

## Chapter 10

# **CROATIAN ACCESSION TO THE EUROPEAN UNION: THE TRANSFORMATION OF THE LEGAL SYSTEM**

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## **ABSTRACT**

Croatian membership in the EU is subject to the fulfilment of the legal and political obligations laid down in, among other places, the SAA, the Stability and Association Agreement. The implementation of the SAA depends on the definition of its position in the constitutional system of the Republic of Croatia, including the ability for its provisions to be directly applied in EU and in Croatian courts, the legal status of the bodies provided for in the SAA, and the legal position and legal standing of the decisions taken by these bodies. The implementation of constitutional changes is necessary for full membership of the EU, and some changes are also necessary even for implementation of the SAA. These are provisions that provide the legal basis for membership in the EU, including the definition of the manner of making use of state sovereignty, provisions that define in detail the legal status of international law and European primary and secondary law in the internal legal system of the EU, and provisions that adapt the constitutional organisation of the Republic of Croatia to the conditions of associate or full membership of the EU, optimise the functions of the institutions of state authority that will have to work in new conditions. In an evaluation of the fulfilment of the conditions for membership in the

EU, the criterion for evaluation of the extent to which the legal system is adjusted will not be only the contents of the legal standards, but also the political, economic and social matters that are governed by these legal standards.

**Key words:**

international law, constitutional law, direct effect, sovereignty, legal interpretation, legal monism, legal dualism, division of power, courts, legal culture

## **INTRODUCTION AND METHODOLOGICAL REMARKS**

It is an almost impossible task to make a diagnosis of the legal system of some country and compare it with the legal system of the EU. Looked at from a methodological point of view, such an effort is pointless, and could possibly be useful only as an exercise in comparative law. At the level of standards, the demands that the legal system of every potential member state must meet are quite clear. Applicant countries must unconditionally take on board the *acquis communautaire*, the legal patrimony, that is, the totality of all the legal standards of the legal system of the EU. Comparing any two legal systems, that of a given country and that of the EU, a meticulous investigator might without any doubt come to some knowledge about the similarities or differences in given legal rules, but the results of such a comparative approach would have extremely little to say about the capacity of the state the legal system of which is at issue to become a member of the EU. And how much the legal rules, both national and supranational, correspond to the social relationships that the applicant state would have to put in order is a completely different question.

A large number of the conditions that applicant states have to fulfil on the road to full integration into the EU are not to do with legal standards, but rather relate to economics and politics. Law, then, as discipline, is an instrument for accomplishing them. The characteristics of a legal system, the features of a legal culture and the substance of legal institutes can certainly help or harm the social and economic processes, but in and of themselves they are not criteria according to which it is possible to judge of the quality of a candidacy for EU membership.

For example, it is possible for the UK to fulfil the criteria for membership in spite of the fact that its legal system traditionally has no codex of fundamental rights and liberties, while some applicant country will still not meet these criteria, in spite of having comprehensive legislative regulation of this matter. From this example it should be clear that through no analysis of legal standards will we be able to determine the level of preparedness of a given country for EU membership, rather it is necessary to judge the extent to which criteria for membership are fulfilled in a material sense, a precondition for which is the distinction of the letter of the law and reality. Here it is necessary to make an important demarcation. Some of the fundamental requirements for the rule of law such as the principle of the division of powers, the democratic system, multi-party politics and the independence of the judiciary constitute the institutional context for a legal analysis and the regulation of the standards, and they have to be taken into consideration, staying all the way within legal methods. As, commenting on the distinction between the provisions of the law and the political, Harvard professor David Kennedy observed, American legal theory does not start with the founding fathers of the American Constitution, Madison, Hamilton and Jay, but with Oliver Wendell Holmes, who did not deal with the architecture of political but the analysis of legal institutes (Holmes: 1996-1997). Similarly, it could be said that the legal theory of the European Community did not start with the ideological founders of the EU such as Ernst B. Haas or Jean Monnet, but probably with Joseph Weiler, who was among the first to bring out the double aspect of supranationalist thinking, the purely legal and the political (Weiler, 1982).

The conceptual distinction of the regulatory and political aspects is relevant for the current analysis, the subject of which should be defined not only as an estimate of the harmonisation of the political institutions and/or legal standards of Croatian with the those of European law, but also as an analysis of the working of the legal standards in the political, social and economic context of rapprochement with the EU. Here it is of minor importance whether some Croatian legal institute governs a given relationship in law in the same way as or in a different way from that in the EU; the primary question is whether the given legal handling of a matter leads to real fulfilment of the criteria for membership. This does not mean that I think a comparison of the legal solutions and the fulfilment of the formal criteria are not relevant for a judgement of the adjustment of a national legal system to the European system. Precisely the opposite, the formal criteria in the law are often topographical signs on the way towards full mem-

bership, and without their fulfilment the process of convergence cannot possibly be continued. However, their fulfilment is only a necessary, and never a sufficient condition, while for the success of the integration process it is necessary to create an appropriate political, economic and social reality. For this, putting the legal regulations into the political, economic and social context is one of the key tasks of Croatian legal theory and practice.

In the light of these introductory remarks it is necessary then to restrict the goal of this work. First of all there will be a review of the formal steps that have to be taken on the road towards full membership in the EU, then a determination of the current Croatian position, and a comparison of this position with that of the applicant states. After that, I shall identify the contextual restrictions that could have some impact on the speed of rapprochement with the EU, and put forward recommendations for laws that have to be taken at the constitutional level and are necessary for a rapid adjustment of Croatia to standards for membership in the EU.

## THE ROAD TO WELLVILLE

The process of converging on the EU could be illustrated by the title of T. C. Boyle's novel *The Road to Wellville*, which speaks of the therapeutic philosophy of the inventor of cornflakes Mr Kellogg, according to whom the route to health and happiness leads through a thorough purging of the organism. It is through such a purge that the applicant states have to pass on the road to full membership.

In principle, every European country can become a member of the EU. The making of an accession decision is a matter of a unanimous political decision of the Council of Ministers and a decision of the EP pursuant to Article 49 of the EU Treaty (EUT below), which has to be preceded by fulfilment of the conditions laid down in Article 6(1) of the EUT. Article 49 of the ET says "Every European state that respects the principles prescribed in Article 6(1) can seek membership in the Union. It shall submit its application to the Council, which shall make a decision unanimously, after which it takes counsel with the Commission, and after this obtains the assent of the European Parliament, which shall make a decision with the absolute majority of the votes of its members". According to Article 6(1) of the EUT "The Union is based on the principles of liberty, democracy, respect for

human rights and fundamental liberties, and the rule of law, which are principles common to all states members”.

These conditions were additionally defined by the conclusions of the European Council of Copenhagen, according to which a state applying for membership in the Union must meet the criteria of democracy, the rule of law, respect for human rights and the protection of minorities, have a functioning market economy that can withstand the comparative pressure in the EU, and the ability to take on the obligations of membership, including respect for the criteria of political, economic and monetary union (Bull. European Commission 6-1992, Item I.13). In other words, between the point of departure – the fact that a given state is from a geographical point of view part of the European continent – and the act of being received into membership of the EU, it is necessary to pass a route that in the briefest outline could be described as a process of adjustment of governmental institutions and of economic disarmament, i.e., the gradual abolition of trade barriers, such as customs, quotas and measures with the same effect, accompanied by the reception of a large quantity, or rather, the totality, of the legal regulations of European law known as the *acquis communautaire*.

The EU has undergone several waves of enlargement, by which the original number of six members has been expanded to the current fifteen; a new wave of enlargement to the countries of CEE is expected in the near future. Thus the original states members – Belgium, France, Italy, Luxembourg, the Netherlands and Germany – were joined in 1973 by the UK, Eire and Denmark, in 1981 by Greece, by Spain and Portugal in 1986, and by Sweden, Finland and Austria in 1995. The current applicant countries are Lithuania, Latvia, Estonia, Poland, CR, Slovakia, Hungary, Slovenia, Bulgaria, Romania, Cyprus, Malta and Turkey. Experience from previous enlargements shows the diversity of the processes that have preceded the act of enlargement, and the diversity in the natures of the treaty relations between the Union and the countries that have joined it. The formal names of these legal instruments regulating the pre-accession period are no indicator of the final outcome of the integration process and are different for each individual example. The free trade agreements between the EU and Spain and Portugal, which mainly governed commercial relations, and which hence in scope and contents were narrower than the later association agreements, brought these countries to membership in the EU. The association agreement between the European Community and Turkey is still not totally put into practice, in spite of the fact it was

signed way back in 1963. The more recent practice of the Union shows that the precondition for joining is the signing of an association agreement, which, according to its material characteristics, sets up a free trade zone, regulating not only trade relations but covering a much wider set of material as well, involves the associated country in the accomplishment of the objectives of the Union, sets up common institutions that have legislative authority, like the Association Council; this agreement is concluded for an indefinite period of time. Turkey applied to be received as a member of the EU in 1987. In the preamble to the Decision on the Accession Partnership Decision it says: “The European Council held in Helsinki announced that Turkey is an applicant state that is predetermined to join the Union pursuant to the same criteria that relate to other applicant countries and that, developing the existing European strategy, Turkey, like the other applicant states, will have benefits from the *pre-accession strategy* that will encourage and support its reforms”. As Smith and Herzog point out (Konstantinidis, ed: 1996, 51, 52):

*“...association means a close and lasting cooperation with the Community. Mere interest in financial or trade arrangements that leave treaties about consultations to one side is not enough. Such treaties include only the exchange of reciprocal benefits, while association implies common objectives and a common institutional framework”.*

The performance of the obligations assumed via an association agreement is accompanied by reports from the European Commission and the Council. These reports are of crucial importance for an estimation of the outcome of the next step on the road to full membership of the Union – the submission of an application by an associated state for reception into full membership. After the submission of this application the next important phase is constituted by the *accession partnership*, in a formal sense, a decision of the EU Council defining in more detail the role of the EU in the process of the integration of the applicant country. The concept of accession partnership was worked out at a meeting of the European Council in Luxembourg in December 1997, when it was decided that this instrument was to be the key element of reinforced pre-accession strategy through which, within a united framework, all forms of aid to applicant countries would be mobilised in order to direct this aid towards the specific needs of each one of them.

The first accession partnerships were accepted in March 1998 pursuant to Article 235, today Article 308, of the European Community Treaty (ECT), which stipulates that “if during the work of the common market the action of the Community is necessary in order to achieve one of the objectives of the Community, and this Treaty does not provide for the necessary authorities, the Council shall, working unanimously at the recommendation of the Commission and after consultation with the European Parliament, undertake the appropriate measures”. The application of this provision indicates that there are an insufficient number of treaty provisions governing accession to the Union.

The third phase in the process of the accession of applicant states to the Union covers amendments to the founding treaty, that is, constitutional changes within the Union itself, in order to make possible the full participation of the representatives of the new states members in its institutions, and in order to ensure internal cohesion in the Union (Luxembourg Council Conclusions, 1997). After a unanimous decision of the Council and the assent of the EP, an accession treaty is concluded with the applicant country. Such treaties have the significance of constitutional amendments in the legal system of the EU, and have to be ratified by the institutions of the EU and the national parliaments of all the states members.

Because of the large number of actors taking part in the association process, all of whom have the power of veto, it is impossible to predict the dynamics of the integration process. Looked at institutionally, this dynamics can be affected to lesser or greater extent by the Commission, the Council, the EP and every single member state. After the positive outcome of the referendum recently held in Ireland, which made possible ratification of the Treaty of Nice, the process of enlargement currently depends on the view of Greece about the integration of the Republic of Cyprus. As is well known, part of Cyprus is controlled by Turkish forces. Currently, the position of the Greek government is that Cyprus can become an EU member only as a single and united state, and declares that it is ready to use its right of veto on the reception of other candidates if Cyprus is not accepted. In the sequel of this paper we shall not deal with political considerations, rather lay out the political problems related to the harmonisation of Croatian law and the legal system of the EU. In so doing, we shall first of all examine the current position occupied by Croatia on the map of the accession process, and state the main problems that will have to be addressed.

## **CROATIA AND THE EUROPEAN UNION: THE EXISTING STATE OF AFFAIRS**

Croatia signed its SAA with the EU and its states members on 29 October 2001. Through this agreement, Croatia obtained the status of potential candidate or applicant for membership in the EU. Before Croatia, the FYR of Macedonia signed a similar agreement with the EU, on 9 April 2001. For it to come into force, the Croatian SAA has to be ratified by the Croatian Parliament, the EP and the parliaments of all the states members. So far it has been ratified by the Croatian Parliament (5 December 2001), the EP (12 December 2001), Austria (26 February 2002), Ireland (17 April 2002) and Denmark (30 April 2002). In the meantime, until the SAA really comes into force, on 28 January 2002 the Council accepted an Interim Agreement which has given effect to the economic provisions of the Agreement.<sup>1</sup>

The first European Commission report about the process of stabilisation and association in Croatia was published on 4 April 2002 (SEC/2002/341); this can serve as the point of departure for an estimate of the progress of Croatia and a comparison of the country with the applicant countries. It is possible to discern in the report the importance of satisfying the political criteria, for it is on the fulfilment of them that the evaluation of the implementation of the whole process depends. Three main political conditions relate to the reinforcement of democracy and the rule of law, respect for human rights and protection of minorities, and to regional cooperation. As stated in the report, democratic institutions in Croatia function on the whole well. A particular problem is stated to be the judiciary, which “suffers from serious problems of organisation, procedural inefficiency, lack of expertise and the excessive length of procedures. Radical reforms are needed, and no real progress has been made. This weakness directly affects the accomplishment of the rule of law, which remains problematic and uneven” (Item 2.1., p. 4). Particular emphasis is placed on the worrying tendency for politically sensitive court decisions not to be implemented, and the execution of them is stated as a priority (Item 2.1.2., p. 6).

The priorities that need to be settled in the 12 month period after the publication of the report cover:

- redefinition of the concept of the expatriate community in electoral legislation and a proportional and appropriate representation for minorities;



- reform of the judiciary, including the settling of delayed cases, reform of legal education and training of judges and state attorneys;
- complete respect for human rights, including the passing of a constitutional law for the protection of minorities;
- legal definition of the framework of Croatian Radio Television and its conversion into an independent public service;
- reinforcement of regional cooperation;
- reinforcement of cooperation with the ICTY in The Hague and the fulfilment of existing obligations;
- acceleration of the return of property to refugees (Item 3.1, p. 14).

For the purpose of executing the obligations assumed in the SAA, the government of the EU accepted the Association Implementation Plan, according to which it publishes monthly reports. The last report was published in June 2002, and according to the latest figures, of the 128 measures that have to be carried out in the period given, 65 have been carried out. Of these 36 laws planned to be passed, 12 have not so far seen the light.<sup>ii</sup> Among the laws planned but not so far passed are the exceptionally important proposals through which protection of minorities, reform of the judiciary, public television, government of the system of state aid and consumer protection should be handled (Adjustments, *passim*).

If we compare the Croatian reform agenda with the current obligations of some of the applicant countries, we can see that some of them have to face similar reform problems. For example, in the area of meeting the political criteria, Slovenia has to carry out a reform of the civil service, which means the passage of a law concerning civil servants, and it has to repair the situation in the justice system, in particular by reducing the number of unsettled cases (*Report Slovenia*, 2001). The state of affairs in the judiciary, particularly in the Supreme Court, is one of the reform priorities of Hungary too, alongside which is mentioned the political obligation to improve the position of the Romany (*Proposal Hungary*). The CR, alongside the obligation to reform the judiciary and the civil service is also bound to improve the status of the Romany minority and to control the work of the police (*Proposal CZ Republic*).

However, what definitely needs stressing is that the harmonisation efforts of the individual applicant states are doubly conditioned: by the dynamics of the political, economic and legal reform processes, and by the participation of the EU in their implementation. In this con-

text, Croatia is limited by the range of the objectives and purposes of the SAA and by the political will of the EU to take an active part in and help the integration process. In this the political criteria are a signal that can speed up or slow down the integration process. Although the problems of the candidate states, like those described, are essentially similar to those faced by Croatia, it is the political evaluation of the EU about the satisfactory or unsatisfactory manner in which the criteria stated are addressed that is crucial.

## LEGAL PROBLEMS AND CONTEXTUAL LIMITATIONS

The application of the SAA depends on the implementation of numerous political and legal activities defined in detail in the Implementation Plan, and can on the whole be defined as international political obligations. The implementation of these obligations depends on the effectiveness of the executive and the civil service. From a legal point of view, the application of the Agreement depends upon:

- the legal position of the SAA in the constitutional systems of the EU and the Republic of Croatia, including the possibility of applying the provisions of the SAA directly before the courts in the EU and in Croatia;
- the legal status of the bodies provided for in the Agreement;
- the legal position and legal force of the decisions that these bodies make.

With respect to the way these factors are interwoven, they will be considered in their common context.

The legal system of the law of the European Community is different from the legal system of international law. As far back as 1963 the European Court in Luxembourg adopted the stance that the legal position of the then European Community constituted a “new legal order” (*Van Gend en Loos*). The evolution of the legal system of European law has in the meantime progressed to such an extent that today one talks of the “legal system of the EU”, of course, in the sense of the constitutional system of the EU as international organisation. According to practice of the European Court, association agreements are an integral part of the legal order of the Community, are applied directly, create rights and obligations for natural and legal entities and the courts of the states members are

bound to accord legal effect to the provisions (*Haegeman*). Although there are certain differences in the interpretation of the legal rules of an association agreement and of the primary European law (*Polydor*), there is no doubt that the provisions of an association agreement do have the status that, from the point of view of the EU, is equivalent and equal to that of primary European law. In the applicant states the provisions of association agreements are on the whole interpreted like the provisions of other treaties, and at the moment these countries actually accede to the EU, the legal regime governed by these contracts will be modified.

Looked at comparatively, there is nothing quite like EU accession and the legal integration that is currently under way. Certain historical similarities can be found in the US, however. For example, the debate that was once carried on between the federalists and the anti-federalists in connection with the concept of states' rights does have a certain importance for the constitutional debate in the applicant countries. The CEE countries have no precedents in their legal practice for their association agreements with the EU. For this reason it is not surprising that their legal status in the national legal systems is governed by the same constitutional provisions that govern the legal status of treaties in general. This lack of differentiation also marks, among other things, the uncertain status of the legal regulations of international law in the legal systems of these countries. For instance, the Croatian Constitution (Article 140) stipulates a monistic principle, but the bodies of government have a problem in abandoning the previous dualistic practice (Rodin, 1995; 783).

Irrespective of whether this kind of approach derives from the legal tradition and culture of socialist law that promoted a dualistic approach in the relations of national and international law (Balas) or from the idea that the integration process can be mastered by the application of existing constitutional standards, as in Italy, which considered that existing constitutional provisions were sufficient for the ratification of Maastricht, most transitional countries have been faced with a common problem that could be described as a gap between the demands of the integration process and the rigidity of their constitutional models and traditions. In other words, while the constitutional frameworks of EU states members have adapted to the relations of interdependence and gone through a process termed a constitutional revolution by Joseph Weiler (Weiler, 1991; 2403) the legal and constitutional systems of the applicant countries, or potential applicants, have remained more or less unchanged and thus are insensitive to the demands that are being made by European integration.

For all the states that entered into the type of treaty relationship with the EU described, the association agreement has meant much more than any other treaty in international law. In terms of their complexity and the nature of the obligations assumed, association agreements are a draft for an all-embracing social, economic and legal transformation, and hence permeate the totality of the social reality of the states parties. This is confirmed by Article 69 of the SAA between the EU and the Republic of Croatia, which is an example of a harmonisation clause typical of this kind of treaty or agreement: “The parties ascribe important to the harmonisation of existing Croatian legislation with the legislation of the Community. Croatia will endeavour to ensure the gradual harmonisation of existing laws and any future legislation with the legal patrimony of the Community (the *acquis*).” In the area of law, the obligations assumed pursuant to the SAA include the obligation to carry out complex and radical constitutional and legal reforms. As Chris Patten recently said, speaking of SAAs in general: “These treaties are legally binding agreements. They prescribe rights and transfer rights to the states they refer to. These are strict agreements, because they include the fundamental principles that are the foundation for membership in the EU – free trade with the EU and the associated disciplines, the principles of market competition and the rules about state aid, rights of intellectual property and so on”.<sup>iii</sup>

Apart from the need for the fulfilment of the material provisions of the association agreement, it is also necessary to carry out a reform to be able to create an interface between national and European law, to open up the legal systems of the application countries for the application of the supranational, European legal sources. This kind of interface should give legal definition to the status of European law in the national legal system, and allow for direct implantation of Community law and “association law”, i.e., law that is based directly or indirectly on the SAA. There are at least two additional elements of such an interface, which we shall not embark on in detail here. These are the constitutional basis for association with/accession to the EU, and an appropriate and effective national institutional framework making it possible to run an effective integration policy, which implies the need to create a pro-Europe consensus to facilitate the accomplishment of the other aims stated. Applicant countries have addressed these problems in different ways, and there are considerable differences in the provisions concerning the status of treaties in their legal systems.

In Bulgaria, for instance, ratified treaties that are in force are equivalent to national regulations and have a legal force above statutory law (Constitution, Article 5). In the CR, treaties that govern the material of human rights are “*immediately binding*” and have a force above statute. Thus Article 10 of the CR Constitution states: “Published treaties the ratification of which has been accepted by Parliament and which bind the CR are part of the legal system; if the treaty is different from statute, then the treaty must be applied” (395.2001 Sb [Official Gazette]). The Estonian Constitution (Article 3) and the Hungarian Constitution (article 7) speak only of general rules of international law, but the Hungarian in addition defines the obligation to harmonise national law with international obligations. Article 9 of the Polish Constitution stipulates the obligation to respect the obligatory rules of international law, and Article 87 says that ratified treaties are a source of national law. The Slovak Constitution, Article 7 (5) prescribes the derogatory power of directly applicable treaties vis-à-vis the usual laws: “Treaties concerning human rights and fundamental liberties, treaties that do not require implementation pursuant to the law, and treaties that directly prescribe the rights and obligations of natural and legal entities, and which have been ratified and announced in a manner prescribed by law, have priority over Slovak laws.” The Slovene Constitution (Article 8) affords perhaps the most comprehensive solution for the application of treaties, which, once ratified, may be implemented directly. The Croatian and Macedonian constitutions (Articles 140 and 118 respectively) say that ratified treaties constitute part of the national legal system and supra-statutory legal force is guaranteed for them. However, these constitutions say nothing of the direct implementation of treaties. Nevertheless, the possibility of the direct application of treaties does exist in Croatia, and sometimes the Croatian courts will allow them to have immediate effect.

Such a diversity of constitutional solutions should not be surprising in the light of the fact that even within the EU the states members have various different approaches to the status of the legal regulations of international law. Thus the UK accepts a pronouncedly dualistic concept, while the Netherlands is an example of legal monism. Nevertheless, this diversity of approach does not have any effect on the final outcome, i.e., on allowing the legal rules of European law direct effect. As for the applicant states, the lack of constitutional standards to regulate the effects of European law shows that most applicant or associate states do not differentiate between association agreements and the rest of international law.

In a word, from the point of view of constitutional law, and in the absence of any specific constitutional provisions specifically to govern association agreements, the interpretive paradigms that are applicable to these associations are the same as those that are applied to other international law agreements, and their direct application is not automatic, that is, they do not have a *self-executing* character, irrespective of the understanding of the European Court, which the courts of the associated countries are not obliged to consider. Although there is some technical justification in this approach, it can lead to difficulties in the application of association agreements and the process of the harmonisation of national with European law. We will mention the instance of only one associated country that does not admit *self-executing* status to the association agreement, and yet in joining the EU will take on the obligation to ascribe this status to all other agreements that the EU has previously entered into with third states. Even if this does not technically create a problem, the very change of the interpretive paradigm will require a certain adjustment. Although the absence of express provisions about the position of an association agreement in the national constitutions does not prevent national courts from implementing them, the fact that they do not exist must certainly discourage the courts from applying them. As Cremona puts it (Craig and de Burca. 1999; 143): the relation between the legal systems is a matter of the legal system of the Community, irrespective of the views that the other contractual part has; bona fide execution of a contract in the sense of international law is not conditional upon the legal mechanisms that the parties might choose to accomplish its objectives. For this reason, as long as both sides fulfil their obligations, the fact that one party ascribes direct application to the provisions of the treaty, and the second does not, will not affect the reciprocity of the treaty.

The problem of the direct implementation of the laws of the association treaties is exacerbated by the fact that the association agreements invoke the implementation of the law of the European Community in their application. For example, Article 63(2) of the Hungarian association agreement says that every practice that is in contravention of the provisions governing market competition “*shall be judged pursuant to the criteria that derive from the application of articles 85 and 86 of the Treaty [of Rome]*”. There is similar diction in other association agreements, and it is taken over in the stabilisation and association agreements. Thus Article 70(2) of the EU and Croatian SAA says: “Every action in contravention of this Article shall be judged pursuant

to the criteria that derive from the application of the rules about market competition in the Community, especially articles 81, 82, 86 and 87 of the EUT and interpretive instruments adopted by the institutions of the Community". This wording shows that the associated countries have not only assumed the obligation adopting the rules of the European Community about market competition, but have also committed themselves to interpreting these rules according to the way the community itself interprets them. In this way elements of the *acquis* are being brought into the legal relationship that in the associated countries is understood as a relationship of international law.

When the Constitutional Court of Hungary had to face these problems, it concluded that the "principle of *favor conventionis* will be applied to the limits up to which such a kind of interpretation of national law in line with international would be understood as a breach of the Hungarian Constitution" (Volkai, 1999). Thus the Hungarian Constitutional Court has adopted a way of thinking similar to that from the previous constitutional practice of the constitutional courts of some of the member countries, especially of Italy, in the *Frontini* case, or Germany in the *Maastricht* cause. The decision of the Hungarian Constitutional Court is explained in greater detail than any other similar decision in the associated countries, i.e., a decision addressing the relationship of national law and the legal system of the EU. However, however much the logic of this decision might seem correct, it has not settled the main problem. The Europe Agreements provide for the application of the laws of the EU in market competition so that these rules should promote economic rationalisation and facilitate the integration of the associated countries into the EU. The non-application of these legal rules in the associate membership period would undermine the very goals of the association agreement. Finally, association agreements differ from the other treaties in international law in that their objective is the accession of a state party to the EU. For this reason, the courts, I would hold, would have to take this objective into account in the interpretation of the agreements. An opinion of the Polish Constitutional Court<sup>iv</sup> would tend to confirm this; it expressed its readiness to interpret national law in the light of the laws of the Community, and this is justified by the need to respect obligations assumed pursuant to the Europe Agreement.

*"Naturally, EU law does not have any binding power in Poland. The Constitutional Court, however, wishes to stress the provisions of articles 68 and 69 of the Europe Agreement in which an association between the*

*Republic of Poland on the one hand and the European Community and its states members on the other was established. Poland thus has the obligation to undertake ... everything it can in order to ensure that future laws shall be harmonised with the regulations of the Community.”*

And further:

*“... The Constitutional Court considers that the obligation to ensure the harmonisation of the legislation (which pertains primarily to the government and to the Parliament) also creates the obligation that the existing laws should be interpreted in such a way as to ensure the highest possible degree of such harmonisation.”*

Some German authors, Bleckmann for instance, consider that the Europe agreements have not created any kind of supranational legal system and that they remain within the domain of classic international law. This understanding is backed up by the claim that the European Community is a creation of international law, and that, in line with this, its states members remain “masters of the treaty”. According to this author, the institutes founded pursuant to an association agreement, i.e., the decisions of the Council for Stabilisation and Association, do not of themselves have any legal application in the legal system of the EU or in the legal systems of the states members, but should rather be incorporated into the secondary legislation (Bleckman, 1997; 503). This opinion has been subject to increasingly severe criticism. Thus Pernice says:

*“An estimate of the many proposals discussed and consideration of concrete steps for the explanation and, if necessary, supplementation of the European system of competences in a changed constitutional treaty should be based on a common understanding of the actual nature of the Union. My view is that it is not an international organisation the masters of which are the states members the instruments of which comprehend their citizens because the instruments of the member states recognise their validity. I propose that this be conceived as a multi-level constitutional system that consists, depending on the case, of local, regional, national and European levels of political integration and action and for this reason as a system of multi-level competences that are established so as to be able to satisfy the needs of the citizens at an appropriate level as effectively as possible.”*



Article 6 of the Croatian Implementation of the SAA Law (NN MU 15/1991) is an example of a radically dualist approach, decisions of the Stabilisation and Association Council having to be ratified by the Croatian Parliament. This is a deviation from the monistic principle laid down in the Constitution, in Article 140, according to which ratified treaties do make a part of national law; however, the constitutionality of this provision is questionable.

This point of view, which is not alone in the constitutional practice of the associated states, is in contravention of the settled practice of the European Court as developed in the interpretation of earlier association agreements. Apart from that, I would say that such practice does not contribute to efforts for the adjustment of national law to the legal system of the European Union. It is, that is, possible, as alternative to the classical approach of international law to find different solutions, and some of these possible solutions are indeed in accordance with the common practice in the interpretation of treaties. An obvious example can be found in the *favor conventionis* interpretive principle, that is, in the interpretation of national law in accordance with the treaty. This concept is well known, and by way of example Germany or England and Wales can be cited (McCarthy v Smith; Hood Phillips: 1980, 31). In Germany this concept is known as *Völkerrecht-freundliche Auslegung* and its application is not limited to the law of the EU. As explained by the Federal Constitutional Court in the interpretation of the European Convention on the Protection of Human Rights and Fundamental Liberties “all laws, present and future, must be interpreted in the light of the Convention” (BVerfGE 74, 358/370; Frowein: 1987).

According to this approach, the national courts of the associated countries can interpret the provisions of national law in accordance with the association agreement, taking into consideration the current state of affairs of the *acquis*, including the practice of the European Court. Such practice could well lead to gradual acceptance of the direct effect of directly applied provisions of primary and perhaps of secondary law too that derive from the association agreement. An argument in favour of this approach is that the associated countries, assuming their treaty obligations, did intend to conform their national legal systems to the legal system of European law. The consequence of such an intention is the obligation to interpret national law and the association agreement in line with the *acquis communautaire*. But this still does not mean that the relation between the Union and a partner country has features of the constitution of the EU (Cremona 2000, 92).

## **REFORM OF THE FRAMEWORK OF CONSTITUTIONAL LAW ENTAILED BY THE PROCESS OF EUROPEAN INTEGRATION**

The outlook for Croatian full membership of the EU requires the implementation of constitutional modifications and the amendment of a number of legal approaches. Some of these changes are necessary right at this moment, as part of the implementation of the SAA, and some are essential because of the outlook of full EU membership. However, it is assumed that Croatia will best express its genuine desire for full membership of the EU by now, at the constitutional level, creating the assumptions for full membership. The proposed changes can be put in a number of groups. They are:

- a) provisions that provide the legal basis for EU membership, including the government of the manner in which state sovereignty is exercised;
- b) provisions that define in more detail the legal status of international law and European primary and second law within the internal legal system of the Republic of Croatia;
- c) provisions through which the constitutional organisation of the Republic of Croatia is adjusted to the conditions of associate or full membership in the EU and the functions of the institutions of government that will have to work in new conditions are optimised;
- d) provisions that govern the jurisdiction of the Constitutional Court.

With reference to a). The existing constitutional definition of state sovereignty is insufficiently adapted to the conditions of membership of the EU. For this reason it would be necessary to stipulate that state sovereignty cannot be alienated, or divided or transferred in the sense of the presently valid Article 2 of the Constitution, but is used in concert with other states. This change is based on a contemporary understanding of sovereignty as a possibility of taking part in the making of decisions in international relations (not *summa potestas* but a place at the table).

With reference to b). The second part of the proposed modifications relates to settling and defining the status of European law in the Croatian legal system. In this segment it should be stipulated that treaties that are of a self-executing nature (that are clear, unambiguous and unconditional) need not be additionally processed but simply

directly applied, i.e., they serve as the legal base for the making of individual acts. This goes for all treaties that are of a *self-executing* nature, for example, for the European Human Rights Convention, and certainly for the SAA, and for all legal standards that are based on this agreement. According to the current state of affairs, Article 6 of the SAA Implementation Law starts from a radically dualist understanding, the decisions of the SA Council having to be ratified by the Croatian Parliament. This kind of approach deviates from the monistic principle laid down in the Constitution, according to which treaties are automatically a part of the legal system of the Republic of Croatia, although the constitutionality of this, as we remarked earlier, is disputable.

With reference to c). In the conditions of associate, and in particular of full, membership of the EU it is necessary to coordinate the working of the main institutional stakeholders, particularly the parliament and the government. Considering that the SAA was not ratified by the two thirds majority necessary to enable transfer of regulatory authorities to the SA Council, the Croatian government has to carry out the decisions of this body. It would here be sensible to prescribe the obligation of the government to inform the Parliament in due time about its regulatory activities related to the execution of its treaty obligations. The current state of affairs is regulated by Article 112, Paragraph 4 of the Constitution, which authorises the government to make decrees for the execution of the laws, and hence decrees for the execution of the law concerning the ratification of treaties, but only those that have been ratified by an ordinary majority. This is logical, because this manner of ratification does not make it possible to transfer legislative authority to bodies founded by treaties. Since this is concerned with decrees for the execution of a law, it is logical that the Parliament should be informed in advance. Still, in this area of regulation the government does have original constitutional authority and the parliament can prevent the government passing them only by a vote of no-confidence. However, the need for the government to take part in the passing of decisions in the SA Council, and later in the Council of Ministers of the EU, calls for a change in the existing solution; it is necessary to provide for direct constitutional authority of the government to take part in the making of such decisions, with the simultaneous obligation to inform parliament regularly about this kind of activity. A similar approach has been provided for in the French Constitution. A special problem is a situation when, for the implementation of a treaty, it is necessary pass some law, or when the legal mate-

rial that the treaty regulates belongs to the area of so-called legislative reserves. This is the case, for instance, with electoral laws. Then it is necessary for the legislative government to take part directly, but only if a treaty is not of a *self-executing* nature. If it is a *self-executing* treaty that is concerned, no additional legislative regulation will be needed, rather the treaty is applied directly. For this reason it should be prescribed that the parliament may transfer its legislative authority to the government if two conditions are fulfilled: a) that a treaty is not *self-executing* and b) it is not a legislative reserve that is concerned.

With respect to d). Changes are necessary too in the area of the authority of the constitutional court; some of these changes have already been introduced in the practice of this court.

Firstly, it is necessary to say that the Constitutional Court should decide whether, before the ratification of some treaty, it is necessary to carry out constitutional changes. If no changes are necessary, there is a presumption of the conformity of the Constitution and the treaty and the ratification of it ceases to be a problem of constitutional law. Similar solutions exist in the constitutions of Germany, Slovenia and elsewhere. For a complete legal settlement of this institute in the Republic of Croatia it is necessary to put through modifications of the Constitutional Law concerning the Constitutional Court. This law, that is, has to prescribe who can start off this procedure, and it would be good for it to be the same persons that can launch a procedure for the abstract evaluation of constitutionality. For the needs of full membership in the EU (but not before) it is necessary to define constitutional procedural law so as to bring it into line with the practice of the European Court, as for example in *Simmenthal*. This can be done via amendments to the Constitutional Law and/or by changes in the Courts Law. The contents of these changes would relate to a change in the legal institute of *exceptio illegalitatis* by the regular courts in the event of some lack of harmonisation of some legal regulation of Croatian law with some regulation of EU law. This would bypass the need for the procedure of the abstract evaluation of constitutionality before the Constitutional Court.

Secondly, it is necessary, along the lines of German constitutional law, to introduce the competence of the Constitutional Court to adjudicate on the existence of legal rules of universal international public law. This must be done in every case, particularly for the purpose of the SAA and later full membership in the EU, since in European law, the standards of universal international law are regularly applied, and from this point of view, our legal system has to be brought into line.

Thirdly, the possibility for the Constitutional Court to evaluate the compliance of laws and other regulations with treaties already exists today pursuant to the practice of the Constitutional Court of the Republic of Croatia, according to which it has been established that contravention by a law of a treaty is at the same time a violation of Article 5 of the Constitution, i.e., of the principle of constitutionality and legality. This practice is thus made constitutional. However, because the legal regulations of European law, including the legal regulations made by the SA Council, according to well-established rules of European law, have a supra-statutory force and many of them are self-executing, it will, from this point of view, be necessary additional to handle Croatian procedural law in order to avoid the Constitutional Court having to decide on the accord of laws and byelaws with secondary sources of European law, for this would be in contravention of European law. In any event, when the Republic of Croatia becomes a full member of the EU, the Constitutional Court will not be able to evaluate the accord between a law and the European Union Treaty, rather it is the European Court in Luxembourg, pursuant to Article 234 of the EUT, which will decide on whether such laws are in breach, and regular courts will have exempt such laws, against the laws of the Community, from practice.

## **FINAL CONSIDERATIONS: CROATIAN AND EUROPEAN LEGAL CULTURE**

The legal position of the SAA in Croatia is different from its position in the EU. While in the EU the legal standards of the Agreement are part of the internal legal system and are applied directly, in Croatia a practice necessarily is called up that, quite against the intentions of the Croatian Constitution, insists, out of sheer inertia, on additional legislation as the modus for the implementation of treaties, hence of the SAA. This practice also exists with respect to the legal standards that come into being through the regulative activities of the bodies set up by the SAA – secondary legal standards – which according to current legal approaches will not be directly applicable in Croatia, but will at the same time be directly applicable in the states members of the EU. For this reason legal protection against violations of these standards will be possible before the courts of states members, the European Court and the First Instance Court, but not before Croatian courts. This problem is not only a technical one, but very

largely is of a conceptual nature. The law of the European Community, the moment Croatia becomes a member of the EU, will become Croatian law too; but the SAA is a transitional instrument – a means that enables the gradual acceptance of the legal patrimony of the EU, the *acquis*. Understanding of the SAA and the secondary law of which it is the basis as source of international law does not help this process. The adjustment of the Croatian legal system with the European does not just mean the reception of a vast number of legal standards with the constitutionally established conditions, but an organic and functional integration and melding of the national (Croatian) and supranational (European) legal systems.

The Europeanisation of Croatian law means above all a bridging of the legal culture gap that has been brought about by many years of detachment from the European and world mainstream. For Croatia, at the level of legal theory, what started to develop in Europe with the teaching of Rudolph von Ihering and his rejection of the dogmatic approach is very relevant (Ihering, 1872); this created the ideological premises for the creation of a “new European legal culture” that, as Hesselink says, is positivist (because it is occupied with positive law here and now) and dogmatic (for it is based on the assumption that a legal system is coherent and integrated, and that for a given legal question there is only one proper answer). Under the impact of European legal standards, traditional culture was transformed and became informed by substantial elements, analytic, interdisciplinary, critical (Hesselink, 2001). In the USA a similar process started to develop with the work of Oliver Wendell Holmes, begetter of the school of legal realism. Characteristics of both processes are a break with the way of thinking connected with the forms of law, directed at legal concepts that ignore the reality, and a *down to earth* approach to legal problems, which is best expressed, perhaps, in the famed sentence of Holmes that in studying law we do not study any kind of mystery, but a well known profession. The break with traditional legal culture on both sides of the Atlantic has enabled a convergence with analysis of standards with that of economics, society and institutions; it is precisely this radical break that will turn out to be the key assignment of Croatian legal theory and practice in the modernisation of the legal system.

Traditional legal culture in Croatia has made possible the inveterate acceptance of the understanding that since, after all, the Croatian legal system is founded upon the fine traditions of Roman law, of Austro-Hungarian, Germanic, Central European and who knows what other traditions, that for its harmonisation with the demands of Europe

it is only necessary to accept a given number, true, a very large number, of legal rules; this is, after all, a merely technical task. This kind of legal optimism has contributed to the flood of legal institutes for which there is often no real social grounding, and no opposed interests in the settlement of which the legal rules should be made concrete, to do with which legal doctrine should be developed. Quite the opposite to such an understanding, in the context of meeting the criteria for membership in the EU, the measure of conformity and adjustment of the legal system will be seen in its fruits, that is, the political, economic and social substances that are governed by these legal standards, and this need to be determined empirically.

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<sup>i</sup> *The Interim Agreement was ratified in the CP on 5 December 2001, Official Gazette, Treaties, no. 15.2001, and has been in force since 1 March 2002, pursuant to the Announcement of the MFO of the Republic of Croatia of 5 February, Official Gazette, Treaties, no. 3/2002, 22 February 2002.*

<sup>ii</sup> *Cf Jutarnji list, Wed. 4 September 2002, "Croatia has not met even a third of its obligations to the EU", p. 7*

<sup>iii</sup> *European Commission at the Regional Conference for SEE (Stability Pact), speech by the Rt Hon. Chris Patten, CH, Member of the European Commission for External Relations, Speech/01/489, Regional Conference for SEE, Bucharest, 25 October 2001.*

<sup>iv</sup> *East European Case Reporter of Constitutional Law 271, at 284 (1998). Article 68 of the Polish Europe Agreement says: "The parties agree that an important condition of the economic integration of Poland into the community is the harmonisation of current and future Polish legislation with the legislation of the Community. Poland will endeavour to make sure of gradual harmonisation of existing laws and future legislation with the legal patrimony of the Community (the *acquis*)." Article 69 of the Croatian SAA contains a similar provision.*

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- Conclusions of the Luxembourg European Council (December 1997). See also Annex II of Nice Agreement - Declaration on the Enlargement of the European Union.
- Council Regulation 622/98 on the establishment of Accession Partnerships, 1998., O.J. L 85, 20/03/1998 p. 0001 - 0002.
- Council Regulation (EC) No 390/2001 of 26 February 2001 on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership, O.J. L 058 , 28/02/2001 p. 0001 - 0002.
- European Parliament legislative resolution on the proposal for a Council and Commission decision on the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, of one part and the Republic of Croatia, of the other part (11172/2001-COM(2001)371 - C5-0565/2001 - 2001/0149(AVC).
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