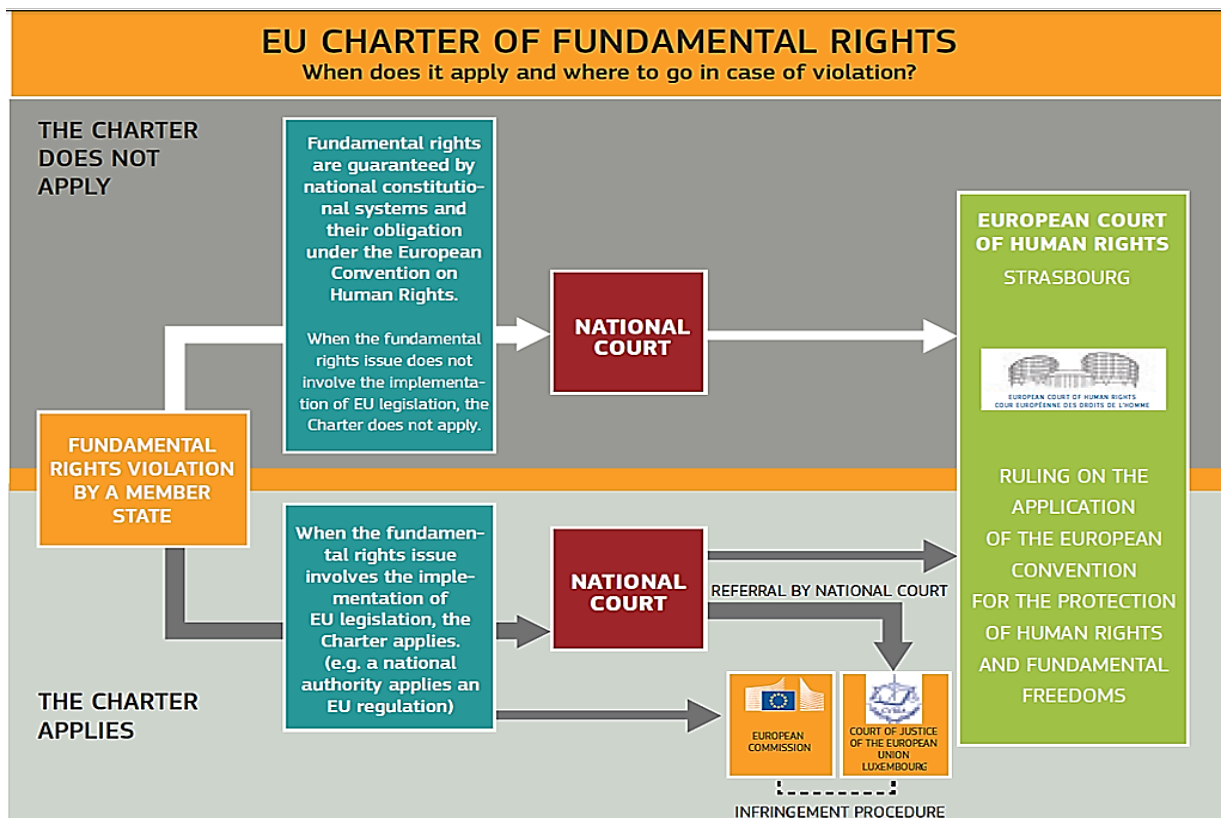
²³ ECtHR, *Zolotukhin v. Russia*, judgment, no. 14939/03, 10 February 2009.

²⁴ Cf. Opinion of Mr Advocate General Cruz Villalón, § 79. See *supra* note 17.

On the other hand, in the Case C-617/10 *Åkerberg Fransson*,²⁵ the CJEU delivered its judgment in the preliminary ruling procedure, upon a request from the Haparanda District Court in Sweden, concerning the principle of *ne bis in idem* in cases regarding administrative and criminal sanctions for tax evasion in the light of Article 50 of the CFREU.²⁶

The noted differences in the interpretation of Article 4 of Protocol no. 7 by the ECtHR and Article 50 of the CFREU by the CJEU put the CCRC in a very sensitive spot, since the interpretation supported by the CJEU is closer to the standpoint of the CCRC, but the decisions of the CCRC that are related to the *ne bis in idem* principle are under the direct supervision of the ECtHR.

To sum up, when it is clear that there will be no EU accession to the ECHR in the near future, in the coming period the existing structure of the institutional protection of human rights on the European and national level will remain in force, as it is shown on the following illustration from aspect of the application of the CFREU:



Source: 2014 report on the application of the EU Charter of Fundamental Rights, European Commission – Directorate-General for Justice and Consumers, Luxembourg: Publications Office of the European Union, 2015, p. 22.

²⁵ CJ, Case C-617/10 – Judgment of the Court (Grand Chamber) of 26 February 2013 (request for a preliminary ruling from the Haparanda tingsrätt – Sweden) – Åklagaren v. Hans Åkerberg Fransson, OJ 2013/C 114/08 of 20 April 2013.

²⁶ The CJ confirmed that the principle of *ne bis in idem* prevents the levying of two subsequent criminal sanctions for the same act, whilst the same principle permits an administrative sanction followed by a criminal sanction (§ 34). The CJ also confirmed that sanctions that are administrative by name may in fact be criminal, depending on their legal classification, the nature of the offence and the degree of severity of a potential penalty. However, instead of providing clear guidance on whether or not the administrative sanction was criminal, the CJ left it to the national court to decide, thereby still leaving the door open as to the applicability of the principle of *ne bis in idem* in taxation cases (§ 36).

Where individuals or businesses consider that an act of the EU institutions directly affecting them violates their fundamental rights as enshrined in the CFREU, they can bring their case before the CJEU, which, subject to certain conditions, has the power to annul the act in question.

The Commission cannot pursue complaints which concern situations outside the implementation of EU law. In those situations, it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected. Member States have domestic guarantees of fundamental rights, normally at constitutional level. These guarantees are protected by national judges and, usually, constitutional courts. Accordingly, complaints in this context need to be directed to the national level.

In addition, all EU Member States are bound by the commitments they have made under the ECHR, independent of their obligations under EU law. Therefore, as a last resort and after having exhausted all legal remedies available at national level, individuals may bring an action before the ECtHR in Strasbourg for a violation by a Member State of a right guaranteed by the ECHR. Therefore, even where the CFREU is not applicable to a given situation within an EU Member State, two other sources of protection for fundamental rights exist: Individuals may have recourse to national remedies and, after having exhausted them, they can lodge an application to the ECHR, in conformity with that convention.²⁷

2. Standard Model of the Human Rights Protection at a National Level: the Republic of Croatia

2.1. Brief Overview of the Constitutional Order of the Republic of Croatia

The Croatian Constitution was adopted on 22 December 1990, on the eve of Croatia's disassociation from the previous state, i.e. the former SFRY.²⁸ It has been amended five times since its adoption in 1990.²⁹

Croatia is today an independent unitary state. It is defined as a "democratic and social state" where "freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the

²⁷ 2014 report on the application of the EU Charter of Fundamental Rights, European Commission – Directorate-General for Justice and Consumers, Luxembourg: Publications Office of the European Union, 2015, pp. 21, 23.

²⁸ Within the framework of the former SFRY, in February 1990 the Parliament of the former SRC adopted the Decision Proclaiming Amendments LXIV to LXXV to the Constitution of the Socialist Republic of Croatia (Official Gazette no. 31/90). Amendment LXIV required deleting the word "Socialist" before the words "Republic of Croatia" in the title of the Constitution and in its provisions, so that ever since 25 July 1990 the name of the State has been *the Republic of Croatia*. The *Sabor* – the Croatian Parliament – enacted the new Constitution on 22 December 1990 (Official Gazette no. 56/90). After a referendum on 22 May 1991, the Croatian Parliament on 25 June 1991 adopted the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia (Official Gazette no. 31/91), which was postponed for three months. Accordingly, at its session held on 8 October 1991 the Croatian Parliament adopted the Decision by which "as of 8 October 1991 the Republic of Croatia has severed state and legal relations on the basis of which it constituted the previous SFRY together with the other republics and autonomous provinces, and has terminated the legitimacy and legality of all the bodies of the previous federation – the SFRY" (Official Gazette no. 53/91).

²⁹ In this Report, the author uses the official consolidated text of the Constitution, which is published in Official Gazette no. 85/10. In that text, the numbers of the original Articles of the Constitution have been changed.

environment, the rule of law and a democratic multiparty system are the highest values of its constitutional order and the basis for the interpretation of the Constitution." It is founded on the principle of the separation of powers into the legislative, executive and judicial branches, which encompasses forms of mutual cooperation and reciprocal checks and balances. State power is limited by the constitutionally guaranteed right to local and regional self-government.³⁰

A bill of rights, containing an extensive list of constitutional rights, is mainly included in Chapter III of the Constitution.³¹ It was inspired by international human rights instruments, including the UN General Declaration of Human Rights and the ECHR. From the very outset, the catalogue of constitutional rights has been considered a central constitutional achievement.

The CCRC defined the "constitutional identity" of the Republic of Croatia as follows:

"5. ... structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)." ³²

Articles 1 and 3 of the Croatian Constitution prescribe:

"Article 1

The Republic of Croatia is a unitary and indivisible democratic and social state.

Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens.

The people shall exercise this power through the election of representatives and through direct decision-making."

"Article 3

Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution."

Croatia has provided for a monistic approach to international treaties within its legal system. The first sentence of what is today Article 141 of the Constitution prescribes:

"Article 141

International treaties in force, which have been concluded and ratified in accordance with the Constitution and made public, shall be part of the internal legal order of the Republic of Croatia and shall have precedence in terms of their legal effects over the [domestic] statutes. ..."

³⁰ Articles 1, 3 and 4 of the Constitution.

³¹ Chapter III of the Constitution is named "Protection of Human Rights and Fundamental Freedoms" and is divided into three parts: 1. Common Provisions (Articles 14–20); 2. Personal and Political Liberties and Rights (Articles 21–47); 3. Economic, Social and Cultural Rights (Articles 48–70).

³² CCRC, Communication on the Popular Constitutional Referendum on the Definition of Marriage (*Priopćenje o narodnom ustavotvornom referendumu o definiciji braka*), no. SuS-1/2013 of 14 November 2013, Official Gazette no. 138/13.

Since the Constitution prescribes that international treaties have higher legal force than the ordinary and organic acts of Parliament ("statutes"), in the case of the non-compliance of the national law with such an international treaty, courts and other bodies vested with state and public authority are obliged to apply the international treaty.

Further, according to what is today Article 118.3 of the Constitution, courts must administer justice in accordance with, *inter alia*, international treaties. This gives additional power to the courts to directly apply international treaties in the Croatian legal order.

Therefore, external sources of legality could be considered a part of the Croatian Constitution.

2.2. Constitutional Judiciary in Croatia

As regards constitutional justice, Croatia has a long history of constitutional judiciary, reaching back to the pre-democratic era.³³ It is considered a separate part of the constitutional structure, which reviews all three branches of power in constitutional matters and thus forms what may be termed the "fourth branch of power".

The CCRC is basically designed according to the traditional Hans Kelsen's (Austrian) or the European-Continental Model of Constitutional Review. In this model of constitutional review ordinary or regular courts cannot deal with constitutional matters. They are only courts of law or trial courts. And, if ordinary court in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions.³⁴

Accordingly, the CCRC is the special supreme judicial institution established in view of special and exclusive decision-making powers just on constitutional matters. It protects the constitutionality of the whole legal system, the rule of law and human rights and fundamental freedoms guaranteed by the Croatian Constitution. The CCRC is placed outside the judicial system of regular courts and is fully independent of other branches of state and public authorities. It controls them all in constitutional matters.

The Croatian Constitution prescribes that the CCRC: – decides on the conformity of laws enacted by the Croatian Parliament with the Constitution (it may repeal a law if it finds it to be unconstitutional); – decides on the conformity of other regulations, passed by the President of the Republic, the Government, ministries and other state and public authorities, with the Constitution and law (it may repeal or annul any regulation if it finds it to be unconstitutional or illegal); – protects individual constitutional rights in proceedings instituted by a constitutional complaint (it may quash any judgment passed by any Croatian national court, including judgments of the Croatian Supreme Court as the highest national court, and any individual act passed by any other authorized body, if it finds that this individual act violates

³³ Constitutional judiciary was introduced in 1963 and the Constitutional Court of the former SRC began to work in 1964. On 25 July 1990, the earlier name of the Constitutional Court of the SRC was changed to the Constitutional Court of the Republic of Croatia (the CCRC).

³⁴ The European-Continental Model of Constitutional Review is quite different from the "American" – Judicial Review Model based on the case of *Marbury vs. Madison* from 1803 and on John Marshall's doctrine. Namely, under the American model, constitutional matters are dealt with by all ordinary courts. So, it is a decentralized or diffuse or dispersed review under ordinary court proceedings (*incidenter*).

the constitutional right of the citizen in question); – decides on jurisdictional disputes among the legislative, executive and judicial branches of government; – supervises the constitutionality of the programmes and activities of political parties; – supervises the constitutionality and legality of elections and state referendums and decides on electoral disputes which do not fall within the jurisdiction of courts; – decides on the impeachment of the President of the Republic in proceedings instituted by the Croatian Parliament; – monitors the execution of constitutionality and legality and reports to the Croatian Parliament on any kind of unconstitutionality and illegality it has observed.

The CCRC bases its work exclusively on the provisions of the Constitution and the Constitutional Act on the CCRC, the only law in Croatia so far that has the force of constitutional law. By the force of the Constitution, the CCRC is obliged to implement international law (which is part of the internal legal order of the Republic of Croatia in accordance with provisions of what is today Article 141 of the Constitution) in the performance of its tasks, and does so in its everyday work. Accordingly, the impact of external (European and international) law on the Croatian constitutional doctrine in legal science and on the jurisprudence of the CCRC is very strong. These sources of legality are common standards of constitutional review in Croatia.

Moreover, it is important for the CCRC to faithfully follow the external (European and international) law. "Faithfully following" this law should be understood primarily as the execution of an international obligation which the Republic of Croatia undertook by ratifying it. Respecting State obligations is a constitutional issue *par excellence*.

In Decision no. U-III-3304/2011 the CCRC in this sense stressed (concerning the obligations of courts towards the ECHR):

"32. ... the domestic case-law must be built so as to observe the international legal obligations that for the Republic of Croatia arise from the ECHR. It must be in conformity with the ... relevant legal positions and case-law of the ECtHR, because for the Republic of Croatia they represent binding standards of international law."

2.3. Accession of the Republic of Croatia to the CoE and Ratification of the ECHR

The CoE has worked to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage. Its core objective is to preserve and promote human rights (which are considered as universal, indivisible and inalienable rights of each and every individual), democracy and the rule of law in Europe. The ECtHR represents the judicial dimension of this action. It ensures the observance of the engagements undertaken by States Parties under the ECHR, an instrument which is the expression of a common European standard, i.e. a common foundation of human rights for the whole of Europe.³⁵ All these aims of the CoE, as well as the values it promotes and the safeguards, are embodied in the Croatian Constitution, creating the structural characteristics of the Croatian constitutional state, that is, its constitutional identity.

Cooperation between the Republic of Croatia and the CoE started in 1991, when the PACE, at its session of 21 September 1991, based on the 1974 Constitution of the former SFRY,

³⁵ See CM Document, 119th Session of the Committee of Ministers (Madrid, 12 May 2009) – Declaration, CM(2009)50 final, 12 May 2009.

recognised the right of disassociation for the former Yugoslav republics that wished to exercise this right.

Following its international recognition, Croatia submitted an application for full CoE membership on 11 September 1992. It became the 40th full member of the CoE on 6 November 1996, provided it fulfilled the 21 conditions the CoE had stipulated.³⁶

a) Status of the ECHR Law and the ECtHR in the Croatian Legal Order

Croatia ratified the ECHR on 22 October 1997.³⁷ The ECHR entered into force in respect of Croatia on 5 November 1997, together with Protocols nos. 1, 4, 6, 7 and 11. In 2003, 2005 and 2010, respectively, Protocols nos. 13, 12 and 14 entered into force in respect of Croatia. Croatia has not so far signed Protocols 15 and 16.

The ECHR constitutes a self-executing international agreement in Croatia. Although it formally has sub-constitutional status (Article 141 of the Constitution), the ECHR is so far the only European law in Croatia which actually has a quasi-constitutional status. This status of the ECHR has been recognised by the CCRC in its case-law.

Namely, in Decision no. U-I-745/1999 of 8 November 2000, rendered in proceedings of the abstract control of the constitutionality of the Expropriation Act,³⁸ the CCRC for the first time reviewed the conformity of a domestic law directly with the ECHR, not with the Constitution, and it repealed some provisions, finding that they were not in conformity with Article 6 of the ECHR. In this decision, the CCRC held that any non-compliance of a national law with the ECHR simultaneously means the non-compliance of this law with the rule of law, the principle of constitutionality and legality, and the principle of legal monism (Articles 3 and 5 and what is today Article 141 of the Constitution).

In this way, the CCRC in fact replaced constitutional review with a review of the consistency of a domestic law with the ECHR and by doing so secured a quasi-constitutional status for the ECHR in the domestic legal order.

When it comes to the ECtHR, the CCRC in its case-law so far has highlighted the similarities between particular provisions of the Constitution and the ECHR, as well as the role of the CCRC and the ECtHR in protecting individual (fundamental) rights. For example, in Decision no. U-III-3304/2011,³⁹ with regard to Article 29 of the Constitution and Article 6 of the ECHR, it stressed the following:

"40.2. The Constitutional Court is obliged to point out the incorrect opinion of the first-instance disciplinary court that the applicant's request should have been dismissed because the ECtHR in its decision had found 'a violation of a right under the ECHR due to

³⁶ See PACE Opinion no. 195 (1996), adopted at the 12th Sitting of the PACE on 24 April 1996.

³⁷ Law on Ratification of the Convention for the Protection of Human Rights and Basic Freedoms and Protocols nos. 1, 4, 6, 7 and 11 to the Convention for the Protection of Human Rights and Basic Freedoms (*Zakon o potvrđivanju Konvencije za zaštitu ljudskih prava i temeljnih sloboda i Protokola br. 1, 4, 6, 7 i 11 uz Konvenciju za zaštitu ljudskih prava i temeljnih sloboda*), Official Gazette – International Agreements, no. 18/97, 6/99 – corr.

³⁸ CCRC, Decision no. U-I-745/1999 of 8 November 2000, Official Gazette no. 112/00.

³⁹ CCRC, Decision no. U-III-3304/2011 of 23 January 2013, Official Gazette no. 13/13 (Case of *Vanjak*).

a violation of form, but does not call into question the content, namely the decision on the claimant's responsibility and punishment'. Such and similar opinions of courts undermine the rule of law in the Republic of Croatia, leading to the loss of public confidence in the national judicial system. In addition to this, they also indicate insufficient knowledge of the subject matter, aim and purpose of Article 6 of the ECHR.

In these terms, it must firstly be reiterated that 'fairness' in the meaning of Article 6 of the ECHR, similarly to 'fairness' in the meaning of Article 29 of the Constitution, must not be interpreted as being 'substantive', because its nature is exclusively 'procedural' or related to the 'process'. A procedural violation in the meaning of Article 6 of the ECHR made by the court during criminal proceedings has, therefore, an independent legal nature and does not depend on finding an individual guilty or innocent.

This means that the ECtHR, similarly to the Constitutional Court at the national level, is not a 'court of fourth instance' and does not decide on the merits about rights and obligations or about a criminal suspicion or charge in individual cases. This is the task of the ordinary national courts. In the case of *Jalloh v. Germany* (judgment, Grand Chamber, 11 July 2006, application no. 54810/00) the ECtHR explicitly determined that Article 6 of the ECHR did not relate to the establishment of the applicant's guilt or innocence:

'95. It is ... not the role of the Court to determine, as a matter of principle, whether ... the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found.'

Therefore, similar to the task of the Constitutional Court at the national level when it comes to the Constitution, the primary task of the ECtHR at the international level is to ensure the observance of the ECHR and the international treaty obligations assumed by the Republic of Croatia by its ratification."

b) Subsidiarity of the ECHR Law in the Croatian Legal Order

The quasi-constitutional status of the ECHR in the Croatian legal order must always be observed in the light of the fact that the machinery for the protection of human rights and fundamental freedoms established by the ECHR is subsidiary to national systems safeguarding these rights and freedoms.⁴⁰

In the case of *Srbić against Croatia*,⁴¹ the ECtHR laid down clear rules concerning the subsidiarity of the ECHR's control mechanism to the Croatian mechanism safeguarding human rights (i.e. the constitutional complaint before the CCRC):

⁴⁰ The principle of subsidiarity (and the doctrine of the margin of appreciation) was debated in the lead-up to the 2012 Brighton Conference. According to the Brighton Declaration, Protocol no. 15 reads, "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention." While the addition of a new recital clearly stems from the agreement at Brighton, and will provide a further point of reference for the ECtHR, it is hardly likely to make a meaningful substantive impact on the ECtHR's adjudication in practice. Namely, the ECtHR has already fully interpreted in its case law the subsidiarity of the ECHR's control mechanism.

⁴¹ ECtHR, Decision as to the admissibility of application no. 4464/09 by Krešimir Srbić against Croatia of 21 June 2011.

"The Court reiterates that the machinery for the protection of fundamental rights established by the Convention is subsidiary to national systems safeguarding human rights. The Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the functioning authorities of their countries and are better placed to assess the opportunities and resources afforded by their respective domestic legal systems (see *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 50, Series A no. 20; *Chapman v. the United Kingdom* [GC], no. 27238/95, § 91, ECHR 2001-I; and *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 90, ECHR 2007-II).

As to the exhaustion of domestic remedies, the Court reiterates that, in accordance with Article 35.1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A, and *Remli v. France*, 23 April 1996, § 33, Reports 1996-II). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. To hold otherwise would be to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with the subsidiary character of the Convention (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005).

(...)

In order to comply with the principles of subsidiarity the applicants, before bringing their complaints to the Court, have first to afford the Croatian Constitutional Court, as the highest Court in Croatia, the opportunity of remedying their situation and addressing the issues they wish to bring before the Court."

In conclusion, from the CCRC's point of view, the most important effect of the subsidiarity of the ECHR's control mechanism is that the CCRC has the opportunity of preventing and/or redressing by itself the alleged violations of the rights and freedoms defined in the ECHR and its Protocols before those allegations are submitted to the ECtHR.

c) The ECtHR's Attitude toward the CCRC

The case-law of the ECtHR concerning Croatia indicates that, from the standpoint of the application of the ECHR, the ECtHR considers the CCRC as "the highest court of the Republic of Croatia",⁴² not as the constitutional court (which is not part of the judicial branch of Croatian government).

The special status of the CCRC could possibly be perceived only in the cases where the ECtHR examines alleged violations of Article 6.1 of the ECHR. With regard to this, we should first recall the well-known discussion on the applicability of Article 6.1 of the ECHR

⁴² ECtHR, *Srbić against Croatia*. See *supra* note 41 and the accompanying quotation from this decision in the main text.

on constitutional courts, which was held concerning the case of *Ruiz-Mateos v. Spain*.⁴³ In this judgment, the ECtHR concluded as follows:

"1. *Applicability of Article 6 para. 1 (art. 6-1)*

55. The Government denied that Article 6 para. 1 (art. 6-1) was applicable, pleading that the right in issue was not a 'civil right'. In support of this contention, they cited the specific nature of the Constitutional Court's task and the features peculiar to questions of constitutionality. The Constitutional Court's role was to ensure that the legislature, the executive and the judiciary respected the Constitution and not to rule on the rights and interests of individuals. This specificity of its functions appeared even more clearly in relation to proceedings of the type under review. Such proceedings were instituted by the ordinary courts and were intended to eliminate from the domestic legal system provisions contrary to the Constitution. In this instance, there were no 'parties' because Institutional Law no. 2/1979 provided that only the representatives of the State authorities and the Attorney General need be heard (...). In addition, the judgment was notified solely to the court which referred the question.

56. In their observations of 10 June and 27 August 1992 (...), the German and Portuguese Governments drew attention to the fact that the decision in the *Ruiz-Mateos* case would be of great significance to those other member States of the Council of Europe which have a constitutional court. The German Government, citing the above-mentioned *Buchholz* judgment, maintained that Article 6 para. 1 (art. 6-1) did not apply to proceedings conducted before such courts. That had been the Federal Republic's understanding when it had ratified the Convention. They supported the respondent Government's argument, giving a broad outline of the rules in force in Germany, which are moreover similar to the Spanish provisions. The Portuguese Government took the view that, by reason of their nature, structure and jurisdiction, constitutional courts fell outside the ambit of Article 6 para. 1 (art. 6-1).

57. The Court is not called upon to give an abstract ruling on the applicability of Article 6 para. 1 (art. 6-1) to constitutional courts in general or to the constitutional courts of Germany and Portugal or even of Spain. It must, however, determine whether any rights guaranteed to the applicants under that provision were affected in the present case.

(...)

59. The Court observes that there was indeed a close link between the subject-matter of the two types of proceedings. The annulment, by the Constitutional Court, of the contested provisions would have led the civil courts to allow the claims of the *Ruiz-Mateos* family (...). In the present case, the civil and the constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants' rights. The Court notes that by raising questions of constitutionality, the applicants were using the sole – and indirect – means available to them of complaining of an interference with their right of property: an amparo appeal does not lie in connection with Article 33 of the Spanish Constitution (...).

60. Accordingly, Article 6 para. 1 (art. 6-1) applied to the contested proceedings."

A summary of the general standpoints on the applicability of Article 6.1 of the ECHR also on constitutional court proceedings was provided by the ECtHR in the case of *Süßmann v. Germany*:⁴⁴

⁴³ ECtHR, *Ruiz-Mateos v. Spain*, judgment (Court plenary), no. 12952/87, 23 June 1993, Series A, 262.

⁴⁴ ECtHR, *Süßmann v. Germany*, judgment [GC], no. 20024/92, 16 September 1996, Reports 1996-IV, p. 1171.

"39. According to the its well-established case-law on this issue (see the *Deumeland v. Germany* judgment of 29 May 1986, Series A no. 100, p. 26, para. 77; the *Bock v. Germany* judgment of 29 March 1989, Series A no. 150, p. 18, para. 37; and the *Ruiz-Mateos v. Spain* judgment of 23 June 1993, Series A no. 262, p. 19, para. 35), the relevant test in determining whether Constitutional Court proceedings may be taken into account in assessing the reasonableness of the length of proceedings is whether the result of the Constitutional Court proceedings is capable of affecting the outcome of the dispute before the ordinary courts.

In the *Ruiz-Mateos* case the Court also found that Article 6 para. 1 (art. 6-1) applied to Constitutional Court proceedings from the point of view of fair trial (see the above-mentioned judgment, pp. 23-24, paras. 55-60). It held that, while it was not called upon to give an abstract ruling on the applicability of Article 6 para. 1 (art. 6-1) to Constitutional Courts in general, it had nevertheless to determine whether any rights guaranteed to the applicants under that provision (art. 6-1) were affected in the case before it (ibid., para. 57). It noted further that by raising questions of constitutionality, the applicants were using the sole – and indirect – means available to them of complaining of an interference with their right of property (ibid., para. 59).

It follows that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 para. 1 (art. 6-1)."

Moreover, in the *Süßmann v. Germany* judgment, the ECtHR extended the application of Article 6.1 of the ECHR to cases that concern the length only of proceedings in a Constitutional Court and not also that of proceedings conducted in ordinary courts:

"40. However, the present case differs from earlier cases in that it concerns the length only of proceedings in a Constitutional Court and not also that of proceedings conducted in ordinary courts. In this instance the proceedings in the Federal Constitutional Court were not an 'extension' of proceedings in the ordinary courts. The applicant had first contested the lawfulness of the reduction of his supplementary pension, following the amendment of the Fund's rules, in the arbitration tribunals (...). As the Federal Court, in a series of test cases, had confirmed the validity of these amendments (...), the applicant could appeal directly to the Federal Constitutional Court, without first bringing proceedings in the ordinary civil courts (...).

41. The Court recalls that proceedings come within the scope of Article 6 para. 1 of the Convention (art. 6-1), even if they are conducted before a Constitutional Court, where their outcome is decisive for civil rights and obligations (see, inter alia, the *Kraska v. Switzerland* judgment of 19 April 1993, Series A no. 254-B, p. 48, para. 26).

42. The dispute as to the amount of the applicant's pension entitlement was of a pecuniary nature and undeniably concerned a civil right within the meaning of Article 6 (art. 6) (see the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 17, para. 46, and the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, para. 26). Following the decisions of the Federal Court in the test cases, the only avenue through which Mr Süßmann could pursue further determination of that dispute was by means of an appeal whereby he alleged a breach of his constitutional right of property. The Federal Constitutional Court proceedings therefore concerned a dispute over a civil right.

43. In the event of a successful appeal, the Federal Constitutional Court does not confine itself to identifying the provision of the Basic Law that has been breached and indicating the public authority responsible; it quashes the impugned decision or declares void the legislation in question (section 95 of the Federal Constitutional Court Act ...).

In the present case, if the Federal Constitutional Court had found that the amendments to the civil servants' supplementary pension scheme infringed the

constitutional right of property and had set aside the impugned decisions, Mr Süßmann would have been reinstated in his rights. Thus he would have received the full amount of his initial supplementary pension.

44. The Federal Constitutional Court proceedings were therefore directly decisive for a dispute over the applicant's civil right.

45. Admittedly in this case the Second Section of the First Division, sitting as a panel of three judges, had declined to accept Mr Süßmann's complaint in the course of preliminary proceedings (sections 93a and 93b of the Federal Constitutional Court Act as amended in 1985 ...). Nevertheless, in giving the reasons for its decision, it examined the submissions on the merits made by the applicant and, in particular, considered in detail whether the Federal Court, by confirming the validity of the amendments to the rules, had infringed the applicant's constitutional right of property (...).

46. In these circumstances Article 6 para. 1 (art. 6-1) is applicable to the proceedings in issue."

However, in the case of *Batinović and Point-Trade d.o.o against Croatia*,⁴⁵ the ECtHR took a somewhat different approach because it examined primarily whether there was a "dispute" over civil rights or obligations within the meaning of Article 6.1 of the ECHR. In doing so, it focused on the discretionary nature of the legal remedy before the CCRC, and not on the question of whether the CCRC's proceedings were directly decisive for a dispute over the applicant's civil right:

"The Government contested this view, claiming that Article 6 was not applicable to the Constitutional Court proceedings in the present case. They submitted that a petition for review of constitutionality and legality concerned abstract proceedings rather than those for the protection of rights and interests of individuals. When filing such a petition, the person did not have to prove his or her standing or legal interest in the matter. Once the petition was lodged, it is for the Constitutional Court to decide whether or not it would institute proceedings for review of constitutionality and legality. In sum, based on the purpose and characteristics of proceedings following such a petition, the Government claimed that they did not concern a 'dispute' within the meaning of Article 6 § 1 of the Convention.

The applicants disagreed.

The Court recalls that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 § 1 of the Convention (see *Süßmann v. Germany*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1171, § 39). However, for Article 6 § 1 to be applicable, the impugned proceedings must involve a dispute over an individual's civil rights or obligations.

In the present case, the Court has already concluded that the applicants had the opportunity to address the commercial courts with their claim for the return of their shares. Nonetheless, they never brought such an action. Instead, the applicants filed a petition for constitutional review, which did not automatically institute such proceedings, but required a separate discretionary decision of the Constitutional Court to that end. However, that court had never decided to institute the review proceedings following the applicants' petition. In these circumstances, the Court considers that the proceedings before the Constitutional Court did not involve a 'dispute' over civil rights or obligations within the meaning of Article 6 § 1 of the Convention.

Having regard to this, the Court finds that Article 6 § 1 of the Convention does not apply to the present case.

⁴⁵ ECtHR, Decision as to the admissibility of application no. 30426/03 by Joko Batinović and Point-trade d.o.o. against Croatia of 10 July 2007.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4."

It can be deduced from the stated standpoints of the ECtHR that Article 6.1 of the ECHR would not apply to proceedings of the abstract review of the conformity of laws with the Constitution, which in Croatia have the characteristics of *actio popularis*, and regarding which the CCRC has discretionary authority to decide whether or not to initiate proceedings. Nevertheless, this does not mean that the ECtHR could not also declare itself competent *ratione materiae* for such proceedings provided that the CCRC agrees to decide on the filed proposal and to render a decision about this on the merits, and such a decision would be directly decisive for a dispute over the applicant's civil rights. Therefore, in this case the CCRC, from the ECtHR's point of view, would also be "a court like the others".

In sum, the CCRC's position in respect of the law of ECHR is the position of the highest national court whose final decisions are reviewed (i.e. supervised) by the higher court (the ECtHR) regarding all issues for which the ECtHR – in interpreting the ECHR – has declared itself as the competent supervisory court.

2.4. Accession of the Republic of Croatia to the EU

The SAA was signed in Luxembourg on 29 October 2001. Croatia was the second country to sign the SAA with the EU and that agreement represented the first formal step in institutionalising the relationship of Croatia with the EU. The SAA entered into force on 1 February 2005.⁴⁶

Croatia formally applied for EU membership on 21 February 2003 in Athens, and the European Commission recommended making it an official candidate in early 2004. Candidate country status was granted to Croatia by the European Council on 18 June 2004. After the opening of accession negotiations on 3 October 2005, the process of screening 35 acquis chapters with Croatia was completed on 18 October 2006.

A year before finishing accession negotiations, on 16 June 2010, the Croatian Parliament amended the Constitution,⁴⁷ aiming to create a constitutional basis for Croatia's membership in the EU and to harmonise the Croatian legal system with that of the EU. A new chapter VII.A under the title "European Union" and new Articles 141.a ("Legal Grounds for Membership and Transfer of Constitutional Powers"), 141.b ("Participation in European Union Institutions"), 141.c ("European Union Law") and 141.d ("Rights of European Union's Citizens") were added to the Constitution.⁴⁸ These articles of the Constitution read:

"VIII. EUROPEAN UNION

⁴⁶ Law on Ratification of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (*Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica*), Official Gazette – International Agreements nos. 14/01, 1/05.

⁴⁷ Amendments to the Constitution of the Republic of Croatia (*Promjena Ustava Republike Hrvatske*), Official Gazette no. 76/10. It was the fourth amendment of the Constitution since 1990.

⁴⁸ In the official consolidated text of the Constitution, which is published in Official Gazette no. 85/10, the chapter and articles are numbered as follows: Chapter VIII and Articles 143, 144, 145 and 146. *See supra* note 29.

1. LEGAL GROUNDS FOR MEMBERSHIP AND TRANSFER OF CONSTITUTIONAL POWERS

Article 143

Pursuant to Article 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union.

Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

2. PARTICIPATION IN EUROPEAN UNION INSTITUTIONS

Article 144

The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.

The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.

The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis for the Government's actions in European Union institutions.

Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.

The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.

3. EUROPEAN UNION LAW

Article 145

The exercise of the rights ensuing from the European Union *acquis communautaire* shall be made equal to the exercise of rights under Croatian law.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*.

Croatian courts shall protect subjective rights based on the European Union *acquis communautaire*.

Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

4. RIGHTS OF EUROPEAN UNION CITIZENS

Article 146

Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union *acquis communautaire*, and in particular:

- freedom of movement and residence in the territory of all Member States,
- active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,
- the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,

– the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.

All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.

In the Republic of Croatia, all rights guaranteed by the European Union *acquis communautaire* shall be enjoyed by all citizens of the European Union."

Croatia finished accession negotiations on 30 June 2011. It signed the Treaty of Accession on 9 December 2011 in Brussels. On 23 December 2011, the Croatian Parliament adopted the decision on calling a state referendum on the accession of the Republic of Croatia to the EU. A referendum on EU accession was held on 22 January 2012, with 66.27% of participants voting in favour of joining the EU. With 136 "Yes" votes, Croatian Parliament unanimously ratified on 9 March 2012 the Accession Treaty of the Republic of Croatia to the European Union.

Croatia became the 28th full-fledged member of the EU on 1 July 2013.

The Act on Cooperation between the Parliament and the Government of the Republic of Croatia in European Affairs was passed by the Croatian Parliament at its session on 28 June 2013 and it entered into force on 1 July 2013.⁴⁹ It governs the cooperation of the Croatian Parliament and the Government in European affairs, in line with the TEU and TFEU and in line with the Constitution. It stipulates that the Parliament shall monitor the Government's work within the EU institutions, review EU documents and Croatia's positions and reach conclusions on them, participate in putting forward Croatian candidates for EU institutions and bodies, take part in cooperation between national parliaments, cooperate with the European Parliament, etc.

a) Status of the EU Law and the CJEU in the Croatian Legal Order

The EU law has sub-constitutional status in the Republic of Croatia, not quasi-constitutional (as is the case with the ECHR law).

As to the Article 145 ("European Union Law"), the CCRC has had no opportunity in its jurisprudence so far to interpret these constitutional provisions. However, it is considered in legal theory that the "[s]tated principles create specific obligations for ordinary national courts and for the Constitutional Court."⁵⁰ The positions of Croatian legal theory concerning the significance and achievements of particular provisions of what is today Article 145 of the Constitution are as follows:⁵¹

⁴⁹ Act on Cooperation between the Parliament and the Government of the Republic of Croatia in European Affairs (*Zakon o suradnji Hrvatskoga sabora i Vlade Republike Hrvatske u europskim poslovima*), Official Gazette no. 81/13.

⁵⁰ Čapeta, Tamara; Rodin, Siniša (2011) Basics of EU Law (*Osnove prava Europske unije*), 2nd edition, Zagreb: Narodne novine d.d., p. 150.

⁵¹ Čapeta; Rodin, *ibid.*, pp. 151–153.

- Article 145.1 of the Constitution "constitutes a declaration of two principles formulated in the case-law of the ECtHR – the principle of equivalence and the principle of effectiveness. Both these principles are embedded in the very foundations of the EU legal order and are well established in the case-law of the ECtHR. These procedural principles are binding for ordinary and constitutional courts."
- Article 145.2 of the Constitution "can be understood as a norm that implicitly allows for the direct effect and supremacy of EU law over Croatian law. These principles are embedded in the very foundation of EU law and constitute its original and autonomous legal order." Therefore, Article 145.2 of the Constitution "must not be superficially understood as a mere conflict-of-law rule, but rather as the acceptance by constitutional law of the fundamental principles on which EU law is based. These principles permeate the national legal orders of the Member States, and without their acceptance, membership in the EU is not possible." Article 145.2 of the Constitution "opens up the Croatian legal system to the legal order of the EU and, by doing so, differentiates it from the legal order of international law. Among other things, it constitutes the national legal expression of the principle of the direct effect and supremacy of EU law over national law, but also includes the other principles of EU law, which are crystallised in the jurisprudence of European law."
- Article 145.3 of the Constitution "should be understood as a special expression and additional elaboration of Article 141 of the Constitution, which lays down that international treaties are a component of the domestic legal order and have primacy over domestic law."
- Article 145.4 of the Constitution "prescribes the so-called direct administrative effect." This means that the obligation to apply directly EU law binds not only Croatian courts, but also state bodies, bodies of units of local and regional self-government, and legal persons vested with public authority.

When it comes to the CJEU, it is sufficient to find that the CJEU is not a court whose functions are exhausted with the protection of individual (fundamental) rights, as is the case with the ECtHR. Taking into consideration all its competences, it seems that the following definition of the CJEU, offered by Vassilios Skouris, the former President of the CJEU, comes the closest to what the CJEU actually is in the practical legal life of the EU and its Member States:

"Is the Court of Justice a Constitutional Court?"

In order to appreciate the exact nature of the European Court of Justice and whether it could be considered as a purely constitutional Court, we have to view the system of enforcement of EU law by the Court in its entirety. In doing so one cannot help but noticing a basic feature: duplicity. Indeed, it can be easily observed that the relevant provisions examined above, ensure the enforcement of Community law on two levels: the Community level (through direct actions) and the Member State level (through preliminary references). Furthermore, in both procedures the Court has jurisdiction to

- interpret the Treaty provisions,
- control Member State non-compliance with Treaty provisions and
- control the legality of acts or failures to act by institutions of the Community.

It is interesting to examine briefly the function of this duplicity. First of all, the two levels of judicial enforcement by the Court of Justice complement each other in a unique way. The weaknesses of direct actions noted above are remedied to a great extent by the preliminary reference procedure. A European Court judgment in an Article 226 procedure remains declaratory and might not be complied with by a Member State until

the Commission decides to bring an Article 228 action. After a preliminary ruling, it is the national court that renders the final judgment and national court judgments cannot be easily disregarded. Furthermore, the preliminary reference procedure lacks the political character of the decision to initiate an Article 226 procedure; important and minor violations can appear before the Court; the 'centralized' direct enforcement under an Article 226 procedure is coupled with the 'decentralized' indirect enforcement under Article 234, with private individuals monitoring compliance with EC law.

Secondly, the system of enforcement, and therefore the Court, enjoys far more credibility due to the fact that it includes judicial review of the legality of the acts or omissions by Community institutions. Community law is not enforced selectively.

Finally, the dual character of the system enables enforcement of Community law by the Court of Justice both in vertical relationships (between Community institutions and Member States, between Community institutions and individuals and between Member States and individuals) and in horizontal relationships among individuals.

In view of these considerations, I believe that the European Court of Justice cannot be considered as a Constitutional Court in the sense this term is used in national legal orders. It is certainly entrusted with the authoritative interpretation of the EU's constitutional charter, it does have jurisdiction to control the legality, with regard to this Charter, of all legislative or administrative measures adopted within the sphere of EU law and lastly it is the only judicial authority that can resolve conflicts of jurisdiction between the EU institutions. However, the Court also has jurisdiction over appeals brought against judgments and orders of the Court of first instance. It will soon have the option of reviewing appellate judgements of the Court of First Instance. In preliminary references it frequently interprets EU law provisions of minor importance. To illustrate this with an example I will only say that the Court has rendered judgments on the customs classifications of pyjamas, female underwear and integrated printer-fax machines. Moreover, an infringement action brought by the Commission against a Member State for failure to comply with certain provisions of the waste management directive can hardly be characterised of a constitutional nature.

Hence, if I were to seek the Court's counterpart in national legal orders I would most probably not look towards constitutional courts but towards supreme courts. I do believe though that the most accurate characterisation of the European Court of Justice is that of a hybrid court performing both the functions of a supreme and a constitutional court."⁵²

The CJEU serves as the guardian of EU law, including the CFREU. It adjudicates only within the area of application of EU law, and in the area of fundamental rights when implementing the law of the Union (Art. 51.1 of the CFREU). Thus, the CCRC generally does not exercise its jurisdiction to protect fundamental rights in Croatia within the area of mandatory Union law. It is the task of the CJEU, which is at the same time obligated under the first sentence of Article 4.2 of the TEU, to give regard to national identity.

In other words, to determine definitively how primary and secondary law should be interpreted in respect of the whole of the EU is, and remains, the most important function of the CJEU. On the other hand, the interpretation and application of national law, even where this is derived from EU law, is and remains the exclusive domain of the national courts. In the words of Skouris, "The European Court of Justice confines itself to interpreting or ruling on

⁵² Skouris, Vassilios. The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts, Presentation at the Constitutional Court of the Republic of Slovenia, at <http://www.us-rs.si/o-sodiscu/katalog-inf-javnega-znacaja/contributions/presentation-by-dr-vassilios-skouris-president-of-the-european-court-of-justice/> (Last accessed: 15 January 2016).

the validity of the relevant Community law, and directs the referring court to determine the dispute pending before it on the basis of that preliminary ruling. National law thus remains the national courts' very own domain, and the European Court of Justice concentrates on Community law, in order to ensure that this is interpreted and applied uniformly in all Member States. Thus, the concept underlying the preliminary ruling procedure is relatively straightforward and, so far as the national courts and tribunals are concerned, characterised by the fact that they may make a reference to the European Court of Justice if they are sitting at first instance or on appeal and are subject to appeal to a higher or supreme court, whereas they must bring the matter before the European Court of Justice if no appeal lies against their decision in a dispute. The absolute obligation to make a reference does not apply [according to the doctrine of 'acte clair' – Case 283/81 *CILFIT and Others* (1982) ECR 3415, §§ 14 and 16] if the interpretation of the relevant Community law is clear, that is where previous decisions of the Court of Justice have already clarified the point of law in question, or where the correct interpretation of Community law is so obvious as to leave no scope for any reasonable doubt."⁵³

Accordingly, if in a specific case the CCRC established that EU law had been applied, and the interpretation of the relevant EU law was clear in the meaning of the doctrine of "acte clair", the CCRC would remand the case to the competent ordinary court through an order, with the necessary reasons and instructions, to resolve the case in conformity with the relevant standpoints of the CJEU. Otherwise, the CCRC could also remand the case with an order, with the necessary reasons and instructions, for the competent ordinary court to make reference to the CJEU. At this time it is not possible to assess whether, and – if so – in which cases the CCRC itself would forward a reference to the CJEU.⁵⁴

b) Subsidiarity of the EU Law in the Croatian Legal Order

As to the subsidiarity of the EU law in the Croatian legal order, there is still no relevant case-law of the CCRC regarding this issue. However, it is reasonable to presume that the relevant legal standpoints of the German BVerfG will be carefully considered by the CCRC in the coming period. This is primarily related to the standpoints of the BVerfG that it is obliged to intervene if a measure under EU law were to represent a clear or structurally significant *ultra vires* act,⁵⁵ or if it were detrimental to Germany's constitutional identity as protected under Article 79.3 of the Basic Law, including the minimum standard of protection of fundamental rights demanded by the Basic Law.⁵⁶

These standpoints, if and when applied in the case of Croatia, could mean the following: the EU derives its democratic legitimacy in Croatia within the meaning of what are today Articles 143–146 in connection with Article 1 of the Constitution. Therefore, the CCRC could see itself as being obliged to monitor at least those actions that arbitrarily exceed the limits of the

⁵³ Skouris, Vassilios. The Relationship of the European Court of Justice with the National Constitutional Courts, Presentation at the Constitutional Court of Hungary (A Magyar Köztársaság Alkotmánybírósága), at <http://www.mkab.hu/index.php?id=vassilios_skouris__president_of_the_european_court_of_justice> (Last accessed: 15 January 2016).

⁵⁴ See *infra* Part III (Judicial Dialogue), Section 2.3., Point a) "Referral by the CCRC to the CJEU".

⁵⁵ BVerfGE 89, 155 [187 and 188] – Maastricht; 123, 267 [353, 400] – Lisbon; 126, 286 [304] – Honeywell.

⁵⁶ BVerfGE 37, 271 [278 et seq.] – Solange I; 73, 339 [375 et seq.] – Solange II; 89, 155 – Maastricht; 102, 147 – Banana market.

EU programme of integration, that is, the constitutional powers transferred to the EU, and, if necessary, to find such legal acts to be inapplicable in Croatia.

However, the CCRC is fully aware of the CJEU's sharp criticism of the above-mentioned legal standpoints of the BVerfG. It is necessary to recall the following critique issued by Skouris: "First of all, the Federal Constitutional Court claims the right to review acts of the European institutions and bodies with a view to determining whether they remain within the limits of the sovereign rights conferred on them by virtue of the limited powers granted, while preserving the European Union principle of subsidiarity. This process, described by the Federal Constitutional Court as an *ultra vires* check, which presumably also encompasses scrutiny of the case-law of the European Court of Justice, is to be supplemented by an 'identity check' to determine whether the inviolable core content of the constitutional identity of the German Basic Law (*Grundgesetz*) has been preserved. In plain English this means that the acts of, and decisions taken by, Union institutions may be subject to double scrutiny by the Federal Constitutional Court: first, with regard to observance of the safeguards under the Basic Law, which are subject to the 'immutability guarantee'; second, with regard to compliance with the principle of subsidiarity enshrined in the Union Treaties. Although this is not the first time that the Federal Constitutional Court has announced an *ultra vires* check, there can be no doubt that the preservation of subsidiarity as a precondition for the validity of all legal acts of the European Union is a matter which falls to be assessed by the European Court of Justice and is covered by its monopoly on annulment, as evidenced not least by the fact that the Lisbon Treaty introduces a special claims procedure so that, with the substantial involvement of the national Parliaments of the Member States, the question of subsidiarity can be put to the European Court of Justice at the earliest possible stage. But carrying out an identity check relating exclusively to the national constitution when actually exercising powers which have been conferred on the European Union is also highly conflict-laden because it places legal acts of the European Union, all of which are subject to review by the European Court of Justice as to their legality, and which can only be annulled or declared invalid by that court, within the national constitutional courts' powers of scrutiny, for the purposes of determining whether the integration-proof constitutional identity of the Member State concerned has been damaged. Both the *ultra vires* and identity checks mean, ultimately, that acts of the Union institutions may be open to review in 27 Member States in that they may be examined 27 times with regard to observance of the principle of subsidiarity under Union law and 27 times with regard to respect for the integration-proof identity of the Member State concerned. To describe the consequences as succinctly as possible and thereby paraphrasing the theory of a famous German-born physicist, this would mean the introduction of an absolute theory of relativity for acts of secondary legislation under European Union law."⁵⁷

Consequently, the CCRC will, in the coming period, have to take into account all the above-mentioned arguments and, based on the requirements derived from Articles 143–146 together with Article 1 of the Constitution, define the fundamental meaning of the subsidiarity of EU law in the Croatian constitutional order. This has not been done to date. Namely, until now the CCRC has issued only one general legal standpoint concerning EU law. In the Decision of the CCRC no. U-VIIR-1158/2015 of 21 April 2015,⁵⁸ the CCRC first established that the

⁵⁷ Skouris, *The Relationship of the European Court of Justice with the National Constitutional Courts*. See *supra* note 53.

⁵⁸ CCRC, Decision no. U-VIIR-1158/2015 of 21 April 2015, Official Gazette no. 46/15. With this decision, the CCRC did not allow the so-called "motorways monetisation" referendum to be called, since it established that the proposed referendum question was not in conformity with the Constitution. The referendum question read:

proposed Act on Amendments to the Roads Act was not in conformity with the Constitution. In this context, it subsequently concluded that it was not necessary to further review "the conformity of the referendum question with EU law in substance because the Constitution by its own legal force has supremacy over EU law" (§ 60 of the decision).

c) The CJEU's Attitude toward the CCRC

From the standpoint of the cooperation between the CJEU and CCRC, the CJEU considers the CCRC as the court with no special status in comparison with other Croatian courts. Skouris' general view on the status of constitutional courts in the area covered by the EU Treaties is as follows:

"... I would say that the constitutional courts do not have a special status with regard to the cooperation between the European Court of Justice and the national courts and tribunals that is based on the founding Treaties. They may have a great deal of influence in individual Member States and carry out eminently important work. In relation to the interpretation and application of European Union law, however, their responsibility is no greater or smaller than that of other courts and tribunals; they are required, under the relevant Treaty provisions, to make a reference to the European Court of Justice if they have doubts as to the interpretation of Union law or the validity of Union legislation."⁵⁹

III. JUDICIAL DIALOGUE

The judicial dialogue can be either personal or institutional.

1. Personal Dialogue

Personal dialogue arises from the fact that judges of national constitutional courts may be elected as judges of the ECtHR or CJEU, or that judges of the ECtHR or CJEU may be elected or appointed as judges at their respective national constitutional courts when their terms of office come to an end. These judges are able to bring into deliberations the wealth of experience acquired in their previous posts and make effective use in their new posts of the knowledge acquired during their previous term of office.

2. Institutional Dialogue

2.1. Mutual Institutional Contacts between Courts

The first area of institutional dialogue arises from the fact that judges of national constitutional courts actively seek and maintain contact with the ECtHR and CJEU, and *vice versa*. They regularly participate in national, European or international events organised by the national constitutional court, CoE, EU, Venice Commission or some other relevant European body or international organisation.

"Do you agree that at the referendum the following Act on Amendments to the Roads Act be adopted", followed by the text of the proposed act. Given that the referendum question was worded in this way, the CCRC, in the proceedings of reviewing the constitutionality of the proposed referendum question, in fact reviewed the constitutionality of the proposed Act on Amendments to the Roads Act.

⁵⁹ Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. *See supra* note 53.

Forty national constitutional courts are members of the Conference of European Constitutional Courts, the most important institutional form of cooperation between the constitutional courts of all European states.⁶⁰ As stated in the preamble to the Statute of the Conference, regular contacts between constitutional courts and the desire to share experience in constitutional practice and jurisprudence within the framework of specialised conferences are at the core of the activities of the Conference, its aim being to enhance the independence of constitutional courts as essential factors in guaranteeing and implementing democracy and the rule of law, in particular with a view to securing the protection of human rights.

There is also the World Conference on Constitutional Justice. It unites 98 constitutional courts and councils and supreme courts in Africa, the Americas, Asia and Europe. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law (Article 1.2 of the Statute). The World Conference pursues its objectives through the organisation of regular congresses,⁶¹ by participating in regional conferences and seminars, by promoting experiences and case-law and by offering good services to members on their request (Article 1.2 of the Statute). "The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale. Due to the obligation of judicial restraint, constitutional judges sometimes have little occasion to conduct a constructive dialogue on constitutional principles in their countries. The exchanges that take place between judges from various parts of the world in the World Conference furthers reflection on arguments, which promote the basic goals inherent in the national constitutions. Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world who are committed to promote constitutionality in their own country. As these judges sometimes find themselves in situations of conflict with other state powers due to the decisions they had to hand down based on the Constitution, being part of the World Conference provides them with a forum that not only allows them to exchange information freely with their peers, but where judges from other countries can also offer moral support. This can be important in upholding constitutional principles, which the judges are called upon to defend in their line of work."⁶²

Besides participation in institutionalised global and regional international forms of cooperation between constitutional courts, the CCRC's cooperation includes study visits and other types of meetings with other constitutional courts on expert topics in the field of constitutional court judicature.

⁶⁰ It was in Croatia, in Dubrovnik in 1972, that the inaugural meeting was held at which Austria, Germany, Italy and the former SFRY founded the Conference of European Constitutional Courts. Over the past four decades, the Conference has evolved from a small and select discussion circle into a truly pan-European forum comprising forty full members. The most recent, XVIth, Congress of the Conference was held in Vienna from 12–14 May 2014 under the Chairmanship of the Austrian Constitutional Court and the next will be held in Georgia in 2017 under the Chairmanship of the Georgian Constitutional Court.

⁶¹ The 3rd Congress of the World Conference on Constitutional Justice was hosted by the Constitutional Court of the Republic of Korea on 28 September – 1 October 2014. The Constitutional Court of Lithuania will host the 4th Congress in Vilnius in 2017.

⁶² Venice Commission, at http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ (Last accessed: 16 January 2016).

Further, very successful cooperation with the constitutional courts of other European and non-European countries is achieved through the Venice Forum.⁶³

Finally, the ECtHR and CJEU regularly receive delegations from national constitutional courts in Strasbourg and Luxembourg. On the other hand, the CCRC hosted in Zagreb the former presidents of the ECtHR, Wildhaber and Costa, as well as Skouris, the former president of the CJEU. As Skouris said, "There really is no shortage of opportunities for bilateral or multilateral meetings, which are extremely useful for all who participate, in so far as they provide an appropriate forum for the exchange of information and ideas but also of concerns. Thanks to this lively exchange of information about the issues which concern us, we all know exactly what we are doing and which law we are applying."⁶⁴

2.2. Dialogue "Through the Judgments"

ECtHR judges also speak of dialogue "through the judgments of the ECtHR". The best known example of judicial or jurisprudential dialogue through judgments is the one between the Supreme Court of the United Kingdom in the case of *R. v. Horncastle & Others* [2009] UKSC 14 (on appeal from: [2009] EWCA Crim 964) (in which the UK Supreme Court declined to follow the Chamber judgment of the Fourth Section of the ECtHR delivered on 20 January 2009 in the cases of *Al-Khawaja and Tahery v. the United Kingdom* 49 EHRR 1) and the responses of the ECtHR in the Grand Chamber's cases *Al-Khawaja and Tahiri v. the United Kingdom*.⁶⁵ The former president of the ECtHR, Sir Nicholas Bratza, described this type of judicial dialogue as follows:⁶⁶

"But there is also scope for judicial dialogue through judgments and decided cases. I would cite one recent example in relation to my own country - the Grand Chamber's judgment in the case of *Al-Khawaja and Tahery*. The Supreme Court of the United Kingdom conveyed to Strasbourg its misgivings over what it perceived as an inflexible application of the Court's case-law on the fairness of relying on hearsay evidence, with no proper regard to the specific features of the country's rules of criminal procedure. This view was considered carefully by our Court, and responded to at length in the Grand Chamber's judgment. It was, in my view, a very valuable exchange, conducted in a constructive spirit on both sides.

There is, of course, as things stand, no formal, direct channel permitting such communication or exchange within the Convention system. Whether there should be a new, purpose-made procedure for dialogue between national courts and the European Court is a question now under consideration in the broader reflection on future reforms."

⁶³ For example, the CCRC established cooperation with other courts through the Venice Forum in case no. U-IP-3820/2009 *et al* of 17 November 2009 (Official Gazette no. 143/09), in which it refused the proposals to review the conformity with the Constitution of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

⁶⁴ Skouris, *The Relationship of the European Court of Justice with the National Constitutional Courts*. See *supra* note 53.

⁶⁵ ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, judgment [GC], nos. 26766/05, 22228/06, 15 December 2011.

⁶⁶ Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, address by Sir Nicolas Bratza, President of the European Court of Human Rights, European Court of Human Rights, Strasbourg, 27 January 2012, 4–5.

2.3. Advisory Jurisdiction of the ECtHR/CJEU

The most important area of institutional dialogue of the ECtHR/CJEU with the constitutional courts of the Member States of the CoE/EU is of a formal nature, because it is based on the ECHR/Treaties establishing the EU and places the dialogue with the national constitutional courts in relation to the interpretation and application of ECHR/EU law.

As to EU law, the most important method of collaboration is "via the unique mechanism of the reference to the European Court of Justice for a preliminary ruling."⁶⁷

As to ECHR law, the most important method of collaboration is intended to be via the "Protocol on judicial dialogue" or "the dialogue Protocol", as Protocol no. 16 to the ECHR is often called by Dean Spielmann, the former President of the ECtHR.⁶⁸ In Spielmann's view, "By providing our Court and national supreme courts with a partnership-based tool, Protocol no. 16 will fulfil what Professors Ost and van de Kerchove referred to as the transition 'from pyramid to network'."⁶⁹

a) Referral by the CCRC to the CJEU

The reference for preliminary ruling forms part of the procedures which may be exercised before the CJEU. This procedure is open to all Member States' national judges. They may refer a case already underway to the CJEU in order to question it on the interpretation or validity of EU law. In contrast to other judicial procedures, the reference of a preliminary ruling is therefore not a recourse taken against a European or national act, but a question presented on the application of EU law.

The following table shows the data on the number of references for a preliminary ruling by EU Member State and by court or tribunal from 1952 to 2014.

General trend in the work of the Court (1952-2014) – New references for a preliminary ruling (by Member State and by court or tribunal)

⁶⁷ Skouris, *The Relationship of the European Court of Justice with the National Constitutional Courts*. See *supra* note 53.

⁶⁸ "I regard it as the protocol of judicial dialogue." In: Address of Dean Spielmann, President of the European Court of Human Rights, at the meeting with the Supreme Court and the Supreme Administrative Court, Stockholm, 19 May 2014. In his speech at the 78th meeting of the CDDH on 27 June 2013, President Spielmann also stated, "As I have already said many times, I have always been strongly in favour of giving the highest national courts the opportunity to engage in such dialogue with our Court and that is why I named Protocol No. 16 'the dialogue protocol'." Further, in his keynote speech at the Göttingen Conference on Judgments of the ECtHR: Effects and Implementation, held on 20 September 2013, President Spielmann pointed out, "... there is an important place for dialogue within the system, among its multiple levels. I simply note in passing that Protocol 16 ... will open a formal and direct channel for dialogue between the national and European judge."

⁶⁹ Opening Speech of Dean Spielmann, President of the ECtHR, at the solemn hearing for the opening of the judicial year of the European Court of Human Rights, ECtHR, Strasbourg, 31 January 2014.

			Total						
Belgium	(rt)	Cour constitutionnelle	30		Hungary	Kúria	17		
		Cour de cassation	91			Fővárosi Ítéletbíróság	5		
		Conseil d'État	71			Szegedi Ítéletbíróság	2		
		Other courts or tribunals	570	762		Other courts or tribunals	83	107	
Bulgaria		Върховен касационен съд	1		Malta	Constitutional Court			
	(NO)	Върховен административен съд	13			Qorti ta' l- Appel			
		Other courts or tribunals	64	78		Other courts or tribunals	2	2	
Czech Republic		Ustavní soud			Netherlands	Hoge Raad	253		
	(NO)	Nejvyšší soud	3			Raad van State	101		
		Nejvyšší správní soud	20			Centrale Raad van Beroep	59		
		Other courts or tribunals	17	40		College van Beroep voor het Bedrijfsleven	151		
Denmark		Højesteret	35		Tariefcommissie	35			
		Other courts or tribunals	130	165	Other courts or tribunals	310	909		
Germany	(rt)	Bundesverfassungsgericht	1		Austria	(rt)	Verfassungsgerichtshof	5	
		Bundesgerichtshof	194			Oberster Gerichtshof	103		
		Bundesverwaltungsgericht	116			Verwaltungsgerichtshof	81		
		Bundesfinanzhof	303			Other courts or tribunals	258	447	
		Bundesarbeitsgericht	26			Poland	Trybunał Konstytucyjny		
		Bundessozialgericht	76				(NO)	Sąd Najwyższy	9
		Other courts or tribunals	1.421	2.137			Naczelny Sąd Administracyjny	28	
Estonia		Riigikohus	5		Other courts or tribunals	37	74		
		Other courts or tribunals	10	15	Portugal	Supremo Tribunal de Justiça	4		
Ireland		Supreme Court	26			(NO)	Supremo Tribunal Administrativo	53	
		High Court	25		Other courts or tribunals	67	124		
		Other courts or tribunals	26	77	Romania	Înalta Curte de Casație și Justiție	7		
Greece		Άρειος Πάγος	10			(NO)	Curtea de Apel	45	
		Συμβούλιο της Επικρατείας	54		Other courts or tribunals	39	91		
		Other courts or tribunals	106	170	Slovenia	(rt)	Ustavno sodišče	1	
Spain	(rt)	Tribunal Constitucional	1			Vrhovno sodišče	5		
		Tribunal Supremo	53			Other courts or tribunals	3	9	
		Other courts or tribunals	300	354	Slovakia	Ustavný Súd			
France	(rt)	Conseil constitutionnel	1			(NO)	Najvyšší súd	9	
		Cour de cassation	110		Other courts or tribunals	18	27		
		Conseil d'État	93		Finland	Korkein oikeus	16		
		Other courts or tribunals	702	906		Korkein hallinto-oikeus	45		
Croatia		Ustavni sud				Työtuoimioistuin	3		
	(NO)	Vrhovni sud				Other courts or tribunals	27	91	
		Visoki upravni sud				Sweden	Högsta Domstolen	18	
		Visoki prekršajni sud			Högsta förvaltningsdomstolen		7		
		Other courts or tribunals	1	1	Marknadsdomstolen		5		
Italy	(rt)	Corte Costituzionale	2		Arbetsdomstolen		3		
		Corte suprema di Cassazione	130		Other courts or tribunals		81	114	
		Consiglio di Stato	107		United Kingdom	House of Lords	40		
		Other courts or tribunals	1.040	1.279		Supreme Court	5		
Cyprus		Ανώτατο Δικαστήριο	4			Court of Appeal	74		
		Other courts or tribunals	3	7		Other courts or tribunals	454	573	
Latvia		Augstākā tiesa	21		Others	Cour de justice Benelux/Benelux Gerechtshof (1)	1		
	(NO)	Satversmes tiesa				Complaints Board of the European Schools (2)	1	2	
		Other courts or tribunals	16	37	Total			8.710	
Lithuania	(rt)	Konstitucinis Teismas	1		Case C-265/00 Campina Melkunie.				
		Aukščiausiasis Teismas	11		Case C-196/09 Miles and Others.				
		Vyriausiasis administracinis teismas	9						
		Other courts or tribunals	8	29					
Luxembourg		Cour supérieure de justice	10						
		Cour de cassation	12						
		Cour administrative	10						
		Other courts or tribunals	51	83					

Source: Court of Justice of the European Union Annual Report 2014. Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal, Luxembourg, 2015, at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/en_ra14.pdf> (Last access: 17 January 2016)

The data shows that so far only eight national courts submitted references for a preliminary ruling of the CJEU. Apart from the Belgian, the other seven constitutional courts have done so only once or up to five times. Ten national courts have made no request at all. The remaining ten EU Member States have no institutionalised constitutional courts.

Indeed, national constitutional courts tend to be, in the words of Skouris, "outsiders" in terms of the frequency of their references for a preliminary ruling to the CJEU, compared with the total number of references dealt with by the CJEU. Namely, unlike other courts, constitutional courts tend only rarely to be faced with questions of EU law. If a dispute concerns the law governing the organisation of the State, connections with EU law will rarely arise. The position may be different only if fundamental rights are at issue, and a constitutional court is called upon to determine whether measures adopted by the State bodies responsible for

transposing or implementing EU law are compatible with the fundamental rights enshrined in the national Constitution or with the core values of the constitutional order in question.⁷⁰

At the moment, the general standpoint of the CCRC on whether this court is prepared to make referrals to the CJEU is not yet known. At this time, it can only be said that the CCRC will probably consider the acceptability of the well-established jurisprudence of the BVerfG, which holds that an arbitrary violation of the duty incumbent upon the courts of last instance under Article 267.3 of the TFEU to refer matters, where no legal remedy is available under national law, for a preliminary ruling can at the same time be a violation of the guarantee of the lawful judge.⁷¹ Such an approach by the CCRC could reinforce the willingness of the ordinary courts to refer matters concerning the validity and interpretation of the EU law to the CJEU.

b) The CCRC's Request for an Advisory Opinion of the ECtHR

The advisory jurisdiction of the ECtHR, set up by the 1950 ECHR, was envisaged for the first time in 1963, by Protocol no. 2 to the ECHR, conferring upon the ECtHR competence to give advisory opinions (CETS no. 44), which entered into force in 1970. Protocol No 11 to the ECHR, restructuring the control machinery established thereby (ETS no. 155), which was signed in 1994 and entered into force in 1998, did not significantly change the content of Protocol no. 2, but meant that the text of Protocol no. 2 was incorporated in the very text of the ECHR (Articles 47–49).

The new Protocol no. 16 to the ECHR (CETS no. 214) was opened for signature on 2 October 2013 but has not yet entered into force. This new, additional and optional, Protocol to the ECHR provides for an extension of the advisory jurisdiction of the ECtHR.

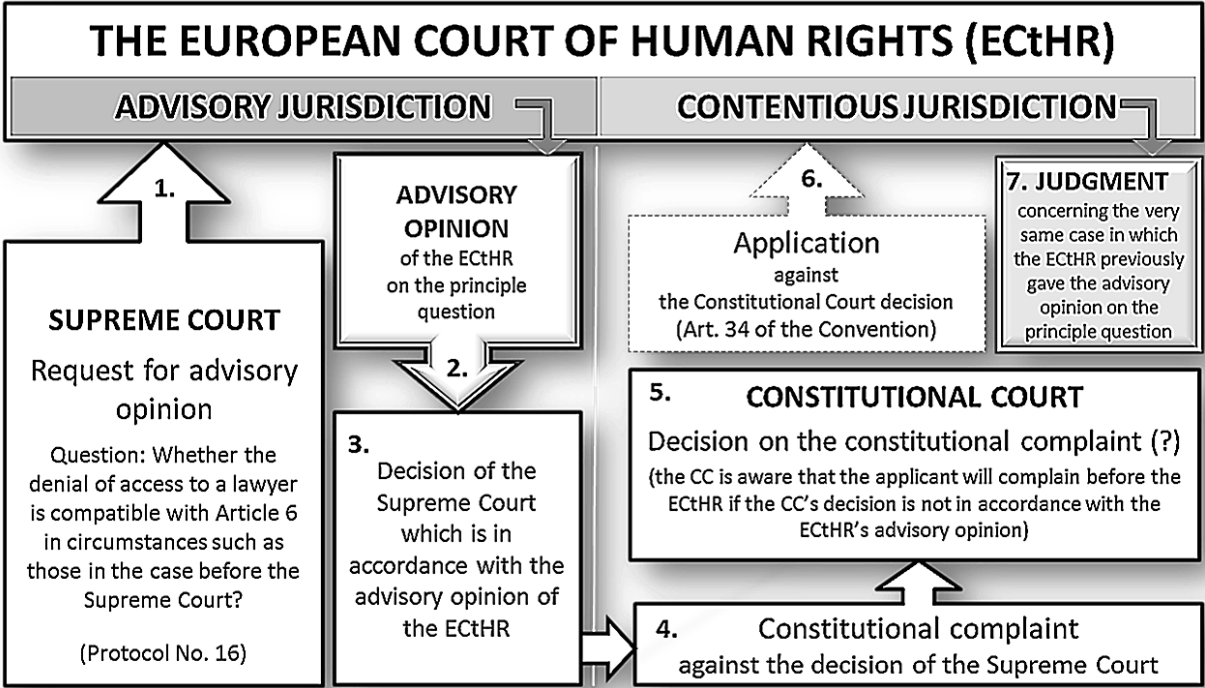
However, Protocol no. 16 to the ECHR raises certain questions and contains some uncertainties. One of the most sensitive is related to Article 1.1, which states that "highest national courts or tribunals" may seek an advisory opinion in the context of a case pending before it. In other words, it enables for the first time highest national court or tribunal, indicated by States Parties, to request, in the context of a case pending before it, a non-binding advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its Protocols. It is considered that this innovation would enhance the ECtHR's "constitutional role" and expand and institutionalise cooperation between the ECtHR and domestic courts, fostering dialogue between them.

⁷⁰ Cf. Skouris, *The Relationship of the European Court of Justice with the National Constitutional Courts*. See *supra* note 53.

⁷¹ The BVerfG overturns judgments by the ordinary courts as violations of the right to one's lawful judge (second sentence of Article 101.1 of the German Basic Law), which is equivalent to a fundamental right, only in cases where the manner in which the ordinary courts deal with the duty of referral for a preliminary ruling is untenable, particularly in those cases in which the duty of referral is fundamentally disregarded, i.e. where there is a deliberate deviation from existing jurisprudence without any willingness for referral, or if no referral is made on an arbitrary ground, regardless of whether the European jurisprudence is incomplete in the matter. In: Huber, Peter M.; Paulus, Andreas L. (2014) National Report – Germany, XVIth Congress of the Conference of European Constitutional Courts "Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives", under the Chairmanship of the Constitutional Court of Austria, Vienna, 12–14 May 2014, p. 24. See also BVerfGE 75, 223 [234]; BVerfGE 82, 159 [192 and 193]; BVerfGE 128, 157 [187]; BVerfGE 129, 78 [105].

However, the potential decisions of national authorities related to their obligation under Article 10 of Protocol no. 16 to indicate "highest court and tribunals" which have the right to seek advisory opinions raise concerns, especially in those States Parties which have both a specialised and concentrated type of constitutional judiciary, such as Slovenia, Croatia, the Czech Republic, etc. These States Parties have authorised their constitutional courts to decide upon constitutional complaints as a special legal remedy against the decisions of the highest ordinary courts, including the decisions of the highest national court. In these States Parties, highest courts, including the highest ordinary court, and the Constitutional Court, are directly mutually related as the supervised and the supervisors when it comes to constitutional issues: the Constitutional Court is authorised to quash a decision of the ordinary court (including that of the highest national court) if the court decision has violated individual fundamental rights. Therefore, in such a system, the mutual relations of the highest ordinary courts and the Constitutional Court are burdened with tensions that are inherent in such a system because they are structural in nature. Consequently, any external impetus that affects their mutual relations can lead to structural disruptions within the settled system.

Accordingly, it appears that in these States Parties the implementation of Protocol no. 16, according to a model where both the Constitutional Court and the Supreme Court (or, if so indicated, the Constitutional Court, the Supreme Court and other of the highest ordinary courts) may seek an advisory opinion of the ECtHR in the context of a case pending before it, could in certain circumstances lead to the distortion of the position of the Constitutional Court established by the Constitution. The potential impact of applying Protocol no. 16 on the position of the CCRC when dealing with constitutional complaints can be schematically presented in the following way:



Source: Omejec, Jasna (2015) Dialogue on the Advisory Jurisdiction of the European Court of Human Rights, in: *Estudos em memória do conselheiro Artur Maurício*, Coimbra: Tribunal Constitucional de Portugal, p. 501). The example of the "question of principle" is taken from the ECtHR's *Reflection Paper on the Proposal to Extend the Court's Advisory Jurisdiction* (2011).

In this light, in systems such as, for instance, the Croatian, Slovenian or Czech ones, it should not happen that national authorities indicate any other court but the Constitutional Court to

seek advisory opinions.⁷² Indicating other highest courts to seek advisory opinions could only be justified in those rare situations where a final decision of a highest ordinary court is not subject to a review of conformity with the Constitution (and the ECHR) by the Constitutional Court, if such a situation can be imagined at all (in Croatia, such a situation does not exist in practice). In any case, these situations would need to be precisely regulated in national legislation.

To conclude, Protocol no. 16 requires precise, clear and consistent elaboration in the national legislation of States Parties to prevent the intended enhancing of the ECtHR's "constitutional role" from turning into a conflict of jurisdictions between the ECtHR and national constitutional courts, and "the dialogue Protocol" turning into a "strife-ridden Protocol". Having regard to all the open issues, the solution referred to in Article 10 of Protocol no. 16 that a State Party may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion appears both correct and justified.⁷³

IV. JUDICIAL TECHNIQUES FOR INTEGRATING THE CASE-LAW OF EUROPEAN AND OTHER NATIONAL CONSTITUTIONAL COURTS, AS WELL AS INTERNATIONAL LAW INSTRUMENTS IN THE CCRC'S DECISIONS

1. The CCRC's Techniques for Referring to the Jurisprudence of the ECHR

The CCRC in its decisions regularly refers to the jurisprudence of the ECtHR.⁷⁴

With regard to the jurisprudence of the ECtHR, there are no specific provisions of constitutional law imposing explicitly a legal obligation on the CCRC to consider judgments and decisions rendered by the ECtHR (as, for example, in the Kosovo Constitution⁷⁵). The CCRC derives the legal obligation to consider the ECtHR's judgments and decisions by interpreting the text of the Constitution in its entirety. In addition, the CCRC considers that the ECHR is in itself a direct legal basis giving rise to the legal obligation to consider judgments and decisions rendered by the ECtHR. Namely, according to Article 46 of the ECHR, the States Parties are obliged to respect the ECHR and the judgments of the ECtHR.⁷⁶

⁷² However, it seems that the Slovenian authorities did just that. The Republic of Slovenia ratified Protocol no. 16 on 26 March 2015. The instrument of ratification contains a declaration that reads, "Pursuant to Article 10 of the Protocol, the Republic of Slovenia declares that the national courts for the purposes of Article 1, paragraph 1, of the Protocol, to address the requests for advisory opinions to the European Court of Human Rights, are the Supreme Court of the Republic of Slovenia and the Constitutional Court of the Republic of Slovenia."

⁷³ For more detail, *see* in Omejec, Jasna (2015) Dialogue on the Advisory Jurisdiction of the European Court of Human Rights, in: *Estudos em memória do conselheiro Artur Maurício*, Coimbra: Tribunal Constitucional de Portugal, pp. 473–515.

⁷⁴ The CCRC has not regularly referred to the jurisprudence of the CJEU until now because the Republic of Croatia joined the EU only on 1 July 2013. Consequently, the following considerations concern only the law of the ECHR.

⁷⁵ Article 53 [Interpretation of Human Rights Provisions] of the Kosovo Constitution reads, "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

⁷⁶ *See* in this regard the CCRC's Decision no. U-III-3304/2011 of 23 January 2013, Official Gazette no. 13/13 (Case of *Vanjak*).

Among the decisions and judgments of the ECtHR to which the CCRC has referred in its decisions and rulings, there are incomparably more of those that the ECtHR passed in relation to other States Parties to the ECHR than those that it passed in relation to Croatia. In other words, the CCRC accepts the binding interpretative authority of all the judgments and decisions of the ECtHR, irrespective of the States Parties in relation to which the judgments and decisions were passed. Further, the CCRC does not differentiate between fields of law when referring to the jurisprudence of the ECtHR related to other countries. What is important is that specific ECtHR jurisprudence is regarded as applicable in the constitutional order of the Republic of Croatia and relevant for the case in question.

Starting from the conception of legal monism, the effectively quasi-constitutional status of the ECHR in the Croatian legal order and the constitutional demand for the direct application of the ECHR, the CCRC has so far referred to the case-law of the ECtHR in more than 1,800 of its decisions and rulings. In its case-law to date, the CCRC has adopted several ways of integrating in its decisions the legal opinions of the ECtHR. It applies them in the abstract review of the constitutionality of laws, in individual constitutional complaints and in other proceedings that the CCRC implements within its jurisdiction. Most often the CCRC integrates the ECtHR's case-law into its decisions in the following ways (we refer to the examples of CCRC decisions contained in Section 1.1. *infra* "Excerpts from Decisions of the CCRC"):

- a) describing the principle adopted by the ECtHR in its approach to a specific ECHR rule or institute (e.g. taxation) and referring to the relevant case-law – *see* examples 3, 4, 7, 9, 13 and 14 in Section 1.1. *infra*;
- b) directly citing in their entirety the legal opinions of the ECtHR from a particular judgment or decision – *see* examples 1 and 10 in Section 1.1. *infra*;
- c) describing in detail the whole case before the ECtHR and directly citing the relevant legal opinions of the ECtHR in the respective judgment or decision – *see* example 2 in Section 1.1. *infra*;
- d) showing the development of a particular legal institute in the case-law of the ECtHR as the ECtHR itself showed it (for example, the development of "legitimate expectations" in the light of Article 1 of Protocol no. 1 to the ECHR) – *see* example 11 in Section 1.1. *infra*;
- e) showing a legal opinion of the ECtHR with a listing of several cases from its case-law in which it applied that opinion – *see* example 5 in Section 1.1. *infra*;
- f) showing the legal opinions of the ECtHR in connection with the positive obligations of the States Parties – *see* examples 7 and 10 in Section 1.1. *infra*;
- g) expressing a legal opinion of the CCRC and at the same time referring to a relevant judgment or decision of the ECtHR expressing an identical opinion – *see* example 6 in Section 1.1. *infra*;
- h) interpreting the structure of the relevant provisions of the Constitution in keeping with the interpretation of the structure of comparable ECHR provisions given by the ECtHR – *see* example 12 in Section 1.1. *infra*.

When the CCRC integrates the ECtHR's case-law in its decisions in the various ways shown above, this case-law is shown in Croatian. However, in many of its decisions the CCRC also uses the following techniques:

- a) besides the ECtHR's legal opinion given in Croatian, the original text of the opinion is also given in parentheses in English - *see* example 13 in Section 1.1. *infra*;
- b) besides the ECtHR's legal opinion given in Croatian, the key concept or some sentences or its most important part is given in parentheses in English – *see* examples 6, 10 and 11 in Section 1.1. *infra*;
- c) besides the ECtHR's legal standpoint given in Croatian, the key concept is given in parentheses in English and in French – *see* example 15 in Section 1.1. *infra*.⁷⁷

1.1. Excerpts from Decisions of the CCRC

The following examples from the CCRC's case-law are classified in the order of the articles of the ECHR. In addition to the acronym "ECHR", the following abbreviations are also used: "Convention" or "European Convention". Furthermore, instead of the acronym "ECtHR", the abbreviation European Court is also used in the examples.

a) Article 3 of the ECHR

Article 3 of the ECHR prescribes:

"Article 3
PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

EXAMPLE 1 — Decision no. U-III-2501/2008, 16 October 2008 – constitutional complaint concerning refusal of the applicant's request for asylum in the Republic of Croatia (exposure to the risk of ill-treatment in Bosnia and Herzegovina after extradition - the principle of "non-refoulement").

"7. The Constitutional Court also had the legal opinion of the European Court of Human Rights in mind. The European Court states, in the reasons for the judgment in the case of *Saadi v. Italy*, no. 37201/06 of 28 February 2008, that 'Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies... As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department ... At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (*Fatgan Katani and Others v. Germany*, no. 67679/01 of 31 May 2001), ... and that, where the sources available to it describe a general situation, an applicant's specific

⁷⁷ An overview of the way of integrating the jurisprudence of the ECtHR in the decisions of the CCRC was prepared by Jasna Omejec in the Report "Ways and Means to Recognize the Interpretative Authority of Judgments against Other States – the Experience of the Constitutional Court of Croatia", Conference on "Strengthening Subsidiarity: Integrating the European Court's Case Law into National Law and Judicial Practice", Skopje, Macedonia, 1–2 October 2010, organised by the European Commission for Democracy through Law (Venice Commission) in co-operation with the Ministry of Justice of "the former Yugoslav Republic of Macedonia" (in the framework of the Chairmanship of the Committee of Ministers of the Council of Europe), Venice Commission document CDL-JU(2010)019, Strasbourg, 5 November 2010, pp. 10–11.

allegations in a particular case require corroboration by other evidence. In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment' (*Labita v. Italy*, no. 26772/95)."

EXAMPLE 2 — Decision no. U-I-988/1998 *et al*, 17 March 2010 – abstract review of the constitutionality of the 1998 Pension Insurance Act.

"14.5. In this light we must answer the following question: ... is there a general minimum of pension benefits which, if exceeded, would entail a violation of human rights enshrined in the Constitution?"

The Constitutional Court did not address this issue in its previous case-law. On the other hand, the European Court has a developed case-law on this subject. It has adopted the principle that the total amount of an individual's pension, together with all the State and public benefits and discounts that the potential victim of the violation of the Convention enjoys, may – because they are not sufficient – under some circumstances, in a specific case, open the question of inhuman or degrading treatment by the State within the meaning of Article 3 of the Convention, if that amount, accessible to the individual, is not sufficient protection from 'impairing physical or mental health' or from 'degradation incompatible with human dignity' to a measure that would be serious enough to fall within the framework of Article 3 of the Convention (compare the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia*, 18 June 2009, application no. 45603/05, pp. 6–7; decision in the case *Aleksandra Larioshina v. Russia*, 23 April 2002, application no. 56869/00, p. 4, and the judgment in the case of *Kutepov and Anikeyenko v. Russia*, 25 October 2005, application no. 68029/01, §§ 61–63).

Thus in the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia* the European Court examined the admissibility of the applicant's allegation that the amount of her pension is below subsistence level, which constitutes a threat to her right to life within the meaning of Article 2 of the Convention. The Court found that the authorities did not mistreat the applicant in any way. The essence of the applicant's objection was that the State pension on which she depended for survival was insufficient for her basic human needs.

Examining the application's admissibility, the European Court took into account, besides the amount of the pension itself, also the sum of the applicant's other monthly receipts (in Russian roubles – RUB): – her pension (RUB 1,460), – social aid (RUB 590) and – compensation for limited ability to work (RUB 410), but also the following privileges that the applicant enjoyed: – 50% discount on utility bills; – free public urban and suburban transport; – 50% discount on interurban rail and air transport; 50% discount on telephone and radio bills; free medical assistance; free dental prosthetics (except precious metals and cermets); – 50% discount on medical prescriptions; – free sanatorium treatment and – free suburban and interurban transport to the place of the treatment. The European Court further took into consideration that the applicant had received one sum of RUB 500 indigence aid, and that her family also benefited from the discount on utility bills. Finally, the European Court also took into consideration that part of the applicant's benefits, on her request, was monetised (pp. 2–3 of the decision).

Although the European Court found that the applicant's monthly income 'was not high in absolute terms', it declared inadmissible the applicant's objection that her rights were violated because her income was below subsistence level, with the explanation that the applicant had not proved that 'the lack of funds translated itself into concrete suffering'.

In the *Kutepov and Anikeyenko v. Russia* the European Court pointed out the following:

'61. The second applicant further relied on Article 2 of the Convention in that the present amount of his old-age pension was insufficient to maintain a proper living standard.

62. The Court recalls that the Convention does not guarantee, as such, the right to a certain living standard. It further notes that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the second applicant's pension has caused such damage to his physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention, or that he faces any 'real and immediate risk' either to his physical integrity or his life, which would warrant the application of Article 2 of the Convention in the present case ..."

b) Article 5 Paragraph 1c of the ECHR

Article 5 para. 1c of the ECHR prescribes:

"Article 5

RIGHT TO LIBERTY AND SECURITY

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

...

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

EXAMPLE 3 — Decision no. U-III-1897/2008, 20 May 2008 – constitutional complaint (extension of detention after the court of first instance had passed judgment).

"5.4. With reference to the second part of Article 102 paragraph 1 indent 3 of the Criminal Procedure Act, under which if detention is ordered for reasonable suspicion that a person has committed an offence 'special circumstances' justifying such suspicion must be shown, it is necessary to recall the opinions of the European Court of Human Rights in the application of Article 5 para. 1c of the European Convention on Human Rights. According to these opinions, detention cannot be grounded only on reference to an equal offence and danger of reoffending, or only on reference to the defendant's past history and personality or only on previous conviction, but all the circumstances of a particular case must be taken into account, including the defendant's personal circumstances and character, the amount of the damage, his perseverance and the frequency of his offences and the like (judgments of the European Court of Human Rights in the cases *Clooth v. Belgium*, § 40; *Muller v. France*, § 44; *Matznetter v. Austria*, § 9), because only thus can the public interest for depriving a person of freedom be seen to prevail over his right to freedom. This is especially important when detention is extended on the grounds on which it had originally been ordered, because in such cases the reasons for the continuation of detention, as the measure that interferes most deeply with the fundamental right to personal freedom, must be qualitatively stronger."

c) *Article 5 Paragraph 3 of the ECHR*

Article 5 para. 3 of the ECHR prescribes:

"Article 5
RIGHT TO LIBERTY AND SECURITY

...

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

EXAMPLE 4 — Decision no. U-III-3698/2003, 28 September 2004 – constitutional complaint (reasonable suspicion as a legal ground for continued detention on remand).

"8.... The Constitutional Court also points out the legal opinion taken by the European Court in the application of Article 5/3 of the European Convention, whereby reasonable suspicion, however grave the criminal offence, is after a lapse of time in itself not sufficient legal ground for continued detention on remand. The case of *Kemmache v. France* of 21 October 1991 contains the following legal stand: where an arrest is based on reasonable suspicion that the person concerned has committed an offence, persistence of that suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings. The above legal opinions of the European Court were repeated in the case of *Nikolova v. Bulgaria*, of 5 March 1999, and in many other judgments."

d) *Article 6 Paragraph 1 of the ECHR*

Article 6 para. 1 of the ECHR prescribes:

"Article 6
RIGHT TO A FAIR TRIAL

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

da) *Judicial Impartiality*

EXAMPLE 5 — Decision no. U-III-5423/2008, 28 January 2009 – constitutional complaint (objective judicial impartiality).

"6.1. ... The European Court of Human Rights deems that a judge is presumed impartial until proved otherwise. However, in a particular case the facts may give rise to objective negative appearances of a judge's (im)partiality which justify legitimate expectations that the judge will excuse himself from the trial. Such facts exist, for example: a) when a judge taking part in the trial decided, in prior proceedings, about issues that are closely connected with the issue he will have to settle when giving judgment (judgment in the case of *Hauschildt v. Denmark* of 24 May 1989, § 51–52); b) if he, after participation in passing the first-instance judgment, participates in deciding on

appeal (judgment in the case of *De Haan v. Netherlands* of 26 August 1997, § 51, 54); c) if he was on the out-of-trial panel of judges that confirmed the grounds for indictment and was after that a member of the chamber of judges at the trial (judgment in the case of *Castillo Algar v. Spain* of 28 October 1998, § 47–49). In the case of *Piersack v. Belgium* (judgment of 1 October 1982, § 30–31), the fact that the judge who presided over the panel at the trial had earlier been at the head of the public attorney's office competent for prosecution in the case was also found as a negative indicator of the criminal court's impartiality."

EXAMPLE 6 — Decision no. U-III-282/2008, 2 June 2010 – constitutional complaint (subjective and objective judicial impartiality).

"6. ... A judge's impartiality in criminal proceedings is not ascertained, but to exclude (Article 36 para. 1 CPA) or excuse (Article 35 para. 2 CPA) him from the trial circumstances that indicate bias must be found (judgement of the European Court of Human Rights in the case of *Kyprianou v. Cyprus* of 15 November 2005, § 122).

The existence of these circumstances is established by a subjective test, where it is necessary to examine the judge's personal beliefs and behaviour indicating whether he has personal bias (Engl. '*personal bias*') against the party in the case (judgment of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 47), and by an objective test, where it is necessary to examine whether there are objectively ascertainable facts that may raise doubts as to a judge's impartiality (so-called negative indicators of the 'appearance of impartiality', judgment of the European Court in the case of *Sramek v. Austria* of 22 October 1984, § 42). In this examination the misgivings of the party in the proceedings that he was the victim of a judge's bias is 'important but not decisive'; what is decisive is whether these misgivings can be objectively justified (judgement of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 48). If this is possible, there is legitimate doubt as to the judge's impartiality and he must be excused from the trial in that case, regardless of the level of the proceedings at which this was discovered."

db) Reasonable Length of Proceedings

EXAMPLE 7 — Decision no. U-III A-474/2003, 3 June 2003 – constitutional complaint against the unreasonable time of proceedings (positive obligations of the States Parties).

"5.5.... It must be said that in several of its judgments the European Court of Human Rights explicitly found that the States Parties are bound to organise their legal orders in a way that enables courts to comply with the requirements provided for in Article 6 para. 1 of the European Convention, reiterating the especial importance of this requirement for the proper and regular conduct of judicial proceedings (*see* for example judgments of the European Court in the cases of *Buchholz v. Germany* of 6 May 1981, *Guincho v. Portugal* of 10 July 1984, *Unión Alimentaria Sanders SA v. Spain* of 7 July 1989, *Brigandi v. Italy* of 19 February 1991 etc.)."

dc) Right of Access to Court

EXAMPLE 8 — Decision no. U-III-443/2009, 30 April 2009 – constitutional complaint (the right to judicial protection against a parliamentary decision on the election or appointment of the highest state officials).

"8.1.a) The Constitutional Court notes that neither the Constitution nor the relevant laws explicitly provide for a legal remedy against the election or appointment of the highest state and judicial officials nor provide for a circle of people empowered to submit a legal remedy against these. On the other hand, they do not explicitly exclude this. In this sense the new legal view of the European Court of Human Rights must be mentioned, expressed for the first time in the Grand Chamber judgment in the case of *Vilho Eskelinen and Others v. Finland* of 19 April 2007 (application no. 63235/00), which reads:

'61. The Court recognises the State's interest in controlling access to a court when it comes to certain categories of staff. However, it is primarily for the States Parties, in particular the competent national legislature, not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way ...

62. To recapitulate, in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest... It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified."

e) Article 8 of the ECHR

Article 8 of the ECHR prescribes:

"Article 8

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

EXAMPLE 9 — Decision no. U-III-980/2007, 14 May 2009 – constitutional complaint (parent–children relations).

"5. The Constitutional Court notes that the European Court of Human Rights, when it applies the relevant provisions of the Convention (...) in its decisions that refer to the right to family life, which, among other things, also includes parental rights and the right to care, pointed out the state's obligation for the parents to be involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests in proceedings involving child care (*mutatis mutandis*, *W. v. the United Kingdom*, judgment of 8 July 1987, §§ 63–65, and *Elsholz v. Germany*, judgment of 13 July 2000, § 52). Also, in deciding on the execution of parental rights the state must establish a fair balance between the interests of the child and of the parents, where special importance must be given to the best interests of the child, which, depending on their nature and gravity, may prevail over the interest of the parents (*mutatis*

mutandis, Sahin v. Germany, application no. 30943/96, judgment of 8 July 2003, § 65, § 66, and *Elsholz v. Germany*, § 50, *ibid.*."

EXAMPLE 10 — Decision no. U-III-1801/2006, 20 May 2009 – constitutional complaint (child abduction – application of the Hague Convention on the Civil Aspects of International Child Abduction).

"7.... Furthermore, the European Court found that the positive obligations Article 8 of the Convention imposes on the States Parties with respect to reuniting parents with their children that have been abducted, they must be interpreted in the light of the Hague Abduction Convention (§ 1 *Karadžić v. Croatia*, judgment of 15 November 2005, § 75; *H.N. v. Poland*, judgment of 13 September 2005). The national bodies incorrect interpretation of some provisions of the Hague Abduction Convention does not free the state from the responsibility for the violation of the provision of Article 8 of the Convention (§ 80 and 81 *Monory v. Romania and Hungary*, Judgment of 5 July 2005)."

f) *Article 1 of Protocol No. 1 to the ECHR*

Article 1 of Protocol no. 1 of the ECHR prescribes:

"Article 1
PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

EXAMPLE 11 — Decision no. U-IIIB/1373/2009, 7 July 2009 – constitutional complaint before the judgment became final (legitimate expectations).

"7.... The Constitutional Court also brings to notice the accepted legal opinion of the European Court of Human Rights (hereinafter: European Court) which recognises that the legitimate expectations of the parties must under certain conditions be considered 'property' under the protection of Article 1 of Protocol no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (... hereinafter: Convention), which regulates the protection of ownership.

The European Court first mentioned the concept of 'legitimate expectation' in the context of Article 1 of Protocol no. 1 to the Convention in the judgment in the case of *Pine Valley Developments LTD and Others v. Ireland* of 29 November 1991 (application no. 12742/87). In this case the applicants were entrepreneurs whose principal business was the purchase and development of land; in 1978 they bought land on the site in reliance on an outline planning permission for industrial warehouse and office development, which the Irish Supreme Court later found *ultra vires* and therefore *ab initio* a nullity because it contravened relevant laws. In that case, the Court found that a 'legitimate expectation' arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was 'a component part of the applicant companies' property' (§ 51 of the *Pine Valley* judgment and § 45 of the

judgment of the Grand Chamber in the case *Kopecký v. Slovakia* of 28 September 2004, application no. 44912/98, 2004-IX).

In the *Kopecký v. Slovakia* judgment the Grand Chamber of the European Court condensed the views explained in the *Pine Valley* judgment and in the newer *Stretch v. the United Kingdom* judgment of 24 June 2003 (application no. 44277/98, § 35). It explicitly stated that in the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the 'legitimate expectation' is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights (§ 47 of the *Kopecký* judgment).

Furthermore, the European Court of Human Rights in many of its decisions reiterated that the applicants do not have a 'legitimate expectation' if it cannot be found that they have a 'currently enforceable claim that was sufficiently established'. Thus in the Grand Chamber Decision on the admissibility of the application in the case of *Gratzinger and Gratzingerova v. the Czech Republic* of 10 July 2002 (application no. 39794/98, 2002-VII), in which the applicants failed to meet one of the essential statutory conditions for realising their claim, the Grand Chamber of the European Court found that their application was not sufficiently established for the purposes of Article 1 of Protocol no. 1 to the Convention. 'The belief that the law then in force would be changed to the applicants' advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol no. 1. The Court considers that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The Court accordingly concludes that the applicants have not shown that they had a claim which was sufficiently established to be enforceable, and they therefore cannot argue that they had a 'possession' within the meaning of Article 1 of Protocol no. 1' (§§ 73 and 74 of the *Gratzinger* decision and § 49 of the *Kopecký* judgment).

The Constitutional Court already referred to the above legal opinions of the European Court in its decision no. U-I-2921/2003 *et al* of 19 November 2008 (Official Gazette no. 137/08), so it remains here to again find them in conformity with Article 48 para. 1 of the Constitution, and thus also applicable in the constitutional order of the Republic of Croatia.

The Constitutional Court additionally notes that conditional claims or applications that were refused because the party did not meet statutory conditions, or a relevant legal act, are not considered property that would constitute ownership rights for the purposes of Article 48 para. 1 of the Constitution. The European Court takes the identical stand (*see* summary of relevant stands in the cases: *Mario de Napoles Pacheco v. Belgium*, decision of the European Commission of 5 October 1978, application no. 7775/77, DR 15, p. 151 in the English edition; *Malhous v. the Czech Republic*, Grand Chamber decision of 13 December 2000, application no. 33071/96, ECHR 2000-XII; *Prince Hans-Adam II v. Germany*, Grand Chamber decision, application no. 42527/98, ECHR 2001-VIII, § 85; *Nerva v. the United Kingdom*, judgment of 24 September 2002, application no. 42295/98, Report on Judgments and Decisions 2002-VIII, § 43).

In the case under examination here the applicants' request for a building permit was not refused for not meeting the statutory conditions. On the contrary, in this case the applicants' request for a building permit was well founded so they were issued with one; in this way their right of construction was recognised in a final and legally effective document and they began to build. For the needs of construction they partly invested their own money and partly took a bank loan with set deadlines for returning the loan during several years.

Starting from the above legal opinions of the European Court, which it too had accepted in its previous practice, the Constitutional Court finds that in this case the applicants had a 'legitimate expectation' that the conditions in the building permit, on the grounds of which they assumed a financial burden, would be met, considering that it was based on reasonably justified confidence in a final and legally effective administrative act which had a valid statutory foundation. Thus there is no doubt that their claim was sufficiently well established and thus also 'enforceable', which qualifies it as 'property' for the purpose of Article 1 Protocol no. 1 to the Convention.

The Constitutional Court therefore concludes that the above legitimate expectation in itself constitutes the applicants' ownership interest so the legally effective building permit is in this case a component part of the applicants' property that falls under the guarantee of Article 48 para. 1 of the Constitution and Article 1 of Protocol no. 1 to the Convention."

EXAMPLE 12 — Decision no. U-III-3491/2006 *et al*, 7 July 2010 – constitutional complaint (three rules of Article 1 of Protocol no. 1 to the Convention).

"15.3. Like Article 48 of the Constitution, so Article 1 of Protocol no. 1 to the Convention contains three clearly defined rules. The European Court analysed and applied them for the first time in the judgment in the case of *Sporrong and Lönnroth v. Sweden* of 23 September 1982, applications no. 7151/75 and 7152/75." (Further in the statement of reasons, an explanation of the "three rules of P1-1" is given – note of the author.)

EXAMPLE 13 — Decision no. U-I-988/1998 and Others, 17 March 2010 – abstract review of the constitutionality of the 1998 Pension Insurance Act.

"14.3. ...The right to a social benefit from the pension insurance sub-system based on generation solidarity is also protected under Protocol no. 1 to the Convention ...

The European Court of Human Rights in Strasbourg (hereinafter: the European Court) has in many of its decisions and judgments pointed out that the Convention 'does not as such guarantee a right to a State pension or to a similar State-funded benefit' (decision on admissibility in the case of *Neill and Others v. the United Kingdom*, 29 January 2002, application no. 56721/00).

However, '... where a right to such benefits based on a contributory scheme is provided for in domestic legislation, such right may be treated as a pecuniary right for the purposes of Article 1 of Protocol no. 1 so as to render applicable that provision' (decision on admissibility in the case of *Neill and Others v. the United Kingdom*, 29 January 2002, application no. 56721/00; judgment in the case of *Gaygusuz v. Austria*, 16 September 1996, application no. 17371/90, Reports 1996-IV, §§ 39–41)."

EXAMPLE 14 — Rulings no. U-IP/3820/2009 *et al*, 17 November 2009 – abstract review of the constitutionality of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

"14.1. The European Court starts from the principle that every taxation is *prima facie* interference in the right to the peaceful enjoyment of possessions guaranteed in Article 1 of Protocol no. 1 to the Convention ... 'since it deprives the person concerned of a possession, namely the amount of money which must be paid' (judgement of the Grand Chamber of the European Court in the case of *Burden v. the United Kingdom*, 20 April 2008, application no. 13378/05, § 59).

However, the Convention does not deprive the state of its taxation powers: the state has the right to apply laws to ensure the payment of tax. This interference of the state in the property of people is in general justified under Article 1 para. 2 of Protocol no. 1 to

the Convention, which explicitly provides for the 'right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. From the aspect of the supervision carried out by the European Court 'states, in principle, remain free to devise different rules in the field of taxation policy' (judgement *Burden*, § 65).

Nevertheless, the European Court, similarly to the Constitutional Court in proceedings instituted by constitutional complaints, in specific cases reserves the right of judicial control over state interference into the private property sphere of individuals through taxes, 'since the proper application of Article 1 of Protocol no. 1 is subject to its supervision' (judgment *Burden*, § 59).

This means that taxation should be regulated so that it satisfies the general requirements of the Convention: it must be prescribed by law, must be in the public or common interest, and tax regulations or measures of tax policy must be 'reasonable' and 'proportional' to the goal that they are intended to achieve. In other words, the regulation of tax rights and liabilities shall be considered contrary to the principles of the Convention if there is no objective and reasonable justification for them, that is, if they do not have a legitimate goal and there is no reasonable proportionality between the measure applied and the goal that it is intended to achieve."

g) *The Meaning of the Convention Term "Prescribed by Law" (Articles 8 to 11 of the ECHR)*

EXAMPLE 15 — Decision no. U-I-659/1994 *et al*, 15 March 2000 – abstract review of the constitutionality of the 1993 National Judicial Council Act.

"19.5. Since the Republic of Croatia is one of the signatories of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter: the European Convention), the Court deems important to point out that no law shall be considered 'law' in terms of the European Convention for the mere fact of its existence. The European Court of Human Rights provides for much more stringent criteria which must be complied with for a 'law' to be considered 'law' in the syntagm '*prescribed by law*', or in French '*prevues par la loi*'." (Further in the statement of reasons, the views of the European Court in the judgments *Sunday Times*, *Silver and Others* and *Malone v. the United Kingdom* are given – note of the author)."

2. The CCRC's Techniques for Referring to the International Law Instruments

The CCRC is in its everyday practice lesser influenced by international law than by European law. Namely, the CCRC implements the law of the ECHR in nearly every case on which it deliberates since the objections of the applicants of constitutional complaints on alleged violations of their constitutional rights may almost always be subsumed under the appropriate Article of the ECHR or its Protocol. This is also generally true of objections that are lodged by proponents who require an abstract review of the constitutionality of laws and other legislation. As opposed to this, the CCRC implements international law instruments only provided that the applicants of constitutional complaints or proponents of the review of laws and other legislation invoke them, and that they are relevant for the case considered by the CCRC. Several examples from the CCRC's jurisprudence are mentioned below.

EXAMPLE 1 — Decision and Ruling no. U-I-2414/2011 *et al*, 7 December 2012 – abstract review of the constitutionality of the 2011 Act on the Prevention of Conflict of Interest.

"INTERNATIONAL LAW

1) UN Convention against Corruption

11. The UN Convention against Corruption was adopted at the 58th session of the UN General Assembly on 31 October 2003. It entered into force on 14 December 2005. For the Republic of Croatia it has also been in force since 14 December 2005 (Act on the Ratification of the United Nations Convention against Corruption, Official Gazette – International Treaties no. 2/05 and Publication Concerning the Entering into Force of the United Nations Convention against Corruption in the Republic of Croatia, Official Gazette – International Treaties no. 1/06; hereinafter: CaC/05).

12. The CaC/05 clearly states the difference between the criminal sphere of combating corruption and preventive (ethical and administrative law) measures that serve the purpose of promptly preventing the occurrence of conflict of interest, or of effectively addressing existing or newly occurred conflict of interest.

The relevant provisions for these Constitutional Court proceedings can be found in Chapter II of the CaC/05 entitled 'Preventive measures'. The Government also referred to them in the Proposal of the APCI (...). These provisions are quoted in the appropriate places in the statement of reasons of this decision and ruling.

Chapter III of CaC/05 titled 'Criminalisation and law enforcement' does not apply in the area of preventing conflict of interest. It regulates criminal liability for corruptive criminal offences that are not subject to regulation by the APCI."

EXAMPLE 2 — Decision no. U-I-295/2006 *et al*, 6 July 2011 – abstract review of the constitutionality of the 2005 Public Assembly (Amendments and Revisions) Act.

"B. INTERNATIONAL TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

19. Relevant in the review of the grounds for the proposals is ... Article 21 of the International Covenant on Civil and Political Rights which reads:

'Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

Finally, also relevant is Article 20 paragraph 1 of the Universal Declaration of Human Rights which reads:

'Article 20

1. Everyone has the right to freedom of peaceful assembly and association ..."

EXAMPLE 3 — Decision and Ruling no. U-I-4170/2004, 29 September 2010 (CODICES: CRO-2010-011) – abstract review of the constitutionality of the 1997 Social Welfare Act.

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

These are ... the UN Convention on the Rights of Persons with Disabilities (Official Gazette – International Agreements, nos. 6/07, 3/08 and 5/08). ...

(...)

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

'Article 5

Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

EXAMPLE 4 — Decision no. U-IX/3911/2009, 24 September 2009 – appeal against the decision of the National Judicial Council concerning appointment and relief of judicial office.

"The Constitutional Court recalls the fundamental principles of judicial office, having in mind the relevant provisions of the Judiciary Act (Official Gazette , nos. 150/05, 16/07 and 113/08), relevant international documents (UN Universal Declaration of Human Rights included in Resolution no. 217A (III) of 10 November 1948; UN Resolution 'Basic Principles on the Independence of the Judiciary' of 1985; UN Resolution 'Human Rights and Judiciary' of 22 October 1993 no. 50/181, and 20 November 1993 no. 48/137; Declaration on the rights and responsibilities of individuals, groups and national bodies for promoting and protecting of the accepted human rights and freedoms, entailed in the Resolution of the UN General Assembly no. 53/44 of 8 March 1999; the Council of Europe Recommendation no. R(94)12 of 13 October 1994 on the independence, efficiency and role of judges; The Bangalore Principles of Judicial Conduct; the principles in the 1998 European Charter on the statute for judges and the like) and guidelines of the Code of Ethics for judges passed by the Supreme Court of the Republic of Croatia on 26 October 2006 (Official Gazette no. 131/06)."

EXAMPLE 5 — Decision no. U-III-1801/2006, 20 May 2009 – constitutional complaint (child abduction – application of the Hague Convention on the Civil Aspects of International Child Abduction).

"Substantiating the allegations in the constitutional complaint, the applicants maintain that the above rulings violated the Hague Convention on the Civil Aspects of International Child Abduction (Official Gazette – International Agreements, no 4/94; hereinafter: The Hague Convention). Article 11 of the Hague Convention stipulates that the judicial or administrative authorities of the Contracting States (including also the Republic of Croatia) shall act expeditiously in proceedings for the return of children.

The Hague Convention binds the Republic of Croatia within the meaning of Article 134 [141] of the Constitution. The provision of Article 6 of the Hague Convention stipulates that one or more central authorities shall be designated to 'discharge the duties which are imposed by the Convention upon such authorities'.

Pursuant to the provision of Article 7 paragraph 2 of the Hague Convention the central authority shall: 'either directly or through any intermediary, take all appropriate measures: a) to discover the whereabouts of a child who has been wrongfully removed or retained; (...) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (...) f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of

access; g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (...).'

Article 8 paragraph 1 of the Hague Convention reads:

'Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.'

Articles 29 and 30 of the Hague Convention read:

'This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.'

(...)

The provisions of the Hague Convention requiring the designation of a Central Authority for discharging the duties which are imposed upon it by the Convention does not influence the competence of the courts, because this authority is established only with the purpose of providing help to persons the Convention is intended to protect.

Therefore, the Vukovar County and Municipal Courts were not right saying that the applicant could not directly approach the court with her proposal for the return of the wrongfully removed child. If all other requirements were met in order for the court's jurisdiction to be established in the specific case, the court proceedings should have been conducted.

By declining the jurisdiction to proceed, the above Courts violated the applicant's right of access to a court guaranteed in Article 29 paragraph 1 of the Constitution ..."

EXAMPLE 6 — Decision no. U-III-3138/2002, 7 February 2007 – constitutional complaint (alleged discrimination of Roma children in some primary schools in Croatia).

"4. For the purposes of the present proceedings, the Constitutional Court ... examined the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Službeni list SFRJ no. 9/91 and item 32 of the Decision on the publication of multilateral treaties to which the Republic of Croatia is a party on the basis of notifications of succession, Official Gazette – International Agreements no. 12/93), the Convention on the Rights of the Child, ... which are international agreements ratified in the Republic of Croatia, so they are part of the internal legal order of the Republic of Croatia and are above law in terms of legal effects (Article 140 of the Constitution)."

3. The CCRC's Techniques for Referring to the Jurisprudence of other National Constitutional Courts

The CCRC, when deciding on cases, also takes into account the available jurisprudence of other European or non-European constitutional courts, and it refers in its decisions to

jurisprudence that is applicable in the constitutional order of the Republic of Croatia if it finds this relevant for the particular case.

Techniques that the CCRC uses when it integrates in its decisions the case-law of other national constitutional courts are the same as those used to referring to the ECtHR case-law.

In its case-law so far, the CCRC has most frequently referred to the jurisprudence of the German BVerfG. Besides the BVerfG's legal opinion given in Croatian, the CCRC also quotes in its decisions in parentheses the original text of the opinion in German.

3.1. Special CCRC's Techniques

a) Comparative Overview of the Case-Law of Constitutional Courts of the CoE Member States

In some cases, when it is important to establish the existence of common ground in the legal orders of the States Parties of the ECHR, the CCRC uses a comparative overview of the case-law of their constitutional courts. Following examples are classified in chronological order.

EXAMPLE 1 — Decision no. U-III-3304/2011 of 23 January 2013 – constitutional complaint concerning the execution of the judgments of the ECHR (reopening disciplinary proceedings on account of the ECtHR judgment *Vanjak v. Croatia* of 14 January 2010, no. 29889/04).

"32. ... every judgment against the Republic of Croatia in which the ECHR found a violation of the ECHR – for the competent domestic bodies – constitutes a new fact. The force of such a new fact was best described by the German Federal Constitutional Court when on the occasion of the judgment of the ECHR in *M. v. Germany* (17 December 2009, application no. 19359/04) and several similar judgments that followed in its judgment in Security Prison I of 4 May 2011, it found as follows:

'1 The decisions of the European Court of Human Rights, which contain new aspects for the interpretation of the Basic Law are equivalent to legally relevant changes that might lead to the prevailing effects of the final and binding decisions of the Federal Constitutional Court itself.'

(1 Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechtserheblichen Änderungen gleich, die zu einer Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können.) – BVerfG, Urteil des Zweiten Senats vom 4. Mai 2011 – 2 BvR 2365/09-2 BvR 740/10-2 BvR 2333/08-2 BvR 1152/10-2 BvR 571/10, Absatz-Nr., 1–178.

The Constitutional Court finally recalls Article 31.3 of the Constitution, which explicitly allows for the possibility of reopening criminal proceedings if this is prescribed by the law 'in accordance with international treaties'."

EXAMPLE 2 — Decision no. U-I-448/2009 *et al.*, 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

"44.4. ... In its interpretation of constitutional values, the Constitutional Court accepts the legal position of the German Federal Constitutional Court that human dignity is a central point that must be used as a starting point for balancing all other constitutional values. This position was expressed in the judgment *Lebach* (BVerfGE 35, 202 /Lebach/ –

Urteil des Ersten Senats vom 5. Juni 1973 auf die mündliche Verhandlung vom 2. und 3. Mai 1973 – 1 BvR 536/72):

'In the case of conflict, both constitutional values must be balanced, as far as possible; if this cannot be achieved, then it must be decided, on the basis of the special characteristics and circumstances of the individual case, which of the interests must be abandoned. In such a case, both constitutional values must be observed in relation to their relationship towards human dignity as a central point in the value structure of the Constitution.'

('Beide Verfassungswerte müssen daher im Konfliktfall nach Möglichkeit zum Ausgleich gebracht werden; läßt sich dies nicht erreichen, so ist unter Berücksichtigung der falltypischen Gestaltung und der besonderen Umstände des Einzelfalles zu entscheiden, welches Interesse zurückzutreten hat. Hierbei sind beide Verfassungswerte in ihrer Beziehung zur Menschenwürde als dem Mittelpunkt des Wertsystems der Verfassung zu sehen.')"

EXAMPLE 3 — Decision no. U-I-295/2006 *et al*, 6 July 2011 – abstract review of the constitutionality of the 2005 Public Assembly (Amendments and Revisions) Act.

"E. NATIONAL LAW AND PRACTICE OF THE COUNCIL OF EUROPE MEMBER STATES

22. Present national legislations in the Council of Europe member states lack clear and firm 'common ground', and therefore there is no common European approach and clear European consensus with regard to restricting the right to freedom of public assembly in the proximity of premises holding seats of the highest bodies of public power.

The relevant data are presented in Enclosure 1 to this decision.

(...)

ENCLOSURE 1

NATIONAL LEGISLATION AND PRACTICE REGARDING THE RIGHT TO FREEDOM OF PUBLIC ASSEMBLY IN THE COUNCIL OF EUROPE MEMBER STATES

(...)

2) Case-law of constitutional courts of the Council of Europe member states

6. The Constitutional Courts of the Council of Europe member states dealt with the right to freedom of public assembly from different aspects.

7. The well-established view of the Federal Constitutional Court of Germany is that mere suspicion or presumption that there will be disorders is not a sufficient reason for imposing a ban on a public assembly. In decision no. BVerfG, 1 BvQ 22/01, 5. 1. 2001 (1–22) this Court reviewed the proposal to order a temporary measure and to repeal the order of the Higher Administrative Court of the Nordrhein-Westfalen Land relating to the ban on a specific public assembly. The German Constitutional Court refused the proposal stating that the freedom of assembly is one of the guarantees that goes along with the principle of the rule of law, including also the limitations imposed on that freedom listed in Article 8 paragraph 2 of the Basic Law. In accordance with the case-law of the Federal Constitutional Court bans may only be imposed with the purpose of protecting the fundamental legal values: the mere threat to public order could not be considered sufficient. (*'18. Zu den rechtsstaatlichen Garantien gehört die Versammlungsfreiheit einschließlich ihrer in Art. 8 Abs. 2 GG aufgeführten Grenzen. Nach der Rechtsprechung des Bundesverfassungsgerichts kommen Versammlungsverbote nur zum Schutz elementarer Rechtsgüter in Betracht, während die bloße Gefährdung der öffentlichen Ordnung im Allgemeinen nicht genügt (vgl. BVerfGE 69, 315 (353)). Zur Abwehr von Gefahren für die öffentliche Ordnung können aber Auflagen erlassen werden.'*)

7.1. In the latest decision of 22 February 2011 the German Constitutional Court extended the obligation to protect the right to freedom of public assembly and expression

also onto some legal subjects whose work is grounded on the rules of civil (private) law. This relates to the impact of the fundamental rights on third persons (*Dritwirkung*), which in the specific case the Court substantiated by the fact that not only public companies, which are entirely publicly owned, are bound by the fundamental rights but also companies that are in public-private ownership, if they are controlled by the public sector. This case concerns the ban on access to Frankfurt Airport, which was imposed on the applicant of the constitutional complaint – an activist of the 'Anti-Deportation Initiatives' – by the Fraport AG Company (a joint-stock company that manages Frankfurt Airport, and is in public-private ownership). The applicant's appeal against the Fraport AG Company was rejected before all civil courts at all instances.

The Federal Constitutional Court repealed all the judgments with the explanation that the disputed ban is in breach of the freedom of assembly, because it prohibits the applicant, with no concrete risk estimation and for an unlimited time, from holding any kind of gatherings in the premises of the entire Frankfurt Airport. Such a civil ban is disproportionate. In principle, civil-law authorisations, to which category the prior authorisation of Fraport AG to hold assemblies belongs, and which it renders pursuant to a discretionary assessment, cannot be interpreted in a manner that exceeds the constitutional boundaries imposed on the government authorities competent to ban assemblies. Accordingly, a ban on assemblies is acceptable only if there is imminent and foreseeable danger to the legal values that are equivalent to the freedom of assembly. This, however, does not prevent the separate treatment of the potential danger of assembling in an airport – which is organised as a place for the general communication traffic – and also taking into account the rights of other holders of fundamental rights. In so doing, the particular vulnerability of an airport in its primary role of a location where air traffic takes place can justify the limitations which – starting from the principle of proportionality – might not be taken into consideration in an open street.

Furthermore, the German Federal Constitutional Court also found that the applicant's rights to expression were violated, because the use of airport premises to express one's opinion cannot be restricted for the protection of legal values in a manner different than in a public street. These restrictions must be in accordance with the principle of proportionality. This excludes a general ban on distributing fliers in the public premises of the airport, as well as access to spaces that are arranged as public forums, and a general ban making general access to these spaces conditional on issuing a licence.

The above judgment of the German Federal Constitutional Court is also important because it directly connects the freedom of public assembly with all the places of the 'usual communication traffic' of people. Such gatherings cannot today be limited only to public traffic spaces, but holding an assembly must also be guaranteed in other areas that are increasingly supplementing these spaces, such as shopping centres or other places where people meet. This rule applies regardless if whether there are autonomous areas or are connected to infrastructural objects, or if they are indoor or outdoor places.

8. The Constitutional Courts of the majority of the Council of Europe member states that imposed the measure of an absolute legal ban on the freedom of public assembly in the proximity of buildings holding seats of the highest bodies of state power have so far not reviewed the compliance of these legal solutions with the national constitutions.

According to available data, the only exception is the Constitutional Court of Latvia. It reviewed the constitutionality of Article 9 paragraph 1 of the Assemblies, Processions and Demonstrations Act at the request of 20 representatives of the 8th sitting of the Latvian Parliament (the Saeimas). Article 9 paragraph 1 of the Act stipulated that it is prohibited to organise meetings and demonstrations closer than 50 metres from the residence of the President and the buildings of the Saeima, Cabinet, Council of Local Authorities, courts, public prosecutor, police, prison and foreign diplomatic and consular

offices. In the organisation of meetings and demonstrations close to these buildings, the relevant institutions, except foreign diplomatic and consular offices, may also indicate special places closer than 50 metres. In decision no. 2006-03-0106 of 23 November 2006 the Latvian Constitutional Court accepted the request. Despite the finding that the disputed legal ban has a legitimate aim (securing the undisturbed work of the above institutions and preventing the threat to public security), the Latvian Constitutional Court repealed this provision for non-compliance with the Constitution because it found it not proportional with the aim it was sought to achieve (point 29 of the judgment)."

EXAMPLE 4 — Decision no. U-III-5200/2011, 31 May 2011 – constitutional complaint (evidence obtained illegally may not be admitted in criminal court proceedings).

"German Federal Constitutional Court dealt with the issue of a constitutional complaint related to the search of premises in decision BVerfGE 103,142 (151) and concluded that these presumptions are violated if there are no real, plausible reasons for the search. A decision must show that the investigating judge carefully examined the presumption of the violation of a fundamental right."

EXAMPLE 5 — Decision no. U-I-3843/2007 of 6 April 2011 – abstract review of the constitutionality of the 1999 Execution of Prison Sentences Act.

"19. The Constitutional Court deems it beyond doubt that the addressees of a legal norm cannot truly and distinctively know their rights and obligations and foresee the consequences of their behaviour if the legal norm is not sufficiently definite and precise. The requirement for the definiteness and precision of a legal norm 'constitutes one of the fundamental elements of the rule of law' (judgment of the ECtHR in the case of *Beian v. Rumania*, 6 December 2007, application no. 30658/05, § 39: '*... constitue l'un des éléments fondamentaux de l'Etat de droit*') and is crucial for the development and preservation of the legitimacy of a legal order. It ensures that the democratically legitimate legislator can independently and by law elaborate the fundamental rights and freedoms, that the executive and administrative powers can resort to clear standards in laws and subordinate legislation on which to base their decisions, and that the judicial power and courts can control the legality of the legal order (judgment of the German Federal Constitutional Court 1 BvR 370/07 of 27 February 2008, § 209). When this requirement is not respected indefinite and imprecise laws delegate, in a constitutionally impermissible manner, part of the legislator's authority to the subjective resolution (discretion) of the administrative and judicial powers."

EXAMPLE 6 — Decision no. U-I-722/2009 of 6 April 2011 – abstract review of the constitutionality of the 2008 Free Legal Aid Act.

"3.1. During the consideration of the case the Court also examined the relevant case-law of the European Court of Human Rights (...) in relation to the Republic of Croatia (...), of the Federal Constitutional Court of the Federal Republic of Germany (...) and of the Supreme Court of the USA, which are referred to in the relevant parts of the reasons of the Decision and Ruling."

EXAMPLE 7 — Decision and Ruling no. U-IP-3820/2009 *et al*, 17 November 2009 – abstract review of the constitutionality of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

"8. ... In the view of the Constitutional Court, the Special Tax Act may be approached using the legal opinion of the Federal Constitutional Court of the Federal Republic of Germany (BVerfGE 21, 12, judgment of the First Senate of 20 December 1966 – 1 BvR 320/57, 70/63) that it is in practice impossible, in the case of a tax that is all-encompassing, to find a formulation delimiting the unchallenged part from the challenged part of the act, i.e. that delimitation is possible 'only on the theoretical level'.

(...)

13.3. The above principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located on the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

The standards for determining this borderline in constitutional court's case-law, formulated by the Federal Constitutional Court of the Federal Republic of Germany, are today considered the ruling guidelines for the work of European constitutional courts:

'This principle of the social State may certainly be of importance for the interpretation of basic rights, as well as for the interpretation and constitutional evaluation of laws that restrict basic rights pursuant to a proviso of law. It is, however, not capable of limiting basic rights in the absence of specification by the legislature, i.e., directly. It places a duty on the State to provide for a just social order (cf., e.g., BVerfGE 5, 85 [198]; BVerfGE 22, 180 [204]; BVerfGE 27, 253 [283]; BVerfGE 35, 202 [235 f.]); in fulfilling this duty, the legislature is endowed with a broad margin of discretion (BVerfGE 18, 257 [273]; BVerfGE 29, 221 [235]). In other words, the principle of the social State sets a task for the State but does not say anything as to how this task is to be accomplished in detail – in any other case, the principle would come into conflict with the principle of democracy: the democratic order established by the Basic Law would, as the system of a free, political process, be decisively restricted and curtailed if political decision making were to be made subject to a constitutional obligation that could only be met in a specific, stipulated manner. Due to this openness, the principle of the social State cannot erect any direct limitations on basic rights.' (BVerfGE 59, 231 /Freie Mitarbeit/ – ruling of the First Senate of 13 January 1982 – 1 BvR 848, 1047/77 916, 1307/78, 350/79 und 475, 902, 965, 1177, 1238, 1461/80).

('Dem Sozialstaatsprinzip kann Bedeutung für die Auslegung von Grundrechten sowie für die Auslegung und verfassungsrechtliche Beurteilung von – nach Maßgabe eines Gesetzesvorbehalts – grundrechtseinschränkenden Gesetzen zukommen. Es ist jedoch nicht geeignet, Grundrechte ohne nähere Konkretisierung durch den Gesetzgeber, also unmittelbar, zu beschränken. Es begründet die Pflicht des Staates, für eine gerechte Sozialordnung zu sorgen (vgl. etwa BVerfGE 5, 85 [198]; 22, 180 [204]; 27, 253 [283]; 35, 202 [235 f.]); bei der Erfüllung dieser Pflicht kommt dem Gesetzgeber ein weiter Gestaltungsspielraum zu (BVerfGE 18, 257 [273]; 29, 221 [235]). Das Sozialstaatsprinzip stellt also dem Staat eine Aufgabe, sagt aber nichts darüber, wie diese Aufgabe im einzelnen zu verwirklichen ist – wäre es anders, dann würde das Prinzip mit dem Prinzip der Demokratie in Widerspruch geraten: Die demokratische Ordnung des Grundgesetzes würde als Ordnung eines freien politischen Prozesses entscheidend eingeschränkt und verkürzt, wenn der politischen

Willensbildung eine so und nicht anders einzulösende verfassungsrechtliche Verpflichtung vorgegeben wäre. Wegen dieser Offenheit kann das Sozialstaatsprinzip den Grundrechten keine unmittelbaren Schranken ziehen.'")

b) Comparative Overview of the Relevant Legislation of the CoE Member States

In some cases, the CCRC applies a comparative overview of the relevant legislation of the CoE Member States. Following examples are classified in chronological order.

EXAMPLE 1 — Decision no. U-I-4469/2008 of 8 July 2013 – abstract review of the constitutionality of the 2007 Act on the Takeover of Joint Stock Companies.

"B. COMPARATIVE GERMAN AND AUSTRIAN LAW

15. ... When deciding on the appropriateness of the exclusion of voting rights, the gravity of the sanction imposed on the offeror should be considered on one hand, and on the other hand, the value of the desired aim (protection of minority shareholders). In order to assess such appropriateness, the approach used by other countries must also be considered. The European Union, in Article 17 of Directive 2004/25/EC, leaves the determination of the sanctions to the Member States, and no conclusion can be drawn from it either for or against the exclusion of voting rights. The exclusion of voting rights is a standard sanction in the countries of what is known as the German legal circle. Within the EU, this includes Germany, Austria and Slovenia. Different legal systems, such as French or English law, do not envisage this sanction. Therefore, this sanction as such is not unknown in other legal systems, especially those that are close to the Croatian system. In order to view it in the right light, the form in which it is known there must be considered, as well as the manner in which these countries protect in their constitutions the right to invest capital.

Germany:

German law regulates the exclusion of voting rights in § 59 of the Securities Acquisition and Takeover Act (*Wertpapiererwerbs – und Übernahmegesetz – WpÜG*). With regard to the sanction itself, German law is stricter than Croatian law because it does not just prescribe the exclusion of voting rights as does ATJSC, but the loss of all rights from shares, with the exception of the right to a dividend and to part of the assets after the liquidation of the company. It is considered that this sanction complements other sanctions (fines) and that it therefore represents a part of the system that ensures the correct conduct of the offeror. Some authors consider that this sanction is appropriate, effective and dissuasive in conformity with Directive 2004/25/EC (Article 17). It is appropriate (*verhältnismäßig*) because it is applied only as a sanction for the violation of duties related to the bid, and because the loss of rights does not include the loss of the right to dividends and to part of the assets after the company is liquidated. On the other hand, some authors criticise this provision precisely because, in their view, it is not appropriate and they call into question its constitutionality.

The proponents point out that § 37 WpÜG (1) provides for the possibility that the German Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) exempts the offeror from the duty to publish the bid, on the basis of his written proposal, if this proves to be justified in view of the manner of attainment, the objectives being pursued with the attainment of control, a drop below the control threshold subsequent to the attainment of control, the shareholder structure of the target company, or the actual possibility of exercising control, taking into account the interests of the applicant and the interests of the holders of shares. German legal science stresses that this possibility of exemption provides the 'necessary checks and balances', because the control threshold can be overstepped even without any action being undertaken by the offeror and in that case

the obligation of publishing the bid would constitute 'unacceptable difficulties'. It is also emphasised that the possibility of exemption has great practical importance and that in the first year from the coming into force of the WpÜG, as many as 43 proposals for exemption were already filed.

It can be read in the writing of some German authors that the loss of rights attached to shares would be contrary to the Constitution if there was no exemption from the duty to publish a takeover bid. However, it must be taken into account that § 37 WpÜG is not the only exemption from the duty to publish a takeover bid. Thus, for example, pursuant to § 36 WpÜG, shares that were acquired by way of inheritance, gratuitous dispositions among spouses or relatives in direct line and up to the third degree, or by way of division of marital estate, the change of legal status or change in shareholder structure within a company remains unconsidered when calculating the percentage of voting rights on the basis of which the control threshold is determined. The literature stresses that, although only § 37 WpÜG is titled 'Exemption from duty', WpÜG also provides for other exemptions and exceptions which are viewed in their entirety. The specific quality of § 37 is that, unlike other exceptions, it is based on a discretionary decision of the Supervisory Authority (*BaFin*), in the framework of cases determined by law. And the possibility of such a discretionary assessment, even though it provides flexibility and adaptability to the needs of the case, is also subject to criticism in German law. These considerations must particularly be kept in mind when speaking of the principle of appropriateness and exceptions in Croatian law (...).

Austria:

In Austrian law, the suspension of voting rights is regulated by § 34 of the Takeover Act (*Übernahmegesetz – ÜbG*). This act was amended for the purpose of aligning it with Directive 2004/25/EC ... In the present form, § 34 ÜbG resembles Article 13.3 ATJSC in the way it prescribes the suspension of voting rights if the offeror fails to publish the takeover bid.

As the proponents point out, § 34(2) ÜbG prescribes that the Supervisory Commission (*Übernahmekommission*) may rescind the suspension of voting rights in cases where the breach of the law does not in fact threaten the financial interests of the shareholders of the offeree company in specific cases or if the threat can be eliminated by imposing conditions or guarantees. However, just as is the case in the German law, this is only one of the exceptions in the suspension of voting rights. Thus, for example, § 24 ÜbG ... states that this duty does not apply if the offeror, in spite of having acquired the control threshold, does not have a decisive influence over the company."

EXAMPLE 2 — Decision no. U-I-448/2009 *et al*, 19 July 2012 (CODICES: CRO-2012-2-007) – abstract review of the constitutionality of the 2008 Criminal Procedure Act.

"a) Judicial protection against unlawful (arbitrary) criminal prosecution and investigation

39. Lawful pre-investigative and investigative actions, including police actions, are the basic preconditions of and the best preparation for the fair trial that may follow.

The question is therefore whether the legislator has the constitutional obligation to prescribe a legal remedy against unlawful (arbitrary) criminal prosecution and investigation and thus ensure for anyone suspected of committing a criminal offence judicial protection against such prosecution or investigation?

39.1. The Constitutional Court notices that countries that have accepted the state attorney investigation have contradictory legal solutions in relation to judicial control of investigation in criminal procedure. Examples are German and Austrian laws on criminal proceedings. While, according to the German legislator, the rights of the defendant may not be violated by the institution of investigative proceedings or by consequences of

investigative actions, or by a decision on the suspension of investigation because of which a person is not entitled to be informed that he or she is suspected of having committed a criminal offence, the Austrian legislator envisages certain legal remedies in pre-trial proceedings as well. (For more details Đurđević, Z: 'Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspekt' (Judicial Control of Criminal Prosecution and Investigation: Comparative and Constitutional Aspects) Croatian Annual of Criminal Law and Practice, Zagreb, vol. 17 no. 1/2010, pp. 7–24.)"

V. CONCLUSIONS

In modern Europe, the constitution principle (constitutional democracy) has weighed supreme over the popular sovereignty principle (popular democracy), emphasising limits on the exercise of political power and constraints on majoritarian political institutions. The cornerstone of contemporary constitutionalism is to be found in an enforceable bill of constitutional rights.

The Croatian Constitution represents the fundamental law of the nation and serves as the supreme law of the land. It is a binding document, and it controls the entire legal order. It provides a judicial remedy for any violation of a constitutional right and creates the CCRC to guard and protect the Constitution as a whole, including the constitutional identity of the Republic of Croatia.

On the other hand, the Constitution itself has enabled the "transfer of constitutional powers" to the EU, prescribing that "the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership."

As to the ECHR, pursuant to what is today Article 141 of the Constitution, the Republic of Croatia recognised the jurisdiction of the ECtHR on 5 November 1997 by the special Declaration with respect to Article 46 of the ECHR. Namely, it recognised, for an indefinite period of time, "as compulsory *ipso facto* and without special agreement, on condition of reciprocity, the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the present Convention and the Protocols thereto, based on facts occurring after the Convention and the protocols thereto entered into force in the Republic of Croatia." Thus, a part of the sovereign judicial authorities of the Croatian State was also transferred to the ECtHR.

In such a situation, we can speak of the sovereignty of the Croatian State, but always and only within the framework of the fundamental postulates of modern constitutional democracy. The Croatian Constitution is based on the principles of openness towards European and international law, which oblige all state authorities, especially the CCRC, to give wide-ranging regard to European and international law and the decisions of European and international courts in order to avoid conflicts between the obligations of the Republic of Croatia under these laws, on the one hand, and national law, on the other hand, as far as possible.

When there is a competition of primacies between the Croatian Constitution, the EU law and the law of the ECHR, there are differences between the law of the ECHR and EU law in this respect. In sum, the following applies:

- When domestic courts implement EU law, EU law, including European fundamental rights guaranteed in the CFREU, prevails. The CJEU, not the CCRC, serves as the guardian of this law;
- The CCRC serves as the guardian of the Constitution, as well as of the ECHR at the national level. The ECHR has *de facto* quasi-constitutional status in the Croatian legal order. The jurisprudence of the ECtHR, which creates the law of the ECHR, has a function of obligatory guidance for the jurisprudence of the CCRC in the interpretation of the Constitution and the protection of individual constitutional rights within the domestic constitutional sphere.

As to the legal nature of the ECtHR and CJEU, it must be taken into account that the ECtHR constitutes the only judicial authority of the ECHR's control mechanism (Article 19 of the ECHR) and that the CJEU (with its three courts: the CJ, GC and CST) constitutes the only judicial authority of the EU. From this aspect, these courts can be considered by the nature of things as ordinary jurisdictions of European law. However, as Voßkuhle has rightly mentioned, "in the field of fundamental rights, they [the ECtHR and CJEU] are facing similar questions as the national constitutional courts; they perform their review on the basis of comparable fundamental rights catalogues and in comparable procedures."⁷⁸ Thus, as regards the functions of the national constitutional courts and the European courts in Strasbourg and Luxembourg to protect same fundamental rights at different levels, the ECtHR and CJEU may be regarded as European constitutional courts rather than ordinary jurisdictions of European law. Access to the ECtHR and CJEU as "European constitutional courts" in the field of fundamental rights facilitates the establishment of the necessary dialogue between these courts and the national constitutional courts. In these terms, Voßkuhle speaks of *europäische Verfassungsgerichtsverbund*, considering that the system of different levels of European and national constitutional courts "can be understood as a *Verbund* of constitutional courts – a system of multilevel cooperation."⁷⁹

In this light, we advocate "constitutional pluralism" as the best analytical paradigm for the European system for the protection of human rights and fundamental freedoms. Considering that the national and European legal norms, which regulate the same or similar rights, overlap one another, the judicial dialogue is becoming a key issue in the debate on European constitutional pluralism. There is no doubt that the personal relationships among judges of the national constitutional courts, the ECtHR and CJEU are important. There is also no doubt that bilateral or multilateral meetings are always useful for their participants. However, in terms of the "national constitutional court – the ECtHR" or the "national constitutional court – the CJEU" we are *de facto* still very far from "judicial dialogue through judgments and decided cases". Moreover, between the two European courts and national constitutional courts the relations are still hierarchically set. Thus, the "transition from pyramid to network" through judicial dialogue in today's circumstances is more wishful thinking than a real possibility.

Finally, the decisions of the CCRC are a useful instrument for the formation of relevant public awareness on constitutional and European legal requirements, which is one of the most important tasks of the constitutional judiciary in transition democracies. The fact that the

⁷⁸ Voßkuhle, *The Protection of Human Rights Within the European Cooperation of Courts*, p. 4. *See supra* note 3.

⁷⁹ Voßkuhle, Andreas: *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, *European Constitutional Law Review*, Vol. 6, Issue 2 (June 2010), pp. 175–198.

CCRC in its everyday work examines, accepts and implements the jurisprudence of the European courts as well as other national constitutional courts, together with the international law instruments, is undoubtedly transformative because the decisions of the CCRC gradually fill the legal framework of Croatia with constitutional content aligned with the European legal standards. However, in the situation when it is clear that there will be no EU accession to the ECHR in the near future, potential divergences between the law of the ECHR and EU law in the same matters will remain to exist thus making the tasks of the constitutional court judges very difficult when applying European law standards.

In spite of all the abovementioned problems, Wildhaber and Greer rightly pointed out that "any attempt to provide transnational legal protection for human rights in Europe is likely to be ineffective unless grounded in a full appreciation of the fact that, although a plurality of national and transnational legal and constitutional systems clearly exists, almost without exception they presuppose common constitutional fundamentals embodying democracy, the rule of law, and human rights"⁸⁰ as exemplified by the national constitutions, ECHR and CFREU. These constitutional fundamentals are the European *eternity clause* to which the European Continent is truly devoted.

⁸⁰ Greer, Wildhaber, Revisiting the Debate about 'constitutionalising' the European Court of Human Rights. *See supra* note 6, p. 684.

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