

COLLECTION OF PAPERS

**TACKLING CONSTITUTIONAL CHALLENGES ON THE ROAD  
TO THE EUROPEAN UNION: PERSPECTIVES  
FROM SOUTH-EAST EUROPEAN ACCESSION COUNTRIES**



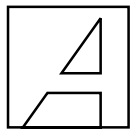
SKOPJE , 2012

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Konrad  
Adenauer  
Stiftung

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<sup>1</sup> The opinions expressed herein are those of the authors and do not necessarily reflect the views of the Konrad Adenauer Stiftung Rule of Law Program South East Europe.

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## FOREWORD

The Association for Development Initiatives – Zenith, in partnership with the Konrad Adenauer Stiftung Rule of Law Program South East Europe and the Swiss Agency for Development and Cooperation organized a regional conference in December 2011 which examined the impact that the process of European integration will have on national constitutions in South-East European accession countries Albania, Croatia, Montenegro, Serbia and Macedonia. Gathering distinguished academics, judges, Members of Parliament and representatives of executive branch of power from the respective countries the conference initiated a debate on this often over looked aspect of the EU integration process.

With a view to maintaining, deepening and further expanding this debate the Association Zenith, and the Konrad Adenauer Stiftung Rule of Law Program South East Europe identified country-specific issues and experiences from the regional conference which merit further elaboration and in-depth exploration. In 2012, distinguished authors and researchers were invited to prepare an academic article focusing on these issues and ensuring a proper follow-up to the debate opened in 2011. After months of hard work, we are proud to present the result in this compilation of academic articles.

The publication contains ten articles, two pertaining to each country of the involved South-East European accession countries:

- **Dr. Tanja Karakamisheva-Jovanovska** analyses the most important aspects of the process of Europeanization of the EU Member States national constitutions, as well as the need of the Republic of Macedonia to join in this process bearing in mind the experience of the countries that have already gone along this path;

- **Dr. Sinisha Rodin** discusses the Croatian 2010 constitutional amendment in context of accession requirements, and argues that despite this the requirements of the internal market of the EU still need to be fully embraced by the judiciary and by the Constitutional Court, as the constitutional amendment does not, on its own right, suffice to open the national legal system to application of internal market rules;

- **Dr. Grida Duma Shqina** focuses on the legal effects of the Stabilization and Association Agreement in the pre-accession period in the national legal order of the Republic of Albania, including the national constitutional provisions, and particularly those conditions governing the relationship between international law, domestic law and the role of the judiciary.

- **Dr. Djordije Blazhic** and Andjelka Rogac, investigate constitutional changes in the Republic of Montenegro in context of the European integration

process, from a constitutional law viewpoint but also from a political aspect;

- **Dr. Kristian Turkalj** examines and evaluates the experiences of the Republic of Croatia in the negotiation process in Chapter 23 and Chapter 24 and reforms that have been implemented in order to meet the criteria for EU membership, with special emphasis put on the constitutional changes that have been implemented;

- **Dr. Ivana Krstic** explores primarily the constitutional deficiencies which affect the human rights protection in Serbia, as well as the capacity and will of public servants and judges to directly apply international norms on human and minority rights, including EU law, and to interpret domestic norms in accordance with the practice of relevant international bodies;

- **Bojan Bozhovic** discusses the emergence of a human rights protection system, with special focus on the European system, and also sheds light on the situation in Montenegro and its effort to harmonize its legal framework with the EU law especially in the field of human rights;

- **Dr. Tanasije Marinkovic** presents the constitutional framework of the guarantees of judicial independence in the Republic of Serbia, concludes on the unconstitutionality of recent personnel re-composition of the courts, and depicts the politico-judicial battle surrounding the reform, where the European Union played a powerful role based on the place of the judiciary in the constitutional architecture of the EU;

- **Aleksandar Spasenovski** investigates the constitutional safeguards for the freedom of religion in the Republic of Macedonia, and argues that the European standards, set up primarily by the Council of Europe and by the EU, might be a vital element for achieving the intended equilibrium among the factors that contribute towards defining the Macedonian pattern of secularism;

- **Malltezi Orinda** and **Jonida Drogu** explore the controversies and manoeuvring that emerged from the initiative for constitutional changes on immunity of high state officials and Members of Parliament in the Republic of Albania in response to requests from the EU for improving the fight against corruption and enhancing transparency.

We sincerely hope that this collection of articles will continue the established forum in the region and will keep the topic on the agenda of decision-makers and the expert public, providing critical insights and drawing valuable parallels.

**Aleksandar Nikolov**

Executive Director

Association for Development Initiatives - Zenith

# **ON THE NEW CHALLENGES OF THE EUROPEAN CONSTITUTION AND THE NEED OF EUROPEANIZATION OF THE MACEDONIAN CONSTITUTION**

**Tanja Karakamisheva-Jovanovska, Ph.D.**

## **ABOUT THE AUTHOR**

Prof. Tanja Karakamisheva-Jovanovska earned her Ph.D. degree from the University of Ljubljana, Faculty of Law, Republic of Slovenia in 2002, and her LL.M. degree from the University “Ss. Cyril and Methodius”, Faculty of Law “Iustinianus Primus” in Skopje, Republic of Macedonia in 1997. She is a regular professor at the Constitutional Law and Political System Department, Law Faculty “Iustinianus Primus”, University “Sc. Cyril and Methodius” – Skopje. She has been working as an expert in many GTZ, OSCE, UNDP, Council of Europe and other projects. She was also involved in creating and developing terms of reference for the projects related to the National Version of the EU Legislation, working on a Twinning Project with the Republic of Slovenia; member of the leader team in the project “Technical Support for Establishment of Public Training Institute for Judges” funded by the European Agency for Reconstruction (EAR), as well as coordinator of the project “Regional Centre for Postgraduate Program in European Law and Integration”, Faculty of Law “Iustinianus Primus”. She has participated in more than twenty relevant international scientific projects, and more than fifty seminars and international conferences around the world with papers or studies.

## ABSTRACT

The paper analyses the most important aspects of the process of Europeanization of the EU Member States national constitutions, as well as the need of the Republic of Macedonia to join in this process bearing in mind the experience of the countries that have already gone along this path. The experience of the EU Member States is particularly important for Republic of Macedonia because it can help in reflecting all problems and difficulties that this journey brings along, as well as the possible solutions in the process of amending the national Constitution. Significant importance is also given to the precedent law of the EU Court of Justice in the part of protection of human rights and freedoms and the basic freedoms within the Union as a source of the law that should be kept in the focus in the process of harmonization of the Macedonian Constitution with the EU legislation. Comparison showed that membership in the EU gives rise to numerous and specific constitutional challenges due to the specific features of the EU legal system. Almost all EU Member States have amended their Constitutions in order to meet the requirements resulting from their integration into the EU legal system.

## РЕЗИМЕ

Трудот ги анализира најзначајните аспекти на процесот на европеизација на националните уставы на земјите-членки на ЕУ, како и потребата да се пристапи кон таквиот процес и во Република Македонија, имајќи ги предвид искуствата на земјите кои веќе го поминале овој пат. Искуствата на земјите-членки се од посебно значење за Република Македонија, бидејќи преку нив можат да се согледаат сите проблеми и потешкотии кои овој процес ги носи, како и можните решенија за нивно надминување во процесот на менување на македонскиот устав. Исто така, значајно внимание е посветено и на прецедентното право на Судот на правдата на ЕУ во делот на заштитата на човековите права и основните слободи во рамки на Унијата, како извор на правото за кој посебно треба да се води сметка во процесот на хармонизирањето на македонскиот устав со правото на ЕУ. Споредбата покажа дека членството во ЕУ создава бројни и специфични уставни предизвици како резултат на специфичните карактеристики на правниот систем на ЕУ. Скоро сите земји-членки на ЕУ ги имаат изменето нивните Устави со цел да ги исполнат условите кои резултираат од нивната интеграција во правниот систем на ЕУ.

Key words:

constitution, constitutionalism, Europeanization, ECJ, supremacy.



# **ON THE NEW CHALLENGES OF THE EUROPEAN CONSTITUTION AND THE NEED OF EUROPEANIZATION OF THE MACEDONIAN CONSTITUTION**

## **1. The different understanding of the elements of the European Constitution**

1. It is generally accepted that the Constitution in the EU is in a state of perpetual creation. Its creation has a hidden and a manifest form.

The hidden, latent form of creation of the European Constitution is perceived by the evolutionary development of European constitutionalism, while the manifest form by the planned and thoughtful steps taken by the European institutions as part of the process called constitution in creation.

From a functional viewpoint, through which one perceives the structural merger of the legal and the political system of the Union, there is almost no doubt that the EU has a modern constitution. In fact, this viewpoint acknowledges the evolutionary development of European constitutionalism, i.e., the evolutionary idea for the Constitution represented through the content of European primary law. The founding treaties set the boundaries that detach the legal from the political system of the Union and provide a reciprocal independence of the two systems. Hence, there is no doubt that the EU has a Constitution in the functionalistic sense of the word.

On the other hand, neither the normative dimension of the European Constitution can be questioned, understood as a set of norms that enable the democratic policy. As set of legal documents, the founding treaties are actually a constitution not only in the functionalistic or evolutionary sense, but also in the normative sense of the word. The EU has a normative Constitution if we look at it from the viewpoint of the tradition of the rule of law principle, according to which the systems limit the political authority and domination. Thus, in accordance with the English and the German tradition, the constitution is “a legalization of the state’s authority” (Grimm).

However if we look at the normative Constitution from the perspective of the French and the U.S. tradition of the rule of law principle, then the Constitution has to be understood as a basis of the political authority. The main essence of this normative conception of the European Constitution is not how to limit the state power, but how to establish the power of the citizens.

This conception institutes the so called Revolutionary idea for the Europe-

an Constitution, regardless whether it is really a product of the revolution or not.<sup>1</sup> This revolutionary Constitution presumes that there is a strong public which has a great moral influence on the political and the administrative authority. “The revolutionary constitution” can emerge only by creating a system of norms that will equally regulate the universal suffrage, the formation of political parties and the right of political association of citizens, equal representation, etc., or simply said – a system of norms that aim to create a strong civil society.

This “revolutionary Constitution” is creator of a strong public. Such strong public presumes the existence of an egalitarian and proper quality procedure for transforming the public discussions within the civil society in compulsory decisions of the EU system. There is reasonable doubt whether Europe will ever be able to create an appropriate democratic revolutionary constitution.

2. Which are the constitutional elements that compose the content of the European Constitution?

Let’s start with the so called cluster of traditional constitutional elements, which include:

- civil liberties and rights and their systemic protection,
- the matter of division of institutional competencies,
- division of power functions (in a horizontal and vertical manner),
- the issue of the model of democracy and the instruments by which it is practiced and
- the matter of citizenship.

The second group of constitutional elements is comprised of the following issues:

- the geographical borders of the EU,
- different variants of regulating the relations between the EU and the Member States (the hard core idea, the idea to form concentric circles in the Union or creation of the EU as club of clubs, the idea for enhanced cooperation between the Union and the Member States, so called integration with many speeds, etc.),
- resolving the dilemmas on how many of the rules and norms pertaining to the internal EU market and related with the socio-economic model of the Union should be constitutionalised in a material and in a formal sense, and finally
- the issue of the European identity (including the aspects of historical and cultural identity of the Union, social cohesion, political culture, etc.).

The third group of constitutional elements is comprised of those related with:

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<sup>1</sup> Möllers had made a similar difference between the evolutionary and the revolutionary idea for the constitution, but in doing so has not limited the term evolution to the process of structural merger. For an even more restrictive idea of the revolutionary constitution also see Haltern, U., “On the Finality of the European Union”, *European Law Journal*, Vol. 9, No. 1, 2003.

- uniqueness,
- distinctiveness,
- the autonomy of the national constitutions on one hand, and the European constitution on the other, or in words of Pedro Cruz Villalon, “the reciprocal meta-constitutionality on both sides.”

3. An essential part of the common European constitutional identity is the relative resistance of the national constitutions to regulate the dynamics of the European constitution.

On the other hand, the integrative role of the European Constitution and the function of harmonizing the common constitutional elements of the Member States do not allow seeking the common idea for national identity. In fact, what the issue of supremacy of EU law paradoxically reveals is the idea of the constitutional elements as another way of explanation of the multi-level constitutionalism, constitutionalism of at least four different levels of constitutional segments and their reciprocal meta-constitutionalism: national, sub-national or regional, supranational or European, and transnational level. Thus, we have come to the fourth and last set of criteria for the European constitutional elements.

Based on these constitutional elements the three large functions of European constitutionalism can be positioned.

The first one can be defined as mobilization of the community where we are reviewing the idea of “the constitution as a process”<sup>2</sup>; the second function of constitutionalism is one of institutional design according to which the basic role of the Constitution is fulfilled if it draws the institutional matrix and “the power map of authority”<sup>3</sup>; the third function of constitutionalism is related to the community affirmation by the contribution of the Constitution as a factor for identity creation of the “political community” through establishment of its borders or so called authoritative space of the community and by acknowledging and nurturing the political ideals and wishes of the community by its members.<sup>4</sup>

Despite the failure of the ambitious project of the European Constitution Treaty, the new millennium opened new constitutional era for the EU, focusing on the protection of fundamental rights of citizens. As of 2000 when the Charter of Funda-

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2 Also see: Sadurski, W., “Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Post-communist Transitions”, J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe*, Vol. 1 Institutional Engineering, Oxford, 2001, (pg. 455-474, 466-472).

3 Also see: Duchacek, I., *Power Maps: Comparative Politics of Constitutions*, Santa Barbara, 1973.

4 For the three functions of constitutionalism also see: Walker, N., “Constitutionalizing Enlargement, Enlarging Constitutionalism”, *European Law Journal*, Vol. 9, No. 3, July 2003, (pg. 369-370).

mental Rights of the EU was proclaimed, fundamental rights feature highly on the European agenda.<sup>5</sup>

This marked the start of a new phase of judicial activism of the European Court of Justice, focused above all on the issue of protection of fundamental rights. As a matter of fact, the Charter brought numerous benefits in fulfilling and guaranteeing the human rights in the EU, but at the same time it also caused numerous problems. The most significant one is related to the increasingly evident transformation of the European Court of Justice in a Court of rights as a potential risk of centralization and standardization of the human rights protection procedures.

Also, several significant constitutional changes appeared that are related to the application of the ECHR and the formation of the European Fundamental Rights Agency in Vienna. All these developments served as “fresh constitutional fuel for the engine” of the European Court of Justice.

On the other hand, it seems that the acceptability of the written catalogue of fundamental rights has encouraged the ECJ to act as a constitutional court of the EU although this evolution is not new. Many other stages in the history of European integration were marked as moments of weakness of the political processes in EU and as moments for strengthening the activism of the judicial power.

Finally, it is generally known that the political weaknesses have left and still leave more space for strengthening of the judicial activism. What is new in the last wave of judicial-constitutional activism in the EU is the intensive activity of the Union in the area of protection of fundamental human rights where the Member States of the Union show common basis, but also different constitutional traditions and considerations. A question arises whether this situation could endanger the elements of the national constitutions, on one hand, and the European constitutional balance on the other; whether it could endanger the principle of constitutional tolerance between the segments and the issue of the so-called mutual nurturing between the national and the European Constitution which stems from the theory of multi-level constitutionalism?

The answer to these questions is that the basic counterpoint of these risks is the maintenance of the dynamism of judicial dialogue between the national constitu-

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5 Right after the formal proclamation of the Charter of fundamental rights by the EU in Nice on December 7, 2000, Armin von Bogdandy wrote: “The human rights as an essence of the supranational order are a grueling perspective. They can provide strong, obvious, non-competitive *raison d’être*, something which the Union wants, giving common attributes of the common market and policy”. In the Charter of fundamental rights the author has felt the first symptoms of the evolution which is meant to reorder the characteristics of the European integration, moving from an economic community to a community of fundamental rights. As the author predicted the Charter of fundamental rights has marked the new era of the European integration, removing all of its seduction power. It has also improved the guarantees of fundamental rights in the EU. Significant progress is also visible in the judicial and political decisions of European institutions.

tional courts and the European Court of Justice by the eminent preliminary ruling procedure. It presently seems that the preliminary ruling procedure is the most effective way of presenting the specifics of the national constitutional traditions in front of the European Court of Justice and of nurturing the multi-level constitutionalism.

3. The abovementioned shows that the first line of resistance in the relationship between the national constitutional law and the EU Law is the area of civil liberties and rights. In 1970 there was a resistance to the acceptance of the principle of EU Law supremacy from the German and the Italian constitutional courts which affirmed the stance that in case certain parts of the EU Law directly harm the national constitutional guarantees of the fundamental rights of citizens, they have the right to require that such parts of the EU Law are to be amended.<sup>6</sup>

However, over time, as the European Court of Justice developed its jurisdiction in the sphere of fundamental rights, this issue has lost its primary meaning. Recently, both the German and the Italian court have withdrawn from this standpoint and confirmed that they will no longer go into the procedure of initiating changes to the EU Law when it harms the national constitutional rights of their citizens, due to the conclusion that the EU institutions offer sufficient legal means for their protection. Although the fundamental rights remain to be a legal basis for some national constitutional courts to reject the application of EU Law, the probability that this will result in a conflict between EU Law and the national constitutional law is very small.

4. The second line of resistance and most common case of collision between the national constitutional law and the EU Law is related to the issue of institutional jurisdiction (*Kompetenz-Kompetenz*). This matter is relatively new and it resulted from discussions related to the principle of subsidiarity. Its essence lies in the answer to the question as to who will determine the boundaries of the institutional competences when it comes to the delimitation between the national and the European policies. Can we generally accept the viewpoint of the German and the Danish Supreme Court that they, in accordance with their national constitutions, have the authority to decide when and whether the legal acts of the EU are applied *ultra vires*?

According to the viewpoint of these two courts, the European Court of Justice has a jurisdiction to interpret the legality of EU Acts, which includes the question whether their application is within the responsibilities of the EU. But on the other hand, the European Court of Justice is an institution of the EU that has the right to act *ultra vires* through the possibility to change the national constitution of Member States by interpreting certain norms.

And the third line of resistance relates to the possibility of conflict between EU Law

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<sup>6</sup> BVerfGE 37,337 (Solange I).

and some other specific provisions of national constitutions of Member States of the Union. These conflicts have especially intensified with the signing of the Maastricht Treaty.

Thus, for instance, the Maastricht Treaty for the first time provides the possibility to utilise the active and passive voting right for all citizens of the EU in all Member States, regardless of their citizenship, as well as the right of all European citizens who have a habitat and residence in another Member State to be elected as representatives in their local authorities.

A direct collision with the provision of the Maastricht Treaty was noted, for example, in the provision contained in the Spanish Constitution where the voting right was guaranteed only for Spanish citizens. After some consultations between the national and the European institutions, it was agreed that collisions of this type are to be resolved in the context of the national ratification of the Treaty.

In accordance with this stance, the Spanish Constitutional Court opened the issue of constitutional changes. Thus, article 13 of the Spanish Constitution was amended in the interest of the national ratification of the Maastricht Treaty. Far more contentious were the collisions that emerged between the secondary acts of the EU law and the provisions of the national constitutions. Such prominent examples were the right of women, provided in the EU Law, to be involved in the army that caused a change in the Constitution of Germany, or cases when the EU Law allows specific educational degrees issued by private universities to be recognised, that directly forced Greece to renounce its recognition of diplomas issued only by the public universities.

## **2. Directions in the process of Europeanization of the national constitutions**

The European integration, undoubtedly, causes major changes in the content of the national legal systems of the Member States, as well as in the systems of the candidate countries for membership in the Union.<sup>7</sup>

Equally important is the process of harmonisation of the national constitution with the EU law, having in mind the place and the role of the national constitution in the hierarchy of the legal systems in every individual country.

In every EU Member State, the European legal system constitutes a source of new

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<sup>7</sup> For more information, see: Anneli Albi, 'Europe' Articles in the Constitutions of the Central and Eastern European Countries, *Common Market Law Review*, 42 (2) 2005, p. 399-423 and Frank Hoffmeister, *Constitutional Implications of EU Membership: a View from the Commission*, *Croatian Yearbook of European Law and Policy*, Vol. 3, No. 3, November 2007, p. 59-97.

law that dominates over the domestic norms at any level. The supremacy of the EU law also means an obligation for its direct and absolute application in the national legal and constitutional systems. The supremacy of this law changes the foundations of the formal order of the national governments under their parliaments. The standard doctrine that is applied in the EU, and which comes as a product of the EU Court of Justice, says that all national judges must give supremacy and direct effect to the EU law, despite the dominant importance of the domestic legislation. In this sense, the Court speaks of two independent legal systems.<sup>8</sup>

Still, the formal rejection of the EU Court of Justice to verify the thesis that the national legislation in the EU Member States controls the legality and the coordination of the EU regulations with those of the Member State merely highlights the failure of the Court to study the forms and conditions based on which the national constitutions should determine the scope of their competences. It is this failure that magnified the doubts in the basic value of this reciprocal independence.

It is believed that the coordination between the legal systems is not at all horizontal, but is in fact vertical i.e. hierarchical, which means that the founding treaties of the Union, as well as its secondary legislation, have direct effect in the EU Member States, and supremacy over the national constitutional law.

The fact that a number of national constitutions in the EU Member States have set the international treaties on a higher, supra-legal level, comes as a result of the direct effect of the primary and secondary law in the Union.<sup>9</sup>

In most of the EU Member States, the process of Europeanization of the national constitutions moved in several directions<sup>10</sup>, such as:

- incorporation of new constitutional provisions that refer directly to the EU, especially provisions that refer to the transfer of part of the national sovereignty to the Union,
- reforms in the existing constitutional provisions that concern the international treaties,
- reforms in the provisions that refer to the constitutional amendments, as well as
- changes in the constitutional provisions about the obligatory referendum on national level.

<sup>8</sup> In this context, also the opinion of: European Commission for Democracy through Law (Venice Commission), Constitutional Law and European Integration, CDL-INF (99) 7, Strasbourg, 21 April 1999.

<sup>9</sup> See: Pellet, Alain, Les fondaments juridiques internationaux du droit communautaire, Courses of the Academy of European Law, 1994, Vol.V-2, The Hague-Boston-London 1994, p. 256, Schönberger, dr.Christoph, Normenkontrollen im EG-Föderalismus, Die Logik gegenläufiger Hierarchisierungen im Gemeinschaftsrecht, Europarecht 2003/4, p. 620, Steiner, Josephine/Woods, Lorna/Twigg-Flesner, Christian, EU Law, Ninth Edition, Oxford, p. 89.

<sup>10</sup> An excellent documentation with the texts of the related constitutional provisions in EU Member States and candidate countries can be found on the following website "The Europeanisation of National Constitutions" (<http://proyectos.cchs.csic.es/europeconstitution/>).

For example, in the French Constitution provisions were incorporated that clearly highlight the readiness of the country to participate in the work of the European Communities and in the EU by performing the joint competences. This is also the aim of the provision for transfer of part of the national sovereignty to the EU institutions. Article 88-1 of the Constitution says that the Republic shall participate in the EC and in the EU constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers jointly, and paragraph 2 stipulates that “France agrees to the transfer of powers necessary for the establishment of European economic and monetary union”.

Of equal importance is the provision that refers to the right of all EU citizens who live on the territory of France to elect and to be elected on local elections, with one restriction that these citizens cannot act as mayors nor can they participate in the elections for members of the Senate. “...the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An institutional Act passed in identical terms by the two assemblies shall determine the manner of implementation of this article”.

The French Constitution also stipulates an obligation for the French government to lay before the National Assembly and the Senate draft proposals for legislation of the European Union together with drafts of or proposals for acts of the EC or the EU containing provisions which are matters for statute as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for acts or any document issued by an EU institution.

The National Assembly or the Senate can pass its own opinion about the coordination of the draft law with the principle of subsidiarity. This opinion is presented through the President of the Assembly, to the President of the European Parliament, the EU Council and to the European Commission. The national government should be also informed about this opinion. Every house in the Assembly, through the French Government, can launch a procedure in front of the EU Court of Justice against any EU act due to lack of coordination of that act with the principle of subsidiarity.<sup>11</sup>

The Constitution also makes it obligatory for any legislative proposal that authorises the ratification of a treaty for accession of any state into the EU to be first put on a referendum by the president of the Republic. As far as the reforms of the constitutional provisions that refer to the international treaties are concerned, the

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<sup>11</sup> See articles 11, 52, 53, 53-1, 53-2, 54, 55, 88-1, 88-2, 88-3, 88-4, 88-5, 88-6, 88-7, and 89 of the French Constitution: <http://proyectos.cchs.csic.es/europeconstitution>



French Constitution says that the President of the Republic should be involved in the process of negotiations and ratification of the treaties. He should be also informed about all negotiations that lead to signing of international treaty and which are not subject of ratification.

The Constitution also stipulates that the Republic can sign bilateral agreements with other European countries that have obliged themselves to respect the European provisions about asylum and the protection of the basic human rights and freedoms, and also stipulates that the Republic recognises the competences of the International Criminal Court as specified with the Treaty signed on 18 July 1998. Article 53, paragraph 1 of the Constitution stipulates that the Republic may conclude, with European States that are bound by commitments identical with its own in the matter of asylum and the protection of human rights and fundamental freedoms, agreements determining their respective jurisdiction in regard to the consideration of request for asylum submitted to them.

However, even if the request does not fall within their jurisdiction under the terms of these agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for this action in pursuit of freedom or who seeks the protection of France for some other reason.

If, based on previous notification by the President of the Republic, the Prime Minister, the representatives of the two houses of the Assembly, or by 60 representatives of the National Assembly or 60 senators, the Constitutional Council determines that the international agreement contains a clause that is contrary to the Constitution, the authorisation for ratification of that international agreement can be made possible only through changes in the Constitution.

In the Italian Constitution, the Europeanization of the constitutional provisions also moved along the directions mentioned above. As the Article 117 of the Constitution stipulates, the legislative power in Italy belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations. The state has an exclusive legislative authority in the following matters: a) foreign policy and international relations of the state; relations of the state with the European Union; and right of asylum and legal status of the citizens of states not belonging to the European Union.<sup>12</sup>

The following matters are subject to concurrent legislation of both the state and regions: international and EU relations of the regions; foreign trade; labour protection and safety; education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific

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<sup>12</sup> See the articles 10 (1), 75, 117, 138 and 139 of the Italian Constitution: Constitution of Italy, <http://vescc.az/constitution/italy-constitution-eng.html>

and technological research and support for innovation in the productive sectors; healthcare; food; sports regulations; disaster relief service; land-use regulation and planning; harbours and civil airports; major transportation and navigation networks; regulation of media and communication; production, transportation and national distribution of energy, etc.

The legal system of Italy conforms to the generally recognized principles of international law. Legal regulation of the status of foreigners conforms to international rules and treaties. Legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations.

The Constitution of Latvia also contains provisions that directly refer to the EU. For example, Article 68, paragraph 3, reads that the membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the Saeima. Substantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the Saeima. An amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. A draft law, a decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted for national referendum shall be deemed adopted if the number of voters is at least half of the number of electors that participated in the previous Saeima election and if the majority has voted in favour of the draft law, the membership of Latvia in the EU or for substantial changes in the terms regarding such membership.

As provided by law, every citizen of Latvia has the right to participate in the work of the State and the local government, and to hold a position in the civil service. Local governments shall be elected by Latvian citizens and citizens of the European Union who permanently reside in Latvia. Every citizen of the European Union who permanently resides in Latvia has the right to participate in the work of the local governments. The working language of local governments is the Latvian language.<sup>13</sup>

The Constitution of Lithuania incorporates a special Constitutional act on Membership of the Republic of Lithuania in the European Union that regulates the aspects related with the country's membership in the EU. "The Seimas of the Republic of Lithuania, executing the will of the citizens of the Republic of Lithuania expressed in the referendum on the membership of the country in the EU, held on 10-11 May 2003; expressing its conviction that the EU respects human rights and fundamental freedoms and that the Lithuanian membership in the EU will contribute to a more

<sup>13</sup> See articles: 41, 68, 70, 76, 77, 78, 79, 80, и 101 of the Latvian Constitution: Constitution of Latvia, [http://www.concourt.am/armenian/legal\\_resources/world\\_constitutions/constit/latvia/latold-e.htm](http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/latvia/latold-e.htm)

efficient securing of human rights and freedoms, noting that the EU respects national identity and constitutional traditions of its Member States, seeking to ensure a fully-fledged participation of the Republic of Lithuania in the European integration as well as the security of the Republic of Lithuania and welfare of its citizens, having ratified, on 16 September 2003, the Treaty between... [all EU Member States], adopts and proclaims this Constitutional Act:

1. The Republic of Lithuania as a Member State of the EU shall share with or confer on the EU the competences of its State institutions in the areas provided for in the founding Treaties of the EU and to the extent it would, together with the other Member States of the EU, jointly meet its membership commitments in those areas as well as enjoy the membership rights.

2. The norms of the EU law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the EU, the norms of the EU law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

3. The Government shall inform the Seimas about the proposals to adopt acts of EU law. As regards the proposals to adopt the acts of EU law regulating the areas which, under the Constitution of the Republic of Lithuania, are related to the competences of the Seimas, the Government shall consult the Seimas. The Seimas may recommend to the Government a position of the Republic of Lithuania in respect of these proposals. The Seimas Committee on European Affairs and the Seimas Committee on Foreign Affairs may, according to the procedure established by the Statute of the Seimas, submit to the Government the opinion of the Seimas concerning the proposals to adopt the acts of the EU law. The Government shall assess the recommendations or opinions submitted by the Seimas or its Committees and shall inform the Seimas about their execution following the procedure established by legal acts.

4. The Government shall consider the proposals to adopt the acts of the EU law following the procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions for the adoption of which the provisions of Article 95 of the Constitution are not applicable.”<sup>14</sup>

The Constitution of Portugal contains 13 provisions that refer directly to the EU.

For example, Article 7 of the Constitution says that Portugal may enter into agreements for the exercise of powers jointly, in cooperation or by the Union's institutions by respecting the principle of reciprocity and basic principles of subsidiarity,

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<sup>14</sup> See Article 150 of the Constitution and the Constitutional Law of Lithuania for membership in the EU (<http://proyectos.cchs.csic.es/europeconstitution>)

and also in direction of achieving economic, social and territorial cohesion in the field of freedom, security and justice, as well as in context of defining and implementing a common external, security and defence policy. Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union.

The provisions of the treaties that concern the European Union, and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.

In accordance with the principle of reciprocity and the Portuguese law, the EU citizens who reside in Portugal may be granted to vote and stand for election as Members of the European Parliament. The EU legislation and the other EU legal acts are transmitted to the domestic legislation in a form of a law or in a form of a regional legal decree. The Portuguese Parliament monitors the participation of Portugal in the process of constituting of the EU and applies rules for appointing members of the EU bodies and institutions, with an exception of the European Commission.<sup>15</sup>

The Constitution of Romania contains additional six provisions that refer directly to the EU. For example, Article 16, paragraph 4 of the Constitution says that after Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies. After Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament.

Article 44, paragraph 2 of the Constitution refers to the right to equal guarantee and legal protection of the private property of all people, regardless of who is the owner of the property. It is stipulated that the private property shall be equally guaranteed and protected by the law, irrespective of its owner. Foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the EU, and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance.

Article 135, paragraph 1 of the Constitution, stipulates that Romania's economy is a free market economy, based on free enterprise and competition. The state must secure: implementation of regional development policies in compliance with the objectives of the European Union. The national currency is the Leu, with its subdivision, the Ban. Under the circumstances of Romania's accession to the European

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<sup>15</sup> See articles 7, 8, 15, 33, 112, 115, 119, 133, 161, 163, 164, 197, 227, 284, 285, 286, 287, 288, 289 and 295 of the Portuguese Constitution: <http://proyectos.cchs.csic.es/europeconstitution>

Union, the circulation and replacement of the national currency by that of the EU may be acknowledged by means of an organic law.

Article 148, paragraph 1 says that Romania's accession to the founding treaties of the EU, with a view to transferring certain powers to community institutions, as well as to exercising jointly with the other member states the powers stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. As a result of the accession, the provisions of the founding treaties of the EU, as well as of other mandatory community regulations shall take precedence over the conflicting provisions of the national laws, in compliance with the provisions of the accession act. The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the EU institutions for approval.

The Constitution of Slovakia contains two provisions that directly refer to the EU.

Article 7, paragraph 2 refers to the transfer of part of its powers to the European Communities and the European Union. Legally binding acts of the EC and of the EU shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts that require implementation shall be realized through a law or a Government ordinance in accordance with Article 120, paragraph 2. The Slovak Government shall have the power to issue regulations to implement laws within limits laid down by the law. The Government is authorized to issue regulations on the implementation of the Europe Agreement establishing an association between the EC and their Member States, of the one part, and the Slovak Republic, of the other part, and on execution of international treaties.<sup>16</sup>

The Constitution of Slovenia also contains provisions that refer to the EU. For example, Article 3a says that in accordance with a treaty ratified by the Slovenian National Parliament with a two-thirds majority vote of all MPs, this country may transfer the execution of part of its sovereign rights to international organisations that are founded on the principles of respect for human rights and fundamental freedoms, democracy and the respect of the rule of the law, and that the country can join defence alliances with countries based on respect of these values.

### **3. Techniques for application of the national constitutions and their adjustment with the EU law**

The expansion of competences of the EU as well as the direct interaction with individuals are elements of potential conflict of EU legislation with Member State

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16 Also, (<http://proyectos.cchs.csic.es/europeconstitution/>).

Constitutions. The supremacy of EU law might lead to the non-application of contrasting national legislation, and it is still controversial whether this also includes constitutional law. As EU law is still based on international treaties these questions raise issues of legitimacy and have thus been a challenge for national Parliaments and Constitutional Courts. While many Member States created specific constitutional provisions related to EU membership, the latter have engaged in a judicial dialogue with the ECJ, in an attempt to (de)limit the respective spheres of influence.

Every country that wants to become part of the EU has the right to decide on the changes of part of the provisions of the National Constitution in order to be legally integrated in the EU system. Some Member States adopted special constitutional integration clauses, while others have accepted the technique of adopting general clauses, which are also valid for the other forms of membership in international organisations. Almost all integration clauses introduce special procedural demands for transfer of sovereignty from national to EU level: parliamentary consent, most often with qualified majority, derogation of internal distribution of power, and in certain cases also the need of scheduling a referendum in case of ratification of major changes in the constitutional treaties of the EU, or in case of introduction of constitutional changes in the national constitution.<sup>17</sup>

Also, the key principles of supremacy of the EU law and the direct effect of the EU law are clearly defined in most of the constitutions of the EU Member States, and there are no examples of constitutional amendments that put national constitutional reserve in the part of the uniform application of EU law. In the segment of human rights and freedoms, especially visible is the constitutional guarantee for the right to elect and be elected for service in the bodies of the local authorities that applies to EU citizens who have a permit for stay in another EU Member State, and in certain constitutions, according to the principle of reciprocity, the voters' right to elect members for the European Parliament is also guaranteed.

#### **4. The Court of Justice of the EU and the process of Europeanization of the national constitutions**

In addition, I will present several known case-studies from the practice of the EU Court of Justice that reaffirm the weight of the principle of direct effect of the EU law and the principle of supremacy of the EU law vis-à-vis the national constitutional law of the EU Member States.

The case of Tanja Kreil was closed in the year 2000,<sup>18</sup> before the adoption of the EU charter of fundamental rights, but also at a time of true constitutional euphoria in

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17 See: A. Kellermann et al. (eds), *The Impact of EU Accession on the Legal Orders of the New EU Member States and (Pre-)Candidate Countries-Hopes and Fears*, The Hague, 2006.

18 ECJ Judgement 11 January 2000, C-285/98, Tanja Kreil

the Union. In this case the European Court of Justice found that there is a collision between Article 12 of the German Constitution, which prohibits a woman to hold a rank in the German Army, i.e. to use firearms, and the basic principle of the *acquis communautaire*, i.e. the principle of non-discrimination based on sex/gender. In its decision, the Court concludes that the communitarian principle of non-discrimination eliminates the application of the national constitutional provision that prevents German women to serve in the Army and to use firearms, while it allows women access to the medical and musical army services.

The Court decided that Germany should make constitutional changes to this article, pointing out that in this case there is a collision between the EU law and the national constitution of Germany. Unlike in the previous cases, when the European Court of Justice usually remained silent when it came across concrete cases of collision between the national constitutions and the principles of the EU law, in this case the Court obliged the German authorities to coordinate their national norms with the EU norms through concrete changes in the constitution, which is the reason why this case is considered a pioneer in the new line of decisions of the Court.

Over a very long time period, the protection of the basic rights of the citizens in the Union was subdued to the general goals of the European economic integration and to the benefits of the joint EU market. The practice of the European Court of Justice shows that there are great differences in the work of the Court when it comes to protection of the economic freedoms realised in the common EU market, and some other basic rights of the citizens. Although the Court never reviewed the fundamental rights and freedoms as absolute values, still it was very careful when it decided on cases for protection of economic rights and freedoms on one hand, and on the cases for protection of fundamental rights and freedoms on the other. In the framework of this complex balance, the economic freedoms were most often given an advantage.

This explains why the Case of Schmidberger from 2003<sup>19</sup> was welcomed with such an enthusiasm by many authors and analysts. In this case, the European Court of Justice was summoned to resolve a controversial issue between two freedoms: the market freedom, i.e., in this case, the free movement of goods, and the freedom of assembly and speech, in context of the demonstrations of the environmental association that blocked the Brenner highway for 30 hours. Surprisingly, the court, in a very thorough decision, gave advantage to the environmental association, which was unprecedented in the judicial practice because this was the first time that an economic right did not manage to overcome civic rights.

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19 ECJ Judgement 12 June 2003, C-112/00, Schmidberger. M. Avbelj, European Court of Justice and the Question of Value Choices, Jean Monnet Working Paper 06/04.

In this context, the decision on the Omega case from 2004<sup>20</sup> was an even bigger surprise, when the Court faced with a conflict between the economic freedom protected by the Treaty of the EC, in the sense of free movement of goods and services on one hand, and protection of the human dignity on the other, when that dignity is harmed by offering games that simulate killing of people through use of toys – laser guns. The decision of the court was based on two arguments; the first argument concerned the provision of services and restrictions to this freedom in the name of peoples' public safety, while the second argument referred to the possible restrictions to economic freedoms in the name of protection of the fundamental human right, i.e. the right to human dignity. The case could have been closed even if the Court called upon the first argument, violation of the basic norms for public safety of the citizens, however the Court also used the principle of human dignity not only as a value contained in the German constitution, but also as part of the values of the European legal system.

In modern days, the trend of the European Court of Justice to expand the scope of protection of the basic citizens' rights contained in the EU law is quite visible, even outside the scope of the competences of the EU, but in accordance with the so-called incorporation doctrine. This tendency is quite obvious in two cases that analyse the rights of transsexuals. Namely, in the cases of K.B.<sup>21</sup> and Richards<sup>22</sup>, the Court reviewed one very interesting legal condition, related with the legal system of the UK, which allows change of sex even in the framework of the national health-care, but does not allow this sex change to be registered in the national register.

In this factual situation, the transsexuals in this EU Member State were not allowed to enjoy the status of the gender that he or she has gained after the sex change operation. The European Court of Justice found that due to the absence of the possibility for the appropriate gender to be registered these people are not in position to realise at least two of their rights: the right to freely join in marriage and the right to use the family pension from their partner because of the inability of the partner to retire at the age of sixty, i.e. the age limit when women gain their right to retirement. In both cases the Court found that the British legislation is incompatible with the principles of gender non-discrimination and as a result the UK was subject of several court processes both in the Strasbourg and in the Luxemburg Court.

However, these cases resulted with changes in the British national legislation and adjustment with the European principles. It is interesting to note that in these cases the fundamental citizens' rights have been violated by the existing regime of the British civic status, an issue that is far from the EU competences. The issues that

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20 ECJ Judgement 14 October 2004, C-36/02 Omega.

21 ECJ Judgement 7 January 2004, C-117/01, K.B.

22 ECJ Judgement 26 April 2006, C-423/04, Richards.



concern the legal status of the transsexuals and the regulations about the citizens' registry are not within the scope of competences of the Union.

Still, the European Court of Justice, by using the principle of non-discrimination, found that it was in its mandate to protect the right to marriage and the right to family pension by expanding the doctrine of incorporation by the Court. However, the decision regarding the British legislation did not provide rules for implementation, nor rules for application of the communitarian acts. As the European Court of Justice concluded, the British legislation for registering of citizens' personal data does not harm the right protected by the communitarian law – the right to pension, but it has a discriminatory impact on one of the conditions necessary for the realisation of this right – the age for retirement. The Court found that the description of the sex change is a precondition for one to be able to enjoy the social rights mentioned above. It is too early to say whether this is an announcement for expansion of the doctrine of incorporation, according to which the European fundamental rights put in context of the measures that the national authorities can set preconditions for one to enjoy the fundamental rights of the Community.<sup>23</sup>

## 5. Conclusion

Considering the experiences of the EU Member States it could be concluded that constitutional adaptations are a result of the different constitutional situation and traditions in the single States, to their political situation as well as to the dependence from the results of accession negotiations with the EU. However, there is a list of constitutional issues to be addressed before accession and a number of solutions to choose from based on a critical evaluation of their functioning in practice.

The Republic of Macedonia will have to immediately launch the process of Europeanization of its constitution, having in mind the numerous different experiences of the “old” and the “new” EU Member States in the process of building joint European standards and norms.

One can notice that some countries, on one hand, applied cosmetic changes to the constitutional provisions without making some deep essential cuts in their constitutional and political systems, while other countries applied serious and detailed constitutional changes in the process of constitutional harmonisation with the EU standards.

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23 In context of the expansion of the boundaries of incorporation, see the conclusions of the German representative M. Poiares Maduro 12 September 2007, C-380/05, Centro Europa 7, particularly in 21 and 22, where he presents his opinion about the uniformed protection of the fundamental rights as a necessary precondition for efficient realisation of the freedom of movement of people throughout Europe, as well as the conclusions of the general representative Damaso Ruiz Jarabo Colomer 6 September 2007, C-267/06 Tadao Maruko, where he speaks about marriage with partners form the same sex and the right to family pension.

Still, what can be determined as a joint characteristic of all countries is that the constitutional changes in both groups tackle numerous procedural and essential issues and aspects. In the group of procedural aspects the most important issue is the one on sovereignty and its transfer from national to European level, while in the group of issues that concern the content most important aspect is the *acquis communautaire*, the institutional balance on national and European level in the process of decision-making and in the process of efficient application of the EU Law, the issue of realisation and protection of the human rights and fundamental freedoms, etc.

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**NATIONAL CONSTITUTIONS**

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2. Constitution of the V. French Republic
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4. Constitution of Lithuania
5. Constitution of Slovenia
6. Constitution of Slovakia
7. Constitution of Portugal
8. Constitution of Romania

**CASE-LAW OF THE ECJ**

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2. ECJ Judgement 26 April 2006, C-423/04, Richards
3. ECJ Judgement 12 June 2003, C-112/00, Schmidberger
4. ECJ Judgement 14 October 2004, C-36/02 Omega
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# CROATIAN CONSTITUTION AND INTERNAL MARKET OF THE EUROPEAN UNION

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## ABOUT THE AUTHOR

Prof. Sinisha Rodin earned his Ph.D. degree from the University of Zagreb, Faculty of Law, Croatia in 1995, and his LL.M. degree from the University of Michigan Law School in Ann Arbor, Michigan in 1992. He specialised European Law at the European University Institute in Florence, Italy, and German Constitutional Law at the Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg, Germany. He is recipient of the University of Michigan Law School Merit Award, and the University of Zagreb Rector's Award. In 2001/2002 he was Fulbright fellow and Visiting Scholar at Harvard Law School. Prof. Rodin is member of the International Association of Constitutional Law and of the European Communities Studies Association. He is author of two books and more than fifty research papers. Together with prof. Tamara Chapeta he co-authored the first textbook on EU law in Croatian language. Prof. Rodin's scientific interest includes issues of constitutional interpretation, fundamental rights and constitutional aspects of European integration. His research also focuses on free movement of services. He is a member of the editorial board of Croatian Yearbook of European Law & Policy and Zeitschrift für Öffentliches Recht. He is a member of the UACES and FIDE. Prof. Rodin holds ad personam Jean Monnet Chair at the University of Zagreb, Faculty of Law, Zagreb, Croatia. His teaching includes a general course on EU law and an advanced course on Human Rights in the EU. He is one of the supervisors of students participating at the European Law Moot Court Competition and Central and East European Moot Court. In 2012 prof. Rodin also teaches at CEU San Pablo, Madrid and as a Marc and Beth Goldberg Distinguished Visiting Professor at Cornell University Law School.

## ABSTRACT

The paper discusses Croatian constitutional amendment of 2010 in context of accession requirements. The author suggests that despite of the formal change of the Constitution, requirements of the internal market of the EU still need to be fully embraced by the judiciary and by the Constitutional Court. In that context the author presents case law relevant for constitutional interpretation and discusses it in context of the internal market rules that Croatia is bound to fully apply as of July 1, 2013. It is also argued that despite the legal reform and significant legal adjustment with EU internal market rules, the concept of market freedoms is still largely misunderstood by the Croatian judiciary. Accordingly, constitutional amendment does not, on its own right, suffice to open the national legal system to application of internal market rules.

## РЕЗИМЕ

Трудот ги разгледува хрватскиот уставен амандман од 2010 година во контекст на пристапните барања. Авторот предлага дека и покрај формалната промена на Уставот, условите врзани за внатрешниот пазар на ЕУ сè уште треба да бидат целосно прифатени од судството и од страна на Уставниот суд. Во тој контекст, авторот претставува судска пракса релевантна за уставното толкување и расправа за тоа во контекст на правилата на внатрешниот пазар што Хрватска е обврзана целосно да ги применува од 1 јули, 2013. Исто така, авторот тврди дека и покрај реформите во законодавството и значајните правни усогласување со правилата на Европската унија на внатрешниот пазар, концептот на пазарните слободи сè уште, во голема мера, е погрешно разбран од страна на хрватското судство. Соодветно на тоа, уставниот амандман, сам по себе, не е доволен да се отвори националниот правен систем за примена на правилата на внатрешниот пазар.

Key words:

accession, internal market, constitutional law, interpretation, Croatia.

# CROATIAN CONSTITUTION AND INTERNAL MARKET OF THE EUROPEAN UNION

## 1. Introduction

On its way to membership of the EU, Croatia has amended her Constitution. The Constitutional amendment removed the main obstacles for accession and provided legal basis for application of EU law in the national legal order. However, beyond the black letter law of the Constitutional Amendment, constitutional reality remains ignorant of free market rules that were introduced by both the Constitution and the Stabilization and Association Agreement.<sup>1</sup> The aim of this paper is twofold. In the second section I will discuss relevant Constitutional amendments in context of accession requirements. In the third section I will demonstrate that, despite the formal change of the Constitution, requirements of the internal market of the EU still need to be fully embraced by the judiciary and by the Constitutional Court. In that context I will present case law relevant for constitutional interpretation and discuss it in context of the internal market rules that Croatia is bound to fully apply as of July 1, 2013. I will argue that despite the legal reform and significant legal adjustment with EU internal market rules, the concept of market freedoms is still largely misunderstood by the Croatian judiciary. Accordingly, constitutional amendment does not, on its own right, suffice to open the national legal system to application of internal market rules.

## 2. The Constitutional Amendment

On June 16, 2010 the Croatian Parliament adopted the major constitutional amendment the purpose of which was, primarily, to regulate the status of the European Union law in the national legal order. The newly introduced provisions, placed in the separate Chapter VIII of the Constitution titled “European Union” will take effect on the day of accession, envisaged for July 1, 2013. Those provisions regulate the legal basis for accession and transfer of constitutional powers to the institutions (Art. 143), participation of Croatian citizens and bodies in European institutions (Art. 144), relationship of national and European Union law (Art. 145), and reiterates rights of citizens of the EU (Art. 146). Within Chapter VIII the provision of utmost importance, and one on which I will focus, is Article 145 which reads:

(1) The exercise of the rights ensuing from the European Union *acquis communautaire* shall be made equal to the exercise of rights under Croatian law.

(2) All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in

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<sup>1</sup> O.J. L 26, 28/01/2005

accordance with the European Union *acquis communautaire*.

(3) Croatian courts shall protect subjective rights based on the European Union *acquis communautaire*.

(4) Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.<sup>2</sup>

This constitutional provision opens the Croatian constitutional order to application of EU law by national courts and public administration. More specifically, paragraph 1 lays down the principle of equivalent and effective legal protection, paragraph 2 the principle of supremacy, paragraph 3 the principle of direct effect, while paragraph 4 introduces the administrative direct effect. All these principles have been well established in the case law of the Court of Justice of the European Union and are binding on all Member States. Therefore, Article 145 is a specific constitutional declaration of European principles which are binding regardless of their formal presence in the Constitutional text. Those principles create concrete obligations for national courts and for the Constitutional Court alike. In a nutshell, national courts have a legal duty to extend protection to individual rights based in EU law, and that legal protection has to be effective and equivalent to legal protection extended to individual rights based in national law. Furthermore, national courts have to interpret national law in light of EU law, and where it is not possible, have a legal duty to conclude that a rule of national law is contrary to EU law, and to cease its application, without waiting for a decision of the Constitutional Court or any other body. Where an interpretation of EU law is necessary to decide a case, the courts can or, indeed, must address a preliminary reference to the CJEU, in accordance with Article 267 of the Treaty on Functioning of the European Union.

My basic claim is that Art. 145, is a declaratory constitutional rule which reiterates well established principles of EU law. In order to substantiate this assertion, I will first look into the nature of obligations under EU law which it mirrors. I will proceed explaining the duty of national courts to set aside rules of national law that are contrary to the law of the EU and how this duty affects the abstract constitutional review. I will suggest that, despite its declaratory nature, Art. 145 still performs an important function, namely, prepares the ground for participation of national courts in European legal discourse.

## **2.1. Art. 145. of the Constitution as a Mirror Provision**

Article 145(2) is circular. It establishes a duty of national courts to apply law in manner compatible to the law of the EU. In that respect it is similar to the United Kingdom's Art. 2(1) of the European Communities Act (1972),<sup>3</sup> and to Art. 3(a)(3) of

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<sup>2</sup> Translation provided by the Croatian Parliament

<sup>3</sup> European Communities Act (1972), Art. 2(1): "All such rights, powers, liabilities, obligations and restrictions from



the Slovenian Constitution.<sup>4</sup> Circularity of the mentioned rules conceal the actual scope of the obligation which extends not only to the self-referential duty to apply EU law, but also a duty to interpret and apply national law in accordance with it. While it is self-evident that legal rules of EU law are to be applied in the way they envisage themselves, the duty to interpret national law in accordance with EU law is based on principles of EU law, such as supremacy, direct effect and duty of sincere cooperation. Therefore, Art. 145(2) has to be understood as a rule laying down a duty to interpret the entire national law in manner compatible with EU law, as interpreted by the CJEU.<sup>5</sup> In other words, a rule of EU law shall have direct effect in Croatia whenever it is demanded by the rule of EU law itself, and shall have supremacy in respect of national rules, not because the Constitution says so, but because it follows from EU law. In other words Art. 145(2) can be understood as a rule introducing the principles of direct effect and supremacy of EU law into Croatian legal order. Those principles are built in the foundations of EU law and establish her legal order as original and autonomous. Therefore, Art. 145(2) should not be understood as a banal collision norm, but as a Constitutional declaration of fundamental legal principles on which the EU is founded and which permeate national legal orders of the Member States.

Furthermore, the binding nature of the European legal order is not subject to national derogations or exceptions. Therefore, the expression "... legal acts and accepted by the Republic of Croatia in European Union institutions" has to be understood as not being conditioned by national acceptance or ratification procedures. On the contrary, rules of EU law are binding regardless of whether a Member State has objected to them during the legislative procedure.<sup>6</sup> Having said this, Art. 145(2) opens the national legal system for rules and principles of EU law, as interpreted by the CJEU, and differentiates it from the legal order of international law.

## 2.2. Protection of Individual Rights Based in EU Law

Article 145(3) lays down a duty of national courts to protect individual rights based in EU law. It introduces a specific expression of a more general rule laid down by Art. 141 of the Constitution which specifies that international treaties make part of national legal order and have higher legal force than ordinary legislation. While Art.

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time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

4 Constitution of Slovenia, Art. 3(a)(3): "Pravni akti in odločitve, sprejeti v okviru mednarodnih organizacij, na katere Slovenija prenese izvrševanje dela suverenih pravic, se v Sloveniji uporabljajo v skladu s pravno ureditvijo teh organizacij."

5 Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECR 1 English special edition; Predmet 6/1964 Flaminio Costa v. E.N.E.L., ECR 585 English special edition

6 Case 39/72 Commission v. Italy, para. 20

141 opens the national legal order to international treaties, Art. 145(3) digs deeper and refers to the entire *acquis communautaire*, meaning not just the treaty law but, indeed, secondary law under the Treaties and the case law of the CJEU. Again, the rule is declaratory and the same would hold for any Member State even in its absence. The rule itself signals the duty of national courts to follow case law of the CJEU and to extend legal protection to individual rights rising under EU law. This obligation radiates through the entire legal system and applies to both, vertical and horizontal situations, subject to case law of the CJEU.

### 2.3. Administrative Direct Effect

Article 145(4) lays down a principle according to which not only the courts, but the entire public administration has a duty to apply EU law. The principle is sometimes called “administrative direct effect”.<sup>7</sup> This rule has to be understood functionally as to apply to all public authorities and not only to those mentioned in the black letter of the constitutional provision. The rule is applicable to all bodies which are *largo sensu*, under authority or control of the State or exercise public authority. All such bodies have a duty to apply EU law and, if necessary, to cease application of national legal rules that are contrary to it.<sup>8</sup>

### 2.4. Equivalent and Effective Legal Protection

Article 145(1) is a declaration of principles of equivalence and effectiveness of EU law, both principles being an inextricable part of European legal edifice. In essence, these procedural principles require that exercise of rights based in EU law has to be equivalent to exercise of rights under national law and that exercise thereof must not be rendered excessively difficult or virtually impossible.<sup>9</sup> These obligations are equally binding on all national courts, ordinary and constitutional.

The two principles are closely interrelated and create two mutually reinforcing procedural duties. First, if legal remedy for protection of an EU law-based individual right does not exist in national law, a national court has to avail of legal protection, if necessary, by creating a new legal remedy.<sup>10</sup> Conversely, where a national procedural norm prevents effective and equivalent legal protection, a national court is under a duty to set it aside, even in situations where the rule would have still been applied in an entirely internal situation.<sup>11</sup>

Principles of equivalence and effectiveness are binding on constitutional courts as well. The CJEU clarified in *Transportes Urbanos*, that preliminary reference proce-

7 Case 103/88 *Fratelli Costanzo S.p.A v. Comune di Milano* (1989) ECR 1839, paras. 30 and 31

8 *Id.* para 33

9 See e.g. case C 542/08 *Friedrich G. Barth v Bundesministerium für Wissenschaft und Forschung* (2010) ECR I-03189, § 17. See also case C-228/96 *Aprile* (1998) ECR I-7141, para. 18

10 Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, (1986) ECR 1651

11 Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, (1995) ECR 4599. See also *Čapeta T. i Rodin S.*, OSNOVE PRAVA EU, Narodne novine, Zagreb, 2011.

cedure under Art. 267 TFEU is equivalent to national procedure of concrete constitutional review<sup>12</sup> and that standards of protection of individual rights in the both procedures have to be equivalent.<sup>13</sup>

### 3. Internal Market Rules and Constitutional Reality

The purpose of this section is to highlight discrepancies in approach to State – market relationship that exist between the functional approach applied by the European Court of Justice and Croatian Constitutional Court. In doing that I will first, in section 3.1., describe how the Treaties define the internal market and what is the methodology of separating market regulation from regulation of public interest, which is, typically, reserved for the State. I will also explain that the methodology applied by the ECJ is primarily functional, be it in free movement of goods, services, workers, or competition. In section 3.2. I will discuss functions of the functional approach and suggest that they include, but are not necessarily limited to, delimitation of competences between the EU and the Member States and docket control of the ECJ. In section 3.3. I will discuss case law of the Croatian Constitutional Court in respect of guarantees of market freedoms under Art. 49 of the Constitution and suggest that the Constitutional Court relies on conceptual rather than on functional approach. Such an approach, I will argue, creates an obstacle for application of internal market law in Croatia and creates a conceptual rift between national and EU understanding of economic constitution.

#### 3.1. How EU Law Delimits State from Market

Internal market of the EU is defined by Art. 26(2) of the TFEU as “...an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.” From the outset, the Founding Treaties made a distinction between rules applicable to undertakings, i.e. competition rules, and rules protecting the free movement, i.e. granting the fundamental market freedoms. While the former were designed to apply horizontally, in relations between individuals, the latter were framed in a way as to create obligations for the Member States. This separation of public-private sphere proved to be untenable and the dividing line gradually became blurred.

European Union has competence to regulate internal market. The idea of “...an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” is a functional one. The competence of the EU is triggered by a need to ensure free movement and, as a rule, not more. So Art. 3 of the TFEU

<sup>12</sup> In Croatia the relevant norm is one of Art. 37. of the Constitutional Law on Constitutional Court (Ustavni zakon o Ustavnom sudu RH), Official Gazette No. 49/2002

<sup>13</sup> Case 118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* (2010) ECR I-00635

creates a task of establishing of the competition rules necessary for the functioning of the internal market, Art. 26 TFEU creates power of the EU to adopt measures “with the aim of establishing or ensuring the functioning of the internal market”, Art. 108 TFEU empowers the Commission, in cooperation with Member States to review systems of state aid and to propose appropriate measures “required by the progressive development or by the functioning of the internal market.” Not less importantly, approximation of laws under Art. 114 requires regulation to have as its object “establishment and functioning of the internal market” in cases where distortions are appreciable.<sup>14</sup> The flip side of the coin is lack of EU competence to regulate beyond the scope of the internal market. In that way, even regulation in area of judicial cooperation in civil matters (Art. 81 TFEU) has to be “...necessary for the proper functioning of the internal market.”

In other words, EU law is functionally focused on regulation of the internal market and the concept of internal market is central for delimitation of regulatory competences between the EU and the Member States. The line is, however, fluid and depends on a number of additional factors.

### State Action

The doctrine of state action originates from the constitutional law of the United States.<sup>15</sup> Within the system of EU law, its gist originates from the fact that the Founding Treaties are created and controlled by the Member States who are the primary addressees of obligations created therein.

This picture started to change since landmark *Van Gend en Loos* case. Free movement provisions of the Founding Treaties, such as Articles 34 – 36 TFEU are, apparently, addressed to the Member States. It looks logical that quantitative restrictions and measures of equivalent effect can be introduced only by States. Initially, application of free movement rules was dependent on State action. However, development of case law, particularly definition of individuals as subjects of EU law, brought about possibility of horizontal application of the Treaties, making the free movement provisions applicable to individuals too. In 1974 the ECJ clarified in *Walrave and Koch*,<sup>16</sup> that the fundamental objectives of the Treaty would be compromised if the abolition of barriers created by state action could be neutralized by obstacles resulting from exercise of private regulatory autonomy. Much later, a plausible theory was offered by Advocate General Maduro in his opinion in *Viking*.<sup>17</sup> According to the Advocate General, while only States have socio-economic power to restrict

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14 Case C-376/98 *Germany v. Parliament and the Council*, (2000) ECR I-08419 at para. 106, 108

15 See e.g. Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA LAW REVIEW* (2006) 1379

16 Case 36/74, para. 18

17 Opinion of AG Maduro in Case C-438/05 *Viking*, para. 43

market freedoms, private persons may also have restrictive capacity. Accordingly, "... [T]he implication is that the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement." This position has gained support of the ECJ in the recent *Fra.bo SpA* case<sup>18</sup> where a private entity – DVGW – being vested by the State with authority to certify the products, effectively had power "... to regulate the entry into the German market of products...". Accordingly, such activity was held to be within scope of Art. 34 TFEU.

Unlike free movement rules, which were originally understood as being addressed to the Member States, competition rules were meant to be applicable to undertakings. This has also changed. The ECJ has construed the Treaty in a specific way, creating an obligation for Member States to refrain from any regulatory activities "... which may render ineffective the competition rules applicable to undertakings."<sup>19</sup> According to the ECJ, this follows from synergy of Art. 101 TFEU), and duty of sincere cooperation under Art. 4(3) TEU).

As one can see, the result of the development of EU law by the ECJ has been that provisions of the Treaties, equally those applicable to free movement and those applicable to competition, apply to both private and State action. What triggers applicability of the Treaty is interference of the regulatory measure in question, whether that measure is of private or public nature, with the internal market guarantees under the Treaties.

While functional definition of the internal market made wider application of EU law possible, it is clear that its scope had to be delimited. In that respect the ECJ developed the doctrine of internal situations and the doctrine of economic activity. Both doctrines are inherent in the concept of the internal market of the EU which, by definition, concerns exchange between more Member States than one (internal) and assumes economic exchange (market). In other words, to trigger application of EU law, certain activity not only has to involve at least two Member States, but, functionally, the nature of the exchange has to be of economic nature.

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18 Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein*, paras. 31, 32

19 Case C-35/99 *Arduino*, para. 34: "Although Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 5 of the Treaty, none the less requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings"; see also Case C-13/77, *GB-Inno-BM*, para. 31

## Economic Activity Requirement

As a rule, EU law is applicable to activities of economic nature. Conversely, situations that do not involve economic activities are outside the scope of EU law. Treaty provisions on free movement of services (Arts. 49 and 56 TFEU) provide for a good example. According to the European Commission,

“[f]or a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration. The service does not, however, necessarily have to be paid by those benefiting from it. The economic nature of a service does not depend on the legal status of the service provider (such as a non-profit making body) or on the nature of service, but rather on the way a given activity is actually provided, organised and financed.”<sup>20</sup>

Indeed, there are activities which are not of economic nature and which fall outside the scope of the Treaties. In essence, non-economic services of general interest are those which are not provided for remuneration or pay. Therefore, such services are not considered services within the meaning of Art. 57 of the TFEU and are outside the scope of Art. 56 of the TFEU.<sup>21</sup> The consequence is that such activities do not have to be justified in case when they restrict one of the market freedoms.<sup>22</sup> With certain important exceptions, the education sector is considered a non-economic service of general interest. However, only non-economic services of general interest<sup>23</sup> are exempt from application of internal market rules. The exemption is not absolute, but only “... on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.”<sup>24</sup>

On the other hand, activities which are of general interest but are considered to be of economic nature may be within the scope of application of rules applicable to free

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20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment (COM(2007) 724 final), at p. 5

21 See recital 17 of the Preamble to the Directive 123/2006/EC O.J. L 376/36 of 27. 12. 2006

22 That, however, does not affect the obligation of a State not to distort competition. According to well established case law of the ECJ, States are also bound by Arts 102 and 4(3) TEU, and must not enact legislation that is liable to distort competition. See case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* (1998) ECR I-3949, § 49; case C-96/94 *Centro Servizi Spediporto* (1995) ECR I-2883, § 20 and case law cited therein

23 See Green Paper on Services of General Interest Brussels, 21.5.2003 COM(2003) 270 final, § 10

24 Art. 14 TFEU. In addition, Art. 36 of the Charter of Rights of the European Union provides that “[t]he Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.”

movement of goods,<sup>25</sup> freedom to provide services,<sup>26</sup> freedom of establishment,<sup>27</sup> free movement of workers,<sup>28</sup> and, most likely, free movement of capital, as well as within the scope of competition rules.

Economic activity criterion is relevant also for application of EU competition rules. They will be applicable if an economic activity (offer of goods or services) is performed by an undertaking for profit. Importantly, undertakings are defined in a functional way,<sup>29</sup> meaning that for purpose of application of Arts. 101 and 102 TFEU even public authorities can be considered as an undertaking. As the ECJ stressed in *Höfner and Elser*,<sup>30</sup> an undertaking is “... every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.” On grounds of this test the ECJ ruled a State-operated employment agency to be an undertaking for purpose of application of EU competition rules. In the same way, applying functional criteria, the ECJ considered a bar association an association of undertakings for purposes of application of EU competition rules. Members of the bar perform an economic activity and the fact that the legal profession is regulated does not detract from that conclusion.<sup>31</sup>

As it is consistently held by the European Commission, EU competition rules do not apply to all services of general interest (SGI), but only to those that are “economic” in nature, i.e. to SGEI. Also social services of general interest (SSGI), which can be both economic and non-economic in nature, are only subject to EU competition law where they are genuinely economic.<sup>32</sup>

Moreover, according to Article 2 of Protocol 26 on Services of General Interest, “[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general

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25 See case C-438/02 Criminal proceedings against Krister Hanner, (2005) ECR I-4551

26 Case C-281/06, Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg, (2007) ECR I-12231

27 Case C-153/02, Valentina Neri v European School of Economics (ESE Insight World Education System Ltd), (2003) ECR I-13555

28 Case C-4/91, *Annegret Bleis v Ministère de l'Education Nationale* (1991) ECR I-5627. In the opinion of the ECJ public service exception under Art 45(3) TEU is not applicable in respect of high school teachers

29 Okeoghene Odudu, *Economic Activity as a Limit to Community Law*, in Catherine Barnard and Okeoghene Odudu (eds.) *OUTER LIMITS OF EUROPEAN UNION LAW*, Hart Publishing 2009, at p. 230

30 Case C-41/1991, para. 21

31 Case C-309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap, (2002) ECR I-01577 paras. 48 and 49: “48 “Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49 That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion.”

32 Communication from The Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions - Reform of the EU State Aid Rules on Services of General Economic Interest, Brussels, 23.3.2011 COM(2011) 146 final, at p. 3

interest.”<sup>33</sup> Activities which are not regarded as economic for the purposes of the competition rules are, for instance, air navigation safety or anti-pollution surveillance because these activities are linked to the exercise of State prerogatives and to the fulfilment of State responsibility towards the population.

## **To regulate free movement**

EU law will have restrictive effects on national law and eventually preclude its application if, other criteria being satisfied, national law “regulates free movement”. Moreover, according to the standing line of case law, the effect on free movement must not be negligible. For example, in *Krantz*, the ECJ held that tax arrangements in the Netherlands was “too uncertain and indirect” to be liable to hinder trade between Member States.<sup>34</sup> Later on, in *Peralta*, the ECJ clarified that Article 34,

“...makes no distinction according to the origin of the substances transported, its purpose is not to regulate trade in goods with other Member States and the restrictive effects which it might have on the free movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States.”<sup>35</sup>

A nice example of separation of free trade from public policy concerns can be found in *Lemmens* where the ECJ held that failure to notify technical regulations to the Commission may preclude national regulation for purposes of free movement rules, while it does not affect use of a product for purpose of enforcement of national police powers.<sup>36</sup>

More recently the described approach was reiterated in *Guarnieri*<sup>37</sup> where the ECJ had to address whether *cautio iudicatum solvi* – a requirement to provide security pending judgment when bringing proceedings against a Belgian national which is applied only to non-Belgian citizens constitutes a hindrance to the free movement of goods. According to the ECJ, national measures will not be precluded by the Treaty provisions applicable to free movement where they are indistinctly applicable, where their purpose is not to regulate trade between Member States and where their effects are too uncertain and indirect.<sup>38</sup>

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33 O.J. C 83/308 of 30. 03. 2010

34 Case C-69/88 *Krantz* (1990) ECR I-00583, para. 1: “ Furthermore, the possibility that nationals of other Member States would hesitate to sell goods on installment terms to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Netherlands tax debts is too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States.”

35 Case C-379/92 *Criminal proceedings against Matteo Peralta*, (1994) ECR I-03453, para. 24

36 Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* (1998) ECR I-03711, para. 36: “The use of the product by the public authorities, in a case such as this, is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.”

37 Case C-291/09 *Francesco Guarnieri & Cie v Vandeveld Eddy VOF* (2011) ECR, not yet published.

38 In *Guarnieri*, it appeared that even measures which appear to be distinctly applicable may be considered as being



## Economic Activity and Public Authority

Another functional criterion that governs application of EU law is “exercise of official authority” under Art. 51 TFEU which lays down an exception from free movement of services, establishment and workers. While the provision exempts “activities which in that State are connected, even occasionally, with the exercise of official authority”, the concept of official authority is interpreted restrictively, as being applicable only to “...what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect”.<sup>39</sup>

The ECJ distinguishes concepts of public authority from the concept of public interest. According to the Court, regulated professions often have an obligation for the persons concerned to pursue objectives of public interest, without falling within the exercise of official authority.<sup>40</sup> Accordingly, profession of public notaries was held to fall outside scope of exception prescribed by Art. 51 TFEU.

### 3.2. Functionalism and Functions of European legal concepts

As it can be easily seen from the mentioned examples, application of EU law depends on functional criteria such as economic activity, undertaking, free movement or official authority. How can the functional approach be explained? I will argue that, in context of EU law, functionalism itself performs two functions – jurisdictional and constitutional. In fact, functional interpretation of EU law has effect of setting aside national legal concepts that create obstacles for effective application of EU law on national level.

Writing in the 1935 volume of *Columbia Law Review*, Felix Cohen attacked legal conceptualism and suggested a functional approach to legal interpretation<sup>41</sup> Cohen criticized conceptual jurisprudence for being circular and “... ignoring practical questions of value or of positive fact...”. In his criticism Cohen described legal concepts, such as, for example, fair value, due process, conspiracy or malice, as “... supernatural entities which do not have a verifiable existence except to the eyes of faith.”<sup>42</sup> Understanding functionalism as rejection of conceptual dogmatics, Cohen suggested that only two questions are relevant for legal analysis – “how do courts

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out of scope, if requirements 2 and 3 above are met. The problem is whether the Belgian measure can be considered distinctly applicable. In para. 16 the ECJ took position that the measure was, in fact, not distinctly applicable since “... its application depends not on the origin of the goods in question, but on two cumulative conditions, namely, first, that a dispute must arise subsequent to the conclusion of a contract that leads to litigation before the Belgian courts and, second, that any such action must involve a Belgian national as defendant who chooses to avail himself of the provision in question.”

39 Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado*, (2003) ECR I-10391 para. 41, see also Case 225/85 *Commission v Italy* (1987) ECR 2625, para. 7

40 Case C-51/08 *European Commission v Grand Duchy of Luxembourg*, (2011) ECR not yet reported, para. 96

41 Felix Cohen, *Transcendental Nonsense and Functional Approach*, 35 *Col. L. Rev* 6 (1935) 809

42 *Id.* at p. 821

actually decide cases of a given kind” and “how ought they to decide cases of a given kind.”<sup>43</sup> Cohen’s functionalism was refreshing and liberating. It changed angle of legal analysis from conceptual to empirical and pushed the interpretative paradigm beyond syllogistic logic.

Today, functionalism is widespread in legal reasoning. Functional approach is used to explain how legal systems operate,<sup>44</sup> to explain functions of general principles of international law,<sup>45</sup> to discuss Australia’s constitutional reform,<sup>46</sup> to analyse restraints of trade in industrial England,<sup>47</sup> to define the notion of religion in the First Amendment to the US Constitution.<sup>48</sup>

On another trait, the entire process of European integration was largely based on functionalist ideas, such as those of Ernst B. Haas<sup>49</sup> and Leon N. Lindberg.<sup>50</sup> It became increasingly acknowledged not only that the entire system created by the Founding Treaties is functional,<sup>51</sup> but also, that the way it operates can be explained along functionalist rather than along conceptualist lines.<sup>52</sup>

While all the theories mentioned above employ functional approach, they remain largely diverse. Cohen’s functionalism was seeking to change the interpretative legal paradigm, and economic functionalism of Haas and Lindberg offered the grand design of European integration. Nevertheless, the functional method they all employ asks a specific question: what are the consequences (or functions) of certain course of action.

I have already demonstrated that the European Court of Justice employs functional approach as a matter of routine in almost all areas of EU law. The main instruments of its analysis are constructs such as economic activity, official authority, regulation of trade, or internal situation.

An economic activity is a function of economic exchange expressed as remunera-

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43 Id. at 824

44 According to Theodore M. Benditt, when applying functional approach, one needs to say “... what the object referred to is for, or what it is supposed to do”, Theodore M. Benditt, *A Functional Theory of Law*, 14 W. ONTARIO L. REV. 149 (1975) 157

45 M. Cherif Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT’L L. 768 1989-1990

46 Jeremy Webber, *Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform*, 21 SYDNEY L. REV. 260 1999

47 P. J. Kaplan, *A Functional Analysis of the Law Relating to Restraint of Trade*, 17 BELL YARD J.L. SOC’Y SCH. L. 3 1936

48 Ben Clements, *Defining “Religion” in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 1988-1989

49 Ernst B. Haas, *THE UNITING OF EUROPE*, Stanford University Press 1958.

50 See e.g. Dirk U. Stikker, *Functional Approach to European Integration*, 29 FOREIGN AFF. 436 1950-1951

51 Leon N. Lindberg and Stuart A. Scheingold, *Europe’s Would-be Polity*, Prentice Hall, 1970

52 Speaking about non-contractual liability of Community for damages, Pablo Martin Rodriguez noted: “As long as Community institutions or agents are able to cause damages, there is a need to decide which ones must be made good.” 11 COLUM. J. EUR. L. 605 (2004-2005) at p. 606

tion or pay and does not depend on national regulation. In other words, economic activity is defined by EU law, regardless of how national authorities define it. Official authority is a function of Member State activity, i.e. what a Member State does, not how it defines a status of public servant. By the same token, regulation of trade is regulation of movement of goods between Member States and, conversely, an internal situation is defined by trade not happening among the Member States.

At this point a question has to be asked whether the ECJ has only replaced national concepts with those of the EU? And if it has, is it possible at all, to tell which one is better? Is it the sheer supremacy of EU law which makes EU legal concepts prevail over national ones? I do not think so. Saying that the concept of public authority entertained by the ECJ is functional while national concepts of public authority are normative is only the first step which has to introduce us into inquiry about the function of the concept defined in a functional way. In other words, why should one prefer a functional concept instead of a normative one?

Arguably, one function of the above mentioned concepts of EU law is jurisdictional, i.e. they, apparently, determine the scope of EU law and to delimit jurisdiction (regulatory and judicial) between the Union and its Member States. In other words, province of EU internal market law is defined largely by concept of economic activity while non-economic activities remain in regulatory competence of the Member States. Similar can be said of official authority, free movement / internal situations or, indeed, selling arrangements. By defining these concepts in functional way the ECJ was able to extend or, sometimes, to narrow the scope of application of EU law and to control its jurisdiction.

The second function of legal concepts of EU law is constitutional, since it defines the basic genetic code of the EU and makes the choice between policies that seek to improve the rules of the game as opposed to policies that seek to determine the outcomes directly by state intervention. European Union displays a strong bias towards the first mentioned policy choice. When it comes to either free movement or competition rules, there is no place for state intervention as long as market operates properly. According to the representatives of the German *ordo-liberal* school, market order should be understood as constitutional order, since it is a deliberate constitutional choice.<sup>53</sup> In other words, choice between the two models (regulation of rules or regulation of outcomes) determines the nature of an economic constitution. Indeed, primacy of the market in respect of state intervention is built into the key Treaty provisions, such as Art. 106. TFEU.<sup>54</sup>

<sup>53</sup> Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism* by Freiburg Discussion Papers on Constitutional Economics, No. 04/11, Institut für Allgemeine Wirtschaftsforschung Abteilung für Wirtschaftspolitik Albert-Ludwigs Universität Freiburg i. Br., at p. 7

<sup>54</sup> Art. 106(2) TFEU: Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be

This choice is not only enshrined in the Treaties, but is also defined by how the ECJ interprets justifications of national restrictions of free movement. The more restrictive interpretation indicates the “rules of the game” approach, while the more extensive one indicates willingness of the ECJ to defer to national outcome regulation. For example, by accepting certain public policy justification, the ECJ actually allows the State in question to favour certain distributive outcomes on account of EU based rules of free trade.

Is then possible to tell whether European functional conceptualism is “better” than national normative one? One of its merits is certainly in the fact that reliance to EU legal concepts avoids this discussion at regulatory level and brings it to the judicial arena where problems are solved on case by case basis. Imagine difficulties in reaching a common EU normative concept of “official authority” or “economic activity.” In that sense, functional conceptualism recognizes that problems should not be solved by confrontation of one concept against another, but by avoiding debate about transcendental nonsense by answering to a question – how should a case be solved and what are the consequences of the case being solved in one particular way and not another?

### **3.3. Market and the Croatian Constitution**

Croatian Constitution does not define market or market freedoms explicitly. However, Art. 49 provides that entrepreneurial and market freedoms are the fundamentals of the economic order of the Republic (section 1) and that the State guarantees to all entrepreneurs an equal market position (section 2). Article 50(2) lays down justifications for restriction of market freedoms which are protection of interest and security of the Republic, nature, environment and health. The exact meaning of “entrepreneur” and “market” remains undefined.

As I have demonstrated above, market freedoms in the internal market are defined functionally, through the concept of economic activity. Therefore, if Croatian Constitution were to be interpreted in light of European Union law, in accordance with the duty of sincere cooperation, the concept of entrepreneur from Art. 49 should be understood as an individual or legal person, whatever its legal form or status, which pursues an economic activity, i.e. an activity which is offered for remuneration.

This is, however, not how the Croatian Constitutional Court understands the constitutional guarantee of market freedoms. Based on analysis of its line of cases dealing with professional associations of regulated professions, I will demonstrate that the Constitutional Court is not following the functional analysis, but relies on conceptual framework of “state interest”.

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contrary to the interests of the Union.

In the first decision of March 15, 2000,<sup>55</sup> deciding in abstract constitutional review procedure, the Constitutional Court addressed the issue whether professional association of architects may, as a matter of Constitutional prohibition of monopolies, set forth in Art. 49(2), set minimum prices for services of architects and condition provision of such services by membership of Croatian Chamber of Architects. On this point the Constitutional Court ruled that the powers of the Chamber, defined in such way, do not constitute a monopoly. Furthermore, the minimum price of service, determined by the Chamber, places all authorized engineers and architects, as well as recipients of their services, into an equal position. Accordingly, no violation of Art. 49(2) was found. On another point the Constitutional Court found that exercise of public authority by the Chamber in no way infringes Art. 49.

In the second decision of June 26, 2006,<sup>56</sup> the Constitutional Court had to address the issue whether compulsory retirement of medical doctors who, as private entrepreneurs, offer their services in primary medical care, have to retire at the age of 65, provided they have 20 years of pension insurance, restricts entrepreneurial freedoms under Art. 49. Applicants, i.e. argued that similar age restriction does not apply to other professions. The Constitutional Court dismissed the application saying that:

“It is not justified, from Constitutional perspective, to compare position of medical workers with other private entrepreneurs (craftsmen or individual entrepreneurs), since medical workers who work in primary network of medical protection, unlike other mentioned categories, perform public service which is not subject to guarantees of free entrepreneurship, under Art. 49(2) of the Constitution.”

In other words, the Constitutional Court declared that medical workers perform public service and excluded them from the scope of Art. 49(2) of the constitution. The Constitutional Court solved the case on grounds of a normative concept of public service, and did not look into the function which a member of profession was performing, nor whether the activity represents an economic activity.

Finally, in the most recent decision of Sept. 28, 2010,<sup>57</sup> the Constitutional Court addressed the same issue as in the case decided on March 15, 2000, i.e. whether the professional association of dental doctors may impose minimum fees on its members, membership of the Chamber of Dental Doctors being compulsory. The Constitutional Court continued to rely on its earlier cases and said:

“... since the profession of dental medicine makes part of the system of

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55 No. U-I-990/1999

56 Nos. U-I-3117/2003 and U-I-2348/2005

57 No. U-I-3118/2003

health protection in Republic of Croatia, it is subject to the same rules and restrictions as any other part of that system (e.g. activities of medical doctors, nurses, pharmacists and medical-biochemists).

For the reasons stated above, profession of dental medicine is not subject to constitutional guarantees within meaning of Art. 49(2) of the Constitution, not even when it is performed by business companies, private health workers or other individuals or legal persons, subject to specific legislation. The lawmaker is authorized to extend public law regime to that activity, since it is performed as public service.”

Briefly, the Constitutional Court exempted the entire medical sector from free market guarantees under Art. 49 of the Constitution, based on a general assessment that the entire dental medical care activity is defined as public service. In other words, legal assessment that certain activity is a public service, justifies its “public law ordering” and, apparently automatically, exempts the entire sector from free market guarantees.

The same position is apparently based on some academic opinion. Writing extrajudicially, in a context of judicial protection of public servants, the president of the Constitutional Court of Croatia concluded in 2006 that right to fair trial in reasonable time by a legal judge, as guaranteed by Art. 29(1) of the Croatian Constitution is not dependent on functional criteria applied by both, ECtHRs and ECJ, and that it is not likely that the Constitutional Court will adopt the functional criterion in actions instituted by public servants against the State.<sup>58</sup> What seems to be a decisive criterion is the status of individual as defined by law.

#### **4. Concluding remarks**

The described constitutional amendment represents an arguably necessary intervention, which, although declaratory in nature, creates a constitutional instruction for the courts to apply EU law. However, proper application of EU law requires a more fundamental paradigmatic shift that can be brought about only by national courts. The key problem in that respect is the discrepancy between normative conceptualism dominant in interpretation of national courts and embedded functionalism of the CJEU. The difference is not merely doctrinal but discloses a fundamental difference in understanding of the free market. The understanding of the free market entertained by the CJEU implies primacy of the “rules of the game” approach which is inherent in its functional approach. In the CJEU’s world, the regulatory objective is to create a stable and levelled legal playground where winners of the game are not known in advance. Normative conceptualism of the Croatian Constitutional Court, incapable of achieving the same, supports a regulatory environment in which public interest always prevails over free market concerns and market exists only inasmuch it is allowed to exist by public authority. Overemphasized role of the State creates

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<sup>58</sup> Jasna Omejec, Status državnih službenika, Hrvatska javna uprava No. 47/2006, p. 47, 78

a situation which diverts the focus of market participants from the market itself to persuasion and lobbying of public authorities. As Annelise Riles has explained it, though in another context, "... leaders are today chosen not for their entrepreneurial skills, their instinct for risk, their interest in making money even, but for their ability to schmooze and negotiate with government bureaucrats."<sup>59</sup>

Functional approach to interpretation applied by the ECJ performs two functions – jurisdictional and constitutional. Relationship between national and EU law is largely determined by functional criteria. While one can speak about legal conceptualism on both national and EU level, there is difference between normative concepts which are typical for national law and functional concepts which prevail in the law of the EU. The difference that functional concepts, such as economic activity, undertaking, internal situations, or free movement, make is in shifting of jurisdictional conflicts from regulatory to judicial arena. That shift has allowed the ECJ to fine-tune the scope of application of EU law and to control its own jurisdiction while avoiding the clash of conceptual Titans in the regulatory arena.

ECJ's functional approach follows the main watershed established by the Founding Treaties which separates market from non-market. In that sense, functional approach serves purpose of delimiting regulatory space for EU-compliant State regulation in which Member States may regulate regardless of the EU's economic constitution. However, if the European Union is to be understood as an economic constitutional order, it remains questionable if such separation is possible, i.e. whether the economic dimension of the EU constitution can survive in absence of general competence of the EU to regulate the non-economic sphere.

Legal order of the EU is intrinsically market biased and prefers the "rules of the game" to the "results of the game" approach. However, effective enforcement of the rules of the game is possible only within scope of application of EU law which is defined functionally. Outside that scope Member States remain free to regulate. Since the co-existence of two regimes creates an inherent tension and permanent struggle for regulatory competences, there is a permanent need for finding a proper balance between European regulation of the arguably supreme economic domain and residual State regulation of non-economic matters.

Croatian legal system is dominated by normative conceptualism and the Constitutional Court is rejecting functional approach. In practice, state intervention and overemphasized public policy concerns scream out from almost every corner of the Croatian legal order and are endorsed by the Constitutional Court. Although it has never been declared, as a matter of policy, practice of the Constitutional court clearly exhibits preference for the constitutional model based on the results of the

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59 Riles, Annelise. "Is this capitalism? If not, then what is it?" *Theorizing the Contemporary*, Cultural Anthropology Online. May 17, 2012. <http://culanth.org/?q=node/567>

game, which brings Croatian economic constitution in conflict with the one of the European Union.

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# **DIRECT LEGAL EFFECTS ON ALBANIAN CONSTITUTIONAL LAW OF STABILIZATION AND ASSOCIATION PROCESS**

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## **ABOUT THE AUTHOR**

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## ABSTRACT

This paper puts forward for further elaboration a very important overall objective: to assess the impact of closer association with the European Union (EU) and potential accession to the EU on the legal order of Albania, especially on its Constitutional Law. The core of this paper will focus on the legal effects of the Stabilization and Association Agreement (SAA) in the pre-accession period on the national legal order of Albania through the national constitutional provisions, and particularly those conditions governing the relationship between international law, domestic law and the role of the judiciary. The aim of this paper will be to answer whether the SAA has direct effect in the legal order of Albania. This should be answered by the interpretation of the judicial system (especially the Constitutional Court) on mutual national constitutional provisions, particularly those sections dealing with the relationship between international law and domestic law as long that Albania is not an integral part of the Community legal order. According to Article 70(1) of the SAA: "Albania shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis". The Albanian Constitution provides articles on ratification of international agreements, their effect on the internal order and the transfer of specific powers from Albanian to international organizations. International law in Albanian domestic order as well as International Treaties as part of the national legal order are applicable by national courts and can, at least in theory, create individual rights. The paper will try to explain this mechanism.

Key words:

acquis communautaire, European Court of Justice, stabilization and association Process, Stabilization and Association Agreement

## РЕЗИМЕ

Овој труд се обидува дополнително да елаборира една многу важна цел – да го евалуира влијанието на приближувањето кон Европската унија (ЕУ) и потенцијалното пристапување во ЕУ врз правниот поредок на Република Албанија, особено за влијанието врз своето уставно право. Суштината на овој труд се фокусира на правните последици од Спогодбата за стабилизација и асоцијација (ССА) во претпристапниот период на националниот правен поредок на Албанија, преку националните уставни одредби, и особено оние услови кој го регулираат односот меѓу меѓународното право, националното право и улогата на судството. Целта на овој труд е да даде одговор на прашањето дали ССА има директен ефект врз правниот поредок на Албанија. Одговорот може да се даде преку толкувањата направени од страна на судскиот систем (особено на Уставниот суд) на заедничките национални уставни одредби, особено на оние делови кои се однесуваат на односот меѓу меѓународното и националното право се додека Албанија не е составен дел на правниот поредок на Унијата. Врз основа на член 70 (1) од ССА: „Албанија ќе настојува да обезбеди постепена компатибилност на своите постојни закони и идно законодавство со законодавството на Унијата“. Албанскиот Устав предвидува членови со кој потесно се уредува ратификацијата на меѓународни договори, нивно-то влијание врз внатрешниот поредок како и трансферот на одредени овластувања од албански на меѓународни организации. Меѓународното право прифатено од страна на националниот правен поредок како и меѓународните договори кој претставуваат дел од националниот правен поредок се применуваат од националните судови и можат, барем во теорија, да создаваат индивидуални права. Трудот ќе се обиде подетално да го објасни овој механизам.

# DIRECT LEGAL EFFECTS ON ALBANIAN CONSTITUTIONAL LAW OF STABILIZATION AND ASSOCIATION PROCESS

## I. Introduction

Albania, like all the Western Balkans countries, is engaged very seriously toward the integration goal and has started all the social, economic and political engines to reach it. The Stabilization and Association Agreement<sup>1</sup> of 12 June 2006 has been ratified by all EU Member States and went into force on April 1st, 2009. Albania has applied for the membership into European Union<sup>2</sup>, and thus is currently a potential candidate. This, taken together with the EU's confirmation that the future of all countries of the Western Balkans, and consequently, that of Albania, lies in the European Union, if all the significant steps are taken in the right direction, and with the entire institutional and legal infrastructure engaged in this venture, Albania's full membership can be expected in the future.

"...The ability to assume membership and particularly *acquis communautaire* obligations..." is the third of the Copenhagen criteria<sup>3</sup>. The Copenhagen criteria served as the cornerstones of the Stabilization and Association Agreements designed by the European Commission to establish an association between the EU and individual countries aspiring to membership. Thus, the approximation of legislation to the *acquis* stands at the core of the Stabilization and Association Agreements that the EU has offered to the Western Balkan countries.

According to the SAA<sup>4</sup> signed between the EU and Albania: "...Albania shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*..." Similar wording is found in the SAA's of Croatia and Macedonia<sup>5</sup>. Albanian state institutions have understood the above mentioned article, as an obligation to incorporate the respective Community rules into the legal order of Albania to the fullest extent possible as an important condition for the future membership in the Union. This interpretation is further reinforced by the wording of the Community financial assistance to Albania, which stresses that such assistance "... may cover all sectors of co-operation, paying particular attention to ... approximation of legislation..."<sup>6</sup>

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1 Hereafter, SAA;

2 On April 28<sup>th</sup>, 2009;

3 Determined in the Copenhagen Summit in June 1993;

4 Article 70(1);

5 Referred to in EU legal documents as Former Yugoslav Republic of Macedonia;

6 Article 113;

## II. Direct effects of the Association Agreements<sup>7</sup> with the EU to the legal framework of member states

Association Agreements with the EU bring legal consequences within the European Union. For example, the European Agreements<sup>8</sup>, before the date of accession, define the rights and obligations for the candidate countries and its citizens. These rights arise from Community law; in particular those bilateral agreements, which are negotiated between the potential candidate countries and member countries. These can be considered pre-accession effects of Community law<sup>9</sup>.

European Council decisions also have effects before joining the Community legal system and the domestic legal system before the candidate countries join the Union. Copenhagen's European Council decided in June 1993 that every state that has signed Europe Agreements with the European Communities and its Member States, may apply for membership if it has fulfilled the necessary political and economic as well as other obligations for membership. Although a candidate country is not an EU member state, it has the rights and obligations as soon as the European Agreement entered into force.

This refers to the so-called Copenhagen's Political Criteria, the introduction of the Amsterdam Treaty<sup>10</sup>, which refers to Article 6 of the Treaty on European Union<sup>11</sup> as well as the Lisbon Treaty. Compliance with all these requirements is monitored by the European Commission on the progress reports for each aspirant country.

### II.1. Short overview of the principles and sources of the *acquis communautaire*

Sources of the *acquis communautaire* are divided into primary and secondary sources. Community Primary legislation consists of the EEC Treaty, the Treaty of Coal and Steel Community and the European Union Treaty. Along with the general principles of law they constitute the constitutional provisions of Community law. Primary legislation includes protocols and annexes of the treaties, international agreements: European Agreements, that Stabilization and Association Agreement and the Accession Treaties. Secondary legislation consists of acts of the institutions<sup>12</sup>. To understand the character of the *acquis communautaire* one must understand that the Community legal system developments are not provided as the provisions of

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7 Including European Agreements, Association Agreements, Stabilization and Association Agreements, Interim Agreements, as well as Partnership Agreements;

8 Applied to Estonia, Lithuania, Latvia, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Malta and Cyprus;

9 Hereafter referred as *acquis communautaire*;

10 Article 49;

11 Article 6 "...Union founded on the principles of liberty, democracy, respect for human rights and the rule of law..."

12 Autonomous acts as regulations, directives, decisions, recommendations, etc.;

the Treaty or secondary legislation through interpretive practices of the European Court of Justice.

The relationship between primary and secondary legislation is not provided for in the Treaty, but the hierarchy of norms can be interpreted in accordance with the EC Treaty<sup>13</sup>, according to which, if the annulment is based, the Court of Justice to declare null and void the act of appeal. Judicial review includes consideration of the question whether the actions in question are consistent with what is foreseen by law. At the top of the hierarchy are the provisions of the Primary Community legislation, and the general principles of law, which the Court of Justice provides in accordance with the EC Treaty<sup>14</sup>.

## **II.2. Previous decisions of the European Court of Justice regarding the effects of pre-accession European Agreements in the *acquis communautaire***

The legal effects of the Association Agreements with the EU in the *acquis communautaire*, and the national legal orders of the Member States are shown in the decisions by the European Court of Justice, resulting from the direct impact of the European Agreements which are negotiated between the EU and the former candidate countries<sup>15</sup>. I have chosen to consider the cases in front of the European Court referring to Poland, Czech Republic, Bulgaria, Turkey and the Russian Federation. Regarding Western Balkan countries, the European Court of Justice has not yet opened any trial regarding the Stabilization and Association Agreement.

The relationship between the *acquis communautaire* and national legislation is not explicitly provided for in the Treaty<sup>16</sup>. These principles have been interpreted by the European Court of Justice in its decision on the issue *Van Gend & Loos*<sup>17</sup> and *Costa vs ENEL*<sup>18</sup>. On these two issues the ECJ concluded as follows:

... European Community provides a new legal order of international law for the benefit of which the states have further limited their sovereignty, although in limited areas and subjects which include not only Member States but also their nationals. Despite the legislation of Member States, the *acquis communautaire* not only imposes obligations to citizens, but also protects those rights, which become part of the legal heritage. These rights arise not only in cases explicitly stated in the Treaty, but also where there is liability, which the Treaty establishes for individuals, Member

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13 Article 231;

14 Article 220;

15 Member countries already in 2004 and 2007;

16 Even the principles of superiority and direct effect are not explicitly stated in the Treaty;

17 Case 26/62 – ECJ;

18 Case 06/64 – ECJ;

States and the Community institutions<sup>19</sup>.

... In contrast to common international treaties, the Treaty of the European Economic Community established its legal system, with the entry into force of the Treaty, becoming an integral part of the legal systems of EU member countries. By creating a Community, which has institutions, personality and legal capacity and capacity of representation on the international level and especially the power that comes from the limitation of sovereignty or transfer of powers from member states to the Community, Member States restrict their sovereign rights creating a legal system to be implemented by European citizens ... The priority of Community law provided for in Article 189, through which a regulation is binding and directly applicable in EU member countries<sup>20</sup>.

It is clear that the rights deriving from the Treaty because of the special nature cannot or may not be respected by the legislation of a Member State. The transfer of rights and obligations arising from the Treaty, the subjugation of the internal legal order of the Member States to the Community legal order, is always accompanied by a permanent limitation of their rights of sovereignty<sup>21</sup>.

### **III. Direct effects of the Association Agreements with the EU to the legal framework of non-member states**

#### **III.1. Legal effects of the European Agreements and Association Agreements in the internal legal order during the pre-accession process**

Legal effects of Association Agreements in the pre-accession period in the national legal order of non-member states of the EU, usually are in reference to national constitutional provisions, and particularly those conditions governing the relationship between international law, domestic law and the role of the judiciary.

The EC Treaty<sup>22</sup> provides for the procedure with which the Community negotiates and signs agreements with non-EU countries or international organizations. Agreements signed in accordance with the conditions laid down in the Treaty are binding on the Community institutions and Member States. All the types of Association Agreements form an integral part of the *acquis communautaire* from the moment of their entry into force. This is consistent with the monist system. Agreements signed by the Community are part of the Community legal order without the need

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19 Referred to Van Gend & Loos Case

20 Referred to Flaminio Costa vs ENEL Case;

21 This has been foreseen by a very large number of cases, which are today in a focus of a very vivid academic debate such as Gloszczuk, Kondova and Barkoci vs High Court of England and Wales, Demirel vs Federal Court of Germany or "Jane" vs High Court of the Netherlands, etc.

22 Article 300;

to transpose the provisions of the interior of Community law. Rules laid down in the hierarchy deals remain higher than Community institutions. This can be seen from the fact that the Court of Justice considers its institution not authorized to examine the validity of acts of the institutions. Given that international agreements of the community are on a higher hierarchical level than secondary Community legislation, the provisions of the latter are to be interpreted in a manner that is consistent with those agreements.

### **III.2. Legal effects of the Stabilization in the internal legal order during the pre-accession process of the Western Balkan countries<sup>23</sup>**

The Stabilization and Association Agreement between the EU and Croatia entered into force on February 1st, 2005<sup>24</sup>. But, while Croatia was expecting the SAA to enter into force, the Interim Agreement<sup>25</sup> was applied as part of the SAA. Now the SAA has been in force for more than 7 years, however there has not been any litigation over violations of this agreement in the Croatian court. Courts can refer to it directly and indirectly. The failure of the courts to refer to the SAA may have two reasons: first, because there were conflicts related to the Stabilization and Association Agreement, and second because conflicts can be filed in court, but the court has resolved those without implementing the SAA.

The Croatian Constitution of 1990 provided articles for the direct implementation of international agreements into the internal order. Under these provisions, international treaties are ratified and published as part of domestic law and prevail over domestic laws. The Constitution refers to international treaties on 4 different scales. Article 2 (3) refers to the territorial jurisdiction of the sea “... in accordance with international law ...”; Article 31 refers to the principle of legitimacy of defence against a crime under international law; Article 33 deals with the rights of asylum “... in accordance with the basic principles of the international law ...” and finally Article 138 which provides for the issue of the ratification of international agreements in accordance with the rules of international law.

International agreements as part of the national legal order<sup>26</sup>, should be applied by national courts and the need to determine individual rights. However, Article 117 of the Constitution states only the Constitution and laws as sources for the judiciary, which is contrary to Article 140. It does not appear that the purpose of the Constitution is to exclude international law as a source of legal authority. Refer-

23 Due to the fact that Croatia is the only country of Stabilization – Association Process who will join next year the EU, I will be focused in this case as reference for all the Western Balkan Countries, as provisions of the SAAs are the same for Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia;

24 Signed on 29.10.2001, although few member states didn't ratify this agreement until February 1<sup>st</sup>, 2005, which make it at the time, an exceptional case;

25 Interim Agreement which regulates trade issues, became effective on January 1<sup>st</sup>, 2002 and entered into force on March 1<sup>st</sup>, of the same year;

26 Based on Article 140 of the Croatian Constitution;

ence to support this view can be found in the Judiciary Act of 1994, under which the Croatian courts, besides the implementation of the Constitution and laws may also apply International Treaties and regulations adopted pursuant to the Constitution, the international treaties and the Croatian legislation. The Croatian Constitution does not have articles incompatible with the EU Treaty. Therefore, the European Community treaties can be ratified without formal amendments of the Constitution. Several Croatian constitutionalists found some constitutional articles, which do not exclude interpretation that can create problems after the membership into the European Union.

#### **IV. Direct effects of the Stabilization Association Agreement with the EU to the legal framework of the Republic of Albania**

Albania is a constitutional democracy based on the rule of law, the principle of separation and balance of powers and respect for human rights and fundamental freedoms. Article 1 of the Constitution provides that “Albania is a parliamentary republic”, making clear the form of government in the country. It denotes a system of parliamentary government, in which the acquisition and holding executive direction is the result of a political rapport and direct trust between the Government and the Parliament.

The Constitution of Albania is one of the post-Communist era<sup>27</sup> constitutions of the countries of Central and Eastern Europe. These constitutions have tended to have a protective nature with regard to sovereignty and independence, allowing only for a restricted transfer of powers to international organizations. Notwithstanding this, the Albanian Constitution of 1998 contains various articles on international law, among other things, allowing Albania to be part of different international organizations and putting legal obligations deriving from those organizations or from international agreements ratified by Albania at a higher level than the Albanian laws, and according to some interpretations, even higher than the Albanian Constitution itself.

However, the consistency of the Constitution with the EC Treaties should be checked in detail beforehand. It will facilitate accession if necessary amendments are made before accession actually happens. Studies have shown that this has been the practice of old and new EU Member States, which have made the necessary constitutional amendments in order to allow ratification of the EU Treaties and also to avoid any contradiction with the *acquis*. Potential EU accession and the condition to approximate the internal legislation with the *acquis* has an impact on many internal legal procedures, including the process of legal drafting itself, that is, the process of approximation at a lower level of the Albanian hierarchy of norms.

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27 October 21<sup>st</sup>, 1998;



The Albanian Constitution provides for a hierarchy of norms, with the Constitution being at the top, international agreements in second place, and laws and decisions standing below. The majority of the *acquis* that is transposed in the approximation process is transposed via laws and decisions and other sub-legal acts, positioning itself in the Albanian hierarchy of norms below the Constitution and international agreements.

On the other hand, the *acquis* is characterized by the principles of supremacy, direct applicability and direct effect. In this context, the Albanian Constitution should be ‘screened’ as to whether it provides for mechanisms that would affect these principles regardless the system of hierarchy of norms. This screening mechanism must also be able to identify potential conflicts with other sources of international law, in order to avoid or eliminate the conflicts.

One of the pillars on which the functioning of the state is based, is the principle of checks and balances thorough separation of powers<sup>28</sup>. This principle is very important because it regulates how political power is distributed among constitutional organs of the state and how the latter check and balance each other’s power. The need of maintaining balance and strengthening the independence and effectiveness of constitutional institutions is a priority for Albania’s membership in the European Union. Changing the balance between Parliament, Government and the Head of State<sup>29</sup>, cause consequences for the whole system.

In the context of performance evaluation of criteria for obtaining candidate status, the European Union progress rapport for Albania on 2011 notes that Albania needs to: a) strengthen the rule of law between the adoption and implementation of a strategy to reform the judicial system to ensure independence, efficiency, and accountability of the judicial institutions<sup>30</sup> b) implement the anti-corruption strategy and action plan, removing barriers, particularly for judges, ministers and members of Parliament<sup>31</sup> ...

It was this statement that led to important constitutional changes some days ago<sup>32</sup> in the “immunities case” which I’m going to analyse below.

The Albanian legal framework is always adjusted through the European Integration Process. The mechanism we use is called “Approximation of Legislation”, which is a

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28 Enshrined in Article 7 of the Constitution;

29 As holders of political power;

30 European Commission - Albania Progress Rapport (2011), page 12. COM(2011)666;

31 European Commission - Albania Progress Rapport (2011), page 13. COM(2011)666;

32 September 18<sup>th</sup>, 2012 (Ligj nr. 88/2012 “Për disa ndryshime në ligjin nr. 8417, datë 21.10.1998 “Kushtetuta e Republikës së Shqipërisë”, të ndryshuar). Will be entering into force in English version, on October 5<sup>th</sup>, 2012. – The author has not the right to translate the title in English, until it will be published in the “Official Gazette”;

well consolidated mechanism<sup>33</sup> consisting of making compatible the entire national legislative framework with the *acquis communautaire*. My focus will be only on legal changes which have effected or will affect directly or indirectly the Albanian Constitution or in primary sources of the *acquis communautaire*.<sup>34</sup>

## **IV.1. Constitutional adjustments due to the obligations deriving from the Stabilization and Association Agreement**

### **IV.1.1. “Zela” Law**

“Zela” Law<sup>35</sup> provides special rules for the role of Parliament as the highest hierarchical body of the Stabilization and Association Process aiming at the development of a comprehensive legal framework that supports and oversees the process of European Integration of Albania into the EU. “... The Council of Ministers sends regularly information to Parliament, on the work done by the various governmental institutions on the European Integration Process and it is Parliament which assesses especially draft agreements and conventions to be associated with the European Union in the process of accession of Albania into EU...”<sup>36</sup>

The need of a direct constitutional authority, which gave the government the constitutional basis for the preparation of decisions and their implementation at national level, led to the creation of the Stabilization and Association Council<sup>37</sup>. This has been accompanied by a simultaneous obligation to inform Parliament on a regular basis for regulatory activities.

### **IV.1.2. Transferring national legal competences to the EU legal order**

International law and international treaties are applicable by national courts in the Albanian domestic laws as part of the national legal order and they can create individual rights, at least in theory.

The Albanian Constitution states that “...Republic of Albania, on the basis of international agreements, delegates to international organizations, state powers on certain issues<sup>38</sup>... Any ratified international agreement constitutes part of the inter-

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33 Started from 1998;

34 By applying the cases that I mentioned on the subtitles (II.1.) and (III.1.) of this article in a hypothetic Albanian case.

35 May 17<sup>th</sup>, 2004;

36 Section 3 of Article2;

37 Established on April 1<sup>st</sup>, 2009 with entering into force of the SAA and constituted on May, 17<sup>th</sup> 2010. Stabilization and Association Council supervises the application and accomplishment of the SAA. It examines any major issues arising from the SAA and any other bilateral or international issues of mutual interest. The Stabilization and Association Council consists of members of the Council of the European Union and members of the Commission of the European Communities on the one hand, and of members of the Government of Albania, on the other;

38 Article 123;

nal law system, as published in the Official Gazette of the Republic of Albania. It is implemented directly, except for cases when it is not applicable on its own and its implementation requires the adoption of a new law. The amendment and repeal of laws approved by a majority of all the members of the Assembly, for ratification effect of international agreements, is made by the same majority<sup>39</sup>... An international agreement ratified by law has priority over laws of the country that are not compatible with it<sup>40</sup>. ... Norms issued by an international organization have priority, in case of a dispute, over the laws of the country, when an agreement ratified by the Republic of Albania for participation in that organization expressly contemplates their direct implementation<sup>41</sup> ...”

Now that Albania has its own SAA into force, so there is the question of whether regulatory authority should be transferred to the Stabilization and Association Council. As a result of the Albanian Constitution, Article 123 provides for the transfer of legislative powers to international organizations, although there is no confirmation of judicial practice yet. However, it remains to discuss the question whether better introduction of Article 123 of the Constitution as legal basis for EU membership, can ensure the transfer of the powers of the Community institutions and at the same time make it clear that adopted legal acts have direct effect on the Albanian legal order and shall take precedence over domestic legislation.

The legal status of Community legislation, such as primary and secondary is not yet defined in the internal legal order of Albania. There is no distinction between international and Community legislation. At this stage Albania is not a member of the EU. In Article 122 of the Constitution it is clearly stated the need for making an integral part of Community legislation and national legislation of differentiation of this legislation by international treaties or other rules of international law. This differentiation should recognize the special nature of Community legislation, and does not necessarily recognize the position of international law in the Community legal order. In other words, the legal rules of Community legislation should be given more specifically legal authority and superiority as well as opportunities for application of direct effect. This issue can be remedied in the same article, thus providing the legal basis for membership of the EU.

### **IV.1.3. Judiciary Reform**

Today Courts may apply the Stabilization – Association Agreement, since it is currently in effect. There may be legal issues related to the implementation of the SAA, but so far we have no information on such issues. However, we think that there may

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39 Article 122 – Section 1;

40 Article 122 – Section 2;

41 Article 122 – Section 3;

be issues on articles standstill as, for example, brandy tax is lower than that for grappa. This is contrary to Article 21 of SAA;<sup>42</sup> specifically the prohibition of fiscal discrimination and a grappa's importer may file a lawsuit in court on this issue. This issue raises a few questions like: what happens if the competent authority does not apply the Joint Committee Decision of the Interim Agreement or apply it, but incorrectly; should courts apply directly the Joint Committee Decision only when Albania is made a member of the EU?

In my opinion the SAA itself, if interpreted in the light of its objective and purpose, which is close to the EU integration and accession to the EU, authorizes Albanian courts to apply directly the secondary legislation which is able to establish direct effects. The same goes for judicial precedents of the European Court of Justice. This fact justifies the status of supremacy that the SAA or Interim Agreement have on the Albanian legal order and the fact that secondary legislation must be published in the Official Gazette of Albania.

Both the SAA and the conditions for accession to the EU, require that Albania align its legislation with the *acquis communautaire*. This adjustment is not done simply by adopting legal acts in compliance with the *acquis*, but applying these acts in practice. Interpretation of the Albanian legislation and other acts in the light of Community law can be interpreted as one of the obligations under the SAA. So a possible interpretation is that the non-application of the principles of indirect effect in such cases is a failure to comply with SAA by the courts.

EU membership does not cause changes in the organization of the judicial system in Albania. By the judicial precedents of the European Court of Justice, it appears that EU legislation does not interfere in the organization of the judicial system in Member States, ensuring there are always courts which are competent to issue decisions based on the *acquis communautaire*.

Although there is no need of an organizational change, the requirements for an effective legal defence will provoke changes in the procedural sphere and in practice with regard to the courts. To become European judges, local judges should be familiar with Community legislation, to understand not only the rules but also precedents that interpret these rules and principles of the Community relating to the implementation and interpretation. To achieve this it is necessary to educate all judges, both present and future. So far the number of Albanian judges that have received lectures on Community law is small, however, the School has expanded its training program on issues of Community law.

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42 Interim(Trade);

#### IV.1.4. Immunities Case<sup>43</sup>

The legislative initiative, embodied in two draft laws<sup>44</sup>, to provide a conclusive and long-term solution to the problem of immunity. The immunity granted to top officials is the highest-level protection that the State offers them. Albania is one of the three leading countries in the world regarding maximum protection provided to top officials with immunity. The perception that “politics is to blame”, which hides behind immunity, has helped in embedding the culture of impunity and lowering public trust in politics and the State.

Viewed in the context of the fight against corruption and abuse of public position, immunity has become, in practice, a legal impediment for the Prosecution in investigating and penalizing corrupt officials with immunity<sup>45</sup>.

There is a growing fear that the lifting of the immunity of the MPs will intensify political blackmail against them. All sides agree<sup>46</sup> that the technical solution of this issue lies in amending the Constitution, but on the other hand, this deepens public mistrust in the Constitution itself because this would be the third time, within twelve years, that the Constitution is amended. Lifting, (not just restriction) of every kind of immunity for politicians and top constitutional officials means that politicians no longer have protection, not only from criminal prosecution, but also from arrest, detention and control.

The Judges of the State should enjoy immunity, but a limited immunity. This means that the Prosecutor’s Office may follow up on, inquire and even carry out preliminary investigations against every Judge up until the moment of formal indictment. At this moment, after the investigation case file is completed, the lifting of immunity becomes an official reality.

On the one hand, this measure permits the Prosecutor’s Office to conduct an investigation to the required degree, and on the other hand, it protects the Judge from blackmail or pressure he/she could be subjected to in the context of abusive criminal prosecution.

The “de-politicization” of the Constitution from such elements as the issue of immunity, seeking simply the abrogation of the articles which foresee immunity will ensure the divorce of the Constitution from issues concerning the anti-corruption fight.

Pursuant to the above stand, these two drafts are providing maximum solution for

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43 Adopted as a Constitutional Change on September 18<sup>th</sup>, 2012. Will be entering into force in English version, on October 5<sup>th</sup>, 2012;

44 On changes to the Constitution and to the Criminal Procedure Code;

45 Although the number of failed cases of the Prosecutor’s Office does not really justify this observation;

46 Majority and opposition;

this problem and do not carry any exceptional juridical or political cost.

First, the abrogation of several paragraphs that guarantee immunity for politicians<sup>47</sup> and for a number of top officials, such as the Ombudsman and the Chair of the Higher State Audit, simultaneously injecting the idea that the immunity of the judges is being limited. The language used in the text is deliberately of an abrogating nature, precisely to free the Constitution from these issues, as well as to address, to a certain degree, the critical line of thought<sup>48</sup>, that the Constitution cannot be intervened into so frequently. The amendments proposed are minimal, but the effect they will have is maximal.

The second legislative initiative has to do with amendments that guarantee how the lifting and restriction of immunity will actually function, in practice. From the outset, we believe that establishing a definition for criminal procedure, clearly helps Court practice to correctly implement and without abuse, the standards of the investigation and criminal procedure against top officials.

The amendment of the Constitution, in itself, is insufficient to provide a conclusive solution to this issue. Therefore, it is suggested that the Code of Criminal Procedure be amended too.

#### **IV.1.5. Switching cases, from the national courts to the European Court of Justice**

Legal effects of the provisions of the Europe Agreement are more or less identical to the provisions of the Association Agreement with Turkey and those of the Stabilization and Association Agreement with the Western Balkan countries and the EU, such as Stabilization and Association Agreement between the EU, its member states and Albania. So if you replace the Turkish and Albanian citizens, you will have the same legal effects in the Community legal order for these citizens. In practice, so far, on the Ankara Agreement<sup>49</sup>, one can analyse only the direct effects in the Community legal order by referencing certain judicial precedents of the European Court of Justice.

European agreements do not address the free movement of workers. They only give the same rights to those citizens who are legally resident and working in one of the

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47 MP's and ministers;

48 Also made present by the opposition;

49 Association Agreement between Turkey and the European Community in 1963, which entered into force on 1 December 1964, is the legal basis for the association between Turkey and the EU. There were over 24 litigation decisions by the European Court of Justice and a number of issues considered by the national courts of member countries, which have been subject to review violations and Association Agreement, the Additional Protocol and decisions of association. European Court of Justice has dealt Association Council decisions in the same way and Association Agreement and considers these documents as an integral part of the Community legal order;

EU member countries. The European Court of Justice<sup>50</sup> ruled that Article 37 of the European Convention should be applied directly, thereby Polish citizens can use as protection and to file a claim in the national courts of the host countries members of the EU.

However, immigration authorities should check in advance if concerned citizens meet the requirements of the European Agreement so that the member states of the EU can issue permanent residence permits. As for the free movement of workers, as interpreted by the European Court of Justice on Article 37 of the Europe Agreement with Poland, there should be equal treatment for citizens coming from the candidate countries, as long as they are already employed lawfully in the territory of an EU Member State.

## **IV.2. Changes of civil and administrative laws due to the obligations deriving from Stabilization and Association Agreement**

### **IV.2.1. “Anti-discrimination” Law**

After intensive work by human rights and international organizations in Albania an all-inclusive anti-discrimination law was decreed on February 24th, 2010 by the Albanian President. The signature followed upon the adoption by the Parliament on January 31st, 2010. Civil Rights Defenders have supported this process over many years. It was a group of human rights organizations and international actors – among them Civil Rights Defenders partners – that drafted the law and finally managed to successfully push for its adoption.

This is an important step forward, when it comes to fighting discrimination in Albania. The law will be an important safeguard and tool for individuals being exposed to discrimination, as well as for organizations trying to decrease the level of discrimination against vulnerable groups, according to the SAA.

The law bans discrimination on the grounds of various characteristics, such as political, religious or philosophical beliefs, disability, ethnicity, sexual orientation and gender identity. It is assessed as a comprehensive law including strong mechanisms for its implementation. This means that Albania now fulfils the European Union’s criteria for protection against discrimination and thereby also comes one step further in the EU integration process.

Article 46 of the SAA, shall apply chapter Free Movement of Workers, which states “In accordance with the conditions and modalities applicable in each Member State: Treatment accorded to workers who are Albanian nationals legally employed in the territory of a Member State shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.

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<sup>50</sup> Case C-162/00 – Pokrzeptowicz vs Meyer 2007;

Husband / wife and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral agreements within the meaning of Article 47, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of authorized stay of employment of the employee.”

So to clarify briefly this article, you must be legally employed. This article gives you the right to be employed legally. Approximately one million Albanian citizens legally employed in the EU Member States can demand their rights and equal treatment based on Article 46 of the SAA.

#### **IV.2.2. Free movement of goods and capitals**

The revised European partnership is approved by the European Council of Ministers Decision<sup>51</sup> of 30 January 2006. However as I said before, there is still no litigation in Albanian courts for violation of the SAA or Interim Agreement. I think that sooner or later Albania will have its judicial precedents in this area. This requires a better understanding of the direct effect of the Interim Agreement. If we compare the internal market provisions of the Treaty of the European Community, signed in Rome on 25 March 1957, as last amended by the Treaty of Nice, the provisions of the Interim Agreement of 22 May 2006, which entered into force on 1 December 2006 we will see similar legal developments particularly with regard to the “standstill” provisions.

What is the outcome and what are the expected legal consequences? The SAA<sup>52</sup> has direct effect and every person and company that is located in Tirana may be sued in national courts against payment of customs duties if the government does not implement this article. Even though Albania is in a pre-accession period, the Constitution<sup>53</sup> of the Republic of Albania states: “The norms issued by an international organization prevail in case of conflict, the right of the country when the agreement ratified by the Republic of Albania to participate in the organization expressly provided direct application of norms issued by it”. This legal basis should be supported when Albanian and European companies located in Tirana bring complaints to National Courts concerning the correctness of the implementation of customs duties or quantitative restrictions.

The second case relates to the fiscal discrimination<sup>54</sup>. “No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.” As well as<sup>55</sup> “Where products are exported to the territory of any

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51 2006/54/EC;

52 Article 37;

53 Article 122, paragraph 3;

54 Article 90 of the EC Treaty;

55 Article 91 of the EC Treaty;



Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.”

In the SAA<sup>56</sup>, we have very similar articles “... Parties shall refrain from measures or abolish practices of internal fiscal nature, or existing ones that cause, directly or indirectly, discrimination between the products of the same party and like products originating in the territory of the other party<sup>57</sup>. ... Products exported to the territory of one party may not benefit from repayment of internal indirect taxation in excess of the amount of indirect taxation imposed on them<sup>58</sup>”.

## V. Conclusions

According to the SAA the approximation process includes the whole *acquis communautaire*, that is, primary and secondary EU legislation, measures adopted under Pillars II and III of the EU and the jurisprudence of the European Court of Justice and its Court of First Instance, as well as EU policies and general rules of EU law.

Furthermore, approximation has a much wider constitutional context. In addition to harmonizing or adapting particular Albanian laws to secondary legislation of the EU, the very signing of the EU treaties that mark the formal step of accession has implications in this connection. Signing them may require for the Albanian Constitution to undergo amendments.

EU accession will also require that the Albanian legal system accepts the very important doctrines of supremacy, direct applicability and direct effect. In this perspective certain constitutional matters should be resolved in advance.

The obligation to approximate EU legislation can sometimes call for domestic legislation that will conflict with other international agreements ratified by Albania.

Taking into account the continuing development of EU law, we may conclude that the approximation process has a very dynamic character making it a continuous process.

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56 Article 34;

57 Article 34, Paragraph 1;

58 Same Article, Paragraph 2;

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# CONSTITUTIONAL CHANGES IN MONTENEGRO IN CONTEXT OF THE EUROPEAN INTEGRATION PROCESS

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## ABOUT THE AUTHORS

Mr. Djordije Blazhic (Ph.D.) was born in Nikshic, on May 6, 1957. In 1996 he obtained the Ph.D. degree at the Faculty of Law, University of Montenegro with the thesis "Inspections in Law System of Yugoslavia", previously finishing Master Studies of Law at the same Faculty in 1989, and graduating from the Faculty of Law at the University of Montenegro in 1981. Currently, Professor Blazhic is the Dean of the Faculty of Administrative and European Studies in Podgorica, as well as the Full Professor at the Administrative Law group of subjects at the several Law faculties in Montenegro and the region. In the period 1992-2003 he was holding the function of the Deputy Minister of Justice to the Government of Montenegro. In his professional career professor Blazhic was the member of several specialized bodies - among them, he was the member of the Institutional Committee of Congress of Local and Regional Authorities of the Council of Europe, Vice president of the Association of Labour Law of Montenegro, member of Board of Directors of the Association of Jurists of Serbia and Montenegro as well as the Deputy President of the Association of Jurists of Montenegro, Vice president of the Association of Labour Law of Montenegro, President of the Agency for Local Democracy and Partnership of Montenegro. Professor Blazhic finished a number of specialized courses in Uzbekistan, Hungary, Germany and United Kingdom. As an author of around twenty publications and books in public administration and administrative law areas, he was twice awarded "Literals Honors" at the University of Kopaonik School of Natural Law.

Ms. Andjelka Rogac was born in Bar (Montenegro) on 3rd March 1990. Completed elementary school and high school in Bar and was awarded as the "Best student in the generation". As a 16-year-old enrolled two faculties at the University of Montenegro – Theoretical Mathematics at the Faculty of Natural Sciences, and International Relations at the Faculty of Political Science. In 2009 completed both faculties and was awarded as the best student. As a 21-year-old, she has obtained a Master degree in International Relations at the Faculty of Political Science. Completed several trainings and seminars abroad, including: the Diplomatic Academy in Vienna in 2012; the Seminar on Prevention of Genocide, Auschwitz (Poland), in 2011; Seminar for Young Leaders, Brighton (England), in 2009; internship in the International Criminal Court in Hague in 2009. Since 2010 she is an employee in the Ministry of Foreign Affairs of Montenegro as well as at the Faculty of Administrative and European Studies as a teaching assistant on the courses: International Public Law and Contemporary Political Systems. She is also in charge of international cooperation and public relations of the international scientific journal for research of the society and media "Media Dialogues". Simultaneously, she is a Ph.D. student at the Faculty of Political Science in Zagreb (Croatia), as well as a student of Master Studies at the Faculty of Administrative and European Studies and the Faculty of Natural Studies. Fluent in English and Italian, she is learning Spanish, German and French.

## ABSTRACT

This paper deals with constitutional changes in Montenegro in context of the European integration process, both from a constitutional law and political aspect. One of the most important problems Montenegro needs to confront in this context is the change of the constitutional framework in a way that will represent a good basis for a stable institutional system, instilling trust among citizens and enabling rule of law. In this paper we will devote our attention not only to the legal procedure of amending the Constitution, but also the constitutional framework under the perspective of the current political moment, in order to try to present the complete view of the results achieved in this context by now.

## РЕЗИМЕ

Овој труд се бави со уставните измени во Црна Гора во контекст на процесот на европска интеграција, од уставно-правен и политички аспект. Еден од најважните проблеми со кои Црна Гора треба да се соочи е промена на уставната рамка на начин кој ќе претставува добра основа за стабилен институционален систем во кои граѓаните имаат доверба, како и за владеењето на правото. Во овој труд ќе се посвети внимание не само на правната процедура за измена на Уставот, туку и уставната рамка во контекст на актуелниот политички момент, со цел да се обиде да се презентира целосната слика на постигнатите резултати во овој контекст до сега.

Key words:

amending Constitution, rule of law, trust in institutions, role of the political institutions

# **CONSTITUTIONAL CHANGES IN MONTENEGRO IN CONTEXT OF THE EUROPEAN INTEGRATION PROCESS**

## **1. Introduction**

This paper deals with constitutional changes in Montenegro with an accent put on the reform of judiciary, initiated with the aim to make a step forward on the way of transforming society into effective democracy, and stimulated by the international community in context of the European Union integration process. Our aim in this paper is to present challenges Montenegro faces when it comes to the establishment of democratic institutions with respect for rule of law, within the process of establishing an independent judicial system within the Constitutional changes process, and to evaluate this process as one step on the path Montenegro needs to pass to become a member of the European Union and a democratic state with stable institutions that are effective in practice.

In order to do so, firstly we will consider the concepts of new democracies and democratic consolidation in South-Eastern Europe, then we will deal with main problems electoral democracies without fully established democratic institutions and democratic ways of making decisions face, the requests the European Union poses in front of the candidate states from this region and their purpose, all these phenomena in a relation with judiciary reform, taking into account, as we are going to see, it is a main EU request to Montenegro regarding establishing legal framework for democracy in practice. Our specific paper will be devoted to the process of amending the Constitution of Montenegro, legal basis to do so, reasons as well as the struggle among different political actors on the way of adopting constitutional changes.

## **2. Theoretical and hypothetical framework**

In absence of concrete theories that deal with constitutional changes in South-East European states (among them Montenegro), our theoretical framework has been built by looking into theoretical approaches to the role of both the European Union and domestic actors in reforming these societies into stable democracies with respect for rule of law and stable institutions in practice. That has lead us to the theories on democratic transition and consolidation, showing that one of the most important steps these states need to make is to reform their constitutional systems in order to be transformed into efficient democracies. As Schroth and Bostan (2005, 633) noted, domestic constitutional law is in almost all cases shaped by relevant international influence. In this case, the European Union may be considered as an

international actor that provides an outside motivation for domestic actors aimed at implementing constitutional reforms. Namely, one of the basic tools for helping Balkan states to transform themselves into new consolidated democracies is the process of integration towards the European Union. From the view of the European Union, enlargement to the South-East European states is possible only if the states prove their ability to act as fully-effective democracy without problems with rule of law, corruption, dependent judicial branch of power and other negative phenomena consolidation from post-communist states to new democracies brings with itself. This means that, although the European Union may offer an incentive to its candidate countries in the form of expertise and financial aid to build stable democratic institutions, it still requires domestic support for reforms aimed at meeting EU standards and therefore completed process of building democracy (Wood 2009, 4).

In this regard, with particular focus on the status of Montenegro as a candidate state considered from the constitutional law standpoint, our main hypothesis in this paper is the following one: After solving the question of statehood, the Constitutional changes regarding the reform of the judicial system in Montenegro, represent the fundamental legal basis for establishing efficient consolidated democratic system, and therefore the basic condition for integration process to the European Union. In order to check this hypothesis, we must explain the basic conditions set by the European Union to Montenegro, what is the relation between the consolidated democracy and fully independent judiciary, and as auxiliary tool we must look into the main actors in this regard, both internal and external, and the main problems political actors in Montenegro point out.

In order to explain the connection between democratic consolidation process and the EU integration, we need to make a short overview of the concepts of the democratic consolidation and finished democratic consolidation. The process of the democratic consolidation is a natural consequence of the successfully finished liberalization and democratization process that constitute the democratic transition process. Linz and Stepan (1996) consider the democratic transition finished if there is enough agreement on political procedures for free election of Government, when the Government obtains the power directly on the basis of the free and general elections, when that Government has de facto power to create new policy, and when executive, legal and judicial branch created by the new democracy are fully autonomous in a sense they don't share the power among themselves. Professor Darmanović (2002, 14) adds one more criteria - when no branch of power manages to attain a domination in relation to the others and to the society beyond the Constitution and common practice based on the division of power.

Constitutional and political theories offer different criteria for determination in which moment we can consider democracy consolidated. According to Huntington, a regime may be considered as consolidated only after two electoral changes.

However, there is always a possibility for no democracy in practice, which means that democracy may not be based only on the electoral result. For this reason we will consider as the key parameters of the regime consolidation the following ones: successful functioning of democratic political institutions in practice including political parties, legislation, and judiciary. Of course, an important parameter is also democratic political culture – in other words, democracy is not possible without democrats.

Taking into account that consolidated democratic consolidation and the European integration are two complementary processes, it is necessary to: show when a post-communist post-transitional state from South-Eastern Europe may be considered as a new democracy; briefly elaborate the democratic transition and consolidation of democracy process Montenegro has passed throughout since 1990; state the pre-conditions for membership in the European Union set for Montenegro; explain when we can consider that positive law conditions for meeting basic criteria for membership have been created; as well as to show that successfully implemented constitutional reform plays an undoubtedly important role among those conditions. Thereby, having in mind that the first Constitution in 1992 Montenegro adopted within the framework of the State Union of Serbia and Montenegro when Montenegro didn't have subjectivity under the international law, our research will be focused only on the constitutional and political changes since independence, after the adoption of the first Constitution of independent Montenegro in 2007. These changes have a role to contribute to the creation of formal and legal conditions for Montenegro to become a truly democratic society and a member of the European Union, after proving successful implementation of the legacy in practice and existence of stable democratic institutions.

For the judiciary to be independent, it must act as an impartial, neutral third party when resolving the conflicts, and must not be influenced by political branches of power during the adjudication of disputes<sup>1</sup> in order to be a successful check against unconstitutional laws and actions by nullifying laws and decrees. Independent judiciary should not interfere with the legitimate actions of the political branches of power (Stephens 1985, 529), but on the other hand, it must feel free to exert its own opinion in disputes even if decisions are not in favour of the other branches of power (Harron and Randazzo 2003, 424). Although there is no unique definition of judicial independence, we can consider this phenomenon as:

“degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires

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1 See, for example, Shapiro 1981, Larkins 1996.

of those with political or judicial power may bring some retribution on the judges personally or on the power of the court”<sup>2</sup>.

A stable judicial system may be considered as a pre-condition for stable democracy, having in mind that strong, independent and autonomous judiciary which evaluates legislative and executive branches decisions in context of constitutionality, opens the possibilities for developing the political consciousness that the rule of law cannot be bypassed in favour of political gain. This is particularly important for post-communist successor states as a condition for break up with the authoritarian past (Larkins 1996, 606-607). There is a danger in the context of the establishment of that system – if independence of judicial decisions has not been regulated by Constitution and laws, in a way it is not only declaratory. The conditions for disabling the possibility for the judiciary to become at any moment an extension of the other branches of power and possibility for judges to fall under political influence in decision-making process have to be met.

When it comes to post-communist states of South-Eastern Europe, there is almost universal consensus regarding the normative value of judicial independence, but the problem is how to ensure the judiciary will express independent behaviour in practice. In post-communist states judges do not have the prestige and legitimacy equal to their colleagues’ in established democracies (Harron and Randazzo 2003, 424). There is no adequate constitutional framework that would provide independent judicial review and prevent the judiciary to be influenced by political actors. The judiciary is often used by political elites as a convenient tool for making unconstitutional and unlawful actions and legitimating decisions, because constitutions leave possibilities for abuse by not protecting the judicial profession from political interference<sup>3</sup>. The main reason why post-transitional states that have emerged from the communist or authoritarian past do not have perfect constitutions is the non-existence of readiness of the main political elites to establish effective and efficient democratic both political and state institutions that would be able to lead to the eventual loss of power. As we are going to see, the same challenge of reforming Constitution faces Montenegro.

### **3. Amending the constitution in Montenegro**

#### **3.1. Montenegrin path to democracy**

As in all states in South-Eastern Europe, the transition process in Montenegro started in 1989 and consisted from two parallel segments: 1) transformation from system with one, communist party, to multiparty electoral democracy and 2) transforma-

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<sup>2</sup> Herron and Randazzo (2003, 424) based on Becker (1970, 214).

<sup>3</sup> For example, president of Belarus abused his position by overturning legal acts that are minimizing presidential authority with support of the judicial branch of power.



tion from planned economy based on state property to market economy based on private profit (Jovanović 2006, 19). Something what makes Montenegro specific by comparison with other successor states of former Yugoslavia, is the fact that in Montenegro a conflict between political elites related to the international law status, which resulted in independence in 2006 formed an integral part of the political and state institutions maturation process.

Since 1989, Montenegro has passed through two transitional processes: 1) the first one started in 1989 with the so-called anti-bureaucratic revolution which was marked by the struggle among communist political elites and resulted in reform of the old communist garniture and creation of the pluralistic system that, although was marked as a multiparty system, ruled on the same, authoritarian basis of the previous one, 2) the second one started in 1996 by disruption within the ruling party between regime reformists and regime conservatives and was marked by electoral democracy with free and fair elections as well as new, pro-European orientation of the ruling party (Darmanović 2002, 185). The end of the democratic transition in Montenegro happened in 2000, when the Milošević's regime was definitely overturned. This year was the beginning of the democratic consolidation process, mainly marked by different views on the international status of Montenegro, differences between independents and unionists, which were almost the same as differences between pro-European and traditionally oriented ruling and oppositional parties. In 2006, Montenegro after 88 years once again became independent state recognized by the international community, with a new aim – integration to the European Union structures upon which all the political actors were accorded. However, the perceptions about the path Montenegro needs to pass on the way of the membership in the European Union have been and still are different. As we could see in the previous Chapter, one of the reasons for the importance of the European Integration for the South-East European states is the fact that this process helps establishing democratic institutions with respect for rule of law. One of the main challenges in this regard for Montenegro and for all other states in the region is the Constitutional reform with the goal to create legal basis for full acceptance of democratic principles. Namely, as all other states in the region, Montenegro seeks to use the European Integration process to reform its political system with the aim of establishing a sustainable consolidated democracy. The fulfilment of the seven Copenhagen criteria is one of the main requests of the European Union, and one of the main tools (and problems at the same time) for meeting this goal – agreement among internal political structures upon Constitutional changes and their implementation in practice.

### **3.2. Main Influences on Constitutional Changes**

Perceiving the differentiation between law and policy in South-East and Central Europe, Pollack (1990, 293-97) comes to conclusion that the relation, behaviour and

work of state institutions have been determined according to the need of the ruling elites to legitimise their power for an indefinite period<sup>4</sup>. The first constitutional conflict between law and policy Montenegro experienced shortly after the beginning of the first transitional period in the 90s, which resulted in adoption of the Constitution in 1992. The next Constitution of Montenegro was adopted only after promulgating its independence, in 2007. As it was to be expected, the integration process of Montenegro towards the European Union made an important influence to the course of the constitutional changes, as well as disagreements in that regard. Firstly, after resolving the “statehood issue”, the EU integration process directed the constitutional changes process to the struggle for independence of judiciary and fight against corruption.

One of the important problems on the way to the adoption of the constitutional amendments was exactly the fact its adoption is under the jurisdiction of Parliament, where, since 2008, there is a ruling coalition categorically oriented towards reforming state institutions within independent Montenegro. On the other side there is a diverse opposition, previously focused on preserving the dependent status of Montenegro within the State Union of Serbia and Montenegro, and now faced with the challenge of offering different economic and social policy within the EU integration framework in combination with some still existing attempts for bringing to the agenda a community-with-Serbia-issue.

Factors that were influencing the process of constitutional changes in the period 2011–2012, were: requests and suggestions of the European Union and other organizations with mandate to help establishing and sustaining democratic institutions in the region; the requests of the Parliamentary opposition on one hand and the resistance of the ruling coalition on the other to connect judiciary reform and combating corruption (main requests of the EU and the Venice Commission) with the issue of state symbols and emblems; cautiousness on both sides because of the fact that the adopted amendments in combination with an economic crisis could negatively impact the electoral result at the expected parliamentary elections, then scheduled for autumn 2012, or spring 2013. Constitutional amendments have been seen not only as an opportunity to harmonize the Montenegrin legal system with the *acquis communautaire* and to correct the Constitutional provisions in a way that would set a legal framework for an efficient judiciary, but also as an opportunity to put on the agenda some political issues as request for returning old state symbols and the Serbian language. This is certainly in accordance with our initial annotation that one of the most important variables that influence democratic transition and consolidation in Montenegro was the national and statehood issue, although in 2006, after the Referendum, it seemed that the conditions for its reactivation ceased to exist.

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<sup>4</sup> Ginsburg and Moïstafa come to the same conclusion when writing about right-wing autocracies (2008).

### **3.3. Legal basis and reasons for amending the Constitution of Montenegro**

Article 155 of the Constitution of Montenegro stipulates the possibility of amending the Constitution of Montenegro by submitting a proposal from the President of Montenegro, the Government or at least 25 delegates, while a proposal may refer to an amendment of certain provisions of the Constitution, or to an adoption of a new one (Constitution of Montenegro, 2007). The same Article provides that a proposal to change the Constitution is adopted by the Parliament of Montenegro by a two-thirds majority of all delegates, and that in case of non-adoption the same proposal to amend the Constitution can be submitted again only after one year. Article 156 of the Constitution, which contains provisions on the Act to amend the Constitution, states that certain provisions of the Constitution are changed by amendments, that a draft legislation to change the Constitution is prepared by a competent body of Parliament, and then it must be adopted by a two-thirds majority of all delegates. After a public debate, for which deadlines are also prescribed by the Constitution, the competent authority of Parliament prepares a proposed Amendment to the Constitution, which Parliament must also adopt by a two-thirds majority.

After the restoration of independence, at the Referendum held on 21 May 2006, the Government of the Republic of Montenegro, by the adoption of the Declaration of Independence in the Parliament of the Republic of Montenegro, on 3 June 2006, assumed the responsibility of defining and conducting foreign policy, implementation of which is primarily in hands of Ministry of Foreign Affairs and European Integration (former Ministry of Foreign Affairs of the Republic of Montenegro). Basic directions of Montenegrin foreign policy have not changed substantially compared to the period before the restoration of independence, with one important difference, which refers to the fact that since 2006 Montenegro, as a subject of international law and a United Nations member state, recognized by a significant number of other states, has a capacity for implementation of its foreign policy priorities. Basic foreign policy priorities of Montenegro are the following: 1) integration into the European Union and the North Atlantic Treaty Organization (NATO), 2) Improving and maintaining good neighbourly relations and regional cooperation, 3) Developing bilateral and multilateral cooperation.

In accordance with the defined foreign policy priority of joining the European Union, and in line with the results achieved in this area, Montenegro was granted candidate status for the EU membership, based on the opinion of the European Commission, as of 9 November 2010 and the recommendation of the European Council for granting the status of a candidate country. In the opinion of the European Commission, and later in the Progress Report for 2011, the European Commission has focused on the assessment of compliance with the Copenhagen criteria and in accordance with them formulated seven key priorities that were necessary to realize in order to open

accession negotiations. In doing so, the European Commission, as in the case of accession of other countries of Southeast Europe, placed a special emphasis on political criteria, requiring that new members are states with built and stable institutions, independent judiciary, with results in terms of fight against corruption and organized crime, protection of human rights and regional cooperation. One of the recommendations within these priorities related to improving respect of the principle of rule of law, especially given the estimated insufficient autonomy and independence of the judiciary and prosecution, such as stipulated by the Constitution and visible in practice. Namely, the Analytical report delivered along with the opinion of the European Commission, states that the current Constitution of Montenegro stipulates judicial independence, autonomy of the State Prosecutor and impartiality of judges, while, on the other hand, concerning independence of judges, there was room left for exercise of political influence. Although judges are elected by the Judicial Council, the majority of its members are elected by the Parliament or the Government. All State Prosecutors are elected by the Parliament. Deputy State Prosecutors are appointed by the Prosecutorial Council, elected by the Parliament. The legislation also allows an accumulation of excessive power in the President of the Supreme Court and the Supreme State Prosecutor, who are also elected by the Parliament, by simple majority. The President of the Supreme Court also chairs the Judicial Council and the three-member Commission for appointing judges, with an authority to manage and organize the work of the Conference of Judges. The appointment of the Supreme State Prosecutor by Parliament has caused additional concern about the hierarchical structure of the prosecution service.

The opinion and recommendations of the European Commission clearly indicate the necessity to change some of the provisions of the Constitution, particularly those relating to the election of the President of the Supreme Court, the composition of the Judicial Council, the appointment of the Prosecutorial Council and State Prosecutors by the Parliament, which is, in fact, incorporated in the Governmental proposal to change the Constitution of Montenegro, as of May 2011. Specifically, the Constitution of 2007 compared to the previous one, strengthened the independent position of the judiciary by declaring that the Judicial Council is to act as an independent body with a mission to ensure realization of autonomy and independence. Also the Prosecutorial Council was formed for the first time, with the authority to ensure independence of the State Prosecutor's office. However, what has not been fully resolved in the Constitution is the question of independence and autonomy of the judiciary.

Concerns about the possibility to exert political influence on the judiciary were not expressed only by the European Union through the opinions and progress reports, but also by the Venice Commission within the framework of its Opinion on the Constitution of Montenegro, as well as in reports of the Council of Europe's Monitoring Mission. Bearing in mind that an independent judiciary is the basic guarantee for

democratic functioning of the institutions, as was presented in the previous section, based on the above stated facts on the suggestions and requirements of relevant international bodies, it is obvious that the establishment of an independent and professional judiciary must be recognized as a strategically important area necessary to work on in the process of the European integration.

### **3.4. The process of amending the Constitution**

The process of amending the Constitution was initiated in early 2011. The Government adopted on 24 February 2011, the Analysis on the need to amend the Constitution to strengthen the independence of the judiciary, as an example of compliance of the judicial system with the international standards, and the proposed changes with the aim of establishing an independent position of the judiciary and State Prosecutors, as a precondition for achieving the rule of law. The analysis is based on the international standards contained in the documents of the Council of Europe, the United Nations and the European Union, among which the most important are the following:

- The European Convention on Human Rights and Fundamental Freedoms,
- Recommendation R (2010) 12 of the Committee of Ministers to Member States on the Independence, efficiency and accountability
- Grand Charter of judges (Magna Carta) 2010 (3)
- The European Charter on the Statute for Judges
- Opinion of the Consultative Council of European Judges
- Opinion of the Consultative Council of Prosecutors
- Opinion of the European Commission for Democracy through Law, so called Venice Commission
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights, and
- Basic principles of judicial independence adopted by the UN Seventh Congress and accepted by the General Assembly

#### **3.4.1. Analysis of the Government of Montenegro on the need to amend the Constitution of 2007 regarding independence of judiciary**

The Analysis shows that the provisions of the Constitution problematic in terms of independence of the judiciary, are the following: Article 11 – the principle of division of power, Article 32 – fair and public trial, Article 54 – prohibition to organize, Article 82 points 13, 14, 15 – the competence of the Parliament of Montenegro, Articles 118-128 – Court, Article 86 – Immunity, Article 95, point 5 – the authority of the President of Montenegro, Article 134-138 – State Prosecutor’s Office. Article 11 clearly indicates that the three branches of power in the political system of Monte-

negro are separated from one another. However, declaratively stating that the judicial power cannot be under the political influence of the other two does not mean the principle of separation of powers is achieved in practice. For it to be realized it is necessary to amend the Constitution by providing institutional independence of the judiciary and the State Prosecutor's Office.

Regarding the articles by which the current Constitution intends only to provide permanence and independence of the judiciary, the Constitution generally guarantees a fair and public hearing (Article 32), as well as an independence of the judiciary in a way which prohibits membership of judges (Article 54), State prosecutors and their deputies in political organizations, but on the other hand sanctions for membership are not provided in terms of termination and dismissal from duty. The solution which, in this regard is rated as acceptable, is the constitutional provision that a judge who has been convicted for a crime committed with premeditation during the judicial function, loses the position, while other reasons for termination of the judicial function and dismissal of judges are to be prescribed by law.

The current provision of the Constitution that Parliament has the authority to elect and dismiss the Supreme Court President, to appoint and dismiss the Supreme State Prosecutor, State Prosecutors and Prosecutorial Council, the Venetian and the European Commission recognized as legally facilitating the exercise of political influence on the judiciary, hence being opposite to the principle of independence of the judiciary. Under the current Constitution, by appointing and dismissing officials who bear judicial and prosecutorial functions, the Parliament possesses the right to decide about their immunity. However, in order to allow an independent position of the Supreme Court and the Supreme State Prosecutor, it was found necessary to establish the constitutional guarantee of full immunity.

Regarding the section of the Constitution which further regulates judicial power, it was estimated that changes must be made to the provisions relating to the autonomy and independence of courts, public trials, the trial of the council, the permanence of the judicial function, functional immunity, and incompatibility with other public functions. The title of the chapter "Court" was assessed as technically problematic because it regulates the Judicial Council and the guarantees of personal and real independence of judges. From the aspect of leaving opportunities for exerting political influence on judicial independence, provisions rated as problematic are those relating to the appointment of the President of the Supreme Court (appointed and dismissed by the Parliament on the proposal of a President of Montenegro, a President of Parliament and a Prime Minister, without the participation of the judiciary). The Constitution provides that a President of the Supreme Court is appointed on the proposal of the Parliament working body with consent of the three Presidents, which, given that the participation of judicial power was ruled out, and the choice left to the legislative and executive ones, leaves the possibility for

political influence of the ruling majority in Parliament. Possibility to exert political influence is also left by the constitutional provisions on the composition and powers of the Judicial Council and its proclaimed constitutional and institutional independence. Specifically, apart from four members with ranks of judges, the Judicial Council consists of two representatives from the position and the opposition, Justice Minister and two distinguished jurists nominated by the President of Montenegro. The President of the Supreme Court is President of the Judicial Council by default, by which, as we have seen, the Constitution leaves the possibility to exert political influence on this function.

### **3.4.2. Review of the Constitutional provisions to be changed**

Considering the above stated facts, the proposed amendments to the Constitution are the following:

- Article 33, which provides that no one can be punished for an act which, before it was done, was not prescribed by the law as a criminal one, nor can be sentenced with punishment that was not designed in a way to allow the offence to be regulated by a provision based on the law. The reason for this proposal is the fact that the current arrangement excludes the possibility that the offences such as minor offences are regulated by a secondary regulation, as well as the fact that the offences can not be regulated by a local government's decisions, and therefore there is no possibility of punishing behaviours that are contrary to the rules laid down in the decisions of local governments regulating the matter in their primary, or derived jurisdiction.

- Article 82, paragraph 1, item 14, which provides that the appointment and dismissal of State prosecutors is under the jurisdiction of Parliament, so that this authority is put under jurisdiction of the Prosecution Council.

- Article 91, paragraph 2, which regulates cases in which Parliament decides by majority of all deputies, so that the Article is amended by a provision that Parliament decides this way on appointment and dismissal of the Supreme State Prosecutor.

- The third part of the Constitution "The arrangement of the Authority." Item 5 "Court" so that the item is titled "Judiciary" since it regulates the Judicial Council and the guarantees of personal and real independence of judges.

- Article 121 paragraphs 2 and 3, which sets the conditions for termination of the judicial function and dismissal, so that the conditions and procedures for termination of the judicial function and dismissal are defined by the law, while the Constitution maintains only the provisions on the reasons for mandatory dismissal of judges, and only when a judge is convicted for a criminal offence committed with

premeditation, by misusing judicial functions.

- Article 124 paragraphs 2.3 and 4 relating to the jurisdiction of the Supreme Court and the procedure for appointing President of the Supreme Court, so that it is regulated that the Supreme Court, in addition to the already established competence to ensure uniform application of the law by the courts, performs other duties prescribed by the law, in order to regulate other jurisdiction of the Supreme Court by the law, as well as to provide that the President of the Supreme Court is appointed by Parliament for a period of five years, on proposal of the Judicial Council, with a previously provided opinion of the general session of the Supreme Court.

- Article 127 paragraphs 2 and 3, which regulate the composition of the Judicial Council, so that it is provided that the Judicial Council consists of a Chairman and ten members – six judges, two distinguished jurists appointed by Parliament, two distinguished jurists appointed by the President of Montenegro and the Minister of Justice, and so that the President of the Judicial Council is elected from judges of the Supreme Court.

- Article 128 paragraphs 1, 2 and 3 which regulate the jurisdiction of the Judicial Council in determining the number of judges and the number of jurors in the Court and in the consideration of the report of the Court, petitions and complaints about the work of the Court and an opinion about them, and concerning the decision-making process of the Judicial Council, where it is suggested that responsibilities and decision-making process are not prescribed by the Constitution but by the law and, that the provision on the number of judges and jurors is amended by the determination that the Minister of Justice does not vote in case of dismissal of judges.

- Article 135 regulating appointment and mandate of State Prosecutors so that it is determined that the activities of the State Prosecutor's Office are conducted by heads of State Prosecutor's Offices and State Prosecutors, that Supreme State Prosecutor is appointed by Parliament on proposal of the Prosecutorial Council for a period of 5 years, and Heads of State Prosecutors Offices are appointed by the Prosecutorial Council for a term of 5 years, as well as to establish the continuity of the functions of State Prosecutors, except when it comes to the first appointment of State Prosecutors in the State Prosecution of the first degree, when the mandate would be limited to three years. It also proposes to prescribe by the Constitutional provisions the conditions for termination and dismissal of a State Prosecutor, analogous to the proposal regarding the conditions for termination and dismissal of judges.

- Article 136, which relates to the position and manner of appointment of the Prosecutorial Council, so that the composition and powers of the Prosecutorial Council, prescribed by the Constitution in order to be consisted of a President and



ten members – Supreme State Prosecutor, six members from State Prosecutors, appointed and dismissed by the extended session of the Supreme State Prosecutor's Office, two prominent jurists who are appointed and dismissed by Parliament, an attorney who is appointed and dismissed by the Lawyers Association; that a President of the Prosecutorial Council is appointed from members of the Prosecutorial Council, State Prosecutors, and that the composition is declared by the President of Montenegro for a four year term. Analogous to the competence of the Prosecutorial Council, it is proposed that the jurisdiction of the Prosecutorial Council is defined by the Constitution.

- Article 151 regulating the Constitutional Court decision making procedure, so that it is prescribed that the Constitutional Court decides on constitutional complaints in a council of three judges unanimously, and, in case that the council was not unanimous, a decision can be brought by the Constitutional Court at a meeting of all the judges by a majority of votes – all in order to meet the standards of the European Convention on Human Rights and Fundamental Freedoms concerning the right to an effective legal remedy and recommendations for more efficient work of the European Court of Human Rights in Strasbourg.

### **3.5. Draft amendments to the Constitutional provisions relating to the judiciary sent to the European Commission for Democracy through Law (Venice Commission)**

The Constitutional Issues and Legislative Committee of the Parliament of Montenegro on 28 May 2012 adopted the Proposal Amendments to the Constitution of Montenegro as well as the Proposed Constitutional Law for Implementation of the Amendments to the Constitution of Montenegro. According to the procedure for changes of the Constitution, these amendments should make an integral part of the Constitution of Montenegro and should enter into force on the day of their promulgation. These proposals were sent to the Venice Commission, and Montenegro is now expecting Opinion of the Venice Commission on the Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro.

It is very important to mention that the biggest part of the opposition did not participate in the work of the Parliamentary Committee. The only participant was the Socialist People's Party, which at the end of process did not accept the final version of the Amendment Proposal. In addition to this set of draft amendments, Socialist People's Party of Montenegro sent to the Venice Commission its, second, set of draft amendments to the Constitution.

The final version of the Proposed Amendments contained solutions regarding the judiciary, which prescribes that the election of the Presidents of the Supreme and Constitutional Court should not be within the duties of Parliament. This was unac-

ceptable for the opposition party which was explaining that within the system of division of powers as Montenegrin is, no branch should have full autonomy and therefore Parliament should elect judicial officials by two-third-majority to prevent from making political influence on the election process. On the other side, the parties which accepted the Amendment Proposal were of an opinion that the biggest influence can be made in case the electoral process is within the duties of Parliament. Therefore, the Proposal Amendments as well as the Constitutional Law for their implementation have been adopted by the ruling majority. Without any intention to judge the non-participation of the Parliamentary opposition, it is important to mention that the main reason why the other opposition parties did not take participation in the amendments-drafting-process, is the fact that the ruling coalition did not want to consider the issue of state symbols and Serbian language together with the reform of judiciary. On the other hand the Venice Commission several times has pointed out that the Constitutional reform regarding the judiciary is a question of providing legal framework for rule of law and must not be mixed with other political and identity issues. Having in mind the 2008 Parliamentary elections results, the ruling coalition has a majority that enables it to adopt decisions without the opposition parties, and this was case during the amendments drafting process.

The final text of amendments is similar to the proposal set by the Government of Montenegro, so we will present only differences, contained in the Opinion that the Government gave after the adoption of the amendments. Namely, after formulating Draft Amendments, the Government of Montenegro on its session held on June 28, 2012, considered the Draft Amendments and Draft Constitutional Law for their implementation, submitted by the Parliament and gave its opinion on accordance of the Amendments with its initial Proposal to change the Constitution, as well as Additional Proposal to change the Constitution.

The Government of Montenegro did not have objections regarding most of the amendments. The suggestions were about the Amendments III, VII and X. Regarding the Amendment III, the difference between the Governmental and the proposal submitted by the Parliament lays in the fact that Parliament wanted to provide that Parliament neither elects nor releases from duty the president of the Supreme Court. The opinion of the Government is that the recommendation of the Venice Commission would be adopted even if the election and the release from the duty of the President of the Supreme Court remain under the jurisdiction of the Parliament, which should elect it by qualified majority. According to the Government's opinion, a sufficient change would be to establish the Judicial Council for election of the judicial officials. The amendment VII which stipulates only one reason for releasing from the duty (if he has been convicted by a legal and binding decision for a criminal act committed by abusing the judicial duty) and leaves to the law to prescribe the other cases, according to the Government, is not in accordance with the opinion of the Venice Commission and needs to be replaced. Regarding the Amendment X the

objection of the Government was that the amendment about the jurisdiction of the Judicial Council should include the duty to decide on the functional immunities of the judges, based on the Article 122 of the Constitution by which functional immunity was prescribed.

#### **4. Conclusion**

We could see that the EU strategies towards the Balkans provide the means for consolidating democracy by ensuring that democratic institutions function in practice and that all the domestic political actors are fully free to participate in the democratic process. In the EU integration process a special accent has been put on the judiciary and public sector reforms, as the key areas to fighting organized crime and corruption. For this reason, fully implemented constitutional changes regarding judiciary are one of the most important steps for candidate countries towards the EU membership.

As we have seen, Montenegro has the double challenge on the way of creating stable democratic institutions all political actors would have confidence in: 1) agreement among all the political actors on the importance of creating a legal framework for rule of law by constitutional reforms in practice as well as on the most convenient way to implement them, 2) full implementation of the constitutional changes in accordance with authoritative opinions given by the international community actors. After receiving the Opinion on the Draft Amendments which can be expected in October 2012, we perceive as important the inclusion of all the political actors in the constitutional reform process having in mind the fact that this issue is important for all segments of society, because a clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture is required to achieve fully respected democratic principles in practice. Besides this, as we could see and according to our initial hypothesis, the successful implementation of legal provisions that provide the rule of law (among them judicial system reform) is the pre-condition for the EU membership, on which there is absolute consensus in Montenegrin society.

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# **FULFILMENT OF CROATIA'S POLITICAL CRITERIA IN THE EU ACCESSION NEGOTIATIONS WITH AN EMPHASIS ON THE IMPLEMENTED AMENDMENTS TO THE CROATIAN CONSTITUTION**

**Kristian Turkalj, Ph.D.**

## **ABOUT THE AUTHOR**

Kristian Turkalj, was born on 8 October 1970 in Zagreb. Graduated in 1995 at the Faculty of Law in Zagreb, Croatia, and received the rector's award in 1992 for the best paper. He studied as well at the Faculty of Law, University of Oslo, at the Law School of University of North Dakota (USA), and at the Asser Institute in The Hague, Netherlands. Upon completion of the studies he was employed at the Ministry of Foreign Affairs of Croatia and worked at the International Legal Department. He was a trainee at the Municipal and County Court in Zagreb. He completed a Master degree in International public and private law in 2000; the topic of the thesis was "The delimitation of the territorial sea between Croatia and Slovenia in the Piran bay". In 2000 he completed as well the program at the Diplomatic Academy. At the Ministry of Foreign Affairs (MFA) and later at the Ministry of Justice of Croatia he gained negotiating experience by participating and chairing several bilateral and multilateral negotiations. He worked at the MFA till 2000 when he was transferred at the Government Office for Cooperation with the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (ICTY) as Head of Department for preparing the Memorial against Federal Republic of Yugoslavia for the violation of the Convention on the prevention and punishment of the crime of genocide before the Court of Justice. In July 2001 he started his mandate at the Mission of the Republic of Croatia to the European Union, and since then he is dealing with issues concerning the European Union and Croatia's accession to the EU. By a Government decision in 2005, he was appointed as the Head of the Working Group for negotiation of Chapter 24 "Justice, freedom and security". In 2008, he was transferred at the Ministry of Justice and promoted by the Government to a Member of the Negotiation team responsible for chapters 23 "Judiciary and fundamental rights" and 24 "Justice, freedom and security". In 2009 he passed the bar exam and in 2011 he obtained a Ph.D. degree on the topic "Legal and institutional framework of the European Union for the suppression of terrorism" at the Law Faculty in Zagreb. He wrote several scientific and professional articles and publications. He is a lector at the Diplomatic Academy and Judicial Academy and participates at numerous scientific and professional conferences. He is an associate member of the Croatian Academy of Legal Sciences.

## ABSTRACT

With the accession negotiations, Croatia was faced with a set of very high demands, at least when it comes to chapter 23 and 24. These demands have been extremely challenging and often directed to the highest standards in the EU. In order to meet some of the political criteria, amendments to the Constitution had to be implemented. Constitutional changes were related to independence and impartiality of judiciary, prevention of corruption (right to access to information), human rights (independence of ombudsman) and especially minority rights, as well as rights of EU citizens (voting rights and consular protection). It was similar with chapter 24 where one of the closing benchmarks was related to the necessity of amending the Constitution in order to pave the way for the application of the European arrest warrant. The purpose of this paper is to provide better knowledge, understanding and evaluation of the negotiation process in Chapter 23 and Chapter 24 and reforms that have been implemented in order to meet the criteria for EU membership, with special emphasis put on the constitutional changes that have been implemented.

## РЕЗИМЕ

Со пристапните преговори, Хрватска се соочи со плејада на тешки критериуми, барем кога станува збор за поглавјата 23 и 24. Овие критериуми беа крајно предизвикувачки и често насочени кон највисоките стандарди во Европската унија. Со цел исполнување на дел од политичките критериуми беше потребно имплементирање на амандманите на Уставот. Уставни промени се однесуваа на независноста и непристрасноста на судството, спречување на корупцијата (право на пристап до информации), човековите права (независноста на народниот правобранител), а особено правата на малцинствата, како и правата на граѓаните на Европската унија (право на гласање и конзуларна заштита). Слична беше сликата и со поглавјето 24 каде што еден од одредниците за затворање на поглавјето беше поврзан со потребата од изменување и дополнување на Уставот со цел да се отвори патот за примена на Европскиот налог за апсење. Целта на овој труд е да се зајакне знаењето, разбирање и евалуација на процесот на преговори за поглавјата 23 и 24 како и реформите што беа спроведени со цел да се исполнат критериумите за членство во Европската унија, со посебен акцент на имплементираниите уставни измени.

### Key words:

EU accession, political criteria, Constitutional changes, reform of judiciary, combating corruption, human rights and EU citizen's rights.



# **FULFILMENT OF CROATIA'S POLITICAL CRITERIA IN THE EU ACCESSION NEGOTIATIONS WITH AN EMPHASIS ON THE IMPLEMENTED AMENDMENTS TO THE CROATIAN CONSTITUTION**

## **I. Introduction**

The integration process of the Republic of Croatia to the European Union (EU), one could argue, started with the signing of the Stabilization and Association Agreement in 2001.<sup>1</sup> The accession negotiations started on October 3, 2005.<sup>2</sup> However, that did not mean that Croatia began to negotiate on all chapters at the same time. Chapter 23 is the last chapter which has been opened in the accession negotiations. On February 19th, 2010, Croatia has submitted its negotiating positions on chapter 23 and negotiations were finally opened on June 30th the same year. On that occasion, the EU has defined its position i.e. the closing benchmarks for this chapter.<sup>3</sup> Finally, the negotiations were officially closed once Croatia has meet all the closing benchmarks meaning after implementing demanding, but also comprehensive reforms, and the necessary adjustments of its legal and institutional framework. In order to meet some of the criteria, it was necessary to amend the Croatian Constitution.

The most obvious changes are visible through the implementation of the constitutional adjustment for EU membership. Preparation for membership in the EU included a comprehensive adjustment of the entire legal, economic and administrative system. In order to meet the criteria for membership, Croatia had to go through a complex process of harmonization of the legislation and strengthening of its administrative capacity and to make appropriate reforms which in one part, included reforms of the fundamental functions and responsibilities of individual state agencies and institutions. Membership in the EU also includes a transfer of certain constitutional powers to EU institutions, direct legal effect and application of EU law as well as guarantees of certain rights to EU citizens on Croatian territory. In addition, every candidate country before joining the EU should establish a constitutional and legal basis for joining the EU, which may imply holding referendum. As the aforementioned categories and relevant legal institutes, are legally constituted

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1 See: Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica, Narodne novine – međunarodni ugovori, br. 14/2001.

2 On the decision of the the Council of the European Union on opening negotiations with the Republic of Croatia see: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/86442.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/86442.pdf)

3 On the opening of chapter 23 see the press statement of the Council of the European Union: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/er/115569.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/115569.pdf)

not only in laws and by-laws, but also in the Croatian Constitution, the preparations for accession to the EU required appropriate constitutional and legal adjustments that take into account the new political and legal environment in which the Republic of Croatia will find itself after joining the EU. The necessity of certain constitutional changes was indicated by the EU during the accession negotiations on a number of negotiating chapters (including chapters 23 and 24), with a particular set of constitutional changes presented as closing benchmarks. Therefore, with the aim to complete the accession negotiations while ensuring adequate constitutional and legal basis for Croatian accession to the EU, and effective functioning of Croatia in the EU, it was necessary to change the Croatian Constitution.

In the accession negotiations, two chapters in particular were under the spotlight: Chapter 23 – Justice and fundamental rights, and chapter 24 – Justice, Freedom and Security. This was due to the exceptionally demanding issues that were covered by these chapters. There were a number of reasons why the EU has devoted such attention to these specific chapters. Some reasons are of objective nature, whereas some arise from certain subjective Member States perceptions as well as European Commission views.

Perhaps the most important reason for the increased interest of the EU for the functioning of the judiciary, fight against corruption and protection of fundamental rights derives from its internal development. The EU has begun a rapid transformation from economic integration of the Member States into political integration. One of the key elements of that political integration is the creation of the EU as an Area of Freedom, Security and Justice. Among the most important components of this “Area of Freedom, Security and Justice” is the mutual recognition and execution of court decisions rendered in other Member States. In order to recognize a foreign court decision, of crucial importance is the confidence in the judicial system which has rendered it. This trust implies confidence in the independence, impartiality, professionalism and efficiency of the court, but also other judicial bodies that have the power to reach decisions. The state that recognizes and enforces a decision wants to be sure that the actual decision was rendered in compliance with all international standards and procedural rules that protect human rights. A corrupt society in which the judiciary is also corrupt will certainly not be a guarantor of these values. These are some of the basic postulates on which depend the success of the EU as an Area of Freedom, Security and Justice. Postulates for which the EU still has not created the internal mechanisms that will enforce them, but had the mechanisms to ensure them for all new countries wishing to join the EU. Having said that, one could argue that the EU, through the accession negotiations, sought to secure itself from the entrance of unprepared members and in that way, prevent the admission of a problematic juridical system that would have negative impact on the confidence building efforts among Member States, and thereby jeopardize the political project of establishing the EU as an Area of Freedom, Security and Justice.

From this perspective, it is clear that the European Union pays great attention to the sustainability of the political project that surpasses the importance of accession negotiations. Therefore, the increased interest of EU Member States for the functioning of the Croatian judiciary is quite understandable. Repeating the mistakes of the previous wave of enlargement could jeopardize the trust of EU citizens in the whole project of political integration of the EU.

The purpose of this paper is to provide better knowledge, understanding and evaluation of the negotiation process in Chapter 23 and Chapter 24 and reforms that have been implemented in order to meet the criteria for EU membership, with special emphasis put on the constitutional changes that have been implemented.

## II. Negotiating chapters 23 and 24

Chapter 23 – Reform of the judiciary and fundamental rights did not exist as a separate chapter in the accession negotiations that preceded the Croatian negotiating process. Issues included in chapter 23 were negotiated in a single chapter 24 due to which the EU has not paid equal attention to these issues, as in the case of negotiation with Croatia. Many circumstances have influenced the change in attitude of the EU towards these issues. One the particular reason is the fact that the accelerated development of the *acquis* has made it no longer possible to negotiate these issues within a single chapter. As a result, the EU has decided to negotiate the reform of the judiciary, fight against corruption, fundamental rights and EU citizens' rights in a separate negotiating chapter.

Chapter 23 is divided into 4 thematic areas (reform of the judiciary, anti-corruption policy, fundamental rights and the rights of EU citizens) which are interconnected and divided into a number of sub-areas. Although it looks like a clearly defined thematic area of negotiations, the range of topics that this chapter covers is very wide. Thus, the heading of reform of the judiciary, entails the strengthening of the independence, impartiality, professionalism and efficiency of the judiciary; anti-corruption policies strive for creation of policies aimed at prevention and repression of corruption; the fundamental rights segment is devoted to raising the level of protection of human rights in Croatia with special emphasis on the protection of minority rights and return of refugees. Finally, the rights of EU citizens include active and passive right to vote on elections for the European Parliament, as well as on national elections, and the right of consular protection of EU citizens in those countries where a Member State does not have its own consular service.

Besides that, the main issue arising from chapter 23 is the one of clear standards that the candidate country must fulfil in order to meet the criteria for EU membership. The aforementioned is particularly complicated if one takes into account that, unlike other chapters, this one lacks the so-called “hard *acquis*”, which leaves

Croatia only to the best practices of specific Member States, whereas each Member State has its own best practice and experience and is often convinced that its particular solution is the best one in the EU. In this context, Croatia was faced with the challenge of finding solutions and standards that will be acceptable to all EU Member States. Although it was not always easy, accession negotiations led to the transformation of the Croatian society, which in the long term should leave its mark on the development of democracy, rule of law, respect for human rights, and generally the better functioning of the state.

Chapter 24 is comprised of 10 thematic areas such as: asylum, migration, visa, Schengen system and the EU's external borders, judicial cooperation in criminal and civil matters, fight against terrorism, fight against trafficking of human beings, and combating drug trafficking, police and customs cooperation. Unlike Chapter 23, this chapter has extensive *acquis* with which the Republic of Croatia had to ensure harmonization, but also had to build administrative capacities for its proper application.

Some of these issues have led to the need to change the Constitution. Amendments to the Croatian Constitution related to the Croatian accession to the EU can be generally divided into two groups: constitutional issues arising from the individual negotiation chapters and constitutional issues that are not directly related to the individual chapters, but are connected to the modalities of accession of Croatia into the EU. The first group of constitutional issues among others was related to chapter 23, Judiciary and fundamental rights (active and passive voting right for EU citizens which reside in the Republic of Croatia on election in the European Parliament, as well as local elections, strengthening the independence, impartiality and professionalism of the judiciary and the holders of judicial power), and Chapter 24, Justice, Freedom and Security (effective implementation of the EU Council Framework Decision on the European arrest warrant).

### **III. Changes of the sources of law in the Croatian legal system**

As previously stated, some constitutional issues addressed in the changes of the Constitution of Republic of Croatia were horizontal, and were not directly related to the particular chapters of the accession negotiations, but were rather related to the modalities of the accession or functioning of the Republic of Croatia within the EU. These issues include, among other, the changes related to the sources of law in the legal system of the Republic of Croatia, which are not directly in relation to Chapters 23 and 24, but have direct influence on the functioning of the Croatian judiciary in the EU.

Changes of the Constitution related to the sources of law are reflected in 4 articles of the Constitution, namely: Article 5, Article 118, Article 119 and Article 145 of

the Constitution of the Republic of Croatia. Article 5 states that “every person is responsible for complying with the Constitution and the law and for respecting the legal system of the Republic of Croatia.” In Article 118 paragraph 3 the sources of law used by the courts in the Republic of Croatia have been enlarged, in a way that explicitly mentions international agreements and other applicable sources of law. Current stipulation reads: “Courts shall administer justice according to the Constitution, the law, international agreements and other valid legal sources”. The word “law” incorporates the “EU law”, thus giving to the courts the constitutional grounds to directly implement it. The sources of the EU law consist not only of the founding treaties, but also of the secondary EU law, i.e. the legislation adopted by the EU institutions based on the competencies given by the founding treaties. Those acts (especially regulations, but by exception the directives as well), are directly applicable in the national judicial system. In addition, these changes enabled the application of the European Court case law, which is also a source of the EU law.

In Article 119 paragraph 1 the constitutional change is related to the jurisdiction of the Supreme Court (Supreme Court of the Republic of Croatia, SCRC), for ensuring unified application of the EU law. Namely, the previous text of the article stated that that SCRC “ensures unified application of the legal acts and equality of citizens”. In this citation, the word “legal act” (zakon) has been replaced with the word “law” (pravo). Besides this, the word “citizens” has been assessed as too narrow, and thus has been replaced with “equality before the law for all”, bearing in mind that with the EU accession, the SCRC will also be ensuring the equality of the citizens of the EU Member States as well as the legal entities from those states. The new stipulation of the Article 119 paragraph 1 reads: “The Supreme Court of the Republic of Croatia, as the highest ranking court, shall ensure uniform application of the law and equality before the law for all”.

The constitutional changes introduced a new article, Article 145 which is related to the EU law.<sup>4</sup> This article regulates the protection of the subjective rights of the citizens in front of Croatian courts. It is, in fact, a matter of “direct effect” of the EU law, which is one of the fundamental characteristics of that law, thus the Croatian courts have the obligation for its proper application. EU law is part of the national legal order and courts are obliged to rule by it, however with the notion that, in the cases when the national stipulation is in contradiction to the one in the EU law, the national court has to exempt itself from the implementation of the national law and directly implement the norm as in the EU law. The obligation for implementation of the EU law is imposed not only to the courts, but to other

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4 Article 145 of the Constitution states: (1) Realisation of rights stemming from the *acquis communautaire* shall be deemed equal to the realisation of rights guaranteed under the Croatian legal order. (2) Legal acts and decisions accepted by the Republic of Croatia in the institutions of the European Union shall apply in the Republic of Croatia in accordance with the *acquis communautaire*. (3) Croatian courts shall protect the subjective rights based on the *acquis communautaire*. (4) State bodies, bodies of local and regional self-government and legal persons vested with public authorities shall apply the *acquis communautaire* directly.

entities as well. State bodies, bodies of the local and regional governments as well as legal entities with public authorizations also have to implement the EU law.

#### **IV. Reform of the Judiciary and amendments to the Constitution related to the reform**

Independence and impartiality of the judiciary are closely related concepts. It is rather impossible to imagine implementing one without the other. More specifically, a dependent judge can hardly be impartial. Therefore, one could argue that the independence of the judiciary is the precondition of its impartiality. However, in order to be an independent judge of crucial importance is the way how one came to that position and the way in which one was appointed. For the EU as an Area of Freedom, Security and Justice, it is essential that all its citizens enjoy equal treatment in the courts of the Member States, regardless of which Member State they are coming. This is the reason why the EU paid special attention to the independence and impartiality of the judiciary in a state that negotiates its membership.

In achieving the independence of the judiciary, emphasis is placed on the entry into the judicial profession and career management of judicial officials – trainees, advisors, judges and prosecutors. The EU has required introduction of a uniform, objective and transparent criteria for the selection of trainees, appointment of judicial advisers, as well as the appointment and dismissal of judges and prosecutors. In addition, the reform process introduced objective and transparent criteria for the career promotion in the judiciary, as well as improved procedure for selection of the court presidents. Furthermore, the independence of judicial bodies (the State Judicial Council and the State Prosecutors Council) was further strengthened. This meant amending the constitutional, legal and institutional framework, in a way to exclude the possibilities for political influence in the appointment process, and assigning this appointment responsibility exclusively to the judiciary.

However, independence without accountability, impartiality and professional ethics does not lead to judiciary based on European values. Therefore, aside from strengthening the independence of the judiciary, the EU has also focused on strengthening judicial accountability. Emphasis was placed on automatic distribution of cases, further strengthening the system of the assets declaration, procedures for combating breach of ethical code, strengthening the system of disciplinary responsibility, as well as regulating the immunity of judges and prosecutors.

Independence and impartiality are insufficient if the judicial officials are lacking expertise and professionalism and in this line, Croatia has strengthened the system of professional training and professionalism of the judiciary. The obligations followed the line of establishing independent judicial institutions which have allocated sufficient financial resources and staffing needed to conduct the training programs. In addition to the institutional strengthening, EU has required improving the existing

educational curricula, which surfaced the necessity of the establishment of the Judicial Academy, which will be able to provide initial training for trainees, candidate for judges and prosecutors, as well as to provide lifelong learning modules for current judges and state prosecutors.

Key changes occurred with the adoption of the legislative package in December 2009;<sup>5</sup> the amendments of the Constitution in June 2010;<sup>6</sup> and the adoption of the legislative package in October 2010.<sup>7</sup> The independence of the judiciary was primarily strengthened by increasing the responsibilities of key judicial bodies such as the State Judicial Council, the State Prosecutors Council and the Judicial Academy as well as through changing the methodology of selection of members of these bodies. The changes of the Croatian constitution related to judicial independence have further strengthened its position and it is now completely independent from the influence of the other two branches of power. Members of the State Judicial Council and State Prosecutors Council are elected by judges and prosecutors, unlike before when the appointment was part of the responsibilities of the Parliament, and when the Minister of Justice had the authority to propose candidates for members of these bodies. Additionally, their authorities have been expanded and strengthened in a way that now they are fully responsible for all procedures related to the appointment, dismissal, promotion of judicial officers and appointment of court presidents and heads of state prosecutors. Furthermore, they are responsible for conducting disciplinary measures against judicial officials, as well as for management and control of assets declarations of judicial officials.

The independence and impartiality of the judiciary was strengthened with the amendments of 3 articles of the Croatian Constitution, namely articles 123, 124 and 125. With the adopted amendments, the institutional and organizational strengthening of the SJC and the SPC is ensured in order to be independent of any influence from the executive and legislative powers. More specifically, the SJC now independently decides on the appointment, promotion, transfer, dismissal and disciplinary responsibility of judges and presidents of courts, with the exception of the President of the Croatian Supreme Court.<sup>8</sup> In this sense, the previous provisions under which the SJC, when appointing and dismissing judges, was required to obtain the opinion of the competent Parliament committee were deleted. Article 124 defines the number, composition and the man-

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5 See: Zakon o izmjenama i dopunama Zakona o sudovima, NN br. 153/2009 from December 21, 2009; Zakon o izmjenama i dopunama Zakona o državnom odvjetništvu, NN br. 153/2009, from December 21, 2009; Zakon o izmjenama i dopunama Zakona o Državnom sudbenom vijeću, NN br. 153/2009, from December 21, 2009; Zakon o Pravosudnoj akademiji, NN br. 153/2009, from December 21, 2009.

6 See: Izmjene Ustava RH, NN br. 76/2010.

7 See: Zakon o izmjenama i dopunama Zakona o sudovima, NN br. 116/2010 from October 13, 2010; Zakon o izmjenama i dopunama Zakona o državnom odvjetništvu, NN br. 116/2010 from October 13, 2010; Zakon o Državnom sudbenom vijeću, NN br. 116/2010 from October 13, 2010.

8 See: paragraph 2 of Article 124 of the Constitution of RoC, op. cit.

date of the SJC, while its scope, organization, election of members and operation are regulated by law.

There was a significant change in the composition of the SJC whereas two attorneys have been excluded from its composition, and instead two representatives of the Croatian Parliament have been included. The EU did not wholeheartedly support this; however, it was accepted once the reasons for this solution were elaborated. The reasons stem from the fact that participation in the work of advocates in the judicial council poses a risk to the impartiality of the judiciary. More specifically, the judge who tries to advance to a higher court, faced in a court case with an attorney who is a member of the SJC, can hardly be impartial and ignore the fact that particular attorney s/he is facing will in fact participate in decisions on her/his promotion. On the other hand, after the exclusion of politics from the process of election of members of the SJC and SPC, the question arose as to whether the bodies should function without any external control as a corrective role, i.e. whether it will be useful for their work to be monitored by elected representatives of the citizens. In such context, it was decided that 2 representatives out of the 11 members of the SJC and the SPC do not have a decisive influence on the decisions making process of these bodies. Special attention was devoted to the composition of these bodies in order to have equal representation by the representatives of the parties in power and the opposition.

With the amendment to Article 123 of the Constitution, the former paragraph 2 was deleted, that contained an exception from the general rule that the judicial profession is permanent. By implementing this, the concept of judicial probation period before being appointed to a permanent position is abandoned. This was closely linked with the establishment of the State school for judicial officials, which ensured a pre-selection of candidates and training of future judges and guaranteed a transparent and objective process of selection of judges. For the foregoing reasons, it was no longer necessary for the judges who entered judicial profession for the first time to be appointed to a five year term.

In the same way this change were also carried out in respect to the State Prosecutors Council. With the amendments to Article 125 of the Constitution, the provision on the probation term for the first entry in the public prosecutors profession (appointment for a five year term) was deleted. Furthermore, Article 125 prescribes that the deputy prosecutors are appointed and dismissed by the SPC. Furthermore, it also determines the number, composition and mandate for the SPC.

Thus, the constitutional amendments laid the foundation for full independence and impartiality of the judiciary, which is separated from the spheres of political influence. At the same time, the transparency and credibility of the entire system is improved as well as the expertise, impartiality and accountability of judicial officials which is a necessary counterbalance to their independence.



## V. Combating corruption

EU Member States, as well as the European Commission and the European Parliament devoted great attention to the fight against corruption. The motivation behind this was, in general terms, their determination not to allow additional problems to enter the Union, problems which later in the process they will have to deal with by themselves. Because of the fact that the EU is a common market in which the freedom of movement of capital, goods and services exists, the corruption issue is observed as a barrier to these freedoms and generally leads toward discrimination in the market competition. This was perceived as the main motivation for Member States in the effectiveness of the anti-corruption system. They wanted to be assured that, once Croatia joins the EU, the companies which wanted to do business in Croatia will not be disadvantaged because of corruption, and that Croatia will be a venue for proper market competition.

The European Commission has requested Croatia to establish a clear and effective system (with institutional and strategic plan) to combat corruption. On institutional level, Croatia had to establish institutions which will be systematically involved in defining anti-corruption policies and which will independently monitor the implementation of anti-corruption policies. In addition to the repressive segment of anti-corruption policies, it was necessary to establish an efficient institutional system of detection, prosecution and sanctioning of corruption.

In order to achieve these expectations, efforts were made, on one hand in prevention of corruption, and on the other, in its repression. Prevention primarily meant to eliminate all possible risks that are conducive to corruption by improving the legal and institutional framework in order to reduce the possibility that corruption does occur. But once corruption occurs, it was required to have an effective system in place that will be able to sanction such incidents in the shortest possible time, and thereby send a preventive message that corruption does not pay off. In other words, this could only be addressed with the establishment of an effective system of detection, prosecution and sanctioning of corruption offenses. In achieving these goals, of both prevention and repression, the EU has focused on a number of specific issues. Regarding prevention of corruption, negotiation were focus on the issue of political parties financing, combating conflict of interest and right on the access to information, all of them closely connected with the problem of abuse of political influence.

Undoubtedly, such lack of transparency is conducive to corruption as it is difficult to reveal it. Therefore, the focus was put on limiting the amount of donations to political parties, their transparency and system of control. The new Law on financing political activities established a uniform legal framework for all kinds of election campaigns and introduced a transparent monitoring system of financing political

parties.<sup>9</sup> Highest amount of donations were determined in line with EU standards and all political parties and independent candidates were required to open a separate account in order to monitor the financing of election campaigns. In the reformed system of supervision, the State Election Commission is responsible for the supervision of financing election campaigns, while the National Audit Office is responsible for audits of the annual financial operations of the political parties. In addition, the system that provides monetary sanctions and sanctioning of political parties and responsible persons in political parties was significantly strengthened.

In the area of conflict of interest, the situation was similar, but limited only to the use of individual political influence in order to achieve certain benefits at the expense of the public interest. In order to prevent conflicts of interest, special attention has been devoted to strengthening the institutional framework to prevent conflicts of interest and to reinforce the monitoring system of assets declaration. The requirements were two fold – de-politicization and professionalization of the Commission for conflict of interest on one hand and strengthening the monitoring system of declaration of assets in order to ensure prevention. More specifically, any unexplained and sudden increase in assets of state and local officials should be sufficient circumstantial evidence to take further actions aimed towards examining the particular case. The public accessibility of the asset declarations was to ensure additional guarantees for discovering conflicts of interest. A new law on prevention of conflict of interest was passed introducing an effective mechanism for monitoring the assets of state officials, further strengthening the system of preventive measures, professionalizing and depoliticising the Commission for combating conflicts of interest and improving the system of sanctions.<sup>10</sup>

By strengthening the system of access to information, the EU wanted to increase the level of transparency in the work of national and local governments. Transparency that requires politics to make decisions based on objective and transparent criteria. It is precisely in this area that Croatia has amended its Constitution, and the right of access to information became a constitutional category. By amending the Constitution, in accordance with EU standards, a test for public interest was introduced so that in cases where a reason exists to withhold information, the public authority may decide to allow access to information if the information is of public interest. With the inserted article 38, Croatian Constitution reads: “access to information held by public authorities shall be guaranteed“, whereas “restrictions imposed on access to information must be in proportion with the need for restriction required in each particular case and are necessary in a free and democratic society, and shall be prescribed by law”.<sup>11</sup> The amendments to the Freedom of Information

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9 See: Zakon o financiranju političkih aktivnosti i izborne promidžbe, NN br. 24/2011 and Zakon o izmjenama i dopunama Zakona o financiranju političkih aktivnosti i izborne promidžbe, NN br. 61/2011.

10 See: Zakon o sprečavanju sukoba interesa, NN br. 26/2011.

11 Article 38 of the Constitution, which introduces in the constitutional law the right to access to information held by public authorities and sets basis for its consistent legal implementation, also prescribes the constitutional basis for

Act have further reduced the number of reasons that may be used to deny access to information.<sup>12</sup> Although civil society organizations, on the occasion of proposing this provision, have specified the confidentiality criterion as a sole criterion for restricting the right of access to information, the specification of the restriction in the act needed to also respect international documents, especially the Council of Europe Convention on access to official documents.<sup>13</sup> In case of refusal, there is a possibility to appeal to the Agency for the Protection of Personal Data while judicial protection is provided through the Administrative Court.

In the repressive part of the fight against corruption, issues related to the establishing of an effective institutional and legal framework for detection, prosecution and sanctioning of corruption prevailed. A verification of the effectiveness of the repression system was sought. Account was taken for sufficient staffing of the police, the state prosecution and the courts competent for prosecuting corruption. Regarding the police reforms, the EU required its depolitization and professionalization. Concerning legislation, it was required to regulate the confiscation of property gains acquired by a criminal offence, both in its detection as well as in the segment of freezing and confiscating such assets. Furthermore, amendments of legislative acts were requested to ensure the promptness and priority in the processing of corruption offenses by the judicial authorities.

## VI. Fundamental rights

The area of fundamental rights is extremely broad, and the *acquis communautaire* includes the rights protected by the EU Charter of Human Rights, which is an integral part of the Treaty of Lisbon.<sup>14</sup> Having the same force as treaties, the EU Charter of Fundamental Rights acquired the status of primary law. This is explicitly provided in Article 6 of the Treaty of EU.<sup>15</sup> In addition, the *acquis* also includes those human rights that are protected with other international instruments, whether adopted

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legal restriction of the right to access to information. Legal restrictions must satisfy the principle of proportionality of the restriction so that it is proportional to the nature of the need to restrict in each separate instance, in accordance with the Article 16, paragraph 2 of the Constitution of the Republic of Croatia.

12 See: Zakon o izmjenama i dopunama Zakona o pravu na pristup informacijama, NN br. 77/2011.

13 The Council of Europe Convention on access to official documents prescribes in Article 3:

1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting: a. national security, defence and international relations; b. public safety; c. the prevention, investigation and prosecution of criminal activities; d. disciplinary investigations; e. inspection, control and supervision by public authorities; f. privacy and other legitimate private interests; g. commercial and other economic interests; h. the economic, monetary and exchange rate policies of the state; i. the equality of parties in court proceedings and the effective administration of Justice; j. environment; or k. the deliberations within or between public authorities concerning the examination of a matter.

2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3. The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

14 For the text of the Lisbon Treaty see: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83 of March 30, 2010, pp. 1-389.

15 See: Article 6. UEU, OJEU C 83, op. cit., p. 19.

at the level of the United Nations,<sup>16</sup> or at the level of the Council of Europe.<sup>17</sup> It is important to emphasize the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe as well as a number of important conventions adopted by the same institution which have established standards for protection of human rights in specific areas such as the protection of national minorities, or the protection of children.<sup>18</sup>

Although accession negotiations were initially dealing with all the issues of protection of human rights, as the negotiations progressed specific attention was devoted to those issues for which the EU considered that sufficient progress has not been made by Croatia, such as anti-discrimination, punishment of hate crimes, protection of national minorities, return of refugees, convalidation (validation of pension rights), strengthening the role of the Ombudsman, free legal aid, and administrative adjudication.

Certainly, the most complex issues in regards of human rights protection pertained to the protection of national minorities and the return of refugees. The reasons for this were of subjective and of objective nature. The subjective ones arose from the different perceptions on the position of national minorities regarding their rights and the problems they face. The objective ones pertained to the financial effects that certain issues had on the state budget. But in essence, when we talk about protecting the rights of national minorities, the main issue that dominated this area was related to the representation of national minorities in the state administration and the judiciary.

Regarding protection of national minorities, Croatia has established a legal framework that guarantees high level of protection of national minorities. Minority rights are regulated by the Constitutional Act,<sup>19</sup> and relate to political representation, the right to education in their own language, the right to use their own language, the right to a preferential employment under the same conditions in the state administration and judiciary, cultural and other rights. In order to ensure proper exercise of rights guaranteed, measures were taken for the effective implementation of the

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16 Such as the International Covenant on Civil and Political Rights, adopted by the Resolution 2200A (XXI) Of the General Assembly on December 16, 1966, which entered into force on March 26, 1976; the Convention on the Elimination of All Forms of Racial Discrimination from 1965; or the Universal Periodic Review established by the UN General Assembly on March 15, 2006, with the Resolution 60/251.

17 Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (ETS 005), Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS 126), European Charter for Regional or Minority Languages (ETS 148), Framework Convention for the Protection of National Minorities (ETS 157), Council of Europe Convention on Action against Trafficking in Human Beings (ETS 197).

18 The Republic of Croatia is a party to all relevant instruments of protection of fundamental human rights in the Council of Europe and the United Nations, and actively participates in a number of mechanisms for monitoring human rights. For this very reason, even at the time of opening negotiations, Croatia has in many areas ensured a high level of protection of human rights. Therefore, the negotiations focused only on some of the issues where the European Union deemed it was necessary to make additional progress.

19 See: Constitutional act concerning national minorities, NN 155/2002.

Constitutional law on national minority rights. Implementation of various activities were aimed at raising public awareness of the existence of rights under article 22 from the Constitutional law, which guarantees members of national minorities preferential employment. In the field of education, the legal preconditions for promotion of tolerance and inclusion were reinforced, and various measures were implemented in practice, especially concentrating on the integration of Roma children.

Although the EU has not requested in any document a change of the Constitution in the direction of the promotion of the position of the national minorities, Republic of Croatia, has – with the changes in the Constitution, as well as changes in the Constitutional law for protection of the national minorities – made a further step towards strengthening of the constitutional position of the national minorities. The above stated, can be analysed in the broader context of fulfilment of the political criteria for EU membership. Namely, the stated Constitutional changes reflect the political will for protection of all national minorities in the Republic of Croatia.

Changes of the Constitution of the Republic of Croatia are two folded. On one hand, the framework of recognized national minorities has been extended, and on the other hand, the stipulations of their legal representation have been strengthened. With regard to the number of national minorities, Constitutional changes have been implemented through changes of preamble of the Constitution by enlisting all national minorities in Croatia. With the changes of the Constitution of the Republic of Croatia, to the original list of national minorities, the following minorities have been added: Bosniaks, Slovenes, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians.

Furthermore, with the changes in Article 15 of the Constitution, the adjustments have been made to the right to vote of the national minorities. For strengthening the position and the right of the national minorities, the state is obliged, besides the general national vote, to ensure special right to elect their representatives in the Croatian parliament, which in the previous text of the Article 15 was only stated as a possibility. Before constitutional amendments, the representatives of the national minorities had to choose whether they would vote for one of the lists in the 10 electoral units in the Republic of Croatia (as a general voting right), or for their representative in a separate minority electoral unit (as a special right to vote). That had significantly burdened the possibility for the representatives of national minorities to exercise their right to elect their political representatives in the Croatian parliament.

Additionally, with the changes in the Constitutional law in regard to the rights of the national minorities from May 2010, special attention has been given to the improvement of the employment of the representatives of national minorities –in the state

administration and judiciary.<sup>20</sup> Article 22 paragraph 2 and 3 have been changed as follows:

»(2) Representatives of the national minorities are guaranteed the representation in the bodies of the state administration and judiciary in accordance with the stipulations of the special law and other acts and policies related to the employment in those bodies, bearing in mind the proportion of the representation of the national minorities in the total population at the level of the establishment of the body of state administration or judiciary and the acquired rights.

(3) Representatives of the national minorities are guaranteed representation in the bodies of the self-government units in accordance with the stipulations in the special law for determination of the local and regional self-government and other acts and policies related to the employment in those bodies and in line with the acquired rights.«

With regard to the fulfilment of the conditions for membership that are related to the protection of the human rights, only one additional issue has been addressed with the Constitutional changes. The position of the ombudsperson has been strengthened, through introduction of a fully new constitutional stipulation on the ombudsperson.<sup>21</sup> Thus, the ombudsperson has been raised to the level of a constitutional category. Changes in the Article 92 set the constitutional framework for the ombudsperson.<sup>22</sup> Namely, the authorizations of the ombudsperson while working on individual cases of protection of the rights of the citizens were limited by the law to the bodies of state and local administration as well as bodies with public authorizations, whereas in regard to the judiciary bodies and other legal entities, the ombudsperson could act only through the administrative bodies. The proposed change has removed the ambiguity about the possibility for regulation of ombudsperson's authorities through an act. Also, it defined that the ombudsperson and all persons authorized by the Croatian parliament for the promotion and protection of the human rights have the same immunity as members of the Croatian parliament.<sup>23</sup>

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20 See: Constitutional law on the changes and amendmenst of the Constitutional law on the rights of the nialonal minorities, NN 80/2010..

21 See: para. 1. art. 92 of the Constitution that states: "the Ombudsman is a commissioner of the Croatian Parliament in charge of promotion and protection of human rights and freedoms set out by the Constitution, by laws and international legal acts on human rights and freedoms to which the Republic of Croatia is a party" and para. 3. that states: "The Ombudsman shall be elected by the Croatian Parliament for a term of eight years. The Ombudsman shall be independent and autonomous in his work."

22 See: para. 2. and 4., art. 92 of the Constitution that state: „anyone may file a complaint before the Ombudsman if they consider that, by unlawful or irregular actions by state administration bodies, local and regional self-government bodies and bodies with public authorities, their Constitutional rights and rights guaranteed by law have been threatened or violated", and „conditions for the election and relief of duty of the Ombudsman and his deputies, the scope and method of operation shall be regulated by law. Certain authorities pertaining to legal and natural persons may also be conferred upon the Ombudsman by law, for the purpose of protection of fundamental Constitutional rights."

23 See: para. 5. art. 92 of the Constitution that states: „the Ombudsman and other commissioners of the Croatian Parliament in charge of promoting and protecting human rights and fundamental freedoms shall have immunity the

## VII. EU citizens' rights

During the accession negotiations the area of EU citizens' rights, given its scope and the controversy of the issues that it covers, was treated as a purely technical field where Croatia should achieve harmonization with the relevant *acquis*. Thus, this segment of chapter 23 can be largely compared with all the other chapters where legislative harmonization took place. However, the legislator found it necessary to provide additional legal certainty by amending the constitutional framework in order to ensure the proper application of the *acquis*. The topic related to this specific area of chapter 23 was the regulation of the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections. Furthermore, it also referred to the right of free movement and residence within the European Union and diplomatic and consular protection.

The Treaty on establishing the European Community provides citizens of the EU guarantees of active and passive right to vote at local level in the Member States of the EU, in which they reside, not necessarily being its nationals, under the same conditions as the nationals of that Member State. Directive 94/80/EC from December 19, 1994 supplemented with later amendments, urges the Member States to ensure voting rights for EU citizens at the basic local government unit level, and not necessarily at higher levels, such as regional governments, however, some Member States provide even this right on their own. Croatia was obliged, in the framework of chapter 23 – Judiciary and fundamental rights, to provide a legal framework for the exercise of that right from the day of its accession to the EU. Consequently, it was required from Croatia to pass a legislation allowing the EU citizens to vote and stand as candidates in elections for the European Parliament,<sup>24</sup> as well as regulations allowing the EU citizens to vote and stand as candidates in the municipal elections. Furthermore, Croatia had to regulate the free movement and residence of EU citizens in Croatia.<sup>25</sup> These citizens must also be allowed to vote and stand for election as candidates for the European Parliament.<sup>26</sup> Finally, it was expected to legally regulate the access of EU citizens to diplomatic and consular protection by Croatia. The aforementioned is needed in situations where a Member State has no diplomatic and consular representation in a non-EU Member State, and consequently those Union citizens should be provided protection by the other Member

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same as representatives in the Croatian Parliament.”

24 The elections to the Union's only directly elected body are provided for by Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, relating to the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, lastly amended in 2002.

25 Article 22 of the Treaty on the functioning of the EU stipulates clear obligation for all Member states: “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.”. See: Consolidated version of the Treaty on the functioning of the EU, Official Journal of the European Union, C 83/57, March 30, 2010.

26 The detailed legislation is to be found in Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, lastly amended in 2004.

State under the same conditions as its own nationals.<sup>27</sup>

EU citizens' rights have not attracted much attention in the accession negotiations. The process of harmonization of the legislation and the Constitution with the acquis was done without any major problems. The right to vote and to be elected for the European Parliament elections and in municipal elections was achieved by the adoption of the Law on Election of Croatian Representatives in the European Parliament and the amendments to the Law on election of members of representative bodies of local and regional self-government.<sup>28</sup>

The right of free movement and residence in the EU is regulated by changes in the Law on Aliens,<sup>29</sup> while the question of diplomatic and consular protection is still necessary to align with amendments to the Law on foreign affairs. It is worthwhile mentioning that these issues will be of great importance for Croatian citizens, especially in terms of diplomatic and consular protection taking into consideration that Croatia does not have diplomatic and consular representation in many countries. With the EU accession, Croatian citizens will enjoy diplomatic and consular protection in every country where there is at least one diplomatic office of a Member State.

Amendments to Article 132 of the Constitution (the right to a local (regional) self-government) gives the EU citizens the right to a local (regional) self-government in the Republic of Croatia, which will be pursued in accordance with the Law and the EU legal system.<sup>30</sup> Article 20 and 22 of the Treaty on functioning of the European union guarantees EU citizens active and passive right to vote at local level in the EU Member States in which they reside, not necessarily being a citizen of that country, under the same conditions as the nationals of that specific Member-State. Croatia's obligation under chapters 23 was to provide a legal framework for exercising this right from the day of its accession to the EU.

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27 See article 20 of the Treaty of EC. The right to consular and diplomatic protection is also protected by Article 46 of the Charter of Fundamental Rights of the European Union. Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 18 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations provides for the most important aspects of protection of a citizen in distress: detention and arrest, being victim of violence, repatriation (of corpses and of survivors), serious sickness and "other cases". Decision of the Representatives of the Governments of the Member States (96/409/CSFP) meeting within the Council of 25 June 1996 on the establishment of an emergency travel document established an emergency travel document (replacing a lost or stolen national passport), a document enabling its holder to cross the EU external borders and to eventually move within the EU.

28 See: Zakona o izborima zastupnika RH u Europski parlament, NN no. 99/2010., Zakon o dopuni Zakona o izboru članova predstavničkih tijela jedinica lokalne i područne (regionalne) samouprave, NN 109/2007., and Zakon o pravu državljana drugih država članica Europske unije u izborima za predstavnička tijela jedinica lokalne i područne (regionalne) samouprave, NN no. 109/2007.

29 See: Zakon o izmjenama o dopunama Zakona o strancima, NN no. 36/2009.

30 Whether the passive right to vote at elections will be provided for election of mayors (or municipal mayors and their deputies, as well as directly elected holders of executive power in local government units) is one of the particular questions that need to be addressed by law. EU law does not require such a commitment, and allows Member States to retain this right for their citizens. For example, the French Constitution expressly reserves the right for electing the mayors and their deputies for French nationals.



Article 146 of Croatian Constitution now stipulates that Croatian nationals are EU citizens and that they enjoy the rights guaranteed by the EU legal order. All their rights are realized in accordance with the conditions and limitations prescribed by the founding treaties of the EU and the measures adopted pursuant to those treaties. Paragraph 3 guarantees that in Croatia, all rights guaranteed by the EU legal order, are enjoyed by all citizens of the EU. European citizenship is a fundamental status enjoyed by citizens of EU Member States and it carries a number of rights that are mentioned in this article. These rights are guaranteed by the founding treaties. They belong to all citizens of the EU, and with the accession of Croatia will belong to the Croatian citizens in all Member States and to other nationals of Member States in Croatia.

## **VIII. Judicial cooperation in criminal matters**

Judicial cooperation in criminal matters on EU level is governed by a series of framework decisions. The fact that they are made at EU level is largely driven as a reaction to the terrorist attacks in New York and later in London and Madrid. The EU wanted to create the appropriate legislative mechanisms in order to prosecute and punish the perpetrators of terrorist acts, and other serious criminal acts. One of the most important legislative instruments adopted at EU level is the European Council Framework Decision 2002/584/JHA reached on June 13th 2002 on the European arrest warrant.

Until the day of accession, Croatia should have ensured effective implementation of the European Arrest Warrant (EAW). EAW is an instrument of mutual legal assistance *sui generis*, which was accepted and implemented by all the EU Member States, under the conditions and in the manner provided in the European Council's Framework Decision. With its implementation, a wanted person could be extradited to the competent judicial authority of another Member State where the person is requested, either for the purpose of prosecution or for the execution of a prison sentence.

In order for the EAW to be fully applicable in the EU Area of Freedom, Security and Justice, the national legislation of the Member States must not contain restrictive provisions on executing orders of foreign judicial bodies – such as a prohibition for extraditing its own citizens. Therefore, the change of the Croatian national legislation was to be directed towards enabling the execution of the EAW, as required by the European Council Framework Decision 2002/584/JHA of June 12, 2002. However, the prohibition on extraditing its own citizens is one of the basic rights and essential elements of the content of citizenship, due to which the provision on the prohibition of extradition must be contained in the Constitution as the highest act of the state, which governs the relations between the state, as a community of free and equal citizens, and its own nationals. Based on the aforementioned, the provi-

sion should have been retained in the Constitution, but with a proposed amendment that would allow handling and execution of the EAW in the single Area of Freedom, Security and Justice in the EU.

The original constitutional provision of Article 9 did not allow the extradition of Croatian citizens to other states and represented a legal obstacle to the effective execution of the EAW from the date of accession, and therefore, for the overall harmonization of Croatian legislation with the European Council Framework Decision on the EAW, which was also defined as a closing benchmark for chapter 24. For these reasons it was necessary to change article 9 paragraph 2 of the Croatian Constitution.

The novelty in the relevant provision of the Constitution reserves the principle of prohibition of extradition, as a determinant of citizenship, but also ensures constitutional and legal basis for actions based on the EAW and for the adoption of adequate legislation that will further regulate this issue, in accordance with the legal order of the EU. The amended article 9 Paragraph 2 of the Croatian Constitution now reads: "Croatian citizen cannot be exiled from Croatia nor can be deprived of citizenship, and cannot be extradited to another state except in the case of execution of an extradition or surrender decision adopted in accordance with international agreements or with the *acquis communautaire*." The adopted amendment also allows extradition of Croatian citizens on the basis of a treaty concluded with a third country, of course, if such treaties are concluded.

## IX. Conclusion

Croatian negotiations for membership in the EU may be the most demanding and difficult negotiations to date. However, one should never run erroneous conclusions that they were directed against Croatia. In fact, even a very superficial analysis of the previous waves of enlargement shows that the conditions with each wave of enlargement have tightened.<sup>31</sup> Even, a country such as the United Kingdom was faced with very tough requirements that it should have fulfilled in order to enter the European Community.<sup>32</sup> It should be noted that all previous negotiations were conducted in a political context that was different, subsequently differently influencing the negotiations. A very important fact was that after the fall of the Berlin Wall, a political idea of reunification of Europe emerged. The positive political context but also the momentum was strong enough to pave the way for swift closing of accession negotiations with 10 states of the fifth wave of EU enlargement. In contrast

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31 When Greece entered the European Community, practically the only existing criterion was that it is a European country and that the EC will add additional criteria in the case of other enlargement. For the ten countries that joined the EU in 2004, the EU has defined the Copenhagen criteria, and then added the Madrid criteria.

32 Great Britain was faced with a difficult decision in order to enter into the European Community. For the reasons why the UK has been blocked from entering the European community see: Booker, C., R. North, *Great Deception - Secret History of the European Union*, Sources, Zagreb, 2004., pp. 128-166.

to this, Croatia negotiated during the time of enlargement fatigue, the failure of the EU Constitution, it was negotiating alone and not as part of a larger group, and therefore had a lot more complicated political context than the one in which its predecessor negotiated. Despite such a complex political context, Croatia has managed reforming its policies in order to meet the criteria for membership. But what is more important, it has managed to transform the country in a direction of respect for human rights and rule of law.

This voyage led to significant reforms that also included amending the Constitution. Changes which were necessary to complete the accession negotiations with the EU were related to: amendments to the Foundations of the Constitution listing all of the national minorities which are electing their representatives to the Croatian Parliament, emphasizing the constitutional principle of the independence of the judiciary by strengthening the constitutional position, independence of the State Judicial Council and the State Prosecutors Council, and in particular, the introduction of compulsory special voting rights for national minorities, the introduction of EU citizens rights in the Republic of Croatia, defining the position of the Ombudsman and finally, elevating the right to access to information on constitutional level.



# HUMAN RIGHTS PROTECTION IN SERBIA FROM A CONSTITUTIONAL STANDPOINT

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## ABOUT THE AUTHOR

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## ABSTRACT

This paper explores primarily the constitutional deficiencies which affect the human rights protection in Serbia. It will be shown that a broad catalogue of human rights provided by the Constitution of Serbia from 2006 is in compliance with the European and international standards. However, despite the modern and extensive constitutional provisions, some are ambiguous and open to different interpretations. Also, there is a legal gap in certain areas, such as the entering of new data in birth certificates and issuing of new diploma after the gender reassignment. In this case, the international law should apply, as the Serbian Constitution in Article 16, par. 2 provides that human and minority rights which are guaranteed by the generally accepted rules of international customary law and ratified international treaties are an integral part of the national legal system and should be applied directly. Furthermore, Article 18 prescribes a very important obligation for the State to interpret human and minority rights pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions that supervise their implementation. The paper investigates whether public servants and judges are willing to directly apply international norms and whether they are able to interpret domestic norms in accordance with the practice of relevant international bodies. Finally, it will be shown that despite the fact that in certain areas Serbia has made an effort to enact progressive laws, as in the area of anti-discrimination, the problem of enforcement arises as a result of a slow change in attitudes, awareness and non comprehensive fight against stereotypes and prejudices.

Key words:

human rights, Constitution, international standards, legal gap, implementation, awareness.

## РЕЗИМЕ

Овој труд ги истражува првенствено уставните недостатоци кои влијаат на заштитата на човековите права во Србија. Тоа ќе покаже дека еден широк спектар на човекови права гарантирани со Уставот на Србија од 2006 година се во согласност со европските и меѓународните стандарди. Сепак, и покрај модерните и опширни уставни одредби, некои се двосмислени и оставаат простор за различни интерпретации. Исто така, постои правна празнина во одредени области, како што се внесување на нови податоци во матичната книга на родените и издавање на нова диплома по промена на полот. Во овој случај, треба да се примени меѓународното право, како што е предвидено со Уставот на Србија во член 16, став 2 што обезбедува човековите и малцинските права кои се гарантирани со општо прифатените правила на меѓународното обичајно право и ратификуваните меѓународни договори да претставуваат составен дел од националниот правен систем и треба да се применат директно. Понатаму, член 18 предвидува многу важна обврска за државата да ги толкува човековите и малцинските права во согласност со важечките меѓународни стандарди, како и на практиката на меѓународните институции кои го надгледуваат нивното спроведување. Трудот истражува дали државните службеници и судиите се подготвени директно да ги применат меѓународните норми и дали се способни да ги протолкуваат националните норми во согласност со практиката на релевантните меѓународни тела. Конечно, ќе се покаже дека и покрај фактот дека во одредени области Србија направи напор да донесат прогресивни закони, како на пример во областа на анти-дискриминацијата, проблемот на нивната соодветна имплементација е резултат на бавната промена во ставовите, свеста и не-сеопфатната борба против стереотипите и предрасудите.

# HUMAN RIGHTS PROTECTION IN SERBIA FROM A CONSTITUTIONAL STANDPOINT

## Introduction

Ever since democratic changes, Serbia has embarked upon a large scale of social, political and economic reform process. In many areas of law, new laws or major amendments to existing legislation have been adopted, in order to bring national legislation and practice into line with international and European standards. Serbia adopted a new Constitution in 2006,<sup>1</sup> which contains a broad catalogue of guaranteed human rights. Among other things, it has adopted a comprehensive legal framework for the protection from discrimination, set up the asylum system, introduced measures against domestic violence, criminalized human trafficking, introduced inclusive educational system, and established several independent bodies that deal with different aspects of human rights violations. It has ratified almost all relevant international human rights treaties and begun to pay more attention to the practice of international bodies that oversee the fulfilment of international obligations, undertaken by ratification of those treaties.

However, several constitutional provisions are ambiguous and subject to different interpretation, while some provisions are missing, e.g. the right to privacy or the right to good administration. Also, some changes introduced by systematic laws are step back from the previous rules, such as the legal representation in civil cases which significantly limits freedom of choice, although the Constitution guarantees that attained level of human and minority rights cannot be lowered (Article 20, par. 2). Furthermore, there are situations that are not legally prescribed, such as the change of sex and name in legal documents after the gender reassignment.

Finally, it must be emphasized that despite these major legal changes which are mostly positive, the progress in respecting human rights is still unsatisfactory mainly as a consequence of slow changes in attitudes, stereotypes and prejudices that are dominant in the society, including those who are responsible for its implementation. Also, the Serbian society enjoys a higher level of tolerance towards certain behaviours, e.g. a “hate speech” of politicians and racist groups, discrimination towards Roma, LGBT population, people with disabilities, women, which is a consequence of years of inadequate policies, lack of human rights culture and weak institutions.

The European Council granted Serbia the status of candidate country on 1 March

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1 „The Official Gazette of the Republic of Serbia“, no. 98/2006.

2012, on the basis of the Commission Opinion on Serbia's membership application adopted on 12 October 2011.<sup>2</sup> However, the accession negotiations depend on the Commission's evaluation that Serbia has achieved the necessary degree of compliance with the membership criteria, particularly in relation to respect of human rights. In its Progress Report for Serbia for 2012, the European Commission assessed that the legislative and institutional human rights framework in Serbia is adequate and corresponds to relevant European and international standards. However, further efforts to implement international instruments and domestic legislation are required.<sup>3</sup>

This paper explores the major challenges in respect to fulfillment of conditions expressed in the Progress Report in the area of human rights.

## **1. Constitutional challenges for the human rights protection**

### **1.1 Prescribed human rights provisions**

The Constitution provides a broad catalogue of human and minority rights in Part II (Articles 18 to 81),<sup>4</sup> guaranteeing civil and political rights, which are followed by a series of fundamental rights of the so-called second and third generation ranging from health care, social protection, social security, pension insurance, right to education to the right to healthy environment, as well as the protection of consumers. Their content is in line with European standards and goes in some respect even beyond that.<sup>5</sup> However, some constitutional provisions are ambiguous or imprecise. For example, Article 21 of the Constitution proclaims that all individuals are "equal before the Constitution and law," and that every person "shall have the right to equal legal protection, without discrimination." The Constitution prohibits both direct and indirect discrimination and recognizes the affirmative action providing that "special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination" (Article 21, par. 4). However, although it must be welcomed that the Constitution recognizes deviation from formal equality in the form of "special measures", designed to help discriminated groups to achieve substantial equality, this provision lacks the temporal restriction, which is necessary for the assessment of the proportionality of affirmative action measure. It must be noted that its predecessor, the Charter of Human and Minority Rights and

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<sup>2</sup> European Commission, Commission Opinion on Serbia's application for membership of the European Union, Brussels, COM (2011) 668, 12 October, 2011.

<sup>3</sup> European Commission, Serbia 2012 Progress Report, COM(2012) 600, Brussels, 10 October, 2012, p. 13.

<sup>4</sup> Part II is divided into 3 parts: Fundamental Principles (Articles 18 to 22), Human Rights and Freedoms (Articles 23 to 74), and Rights of Persons Belonging to National Minorities (Articles 75 to 81).

<sup>5</sup> See European Commission for Democracy Through Law, Opinion on the Constitution of Serbia, No. 405/2006, Strasbourg, 19 March 2006, par. 23.



Civil Liberties (Human Rights Charter) of the State union Serbia and Montenegro<sup>6</sup> from 2003 (which was a composite part of the Constitutional Charter<sup>7</sup>), in its Article 3, par. 4 allowed the introduction of special interim measures necessary for the realization of equality, and in par. 5 proclaimed that these measures can apply only until their purpose is achieved. Inexplicably, this modern approach to affirmative action measures was abandoned in the Constitution from 2006. The Human Rights Charter was known as a legal document which provided a modern and extensive catalogue of human rights<sup>8</sup> and it remains unclear why certain provisions were not incorporated, or have been left out from the current Constitution, e.g. the right to privacy that was guaranteed by the Human Rights Charter (Article 24). Also, bearing in mind the year of its adoption (2006) it is regrettable that the right to good administration (which does not only mean that authorities should work professionally, quickly, and without discrimination, but that it is the fundamental right of citizens) is not included in the human rights catalogue.

The Venice Commission in its opinion on the Constitution expressed concern for the existence of complex and imprecise provisions, especially in the Part I covering fundamental principles that may lead to allowing excessive restrictions of fundamental rights.<sup>9</sup> The Commission emphasized the role of courts, in particular the Serbian Constitutional Court, in ensuring an interpretation of constitutional provisions in line with the democratic values set forth in the Constitution, as well as the relevant international standards. However, the Constitutional court is overloaded with cases which are waiting to be solved, and with many other complaints and initiatives which are submitted lately, while the composition of the Court was not completed until the end of 2010. These facts definitely affect the effectiveness of this legal remedy, together with its subjectivity to political influences.

## 1.2 Interpretation of constitutional provisions by international law

### 1.2.1 Position of international law in Serbian legal system

Some legal solutions can be strengthened and their implementation improved applying relevant international laws and standards. Also, it is important whether the rights guaranteed by international sources and which may serve as defense against infringements, are part of the concrete domestic legal order. The Serbian Constitution in Article 16, par 2 provides that the generally accepted rules of international customary law and ratified international treaties are an integral part of the national

6 „The Official Gazette of the Republic of Serbia and Montenegro“, no. 06/2003.

7 „The Official Gazette of the Republic of Serbia and Montenegro“, no. 01/2003.

8 See Jan E. Helgesen, Venice Commission for Democracy Through Law, Comments on the Draft Charter on Human and Minority Rights and Civil Liberties, Opinion no. 234/03, 2 April 2003.

9 Ibid, par. 25.

legal system and should be applied directly. This solution is welcomed. However, Article 16, par. 2 and Article 194, par. 4 of the Constitution places international treaties below the Constitution and above domestic laws and by-laws. It means that international treaties cannot be ratified if they are not in compliance with the Constitution. Also, Article 16, par. 2 and Article 167, par. 2 enables the Constitutional Court to deprive ratified international treaty of its internal legal force when it does not comply with the Constitution. The Venice Commission noticed that in this case, in order not to violate its international obligations deriving from ratified treaties (as Serbia is bind with ratified treaty vis-à-vis the other States Parties), it would be necessary either to amend the Constitution, which is subject to complex procedure, or to denounce the treaty or withdraw from it.<sup>10</sup> Latter can be done only if this possibility exists under the concrete treaty, or by article 56 of the Vienna Convention on the Law of Treaties.

The position of international law was differently regulated in the Constitutional Charter which recognized in Article 16 an absolute supremacy of international law over domestic law, avoiding this conflict. However, the majority of states do not recognize absolute primacy of international law, but to avoid a conflict situation it would be desirable that international treaties are verified as compliant with the Constitution prior to its ratification. It can be done on several ways, through its assessment by the relevant parliamentary body, relevant ministry, expert opinion, or opinion of independent bodies dealing with specific matter (e.g. the Commissioner for the Protection of the Equality (CPE) in the area of human rights and anti-discrimination).

Direct application of international norms practically means that it is in principle not necessary for those rights to be transposed into separate Serbia legislation. But many provisions are not self-executing and some depends upon socio-economic developments and political choices made by the government.<sup>11</sup> This monistic approach<sup>12</sup> and direct applicability of international norms is not very well received by domestic judges who feel uncomfortable to base their decision on

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<sup>10</sup> The Convention was adopted in 1969, and entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

<sup>11</sup> The direct applicability of international law in the Serbian legal order does not mean that private individuals can automatically invoke these rights in horizontal relationships. International human rights norms have effect in vertical public relationships (the individual versus the State), the government having the duty to respect, protect, and promote those rights. The State's duty to protect has indirect horizontal effects in that it requires the State to set up an adequate legislative framework to prevent violations committed by individuals, and to provide effective remedies for victims of violation. See more on this issue at O. O. Cherednychenko, *Fundamental rights and private law: A relationship of subordination or complementarity?*, <http://www.utrechtlawreview.org/> Vol. 3, Issue 2, December, 2007.

<sup>12</sup> Dualism and monism are two theories on the methods of implementation of international treaties in the domestic legal order. Monistic approach means that a treaty can be incorporated into domestic legal order by a national act, mainly by a parliamentary statute, but it can be also directly applied. Dualistic approach means that international treaties are regarded as acts of executive power, but do not count as elements of the domestic legal order. Thus, the individuals are not directly affected, and can be only by including the provisions into domestic legislation. See more at C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, 2nd ed., 2008, pp. 109-124.

international sources. However, this approach was firstly and successfully applied in *Krsmanovača* case, decided by the Serbian Supreme Court in 2004. In this case, on 8 July 2000, three plaintiffs were not allowed to enter the swimming pool facilities because they were of Roma origin. The Supreme Court found that the defendant's conduct produced emotional damage to them, provoking feelings of inferiority and hurt because they were being treated differently than others due to their ethnic origin. Here, in the absence of the national law provisions the court interpreted and directly applied ratified international conventions: International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>13</sup> This decision sets important legal precedent being the first decision by a Serbian court against Roma discrimination regarding access to public facilities. This case was decided at a time when there was no national anti-discrimination legislation, and the Court directly applied definition from Article 1, par. 1 of the ICERD. It also provided direction for subsequent cases and confirmed that a "situational testing" standard,<sup>14</sup> accepted for the first time by a Serbian court in this case, represents court-admitted evidence.<sup>15</sup>

### **1.2.2 Impact on the existing legal system by international monitoring bodies**

The Republic of Serbia has ratified all the major international human rights conventions: ICCPR (1966), International Covenant on Economic, Social and Cultural Rights (1966), ICERD (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), Convention on the Rights of the Child (1989), International Convention on the Rights of Persons with Disability (2006) and International Convention for the Protection of All Persons from Enforced Disappearance (2006). The only convention that was signed, but still not ratified by the Republic of Serbia is the Convention on the Protection of the Rights of All Migrant Workers and members of their Families (1990).<sup>16</sup> These conventions provide a basis for the establishment of the UN treaty bodies composed of independent experts that monitor implementation of obligations that derive from them. These committees perform number of functions, in accordance with the provisions of the treaties that created them. However, two tools for monitoring are the most relevant: consideration of

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13 Decision of the Supreme Court of Serbia, Rev. 229/2004/1, 21 April, 2004.

14 This standard consists of a survey pursuant to which a group of persons is put in the same situation in order to test and record their reactions and behaviors in a particular situation.

15 This was based on another, the "Club Acapulco" case. Here, the IV Municipal Court of Belgrade sentenced a security agent of a night club "Acapulco" in Belgrade to 2 years of imprisonment because he banned 3 Roma from entering the club due to their ethnic origin. After this event, NGO "Humanitarian Law Center" made a survey on 25 July 2003 which confirmed that the security agents were directly discriminating against the Roma population based on their ethnic origin.

16 This Convention was signed on 4 November, 2004. The Vienna Convention on the Law of Treaties from 1969 provides in Article 18, par. 1 that if the State has signed and not ratified the treaty, it is obliged to refrain from acts which would defeat the object and purpose of that treaty.

State reports and consideration of individual communications. One might say that Serbia more or less in time submits reports to relevant committees,<sup>17</sup> while it happens that presentation of the report and dialogue with members of the Committee is postponed.<sup>18</sup> However, Serbia does not practice publishing reports and making them available to the wider public. Also, in its reports, Serbia refers to systematic discrimination and widespread violation of human rights situation in Kosovo<sup>19</sup>, while it is still reluctant to admit honestly that human rights problems exist in practice in certain areas of life and against specific groups. Significant part of these reports is dedicated to equality and non-discrimination and different committees in their concluding observations found that Serbia can make better progress in this area. For example, it was found that Serbia must ensure the complementarity of different institutions dealing with racial discrimination, “to carry out awareness-raising campaigns to familiarize the public administration and the general public with the roles, work, and ways to access the services provided by these organs”<sup>20</sup> and to strengthen its efforts to eradicate stereotypes and widespread abuse against Roma.<sup>21</sup> The similar findings are expressed in the Progress Report.<sup>22</sup> Furthermore, 11 individual cases were decided by different committees<sup>23</sup> and almost all of them concern some aspects of discrimination. However, the Government is reluctant to respect decisions and to act upon the issued recommendations, as it was illustrated in Ristic case, where the police was unwilling, for years, to investigate the circumstances of the loss of life that occurred in the clash with the police.<sup>24</sup>

At the European level, Serbia has ratified a number of regional treaties, adopted under the auspices of the Council of Europe, among which the most important is the European Convention on Human Rights (ECHR) and its 14 Protocols. Of particular importance is Protocol No. 12 adopted in 2000 and entered into force on 1 April

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17 In 2011, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination were reviewed reports submitted to them. The report to the Committee on the Elimination of Discrimination against Women was submitted in March 2011. See Concluding Observations of CERD to the Republic of Serbia, CERD/C/SRB/CO/1, 13 April 2011 and Concluding Observations of HRC to the Republic of Serbia, CCPR/C/SRB/CO/2, 20 May 2011.

18 For example, the discussion on the Combined Second and Third Periodic Report of the Republic of Serbia to the CEDAW was scheduled for 53rd session (1 - 19 October 2012), but was postponed due to political changes in country and inability to select the state representatives who will defend this report.

19 See, e. g. Combined Second and Third Periodic Report of the Republic of Serbia to the CEDAW, CEDAW/C/SRB/2-3, 16 March 2011, Annex 2 on the Implementation of the Convention in the Autonomous Province of Kosovo and Metohija.

20 Concluding Observations of CERD to the Republic of Serbia, par. 11.

21 Concluding Observations of HRC to the Republic of Serbia, par. 22.

22 See Progress report, p. 16.

23 Milan Ristić against FRJ, communication no. 113/1998, (2001); Džemajl and others against FRJ, communication no. 161/2000, (2002); Dragan Dimitrijević against SCG, communication no. 207/2002, (2004); N.N. against SCG, communication no. 174/2000, (2005); Danilo Dimitrijević against SCG, communication no. 172/2000, (2005); Jovica Dimitrov against SCG, communication no. 171/2000, (2005); Dragan Durmić against SCG, communication no. 29/2003, (2006); Željko Bodrožić against SCG, communication no. 1180/2003, (2006); X. against Serbia, communication no. 1355/2005, (2007); Besim Osmani against Serbia, communication no. 261/2005, (2009); Zoran Novaković against Serbia, communication no. 1556/2007, (2010).

24 See Milan Ristić against FRJ, communication no. 113/1998, (2001).

2005, which is ratified so far only by 18 States (of total 47).<sup>25</sup> Serbia has ratified both instruments in March 2004, at the time when it didn't have any single anti-discrimination law, and when Protocol 12 was not accepted by many Western European States. Not surprisingly, the first case which challenged the broad application of Article 1 of Protocol 12 was case against Serbia.<sup>26</sup> It illustrates the need of state to accept treaties, but unwillingness to seriously examine the obligations they impose, and legal steps that should be undertaken in order to adequately prepare to respect those obligations. Unsurprisingly, until 31 December 2011, total of 6752 applications<sup>27</sup> were submitted to the ECtHR against Serbia. The result is that 61 decisions were brought, finding violation in even 54 cases (only in 2011 were brought 12 decision and violations were found in 8 cases). Dominantly, the Court found violation of the reasonable time of procedure, and non-enforcement of judgements, primarily in the area of family law. Worrisome, the State is not doing much to correct the systematic failures that would prevent violations in future similar cases.

As a candidate country, the EU Charter of Fundamental Rights, which achieved its compulsory nature after the entry into force of Lisbon Treaty, is not binding for Serbia. In Serbia, this legal document is not applied by judges and other practitioners and only legal doctrine emphasizes its significance. However, standards set out in this document are mainly consistent with provisions included in domestic laws. Another issue is their proper application in practice.

Interpretation of human rights in accordance with relevant international standards

The Serbian Constitution in Article 18 prescribes very important obligation for the State to interpret human and minority rights to the benefit of promoting values of a democratic society, pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions that supervise their implementation. In other words, findings of, for example, the European Court of Human Rights (ECtHR) or UN treaty bodies must be taken into account when interpreting human rights provisions. Despite this constitutional obligation, public bodies and institutions rarely apply international norms and standards due to poor knowledge and understanding of international law, and non-recognition of its status in domestic legal order. If public officials apply international norms, they demon-

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25 12 Protocol entered into force on 1 April 2005, and until 5 July 2012, it was ratified by 20 States: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, Netherlands, Romania, San Marino, Serbia, Spain, the Former Yugoslav Republic of Macedonia and Ukraine.

26 See *Stojanovic v. Serbia*, ECtHR, Application no. 34425/04, 19 May 2009. In this case, Mr Stojanovic complained that, while serving a prison sentence, the authorities refused to provide him with free dentures which prevented him from taking solid food. He argued that the principle from *Thlimmenos* case should be applied in his case, and that authorities must treat differently persons whose situation is significantly different. Thus, he claimed that his position was different as of general population because he didn't have income or savings to pay for this service. However, the Court didn't decide on this matter, because Mr Stojanovic had in fact been provided with dentures free of charge in June 2007. It therefore found that that part of the applicant's complaint could be considered resolved.

27 See ECtHR, *Analyses of Statistics in 2011*, January 2012, p. 51.

strate limited knowledge and usually show erroneous interpretation and unsatisfactory application of international standards. From their point of view, it is sufficient to refer to the relevant international instrument, without any research on the real content of certain provision which is today extensively interpreted by international supervisory bodies.

An illustrative example is the Law on Asylum of the Republic of Serbia,<sup>28</sup> which in Article 2 introduces the concept of a “safe third country”.<sup>29</sup> This provision adequately defines this concept and requires that the state respect international standards regarding the protection of refugees. However, the problem in the application lays in the fact that in 2009, the Serbian government adopted a list of 42 countries that are considered to be safe third countries, without any adequate assessment and obligation to periodically review the list.<sup>30</sup> Thus, the bodies deciding on asylum requests (Office on Asylum, Commission on Asylum, Administrative Court) reject them only on the ground that a person was able to receive protection from the country which is on the list.<sup>31</sup> However, the list includes some countries that have a very problematic situation in the application of international human rights standards (for example, Turkey, whose human rights situation is frequently reviewed by the European Court of Human Rights and which limits the application of the Convention on the protection of refugees from 1951 only to refugees from Europe, or Belarus which is the only European country that is not yet in the human right protection system established by the Council of Europe). On the other hand, the list includes the Republic of Greece, which cannot be considered as a safe third country after the judgment of the ECtHR in the case *M.S.S. v. Belgium and Greece*.<sup>32</sup> Here, the ECtHR examined the situation in Greece in relation to asylum seekers and concluded that due to numerous violations of their basic rights, this country can no longer be considered as a safe third country. The Hungarian Helsinki Committee issued an information note in August 2011 that the Republic of Serbia can no longer be considered as a safe third country from the Hungarian standpoint, forasmuch the Serbian practice to reject asylum requests solely on the fact that country is on the list of safe third countries, without any critical assessment.<sup>33</sup> Bearing in mind this problem, many international organizations and NGOs offer and organize trainings for judges, prosecutors, police officers, and other public servants, and publish different handbooks, manuals and brochures with the aim to secure capacity building. The bright spot is the Consti-

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28 „The Official Gazette of the Republic of Serbia“, no. 109/2007.

29 A safe third country means „a country in which an asylum-seeker could have found protection as a refugee, and in which he/she has been physically present prior to arriving in the country in which she/he is applying for asylum.“ International Catholic Migration Commission, Appendices & Glossary; available at <http://www.icmc.net/glossary/term/334>. See more on this issue at S. Lavenex, *Safe Third Countries: Expanding the EU Asylum and Immigration Policies to Central and Eastern Europe*, Central European University Press, 1999.

30 Decision on the list of safe countries of origin and safe third countries, „The Official Gazette of the Republic of Serbia“, no. 67/2009.

31 See, for example, the judgment of the Administrative Court, No. 8 U 3815/11, 11 July 2011.

32 *M.S.S. v. Belgium and Greece*, ECtHR, Application no. 30696/09, 21 January 2011.

33 See Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited*, June 2012.

tutional Court, the CPE and the Ombudsman which, to a large degree, base their decisions on international standards and norms.

On the other hand, another example presents a good practice and concerns the legal position of transsexuals. Namely, Amendments to the Law on Health Protection<sup>34</sup> and the Law on Health Insurance<sup>35</sup> adopted in 2011, provides the extension of the mandatory health insurance to the gender reassignment for medical reasons. The changes also provide that in exercising their right to health protection from compulsory health insurance, the insured provides at least 65% of the cost of health services from the compulsory health insurance among other things, for a sex change for medical reasons. Despite the possibility to receive allowances for surgery,<sup>36</sup> legal status of persons who changed their sex is still unresolved.<sup>37</sup> It means that for majority of them it's almost impossible to enter new facts (new name and gender) in the birth certificate and to receive new documents after the gender reassignment. Even if these new facts are entered in birth certificate, some institutions refuse to issue new documents (registration of cars, issuance of diploma, etc) because they do not understand the concept of privacy and how much it is important from the prospective of integration. In 2011, the Ombudsman issued a special report on the position of LGBT population in Serbia, emphasizing the necessity to adopt legislation that will regulate their legal identity and status. In the absence of the relevant law, public servants are caught between the legitimate and reasonable requests of persons who have changed the sex, and their concern not to break the existing law.<sup>38</sup> Regarding one recent complaint, the CPE issued an opinion recommending one faculty not to correct data in the old diploma, but to issue a new diploma on the new name.<sup>39</sup> This recommendation was given shortly before the decision of the Constitutional Court, which found that the municipal administration, declaring not to have jurisdiction to enter new data in birth certificate, violated the right of the complainant to dignity and free development of personality.<sup>40</sup> Both decisions are relied on the jurisprudence of the ECtHR, the Human Rights Committee, many other international treaties and soft law sources, such as the relevant resolutions of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.

34 „Official gazette of the city of Belgrade“, no. 107/2005, 72/2009, 88/2010, 99/010 i 57/2011.

35 „Official gazette of the city of Belgrade“, no. 107/2005, correction 109/005, 57/011.

36 The gender reassignment is done in accordance with the jurisprudence of the ECtHR. See *Van Kück v. Germany*, ECtHR, Application no. 35968/97, (2003); *Schlumpf v., Switzerland*, ECtHR, Application no. 29002/06, (2009).

37 See Ombudman of the Republic of Serbia, Special Report on LGBT population in Serbia – human rights situation and social position, Belgrade, September 2011, pp. 14 – 18.

38 *Ibid.*, p. 17.

39 See the CPE, Opinion no. 297/201, 24 February 2012. This new trend is particularly emphasized in the jurisprudence of the ECtHR, See *Christine Goodwin v. UK*, ECtHR, Application no. 38957/95, (2002); *L v. Lithuania*, ECtHR, Application no. 27527/03, (2007).

40 Constitutional Court of Serbia, Už - 3238/2011, 8 March 2012.

### 1.3 Susceptibility of the constitutional provision to different interpretations

It was already said that some constitutional provisions are broad and complex and susceptible to different interpretations. One of them is the provision on free legal aid (FLA), introduced for the first time in Serbian Constitution from 2006, although this right was implicitly guaranteed in previous constitutional documents – in provisions guaranteeing the equality before the law and the right to a fair trial.

Acknowledging the importance of the right to legal aid, the Serbian Constitution guarantees it, as integral part of human rights corpus, in Article 67, which says that “under the conditions stipulated in the law, everyone has the right to legal aid”. However, this provision in par. 2 says that legal aid is provided by the advocature, as an independent and free service, and legal aid offices in local self-governments. This provision is interpreted by the bar associations as to give an exclusive right to provide FLA. However, the representatives of NGOs and legal clinics interpret Article 67 as an integral part of other individual rights enlisted in the Constitution. In other words, it is the right of every individual to legal aid, and in some cases, to FLA in order to secure other guaranteed rights. Thus, it is not an exclusive right, but obligation of the State to provide FLA in certain cases. Consequently, the question of interpretation of Article 67, par. 2 is very important, as it can significantly limit the list of providers in the future Law on Free Legal Aid (LFLA). The process of adoption of the Law on FLA (LFLA) in Serbia is a lengthy process which is still on-going. In 2006, three possible models of the future Law were presented by the Ministry of Justice, Serbian bar association and NGO Center for Improvement of Legal Studies. These three models didn't have many common principles and legal solutions and were based on different perception on the role of the future LFLA. The Ministry of Justice has formed a FLA Working group in June 2011 which is intensively working on preparation of the LFLA. However, its work is threatened by opposite interpretation of Article 67. Therefore, this issue must be urgently resolved, as the European Commission insists on development of legislation and funding for an effective system of FLA.<sup>41</sup>

Existing legislation supports an extensive interpretation. After the adoption of the Constitution, several different laws were adopted, which contain provisions on legal aid. Significantly, the first law that was enacted after the Constitution, which specifically mentions the legal aid, is the Law on Asylum. This Law in Article 10, par. 2 determines that FLA to asylum seekers will be provided by UNHCR and NGOs that deal with refugees and other migrant groups.<sup>42</sup> In practice, it means that UNHCR provides financial means to NGO (before 1 January 2012 Asylum Protection Center (APC), and after Belgrade Center for Human Rights) that provides FLA to asylum

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41 Progress Report, p. 51.

42 „The Official Gazette of the RS”, 109/07.



seekers in administrative procedure and before the Administrative court in order to obtain the status of refugees. It must be emphasized that, so far, no one has challenged Article 10, par. 2 as unconstitutional.

Almost simultaneously with this law, another important act in this area was adopted. The Law on Local-Self Governments from 2007 in Article 20, par. 31 envisages that primary jurisdiction of the municipality is to organize a legal aid office to citizens.<sup>43</sup> Although the wording used in this article is „to organize“, it has to be observed in this context – as an obligation. Also, the Law on the Bar<sup>44</sup> has been adopted recently. In Article 73, this Law foresees that the bar association can organize FLA to citizens, alone or under the contract with the local self-government. However, this provision was included in this Law, without looking back to the Constitutional Court decision from 2010.<sup>45</sup> In this decision, the Constitutional Court held that the Decision on the performance of legal aid of the municipality of Palilula<sup>46</sup> in cooperation with the bar association and through attorneys is unconstitutional. In other words, the Bar and local self-governments are obliged to provide FLA, and a municipality cannot transfer its obligations to the bar association and terminate its legal aid office. The reasoning behind this decision was that it minimizes the possibility of citizens to obtain FLA.

Finally, the 2010 Strategy for FLA System Development in the Republic of Serbia was adopted in order „to establish a comprehensive, functional and efficient system of FLA which would remove obstacles out of the way and ensure equality in access to justice.”<sup>47</sup> This Strategy recognizes some serious weaknesses and limitations in the enjoyment of the right to access to justice in Serbia. Importantly, among other principles of FLA, Strategy explicitly indicates the maintenance and advancement of the existing resources in the field of provision of FLA. Thus, the starting point for the establishment of the future FLA system must be based on the already existing capacities, including NGOs and legal clinics that for provide FLA for more than a decade. However, the National Judicial Reform Strategy stressed that the future FLA system will raise citizens’ awareness on their rights and obligations, improving their knowledge about the grounds for their complaints and the prospects for success in such proceedings, thus precluding the filing of ungrounded complaints, raising the quality of preparatory submissions and ensuring expert representation of clients before a court of law as well as that these effects will increase the degree of courts’ efficiency. In relation to this expectation, the new, recently adopted Civil Procedure Code<sup>48</sup> includes Article 85 which significantly diminishes choices for representation in civil matters, providing that parties can “undertake actions in the

43 "The Official Gazette of the RS" 129/07.

44 „The Official Gazette of the RS”, 31/2011.

45 Decision of the Constitutional Court IUI, no. 45/2009, 18 February 2010, "The Official Gazette of the RS", 55/2010, 6 August 2010.

46 Decision, "The Official Gazette of the city of Belgrade", 56/08.

47 "The Official Gazette of the RS", 074/10.

48 "The Official Gazette of the RS", no. 72/11.

proceedings personally or through an attorney, who must be a lawyer.” Previous solution was that any natural person with full legal competence may be an attorney, except persons engaged in quasi notaryship.<sup>49</sup>

The adoption of this Law was not transparent, and was scheduled for early September. It significantly limited the possibility to have debate on certain new solutions, including the question of legal representation. The Ministry of Justice organized only one debate, and reserved little time for discussion. Despite this, engaged expert from the Max Plank Institute at the public debate had negative comments about this solution and suggested its revision.<sup>50</sup> The same position was undertaken by the CPE, who suggested that this provision is limiting parties' choice on who will represent him/her in the court. If party is not able to attend the public hearing, for example as being old, not healthy or with disability, that person must engage an attorney. Thus, Article 85 violates equality as it imposes a significant financial burden, and before the adoption of LFLA, those who are below the poverty line, will not be able to afford legal representation.<sup>51</sup> Even after the adoption of this Law, certain critical group that is above the poverty line, but is not eligible for FLA, will not engage an attorney due to significant financial burdens. In that respect, Article 85 of the Civil Procedure Code is unconstitutional as it contradicts to Article 18, par. 2 of the Constitution which states that “provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.” It also violates Article 19 of the Constitution stating that “guarantees for inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open, and democratic society based on the principle of the rule of law.” Finally, Article 85 of the Civil Procedure Code violates Article 20, par. 2 of the Constitution which proclaims that “attained level of human and minority rights may not be lowered.” This Article significantly limits the work of NGOs, legal clinics and some municipal Legal offices in writing initial legal acts (e.g. complaints) and in some cases, representing the most vulnerable groups by educated lawyers who mostly passed the bar exam, but are not the bar members.

Finally, according to one recent research, attorneys' monopoly of representation exist in majority of European states in respect to criminal cases because it mainly serves public interest (29 states as opposed to 9), while that monopoly does not exist in civil and administrative cases.<sup>52</sup> However, where there is a monopoly in respect to civil and administrative cases, the data shows that the per capita number of attorneys is appreciably higher in states with a systematic monopoly of representa-

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49 Article 85, Civil Procedure Code, “The Official Gazette of the RS”, 125/2004, 111/2009.

50 Public hearing on the Draft version of the Civil Procedure Code, Palace “Serbia”, 14 July 2011.

51 This argument was mainly used in the Opinion on the Article 85 (no.1038/11) of the Commissioner for the Promotion of Equality, dated on 27 September 2011.

52 J. Lhuillier, D. Lhuillier-Solenik, Efficiency of Access to Justice as an Imperative, CEPEJ, p. 40.

tion than in those with none.<sup>53</sup> The Serbia is not among States with higher number of attorneys per capita, and giving monopoly to attorneys significantly limits the right to legal representation.

#### 1.4 Other obstacles in the implementation of human rights provisions

The Serbian legal system is very much consistent with the European and international human rights standards, as confirmed by the European Commission.<sup>54</sup> However, implementation of these norms and standards is still slow, although some progress in the enforcement of human rights is visible due to various training courses, controlling mechanisms, public awareness campaigns, etc. It is clear that in order to respect human rights, it is necessary to build a culture of human rights, to have strong, independent institutions, to have sensitized and knowledgeable public servants, and society that is intolerable towards certain harmful acts. What has just been said can be illustrated in the area of anti-discrimination.

After the adoption of the Constitution and its Article 21 that prohibits discrimination, inspired by the jurisprudence of the ECtHR and two EU directives from 2000 (EC Race Equality Directive<sup>55</sup> and EC Framework Employment Directive)<sup>56</sup>, Serbia has adopted a relevant anti-discrimination legislation. It first adopted the Law on Prevention of Discrimination against Persons with Disabilities (LPDPD) in 2006,<sup>57</sup> which is followed by the Law on the Prohibition of Discrimination (LPD)<sup>58</sup> and the Law on Gender Equality (LGE), both adopted in 2009. The LPD presents an important milestone in securing basic human rights in Serbia establishing a systematic law on anti-discrimination, and in bringing national laws into conformance with European and international standards. The LDP not only establishes definitions of discrimination and identifies forms of discrimination, but it also sets out the procedure for filing a complaint in case of discrimination that can be initiated by anyone who claims to suffer discriminatory treatment. This Law provides a very broad right of action, a shift of the burden of proof from the plaintiff to the defendant,<sup>59</sup> possibility to issue temporary measures, etc. It also establishes the Commissioner for the Protection of Equality (CPE) as an independent, autonomous and specialized state body which has a wide mandate in the area of promotion of equality and anti-discrimination in

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53 *Ibid.*, p. 42.

54 *Ibid.*, p. 13.

55 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000.

56 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02 December 2000.

57 „The Official Gazette of the Republic of Serbia“, no. 33/2006. This Law is supplemented by the Law on Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD), „The Official Gazette of the Republic of Serbia“, no. 36/2009.

58 „The Official Gazette of the Republic of Serbia“, no. 22/2009.

59 It means that the plaintiff must prove to the degree of likelihood that the defendant committed act of discrimination. If he/she succeeds in this, the defendant has a duty to prove to the degree of certainty that such act has not been a violation of the principle of equality (Article 45).

all areas of social life. The CPE's Office has a range of measures, but from the position of victim of discrimination the most relevant is to receive and consider claims regarding discrimination, to provide an opinion and recommendations in concrete cases, to provide information to the complainant on his/her rights and possibilities of initiating a court procedure or other type of protection measures, and to file complaints for protection from discrimination on behalf of, but with the approval of the discriminated person and to file offence reports against the prohibited discrimination act.<sup>60</sup> Only from May to December 2010, the CPE published 98 opinions and 17 recommendations to the public administration bodies on taking measures to improve equality, gave 4 opinions and initiatives for changing legislation, initiated 3 lawsuits for protection from discrimination, filed 2 misdemeanor charges and published 29 admonitions and releases, as well as 7 public information about non-adhering to the CPE's recommendations.<sup>61</sup> Cases before this independent body are relevant, as they reflect the every-day reality.

In Serbia, very serious problems exist in relation to generalized assumptions and stereotypes toward certain age groups that seriously prevent them from fully participating in the labour market. Thus, in one case, the person stated that she was discriminated on the grounds of her age in the employment procedure, because she was 42 and the announced job had a condition that nurses older than 35 cannot apply for a job.<sup>62</sup> However, her application was taken into account and she was invited for the interview, but despite good credentials she didn't get a job. The director of the clinic explained that the age condition was not eliminatory, but that it is a reflection of a long-lasting experience of head nurses who noticed that younger nurses are more agile and faster in accomplishing assigned tasks. The CPE found that announcing such a job call in relation to persons older than 35 is an indirect discrimination on the grounds of age. The epilogue was that the employer didn't change a decision on the selected employee, and introduced a condition of having less than 35 years in the general act of systematization of jobs, demonstrating that the CPE's recommendation was understood as that this formal condition lead to discrimination, and not the act itself.

Also, people with disabilities before the adoption of the LPREPD were marginalized, isolated, left out without adequate transportation, non-accessibility to many insti-

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60 CPE also submits annual and special reports to the Parliament on the situation in the equality protection field; warns the public about the most common, typical and severe cases of discrimination; monitors the enforcement of the law and other regulations, initiates the adoption of or amendments to such regulations, and provides an opinion on the provisions of the law and other regulations in regard to fight against discrimination; establishes and maintains cooperation with bodies in charge of equality and human rights protection on the territories of the Autonomous Provinces and local self-governments; and recommends equality measures to state bodies and institutions. The establishment of this institution and its mandate is in accordance with the Article 13 of the Race Directive which encourages States to establish bodies for the promotion of equal treatment, that at minimum, are able to provide "independent assistance to victims of discrimination in pursuing their complaints," conduct "independent surveys concerning discrimination," publish "independent reports" and make "recommendations on any issue relating to such discrimination".

61 The Commissioner for the Protection of Equality, Regular Annual Report, 2011, Belgrade, March 2012, p. 6.

62 CPE, Opinion no. 1110/2011, 12 September 2011.

tutions and public spaces, and educated in special schools. Some other laws which were adopted in the past 5 years increased the possibility to tackle their position in Serbia (especially legislation in the area of employment and education). In Serbia, deprivation of legal capacity is regulated by the Family Law (Articles 146-150),<sup>63</sup> but the courts do not respect wishes and interests of these persons, and not limiting restrictions only to the necessary ones.<sup>64</sup> The deprivation of legal capacity entails the full or partial deprivation of the rights to vote and to be elected, which is contrary to the UN convention on the Rights of Persons with Disabilities (Articles 12, 29) and the jurisprudence of the ECtHR.<sup>65</sup> Also, in one case the complaint was submitted by the a person with sight impairment, who claimed that the business bank discriminated against him in the process of approving the credit, because it was necessary for him to sign the promissory note. He gave an authorization, certified in the court, to another person who signed the promissory note instead of him. However, he claimed to be a victim of discrimination in relation to other clients who do not have to authorize other person and do not have additional costs for court certification. The proceeding established that the bank did not discriminate against the appellant, but this procedure identified the need for comprehensive analysis of the Law on promissory note, as well as other laws regulating the way of signing the documents by persons who cannot do it for any given reason, especially from the perspective of legislative harmonization with the equality principle. This issue is still present, as there are many indications that local servants do not want to accept a fingerprint instead of signature for those who cannot sign the documents.

The illustrative is also a Milanovic case, where a violation of discrimination was found by the ECtHR.<sup>66</sup> This case concerned Mr. Zivota Milanovic who since 1984 has been a leading member of the Hare Krishna community in Serbia. He was physically assaulted a number of times by unidentified man who cut or stabbed him with a knife, starting in 2001 and repeating in summer 2005, 2006 and 2007. The police questioned him each time and a number of potential witnesses and took some investigative steps, but failed to identify perpetrators. The ECtHR emphasized that treating religiously motivated violence equally as other cases, such as e.g. pub brawl, meant turning a blind eye to the specific nature of acts that are particularly destructive and violate human rights. Thus, police behaviour was unacceptable and it did not engage in adequate actions that will lead to identification and prosecution of perpetrators. The problem in this case was that the police officers thought that he inflicted injuries to himself, as he looked strange and was a member of the sect. Thus, this perception prevented them from adequate performance of their job.

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63 "The Official Gazette of the Republic of Serbia", no. 18/05, 72/11.

64 See more on the procedure at the Belgrade Center for Human Rights, Human Rights in Serbia 2011, p. 66.

65 See Alajos Kiss v. Hungary, ECtHR, Application no. 38832/06, 20 May 2010.

66 Milanovic v. Serbia, ECtHR, Application no. 44614/07, 14 December 2010.

## Concluding remarks

The government of Serbia has set a goal for EU accession in 2014, as per the Papan-dreou plan – “Agenda 2014”. A legal document of great importance is the Stabilisation and Association Agreement (SAA), which in its Preamble clearly states that Serbia is committed to increase political and economic freedoms, as well as to respect human rights and the rule of law. Article 2 further proclaims that Serbia is obliged to respect human rights, as it is defined and guaranteed in the Universal Declaration of Human Rights, ECHR, the Helsinki Final Act and the Charter of Paris for a new Europe.

One must say that candidate countries face a much bigger challenge in bringing their domestic legislation and practice into line with EU law than other EU Member States did in past. However, the good news for Serbia is that in its Progress Report for 2012 the European Commission found that the Serbian legal framework is mainly consistent with relevant international and European standards. Although some constitutional human rights provisions are complex, or some are missing, most of the provisions are modern and go beyond these standards. In cases where legal solutions are missing, the problem can be easily superseded by direct application of international law. Serbia has to pay more attention to these standards, and more training is needed for public officials in order to raise their capacity to apply international sources where necessary. This capacity is beyond the scope of reading international documents and includes research of relevant jurisprudence of different universal and regional monitoring bodies.

On the other side, the bad news is that Serbia is facing serious problems of human rights implementation. The reasons should be seen in recently introduced legislation, lack of capacity and knowledge of public institutions, especially prosecutors, judges and attorneys to deal with human rights issues, lack of knowledge and understanding of the wider public, especially of victims, and lack of human rights culture. This process is very slow and requires the determination of the whole society to respect human rights, to be tolerant and open for diversity, to be sensible for others, and to be intolerable towards harmful acts. In other words, it is not good enough to be familiar with legal rules, but it is more important to act upon this knowledge in a way that can implement each right in every situation. The journey from the mind to the genuine act is a long one and involves a “lived awareness” of human rights principles.

# **HUMAN RIGHTS PERSPECTIVE IN MONTENEGRO AS KEY FOR THE EU ACCESSION**

**Bojan Bozhovic**

## **ABOUT THE AUTHOR**

Bojan Bozhovic was born in Cetinje in 1984, and finished elementary and high school in Podgorica. He graduated at the Faculty of Law in Podgorica, and proceeded to deepen his knowledge during the Master studies at the Faculty of Law in Novi Sad (Serbia). Currently, he is in his third year of Ph.D. studies at the Faculty of Law in Zagreb (Croatia), enrolled at the Department of Private International Law and Public International Law. During the studies, he has attended numerous conferences, seminars, moot courts and competitions with distinctive results and increasing aspiration to transfer the learning and these experiences to others. In addition to anchoring his devotion to the theory and practice of law, these curricular and extracurricular activities had been instrumental in his decision to work as an Assistant Professor at Donja Gorica University. He has held this post since 2008, and has written several theoretical articles on the abovementioned mentioned topics.

## ABSTRACT

This article discusses several topics, the first being the emergence of human rights protection, with special attention paid to the European system of human rights protection. Although a kernel of what is now termed human rights can be found in Ancient city-states, a full and rounded system of human rights protection only emerged as the result of proactive and organised activity to that effect by states and international organisations in the second half of the twentieth century. This paper also portrays relations between the European Union and the European Convention on the Protection of Human Rights and Fundamental Freedoms. The European Court of Justice used to rule its judgments referring to the judgments of the European Court of Human Rights despite the fact that the European Convention on the Protection of Human Rights and Fundamental Freedoms is not part of so called 'founding treaties' of the European Union. The European Union itself saw the importance of the European Court for Human Rights' existence, which is why the last three decades were pointed towards establishing closer cooperation between these two entities, eventually leading to the accession of the European Union to the European Convention on Human Rights. In the end, this article discusses the situation in Montenegro and its effort to harmonize its legal framework with the EU law especially in the field of human rights. Finally,

### Key words:

human rights, European Convention on Human Rights, European Court of Human Rights, Constitution of Montenegro, European Court of Justice.

## РЕЗИМЕ

Овој труд разгледува повеќе теми, од кои првата се однесува на појавата на заштитата на човековите права, ставајќи посебен акцент на европскиот систем на заштита на човековите права. Иако јадрото на она што денес се нарекува човекови права може да се најде во античките градови-држави, целосно заокружен систем на заштита на човековите права се појави како резултат на про-активната и организирана активност за таа цел од страна на државите и меѓународните организации во втората половина на дваесеттиот век. Исто така, овој труд ги отсликува односите меѓу Европската унија и Европската конвенција за заштита на човековите права и основни слободи. Европскиот суд на правдата ги засноваше своите пресуди врз пресудите на Европскиот суд за човекови права и покрај фактот што Европската конвенција за заштита на човековите права и основни слободи не претставуваат дел од т.н. "основачки договори" на Европската унија. Увидувајќи ја важноста од постоењето на Европскиот суд за човекови права, Европската унија во последните три децении беше насочена кон воспоставување на поблиска соработка меѓу со Европскиот суд за човекови права, резултирајќи со време со пристапување на Европската унија кон Европската конвенција за човековите права. На крајот, овој труд се осврнува на ситуацијата во Црна Гора и нејзините напори да ја усогласи својата правна рамка со законодавството на ЕУ, особено во областа на човековите права.



# HUMAN RIGHTS PERSPECTIVE IN MONTENEGRO AS KEY FOR THE EU ACCESSION

## Introduction

It is only recently that a dispute surfaced, both in theory and practice, about the creation, existence and respect of the human rights, in which it is asked for the core of human rights protection. According to some the fight for establishment of the human rights protection system became a reality once that slave in a theatre play quoted Seneca's words on equality of people: "Homo sum: humani nihil a me alienum puto"<sup>1</sup>. Human rights, above all the principle of equality, have their roots even before the period of Roman empire, more precisely through tendency of Ancient Greeks to acknowledge to the free individuals the right on protection from tyranny.<sup>2</sup> Despite such a long period<sup>3</sup>, the efforts of the individuals not to confer the concept of human rights were not stopped until today. States worldwide and in Europe are under certain legal and political pressure to accept the international approach in the protection system. Due to the fact that post-communist states met certain higher human rights criteria, Montenegro has a task to fulfil certain conditions in order to enhance its international recognition.

## The development of human rights

One of the founders of human rights in the modern sense was John Locke.<sup>4</sup> However, the idea that human beings have natural, inalienable, imprescriptible and sacred rights regardless of their recognition in a community of which they are members, to enjoy equal rights like those in the community, as well as the possibility of implementation of disciplinary measures against those who violate those rights is even in connection to the natural law theory and its representatives such as Thomas Hobbes, Jean Jacques Rousseau, Thomas Paine and others. Such idea was developed amongst others creators of the constitutional novelties and proclamations of American and French revolutions, thus announcing the creation of a modern world. However, the traditional thought of natural rights met objections, which can be classified into the following categories: 1) that it is conceptual nonsense; 2) it is politically

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1 Richard A. Bauman, *Human Rights in Ancient Rome*, London, 2003, p. 1.

2 Milan Paunović, Boris Krivokapić, Ivana Krstić, *Osnovi međunarodnih ljudskih prava*, Beograd, 2007, p. 18.

3 Some theorists trace the origins of international law, and therefore the contours of human rights protection in the ancient states before Greece, such as Sumer, Mesopotamia, Egypt. See in more details: David J. Bederman, *International Law in antiquity*, Cambridge, 2004.

4 Malcolm Shaw, *International Law*, Cambridge, 2008, str. 266.

incorrect; 3) it is socially conditioned, 4) it is based on naturalistic error, 5) is inconsistent because a notion of “some right” is reduced to the idea of duty and good. The first two complaints are attributed to Jeremy Bentham, the third complaint is attributed to Marx, the fourth to Hume, whilst the last objection is explicit and implicit in the work of many jurists and philosophers.<sup>5</sup> Despite this, the experience of the horrors of the 20th century, life through the lens of war and totalitarian regimes have given us enough reason not to question the concept of the need to protect human rights. Significant support for this claim is found in a number of international documents dealing with this issue, and the primacy of international human rights law in relation to the internal law of the State.<sup>6</sup> The adoption of these acts contributed to the establishment of a new system of protection of human rights and the reduction of critical views about their existence. Two events played a crucial role in the development of human rights – 4th August 1789 when the French nobility renounced their privileges and 26th August 1789 when it adopted the Declaration on Human Rights.

Discussion about the creation of this document was conducted from August 11th until the date of adoption, when the final article 17 was adopted (on the sacred and inviolable property)<sup>7</sup>. The Declaration was adopted as a text itself, separated from the future constitution. Although it contains a few contradictions, its contribution to the development of human rights will be saved. From that day on, human rights were created and based on the protection of man, the individual. “All people are born free and equal”, the Declaration stipulated.<sup>8</sup> Although this provision was met with widespread criticism of some of the great philosophers, it laid the foundations for the development of human rights. This declaration defined the freedom as “the right to do anything that does not harm others.”<sup>9</sup> A special discussion occurred on the last provision under which the property was classified as natural. It is because of this article that the revolution got the adjective bourgeois and thus will undergo considerable criticism by the socialists. Its classification as the natural right came from the old law theory school preceding jus naturalists. However, it has had its foundation in the work of Lock, which has held that the property was based on individual work and exists independently of the state.<sup>10</sup>

Anyhow, the most important role in the process of establishing a universal system of human rights protection was the United Nations contribution through the Universal Declaration of Human Rights.

After the horrors of two world wars, the concept of human rights is increasingly

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5 See M. Matulović, *Ljudska prava*, Rijeka 1989, 8

6 Primacy of international human rights law in relation to domestic law is recognized both by the monistic theory of the primacy of international law in relation to domestic law, and the pluralistic theory as well. Read more about the relationship between domestic and international law: R. Etinski, *Međunarodno javno pravo*, Beograd, 2010, 101-110

7 More in: Norberto Bobio, *Doba prava*, p. 96

8 Declaration, Article 1

9 *Ibid.*, Article 4

10 Džon Lok, *Dve rasprave o vladi*, knjiga II, preveo Kosta Čavoški, Zrenjanin 1978, 20-39

based on individual liberty, and with the adoption of the Declaration, the whole concept of justification or denial of human rights has lost its significance. As it is now the question of the existence of human rights is no longer current due to the broad consensus among states that the provisions of the Universal Declaration must be respected. From December 10th 1948 until today, new challenges related to the implementation and protection of human rights arose. So, the question as to whether there is a human rights issue is replaced with “How to ensure the most efficient model for the protection and enjoyment of human rights and freedoms?” So the problem is not in justification, but in the exercise.<sup>11</sup> The truth is of course much more complex, unfortunately, it is impossible, even today, to observe human rights only from that angle.

Although it seems it is more of a practical problem and for theory less important one, human rights cannot be accessed from the viewpoint of pure practice. Doctrine stance is still of great importance. In fact, when it comes to the realization of human rights we ask the following questions: “What does it mean that certain right was exercised?” “What are the criteria for the realization of human rights?”. There is no doubt that these issues are theoretical in nature.<sup>12</sup>

Although it laid the foundation for it, the universal system of human rights protection is not the most developed one. On the contrary regional systems, particularly in Europe, took the lead as will be discussed further.

A very important idea was that the universal system of human rights protection is transmitted to the regional.<sup>13</sup> Regardless of the huge importance that the Universal Declaration of Human Rights had, the biggest shift in the system of human rights protection in Europe was the adoption of the European Convention on Human Rights. Convention was signed in Rome on November 4th 1950 and it entered into force on September 3rd 1953. It was created under the auspices of the Council of Europe as a result of the aspirations of the people of Europe to create a different and modern way of mutual cohabitation, and a different relationship between a human being to the authorities in their own country.<sup>14</sup> To date the Convention was amended with 14 Protocols. For the founding members of the Council of Europe, the ratification was not required. When former socialist states began to apply for the membership to the Council of Europe, the CoE decided on mandatory ratification as a condition for any future membership<sup>15</sup>.

In order to ensure respect of the Convention, the European Commission for Human Rights (1954) and the European Court of Human Rights (1959) were established. The

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11 Matulović, op. cit. 17

12 Ibidem.

13 R.J. Vincent, Human Rights and International and International Relations, Cambridge University Press 2001, 95.

14 Aleksandar Jakšić, Evropska konvencija o ljudskim pravima, Beograd, 2006, 11.

15 Nebojša Vučinić, Osnovi ljudskih prava i sloboda, Podgorica, 2001. 53.

European Court of Human Rights was established after eight member states submitted the declaration of recognition of the compulsory jurisdiction of the Court, as required by the former version.<sup>16</sup> Countries that have accepted the Court's jurisdiction were Belgium, Denmark, Federal Republic of Germany, Ireland, the Netherlands, Luxembourg, Austria and Iceland.<sup>17</sup> The amendments abolished the European Commission and the jurisdiction over the individual applications has become mandatory.<sup>18</sup>

The Courts headquarters are in Strasbourg. The European Court of Human Rights has the same number of judges as the number of signatories to the Convention itself. Each state has one national judge elected by the Parliamentary Assembly of the Council of Europe with a majority of votes of the three candidates proposed by the Parties. However, if the state does not have a national judge, the Court shall request the government to appoint a judge who will have the status of an ad hoc judge. The appointed judge before taking over the duties will make the declaration or will take the oath. It is especially important to point out that regardless of the originating country and status enjoyed, the judges judge in their individual capacity, for example they need not and should not follow the instructions or orders of the state that nominated them. In addition, through the Committee of Ministers (one of the most important bodies of the Council of Europe) the CoE has a mechanism to control the application of the decision of the European Court of Human Rights by member states, which makes this the most effective regional system for the human rights protection in the world.

Of special importance for the protection system is the adoption of Protocol No. 14<sup>19</sup>, which brought significant changes in regards to the number of judges, the composition of the council, judicial mandates, but it also allowed the accession of the European Union to the European Convention on Human Rights.

The European security system is not just based on the work of the European Court of Human Rights and the Council of Europe. The European Union has an increasing importance in this regard. Although the Union has emerged as a regional organization with the aim of free market development, just shortly after its founding, the highest court of the European Union had the first cases on the human rights issues. Gradual changes in the Founding Treaties thus necessarily contributed to the change and improvement in the human rights protection system within the EU.

The European Union to date has undergone a number of changes through a series of Treaties. Hence especially important are: the Single European Act (1986), the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997), the Treaty of Nice (2001), the Constitutional Treaty for Europe (2004) and the Treaty of Lisbon (2007).

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16 Milan Paunović. *op. cit.*, p. 69.

17 Tomas Burgental, *Međunarodna ljudska prava u sažetom obliku*, Beograd 1997, p. 121.

18 See in more detail: Rodoljub Etinski, *Međunarodno javno pravo*, Novi Sad, 2007, pp. 331-364.

19 Protocol No. 14 is adopted May 13th 2004, and entered into force June 1st 2010.

The Single European Act (SEA) was passed on February 28th 1986 and entered into force in 1987 and was the basis of the Maastricht Treaty in 1992. Further on, it was substrate for further expansion of the Community in 1995 (Austria, Finland and Sweden). It did not only extend the jurisdiction of the Community institutions, but it increased the speed of prosperity.<sup>20</sup> The Single European Act makes a number of changes, but for us it is important that this is the first contract under the auspices of the Community referred to human rights. The preamble to the Single European Act refers to the fundamental rights recognized in the constitutions and laws of the Member States, the European Convention on Human Rights and the European Social Charter. With this act, the Community lost its solely economic character.

Under the efforts of the Commission President Jacques Delors, supported by French President Francois Mitterrand and German Chancellor Cole, the unification process was intensified. After great negotiation activities, the Maastricht Treaty was signed on February 7th 1992. It came into force in 1993 following many problems and plenty of consensuses. With the entry into force of the Maastricht Treaty, the EU was established which was based on three pillars:

1. European Communities
2. Common Foreign and Security policy
3. Police and Judicial Cooperation in Criminal Matters or as it was originally named Justice and Home Affairs.

When it comes to the human rights respect, under article F(2) it is specified that: *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

This exact wording was used by the Community Court for years as a justification for its reliance on the European Convention on Human Rights.

Five years after the signing of the Maastricht Treaty, on October 2nd 1997 the Amsterdam Treaty was signed. It came into force on May 1st 1999. The Treaty of Amsterdam went a step further in the protection of human rights and the formulation of an old article F(2) of the Maastricht Treaty was expanded by the following paragraph: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law as the common principles of the Member States".

It was confirmed that Community law must be in conformity with the European Convention on Human Rights, although the Treaty does not bind either the Community or the Union to sign it. The Amsterdam Treaty provides for a procedure whereby the

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<sup>20</sup> Ralph H. Folsom, *European Union Law in a nutshell*, Thomson West 2005, 26.

Council may decide to establish if there is a serious and persistent breach of the principles mentioned in Article 6(1). Provided that it does establish so (the country in question is not allowed to vote on the matter), the Council is able to suspend any membership rights of the State, including the right to vote in the Council. So, for the first time in the history of the European integration, these principles have been operationalized.<sup>21</sup>

It is obvious from the above mentioned that the EU's political authorities began changing attitudes towards the protection of human rights. Without going into specific detail, we have to observe the construction of the new policy, which included:

- 1) accepting the fact that extensive and coherent EU policy on human rights is required,
- 2) changes in culture of human rights in Community legislation and administrative machinery, and
- 3) support of the work that was achieved by other international organizations, primarily the United Nations and the Council of Europe.<sup>22</sup>

The Treaty of Nice was signed on February 26th 2001 and did not include the Charter of Human Rights, although nearly three months before the signatures were laid, the European Union formally declared its text. It came into force on February 1st 2003 and has not made significant changes to the European Union or to the protection of human rights for that matter.

Therefore, the Constitution for Europe (Constitutional Treaty) was drafted; following the signing on October 29th 2004 it was also signed by the representatives of Romania, Bulgaria and Turkey as a candidate for EU membership. The Treaty never took effect because France and the Netherlands did not ratify it. As stated in its Preamble the Constitution was intended to overcome the old division, but in fact it did not create a European nation or a super state. In legal terms, the Constitution was supposed to act as a single act replacing the existing treaties establishing the European Communities and the European Union.

Although not in force, it is important to mention that by the Treaty establishing a Constitution for Europe, the Charter became an integral part of the Treaty and was fully incorporated in the constitutional text. This fact gives a new dimension to human rights perspectives within the Union. In relation to the citizens, the Constitution of the Union undertook to recognize the rights, freedoms and principles set out in the Charter of Human Rights. On the other hand, the EU could seek accession to the European Convention on Human Rights<sup>23</sup>, the Constitutional rights were supposed to make the basic principles of the European Union.

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21 Kristijan Tomušat, *Ljudska prava između idealizma i realizma*, Beograd, 2006, 173.

22 Philip Alston and J. H. H. Weiler, 'Even Closer Union' in Need of a Human Rights Policy: The European Union and Human rights, *The EU and Human Rights*, Oxford, 1999, 19-20.

23 *Ustavni ugovor*, čl. I-9.

European Council in June 2007 adopted the report on the further development of the European Union prepared by Germany as the outgoing Chair country. On the basis of this report, Portugal as the new Chair country of the European Council received a mandate to convene a new intergovernmental conference that will discuss the reform of the treaties establishing the European Communities and the European Union.<sup>24</sup> Although it was planned to complete the ratification process by 2008, the adoption process was on-going due to the new problem of ratification (Irish citizens refused to accept a new Treaty). The Charter was integral part of the Treaty of Lisbon that entered into force in December 2009. In addition, the Lisbon Treaty under the provisions on Article 6 provides the EU's accession to the Convention. This was clearly the message that the European Union will not cancel improvement of the human rights protection system, especially given its aims towards internationally recognized legal personality.

## Montenegro and the European Union

The Montenegrin Parliament on June 8th 2005 adopted the Declaration of the accession to the European Union, which confirms the willingness for accelerated harmonization of the legal system of Montenegro with the EU regulations and standards. It is important to stress that no political document in recent Montenegrin history has passed with such a level of agreement in the otherwise very heterogeneous structure of political subjects and interests. Montenegro in 2007 became a Party to the Stabilization and Association Agreement, which was committed to upholding democratic principles proclaimed in the Universal Declaration of Human Rights and as defined by the European Convention, the Helsinki Final Act and the Charter of Paris for a New Europe. This way Montenegro clearly defined its future path. But first, it was necessary to solve the question of the succession agreement, as well as other issues that at the time were under the Ministry of Foreign Affairs and the Government.

After proclaiming the independence of Montenegro, the Montenegrin Ministry of Foreign Affairs (Decision of Proclamation of independence of the Republic Montenegro) undertook activities on accepting international multilateral conventions, agreements and protocols adopted by the State Union of Serbia and Montenegro that were of interest at that time.

In the first phase, the Ministry of Foreign Affairs launched a procedure to adopt relevant multilateral documents (which are mostly preconditions for membership in those organizations) mainly upon the initiative of competent ministry or after consulting several competent institutions (World Health Organisation, International Labour Organisation, International Migration Organisation etc.).

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<sup>24</sup> Radovan Vukadinović, *Evropska unija ostaje bez Ustava, Pravni život, Udruženje pravnika Srbije, 14/2007, Beograd, 2007, Tom VI, p. 139.*

In the second phase the procedure to approach the relevant multilateral conventions deposited at the UN General Secretary was launched, of which the State Union of Serbia and Montenegro (SCG) or earlier SRY was a signing party.

In the third phase the procedure to approach relevant multilateral conventions deposited by individual countries was launched. Response from ministries of foreign affairs of leading countries (USA, Canada, Switzerland, France, Holland, Sweden, Germany, Portugal, China, Japan) is expected, and based on their lists MFA will launch the procedure to approach conventions whose signer was SCG after consulting relevant ministries<sup>25</sup>. Here is the right place to mention the importance of the Declaration on Relations with the United Nations after the Referendum on State-Legal Status. Among other documents of importance similar to the Declaration on Relations with the United Nations after the Referendum on State-Legal Status is the Declaration of Independent Republic of Montenegro adopted by Parliament on 3rd of June 2006 where it is stated:

“The Republic of Montenegro, independent State with full international legal personality, will continue to develop as a civic, multi-ethnic, multicultural and multi-confessional society, founded on respect and protection of Human Freedoms and Rights, Minority Rights“...

It is obvious that immediately after gaining independence and international recognition Montenegro obliged to respect and develop human and minority rights. It was necessary to accede to all relevant conventions to undertake that.

In addition to accepting the Convention and other international agreements, work on a new Constitution took place.

The Constitution of Montenegro was adopted on October 19th 2007 and it should in many ways represent one of the most important dates in the history of Montenegro. The process of creating the Constitution commenced on April 8th 2005 within the Council for Constitutional Affairs, which was established by the General Assembly on December 18th 2003. Based on the results of the referenda on June 3rd 2006 Parliament adopted a decision on the declaration of independence of the Republic of Montenegro and the Declaration of the independent Republic of Montenegro.

The Act on Constituent Assembly of the Republic of Montenegro was passed on 10th July 2006 which stated that: “the Constituent Assembly will adopt the Constitution of Montenegro, which will regulate state and social system of Montenegro as an independent state.” After a long process and an abundance of opinions, the Constituent Assembly adopted by a two-thirds majority the Draft constitution without amendments, on October 19th 2007.

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25 First Report of the Republic of Montenegro on Implementation of Framework Convention for the Protection of National Minorities, 2007.



Aware of the importance of human rights for Montenegro a working group for drafting the constitution has paid particular attention to this issue. In Part Two of the Constitution, just after the main provisions, and before the provisions of state organization, parliament, the Constitutional Court and the courts, the government and other public bodies, provisions on the basic human rights and freedoms are contained, thus elevating the importance of these issues at the highest level.

Under provisions of Article 9 of the Constitution of Montenegro international treaties are raised above the Montenegrin legislature. This provision limits the legislative sovereignty of Montenegro and emphasises the tendency of Montenegro to put its legal framework in line with European standards. The cited constitutional provision mostly reflects on the legal order of the European Union. The fact is that the legal order of the European Union rests on the principle of subsidiarity and proportionality that was obtained under Article 5 of the Treaty of Lisbon, and Protocol No. 2 on the application of the principles of subsidiarity and proportionality.<sup>26</sup> Therefore, this provision, although it limits the legislative sovereignty, does not take away the right or the ability to value the reception of international law into domestic laws and regulations. It provides solutions and values in line with the Montenegrin social reality, its needs and requirements for development. First and foremost, the obligation is to harmonize national law with EU law, which is the aim and intention of most of the professional and laic public in Montenegro.

A separate issue is still the status of the European Convention on Human Rights, that is, the relationship between the Constitution of Montenegro and the Convention itself. This issue is particularly important because it is one of the basic prerequisites for entry into the European Union. Thus raising the protection of human and minority rights to a higher level is *conditio sine qua non*.

The human rights provisions are comprehensive and systematized in Articles 17 and 80 of the Constitution. These provisions are mostly clear and complete.

The Constitution guaranteed the most important human right, the right to life. This right is guaranteed by direct provision that banned the death penalty (the provision of Article 26). On the other hand, we note the indirect right to life guaranteed by the provisions of Article 28 of the Constitution that also guarantees the respect, dignity and inviolability of the person. All this represents the fulfilment of the prescribed standards of international law.

The right to freedom of thought, conscience and religion

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26 Mijat Šuković, *Koncepcija i sadržina Ustava Crne Gore od 2007*, 186-187

The Constitution guarantees everyone right to freedom of thought, conscience and religion (Article 46). Freedom of thought is absolute right and as such is recognized in the Constitution because it does not provide any reserve to it.

Conscience is a term under which we presume internal system of beliefs of one person, in accordance with those we evaluate and judge the values and right-doing, behaviour and effects of acts committed of one being or anyone else's.<sup>27</sup>

According to article 48 "no one is obliged, contrary to his religion or faith to fulfil a military obligation or other obligation involving the use of arms." Freedom of religion cannot be limited, but freedom to express religious beliefs can be restricted only if necessary to protect human life and health, public safety, and other rights guaranteed by the Constitution.

Article 53 guarantees the freedom of association. Montenegrin Constitution guarantees the right to property and the provision that "no one shall be deprived of property or limited from it, except when required in the public interest, which is subjected to fair compensation."<sup>28</sup>

Here, in particular, we should note that the Constitution of Montenegro grants prohibition of discrimination through a general provision<sup>29</sup>, but also through gender equality<sup>30</sup>, the basis of equality<sup>31</sup> and anti-discrimination regulation<sup>32</sup>. Here we need to point out that Montenegro is one of the few states that are party to the Protocol 12 to the European Convention on Human Rights. Further on in order to meet the standards prescribed by the European Union Montenegro passed a law on discrimination as well.

Special attention during the writing of the Constitution was devoted to minority rights, although the Constitution of Montenegro, as well as many international documents do not provide a definition of minorities. The issue of minority rights is particularly important, as Montenegro is a multinational state. The Constitution equally guarantees to all citizens of Montenegro every human right and every freedom, regardless of their nationality, religion, language and other peculiarities.

We have to stress that those are the same guarantees both to the members of minority nations and other minority national communities living in Montenegro. This principle is in line with the principles set out in the above-mentioned Declaration of the Accession to the European Union.

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27 Mijat Šuković, *Ustavno pravo*, CID, 2009, 271

28 Article 58

29 Article 8

30 Article 17

31 Article 18

32 Article 19

It is worth noting that Montenegro has ratified the European Convention on regional and minority languages and as a result has accepted the Albanian and the Roma language as language of minority in Montenegro.

By far the largest catalogue of minority rights is the most important regional act – Council of Europe Framework Convention for the Protection of National Minorities (1995) of which the former Federal Republic of Yugoslavia was a party (2001). Later on Montenegro has ratified it as well.

Montenegro as a part of Yugoslavia, and later the State Union of Serbia and Montenegro was bound by all international documents above mentioned. In that manner Montenegro was obliged by Pact on Civil and Political Rights and Economic, Social and Cultural Rights Pact back in 1971 while for example SR Yugoslavia ratified the Framework Convention for the Protection of National Minorities in 2001.

## Conclusion

The path of human rights protection worldwide was somewhat rocky. Today many aspects of it are clearer and modern democratic states are obliged to follow regulations and standards set by universal and regional authorities. The role of courts is crucial, thus state courts are to follow the regulations with more attention. The contribution to the protection of human rights by state to state is a chain reaction of the constant international pressure, given that even state aids, funds, international trade market and trade channels, direct investment, could to the certain extent be jeopardized if breach of international mechanisms for human rights protection occurred.

Small or even big states that are striving towards certain economic, global, military or any other kind of international forum are to accept conditions set by global key players. Though sometimes those conditions do seem challenging and rather unfair, once fulfilled they could provide certain benefits for states.

Montenegro as young state, open towards global challenges is working towards fulfilment of the criteria set. Thus, the mere adoption of the regulations, or conversion of the legal acts towards those from the *acquis*, is not enough. Even if one country set an impeccable set of rules in order to protect human rights, it is a dead end if those rules are not applicable, or if applicable not enforceable. The work of the institutions and courts are yet to be challenged as more and more cases before the Court in Strasbourg are raised against Montenegro.



# **STRENGTHENING JUDICIAL INDEPENDENCE IN THE PROCESS OF EU INTEGRATION – THE CASE OF SERBIA**

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## ABSTRACT

Judicial independence, in addition to being a precondition for the establishment and preservation of rule of law, as it is commonly perceived, is also a prerequisite for democracy, reinforcing the horizontal accountability of elected officials. All of this justifies and calls for the institutionalization of its guarantees, so that the ideal of judicial impartiality and objectivity may be achieved in each and every case.

In nascent democracies, however, the institutional guarantees of judicial independence risk being insufficient, since their effectiveness is generally dependent on the readiness of the institutional actors to abide by them. Under those circumstances, other, extra-institutional players, such as civil society and international community, may prove to be more successful in defending judicial independence.

Starting from these premises the paper analyzes the reform of the judiciary in Serbia, going on for the past four years, and consisting mainly of personnel re-composition of the courts through the legislative termination of offices of all incumbent judges. After presenting the constitutional framework of the guarantees of judicial independence, and concluding on the unconstitutionality of the given legislative measures, the paper depicts the politico-judicial battle which ensued for and against the reform.

The latter reveals a powerful role played by the European Union, which was informed and supported by the Serbian Association of Judges, in reversing the effects of the undertaken reform. In this context, the paper examines the place of the judiciary in the constitutional architecture of the European Union which would explain the reasons behind such a prominent engagement of the Union in the whole process.

Key words:

Judicial Independence. – Democratizing Regimes. – European Union. – Civil Society. – Serbian Constitution of 2006.

## РЕЗИМЕ

Судската независност, покрај тоа што претставува предуслов за воспоставување и зачувување на владеењето на правото, како што најчесто се смета, исто така претставува и предуслов за демократија, притоа зајакнувајќи ја хоризонталната одговорност на избраните функционери. Сето ова го оправдува и повикува на институционализирање на нејзините гаранции, така што идеалот за судска непристрасност и објективност може да се постигне во секој поединечен случај. Кај младите демократии, сепак, постои ризикот дека институционалните гаранции за независноста на судството се недоволни, бидејќи нивната ефикасност е генерално зависна од подготвеноста на институционалните актери да се придржуваат кон нив. Под овие околности, други, вон институционални играчи, како граѓанското општество и меѓународната заедница, може да се докажат како поуспешни во одбраната на независноста на судството. Поаѓајќи од овие премиси, трудот ги анализира реформите во судството во Србија, кои се случуваат во изминатите четири години, а се состојат главно од кадровско преуредување на судовите преку законодавен престанок на мандатот на сите актуелниот судии. По презентирањето на уставната рамка за гаранциите за судската независност и утврдување на неуставноста на преземените законски мерки, трудот ја опишува политичко-судската борба која следеше за и против реформата. Последново ја открива моќната улога на Европската унија, која беше информирана и поддржана од страна на Српската асоцијација на судии, во поништување на последиците од преземените реформи. Во овој контекст, трудот го испитува местото на судството во уставната архитектура на Европската унија што ќе ги образложи причините за таквиот истакнат ангажман на Унијата во целиот процес.

# STRENGTHENING JUDICIAL INDEPENDENCE IN THE PROCESS OF EU INTEGRATION – THE CASE OF SERBIA

## 1. Introduction

Democracy has a multitude of meanings, with one of them taking precedence over the others. That is the procedural concept, which identifies the democratic method with a competitive struggle for the people's vote. Understood in this way the democracy is embodied in a number of institutions, such as right to vote, right to be elected, free and fair elections, freedom of association, freedom of expression, etc., which serve the purpose of selection of representatives with the task of producing the government. Nevertheless, in well-established democracies accountability runs not only vertically (through elections), but also horizontally – across a network of relatively autonomous institutions that can call into question and even sanction those officials who abuse their public positions. Without these agencies, among which the independent judiciary is probably the most important, political branches of government have little or no incentive to obey constitutional constraints on their exercise of power. It follows that judicial independence, in addition to being a precondition for the establishment and preservation of rule of law, as it is commonly perceived, is also a prerequisite for a democracy, which calls for the institutionalization of its guarantees.

What has been said for the well-established democracies is even truer for the nascent ones, only there the institutional guarantees of judicial independence risk being insufficient. There where the tradition and culture of rule of law and autonomous courts is less developed, the effectiveness of those formal safeguards tends to be dependent on the readiness of the strategic actors to abide by them, which is again proportional to the degree of electoral uncertainties in the given society. In those instances where these preconditions are not entirely met some extra institutional pressures may contribute to the establishment and maintenance of the judicial independence. Namely, the economic vulnerability of many nascent democracies allows international community, informed and supported by vibrant and well-organized civil society, to use political and economic leverage to push government to respect autonomy of courts.

The Serbian experience with the democratic transition and consolidation falls exactly into this category, as the political branches of government undertook to reform the judiciary by terminating offices of all the judges in a non-transparent way, putting at risk the principle of judicial independence. The whole process was marked by the abuse of the institutions generally envisaged to protect the rule of law and

autonomy of courts. Thus, the pretext for the reform was found in the adoption of the new Constitution (2006), although the previous Constitution (1990) offered in some aspects even better guarantees of judicial independence. Furthermore, the quasi-judicial and judicial instances, such as the High Judicial Council and the Constitutional Court were involved in the whole process, which gave it an image of legitimacy. All of this shows a fairly complex structure of government, drafted more or less in accordance with the contemporary standards of constitutionalism, which in the end failed to produce expected institutional results due to the insufficiently developed political and legal culture.

There where the governmental institutions failed, the civil society rose up, primarily through the appeals of the Judges' Association of Serbia, but also of other members of the judicial support network (law professors, attorneys, prosecutors, non-governmental organizations, etc.). The Judges Association managed to animate the international players as well, particularly, the European Union (EU), whose influence and interest in protecting the independence of the judiciary gradually increased, to the point of becoming crucial, as the country was getting ready to submit its application for the Union's membership. Thus, a spontaneous and informal campaign for the reversal of the reform got developed managing eventually to minimize the harmful effects of the politically envisaged and conducted reform, through a politico-judicial battle which included, inter alia: several negative reports of the European Commission on the judicial reform in Serbia, several proceedings before the Constitutional Court on the constitutionality of the disputed reform legislation, and couple of hundreds of constitutional appeals proceedings of the non-reappointed judges again before the Constitutional Court, as well as the legislative amendments in reaction to this campaign.

This paper attempts to track down the main points of this extra-institutional battle for judicial independence in Serbia by expounding on the importance of the judicial independence in democratizing regimes (chapter 2) and for the membership in the EU (chapter 3), so that the weight of the constitutional guarantees of judicial independence (chapter 4.1), and especially the effective role of the domestic civil society and international community (4.2) can be better appreciated.

## **2. Judicial independence in the democratizing regimes**

Studies of democracy have been dominated since the World War II by a procedural concept of the democratic form of government, as opposed to the definitions of de-



mocracy in terms of its source or purpose.<sup>1</sup> This path-breaking understanding of the democratic method came from Schumpeter who defined it in 1942 as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”.<sup>2</sup> Along these lines, Huntington also studied the democratization in the late twentieth century, understanding the central procedure of democracy as “the selection of leaders through competitive elections by the people they govern”.<sup>3</sup>

However, and paradoxically, competitive elections may mask the fact that other essential components of democracy have not taken root, risking in its consequences to reverse the wave of democratization. The awkward truth is that there are many states where rulers aspire to the legitimization that comes from democratic practices like election, but who are unwilling to leave office. These electoral or competitive authoritarian states are becoming more common, and they are marked by façade institutions and parallel political realities.<sup>4</sup>

Therefore, “a myopic focus on elections is partly to blame for the fragility of the democratic scaffolding in many nascent democracies”.<sup>5</sup> This problem of abuse of power in representative democracies was noticed already by Rousseau who claimed that although “the people of England regards itself as free... it is grossly mistaken” for “it is free only during the election of members of parliament. As soon as they are elected slavery overtakes it, and it is nothing”.<sup>6</sup> In *The Government of Poland* he was even more explicit in his critique of the representative government by stating that English nation “after having armed its deputies with supreme power, has added no brake to regulate the use they may make of that power throughout the seven years of their mandate”.<sup>7</sup> And, although Rousseau was not so much successful in seeking the remedy (by binding the deputies to follow the instructions of the constituents, and in making the representatives render their constituents a strict account of their conduct in the diet), he rightly identified the problem of the unaccountability of the elected representatives in between two electoral terms.

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1 For a source oriented definition of democracy, see Held’s one: “Democracy means a form of government in which, in contradistinction to monarchies and aristocracies, the people rule”. David Held, *Models of Democracy* (Stanford, California: Stanford University Press, 1996), 1. And Tilly offers an understanding of democracy in terms of its purpose: “Substantive approaches focus on the conditions of life and politics a given regime promotes: Does this regime promote human welfare, individual freedom security, equity, social equity, public deliberation, and peaceful conflict resolution. If so, we might be inclined to call it democratic regardless of how its constitution reads”. Charles Tilly, *Democracy* (Cambridge: Cambridge University Press, 2007), 7

2 Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Routledge, 2006), 269.

3 Samuel P. Huntington, *The Third Wave – Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991), 6.

4 Peter H. Solomon Jr., “Judicial Power in Authoritarian States: The Russian Experience,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (Cambridge: Cambridge University Press, 2008), 263.

5 Rebecca Bill Chavez, “The Rule of Law and Courts in Democratizing Regimes,” in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, Gregory A. Caldeira (New York: Oxford University Press, 2008), 63.

6 Jean-Jacques Rousseau, *Du Contrat social* (Edition Gallimard, 1964), 252.

7 Jean-Jacques Rousseau, *Considérations sur le gouvernement de Pologne*, ch. VII

This paradox of democracies may be overcome only by a broader understanding of the accountability, which should run “not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e. other institutions) that can call into question, and eventually punish improper ways of discharging the responsibility of a given official”.<sup>8</sup> It follows that the success of democracy is dependent on the rule of law for it requires “an effective system of horizontal accountability that is composed of government institutions that hold one another accountable to the law and to the public”.<sup>9</sup> Without these institutions, among which an empowered and autonomous judiciary plays an essential role, dominant actors have little or no incentive to obey constitutional constraints on their exercise of power. Accordingly, “an independent judicial branch is part of a larger system of overlapping and mutually reinforcing agencies of horizontal accountability”.<sup>10</sup>

As a matter of fact, there is no question in legal and political theory that judicial independence is essential for the establishment and preservation of rule of law, inasmuch as it is also undisputed that, to the extent to which democracy can't function without the rule of law, judicial independence is a prerequisite for it. On the one hand, it is a guarantee that the justice will be given in each and every case to the parties in dispute, and, on the other, it is instrumental in legitimizing legal and political system, as a whole. In that respect, it has been recognized since the Antiquity that when people dispute, they take refuge into the judge, for “to go to judge is to go to justice”.<sup>11</sup> What is implied in this idea is that in order for the judge to be able to resolve disputes impartially and to pass judgments which will be accepted by the rival parties, she must be independent and free from any external pressure and influence.

Apart from being an ideal that the “judicial decisions should not be influenced in an inappropriate manner by considerations judged to be normatively irrelevant”,<sup>12</sup> judicial independence has also its institutional dimension consisting of formal safeguards that serve to insulate judges against the inappropriate considerations in the performance of their adjudicative function. While the guarantees of substantive independence aim to safeguard legal security directly, by consecrating the autonomy of the decision-making process, mechanisms of personal independence strive to secure the rendering of justice from the indirect influences. This type of independ-

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8 G. O'Donnell, “Delegative Democracy?,” *Journal of Democracy* 5 (1994): 61-62. Quoted in: Chavez, “The Rule of Law,” 65.

9 Chavez, “The Rule of Law,” 65.

10 Chavez, “The Rule of Law,” 65.

11 It was already Aristotle who noticed that men between whom there is injustice act unjustly by “assigning too much to oneself of things good in themselves and too little of things evil in themselves”, and that “this is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant. The magistrate on the other hand is the guardian of justice, and, if of justice, then of equality also”. Aristotle, *Nicomachean Ethics*, Book V

12 Georg Vanberg, “Establishing and Maintaining Judicial Independence,” in *The Oxford Handbook of Law and Politics*, K. E. Whittington, R. D. Kelemen, G. A. Caldeira, eds. (New York: Oxford University Press, 2008), 100.

ence is directed primarily to protect the judge as a person from the undue control of the executive and legislative branch, but it is not confined only to these concerns, as it also includes measures of judicial protection against potential pressures from the parties to the case. The most important guaranties in this respect are: the permanent tenure of judicial office, protection from transfers and the adequate remuneration of judges. In particular, the adequate conditions and procedure for the appointment to and termination of judicial office enjoy a special status among the guarantees of judicial independence. By their nature, they fall under the categories both of substantive and personal guarantees of judicial independence.

These institutional safeguards are, however, effective only to a limited degree, for in nascent democracies judicial independence is conditioned to a great deal by the strategic choices of relevant actors. Namely, political branches of government will refrain from interfering into the judicial decision-making only in so far as the costs of disobeying the rule of law outweighs the benefits. Thus, the judicial independence becomes possible when no single actor or group of actors has sufficient power to dominate: “Where a ruling party foresees that it will remain in power indefinitely, the development of judicial autonomy is unlikely. In contrast, where two or more parties compete aggressively with one another, a ruling party is likely to accept and even promote autonomous courts”.<sup>13</sup>

In instances where the separation of powers framework is not sufficiently effective to ensure judicial independence and autonomy of the courts, other, non-state actors, such as civil society and international community, may contribute significantly to it. As a matter of fact, the dense interaction between the judicial support network<sup>14</sup> and political actors will be determinant for the defence of the rule of law in nations where those in power have hardened against it. “By providing alternative sources of information and increasing the demand for change, reformist networks can foster vertical accountability, which is secured through the electoral process. A reform coalition can impose electoral costs on subordination of the courts by mobilizing public opinion against state actors that subordinate the courts and by advancing the cause of opposition parties”.<sup>15</sup>

The case of Serbia precisely shows how, in the absence of the effective institutional mechanisms, the international community, embodied primarily in the European Union, and animated by Serbian civil society has managed to reverse the harmful effects of the politically envisaged and conducted reform of the judiciary.

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13 Chavez, “The Rule of Law,” 68.

14 The term refers to “institutions and associations, both domestic and transnational, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions if they come under attack”. Tamir Moustafa and Tom Ginsburg, “Introduction: The Function of Courts in Authoritarian Politics,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (Cambridge: Cambridge University Press, 2008), 13.

15 Chavez, “The Rule of Law,” 71.

### 3. Importance of the judiciary in the constitutional architecture of the European Union

It is tempting for a student of the EU government to project on it well known constitutional schemes, borrowed usually from the contemporary federal political systems.<sup>16</sup> Thus, there is an executive organ (Commission) counterbalanced by a legislative body, representing the Member States (Council), on one side, and the citizens of the Union (European Parliament), on the other side. The European Council exercises the functions of a collegial head of state, whereas the Court of Justice and the General Court ensure that the separation and distribution of powers within the EU is observed. In the words of Denys Simon, the Commission is the detainer of the integrative legitimacy, the inter-state bodies are the expression of the inter-governmental legitimacy, the European Parliament is the centre of the democratic legitimacy, and the Court of Justice, together with the General Court, is the holder of the judicial legitimacy.<sup>17</sup>

The judicial system of the EU is, nevertheless, more complex than that, as “there is a joint responsibility between national courts and the Union courts for interpretation and maintenance of EU law”.<sup>18</sup> The Union courts<sup>19</sup> have an exclusive jurisdiction to declare EU measures invalid and to provide authoritative interpretations of EU law across the Union, whilst national courts are in charge of the adjudication of disputes.<sup>20</sup> Insofar as the Treaties entrust national courts with the authority to apply the Union law in the resolution of disputes, a specific procedural instrument had to be envisaged which would enable the uniformity of interpretation and application of the Union law within all of 27 Member States. In the absence of an organic hierarchy between the Union judges and national judges the Treaties have established a mechanism of their cooperation based on the preliminary reference (Art. 267 TFEU) made by the national courts to the Court of Justice,<sup>21</sup> intended to bring

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16 What is meant by the “federal political systems” is “a broad category of political systems in which, by the contrast to the single central source of authority in unitary systems, there are two (or more) levels of government thus combining elements of shared-rule through common institutions and regional self-rule for the governments of the constituent units”. Ronald L. Watts, *Comparing Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 1999), 7.

17 Denys Simon, *Le système juridique communautaire* (Paris: Presses Universitaires de France, 2001), 183.

18 Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge: Cambridge University press, 2010), 143.

19 Article 19 (1) TEU defines the Union courts in the following way: “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed”.

20 This obligation of the national courts follows from the principle of sincere cooperation stated in Article 4 (3) TEU (“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”), and is more concretely framed in Article 19 (2) TEU: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

21 The nature of the relationship between the Court of Justice and the national court in preliminary reference proceedings is rather co-operative than hierarchical. A reference to the Court of Justice should not be regarded, in any sense, as an appeal against the decision of the national court, but more as a dialogue between the former and the latter.

about identity of the meaning and scope of the Union law rules in different national jurisdictions.<sup>22</sup> This partnership between two levels of judiciary became essential to the Court of Justice, making up to two-thirds of its case-law and providing the Court with the opportunity to introduce important constitutional concepts such as the supremacy and direct effect of Union (formerly Community) law, as well as to give its decisive holdings on substantive EU law.

It follows that the EU judicature is composed of the Court of Justice, the General Court and specialized courts (“The Court of Justice of the European Union”), as well as of the Member States judiciaries. National courts are, therefore, not only an integral part of the EU judicial system, but also responsible for the great majority of the Court of Justice’s case-law. This judicial structure, underpinned by the principle of sincere cooperation of Member States (in ensuring the effective legal protection in the fields covered by Union law) and preliminary reference procedure, runs a double risk of being ineffective, if national courts do not possess necessary autonomy and knowledge to resolve the disputes arising from application of the EU law,<sup>23</sup> and of saturating the Court of Justice with poorly drafted, irrelevant, and premature references, again if the national courts are not sufficiently independent and competent in their work.<sup>24</sup> Accordingly, it is primarily for the national judge to apply the European law, which he does on a daily bases.<sup>25</sup>

Given this essential role of the Member States’ judiciary in the application of the EU law and in putting the Court of Justice in action, it is no surprise that the European Council’s Copenhagen Declaration (1993) concerning the relations between the Community and associated countries of Central and Eastern Europe required “that the candidate country has achieved stability of institutions guaranteeing... the rule of law”. As a result, the European Commission regularly assesses, in its progress reports, the role and functioning of the judiciary in the associated states, as well as the state of its independence,<sup>26</sup> the reform of the judicial system being “a key of the European Partnership”.<sup>27</sup> And although the Charter of Fundamental Rights of

22 Article 267 provides that the Court of Justice shall have jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties, and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court

23 If a provision of EU law is directly effective domestic courts must not only apply it but, following the principle of primacy of EU law, must do so in priority over any conflicting provisions of national law. Josephine Steiner, Lorna Woods, *EU Law* (Oxford: Oxford University Press, 2009), 106.

24 Namely, one has to bear in mind in that respect that the Union court structure is “a flat court structure of ‘first, and then equals’, in which all national courts are granted equal possibilities to make a reference to the Court”. Chalmers, Davies and Monti, *European Union Law*, 155.

25 Bernard Stirn, “Juge national,” in *Dictionnaire critique de l’Union européenne*, ed. Yves Bertoncini et al. (Paris : Armand Colin, 2008), 249.

26 See in that respect *Judicial Independence in the EU Accession Process*, Open Society Institute 2001.

27 See for instance, *Serbia 2009 Progress Report*, at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2009/sr\\_rapport\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2009/sr_rapport_2009_en.pdf), 11.

the European Union<sup>28</sup> guaranties “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” (Art. 47 (2)), “the EU has not developed extensive or definitive legal standards or recommendations for judicial independence”.<sup>29</sup> As a result, it is in the current Member States’ own varied practices that one has to look for guidance for developing an objective assessment on what the Europe’s commitments to judicial independence are, which is also reflected in the EU recommendations to the candidate States in the Progress Reports.<sup>30</sup>

In the past four years the European Commission has been reporting on Serbia’s poor efforts, in general, for bringing its judicial system in line with European standards, whereas in 2012 it found, in particular, that “there was little progress regarding the independence of the judiciary”.<sup>31</sup> As Serbia handed over its application for the EU membership in December 2009, and was finally granted the status of a candidate country in March 2012, the European Commission reports on the country’s progress towards the EU and its recommendation became increasingly important in the power politics in Serbia. With such a leverage, which had not only political, but also economic repercussions, EU was in a position to push government to re-examine the effects of the deficient reform of the judiciary.

#### 4. Reform of the judiciary in Serbia

Contemporary challenges of judicial independence in Serbia are marked by the determination of the political branches of government to reshape the personal composition of the judiciary. This demise was affected by the legislative termination of judicial offices in whole, in the aftermath of the adoption of the new Constitution in 2006. While the desire of the executive and legislative power to subject the judicial power to itself need not be surprising from the historical and comparative perspective, such an open and direct attack on judicial independence can’t be described as expected for a country which in the XXI century purports to be democratic and governed by the rule of law. Another salient feature of this “judicial reform”, as it was presented by the political officials, was the full involvement of the quasi-judicial and judicial instances in the whole process, which gave to it an image of legitimacy. That was the case, in the first place, with the High Judicial Council, but also with the Constitutional Court which played a rather controversial role. However, the complex structure of the government, typical for the contemporary, nascent liberal democracies, combined with the pressure of the civil society and the international players (primarily, the EU) did eventually help mitigate some of the initial effects of the reform. In this chapter the case of the general reappointment of the judiciary

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28 Signed and proclaimed in 2000, and entered into force with the ratification of the Lisbon Treaty in 2009.

29 Judicial Independence in the EU Accession Process, 27.

30 Judicial Independence in the EU Accession Process, 27-28.

31 Serbia 2012 Progress Report, at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/sr\\_report\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_report_2012_en.pdf), 49.

in Serbia will be presented through the constitutional framework of the guarantees of judicial independence, and the politico-juridical battle which ensued for and against the reform of the judiciary.

#### 4.1. Constitutional Guarantees of Judicial Independence in Serbia

The current Serbian Constitution was adopted in 2006 on a referendum. Not only that the procedure of its adoption was in conformity with the preceding 1990 Constitution (formal continuity), but its institutions, especially the system of government and the territorial organization, were greatly influenced by the 1990 Constitution (substantive continuity). Nevertheless, the new Constitution did modernize the institutional set-up and proclaim much more developed charter of human rights, providing, among other things, for the integration of the international law norms in the domestic legal system.<sup>32</sup>

In respect of the guaranties of judicial independence, the 2006 Constitution made some important improvements, but it also went below many standards set by the 1990 Constitution. Hence, although the substantive independence of judges is guaranteed completely, there are certain normative incoherencies which may pose a threat to the judicial independence. The principal institutional guarantor of judicial independence – the High Judicial Council was constitutionalized, while some significant aspects of the personal independence of judges lost their constitutional ground and were delegated to the legislative regulation.

The substantive independence is defined in a modern and scholarly way: “The courts shall be autonomous and independent in their work and shall adjudicate on the basis of the Constitution, laws, and other general acts, when it is envisaged by the law, generally accepted rules of international law, and ratified international treaties” (Art. 142 (2)). Accordingly, “every influence on judges in the exercise of their judicial function shall be forbidden” (Art. 149 (2)), and “a judge may not be held responsible for its opinion or vote expressed in the process of adjudication, except in the case of a criminal act of breach of law by a judge” (Art. 151 (1)).<sup>33</sup>

The 2006 Constitution provides for the High Judicial Council, a type of politico-judicial body which received a broad recognition, both from the Constitution makers and academics, as the guarantor of judicial independence.<sup>34</sup> The Constitution stipulates that “the High Judicial Council shall be an independent and autonomous in-

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32 Official Gazette of the Republic of Serbia, no. 1/06

33 However, in the subsequent constitutional provisions the afore cited list of sources on the basis of which the judges adjudicate was reformulated to the point of undermining the legal security of citizens and substantive independence of judges. On one hand, “judicial decisions shall be based on the Constitution, law, ratified international treaty, and on a regulation, adopted on the basis of a law” (Art. 145 (2)), while on another, “a judge shall be independent in the exercise of its function and subjected only to the Constitution and law” (Art. 149 (1)).

34 Its predecessor – the High Council of Magistrature – was for the first time introduced in the Serbian legal system in 2001, on a legislative level.

stitution which secures and guarantees independence and autonomy of the courts and judges” (Art. 153 (1)). It is composed of 11 members - president of the Supreme Court of Cassation, Minister of Justice and president of the pertinent committee of the National Assembly, ex officio, and of eight members, appointed by the National Assembly (Art. 153 (2) and (3)), who enjoy the same type of immunity as judges (Art. 153 (7)). The appointed members, sit in the Council for a period of five years, and are selected from the following legal professions: six of them are judges with a permanent tenure, and two are renowned and distinguished lawyers, with at least 15 years of experience in the profession, out of whom, one is an attorney, and the other is a professor of a faculty of law (Art. 153 (4) and (6)). The role of the High Judicial Council in guaranteeing substantive and personal independence of judges is manifested primarily in its authority to appoint and dismiss judges, to propose to the National Assembly the persons who are appointed for the first time to a judicial office, to propose to the National Assembly the appointment of the president of the Supreme Court of Cassation and of presidents of courts, and to participate in the dismissal of the president of the Supreme Court of Cassation and of presidents of courts (Art. 154). In addition to this, a judge may not be deprived of his liberty, in a process started because of an alleged criminal act, committed in the exercise of the judicial function, without the consent of the High Judicial Council (Art. 151 (2)).

While, on one account, the safeguards of the personal independence of judges were improved in 2006, due to the constitutionalization of the High Judicial Council, they were, on the other, weakened by not being guaranteed fully by the Constitution. Hence, a judge is appointed to a permanent tenure, except for a person who is appointed for the first time to a judicial office, and who exercise it for a period of three years (Art. 146). National Assembly appoints judges to three years of office, on a proposal of the High Judicial Council, while the Council appoints judges to a permanent tenure of judicial office (Art. 147 (1) and (3)). Apart from the departure from the permanent tenure of judicial office, which was guaranteed without exceptions in the 1990 Constitution, the new Constitution went below the old one, also, by failing to state all the reasons for the termination of the judicial office. Accordingly, “the procedure, basis and reasons for the termination of judicial office... shall be regulated by law” (Art. 148 (3)). It is only stipulated that “the office of a judge shall cease on his request, upon the fulfilment of the conditions stipulated in the law, and by the dismissal, for the reasons, provided in the law, as well as if he is not appointed to a permanent tenure” (Art. 148 (1)). Nevertheless, the Constitution introduces one important guarantee of judicial independence - right of appeal of a judge before the Constitutional Court against the decision of the High Judicial Council on the termination of his office (Art. 148 (1)). Finally, the Constitution explicitly provides for a right of a judge to exercise his function in the court in which he was appointed, with two exceptions - he may be transferred or reassigned to another court, without his consent, in case of abolishment of a court or of a greater deal of its jurisdiction, in conformity with the law (Art. 150).



## 4.2. Politico-judicial battle for and against the reform of the judiciary

Reform of the judiciary in Serbia, consisted mainly of the general reappointment of judges. This demise of the judiciary was achieved, as mentioned, by the legislative termination of all judicial offices, in the aftermaths of the adoption of the new Constitution. More precisely, the reform was announced by the Constitutional Act on the Implementation of the Constitution, adopted in November 2006 (a few days after the popular ratification of the Constitution), and put in place by the Act on Judges in December 2008.<sup>35</sup> This reshaping of the personal composition of the judicial branch caused an immediate reaction of the judges, gathered around the Judges' Association of Serbia, who first challenged the constitutionality of the given legislative measure, and then the constitutionality and legality of the individual decisions of the High Judicial Council on the termination of office of those (837) judges who were not appointed in accordance with the Act on Judges.

In a number of reviews of constitutionality which ensued, the Constitutional Court took different positions which paralleled the changing situation on the political scene.<sup>36</sup> After, in the first step, it reviewed the constitutionality of the given Act, and indirectly confirmed its constitutionality in July 2009,<sup>37</sup> it examined, throughout 2009 and 2010 appeals of the non-reappointed judges against the acts of the High Judicial Council (the Saveljic and Tasic decisions).<sup>38</sup> Whereas in the former the Constitutional Court adjudicated in favour of the constitutionality of the general reappointment of the judiciary, contrary to the prevalent opinion of the Serbian legal doctrine, in the latter it gave a full support to the procedural rights of judges in the proceedings on the termination of their offices, relying on the fair trial standards set out by the European Convention on Human Rights and developed by its Court.<sup>39</sup>

Following the Saveljić, and especially the Tasić decision, which had implications for the whole process of appointment of judges, the National Assembly passed the Law amending the Law on Judges in December 2010.<sup>40</sup> The amending legislation provided for an additional internal control of the Council's decisions by the Council itself, and it suspended the entry into force of a decision on the termination of judicial offices, until the final, second instance decision of the Council. Apart from the introduction of the general right of petition to the Council against its first in-

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35 Official Gazette of the Republic of Serbia 116/08.

36 For more information on these developments up to 2011 see : Tanasije Marinković, "Contemporary Challenges of Judicial Independence in Serbia" in *Public Law in Serbia Twenty Years After*, ed. Violeta Beširević (London: Esperia Publications, 2012), 133-42.

37 Decision, no. IUz 43/09, para. 7.

38 Decision, no. VIIIU-102/2010 and Decision, no. VIIIU-189/2010.

39 For more information on the reasoning of the Constitutional Court in Saveljic and Tasic decisions see: Violeta Beširević and Tanasije Marinković, "Serbia in 'a Europe of Rights': The Effects of the Constitutional Dialogue between the Serbian and European Judges" *European Review of Public Law / Revue Européenne de Droit Public*, vol.24, 1 (2012).

40 Official Gazette of the Republic of Serbia, no. 101/10

stance decision (Art. 1), the Law interfered directly into the on-going proceeding of the non-reappointed judges before the Constitutional Court by turning their appeals to the Court into the petitions to the Council (without touching into their right to file eventually an appeal to the Court against a second instance decision of the Council), and by providing that the Council would adopt new guidelines for the assessment of expert knowledge, technical ability and dignity necessary for the appointment (Art. 5 (1), (2), (3) and (6)). It also guaranteed to these petitioners the right to be informed about the case, to be heard before the Council and to receive a reasoned decision of the Council (Art. 5 (5)). Furthermore, the amending legislation allowed for the Council to re-examine its decisions on the appointment of the judges to a permanent tenure, and on the proposals made to the National Assembly for the appointment of the judges who were appointed for the first time to a judicial office (Art. 6 (1)).

Legal scholars and other distinguished members of the legal profession protested against a repeated legislative breach of the constitutional guarantees of judicial independence, by making an appeal to the professional and general public.<sup>41</sup> Although welcoming the efforts of the authorities to overcome some of the major failures in the accomplishment of the reform of the judiciary, the professional public denounced, as contrary to the very idea of rule of law, and to the elementary legal security, as well as to the idea of the separation of powers, the decision of the legislator to turn by its own will a legal remedy filed before the Constitutional Court into another non-existent remedy, filed before the highest institution of judicial administration.

However, the most vocal in informing the domestic and international audience about the general reappointment of the judiciary in Serbia and its constitutional and legislative deficiencies, was the professional organization of judges – Judges' Association of Serbia. Being directly and personally interested in the outcome of the reappointment process, members of the Judges' Association of Serbia regularly issued press statements and addressed letters to other local, regional and international professional organizations, as well as to the regional and international governmental organizations.<sup>42</sup>

Nevertheless, of all the actors on the local and international scene, it appears that the most influential "partner" of the non-reappointed judges in Serbia was the EU, due to the Serbia's ambition to become its member. As Serbia handed over its application for the EU membership in December 2009, the European Commission's reports on the country's progress towards the EU became increasingly important.

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41 For the text of the appeal and its signatories see: [http://www.sudije.rs/files/file/doc/Apel%20strucne%20politickoj%20i%20opstoj%20javnosti%2015\\_2\\_2011%20final.doc](http://www.sudije.rs/files/file/doc/Apel%20strucne%20politickoj%20i%20opstoj%20javnosti%2015_2_2011%20final.doc)

42 On those activities of the Judges' Association of Serbia and the responses which it received from the international audience, see: [http://www.sudije.rs/files/content\\_files/informatorredovnibroj2mart2010.pdf](http://www.sudije.rs/files/content_files/informatorredovnibroj2mart2010.pdf)

And, in 2010 Progress Report the Commission pointed out that the "reappointment procedure for judges... was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary".<sup>43</sup>

It would be impossible not to see a certain correlation between the persisted engagements of the Judges' Association of Serbia to draw attention to the developments in the Serbian judiciary, the European Commission's pressure on Serbia to make a bigger "progress towards further bringing its judicial system into line with European standards, which is a key priority of the European Partnership",<sup>44</sup> and the subsequent Serbian legislation ordering the High Judicial Council to act upon the appeals-turned-into-petitions of the non-reappointed judges.

In a review of constitutionality which started soon after the enactment of the legislative changes, but which ended in December 2011, the Constitutional Court upheld the "reform of the reform" of the judiciary, invalidating only one minor provision of the Law (art. 6, (1) in fine).<sup>45</sup> The Court even refrained from entering into the examination of the legislative interference in the on-going proceedings engaged by the non-reappointed judges, implying thereby that the retroactive transformation of the judges' appeals to the Court into their petitions to the Council and the announcement of the new guidelines for the assessment of expert knowledge, technical ability and dignity necessary for the appointment of judges did not raise the questions of (un)constitutionality.<sup>46</sup>

Until April 2012, the High Judicial Council finalized the review procedure for the non-reappointed judges. Although it issued some positive rulings, bringing back as of July 2011 certain number of judges to their judicial function,<sup>47</sup> serious procedural shortcomings were identified, including the lack of quorum and voting patterns in the High Judicial Council.<sup>48</sup> This raised concerns that contrary to the guidelines for the assessment of expert knowledge, technical ability and dignity necessary for the appointment the ex-officio members (the President of the Supreme Court of Cassation, the Minister of Justice and the President of the Parliamentary Committee for Judicial Affairs), who had participated in the initial reappointment procedure, had substantially influenced the decisions taken on the basis of the review commissions' proposals. Evidence used in the decisions was not always admissible according to the guidelines or was introduced at a too late stage. For these reasons, in July 2012, the Constitutional Court revoked all the decisions taken by the High Judicial Coun-

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43 See [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/sr\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf), 10.

44 See [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/sr\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf), 10.

45 Decision IUz-1634/10, para. 4.

46 For an opposite opinion – that the constitutional principle of non-retroactivity was violated on two distinctive grounds – see Vesna Rakić Vodinec, "Reforma pravosuđa u Srbiji," *Sveske za javno pravo – Blätter für Öffentliches Recht* 9 (2012): 19.

47 Official Gazette of the Republic of Serbia, no. 56/11

48 On these shortcomings see Serbia Progress Report 2012: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/sr\\_rapport\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf), 49.

cil of non-reappointment challenged by the petitioners so far and instructed the High Judicial Council to reinstate all of them.<sup>49</sup>

Although positive in its outcome, by neutralizing the effects of the unconstitutional and nontransparent reform of the judiciary, this decision, unfortunately, raised serious doubts as to the autonomy of the Constitutional Court's decision-making. First of all, the timing of the decision was indicative – it came two months after the general elections which had brought down from power the ruling Democratic Party – the main promoter of the judicial reform. Secondly, in its Decision on the constitutionality of the judges' appeal, the Court entered into the review of the constitutionality of the provisions of the Law on Judges, mixing thereby two different procedures – review of the constitutionality of the High Judicial Council's decisions and of the Law on Judges. Furthermore, it indirectly adjudicated on the unconstitutionality of the provisions of the Law on Judges which it previously validated – and that only couple of months earlier (December 2011). Finally, the given provision – allowing for the *ex officio* members of the High Judicial Council, who took part in the first instance decision-making on the non-reappointment, to participate as well in the second instance decision-making (upon a remonstrative legal remedy) – is not unconstitutional in itself, although the Court declared it so. However, the transformation of the legal remedy filed before the Constitutional Court into another freshly established (previously non-existent), exceptional remedy, filed before the High Judicial Council, is unconstitutional, but the Court refrained even from examining it less than a year ago.

## 5. Conclusion

In the rule of law and democracy judicial independence is a highly valued institutional goal. It has been considered as crucial not only for the rendering of justice in individual cases, but also for the building of public confidence in the legal and political system, as a whole. Thus, the generally recognized importance of the institutional setup and concrete formal safeguards of its protection, especially for the nascent democracies – those with less developed tradition and culture of judicial independence. The separation of powers framework and other formal guarantees of judicial independence may however prove to be ineffective, which raises the weight of the domestic civil society and international community in this process. Indeed, the international actors, with the support of a vibrant and well organized domestic civil society may be very successful in pushing for independent courts in democratizing regimes. Namely, “nascent democracies that rely on foreign aid are likely to respond to pressure from international agencies that advocate judicial autonomy”.<sup>50</sup>

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49 Decision VIIIU-534/2011.

50 Chavez, “The Rule of Law,” 73.

The case of the general reappointment of the judiciary in Serbia confirms the above thesis that where the permanent tenure of judicial office and the fair and legally based process of appointment to a judicial office are at question, formal safeguards have their value, but only to a limited extent. Despite the constitutional framework of the formal guarantees of judicial independence, which is, more or less, at an equal footing with the other European Constitutions, the political part of government felt free to take the advantage of the adoption of the new Constitution, to operate a general re-composition of the judiciary. Thus, using the legislative means, it terminated offices of all the judges in the country and ordered general reappointment of the judiciary. Furthermore, the Constitutional Court validated these measures by judging them to be in conformity with the newly adopted Constitution. The final downgrading of the system of constitutional guarantees of judicial independence ended in the hands of the High Judicial Council, which effected the general reappointment of the judiciary non-transparently and without reasoning its decisions, rising serious doubts as to the objectivity of the whole process.

Nevertheless, the judicial support network consisting of the domestic civil society and international community managed to reverse the reform and neutralize its effects, demonstrating the power that the non-state factors may have in furthering the judicial independence in democratizing regimes. In the given case the EU played a particularly important role – as the timing of the reform framed with the attempts of Serbia to get the status of a candidate country – contributing, through its political and economic leverage, to the strengthening of the judicial independence in Serbia in the process of its integration.

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# **THE CHALLENGES OF THE FREEDOM OF RELIGION, THE STATUS OF THE RELIGIONS IN THE REPUBLIC OF MACEDONIA AND THE INTEGRATION IN THE EUROPEAN UNION**

**Aleksandar Spasenovski**

## **ABOUT THE AUTHOR**

Aleksandar Spasenovski, M.Sc. was born in 1980 in Skopje. In 2002, he graduated from the Faculty of Law "Iustinianus Primus", Department of Political Sciences, thus acquiring the vocational title Bachelor of Science in Political Science. In March 2003, he began his master studies in International Law and Politics at the same faculty – after passing all the necessary exams and successfully defending his master thesis entitled "The Head of State and Foreign Policy – the case of the Republic of Macedonia", he acquired the vocational title Master of Science in International Politics. In February 2008, he registered his Ph.D. thesis at the Faculty of Law "Iustinianus Primus" in the area of law and political science, entitled "The constitutional and legal status of religions and religious freedom (a comparative analysis with a focus on the Republic of Macedonia)". From 2001 to present, he was continuously re-elected as junior faculty member, junior assistant and teaching assistant in the scientific field of Constitutional law and political system. In the period 2000–2002, he worked in the Assembly of the Republic of Macedonia as part of the Internship programme organized by the National Democratic Institute. In 2006 and 2007, he was invited to participate in the capacity of researcher in the project "Conflict settlement through Europeanization – Greece and its' neighbours Macedonia and Turkey" implemented by the Faculty of political sciences within the University of Duisburg – Essen from the Federal Republic of Germany, whereas in 2005 and 2006 he worked as a researcher for the Western Balkans in the Euro Balkan Institute in Skopje. At the parliamentary elections in 2006, 2008 and 2011, he was elected MP in the Assembly of the Republic of Macedonia. He is the author of several books – "Balkans at the crucifix" (2005), published by "Matica Makedonska", and "The Head of State and Foreign Policy" (2008), published by "Evropa 92", as well as the graduation thesis entitled "The development of relations between the Republic of Macedonia and the European Union" (2004), published by Belgrade Open School and Ulof Palme International centre. He is the co-author of the publication "The world in 2005" (2006), published by "Eurobalkan Press", as well as many other scientific, expert and popular works. During his graduate and post-graduate studies, Spasenovski also obtained the talented students scholarship awarded by the "Konrad Adenauer Stiftung".

## ABSTRACT

By the expansion of a representative democracy, the overwhelming conviction was that the religious uniformity is essential basis for stable cohesive society that could not pass without the use of force. In this regard, at the beginning of the 20th century, the answer of the Western European nations was the creation of democratic standards of religious liberty which were accepted by the global organizations, attempting to further improve them. In such historic conditions, Republic of Macedonia as an independent state has designed its constitutional system that struggles to offer extensive safeguards for the exercise of freedom of religion on the foundation of a) the international European standards, b) the traditions of the majority population that belong to Orthodox Christianity and c) the realities of the existing religious landscape. The challenge of the Macedonian model of religious freedom is focused on offering appropriate guarantees for achieving a perfect balance among the three referred factors. In this sense, the central argumentation of this work is that the European standards set up primarily by the Council of Europe and by the European Union might be a vital element which will provide realization of the intended equilibrium among the three factors that contribute towards defining the essence of the Macedonian pattern of secularism.

## РЕЗИМЕ

Со проширувањето на претставничка демократија, постоело силно верување дека верското единство е суштинска основа за стабилно кохезивно општество кое што не може да помине без употреба на сила. Во тој поглед, на почетокот на 20-тиот век, одговорот на западноевропските нации беше создавање на демократски стандарди за верска слобода, кои беа прифатени од страна на глобалните организации, во обид дополнително да ги подобрат. Во вакви историски услови, Република Македонија како независна држава го дизајнираше својот уставен систем кој се обидува да понуди широки заштитни мерки за остварување односно практикување на слободата на религијата врз темелите на а) меѓународните европски стандарди, б) традициите на мнозинското население кое припаѓа на православно христијанство и в) на реалноста на постојниот верски пејзаж. Предизвикот на македонскиот модел на верска слобода е насочен е кон изнаоѓање соодветни гаранции за постигнување на совршена рамнотежа меѓу трите наведени фактори. Во таа смисла, централната аргументација на овој труд е дека европските стандарди поставени првенствено од страна на Советот на Европа и од страна на Европската унија може да бидат фундаментален елемент кој ќе обезбеди воспоставување на предвидената рамнотежа меѓу трите фактори кои придонесуваат кон дефинирање на суштината на македонскиот модел на секуларизам.

Key words:

freedom of religion, secularism, Republic of Macedonia, European Union, Council of Europe.



# THE CHALLENGES OF THE FREEDOM OF RELIGION, THE STATUS OF THE RELIGIONS IN THE REPUBLIC OF MACEDONIA AND THE INTEGRATION IN THE EUROPEAN UNION

## Introduction

The idea that all human beings are equal and have the right to fully exercise their freedom of religion is being promoted primarily with the development of representative democracy in the light of the establishment of the belief of the fundamental importance of human dignity<sup>1</sup>. Despite this fact, throughout major part of human history, forms of state government were largely monarchical, and sometimes even totalitarian, where the dominant belief of the rulers was that common religion is the foundation of a stable society – as their main aim<sup>2</sup>. Therefore, the obstruction of a particular religion by the state towards its dependants constitutes one of the typical forms of action which, obviously, could not go along without the use of force<sup>3</sup>. This standpoint leads to the conclusion that the political history of nations and states is filled with events of religious intolerance, religious wars or inquisitions<sup>4</sup>, to which the western European states in the early 20th century responded with the establishment of the democratic principle of religious freedom where governments proclaim their neutrality on religious matters<sup>5</sup>, leaving every citizen to decide in terms of their own religious beliefs<sup>6</sup>.

Regardless from this development of political consciousness, even today the protection of religious freedoms and rights is an extremely serious task for the states<sup>7</sup>, because of the fact that the process of its realization requires creation of coherent legal rules that will ensure balance in the realization of the rights and duties for the members of the dominant religion, the members of minority religions, and those

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1 For historical development of human rights conceptions see Biran Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*, 1997.

2 Darek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nation Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *Brigham Young University Law Review*, 2002, pp.: 220.

3 See Oded Haklai, *Religious-Nationalist Mobilization and State Penetration Lessons From Jewish Settlers' Activism in Israel and the West Bank*, *Comparative Political Studies* no.: 6, Sage Publications, June 2007, pp.: 713-730.

4 See Alexander Kyrlezhev, *Relationships Between Human Rights Concept And Religious Values*, *Religion in Eastern Europe* no.: 1, February 2007, pp.: 41-47.

5 See Peter van der Veer и Hartmut Lehmann, *Nation and Religion Perspectives on Europe and Asia*, Princeton University Press, Princeton New Jersey, 1999.

6 Darek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nation Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, op.cit.

7 See James F. Harris, *Religion and Liberal Democracy*, *The Humanist*, May-June 2006, pp.: 26-30.

citizens who have no religious belief and belonging<sup>8</sup>. International organizations are also facing the aforementioned challenge<sup>9</sup>, in an attempt to advance the standards related to the realization of human rights and liberties<sup>10</sup> and whose essential component is the freedom of religion<sup>11</sup>.

The breakup of Socialist Macedonia from Federal Yugoslavia<sup>12</sup> happened in the light of major tectonic shifts in the former European socialist/communist countries in the last decades of the 20th century<sup>13</sup>, which were a result of their internal political, economic and social circumstances. Regarding Socialist Federal Republic of Yugoslavia, these processes brought to the surface the partially preserved national myths of constituent-nations, which on these premises set a new top priority – establishing nation states based on a democratic system, market economy and political pluralism according to the standards of the more developed Western European democracies<sup>14</sup>. Given the extremely opposing constitutional concepts, the one that was in the process of dissolution versus the new one that was in the process of establishment, and under pressure from the overall global trends, the process of violent breakdown of the former Yugoslavia started, leading to the emergence of the Republic of Macedonia as we know it today<sup>15</sup> – a sovereign, independent and democratic state, which committed itself to respect the generally adopted principles of

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8 Brice Dickson, *Tahe United Nations and the Freedom of Religion*, *International and Comparative Law Quarterly*, 1995, pp.: 327.

9 See Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, *Michigan Journal of International Law*, Summer 2004, pp.: 981-998.

10 See A. Raymond Randolph, *Spreading Democracy*, *Northwestern University Law Review* no.: 1, 2008, pp.: 431-432.

11 See Louis René Beres, *Religious Extremism and International Legal Norms: Perfidy, Preemption, and Irrationality*, *Case Western Reserve Journal of International Law* 6p.: 39, crp.: 709-730.

12 The dissolution of Yugoslavia was characterized by a series of military conflicts, lead on its territory, with the exception of Macedonia that gained independence peacefully. Wars were characterized by bitter ethnic conflicts between the Yugoslav People Armed Forces and the Slovenes in Slovenia; between Serbs, Croats and Bosnians in Bosnia and Herzegovina and between Serbs and Albanians in Kosovo. The bloody conflicts, the result of the dissolution of Federal Yugoslavia ended with the signing of the Dayton Peace agreement in 1995. From the collapse of this country five new countries emerged, Slovenia, Croatia, Macedonia, Bosnia and Herzegovina, and Federal Republic of Yugoslavia (consisting of Serbia and Montenegro). On May 21, 2006, as a result of a referendum Montenegro become independent, and thus Serbia. On February 17 of 2008, members of Parliament of Kosovo adopted the Declaration of Independence. Wars in Yugoslavia are considered one of the worst armed conflicts on the European continent after the Second World War, for which the UN formed an International Criminal Tribunal for the former Yugoslavia, which initiated proceedings for war crimes against a large number of participants in these military conflicts (See Petar Radan, *Break-up of Yugoslavia and International Law*, Routledge, 21.9.2001; Henry H. Perritt, *The road to independence for Kosovo: a chronicle of the Ahtisaari plan*, Cambridge University Press, Cambridge, 2010).

13 Public uprisings across the Eastern European countries began the process of collapse of communism. The events began in Poland year 1989, then continued in Hungary, East Germany, East Bulgaria, Czechoslovakia and Romania. The Soviet Union disintegrated in 1991, as a result of the decision of the Russian Federation and 14 other nations that declared their independence. Between 1990 and 1992, this system of government was also shattered in Albania as well as in Federal Yugoslavia. These processes had impact on other socialist countries outside Europe, such as Cambodia, Ethiopia and Mongolia, which also rejected this system of state order (See Bartłomiej Kaminski, *The Collapse Of State Socialism*, Princeton University Press, Princeton, New Jersey, 1991).

14 See Carole Rogel, *The Breakup of Yugoslavia and its Aftermath*, Greenwood Press, 2004.

15 See Brad K. Blitz, *War and change in the Balkans: nationalism, conflict and cooperation*, chapter 9 Andrew Rosos, *Disintegration of Yugoslavia: Macedonia's Independence and Stability in the Balkans*, Cambridge University Press, Cambridge, 2006, pp.: 110-118.

international relations contained in the documents of the United Nations (UN)<sup>16</sup>, as well as in European international and regional organizations.

## Challenges of freedom of religion and status of religions, and integration in the European Union

With the creation of the Republic of Macedonia out of the ruins of Socialist Yugoslavia, the national goal of creating an independent and democratic state was achieved. This generated the greatest legal discontinuity in Macedonian history by means of deinstitutionalizing and replacing the existing socialist order with democratic pluralism. This process, which took place gradually, also colloquially known/recognized as “democratic transition”, had its implications on the issues related to human rights and liberties, which contrary to the previous period, began to be authentically regulated by implementing the corresponding Western European standards. Such new constitutional and legal winds brought a new momentum in relation to matters related to the status of religious organizations, as well as religious rights and freedoms.

By establishing the new constitutional, legal and political order, Macedonia needed to meet the challenges of modern times. The order that was established with the adoption of the Constitution on November 17 1991<sup>17</sup> projected Macedonia as a civil and democratic state, in which the rule of law concept is being established and human rights, civil liberties and national equality are being guaranteed<sup>18</sup>.

Concerning the issues related to the relations with religious organizations, and in that sense, guarantees of religious freedom and rights, Macedonia has built a model that is based on:

- **First**, international Western European standards;
- **Second**, majority population traditions and customs of the orthodox version of Christianity, as well as
- **Third**, realities of the current religious landscape.

The challenge that the Macedonian model of relations with religious organizations, as well as guarantees of religious freedom and rights, as time has shown, lays in the ability to ensure proper balance between the three mentioned factors.

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16 Declaration on the plebiscitary citizens' will for a sovereign and independent Macedonian state, Macedonia, Assembly of the Republic of Macedonia, No. 08-3786, Skopje, 17.9.1991.

17 Constitution of the Republic of Macedonia Устав на Република Македонија, Official Gazette of Republic of Macedonia, year: XLVII, no.: 52, Skopje, 1991, pp.: 805-815.

18 Gerhard Robbers, Encyclopaedia of World Constitutions, Igor Spirovski (author), Macedonia, VB Hermitage, pp.: 551-555.

International Western European standards that have been incorporated in the Macedonian constitutional and legal system were built as a theoretical model for natural rights in the 17th and 18th century during the period of the Renaissance<sup>19</sup>, the enlightenment<sup>20</sup> and the protestant reformation<sup>21</sup>, which swept Western Europe<sup>22</sup> and North America<sup>23</sup>. According to these ideas, the human rights and freedoms were understood as a secularized version of Judeo-Christian ethics, whereas the issue of relations between the state and religious organizations was approached through the prism of the model of their separation<sup>24</sup>.

Based on the above-mentioned premises, in 1776, the American Declaration of Independence was adopted<sup>25</sup>, in 1789 in revolutionary France, the Declaration of the Rights of Man and Citizen was adopted<sup>26</sup>, and in 1791, the American Charter of Rights followed<sup>27</sup>. This set the basis of the contemporary system of human rights and liberties, which integral part are the Religious freedoms. Later, with the development of modern constitutionalism, these founding stones attained their place in constitutions of Western European countries, and in international documents whose pinnacle is the UN Universal Declaration of Human Rights of 1948<sup>28</sup>. On the foundation of these standards numerous international regional organizations were created, such as the Council of Europe (CE), but also the North Atlantic Treaty Alli-

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19 The renaissance is a socio-cultural movement of the 14th up until the 17th century, which appears in Italy, and from there it expands all over Europe. The term Renaissance in French language means to be reborn, and in the theory the same term is directly related to the term humanism. The supporters of this movement direct their views only to the human being, who is the centre of their research and their creative efforts, while opposing scholasticism and theology. According to the views of this movement the human should be free, and only s/he can be responsible for her/his own progress and happiness. Given the magnitude of the impact that the Renaissance made in the history, it is considered as a bridge between the Middle Ages and modern times. This movement is associated with painters like Leonardo Da Vinci and Michelangelo, and also with the political theorist Niccolo Machiavelli (See Jerry Brotton, *The Renaissance, A Very Short Introduction*, Oxford University Press, Oxford, 2006).

20 Enlightenment as a social, political, economic and cultural movement appears in the 17th century in Europe, and its basic purpose consisted in clarification of the dogmas of humanity. The literature at that time is secular and anti-feudal, and one of the fundamental properties is the preoccupation with science. In the field of legal and social life, the educators are developing the idea of "natural law", which involves freeing of life from religious, national and traditional characteristics. This offered a solution for the problems of religious and civil wars that destroyed the prosperity of Europe, establishing the basis of modern international law. The most famous names from this time are Grotius, Spinoza, Thomas Hobbes, David Hume, John Locke, Isaac Newton and others. The political ideas of that time had a decisive influence on the adoption of the American Declaration of Independence and the Bill of Rights, as well as the French Declaration of the Rights of Man and Citizen (See Martin Fitzpatrick et al., *The Enlightenment World*, Routledge, New York, 2004).

21 The reformation is the religious-political movement started in 1517 in Germany by Martin Luther (1483-1546 AD), and ended with the Peace of Westphalia in 1648. With the famous 95 theses Luther advocated the Bible to be the main source of Christian faith, the church to be modest, and religious rights to be performed in vernacular language. Luther's movement resulted with the breakup of the unity of the Catholic Church through the installation of the foundations of the Protestant version of Christianity (Encyclopaedia Britannica, op.cit.).

22 See Stathis N. Kalyvas, *Religion and Democratization: Belgium and Algeria*, Estudio/Working Paper 107, 1997.

23 See Sabine C. Carey et.al., *The Politics of Human Rights: The Quest for Dignity*, Cambridge University Press, Cambridge, 2010, pp.: 16.

24 Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, University of California Press, 2008, pp.: 64.

25 Declaration of Independence, op.cit.

26 Declaration of the Rights of Man and of the Citizen, op.cit.

27 Bill of rights, (archives.gov), 7.11.2011.

28 Universal declaration of human rights (ohchr.org), 7.11.2011.

ance (NATO) and the European Communities (EC), or the European Union (EU), which also, have adopted other international regulations, with which they further specified the legal frameworks, among others, and in relation to the above-mentioned issues by means of adopting other international conventions<sup>29</sup>, which were accepted by the Member States thus becoming part of their internal legal orders<sup>30</sup>.

The Macedonian model of secularism draws experience also from the majority population's traditions and customs to the orthodox version of Christianity, which, like the other remaining Orthodox ecumenism, takes the Byzantine Empire<sup>31</sup> as a model of an ideal state. Byzantium unlike the above analyzed international standards for separation of the church from the state, as we saw in the first part of this paper, is based on the principle of Unity (Symphony) between the two authorities<sup>32</sup>.

Namely, in the emperor, who is ruling the empire, the secular and the spiritual or ecclesiastical authority are fused<sup>33</sup>. In this model, the Orthodox Church is not accomplishing its primary goal solely on the basis of activity oriented towards achieving the fundamental spiritual premises, but the church also serves the worldly state whose integral part it is<sup>34</sup>. Therefore, if the church is not associated with the state, such a state is not completely functional. Because, among other things, the jurisdiction of the Orthodox Church is associated with specific state boundaries whereby if the country's borders extend predictably the jurisdiction of the church is also expanded<sup>35</sup>. And vice versa. If the jurisdiction of the church is expanded, in that case, political tendencies to change the state borders emerge<sup>36</sup>. Bottom line, conversely, at times when the Orthodox peoples have been enslaved, the church is the one that "keeps the fire burning" for renewal of the statehood in the areas under its jurisdiction. In regard to the issue of religious rights and freedoms, the Byzantine Empire

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29 See Blandine Chelini-Pont, *Religion and Society in Europe*, Conference: "Law and Religion in Transitional Societies", Norway, 2006.

30 See Jeremy Gunn, *Religion and Societies in Transition*, Conference: "Law and Religion in Transitional Societies", Norway, 2006.

31 The Byzantine Empire is a term of recent times, which is used for naming the Roman Empire from the period of late antiquity to the Middle Ages. The capital of the Empire was Constantinople, today's Istanbul. In the History there is no general agreement of the time period when the Roman Empire ended and the Byzantine epoch started. Most sources refer to the start of the Byzantine Empire under the rule of Diocletian (284-305), who carried out a reform dividing the empire into two administrative regions – East (Pars Orientis) and West (Pars Occidentis), while the end of the Empire is associated with the conquest of Constantinople by the Ottomans in 1453. The term Byzantine Empire is new and it was not known at the time. The Byzantium Empire today is considered one of the most important civilizations in the history of the world, although in the past the use of this term has long been synonymous with decadence. Orthodox Christianity is considered to be the foundation of this civilization. With this in mind, the Byzantine Empire made an immense contribution to the development of the modern world in the field of diplomacy, architecture, literature and art, especially in the preservation of the works of ancient literature, which have been a key factor in the development of the Renaissance in Western Europe. (See John Meyendorff, *The Byzantine Legacy in the Orthodox Church*, St Vladimir's Seminary Press, Crestwood-New York, 1982).

32 Pedro Ramet, *Eastern Christianity and Politics in the Twentieth Century*, Duke University Press, 1988, pp.: 37-58.

33 Pedro Ramet, *Eastern Christianity and Politics in the Twentieth Century*, op.cit., pp.: 40.

34 Mile Bogović, *Država i crkva u srpskom pravoslavlju*, Centar za političkoška istraživanja (cpi.hr), 5.11.2011.

35 Mile Bogović, *Država i crkva u srpskom pravoslavlju*, op.cit.

36 Ibid.

which is recognized as an Orthodox model of state, recognizes Orthodox Christians as a leading constituent element. Namely, the basic requirement for a person to gain appropriate state status in its full capacity is to be Orthodox Christian<sup>37</sup>. Through the prism of the aforementioned, certain diversity of both concepts is obvious, which forms the complot of the Macedonian model of secularism. Namely, unlike the modern international standards which are being developed under the strong influence of the Catholic and Protestant tradition, where pluralism is promoted due to the concept of separation of the spiritual from the secular government, the Orthodox European east lies on the unity of the church and secular government, that is to say is increasingly characterized by state homogeneity and collectivism<sup>38</sup>.

This ideological-political landscape is supplemented by the realities of modern Macedonia, which is not a religiously homogeneous state. Namely, aside the members of the Orthodox version of Christianity, there are other religious groups in significant numbers, such as the Islamic, Christian-Catholic, Christian-Protestant, Jewish, etc<sup>39</sup>. This reality, further shapes the Macedonian model of relations with religious organizations and, in that sense, the character of religious freedoms and rights, which, compared to the corresponding Western European international standards, and historical traditions and customs of the Orthodox Christianity, and on the basis of principles of democratic pluralism, the state provides adequate guarantees for other minority religions in institutional and personal sense.

## Conclusion

Taking in consideration the aforementioned, Macedonia sets practical postulates based on defined ideological-political premises when regulating the relations with religious organizations, as well as freedom of religion. They are the following:

- **First**, in Macedonia, as a result of the Western European heritage, the state government is separated from religious organizations, which implies non-interference of the state in the competencies of the religious organizations, as well as prohibition of substantial involvement of religious organizations in matters that are the responsibility of the state;

- **Second**, exercising religious rights and freedoms, based on universal and Western European standard, is guaranteed in Macedonia;

- **Third**, because of the traditions and customs of the majority population that belong to Orthodox version of Christianity in the light of the legacy of the

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37 See Philip Schaff, David Schley Schaff, *History of the Christian church*, Charles Scribner's Sons, New York, 1910.

38 See Mile Bogović, *Država i crkva u srpskom pravoslavlju*, op.cit., pp.: 89.

39 According to the population and housing census in 2002, in Macedonia, 64.7% of the population are from orthodox religion, 33.3% Muslim, 0.34% Catholic, and 1.5% other religions (stat.gov.mk), 9.11.2011.

Byzantine Empire, the Orthodox Church in Macedonia, as well as its historical and spiritual heritage, have a primary position;

• **Fourth**, given the heterogeneous religious landscape, Macedonia builds a system which provides guarantees for the existence and functioning of the Islamic community, the Catholic Church, the Protestant churches, the Jewish community, as well as other religious organizations.

Since the independence of Macedonia, through the years that followed the ideological-political pillars that defined the Macedonian model of secularism did not always function in harmony. Such a conclusion can be derived from the nature of the legal regulations governing this area. Namely, the nature of the legal solutions is largely conditioned from the ideological positions of the political parties in power. In that sense, it can be concluded that the leftist parties advocate for more pronounced form of secularism under which the state only develops a general approach to all religious organizations. In contrast, the right-wing parties tend to establish less pronounced secularism, which in the framework of established general attitude towards religious organizations tend to raise the status of the Macedonian Orthodox Church. Finally, the political parties of the ethnic communities are undertaking activities, within the defined concept of the state's separation from the religious organizations, to highlight first and foremost the importance of the Islamic Community of Macedonia at times when the state is trying to grant this kind of status to the Macedonian Orthodox Church. This fact leads to the conclusion that in Macedonia, still, there is no unanimity regarding the perfect balance of the three factors that determine the state model of relations with religious organizations, and in this sense freedom of religion. Therefore, in the light of the EU integration process, opportunities arise to overcome such challenges, contributing to Macedonia's stability.





# IMMUNITY AND POLITICAL PARTIES IN ALBANIA

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Jonida Drogu earned her Master degree from the Insitute de recherché et d' Enseignement en Relations Internationale & Europeennes, Paris, called Master Program in European Studies in 2005, and her second master degree at the University of Bon Signora of Consigliore in Governance and territorial Development. Her Bachelor of Arts degree is in International relations and Diplomacy from the Schiller International University, 2000–2004. She specialized in Economics and Pre-M.B.A. Program in The American College of Switzerland, Schiller International University. The title of "Ambassador of Lysine", was given to her when she was a student at Schiller International University from the Municipality of Canton de Vout, the French canton in Switzerland, at 2004. She is the author of many articles in Albanian Newspapers, based on international and social policies and European Integration. Jonida's scientific interest includes issues of constitutional interpretation, fundamental rights and constitutional aspects of European integration. Her research also focuses on free movement of services in European Union policies. Her teaching at the University of Tirana includes a general course on EU and an advanced course on Policies of Freedom and Autonomy. Jonida also teaches at the Department of Philosophy, on Human Rights. Jonida is currently following the Ph.D. studies at the University of Tirana of Social Studies, on the Human Rights Issue. In the period 2006–2007, she has published many articles on social and political issues in the Albanian newspapers: Standard Newspaper, Metropol Newspaper, and Koha Jone Newspaper.

## ABSTRACT

The countries in transition, where there are weak consultation mechanisms available to Parliaments and the community, and where problems of corruption and 'special interests' remain need to undertake some special measures to prevent the further development of these problematic issues. In addition, the Balkan countries including Albania have agreements with the European Union (EU) obliging them to introduce an enormous amount of harmonizing legislation where some adequate consultation processes are evident. Therefore, based on the 'Parliament Trust' inspired by the UK which has a distinguished record of honest respect for all parties and transparent actions, the initiative to waive Members of Parliament, senior officials and judges' immunity in Albania was brought to the agenda. This is becoming a very strong and serious initiative of the Albanian government which is lately confronting difficulties from the opposition to pass this initiative in the Albanian parliament. This is one of the key requests from EU, in order to enhance the transparency of the central government institutions, impacting the issues of corruption and privileges of the Albanian parliamentary representatives. A considerable per cent of parliamentary representatives disagreed with the initiative despite the fact that it became part of the EU accession Agenda.

## РЕЗИМЕ

Земјите во транзиција, каде што се слаби консултативните механизми ставени на располагање на парламентите и заедницата, и каде што сè уште има проблеми со корупцијата и „специјални интереси“ е потребно да се преземат некои посебни мерки за да се спречи понатамошниот развој на овие проблематични појави. Покрај тоа, земјите од Балканот, вклучувајќи ја и Албанија имаат договори со Европската унија (ЕУ) кои ги обврзуваат да воведат огромен број на усогласени законодавни акти кај којшто е евидентно постоењето на консултативни механизми. Оттука, врз основа на „Парламентарниот фонд“ инспириран од Велика Британија, којшто има препознатливо и истакнато досие за почитување на сите засегнати страни и транспарентни постапки, иницијативата за симнување на имунитет на пратениците, високите функционери и судии во Албанија беше ставена на агендата. Ова стана силна и сериозна иницијатива на албанската влада која, во последно време, се соочува со тешкотии од позицијата за да ја изгласа оваа иницијатива во албанскиот парламент. Ова е еден од клучните барања од ЕУ, со цел да се зголеми транспарентноста во работата на институциите централната власт и да се влијае на прашањата поврзани со корупција и привилегиите на албанските парламентарци. Значителен процент од пратениците не се согласуваа со оваа иницијатива, иако истата стана дел од агендата за пристапување кон ЕУ.

Key words:

Constitution of Albania, European Union, immunity of officials, MP immunity, judges immunity.

# IMMUNITY AND POLITICAL PARTIES IN ALBANIA

## 1. Introduction

The paper's structure is divided into three main categories, reflected in three chapters. The first chapter introduces the theoretical basis of immunity at the national and international level. It distinguishes between the subjective and objective scope of immunity. It explains and conveys the concept typology and perceptions in relation to the term 'high state officials'. It explains also the interests and deeds that might be covered by immunities namely the scope of corruption, and the reasoning that justifies the relinquishment of the protection despite its initial application. The second chapter is focused on the continuous political struggle for power through a chronological overview. The rules on immunity in national legal acts as well as their status in the hierarchy of norms in public national law are presented in the chapter. It is argued that the irrelevance of the immunity of highest representatives of a state has evolved into a customary rule of law, which has some important consequences. The third chapter will bring out some of the most important declarations of the Albanian Political Leaders on the waiving of immunity for officials.

A valuable theoretical input is provided by the writings of some well-known scholars, among them Rosanne Van Alebeek, Paola Gaeta, Dapo Akande and Antonio Cassese. Some particularities of the problem are explained based on international journal articles and various online databases. Notwithstanding the initial impression of the lack of sources on the matter of immunities in international law, the availability of literature is astounding.

### 1.1. What does immunity mean?

First of all, before analysing the long debate about the waiving of immunity in Albania, it is important to define what immunity means. Why historically it was given and donated to certain people in certain classes of the society, and what has changed today in the new global system? How come that often "the public officials and members of Parliament, when acting in their official capacities, are protected by official immunity<sup>1</sup>"? Do they profit from these privileges? Is it the same for both affluent and poor countries? All these questions and other questions will find their answers in the paper.

Etymologically, the word privilege, as explained in encyclopaedia "privilegium"<sup>2</sup>, means a "private law", or rule relating to a specific individual or institution. "Boni"

1 Medina County Commissioners Court v. Integrity Group, Inc., 944 S.W.2d 6, 9 (Tex. App.–San Antonio 1996, no writ).

2 It comes from the Latin word for privileges

“Boniface’s Abbey of Fulda<sup>3</sup>” to cite an early and prominent example, was granted privilegium, setting the abbot in direct contact with the pope, bypassing the jurisdiction of the local bishop<sup>4</sup>.

In a wider view, “privilege” can refer to special powers or de facto immunities held as a consequence of political power or wealth. Privilege of this sort may be transmitted by birth into a privileged class, membership in a particular group, or achieved through individual actions. As we know from the French Revolution<sup>5</sup> one of its objectives was the ending of privileges for certain people or classes in the society. More specifically, this meant the removal of separate laws for different social classes (nobility, clergy and ordinary people), instead subjecting everyone to the same common law. “Privileges were abolished by the ‘National Constituent Assembly’<sup>6</sup> on August 4, 1789”.

We can all recall in our minds the three main words of the French Revolution: “Liberte, Egalite and Fraternalite”, that is Freedom, Equality and Brotherhood. Why did these three words come out with such a strong reaction from the society? It is certain that the gaps between the social classes of the French society before 1789 were getting deeper than ever, and as mentioned before there were certain privileged groups of the French society that had so many opportunities compared to the others. The strong reactions of the middle and low classes brought to the whole world a new impetus and a new point of view on how people should be equal and hold the same rights. Now we are ready for a new question which is recently often posed in our academic arena.

## 1.2. Why “immunity” is the new focus in Albania?

The new focus lately in Albania, is the most recent declaration of the Albanian Prime Minister, Mr. Sali Berisha, for a referendum on “the immunity issue” that has been a source of a deep defect in Albania’s political life.

This declaration emerged as a response to the Socialist Party which was not willing to vote for the constitutional changes on immunity limitations. These changes were also requested by the European Union institutions as a benchmark for the candidate status. Through these changes, national individual responsibility was founded and together with its essential elements, created the necessary framework enabling the prosecution and punishment of individuals involved in illegal phenomenon, like corruption, and assisting in the fight against lack of transparency.

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3 Lins, Joseph. “Fulda.” The Catholic Encyclopedia. Vol. 6. New York: Robert Appleton Company, 1909. Accessed 17 Sept. 2012 <<http://www.newadvent.org/cathen/06313b.htm>>.

4 <http://www.parliament.uk/commons/lib/research/briefings/snpc-04905.pdf>

5 Thomas Paine – Volume 4 (1794-1796): the Age of Reason by Thomas Paine

6 National Constituent Assembly, Paris France.

Although at first sight the proposal itself seemed well designed, an insight into its practical application was necessary to notice the difficulties encountered on the way to bringing all the political parties together. The obstacles, which seemed to mainly hinder this structure mostly are immunities awarded to high state officials and Members of Parliament when they are suspected of corruption. This protection is given to them for the reasons of the functions they perform and their role in the national arena as the representatives of the state.

Indeed, it is often the case that a high official of a state that serves as a member of parliament cannot be charged in front of a national court, avoiding prosecution by excusing himself or herself with immunity. However, the establishment of the new structure where high officials have no immunity followed by the creation of this new agenda, changed when the declaration of the Prime Minister mentioned above, has created a widely accepted tendency to waive immunity without any reservations to the highest representatives of a state.

Since this subject matter seems to cause dilemmas in many respects, it appeared interesting to evaluate them and thoroughly analyse the problem. This will assist in clarifying the current state of immunities of high state officials and members of parliament for the purposes of administering justice in national individual responsibility.

In recent times the issues of immunities often occur in relation to arrests of suspected perpetrators and are performed by the exercise of courts requests. Additionally, the relevant case law of these judicial bodies constitutes an essential part for the accurate examination of the subject matter.

The concept of the immunity was more elaborated in the law nr.7574, date 24.06.1992 "On the organization of justice and some changes in the Criminal Procedure and Civil Procedure Codes"<sup>7</sup>. Article 21 of this law stated that "judges, assistant judges, prosecutors and investigators enjoy immunity. They cannot be controlled, detained, arrested or prosecuted without the consent of the organ that elected or appointed them. They cannot be detained without this consent only in cases of an obvious and serious crime". Some famous cases are evaluated in detail, such as those of Ilir Meta and Dritan Prifti, former ministers, which will be detailed and mention latter on the article.

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<sup>7</sup> Report on the Independence of the Judicial System", Part I: The Independence Of Judges, adopted by The Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Paragraph 61.

## 2. Chronological overview of the immunity debate

In 2008, the Democratic Party of Albania and the Socialist Party of Albania presented a Draft Law on Amendments to the Constitution. The proposed amendments were never submitted to Parliament formally as the two parties agreed to resume negotiations on the draft after the 2009 general elections. However the uneasy political climate that followed the 2009 elections did not leave room for constitutional changes on immunity.

Initially the majority which is composed by the Democratic Party and its allies proposed the draft on the waiver of immunity as it was proposed from PACA without any changes but this was not accepted by the opposition which stated that it is not against the waiver of immunity. As we will analyse in this article it is obvious that the opposition wanted to use the case of immunity in achieving other constitutional changes.

Another factor that makes the opposition postpone and reject the constitutional changes on immunity is related to the candidate status that Albania is aspiring to get from the EU, as the EU has made clear that these constitutional amendments are very important for the candidate status. The conditions made by the EU are making the situation quite complex as the opposition does not want the ruling parties to use the accession for political gain – implied by the negative reaction of the opposition every time the Albanian government is moving forward in the accession agenda. This seems to be more an internal struggle for power helped by the unnecessary conditions made by the European Union in Albanian aspiration for membership.

### 2.1. How did the immunity debate start in parliament?

The debate on the waiver of immunity for the members of Parliament (MPs) and ministers has featured in the Albanian parliament for a long time. For instance, since 2007 Astrit Patozi, chairman of the Parliamentary Group of the Democratic Party (DP), and Socialist MP Marko Bello, expressed diametrically opposite positions on the issue of MPs immunity. The senior DP MP stated that the law meets all legal requirements to be available to judicial authorities, while the SP MP was rather in favour for a voluntary waiver of immunity of an MP. Both sides share the same approach to be transparent to the public.

Astrit Patozi, DP: “We think that this is a very important law in the first place to fulfil our obligation before Albanian citizens that parliamentarians, and the country’s political class, is to be the vanguard of the fight against corruption. In the second place, we fulfil our obligations to international organizations, such as the Council of Europe, the European Union and NATO. These have suggested and argued that in Albania not only immunities of deputies should be restricted, but also the immuni-

ties of other officials such as judges, and ministers”.<sup>8</sup>

In the fight against corruption in the period March–April 2012, efforts were focused on improvements of the legal framework for enhancing inter-institutional operation as well as the operational framework. A round table was planned for 27th of April 2012, to present legal opinions on immunity and collecting feed-back from political parties on the proper way to address the immunity issue.<sup>9</sup>

The draft law on the waiver of immunity for the Members of Parliament and public officials was initiated by the ruling majority in Albania on 06.07.2012. It stated that if there are necessary elements or documents to start a penal procedure in relation only to corruption for a Member of Parliament or a Minister then Parliament should not vote for the waiver of the immunity. In this regard in case of corruption the Members of Parliament will not have immunity.

The Council of Ministers has prepared an amendment to Article 118 of the parliamentary Rules of Procedure which regulates the immunity of MPs. According to Article 6 of the prepared material, paragraph 1 of the parliamentary Rules of Procedure shall be amended as follows: “MPs immunity is removed in accordance with a Parliamentary decision, for prosecution of criminal cases of corruption and abuse of office, at the request of the Attorney General.”<sup>10</sup>

This is the essence of the draft prepared by the ruling political party leaders in consultation with the Prime Minister Sali Berisha. The Article 2 of the draft states that after the adoption of this decision for waiving parliamentary immunity, the prosecution can begin 48 hours after the Attorney General notifies in a written request the Chair of the Assembly. The President of the Assembly within 48 hours of receiving this notice informs and sends the case materials to the parliamentary Committee of Regulations, Mandates and Immunity, and to the MP against whom criminal proceedings are initiated.

At the request of the Attorney General or a Parliamentary member, the Assembly may decide to waive the immunity, when leaving the immunity does not meet the needs of prosecution and investigation. This waiver of immunity lasts as appropriate to: the Conclusion of the investigation; its replacement with the authority to waive immunity for the arrest of the deputy; judicial decision of final acquittal or dismissal of the case; expiration of the member’s mandate.

After the DP submitted in Parliament the request to waive the immunity of senior officials and members of Parliament, the opposition in its own draft provided that

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8 KohaJone, Denis Dedej, Balle per balle per heqjen e imunitetit. 5 October 2007

9 [www.parlament.al](http://www.parlament.al)

10 <http://www.mapo.al/2012/07/07/zbardhet-drafti-i-mazhorances-rastet-kur-u-hiqet-imuniteti-deputeteve>

the MP may not be arrested or deprived of liberty in any form without the authorization of the Parliament. Even the Constitutional and Supreme Court judges cannot be arrested without the authorization of the appropriate institution.

Meanwhile, the date for lifting the immunity of senior officials again divided the ruling majority and the opposition at the hearing of the Council of Legislation, which consists of Ilir Rusmali, Enkelejd Alibeaj, Arenca Trashani, Viktor Gumi, Gent Strazimiri, Edi Paloka, Gramoz Ruçi, Warren Truss, Pandeli Majko, Qemal Minxhozi, Ethem Ruka. After long debates, the majority demanded to integrate both drafts – that of the ruling majority and that of the opposition – and come to a consensus by August 6, while the opposition pointed out that the new amendments require broader debate on immunity. It was agreed that the two supervisors Edi Paloka and Pandeli Majko work together to develop a unified draft on the immunity issue.

## 2.2. The parliamentary meeting of July 21, 2012

At the meeting on July 21, 2012, the following experts were invited:

- PACA<sup>11</sup> experts;
- Experts EURALIUS<sup>12</sup>;
- Representatives of the OSCE and OPDAT<sup>13</sup>;
- Domestic constitutional experts;
- Representatives of the constitutional institutions (Constitutional Court, the High Council of Justice, the Ombudsman, the High State Attorney General);
- The Union of Judges and the National Association of Judges;

Representatives from the Faculty of Law of the University of Tirana.

During the long session a request was made to hear the specialized international experts' opinion and the experience of the European Union on the issue of immunity for elected judges and senior officials. Simultaneously the session heard the opinions of representatives of constitutional institutions on immunity limitations and that of the local constitutional experts. During the session, the MPs addressed multiple questions to the guests and commented their thoughts on the immunity issue. Reporters of the joint meeting, worked intensively to reflect all the suggestions and proposals emerging from the hearing, in order to achieve consensus and present a common final draft and approval by Parliament.

The Final draft, which took into account mainly the Socialist Party Parliamentary Group proposals, provided for the limitation of immunity for MPs, judges and senior officials in the exercise of their functions. This draft achieved the main goal of the

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11 Project against Corruption in Albania, funded by the EU and implemented by the Council of Europe.

12 European Assistance Mission to the Albanian Justice System providing technical assistance drawn from EU Member States.

13 Office of Overseas Prosecutorial Development, Assistance and Training of the US Department of Justice.



initiative – to allow the judiciary to exercise its functions on persons who so far have been protected by immunity.

On the basis of this draft, unlike the PACA proposal (which was presented as a proposal of the Parliamentary Group of the Democratic Party), the MP may not be arrested or deprived of liberty in any form, or confined to his/her apartment, without the authorization of the Assembly. On this issue the proposal of the Socialist Party Parliamentary Group was accepted for the sole purpose to achieve the necessary consensus for adoption of the constitutional amendments.

Meanwhile, the MP is not responsible for the opinions expressed in Parliament and votes cast in fulfilling the function. This provision shall not apply in the case of defamation.

The same limitation also applied to the immunity for judges of the Constitutional Court, Supreme Court and other judges and senior officials.

After implementing all the steps and demands of the opposition, both parties reached a consensual variant on the constitutional amendments. This is as follows:

### **Amendment 1:**

Article 73 is amended as follows:<sup>14</sup>

1. The MP is not responsible for the opinions expressed in the Assembly and votes cast by him in exercising his functions. This provision shall not apply in the case of defamation.
2. MPs cannot be arrested or deprived of liberty in any form, or confined to his personal apartment, without the authorization of the Assembly.
3. An MP may be detained or arrested without authorization when caught committing or immediately after having committed a crime. In these cases, the General Prosecutor shall immediately inform the Parliament, which, when it determines that the case is not to be proceed, decides to lift the measure.
4. For matters referred in paragraphs 2 and 3 of this Article, Parliament may discuss in closed session for data protection reasons. The decision is taken by open voting.

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14 [www.parlament.al/web/Propozim\\_per\\_ndryshime\\_Kushtetuese\\_mbi\\_imunitetin\\_10518\\_1.php](http://www.parlament.al/web/Propozim_per_ndryshime_Kushtetuese_mbi_imunitetin_10518_1.php)

## Amendment 2:

Article 126 is amended as follows:<sup>15</sup>

Judge of the Constitutional Court is not responsible for the opinions expressed and the decisions taken in the exercise of his functions.

Judge of the Constitutional Court may not be detained or deprived of liberty in any form or confined to his apartment, without the authorization of the court itself, unless caught in the commission of or immediately after having committed a crime. In this case, the General Prosecutor shall immediately inform the Constitutional Court. If the Constitutional Court does not consent within 24 hours to send the arrested judge to court, the competent organ is obliged to release him.<sup>16</sup>

## Amendment 3:

Article 137 is amended as follows: “Article 137”. Judge of the High Court is not responsible for the opinions expressed and the decisions taken in the exercise of his functions.

“Judge of the High Court cannot be arrested or deprived of liberty in any form or confined to his personal apartment, without the authorization of the court itself, unless caught in the commission of or immediately after having committed a crime. In this case, the General Prosecutor shall immediately inform the Constitutional Court. If the Constitutional Court does not consent within 24 hours to send the arrested judge to court, the competent organ is obliged to release him.”<sup>17</sup>

2. Judges are not responsible for the opinions expressed and the decisions taken in the exercise of their judicial functions.

A judge may not be detained or deprived of liberty in any form or confined to his personal apartment, without the authorization of the High Council of Justice, unless caught in the course or immediately after having committed a crime. In this case, the General Prosecutor shall immediately inform the High Council of Justice, which may decide to lift the measure.

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15 [www.parlament.al/web/Propozim\\_per\\_ndryshime\\_Kushtetuese\\_mbi\\_imunitetin\\_10518\\_1.php](http://www.parlament.al/web/Propozim_per_ndryshime_Kushtetuese_mbi_imunitetin_10518_1.php)

16 [www.parlament.al/web/Propozim\\_per\\_ndryshime\\_Kushtetuese\\_mbi\\_imunitetin\\_10518\\_1.php](http://www.parlament.al/web/Propozim_per_ndryshime_Kushtetuese_mbi_imunitetin_10518_1.php)

17 [www.parlament.al/web/Propozim\\_per\\_ndryshime\\_Kushtetuese\\_mbi\\_imunitetin\\_10518\\_1.php](http://www.parlament.al/web/Propozim_per_ndryshime_Kushtetuese_mbi_imunitetin_10518_1.php)

## Article 4

This law enters into force 15 days after publication in the Official Journal<sup>18</sup>

Although the changes to the amendments were implemented as the opposition proposed, they were not incorporated in the constitution as the opposition refused to vote for them as they argued that additional constitutional changes need to be introduced and made by September 2012. The opposition was trying to make the changes in the constitution on immunity almost impossible as it seemed that the ruling majority was going to gain more political powers in case Albania was given the EU candidate status. Also the opposition conditioned the immunity system reform, with a package of constitutional changes that affect the functioning of some institutions of justice. This was not accepted as reasonable by the Democratic Party, which in the absence of consensus, has made a public proposal for a popular referendum on that matter.

According to politician Lutfi Dervishi, a referendum is a form of pressure of the majority in making a public trial for the opposition's attitude which is not very understandable on the issue of immunity, rather than as a real opportunity to implement it soon.<sup>19</sup>

Analyst Aleksander Cipa says that the solution for waiving the immunity can only be produced in Parliament. "The referendum is a maximalist option, as long as there are resources for dialogue and consensus within the political decision-making in the Albanian Parliament. The opposition is not opposing the removal of immunity, even expressed willingness for this to happen, but conditions constitutional changes,"<sup>20</sup>

According to Cipa, the opposition is conditioning this, but at the same time the opposition has permanently left the path open to understand that beyond this insistence there is room for a bilateral political agreement. On the other side Lutfi Dervishi says that parties should refrain from the use of different issues for amassing political capital. He notes that a negative decision on the status of a candidate country for EU membership, for the third year in a row, is a story that frustrates all Albanians, left to right, with or without a party.

The referendum was opposed not only by the opposition, but also by the Socialist Movement for Integration, an ally of the ruling Democratic Party, making the decision for the referendum quite difficult.

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18 [www.parlament.al/web/Propozim\\_per\\_ndryshime\\_Kushtetuese\\_mbi\\_imunitetin\\_10518\\_1.php](http://www.parlament.al/web/Propozim_per_ndryshime_Kushtetuese_mbi_imunitetin_10518_1.php)

19 Nacional Albania, Shqipëri: Debat pa zgjidhje për imunitetin, 1<sup>st</sup> September 2012

20 Nacional Albania, Shqipëri: Debat pa zgjidhje për imunitetin, 1<sup>st</sup> September 2012

### 3. Public positions of the main parties in Albania and foreign delegations

There are three main parties in Albania:

- The first one is the Democratic Party, headed by Mr. Sali Berisha, the actual Prime Minister.
- The second one is The Socialist Party, headed by Mr. Edi Rama, the former head of the Municipality of Tirana.
- The third one is the Socialist Movement for Integration (SMI), headed by Mr. Ilir Meta, Minister of Foreign Affairs and former Economic minister.
- The Socialist Movement for Integration and the Democratic party in the last election had a coalition so they are governing together with some other right wing parties.

#### 3.1. Overview of positions and quotes from the political parties' leaders about the immunity issue

On 03.09.2012 Berisha stated in media<sup>21</sup> that it doesn't matter how immunity will be lifted. At the same day in an official visit of the Albanian Prime Minister to Slovenia, it was stressed that it is important to Albania to complete all the EU criteria, after noting the unreserved support that Slovenia is giving to Albania in its EU integration efforts.

By emphasizing this support, the Slovenian Prime Minister, Janez Jansa<sup>22</sup>, mentioned in his joint press conference with Berisha the still open issue of waiving immunity. Jansa declared that the immunity issue must be resolved according to the EU standards, and that the EU expects a vote from the opposition on this matter.

“We believe that the opposition will not use this as an internal political matter, but will offer cooperation when the qualified majority will be needed. The opposition must behave with responsibility. We don't have here issues that are related only with the internal state affairs. We are talking about requests that the EU has established not only for Albania, but for every country that aims to join the EU by realizing the EU standards. As for the waiving of immunity, it must be also respected because this must not be a show of strength between the ruling majority and the opposition, but a cooperation of all political forces so that this can be achieved as soon as possible.

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21 [www.top-channel.tv/english/artikull.php?id=6936](http://www.top-channel.tv/english/artikull.php?id=6936)

22 [www.top-channel.tv/english/artikull.php?id=6936](http://www.top-channel.tv/english/artikull.php?id=6936)

If the EU establishes conditions that must be fulfilled, the candidate state must fulfil those conditions in order to be near this goal”<sup>23</sup>, the Slovenian Prime Minister declared<sup>24</sup>.

Berisha gave an important message from Slovenia as regards the way how the immunity will be lifted. Same as the Parliament’s Speaker, he insinuated that besides the referendum there is a second chance for voting on the law with consensus.

“I underline that the immunity lifting is very important, not as important as the path through which it will be achieved. Naturally, after a series of failures to remove it through a Parliamentary way, and because the other Party opposed it, we decided to resort to a referendum. The referendum option is still open and it will be operational as soon as the Parliament will not vote to lift it. Because I think that this is a valuable principle for fighting with all democratic means”, Berisha declared<sup>25</sup>.

There was a second reaction after Berisha, from the leader of the Socialist Movement for Integration (SMI), Ilir Meta, who commented the political debate of the day, the immunity lifting<sup>26</sup>, saying that the important thing for this political force is the removal of immunity and not the paths that will make possible the realization of this action. He added that there is not enough time for a referendum and that a parliamentary solution is necessary. So he called on politicians not to become an obstacle for the candidate status only for their own interests.

SMI reinforced its position that constitutional changes to lift the immunity should be resolved in the parliamentary hall and not through a referendum as proposed by the Prime minister Berisha.

After the declaration of Ilir Meta some days ago, that “the immunity question should be resolved by parliamentary consensus”, the Secretary General of the SMI, Luan Rama said that time won’t wait for Albania to receive a positive grade at the October European exam<sup>27</sup>.

“The referendum in this case, in my judgment, does not give us the opportunity to fulfil this task before October, when assessment of Albania’s progress for fulfilling the obligations towards the EU will take place. If it would be possible for the referendum to take place before October, there is nothing wrong, but SMI judges and is convinced that immunity lifting must still be voted and there exist other possibilities, that Parliament could fulfil this task,” said L. Rama.

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23 [www.top-channel.tv/english/artikull.php?id=6936](http://www.top-channel.tv/english/artikull.php?id=6936)

24 [http://www.vlada.si/en/media\\_room/government\\_press\\_releases/press\\_release/article/slovenia\\_supports\\_albania\\_on\\_its\\_road\\_to\\_the\\_eu\\_and\\_looks\\_to\\_improve\\_economic\\_cooperation\\_25627/](http://www.vlada.si/en/media_room/government_press_releases/press_release/article/slovenia_supports_albania_on_its_road_to_the_eu_and_looks_to_improve_economic_cooperation_25627/)

25 [www.top-channel.tv/english](http://www.top-channel.tv/english)

26 [www.youtube.com/watch?v=5KiEgWgNne4](http://www.youtube.com/watch?v=5KiEgWgNne4)

27 SMI: Lifting immunity, not a test of force - Top Channel, [www.top-channel.tv/english/artikull.php?id=6671](http://www.top-channel.tv/english/artikull.php?id=6671)

At the beginning of the new parliamentary session, the Assembly Speaker Topalli stated the government's commitment to lift any legal immunity of officials and judges.

In a statement for the media, which summarised Parliament's activity during the last session, the Speaker Topalli accused the opposition leader, Edi Rama, for blocking a set of laws and reforms, in order to prevent the status of a EU candidate country.

"Of course I was sad that the session closure on August 6 was made through a rejection or a blockade, to vote a draft written by the opposition. This was a bad message sent to Albanians, and to the international community in the fight against corruption. No Member of Parliament is responsible for this message, because it's their fault. But we certainly feel that immunity lifting has a great importance, while the way we do it is not important. We have been and continue to be determined to pursue all legal and constitutional ways to achieve that goal – waiving of immunity,"<sup>28</sup> said Topalli.

Topalli commented on the issue of election of the new Chairman of the Central Electoral Commission, following the approval by consensus of the amendments to the Electoral Code. According to Topalli, the race for the new head of the CEC will be opened on September 3, a day after the amendments to the law come in effect.

The head of Parliament Topalli announced the launch of the new parliamentary session on Monday, September 3. The work agenda of the Assembly for this session was expected to be a series of important laws, part of the 12 benchmarks set by the European Union, where, among other things, was the law on the Supreme Court, the Law on Immunities and initiatives of the Socialist Party for some changes in the country's Constitution.

### **3.2. Foreign delegations: their opinions and suggestions in relation to immunity**

Eduard Kukan, from the European Parliament delegation for Balkan issues stated that: "The referendum is a direct democracy and it is good, but time is more important at the moment and organizing a referendum takes time. I think that some important political agreements in a country must be resolved by the politicians, and they're the ones to take the responsibility rather than leaving it on the people's back"<sup>29</sup>.

On his behalf, the leader of the Social Democratic Party at the European Parliament, Hannes Swoboda, underlined: "I think that Albania deserves the candidate

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28 [http://www.top-channel.tv/english/artikull/Topalli for immunity](http://www.top-channel.tv/english/artikull/Topalli%20for%20immunity)

29 [www.top-channel.tv/english/artikull.php?id=6952](http://www.top-channel.tv/english/artikull.php?id=6952)Status: No more time, results are needed - Top Channel

status. This could be realized through a double process: saying yes to the candidate status for Albania on its 100th anniversary of independence and making clear that the membership negotiations could start only after the elections will be held in a correct and dignified way”<sup>30</sup>.

Albania has less than a month to fulfil the minimal critical results, which means that some laws must be voted in Parliament in order to advance a recommendation from the Commission for the candidate status, but not for opening membership negotiations. The decision for giving the status to Albania will be taken by the Member States on the summit of December 2012<sup>31</sup>.

As we can see it is an important mission and it was challenging for all the parties to agree on such an issue, but until 18 September 2012 it seemed that the only way out was the referendum as the Socialist Party was using the occasion to reap other benefits. Analysing the situation, it is normal that the climate of polarization and mistrust between the government and opposition is affecting the areas where international standards are not met, a key priority for the EU Opinion.

Parliamentary special trait as the immunity for its members is debatable because of its prospective for abuse<sup>32</sup>; a Member can use it to make harmful claims that would ordinarily be discouraged by defamation laws, without first determining whether such assertions have a strong foundation. A Member of Parliament could, even more seriously, undermine national security and the safety of an on-going army or covert procedure or damage relations with a foreign state by releasing certain information that the Government is not willing to be released in the public sphere.

The MPs may need the “immunity privileges<sup>33</sup>” to contribute in an easier way to the community. On the other hand, the “immunity syndrome” as we would like to call it, has recently posed possibilities for abuse in Albania. As we mentioned before many high representatives of Parliament profited from it not in the most positive and respected way, creating in this way the possibility for ambiguity in being opaque and therefore untruthful to their citizens while seeking trust and votes.

“There are few progresses made in combating corruption within the judiciary as well. One of the main factors obstructing investigations into possible cases of corruption in the judiciary is the full immunity enjoyed by judges. It will be necessary to limit or abolish the immunity of judges, which requires changes to the constitution”<sup>34</sup>.

30 [www.top-channel.tv/english/artikull.php?id=6952](http://www.top-channel.tv/english/artikull.php?id=6952)Status: No more time, results are needed - Top Channel

31 EU Reports 2012 for Albania.

32 <http://www.parliament.uk/commons/lib/research/briefings/snpc-04905.pdf>

33 <http://www.scottish.parliament.uk/business/businessBulletin/bb-99/bb-06-08an.htm>

Privilege (Police Searches on the Parliamentary Estate) Committee 11

34 Web: [www.coe.int/economiccrime](http://www.coe.int/economiccrime)

Annex: Relevant text of the current Constitution

Article 73 1. A deputy does not bear responsibility for opinions expressed in the Assembly and votes given. This provision is not applica-

Such a situation risks creating the wrong perceptions. Why should we trust justice if it doesn't fully work in an equal way for all the people?

Surprisingly on 17 September 2012 after the opposition analysed the determination of the ruling majority not to give other concessions, it declared that they will vote for the law on immunity. In this regard on the 18 September 2012 the law on the waiver of immunity was adopted with 130 votes for, zero against, and no abstentions.<sup>35</sup> The achievement was considered to be a great success for the Albanian future. The other debate following the voting of the law on immunity was focused on the question: which political party benefited most from this struggle?

## 4. Conclusions

Before voting on the law on immunity the Socialist Party (SP) came with a package of proposals for changing the constitution. They stated that they will vote for the law on immunities only if the whole package of constitutional amendments is considered in Parliament. On the other side, the ruling majority opposed the SP proposal as they declared that first they should vote the law on immunity and then pass the package as they see the opposition proposal as a way to achieve as many as possible concessions, and this could be a never ending process. If they would pass the SP proposed package first, no one could guarantee to the ruling majority that the opposition was going to vote for the immunity limitations. It seemed that there was going to be no solution until October when an assessment of Albania's progress for fulfilling the obligations of EU would take place. At this point there were only two ways for achieving a solution. Firstly, if the opposition was going to vote on immunity law and put forward the other constitutional changes without threatening that there will be no voting unless they had achieved their goals. In the beginning it looked like the opposition was only trying to postpone the amendments without really thinking to change the required laws. In this case most probably Albania was not going to achieve the candidate status and the major guilt would go to the SP.

The other solution was having a referendum on the matter.

According to Rustem Gjata there are seven cases for which we cannot have a referendum. Article 151 (2) provides the issues for exemption. These issues are related to the territorial integrity, the restriction of freedoms and fundamental human rights, taxes, and financial obligations of the state, the imposition and lifting of state of

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ble in the case of defamation. 2. A deputy may not be criminally prosecuted without the authorization of the Assembly. Authorization is also required when he is to be arrested. 3. A deputy may be detained or arrested without authorization when he is apprehended during or immediately after the commission of a serious crime. In these cases, the General Prosecutor immediately notifies the Assembly, which, when it determines that the proceeding is misplaced, decides to lift the measure. 4. For issues contemplated in paragraphs 2 and 3, the Assembly decides by secret vote.

35 <http://www.top-channel.tv/artikull.php?id=242461>



emergency, a declaration of war and peace and amnesty.<sup>36</sup> As we notice the case of immunity is not included so it was possible to have a referendum on immunity limitations.

At this point there were arguments that the ruling majority was talking about the referendum in order to threaten the opposition. In case of a referendum most probably the people would vote for the waiver of immunity and this could be seen as an achievement of, and a vote for the ruling majority. Considering that the general election in Albania will take place in 2013 the referendum could have brought political benefits for the majority, as the opposition would have been regarded as a political force which brings only obstacles to Albania's prosperity. In this regard we can say that there are at least three important reasons that made the opposition vote for the law on immunity. First they understood that the majority was not willing to give more concessions as they recognized that it could be a never-ending process.

Second the opposition did not want to go through a referendum just before the elections.

Third they did not want to be blamed for the candidate status in case it was not given to Albania.

Taking into consideration the above mentioned reasons it is believed that the opposition was just trying to benefit as much as possible but without "really" jeopardizing its position.

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36 <http://www.mapo.al/2012/08/26/rustem-gjata-referendumi-per-imunitetin-sipas-nenit-150/>

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