

Croatia Constitutional Reforms Related to the Accession to the European Union*

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1. Introduction

“Ideas and concepts hitherto unknown have been applied in the country of very different legal and political traditions.” This is how Alexis de Tocqueville summarized the appearance of democracy in America. And this was indeed what has happened in Croatia during the last quarter of the Century.

After the decades of autocratic regimes there have been established a strong tradition of: governmental secrecy, selective application of laws, disregard of the constitutionally and of stipulated rights and freedoms, as well as a total absence of popular control and participation in political decision making. The most important for our topics: in such a system the rules on the book do not equal the working rules. Even more, the gap has widened by the cery process of modernization of the legal system.

The fundamental liberal democratic constitutional concept, as it had been understood at the time, was introduced by the Croatian Constitution of December 21, 1990. The Croatian one was first among the post-communist constitutions in Middle and Eastern Europe. The presidential task group (in which I had participated), was made of experts in constitutional and public law who had been acquainted with the Western

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constitutionalist models. As a model documents, we were looking up the constitutions of the countries which had themselves passed earlier through the process of democratic transition: Germany and Italy (at the end of the forties), than France (during the sixties), and during the comparable instances of Portugal and Spain, of the seventies. We had also consulted the expertly well elaborated and noted Turkish document of 1982 which, to our knowledge of the time, had been prepared for the purpose of democratic transition as well.

The further new concepts have been introduced by the two major constitutional revisions (1997 and 2000), and during the following processes of accession, first into the Council of Europe, and later during the process of accession into the European Union. They were necessary in order to follow developments in the very model Western constitutional systems at the end of the Century.

2. Croatian experience and political culture

In Croatia, the long decades of monarchy, autocracy and dictatorship resulted in a strong tradition of:

- governmental secrecy,
- selective application of laws,
- disregard of the constitutionally stipulated rights and freedoms,
- absence of popular control and responsibility of power-holders
- extremely low participation of citizenry in the political decision making.

The part of such Croatian tradition and political culture is not to spoil celebrations with criticism and cost – benefit analyses. Since festivities have already begun, I must say that I am and have been very much pro Europe oriented. I think the membership is in the best interest of Croatia. But I still think that we have to learn a lot from our and European

past, in order better to control the future of the complex community of states.

3. The Constitution of 1990

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As a model documents, we were looking up the constitutions of the countries which had themselves passed earlier through the process of the first European democratic transition: Germany and Italy (at the end of the forties), than France and the beginning of a democratic revolution in the seventies: Portugal and Spain. The main international human rights instruments of the time had also been consulted. At the first place the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Constitutional concepts new to the Croatian tradition were introduced during the following processes of accession with the consent and advice, first by the Council of Europe, and later during the process of accession into the European Union.

They were necessary in order to follow developments in the very model Western constitutional systems at the end of the Century.

4. Constitutional design in theory and practice

As usually happens in human history the process has not developed as expected. The theory of constitutional design takes the original constitutional text as the point of departure. It gets adopted in a 'constitutional moment' and after that serves as a ground for development of legislation and jurisprudence, as well as behavior of dignitaries and parliamentarians. This would initiate direct the expectations of common

people who take the Constitution as an important instrument to protect and promote their interests.

As a matter of fact the Constitution has been to the great extent ignored during the process. The substantial changes were introduced predominantly by the adoption of new legislation. Opposite to the theory of constitutional design, the Constitution has subsequently been partially brought into accordance to the legislation. This was the main meaning of the extensive constitutional reform of 2010. But it should be noted that the process of 'structural reforms' never ends in the new as well as the old members, and the Union itself.

This is why we consider this the right moment to look back and around us, and try to evaluate the achievements as well as the prospects, costs and threats in the rapidly changing environment of the European Union.

5. The twofold process of transition

The idea of 'a democratic transition' was widely accepted in the last decade of the 20th Century. It has been asserted that 'the new democracies' would, with the intellectual and material help of their elder and more mature sisters, during the process of some fifteen to twenty years, succeed to abridge the gap in the development of market economy, political democracy and a rule of law which divided them from the developed 'model' countries.

This evident simplification had been widely accepted and preached, being accompanied with great expectations regarding the new world order (even the 'end of history' as it had been previously known). It was obvious that while 'the newcomers' attempted to narrow the gap, 'the elders' would not sit and wait for that to happen. Even further, the process obviously could not have been irreversible. The transition was twofold and far from incremental.

Therefore, Republic of Croatia and its constitutional order have indeed substantially changed during the process of accession.

But the same could be said for the European Union, its legal nature and the dominant theory (of financial federalism), as well as for its constitutional order.

6. The method of negotiations

The very process of negotiations on accession had taken over seven years (2005 – 2011). After the screening of the Croatian legal system, passing through 35 chapters, the negotiators predominantly worked on dictation and transcription of the existing European Union law into the Croatian legal system. Constitutional issues were rarely mentioned by either side. Year after year, on the grounds of new chapters and new insights, further changes to the recently accepted legislation have been required and urgently passed through the parliamentary procedure.

As expected, the crucial problems had been concentrated around the reform of judiciary and fundamental rights (24), justice, freedom and security (25) and a financial responsibility (32).

Since the *acquis communautaire* already encompasses over 100 thousands pages, a little could have actually been a subject of negotiation. Still, year after year the public had an impression that they would never end and the expectations from membership were gradually seriously reduced. Financial crisis of the Union have certainly contributed to that a great deal. On the eve of the full membership, only 20 percent of voters decided to participate in elections for the European parliament on April 14 of this year.

7. Fundamental constitutional choices

The fundamental constitutional choice was made in 2001 and that might be identified as a point of no return when the people of Croatia had decided to join the Union.

At the moment the process of harmonization of the legal system was already under way. Under the auspices of the Council of Europe and the OSCE the country had been screened and advised on the new legislation intensively after the 1995 which is the year the armed conflict ended and 1998 when the peaceful reintegration of the occupied territories was completed. The European Convention on Protection of Human Rights and Fundamental Freedoms had been ratified and in force from 1997.

Could it, than, happened differently? Well, it certainly could have happened earlier. Since, it should be noted, no country in history has passed during such a process of examination and adaptation while joining some confederation or some federal union. I know that Turkey has still to face that challenge.

8. There was a long path towards the EU

As already mentioned, to my knowledge, no new federal unit in history has passed such a strict examination and adaptation, during the process of joining any confederation or confederation. To that respect the European Union might correctly been characterized as a community of a new nature. The key decisions have been made as follows:

2001 Stabilization and association agreement (the point of no return)

2003 Application for membership

2004 Candidate status granted (after the great enlargement)¹

October 2005. Negotiations begin²

2006 screening completed³

¹ At the London Conference on the new Constitution of Europe, June, 2004 there was a candidates section encompassing Croatia, Turkey and Bulgaria.

² N.B. In June the Constitution was rejected on referenda in France and Netherlands. Enlargement under question. Croatian Negotiations had been blocked for a lack of cooperation with the Hague Tribunal (failure to arrest general Gotovina acquitted in 2012)

³ But simultaneously European constitutional problems had put the very decision on enlargement under question. Mrs. Merkel initiated Lisbon Agreement amid the most serious economic crisis and the serious threats to the 'eurozone' and to the Union itself.

9 Dec, 2011. The Agreement on Accession signed⁴

22 January 2012 referendum (66% pro, 33% contra, 43% turnout)⁵

March 2013 monitoring completed⁶

April 14 Elections for the European Parliament⁷

July 1, a full membership expected

9. The substantial constitutional reforms

The prevalent majority of these reforms had been done by the legislation, and only some of them were later brought in accordance to the Constitution. Warnings against neglecting the Constitution were limited to a few constitutional scholars and mostly ignored for the sake of efficiency. Let us look at those reforms:

Minority rights (2002)

Freedom of Information Act (2003)

Anti-discrimination law (2008)

Independent regulators (2006)

Independent National bank (2008)

Independent Accountant Office (2008)

Prevention of the conflict of interest (2011)

Croatian negotiations underwent the Slovenian blocking of negotiations because of the issue of the border at sea

⁴ Followed by the second Slovenian blocking of ratification (bank assets)

⁵ additional tasks
demands for continued monitoring

⁶ EU in crisis ('Do Croats know something we do not?')
Nobel Prize for peace (return to the roots)

⁷ apathy and disappointment (20,5 % turnout, less than 15 % in comparison to the referendum)

Hierarchy of norms (2010)

Direct application of the constitutional provisions /long-lasting problems)

Direct application of the international law (ECHR 1997)

Primacy and supremacy of the European Union Law (2013)

10. Constitutional revisions

Constitutional revisions reflect the needs of a society's progress as well as the priorities of a state policy. Political developments under the first Constitution were neither simple nor linear, so the Constitution has been repeatedly amended and adapted to the exigencies of the times.

The objective of the **first Revision of the Constitution in 1997** was, on the one hand, to strengthen the constitutional guarantees of state independence in response to the dangers the aggression against Croatia brought, and on the other hand, to *clarify the constitutional guarantees of rights and freedoms*, in accordance with the requirements of Croatia's then impending membership in the Council of Europe. It is for these reasons that its provisions were supplemented with a constitutional ban to any initiation of a procedure of associating into alliances if such an association would result in a renewal of "*Balkan interstate bonds of any kind*" (Art.141 of the Constitution, i.e. Art.142 of the consolidated version). In addition, it was further clarified that the constitutional guarantees of equality do not only protect Croatian citizens, but every person within its jurisdiction. Although such a conclusion was obviously implied in the provision that "all shall be equal before the law" (Art.14 of the Constitution), the opinion that it was necessary to clearly and unequivocally state that "everyone" should enjoy the rights and freedoms guaranteed by the Croatian Constitution won in the end.

The objective of the **profound constitutional reform of 2000** was to strengthen the constitutional guarantees of democratic development and parliamentary democracy, as well as to prevent the concentration of

authority and decision-making power within the institution of the President. For this reason, *the whole system of government* was altered in order to check and supervise the President of the Republic within the model of *parliamentary government*⁸.

The revision of 2001 was, in fact, a belated supplement to the reform made in 2000, caused by the difficulties of adjusting the various positions within the ruling coalition. The most important change was the abolition of the House of Counties, and therefore of the institution of a unicameral Croatian Parliament.

Finally, the objective of the **2010 constitutional revision** was to create and strengthen the constitutional basis for Croatia's full membership in the European Union, as part of its process of fulfilling the strategic goals of joining the Euro-Atlantic integrations which were proclaimed in the Historical Foundations as early as 1990 at the time of the adoption of the Constitution. All these amendments have preserved the baseline for the constitutional order: democracy, human rights and the rule of law, which are the fundamental values of the Republic of Croatia in the context of European and international integrations. The purpose of this short overview is to facilitate orientation within the text⁹.

11. "European" constitutional revision of the year 2010

Constitutional Revision of 16 June 2010¹⁰

The SET OF IMPORTANT constitutional amendments that were adopted, promulgated and entered into force on 16 July 2010 pursuant to

⁸ See: Veljko Mratović, Branko Smerdel, Arsen Bačić, Jadranko Crnić, Nikola Filipović and Zvonimir Lauc: *Expert Grounds for a Proposal to Amend the Constitution*, *Zbornik Pravnog fakulteta u Zagrebu* (Collected Papers of the Zagreb Faculty of Law), 50 (5) 393-450 (2000).

⁹ For more see: Branko Smerdel, Smiljko Sokol: *Ustavno pravo* (Constitutional Law), *Narodne Novine*, Zagreb, 2009; Branko Smerdel, *Ustavne promjene 2010. godine: problemi formulacije, interpretacije i implementacije* (Constitutional amendments of 2010: the issues of formulation, interpretation and implementation), *Informator* No. 1-3 of 14 July 2010.

¹⁰ Official Gazette No. 76 of 18 July 2010. **NB**: the framers of the Constitution again de-

a decision of the Croatian Parliament can be classified into the following categories:

1 Amendments required by the accession negotiations with the European Union

The amendments were adopted at the request of European negotiators, in order to facilitate the accession to the EU: they concern the constitutional status of the Central Bank, the determination of the constitutional status of the State Auditing Office, the abandonment of the principle of non-extradition of own citizens, as well as the adjustment of the decision-making procedure to Croatia's membership in the NATO (Art.7).

A part of these amendments have fully realized their purpose, since this is precisely what was demanded during the accession negotiations: that they should be entered into the Constitution or, more accurately, that the constitutional provisions on the Central Bank and the State Auditing Office should be harmonized with the current EU law.

The abandonment of the principle of non-extradition of own citizens to foreign states is a significant amendment (Art.9). The application of the European arrest warrant has been delayed until Croatia becomes a full member of the European Union, although the negotiators have demanded its direct application even before reaching full membership. The constitutional position of the Central Bank (Art.53) is made more precise, and the position of the State Auditing Office (Art.54) is constitutionally regulated. In order to abolish constitutional impediments to membership, provisions regulating decision-making at association and disassociation referenda have been altered, to which topic we will return later (Art.142).

cided (like in 2001) to alter the numeration of constitutional articles. In the present text we always cite the new constitutional numeration of articles, using the consolidated version (Official Gazette No. 85/10), except when we explicitly point to the old numeration.

2 Amendments required for adaptation of the legal system to (a future) membership in the EU

This important new Title VIII of the Constitution named “The European Union” (Arts.143-146 of the Constitution) was based on the demands of the legal profession and the experience of other members of the European Union, particularly those undergoing transition and will be applied in full only upon reaching full membership¹¹. It sets forth: the legal basis for membership and the transfer of constitutional powers to the Union’s institutions; the participation of governmental bodies in decision-making within the institutions of the European Union; the supremacy of the European Union’s *acquis communautaire* over the Croatian legal system; and the rights of the European Union citizens within the Republic of Croatia.

This Title will enter into force on the day Croatia becomes a full member of the Union¹².

3 Amendments declaring intentions to correct injustices

These amendments encompass the changes to the text of the Historical Foundations, as well as the (potentially) very meaningful abolition of the statute of limitations for certain criminal offences committed during the Homeland War (the new sec.4 of Art.31 of the Constitution). The inclusion of a list of 22 national minorities in the Historical Foundations text, as well as the formulation on how the Croatian “nation and its defenders” have defended the state “in a justified, legitimate, defensive Homeland War for the liberation (1991-1995)” serves, considering that the Preamble is not and cannot be normative, to declare certain good

¹¹ The basic concept was drafted in February and March of 2009 by a working group of professors: leader S. Rodin, members: A. Bačić, Z. Lauc, R. Podolnjak and B. Smerdel. It was accepted by the Government’s Working Group in the session of 3 September 2009. Within the framework of a “twinning” project, the question of the national parliament’s role was elaborated by Hungarian experts in cooperation with Vesna Pusić, President of the Observation of the Accession Negotiations Committee of the Croatian Parliament.

¹² Art.152 of the Constitution, as well as the provisions of Art.133. Sec.4, concerning electoral rights of European citizens and of Art.9. Sec.2. regulating the European arrest warrant.

intentions: to correct the mistakes committed in the '90s. In our opinion, abolishing the statute of limitations for wartime profiteering and crimes committed in the process of privatization of property is of the same significance, since the current formulation of Art.31 is inapplicable without thorough elaboration in a constitutional law¹³.

4 Amendments to the political decision-making system

These are very serious changes, answering a number of old (as well as new) outstanding political issues. They are:

4.1. Positive discrimination of national minorities

An additional voting right is guaranteed to members of the national minorities that make up less than 1.5% of the population, and a guarantee of three seats in the Croatian Parliament is legalized for the minorities whose numbers are greater than the aforementioned percentage (the Serb minority). This amendment, based on sec.3 of Art.15 of the Constitution, was introduced by urgent amendments of the Constitutional Law on the Rights of National Minorities¹⁴, in parallel with the constitutional amendments.¹⁵

4.2. Voting of Croatian citizens residing in foreign countries (Art.45 of the Constitution)

Croatian citizens who are abroad on the day of the elections may vote in diplomatic and consular offices of the Republic of Croatia. Instead of the "non-fixed quota" applied so far, making the number of their

¹³ As early as in 1997 and 2000, as well as on this occasion, I have advocated that the Historical Foundations, as a historical declaration comparable to the American Declaration of Independence, be left to history. However, the enormous symbolic and therefore political significance of the Preamble provoked successive interventions, including in the constitutional amendments of 2010.

¹⁴ Official Gazette No. 80/10; Constitutional Law on Amendments and Modifications of the Constitutional Law on the Rights of National Minorities (155/02 and 80/10). Incidentally, sec.3 of Art.15 was included in the 2001 Revision of the Constitution.

¹⁵ Declared unconstitutional and invalidated by the decision of the Constitutional Court in June 2011.

representatives contingent upon voter turnout, they are now guaranteed three seats in the Croatian Parliament, regardless of voter turnout.

4.3. Decision-making at referenda

The conditions for the decision-making at referenda have been significantly alleviated by the amendments to the previous Arts.86 and 141 (in the consolidated version published in Official Gazette No. 85/10, these are now Arts.87 and 142). The referendum decisions will be made by a majority of voters who turn out (Arts.87 and 142). In this way, the strict provision of Art.86 providing that a majority of all voters take part in the referendum, i.e. that a majority of all voters should vote for a decision on association or disassociation (sec.4 of Art.141), has been abandoned since it contained an impossible requirement.

4.4. Decision-making in the Croatian Parliament

In the future, a majority of all representatives of the Croatian Parliament will decide on the budget (Art.91), and a two-thirds majority of all representatives will be necessary to elect the judges of the Constitutional Court (Art.126). The roles of the Croatian Parliament and of the Government regarding their future relations of joint consideration and adoption of political decisions within the bodies of the European Union have also been determined (Art.144).

5 Amendments aimed at the reform of the judiciary

The amendments lay the foundations for a substantial reform of the judiciary and of the judges' profession. The status of judges and the process of their election have been altered, the obligation to re-appoint judges after the first five years on the bench is abolished, and judgeship has become personal and permanent. The purview of the Supreme Court as well as the new authorities of its President have been additionally specified, and the composition and the competences of the National Judicial Council, as well as of the Office of the Public Prosecutor and the National Council of the Public Prosecution Service, have been altered¹⁶.

¹⁶ The purpose of the reform was stated by Minister Ivan Šimonović the following way: „A judge shall be appointed and advance within the judiciary according to objective and

These extremely significant changes of long-term strategic importance for the development of the Croatian judiciary have not been sufficiently discussed in the public¹⁷.

Amendments strengthening human rights and fundamental freedoms

Articles 38 (right of free access to information), 66 (right to free education) and 93 (the People's Ombudsman) have been amended. Certain important improvements to the right of free access to information have been added. However, an opportunity to strengthen the protective mechanisms for assessing whether public interest was strong enough to override the right of access to information has not been used¹⁸.

10. The Importance of the Constitution of the European Croatia

The process of European integration and thus the European Union has been a creation of the best European minds who had dominated political scene in the most precarious time. These people, who had been unable to prevent two disastrous wars during the one generation, have undertaken the task to create an institutional structure which would ensure "peace and prosperity". In that respect the European Union has historically been "the success story" despite all the crises it had passed, as well as the current one which seems to have threatened the very survival of the community.

transparent criteria"

¹⁷ The proposals on how to resolve the relationship between the judiciary and the legislature have drawn the Judges' Association's special attention. The Association refused the proposal that the Supreme Court should report to the Croatian Parliament annually, as being „contrary to the principle of independence of the judiciary“. In our opinion, it seems undeniable that, as the body „vested with the legislative power“, the Croatian Parliament has and should have the right to demand every possible information on the functioning of governmental bodies, so as to be able to perform its legislative activity in a satisfactory manner. This was a solution adopted in the United States of America a long time ago.

¹⁸ However, there is no reason that this should not be done through the amendments and modifications of the Free Access to Information Act. The instances where the statutory obligation of the governmental and self-government bodies to release information have been ignored underline the need for an efficient means of protecting this right.

The process of “a democratic transition” has brought Croatia into the membership of the compound community of states which has grown from the initial agreements on economic cooperation. This definitely changes the principles, elements, and the whole institutional structure of the Croatian constitutional law. But it also opens new issues of constitutionality within a complex community of states. Let me try to illustrate that by two recent Croatian instances.

1) Regulating conflict of interest

On November 7, 2012, the Constitutional Court struck down the major parts of the Prevention of Conflict of Interest Act of 2011, because it had seriously violated the fundamental constitutional principles, such as separation of powers, as well as certain fundamental constitutional rights.

The notion of a conflict of interest has been new to the traditional and parochial Croatian political culture. The history of legislating on the matter demonstrated that on a number of occasions during the course of twenty years. Politics has traditionally been considered an activity in which the actors should help themselves, as well as their relatives and friends. Until today, the concept that the highest state dignitaries should enjoy lesser legal protection than the common citizens, have not taken serious roots. In addition, the spoils system still prevails in alternation of government on central and local levels.

Amid the frenzy to fulfill the expectations the Parliament had adopted the new Prevention of Conflicts of Interest Act by which a Commission had to be established by the majority parliamentary vote, with the authority to oversight the enumerated officials regarding the potential conflict of interest.

The problem was that it had the combination of the police, judicial and constitutional authority over all the supreme officials of the state without the serious remedies provided.

It has been noted in literature that such bodies could be abused as lethal means in political struggles. The final result of the experiment is that the new Commission lacks most of the serious competences such bodies should have in democratic systems.

But the most important caveat should be that the Constitution must not be neglected and should be reestablished as the source of ultimate authority as well as of the delegation of such an authority.

2) Taking social rights seriously

The Constitutional Court of Portugal on April 2, 2013 struck down the governmental budget proposal providing for the austerity measures, which were negotiated with the European Commission. Apparently it has done so in defense of the constitutional concept of social state.

This decision demonstrates clearly that the development of the leaders of the European Union have, under the pressure of crisis, already discarded some of the fundamental values of its constitutional order, at the first place the respect for the national constitutions and, second, the respect to the European Social Charter. Without any inclination to dramatize, I would warn again against that. Otherwise we would face the hardest choice: whether to reform the European or to abandon the national constitutional orders.