
EU Enlargement and Political Change in Eastern Europe

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Requirements of EU Membership and Legal Reform in Croatia

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Summary

The author claims that the countries of Central and Eastern Europe that have signed the Agreement on Association and Stabilization with the European Union need a reform to facilitate an interaction between the national law and the EU law. This may lead to a direct implementation of the community law or/and the association law. In Croatia there is a dualistic understanding of the secondary association law that may create some obstacles in its implementation. To resolve this, the author proposes that the countries aspiring to association with the EU should redefine their national sovereignty. Such a redefinition would ensue from an acceptance of the *voluntary regulatory restraints* that should be based on a broad pro-European political consensus. In the situation when the concepts of the EU law's supremacy and its unequivocal implementation have to be endorsed, such restraints might even call for amending the national constitutions.

Key words: European Union, legal reform, voluntary regulatory restraints, Croatia, national sovereignty, community law, association law



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1. Introduction

Association with and membership of the European Union confronts national legal systems with challenge of undertaking a comprehensive legal reform. By signing a Stabilization and Association Agreement Croatia has initiated the process of harmonization with Community law and one of the most important elements of this process will unfold in the area of constitutional law. Pressing issues that will have to be solved include position of Community law in Croatian legal order and proper role of national regulatory authorities, both legislative and executive. Following introductory analysis of legal nature of (stabilization and) association treaties and their understanding in other

European states I will discuss current approach to the said issues and propose possible solutions to existing problems that may become relevant for future constitutional amendment.

2. (Stabilization and) Association Agreements: Political commitments and legal obligations

Relationship between the European Union and its associated states of Central and Eastern Europe that are candidates for EU membership is regulated by agreements concluded on legal basis of Article 310 (ex Article 238) of the EC Treaty.¹ Being so-called mixed agreements, they are required signature and ratification not only by the European Community, but of individual Member States too. Today, this type of agreements is generally understood to be an instrument of accession to the full membership of the EU and are therefore dubbed “Europe Agreements”.² In the past, however, the same legal basis has proven to be extremely flexible tool for conclusion of a variety of Treaties, and practice has shown that some of the association agreements have paved the fast track way for associated states to join EU while some have not. The latter is illustrated by example of Turkey which has a long association record with no imminent membership in sight.

While Association Agreements (Europe Agreements) grant their signatories status of EU candidates, the new generation of association agreements – Stabilization and Association agreements grant status of “potential candidate” for EU membership. Only two such agreements have been signed so far, and not one has entered into force yet. FYR Macedonia signed the Stabilization and Association Agreement with the EU on April 9th 2001, and Croatia on October 29th 2001.³

Neither Association Agreements nor Stabilization and Association Agreements stand for a guarantee of EU membership. It is interesting to note that association agreements between EU and Central European states did not originally envisage provisions

¹ “The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.” There are two generations of association agreements with European states. So called Europe Agreements were concluded between the EU and most of the countries of Central and Eastern Europe and they grant associated states status of candidates for EU membership. Later on, Stabilization and Association agreements were concluded between EU and its member states and Croatia and Macedonia, respectively. These agreements grant associated states status of potential candidates.

² Central and East European candidate countries that have acquired that legal status on basis of their respective association agreements, so-called Europe Agreements, are Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. In addition, Turkey, Cyprus and Malta have candidate country status.

³ For a more detailed analysis see Siniša Rodin and Marijana Šarolić, *New Generation of Association Treaties for South-East Europe: Case for Croatia*, Proceedings of the III International Conference – “Economic System of European Union and Accession of the Republic of Croatia”, University of Rijeka, University of Trieste and University of Antwerpen, 2001.

directly referring to accession to the EU. These provisions were negotiated under pressure of some states and even so they are phrased in relatively vague terms.⁴ In fact, not even explicit reference to future membership of the EU in the Europe agreements would not amount to a guarantee of membership.⁵ However, as contrasted to other international treaties that EU is in habit of signing with the third states, association agreements have certain distinctive features. Without trying to be exhaustive, I would like to present some of their specific characteristics.

(i.) First, having signed their respective association agreements with the EU and its Member States, signatory States have found themselves in an entirely new legal position.⁶ This new legal position is defined by a much broader set of instruments than the association treaties themselves. Starting from Article 49 (ex Article O) of the Treaty on European Union and Article 6(1) that it invokes,⁷ the Copenhagen criteria for EU membership,⁸ going over various documents on accession issued by the Council of

⁴ Marc Maresceau, A Legal Analysis of the Community's Association Agreements with Central and Eastern European Countries: General Framework, Accession Objectives and Trade Liberalization, in: Stratos V. Konstadinidis (ed.), *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market*, Dartmouth 1996, pp. 125-129; Opinion of AG Mayras in *Haegeman* is worth noting: "But Article 238 does not define the association and does not particularize in any way the possible contents of an association agreement. It follows that such a type of agreement may lead to the establishment of a very close institutional cooperation between the Community and the associated country without going as far as the unconditional accession of that country." *Haegeman v. Belgium*, case 96/71 [1972] ECR 1005, p. 1023.

⁵ As it was put by Smit and Herzog, "association signifies close and continuous cooperation with the Community. [A]n interest only in financial or trade arrangements, let alone mere consultation agreements is not enough. Agreements seeking this involve only exchanges of reciprocal advantages, while association implies common goals and institutional framework." Smit and Herzog, *Law of the EEC: A Commentary on the EC Treaty*, Vol. G 6; Frank S. Benyon, Community Association Agreements: From the Sixties to the Nineties, in: Konstantinidis, *op. cit.*, p. 51f.

⁶ According to Macleod, Hendry and Hyett, the key criteria defining an association agreement are the following: close relationship between the parties, extending to a participation of the associated country in certain of the objectives of the EC treaty; the content of association which goes beyond merely commercial matters and covers a number of fields of Community activity; the institutions created, which are highly developed and include organs endowed with decision-making power; and permanent nature of links, and indefinite or extended periods of application, see I. Macleod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities*, Oxford University Press, New York, 1996, pp. 370 *et seq.*

⁷ Article 49: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members." Article 6(1): "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

⁸ Bull. EC 6-1993, pt. I.13. As decided in Copenhagen, membership requires that the candidate country has achieved: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union, and the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Ministers,⁹ Agenda 2000, Accession Partnerships,¹⁰ Commission Progress Reports, to the Annexes to the Treaty of Nice defining the number of seats in European institutions of the future, all these documents imply significant legislative commitments for candidate countries.¹¹

(ii.) Another feature of association treaties is their dual nature consisting of legal and political elements. In the legal arena, association agreements specify a number of more or less clear and unambiguous legal obligations interpretation and application of which remains authority of original parties, i.e. of the European Court of Justice and national courts, respectively. However, in the political arena, political commitments undertaken by the parties create a strong policy pressure for a specific kind and direction of legislative reform in candidate countries that would lead to ultimate and unconditional acceptance of *acquis communautaire*. In turn, once honored by candidate countries, these commitments create accession expectations that drive the EU to implement institutional reforms that would allow new members to accede. This was expressed as a commitment on the side of the Union to “strengthen and improve” its institutions, “...keeping with the institutional provisions of the Amsterdam Treaty.”¹² Needless to say, depth and proportion of reform necessitated by these commitments was far greater on the side of associated states. While change of institutional balance of the EU remains an important issue, transformation of social, economic and legal systems of associated states amounts to unprecedented effort to bring obsolete and inefficient legal system in line with EU standards. Proportions of this effort are maybe best illustrated by Janus Justynski speaking about Polish experience, that communist ideology “...transformed the act [the Constitution] into a kind of declaration having no practical application.”¹³ Similar was the situation in other former communist states. So, although reformist commitments on the both sides were significant, the reform in the EU can be said to be of evolutionary, while in the associated states of revolutionary nature.

(iii.) Furthermore, implementation of association treaties is highly dependant on economic and political considerations in each associated state. While the trajectory leading associated states closer to the EU is determined by political commitments, the moving

⁹ See e.g. Luxembourg European council, 12 and 13 December 1997, Presidency conclusions, DOC/97/24.

¹⁰ The first Accession Partnerships were decided in March 1998, as provided for in the Council Regulation 622/98 on the establishment of Accession Partnerships, 1998 OJ L 85. Interestingly, legal basis for relevant Council regulations was found to be ex Article 235, now 308 of the EC Treaty indicating lack of more specific treaty provisions regulating accession.

¹¹ As well as commitments to facilitate reforms in candidate countries, undertaken by the EU.

¹² Conclusions of the Luxembourg European Council (December 1997).

¹³ Janus Justynski, The Impact of the European Integration Process on the Creation of the Broad Lines of the Constitution of the Republic of Poland and on the Political Practices of the Country, in: A.E. Kellerman et al. (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level*, T.M.C. Asser Institut, The Hague, 2001, p. 281.

speed can be determined by individual states and the EU.¹⁴ In associated states the speed will, however depend not only on willingness of the elite, but on economic and political situation that determines political playground for implementing legislative reform. As a rule, improved economic performance of an associated state is critical for dynamics of reform.¹⁵

(iv.) All the association agreements contain some form of conditionality, a carrot and stick mechanism that can be used by the European union to influence policies of associated states and control the speed of rapprochement. The EU has gradually developed at least two distinctive conditionality requirements, notably human rights conditionality,¹⁶ expressed not only in Article 6 of the Treaty on European Union, but in specific human rights clauses of association agreements,¹⁷ and regional cooperation conditionality, introduced for the first time in stabilization and association agreements with Macedonia and Croatia.¹⁸ However, effectiveness of the conditionality approach depends largely on acceptance by associated states of the overarching political goal, whether expressed in association treaty or implicit – membership of the EU. Pursuance of this goal affects the direction of legislative reform and intensity of impetus for legal harmonization.¹⁹

(v.) Application of (Stabilization and) Association Agreements and secondary association law in associated states requires recourse to community law. For example, Article 62(2) of the Hungarian Association Agreement provides that any practice contrary to competition provisions laid therein “...shall be assessed on the basis of criteria arising from the application of the rules of Articles 85 and 86 of the [Rome] Treaty.” Similar language is present in other association agreements and has been retained in stabilization and association agreements too.²⁰ Such wording requires associated states not only

¹⁴ This speed can indeed vary. As the latest comparison shows, Bulgaria has so far completed 12 chapters of negotiations with the EU, Cyprus 23, Czech Republic 21, Estonia 19, Hungary 22, Latvia, Lithuania, Malta and Poland 18, Romania 8, Slovakia 20 and Slovenia 21.

¹⁵ In Croatia, for instance, signing of the Stabilization and Association Agreement was criticized by right-wing opposition as limitation of state sovereignty. In Estonia, the Constitutional definition of sovereignty seems to be inappropriate for purpose of EU membership. See e.g. Anneli Albi, *Europe Agreements in the Light of Sovereignty and Legitimacy: Case of Estonia*, in: A.E. Kellerman et al. (eds.), *op. cit.*, pp. 195 *et seq.*

¹⁶ Generally see Manfred Nowak, *Human Rights “Conditionality” in Relation to Entry to, and Full Participation in, the EU*, in: Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 687 *et seq.*

¹⁷ For discussion of human rights clauses in EU see: Eibe Riedel and Martin Will, *Human Rights Clauses in External Agreements of the EC*, in: Alston, *op. cit.*, pp. 723 *et seq.*

¹⁸ See Council Conclusions of 29 April 1997 on conditionality. For discussion of this topic see Barbara Brandtner and Allan Rosas, *Trade Preferences and Human Rights*, Alston, *op. cit.*, pp. 699 *et seq.* See also Siniša Rodin and Marijana Šarolić, *supra* note 3.

¹⁹ The term was used by Evans in *Voluntary Harmonization in Integration between the European Community and Eastern Europe*, *Eur. L. Rev.*, (22) 1997: pp. 207f; see also, Albi, *supra* note 15, pp. 198f.

²⁰ Article 70(2) of the Stabilization and Association Agreement between EU and Croatia provides: “Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the

to apply EU competition rules, but “interpretative instruments adopted by Community institutions” as well. In this way elements of the *acquis communautaire* are introduced in what associated states understand as an international law relationship.²¹ However, reference to community law is logical in light of the object and purpose of association agreements – gradual integration with the EU. In other words, object and purpose is what makes Association Agreements different from ordinary treaties of international law and national courts of associated states should take it in consideration in their application.

(vi.) Finally, but maybe the most important, both generations of Agreements form part of Community law what is witnessed by the standing practice of the European Court of Justice. This position was expressed as early as in 1974 since when, from the Community point of view, association agreements are considered equal to acts of institutions of the Community for purpose of jurisdiction of the European Court of Justice under Article 177 EC, now Article 234(1)(b).²² Later on, the ECJ extended its jurisdiction to interpretation of secondary law created under an association agreement. For example, in *Deutsche Shell*²³ the Court ruled that it had jurisdiction to give a preliminary ruling on the interpretation of arrangements of a Joint Committee established by the Convention on a Common Transit Regime concluded between the EEC and EFTA countries. The Court upheld its position expressed in *Greece v. Commission*,²⁴ *Sevince*²⁵ and *Kazim Kus*²⁶ cases and said that decisions of an Association Council which is directly linked to the agreement form part of Community law, regardless of whether such decisions have binding or non binding nature. It was position of the Court that even recommendations of an association council that are not legally binding have to be taken in consideration for purposes of interpretation of an Agreement.²⁷ In other words, the ECJ not only accepts jurisdiction for interpretation of primary and secondary association law, but grants Association Agreements status of an “integral part of community law.”

competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.”

²¹ This issue was brought before Hungarian Constitutional Court which concluded that “...the principle of *favor conventionis* applies to the extent until the Constitution is violated as a result of the interpretation of Hungarian law in conformity with the international treaty.” For full discussion of this issue, see Janos Volkai, *The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions*, Harvard Jean Monnet Working Paper 8/99.

²² Case 181/73 (1974), *Haegeman v. Belgium* ECR 449, para. 3; See also Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* (1987) ECR 3719, para. 7.

²³ Case C-188/1991, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, (1993) ECR I-0363, pt. 19.

²⁴ Case 30/88, *Greece v. Commission*, (1989) ECR 3711.

²⁵ Case C-192/89, *S.Z. Sevince v. Staatssecretaris van Justitie*, (1990) ECR 3461.

²⁶ Case C-237/91, *Kazim Kus v. Landeshauptstadt Wiesbaden*, Judgment of 16 December 1992, (1993) CMLR 887.

²⁷ *Id.*, pt. 18. See also Macleod et al., *supra* note 6, p. 138.

Therefore, when applying provisions of (Stabilization and) Association Agreements authorities of candidate and potential candidate countries in fact apply Community Law.

3. *Significance and legal status of AAs in associated states*

For countries of Central and Eastern Europe Association Agreements with the European Union have no comparison in their earlier international practice.²⁸ It is therefore not surprising that their legal status in national legal order is governed by the same constitutional provisions regulating status of international treaties in general. Whether this approach resulted from socialist law background of their legal culture which championed dualist approach,²⁹ or just an understanding that European integration can be mastered on basis of existing constitutional norms,³⁰ most of these states have been facing a common problem which can be described as the gap between the demands of integration with the European Union, and rigidity of their traditional constitutional models. In other words, while constitutional frameworks of European Union member states kept adjusting to the interlocking relationship and went through what Joseph Weiler once named constitutional revolution³¹, constitutional and legal systems of now candidate or potential candidate countries remained more or less unchanged and insensitive to requirements of closer integration with the EU.

In order to facilitate compliance with substantive requirements of association agreements, a reform is needed to create an interface between national and EU law that would open legal systems of candidate countries to application of supranational sources of law. Such an interface should provide for provisions on legal status of the EU law in national legal order that enable direct applicability of association and/or community law.³² With-

²⁸ Even in comparative perspective, accession and legal integration that is underway is unprecedented. There are very few, if any, historic examples of a similar legal effort. However, certain historical moments and debates in the United States may shed some comparative light on the European project. More precisely, the federalist against anti-federalist debate and concept of states rights as opposed to federal supremacy bears certain consequence for constitutional debate in the EU acceding states. Another possible point of comparison can be found in post Civil war reconstruction Constitutional amendments and debates about their ratification in the recalcitrant southern States.

²⁹ This rigidity is, *inter alia*, characterized by unsettled status of international law in national constitutional order. For Czech Republic see e.g. Vladimir Balaš, Legal and Quasi-Legal Thresholds of the Accession of the Czech Republic to the EC, in: A.E. Kellermann et al. (eds.), *op. cit.*, *supra* note 12, p. 267. In Croatia the Constitution provides for monist approach, but public authorities have difficulties in breaking up with former dualist practice. See e.g. Constitutional Court of the Republic of Croatia and International Law, *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, (55) 1995: p. 783.

³⁰ Like it is case in Italy which considered her constitutional provisions sufficient for ratification of the Maastricht Treaty.

³¹ J. H. H. Weiler, Transformation of Europe, *Yale L. J.*, (100) 1991: p. 2403.

³² There are at least two other elements of this interface which will not be discussed in detail. They include constitutional basis for association/accession and an adequate and efficient framework of national institutions that would be capable of pursuing efficient integration policy. The latter includes a need of building a pro-European political consensus that would enable smooth achievement of these goals.

out attempting to be exhaustive, a cursory look into present constitutional provisions of candidate and potential candidate countries regulating status of international treaties in national legal order shows the following.

In *Bulgaria*, ratified international treaties in force are assimilated to national legislation and have derogatory legal force.³³ In *Czech Republic* human rights treaties are “immediately binding” and “superior to law.”³⁴ *Estonian* and *Hungarian* Constitutions speak about general international law only, but in addition to this Hungarian Constitution provides for an obligation to harmonize national law with international legal obligations.³⁵ Article 9 of the *Polish* Constitution stipulates an obligation to respect binding rules of international law, and Article 87 mentions ratified international agreements as source of national law. *Slovakian* Constitution provides for derogatory force of directly applicable international treaties over statutes.³⁶ *Slovenian* Constitution offers a simple, but maybe the most comprehensive solution for application of international treaties which once ratified are to be applied directly.³⁷ Both *Croatian* and *Macedonian* constitutions make ratified international treaties part of national legal order and grant them entrenched legal status but remain silent about their possible direct effect.³⁸

Such a diversity of constitutional solutions is not surprising knowing that even within the EU such different approaches to legal status of international law as one in United Kingdom and the Netherlands can lead to the same result when legal status of community law is concerned. However, since most candidate and/or associated states do not differentiate association treaties from other treaties of international law of specific constitutional reference to community law one can notice that. Therefore, as a matter of constitutional law, in absence of specific constitutional provision tailored for association agreements, their interpretative paradigm remains not different then is the case with other treaties of international law, and their direct effect, or self-executing character is not automatic regardless of the position of the ECJ, which these courts are not bound to take notice of.³⁹ While lack of specific reference to association agreements in national

³³ Constitution (Bulgaria), Article 5.

³⁴ Constitution (Czech Republic), Article 10.

³⁵ Constitution (Estonia), Article 3; Constitution (Hungary), Article 7.

³⁶ Constitution (Slovakia), Article 7(5): “The international treaties on human rights and fundamental freedoms, international treaties which do not require implementation by a statute, and international treaties which directly provide rights and duties of natural persons or legal persons and which were ratified and promulgated in a manner set by a statute, have priority over Slovak laws.”

³⁷ Constitution (Slovenia) Art. 8.

³⁸ Constitution (Croatia), Article 141. However, self executing status of international treaties is not precluded and Croatian courts recognize self-executing effects. Similar solution exists under Article 118 of Macedonian constitution: “The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law.”

³⁹ Though technically justified, such approach may create problems in their implementation, and process of adjustment of national law with community law. Let us only mention an example where an associated state that did not recognize self-executing status to its association agreement would have to start granting self-exe-

constitutions does not prevent national courts from applying them, its absence may inhibit national courts from recognizing their direct effect in legal systems which do not require them to do so.⁴⁰

Some German scholars, notably Bleckmann, hold that association treaties create no supranational legal order and remain in realm of traditional international law. According to this position acts of institutions established under Association treaties, i.e. decisions of an Association Council, do not have, as such, validity in Community law or in legal orders of Member States, but require an act of transformation by secondary Community legislation.⁴¹ This view, which is supported by constitutional practice of associated states, however, runs against the standing practice of the ECJ developed in interpretation of earlier association agreements, and as I suggest, does not seem to be conducive to harmonization efforts. Namely, as alternative to the “classical” international law approach there may be other solutions, some of them being usual practice in interpretation of international law. One of the obvious approaches is interpretation in accordance with international law, a concept well known in many legal systems, such as German⁴² and one of England and Wales.⁴³ According to this approach national courts of an associated state could recourse to interpretation of national law in accordance with the association treaty, taking into account current status of *acquis communautaire* including existing interpretations of the ECJ. Such practice would eventually lead to gradual acceptance of direct effect of self-executing provisions of primary and maybe even secondary association law. Argument in favor of such approach is that associated states, by entering into the Agreement, intended to align their respective legal orders with the one of Community law. Consequentially, in order to get as close as possible to requirements of community law, an association agreement has to be interpreted in light of *acquis communautaire*.⁴⁴

cutting status to association agreements between EU and third countries after having become member of EU. If technically not a problem, new interpretative paradigm would require significant adjustments.

⁴⁰ As it is stressed by Cremona, “...the relationship between legal orders is a matter for the Community legal order without reference to the position taken by the other Contracting Party; the *bona fide* performance of the agreement in international law terms does not predetermine the legal mechanisms chosen by the parties to achieve its objectives. Thus as long as both parties perform their obligations, it does not affect the reciprocity of the agreement if one does so by attributing direct effect to its provisions while the other does not.” See Marise Cremona, External Policy and the European Economic Constitution, in: Grainne de Burca and Joanne Scott (eds.), *Constitutional Change in the EU*, Hart Publishing, Oxford and Portland, 2000, p. 143.

⁴¹ Albert Bleckmann, *Europarecht*, Carl Heymanns Verlag, Köln etc., 1997, pp. 502f.

⁴² In Germany the concept is known as “*Völkerrechtfreundliche Auslegung*”. As it was explained by the Federal Constitutional Court in a case concerning interpretation of the European Human Rights Convention, all laws, existing and future have to be interpreted in light of the Convention. BVerfGE 74, 358 (370); see also Jochen Abr. Frowein, *Das Bundesverfassungsgericht und die Europäische Menschenrechtskonvention*, *Festschrift für Wolfgang Zeidler*, Bd II, Walter de Gruyter, Berlin, New York, 1987.

⁴³ See e.g. *McCarthy v. Smyth*, [1979] I.C.R. 785, [1978] W.L.R. 849, [1981] Q.B. 182. See also, Owen Hood Phillips, “High tide in the Strand?” Post-1972 Acts and Community Law, *L. Q. Rev.*, (96) 1980: p. 31.

⁴⁴ As Cremona has noted, this does not imply that the relationship with the partner state will share the characteristics of the Union's Constitution. Cremona, *op. cit.*, *supra* note 40, p. 92.

4. *Legal status of secondary association law in associated states*

In situation where association agreements are not constitutionally distinguished from other treaties of international law, status of secondary association law in associated states depends on three decisive factors. Terms of Association Agreement, national constitutional or other normative authorization, and judicial recognition.

(i.) As far as the terms of association agreements are concerned, they do not, as such, prevent secondary association law, i.e. acts of an association council, from being directly applicable in associated states, what is witnessed by the standing practice of the European Court of Justice. However, at the first sight, wording of relevant articles of association agreements instructing contracting parties to "...take the measures necessary to implement the decisions taken..."⁴⁵ does not seem to have intended to grant direct effects to decisions of association councils. This wording is indeed similar to one describing directives under article 249 of the EC Treaty⁴⁶ what leaves it entirely on national, primarily judicial, authorities of associated states to decide whether to make any inferences to legal principles of community law in their application, e.g. whether to recognize clear, unambiguous and unconditional provisions of secondary association law direct effect.⁴⁷ At the same time EU sanction for national non-implementation remains in the sphere of political.

(ii.) National constitutions of associated states mainly remain silent on status of secondary treaty law, what may create problems in determining their hierarchy in national legal systems. Nevertheless, their status can be inferred from provisions on delegation of regulatory authority. Namely, in order to create legal effects in national legal order, provisions of secondary association law have to be made under valid constitutional authority. Namely, since secondary association law results from exercise of regulatory authority, such authority has to be exercised on some legal basis. Article 90 of the *Polish* constitution provides for a legal basis for such delegation, subject to two third majority vote in the parliament. Similar is provision of Article 139 of the *Croatian* Constitution.⁴⁸ *Slovakian* constitution goes even a step further providing in Article 7(2)

⁴⁵ E.g. Article 112 of the Stabilization and Association Agreement with Croatia specifies the following: "The Stabilisation and Association Council shall, for the purpose of attaining the objectives of this Agreement, have the power to take decisions within the scope of the Agreement in the cases provided for therein. The decisions taken shall be binding on the Parties, which shall take the measures necessary to implement the decisions taken. The Stabilisation and Association Council may also make appropriate recommendations. It shall draw up its decisions and recommendations by agreement between the Parties." The same wording is reproduced in Article 104 of the Polish association agreement, O. J. L 348 , 31/12/1993, pp. 0002 – 0180, Article 106 of the Hungarian association agreement, O. J. L 347, 31/12/1993, p. 0002 – 0266.

⁴⁶ A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

⁴⁷ There is, of course, no explicit obligation on side of associated states to draw any parallels from the ECJ's case law related to vertical direct effect of directives.

⁴⁸ In Croatia status of legal acts of international institutions is regulated by Article 5 of the Judiciary Act. International treaties and legal acts enacted pursuant to an international treaty are considered a source of law. Author is not aware of similar provisions in other associated states that are of sub-constitutional rank.

that “[l]egally binding acts of the European communities and the European Union have priority over Slovak statutes.” Whether this provision applies to secondary association law remains unclear. In other words, legal status of secondary association law and its possible direct applicability depends on national grant of regulatory authority. In absence of such delegation, secondary association law seems not to be directly applicable in legal systems of associated states.

(iii.) Provided valid delegation of regulatory authority to (stabilization and) association council, and self-executing wording of a relevant legal rule,⁴⁹ direct applicability of secondary association law will depend on judicial acceptance. In fact, national courts will from time to time have to refer not only to primary and secondary association law, but to apply *acquis communautaire*. For example, the implementing rules for the application of the provisions on State aid adopted under Bulgarian association agreement provide for application in national law, of not only existing primary and secondary community law, but “...the present and future secondary legislation, frameworks, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and any decision taken by the Association Council pursuant to Article 4(3).”⁵⁰

It is clear enough that such a provision can not be understood as being addressed to legislative branch, but is to be directly applicable by national executive and/or judiciary, thus overriding any national provisions which may insist on its implementation. Such provisions obviously create problems in legal systems that do not grant direct applicability to association agreements and accordingly to secondary association law. In such situation national authorities will be required to apply community law by virtue of secondary association law, but will be prevented by national requirements. This conflict will have to be solved on constitutional level.

5. *European Union as beacon to constitutional reform in Croatia*

The main structural challenge to Croatian legal system created by requirements of associated membership and eventual membership in the EU can be encapsulated as the following dilemma: how to ensure lawful and efficient application of association law and Community law in national legal system while maintaining appropriate parliamentary control of the executive. With resolving this dilemma in mind I would propose three distinctive groups of constitutional amendments.

First, amendment of provisions regulating relationship of Croatian law and international law, and community law in particular, second, adjustment of constitutional structure of governance to conditions of first associated and ultimately full membership in the EU that will improve functioning of public authorities in the new circumstances,

⁴⁹ In lack of self-executing wording secondary association law can not be applied as such, but in form of implementing measures.

⁵⁰ Decision No. 2/2001 of the EU-Bulgaria Association Council of 23 May 2001, 2001 OJ L 216, 10/08/2001, pp. 20-24.

and third, amendment of constitutional provisions defining national sovereignty. None of the proposed amendments is required by the EU or made conditional for its membership. However, they follow from the logic of European integration and experience of other member states that have undergone the similar process of constitutional reform.

5.1. Regulating legal status of community law in Croatian legal order

Before enactment of the first Croatian constitution in 1990, legal status and application of international law was governed by former Yugoslav constitution which, like constitutions of most other Central and East European states, adhered to a strict dualist system. Former communist countries found the dualist principle to be a practical device for isolating themselves from unwanted effects of international human rights instruments which were often considered an “interference with internal affairs.” In an attempt to depart from such practice and to fully embrace international human rights standards Croatian Constitution of 1990 has put an end to the dualist approach.⁵¹ However, departure from dualist practice has proven to be a difficult task and dualist remnants have not been fully eradicated from Croatian legal system up to the day. Without having to go too far in history of persistence of legal dualism in Croatia, suffice to say that both Croatian Government and the Parliament approached ratification of the Stabilization and Association Agreement under a dualist premise in a clear disregard of constitutional intention.

On November 23rd 2001 Croatian Parliament ratified the Stabilization and Association Agreement⁵² and at the same time enacted the *Act on Implementation of the Stabilization and Association Agreement between Croatia and the EU* (hereinafter “the Act”).⁵³ The SAA was not ratified subject to Article 139(2) of the Constitution (2/3 majority) and as a consequence, no delegation of regulatory power was authorized. Accordingly, secondary association law will require either parliamentary or governmental implementation. Following the same reasoning the Act is insensitive to concept of direct applicability of secondary association law. In fact, the Act requires implementation of all secondary association law and does not provide for its direct effects.⁵⁴

⁵¹ This clearly follows from legislative history of the 1990 Constitution which explicitly refers to legal monism as constitutional principle: “A monistic concept of the relation between international and domestic law is accepted, according to which international contracts that have been concluded and ratified in conformity with the constitution, and have been published are a part of domestic law, are in principle above laws and all state authorities directly apply them according to their prerogatives.” (*Vjesnik*, November 27 1990., p. 6).

⁵² The SAA is published in the Official Gazette (*Narodne novine*), supplement Međunarodni ugovori, No. 14/2001 of December 27th 2001.

⁵³ See Izvješća hrvatskog Sabora, No. 315 of December 20th 2001. Curiously enough, the Act was still not published in the Official Gazette as of January 8th.

⁵⁴ Article 6: “Decisions of the Stabilisation and Association Council and the Interim Committee whose content changes or supplement the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and their member states respectively the Interim Agreement on trade and

This dualistic understanding of secondary association law is not only incompatible with the constitutional choice of legal monism, but may lead to difficulties in its application. Namely, decisions of the Stabilization and Association Council will not be directly applicable in Croatia, while at the same time Croatian courts and public authorities have a treaty obligation to recourse to substantive law of the European Union and case law of the European Court of Justice.⁵⁵ In such circumstances implementation of secondary association law is not only meaningless but contrary to the spirit of the Association Agreement.

There are two possible solutions to this problem. One could be found in more precise constitutional definition of self-executing effects of international treaties and secondary treaty law. Provision to such effect would restate the constitutional principle of legal monism and provide clear instructions for courts and public administration. Such an amendment could specify that provisions of international treaties and secondary treaty law which are clear, unconditional and do not require further implementation, that are legal basis of individual rights or that in other way create legal effects should be applied directly by courts and public administration. Advantage of this approach is that it affirms constitutional choice of legal monism and applies not only to Community law but to much broader array of international sources, such as the law of the European Convention on Human Rights and Fundamental Freedoms. At the same time its disadvantage may be in lack of more EU-specific regulation. However, the latter could be remedied by appropriate legislation. Second solution would be in distinguishing Community law from international law and making specific provisions to this effect. An advantage of such approach is that it can be more sensitive to differences in application of Community rules in pre- and post-accession periods. Another advantage is making a clear watershed between international and Community law what is the current reality. In practice it has been proved, however, that specific constitutional definition of Community law is not necessary provided adequate mechanisms that ensure its self-executing effects. Italy and the Netherlands stand for the clear examples of such approach. In any case, Croatian authorities have chosen a third path which is not only constitutionally impermissible but contrary to object and purpose of the Stabilization and Association Agreement and undertaken political commitments.

trade-related questions between the Republic of Croatia and the European Community are implemented in accordance with the procedure of ratification of international contracts. Decisions of the Stabilisation and Association Council and the Interim Committee which require adopting of new or amending of existing laws are implemented in accordance with the procedure of legislation. Decisions of the Stabilisation and Association Council and the Interim Committee, except those stated in paragraphs 1 and 2 of this Article, are implemented through decisions, conclusions and other acts of the Government of the Republic of Croatia.”

⁵⁵ See e.g. For Article 70 of the SAA which specifies: “Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.”

5.2. Restructuring national institutions

One of the effects of Community law in national legal and political orders is shift of power from legislative branch to the executive. This shift occurs as a consequence of increased decision-making responsibilities of national governments in the Council of Ministers. Even in pre-accession period national executives acquire new regulatory powers within Association Councils that emulate work of the Council of Ministers. In such circumstances question of decision making powers and law making authority has to be regulated on constitutional level, striking a new balance between the two political branches of government. Since both, Community law and association law can be directly effective, national executive not merely undertakes political or legal commitments, but makes fully fledged legal rules that create individual rights and which have to be enforced by the judiciary. In this respect two different legal issues arise on constitutional level. First, issue of cooperation of national executive and legislative branch in EU-related regulatory activities and second, Government's authority to regulate.

(i.) Relationship of Executive and Legislative branch

Following the recent constitutional reform Croatia is a parliamentary republic. The Government is currently composed of a five-party coalition with stable majority and has proved to be able to mobilize even a 2/3 majority of parliamentary votes. The recent Act regulating implementation of the Stabilization and Association Agreement provides for a two-tier system of parliamentary control of the executive. First, it envisages an obligation, under Article 6 of the Act, for the Government to obtain an "opinion" of the Parliament or one of its committees before taking vote in the SA Council. In other words, any vote in the SA Council will be dependable on the mandate, defined by the Government subject to Parliamentary opinion. In this stage the Parliament and its committees may act as policy-makers, though with a limited role due to a non-binding nature of their opinions.

The second tier of parliamentary control is due to non-self-executing nature of the secondary association law, as understood for the time being in Croatia which will allocate much of the regulatory burden to the Parliament which will have to deal with most of the harmonization effort under the SAA in any case. However, regardless of its pivotal role, the Parliament will be restricted by the fact that harmonizing legislation will necessarily have to emulate Community law, and will have either limited, or no discretion at all, particularly when emulating Regulations. When emulating directives, this discretion will be broader, certainly within limits of the aim to be achieved.

When speaking about role sharing between the Government and the Parliament, the main constitutional dilemma seems to be whether, and to what extent, to extend constitutional mandate to the Government when acting within European institutions. While parliamentary participation is necessary for legitimacy of governmental action, present requirement introduced under Article 6 of the SAA Implementation Act to have decisions of the Stabilization and Association Council ratified has to be avoided. This requirement is in any case meaningless since harmonization will have to be performed under general law making procedure, meaning that before parliamentary vote, all legislative bills have to pass scrutiny of one or more parliamentary committees, primarily the Legislation Committee. Interestingly, the Committee for European Integration estab-

lished under Article 96 of the Parliamentary Rules of Procedure does not have any regulatory authority⁵⁶ and it is not entirely clear whether and to what extent will it be engaged in the consultation process envisaged by Article 6 of the SAA Implementation Act.

(ii.) Regulatory authority of the executive

Under present constitutional rules most of the Government's law making authority is subject to parliamentary authorization. There are two principal instances of Governmental regulations: delegated authority and implementing authority.

Under Article 87 of the Constitution the Parliament may delegate its regulatory authority to the Government subject to certain restrictions. Such regulation will be valid for only one year during which it can be ratified by the Parliament, it may not encroach upon exclusive competence of the Parliament that is subject to qualified majority voting, such as electoral legislation, human rights legislation etc., and it may not be retroactive. Delegation of regulatory authority has been subject to controversy due to extensive Governmental regulation of commerce based on vague delegation provisions. It can be expected that much of the harmonization efforts will be dealt with in the Parliament. However, delegation of regulatory powers to the Government can not be excluded. Legislative and executive branch will obviously have to cooperate in this process and present constitutional provisions will have to be refined in order to facilitate smooth harmonization. In any case the Parliament should be able to delegate its regulatory authority for implementation of non-self-executing provisions of the SAA only when its regulatory powers are not exclusive.

Under Article 112 of the Constitution the Government is authorized to implement laws passed by the Parliament. The Constitution does not mention authority to implement international treaties or legal rules made under the treaties, such as decisions of the SA Council. Since the present position of Croatian authorities requires all such legal rules to be implemented, this constitutional provision should be amended in order to include authority of the Government to implement international treaties and secondary treaty law. However, since the Constitution rests on the monistic premise, such implementation could apply only to non-self-executing provisions while self-executing ones have to be applied without being implemented.

5.3. *Re-defining national sovereignty*

Whether being understood as classic treaties of international law or not, association treaties undeniably have effects on national regulatory powers that reach far deeper in a

⁵⁶ *Narodne novine* (Official Gazette) No. 9/2001, Article 96.: “The Committee for European Integrations:
– monitors the harmonization of the legal system of the Republic of Croatia with the legal system of the European Union,
– monitors the implementation of the rights and duties of the Republic of Croatia deriving from international contracts related to the Council of Europe,
– monitors programmes of assistance and cooperation of the European Union,
– cooperates and exchanges experiences with bodies in the European integrations.”

state's regulatory autonomy than other international law treaties.⁵⁷ There is a little wonder that political elite in candidate countries often understand problems of shared supranational decision making coupled by increased power of national executive to regulate without effective parliamentary control as restrictions of national sovereignty.⁵⁸ However, the "heavy" debate on what sovereignty really means and how it is exercised within the framework or integrative orbit of the European Union does not help in performance of obligations undertaken by association treaties.⁵⁹ The concept of sovereignty is sometimes used by right and conservative political groups to slow down political and economic reforms. In fact, opposition to closer integration with the EU is capitalizing on the fact that pace of "rapprochement" towards the EU depends on a plethora of political and economic assessments of economic and democratic progress in a particular associated state, what is sometimes understood as an impermissible interference with national sovereignty. Paradoxically, "international law approach" to association agreements can be used to foster both, pro-integrative and anti-integrative strategies.

On the one hand, this approach is attractive to proponents of national sovereignty since it favors traditional concepts of sovereign equality in international arena and perpetuates an illusion that nothing has really changed. On the other hand, sticking to the traditional international law approach may be useful to counter political pressures that claim national sovereignty to be a supreme value, but it does not increase the regulatory playground of national executive in performance of obligations arising from Association and Stabilization Agreement, and creates a danger of emergence of a climate in which any further step towards EU membership, and thus further limiting regulatory autonomy, will be politically difficult.⁶⁰ However, instead of engaging in a fruitless debate

⁵⁷ To certain extent every international treaty narrows the regulatory playground for national authorities. As early Soviet foreign minister and ambassador to the US, Maxim Maximovič Litvinov, has put it, absolutely sovereign can be only those states that have not undertaken any international obligations. Commitments undertaken by association agreements are of complex political and legal nature. Comprehensive legal reforms are to be implemented by national legislatures under the sword of Damocles of Commission supervision which gradually paves the way to the membership of the EU. National reforms are framed as an integration trajectory defined by the starting point, defined in a feasibility study, and by their ultimate goal – membership in the EU, i.e. full acceptance by a candidate country of *acquis communautaire*.

⁵⁸ For example, Croatia has set a legislative procedure according to which no legislative bill can be introduced to parliamentary procedure without having received a "certificate of compatibility" with EU law from the competent authority. In this way legislative discretion of the Parliament is significantly restricted.

⁵⁹ An interesting example can be found in the above mentioned decision of Hungarian Constitutional Court No. 30/1998 (VI.25), AB határozat ABH 1998, where the Court declared a Government decree seeking to recognize interpretative criteria of EU competition law applicable in Hungarian legal order without prior parliamentary authorization unconstitutional since it is incompatible with constitutional provisions on sovereignty.

⁶⁰ Croatian Prime minister and Minister for European Integration assess the Stabilization and Association Agreement as an ordinary international law treaty and are not pushing for qualified majority ratification which would have been required by the Constitution in case of delegation of regulatory powers to supranational bodies. See e.g. speech by Minister Neven Mimica at Croatian Parliament, presented on October 24th 2001, saying that no constitutional regulatory authority will be delegated to the Stabilization and Association Council (source <http://www.mei.hr>). This was said as a response from right wing parties claiming that the SAA is stripping of Croatia her national sovereignty.

over concepts of national sovereignty, a more practical approach could be taken. Opened texture of association agreements, and sweeping references to a variety of *acquis communautaire*, I suggest, should not be understood as restrictions of national sovereignty, but as *voluntary regulatory restraints* on side of associated states (hereinafter: VRR). The said VRRs have to be built on a broad pro-European political consensus and can be either negative, meaning an obligation not to engage in certain course of regulatory activity that is contrary to *acquis communautaire*, or positive, requiring certain course of legislative substance (harmonization). They may be addressed to national legislatures, but depending on situation, on national executive authorities or even judiciary. Contingent on situation in each particular state, on the road to the full membership of the EU, VRRs might require even constitutional amendment, particularly in order to accept concepts of supremacy of European law and its direct effect. More interestingly, in absence of specific national provisions regulating position of primary and secondary association law in national legal order the said VRRs may have overriding effects in national hierarchy of legal rules, eroding the formal Kelsenian trichotomy Constitution-Law-Regulation (German: Verfassung-Gesetz-Verordnung).

Finally, when accepting obligations rising from (Stabilization and) Association Agreements present, as well as former, candidate countries have found themselves in a different situation than original Member States at time of emergence of these key doctrines. Not only the *acquis communautaire* has significantly grown, but the original Member States have had an opportunity to actively participate in framing of European law and policies. Association Agreements confront candidate countries with virtually non negotiable acceptance of *acquis communautaire* with very little, or no bargain at all.⁶¹ Nevertheless, candidate countries simply have to accept limitation of regulatory autonomy as an “element of the bargain”, as it used to be in previous waves of enlargement.⁶² In other words, limitation of regulatory autonomy is a part of accession package deal.

Under the present constitutional provision, Croatian national sovereignty is “inalienable, indivisible and non-transferable” (Art. 2(1)). This categorical and static definition of sovereignty may hardly satisfy requirements of EU membership and even associated membership. Comparatively, constitutional clauses on sovereignty, such as one of the German constitution, are understood as protecting the core of national sovereignty, while opening national legal system to application of Community law.⁶³ Understood in this sense national sovereignty ceases to be static and becomes a dynamic category. While it is clear that membership in the EU does not amount to a renouncement of sovereignty, it is indisputable that modalities of its exercise are different from its traditional

⁶¹ As Grabbe and Hughes have put it, “... applicants are treated like member States in the extent of their obligations under the APs, but as applicant they have no rights and little say in determining the substance of relations, leaving the EU as a hegemonic actor.” Heather Grabbe and Kirsty Hughes, *Eastward Enlargement of the European Union*, London, The Royal Institute of International Affairs, 1998: p. 37; *op. cit.* Albi, *supra* note 15, p. 202.

⁶² Alan Dashwood, *The British Way: The Cohabiting With Community Law*, in: Kellerman *et al.*, *supra* note 13, p. 86f.

⁶³ See e.g. Ulrich Everling, *The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union*, *Yb. Eur. L.*, (1) 1994.

understanding in Croatia as a supreme and independent regulatory power. In line with the now common understanding ushered by the European Court of Justice in early *Van Gend en Loos* case, the founding treaties of European Communities stand for

“... more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens... The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member States but also their nationals.”⁶⁴

In line with this, a constitutional amendment should provide for a shared exercise of national regulatory powers within the framework of the European Union⁶⁵ while protection of the core of national sovereignty becomes task of the Constitutional Court.

6. Final Remarks

Formal relationship between the European Union and Croatia has just commenced and problems of implementation of association law are still to emerge. As far as reform of the legal system is concerned the real work is still ahead. The most important change which will have come about concerns the change of paradigm in understanding of association law and Community law which will gradually become integral part of Croatian legal system and applied directly by courts and public administration. Progressive integration of the two legal systems, however, will require a fundamental change of judicial reasoning on side of Croatian judges. Association agreements make part of community law and are applied directly by member states of the EU and the European Court of Justice. Therefore, when applying the Stabilization and Association Agreement, Croatian courts will apply Community law and in doing so will have to respect reasoning of the European Court of Justice. At the moment Croatian judges are ill prepared for this task. Recent dualist revival introduced by the Government only complicates efficient application of the Agreement.

In political arena it is often spoken about a necessity to reach political consensus on European issues. However, so far, the government was satisfied with the lowest common denominator. For example, inspite of its capacity to generate 2/3 majority for ratification of the SAA what would meet constitutional requirements for delegation of regulatory powers to the Association Council, it moved for mere qualified majority and ruled out direct applicability of secondary association law. As a consequence, imple-

⁶⁴ Case 26/62 *N. V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, (1963) ECR 1.

⁶⁵ Draft “sovereignty amendment”: The Republic of Croatia exercises its national sovereignty by cooperating with other states in construction of united Europe and for this purpose may exercise certain sovereign rights within institutions of the European Community and European Union as a member or an associated state.

mentation of secondary association law will remain at whim of political bargain and uncertain parliamentary coalitions. In fact, the only consensus that really has to be reached is one concerning understanding of association law and Community law as part of national legal order.

Anyway, bringing Croatian legal system in line with European requirements will take more than a mere legal or constitutional reform. What will be needed is a wide institutional restructuring which would create institutions capable of applying relevant legal rules.