Chapter IV

On Croatian Constitutional Identity and European Integration

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Abstract

This study addresses the topic of Croatian constitutional identity, which is firmly embedded in the original text of the Croatian Constitution adopted in 1990 and is closely connected to the European integration process from the inception of the existence of the Republic of Croatia as an independent and sovereign state. It analyses all relevant constitutional provisions that regulate the relationship between national and international law, including the constitutional amendments of 2010 adopted during Croatia's European Union (EU) membership negotiations that refer to the modalities of accession, functioning of the Republic of Croatia in the EU, and adaptation of the Croatian legal system to new requirements stemming from the final stage of the European integration process. The position of the Croatian Constitutional Court regarding international and EU law and the question of transnational constitutional and judicial dialogue, in general, are also analysed. Entering the European Convention on Human Rights prompted the Constitutional Court to engage more actively in judicial dialogue with other courts. The Constitutional Court accepts and applies the legal standards developed by the European Court of Human Rights (ECtHR). Moreover, in its decisions, it often explicitly refers to the ECtHR case law and the case law of some European constitutional courts, following the pattern characteristic of judicial dialogue in Europe. The author notes that taking a position in such a transnational dialogue must be realised based on mutual partnership and respect. Finally, the elaboration of the fundamental values of constitutional order and the idea of European integration, with the parallel process of adaptation of the national constitutional-political system to the complex of European law, prompted

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the Constitutional Court of the Republic of Croatia to start developing the concept of constitutional identity.

Keywords: constitution, identity, Republic of Croatia, national constitutional identity, Croatian Constitutional Court, constitutional dialogue

1. Introduction

The search for Croatian constitutional identity started at the end of the 1980s and the beginning of the 1990s, a period in which major political changes occurred peaceably in most communist and socialist countries of Central and Eastern Europe. Through the transition from a single-party system to a constitutional democracy, the Republic of Croatia confronted and experienced challenges similar to those in other new European democracies. All such countries had to take a decisive step towards the establishment of democratic institutions founded on the rule of law, and that process was primarily seen through radical constitutional changes.[1] Nevertheless, Croatia did not have the good fortune to experience the so-called velvet revolution (i.e. peaceful transition to constitutional democracy).[2] It is, therefore, also necessary to consider war circumstances when analysing the period of democratic transition in Croatia, including its impact on the constitution-making process. The first democratic Constitution adopted in December 1990 established the Republic of Croatia as a sovereign 'national state of the Croatian people and a state of members of other nations and minorities who are its citizens' based on the respect for the rule of law in which *'the equality of citizens and human freedoms and rights are guaranteed and ensured'*, as stated in its Preamble.[3]

Of course, the question of national identity has multiple aspects and, in a narrower sense, is undoubtedly older and more comprehensive than the complex relations created by the adoption of the Constitution, the declaration of independence, and the realisation of a sovereign constitutional democratic state in 1991.[4] Different elements of the Croatian national identity and status can be traced to centuries and various compound entities. To illustrate the latter, it suffices to consider only the 20th century. Until 1918, Croatia was a part of the

1 According to J. Elster, the crucial question for new democracies was: 'Will the new political systems be permeated by the 'spirit of constitutionalism' in which basic political institutions are seen as a stable framework for policy rather than manipulable tools?' Elster, 1992, p. 17.

2 The term 'velvet revolution' primarily refers to Czechoslovakia. B. Smerdel notes that all repressive communist regimes in Central and Eastern Europe (except for a minor armed conflict in Romania) had 'collapsed on their own'; Smerdel and Sokol, 2006, pp. 78–79.

3 Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 56/1990.

4 Bačić, 2005, p. 89.

Austro-Hungarian monarchy. After 1918, together with Slovenia and Serbia, it was part of the Kingdom of Serbs, Croats, and Slovenes—that is, the Kingdom of Yugoslavia—until 1941. After 1945, until 1991, Croatia became an integral federal unit of the Socialist Federative Republic of Yugoslavia. The period after international recognition and the adoption of the Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia in 1991,[5] including after the end of the Homeland War in 1995, was also a period of expression of Croatian identity on all possible levels, including the 1997 constitutional amendment aimed at *'strengthening the constitutional guarantees of state independence'*, which will be elaborated further in the text.[6]

An integral part of this process of affirmation and strengthening of Croatia's identity constitutes the objective of fulfilling the strategic goals of joining Euro-Atlantic organisations based on common values of peace, security, and the rule of law. These objectives were proclaimed in the constitutional Preamble in as early as 1990, and they were again accentuated in the important 1991 Decision of the Croatian Parliament:

> As a sovereign and independent state that guarantees and ensures the fundamental human and minority rights expressly guaranteed by the Universal Declaration of the United Nations, the Final Act of the Helsinki Conference, documents of the Organization for Security and Co-operation in Europe (OSCE) and the Paris Charter, the Republic of Croatia is willing to enter, in the context of European integration, into interstate and inter-regional associations with other democratic states.[7]

Therefore, the idea of Croatian constitutional identity is firmly embedded in the original constitutional text and is closely connected with the European integration process from the very beginning of the existence of the Republic of Croatia as an independent and sovereign state. Furthermore, a new impetus regarding its conceptualisation came with Croatia's full membership in the European Union (EU), including the identity elements identified by the Constitutional Court of the Republic of Croatia in its case law.

5 Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia, passed by the Croatian Parliament on 25 June 1991, Official Gazette *Narodne novine* No. 31/1991. On 15 January 1992 the Republic of Croatia gained international recognition.

6 Smerdel, 2014, p. 195. This text is also available online, see: https://www.pravo.unizg.hr/_download/repository/Constitutional_law_of_the_28_EU_Member_States_-_Croatia.pdf.

7 Decision on the termination of all legal and state ties with other republics and provinces of Yugoslav federation, p. 5, passed by the Croatian Parliament on 8 October 1991.

2. Constitution and identity

The Constitution of the Republic of Croatia was adopted on 21 December 1990 and has been amended on five occasions: 1997, 2000, 2001, 2010, and 2013. Each of these constitutional revisions had different objectives, such as strengthening and clarifying the constitutional guarantees of human rights and fundamental freedoms in 1997 when Croatia also ratified the European Convention on Human Rights (ECHR),[8] adjusting the constitutional division of powers and altering the semi-presidential system of government with a parliamentary one in 2000, and completing the previous constitutional revision by instituting a unicameral instead of bicameral parliament in 2001. The primary objective of the fourth constitutional revision in 2010 was to create a constitutional basis for membership in the EU. However, with the constitutional change in 2013, only the definition of marriage (as a union between a woman and a man) was included in the constitutional text.

According to procedures for its amendment, the Constitution can be amended following two distinct procedures—it can be done either by the Parliament or by the people's vote in the referendum. Both procedures have been employed since the first four constitutional revisions were made by the Croatian Parliament, while the last revision was a result of the first national referendum on constitutional changes.

When amending the Constitution, the Croatian Parliament follows a special procedure laid down in Part IX, Article 147–150 of the Constitution: Amendments may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the President of the Republic, and the Government; the Parliament decides whether to initiate the procedure by a majority of all deputies; the same majority is required for determining draft amendments to the Constitution; and the final decision to amend the Constitution is taken by a two-thirds majority of all deputies. The Croatian Parliament promulgated the adopted constitutional amendments.

The procedure for amending the Constitution in a referendum is outlined in Article 87, according to which a referendum may be called for by the Croatian Parliament (Article 87 paragraph 1) and by the President of the Republic (though only at the proposal of the government and with the counter-signature of the Prime Minister, Article 87 paragraph 2). Consequently, a referendum on proposals for the amendment of the Constitution (i.e. a referendum on constitutional changes, complete or partial) may be called by the Parliament or the President of the Republic. Nevertheless, constitutional (and legislative) referenda may also be initiated through the Institute of Citizens' Initiative. As per Article 87 (3) of the Constitution, the Parliament shall call a referendum on all issues that may be put to a referendum by the Parliament or the President of the Republic *'when so demanded by ten percent of all voters in the Republic of Croatia'*. The citizen's initiative in Croatia was not part of the original 1990 text of the Constitution but was later introduced with constitutional

8 The Republic of Croatia joined the Council of Europe and signed the ECHR on 6 November 1996. The Convention was ratified and entered into force on 5 November 1997.

changes in 2000. The constitutional referendum in 2013 was not only a result of successful popular initiatives but also the consequence of changes in the referendum framework realised as part of the 2010 constitutional revision to ensure Croatia's entry into the EU.[9]

Finally, no provision in the Constitution would prevent changes to any of its parts. The Constitution does not explicitly impose any limits in this regard. That is, there is no constitutional 'eternity clause'. The constitutional text, however, undoubtedly contains certain provisions that are of special importance for the Constitution as *'an ultimate expression of the will of the people',* for constitutional-legal order, and for the very identity of the Croatian state.

First, Article 3 of the Constitution (Part II—Fundamental provisions) establishes *'the highest values of the constitutional order'*. The new democratic constitution was founded on a set of fundamental principles that differed completely from those exercised in the old regime. Following the example of other countries, Croatian constitution-makers believed that the aim of the constitution-making process was not just a constitution as a mere document but the desire to democratically constitute the people as the source of government. The Croatian constitution-makers' new approach was reflected in the interpretation of the Constitution as a fundamental state norm, whose supremacy is indicated by the constitutional values expressed in Article 3, which enumerates the following:

> Freedom, equal rights, national and gender equality, peacemaking, 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 and the basis for the interpretation of the Constitution.

This provision represents a generally accepted ethical concept and framework of values accepted by society and law. The Constitution does not explicitly mention fundamental principles, but the highest values of the constitutional order *de facto* function exactly. They are defined as the basis for the interpretation of the entire constitutional text and its provisions, Thus, they have a regulative role *sui generis*, as B. Smerdel rightfully notes, as they *'serve as a guideline both for the legislative body when elaborating specific human rights and fundamental freedoms, as well as for judges when deciding in concrete cases'*.[10] Therefore, they represent the fundamental constitutional principles prioritised over all other constitutional norms.

Furthermore, per the constitutional framers' intention to establish the Republic of Croatia as a modern constitutional state based on the rule of law in which all its citizens are equal and have equal rights, Article 1 (Part II) of the Constitution Croatia is defined as a *'unitary and indivisible democratic welfare state'* in which the

9 Bačić and Ivkošić, 2022, pp. 97–98.
10 Smerdel, 2014, pp. 203–204.

power 'derives from the people and rests with the people as a community of free and equal citizens'.

In the Preamble of the Constitution (i.e. part I) with the title 'Historical Foundations' that has special importance for the interpretation of the Constitution, two more definitions of state are embedded, as we already mentioned. These definitions, as noted by M. Arlović and M. Jelušić, illustrate that constitutional framers decided to constitutionalise the state based on a combination of national and civic identity.[11] Namely, paragraph 2 of the Preamble establishes Croatia as the *'national state of the Croatian people and a state of members of other nations and minorities who are its citizens'*.[12] Although this definition emphasises national identity, it constitutes an open understanding of that concept, combining its 'ethnos' element with civic identity (i.e. with the concept of 'demos' that equally includes all citizens of the Republic of Croatia as citizens of the modern democratic constitutional state that respects common values and principles). Further, as stated in paragraph 3 of the Preamble, Croatia is such a *'state in which equality, freedom and human and civil rights are guaranteed and secured, and economic and cultural advancement and social welfare are promoted'*. The definition in Article 1 also emphasises civic identity (i.e. the concept of 'demos'). Moreover, as a more comprehensive concept, the content is determined by the fact that it embraces all citizens of the Republic of Croatia, regardless of their national or other characteristics. In other words, 'We, the people' refers to all Croatian citizens.[13] Croatia is, therefore, primarily defined as a modern constitutional state in which all citizens are equal and have equal rights.

Finally, the fundamental values enumerated in Article 3 are more extensively elaborated in the individual constitutional provisions guaranteeing specific human rights and fundamental freedoms, which are placed in Part III. of the Constitution (under the title 'Protection of human rights and fundamental freedoms'). Among the general provisions that, inter alia, regulate the prohibition of discrimination and rights of national minorities, Article 17 provides that during a state of war, an immediate threat to the independence and unity of the Republic, or in the event of major natural disasters, individual constitutionally guaranteed human rights and freedoms may be restricted. Although the respective constitutional norms do not stipulate

11 Arlović and Jelušić, 2019, p. 55. et seq; online version available at: https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf.

12 The Preamble has repeatedly been amended and supplemented, especially regarding this particular provision. After the last amendment of 2010, para 2 in relevant part states as follows: '… the Republic of Croatia is hereby established as the nation state of the Croatian nation and the state of the members of its national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others who are its citizens and who are guaranteed equality with citizens of Croatian nationality and the exercise of their national rights in compliance with the democratic norms of the United Nations and the countries of the free world'.

13 Smerdel, 2014, p. 202.

which rights are subject to restrictions, Article 17 (3) suggests that it could apply to all rights and freedoms except those for which the Constitution provides special protection, namely the right to life; prohibition of torture, cruel, or degrading treatment or punishment; legal definitions of criminal offences and punishment; and freedom of thought, conscience, and religion. Restrictions on enumerated rights cannot be imposed even in cases of clear and present danger to the state. Thus, these rights are absolute.[14]

As part of the Croatian legal theory, there is an understanding that this norm, which is a non-derogation human rights clause, can be seen as the inviolable essence of the Constitution, or its material core, the norm by which certain principles and their protection are put before the security and existence of the state itself, undoubtedly constituting its constitutional identity. Of course, most European states enshrine such clauses in their constitutions, which are also very similar in content to the Croatian Constitution. Furthermore, Article 15(2) of the ECHR provides a comprehensive list of absolute rights that mostly encompasses rights protected from derogation by the Croatian Constitution.[15]

Nevertheless, the first reference to constitutional identity in the Constitutional Court's case law concerns the constitutional preamble and can be found in the Decision of July 2011 concerning amendments to the Constitutional Act on Rights of National Minorities[16] and the enactment of new electoral legislation that introduced so-called positive discrimination measures concerning the election of parliamentary representatives of national minorities.[17] The Constitutional Court annulled new electoral legislation, insisting on its previously established standpoint on the unity of the Constitution, which cannot be interpreted to extract a single provision from the totality or relations established by it; the Constitution has 'internal unity'; thus, the meaning of any of its parts is bound to all other provisions, especially regarding the

14 Bačić and Ivkošić, 2022, p. 106. When deciding upon restrictions on human rights, the Parliament and the President of the Republic must adhere to important criteria set out in the Constitution. The first criteria relates to the principle of proportionality – the Constitution explicitly demands that the extent of such restrictions must be appropriate to the nature of the threat. The second criteria relates to the non-discrimination principle—such restrictions must not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.

15 The only exception is freedom of thought, conscience and religion. ECHR Art. 15 para 2 protects certain rights from derogation: The right to life, except in respect of deaths resulting from lawful acts of war (Art. 2); The prohibition of torture and other forms of ill-treatment (Art. 3); The prohibition of slavery or servitude (Art. 4 para 1); No punishment without law (Art. 7). Three of the additional protocols to the Convention also contain clauses that prohibit derogation from certain rights contained in them. These are Protocol No. 6 (the abolition of the death penalty in time of peace and limiting the death penalty in time of war), Protocol No. 7 (the ne bis in idem principle only, as contained in Art. 4 of that protocol) and Protocol No. 13 (the complete abolition of the death penalty); https://www.echr.coe.int.

16 Decision U-I-3597/2010…U-I-994/2011 of 29 July 2011.

17 The Croatian Government proposed new model of election of minority representative that basically resulted in dividing national minorities in two groups: minorities that exceeded 1.5 % of population and those that constituted less than 1.5 of all population given dual voting rights.

highest values of the constitutional order (paragraph 28). The Court referred exactly to paragraph 2 of the constitutional Preamble, stating that *'it defines the constitutional identity of the Republic of Croatia'* (paragraph 30.1). Referring further (paragraph 30.2) to Article 1, the Court concluded that 'the Constitution accepted the civil concept of a state in which all its citizens—which include members of the Croatian nation and members of all national minorities —constitute the 'people' (German: Staatsvolk)'.[18]

A new step forward concerning the conceptualisation of national constitutional identity came with Croatia's full membership in the EU. Although the Constitutional Court did not elaborate on the 'national identity clause' located in Article 4(2) of the Treaty on EU or the question of subsidiarity of the EU law, as might have been expected, it located new identity elements in several cases that resulted from popular initiatives launched after 2010 constitutional amendments, which were adopted as necessary preparation for the upcoming EU accession. In an effort to ensure the realisation of its constitutional choice, within which one of the essential aspirations was the integration of the state into the international community, the Republic of Croatia had to solve the issue of adapting its internal legal order to international law. Therefore, in the following chapter, we consider the incorporation of international law and EU legal acts into national law.

3. The relationship between national and international law

On 1 July 2013, Croatia became the 28th member of the EU. Croatia's path towards the EU started in 2000 with opening negotiations for the Stabilisation and Association Agreement (SAA), following the May 1999 proposal of the European Commission on the creation of the Stabilisation and Association Process (SAP) for Albania, Bosnia and Herzegovina, Croatia, Macedonia, and the Federal Republic of Yugoslavia (a new state founded in 1992, transformed in 2003 into the State Union of Montenegro and Serbia; since 2006, Montenegro and Serbia have been independent states). The entire process was launched with the primary aim of stabilising the region and enabling association with the EU as its long-term goal.[19]

18 *'The 'people' defined in this way—that is, the 'community of free and equal citizens'—exercises power by electing its representatives to the Croatian Parliament, the representative body of citizens, on the basis of universal and equal suffrage. Therefore the Constitutional Court determined that the Constitution does not allow the law to guarantee and determine in advance the number of guaranteed seats for any minority on any basis (national, ethnic, linguistic, sexual, age, educational, professional, property, etc.) within the framework of the general electoral system. That system is established in order to provide that the 'people' exercise its power as provided under the Art. 1 para. 2 and 3 and as such it represents direct expression of the equal rights, national equality and democratic multiparty system, which are highest values of the constitutional order of the Republic of Croatia (Art 3.)'*. Ibid.

19 In July 1999, the Stability Pact for South-Eastern Europe was also launched as a political instrument with the strategic aim of establishing and reinforcing peace and security in South-Eastern Europe

Stabilisation and Association Agreements, offered to Western Balkan countries (i.e. Albania[20] and five out of six republics that made up the Yugoslav federation; Slovenia was at that time already included in negotiations to become a full member of the EU)[21] were a sort of new generation of European agreement treaties which were previously offered to Central and East European (CEE) 'new democracies'. Constituting frameworks of relations between the EU and candidate countries, these agreements ensured the formal mechanisms and agreed levels of reference, which opened up the possibility of approaching EU standards, covering areas such as political dialogue, regional cooperation, four freedoms with the creation of a transitional free trade area for industrial products and agricultural produce, approximation of national legislation to the *acquis communitaire*, and wide-ranging cooperation in all areas of EU policy, including justice and home affairs.

Negotiations were launched in November 2000, following the Zagreb Summit.[22] The SAA between Croatia and the EU was signed in October 2001,[23] and the Interim Agreement came into force on 1 May 2002. Accession negotiations between Croatia and the EU were officially opened in 2005 when the SAA was enacted after

through bringing the countries of the region to the Euro-Atlantic structures and strenghtening of mutual cooperation. It was based on the support from the main international organisations and integrations. According to its Preamble '*the countries of South Eastern Europe recognise their responsibility for working together within the international community and developing a strategy for the stability and growth of the region and for cooperating, together with the major donors, so that the strategy should be achieved'*. These *aims 'will be achieved via a comprehensive approach to the region involving the EU, OSCE, Council of Europe, UN, ATO, OECD, WEU, IFIs and the regional initiatives. Particular attention was given to the fact that the Pact would be helped by the USA and that it would obtain priority in dialogues between the USA and Russia'*. See more in Vukadinović, 1999, p. 179 et seq.

20 The SAA for Albania was signed in 2006, it entered into force in 2009 and the country was awarded candidate status in 2014. For short summary of Albania's path through negotiations for the SAA and towards the EU see for example Starova A., Albania on its way to the European Union, CIRR, 2004, pp. 132–137.; Accession negotiations were launched in 2022.

21 Slovenia (2004) and Croatia (2013) are now Member States. In 2008 Western Balkans countries were joined by Kosovo which in socialist Yugoslavia enjoyed the status of autonomous province. Macedonia (now North Macedonia) is a candidate country since 2005, Montenegro since 2010, and Serbia since 2012; Bosnia and Herzegovina applied for EU Membership in February 2016; in April of the same year, the SAA with Kosovo entered into force. Bosnia and Herzegovina and Kosovo are currently in potential candidate status. Montenegro started with accession negotiations in 2012 and Serbia in 2013, while accession negotiations for North Macedonia were finally launched in 2022.

22 In the Annex (Stabilization and association process on an individualised basis) of the Final Declaration adopted on 24 November 2000 at Zagreb Summit, the following was remarked: *'Croatia: the Union commends the scale of the efforts and the success of the reforms embarked upon since the start of this year by this country's authorities. They have now enabled negotiations to be started for a stabilisation and association agreement: we hope they will progress rapidly'*. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ er/declang4.doc.html.

23 See Stabilisation and Association Agreement between the European Communities and their Member States, on the one hand, and the Republic of Croatia, on the other; Official Journal of the European Union, L 26/3 of 28 Vol. 48 of 28 January 2005. Interestingly, Croatia was the second country to sign the Stabilisation and Association Agreement with the EU on 29 October 2001. The first country among six ex-Yugoslav republics involved in the SAP launched in 1999 that signed the SAA was the Republic of Macedonia (SAA signed on 9 April 2001).

being ratified by the national Parliaments of the EU Member States, the European Parliament, and the Croatian Parliament.[24] The negotiation process was terminated in 2011.[25] Following the European Parliament's consent to Croatia's membership, Croatia signed the Treaty of Accession to the European Union on 9 December 2011.[26]

During the period between its entry into force and Croatia's accession to the EU, the SAA constituted a legal basis for the regulation of relations between the EU and Croatia while marking a shift from the voluntary phase to the phase of mandatory harmonisation of national legislation with the *acquis communitaire*. According to the provision of Article 69 of the Croatian SAA, 'Croatia will endeavor to ensure gradual harmonization of existing laws and future legislation with the *acquis*'.[27] Regarding the requirement of 'legal harmonisation' of domestic legislation with the EU law, for all SEE countries and especially for their courts during the EU pre-accession process, a major challenge was the question of whether ongoing 'legislative harmonisation' should go hand in hand with 'judicial harmonisation' as a process in which 'national courts should apply the interpretation of the European Court of Justice and consider EU legislation when applying provisions of domestic laws or the provisions of the SA Agreements'.[28] In most CEE constitutional systems during the pre-accession period, the European Agreements' provisions could generally be applied directly, as

24 Between the Zagreb summit (2000) and the enactment of the SAA (2005), the Thessaloniki summit was held (June 2003). The European Partnership was proposed at the Summit as a new step that should intensify the SAP and further strentghten the common EU and Western Balkans commitment for European integration. Regarding the progress of countries, the following conclusion was adopted: 'Progress of each country towards the EU will depend on its own merits in meeting the Copenhagen criteria and the conditions set for the SAP and confirmed in the final declaration of the November 2000 Zagreb summit'. See para 4 of the Declaration, EU-Western Balkans Summit Thessaloniki, 21 June 2003, available at: e:///C:/Users/user/Downloads/Eu-Western_Balkans_Summit__Thessaloniki__21_June_2003.pdf; See also Meurs, van W., The next Europe: South-eastern Europe after Thessaloniki, SEER, Vol. 6, No. 3, December 2003, pp. 9.-16.

25 Croatia applied for EU membership on 21 February 2003, in April 2004, European Commission issued positive opinion on Croatia's membership application. In June of the same year, European Council confirmed Croatia as a candidate country. The SAA entered into force on 1 February 2005, and accession negotiations were launched in October same year. The EU finally closed accession negotiations with Croatia on 30 June 2011. See: https://www.sabor.hr/en/european-affairs/croatias-path-eu/chronology/chronology-important-dates-eu-accession-process.

26 See: Commission Opinion of 12 October 2011 on the application for accession to the European Union by the Republic of Croatia; European Parliament Legislative resolution of 1 December 2011 on the accession to the European Union of the Republic of Croatia; Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union; Treaty between Member States of the EU and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, Official Journal of the European Union, L 112 Volume 55 of 24 April 2012, https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:12012J/TXT. See also: https://www.europarl.europa.eu/news/en/press-room/20111201IPR32926/croatia-s-eu-accession-green-light-from-parliament.

27 Act on the ratification of the Stabilization and Association Agreement, Official Gazette 'Narodne novine' – International Treaties, no. 14/2001.

28 Albi, 2005, p. 52; See: Georgievski, 2014, p. 13 et seq.

many accepted a monist approach to international treaties.[29] However, in general, there were few cases of direct application of the European Agreements' provisions, though the so-called EU-friendly approach towards application and interpretation of domestic law before courts was widely adopted.[30]

In the Republic of Croatia, the SAA is widely considered an international agreement *sui generis*. Thus, it was a framework for relations with the EU throughout the pre-accession period, and it has been directly applicable by national courts and other authorities, according to Article 141 of the Constitution of the Republic of Croatia, which addresses the application of international law.

> International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.[31]

Determining the relationship between international and national law, Article 141 of the Constitution of the Republic of Croatia gives primacy to international treaties over Croatian laws regarding legal effects. This general incorporation clause applies to all relevant treaties regardless of their subject matter. It does not apply to other sources of international law. The supralegal force of international treaties referred to in the aforementioned constitutional provision derives from their special procedure of adoption in the Croatian Parliament and from the acceptance of the obligations that the state has under international law as a full member of the international community and its legal order. The provisions of these international treaties may be changed or repealed only under conditions and in the way specified by them or in accordance with the general rules of international law.

The aforementioned constitutional provision was amended in 1997 by adding that it expressly referred to agreements in force. International agreements have been concluded and published, but for various reasons, they have not entered into force. Therefore, to avoid confusion and strengthen legal certainty, the constitution-maker stressed that priority in application over Croatian laws is given only to those

29 According to S. Georgievski's analysis, that was the case in Lithuania, Bulgaria, Poland, Estonia, Slovenia, Czech Republic, Slovakia, and Romania following constitutional amendments. Georgievski, op. cit., p. 14. Generally, political transition of CEE countries in 1990s' was often accompanied with the transition from monism to dualism.

30 Ibid. Regarding the judicial application of EU law, the term 'Euro-friendly' (or similar terms 'EU friendly' and 'EU harmonious') might be perceived in that the EU law is used as *'argumentative tool to interpret domestic law'* (Kuhn) or as *'pro-European interpretation of laws'* approach that enables adaptation of national law to EU standards (Lazowski). See also Kuhn, 2019.

31 See the Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 85/2010 (consolidated text).

international treaties that have been concluded and confirmed in accordance with the Constitution, published, and entered into force. Consequently, national courts are obliged to apply international treaties over national law in cases of non-conformity. Regarding the direct application of international treaties, beyond Article 141, such an obligation is also derived from Article 118(3), which stipulates that *'courts administer justice according to the Constitution and laws, as well as to international treaties and other sources of law'* (two latter 'external' sources were added with constitutional amendments in 2010).[32] Apart from *ex officio* application of international treaty provisions in cases of their non-conformity with national laws that regulate the same matter, the courts may decide to directly apply international law upon the request of parties in proceedings, though such a request is not binding.

Regarding the Constitutional Court of the Republic of Croatia and its competencies, the Court has no clear authority to examine the constitutionality of international treaties; that is, to review the substantive content of a treaty. However, it can examine the statute on the ratification of international treaties by which it is implemented in the domestic legal order (as regulated by Article 129 of the Constitution).[33] In other words, the respective Constitutional Courts' competence is limited to a review of the formal constitutionality of the law on ratification adopted by the Croatian Parliament, which is well established and repeated in its case law:

> According to the competences of the Constitutional Court stipulated in Article 125 (Article 129, op. PB)[34] of the Constitution and the conditions under which interna-

32 Prior to the 2010 constitutional amendments, it was stipulated that *'courts shall administer justice according to the Constitution and laws'*. See Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 41/2001 (consolidated text).

33 Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 85/2010 (consolidated text).
Art. 129: *'The Constitutional Court of the Republic of Croatia: – shall decide upon the compliance of laws with the Constitution, – shall decide upon the compliance of other regulations with the Constitution and laws, – may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings, – shall decide on constitutional petitions against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia, – shall monitor compliance with the Constitution and laws and shall report to the Croatian Parliament on detected violations thereof, – shall decide upon jurisdictional disputes between the legislative, executive and judicial branches, – shall decide, in conformity with the Constitution, on the impeachment of the President of the Republic, – shall supervise compliance of the platforms and activities of political parties with the Constitution and may, in* compliance with *the Constitution, ban non-compliant parties, – shall monitor whether elections and referenda are conducted in compliance with the Constitution and laws and shall resolve electoral disputes falling outside the jurisdiction of the courts, – shall perform other duties specified by the Constitution'.*

34 The Constitutional Court uses numbering of the Constitution (see the version published on: www.usud.hr) which is different from the one in the official text of the Constitution of the Republic of Croatia published in the Official Gazette 'Narodne novine' no. 85/2010 (consolidated text). We

> tional treaties can be altered or repealed, contained in the second sentence of Article 134 (Article 141, op. PB) of the Constitution, it follows that in the process of reviewing the constitutionality of laws the Constitutional Court is competent to review the formal constitutionality of acts on the ratification of international treaties. However, the Constitutional Court is not competent to review the substantive content of the international treaty itself as a component part of the Act. The Constitutional Courts' case-law so far shows that – due to the lack of cassational powers – when interpreting the second sentence of Article 134 (141) of the Constitution, the Constitutional Court did not consider itself competent to review the compatibility of the provisions of international treaties with the Constitution, which, in accordance with the first sentence of Article 134 (141) of the Constitution, became an integral component of the legal order of the Republic of Croatia.[35]

Therefore, the Constitutional Court held that its jurisdiction over the constitutionality of national laws that ratify international treaties was strictly limited by the procedural aspect. In other words, the review of constitutionality is limited to questions on whether the law was adopted by the competent authority and whether it followed the procedure mandated by the Constitution. Finally, it seems Article 141 of the Constitution of the Republic of Croatia in the traditional debate between dualists and monists favoured the latter, as it declared international treaties to be part of the internal legal order, assuring them primacy over national laws.[36]

Therefore, in the pre-accession period, Article 141 of the Croatian Constitution was the only constitutional provision that enabled the direct application of EU law sources under the framework of the SAA and its provisions on harmonisation. It may also be concluded that there was no *'clear constitutional authority for the application of EU law'*.[37] Although such possibility existed within the aforementioned limits, in the same period, no such cases would result in a direct application of the SAA provisions instead of conflicting Croatian legislation or *'any established doctrine on the*

use the latter, but, to avoid confusion, when citing the Constitutional Courts' case-law (and only if needed), we provide both numberings (the numbering provided in the Official Gazette is inserted in parentheses i.e. round brackets).

35 U-I-2234/2017 of 6 June 2017, para 4. The Constitutional Court already established the same standpoint in ruling: U-I-825/2001 of 14. January 2004. ('Narodne novine' no. 16/04.), para. 4: *'…the Constitutional Court of the Republic of Croatia is not competent to review the direct compliance of international treaties with the Constitution'*, and later confirmed it in rulings: U-I-1583/2000 and U-I-559/2001 of 24. March 2010. ('Narodne novine' no. 46/10.), and U-I-6738/2010 of 11. June 2013. (www.usud.hr). Art. 129.

36 However, we should not ignore the arguments of those who rightly emphasise that such a solution does not refute the dualist understanding because the constitutional provision does not give priority to international law as a whole but only to that part of it which the state expressly accepts. Moreover, Croatian constitution-maker is free to change such solution at any time, and such a change in the Constitution would not mean a violation of international law. See more in Bačić, 2021, pp. 441–433.

37 Goldner Lang and Mataija, 2014, p. 93. et seq.

interpretation of the mirror provisions of the SAA, even though ECJ case law has at times been relied upon (mostly in the area of competition law)'.[38]

4. Association, dissociation: transfer of sovereign powers and accession to the EU

During Croatia's EU membership negotiations, the Croatian Parliament (Hrvatski Sabor) adopted amendments to the Constitution of the Republic of Croatia on 16 June 2010. The 2010 constitutional amendments created a constitutional and legal basis for Croatia's membership in the EU and ensured new constitutional grounds for the application of EU law. However, new constitutional provisions concerning 'European affairs', which will further be elaborated in the next chapter, entered into force on the day when Croatia became a full member of the Union (in accordance with Article 152 of the Constitution).[39] Before this situation, the EU accession referendum was held on 22 January 2012.

The Croatian Constitution regulates the process of association and dissociation in Article 142, which constitutes Part 2 of Chapter VII, and creates a constitutional basis for previous accessions to international organisations.[40] Article 2(4) of the Constitution foresees that the decision 'on association into alliances with other states' is to be made by the Croatian Parliament or the people directly. The Croatian Parliament decides on the ratification of international treaties, which transfer sovereign powers to international organisations or alliances by a two-thirds majority of all deputies (Article 140). Any decision concerning the Association of the Republic of Croatia was made directly by the people in a referendum (Article 142). In the original 1990 constitutional text, Chapter VII, which regulated international relations, was divided

38 Ibid. Though the Constitutional Court of the Republic of Croatia accepted the 'EU friendly approach' in the area of competition law, as for example in 2011 Decision U-III/4082/2010 of 17 February 2011 in which it speciffically stated that Croatian institutions correctly applied EU law (para. 7.1. – *'The Administrative Court and the Croatian Competition Agency correctly applied the rules on market competition of the European Union and the rules arising from the interpretation instruments adopted by the EU institutions'*), the overview of the case law that might be relevant in terms of the existence of general obligation on harmonisation of Croatian legislation with the *acquis* shows inconsistency in this respect.

39 Art. 152: *'The Amendments to the Constitution shall enter into force on the day of their promulgation, the 16th day of June 2010, with the exception of Art. 9, para. (2) pertaining to execution of a decision on extradition or surrender in compliance with the acquis communautaire of the European Union, and Art. 133, para. (4) and Art. 144, 145 and 146 of the Constitution of the Republic of Croatia, which shall enter into force on the date of accession of the Republic of Croatia to the European Union'.*

40 Although of somewhat different content, as these provisions were partially amended over the years, they will be elaborated in text. For the original text see: Constitution of the Republic of Croatia, Official Gazette 'Narodne novine' no. 56/1990. Croatia acceeded to the United Nations in 1992 and to the Council of Europe in 1996.

into two parts, with the second section (Association and Secession) comprising one provision that regulated the procedure for the association of Croatia in alliances with other states and the secession from such an alliance.[41] Decisions concerning the Republic's association were made based on a referendum by a majority vote of the total number of electors. This provision was incorporated into the constitutional text to provide (together with other relevant norms) a constitutional basis for holding the independence referendum—that is, the establishment of an independent and sovereign Republic of Croatia.[42]

The aforementioned provision was changed in a 1997 constitutional revision, as it regards the procedure of dissociation, and was supplemented by adding a specific ban on Croatia's association with other states if such association would basically result in a renewal of the Yugoslav state association of any kind:

> Any procedure for the association of the Republic of Croatia into alliances with other states, if such association leads, or may lead, to a renewal of a South Slavic state union or to any form of consolidated Balkan state is hereby prohibited.[43]

Constitutional provisions on association and dissociation were again amended in 2010 to create a constitutional basis that would enable Croatia to achieve its long-awaited accession to the EU. In this sense, for the first time since 1990, the constitution-maker intervened in the provision related to the referendum decision-making, providing that any question regarding association shall first be decided *'by the Croatian Parliament by a two-thirds majority of all deputies',* while the final decision *'shall be made in a referendum by a majority of voters voting in the referendum'* (Article 142).[44]

41 Constitution of the Republic of Croatia (1990), Art. 135
'Procedure for the association of the Republic of Croatia in alliances with other states may be instituted by at least one third of the representatives in the Croatian Parliament, by the President of the Republic, or by the Government of the Republic of Croatia.
Such association of the Republic shall first be decided upon by the Croatian Parliament by a two-thirds majority vote of all representatives.
The decision concerning the Republic's association must be made on the basis of a referendum by a majority vote of the total number of electors in the Republic.
Such referendum shall be held within 30 days from the date the decision was rendered by the Parliament.
The provisions of this Constitution concerning association shall also relate to conditions and procedure for secession of the Republic of Croatia, except when owing to extraordinary circumstances the Croatian Parliament may, at the proposal of a third of the representatives, or of the President of the Republic, or the Government of the Republic of Croatia, for the purposes of protection of the Republic of Croatia, decide on secession by a two-thirds majority vote of all representatives present'.

42 The referendum of the independence of Croatia was held on 19 May 1991. The turnout was 83.6%. On the first question, for Croatia to become a sovereign and independent state, 94% voted 'for'.

43 Constitution of the Republic of Croatia (1997), Official Gazette 'Narodne novine' no. 8/1998 (consolidated text), Art. 135. par. 2. Today it is Art. 142 par. 2, while the wording remained unchanged. See Sokol and Smerdel, 2006, p. 432.; see also Rodin, 2008.

44 See Proposal of constitutional amendments of 15 June 2010., Art. 27, Explanatory text, p. 19–20; https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080052/PRIJEDLOG_PROMJENE_USTAVA_RH.pdf.

The decision on the referendum is, thus, made by a simple majority of the votes cast; that is, most voters who have voted. However, until the constitutional revision of 2010, the conditions for reaching decisions in the referendum were significantly stricter. Namely, before 2010, the constitutional requirement was that a decision be made by a majority of all voters (the acceptance quorum), provided that the majority took part in the referendum (the participation quorum). In this sense, by intervening for the first time since 1990 in the provision related to the referendum decision, the constitution maker replaced the difficult-to-achieve condition of obtaining the majority of votes of all voters via a solution that requires only 'the majority of votes of the voters who participated' for the state referendum to succeed. Considering that it also meant that not participating in the referendum (i.e. the abstain vote) no longer has the same effect as a vote 'against', this change made it possible for the real will of the voters to be expressed in the referendum.[45] The aforementioned change, thus, preceded not only the 2012 referendum on the EU accession of the Republic of Croatia but also a citizen's initiative that led to a successful referendum on constitutional change in 2013, thereby significantly alleviating the conditions for decision-making in the referendum.[46]

As a mandatory referendum according to Article 142 of the Constitution (Chapter VII, Part 2, Association and Dissociation), the Croatian Parliament called for a referendum on joining the EU in December 2011, just after signing the Accession Treaty. Held on 22 January 2012, the accession referendum delivered an overwhelming 'yes' vote. The referendum question was straight and simple: *'Are You in favour of the membership of the Republic of Croatia in the EU?'*. Almost two million Croatian citizens voted in the referendum, meaning that the voter turnout was 43.5%. The EU accession referendum passed with 66.2% of the votes cast in support, while 33.1% voted against joining the EU.

5. Constitutional amendments of 2010 and application of European Union law

All changes to the constitution that are closely related to the European integration process can be classified into different groups.[47] Beyond the aforementioned constitutional change regarding the referendum that practically enabled Croatia's accession

45 As noted by R. Podolnjak: *'It was obvious to the vast majority of Croatian politicians and constitutional scholars that the approval quorum required for referendums on state alliances is too high a barrier and that it could be the greatest obstacle in the process of Croatia's accession to the EU'.* Podolnjak, 2015, p. 134.

46 See Smerdel, 2014, pp. 199–200.

47 For example, Smerdel clasiffies them in a following manner: 1) Amendments required by the accession negotiations with the EU, 2) Amendments required for adaptation of the legal system to membership in the EU, 3) Amendments declaring intention to correct injustices, 4) Amendments to the political decision-making system. See Smerdel, ibid.

to the EU, different amendments were adopted at the request of European negotiators to facilitate accession. These constitutional issues arose from individual chapters of negotiations with the EU, such as the constitutional status and independence of the Croatian National Bank (Article 53) and the State Audit Office (Article 54), the abandonment of the principle of non-extradition of its citizens to foreign states, and the effective implementation of the European Arrest Warrant (Article 9).[48]

Constitutional provisions that refer to the modalities of accession, functioning of the Republic of Croatia in the EU and adaptation of the Croatian legal system to new requirements stemming from the final stage of the European integration process are inserted in a separate, new Chapter VIII of the Constitution named 'The European Union' (Arts. 143-146 Constitution). The first of these four provisions, each of which has a separate title, provides the legal basis for membership and the transfer of constitutional powers to the union's institutions (Article 143).[49] Three other provisions encompass the participation of citizens and government bodies in decision-making within EU institutions (Article 144),[50] the application of EU law and its supremacy over Croatian law (Article 145), and the rights of EU citizens within the Republic of Croatia (Article 146).[51] These constitutional provisions (along with Article 9 para-

48 It's interesting to mention that the application of the European Arrest Warrant was delayed until Croatia became a full member of the European Union, although the negotiators demanded its direct application even before reaching full membership.

49 Art. 143 – Legal Grounds for Membership and Transfer of Constitutional Powers
'Pursuant to Art. 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union.
Pursuant to Art. 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'.

50 Art. 144 – Participation in the European Union:
The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.
The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.
The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis on for the Government's actions in European Union institutions.
Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.
The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.

51 Art. 146 – Rights of the Citizens of the European Union:
Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union acquis communautaire, and in particular:
– freedom of movement and residence in the territory of all Member States,
– active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,

graph 2 regarding the execution of a decision on extradition or surrender in compliance with the acquis communautaire of EU and Article 133 paragraph 4 regarding the right to local and regional self-government for EU nationals in compliance with the law and EU acquis communautaire) did not enter into force on the day of its promulgation but on the day when Croatia became the newest EU Member State (though given the 2020 withdrawal of the United Kingdom from the EU, it is no longer the 28th EU Member State as it was at the time of accession).

Regarding the application of EU law in the national legal order, the crucial constitutional provision is Article 145 ('European Union Law'), as it opens the constitutional order for the application of EU law before domestic courts and public bodies:

> The exercise of rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under the Croatian law.
> All legal acts and decisions accepted by the Republic of Croatia in European Union institutions should be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
> Croatian courts shall protect subjective rights based on the European Union acquis communautaire.
> Governmental agencies, bodies of local and regional self-government, and legal persons vested with public authority shall apply European Union law directly.[52]

Article 145 regulates the protection of citizens' subjective rights before Croatian courts based on the principle of equivalent legal protection. It is also about the direct and indirect effects of EU Law as its fundamental characteristics and the principle of supremacy of EU Law (although without explicitly addressing it). All the entities were encompassed by paragraphs 1 and 2. That is, all state authorities, including national courts, must apply EU law in a way that does not constitute the exercise of subjective rights arising from excessively challenging or almost impossible EU law. The principle of the direct effect of EU Law is laid down in paragraph 3, whereas paragraph 4 expresses the principle of the direct administrative effect. Furthermore, Article 5 paragraph 2 stipulates the obligation for all persons to *'abide by the Constitution and law and respect the legal order of the Republic of Croatia'*. This paragraph was also

– the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,
– the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.
All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.
In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union.

52 Constitution of the Republic of Croatia (consolidated text), Official Gazette Narodne Novine no. 85/2010

changed in 2010 such that the word 'law' was inserted (instead of the previously used term 'legislation', which was limited to national laws), implying adherence to the entire legal order, now including not only the relevant international law (especially the most important European Convention on the Protection of Human Rights and Fundamental Freedoms) but also the *acquis communautaire* (Article 145) (i.e. the entire EU legal system).[53]

Regarding the transfer of power to the EU, in addition to Article 141 of the Constitution, which basically promotes monism as the main model of regulation of the relationship between international and domestic law, Articles 139 and 140 have also been considered, which regulate treaty-making power. Article 139 of the Constitution stipulates that 'pursuant to the Constitution, law and rules of international law' international treaty making power is vested upon *'Croatian Parliament, President of the Republic and Government of the Republic of Croatia'*, depending on the *'nature and content' of the respective treaty'*.[54] Further, Article 140 differentiates between four types of international treaties that must all be ratified by the Croatian Parliament but do not follow the same procedure: 1) treaties that require the adoption of amendments to laws, 2) treaties of a military and political nature, and 3) treaties that give rise to financial commitments for the Republic of Croatia (all in paragraph 1) are to be ratified by a simple majority, while (4) treaties that grant an international organisation or alliance powers derived from the Constitution of the Republic of Croatia are to be ratified by a two-thirds majority of all deputies (paragraph 2).[55] Finally, Article 143 paragraph 2 provides *that 'Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'*.

As highlighted in the explanatory text of the 2010 constitutional amendments adopted by the Croatian Parliament, membership in the EU requires the transfer of certain constitutional powers to joint institutions, as per Article 140 of the Constitution. However, according to Article 143, Croatia is determined to accede to and participate in the union of European states that promotes peace, liberty, security,

53 See Smerdel, 2014, p. 206.

54 Art. 139. of the Constitution: *'Pursuant to the Constitution, law and rules of international law, international treaties may be concluded, depending on the nature and content of an international treaty, by the Croatian Parliament, the President of the Republic or the Government of the Republic of Croatia'.*

55 Art. 140. of the Constitution*: (1) The Croatian Parliament shall ratify all international treaties which require the adoption of amendment to laws, international treaties of military and political nature, and international treaties which give rise to financial commitments for the Republic of Croatia. (2) International treaties which grant an international organization or alliance powers derived from the Constitution of the Republic of Croatia shall be ratified by the Croatian Parliament by a two-thirds majority of all deputies. (3) The President of the Republic shall sign the documents of ratification, accession, approval or acceptance of international treaties ratified by the Croatian Parliament in conformity with paragraphs (1) and (2) of this Art.. (4) International treaties which are not subject to ratification by the Croatian Parliament are concluded by the President of the Republic, at the proposal of the Government, or by the Government of the Republic of Croatia.*

and prosperity, as its common founding values. Further, the EU is an organisation with limited powers in that it has only those powers previously transferred to it by Member States with the Founding Agreements and their amendments. Regarding any future amendments to the EU contractual framework, they do not require the activation of procedures in Article 142 (association and dissociation) beyond the procedure stipulated by Article 140 regarding the conclusion and ratification of international treaties.[56]

Therefore, each new transfer of power to EU institutions is limited in that it requires a decision by two-thirds of the majority of all deputies of the Croatian Parliament (Article 140 paragraph 2 of the Constitution). In addition to the clear and strict constitutional requirements in the case of the transfer of new powers, there are no specific limitations: any other future amendment of the treaties that do not include the transfer of new powers requires only a parliamentary decision taken by a simple majority. Furthermore, the referendum stipulated by Article 142 is obligatory only in the case of 'association and dissociation' but not when additional powers are transferred relative to those conferred at the time of accession (though there is always a possibility that a referendum may be called according to Article 87).[57] Finally, as already stated, the Constitutional Court has no direct express authority over the constitutional review of international treaties, either ex-ante or ex-post.[58] Though it is competent to review the constitutionality of a law on the ratification of an international treaty, the competence of the Constitutional Court is limited in

56 See Proposal of constitutional amendments, 15 June 2010, p. 20. proposed by the Committee on the Constitution, Standing Orders and Political System, Draft proposal adopted on June 18 2010, available at: https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080052/PRIJEDLOG_PROMJENE_USTAVA_RH.pdf.

57 Art. 87 of the Constitution:
'The Croatian Parliament may call a referendum on proposals to amend the Constitution, a bill or any such other issue as may fall within its purview.
The President of the Republic may, at the proposal of the Government and with the countersignature of the Prime Minister, call a referendum on a proposal to amend the Constitution or any such other issue as he/she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia.
The Croatian Parliament shall call referenda on the issues specified in paragraphs (1) and (2) of this Art. in accordance with law, when so requested by ten percent of the total electorate of the Republic of Croatia.
At such referenda, decisions shall be made by a majority of voters taking part therein.
Decisions made at referenda shall be binding.
A law shall be adopted on any such referendum. Such law may also stipulate the conditions for holding a consultative referendum'.

58 The following legal acts are relevant for the functioning and the internal organisation of the Constitutional Court of the Republic of Croatia: The Constitution of the Republic of Croatia, Official Gazette 'Narodne novine' no. 85/2010 (consolidated text), The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 'Narodne novine' No. 49/02 (consolidated text), The Rules of Procedure of the Constitutional Court of the Republic of Croatia, Official Gazette 'Narodne novine' 181/03, 2/15 (consolidated text available at: https://www.usud.hr/en/legal-basis).

that regard, as it does not include a review of the constitutionality of the substantive content of an international treaty. Therefore, the Court could perform only an indirect review of their compliance with the Constitution.

6. Constitutional Court of the Republic of Croatia in constitutional dialogue

As the practice of the Constitutional Court regarding international and EU law and the question of transnational constitutional and judicial dialogue, in general, is concerned, the entering into force of the ECHR prompted the Constitutional Court to engage more actively in judicial dialogue with other courts, referring to case-law of the ECtHR in the first place and considering the jurisprudence of other national, primarily European constitutional courts. In this sense, the Court follows the pattern of judicial dialogue in Europe.

Comparative research in the context of constitutional conversations outside Europe, most notably concerning the Canadian example, shows that the concept of dialogue reflects the participation of courts and legislatures in a dialogue regarding the determination of a proper balance between constitutional principles and public policies necessary for the democratic legitimacy of judicial review. Therefore, this ongoing dialogue is used as a middle point between judicial and legislative supremacy. However, in the European context, the emphasis is on dialogue between courts.[59] In European states, among members of the Council of Europe (COE) and the EU, the term transnational judicial dialogue is primarily connected with two modalities: first, it refers to direct interaction between judges that can occur in different settings, such as international conferences or working visits from one court to another; second, it refers to the citation of foreign opinions by national judges, either when such references are mandatory, as in the case of a conflict between national and international law, or when judges decide to do so simply because they are allowed to consult foreign law and they find it helpful in resolving the actual case before them.[60] European courts often use both modalities. In this way, it is possible to argue that Europe developed and accepted the idea of transnational judicial communities, thanks to decades of existence and progress of the COE and the EU; that is, the adoption and application of the ECHR and EU constitutional documents and common legal *acquis*.[61]

In this context, the Constitutional Court accepts and applies the legal standards developed by the ECtHR, and, in its decisions, it often explicitly refers to ECtHR

59 Claes and De Viseer, 2012.
60 Frishman, 2013.
61 Claes and De Viseer, ibid.

case law. For example, the legal stand of the ECtHR on the principle of proportionality is of special importance for the Constitutional Court, which completely adopted the test of proportionality implemented by the ECtHR. Through the Constitutional Court's case law, the ECHR gained special status in the Croatian legal order. The Court repealed certain statutory provisions of the Expropriation Act, reviewing the conformity of domestic law directly with the ECHR.[62]

However, the situation with EU law is different, although the Constitutional Court already accepted the Euro-friendly approach[63] in the pre-accession period and was informed about the legal stands of the Court of Justice of the European Union (CJEU) and, on rare occasions, referred to it in its decisions, for example, regarding the legal opinion about the importance and content of the principle of the legitimate expectations of parties.[64] Surprisingly, the Constitutional Court also referred to the EU Charter of Fundamental Rights in 2012 but without any detailed explanation or connection to the merits.[65] Furthermore, in 2013, the Court concluded that the EU Charter could not be examined in terms of its merits because the period relevant to deciding on the Charter was not yet in force in Croatia.[66]

After Croatia acceded to the EU, the highest national courts started to use EU law, including cross-references to the case law of the CJEU, though not extensively and not by applying it directly but rather limiting it as an interpretative tool. In the 2014 decision regarding the case of an abstract control of the constitutionality of the Inheritance Act, the Court cited the CJEU's case law, underlying its repeated standpoint that procedural legislation is generally applied from the day of its entry into force to all pending procedures at that moment (*Elliniko Dimosio Case*,

62 By 2016, the Constitutional Court has referred to the case law of the ECtHR in more than 1,800 of its decisions. See Omejec, 2016, p. 15. Omejec argues that *'although formally has sub-constitutional status (Art. 141 of the Constitution), the ECHR is so far the only European law in Croatia which actually has a quasi-constitutional status'*.

63 In the 2008 case regarding the regulation of the market competition and the issues of the application of the *'criteria, standards, and instruments of interpretation of the European Communities'*, to which the SSP and the Interim Agreement refer, the Constitutional Court found that they are not applied as the primary source of law but only as an auxiliary instrument of interpretation in the context of obligation of harmonising legislation with the *acquis communitaire*. See U-III-1410/2007 of 13 February 2008.

64 See European Commission for Democracy through Law (Venetian Commission), Questionnaire – Conference of European Constitutional Courts – CDL-JU (2004)035, Strasbourg, 5 March 2004.

65 U-I-448/2009 of 19 July 2012, para. 44.4. *'The Constitutional Court reminds of the fact that human dignity is absolutely protected, non-derogable and non-comparable. Art. 1. of the Charter of Fundamental Rights of the European Union* (Official Journal of the European Union, C 83/389, 30. 3. 2010.) stipulates: *'Human dignity is inviolable. It must be respected and protected. Human dignity represents fundamental indivisible and universal value in the European Union'*.

66 U-I-5600/2012 of 23 April 2013. Recently, the Constitutional Court started to apply the Charter directly, as in an asylum case U-III-424/2019 of 17 December 2019 (see p. 121). This approach is however limited to cases concerning migration and asylum that fall under the scope of application of EU law. The other approach where the Charter is regarded as an interpretative tool only is still dominant. For detailed case analysis and interpretation of the Constitutional Courts' approach see Majić, 2021.

C-121/91 & C-122/91).[67] In another 2014 case, only this time deciding on a constitutional complaint connected with the execution of the European arrest warrant, the Constitutional Court extensively cited the CJEU's judgements in *Radu Case* C-396/11 (including the opinion of the Advocate General delivered in that case) and *Pupino Case* C-105/03, again not using CJEU's case-law directly but through cross-references as an explanation of the legal background.[68] It is interesting to note that the aforementioned *constitutional complaint was lodged due to the alleged violations of human rights and fundamental freedoms guaranteed by the Constitution, inflicted upon the applicant by the rulings of the County Court and the Supreme Court which, as an appellate court, referred to the CJEU's Pupino Case.* The Supreme Court stated the following:

> With a view to achieving the goals and respecting the principles expressed in EU law, national courts are obliged to apply national law in the light of the letter and spirit of EU legislation. This means that national law must be interpreted in its application as far as possible in light of the wording and purpose(…) and to be in line

with EU law. The Supreme Court in its 2015 judgement further clarified that since Croatia became a full member of the EU, *'EU law is a component of the Croatian legal order and must be applied; moreover, it has primacy over national law'*. Such an obligation *'relates to all legal relations established after Croatia's accession that fall into the scope of application of the EU law'*. Furthermore, the Supreme Court noted that though the EU law is not directly applied as it regards those legal relations established in the pre-accession period and corresponding litigations, in such cases, Croatian courts are obliged to interpret national law in the *'spirit of the EU law and acquis communitaire (including the CJEU's case law)'* as such an obligation arises from the SAA that entered into force in 2005.[69]

Communication between the national courts of Member States and the CJEU largely depends on preliminary rulings procedure, which indeed can be seen as a *'nexus between national and European law'*.[70] References for preliminary rulings constitute a specific type of dialogue between judges *'since the question is directed by a national judge to a European one'*.[71] As the first request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU was submitted in

67 See, for example U-I-2403/2009 of 25 February 2014, par. 5 (reference to cases *Elliniko Dimosio v. Nikolaos Tsapalos & Konstantinos Diamantakis,* C-121/91 i C-122/91).

68 U-III-351/2014 of 24 January 2014, par. 9.1, 10, 13.1.

69 Supreme Court Judgement and Decision Revt 249/14-2 of 9 April 2015, p. 22–23.

70 Jacobs et al., 2019, p. 1215.

71 Medal Rodriguez clarifies that there are 'two types of references for a preliminary ruling: when the national judge raises a question about how to interpret a European law in order to correctly apply it, or in the event that a national judge asks for the review of the validity of a European law. In either case, the characteristic feature is that it is a dialogue between judges since the question is directed by a national judge to a European one'. Medal Rodriguez, 2015, p. 109.

2014 by the Municipal Court, more than 30 preliminary questions have been referred to the CJEU by Croatian courts, including the Supreme Court.[72] The Constitutional Court, however, though engaged in constitutional dialogue with national constitutional courts (often referring, for example, to the jurisprudence of German Bundesversassungsgericht in the first place) and international courts in Europe (the dominant influence of the ECtHR), still has not used the possibility of submitting a reference for a preliminary ruling regarding the application of EU law to the CJEU. Nevertheless, in its June 2020 Decision, the Constitutional Court declared that, regarding the criteria established by the CJEU in the *Vaassen-Göbbels Case* (C-61/65, 1966), it considers itself as the national court, which has jurisdiction within the limits of the competences conferred upon it by Article 125 of the Constitution and referring to Article 267. The TFEU launched the procedure for a preliminary ruling before the CJEU.[73]

Nevertheless, the constitutional amendments of 2010 that, preparing for the EU accession referendum, changed the constitutional framework concerning referendum decision-making in practice induced a series of citizen initiatives that also provoked the Constitutional Court to engage more actively in defining Croatian constitutional identity. Second, this reference was made in 2013, concerning the national referendum of the citizens' initiative to amend the Constitution, whereby the definition of marriage as a living union between men and women was introduced.[74] After successfully collecting signatures, the Croatian Parliament called for a national referendum without triggering the Constitutional Court's competence to decide on the constitutionality of the referendum question. Though the Court could act only if so requested by the Parliament, which is the only body competent to institute constitutional review in this case, it reacted before the referendum was held by issuing a

72 Compare data on questions referred for a preliminary ruling, available at Info Curia case-law: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C&for=&jge=&dates=&language=hr&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=HR%252C&td=%3BALL&avg=&lgrec=hr&lg=&page=1&cid=438923.

73 U-III-970/2019 of 24 June 2020, par. 14 et seq. In that sense, the recent development in Constitutional Courts' application of the EU Charter of Fundamental Rights, especially in cases concerning migration and asylum, might lead the Court to activate the preliminary reference procedure in years to come. However, the overall approach of the Constitutional Court is still incostitent and the number of cases in which the Charter was applied is limited. See more in: Majić, ibid.

74 In 2013 Citizen's Initiative called 'In the Name of the Family', reacting to the then Government's initiative to legalise same-sex marriage, managed to collect sufficient number of signatures. The referendum was held on 1 December 2013 and the question that was put to the voters was: *'Are You in favour of the Constitution of the Republic of Croatia being amended with a provision stating that marriage is a life union between a woman and a man?'*. The turnout was 37.9% of voters, out of which 65.8 voted 'yes' and 33.7 voted against. Thus, the Constitutional Charter of Rights and Freedoms was amended by incorporating the definition of marriage into Art. 62 of the Constitution: 'Marriage is a life union between a man and a woman' (Part III, Art. 62, par. 2).

special statement called 'Communication' and extended its review powers.[75] It stated that although Parliament did not react by sending the request, the Court did not lose its general controlling powers over the constitutionality of the referendum. However, the Court further declared that out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, it is only permissible for the Court to make use of its

> general controlling powers as an exception when it establishes the formal and/or substantial unconstitutionality of a referendum question or a procedural mistake of such severity that it threatens to infringe the structural characteristics of the Croatian constitutional state, that is its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (as specified in Article 1 and Article 3).[76]

The Constitutional Court's next references to constitutional identity can also be found in cases connected with popular initiatives. In each of these three cases, the Constitutional Court asked referendum questions contrary to the Constitution. The first Decision[77] dates back to 2014 and concerns the referendum to amend the Constitutional Act on the Rights of National Minorities, specifically the part that regulates minority language rights. Deciding on the constitutionality of the referendum question upon the request of the Parliament, the Court stated that the rights of national minorities, more specifically using language and script, were guaranteed by Article 12 (2) of the Constitution, which represents *'universal and permanent values that define the identity of the Croatian constitutional state'*.[78]

Two other relevant decisions date back to 2015, both on the citizens' initiative and with the same result regarding the constitutionality of the referendum question. In the Decision on so-called outsourcing (paragraph 33.4), the Court repeated its statement in a case that dealt with the constitutional referendum on marriage.[79] In the second decision on motorway monetisation (paragraph 43.1), the court declared that Article 49(1)—that is, guarantees of entrepreneurial and market freedoms—must

75 Communication Sus 1/2013 of the Constitutional Court, of 14 November 2013, on the Citizen's constitutional referendum on the definition of marriage.

76 SuS-1/2013 of 14 November 2013., par. 5. *The Court concluded that the primary protection of values expressed in Art. 1 and 3 of the Constitution does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions.*

77 Decision No. U-VIIR-4640/2014 of 12 August 2014, par. 13.1 The collection of signatures for intended referendum was basically organised to prevent the Government's intention to fully implement the Act on national Minorities and to place bilingual plaques (in Cyrillic script) on public institution buildings in the city of Vukovar.

78 Art. 12 of the Constitution: *(1) The Croatian language and the Latin script shall be in official use in the Republic of Croatia. (2) In individual local units, another language and Cyrillic or some other script may be introduced in official use together with the Croatian language and Latin script under conditions specified by law.*

79 Decision No. U-VIIR-1159/2015 of 8 April 2015, par. 33.4, NN 43/2015.

always be interpreted together with Article 3 of the Constitution (fundamental values) and have special significance for the conception of constitutionally guaranteed rights that constitute the identity of the Croatian constitutional state.[80]

Finally, in the latter Decision, the Constitutional Court first established the unconstitutionality of the referendum question (i.e. proposed Act amendments) and concluded that it is *'not necessary to further review the conformity of referendum question with EU law in substance because the Constitution, by its own legal force, has supremacy over EU law'*.[81] This statement by which the Court explicitly declared the supremacy of the Constitution over EU law was quite surprising, as it was not necessary to reach the decision in the case. The Court did not further elaborate on its position on the relationship between national law and EU law nor did it connect the concept of Croatian constitutional identity with the relevant provisions of the EU Treaties, in particular with Article 4 TEU.[82]

7. Concluding remarks

Different possibilities of transnational dialogue for the institutions of the Republic of Croatia emerged with its international recognition in 1992 and, later, with its gradual integration into various international organisations of a supranational character (UN, COE, WTO, and EU). The gradual implementation of the ECHR law and of the ECtHR judgements in national law was especially evident in the case law of the Constitutional Court and the obligation to take a new course towards the realisation and implementation of EU law after the constitutional amendments of 2010 and the insertion of separate Chapter VII. The 'European Union' in the Constitution of the Republic of Croatia has brought the constitutional judiciary and regular courts into a possible position of taking an active (and not just a passive) dialogic approach towards European institutions. The elaboration of the fundamental values of constitutional order and the idea of European integration, with the parallel process of

80 Decision No. U-VIIR-1158/2015 of 21 April 2015 (par. 43.1), NN 46/2015. Constitution of the Republic of Croatia, Art. 49 para. 1: *Free enterprise and free markets shall form the foundation of the economic system of the Republic of Croatia.*

81 Ibid., par. 60.

82 Deciding recently, again in the case connected with review constitutionality the referendum question (U-I-VIIR-2181/2022 of 16 May 2022), this time regarding revisions to legislation governing the protection of the population from contagious diseases, the Court reiterated the necessity of 'holistic interpretation of the Constitution' (U-I-3780/2003) and its obligation *'not to allow the holding of any referendum when it finds such formal and/or substantive unconstitutionality of the referendum question or such a grave procedural error which threatens to undermine the structural characteristics of the constitutional state, that is, its constitutional identity, including the highest values of the constitutional order (Art. 1 and 3 of the Constitution)'*, as stated in Communication SuS-1/2013 of 14 November 2013., par. 5.

adaptation of the national constitutional-political system to the complex of European law, prompted the Constitutional Court of the Republic of Croatia to start developing the concept of constitutional identity. Exactly taking the position in such transnational dialogue that must be realised based on mutual partnership and respect, including a *'correct understanding of the established limits, both to the national constitution and to the regulatory authority of the European Union'*,[83] would enable national institutions and Constitutional Court to engage more actively in conceptualisation and the protection of national identity that is inherent to fundamental structures of constitutional democracy in Croatia.

83 Smerdel, 2014, pp. 516–517.

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