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Abstract Review of Laws by the Croatian Constitutional Court:

Between the Poles of Judicial Activism and Self-Restraint

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SLIDE 1 – TITLE PAGE

Tisztelt hölgyeim es uraim. Tiszteletve üdvözlöm önöket.

Ladies and gentlemen, dear colleagues,

Please allow me first to thank our hosts for the good organisation, excellent choice of subject and the opportunity to participate at this Symposium.

The subject under discussion is a very broad one. Bearing this in mind, I will not be able to include in this short presentation all the information I would like to. Therefore, I will today give you just some basic information about the Croatian Constitutional Court and its jurisdiction concerning the abstract review of laws from the points of its activism and its self-restraint.

But, first of all, let me say a few words about Croatian legal order and its Constitutional Court.

SLIDE 2 – THE CROATIAN LEGAL SYSTEM

The Croatian legal system is traditionally grounded on so-called European continental law, which is based on Roman law. Croatia is a state based on the civil-law tradition. Historically it belongs to the sphere of influence of German law.

SLIDE 3 – EUROPEAN INTEGRATIONS

As a full member of the Council of Europe, the Republic of Croatia has been under the jurisdiction of the European Court of Human Rights in Strasbourg for the last 11 years.

It is today a candidate for full membership in the European Union.

SLIDE 4 – CONSTITUTIONAL JUDICIARY IN CROATIA (TWO HISTORICAL PERIODS OF THE CONSTITUTIONAL COURT)

Croatia is a post-communist democracy. However, unlike in other ex-communist countries, the Croatian Constitutional Court has been continuously working for 45 years.

The constitutional judiciary was introduced in Croatia in 1964. The Croatian Constitutional Court was the state court of one of the six federal republics of the former federal State, Tito's Yugoslavia.

Today the Court is in its second historical period, which is the period since Croatia gained independence in 1991.

SLIDE 5 – EUROPEAN-CONTINENTAL MODEL (KELSEN'S MODEL)

Since 1991 the Croatian Constitutional Court has been organised on the lines of the classical European continental model of constitutional review, which is often called Kelsen's model.

But, as we all know, the evolution of constitutional justice has significantly changed Kelsen's definition of a constitutional court as a negative legislator, although constitutional courts have retained the power to set aside unconstitutional laws, and structural features still reflect Kelsen's model. For example, the appointment criteria and tenure of constitutional judges.

SLIDE 6 – THE POSITIVE ATTITUDE TOWARD LEGISLATION

Today the constitutional courts establish the positive criteria for legislation and it clearly shows that the courts are using a more activist attitude toward the legislative power. At the core of this attitude lies constitutional interpretation.

SLIDE 7 – THE JURISDICTION OF THE CONSTITUTIONAL COURT

I will not mention all the competencies of the Croatian Constitutional Court in this short presentation. It is

sufficient to mention the abstract control of laws and other regulations and the constitutional complaint, which has been a well-known instrument for the protection of human rights and fundamental freedoms in Croatia since 1991.

SLIDE 8 – THE POLITICAL DIMENSION OF THE ABSTRACT CONSTITUTIONAL CONTROL

The fact that the Croatian Constitutional Court can repeal laws, in whole or in a part, because of their unconstitutionality, and that its decisions have the force of law, makes it evident that the Court can, in this respect, be active in the political sphere.

The Croatian Constitution does not provide for the formal exclusion of certain political questions from the control of the Court.

SLIDE 9 - THE RIGHT OF THE CCRC TO INSTITUTE PROCEEDINGS

Moreover, unlike the German Federal Constitutional Court, the Croatian Constitutional Court has the right to institute proceedings without the initiative of another constitutional body or an application by a citizen. Thus, the right of initiative could, in principle, have a politically motivated starting point or it could become political during its development. Aware of this danger, the Croatian Constitutional Court approaches this competence very cautiously. So far it has made use of it only twice, when the legislator introduced a new competence of the Constitutional Court in an ordinary law, although this may only be laid down in the Constitution.

SLIDE 10 – THE CCRC IS BOUND BY THE CONSTITUTION

In spite of this, the Court is not a political body but a court of justice, bound by the strict standards of the Constitution in its decision-making.

The decisive standard for determining whether the Croatian Constitutional Court is an activist court is the interpretation of the Constitutional provisions that confer competencies on the Court. This kind of interpretation, however, is performed in the court's decisions, so the Constitutional Court's room for manoeuvring is decisively influenced by the Court's understanding of itself.

SLIDE 11 – “POST-COMMUNIST CONSTITUTIONALISM”

We must bring to mind here that the Croatian Constitutional Court is in the post-communist era creating new, central-European constitutional jurisprudence, often called "post-communist constitutionalism". In doing so, it is creating constitutional law very fast and, under the circumstances, with admirable rigor.

Its powers are great and its decisions are far-reaching. These decisions have encompassed rulings concerning the separation of powers, rule of law, equality before the law, discrimination, freedom of speech, freedom of assembly, private and family life, media, different actions taken under the communist regime, different actions taken during the war at the beginning of the 90's under the state of emergency, and different economic and social legislative and administrative measures.

SLIDE 12 – AN INTEGRATED APPROACH TO THE CONSTITUTION

When interpret the Constitution, the Court very often notes that a particular constitutional provision cannot be considered as an isolate clause and interpreted alone. The Constitution has inner unity and the meaning of any part of it is linked to that of other provisions.

SLIDE 13 – THE ACTIVE ROLE OF THE CCRC

Its judgments, particularly with respect to economic and social rights, have not always been met with approval. For example, the decision of the Court that Parliament must recognize the right to the family pension of extramarital couples, not only marital ones, partly went against public opinion, on the one hand, and interfered with the government's budgetary policy, on the other hand. Everybody was tense at the time.

Nevertheless, the Court tries to make a pivotal contribution to Croatian democratization in general, and to the entrenchment of human rights more particularly.

SLIDE 14 – SELF-RESTRAINT OF THE COURT

At the same time, the Court deals with the question of its self-restraint and thus with its own role in a State governed by the rule of law.

This means refraining from "playing politics", that is, from intervening in the area of free policy-making set down by the Constitution. The Court has demonstrated its self-restraint several times, acknowledging and bowing before the law-making function of the democratically elected legislative branch of the government.

SLIDE 15 – THE NATURE OF THE CONSTITUTIONAL ADJUDICATION

In its decisions the Court often notes that its task is not to formulate politically, but to comprehend legally, employing legal methods. The Court finds the criteria for constitutional adjudication exclusively in the text of the Constitution, not in political or economic assessments of appropriateness.

SLIDE 16 – A QUESTION

An obvious question arises: How was it possible for the Croatian Constitutional Court to develop a body of constitutional case-law, in less than 20 years, which rivals that of well-known West European constitutional courts?

SLIDE 17 – IMPORTING THE CONSTITUTIONAL LAW OF OTHERS

To be quite honest, the strategy chosen by the Court to entrench constitutional principles and to make very many

important decisions was to, in a way, import constitutional law from outside. Of course, in appropriate way, not mechanically.

To be more specific, from the case-law of the European Court of Human Rights and, very often, from the case-law of the German Federal Constitutional Court, because its well thought-out jurisprudence is internationally recognized as among the best yet formulated in the context of civil law.

SLIDE 18 – THE COMMON EUROPEAN CONSTITUTIONAL LAW

In this respect, the Croatian Constitutional Court - by selecting for consideration the Convention law and the constitutional law created by European constitutional courts with the Western legal tradition - in fact chose jurisprudence that exemplifies "common European constitutional law".

The Court tries to form a coherent system with its judgements to provide a reliable European standard of constitutionality, even beyond the Constitution which is often amended nowadays by current political interests.

SLIDE 19 - INTEGRATION

By importing its constitutional law from outside, the Court greatly helps the integration of its own national constitutional order into the European constitutional framework. Many constitutional courts of Central, Eastern and South-Eastern European ex-communist countries do the same.

Thus, what Professor Arnold said seems to be true. Namely, that constitutional justice is at this very moment going through unprecedented expansion, and that the constitutional control provided by constitutional courts is playing the central role in ex-communist European countries. But ...

SLIDE 20 – CRITICISM BECAUSE OF ACTIVE ROLE

Croatian lawyers still find it hard to acknowledge that the characteristics of a formalistic civil-law system - that has developed marvellously complex interpretative techniques to subsume particular facts under statutory principles - goes "out the window" as soon as these techniques are applied to such texts as in the Constitution. Occasionally, grumbling can still be heard because of the encroachment of the Court's findings on the authority of the constitutional text, which the Court is supposed merely to apply. There has even been talk about the "invisible constitution" of the Croatian Constitutional Court, the notion which has been connected with the Hungarian Constitutional Court.

SLIDE 21 – CRITICISM BECAUSE OF SELF-RESTRAINT

At the same time, there are great expectations that the Constitutional Court will solve matters of acute political controversy that cause public debates and tensions, instead of this being done by the state bodies whose obligation it is.

More specifically, there are expectations that the Court will solve pure political questions which may exclusively be solved through political parliamentary debate. When the Court demonstrates self-restraint, public condemnation is very strong because the limits of constitutional jurisprudence are not accepted. The public considers this as a weakness of the Constitutional Court.

SLIDE 22 – SUMMARY OF PRESENT CONDITIONS

To summarize, it is obvious that legal culture is not yet sufficiently developed in respect to constitutional jurisprudence. The decisions of the Constitutional Court are often declared "purely political" and the Constitutional Court is often seen as a body under the political influence of this or that political party. This partisanship is omnipresent and overpowering.

Nevertheless, by citing the European Convention and the case-law of the European Court, and also "modern constitutions", especially their exemplification in the German model, the Croatian Constitutional Court has found a convenient strategy for introducing Western concepts of constitutionalism into the constitutional order of its own post-communist State. The Court has met with very considerable challenges and - until now - it has faced them thoughtfully, strategically and, ultimately, successfully.

SLIDE 23 – EXPRESSION OF GRATITUDE

Ladies and gentlemen, thank you very much for your attention.

Tisztelt hölgyeim es uraim, köszönöm a figyelmüket.