

IN QUEST OF A DOCTRINE: CROATIAN CONSTITUTIONAL IDENTITY IN THE EUROPEAN UNION¹

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On the instance of theoretical dilemmas, which have been opened in the Croatian legal community by its entrance into the European legal system, the issues of a constitutional identity have been treated in the paper. There still exist tendencies of equalizing the federal principle with a federative state, and consequently rejecting federalism as a viable principle. In a combination with the two erroneous ideological interpretations of the European Union, whether as a system dominated by a self-serving bureaucracy, or opposite, as a community founded on a faith and altruism, they emphasize the importance of a proper understanding of the notion of constitutional identity. Among other meanings of constitutional identity, there is the one of a 'remnant sovereignty' in a compound community of states. To that purpose it is important, though neglected, to construe a new legal theory with an aim to strengthen the rule of law, as well as to delineate realistic principles of primacy of European law over the national constitution. Such a theory cannot be established upon a pure legalism, but only on an interdisciplinary approach, which would take into account a whole array of extrajudicial factors which determinate dynamics of relationships within a complex system of plural constitutionality of the Union. There must not be forgotten the achievements of the federalist theory, which had permeated the ideas of the founders of the European

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integrations. The erroneous actions of the Croatian government and the dispute with the European Commission at the very beginning of the membership have demonstrated the necessity of such a realistic theory of constitutional identity. Since there exists a lot of confusion on the matter in other countries as well, the problems of the newest member state might be of significance for further clarifications to other members.

Keywords: European Union, constitutional identity, pure legalism, federal principle, federation, compound community, Croatia

Introduction

“Where there is constitutional law, there must also be constitutional theory; and constitutional theory is necessarily rooted in the vision of the constitutional state as being or aspiring to be a moral order.”² Such a theory has not been formulated within the Croatian legal community at its full membership in the European Union. We look at the issues of a constitutional identity of the Union members from a viewpoint of the newest member, one among the smaller states, and a former communist autocracy, with no established tradition of the rule of law. It has a centuries long experience of living within the various compound communities of states.³ In our view thus, the membership in the European Union would require further adaptations to the requirements of the constitutional principle rule of law, which should in turn be properly understood by the Croatian legal community elite. The stress on ‘a proper understanding’ accentuates importance of a realistic perception of the terms and conditions, under which a small and economically weak new member could establish a lasting mutually productive relationships with the other members as well as the bodies of the Union, while maintaining its national and constitutional identity.⁴

“Constitutional identity’ is an essentially contested concept as there is no agreement over what it means or refers to. Conceptions of constitutional identity range from focus on the actual features and provisions of a constitution —

² Neil McCormick quoted by Ola Zetterquist: *The EU Constitution Viewed in Light of Fundamental Constitutional Theories*, in Joakim Nergelius (ed.): *Nordic and Other Constitutional Traditions*, Brill Academic Publishers, Leiden, 2005, p. 13.

³ The reason for the exceptionally long historical survey in the Preamble of the Constitution of the Republic of Croatia of 1990 is to demonstrate that the continuity of the statehood had never been disavowed.

⁴ Branko Smerdel: *Constitutional Identity Within the European Union: a View From the Courts and Beyond*, Jean Monnet conference “National and Constitutional Identity in EU Law” held at the Regensburg University, Regensburg, Germany, March 22, 2012.

for example, does it establish a presidential or parliamentary system, a unitary or federal state — to the relation between the constitution and the culture in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity”, writes M. Rosenfeld.⁵

In the EU law, it has been driven from the Article 4(2) Treaty on the EU: “The Union shall respect (Member States’) national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. There have been controversies about such questions as to what is that what the Union should respect. Whether and in what way this ‘respect’ can entail a restriction of the primacy of EU law, what this ‘identity’ precisely consists of, and who is competent to decide on its interpretation and application. In our view the core of the concept refers to certain principles of the national constitutions. It can refer to different notions of ‘identity’: firstly, to that which essentially makes the constitution (and the state it governs) into what it is, and secondly, to that in which a constitution (and the state it governs) is different from (some) other constitutions. But it might also mean the limits of the community authority over the legal system of a member state and in particular its constitution.⁶ Lately, it has even been treated as an obstacle in a study ordered by a directorate for political matters of the European Parliament.⁷

In this paper, we consider it in the sense of “a remnant sovereignty” of Croatia within the European Union.⁸ From the constitutional point of view it has been the most important one, regarding the Croatian constitutional tradition. For instance, as an etymological consequence of its ‘con-federalist’ experiences, the very Croatian term for the constitution (*ustav*), brings the

⁵ Michel Rosenfeld: *Constitutional Identity*, in: Michael Rosenfeld and András Sajó (eds.): *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 756.

⁶ For various meanings of the notion, see Alejandro Saiz Arnaiz and Carina Alcoberto Llivina (eds.): *National Constitutional Identity and European Integration*, Intersentia, Cambridge, 2013.

⁷ European Parliament: *National Constitutional Avenues for Future European Integration*, at <http://www.europarl.europa.eu/studies>, accessed on March 11, 2014.

⁸ “Considered solved in the part of legal literature, the issue reappeared due to the economic austerity measures in the eurozone.” Oliver Gerstenberg: *An End to European Multilateralism: A Comment on the German Bundesverfassungsgericht’s OMT Decision*, International Journal of Constitutional Law Blog, 19 February, 2014, at: <http://www.icconnectblog.com/2014/02/an-end-to-european-multilateralism-a-comment-on-the-german-bundesverfassungsgerichts-omt-decision>, accessed on March 11, 2014.

connotations to the barriers aimed outwards, towards a foreign center, and the stronger partners. Much less it aims to protection of its citizens against their own governments, like in the Western Europe and Scandinavia. Since such a tradition has been shared with a number of countries, we hold that the Croatian instance might unearth some issues which are worth of greater future scholarly attention.

Croatian membership in the European Union has been achieved during the painstaking and lengthy process of negotiation and accession, which *de facto* had lasted twelve years, since the fundamental constitutional choice was made by entering into force of the Stabilization and Accession Treaty of 2001. The full membership accentuates the importance of a well justified theoretical position on the part of the Croatian legal community, towards the issues of its constitutional identity within the compound community of states. Such a theory still has not been formulated let alone being widely accepted. The events which immediately followed the celebration of full membership on July 1, 2013 have demonstrated that the caveats of this kind, however scarce, have been founded on a rather justified apprehension of possible consequences of the integration of the two different legal cultures: the ‘transitional’ or lenient one and the established or the strict one, on the part of the Commission.⁹

In our view, such a theory should be established upon a strict respect of the conventional obligations and the whole *acquis communautaire*, meaning the written sources of law as well as the case law of the European Court. But also, it is important to emphasize, this should be understood as a relationship between partners, bound by the mutual commitment to duties and responsibilities established by the law. The rights and obligations should be grounded upon a correct understanding of the established limits, both to the national constitution and to the regulatory authority of the European Union.¹⁰ By no means, the relationship should continue in the spirit of subserviently following the demands of European officials. Such a relation had been established during the years of negotiations, whereas representatives of the candidate have been expected to strictly follow a dictate of European experts. This means a right to estimate the national interest and use of legal means in its promotion and, if

⁹ Theodore Konstadinides: *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, Cambridge Yearbook of European Legal Studies, Vol. 13, 2010-2011, pp. 195 ff.

¹⁰ Needless to stress the importance of the Council of Europe’s conventions and the jurisprudence of the ECHR, (since 1997) and the rising influence of the Venetian Commission’s soft law.

needed, the use of legal remedies when so needed. To paraphrase, this means to construct a justifiable bridge between the Croatian legal community and the others in the European Union.¹¹ In order to be able to take such a position, Croatian legal elite should have developed a coherent theory of constitutional identity in relationships with the European Union bodies.¹² This is the reason why we have pleaded earlier in favor of the “euro-realist” as different from “euro-idealist” approach to the issues of legal life and processes within such a compound community of states.¹³ To construct a constitutional theory, one must understand the meaning of constitutionality for democracy.

Pure legalism and its limitations

An exclusive legal approach has at all times been appealing for Croatian constitutional scholars and proponents of a ‘pure’ legal theory, because it does not require a profound insight into the reality of application.¹⁴ However, it carries serious risks for an explanatory capacity of such theories. First, the normative is considered to be real. Second, the case-law is *a priori* considered to be an exclusive indicator of the real state of things. Third, political conditions are considered irrelevant. Neither of these postulates is true. Jurisprudence enlightens only a small part of reality. The same goes for positive legislation on the books, which might be very distant from the rules at work. Let alone the constitutions which often remain ‘semantic’ and sometimes even ‘a shame’.¹⁵ We believe that only an interdisciplinary approach might explain the new po-

¹¹ Michel Rosenfeld: *The Identity of the Constitutional Subject*, Routledge, London and New York, 2010, as for the EU see pp. 172 – 179.

¹² Gary J. Jacobsohn: *The formation of constitutional identities*, in: Tom Ginsburg and Rosalind Dixon (eds.): *Comparative Constitutional Law*, Edward Elgar Publishing, Southampton, 2011, pp. 129 – 142; Gary J. Jacobsohn: *Constitutional Identity*, Harvard University Press, Cambridge (Mass.), 2010, pp. 348 – 355.

¹³ Branko Smerdel: *Primjena federalnog načela i pouke ustavnih amandmana iz 1971. (Application of the federal principle and lessons of the 1971 constitutional amendments)*, in: Branko Smerdel (ed.): *Primjena federalnog načela i pouke ustavnih amandmana iz 1971.*, Pravni fakultet u Zagrebu i Centar Miko Tripalo, Zagreb, 2007, pp. 17 – 38.

¹⁴ That approach had enabled a majority of constitutionalists of former Yugoslavia to praise the system as the most advanced democracy in the world. The small minority who dared to challenge were considered dissidents. By the fall of communism, whole libraries become useless and numerous authors avoided to mention their previous volumes. One among them did not hesitate instantly to declare all of them mistaken.

¹⁵ David S. Law and Mila Versteeg: *The Sham Constitutions*, California Law Review, Vol. 101, No. 4, 2013, pp. 863 – 952.

sition of Croatia being finally a member of a complex association of states. We must turn to the Croatian as well as the European historical experience. This requires us to reconsider the history of federal integrations in order to understand how various forms of federal and con-federal associations appear, operate and develop, and why some of them succeed, the other disintegrate consensually and rather decently, although suffering great economic setbacks, while the others collapse in tragedies of armed conflicts and wars.

The dominant majority of scholars in the discipline of European Law have adopted the opinion that the importance and purpose of the Croatian constitution will be significantly reduced within “the new legal order”, since all the sources of European law would have a supremacy even over the Croatian law. It goes for the Constitution as well. Or better, particularly for the Constitution which is sometimes considered as “an obstacle” to European integration.¹⁶ Some had expected Croatian courts of justice to start reviewing the Constitution, on the grounds of a *de facto authority*.¹⁷ There appeared ever more numerous works in that spirit as the date of full membership had approached. It is hard to oppose the majority on political issues, even if it was just in order to stress the importance of the national Constitution. Only a few constitutional scholars share our conviction that the importance of national constitutions raises in complex associations of states such as the European Union. In order even to attempt to formulate ‘a doctrine’, we must understand not only the legal nature, but a real operation of the complex system of the European Union as well.¹⁸

We have strongly defended the claims to maintain and further develop the interdisciplinary approach to the study of comparative constitutionalism.¹⁹ This

¹⁶ See the document cited in note 7. Fn 617 cites the in depth study of Croatia at pp. 43 – 44.

¹⁷ Siniša Rodin: *Hrvatsko i pravo EU godinu dana prije članstva u EU-u (Croatian and European Law one Year before Accession to the EU)*, in: Slaven Ravlić *et al.* (eds.): *Hrvatska u EU: Kako dalje?*, Centar Miko Tripalo, Zagreb, 2010, p. 8; Tamara Čapeta and Siniša Rodin: *Osnove prava Europske Unije (Introduction to the law of the European Union)*, Narodne novine, Zagreb, 2011, pp. 53 – 58.

¹⁸ The uninformed and controversial actions of the Croatian government during the summer of 2013, which had brought at the very beginning a dispute with the European Commission demonstrate that the proper constitutional theory is severely needed; that it had not been coherently developed and disseminated in the political circles, and that this may lead to unjustified actions on the part of some Croatian government.

¹⁹ Branko Smerdel: *Ustavno uređenje europske Hrvatske (Constitutional Order of the European Croatia)*, Narodne novine, Zagreb, 2013, pp. 228 – 229.

is why we gladly support the Canadian writer Ron Hirschl who writes: “In all of this, a simple yet powerful insight is often overlooked: constitutions neither originate nor operate in a vacuum. Their import cannot be meaningfully described or explained independent of the social, political, and economic forces, domestic and international, that shape a given constitutional system. Indeed, the rise and fall of constitutional orders — the average lifespan of a written constitution since 1789 is 19 years — are important manifestations of those struggles. Culture, economics, institutional structures, power, and strategy are as significant to understanding the constitutional universe as jurisprudential and prescriptive analyses. Any attempt to portray the constitutional domain as a predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, a-historical, overly doctrinal or formalistic accounts of the origins, nature and consequences of constitutional law. From Montesquieu and Weber to Douglass North and Robert Dahl, prominent social thinkers who have engaged in a systematic study of constitutional law and institutions across polities and through the ages have accepted this plain (and possibly inconvenient) truth.”²⁰ In a word, the constitutional concept and thus the practice of constitutionalism is by no means limited to jurisprudence, however great its significance. Nor do processes of governance run exclusively through the judicial system. Neither any certain judgment should be interpreted as a final solution of the issue. Constitutionalism means limiting the power-holders by law and encompasses overall political institutions and processes.²¹

The new ideology and its weaknesses

There has been a lot of praise in favor of the European integrations, and in our opinion, the most of that for more than justified reasons.²² But there had been even more exaggerations. During the accession process the ideology of a new type of community had been produced in Croatia. This approach domina-

²⁰ Ron Hirschl: *From comparative constitutional law to comparative constitutional studies*, International Journal of Constitutional Law, Vol. 11, No. 1, 2013, pp. 1 – 12.

²¹ András Sajó in *Limiting Government* (CEU Press, Budapest, 1999) demonstrates the primordial importance of such a limitation after the overthrow of an autocratic regime. But it is important to keep in mind “a democratic deficit” which has been strengthened since Laeken Declaration.

²² Nobel prize for peace, granted to the EU in 2012, reminded us to its’ greatest achievements: peace and prosperity. And in the right moment, since those had become taken for granted by the younger generations.

ted at the opening of the new century and had brought much disappointment even in some old, core countries. Excessive expectations spread in all the new members to whom their power elites promised a rapid improvement of the life conditions. We have considered it even more risky in our country, regarding its recent bitter experiences, both with ideology and federalism.²³

There has also been a lot of criticism against the European Union, which have been much louder during the last years of crises, in particular in the countries much dependent of the European aid or bailout from bankruptcy.

We have been constantly warning against this kind of propaganda: "... considering the widely shared belief that we are applying to join a 'new type of association', in which dominate 'European values', high moral principles and pure altruism. Such associations of states have never existed, even though many had claimed to be of such a kind. We had already lived in one of such self-proclaimed 'new types of association', and we should not leave this historical experience to oblivion. Nonetheless, there exist rationally organized associations founded upon the idea of legal equality of member states of unequal economic and political power. This might be the only guarantee of their survival and development of such communities. In such associations, nothing is gained effortlessly, so one's own interests should be thoughtfully evaluated and protected in accordance with the principle of equality of members. The community's constitution, along with the constitutions of its member states is the only basis of such equality."²⁴

The Union has indeed been created in a way that knows no precedent in history, and it has already enabled several decades of progress in peace. But the relations within it must be interpreted correctly. They are relations of power sharing, with the emphasis on economic power and size of population but not on infamous "number of divisions".²⁵ However, the nature of politics has not changed, and a reliance on constitutional law makes the best guarantee. States have interests, and their friendships and loyalties depend on those. The constitution is intended to protect interests of the nation, as well as of the people

²³ Branko Smerdel: *Hrvatska ustavnost u Europskoj uniji - Apel eurorealista (Croatian Constitutionality in the European Union - Appeal from a eurorealist)*, *Studia lexicographica*, Vol. 8, 2011, pp. 5 – 16; Branko Smerdel: *Hrvatski Ustav u Europskoj Uniji (Croatian Constitution in the European Union)*, *Hrvatska pravna revija*, Vol. 12, No. 9, 2012, pp. 1 – 8.

²⁴ Smerdel, *op. cit.* (fn 19), pp. 596 – 597.

²⁵ Atributed to Soviet dictator Stalin, as a challenge to the authority of the Pope.

and of individuals. The constitution is also an instrument of legitimizing actual power. In emergency situations, constitutional niceties are replaced by direct actions. Being explicitly prescribed or considered as “implied powers”, the rules of emergency apply, whilst decisions are made and enforced instantly, only subsequently being submitted to the parliaments for approval.

The EU is unique in its approach to enlargement. The acceptance of new members differentiates from all known alliances of states. In his classic work, William Riker asserts that federal associations have historically always been an instrument of imperial enlargement under the domination of certain hegemons.²⁶ Indeed, never in history has there been an alliance of states that has prepared and monitored candidates for membership so thoroughly. The EU itself have prepared and monitored any candidate thoroughly as it had done with Croatia. It seems rather obvious that the monitoring system has by no means been efficient. We still consider the efficiency of the system of harmonization of legislation to be an experiment.²⁷ Instead of excessive ideological expectations, a historically grounded and developed federalist theory can make use of ‘sober expectations’ to point to the objective options as well as the methods of insuring (even defending) our interests in complex associations of states.

Constitutional principles in crises

Complex alliances, established on a federal principle have their purpose and historical justification. The tendency to neglect the main sources and reasons for the creation of European communities, properly expressed in the formula: peace and prosperity. The claim of the Laeken Declaration on the future of the European Union of 2001, that the EU is a “success story” was justified by the fact that integrations have sustained full six decades of peaceful economic progress, based on new principles that excluded the use of force.²⁸ Historical

²⁶ William Riker: *Federalism: Origin, Operation, Significance*, Little, Brown, Boston, 1964, p. 24; Branko Smerdel: *Američke teorije federalizma (American Theories of Federalism)*, in: Vincent Ostrom: *Politička teorija složene republike (Political Theory of a Compound Republic)*, Informator, Zagreb, 1989, p. 7.

²⁷ From the time of *symmachies* and *sympolities* of ancient Greece wherein the alliance hegemons used military power to enlarge the association, to the United States of America which added acquisition of territory (Louisiana, Alaska) to its tradition of military measures (New Mexico), the policy of enlargement has been guided by utilization of historical opportunities and postponed (if at all) the harmonization of legislation and integration for later.

²⁸ The Laeken Declaration on the Future of the European Union from 2001 opens

memory is pale, and many today are inclined to ignore those original ideas, so they talk of a purely economic European association. However, the most important at the time, obviously was to ensure “peace and development”.

European integration was initially and profoundly motivated by political reasons, as a process of forming a political association and thereby as a means of ensuring peace and progress in the European continent that was historically ripped apart by endless wars. The perspective of peaceful development is the main reason that we adamantly support Croatia’s efforts in joining the Union.²⁹ The Laeken Declaration also proposes that the European Union stands at a crossroads unprecedented in its history. The authors conclude that to preserve this history as a “success story”, it was necessary to make certain important decisions on how to respond to three basic problems: first, a challenge of democratic deficit within the Union; second, Europe’s new role in a globalized world; third, European citizens’ expectations with regard to decision-making and policy enforcement in the Union.

In order to understand a magnitude of this task one must consider the fact that struggles for dominance within political associations make its necessary and unavoidable part. Tendencies of abuse of power are always possible in political process. Institutional solutions aim to reduce the destructive potential of such tendencies to prevail, which is they seek to streamline interest-motivated conflicts towards a constructive and compromising direction. The problems that led to the breakup of many national federations, and that generally endanger the survival of complex states are significantly caused by aspirations towards centralization and dominance, rather than by attempts to build sufficiently flexible constitutional solutions that would prevent such domination.

Conflicting interests and thus permanent cleavages have been, and will remain a part of the political process in the European Union. Tensions between old and new members, large and small states, those economically developed and underdeveloped, agricultural and industrial and so forth, are constantly taking place within the Union and are being resolved. Asymmetric arrangements have already been created, primarily by limiting free movement of workers from the new into the old Union members. The federalist spirit, capability for negotiation and advocating one’s own interests while acknowledging the

with the constation that the European Union stands at a crossroads unprecedented in its history.

²⁹ Cf. a survey in: Richard Mayne and John Pinder with John C. de V. Roberts: *Federal Union: The Pioneers, A History of Federal Union*, MacMillan, London, 1990.

interests of others are of crucial importance for a successful harmonization of various interests in complex associations of states. The failure of federalist solutions in the Yugoslav federation as well as in many others does not justify a rejection of federalist theory. In order to be prepared for life in such a community, we need federalist theory. Without it, I am afraid we are in for new disappointments.³⁰

In alliances of states constitutional law is the only protection and pillar of the smaller and weaker members. Even in grave circumstances of serious infractions and violations, it remains “the law”, and is this potentially realized as soon as the circumstances change.³¹

The European Commission’s White Paper on good governance³² confirmed the two important conclusions reached by scientific literature: first, “that the political decision-making process in the Union is so complex that very few ordinary Europeans have a basic knowledge of it, or can with certainty say who is responsible for policies being implemented”, and secondly “that there basic is little knowledge of how efficiently European legislation is really enforced throughout the European Union... while there is a general opinion that enforcement is far from uniformity and perfection”.³³

A discussion on the White Paper concluded that citizens feel estranged from the institutions and political decision-making in the Union’s institutions, and that the voter turnout to elections for the European Parliament is in

³⁰ Daniel Halberstam: *Federalism: theory, policy, law*, in: Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 582 – 605. But see also Daniel Elazar: *Exploring Federalism*, The University of Alabama Press, Tuscaloosa, 1987, and Vincent Ostrom: *The Political Theory of a Compound Republic. Designing the American Experiment*, 3rd ed., with Barbara Allen, Lexington Books, Plymouth, 2008.

³¹ See the eight concluding theses on the theory of federalism in Thomas Fleiner and Lidija Basta Fleiner: *Constitutional Democracy in a Multicultural and Globalized World*, Springer, Heidelberg, 2009, pp. 587 – 593.

³² European Governance – A White Paper, COM (2001) 428 final, Bruxelles, 25.07.2001. See also Governance team, Consultations conducted for the preparation of the White Paper on democratic European governance - Report to the Commission, June 2001, SG/8533/01-EN, that demonstrates the working method employed and the width of sources consulted.

³³ Michael Gallagher, Michael Laver and Peter Mair: *Representative Government in Modern Europe*, 3rd ed., McGraw Hill, Boston, 2001, pp. 125 and 131. Instead of a scientific verification, this extremely important assertion (which I have often quoted) has been dramatically confirmed by “revelations” of false financial reports of a number of states and by the crisis of the past five years!

decline, that decision-making processes are complicated, too slow and non-transparent, that the existing legal system is too complex for an efficient implementation and that the very application of fundamental principles on which the Union is founded, such as solidarity and subsidiarity, requires repeated questioning and improvement in order to be applied in a consistent manner. Functionalism itself requires evaluation on the basis of the mentioned precepts of “good governance”.³⁴

At the beginning of the millennium, the European Union was preparing for strategic decisions. The Laeken declaration on the future of the European Union from 2001 opens with the assertion that the European Union stands at a crossroads unprecedented in its history. The authors conclude that this history is a “success story”, but it is necessary to make important decisions on how to respond to three basic problems: first, a democratic challenge within the union; second, Europe’s new role in a globalized world; third, European citizens’ expectations with regard to decision-making and policy enforcement in the European Union. The basic direction of reforming political institutions is indicated in the form of a demand for greater democracy, transparency and efficiency in the way institutions work. This opens up some constitutional issues: from the need to simplify the legal system based on three fundamental international treaties, through a division of competences between the Member States and the Union, to the structure of Union bodies and their powers as well as mechanisms of decision-making, majority required for reaching decisions, that is, the states’ rights of veto in certain areas of common policy. Neither of these issues has been resolved, nor has the basis for gradual resolution of these key and chronic problems been formed.³⁵ Only those who readily confuse the words on paper with the reality of the actual relationship between decision-making and political power can claim to the contrary.

³⁴ For instance, Fritz W. Scharpf: *European Governance: Common Concerns vs. The Challenge of Diversity*, in: Christian Joerges, Yves Mény and Joseph H. H. Weiler (eds.), Jean Monnet Working Paper no. 6/01 “Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”, The Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Jean Monnet Center for International and Regional Economic Law & Justice, New York School of Law, New York, 2001.

³⁵ The failure of the constitutional convention was predictable to an attentive researcher – cf. Branko Smerdel: *Temeljni problemi ustavnog izbora u Europskoj Uniji – Pokušaj preliminarne prosudbe rezultata Konvencije o budućnosti Europe (Basic Problems of Constitutional Choice in the European Union – An Attempt at a Preliminary Assessment of the Results of the Convention on the Future of Europe)*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 53, No. 3-4, 2003, pp. 509 – 527.

It is gradually becoming obvious that an appearance of periodical crises is in fact a regularity of the European politics. “We would be hard pressed to find a historical period of peaceful development that was crisis-free. True, many dream of it, but prolonged periods of peace have always relied on a dynamic balance of opposing forces, with an ever present danger of escalation of conflict.”³⁶ The famous legal historian recognized the advent of an enormous crisis of the legal system of the West: “The crisis...is not merely a crisis in legal philosophy but also a crisis in law itself. Almost all the nations of the West are threatened today by a cynicism about the law, leading to contempt for law, on the part of all classes of the population. The cities have become increasingly unsafe. The welfare system has almost broken down under unenforceable regulations. There is a wholesale violation of the tax laws by the rich and the poor and those in between. And the government itself, from bottom to top, is caught up in illegalities. ‘public policy’ has come dangerously close to meaning the will of those who are currently in control: ‘social justice’ and ‘substantive rationality’ have become identified with pragmatism; ‘fairness’ has lost its historical and philosophical roots and is blown about by every wind of fashionable doctrine.”³⁷

Berman was criticized for haste in his prediction of system crises and breakdowns. It appears that this stems from a jurist’s, even legal historian’s, aspiration towards a harmonious world of self-contained hierarchy of norms. But, as has been stated many times, the European Union’s development unfolds in an interminable succession of crisis situations that appear ever more serious.³⁸

³⁶ Henry Kissinger: *A World Restored: Metternich, Castlereagh and Restoration of Peace 1812–1822*, Houghton-Mifflin, Boston, 1960, and Henry Kissinger: *American Policy and Preventive War*, Yale Review, Vol. 44, March 1955, pp. 321 ff.

³⁷ Harold J. Berman: *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge (Mass.), 1983, pp. 39 – 41.

³⁸ This is how J. H. H. Weiler summarizes the basic characteristics: “What, then, are the great constitutional moments in the history of the European Union? ... The Schuman Declaration of May 1950? The entry into force of the Treaty of Rome in January 1958? The profoundly important decision of the European Court of July 1964 declaring the supremacy of Community law? Perhaps the 1965 ‘empty chair’ crisis and the subsequent Luxembourg Accord with its hugely important impact on Community decision-making? Perhaps, in more recent times, the 1985 White Paper of the Commission setting the 1992 objective for completion of the single market, or, indeed, the 1986 Single European Act which endorsed that plan, restored majority voting to the Council of Ministers and set a veritable Euro-psychosis across the continent?” By concluding that it is the Maastricht Treaty that “cross[es] the line

We could, therefore, establish with full responsibility that control mechanism is a necessity, that is, a mode of functioning of the relations in complex international integrations demands a contingency planning. Nevertheless, political and economic crises are certainly much preferable to armed confrontations. Instead of weapons, negotiations and the law should resolve the conflicts. Therefore, it is certainly imprudent to give up the constitutional identity by stressing unconditionally the supremacy of any act of the EU's shared bodies over the constitution.³⁹

The purpose of the theory

Croatia has joined the European Union which tremendously differs from the one for whose acceptance it had applied thirteen years ago. The Union has undergone enormous changes during the long decade from the crucial constitutional choice made by the Croatian government with a convincing popular support in 2001 by joining the Stabilization and Accession Agreement.

The most severe crisis of the Union which challenged even the very survival of the Union had brought previously unimaginable concerns about the fundamental objectives and unquestionable achievements of European integrations.⁴⁰ As always in crisis situations, structures of power within the Union as an association of formally equal states, has been altered. Instead of the procedures prescribed by the Lisbon Treaty, first the German-French hegemony,

first", he makes the same mistake as the subsequent founding fathers of the failed constitutional convention – Joseph H. H. Weiler: *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge and New York, 1999, pp. 3 – 4.

³⁹ The authors who propose the term "primacy" instead of "supremacy" seem more in accordance with the complexity of conventional solutions. On the face of it just a nuance, this is nevertheless an important distinction, a characteristic of constitutional arrangements in complex states: there is no *a priori* assumption of supremacy of European law over the constitutional law of the Member State. Leaning on the doctrine of constitutional identity, constitutional courts can eventually decide in favor of supremacy of national law. Allan Rosas and Lorna Armati: *EU Constitutional Law: An Introduction*, Hart, Oxford *et al.*, 2010, pp. 55 – 60.

⁴⁰ Statements on the possibility of a new war in Europe, coming not only from generals but also from politicians, indicated the state of mind in November of 2011: <http://danas.net.hr/svijet/page/2011/12/11/0052006.html> (USA general M. Dempsey on the possibility of a breakup of the European union and war in Europe), <http://videoteka.novativ.hr/multimedia/iz-vijesti-u-17-moguc-novi-rat-u-europi.html> (Polish Foreign Minister J. Rostowski), accessed on March 9, 2012.

and later only of the first one, has been made transparent. The third important country faced the demands for referendum on withdrawal from the Union.

The crisis has unearthed the position of the leading powers towards the “constitutional treaty”, which was finally won in 2009, upon which the Union formally rests after the great reform which was initiated in 2001.⁴¹ We could consider the Lisbon Treaty *tacite* suspended as far as the basic ways and means of creating policy decisions were concerned.⁴² Despite the formally strengthened role of the national parliaments, even the significance of the European Parliament has been politically diminished during the crisis.⁴³ Developments during the last four years including a formulation of the project of ‘a banking union’, require us to reconsider the overall Croatian position in the European Union.⁴⁴

While approaching membership, the Croatian internal politics has already altered its orientation. The public became accustomed to the apologies from national politicians that certain unpopular measures had to be adopted simply “because the negotiators so demanded”.⁴⁵ Often it resulted in adoption of unconstitutional legislation, in direct contradiction to the fundamental principles of representative government.⁴⁶ Important legislative project would have to be previously approved by the European Commission experts, even when the result of the actually dictated law was utter inefficiency.⁴⁷ When serious disa-

⁴¹ Siniša Rodin, Tamara Čapeta and Iris Goldner Lang (eds.): *Reforma Europske Unije: Lisabonski ugovor (European Union Reform: The Treaty of Lisbon)*, Narodne novine, Zagreb, 2009. Especially see Robert Podolnjak: *Od Laekena do Lisabona – uspon i pad ustavnog ugovora (From Laeken to Lisbon – the Rise and Fall of the Constitutional Treaty)*, in: *ibid.*, pp. 27 – 65.

⁴² This is what the new president of the European Parliament Martin Schulz repeatedly warns about since assuming the position in the fall of 2012.

⁴³ Editorial Comments: *Some thoughts concerning the Draft Treaty on a Reinforced Economic Union*, Common Market Law Review, Vol. 49, No. 1, 2012, pp. 1 – 14.

⁴⁴ Pierre Pâris and Charles Wyplosz: *The PADRE plan: politically acceptable debt restructuring in the Eurozone*, 28 January 2014, <http://www.voxeu.org/article/padre-plan-politically-acceptable-debt-restructuring-eurozone>, accessed on March 11, 2014.

⁴⁵ Branko Smerdel: *Pravo javnosti na pristup informacijama: monitoring treba nadzirati! (The Right of the Public to Know: Monitoring Must Be Monitored!)*, Informator: instrukтивно-informativni list za ekonomska i pravna pitanja, No. 5975, 2011, p. 3.

⁴⁶ Branko Smerdel: *O neustavnosti Zakona o sprečavanju sukoba interesa (On the unconstitutionality of the Act on the prevention of conflict of interest)*, Informator, No. 5977, 2011, pp. 1 – 3.

⁴⁷ Cf. <http://www.tportal.hr/vijesti/svijet/180890/Pusic-s-veleposlanicima-zemalja-EU-a-o-monitoringu.html> and <http://www.tportal.hr/vijesti/svijet/180732/Zasto-ministri-svakodnevno-hodocaste-Vandorenu.html> (accessed on March 9, 2012). Also, see Globus from March 8, 2012, p. 20.

reements occur, even the democratic legitimacy of the Commission and other Union institutions has been questioned.⁴⁸ This opens new questions about the meaning and a position of the national constitutions both in the network of the European pluralist constitutional system as in internal relations.⁴⁹

The constitutional basis of Croatian Constitution's supremacy over European law would not be hard to construe by an objective interpretation. There is Article 2 of the Constitution on sovereignty, Article 3 enumerates the supreme values of the constitutional order, and the Constitution is mentioned foremost, before statutes and the law in the Article 5 of the Constitution. But that is far from our purpose. The provisions of the constitution might be only the last defense in any form of international association. Croatia is no exception. The national constitution became even more important when the Croatian citizens' referendum decision was finally confirmed by the governments or citizens of each of the 27 Member States of the European Union. We have warned: "Those jurists who believe that true equality in the EU is the privilege of the big and strong are wrong".⁵⁰

The new theory should be interpreted strictly as it was meant in the classic federalist theory. That is, the theory of the last resort, to be employed when national interests properly understood, should be protected by ultimate legal means. It is not 'the theory' offered to any government of the time to disguise some disreputable political action. The worst case scenario of the newly established relationship opens the prospects for a new monitoring, and even sanctions against the newest member. It is important to stress that all these decisions have not, and most likely would not be taken by the Court of Justice, but by the European Commission as 'a guardian of the Treaties'. The regretful episode of a Croatian government's dispute with the European Commission about the piece of legislation on the European Arrest Warrant only emphasi-

⁴⁸ Rather recently asserted by the Hungarian Prime Minister Viktor Orban, followed by the Prime Minister of Belgium – Forum, March 9, 2012, p. 7. Regretfully the Croatian government joined the argument as soon as the full membership was proclaimed on July 1, 2013. Cf. <http://vijesti.hrt.hr/razgovarali-milanovic-i-barroso-vladin-non-paper-bruxellesu>, accessed on March 11, 2014.

⁴⁹ A new EU Framework to strengthen the Rule of Law, Brussels, 11.3.2014, COM(2014) 158 final.

⁵⁰ Rainer Arnold: *Supremacy of the Constitution as the Basic Development in European Constitutionalism*, in: Igor Kaučič (ur.): *Dvajset let Ustave Republike Slovenije: Pomen ustavnosti in ustavna demokracija - Twenty years of the Constitution of the Republic of Slovenia: Significance of constitutionality and constitutional democracy*, Pravna fakulteta Ljubljana, Ustavno sodišče Republike Slovenije, Ljubljana, 2012.

zes our point. The principles of constitutionalism extent far beyond the case law of the courts of justice! It should spread through the whole system of government. Nor did the Constitutional Court's decision lead to that dispute, nor had it been resolved by the decision of the European Court. We attribute tragically erroneous dealing with the issue by the Croatian government, precisely to the absence of a coherent doctrine on the relationships with the European Union among the Croatian legal scholars and a reflection of such neglect to the members of the power elite.⁵¹

The federalist attitude

As the constitutionalism itself, federal communities are constructed on artificial, scientific knowledge and cost-benefit analyses, but not on ideological beliefs. This contradicts the 'natural and simple' logic of forcing political will of the strongest dominant partner, as common in history. Therefore, anyone entering such a community must pay attention to the interdisciplinary science on political associations. The significant body of knowledge has been accumulated under the title of federal theory. Despite that, it seems to be neglected by the great part of the 'European law' scholars.⁵² A majority of the most prominent theorists of federalism have tried to underline the dangers that lie in

⁵¹ Even though the Constitution was amended in order to facilitate the implementation of the EAW decision, the ordinary law implementing the decision (the so-called "lex Perković" passed three days before Croatia's EU accession on 1 July 2013) respected the framework decision but only for crimes committed after 7 August 2002. The EU had threatened Croatia with sanctions soon afterwards, explaining that Croatia cannot insert derogations in the implementing legislation and reminding that Article 39 in the Accession Treaty to the European Union gives the Commission the right to take 'appropriate measures in the event of serious shortcomings'. In an attempt to avoid a rift with the EU just months after joining, Parliament adopted further amendments in October 2013, changing the restrictions on the use of the EAW and making it applicable to all criminal offences, regardless of when they were perpetrated. The new law entered into force on 1 January 2014.

⁵² We do not assume being exclusive in emphasizing the enormous importance of the classic federalist theory. This kind of warnings has been present, but in a surprisingly scarce extent. The first group of scientists arguing in favor of interdisciplinary approach are so called 'Tocquevillians'- see Larry Siedetop: *Democracy in Europe*, Penguin, London, 2000; the other are rather exceptional 'comparativists' among the European constitutionalists – see Robert Schutze: *Federalism and Constitutional Pluralism: a letter from America*, in: Matej Avbelj and Jan Komarek (eds.): *Constitutional Pluralism in the European Union and Beyond*, Hart, Oxford, 2012, pp. 185 – 212. It has just been neglected in Croatia.

an intuitive inclination towards those who seek a rapid integration by force.⁵³ The advantages of complex forms of association lie in accommodation of different identities ensured through institutional means and are cultivating politics within and between states. Philosopher Denis de Rougement, connecting the federal principle and democracy as alternatives to threatening totalitarianism, warns: "Totalitarianism is simple and rigid like war, like death. Federalism is complex and flexible, like peace, like life. And since it is simple and rigid, totalitarianism is a constant temptation for our weariness, anxieties, doubts and misfortunes stemming from a spiritual resignation. A totalitarian spirit is not dangerous only because it triumphs in a handful of states and makes a fast or slower advance in all others, but especially because it spoils all of us, in the heart of our thoughts, at the very least constraining our vitality, courage and life's purpose."⁵⁴

Political processes in complex associations of states constantly generate specific political problems and issues that are to be dealt with in a way tailored to the application and maintenance of the federal principle. This is the very essence of federal solutions, with their imminent ambivalence between the demand for joining a wider association and the imperative of preserving autonomy and identity in such a union. American author Martin Diamond summarized this in the following way: "The distinguishing characteristic of federalism is the peculiar ambivalence of the ends men seek to make it serve... Federalism is always an arrangement pointed in two contrary directions or aimed at securing two contrary ends. One end is always found in the reason why the member units do not simply consolidate themselves into one large unitary country; the other end is always found in the reason why the member units do not choose to remain simply small wholly autonomous countries. The natural tendency of any political community, whether large or small, is to completeness, to the perfection of its autonomy. Federalism is the effort deliberately to modify that tendency. Hence any given federal structure is always the institutional expression of the contradiction or tension between the parti-

⁵³ Branko Smerdel: *Neki komparativni problemi primjene federalizma (A few comparative problems in the application of federalism)*, Naša zakonitost, No. 9, 1986, pp. 1137 – 1145; Branko Smerdel: *Politika, pravna znanost i aktualni problemi jugoslavenskog federalizma (Politics, legal science and current problems of Yugoslav federalism)*, Naše teme, No. 7-8, 1986, pp. 38 – 52.

⁵⁴ Denis De Rougement: *L' attitude Federaliste*, cited in: David R. Herron: *The Ends of American Federalism: an European Perspective*, South-Western Political Science Association Meeting, Fort Worth, Texas, March 22, 1973, p. 30.

cular reasons the member units have for remaining small and autonomous but not wholly, and large and consolidated but not quite. The differences among federal systems result from the differences of these pair of reasons for wanting federalism.”⁵⁵

These assertions are important in order for us to clarify the Euro realists’ position that the European Union is neither some kind of a new type of association, where the iron laws of international and internal policies would no longer apply, nor it is some kind of a new type of a historically unprecedented political system. It is a complex association of states founded on federalist principles⁵⁶, having its historical predecessors and comparative examples and as such it should be understood, studied and considered while preparing to participate in. In this, it is of great importance that we should not disregard historical experience, as well as the accomplishments of domestic thought. Such an approach we consider ‘a realist one’, because it advocates accession to the European Union, in full familiarity of its advantages. Those are first and foremost expressed by the original slogan “peace and prosperity”, as well as of its true nature and problems it generates. Realism does not mean hostility towards association⁵⁷, but instead demands understanding of the complexity and fragility of federalist institutional complexes.⁵⁸ That understanding is therefore necessary in accession to complex associations, as well as in their maintenance. Excessive expectations lead to great disappointments and often tragedies as well.⁵⁹

⁵⁵ Martin Diamond: *The Ends of Federalism*, Publius, Vol. 3, No. 2, 1973, p. 130.

⁵⁶ The federal principle is fundamental to associations of equal entities, wherein the law ensures equality and preservation of identity of the complex association’s member states. Federation is only one example of applying this principle – Branko Smerdel, in: Branko Smerdel and Smiljko Sokol: *Ustavno pravo (Constitutional Law)*, Narodne novine, Zagreb, 2009, pp. 409 – 436. Also see Branko Smerdel: *Relevance of the Political Theory of a Compound Republic for the European Integration: Toward a Theory of Constitutional Choice*, Workshop in Political Theory & Policy Analysis, Indiana University, Bloomington, 2006.

⁵⁷ Likewise, “Euro scepticism” also does not mean hostility towards the Union, as has become common to claim during the propaganda on the accession referendum.

⁵⁸ Lidija Basta Fleiner and Jean-Francois Gaudreault-DesBiens: *Federalism and Autonomy*, in: Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.): *Routledge Handbook of Constitutional Law*, Routledge, London and New York, 2013, pp. 143 – 158.

⁵⁹ Smerdel, B. (ed.), *op. cit.* (fn 13).

Conclusion

Each member state is obliged to observe the EU law as provided by the agreements on membership, i.e. up to the limits of the principle of rule of law. But no member state should be required to renounce its Constitution, accepting a total supremacy of all the sources of the Union law, in advance and with no reservations. This goes in particular for the erroneous approach according to which the “constitutional domain reserve” applies only to the core countries, at the first place Germany and France, and not to the smaller and newer members. We are not equally powerful, but we have equal rights. At the root of these doubts, there is a different understanding of the constitution and constitutionality. For positivists, the constitution is an act of regulation just like any other such act, for the subscribers of the today suppressed historical school of jurisprudence it is a text trying to summarize the historical experience of a people in its struggle for natural rights.⁶⁰ As the supreme act of the national legal system, the constitution rules not only within the domain of courts of justice. By limiting our research to the jurisprudence of the European court, we are denied a necessary deeper insight into a reality of relations in the compound community of nations.⁶¹ The most comprehensive analyses of the case-law unearth only a part of the phenomenon called legal order, which must include an insight into the ways and modalities of implementation. An appraisal of the whole requires a wider interdisciplinary approach than the one enabled by legal positivism dominating the study of constitutionality in the European Union.⁶²

⁶⁰ This also enables the ease with which the preamble of the Croatian Constitution has been amended and retailored. Positivists do not understand demands for acknowledgement of historical experience in the function of prediction. For an interesting analysis of the dispute see Harold Berman: *World Law: An Ecumenical Jurisprudence of the Holy Spirit*, Emory Public Law Research Paper No. 05-4, February 2005, pp. 6 – 7, at <http://papers.ssrn.com/abstract=666143>, accessed on March 25, 2014.

⁶¹ This assertion does in no way underestimates the importance of our new, positivistic European law theory that has successfully fit in the European and American trends, but aims to integrate it into an interdisciplinary approach which has already been developed. On the development of the newer judicial theory and practice see extensively Siniša Rodin: *Ustavni protekcionizam i nacionalni identitet (Constitutional protectionism and national identity)*, in: Arsen Bačić (ed.): *Ustavna teorija: strani utjecaji i hrvatski odgovori (Constitutional Theory: Foreign influences and Croatian responses)*, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2012.

⁶² Citing European court decisions *Costa v. Enel* from 1964 and *Simmenthal* from 1977, some authors have rushed to conclude that the European constitution had been

In every form of association of states, the national constitution represents the final guarantee of identity preservation, which is in itself a condition of accession to any association of states. The attitude of the powerful towards the European constitution as well as towards the hard-won Lisbon Treaty and the newly established institutions calls for caution. This is why we should be aware of the examples of numerous EU members, not just the large or old ones, which rely on their constitutions in the protection of national interests. A special role-model is the developed jurisprudence of the German Federal Constitutional Court, already followed by a few other constitutional courts. The Court had developed a theory of constitutional identity as a basis for decisions wherein advantage might belong to domestic constitutional law, instead of the theory of a total supremacy of all sources of European law over national law.⁶³

already in existence at the end of the last century. For example, see Koenraad Lenaerts, Piet Van Nuffel and Robert Bray (eds.): *Constitutional Law of the European Union*, Sweet and Maxwell, London, 1999.

⁶³ With in principle very significant, but with no politically problematic effects. See Theresa Donovan: *Germany Constitutional Court affirms Euro zone bailout*, Jurist, 14.03.2014., at <http://jurist.org/paperchase/2014/03/germany-constitutional-court-affirms-euro-zone-bailout-decision.php>, accessed on March 25, 2014.

Sažetak

Branko Smerdel *

U POTRAZI ZA DOKTRINOM: HRVATSKI USTAVNI
IDENTITET U EUROPSKOJ UNIJI

Ulazak Republike Hrvatske u europski pravni sustav otvorio je niz teorijskih kontroverzi i rasprava u pravnoj javnosti. U radu se obrađuje jedna od njih – problem ustavnog identiteta. I danas postoje tendencije izjednačavanja federalističkog načela i federativne države te posljedično odbacivanje federalizma kao ostvarivog načela. U vezi s dvjema pogrešnim ideološkim interpretacijama Europske unije – jedne prema kojoj je riječ o sustavu kojim dominira samodostatna birokracija, ili suprotne, prema kojoj je riječ o zajednici utemeljenoj na povjerenju i altruizmu – naglašava se važnost pravilnog razumijevanja pojma ustavnog identiteta. Među ostalim značenjima ustavnog identiteta je i ono o “preostalom suverenitetu” u složenoj zajednici država. Stoga je važno, iako zanemareno, stvoriti novu pravnu teoriju radi jačanja vladavine prava, kao i jasnog definiranja realističnih načela prednosti prava Europske unije nad nacionalnim ustavima. Takva teorija ne može biti utemeljena na čisto pravnom, već samo na interdisciplinarnom pristupu, koji bi uzeo u obzir niz izvanpravnih čimbenika koji određuju dinamiku odnosa unutar složenog sustava različitih razina ustavnosti u EU-u. Pri tome ne smiju biti zaboravljena postignuća federalističke teorije koja je prožimala ideje utemeljitelja europskih integracija. Pogreške hrvatske Vlade i spor u koji je ušla s Europskom komisijom na početku hrvatskog članstva u EU-u pokazale su nužnost takve realistične teorije ustavnog identiteta. S obzirom na nejasnoće koje postoje glede tog pitanja i u drugim zemljama, problemi s kojima se susreće najnovija članica mogu biti važni i za njihova daljnja razjašnjenja u ostalim članicama EU-a.

Ključne riječi: Europska unija, ustavni identitet, čisti legalizam, federalno načelo, federacija, složena zajednica, Hrvatska

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