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The Constitutional Complaint in the Croatian Model

1. Introduction

Protection of human rights and fundamental freedoms prescribed by the Constitution is one of the most important competencies of the Constitutional Court of the Republic of Croatia, beside the control of the constitutionality of laws and other regulations. The constitutional complaint is not a regular or extraordinary legal remedy, it is an additional end exceptional institute for the protection of human rights and fundamental rights guaranteed in the Constitution by the special body outside of the system of regular and specialised judiciary protecting the fundamentals of constitutional system of a democratic state based on the rule of law. Given the importance of the protected values, the system of protection of constitutional rights through regular and administrative courts has been supplemented with the constitutional complaint. The institute of constitutional complaint created for the protection of constitutional rights exists for almost thirty years in the Croatian legal system.¹ In this presentation the key aspects of the individual application to the Constitutional Court of the Republic of Croatia and its relations with other courts within their respective constitutional competence will be presented.

2. Protection of constitutional rights and freedoms through the constitutional complaint (individual application)

The procedure before the Constitutional Court providing the constitutional protection against individual decisions of competent state authorities (mostly against decisions of regular courts) has supplementary nature. Citizens and legal entities

¹ The Constitution of the Republic of Croatia of 1990 has been published in the Official Gazette "*Narodne novine*" Nos. 56/90, 135/97, 8/98-consolidated text, 113/00, 124/00-consolidated text, 55/02-correction, 76/10, 85/10-consolidated text and 5/14 - Decision of the Constitutional Court of the Republic of Croatia.

may initiate procedure before the Constitutional Court only after exhaustion of ordinary legal remedies. Constitutional court procedure is new judicial procedure, but it must take into account previously conducted ordinary judicial procedures. On one hand, it is a new procedure because the Constitutional Court has the right to implement its specific procedural rules. On the other hand however, this procedure is the old one as well. From the previously conducted ordinary judicial procedure originates the constitutional dispute and its proper settlement is not possible without conversance of this previous judicial procedure.² According to Article 129 of the Constitution the Croatian Constitutional Court decides on constitutional petitions against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution. There is special Constitutional Act on the Constitutional Court that in Article 62 stipulates that everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his rights and obligations, or about suspicion or accusation for a criminal act, has violated his human rights or fundamental freedoms guaranteed by the Constitution, or his right to local and regional self-government guaranteed by the Constitution.³

If some other legal remedy is provided against the violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted. In matters in which an administrative dispute is provided, respective revision on points of law in civil or extralitigation procedure, remedies are exhausted after the decision has been rendered upon these legal remedies.

There is an exception to the general rule. Namely, Article 63 of the Constitutional Act prescribes that the Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable

² See **Branko Smerdel**, *"Ustavno uređenje europske Hrvatske"* ("Constitutional System of the European Croatia"), Zagreb, 2013, pp. 441-449.

³ Analysis of the procedural aspects of the functioning of the Croatian Constitutional Court has been given by professor **Davor Krapac** (former justice of the Constitutional Court of the Republic of Croatia 2007-2015) in his book *"Postupak pred Ustavnim sudom Republike Hrvatske - ustrojstvo i proceduralni elementi ustavnog nadzora"* ("The Procedure Before the Constitutional Court of the Republic of Croatia - Organisation and Procedural Elements of the Constitutional Control"), Zagreb, 2014. See also **Jadranko Crnić** (first president of the Constitutional Court of the Republic of Croatia 1991-1999), *"Komentar Ustavnog zakona o Ustavnom sudu Republike Hrvatske"* ("Commentary of the Constitutional Act on the Constitutional Court of the Republic of Croatia"), Zagreb, 2002.

consequences may arise for the applicant if constitutional court proceedings are not initiated.

If the decision is passed to adopt the constitutional complaint for not deciding in a reasonable time, the Constitutional Court determines a deadline for the competent court of justice within which that court has to pass the act meritoriously deciding about the applicant's rights and obligations, or the suspicions or accusation of a criminal offence. Such deadline for passing the act begins to run on the day following the date when the Constitutional Court decision is published in the Official Gazette.

In its decision the Constitutional Court determines appropriate compensation for the applicant for the violation of his constitutional right committed by the court of justice by not deciding within a reasonable time about his rights and obligations, or about the suspicions or accusations of a criminal offence. The compensation is paid from the state budget within a term of three months from the date when the applicant lodged a request for its payment.

It is important to stress that the constitutional complaint may be submitted during the term of 30 days from the day the decision was received.⁴

The constitutional complaint, as a rule, does not prevent the application of the disputed act, but the Constitutional Court may, on the proposal of the applicant, postpone the execution of court of justice decision until the decision is made, if the execution would cause to the applicant such damage, which could hardly be repaired, and the postponement is not contrary to the public interest nor would the postponement cause to anyone greater damage.⁵

The constitutional complaint is decided by the council composed of six judges. In addition, the council composed of three judges decides about constitutional complaints when procedural requirements for deciding upon them do not exist (late, lacking legal standing to lodge a constitutional complaint, inadmissible etc.). The council decides unanimously and with all its members present. But if the council fails to reach a unanimous decision, or if it holds that the matter of the constitutional complaint is of broader significance, such constitutional complaint will be decided by the Session (plenum) of the Constitutional Court.

In conducting the preparatory proceedings for a constitutional complaint to be discussed by the competent council of the Constitutional Court, the role of a reporting judge is essential. The reporting judge invites the applicant, ordering the term, to

⁴ The Constitutional Court permits the restitution into the previous state to the person who for the justified reasons has omitted the term for submission of the constitutional complaint, if during the term of 15 days after the cessation of the reason which has caused the omission he submits the proposal for restitution into the previous state and at the same time submits the constitutional complaint. After the expiration of three months from the day of omission, the restitution into the previous state may not be sought. Restitution into the previous state is not permitted if the term for submission of the proposal for permission of restitution into the previous state has been omitted. (Article 66 of the Constitutional Act on the Constitutional Court, Official Gazette "Narodne novine", Number 99/99, 29/02, 49/02)

⁵ Article 67 of the Constitutional Act.

supplement the constitutional complaint or to correct it if not understandable, respective if after the evidence and the enclosures it cannot be ascertained from the constitutional complaint which act is disputed or if the constitutional complaint has not been signed (incomplete constitutional complaint). According to Article 71 of the Constitutional Act on Constitutional Court the council, respective the Session of the Constitutional Court, will examine only the violations of constitutional rights which are stated in the constitutional complaint. It has to be emphasized that constitutional complaint shall not be considered in cases when it does not deal with the violation of a constitutional right. The constitutional complaint will be refused by the decision when the Constitutional Court ascertains that the reasons for which the act has been disputed do not exist. If the council does not reach a unanimous decision, a council composed of six judges, i.e. the Session of the Constitutional Court, will pass the decision.

Regarding the procedural issues, the Constitutional Court may reject the constitutional complaint by a ruling if it is not competent, if the constitutional complaint has not been timely submitted, or if it is incomplete, not understandable or not permissible. The constitutional complaint is not permissible if the provided legal remedies are not exhausted, respective if the applicant has omitted to use the provided legal remedy in the previous procedure, with the exception provided for in Article 63 of this Constitutional Act on the Constitutional Court; if the complaint has been submitted by the person not entitled to submit it, and if the complaint has been submitted by a legal person who cannot be entitled to the constitutional rights.⁶

Contrary, if there are reasons for granting the constitutional complaint, the Constitutional Court will, in its decision accepting the constitutional complaint, repeal the disputed act by which a constitutional right has been violated.⁷

If the competent judicial or administrative body, body of a unit of local and regional self-government, or legal person with public authority, are obliged to pass a new act to replace the act that was repealed by the decision accepting the constitutional complaint, the Constitutional Court will return the matter to the body that passed the repealed act for renewed proceedings. If the law regulating competency for proceeding in that legal matter was changed before the Constitutional Court had passed its decision, the body that conducted the proceedings and passed the repealed act must without delay refer the matter to the competent body.

If the disputed act that violated the constitutional right of the applicant no longer produces legal effect, the Constitutional Court will pass a decision declaring its unconstitutionality, and state in the dictum which constitutional right of the applicant had been violated by that act.

⁶ If ascertained that the constitutional right of the applicant has been violated not only by the disputed, but also by some other act brought in this matter, the Constitutional Court shall repeal by the decision, as a whole or in part, and this act as well (Article 74 of the Constitutional Act on the Constitutional Court).

⁷ When the constitutional complaint is accepted and the disputed act repealed, the Constitutional Court has to state in the reasons for the decision which constitutional right has been violated and what makes the violation, as is prescribed by Article 77, para. 1 of the Constitutional Act on the Constitutional Court.

If the constitutional complaint has been accepted, according to Article 77 of the Constitutional Act on Constitutional Court, when passing the new act the competent judicial or administrative body, body of a unit of local and regional self-government, or legal person with public authority, is obliged to obey the legal opinion of the Constitutional Court expressed in the decision repealing the act whereby the applicant's constitutional right was violated.

Finally, the Constitutional Court is allowed to order that the applicant of the constitutional complaint who has not succeeded with his/her complaint reimburses the expenses of the proceedings before the Constitutional Court if he/she has caused them intentionally. However, this has never happened in the practice of the Croatian Constitutional Court due to political implications such decisions could potentially imply, i.e. this could be understood in public as something not democratic, as something aiming at deterring the citizens from requiring the Constitutional Court to protect their constitutional rights.

2. Relations between the Constitutional Court and other Croatian courts

It has to be emphasized that the Constitution provided the Constitutional Court with a special position outside the judiciary. It is a special body with its own constitutional competences. Accordingly, the Constitutional Court may repeal laws or some of their provisions if it finds them in breach of the Constitution. Also, it may repeal or annul secondary regulations and some of their provisions if it finds them not in line with the Constitution or law. In such cases the Constitutional Court will take into account all the circumstances of protection of constitutionality and legality, having particularly in mind seriousness of the violation of the Constitution or the law and the interest of the legal certainty. When deciding on the violation of the constitutional rights, the Constitutional Court may repeal decisions of regular courts if they violate these rights. Since the Constitutional Court protects human rights and fundamental freedoms, and its jurisprudence has been entirely harmonised with the jurisprudence of the European Court of Human Rights, it is of special importance in such cases the possible violation of the right to a fair trial in reasonable time, prescribed by Article 29 para. 1 of the Croatian Constitution, which includes the protection of right to the access to the courts, right to absence of the arbitrariness in proceedings, possibility of participation within the process, possibility to propose the evidence as well the right to explained decision. If regular courts cause such a violation, the Constitutional Court will repeal their decisions.

In addition, there is a special competence of the Constitutional Court to pass decisions within the procedures against decisions of the National Judicial Council⁸ in disciplinary procedures. Against the decision to relieve a judge of his duty, he/she has the right to appeal to the Constitutional Court within the term of 15 days from the day the decision has been delivered. The same term applies for the appeals against

⁸ In accordance with Article 124 of the Constitution the National Judicial Council is an autonomous and independent body that ensures the autonomy and independence of the judicial branch in the Republic of Croatia. It autonomously decides, in conformity with the Constitution and law, on the appointment, promotion, transfer, dismissal and disciplinary accountability of judges and presidents of courts, except in the case of the President of the Supreme Court of the Republic of Croatia.

decisions of the National Judicial Council on disciplinary responsibility of a judge. In such cases the Constitutional Court has to reach the decision within a term of thirty days in accordance with Article 101 para 1 of the Constitutional Act on the Constitutional Court.