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THE LEGITIMATION OF A RE-ENACTMENT OF FORMER LAW AND TEMPORAL EFFECTS OF JUDGMENTS IN A CONSTITUTIONAL DEMOCRACY

(COMPARATIVE STUDY IN THE LIGHT OF RECENT JURISPRUDENCE OF CROATIA'S CONSTITUTIONAL COURT***)

Summary: *In 2015, the Croatian Constitutional Court suspended the Family Act (2014) without a final decision in the judicial review proceedings and ordered the re-enactment of a more than ten-year old regulation Family Act (2003). The article considers Croatian Constitutional Court's decision as an opportunity to examine the conditions for a re-enactment of formerly repealed law, and additionally the temporal effects of judgments of some European constitutional courts from a comparative law perspective. Thus, the article first deals with the (historical) legal situation in Austria and Germany and the criteria that would generally justify the re-enactment of former law in their legal systems. Finally, the development of these countries' legal systems has been reconsidered in the Croatian context.*

Keywords: *Judicial review proceedings, Constitutional Court, re-enactment of former law, suspension of the Family Act (2014), Family Act (2003)*

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1. INTRODUCTION

The Croatian Constitutional Court (hereinafter CCC or Court) in its judgment of 12 January 2015[1] on ex post assessment of Family Act 2014[2] delivered the following ruling:

"[...]

i) the execution of all the individual decisions and actions undertaken based on the Family Act 2014 is suspended until the adoption of a final judgment of the Constitutional Court of the Republic of Croatia on the compliance of the Family Act with the Constitution [enacting part I of the ruling];

ii) the Family Act 2003[3] shall be applied until the adoption of the final judgment of the Constitutional Court of the Republic Croatia [enacting part III of the ruling] [...]"

Of course it is not unusual, that in a rule-of-law-state there is a clear division of responsibilities between the legislature as the institution which makes the law and the judiciary which has to control the application of the law in the most effective way possible. This is why in democracies – with some exceptions,– some kind of judicial review (weak or strong)[4] can be found in order to, *inter alia*, meet the demands of a separation of powers, either bundled in a unique competent constitutional court, or split between various specialized courts.[5] In connection with these review competences the courts usually have it within their power to declare a regulation null and void or inapplicable in some countries where a separate constitutional court is established with an effect *erga omnes*. In other countries, only with an effect inter parties, namely for the parties of the examined case.[6] Temporal effects of the court's decision are classified as *ex tunc*, *ex nunc* and *pro futuro*.[7] Courts have to *expressis verbis* state the temporal effect of their decision in the ruling.

Constitutional courts are not equally reluctant or activists in intervention into legislative power in Europe. That is why it is all the more astonishing that the Croatian Constitutional Court – in the present case – suspended the law in dispute even without a final decision in the judicial review proceedings and ordered the re-enactment of a more than 10-years-old regulation. In practical terms, the Court, based on rather vague and non-existing legal provisions, in order to make the principle of legal certainty prevail, rendered the former Family Law Act (2003) applicable until a final judgement is delivered on the contested new Family Law Act (2014), while all actions based on the Family Act 2014 were suspended. These two actions taken together basically mean the suspension of the Family Act 2014 itself. The rather vague

1 No. U-I-3101/2014. Translation is provided by Prof. Branka Rešetar who added that pages 6 to 333 of the ruling contain all observations and expert opinions as an integral part, but this part has been dismissed from the translation since their content has not been considered in the proceeding.

2 Official Gazette no. 75/2014.

3 Official Gazette no. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 61/2011, 25/2013.

4 See e. g, Colón-Ríos, 'A new way of judicial review of legislation', Global Constitutionalism (2014) vol. 3, issue 2, July 2014, Gardbaum, 'The new commonwealth model of constitutionalism', 49 *American Journal of Comparative Law* 707 (2001).

5 Schroeder, Die zeitliche Wirkung von Urteilen in Normenkontrollverfahren, p. 87.

6 For a detailed overview: Schmitz; Krasniqi, Die Beschränkung der zeitlichen Wirkung von Urteilen, p. 189, also Popelier, Verstraelen, Vanheule, Vanlerberghe, eds, *The Effects of Judicial Decisions in Time*. Intersentia, 2014.

7 For definitions see, Popelier, Verstraelen, Vanheule, Vanlerberghe, ‚The Effect of of Judicial Decisions in Time: Comparative Notes', in Popelier, Verstraelen, Vanheule, Vanlerberghe, eds, *The Effects of Judicial Decisions in Time*, Intersentia, 2014, pp. 7–12.

provision in this case is Article 31 (5) of the Constitutional Act on the Croatian Constitutional Court (2002, hereinafter CCCA), which stipulates:

"(5) The Constitutional Court may determine the manner in which its decision, respective its ruling, shall be executed."

Seeing this quite activist approach towards interpretation of the Croatian Constitutional Court on its own competence, the authors would like to take the Croatian Constitutional Court's decision as an opportunity to examine the conditions for a re-enactment of formerly repealed law, and in addition the temporal effects of judgments of some European constitutional courts from a comparative law perspective. The astonishing action of the Court was that without clear legal basis, it re-enacted a former law (2003) leaving the constitutionality of the law challenged an open question and suspended all actions that have been taken on the basis of the challenged law (2014). The example of Article 140 (6) of the Austrian Constitution shows that in some cases even a re-enactment of an earlier law, which was later replaced by the law in dispute, can be expressly intended and regulated in the constitution. However, in Austria it is applied when a law is declared unconstitutional and thus annulled. The German jurisprudence also acknowledges an equivalent legal instrument, not on a basis of a formal re-enactment, but rather through the continuity of former law, if the disputed law is declared null and void.

With a deeper and more extended comparative analysis of this possibility of a court, we intend to show whether the action taken by the CCC alone and in conjunction with the suspension of all action based on the challenged law, fits or does not fit into the general practice of constitutional courts in Europe. It can also be seen that the CCC based its decision on a provision which exact content, as being so vague and ambiguous, cannot be easily determined. This comparative analysis may or may not lead us to a conclusion that the Croatian Court did nothing special, but broadly interpreted its competences.

For this abovementioned comparative purpose, this article will first deal with particularly the (historical) legal situation in Austria and Germany and the criteria which generally would justify a re-enactment of former law in their legal systems, and afterwards put the development of these countries' legal systems into the context of the situation in Croatia.

2. THE AUSTRIAN REGULATION OF JUDICIAL REVIEW (1920) AS 'THE EXAMPLE' FOR OTHER LEGAL SYSTEMS

The new Federal Republic of Austria which was formed after 1918 was – together with the former Czechoslovakia – the first country in the world, which gave the final word in the interpretation of the law not to the legislator himself anymore, as it was the customary in those days, but to a single (Constitutional) Court.[8] The main reason for an independent review of both the States' (Länder) law and the Federal law was not to strengthen individual rights, but to safeguard the strict distribution of powers between the Federation on the one hand and the

8 Hiesel, Verfassungsgesetzgeber und Verfassungsgerichtshof, p. 2 ff.

States on the other hand.[9] This is why in the original version of Article 140 (1) of the Austrian Federal Constitution (AFC) there was only the possibility of an abstract review of Federal law on the request of one of the States (Länder) respectively a review of Land law on the request of the Federation. However, the also existing possibility to review a law which would have to be applied by the Constitutional Court itself led to a more detailed regulation of also concrete reviews in 1929, which became an example for many European countries.[10]

2.1. THE GENERAL CONSEQUENCES OF A SUCCESSFUL REVIEW

According to the current version of Article 140 AFC, the Constitutional Court makes a judicial review when the Federal Government requests the examination of a Land law or a Land government requests the examination of a Federal law, regardless of the question, whether the Federal law has any effect in the concerned Land. Furthermore, it initiates a review at the requests of the Supreme Court and the Administrative Court, or *ex officio*, if the constitutionality of a law might be relevant to its own decisions. A corresponding provision for legal ordinances can be found in Article 139 AFC. Article 140 AFC itself stipulates as follows:

"(1) The Constitutional Court pronounces on application by the Administrative Court, the Supreme Court, a competent appellate court or an independent administrative tribunal whether a Federal or Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit. It pronounces also on application by the Federal Government whether Land laws are unconstitutional and likewise on application by a Land Government, by one third of the National Council's members, or by one third of the Federal Council's members whether Federal laws are unconstitutional. A Land constitutional law can provide that such a right of application as regards the unconstitutionality of Land laws lies with one third of the Diet's members. The Court pronounces furthermore whether laws are unconstitutional when an application alleges direct infringement of personal rights through such unconstitutionality in so far as the law has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling [...]"

At a substantive level, the original version of the Austrian Constitution provided a rescission of the law in dispute upon expiry of the date of promulgation, which in the end means an inapplicability with the effect *ex nunc*. For reasons of certainty, the decisions do not, in general, provide any retroactivity for former legally binding matters, except the starter cases for the decisions.[11] The citizens shall rather be able to trust that even an incorrect regulation would be effective until its official rescission by the court.[12] Besides that, right from the start, the constitution even offered the possibility to delay the binding effect of the rescission in the beginning for a period up to six month, later up to 12 month, since 1992 up to 18 months. The idea behind the temporary delay *pro futuro* was in particular to avoid any kind of legal vacuum

9 Stelzer, Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, p. 63.

10 Walter, Die mitteleuropäische Verfassungsgerichtsbarkeit und die Reine Rechtslehre, p. 266.

11 For the criteria determining the range of starter cases: Mayer; Kucsko-Stadlmayer; Stöger, Grundriss des österreichischen Bundesverfassungsrechts, p. 589.

12 Adamovich; Funk, Österreichisches Verfassungsrecht, p. 339.

and to offer the legislator the chance and in particular the needed time to make a new regulation which matches all criteria to be constitutional before the former law forfeits its legal force.[13] Namely, Article 140 AFC stipulates in its paragraph 5:

„(5) The judgment by the Constitutional Court which rescinds a law as unconstitutional imposes on the Federal Chancellor or the competent Governor the obligation to publish the rescission without delay. [...] The rescission enters into force on the day of publication if the Court does not set a deadline for the rescission. This deadline may not exceed eighteen months."

The consequences are quite largely known. For reasons of legal certainty a regulation which in fact already had been considered unconstitutional would be applied anyway for a certain period. All actions based on that regulation would carry the stigma to be somehow illegal.

2.2. THE POSSIBILITY OF RE-ENACTMENT OF THE FORMER LAW

With the constitutional reform in 1929 the Austrian legislator introduced another innovation: if a law or a part of it is repealed by the judgment of the Constitutional Court, those regulations would come back into force, which had been abolished by the law and found to be unconstitutional. There is no similar legal fate of legal ordinances and statutes according to Article 139 AFC. The current version of Article 140, paragraph 6 specifies:

"(6) If a law is rescinded as unconstitutional by a judgment of the Constitutional Court, the legal provisions rescinded by the law which the Court has pronounced unconstitutional become effective again unless the judgment pronounces otherwise, on the day of entry into force of the rescission. The publication on the rescission of the law shall also announce whether and which legal provisions again enter into force."

Thus, according to the wording, the re-enactment of the former law should be the rule.[14] The reason for this stems directly from the negotiations in 1925 on the constitutional reform: the legislator explicitly wanted to prevent a *vacatio legis* in important areas of legislation resulting from the repeal of a law. The re-enactement of a constitutional, former law should thus fill the gap, without having to take recourse to a further application of a law, which dogmatically is attached with the stigma of unconstitutionality.[15]

Of course, the Constitutional Court has the possibility to dispense with the re-enactment of previous law expressly in its judgment. Anyway, in contrast to the wording in Article 140 (6), the Constitutional Court, in practice, nearly always makes use of this possibility.[16] The reason for this is simple: The referring back to former law is often not possible, as long as only smaller parts of a law have been rescinded and therefore caused a legislative gap. Detailed regulations from a former law might probably not fit to fill this gap in an appropriate way. They

13 Adamovich, Handbuch des österreichischen Verfassungsrechts, p. 457.

14 For further details: Haller, Die Prüfung von Gesetzen, p. 265.

15 Haller, Die Prüfung von Gesetzen, p. 265.

16 Adamovich, Handbuch des österreichischen Verfassungsrechts, p. 458.

would be taken from their original context and put into a new context, and it is not even said, that the original regulation itself matched the criteria of constitutionality.[17] This is why the Constitutional Court would regularly have to examine the former law as well, even without a clear mandate. Furthermore, by reforming former law the legislator apparently made clear, that he considered the former law unsuited to the present situation. Besides, the former regulations often would not even meet the current European Union's statutory and regulatory requirements.

Against this background, the Constitutional Court cannot apply Article 140 (6) AFC without further consideration, even though it was the legislator's general will to refer back to the former law. As a result, the Austrian Constitutional Court would in almost all cases make use of the exception within Article 140 (6) AFC and announce in its decisions, that:

"Former legal provision will not come back into force again."[18]

One of the few exceptions, in which the Austrian Constitutional Court in the end re-enacted the former legal provisions, was a case dealing with a new Security Act (2011) of one of Austria's Länder, namely the Steiermark, which prohibited begging in any "important public place".[19]

The decision shows in an exemplary manner under which conditions the re-enactment of former law can make sense in order to follow the legislator's expressed will and to avoid a legislative gap: The Constitutional Court criticized that the new provision was too vague and disproportionate and thus the Court considered it as nothing less than a serious infringement of the principle of legal certainty. In the same time the Court announced repeatedly, that the former law, which only prohibited "aggressive begging" in the Steiermark in general was much more balanced. This former law was from 2005, so it was not "too" old, and as the new law was rescinded in its entirety, the former law could easily replace it in its whole context. Therefore, the decision matched the main aims of a re-enactment: the provisions for a transitional period would not have the stigma of unconstitutionality and represent the legislator's (recent) will anyway. The legislator on the other hand would have the time needed to work on a new, more balanced law.

3. THE GERMAN REGULATION OF JUDICIAL REVIEW AND ITS DEVELOPMENT IN THE EUROPEAN CONTEXT

In contrast to Austria, and thus to most constitutional systems, Germany is one of the few European countries (besides Belgium, Estonia, Ireland, Portugal and Spain), in which – in general – the declarations about the compatibility with the constitution would generally not

17 Haller, Die Prüfung von Gesetzen, p. 267.

18 This standard ruling "Frühere gesetzliche Bestimmungen treten nicht wieder in Kraft" can be found e.g. in all published decisions from 2014/2015: https://www.vfgh.gv.at/cms/vfgh-site/entscheid.html?periode=old.

19 Decision G 64/11-8 from 6th December 2012. Online: https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/0/8/CH0006/CMS1361283710520/bettelverbot-steiermark-g64-8.11.pdf.

only lead to an inapplicability *ex nunc*, but to a nullity *ex tunc*. The relevant basis for this legal consequence can be found in section 78 Constitutional Court Act which explicitly stipulates:

"If the Federal Constitutional Court comes to the conclusion that Federal law is incompatible with the Basic Law or that Land law is incompatible with the Basic Law or other Federal law, it shall declare the law to be null and void. If further provisions of the same law are incompatible with the Basic Law or other Federal law for the same reasons, the Federal Constitutional Court may also declare them to be null and void."

There are various, especially historical reasons for the provision, namely that the framers of the Basic Law from 1949, were convinced that (only) the null and void-rule would force the legislator to make strong laws and not weak compromises for political needs. In particular, a governing coalition could not make a rather vague law for political reasons and sit back and leave it to the Constitutional Court to "fix" the law, because they would always risk to lose the legal basis definitely and thus to reverse all legal relations concerned. In addition, the strict nullity of an unconstitutional law was considered to emphasize the supremacy of the constitution within the legal system in an appropriate way.[20]

Anyway, even though there has only been an explicit regulation about the possibility not to declare a law null and void, but not to declare it (only) "incompatible", the German Federal Constitutional Court, for practical reasons has made more and more declarations of incompatibility in the course of the last 40 years, so the further development of the law was caused by judicial decisions. Furthermore, after a reform in 1970, the possibility to declare a law only incompatible with the Constitution has at least been mentioned indirectly in section 31 (2) and in section 79 (1) of the Constitutional Court Act. In the meantime, the relation between decisions *ex tunc* and decisions *ex nunc* has developed in the ratio of almost 1:1.[21]

3.1. DECISIONS *EX TUNC* AND THE POSSIBILITY OF RE-ENACTMENT (CONTINUITY) OF FORMER LAW

A null and void (*ex tunc*) decision would be made, if the nullity of the concerned law can restore the constitutional situation unequivocally and without further ado, or the infringement of the Basic Law is irreparable or too serious to stay in force.[22] "The example" for a serious violation of the constitution is, if the legislator did not even have the competence for the legislation, as the matter would have to be regulated by the Länder.[23] Anyway, even in a case of nullity, for reasons of legitimate expectations, legal clarity and legal certainty, the cases which have become legally binding, except in criminal matters, could not be opened again.[24]

20 Seer, Die Unvereinbarkeitserklärung des BVerfG, p. 290.

21 Schlaich; Korioth, Das Bundesverfassungsgericht, recital 397.

22 BVerfGE 34, p. 9 (p. 25); BVerfGE 91, p. 148 (p. 175); BVerfGE 120, p. 56 (p. 79).

23 Seer, Die Unvereinbarkeitserklärung des BverfG, p. 285. Anyway, the Court's decision in BVerfGE 91, p.186 ff shows, that even in cases in which the legislator would not have the competence for any legislation, the Court could declare a regulation for only incompatible if it comes to serious political or financial consequences, e.g. in tax matters.

24 Section 79 (2) Constitutional Court Act. For the deatiled criteria: Maunz; Schmidt-Bleibtreu; Klein; Bethge, Bundesverfassungsgerichtsgesetz, § 95, recital 37.

Considering, that according to section 78 of the Constitutional Court Act an – unconstitutional – law in dispute would *ipso iure* be null and void with an effect *ex tunc*, the current legal situation would in general automatically refer back to the former legal situation.[25] It would not even need a formal re-enactment of former law, as a null and void regulation is considered not to have had the power to replace a former law at any time, e.g. according to the *lex posterior*-principle.[26] In short: the former law inconspicuously stayed in force the whole time as the new unconstitutional law never matched the criteria to replace it. Again, the idea behind that ambiguous regulated approach has also to do with the fact that Germany is a federation. If e.g. the federation made a law for which in fact the 16 Länder would have been competent, the law in dispute should not be a legal basis for any second, since it would give the Federal legislator the power to interfere with Länder law.[27]

Anyway, in the course of years, several criteria have been developed for cases in which the nullity of the concerned law would not lead to an automatic continuity of former law, e.g. if the former law itself also had partly been found unconstitutional.[28] But the Court also practices judicial self-restraint when the legislator by making a new law somehow made obvious that he did not only want to modify the former legal situation but definitely change or even abolish it in its complexity, even if this new law might be found unconstitutional one day.[29] The reasons for this are numerous, in particular the Constitutional Court practices a strict judicial self-restraint in the frame of the separation of powers, respecting that even an unconstitutional law would still have a democratic legitimacy and thus matches the prerequisites of democratic governance.[30]

3.2. DECISIONS WITH AN EFFECT *EX NUNC* OR *PRO FUTURO*

As in all other states that have an *ex tunc*-system, there is the possibility also in Germany to deviate from the principle of retroactive annulment, even though it is not explicitly stipulated in the law.[31] Instead of declaring the concerned law null and void, the Constitutional Court would confine itself to declare it "incompatible" with the constitution. This ruling, that a *per se* unconstitutional regulation stays applicable anyway is considered appropriate, if the disadvantages caused by a rescission clearly outweigh the disadvantages connected to the further application of the law.[32] In general, the law concerned would then be declared applicable for a

25 Maunz; Schmidt-Bleibtreu; Klein; Bethge, Bundesverfassungsgerichtsgesetz, § 48, recital 50 ff, BverfGE 102, p. 197 (p. 208); 104, p 126 (p. 149f); 131, p. 316 (p. 376).

26 See Benda; Klein, Verfassungsprozessrecht, recital 1376; BVerfGE 104, p. 126 (p.149f).

27 Schlaich, Korioth, Das Bundesverfassungsgericht, recital 457.

28 BVerfGE 131, p. 316 (p. 376), see also BVerfGE 121, p. 266 (p. 314).

29 Maunz; Schmidt-Bleibtreu; Klein; Bethge, Bundesverfassungsgerichtsgesetz, § 78, recital 51; Benda/Klein, Verfassungsprozessrecht, recital 1488; Pestalozza, Verfassungsprozessrecht, § 20 VI, recital 127.

30 Burkiczak; Dollinger; Schorkopf, Heidelberger Kommentar, § 78, recital 44.

31 For a detailed overview: Schmitz; Krasniqi, Die Beschränkung der zeitlichen Wirkung von Urteilen, p. 200 f.

32 Burkiczak; Dollinger; Schorkopf, Heidelberger Kommentar, § 78, recital 49.

further transitional period on the basis of section 35 of the Constitutional Court Act, which stipulates:

"In its decision the Federal Constitutional Court may state by whom it is to be executed; in individual instances it may also specify the method of execution."

The idea behind is to give the legislator enough time to organize a smooth transition from the unconstitutional to the constitutional situation, namely to avoid disruptions during the time being, especially in an area such as the tax law, where the state has a certain interest that the proceedings are not interrupted.[33] This is why the most important, often criticized decisions with an effect *ex nunc* or even *pro futuro* would be related to cases dealing with the legislation of taxes and levies, in which the Court obviously intended to prevent an extensive retroactive tax relief for the tax payers with a certain danger of financial chaos or even the loss of a relevant part of the recent budgets.[34] At any rate, one of the starter cases for the Court's "incompatibility"-decisions in 1966 dealt with a Tax Act and the possibility that in declaring it null and void the Federal state might lose up to 41 percent of its annual tax income.[35]

Apart from those evident serious cases, the Court would also decide on an incompatibility-basis in cases of minor legislative mistakes, which could be easily healed, e.g. caused by a wrong legislative procedure, or in cases where the legislator has several possibilities to solve the unconstitutional situation and therefore should not be limited in his possible actions. This might be the case if the judges cannot clearly define which part of the law would violate the constitution, e.g. if certain groups of people / organizations should be added or rather excluded from the field of application to match the criteria of equality, or, if the legislator has several possibilities to react: new definitions, a new field of application, or a completely new law. The Court would also rule "incompatible" in those cases in which the rescission of the law would – from a constitutional point of view – cause an even worse legal situation.[36] By upholding the regulation, the Court would show respect to the legislator's original will and give him a second chance to correct his own law. The Constitutional Court's tendency to decide on the incompatibility-principle with a temporarily continued application in an increasing number of cases shows that the Court finally voluntarily waives his rights to strictly annul or even 'regulate' for a certain time being[37], but instead practices a reluctant judicial self-restraint. Therefore, it gives the responsibility to deal with the unconstitutional situation back to the legislator as the responsible institution for both, the unconstitutional regulation in the past as well as the new – constitutional – regulation to be made.

4. THE CROATIAN CONSTITUTIONAL COURT'S DECISION IN THE LIGHT OF THE GENERAL DEVELOPMENT

33 Schroeder, Temporal Effects of Decisions, p. 31.

34 Seer, Die Unvereinbarkeitserklärung des BVerfG, p. 288.

35 BVerfGE 21, p. 12 (p. 39f); Burkiczak; Dollinger; Schorkopf, Heidelberger Kommentar, § 78, recital 35.

36 Maunz; Schmidt-Bleibtreu; Klein; Bethge, Bundesverfassungsgerichtsgesetz, § 78, recital 68.

37 The Court can even give the interim situation a new substantive content up to a certain level, at least if the Court tries to "save" the law from definitely violating the constitution, e.g. in BVerfGE 87, p. 153 (p. 154).

The legal systems of both Austria with its Constitution, which became "the Example" for most of the European countries and thus also for the recent development in Eastern and Southern Europe, and Germany show that a re-enactment, either in the explicit construction as in the Austrian Constitution, or as the German alternative of a strict consequence of a nullity *ex tunc* as well as with an effect *pro futuro* can be an appropriate measure in a case of an unconstitutional legal situation. In both cases the legislator at once gets back into the responsible position, in the same time the executive or judicial power does not have to apply a regulation which is attached with the stigma of unconstitutionality. Quite the contrary, for the transitional period a law would be applied which directly refers back to the Parliament, the sovereign law-maker, even if it was made a certain time ago. The Court thus does not have to interfere into the Parliament's rights, let alone to provide the transitional provisions replacing the gaps in the legal text or the field of application caused by the incompatibility-decision.

However, the jurisprudence of the Austrian and German Constitutional Courts also show, that the label of constitutionality is not the most important factor in a rule-of-law state, let alone in a democracy: even an unconstitutional law is directly based on the Parliament's will and therefore enjoys a high legitimation, not to mention legal certainty considerations which may legitimately arise if there is no law at all regulating a certain social or other field. In the constitutional interplay between an as best as possible legal certainty on the one hand and a strict separation of powers on the other hand, the legal systems must deal with well restricted criteria for a re-enactment of former law.

4.1. THE CROATIAN CONSTITUTIONAL COURT'S *INVENTION OF PREVENTIVE INTERVENTION*

The Croatian Constitutional Court obviously followed the path of a strict supremacy of the constitution and tried in the same time "to rescue" the legislator from a homemade constitutional problem. The Court thus applied with good but inconsequential proposals its competences laid down in the Articles 31 (5) and 45 of the Croatian Constitutional Court Act and Article 126 of the Croatian Constitution.

First, as the Court was still dealing with the review, it temporarily suspended the execution of any action on the concerned legal basis, as it is explicitly provided in Article 45 CCCA:

"The Constitutional Court may, until the final decision, temporarily suspend the execution of the individual decisions or actions undertaken on the grounds of the law or the other regulation, the constitutionality respective of the legality of which is being reviewed, if their execution might cause grave and irreparable consequences."

But then, instead of waiting for its own final decision or at least giving instructions for a further application of the Family Act (2014) for the needed time being, it declared in the same time the re-enactment of the former Family Act (2003) on the grounds of Art 31 (5) CCCA, which permits the Court to determine the execution of its "decisions and rulings" in general.

In its preventive intervention the Court even refers to Article 126 (1) of the Croatian Constitution which stipulates the repeal of a law, which was (finally) found unconstitutional.[38]

The decision, which is not less than an *invention of preventive intervention of the Court,* seems to mix two distinct legal institutions, namely the suspension of legal actions based on the law under examination and the annulment of the law itself. De facto, the suspension of any actions and the re-enactment of the former law meant a suspension of the Family Act (2014). The suspension or annulment is usually used for the direct protection of constitutionality, whereas the suspension of decisions and actions taken on the grounds of the challenged law takes legitimate expectations and legal certainty into account and protect the individual's rights and interests during the review process of the constitutional or ordinary court, until the constitutionality is decided on.

In its decision the CCC basically applied, due to the presumably long period of time needed for properly considering the case and pro and contra arguments, etc., a 'presumption of unconstitutionality and dysfunctionality', because it did not intend to accept any possible legal and factual consequences that might be stemming from the future declaration of unconstitutionality (which the Court may conclude after having examined all aspects of the problem). For this, however, there is *expressis verbis* no legal basis neither in the Croatian Constitution, nor in the Constitutional Court Act. Neither can the Court refer to the German possibility of continuity of former law which cannot be replaced by an *ex tunc* unconstitutional law, nor to a traditional similar jurisprudence which could at least justify the decision in the frame of legal certainty.

Instead, the Court made *references* to the rule of law and legal certainty principle *without explicitly* mentioning back to its own case law[39] or at least referring to the case in hand to flash the legal relevance of these principles. Instead, the Court argued that its preventive intervention in the form of factually re-enacting former law was necessary and required by the nature of the Family Act 2014 as being a *systematic law* with a general social character by which individuals are affected, which is *ambiguous, vague, contains mutual contradictions*. In the Court's opinion, *these may lead to* an uneven application of law, due to some other flaws of the law, such as that institutional mechanism have not been available for the efficient implementation of the law in both administrative as well as judicial practice.[40] Again, without reference, the Court established that, practical experience and previous judicial practice, which has demonstrated that decision, regardless of their properness and necessity, do not achieve their full effect and required efficiency if they are not made in due time'.[41] The Court also noted that overviewing the case, ‚disclosed, already at this point in the procedure, the reasonable doubt that the FA/14 contains structural flaws accompanied with individual solutions or sets thereof

38 Art 126 (1) in its wording: "The Constitutional Court of the Republic of Croatia shall repeal a law (act) if it finds it to be unconstitutional."

39 Application of former case law reinforces legal certainty. This latter requires that proper reference is made to the sources based on which the Court founds its decision, even in a case when former decisions of a constitutional court is withdrawn. See decision 13/2013. (VI. 17.) of the Hungarian Constitutional Court, ABH 2013. 440. 453–453. [31]–[34], according to which in constitutional democracy, the reasoning of a decision and its sources have to be open and controllable for all; the principle of legal certainty requires that factors influencing the decision have to be transparent and traceable. The Hungarian Constitutional Court refers to its former decisions by clearly indicating them and quoting its parts.

40 Ruling [760–761, 764].

41 Ruling [767.1].

which might – if this preliminary assessment turns out to be correct – qualify this act as dysfunctional to the extent that shall entail incompliance with the Constitution'.[42]

4.2. ASSESSMENT OF THE DECISION OF THE CCC

The examples of the Austrian and German legal systems, in which the explicit or at least indirectly regulated possibility of a re-enactment has only been used for few cases show, that there are good reasons for a judicial self-restraint, leaving the responsibility for the treatment of an unconstitutional law to the legislator alone. This must be even more true, if the legal system, such as in Croatia, does not explicitly provide the re-enactment.

The CCC might have had a good intention to prevent grave and irreparable legal actions on the grounds of a possible unconstitutional law. But with its ruling unilaterally attaching priority to a constitutional legal basis it did not match the criteria of the well-balanced interplay between the legal certainty on the one hand and the strict separation of power on the other hand, neither in the formal, nor in the substantive provisions.

Strictly speaking, even for the suspended actions the ruling does not even provide any specific information, in how far a mere number of possible violations of the constitution could lead to "grave and irreparable" damages and thus justify the suspension. The Court rather refers to the quantity of cases than to the quality of the possible damage.

Furthermore, for the re-enactment of former law, the decision lacks of any specification in how far Article 31 (5) CCCA could be an appropriate legal basis. In its very wide interpretation of Art 31 (5) CCCA the Court does not determine with any single word in how far – for historical, systematic or teleological reasons – the regulation might also express the legislator's will to cover any rulings according to Article 45 CCCA, especially if it comes to a re-enactment of law, a rather legislative competence. First, Article 45 CCCA is only meant to regulate the treatment of legal actions for a certain transitional time, namely until the Court's final decision. Through the combination with a re-enactment it would *de facto* create a final legal situation without even waiting for a final decision or ruling in the main proceedings. The Court even ignores the consequences, what happens if the final decision confirms the constitutionality of the concerned law in the end: there would be two separate Family Acts under circumstances and the legislator would have to deal with a dual legislative situation that was not even caused by him.

Finally, even if the re-enactment of former law could be somehow based on Art 31 (5) CCCA in general, then at least it would not have been an appropriate measure in this concrete case. The Austrian and the German jurisprudence show clearly, that a re-enactment of former law depends on many different factors and conditions. This must be even legitimate if the legal system does not explicitly know the legal institution of re-enactment in general: The Court would have been obliged, to show at least in an exemplary way the seriousness of the situation, by giving concrete examples and the possible grave consequences stemming from the lacks in the law. It should have explained why a standard measure like the suspension /

42 Ruling [765].

inapplicability *ex nunc* or even *pro futuro* should not have been a practicable way, and if the damage stemming from the application of a "possibly unconstitutional law" which still enjoys the legislator's legitimation is really substantial enough to justify a serious interference in the Parliament's competences. What makes the situation even worse is the fact that the Croatian legislator obviously did not only want to modify the Family Act, but instead change it completely. This is even proven by the fact that the government elaborated a new draft bill only 13 days after the ruling and made a new law within only few months. In the end the ruling caused exactly the contrary of what countries with a decision *ex nunc* or *pro futuro* generally intent and what makes their jurisprudence well-balanced: to give the legislator the time to deal with his own mistakes and find balanced new provisions. The Croatian Constitutional Court rather put the legislator under pressure of time.

5. CONCLUSION

The Croatian Constitutional Court obviously needed more time for the request of professional opinions and also for a closer examination of the complex issue. While the suspension of any legal actions according to Art 45 CCCA was a legitimate and appropriate measure, the re-enactment of the former Family Act (2003) is lacking a convincing legal justification. The Court's ruling cannot be based on Art 31 (5) CCCA, at least not without further ado. By ruling a re-enactment of the former Family Act (2003) anyway the Court did not even achieve to match the criteria established by other jurisprudences, e.g. in Austria and Germany, for good reasons. In particular, the Court ignored the legislator's obvious will not to refer back to the former law. Thus, the interference in the legislative body in a well-balanced system of checks and balances carries even more weight. The success of the ruling will stay questionable, as the constitutionality of the Family Act (2014) is still to be decided. Whatever the final result is, the solution of the CCC is not convincing and it may forecast a very non-clear, uncertain and unpredictable operation of the CCC in the future, which consequential effect is exactly the opposite what the CCC has intended when delivered the ruling.

In the end, the decision caused exactly the contrary of what usually is intended by a review *ex nunc* or *pro futuro*: to give the legislator the needed time to make a new, better law. And the ruling raises some open questions, in particular what happens, if the Court would never take a final decision in this matter, or – even "worse" – what happens if the Act turns out to be constitutional. The Court never considered, what the consequences would be, if the former Family Act (2003) itself could intermediately be attached with the stigma of unconstitutionality, e.g. due to changes in the EU law, different interpretation of legal institutions due to legal equality etc. Then the questionable interference in the legislator's competences would have caused an even worse damage as if the Court simply had left the law in dispute in force.

6. LITERATURE

1. Adamovich, Ludwig K., Handbuch der österreichischen Verfassung. Wien, 1971.
2. Adamovich, Ludwig K., Funk, Bernd-Christian, Österreichisches Verfassungsrecht. Verfassungsrechtslehre unter Berücksichtigung von Staatslehre und Politikwissenschaft. Wien /New York, 1987.
3. Adamovich, Ludwig K.; Funk, Bernd-Christian; Holzinger, Gerhart; Frank, Stefan Leo, Österreichisches Staatsrecht. Wien, 2014.
4. Benda, Ernst; Klein, Eckart; Klein, Oliver, Verfassungsprozessrecht. Heidelberg, 2011.
5. Burkiczak, Christian; Dollinger, Franz-Wilhelm; Schorkopf, Frank and others (ed.), Heidelberger Kommentar zum Bundeverfassungsgerichtsgesetz. Heidelberg, 2015.
6. Haller, Herbert, Die Prüfung von Gesetzen. In: Forschungen aus Staat und Recht, volume 47, Wien/New York, 1979.
7. Hiesel, Martin, Verfassungsgesetzgeber und Verfassungsgerichtshof. Wien, 1995.
8. Maunz, Theodor; Schmidt-Bleibtreu Bruno; Klein, Franz; Bethge, Herbert and others (ed.), Bundesverfassungsgerichtsgesetz. Kommentar. München, August 2015.
9. Mayer, Heinz; Kucsko-Stadlmayer, Gabriele; Stöger, Karl, Grundriss des österreichischen Bundesverfassungsrechts. Wien, 2015.
10. Pestalozza, Christian, Verfassungsprozessrecht. München, 1991.
11. Schlaich; Klaus; Korioth; Stefan, Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen. München, 2015.
12. Schmidz; Holger; Krasniqi; Ahqipe, Die Beschränkung der zeitlichen Wirkung von Urteilen in den Mitgliedstaaten der Europäischen Union. In: EuR 2010, p. 189–206.
13. Schroeder, Werner, Die zeitliche Wirkung von Urteilen in Normenkontrollverfahren. Monatsbericht des BMF, October 2008, p. 83–91.
14. Schroeder, Werner, Temporal Effects of the German Federal Constitutional Court. In: Popelier, Patricia; Verstraelen, Sarah; Vanheule, Dirk; Vanlerberghe, Beatrix (ed.), The Effects of Judicial Decisions in Time. Cambridge, 2014, p. 21–34.
15. Seer, Roman, Die Unvereinbarkeitserklärung des BVerfG am Beispiel seiner Rechtsprechung zum Abgabenrecht. In: Neue Juristische Wochenzeitung, München, 1996, p. 285–291.
16. Stelzer, Manfred, Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria. In: Popelier, Patricia; Verstraelen, Sarah; Vanheule, Dirk; Vanlerberghe, Beatrix (ed.), The Effects of Judicial Decisions in Time. Cambridge, 2014, p. 63–76.
17. Walter, Robert, Die mitteleuropäische Verfassungsgerichtsbarkeit und die Reine Rechtslehre. In: Österreichische Richterzeitung 1993, p. 266–275.

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LEGITIMNOST VRAĆANJA NA SNAGU PRIJAŠNJEG ZAKONA I VREMENSKO DJELOVANJE ODLUKA U SUSTAVIMA USTAVNE DEMOKRACIJE

Sažetak

Godine 2015. Ustavni sud RH suspendirao je Obiteljski zakon (2014) i naložio primjenu prethodnog Obiteljskog zakona (2003), starog više od deset godina, a da nije proveo postupak i donio odluku o neustavnosti suspendiranog Zakona. Potaknuti ovom odlukom hrvatskog Ustavnog suda, u radu se komparativno ispituju uvjeti za vraćanje na snagu prijašnjeg propisa stavljenog izvan snage, kao i vremensko djelovanje odluka odabranih europskih ustavnih sudova. Stoga ovaj rad pruža priliku čitatelju da se upozna s praksom austrijskog i njemačkog ustavnog suda, kao i uvjetima na temelju kojih je moguće vratiti na snagu prijašnji propis u njihove pravne sustave, ukazujući na pravnopovijesne razloge postojanja ovakvog rješenja. Zaključno se u radu austrijski i njemački sustav razmatraju u aktualnom hrvatskom kontekstu.

Ključne riječi: *ocjena ustavnosti zakona, Ustavni sud, vraćanje na snagu prijašnjeg propisa, suspenzija Obiteljskog zakona (2014), Obiteljski zakon (2003)*

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