

THE RIGHTS OF A PROTECTED LESSEE FROM THE VIEWPOINT OF THE CONSTITUTIONAL COURT

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ABSTRACT Regulating relations in the sphere of housing for their compliance with the Constitution, the legislator has, by the Rent Act, replaced tenant's right of tenancy, under certain conditions, to lease. Since the alignment of housing legislation implemented during the transition period of transformation of social property and privatization, the legislator, for the owners of apartments, had kept the burden of restrictions on their property rights, the burden of protected tenants, as (inevitable) effect to protect vested rights (based on valid legal grounds) on the apartment that is not their property. The enforcement of this legal regulation had not demanded that the owners of these apartments suffer greater restrictions on their ownership than the limitations that already existed, and which consisted in impossibility to live in that apartment.

However, the Rent Act in Article 19 provides for situations in which the lessor (landlord) may cancel the lease to lessee (the former person entitled to tenancy rights).

Nevertheless, except for reasons of Article 19 of Rent Act, landlord may terminate the lease if he intends to settle in the apartment wether alone or with his descendants, parents or persons under special regulations to support (Article 21 and 40 of the Rent Act). Regarding to their extreme sensitivity that emerged in implementing the law on real life (dis) advantages of addressees, Article 21 Paragraph 2 and Article 40 paragraphs 1 and 2 were before the Constitutional Court in the proceedings initiated in order to assess their conformity with the Constitution.

Because of established breach of Articles 3, 14 § 2, 48 paragraph 1 and 50 paragraph 1 of the Constitution, Croatian Constitutional Court in decision and ruling UI-762/1996 abolished Article 21 Paragraph 2 and Article 40 § of Rent Act. In pronouncement of mentioned decision is determined that abolished Article 21 Paragraph 2 and Article 40 Paragraph 2 of Rent Act expire until six months from the date of publication of this decision. What did the legislator do after the decision of the Constitutional Court, and what followed in time to the present day - the authors suggest the analysis and presentation of the facts in the rest of the content.

JEL: K11, K12, K40

1. INTRODUCTION

The Constitution of the Republic of Croatia (“Narodne novine” – Official Gazette of the Republic of Croatia issue no. 56/90, 135/97, 113/00, 28/01 and 76/10, hereinafter: the Constitution) does not recognise social ownership and tenancy rights as constitutional rights.

At the time when the Croatian Parliament was enacting regulations of housing conditions, the Republic of Croatia had already been defined (by the Constitution) as a social state. Within the framework of its legislative politics of that time, partially directed towards that legal area and the process of transferring flat ownership, the housing regulation was primarily directed towards flats in social ownership.

Social ownership was a very significant characteristic of the former state and its regime. It was defined as a socio-economic relation in which a right holder of things in social ownership (titular) did not exist; therefore, it mainly arose from a compulsory transfer of numerous immovable properties from private to social ownership. Thus, the former state constituted two systems of ownership; a dominant system of social ownership opposed to a limited system of private ownership. After the declaration of independence and the adoption of the Constitution on 22 December 1990, the re-establishment of private ownership of immovable properties in social ownership was initiated.

Abolishing the property dualism, the Constitution has enabled the reversion to private ownership, and today it guarantees an ownership right to all citizens, without any exception, and its inviolability is among the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution). Furthermore, the Constitution ceases to recognise social ownership as well as other real rights as constitutional rights, that existed in the former regime (the right to keep, fully use and manage, as well as special tenancy rights). Therefore, in the period of transition numerous acts were enacted to enable the conversion of social ownership into private ownership.

For example the Act on the conversion of social companies (“Narodne novine” – Official Gazette of the Republic of Croatia issue no. 19/91, 83/92, 84/92, 94/93, 2/94, 9/95, 21/96 and 118/99) that was used to convert companies with social capital into companies, respectively joint-stock companies and limited liability companies to which an owner will be assigned.

Furthermore the Act on Ownership and Other real Rights (“Narodne novine” – Official Gazette of the Republic of Croatia issue no. 91/96, 68/98, 137/99, 22/00, 73/00 - hereinafter: Act on Ownership) was enacted with which the legislator intended to “convert social ownership to private ownership”.

The Act on Sale of Flats subject to tenancy rights was also enacted (“Narodne novine” - Official Gazette of the Republic of Croatia issue no. 43/92 – revised version, no. 69/92, 25/93, 48/93, 2/94, 44/94, 58/95 and 11/96, hereinafter: Act on sale of flats), and it was also used in the conversion of socially owned flats into privately owned flats.

Thereby the alignment of the Housing Act with the Constitution has started, which was completed with the enforcement of the Rent Act (“Narodne novine” - Official Gazette of the Republic of Croatia issue no. 91/96, 48/98, 66/98 and 22/06) on 5 November

1996. According to these regulations, certain individuals who had tenancy rights were enabled, under prescribed conditions, to repurchase certain flats. However, individuals who had tenancy rights, but could not repurchase these flats because they were in private (not in social) ownership, the tenancy rights were converted into a rental relationship. Hence, these individuals became lessees, whereas the flat owners became lessors.

2. THE SCOPE OF THE LESSEE'S RIGHTS WITH REGARD TO THE SCOPE OF THE TENANCY RIGHTS HOLDER

In arranging the relations in the area of housing in order to achieve an alignment with the Constitution, the legislator has replaced the “expired” tenancy rights regulation with a classical civil rights regulation: a lease, which, in the procedure for concluding an agreement (of indefinite duration), was ensured a special protection. The legislator stipulated a protected lease, and gave special attention to define/prescribe reasons for a cancellation of a lease contract.

Thereby the legislator also beared in mind the need for a special protection of tenancy rights holders, who had those rights on privately-owned flats, since they were not enabled to purchase the flat under the conditions of the Act on Sale of Flats.

In conducting the legislative politics and in the process of transforming the previous legal relations into new contract relations among parties, a continuity of ownership towards this flats has been kept and protected, as guaranteed by the Constitution.¹

At the same time, in converting the status of a flat owner from the former flat provider into the status of a lessor, the flat owners have gained a legal status typical of a classic civil-law system (status of a lessor). However, the consequence of this was, that the newly established rental relationship imposed a burden on flat owners (lessors) regarding the use/disposal of their property.

Since the adjustment of housing regulations was conducted during the transition period of conversion and privatization, the legislator (the state) could not have been withheld the right to convert the legal status of former tenants “into a new status“, in a way that their rights to inhabit a flat (which also includes the right to a home, a life in a flat) are protected by a protected lessees regulation. Furthermore, at the same time the rights of the flat owner, who was imposed with the obligation to endure a burden on his ownership in terms of a protected lessee as an inevitable restriction, should be respected.

In the described proceeding and creating legislative solutions, that at the same time transformed and restricted the opposed interests (of the owners and their tenants), and that finds its source in the Constitutional principle (Article 16)² according to which the rights of a

¹ By the Article 48 of the Constitution the ownership right is guaranteed.

² Article 16 of the Constitution

Freedoms and rights may only be curtailed 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 to do so in each individual case.

person can be restricted by law in order to protect the rights of others as well as the constitutional order, the legislator has given its best to protect as well the inviolability of the highest values of the constitutional order of the Republic of Croatia prescribed in Article 3 of the Constitution, thus the inviolability of ownership³, by enacting the Act on Rent of Flats.

In the process of converting earlier contracts on tenancy rights on flats in private ownership into a legal lease regulation, the position of former tenancy right holders on flats in private ownership – now lessors, is regulated through a guarantee of a continued usage of flats for an indefinite time.

Therefore, the leading idea of the legislator has been the protection of the protected lessor's private and family life (Article 35 and Article 61, paragraph 1 of the Constitution)⁴, and simultaneously (inevitably) with a restriction of the rights of owners in proportions prescribed by Article 16 of the Constitution.

3. THE SCOPE OF THE OWNERSHIP RIGHT ON A FLAT "BURDENED WITH A LEASE"

However, by changing the status of the former tenancy rights holder into the status of the protected lessee, the owners of these flats being lessors were not completely deprived of the possession of these flats. The legislator has determined them to be indirect owners according to Article 10, paragraph 3 of the Ownership Act⁵.

It is important to emphasise that the introduction of the stated legal regulation has not resulted in an expropriation of the owners of these flats, nor has it demanded from them to endure more restrictions of their ownership rights than the restrictions, which already existed on the flat in their possession, when the same flat already had tenancy rights.

The described legal solution was necessary to make, for the civil-law system the Republic of Croatia has turned to, has no longer recognised the regulation of tenancy rights. It was necessary to transform the rights of the former tenancy rights holder on a flat in private ownership into a legal relationship in which a respect of the principle of protection of vested rights (Article 16 of the Constitution) is guaranteed, and the former tenant relation is now regulated as a classic civil-law relation *sui generis*.

³ Article 3 of the Constitution

Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.

⁴ Article 35 of the Constitution: Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.

Article 61 of the Constitution: The family shall enjoy special protection of the state.

⁵ Article 10 (3) of the Ownership Act: When someone owns something as a beneficiary, a pledge creditor, a tenant, a lessee, a caretaker, a lender or if he is in any other similar relation in which he is authorized or obliged towards someone else to own it for a while, then the owner of the thing is the other as well (indirect owner). If the indirect owner is in a similar relation to a third party, then he is an indirect owner as well.

In this way the legislator has acted with the aim to protect the rights of ownership guaranteed by Article 48, paragraph 1, respecting thereby the constitutional postulate of Article 50, paragraph 1 of the Constitution of the Republic of Croatia⁶ as well.

Article 6 of the Act on Rent of Flats prescribes two types of lease, a protected lease and a freely negotiated lease.⁷

In regard to a protected lease (Article 7 of the Act on Rent of Flats) the legislator has prescribed that it is a lease that is determined in terms of conditions and measures that has been determined by the Government of the Republic of Croatia. The conditions and measures for defining a protected lease are: how a flat is equipped, the flat's usability, the costs of maintaining joint space and devices of the building, and the payment capability of the lessee. However, a protected lease (regardless of the stated conditions and measures) can not be lower than the amount needed to settle the costs of the standard building maintenance, that is determined by a special regulation.

By prescribing that former tenancy rights holders on flats in private ownership, who have now become protected lessees, have the right to a protected lease, the legislator has not introduced any other restrictions on ownership, which would lead to an excessive encroach into the ownership rights of the holder of these rights.

4. POSSIBILITY OF A CANCELLATION OF A LEASE AGREEMENT

In chapter VI under the heading Cancellation of a lease agreement, the Act on Rent of Flats has prescribed in Article 19 the situations in which a lessor can cancel a lease agreement.

In paragraph 1, sections 1 to 5, it is prescribed that a lessor can cancel a lease agreement if a lessee or other tenants use the flat contrary to the Act on Rent of Flats, especially: if the rental fee and other housing costs are not paid within the stipulated period, if a lessee sublets a flat or its parts without a lessor's permission, if the lessee or other tenants annoy or disturb other lessees or tenants, if a person who is not listed in the lease agreement uses the flat, or if the flat is used for other purposes rather than living.

Before a lease agreement is ended, a lessor has to give a written warning to a lessee explaining the reasons for the cancellation of the lease agreement, as well as provide a period of 30 days to eliminate those violations.

However, a lessor has the right to cancel a lease agreement without any previous warning, if a lessee acts more than two times contrary to the lease agreement and therefore contrary to the Act on Rent of Flats.

⁶ Article 50: In the interest of the Republic of Croatia, ownership may be restricted or rescinded by law, subject to indemnification equal to the market value of the pertinent property.

⁷ Article 6: The lease that a lessor pays for the use of a flat can be: a protected lease, a freely negotiated lease.

Article 19 of the Act on Rent of Flats reads:

Article 19

(1) A lessor can cancel a lease agreement if a lessee or other tenants use the flat contrary to the Act on Rent of Flats and the lease agreement, especially:

1. if the lessee does not pay the rental fee and other housing costs within the stipulated period,
2. if the lessee sublets the flat or its parts without the lessor's permission
3. if the lessee or other tenants annoy or disturb the peace of other lessees or tenants of the building,
4. if a person who is not listed in the lease agreement uses the flat for more than 30 days without the permission of the lessor, unless the person is a spouse, a descendant, a parent, a person who he is obliged to support according to the law or a person who provides the lessee or other tenants with necessary care and assistance but only for the time he is needed,
5. if the lessee or other tenants use the flat for other purposes rather than living.

(2) A lessor can not cancel a lease agreement although the conditions listed in paragraph 1 of this Article are fulfilled, unless he previously gives the lessee a written warning to eliminate the reasons for the cancellation within a period of 30 days.

(3) A lessor has the right to cancel a lease agreement without any previous warning stated in paragraph 2 of this Article, if a lessee acts more than two times contrary to the agreement and the law.

Besides the reasons stated in Article 19 of the Act on Rent of Flats, a lessor can cancel a lease agreement if he himself wishes to move into the flat in question, or if he has the intention to move his descendants, parents or persons, who he is obliged to support according to special regulations, into that flat.

5. THE SUBJECT MATTER OF THIS PAPER

Article 21 of the Act on Rent of Flats reads:

Article 21

(1) A lessor can cancel a lease agreement of indefinite duration besides the reasons stated in Article 19 of this Act if he has the intention to move into that flat or if he intends to move in his descendants, parents or persons who he is obliged to support according to special regulations.

(2) In the case of paragraph 1 of this Article a lessor can cancel a lease agreement of indefinite duration only if he has assured another habitable flat for the lessee under the housing conditions that are not unfavorable for the lessee.

Special attention should be given to Article 40 of the Act on Rent on Flats, especially paragraph 1 and 2 which read:

Article 40

(1) A lessor can cancel a lease agreement that he has with a protected tenant besides the reasons stated in Article 19 of this Act, which are:

- prescribed in Article 21 of the same Act;
- if his or his family's housing question is not solved, according to a special regulation he has the right to receive social support if he is older than 60.

(2) In the case of paragraph 1, subparagraph 1 of this Article a lessor can cancel a lease agreement of indefinite duration only if he has assured another habitable flat for the lessee under the housing conditions that are not unfavorable for the lessee. (...)

Because of their distinct sensibility that appeared in the implementation of the law in specific life situations of addressees, Article 21 paragraph 2 and Article 40 paragraph 1 and 2 of the Act on Rent of Flats have been the subject matter of the Constitutional Court regarding the proposal of some applicants to evaluate these Articles in accordance with the Constitution.

The applicants (owners of flats in which lessees live in) have named their reasons why they are considering Article 21, paragraph 2 of the Act on Rent not to be in accordance with Article 3, Article 48, paragraph 1 and Article 50, paragraph 1 of the Constitution. They have pointed out that this disputed regulation protects the lessee's rights, which are not constitutional rights and that this is contrary to the rights of the lessors being the owners. Furthermore, they believe that a lessor was taken the right to cancel a lease agreement (of indefinite duration), since he, as the owner of the flat, has to assure another habitable flat for the lessee under the housing conditions that are not unfavorable for the lessee, even in the situation when the flat in which the lessee is living (a flat in the ownership of a lessor) is used irrationally by the lessee, because it is for example too large considering the actual housing needs of the lessee and his family members.

Analyzing the applicants' assertions considering the normative content of Article 21, paragraph 2 of the Act on Rent and the authorized regulations of the Constitution, the Constitutional Court has considered the collateral model that the legislator has used regarding a cancellation of a lease agreement of the formerly valid Act on Housing Relations ("Narodne novine" – Official Gazette of the Republic of Croatia issue no. 51/85, 42/86, 22/92 and 70/93) with regards to the identical legal situation standardized by the Act on Rent of Flats.

The following conclusion was drawn, regarding the determined inconsistency of the stated legal provisions of Article 3, Article 48 paragraph 1 and Article 50 paragraph 1 of the Constitution of the Republic of Croatia:

"The Act on Housing Conditions from 1985 has already prescribed that in Article 123 paragraph 1 and stated that an owner of a family house or flat in which the person from Article 3, paragraph 2 of the same Act lives, has the right to switch the flat he live in and has tenancy rights for the flat that is in his possession, if he or his full-aged descendant moves in. In paragraph 2 of the same Article of the Act on Housing Relations it was determined

that the right from paragraph 1 of that Article an owner has in the case, if the person from Article 3, paragraph 2 of that Act offers in exchange a flat at the same place that does not deteriorate the living conditions in regard to the previous flat, and if he gains the tenancy rights to that flat. However, the same Act on Housing Conditions contained Article 124 that in paragraph 1 stated that if an owner of a family house or flat lives under difficult housing conditions, according to Article 3, paragraph 2 of that Act the local district will provide another appropriate flat for him from the existing housing fund that can not be bigger than the previous one. Here we are indicating towards the provisions of the Act on Housing Relations from 1985, since it was more favorable for the owners, at least for those, who lived in difficult housing conditions, since this obligation also included owners whose tenants would be provided with a flat by the local district (except in Article 40 paragraph 3 regarding paragraph 1 subparagraph 2 of the same Article of the Act on Rent).

According to the Act on Rent cancellations are possible only if the lessee violates the law and the agreement (Article 19) or if the lessor needs the flat (Article 21). As opposed to this, according to Article 109 of the Act on Housing Relation from 1985, lessors could have cancelled a lease agreement without stating a reason (Article 111 of this Act). Thus, the position of lessors have become more difficult, since they can not cancel a lease agreement without a reason, not even in cases of lease agreements that were concluded at the time the Act on Rent was enforced. That violates the basic values of equality and the rule of law from Article 3, as well as the guaranteed ownership rights from Article 48, paragraph 1, and it is not in accordance to Article 50, paragraph 2 of the Constitution. Therefore it was necessary to abolish the provision of the Article 21, paragraph 2, but since it relates to the provision of paragraph 1 of the same Article, it was necessary to postpone the effect of its abolishment in terms of the provision of the Article 21, paragraph 2 of the Constitutional law on the constitutional court of the Republic of Croatia ("Narodne novine", no. 13/91), that was done in point I.2. of the decision. Within a period of six months the legislator can adequately arrange the prerequisites for a cancellation in terms of the provision of the Article 21, paragraph 1 of the Act on Rent."

The accordance with Article 14 paragraph 2 and Article 48 paragraph 1 of the Constitution is also disputed in Article 40 paragraph 2 of the Act on Rent of Flats.

Besides the already stated reasons, the applicants (flat owners encumbered with protected lessees) have also pointed out that "in a democratic social system it is impossible and impermissible to enact laws that restrict/deprive ownership rights." They explained that by creating various categories of flat owners regarding the possibility to access/use the property, comparing their status with the status of an owner whose flats are not "encumbered with protected lessees".

The Constitutional Court also abolished Article 40, paragraph 2 of the Act on Rent, and in explaining its decision it emphasized:

"The regulation in question conditions the rights of a lessor to cancel a lease agreement with a protected lessee when he himself wishes to move in, or when he intends to move in his descendants, parents or persons he is, obliged to support according to special regulations. Furthermore, the lessor has to assure another habitable flat to the lessee under the housing conditions that are not unfavorable for the lessee, according to Article 21, paragraph 2 of the

Act on Rent for which the Court has determined not to be in accordance with the Constitution. Therefore the reasons that are listed in chapter III.6 are mentioned, in order to abolish it. However, since it related to the provision of paragraph 1 of the same Article, the effect of its abolishment should have been postponed in terms of the provision of Article 21, paragraph 2 of the Constitutional Law on the Constitutional Court of the Republic of Croatia (“Narodne novine“, no. 13/91), that was done in point I.2 of the Decision. Within a period of six months the legislator can arrange the prerequisites for a cancellation in terms of the provision of Article 40, paragraph 1, subparagraph 1 of the Act on Rent.

Besides the specified, the provision of Article 40, paragraph 1, subparagraph 2 states that another habitable flat is assured to the lessee by the local government, in other words the city of Zagreb, and this can not have an influence on the provision of paragraph 2...”

The Constitutional Court has, by its decision number: U-I-762/1996 from 31 March 1998 (published in “Narodne novine“ – Official Gazette of the Republic of Croatia, no. 48/98 and 66/98), abolished the provision of Article 21 paragraph 2 and Article 40 paragraph 2 of the Act on Rent since there was an inconsistency with Article 3, Article 14 paragraph 2, Article 48 paragraph 1 and Article 50 paragraph 1 of the Constitution.

In point II of the ruling it was pointed out that the abolished Article 21 paragraph 2 and Article 40 paragraph 2 of the Act on Rent cease to be valid six months after the promulgation of this ruling.

Postponing the effect of the implementation of its ruling, the Constitutional Court has provided (in accordance with Article 55 paragraph 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia “Narodne novine“ – Official Gazette, no. 99/99, 29/02 and 49/02: hereinafter: Constitutional Act, 6 April 1998)⁸ the proposer of the Act and the legislator the possibility to change the legal provisions in order to be in accordance with the Constitution within the period of six months after the promulgation of the decision in “Narodne novine“ on 6 April 1998.

6. How did the legislator act after the decision of the Constitutional Court, and what has happened until today?

However, after the enactment of the stated decision/ruling of the Constitutional Court, as well as after the period of six month of the postponment of the implementation of its decision/ruling, the prososer of the law and the legislator have not acted as it had been expected. In the legal order of the Republic of Croatia – with regards to the possibility to cancel a lease agreement, made between a lessor (flat owner) and a protected lessee, if the lessor wants to move into that flat (article 21 paragraph 1), a legal gap has occurred.

The above stated has resulted in the fact that the owners of flats inhabited by protected lessees, “exonerating themselves with the reasons“ stated in Article 21 paragraph 1 of the Act on Rent, have initiated proceedings for the eviction of protected lessees, without the need to act in accordance with Article 21 paragraph 2 and Article 40 paragraph 2 of this

⁸ Article 55 (2): The repealed law or other regulation, or their repealed separate provisions, shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette “Narodne novine“, unless the Constitutional Court sets another term.

Act (because the paragraphs of the stated legal provisions no longer existed). It was enough to mention that the lessor himself has the intention to move into the flat or has the intention to move in his descendants, parents or persons he is obliged to support according to special regulations (Article 21 paragraph 1). In other words, if his own or his family's housing question is not solved, or if he is older than 60, according to a special regulation he has the right to receive social support (Article 40 paragraph 1, indent 2).

In most cases the complaints of the owners were accepted, for the former protected lessees in flats in private ownership lost their status and it was decided to evict them.

After the completion of the regular legal action (the court has reached the decision to evict the "protected lessee"), the Constitutional Court had to deal with various procedures in cases initiated by the constitutional complaints of the deprived and previously protected lessees, who sought protection of their right to a home that is guaranteed by the Constitution prescribed in Article 34 paragraph 1 of the Constitution regarding Article 35 of the Constitution. The specified constitutional provisions state:

"Article 34

The home is inviolable."

"Article 35

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

Since the legislator has kept silent (and he still does), the Constitutional Court, aware of the fact that the previously mentioned problem of "fulfilling legal gaps" originated because of the inactivity of the legislator after the implementation of the ruling/decision, ruling number :U-I-762/1996 from 31 March 1998, and estimating the difficult life situations the "former protected" lessees in flats in private ownership have been in, the only thing it could do according to Article 67 paragraph 2 of the Constitutional Act⁹ was to decide upon determining a temporary postponement of the execution of their eviction from the specified flats sought by the applicant of the constitutional complaint.

In the explanation of the Constitutional Court's decision on the postponement of the execution/eviction of protected lessees (pointed out as examples in this paper), decision number: U-III-135/2003 of 30 April 2003 (published in "Narodne novine"- Official Gazette of the Republic of Croatia, issue no. 73/03) and decision number: U-III-485/2006 of 23 May 2006, it was also stated that these rulings were made in accordance with the provision of Article 21 paragraph 1 of the Act on Rent. According to the provision of this Article a lessor can cancel a lease agreement of indefinite duration if he himself wishes to move into that flat or if he wishes to move in his descendants, parents or persons who he is obliged to support according to special regulations. According to the provision of Article 40 paragraph 1 subparagraph 1 of the same Act, a lessor can cancel a lease agreement that he has with a pro-

⁹ Article 67 (2): The Constitutional Court may, on the proposal of the applicant, postpone the execution of court of justice decision until the decision is made, if the execution would cause to the applicant such damage, which could hardly be repaired, and the postponement is not contrary to the public interest nor would the postponement cause to anyone greater damage.

tected lessee for the previously mentioned reason. The Constitutional Court has abolished the provision of Article 40 paragraph 2 of the Act on Rent on 31 March 1998. This Article defined the obligation of a lessor, in the case of a cancellation of a lease agreement, to assure a protected lessee another habitable flat under the housing conditions that are not unfavorable for the lessee. Before the Constitutional Court makes its meritor decisions on the grounds of the statements taken from the applicant's constitutional complaints, it is necessary to define the circumstances as well as the way of the enforcement of decision of the Constitutional Court, decision number: U-I-762/1996 and others of 31 March 1998.

However, from the day the specified decision of the Constitutional Court was announced, a longer period of time passed, within which the Croatian Parliament did not act regarding the decision and ruling of the Constitutional Court, decision number: U-I-762/1996 from 31 March 1998.

The Constitutional Court, based on Article 125 indent 5 of the Constitution and the official authorities prescribed in Article 104 paragraphs 1,2 and 3 of the Constitutional Act¹⁰, directed the Report number: U-X-2191/2007 (published in "Narodne novine", number 67/07) to the Croatian Parliament on 20th June 2007 which stated:

In the period after the Constitutional Court had made its decision, therefore after the abolished legal regulation ceased to be valid, owners of flats (lessors) started numerous proceedings in authorized courts because of the cancellations of lease agreements, appealing to Article 40 paragraph 1 subparagraph 1 of the Act on Rent.

According to constitutional case files, the Constitutional Court was filed with constitutional charges against the verdicts, with which the courts have decided upon the complaints of flat owners (lessors) on the eviction of lessees, although the Act on Rent has not previously determined the prerequisites of such an eviction. The constitutional complaints were filed by flat owners (lessors) depending on the verdict, since they believed that by those verdicts the constitutional rights were violated.

On the occasion of such constitutional complaints, the Constitutional Court has in two cases (U-III-135/2003, U-III-485/2006) postponed the enforcement of the decision of the authorized courts regarding the eviction of lessees until the decision regarding the constitutional complaint was made. The Constitutional Court has not brought the decision regarding the constitutional complaints in the specified cases since the decision of the Constitutional Court regarding the abolishment was not conducted by the Croatian Parliament, and that is a prerequisite for a meritor decision making regarding

¹⁰ Article 125: The Constitutional Court of the Republic of Croatia: follows if constitutionality and legality are achieved and reports to the Croatian Parliament on the occurrence of unconstitutionality and nonlegality.

Article 104

- 1) The Constitutional Court follows the achievement of constitutionality and legality, and reports to the Croatian Parliament on the occurrence of unconstitutionality and nonlegality.
- 2) The session of the Constitutional Court determines the report from paragraph 1 of this Article.
- 3) The report from paragraph 1 of this Article is delivered in the written form to the President of the Croatian Parliament, who reports on it to the Croatian Parliament.

the constitutional complaints. According to Article 31 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (further referred to as: the Constitutional Act), the decisions of the Constitutional Court are obligatory and all government bodies are obliged to implement the decisions of the Constitutional Court within their constitutional and legal scope.

The Constitutional Court points out that within the scope of its jurisdiction it does not have the authority to reduce inequality in the implementation of the Act on Rent, which appeared when the abolished regulation ceased to be valid. The decisions of the Constitutional Court (adoption, and rejection of a constitutional claim) would lead to a further inequality regarding the Act, what is contrary to the constitutional warranty referred to in Article 14, paragraph 2 of the Constitution. Therefore, the current normative situation is unacceptable and impermissible from the viewpoint of the Constitution since it does not solve the problem entirely and in the same way for all regarding the implementation of the Act on Rent.

Therefore, only the legislator has the authority to arrange the specified legal relations in a way that would guarantee equality of all before the law by making appropriate modifications and amplifications of the Act on Rent.

Following the achievement of constitutionality and legality and bearing in mind the obligation to implement the decisions of the Constitutional Court (Article 31 of the Constitutional Act), referred to in Article 128 indent 5 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act, this Report was directed to the Croatian Parliament.“

The constitutional complaint of the applicants in cases number: U-III-135/2003 and U-III-485/2006 were considered at the session of the Constitutional Court held on 17 March 2009. Analyzing the grounds of the constitutional complaints, the Constitutional Court has accepted the viewpoint of the Supreme Court of the Republic of Croatia stated in its decision number: Rev-486/20-2 Gzz 74/02-2 on 21 February 2007:

“(…) The acceptance of the applicant’s complaint on the fact that the flat owner who wishes to move into his flat does not have a legal possibility to cancel the lease agreement of indefinite duration to the protected lessee until the legislator replaces the abolished provision of Article 40 paragraph 2 of the Act on Rent with another provision, would mean that a restriction of rights of the flat owner existed which insults the basic values of equality and the rule of law based on Article 3, as well as the guaranteed right to ownership from Article 48 paragraph 1 beside the provision of Article 50 paragraph 2 of the Constitution of the Republic of Croatia. That is the reason why the cited provision was abolished, as well as the provision of Article 21 paragraph 2 of the Act on Rent, since these provisions conditioned the lessor to assure the lessee (the ordinary as well as the protected) another habitable flat under the housing conditions that are not unfavorable for the lessee. Therefore, this court considers the stated omission of the legislator, to replace the abolished provision of Article 40 paragraph 2 of the Act on Rent with a new provision, can not be at the expense of the flat owner’s rights (the lessor), prescribed in the provision of Article 40 paragraph 1 subparagraph 1 of the Act on Rent, to cancel a lease agreement of indefinite duration to a protected

lessee for the reasons prescribed in this provision. The stated legal regulation was not abolished by the Constitutional Court's decision of 31 March 1998.

Since the legislator has still not replaced the abolished Articles of the Act on Rent with provisions of a different normative content, and still persisting on the viewpoint stated in the decision/ruling number: U-I-762/1996 of 31 March 1998 cited in point 5 of this paper (also used by the Supreme Court in the stated decision), the Constitutional Court rejected both constitutional complaints with the following explanation.

Respecting the particular circumstances of each individual case (the constitutional complaint of the applicant (protected lessee) as well as the flat owner's/lessor's), the impossibility of the applicant's eviction represents a disproportionate and excessive burden for the flat owner (the lessor). Therefore, on 17 March 2009 the Constitutional Court rejected the constitutional complaint of the applicant and abolished the previously ruled decisions on the postponement of the eviction (enforcement).

However, a proposed amendment to the Act on Rent is still not submitted to the Croatian Parliament, in accordance with the decision/ruling of the Constitutional Court number: U-I-762/1996 of 31 March 1998 and the Report number: U-X-2191/2007 of 20 June 2007.

7. Since there are no laws on the amendment to the Act on Rent, how should we proceed?

The Constitutional Court, acting entirely within the framework of its authority prescribed in Article 125 of the Constitution, in deciding on the proceedings of the actual control of constitutionality through its newer viewpoint regarding the observed violations of the constitutional rights of the complainant, regarding the lease agreement on privately owned flats, has also attempted to explain the praxis of the European Court of human rights in Strasbourg (further referred to as: the European Court). Respecting the fact, that in the named legal situations a special attention should be given to the accomplishment of a legal balance between the protection of the established rights of the former flat users on the one hand, regarding the protection of the rights of ownership holders on the other side, the Constitutional Court has found its starting point considering the grounds of the citation from the constitutional complaints, except for the relevant provisions of the Constitution, in Article 8 of the Convention of the Protection of Human Rights and Fundamental Freedoms of the European Council ("Narodne novine – International Conventions", no. 18/97, 6/99 – consolidated text and 8/99 - correction, 14/02 and 1/06; further referred to as: Convention), that states:

"Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Regarding the abuse of rights from Article 8 of the Convention, in the case *Čosić against Croatia* (judgment, 15 January 2009, Application no. 28261/06) the European Court stated:

“21.... the guarantees of the Convention require that the interference with an applicant’s right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia’s obligations under the Convention (...)

22. In this connection the Court reiterates that the loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (...)”

In its rulings in cases *Orlić against Croatia*, its decision of 21 June 2011 (Application no. 48833/07) and *Bjedov against Croatia*, decision of 29 May 2012 (Application no. 42150/09) the European Court has made a detailed elaboration of the necessity test, the legitimacy aims and linearity of the measure taken regarding the abuse of rights based on Article 8 of the Convention (right to a home). The following part is taken from the Court’s assessment of both rulings:

“(a) Whether a right protected by Article 8 is in issue (...)

57. The Convention organs’ case-law is clear on the point that the concept of “home” within the meaning of Article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established. “Home” is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a “home” which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place (see *Buckley v. the United Kingdom*, 25 September 1996, Reports 1996-IV, §§ 52-54, and Commission’s report of 11 January 1995, § 63; *Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109; *Wiggins v. the United Kingdom*, no. 7456/76, Commission decision of 8 February 1978, DR 13, p. 40; and *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI (extracts)). Thus, whether a property is to be classified as a “home” is a question of fact and does not depend on the lawfulness of the occupation under domestic law (see *McCann v. the United Kingdom*, no. 19009/04, § 46, 13 May 2008). (...)

(b) Whether there has been an interference with the applicant’s right to respect for his home

59. The Court has so far adopted several judgments where it assessed the issue of an interference with an applicant’s right to respect for his or her home in the circumstances where an eviction order had been issued. In the case of *Stanková v. Slovakia* (no. 7205/02, 9 October 2007) the Court held as follows:

“57. The Court notes, and it has not been disputed between the parties, that the obligation on the applicant to leave the flat amounted to an interference with her right to respect for her home which was based on the relevant provisions of the Civil Code and the Executions Order 1995 ...”

60. Subsequently the Court held in the *McCann v. the United Kingdom* (no. 19009/04, 13 May 2008):

“47. It was further agreed that the effect of the notice to quit which was served by the applicant’s wife on the local authority, together with the possession proceedings which the local authority brought, was to interfere with the applicant’s right to respect for his home.”

61. Further, the Court has held in *Čosić v. Croatia* (no. 28261/06, 15 January 2009):

“18. The Court considers that the obligation on the applicant to vacate the flat amounted to an interference with her right to respect for her home, notwithstanding the fact that the judgment ordering the applicant’s eviction has not yet been executed.” (...)

(c) Whether the interference was prescribed by law and pursued a legitimate aim

63. The applicant was ordered to vacate the flat in question by the national courts under Croatian laws regulating ownership, which allow an owner to seek repossession of his or her property when the possessor has no legal grounds for possession (see above the relevant provision of the Property Act). In this connection the Court first reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention incorporates the rules of that law since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection. The Court will not substitute its own interpretation for theirs in the absence of arbitrariness. The Court is thus satisfied that the national courts’ decisions ordering the applicant’s eviction were in accordance with domestic law, in particular, the Housing Act and the Property Act. The interference in question therefore pursued the legitimate aim of the economic well-being of the country.

(d) Whether the interference was necessary in a democratic society

64. The central question in this case is, therefore, whether the interference was proportionate to the aim pursued and thus “necessary in a democratic society”. It must be recalled that this requirement under paragraph 2 of Article 8 raises a question of procedure as well as one of substance. The Court set out the relevant principles in assessing the necessity of an interference with the right to “home” in the case of *Connors v. the United Kingdom*, (no. 66746/01, §§ 81–84, 27 May 2004) which concerned summary possession proceedings. The relevant passage reads as follows:

“81. An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is pro-

portionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention

82. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation'

The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant ...

83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 ..."

65. ... the guarantees of the Convention require that the interference with an applicant's right to respect for his home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention (see *Stanková v. Slovakia*, cited above, § 24, 9 October 2007).

66. In this connection the Court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and

reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat (see, *McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008), which regulates the law of landlord and tenant (see, *McCann v. the United Kingdom*, cited above, §§ 28 and 54). (...)

68. The Court notes that in the present case the applicant raised the issue of his right to respect for his home, which was not taken up by the national courts. They ordered the eviction of the applicant from his home without having determined the proportionality of the measure... (...)

70. Another element of importance is the following. In circumstances where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the State's legitimate interest in being able to control its property comes second to the applicant's right to respect for his home. Moreover, where the State has not shown the necessity of the applicant's eviction in order to protect its own property rights, the Court places a strong emphasis on the fact that no interests of other private parties are likewise at stake.

71. ... competence for carrying out the test of proportionality lies with a court conducting regular civil proceedings in which the civil claim lodged by the State and seeking the applicant's eviction was determined (see *Paulić v. Croatia*, no. 3572/06, § 44, 22 October 2009).“

6. THE INCORPORATION OF THE VIEWPOINT OF THE EUROPEAN COURT – INSTEAD OF A CLASSIC CONCLUSION

The authors of this paper, instead of providing a classic conclusion, find it interesting to conclude this paper with an analysis of the way how the Constitutional Court has incorporated the effect of violation of the rights prescribed in Article 34 and Article 35 of the Constitution as well as the violation of rights guaranteed by Article 8 of the Convention in its decision, decision number: U-III-405/2008 of 21 February 2012 (published in “Narodne novine“, issue no. 38/12)¹¹

In brief, the factual situation of the specified case was as follows. The applicant of the constitutional complaint was the daughter of the tenancy rights holder who gained this right based on a lease agreement concluded on 1 April 1970. All family members of the tenancy rights holder, including the applicant of the constitutional complaint, had the legal status of “members of the family household“. The father of the applicant moved out from the specified flat in 1970, and his son (the brother of the applicant) continued to

¹¹ The Constitutional Court has accepted the constitutional complaint and has abolished the rulings of the lower courts (the Municipal Court and the County Court), and has returned the case to be processed again. The first-instance ruling (confirmed in the second stage) decided upon the applicant's eviction from the flat in Zadar with the obligation to return the flat to its owner. Her complaint (the applicant was the complainant) with which she asked to gain the status of a protected lessee was rejected.

live in it, together with the applicant of the constitutional complaint until she went to university (1971), and later on with his family (from 1972).

According to the statement of the applicant, she had been living in the specified flat with her brother until 1971, when she enrolled at university. In the period from 1971 to 1980 the applicant occasionally stayed in the specified flat, and from 1980 the applicant is living in that flat the whole time, alone, because her brother moved with his family to another flat in 1979. From 10 May 1982 on she has registered this flat as her place of residence. From October 1995 the applicant has several times sent a request to the flat owner to conclude a purchase contract for that flat, but the applicant has never received an answer regarding those requests.

The Municipal Court in Zadar has, by its decision number: P-301/01 from 10 October 2001, made the decision that the applicant “has the legal status of a protected lessee regarding the specified flat“. The court has also stated that the applicant is among the persons anticipated by provisions of Article 9, paragraph 4 of the Act on Housing Relations and that the circumstance of her absence from the specified flat for educational reasons /from 1971 to 1980) does not necessarily mean a break of a shared living in this flat. Regarding the complaint of the flat owner, the County Court in Zadar abolished the first-instance decision, and returned the case to the Municipal Court in order to be processed again.

In the reprocessed legal procedure, the Municipal Court in Zadar has made a decision, decision number P-2608/03 from 24 October 2005 (confirmed by the decision of the County Court in Zadar, decision number Gž-2131/05 from 22 November 2007), with which it has ordered the applicant to evict from the specified flat. This was explained by the fact that after the father of the applicant, being the tenancy rights holder, had moved out from the specified flat, the members of his family household (the applicant and her brother with his family), who continued to use the flat, have not reached an agreement, in accordance with Article 67, paragraph 3 of the Act on Housing Relations (“Narodne novine“, no. 51/85, 42/86, 22/92 and 70/93) on who will take up the status of the tenant. Therefore, the court has evaluated that in the concrete case the conditions prescribed in Article 30 of the Act on Rent were not fulfilled and that the applicant can not be granted the status of a protected lessee.¹²

Unsatisfied with the result of the specified legal procedure, the applicant has filed a complaint to the Constitutional Court, believing that the way in which the courts have interpreted and applied the relevant Articles of the Act on Rent was contrary to the aim and purpose of the Act. Furthermore, the applicant pointed out that this all resulted with a violation of the rights guaranteed by Article 14 paragraph 2 of the Constitution (the guarantee of equality of all before the law), regarding the right to continue to live in the specified flat with the status of a protected lessee.

¹² Article 30 (1): With the day of the enforcement of this Act the tenancy rights of persons who have gained those rights according to provisions that were valid until the day of the enforcement of this Act ceased to be valid, with the day of the enforcement of this Act.(2)The persons from paragraph 1 of this Article gain the rights and obligations of a lessee.

The Constitutional Court evaluated that this complaint shows an alleged violation of her rights to a home.

The Constitutional Court led by the way the European Court analyses the procedures of authorized courts, and that could have resulted in a violation of the applicant's rights which are guaranteed by Article 8 of the Convention (a right to a home), has in this first-instance procedure looked for answers to the following questions:

- *Is the flat in question the home of the applicant of the constitutional claim?*
- *Were the authorized bodies involved in the applicant's achievement of rights to respect for her home?*
- *Was the involvement justified (in accordance with the law and the legitimacy of the goal to be achieved, with a respected proportionality)?*

The Constitutional Court has evaluated that it is completely obvious (from the circumstances of the concrete case) that the applicant has never had any illegal intentions regarding the specified flat. She has lived in it longer than 40 years without any interruption, and she has in due time undertaken legal procedures for the arrangement of its usage (1995, before the enforcement of the Act on Rent). Therefore, the specified flat has always represented a home, exactly in the way as the European Court elaborated it in the ruling of the case Orlić against Croatia and Bjedov against Croatia.

The authorized lower courts resented the applicant for not acting in accordance with Article 67 paragraph 3 of the Act on Housing Relations after her father moved out of the flat (inform the flat provider to be considered a tenant in this flat, after her father moved out). However, the father of the applicant made a request to the flat provider on 18 October 1973, in which he informed the flat provider, Zadar garrison command, that he is leaving the flat permanently, suggesting that the tenancy right should be transferred to his son. The tenancy right holder of the specified flat has informed the flat provider about his permanent eviction. However, the flat provider has not brought the decision on the cessation of the tenancy right of the former holder, nor has he undertaken any procedures for the eviction of the family members who continued to live in the flat (the applicant and her brother with his family). Zadar garrison command has in its memo number 670/69 from 11 December 1973, directed to the father of the applicant, appealing to the Act on Housing Relations ("Službeni list SFRJ" - Official Gazette of the Federative Republic of Yugoslavia no. 11/66) rejected the request to shift the tenancy right from one member of the family to another one, after the tenancy right holder moved out.

The Constitutional Court has evaluated that the applicant had valid legal expectations and therefore, her staying in the specified flat was not "questioned". After the enforcement of the Act on Rent, a continuation of her living in the specified flat will be enabled from the flat owner that is in accordance with Article 37 paragraph 1 of this Act.¹³

The Constitutional Court emphasised the fact that the omission of the authorized

¹³ Article 37 (1): The persons who on the day of the enforcement of this Act have the legal status of a family member, gained according to the provision of the Act on Housing Conditions ("Narodne novine", issue no. 51/85, 42/86, 22/92 and 70/93), will be listed in the lease agreement.

bodies to solve her request regarding the memo that had been directed by the holder of the tenancy right on that flat (the father of the applicant), can not be considered her fault and therefore, the Constitutional Court has reminded on its basic viewpoint that errors or omissions of the authorized bodies should not be at the expense of the citizen.¹⁴

The same viewpoint was shared by the European Court in the case *Gashi against Croatia* (Judgment of 17 December 2007, Application number 32457/05).¹⁵

In seeking the answer to the question whether, and if yes, which legitimate goal the domestic courts have wished to achieve with the specified legal procedure (evicting the applicant from the specified flat, as well as rejecting her request to gain the legal status of a protected lessee), the Constitutional Court has noticed that the courts in the specified judgments have not stated any claim regarding this issue.

Therefore, the Constitutional Court found it was necessary to view the case of the applicant with respect to the benefits that the owner of the specified flat has from her eviction from the specified flat. In the concrete case the flat owner is not a natural person who would, by the eviction of the applicant from the specified flat, gain the flat for his usage. The flat owner would move another natural person into it, or he would sell it and in this way gain a material benefit.

In both cases it has been evaluated that, the legitimacy of her eviction, in other words the legitimacy of not granting the applicant the status of a protected lessee regarding the specified flat, should be questioned. Unlike the ownership rights, the applicant's rights to a home is a matter of her own personal safety and welfare, and therefore, the specified flat is for the applicant of existential importance.

The European Court has, in the previously mentioned judgment of the case *Gashi against Croatia* (2007)¹⁶, warned of the obligation to acknowledge the important difference that exists in situations in which there are two private interests that are in contradiction, and situations in which they are not present.

Therefore, the Constitutional Court could hardly have accepted that the eviction of the

¹⁴ Decision no. : U- III-4673/2008 from 20 May 2009, "Narodne novine" no. 67/09, decision no.: U – IIIB-1373/2009 from July 2009, "Narodne novine" no. 88/09, decision no. : U –III-3063/2007 from 4 October 2011, "Narodne novine" no. 124/11.

¹⁵ 40. The court finds that the errors or omissions of the government bodies should go on behalf of the affected persons, especially if no other private interest is questioned. In other words, the risk of each error that a government body makes should be made an error of the state, and the omissions should not be corrected at the expense of the concerned citizen (see, *mutatis mutandis*, Radchikov against Russia, no. 65582/01, § 50, 24 May 2007)."

¹⁶ "36. Firstly, the specified flat was a *ab initio* social propriety. While in the previously mentioned cases, that referred to Bulgaria and the Czech Republic, the Court, in its ruling in accordance with Article 1, Protocol 1 of the Convention, should have taken the two contradictory private interests into consideration, in other words the previous owners, whose propriety had been nationalized during the communist reign and the interests of the new owners who purchased those flats, in this case such a sensitive balance was not questioned."

applicant and the rejection of her request to be granted the status of a protected lessee regarding the specified flat, had a clear legitimate goal. The Constitutional Court evaluated the lower courts' determination whether the eviction of the applicant from the specified flat was imperative in order to protect the ownership right and the so called "economic welfare" of the flat owner, as insufficient in the sense of a violation of her rights based on Article 35 regarding Article 16 of the Constitution as well as Article 8 of the Convention.

Deciding on the existence of possible violations of the constitutional/conventional rights to a home, that can also be found in legal relations based on a lease agreement, the examination of the scope of the rights of Article 8 paragraph 2 of the Convention needs to include a proper evaluation of the permissibility of an interference of any state bodies (judicial or public authorities) in achieving this right. Only if such an interference is "in accordance with the law and if in a democratic society it is necessary for the reasons of national security, public order and peace, or economic welfare of the state", it can be justified by the effect it had on each case.

In order to determine whether the measure, determined by the specified judicial judgments, was "necessary in a democratic society", the Constitutional Court always assesses, if the reasons, the authorized courts have named to justify the measure taken, were relevant and sufficient regarding Article 8, paragraph 2 of the Convention. The term necessity implies a vital social need, and it is very important that the applied measure is proportionate to the legitimate goal which was wished to be achieved by the judgments.

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