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REPUBLIC OF CROATIA / REPUBLIQUE DE CROATIE /  
/REPUBLIK KROATIEN / РЕСПУБЛИКА ХОРВА́ТИЯ

The Constitutional Court of the Republic of Croatia /  
La Cour Constitutionnelle de la République de Croatie /  
Das Verfassungsgericht der Republik Kroatien /  
Конституционный суд Республики Хорватии /  
Ustavni sud Republike Hrvatske

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REPUBLIC OF CROATIA  
CONSTITUTIONAL COURT

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**ANSWERS TO THE QUESTIONNAIRE FOR THE XVIII<sup>th</sup>  
CONGRESS OF THE CONFERENCE OF EUROPEAN  
CONSTITUTIONAL COURTS**  
(Prague, 26 - 29 May 2020)

Subject:

"Human Rights and Fundamental Freedoms:  
the Relationship of International, Supranational and  
National Catalogues in the 21<sup>st</sup> Century"

Zagreb, October 2019

## Table of Contents

<b>I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS .....</b>	<b>1</b>
<b>I.I International catalogues of human rights (ECHR, UDHR and ICCPR).....</b>	<b>1</b>
1. In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights? .....	1
2. What mechanism is used to invoke the international treaties in national court decision-making? .....	2
3. Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism. ....	2
<b>I.II Supranational catalogues of human rights (the Charter).....</b>	<b>2</b>
1. Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)? .....	3
2. Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making? .....	4
3. Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU? .....	5
<b>I.III National human rights catalogues .....</b>	<b>5</b>
1. Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?.....	6
2. What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original? .....	6
3. What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment? .....	6
<b>I.IV The mutual relationship between different catalogues of human rights.....</b>	<b>7</b>
1. Can you give examples from the case law of your court related to the application of any of the international catalogues? .....	7



- 2. Has your court considered the relationship/hierarchy/competition of the catalogues of human rights?..... 8
- 3. Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary)? ..... 9

**II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS..... 9**

**II.I Right to Life ..... 9**

- 1. What is the original wording of the provision protecting this right in your national catalogue?..... 9
- 2. Is it possible to restrict the right? If so, how and under what conditions?..... 9
- 3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. .... 10
- 4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?..... 12

**II.II Freedom of expression..... 12**

- 1. What is the original wording of the provision protecting this right in your national catalogue?..... 12
- 2. Is it possible to restrict the right? If so, how and under what conditions?..... 13
- 3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. .... 14
- 4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?..... 15

**II.III Right to privacy/right to respect for private life/right to private life ..... 16**

- 1. What is the original wording of the provision protecting this right in your national catalogue?..... 16
- 2. Is it possible to restrict the right? If so, how and under what conditions?..... 16
- 3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. .... 17
- 4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?..... 19

**II.IV Freedom of religion ..... 19**

- 1. What is the original wording of the provision protecting this right in your national catalogue?..... 19



2.	Is it possible to restrict the right? If so, how and under what conditions?.....	19
3.	Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. ....	20
4.	Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right? .....	22
<b>II.V Prohibition of discrimination .....</b>		<b>22</b>
1.	What is the original wording of the provision protecting this right in your national catalogue?.....	22
2.	Is it possible to restrict the right? If so, how and under what conditions?.....	22
3.	Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. ....	23
4.	Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?.....	24
<b>II.VI Right to liberty .....</b>		<b>24</b>
1.	What is the original wording of the provision protecting this right in your national catalogue?.....	24
2.	Is it possible to restrict the right? If so, how and under what conditions?.....	24
3.	Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. ....	25
4.	Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right? .....	26

### ***Main abbreviations and acronyms***

**ECtHR** – European Court of Human Rights in Strasbourg

**CJEU** – Court of Justice of the European Union

**EU** – European Union

**Convention** – European Convention on Human Right and Fundamental Freedoms

**Constitution** – Constitution of the Republic of Croatia

**Constitutional Court** – Constitutional Court of the Republic of Croatia

**Supreme Court** – Supreme Court of the Republic of Croatia

# I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

## *I.1 International catalogues of human rights (ECHR, UDHR and ICCPR)*

### **1. In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?**

With regard to the legal status of international treaties, the Republic of Croatia opted for the monistic approach. Pursuant to Article 134 of the Constitution, all international treaties (including those protecting human rights<sup>1</sup>) which are concluded and ratified in accordance with the Constitution, which have been published and which have entered into force, are a component of the domestic legal order and have primacy over domestic law. In accordance with legal theory, the term "conclusion" under Article 134 of the Constitution "should be understood as Croatian, (although not so clear), equivalent for ratification of international treaties".<sup>2</sup>

Consequently, in the hierarchy of legislation in the legal order of the Republic of Croatia, an international treaty is a piece of legislation of higher rank than a law. Accordingly, laws must be in conformity with ratified and published treaties.<sup>3</sup> The lack of conformity of an individual statutory provision with the relevant provision of a treaty "constitutes a violation of the principle of the rule of law referred to in Article 3 of the Constitution, as the highest value of the Constitutional order" of the Republic of Croatia.<sup>4</sup>

However, the Constitutional Court has granted a higher, quasi-constitutional status to the Convention. The Constitutional Court expressly stated back in 2000, that lack of conformity of a law with the Convention also meant lack of conformity with the principle of the rule of law enshrined in Article 3 of the Constitution and with the principles of constitutionality and legality enshrined in Article 5 as well as the principle of legal monism of national and international law enshrined in Article 134 of the Constitution.<sup>5</sup>

According to its well-established case law, the Constitutional Court's jurisdiction is restricted to a review of the formal constitutionality of a law on the ratification of an international treaty.

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<sup>1</sup> The Republic of Croatia is a party to large number of global and regional international treaties on human rights. Among treaties on international level these are the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 International Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, the 1990 Convention on the Protection of Migrant Workers and their Families, the 2006 Convention on the Protection of all Persons from Enforced Disappearance and the 2006 UN Convention on the Rights of Persons with Disabilities. Among regional instruments there are for example the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, the European Social Charter, the Framework Convention for the Protection of National Minorities and the European Charter on Regional and Minority Languages.

<sup>2</sup> Degan, Vladimir Đuro, *International law*, 2<sup>nd</sup> updated edition, Rijeka, Faculty of law, University in Rijeka, 2006, 136-137.

<sup>3</sup> See decision no. U-I-745/1999 of 8 November 2000.

<sup>4</sup> See decision no. U-I-920/1995 *et al* of 15 July 1998.

<sup>5</sup> See decision no. U-I-745/1999, cited above.

The Constitutional Court is not competent to review the substantive content of the international treaty itself which is an integral part of the law on the ratification of an international treaty.<sup>6</sup>

## **2. What mechanism is used to invoke the international treaties in national court decision-making?**

The Constitution is silent about the direct application of international treaties. However, their direct application is derived from the above-mentioned provision of Article 134 and from the provision of Article 115.3 of the Constitution under which courts administer justice according to the Constitution, law, international treaties and other valid sources of law.

In the case of the non-conformity of a national law with an international treaty, national courts must apply the international treaty, in the light of the above-mentioned status of international treaties in the hierarchy of legislation.

The Constitutional Court directly applies various international treaties in the field of the protection of human rights, mostly the Convention. The Convention is directly applicable in the proceedings before the Constitutional Court. The Constitutional Court explained that as a sovereign state the Republic of Croatia transferred one part of its judicial jurisdiction to the ECtHR, and accordingly legal standards developed by the ECtHR are applied in the proceedings instituted by constitutional complaints before the Constitutional Court. The execution of international obligations assumed by the Republic of Croatia by the ratification of the Convention is ensured only in a manner which makes it possible to resolve disputes at national level by the direct application of the Convention and the ECtHR's case law in line with the principle of the subsidiarity of the Convention's supervisory system.<sup>7</sup>

According to the Constitutional Court, the ECtHR's judgments go beyond individual cases, that is, the Constitutional Court recognises the interpretative authority of the ECtHR's judgments. The Constitutional Court applies the Convention by expressly invoking the ECtHR's case law. It does not refer only to the cases related to Croatia, but to the entire case law of the ECtHR in relation to all High Contracting Parties.

## **3. Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.**

Parties in proceedings may request the court to directly apply an international treaty on human rights in certain situations. However, the potential request made by the party is not binding on the court. As mentioned above, courts shall, *ex officio*, apply a provision of an international treaty directly if the relevant law is not in conformity with the international treaty.

### ***I.II Supranational catalogues of human rights (the Charter)***

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<sup>6</sup> See, *inter alia*, the rulings no. U-I-2234/2017 of 6 June 2017, no. U-I-1596/2012 of 23 May 2017 and no. U-I-5705/2010 of 11 June 2013.

<sup>7</sup> See *inter alia*, decisions no. U-III-3304/2011 of 23 January 2013; no. U-III-5807/2010 of 30 April 2013 and no. U-III-2864/2016 of 23 May 2019.

**1. Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?**

The application of EU law and accordingly the relation between the Charter and the Croatian Constitution is regulated by Article 141c of the Constitution which entered into force on 1 July 2013, on the date of the accession of the Republic of Croatia to the EU. This provision reads as follows:

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

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 individual rights based on the European Union *acquis communautaire*.

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

It should be noted that even before the accession of the Republic of Croatia to the EU the Constitutional Court was mindful of the manner in which fundamental rights enshrined in the Charter were interpreted in the CJEU's case-law.

For example, in the case of an abstract control of constitutionality of the Criminal Procedure Act, the Constitutional Court referred to Article 1 of the Charter and, invoking human dignity as the basis of all fundamental rights, repealed the provision of that Act whereby in certain exceptional circumstances the use of evidence obtained through a violation of the right to dignity was permitted.<sup>8</sup> The Constitutional Court held that human dignity was "absolute, non-derogable and incomparable" and that it was impossible to restrict it or balance it. Obtaining evidence through a violation of human dignity makes that evidence unlawful. A derogation from that right is not permitted because no other individual right or freedom, or any general or public interest, or even one aimed at the successful prosecution of the most serious criminal offences, may be compared with or be given priority over human dignity.<sup>9</sup>

After the accession of the Republic of Croatia to the EU, the Charter became legally binding. Furthermore, the CJEU's decisions became binding on domestic courts, including the Constitutional Court, on the basis of the Lisbon Treaty and the supremacy of EU law and its direct effect.

For example, without touching upon the issue whether a case is within the application of EU law, the Constitutional Court used the CJEU's case law as an interpretative tool in the case of an abstract control of constitutionality of the provisions of the Inheritance Act whereby the procedural provisions of that law applied to cases in which a final ruling had not been issued

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<sup>8</sup> See decision no. U-I-448/2009 *et al* of 19 July 2012.

<sup>9</sup> See Đurđević Zlata, Decision of the Constitutional Court of the Republic of Croatia On The Compliance With The Constitution Of The Criminal Procedure Act, Bulletin for Croatian Criminal Law and Practice, vol. 19, no. 2/2012, 428 - 430, available at:

<https://www.pravo.unizg.hr/hljcpp/2012.godina/vol.19-br.22012/durdevic>

before its entry into force. The Constitutional Court refused the petitioner's arguments and underlined that according to the CJEU's case law procedural legislation in force is generally applied to all pending proceedings at that moment.<sup>10</sup>

On the other hand, the subject matter of the case in which the Constitutional Court decided on the constitutionality of the legislative solution of the Public Procurement Act which allowed two-level supervision of the decision on the selection of tenderers, firstly through an appeal to a competent body<sup>11</sup> and after that through an administrative dispute before the High Administrative Court as the last instance court, was within the field pertaining to the regulatory competence of the EU, and the Constitutional Court had the obligation to apply the Charter.<sup>12</sup> The Constitutional Court held that the guarantee of the right to appeal under Article 18 of the Constitution represents a higher standard of the protection of fundamental rights of individuals than the one guaranteed by the Charter. The Charter does not guarantee the right to appeal within civil or administrative proceedings, while the Constitution guarantees "the right to appeal against individual legal acts made in first-instance proceedings by courts or other authorised bodies". Stating that the relevant Directive<sup>13</sup> does not guarantee multi-level judicial protection either, the Constitutional Court refused the petitioner's request according to which the limitation of judicial protection only to the proceedings before the High Administrative Court would be contrary to Article 18 of the Constitution. The Constitutional Court stated, *inter alia*, the following:

"The fact that the Constitution guarantees a higher standard of the protection of rights of individuals obliges the Constitutional Court to protect precisely that higher standard. However, at the same time, the fact that the Charter, as the system of legal protection of minimum fundamental rights of all citizens of the European Union regardless of their state of origin, does not guarantee the right to an appeal as a fundamental right, supports the previously explained position that the right to an appeal guaranteed by Article 18 of the Constitution does not presuppose multi-instance judicial protection in circumstances when the right to an appeal can be used within the ... [administrative] proceedings before accessing to the courts."

**2. Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?**

The CJEU case law on human rights serves as guidance for ordinary courts in their interpretation and application of the provisions of national legislation.

For example, the Supreme Court as an appellate court granted a right to an appeal to an injured party's family against a ruling dismissing execution of a European Arrest Warrant issued against a Croatian national by a German court. Referring to the ECJ's judgment in the *Pupino* case, the Supreme Court laid down the principle that Croatian legislation must be interpreted as far as possible in the light of the wording and purpose of reference framework decisions and directives, in order to attain thereby a result in line with the EU law, even in the field of police and judicial cooperation in which the legislation had been adopted before the entry into force

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<sup>10</sup> See ruling no. U-I-2403/2009 of 25 February 2014.

<sup>11</sup> The State Commission for Supervision of Public Procurement Procedures.

<sup>12</sup> See decision no. U-I-2911/2017 of 5 February 2019.

<sup>13</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

of the Lisbon Treaty has no direct impact before national courts. The Supreme Court referred to Directive 2012/29 which not only did not contain express provisions on the right to an appeal against decisions on the execution of European Arrest Warrants, but Member States were not even obliged to transpose it into their legislation before November 2015. The relevant part of the Supreme Court judgment reads:

"A grammatical or literal interpretation of the mentioned provisions [of the Act on Judicial Cooperation in Criminal Matters with EU Member States] would suggest that the parties to these proceedings are the wanted person and the issuing state, where the wanted person has a defence counsel and the issuing state is represented by the public prosecutor, and this state may not appear in the proceedings in any other way. In other words, a conclusion may be reached that no one outside the circle of exhaustively listed persons (the public prosecutor as the *ex lege* authorised person for the issuing country, the requested person and his or her defence attorney) is authorised to file an appeal.

However, such a literal interpretation would put into question the achievement of the purpose of European law, expressed through the mentioned Framework Decision of the EU Council on the European Arrest Warrant and the surrender procedures between Member States, but also other legislation regulating European Union law (Directives and Framework Decisions), which relate to the protection and rights of victims in criminal and other proceedings. Therefore, with a view to achieving the goals and respecting the principles expressed in EU law, national courts are obliged to apply national law in the light of the letter and spirit of EU legislation. This means that national law must be interpreted in its application as far as possible in the light of the wording and purpose of reference framework decisions and directives, in order to achieve the results which are the purpose of those framework decisions and directives and, as a result, to be in line with the provision of Article 34.2 b) of the Treaty on the European Union (...). Through its accession to the EU, the Republic of Croatia has also committed itself to act accordingly."

**3. Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?**

It is clear from the above mentioned provision of Article 141c of the Constitution according to which EU law is applied "in accordance with the European Union *acquis communautaire*" that courts must protect individual rights based on the European Union *acquis communautaire* (paragraph 3) and apply European Union law directly (paragraph 4) whereby the efficiency of the protection of rights ensuing from the European Union law must not lag behind the protection of subjective rights guaranteed by Croatian legislation (paragraph 1).

The Constitutional Court has not had the opportunity yet to decide on a petitioner's objection that human rights and freedoms have been violated by an action originating from EU law and accordingly has not had an opportunity to state whether the relation between the Constitution and the Charter will be defined through the presumption of equivalent protection in the manner in which the ECtHR has done through its case law.

The national impact of the Charter is not conditioned on the request for a preliminary ruling with the Court of Justice of the EU.

### ***I.III National human rights catalogues***

**1. Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?**

Human rights catalogue is integral part of the 1990 Constitution together with all its subsequent amendments. Heading III of the Constitution entitled Protection of human rights and fundamental freedoms embraces the list of all guaranteed human rights. It is divided into three sections: 1. General provisions (Articles 14 - 20); 2. Personal and political freedoms and rights (Articles 21 - 47); and 3. Economic, social and cultural rights (Articles 48 - 69).

**2. What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?**

International and regional agreements on protection of human rights and fundamental freedoms<sup>14</sup> have influenced not only the type of human rights guaranteed by the Constitution but also their classification under its Heading III. Civil and political, economic, social and cultural rights guaranteed in the Constitution correspond to the rights guaranteed in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as to the Convention and the European Social Charter at the regional level.

**3. What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?**

The Croatian Catalogue of human rights contained in the 1990 Constitution has been amended several times after 1990.

Article 16 of the Constitution on the proportionality principle was amended in 2000 with a new paragraph 2 which reads: "Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case." To a large degree, the said amendment is a result of the Constitutional Court's decision rendered the same year.<sup>15</sup> By that decision, the Constitutional Court repealed several provisions of the 1999 Restriction on the Use of Tobacco Products Act founding its decision solely on the proportionality principle, although this principle was not explicitly recognized in the Constitution at the time. In this decision, the Constitutional Court also carried out a proportionality test modelled on the case-law of the ECtHR. Thus, the proportionality principle was introduced into the constitutional and legal order of the Republic of Croatia as a constitutional institute.

For the purposes of harmonization with Article 6.1 of the Convention, Article 29 of the Constitution on the right to a fair trial was also amended in 2000. Before the amendment, Article 29 guaranteed the right to a fair trial, but only during the course of *criminal proceedings*. Due to the deficiency of this constitutional provision, the Constitutional Court has invoked the ECtHR's case-law and in a number of decisions has taken the legal position that "although the constitutional guarantee is referred to in an article that primarily regulates the rights of persons during *criminal proceedings*, in terms of quality the same rights belong to all other participants

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<sup>14</sup> See above, footnote 1.

<sup>15</sup> See decision no. U-I-1156/1999 of 4 February 2000.

in legally regulated proceedings conducted before competent bodies established by law".<sup>16</sup> The Constitutional Court thus influenced the amendment of the provision of Article 29 of the Constitution which now reads: "Everyone shall be entitled to have his/her rights and obligations, or suspicion or accusation of a criminal offence, decided upon fairly and within a reasonable time by an independent and impartial court established by law."

Procedure for amendments to the Constitution is prescribed by the Constitution. The Constitution envisages two possible procedures for amendments: the first is amending the Constitution on the basis of a decision of the regular legislative representative body, i.e. the Croatian Parliament (Articles 136 to 139); the second is to call a facultative constitutional referendum (Article 87).

*a) Amendments to the Constitution by a decision of the Croatian Parliament*

A minimum of one-fifth of the Members of the Croatian Parliament, the President of the Republic and the Government of the Republic of Croatia may propose amendments to the Constitution. After the authorised proposer has submitted an initiative, the Croatian Parliament holds a discussion and decides by a majority vote of all its Members whether or not to initiate the procedure for amending the Constitution. A final decision on amending the Constitution is made by a two-thirds majority of all Members of the Croatian Parliament. Amendments to the Constitution are promulgated by the Croatian Parliament.

*b) Amendments to the Constitution by a voters' decision (constitutional referendum)*

The constitutional provisions provide for the possibility of amending the Constitution by a referendum, i.e. by calling a referendum on a proposal for amending the Constitution when so decided by the Croatian Parliament, or the President of the Republic, or when so requested by ten percent of the total electorate.

The Parliament decides on calling a referendum independently, and for this decision, the Constitution does not prescribe any particular majority. For that decision a majority of votes is required, provided a majority is present at the session. In the case of a citizens' initiative for amending the Constitution, it is the duty of the Croatian Parliament to call a referendum on amending the Constitution if a minimum of ten percent of all voters in the Republic of Croatia have added their signatures requesting a referendum.

The President of the Republic may call a referendum on a proposal for amending the Constitution but only on the proposal of the Government and when this is countersigned by the Prime Minister. At a referendum for amending the Constitution, decisions are made by the majority of voters taking part in the referendum. Referendum decisions are binding.

***I.IV The mutual relationship between different catalogues of human rights***

**1. Can you give examples from the case law of your court related to the application of any of the international catalogues?**

The Constitutional Court supervises the respect of international obligations undertaken through the ratification of international treaties in the proceedings for the abstract review of the conformity of laws with international treaties and in the proceedings instituted by constitutional

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<sup>16</sup> See decisions no. U-I-745/1999 of 8 November 2000; no. U-III-504/1996 of 8 July 1999 and U-III-435/2000 of 17 May 2000.

complaints in individual cases. As already mentioned, the Constitutional Court most frequently applies the Convention and ECtHR's case law in its adjudication. However, the application of the Convention does not exclude the application of other catalogues of human rights in a situation in which another international treaty is primarily applied to a certain issue.

#### Example 1

In the case of an abstract control of constitutionality of the Railways Act, the Constitutional Court repealed the provision whereby the right to strike was permitted exclusively on the basis of discretionary powers of the competent minister because it found that it was not in conformity with Article 8 of the International Covenant on Economic, Social and Cultural Rights which guarantees the right to form or join trade unions and which protects the right to association. The Constitutional Court held that such non-conformity constitutes a violation of the principle of the rule of law which is recognized as one of the highest values of the Constitutional order of the Republic of Croatia in Article 3 of the Constitution.<sup>17</sup>

#### Example 2

In the case of an abstract control of constitutionality of a decision introducing health and sex education classes to elementary and secondary schools, the Constitutional Court invoked several different catalogues of human rights that were relevant for the rendering of the decision: the Constitution, international acts binding on the Republic of Croatia, and relevant statutory provisions.<sup>18</sup> The international acts are listed in the following order: the Universal Declaration on Human Rights, the UN Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and finally the bilateral agreement between the Holy See and the Republic of Croatia in the areas of education and culture.

#### Example 3

In cases relating to international child abduction, the Constitutional Court always assesses the case in line with the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: the Hague Convention) and in the light of the standard "in the best interests of the child" under the Convention on the Rights of the Child because this is the decisive factor in proceedings relating to children, bearing in mind the general principles of the ECtHR concerning the relationship between these international treaties.<sup>19</sup> The Constitutional Court applied these standards and found a violation of Article 35 of the Constitution and Article 8 of the Convention because it found that the competent court "failed to provide sufficient reasoning for the lack of an exemption from the rule of urgent return within the meaning of Article 13.1b) of the Hague Convention in relation to the required protection of the best interest of the child".<sup>20</sup>

## **2. Has your court considered the relationship/hierarchy/competition of the catalogues of human rights?**

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<sup>17</sup> See decision no. U-I-920/1995 *et al* of 15 July 1998.

<sup>18</sup> See decision no. U-II-1118/2013 *et al* of 22 May 2013.

<sup>19</sup> See the judgment in the case of *X. vs Latvia* [Gc], no. 27853/09, judgment of 26 November 2013.

<sup>20</sup> See decision no. U-III-5232/2017 of 29 March 2018.

Given its *de facto* quasi-constitutional position in the Croatian legal order and the constitutional obligation of direct application of the Convention,<sup>21</sup> the Constitutional Court mostly applies the Convention.

There is no explicit answer so far from the Constitutional Court's case law as to the question about the relationship/hierarchy/competition between different catalogues of human rights.

- 3. Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary)?**

There is no established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues. However, in case of its mandatory application pursuant to Article 51.1 of the Charter, national courts / the Constitutional Court would certainly apply the Charter within the meaning of Chapter VII.

## **II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS**

### ***II.1 Right to Life***

- 1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions on the protection of the right to life are contained in Article 21 of the Constitution, which reads:

Every human being has the right to life.

There shall be no capital punishment in the Republic of Croatia.

In accordance with Article 17.3 of the Constitution no restrictions may be imposed upon the constitutional provisions on the right to life even in cases of clear and present danger to the existence of the state.

- 2. Is it possible to restrict the right? If so, how and under what conditions?**

The Constitutional Court interprets the restriction of the right to life bearing in mind the principle of proportionality referred to in Article 16 of the Constitution<sup>22</sup> which, as "a general principle is interwoven in the entire legal order"<sup>23</sup> and in line with the positions "set by the

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<sup>21</sup> See above, answer to the first question under I.I.

<sup>22</sup> Article 16 reads:

"Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health.

Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case."

<sup>23</sup> Rodin Siniša, The principle of proportionality in the recent case-law of the Constitutional Court of the Republic of Croatia, Informator no: 5623 of 26 January 2008., available at:

ECtHR within Article 2 of the Convention". As the right to life is a constitutional right of fundamental importance, the Constitutional Court "carries out the strict review of the proportionality of the restrictions of that constitutional right".<sup>24</sup>

The Constitutional Court reviewed the constitutionality of the provision of the Police Duties Act whereby police officers are permitted to use firearms also "in circumstances other than resisting an attack on the victim's life or the life of the police officer" and applied the ECtHR's standard according to which the use of firearms which resulted or could have resulted in the loss of life must be "absolutely necessary" and strictly proportionate to the aim pursued by the restriction. It held that this provision is clear and predictable and that it restricts the use of firearms only to certain exceptional circumstances "in which it is known that the person being arrested represents a threat against life and limb or that the person is suspected of committing an extraordinarily serious violent criminal offence", and only after a warning has been made prior to the use of the firearm. Therefore, the use of firearms is permitted as an ultimate means for the purpose of attaining the legitimate goal of arrest or to prevent the escape of a person suspected of committing a very serious violent criminal offence. The Constitutional Court found that the existing legal framework established a system of supervision of the lawfulness of police powers and provided preliminary training in handling firearms and held that the challenged provisions of the Police Duties Act were in conformity with Article 21 of the Constitution and Article 2 of the Convention.<sup>25</sup>

Although this is a "fundamental right", the legislator must, in certain cases, take into account that when there is competition between the right to life and some other right guaranteed by the Constitution, the legislative solution must achieve a fair balance between the competing rights and interests.

For example, in the case of abstract control of constitutionality of the Act on Health Measures for the Exercise of the Right to a Free Decision on Child Birth of 1978 which regulates the requirements for lawful abortion, the Constitutional Court refused the petitioner's objections that the mentioned Act was not in conformity with Article 21 of the Constitution and declared that "an unborn being, as a value protected by the Constitution, enjoys constitutional protection within the meaning of Article 21 of the Constitution only to the extent which does not contradict the woman's right to privacy. Accordingly, the right to life of an unborn being is not protected by having priority or enjoying more protection compared to the woman's right to privacy. Within this meaning, the legislator enjoys a margin of appreciation in achieving a fair balance between a woman's right to make a free decision and to privacy on one hand, and public interest to ensure the protection of an unborn being on the other."<sup>26</sup>

**3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

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[https://www.pravo.unizg.hr/download/repository/Naeelo\\_proporcionalnosti\\_u\\_novijoj\\_praksi\\_USRH\\_Rodin.pdf](https://www.pravo.unizg.hr/download/repository/Naeelo_proporcionalnosti_u_novijoj_praksi_USRH_Rodin.pdf)

<sup>24</sup> See ruling no. U-I-3924/2009 of 9 April 2019, § 13.1.

<sup>25</sup> See ruling no. U-I-3924/2009 of 9 April 2019.

<sup>26</sup> See ruling no. U-I-60/1991 *et al* of 21 February 2017.

In its case law, the Constitutional Court has reviewed violations of the right to life in its procedural aspect, that is, it has examined whether the state has met its positive obligations. As a rule, this is the obligation to carry out efficient investigations in situations where a person has died during a time of war or in other suspicious circumstances.<sup>27</sup> In a certain number of cases, the Constitutional Court has reviewed whether the state had the obligation to protect the life of an individual who subsequently died or just avoided death only by chance, but suffered serious bodily injuries.<sup>28</sup>

The Constitutional Court accepted the relevant opinions of the ECtHR and found that that following situations *inter alia* fall within the scope of the right to life guaranteed under Article 21 of the Constitution: death as a consequence of a war crime or due to the events of war<sup>29</sup>, the serious injury of a worker caused by an explosion at the workplace<sup>30</sup>, murder committed by an individual who did not have a licence to carry firearms and who had been punished several years before for the violation of public order and peace<sup>31</sup>, death in a hospital allegedly caused by the victim's husband<sup>32</sup>, death in a flood allegedly caused by a breach in a dam after the illegal excavation of gravel<sup>33</sup> which the state should have prevented.

#### Example 1

The Constitutional Court held that failure to locate and sentence the person responsible for the death of the applicant's son does not mean that the investigation itself was inefficient, in particular because the investigation was completed and criminal proceedings instituted, but facts were not established and evidence not found to indicate a particular person or persons directly responsible for the death of the applicant's son. These circumstances can certainly be attributed to objective reasons, caused primarily by a state of war, the destruction of evidence by perpetrators of war crimes after the occupation of Vukovar and the removal of traces of crime before the peaceful integration of the Croatian Danube Region and the fact that the accused are out of reach of the criminal prosecution authorities and that an international arrest warrant had been issued against them. However, the state cannot be held responsible for those circumstances.<sup>34</sup>

#### Example 2

The Constitutional Court found no violation of Article 21 of the Constitution and Article 2 of the Convention in their procedural aspects in circumstances where the applicant, who had suffered serious bodily injuries during explosion in a factory, had failed to avail himself of an available and more appropriate remedy. More precisely, he had failed to institute civil proceedings for damages against the factory, but opted for criminal proceedings ten years after the explosion, when the statute of limitations for criminal prosecution had already expired. The Constitutional Court concluded that the applicant himself, through his inactivity and failure to

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<sup>27</sup> See decisions no. U-III Bi-7367/2014 of 15 December 2015, no. U-III Bi-2698/2016 of 14 December 2016, no. U-III Bi-4690/2015 of 11 January 2017, no. U-III Bi-3699/2015 of 30 March 2017 and U-III Bi-1066/2015 of 3 April 2019.

<sup>28</sup> See decision no. U-III Bi-863/2019 of 9 July 2019.

<sup>29</sup> See decision no. U-III Bi-1066/2015 of 3 April 2019.

<sup>30</sup> See decision no. U-III Bi-863/2019 of 9 July 2019.

<sup>31</sup> See decision no. U-III-2733/2017 of 14 November 2018.

<sup>32</sup> See decision no. U-III Bi-2615/2017 of 13 September 2017.

<sup>33</sup> See decision no. U-III Bi-4690/2015 of 11 January 2017.

<sup>34</sup> See decision no. U-III Bi-1066/2015 of 3 April 2019.

undertake legal actions for the protection of his right to life, caused the situation in which state authorities had no longer been able to conduct an efficient investigation".<sup>35</sup>

#### Example 3

The Constitutional Court found no violation of the State's positive obligation to protect a right to life of an applicant who had suffered serious bodily injuries and disability in an explosion of a hand grenade activated by a member of the Croatian Army, at the time suspended from work due to alcohol. The Constitutional Court held that one cannot speak of a violation of the positive obligations of the Republic of Croatia to prevent the occurrence of the harmful event because at the relevant time the competent authorities did not know or could have known about the existence of the danger threatening the applicant's life and limb.<sup>36</sup>

#### **4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

The Constitutional Court has been interpreting the scope of the right to life under Article 21 of the Constitution and the obligations arising for the State on the basis of that provision in line with ECtHR case law.

In relation thereto, it is emphasised that the Committee of Ministers of the Council of Europe (hereinafter: the Committee of Ministers) found, in the process of supervision of the execution of ECtHR's judgments in which a violation of Article 2 in its procedural aspect had been found,<sup>37</sup> that the Constitutional Court's case law allows judicial review of the efficiency of war crimes investigations<sup>38</sup> and emphasised in particular decision no. U-IIIBi-1066/2015 of 3 April 2019.<sup>39</sup>

### ***II.II Freedom of expression***

#### **1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions on the protection of the right to freedom of expression are contained in Article 38 of the Constitution, which reads:

Freedom of thought and expression shall be guaranteed.

Freedom of expression shall particularly encompass freedom of the press and other media, freedom of speech and public opinion, and free establishment of all institutions of public communication.

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<sup>35</sup> See decision no. U-IIIBi-863/2019 of 9 July 2019.

<sup>36</sup> See decision no. U-III-2404/2018 of 6 February 2019.

<sup>37</sup> These are the judgments in the following cases: *Skendžić i Krznarić vs Croatia*, no. 16212/08, judgment of 20 January 2011; *Jularić vs Croatia*, no. 20106/06, judgment of 20 January 2011; *Jelić vs Croatia*, no. 57856/11, judgment of 13. October 2014; *B. and Others vs Croatia*, no. 71593/11, judgment of 18 June 2015 and *M. and Others vs Croatia*, no. 50175/12, judgment of 2 May 2017.

<sup>38</sup> See the decision of the Committee of Ministers CM/Del/Dec(2019)1348/H46-7 of 6 July 2019, available at: <http://hudoc.exec.coe.int/eng?i=004-12091>.

<sup>39</sup> See above, Example 1 of the Constitutional Court's case-law, answer to the third question under II.I.

Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.

The right of access to information held by any public authority shall be guaranteed. Restrictions on the right of access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law.

The right of correction is guaranteed to anyone whose constitutionally and legally established rights have been violated by public information.

## **2. Is it possible to restrict the right? If so, how and under what conditions?**

Article 38 of the Constitution does not guarantee unrestricted freedom of expression. The Constitutional Court interprets the restriction of the right to freedom of expression bearing in mind the principle of proportionality under Article 16 of the Constitution<sup>40</sup> and in line with the standards developed by the ECtHR in its case law. The restriction has to be lawful, it must pursue a legitimate aim and it must be "necessary in a democratic society". When assessing violation of the freedom of expression, the Constitutional Court examines "each individual case in the light of all the circumstances, including the content of the disputed allegations as well as the context in which these allegations were made", and in particular, whether the measures undertaken to restrict the freedom of expression were proportionate to the legitimate aim pursued by that restriction.<sup>41</sup> When it assesses which of the opposing rights prevail in a particular case and which need to be protected, the Constitutional Court applies the criteria established by the ECtHR in the Grand Chamber's judgments *Axel Springer AG* and *Von Hannover (no. 2)*.<sup>42</sup>

### **Example 1**

The Constitutional Court held that the imposition of a fine on the parties because they offended a judge in a letter was not lawful because the applicants did not file the controversial letter in the case to which they were parties; moreover, they did not file it with the court before which the proceedings were pending. They filed the letter with the Supreme Court, pointing to the allegedly incorrect and unlawful work of the judge, and that court forwarded it to the court before which the proceedings were being conducted. The Constitutional Court held that the courts could not invoke a provision of relevant procedural law prescribing punishment of a party to the proceedings who offend the court in his/her submissions, which means that the interference with the applicants' right to freedom of expression was not lawful. Since the first criterion for the justification of the interference had not been met, the Constitutional Court did not continue to examine whether the interference pursued a legitimate aim and whether it was proportionate to the attainment of that aim.<sup>43</sup>

### **Example 2**

The Constitutional Court held that the restriction of the right to freedom of expression of the publisher of a daily paper who published an article on mutual relations between judges at a local

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<sup>40</sup> For Article 16 of the Constitution, see above, footnote 22.

<sup>41</sup> See *inter alia* decisions no. U-III-2588/2016 of 8 November 2016 and no. U-III-4946/2013 of 10 October 2017.

<sup>42</sup> See the judgments in the case of *AxelSpringer AG vs Germany* (Gc), no. 39954/08, judgment of 7 February 2012 and the case of *Von Hannover vs Germany no. 2*, (Gc), nos. 40660/08 and 60641/08, judgment of 7 February 2012.

<sup>43</sup> See decision no. U-III-63/2017 of 26 February 2019.

court was disproportionate. That article, as it was subsequently found, resulted in a violation of honour and reputation of the judge working at that court. The Constitutional Court emphasised that judges are subject to broader limits of acceptable criticism than ordinary citizens. It also held that the reasoning of the challenged judgments did not show that the courts which offered protection to the judge took into account that judges are not immune to criticism and scrutiny and that although they form part of judicial power which is part of the fundamental institutions of the state, except in the case of harmful attacks which are in essence unfounded, they may be subjected to broader limits of acceptable criticism by ordinary citizens. Further, courts should have provided the reasons why they adjudicated the high amount of damages to the plaintiffs because the awarded compensation should not have a deterring effect. The publisher also published a *corrigendum* to the disputed article, thereby allowing a correction to be made to the actual damage which possibly occurred due to untrue media disclosures.<sup>44</sup>

The protection of rights stemming from the constitutional guarantee of freedom of opinion and expression of thoughts may not be to the detriment of the protection of dignity, honour and reputation of an individual because these are not only "values protected by law but also a right protected by the Constitution (Article 35)". At the same time, courts must be mindful of the fact that these are "rights deserving equal protection and that the courts have the task to strike a fair balance between these rights. When a decision is made on an objection by a person alleging that his or her dignity, honour or reputation was violated by someone's public statement, the result must be the same as when a decision is made on the objection of a violation of freedom of expression of thoughts".<sup>45</sup>

### Example 3

The expression of messages "whose content incites hatred based on racial, national and religious affiliation" and which are prohibited by relevant misdemeanour legislation is not protected by the guarantee of freedom of speech. Therefore, the Constitutional Court held that the misdemeanour conviction of a football player who spoke these messages to fans at a football match did not lead to the violation of his right to freedom of expression.<sup>46</sup> After the decision of the Constitutional Court, the applicant filed an application with the ECtHR which endorsed the position of the Constitutional Court in its decision *Šimunić v. Croatia* according to which the interference in the applicant's right to freedom of expression was lawful and proportionate to the legitimate aim of preventing of disorder and combating racism and racial discrimination in the field of sport.<sup>47</sup>

### **3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

The Constitutional Court accepted the relevant opinions of the ECtHR and held that the right to freedom of expression includes, *inter alia*:

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<sup>44</sup> See decision no. U-III-964/2017 of 26 June 2019.

<sup>45</sup> See decision no. U-III-2944/2018 of 26 June 2019.

<sup>46</sup> See decision no. U-III-2588/2016 of 8 November 2016.

<sup>47</sup> See the decision the case of *Šimunić vs Croatia*, no. 20373/17, decision of 22 January 2019, §§ 41- 49.

- the right to the freedom of the media to report on topics of public interest, such as the functioning of the judicial system / judicial power,<sup>48</sup> which however requires the media to act in good faith and in line with journalists' ethics when present information of public interest; thus publication of incomplete and insufficiently checked allegations on the work of an individual judge may not be justified by public interest;<sup>49</sup>
- the participation of an individual in a debate on matters of public interest, such as a "debate on the Second World War, on the emergence of fascism in Croatia in the mid-20th century and on the manner in which historic events are perceived today in the public and how they are discussed" because "the provision on freedom of expression is not only applicable to information or ideas which are accepted benevolently or which are not considered offensive or which do not provoke any reaction, but also to those which are offensive, shocking or disturbing", as required "by pluralism, tolerance and free spirit which are indispensable for the existence of a democratic society."<sup>50</sup>
- freedom of speech and public statements, for example: criticising practice and of an individual organisation presented in the form of an advertisement on radio programmes and through electronic media, but which must not cross the line to insult, and this was precisely at issue in the case in which a private legal entity suggested in an advertising message that the fee collection system used by the national professional service for the protection of copyright in the field of musical works was contrary to morals, possibly even a robbery;<sup>51</sup>
- the right to the expression of one's own opinion at the workplace which may not be a ground for the termination of labour relation except when extraordinary circumstances exist in a particular situation which allow the restriction of freedom of expression in line with Article 10 of the Convention and Article 19 of the International Covenant on Civil and Political Rights which must be determined by the trial court.<sup>52</sup>

#### **4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

As indicated above, the Constitutional Court has accepted and applied standards developed by the ECtHR in its case law.

It is emphasized in this respect that the ECtHR in the *Šimunić* decision endorsed the Constitutional Court's findings that the misdemeanour conviction in the circumstances of the concrete case did not amount to violation of Article 10 of the Convention. Furthermore, the ECtHR emphasised that the Constitutional Court rendered its decision relying on the principles established in the ECtHR's case law.<sup>53</sup>

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<sup>48</sup> See decisions no. U-III-964/2017 of 26 June 2019 and no. U-III-458/2018 of 23 May 2019.

<sup>49</sup> See decision no. U-III-2195/2016 of 2 November 2016.

<sup>50</sup> See decision no. U-III-2944/2018 of 26 June 2019.

<sup>51</sup> See decision no. U-III-7479/2014 of 16 December 2015.

<sup>52</sup> See decision no. U-III-727/1997 of 10 January 2001.

<sup>53</sup> See the *Šimunić* decision, cited above, § 7.

## ***II.III Right to privacy/right to respect for private life/right to private life***

### **1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions on the protection of the right to life are contained in Article 35 of the Constitution, which reads:

Respect for and legal protection of each person's private and family life, dignity, and reputation shall be guaranteed.

### **2. Is it possible to restrict the right? If so, how and under what conditions?**

In line with the Constitutional Court's case law, the restriction of the right to private life is permitted only in "cases regulated by the Constitution and law in conformity with the principle of proportionality (Article 16 of the Constitution), considered in the light of the rules in force in a democratic state".<sup>54</sup> The law which restricts the right to private life "must pursue specific legitimate aims and must be necessary for the protection of those aims in a democratic society. Interference with somebody's privacy must reflect an urgent social need to protect one or several legitimate aims and must be an appropriate means of protection in relation to those aims".<sup>55</sup>

For example, the Constitutional Court held that the provision of the Act on the Suppression of Narcotic Drugs which prescribes the mandatory imposition of protective measures of medical treatment or withdrawal from addiction on occasional drug users "represents an interference in their personal life and dignity, which are protected by Article 35 of the Constitution". However, the Constitutional Court held that the purpose of the interference was the preventive "provision of assistance so that they would not develop an addiction to drug use" and therefore proportionate to the legitimate aim of the protection of life and health of people.<sup>56</sup>

When reviewing the right to respect a private life, the Constitutional Court assesses both the positive and negative obligations of the state. Positive obligations are various "activities or measures" which "the state should undertake for the purpose of achieving the guarantees referred to in Article 35 of the Constitution". Negative obligations cover the duty of the state to refrain from unlawful and disproportionate interference in the private lives of individuals. Bearing in mind the vagueness of the constitutional notion of respect for personal life, the interpretation by the state differs from case to case, and the existing capacity of the social community and its individuals are respected in the interpretation. Starting from the notion that the state has a certain margin of appreciation when choosing measures which will enable respect for private life, the Constitutional Court, in proceedings for a review of possible violations of the mentioned constitutional guarantee in specific cases, always takes into account the striking of a fair balance between the competing interests of individuals and the community as a whole.<sup>57</sup>

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<sup>54</sup> See decisions no. U-III-1380/2014 of 20 May 2015; no. U-III-4536/2012 of 14 January 2016; no. U-III-4531/2012 of 30 March 2016 and no. U-III-2404/2016 of 20 February 2019.

<sup>55</sup> See ruling no. U-I-60/1991 *et al* of 21 February 2017, § 44.1.

<sup>56</sup> See ruling no. U-I-2938/2018 of 18 June 2019.

<sup>57</sup> See decision no. U-III-2404/2016 of 20 February 2019.

**3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

The scope of constitutional notion of respect of private life is not limited and includes various aspects of the physical and social identity of an individual. According to the case law of the Constitutional Court, the right to private life includes, *inter alia*, the following categories.

*3.1. The activities of a professional or business nature*

The Constitutional Court held that the termination of a labour contract for a teacher of religion whose canonical mandate for teaching Catholic religious classes or religious education was withdrawn after a divorce because he no longer met the requirements for the mentioned job did not result in a violation of his right to protection of personal and private life.<sup>58</sup> The ECtHR endorsed the Constitutional Court's findings in the *Travaš v. Croatia* judgment.<sup>59</sup>

*3.2. The right to recognition as a person before the law, that is, the right to legal capacity*

The Constitutional Court invoked the relevant case law of the ECtHR in cases against Croatia<sup>60</sup> and held that divestment of legal capacity constitutes an extraordinarily serious measure which prevents an individual from "independently and of his / her own will" managing his or her life. Therefore, the proceedings for deprivation of legal capacity must meet the requirements of a fair trial, which means, *inter alia* "adversary proceedings through the active participation of a guardian". Further, it is the duty "of the court to decide whether such an extreme measure is "necessary or whether a more lenient measure would be sufficient".<sup>61</sup> The Constitutional Court thus held that the competent court violated the applicant's right to respect of private life by divesting him of legal capacity because it failed to determine with a sufficient level of certainty that the applicant was not capable of taking care of his personal needs, rights and interests or that he endangered the rights and interests of other persons, and the applicant's mother was also his special guardian and opposed the deprivation of his legal capacity.<sup>62</sup> A violation of Article 35 of the Constitution was found also in the case in which the seized court failed to provide reasons for not having heard the applicant during the proceedings<sup>63</sup> and in the case in which a special guardian was passive during the proceedings for deprivation of legal capacity.<sup>64</sup>

*3.3. The right of a woman to make a decision in connection with conception and pregnancy which is an inherent part of the right to have freedom of decision and self-determination*

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<sup>58</sup> See decision no. U-III-702/2009 of 22 May 2013.

<sup>59</sup> See judgment in the case of *Travaš vs Croatia*, no. 75581/13, judgment of 4 October 2016.

<sup>60</sup> See judgments in the case of *X and Y. vs Croatia*, no. 11223/04, judgment of 17 July 2008 and the case *Ivinović vs Croatia*, no. 13006/13, judgment of 18 September 2014.

<sup>61</sup> See decisions no. U-III-1380/2014 of 20 May 2015, no. U-III-4536/2012 of 14 January 2016, no. U-III-4531/2012 of 30 March 2016, no. U-III-361/2014 of 21 November 2017 and no. U-III-2404/2016 of 20 February 2019.

<sup>62</sup> See decision no. U-III-1380/2014 of 20 May 2015.

<sup>63</sup> See decision no. U-III-2404/2016 of 20 February 2019.

<sup>64</sup> See decision no. U-III-2822/2010 of 17 December 2013.

Deciding on the constitutionality of a law regulating the performance of lawful termination of pregnancy, the Constitutional Court held:

"The right of a woman to her own spiritual and physical integrity is inherent to the right of privacy, and it includes the decision whether she will conceive a child and how her pregnancy will develop. By becoming pregnant (either in a planned or unplanned or voluntary way or as a consequence of violence) a woman does not waive her right to self-determination. Any limitation of a woman's decision-making in autonomous self-realisation, including whether she wants to remain pregnant until its natural completion, represents interference with her constitutional right to privacy."<sup>65</sup>

#### *3.4. Questions related to sexual orientation and gender identity*

In the Republic of Croatia sexual and gender diversity are protected by the Constitution. The rights of all persons, regardless of sex and gender, to respect for and legal protection of each person's private and family life and their human dignity are also protected (Article 35 of the Constitution). These legal facts are today considered a lasting value of the Croatian constitutional state. Therefore, even the possible amendment to the Constitution through a provision whereby marriage is a living union of a woman and a man cannot have any impact on the further development of the legislative framework of extramarital and same-sex unions in accordance with the constitutional requirement that everybody in the Republic of Croatia has the right to respect for and legal protection of his or her private and family life and his or her human dignity.<sup>66</sup>

The Constitutional Court invoked the relevant case law of the ECtHR<sup>67</sup> and held that the refusal to change data on the sex and name on a degree certificate after these data were changed in the register of birth as a consequence of the irreversible change of sex and the new personal documents obtained falls within the scope of Article 35 of the Constitution. In such circumstances the Constitutional Court held that the faculty and the administrative court were overly formalistic in their actions and that they neglected the relevant policies and principles of the national legal system when they dismissed the applicant's request to be issued with a new degree only "for the reason that no official records are kept on subsequent changes on the status of the graduate, effected after the issuance of the degree."<sup>68</sup>

#### *3.5. The application of measures of permanent supervision in preliminary criminal proceedings*

Referring the relevant case law of the ECtHR in cases against Croatia,<sup>69</sup> the Constitutional Court held that telephone calls are covered by the notion of the right to a private life under Article 35 of the Constitution and rights of freedom and secrecy of correspondence under

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<sup>65</sup> See ruling no. U-I-60/1991 *et al* of 21 February 2017.

<sup>66</sup> See notification no. SuS-1/2013 of 14 November 2013, § 7.2.

<sup>67</sup> See judgments in the case of *B. vs France*, no. 13343/87, judgment of 25 March 1992 and the case of *Christine Goodwin vs United Kingdom*, no. 28957/95, judgment of 11 July 2002.

<sup>68</sup> See decision no. U-III-361/2014 of 21 November 2017.

<sup>69</sup> See judgments in the cases of *Dragojević vs Croatia*, no. 68955/11, judgment of 15 January 2015 and the case of *Bašić vs Croatia*, 22251/13, judgment of 25 October 2016.

Article 36 of the Constitution; thus, surveillance over telephone calls constitutes an interference with those constitutional guarantees.<sup>70</sup>

**4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

The principles of the Constitutional Court regarding meaning and scope of constitutional guarantee under Article 35 of the Constitution are in line with the ECtHR's case-law under Article 8 of the Convention.

## ***II.IV Freedom of religion***

**1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions of the Constitution which protect the freedom of religion read:

Article 40

Freedom of conscience and religion and freedom to manifest religion and other convictions shall be guaranteed.

Article 41

All religious communities shall be equal before the law and separate from the state. Religious communities shall be free, in compliance with law, to publicly conduct religious services, open schools, colleges or other institutions, and welfare and charitable organisations and to manage them, and they shall enjoy the protection and assistance of the state in their activities.

In accordance with Article 17.3 of the Constitution no restrictions may be imposed upon the constitutional provisions on the right to religion even in cases of clear and present danger to the existence of the state.

The constitutional guarantee of freedom of religion has been operationalized by conclusion of the treaties between the Republic of Croatia and the Holy See in 1996 and 1998,<sup>71</sup> adoption of the Act on the Legal Position of Religious Communities in 2002 and conclusion of agreements on issues of mutual interest with other churches and religious communities.

**2. Is it possible to restrict the right? If so, how and under what conditions?**

The freedom to manifest one's religion or beliefs may be restricted in accordance with Article 9 of the Convention, thus restrictions will be justified only if they are prescribed by law and are necessary in a democratic society in the interests of public order and peace, the protection of public order, the health of people or morals, or the protection of the rights and freedoms of others.

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<sup>70</sup> See decisions no. U-III-3509/2016 of 18 December 2018 and no. U-III-1129/2017 of 17 January 2019.

<sup>71</sup> See list of these treaties on the web page of the Ministry of Foreign and European Affairs:

<http://www.mvep.hr/hr/vanjska-politika/bilateralni-odnosi/pregled-bilateralnih-medunarodnih-ugovora/svetostolica.126.html>

For example, the Constitutional Court held that by refusing the request to issue a personal identification card with a photograph on which the applicant is wearing a headscarf, competent bodies violated the applicant's constitutional right to the freedom to manifest religion. Her request was dismissed because the photograph the applicant attached to her request to be issued with a personal identification card did not comply with the regulation then in force which prescribed that all persons in a photograph must have an "uncovered forehead, without headgear and that 70 to 80% of the photograph must show the person's head from chin to vertex", and the exemption could not be applied to the applicant whereby the provision did not apply to elderly persons who "according to folk customs wear a headscarf or a cap as part of their folk costume". Invoking the ECtHR's judgment in *Bayatyan v. Armenia*,<sup>72</sup> the Constitutional Court held that the application of the mentioned regulation resulted in unconstitutional effects in relation to the applicant's right to freedom of religion and the freedom to manifest one's belief, guaranteed by Article 9 of the Convention and Article 40 of the Constitution. In connection with this, after the submission of the constitutional complaint, a new regulation was adopted whereby the provision on the photograph was amended so that the "cheeks, chin and the forehead of the person who for religious or medical reasons wears a headgear must be visible in the photograph" and accordingly the applicant obtained a personal identification card before the Constitutional Court's decision.<sup>73</sup>

**3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

The Constitutional Court also considered various issues under of Article 40 and Article 41 of the Constitution.

In the case of an abstract control of constitutionality of the decision introducing health (including sex) education classes to elementary and secondary schools in the Republic of Croatia, the Constitutional Court held that the state has the obligation to make it possible for parents to have their "beliefs" or "convictions" influence the education of children through curricula in public schools. The Constitutional Court invoked a series of relevant international treaties<sup>74</sup> as well as ECtHR case law on Article 9 of the Convention<sup>75</sup> and repealed the impugned provision because finding that appropriate public debate had not been conducted before its adoption. Public debate was necessary, *inter alia*, because parents' conviction about the manner of education of their children may fall within the scope of Article 9 of the Convention and relate to significant and important aspects of human life and behaviour of special interest for the identity of an individual.<sup>76</sup>

The Constitutional Court held that the text of the oath prescribed by law ending with the words "So help me God" does not result in a violation of the "freedom of conscience and religion" of

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<sup>72</sup> See judgment in the case of *Bayatyan vs Armenia*, no. 23459/03, the judgment of 7 July 2011, § 18.

<sup>73</sup> See decision no. U-III-3785/2009 of 18 June 2014.

<sup>74</sup> See above, Example 2. of the Constitutional Court's case-law, answer to the second question in I.IV.

<sup>75</sup> See judgment in the case of *Folgerø and Others vs Norway* (Gc), no. 15472/02, judgment of 29 June 2007.

<sup>76</sup> See decision no. U-II-1118/2013 *et al* of 22 May 2013.

an elected President and of his or her right to the "free public manifestation of religion or other belief" as a private person or with his / her right to have and change beliefs.<sup>77</sup>

Although pursuant to Article 41 of the Constitution religious communities are separate from the state, some religious communities may carry out certain functions otherwise connected with the state (for example, the conclusion of a marriage). The constitutional case law has not yet set a clear limit which the state and religious communities may not cross in such cases. It seems that opinion prevails in legal theory that an unconstitutional convergence would undoubtedly occur in a situation where a religious community could entirely substitute a secular right by its own: in other words, if in some or all matters it would completely replace the state.<sup>78</sup>

In the case of an abstract control of constitutionality of the Decree on the Internal Organisation of the Ministry of Defence whereby, by means of an international agreement with the Holy See, an independent department for administrative assistance for pastoral work of the Catholic Church in the Armed Forces was established, the Constitutional Court refused the petitioner's arguments that the establishment of the department violated the principle of separation of religious communities from the state. The Constitutional Court held that the establishment of the Department was in conformity with the Constitution for two fundamental reasons. Firstly, this was not a state body vested with the "powers to carry out religious activity" and thereby interfere in religious affairs. Secondly, the Constitutional Court held that there were no grounds for the conclusion that the establishment of the Department amounted to unpermitted interference by the Catholic Church in the affairs of the state.<sup>79</sup>

The view of legal theory is that in this way the Constitutional Court established separation as a two-way barrier which safeguards the autonomy of a religious community in relation to the state, but it also has the task to prevent the interference of religious communities in the affairs of the state.<sup>80</sup>

In the case of an abstract control of constitutionality of the Act on the Legal Status of Religious Communities which allows religious education and the teaching of religion in educational institutions, the Constitutional Court dismissed the petitioner's argument that the introduction of religious classes in pre-school institutions and the introduction of religious education as an optional course in elementary and secondary schools in accordance with the signed agreements with individual religious communities resulted in a violation of the constitutional principle of separation of religious communities from the state. The Constitutional Court invoked the ECtHR's opinion in *Savez crkava "Riječ života"*<sup>81</sup>, according to which the holding of religious education in public schools and pre-school institutions constitutes an additional right which falls within the broader scope of Article 9 of the Convention, which "the state voluntarily decided to ensure" and held that in that particular case the legislator opted to enable the exercise

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<sup>77</sup> See ruling no. U-I-64500/2009 *et al* of 23 May 2017.

<sup>78</sup> See Miloš, Matija, Croatian Religious Communities in the (Counter) Majoritarian Prism of the Secular State, *Journal of the Law Faculty*, Vol. 35, No. 2, 2014, 660, available at: <https://hrcak.srce.hr/131269>.

<sup>79</sup> See ruling no. U-II-2050/2012 of 13 November 2012, §§ 11.1 and 14.

<sup>80</sup> See Matija, cited above, 659 - 660.

<sup>81</sup> See judgment in the case of *Savez crkava "Riječ života" and Others vs Croatia*, no. 7798/08, judgment of 9 December 2010., §§ 57 - 58.

of that right, while the option to attend religious education is ultimately the free choice of the students themselves and / or their parents or guardians.<sup>82</sup>

The Constitutional Court took into consideration the provisions of Article 41 of the Constitution and repealed the decisions of the competent authorities and courts in several cases which refused to recognise the tax exemption of religious communities for the purchase of religious objects in cases where the purchased property was originally not a religious object.<sup>83</sup>

**4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

The Convention's standards on the limits of permitted restrictions of the freedom of religion have been affirmed in the case law of the Constitutional Court.

## ***II.V Prohibition of discrimination***

**1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions that guarantee prohibition of discrimination are contained in Article 14 of the Constitution which reads:

All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status.

All persons shall be equal before the law.

Even though pursuant to Article 17.1 and 2 certain individual constitutionally guaranteed freedoms and rights<sup>84</sup> may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster, the restriction may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.

**2. Is it possible to restrict the right? If so, how and under what conditions?**

The Constitutional Court interprets the restriction of the right to life bearing in mind the principle of proportionality referred to in Article 16 of the Constitution,<sup>85</sup> all in the light of the highest values enshrined in Article 3 of the Constitution.

For example, in the case of the abstract control of constitutionality of the Act on the Election of Members of the Croatian Parliament, the Constitutional Court decided on positive discrimination in the election process (the so-called female quota) and repealed the statutory provision that prescribed the automatic disqualification of a list of candidates for parliamentary election with a representation of less than 40% of both genders. The Constitutional Court found

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<sup>82</sup> See ruling no. U-I-4504/2010 *et al* of 18 December 2018.

<sup>83</sup> See rulings no. U-III-3817/2009 of 19 December 2012 and no. U-III-4033/2011 of 9 January 2014.

<sup>84</sup> Except rights and freedoms in Article 17.3 of the Constitution.

<sup>85</sup> For Article 16 of the Constitution, see above footnote 22.

that this provision was not in conformity with the requirement of the rule of law or the requirement of the proportionality of restriction when it comes to the freedom of candidacy (Article 16 of the Constitution in conjunction with Article 45.1 of the Constitution) and emphasised that “elections for Members of the Croatian Parliament are conducted primarily for the purpose of the efficient exercise of a democratic multiparty system. In other words, given the competition of the two otherwise equal values of the constitutional order of the Republic of Croatia referred to in Article 3 of the Constitution (a democratic multiparty system and gender equality), in the case of the election of Members of Parliament, multiparty democracy must always prevail. Therefore, legislative measures which regulate the requirements for the participation of political parties and their candidates in parliamentary elections must be shaped so as to promote, encourage and protect multiparty democracy. It is not permitted to disproportionately suppress this, not even in the name of achieving other of the highest constitutional values.”<sup>86</sup>

**3. Has your court considered this right / its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

The Constitutional Court has reviewed, *inter alia*, the issue of positive discrimination or the advantages granted to members of national minorities in employment with state authorities;<sup>87</sup> the right of national minorities to vote;<sup>88</sup> official use of minority languages;<sup>89</sup> the alleged discrimination of Roma children in some elementary schools;<sup>90</sup> differences in access to secondary and higher education;<sup>91</sup> as well as the right of parents to participate in the process of shaping curricula, in particular those connected with different “convictions” or beliefs”, in the particular case of sex education.<sup>92</sup>

According to the ECtHR's case-law, the Constitutional Court links in certain circumstances the prohibition of discrimination with the prohibition of abuse that imposes the obligation on the state to conduct efficient investigation on the abuse. Accordingly, the Constitutional Court granted the constitutional complaint filed by an applicant who alleged that the public prosecution service failed to conduct efficient investigation of her criminal report against police officers who allegedly abused her during questioning in the police station and who inappropriately treated her due to her sexual orientation.<sup>93</sup> The Constitutional Court found a “violation of procedural obligations referred to in Article 3 in conjunction with Article 14 of the Convention”. The ECtHR decided on the application submitted in the meantime upon the same event and held that the “central issues of the applicant’s complaints were resolved” by the mentioned decision of the Constitutional Court and that, bearing in mind that the competent

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<sup>86</sup> See decision no. U-I-1397/2015 of 24 September 2015.

<sup>87</sup> See rulings no. U-I-402/2003 *et al* of 30 April 2008 and no. U-I-2767/2007 of 31 March 2009.

<sup>88</sup> See decision and ruling no. U-I-732/1998 of 12 April 2001, decision no. U-I-120/2011 *et al* of 29 July 2011 and rulings no. U-I-1681/2003 of 17 September 2003.

<sup>89</sup> See rulings no. U-II-425/2002 of 16 January 2008.

<sup>90</sup> See decision no. U-III-3138/2002 of 7 February 2007.

<sup>91</sup> See decision no. U-I-4585/2005 *et al* of 20 December 2006.

<sup>92</sup> See decision no. U-II-1118/2013, quoted above.

<sup>93</sup> See decision no. U-IIIBi-2349/2013 of 10 January 2018.

public prosecution service “continued investigation” after the Constitutional Court’s decision, it rejected her application to the ECtHR as premature.<sup>94</sup>

**4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

The case law of the Constitutional Court has been harmonised with the ECtHR's case law.

***II.VI Right to liberty***

**1. What is the original wording of the provision protecting this right in your national catalogue?**

The provisions of the Constitution on the protection of the right to liberty read:

Article 22

Human liberty and personality shall be inviolable.

No one shall be deprived of liberty, nor may liberty be restricted, except when specified by law, upon which a court shall decide.

Article 24

No one may be arrested or detained without a written warrant grounded in law. Such warrant shall be read and presented to the person placed under arrest at the moment of arrest.

The police authorities may arrest a person without a warrant provided that they immediately surrender the person arrested to the court when there is reasonable suspicion that such person has perpetrated a grave criminal offence as defined by law. Such person shall be promptly informed, in understandable terms, of the reasons for arrest and of his/her rights as stipulated by law.

Any person arrested or detained shall have the right to appeal before a court, which must without delay decide on the lawfulness of the arrest.

Article 25

Any arrested and convicted person shall be accorded humane treatment, and the dignity of such individual shall be respected.

Whosoever is detained and indicted of a criminal offence shall have the right to be brought before a court within the minimum time specified by law and to be acquitted or convicted within the statutory term.

A detainee may be released on bail to defend himself/herself.

Whosoever has been unlawfully deprived of liberty or convicted shall have the right to compensation and a public apology in accordance with law.

**2. Is it possible to restrict the right? If so, how and under what conditions?**

According to the Constitutional Court’s case law, the principle of proportionality referred to in Article 16.2 of the Constitution must be respected when a decision is rendered on detention.

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<sup>94</sup> See decision in the case of *D.K. vs Croatia*, no. 28416/14, of 26. June 2018, §§ 43 - 44.

Therefore, in detention cases the Constitutional Court always assesses whether reasons of public interest prevail over the applicant's right to personal freedom and the presumption of innocence. In accordance with the mentioned principle, the competent court must examine whether conditions are met for ordering an alternative more lenient measure which attains the same purpose as the detention measure instead of the detention measure.<sup>95</sup>

**3. Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.**

It is noted, by way of introduction, that until 2014 the Constitutional Court has been dismissing constitutional complaints against rulings ordering and prolonging detention when the competent court had already issued a new ruling before the Constitutional Court decided the case. After several ECtHR judgments finding violation of Article 5.4 of the Convention on account of such case-law of the Constitutional Court, the Constitutional Court diverged from that case-law and started to deliver decisions on the merits on the rulings that were no longer in force.<sup>96</sup> It expressly invoked the ECtHR's case-law in cases against Croatia. In proceedings for the supervision of the execution of the ECtHR's judgments that found violations of Article 5.4 of the Convention, the Committee of Ministers found that change of case-law by the Constitutional Court was sufficient for the prevention of similar future violations.<sup>97</sup>

Most of the Constitutional Court's case law relates to a review on whether the reasons given by the competent court for ordering or prolonging detention were relevant and sufficient and whether the criminal procedure bodies exercised "special diligence" in the conduct of the proceedings. The standards of the Constitutional Court are harmonised with the ECtHR's standards. More precisely, for the reasons for detention to be sufficient and legally relevant, they may not be abstract and general, but must relate to specific facts which relate personally to the accused and must be relevant for each individual ground for ordering / prolonging detention prescribed by law.<sup>98</sup>

The Constitutional Court also accepted the ECtHR's case-law procedural guarantees in proceedings for ordering or prolonging detention.<sup>99</sup> For example, the Constitutional Court held that these guarantees were not provided in the case of an accused person who was not given an opportunity to comment on an appeal before the court's decision on the public prosecutor's appeal, either by the service of the appeal or by summoning him to the session of the second-instance chamber. Therefore, the Constitutional Court found a violation of the principle of adversary proceedings and equality of arms referred to in Article 24.2 of the Constitution in conjunction with Article 5.2 of the Convention.<sup>100</sup>

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<sup>95</sup> See *inter alia*, decision no. U-III-2431/2019 of 18 June 2019 and no. U-III-788/2019 of 7 May 2019.

<sup>96</sup> See decision no. U-III-5449/2013 of 13 January 2014.

<sup>97</sup> See for example final resolution of the Committee of Ministers in the case of *Šebalji vs Croatia*, CM/ResDH(2018)410 of 14 November 2018, available at: <http://hudoc.exec.coe.int/eng?i=001-188002>.

<sup>98</sup> See above, footnote 94.

<sup>99</sup> See the judgment in the case of *Oravec vs Croatia*, no. 51249/11, judgment of 11 July 2017.

<sup>100</sup> See decision no. U-III-2518/2019 of 19 June 2019.

The Constitutional Court accepted the ECtHR's findings<sup>101</sup> as regards application of Article 22 of the Constitution and Article 5 of the Convention in cases of forced placement of an individual in a psychiatric institution.<sup>102</sup> One of these standards is definitely the right to an effective legal aid; accordingly the Constitutional Court found violations of Article 22 of the Constitution and Article 5.1(e) and 4 of the Convention because the attorney appointed *ex officio* by the court to the applicant acted as a wholly passive observer of the proceedings in which the applicant's forced placement was prolonged and the attorney did not provide her with legal assistance, and the competent courts failed to effectively supervise him.<sup>103</sup>

In accordance with the ECtHR's case law<sup>104</sup> the Constitutional Court held that Article 22 of the Constitution and Article 5 of the Convention were also applicable in cases concerning restriction of freedom of migrants.<sup>105</sup> In a case concerning migrant without documents who was detained for some time with his family in a Detention Centre for Migrants for the purpose of ascertaining his identity and citizenship and preventing escape, the Constitutional Court found that the restriction of his freedom was based on law, that the applicant was informed about the reasons for the application of such a measure and that free legal aid was provided to him, as well as sufficient information in order to be able to challenge that measure before the court. Further, the proceedings before competent courts were conducted with sufficient urgency; the competent courts heard the applicant with the assistance of an interpreter and their decisions were adequately reasoned. Accordingly, the Constitutional Court held that there had been no violation of the applicant's right to freedom in this particular case.<sup>106</sup>

#### **4. Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?**

The Constitutional Court's case law has been harmonised with the ECtHR's case-law.

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<sup>101</sup> See the judgments in the case of *M.S. vs Croatia no 2*, no. 75450/12, judgment of 19 February 2015 and the case of *Čutura vs Croatia*, no. 55942/15, judgment of 10 January 2019.

<sup>102</sup> See decisions no. U-III-726/2014 of 3 July 2014, no. U-III-3797/2015 of 4 February 2016 and no. U-III-3113/2019 of 31 July 2019.

<sup>103</sup> See decision no. U-III-3113/2019 od 23 July 2019

<sup>104</sup> See the judgments in the case of *Khlaifia and Others*, no. 16483/12, judgment of 15 December 2016.

<sup>105</sup> See decision and ruling no. U-III-4866/2018 and decisions no. U-III-500/2019 and no. U-III-826/2019, all of 11 July 2019.

<sup>106</sup> See decision and ruling no. U-III-4866/2018, cited above.