The Constitution of Croatia in the Perspective of European and Global Governance

Iris Goldner Lang, Zlata Đurđević and Mislav Mataija

Abstract The report from the newest EU Member State – Croatia – explains that the constitutional system represents a break from the former socialist system, where the Constitution had been more 'political' and not directly applied in practice. The constitutional order is highly influenced by the German constitutional tradition, and the Constitutional Court often cites the German Constitutional Court. The Constitution has been amended with regard to the EU in a very extensive manner. No significant constitutional issues have arisen with regard to EU or international law. By way of some limited exceptions, trade unions and individuals unsuccessfully sought to contest austerity measures required as part of the EU Council's excessive deficit proceedings in the Constitutional Court. The Constitutional Court has additionally adjudicated questions on whether referendums regarding privatisation of certain public services are permissible, given that the referendum outcome

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could lead to incompatibility with EU law. The increased cost of water in relation to a relevant EU Directive was the object of the first reference for a preliminary ruling from Croatia. With regard to the European Arrest Warrant (EAW), some legislative guarantees (such as the statute of limitations) were removed from an implementing law following severe criticism and the threat of financial sanctions from the European Commission. The move through the EAW system towards *in absentia* judgments has also led to some debate, given the historical experience with a high number of *in absentia* judgments during the 1991–1995 war and the subsequent finding that a vast majority of these trials had violated fair trial rights.

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 In the socialist system of the former Yugoslavia the Constitution could have been characterised as falling more into the second category of 'political' constitutions, as it was considered to be a set of ideopolitical principles which were not linked to legal practice and which were not supposed to be directly applied in practice.[1] This perception still persists to a certain degree today with regard to the Croatian Constitution, but it has undergone a slow, but visible change, particularly in the last couple of years, with the growing importance of both the Constitution and the Constitutional Court. Different branches of the government and other actors on the Croatian political scene, such as trade unions and diverse interest groups, are using the Constitution and the important position of the Constitutional Court to advance their political agenda.[2] However, outside the political forum, Croatian

[1] Smerdel 2010, p. 6.

[2] E.g. for the applications of the Croatian Parliament to the Constitutional Court see Judgments U-VIIR-1159/2015, 8 April 2015 and U-VIIR-1158/2015, 21 April 2015, of the Constitutional Court, where the Croatian Parliament asked the Constitutional Court to determine whether it is constitutional to put questions on outsourcing and on giving highways in concession at national referendums (for the lowering of the referendum threshold, see the answer to question 1.2.3). On the other hand, former Croatian President Ivo Josipović stood for constitutional amendments in his 2013/2014 presidential campaign. See also the proposal for constitutional review initiated by nine trade unions as a response to Government austerity measures, discussed in more detail in the answer to question 2.7.3. (Judgment U-I-1625/2014 and others, U-I-241/2015, U-I-383/2015, U-II-1343/2015, 30 March 2015).

judges are still extremely reluctant to use or rely on the Constitution in their judgments.[3]

Croatian constitutional tradition is and will surely continue to be highly and predominantly influenced by the German constitutional tradition, as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This influence is felt both at the level of constitutional provisions and of the judgments of the Constitutional Court. The latter is evidenced by the fact that by October 2013, the Constitutional Court had relied on the case law of the European Court of Human Rights (ECtHR) in more than 1,000 of its decisions.[4]

In the context of constitutional amendments which have been made under the influence of the ECHR, two examples can be provided. First, Art. 16 of the Croatian Constitution was amended in 2000 by inserting a new paragraph providing for the principle of proportionality which was previously not included in the Constitution.[5] As explained in the National Report provided by the Croatian Constitutional Court for the XVIth Congress of the Conference of European Constitutional Courts, this insertion was 'predominantly the result of a [previous] judgment … of the Constitutional Court …, which was based on the principle of proportionality' and in which the Constitutional Court 'carried out the proportionality test as performed in the case-law of the ECtHR'.[6] The other example is the 2000 constitutional amendment whereby Art. 29 on the principle of a fair trial was aligned to Art. 6(1) of the Convention.[7]

On the other hand, the influence of the German Federal Constitutional Court (*Bundesverfassungsgericht,* hereinafter *BVerfG*) is most visible in the judgments of the Croatian Constitutional Court, in which it often cites the relevant paragraphs of judgments of the *BVerfG* in Croatian and the original text in German. On the occasions that it finds it necessary to establish whether a common standard on a certain issue can be found in a number of signatory states to the Convention, the Constitutional Court performs a comparative overview.[8]

The influence of the *BVerfG* can be expected to continue to be felt in the reasoning of the Croatian Constitutional Court both in matters which are not related to EU law and in the context of the relation between Croatian constitutional law and

[3] For a rare example of a Croatian judge who decided to initiate a constitutional review procedure and a critique of the formalistic reasoning of the Constitutional Court, see the Report by T. Ćapeta in 'Member States' Constitutions and EU Integration' in the project coordinated by S. Griller, University of Salzburg, Hart, forthcoming in 2019.

[4] National Report of the Constitutional Court of the Republic of Croatia based on the Questionnaire for the XVIth Congress of the Conference of European Constitutional Courts, 2013, p. 18.

[5] The Vice-president of the Croatian Constitutional Court, Dr. Snjezana Bagić, recently wrote her Ph.D. thesis on the principle of proportionality in the case law of the European courts and its impact on the case law of the Croatian courts; Bagić 2013.

[6] National Report of the Constitutional Court of the Republic, n. 4, p. 14.

[7] Ibid., p. 14.

[8] Judgment U-I-295/2006 et al, 6 July 2011.

EU law. So far, there have been only two judgments where the Constitutional Court has invoked Art. 145 of the Croatian Constitution (which stipulates the relationship between national and EU law) by stating that 'the Constitution is, by its legal nature, supreme to EU law'.[9] One can expect future judgments of the Constitutional Court to take a more detailed stance on the relation between Croatian and EU law, as well as the further influence of the *BVerfG* in this segment of the Constitutional Court's reasoning.

1.1.2 The Croatian Constitution lays importance on both of these areas. Title III, which encompasses 57 articles, in a very detailed way provides for the protection of human rights and fundamental freedoms. On the other hand, there are several provisions invoking sovereignty. Article 2, as the crucial sovereignty provision, provides that '[t]he sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable' and that '[t]he Republic of Croatia may conclude alliances with other states, retaining its sovereign right to decide upon the powers to be so delegated and the right to freely withdraw therefrom'.[10] Further, Art. 142 entitled 'Association and Dissociation', which was used as the legal basis for EU membership (as explicitly stated in Art. 143 of the Constitution), provides for the procedure for associating Croatia into alliances with other states. It also contains a provision explicitly prohibiting Croatian association in alliances which could lead 'to a renewal of a South Slavic state union or to any form of consolidated Balkan state'.[11]

1.2 The Amendment of Constitutions in Relation to the European Union

1.2.1 Croatia acceded to the European Union on 1 July 2013. The act of accession was preceded by a lengthy and difficult process of accession negotiations. Croatia applied for EU membership on 21 February 2003, at the time when its Stabilisation and Association Agreement, signed in October 2001, was not yet in force. Having acquired candidate status in June 2004, accession negotiations were launched on 3 October 2005 and closed on 30 June 2011. The Accession Treaty was signed five months later on 9 December 2011. The constitutional amendment which paved the way for Croatian accession to the EU was adopted in June 2010 and was published in the Official Gazette of the Republic of Croatia 76/10 of 18 June 2010.

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[9] For the discussion of these judgments, in terms of the relation of national and EU law, see the answer to question 1.2.1. All translations of Croatian court judgments are by the authors.

[10] All translations of the Constitution are from the English translation on the website of the Croatian Parliament. http://www.sabor.hr/Default.aspx?art=2405.

[11] Arguing that the crucial aim of this constitutional provision was dissociation from the former Yugoslavia, Sinisa Rodin suggested that a different legal basis for the transfer of powers to an international organisation or an association could be used for Croatian accession to the EU: see Rodin 2007, p. 23.

The constitutional amendment had a threefold role. First, it inserted a separate Chapter VII, entitled 'European Union', into the Croatian Constitution. The purpose of this chapter is to provide the legal grounds for Croatian membership in the EU and to regulate the status of EU law in the national legal order. The provisions of Chapter VII regulate the legal grounds for membership and the transfer of constitutional powers (Art. 143);[12] representation of Croatian citizens and institutions in the EU institutions and decision-making process (Art. 144);[13] and the relationship of national and EU law (Art. 145);[14] and they reiterate the rights of EU citizens (Art. 146).[15] The amendment came into force on 1 July 2013, the date of Croatian accession to the EU.

[12] Article 143 of the Croatian Constitution, entitled 'Legal Grounds for Membership and Transfer of Constitutional Powers' provides:

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

[13] Article 144 of the Croatian Constitution, entitled 'Participation in European Union Institutions', stipulates:

'The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.

The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.

The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis on for the Government's actions in European Union institutions.

Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.

The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.'

[14] Article 145 of the Croatian Constitution is cited in the answer to question 1.3.1.

[15] Article 146, entitled 'Rights of European Union Citizens' stipulates:

'Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union acquis communautaire, and in particular:

– freedom of movement and residence in the territory of all Member States,

– active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,

– the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,

– the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the

Further, the 2010 Constitutional amendment was necessary in order to satisfy certain EU membership requirements, and a number of constitutional provisions were amended for this purpose.[16] Finally, the crucial amendment, which facilitated if not enabled Croatian accession to the EU, was the rule on the requirement of a referendum which had to take place as a necessary part of the accession procedure. Namely, for the positive outcome of a referendum, Art. 141 of the pre-2010 version of the Constitution, as the legal basis of accession,[17] required the majority vote of all voters in Croatia. This strict rule was toned down in order to prevent the possible failure of the referendum. The wording 'the majority vote of all voters in the state' was thus changed to 'the majority vote of all voters voting in the referendum'. The low turnout of only about 44% of eligible voters in Croatia at the referendum which took place on 22 January 2012 testified to the fact that the fear of not fulfilling the strict referendum requirement contained in the then Art. 141 had been reasonable. Out of all voters who took part in the referendum, more than 66% voted in favour of accession, which sufficed for a positive outcome.

1.2.2 The 2010 constitutional amendment followed the stipulated amendment procedure. Generally, amendments to the Croatian Constitution may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the Croatian President or the Croatian Government.[18] Accordingly, on 1 October 2009 the Croatian Government proposed the 2010 constitutional amendment. Based on this proposal and the proposal submitted by members of the Croatian Parliament on 16 October 2009, on 30 April 2010 the Croatian Parliament adopted the Decision on the Commencement of the Amendment of the Constitution of the Republic of Croatia.[19] Based on Art. 148(1) of the Constitution, such a decision must be

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Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.

All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.

In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union.'

[16] Amendments included the provisions on the position of the Croatian National Bank (Art. 53) and the State Audit Office (Art. 54), as well as the abandoning of the previous rule of a complete ban on extradition of Croatian nationals which now became possible in order to comply with the European Arrest Warrant (Art. 9).

[17] There was no consensus on the question whether Croatian accession should take place on the basis of Art. 141 of the pre-2010 version of the Constitution (which regulated Croatia's association in and dissociation from international alliances with other states) or based on the general provision of Art. 139 of the pre-2010 version of the Constitution (which regulated the conclusion of international treaties and which, together with the then Art. 86, contained a more lenient referendum rule requiring a majority vote of all voters who took part in the referendum). Finally, Art. 141 was taken as the legal basis for accession. For the discussion on possible constitutional bases for EU accession, see Rodin, supra n. 11; Ćapeta 2008, pp. 1–3.

[18] Article 147 of the Constitution (Art. 142 of the pre-2010 version of the Constitution).

[19] Official Gazette of the Republic of Croatia 56/10.

adopted by the majority of all Members of Parliament.[20] The decision to amend the Constitution has to be made by a two-thirds majority of all deputies.[21] Within the framework of the 2010 constitutional amendment, such a decision was made on 16 June 2010, whereby 133 deputies voted for the amendment, four deputies voted against it and one abstained.

1.2.3 The Republic of Croatia is a rather young state, as its establishment as a sovereign and independent state dates back to 25 June 1991 when the Croatian Parliament passed a Constitutional Decision on the Sovereignty and Independence of Croatia[22] – thus initiating the proceedings of dissociation from the other republics and from the Socialist Federal Republic of Yugoslavia – and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia.[23] On 22 December 1990, the Croatian Parliament passed the Constitution of the Republic of Croatia, which has undergone several revisions and amendments, and is still in force today.[24] The first amendment took place in 1997,[25] the second one in 2000[26] and the third in 2001.[27] The fourth amendment took place in 2010 and, as described in Sect. 1.2.1, its motif was the enablement and facilitation of EU accession.[28]

The last constitutional amendment to date took place in 2013[29] as the result of a controversial national referendum on the inclusion in the Constitution of the definition of marriage as a union between a woman and a man. Namely, based on Art. 87(3) of the Constitution, the Croatian Parliament 'shall call referendums' on proposals to amend the Constitution, a bill or any such other issue as may fall within its purview 'when so requested by ten percent of the total electorate of the Republic of Croatia'. Following a successful petition of the conservative, catholic initiative 'In the name of the family', which managed to collect the signatures of more than 10% of the eligible voters in Croatia, a referendum was held on 1 December 2013. The turnout was rather low, as only a little bit less than 38% of eligible voters took part in the referendum. However, the 2010 constitutional amendment had changed the referendum threshold from 'the majority of all voters in Croatia' to 'the majority of all voters in the referendum', for the purpose of securing Croatian accession to the EU. This constitutional amendment indirectly enabled a positive outcome in the 2013 referendum, as out of those who voted, 65% supported the amendment, which consequently led to the adoption of the 2013

[20] Article 143(1) of the pre-2010 version of the Constitution.

[21] Article 149 of the Constitution (Art. 144 of the pre-2010 version of the Constitution).

[22] Official Gazette of the Republic of Croatia 31/91.

[23] Official Gazette of the Republic of Croatia 31/91.

[24] Official Gazette of the Republic of Croatia 56/90.

[25] Official Gazette of the Republic of Croatia 135/97.

[26] Official Gazette of the Republic of Croatia 113/2000.

[27] Official Gazette of the Republic of Croatia 28/2001.

[28] Official Gazette of the Republic of Croatia 76/2010.

[29] Official Gazette of the Republic of Croatia 5/2014.

constitutional amendment. For this reason the 2010 lowering of the referendum threshold, which had been passed in order to ensure Croatian accession to the EU, directly enabled and led to the 2013 constitutional amendment.[30]

1.2.4 As explained previously, the EU-related amendment proposals did materialise in practice. There are currently no provisions of the Constitution that are considered to be in need of amendment in view of EU membership.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The transfer or delegation of powers to the EU Croatia is a monist state, based on Art. 141 of its Constitution.

Further, Art. 143(2) of the Croatian Constitution provides:

> Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

The supremacy and direct effect of EU law Article 145 of the Constitution, entitled 'European Union law', is the most important Constitutional provision in terms of application of EU law in the national legal order. It opens the Croatian legal order to EU law. It provides:

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

Paragraph 1 provides for the principle of equivalent legal protection based on EU law and national law. Paragraph 2, which states that EU legal acts have to be applied 'in accordance with the acquis communautaire', indirectly lays down the application of the principles of EU law such as supremacy, direct and indirect effect. Paragraph 3 provides for the principle of direct effect of EU law and paragraph 4

[30] For an analysis and a critique of the Croatia constitutional referendum defining marriage as a union between a man and a woman, see Orsolic Dalessio T. (2014, January 23) The Interplay of Direct and Indirect Democracy at Work: Croatia's Battle Over the Rights of Same-Sex Couples. Jurist forum. http://jurist.org/forum/2014/01/tina-dalessio-croatia-referendum.php.

enables administrative direct effect, meaning that not only national courts but also national administrative bodies have to apply EU law.

Indeed, in a recent judgment the Croatian Supreme Court made it clear that EU law forms part of the Croatian legal order and 'must be applied, moreover it is superior to national law'. This duty to apply EU law concerns 'all legal relationships that fall within the scope of application of European Union law, and that [take] place after the accession of the Republic of Croatia into the European Union'.[31]

However, all these principles and rules exist based on the interpretations of EU law provided by the Court of Justice of the European Union (CJEU). For this reason Art. 145 of the Constitution can be understood as being of a declaratory and not of a constitutive nature.

1.3.2 In the past almost two years following the Croatian accession to the EU and the 2013 Constitutional amendment, there have been only two judgments in which the Constitutional Court has referred to Art. 145 of the Croatian Constitution.[32] However, the Court did so only in stating that it was not necessary to examine whether the issue disputed in the case complies with Art. 145 of the Constitution, due to the fact that the Constitution is, by its legal nature, supreme to EU law.[33] One could infer two conclusions based on this statement. First, if an issue is contrary to the Croatian Constitution, there is no need to address its compliance with EU law, as the Constitution is supreme to EU law. On the other hand, if an issue complies with the Croatian Constitution, it will be admissible based on the Constitution, regardless of whether the same conclusion would be reached based on EU law. In the latter example, the case might undergo an analysis of compliance with EU law, but the outcome of the compliance analysis would be irrelevant in the end due to the fact that compliance with the Croatian Constitution had already been established and the Constitution is supreme to EU law.

1.3.3 See the answers to questions 1.2.1, 1.3.1 and 1.3.2.

1.3.4 See the answers to questions 1.2.1, 1.3.1 and 1.3.2.

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[31] Revt 249/14-2, decision of 9 April 2015.

[32] The numbering provided by the Constitutional Court is different (Art. 141c) from the one provided in the Official Gazette, which can create misunderstandings and errors. Thus, the numbering of the newly inserted articles, as provided in the Official Gazette 85/10 (Art. 143–146) does not match the numbering provided in the version published on the website and cited in the judgments of the Constitutional Court (Art. 141a–141c).

[33] Paragraph 46 of Judgment U-VIIR-1159/2015, 8 April 2015, of the Croatian Constitutional Court on the application by the Croatian Parliament to the Constitutional Court to determine whether the question proposed to be put at the national referendum on outsourcing is in conformity with the Constitution; Para. 60 of Judgment U-VIIR-1158/2015, 21 April 2015, of the Croatian Constitutional Court on the application by the Croatian Parliament to the Constitutional Court to determine whether the question proposed to be put at the national referendum on giving highways in concession is in conformity with the Constitution.

As regards EU-friendly interpretation, the previously cited Art. 145(2) of the Croatian Constitution implies the duty to apply basic EU law principles in Croatia, including the indirect or interpretative effect of EU law. Nevertheless, there have not yet been many judgments in which Croatian courts have interpreted Croatian law in light of EU law. However, a 2014 order of the Croatian Supreme Court needs to be singled out, also due to its importance and the politically controversial context of the case, which was also based on the *Pupino*[34] judgment. In its order the Supreme Court stated:

> … for the achievement of the aims and the respect for the principles expressed by EU law, national courts are obliged to apply national law in light of the letter and spirit of EU provisions. This means that national law must in practice be interpreted as far as possible in light of the wording and purpose of the relevant framework decisions and directives, in order to thus achieve the result sought by those framework decisions and directives … (as expressly stated in the judgment of the ECJ in Case 105/03 P of 16 June 2005). By acceding to the EU, the Republic of Croatia has also taken on the duty to act in such a way.[35]

1.4 Democratic Control

1.4.1 The involvement of the Croatian Parliament in EU affairs is stipulated both by the Croatian Constitution and the Act on Cooperation of the Croatian Parliament and the Government of the Republic of Croatia.[36] Most importantly, the European Affairs Committee monitors the activities of the European Parliament in European affairs, adopts the Work Programme for considering the positions of the Republic of Croatia, and considers EU documents and the positions of Croatia on EU documents, with the authority to adopt conclusions thereon.[37]

The European Affairs Committee of the Croatian Parliament is in charge of conducting parliamentary scrutiny and subsidiarity checks, but the process may be initiated by any Member of Parliament, parliamentary committee, parliamentary party group or the Government. In 2014 the European Affairs Committee issued one reasoned opinion in the context of a national parliamentary subsidiarity check procedure. In this reasoned opinion, issued on 6 October 2014, the Committee considered that the Proposal for a Directive amending Directives 2008/98/EC on waste, 94/62/EC on packaging and packaging waste, 1999/31/EC on the landfill of waste, 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical

[34] Case C-105/03 *Pupino* [2005] ECR I-05285.

[35] Order of the Supreme Court Kž-eun 5/14-4 of 6 March 2014.

[36] Official Gazette of the Republic of Croatia 81/13.

[37] See the Report of the work of the European Affairs Committee for 2014. http://www.sabor.hr/fgs.axd?id=42829.

and electronic equipment,[38] did not comply with the principle of subsidiarity.[39] Both the European Affairs Committee and the Environmental Protection Committee considered that the Proposal did not take into consideration the existing differences among national systems of waste management which prejudiced a balanced development of the European regions. The reasoned opinion was issued within the required 8-week period from the date of the publication of the proposal. However, there were not a sufficient number of reasoned opinions to initiate the 'yellow card' procedure, as only the Austrian, Croatian and Czech parliaments issued reasoned opinions. However, the Juncker Commission has since withdrawn the Proposal.[40]

Further, as part of the 'political dialogue', the Croatian Parliament sent three opinions to the European Commission in 2014 and received the Commission's responses. The first one related to the application of the principle of subsidiarity in the legislative procedure, the second opinion was on the Proposal of a Regulation on the establishment of the European public prosecutor's office,[41] and the third concerned the Proposal of a Regulation amending Regulation 1308/2013 and Regulation 1306/2013 as regards the aid scheme for the supply of fruit and vegetables, bananas and milk in the educational establishments.[42]

Apart from its role in the subsidiarity procedure and the 'political dialogue', the European Affairs Committee composes an annual parliamentary Work Programme which contains the list of EU acts that are to be scrutinised. The specialised parliamentary committees may propose draft acts from their area of responsibility to be included in the Work Programme. When a draft act, together with the corresponding Position of the Republic of Croatia, is delivered to the European Parliament, the relevant specialised committees may discuss them and send their opinions to the European Affairs Committee which may, by a majority of votes of its members, draw a Conclusion on the Position of the Republic of Croatia, on which the Government must base its actions in the EU institutions. So far, the Committee has not used this competence in practice.

1.4.2 Two of the referendums that have been held in Croatia have been directly or indirectly linked to Croatian accession to the EU. The first took place on 22 January 2012 and was part of the Croatian accession process. As explained in the answer to question 1.2.1, due to what proved to be a justified fear of a low turnout, the wording of the Constitutional provision previously requiring 'the majority vote of all voters in the state' had been amended to 'the majority vote of all voters in the referendum', which enabled a positive outcome of the accession referendum, despite the low turnout.

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[38] COM(2014) 397 final.

[39] Reasoned opinion of the Croatian Parliament on COM (2014)397. http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc548cd77e10148e4f3bf0f181a.do.

[40] Commission response. http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc54d4a5c3c014d4cc47c6b0237.do.

[41] COM(2013) 534 final.

[42] COM(2014) 32 final.

The second referendum, discussed in the answer to question 1.2.3, on the inclusion in the Constitution of the definition of marriage as a union between a woman and a man, took place in 2013 and, even though it was not directly related to Croatian membership in the EU, its positive outcome was a direct consequence of the 2010 Constitutional amendment which changed the previously high Constitutional referendum threshold of 'the majority of all voters in Croatia' to 'the majority of all voters in the referendum'. This 2010 Constitutional amendment of the referendum threshold, which was done in the context of securing Croatian accession to the EU, thus enabled a completely different Constitutional amendment not linked to EU membership.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 See the answer to question 1.2.1. As explained previously, the Croatian Constitution has a number of EU amendments. These are fairly extensive, and they were partly based on input from a working group of academics.[43]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 As was seen in Sect. 1.1.2, the Constitution regulates, in a detailed way, human rights and fundamental freedoms in title III, which encompasses 57 articles. Proportionality is a general requirement for governmental action limiting individual rights and freedoms (Art. 16). A specific rule prohibits the retroactive application of laws and other measures, except, as far as laws are concerned, in exceptional circumstances (Art. 90). More broadly, Art. 3 of the Constitution provides that 'freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia'. Article 3 of the Constitution has been applied by the Constitutional Court (CC) on a number of occasions.

In addition, the Constitution contains specific and relatively detailed chapters on civil and political rights and economic, social and cultural rights.

All constitutional provisions, including the ones cited above, are in principle enforceable in courts. There is no doctrine according to which certain parts of the

[43] See Smerdel 2010, p. 4. See also Rodin 2007 and Rodin 2010.

Constitution are off limits to (some) courts. Nevertheless, the Constitution is almost never explicitly relied upon in adjudication, except in the practice of the Constitutional Court. There are two possible reasons for this. First, like in some other European legal systems, Croatian courts cannot disapply legislation or find norms unconstitutional in an individual case – if a court considers the legal norms in question to run counter to the Constitution, it must refer the case to the Constitutional Court.[44] The second reason is the legal culture: adjudication is largely seen as the application of laws. The Constitution, but also international agreements, case law, other sources of law as well as non-binding materials such as scholarly works, are very rarely used by ordinary courts, and have only been used by the Supreme Court in a few exceptional instances. In this respect, there is a strong divide between the Constitutional Court and other courts.

2.1.2 Article 16 of the Constitution provides:

> Freedoms and rights may only be curtailed by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.

2.1.3 Article 3 of the Constitution has been referred to above in Sect. 2.1.1. Article 3 and the principle of the rule of law have been relied upon by the Constitutional Court to impose general requirements on the legislator. Notably, the Constitutional Court has frequently pointed out that the legislator is authorised to independently regulate economic, legal and political relationships, but is required to respect the requirements imposed by the Constitution, and in particular those that 'arise from the principle of the rule of law' and the principle of legal certainty. Thus, the notion of the rule of law imposes general requirements on the legislator.[45]

Some decisions of the Constitutional Court have fleshed out this notion. For example, the rule of law requires that laws are 'general and equal for all', that their consequences must be foreseeable by the addressees and also that they must conform to the legitimate expectations of the parties in each specific case to which they are applied.[46] This concerns not only formal legality and constitutionality, but controls substantive as well as procedural aspects,[47] and requires laws to be sufficiently determinate.[48] The separation of powers is an aspect of the rule of law, meaning that the legislator cannot intrude into the constitutionally defined powers and duties of the 'highest State authorities', such as the State Council for the Judiciary, the body in charge of judicial appointments.[49] The rule of law is also connected to the rule allowing only for the exceptional retroactivity of laws as

[44] Constitutional Act on the Constitutional Court of the Republic of Croatia ('Narodne novine' 49/02), Art. 37.

[45] U-I-659/1994 et al, 15 March 2000, para. 10.

[46] Ibid., para. 11.1.

[47] Ibid., para. 11.

[48] Ibid., para. 19.2.

[49] Ibid., paras. 12–13.

outlined above.[50] The requirements of the rule of law are thus said to be especially strict in relation to the transitional provisions of laws (especially those which regulate the retroactive application of such laws), which 'best show the relationship of the legislator to constitutionally protected values and its respect for constitutional guarantees'.[51] In that sense, the rule of law may even prevent the legislator from limiting or eliminating previously recognised subjective rights, insofar as such restrictions are not justified by a legitimate aim in the public interest.[52]

The judgments of the ECtHR and, occasionally, of the CJEU, have been used in support of the Constitutional Court's conclusions in this respect. For example, the Court cited the ECtHR judgment *Kozlica v. Croatia*[53] and the CJEU judgment *Tsapalos*[54] to support the general point that procedural rules in new legislation can be applied immediately to pending proceedings.[55] The requirement that laws must be available, sufficiently precise and foreseeable, and that any discretionary powers given to State authorities must be circumscribed, was supported by invoking the ECtHR rulings in *Sunday Times* and *Silver and Others*.[56]

The right of access to courts is an aspect of what the Constitutional Court calls the 'right to a court', and is governed by Art. 29 of the Constitution, frequently cited alongside Art. 6 of the ECHR. Article 29 provides in its introductory clause that '[e]veryone shall be entitled to have his or her rights and obligations, or suspicion or accusation of a criminal offence decided upon fairly before a legally established, independent and impartial court within a reasonable period'. The analysis is usually conducted under this provision and not under a general principle of the 'rule of law', but the two are connected. The Court has pointed out that the 'principle according to which recourse to a court must be possible is one of the generally recognised basic principles of law'.[57]

Finally, the Constitution contains a general proportionality rule (Art. 16) according to which 'freedoms and rights may only be curtailed *by law* in order to protect the freedoms and rights of others, the legal order, and public morals and

[50] U-I-4113/2008 et al, 12 August 2014, para. 22.

[51] Ibid., para. 38.

[52] Ibid., para. 64, 'When [it] authorises the Croatian Parliament to directly and independently decide on the regulation of economic, legal and political relations in the Republic of Croatia "in accordance with the Constitution and laws", the Constitution lays down a requirement that those "decisions" must respect basic constitutional values and take account of protected constitutional goods. In that sense, generally speaking, whenever it limits or eliminates previously recognised rights the legislator must have a legitimate aim in the public interest capable of justifying such a measure, and must also respect other requirements arising from the principle of the rule of law, legal certainty and legal predictability that were not raised when those rights were recognised.'

[53] *Kozlica v. Croatia*, no. 29182/03, 2 November 2006.

[54] Joined cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-06405 (case number incorrectly cited as Joined cases C-121/91 and C-122/91, another judgment which makes a similar statement).

[55] U-I-663/2011, 15 October 2014.

[56] U-I-659/1994 et al, 15 March 2000, para. 19.5.

[57] U-III/760/2014, 13 November 2014, para. 7.1.

health' (emphasis added), and Art. 31 provides that '[n]o one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law'. Article 90 provides for the publication of 'laws and other regulations of government bodies' in the official journal and requires that ordinances of bodies vested with public authority 'be published in an accessible manner, in compliance with law' before their entry into force. Laws can enter into force no earlier than the eighth day after publication, except in exceptionally justified cases. See also the answer to question 2.5.1 below.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 As of yet, there do not seem to be any examples of a Croatian court addressing a conflict between the EU fundamental freedoms and constitutional rights. For that matter, the rapporteurs are not aware of any high-profile conflicts between the EU free movement rules and Croatian law adjudicated before the Croatian courts.

The approach of the Constitutional Court to the adjudication of national constitutional rights may, however, be relevant. For example, Art. 50(2) of the Constitution provides that '[f]ree enterprise and property rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health'. In reviewing the constitutionality of laws in this respect, the Constitutional Court has loosely followed the approach of the ECtHR. In a recent decision, it applied a test containing the following questions: (1) does the provision at issue interfere in addressees' property rights?; (2) does it have a legitimate aim?; (3) is it proportionate to the legitimate aim?; (4) does it impose an excessive burden to its addressees?; (5) does it have discriminatory effects?[58]

In the majority of cases, the Constitutional Court tends to defer to legislative choices on issues related to freedom of entrepreneurship and property rights, at least as long as such measures are not discriminatory and do not violate rule of law guarantees such as predictability. One exception is a 2009 decision declaring certain provisions of the Retail Act on Sunday Trading to be unconstitutional.[59] First, the ban on Sunday trading with the aim of protecting workers failed the proportionality test, because the legislator cannot rely on the ineffective application of general labour law rules providing for minimum weekly rest as an argument for a specific working time regulation in retail trade. In addition, the detailed exemptions for certain categories of shops were held to violate Art. 49 of the Constitution (the 'equal legal status' of entrepreneurs on the market). The bar seems to have been set

[58] U-I-381/2014 et al, 12 June 2014.

[59] U-I/642/2009, 9 July 2009.

quite high here: the Court essentially found that the rules on exceptions were too detailed ('excessive normativism' in the Court's terms) which is inappropriate from the point of view of freedom of entrepreneurship, and that they violate Art. 49 of the Constitution because it could not be 'ruled out beyond any doubt' that the law resulted in the unequal treatment of different groups of traders.[60]

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

The relevant provisions of the Constitution of the Republic of Croatia are:

> Article 22
>
> Human liberty and personality shall be inviolable.
>
> No one shall be deprived of liberty, nor may such liberty be restricted, except when specified by law, upon which a court shall decide.
>
> Article 24
>
> No one may be arrested or detained without a written court order grounded in law. Such an order has to be read and presented to the person placed under arrest at the moment of said arrest.
>
> The police authorities may arrest a person without a warrant when there is reasonable suspicion that such person has perpetrated a grave criminal offence as defined by law. Such person shall be promptly informed, in understandable terms, of the reasons for arrest and of his/her rights as stipulated by law.
>
> Any person arrested or detained shall have the right to appeal before a court, which must forthwith decide on the legality of the arrest.
>
> Article 25
>
> …
>
> Whosoever is detained and indicted of a criminal offence shall have the right to be brought before a court within the minimum time specified by law and to be acquitted or convicted within the statutory term.
>
> A detainee may be released on bail to defend him-/herself.
>
> Whosoever is illegally deprived of liberty or convicted shall, in compliance with law, be entitled to indemnification and a public apology.
>
> Article 28
>
> Everyone is presumed innocent and may not be held guilty of a criminal offence until such guilt is proven by a binding court judgment.

[60] Ibid., para. 11.2.

Article 29

Everyone shall be entitled have his or her rights and obligations, or suspicion or accusation of a criminal offence decided upon fairly before a legally established, independent and impartial court within a reasonable period.

…

Article 31

No one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law.

2.3.1 The Presumption of Innocence

2.3.1.1 In Croatia, criminal proceedings commence with the establishment of reasonable suspicion, which is a higher level of suspicion based on evidence and not only on indicia. Also, detention can be ordered only if there is reasonable suspicion that a person has committed a crime. Thus, in order to commence criminal proceedings or to order detention, it is necessary that a prosecutor and/or a judge verify on the basis of collected evidence that there is reasonable suspicion. The requirement of establishing reasonable suspicion based on evidence emanates from the presumption of innocence and protects the citizen from coercive state powers. The ECtHR has established that '[h]aving a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence'.[61]

The problem with the presumption of innocence in the context of a European Arrest Warrant (EAW) surrender is that there is a possibility that the issuing state does not require the establishment of reasonable suspicion based on evidence for conducting a criminal prosecution but rather a lower level of suspicion and, secondly, that the executing state might not assess whether there is evidence that proves the existence of reasonable suspicion. Therefore, it is possible that a person could be arrested in order to be surrendered to another state without reasonable suspicion being established either in the issuing state or in the executing state. The comparative research shows that EU states have different thresholds for the application of arrest and detention as well as for the commencement of criminal proceedings. Also, the notion of the judicial authority empowered to issue an EAW is not interpreted in all Member States as being a judge, rather in some Member States this may be the prosecuting authority, administrative authority, ministry of justice or police. Therefore, it can be said that suspects in EAW proceedings are not granted the same level of protection emanating from the presumption of innocence as suspects in national criminal proceedings or in traditional extradition proceedings.

[61] *Stepuleac v. Moldova*, no. 8207/06, § 68, 6 November 2007.

This issue has not been raised in the national case law or before the Constitutional Court.

2.3.1.2 According to the Croatian Law on the European Arrest Warrant,[62] a hearing in front of a court panel of three judges is obligatory. The suspected person and his/her defence counsel have to be invited to this hearing. The appellate courts have on several occasions vacated first instance decisions due to a substantial violation of procedural rules in cases where the suspected person or his/her defence lawyer were not summoned or present at the hearing.[63] However, the Law envisages that the defence may present evidence but only related to the grounds for refusal to surrender prescribed by law. In many cases the defence has tried to convince the court that the suspect is innocent and has corroborated its claims with evidence. Nevertheless, the courts have continuously refused to assess the existence of reasonable suspicion. The courts have taken the following standpoint:

> The European arrest warrant is an instrument of mutual judicial cooperation between the Member States of the European Union that is based on the principles of mutual recognition between Member States and effective cooperation, and contains a legal obligation and moral responsibility of the national courts of the Member State of execution to grant the surrender of the person requested, unless there are the few and expressly prescribed grounds for refusal to surrender (listed in Arts. 20 and 21 ZPSKS-EU). The existence of reasonable suspicion that the person sought committed the offence for which the surrender is requested is not among these grounds, and the court of the state of execution is not even entitled to question whether there is such a probability of committing a crime by the person sought, because it automatically derives from the fact that a European arrest warrant was issued against him/her.[64]

2.3.2 *Nullum crimen, nulla poena sine lege*

Judicial abolishment of prescription of criminal prosecution justified by the abolition of the double criminality requirement

2.3.2.1 The Croatian judicial interpretation of provisions regarding the surrender of citizens for the 32 categories of crimes for which the rule of double criminality has been abolished, is to my knowledge original in the European judicial space and has subjected Croatian citizens to unequal treatment in comparison with other EU citizens. It was preceded by a legislative manoeuvre by the Croatian Parliament related to the implementation of the EAW immediately prior to Croatian EU accession.

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[62] Act on Judicial Cooperation in Criminal Matters with the EU Member States (OG 91/10, 81/13, 124/13).

[63] E.g. VSRH, Kž-eun 6/13-4, 9 August 2013; VSRH, Kž-eun 13/13-4 21, October 2013.

[64] VSRH, Kž-eun 17/14-4.

In Croatia the Framework Decision on the European Arrest Warrant (FD EAW) was implemented by the Act on Judicial Cooperation in Criminal Matters with the EU Member States (AJCEU) adopted in July 2010 during the accession negotiations. Although the Act was adopted correctly from the perspective of EU law, the priority of the Croatian legislator was to fulfil a benchmark for closing Chapter 23 'Justice, freedom and security' of the acquis communautaire and not to genuinely implement the EAW in practice. On 28 June 2013, three days before accession, the Croatian Parliament passed the extensive amendment of the AJCEU that established a new institutional and procedural framework for cooperation with EU Member States in criminal matters. Although this was a major problem for the Croatian courts and prosecutors who had to implement the new law in three days after it was passed, domestic and European political and public attention was focused on two amended provisions that allegedly violated EU law. One was the introduction of a temporal limitation on the EAW, which prevented authorities from surrendering anyone suspected of a crime committed before 7 August 2002. Under severe criticism and the threat of financial sanctions from the European Commission, the temporal limitation was removed on 1 January 2015. The second critical change was the transformation of the statute of limitations from a ground for optional non-execution of EAW into a ground for mandatory non-execution. The AJCEU expressly prescribes that the Court shall refuse an EAW if under domestic law the limitation period[65] for criminal prosecution or the enforcement of criminal sanctions has expired, and the act falls within Croatian jurisdiction under its own criminal law (Art. 20(2.7)). This amendment, which was exposed to criticism in Croatia but not from abroad, resulted in the infamous interpretation of the Croatian courts, which abolished the rule that the statute of limitations for criminal prosecution can bar the surrender of a person for an offence for which the rule on double criminality does not apply.

The Croatian Supreme Court has introduced the rule that in cases where the verification of double criminality is excluded (Art. 2(2) FD EAW), the verification of the statute of limitations is also excluded: 'When executing an EAW, the court shall not apply domestic legal provisions regarding the statute of limitations for criminal prosecution, because the court does not verify double criminality'.[66] The explanation was that in order to determine whether there is a statute of limitations for the criminal offence in the executing state, it is necessary to establish jurisdiction or to determine which punishable criminal offence the act qualifies as according to the criminal law of the executing state. This means that double criminality would have to be verified, as 'the statute of limitation is organically linked to the prescribed punishment for a criminal offence' and therefore 'the statute of limitations is

[65] The limitation periods are prescribed by the statutes of limitations, which set the maximum time period after the commission of an offence that criminal prosecution may be initiated or continued or that a criminal sanction can be enforced after the rendering of a final judgment.

[66] Kž-eun 11/13, 20 September 2013.

an integral part of the concept of double criminality'.[67] This interpretation was also challenged in the Constitutional Court, which held that the surrender procedure is not a criminal procedure, but rather a *sui generis* judicial proceeding the aim of which is to enable criminal prosecution and not to decide on the guilt of the suspect. Therefore, the scope of potential constitutional complaints is very narrow and the Constitutional Court 'is not allowed to question the interpretations of domestic courts regarding domestic law and its application in concrete cases of surrender on the basis of an EAW, unless reasons are presented indicating that the assessment of the courts in a concrete case was "flagrantly and obviously arbitrary"'.[68]

It is generally accepted in international and European law as well as in theory on mutual legal assistance that double criminality requires that the act constitute an offence under the law of both states (requesting and executing). Therefore, for determining whether the rule on double criminality permits extradition or surrender, it is enough to find the offence with the constituent elements that correspond to the behaviour which is criminalised in another state. In the theory on international legal assistance, a double criminality requirement is considered to be a substantive requirement while a statute of limitations is a procedural requirement for extradition. They are therefore different legal requirements of which the content is neither overlapping nor mutually exclusive, and thus both requirements have to be checked separately. This was also the interpretation of the Croatian courts in extradition procedures before the implementation of the EAW.[69] However, the Croatian Supreme Court has rightly pointed out that in order to find out whether the prosecution is time-barred, the executing state has to establish which offence according to its criminal law is relevant, for which prosecution could be barred, and this procedure presumes the verification of double criminality. The further question for EU law-makers is that if the executing state has to check the rule of double criminality in order to verify the statute of limitations in any case, why was the verification of double criminality abolished in the EAW procedure?

The generally accepted public opinion (from supporters as well as from critics) is that the interpretation of the Croatian courts was motivated by a desire to bypass the newly introduced implementing law, which made the statute of limitations for criminal prosecution a ground for mandatory non-execution. It is alleged that the aim was to enable the surrender of Josip Perković, a former Yugoslav and Croatian intelligence agent suspected of participating in the organisation of the murder of Stjepan Đureković, a Croatian emigrant in Germany, in Munich in 1983, for which Germany had issued an EAW.[70] However, in the meantime, this judicial interpretation has become established case law and e.g. it resulted in the recent surrender

[67] VSRH, Kž-eun 2/14-5, 17 January 2014; Kž-eun 8/14-4, 7 February 2014.

[68] U-III-351/2014, 24 January 2014.

[69] VSRH II-8 Kr-268/01-3, 16 May 2001; I KŢ-689/03-3, 29 July 2003.

[70] Josip Perković was surrendered to German authorities on 24 January 2014, and the criminal trial against him has commenced in October 2014.

of a person for acts of theft that were committed from 1985 to 1987, i.e. almost 30 years ago.[71]

This development in Croatia only deepened the further violation of the fundamental rights to legal security and equality of EU citizens that was prompted by the different implementation of the grounds for mandatory and optional non-execution of the EAW in the EU Member States. Already in 2007, the European Commission claimed that one of the weakest points in the implementation of the EAW was the provision on optional grounds for refusal. It was described as 'a patchwork which is contrary to the Framework Decision'.[72] Initially, the intention of the FD EAW was that the grounds for optional non-execution should be determined by judges and not the national legislator, and it was considered to be mistake if a Member State made a ground for optional refusal mandatory.[73] However, the reality is that 15 states have introduced the statute of limitations as a ground for mandatory non-execution of an EAW (Austria, Belgium, Czech Republic, Finland, France, Greece, Italy, Lithuania, Hungary, Malta, Netherlands, Germany, Slovenia, Slovakia, Sweden), and 12 states have introduced the statute of limitations as a ground for optional non-execution of an EAW (Bulgaria, Cyprus, Denmark, Estonia, Ireland, Latvia, Luxembourg, Poland, Portugal, Romania, Spain, United Kingdom).

Such varied implementation of the EAW has been accepted by the European Court of Justice in its *Gasparini* and *Wolzenburg* decisions. In the *Gasparini* decision, the Court stated:

> Article 4(4) of the framework decision, …, permits the executing judicial authority to refuse to execute a European arrest warrant *inter alia* where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist.[74]

In the *Wolzenburg* judgment, the Court went even further and held that when implementing grounds for optional non-execution of an EAW as mandatory or '[w]hen implementing Art. 4 of the Framework Decision…, the Member States have, of necessity, a certain margin of discretion'.[75]

The different implementation and interpretation of grounds for non-execution of an EAW have resulted in the utterly unequal treatment of EU citizens depending on which state is executing an EAW. Germany and Croatia exemplify the two extremes. Croatia surrenders citizens in EAW proceedings for the 32 categories of

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[71] VSRH, Kž-eun 20/14-6, 15 April 2014.

[72] Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2007) 407 final], p. 11.

[73] See EU Council report on the practical application of the European Arrest Warrant and corresponding surrender procedures between member states, 28 May 2009, 8302/4/09 REV 4, pp. 13–14.

[74] Case C-467/04 *Gasparini and others* [2006] ECR I-09199, para. 31.

[75] Case C-123/08 *Wolzenburg* [2009] ECR I-09621, para. 61.

offences without verifying double criminality or the statute of limitations. In Germany, the statute of limitations is a ground for mandatory non-execution, and the German Constitutional Court, Federal Court of Justice and appeal courts unitedly agreed that a person shall not be surrendered, notwithstanding whether he/she is a German citizen,[76] if prosecution is time-barred according to German law. Certainly the most famous decisions of the German courts not to extradite a person because of the statute of limitations is the refusal to extradite Sören Kama, a member of the Danish SS unit and a Dane who acquired German citizenship in 1956. Denmark had asked for his surrender on the basis of a European arrest warrant for the murder of a number of journalists in Copenhagen in 1943. In 2007, the appeals court in Munich decided that the surrender did not relate to a case of qualified murder (*Mord*), which is not subject to a statute of limitations, but rather to a case of ordinary manslaughter (*Totschlag*) and that therefore the prosecution was time-barred.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The Croatian rapporteur for the questionnaire on the Area of Freedom, Security and Justice for the FIDE XXV Congress in 2012 stated that one of the major threats to defence rights in criminal proceedings arising from EU law was introduced by the 2009 Amendment of the FD EAW. According to the rapporteur, it is absurd to say that this FD has the aim of 'enhancing the procedural rights of persons' when its only aim is 'fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial'. The aim of fostering the principle of mutual recognition to decisions rendered in the absence of the person concerned should be fulfilled without restricting the procedural rights of the defendant.[77]

The ECtHR considers the right to be present at trial as an element of fair trial in the sense of Art. 6. of the ECHR, as it enables the realisation of other rights protected by Art. 6 (3.c, d and e). In general, trials *in absentia* are not acceptable, and thus criminal procedure is armed with various coercive instruments in order to secure the defendant's presence. The ECtHR differentiates between a trial *in absentia* that results from the accused person's free will,[78] and one which is the consequence of circumstances outside his/her control.[79] A waiver of the right to appear in person at the trial has to be unequivocally established, and this will not be the case where the accused person cannot reasonably foresee the consequences of

[76] OLG Karlsruhe Beschluss Az. 1 AK 102/11 vom 25. März 2013.

[77] Đurđević et al 2012, p. 251.

[78] *Poitrimol v. France*, 23 November 1993, § 30, Series A no. 277-A; *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 29, ECHR 1999-I.

[79] *Goddi v. Italy*, 9 April 1984, Series A no. 76; *Colozza v. Italy,* 12 February 1985, Series A no. 89; *Krombach v. France,* no. 29731/96, ECHR 2001-II.

his/her absence at the trial.[80] In such a case, the accused has to be given the opportunity for a re-trial.[81] The ECtHR has also stated that it is of capital importance that the accused appears, and that legislation has to be capable of discouraging unjustified nonappearance.[82]

The requirements for execution of an EAW issued for the purpose of executing a custodial sentence following an *in absentia* trial, pursuant to the 2009 Amendment (Art. 4a FD EAW), do not satisfy either the ECHR standards or the Croatian standards. The FD EAW obliges the executing authority to surrender a person even if he/she was neither summoned in person and he/she has no right to a retrial.[83] The establishment of requirements for execution of an EAW for a trial *in absentia* is no longer under the jurisdiction of the executing state,[84] but rather of the issuing state, which simply ticks the relevant box in the form.[85] It is apparent that the execution of an EAW for the purpose of the surrender of a person convicted *in absentia* to serve a (final) custodial sentence without the possibility of a retrial puts the quality of justice in the EU at a lower level than standards recognised in ECtHR case law and in all states, including Croatia, where a person tried *in absentia* has the right to ask for a retrial. The exclusion of the possibility of a retrial undermines the existing fundamental procedural rights and paves the way for possible miscarriages of justice.

A trial *in absentia* in Croatia is considered to be contrary to the defendant's right to a fair trial and rights of defence, such as the right to be informed of the accusation, to be heard by the judge and to examine witnesses. Therefore, the Croatian Criminal Procedure Act guarantees a person sentenced *in absentia* the right to a retrial in his/her presence.[86] Furthermore, in proceedings for the execution of a foreign judgment according to the rules of mutual legal assistance in criminal matters, the national judge may examine whether the fundamental rights to be heard and to defence were respected.[87]

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[80] Harris et al. 2009, p. 142.

[81] Ibid.

[82] *Lala v. the Netherlands*, 22 September 1994, Series A no. 297-A; *Pelladoah v. the Netherlands*, 22 September 1994, Series A no. 297-B; *Van Geyseghem v. Belgium* [GC], no. 26103/95, ECHR 1999-I.

[83] See Morgan 2005, p. 207.

[84] Article 5(1) of the FD EAW, which laid down the rule that surrender of a person shall be subject to the issuing State giving 'adequate' assurances that the person will have an opportunity to apply for a retrial of the case, was deleted by the 2009 Amendment.

[85] See Open Europe Briefing note: EU strengthens trials in absentia – Framework Decision could lead to miscarriages of justice, 2008. http://archive.openeurope.org.uk/Content/documents/Pdfs/tia.pdf.

[86] Article 497(3) Criminal Procedure Act (Official Gazette No. 152/08, 76/09, 80/11, 91/12 – The decision of the Constitutional Court of the Republic of Croatia, 143/12, 56/13, 145/13).

[87] Article 4 of the Act on Mutual Legal Assistance in Criminal Matters (Official Gazette No. 178/04).

Additionally, the European legislator should have been warned by, and learned a lesson from, the Croatian experience twenty years ago with trials *in absentia* that shows that they may be perilous for fair trial rights. From the early 1990s, the Croatian courts rendered a high number of judgments *in absentia* for war crimes committed on the territory of Croatia during the war from 1991 to 1995, against Croatian Serbs, most of whom had fled to Serbia. Later, the international community and Croatia recognised that many of these trials violated fair trial rights and the rule of law. Unprofessional and biased criminal proceedings were manifested through unsubstantiated and incorrectly written indictments, the passiveness of defence lawyers, the failure to submit appeals and so on. Croatia has paid a very high price on the international level, and even higher domestically because of the errors that were made in the prosecution of war crimes.[88] The revision of these proceedings became one of the benchmarks for EU accession. In order to correct the illegal judgments, Croatia took a series of legislative and concrete measures. Thus, up to the end of 2010, the State Attorney's Office reviewed all the convictions made *in absentia* from the 1990s (465) and found that 20% (93) of the judgments were groundless, and therefore requested the reopening of the case. Reopening was permitted in all cases and the vast majority of these judgments were repealed (80%). In addition, although the Croatian Criminal Procedure Act prescribed the right to a retrial for any person tried *in absentia*, at the request of the European Union, in 2008 the right of persons convicted *in absentia* to apply for a retrial without returning to Croatia was introduced in the Croatian Criminal Procedure Act. Now, however, the EAW procedure requires the Croatian legislator and courts to give up the high procedural rights standards of persons tried *in absentia*, and requires the surrender of a person tried *in absentia* without establishing that the person will be entitled to a new trial in the requesting country.

The implementation of Art. 4a of the FD EAW in Croatia shows that the errors in the implementing law will further weaken defence rights and fair trial guarantees in trials *in absentia*. The Croatian implementing law establishes that it is sufficient for execution of an EAW that the requested person was represented at the trial by a defence lawyer appointed by the person concerned or by the requesting state.[89] The additional condition that the person had to be aware of the scheduled trial was mistakenly omitted.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 In Croatia, the state does not provide any kind of assistance to its surrendered citizens beyond standard consular assistance, and there is no public or non-governmental organisation that provides assistance to them.

[88] Hrvatin (2010).

[89] Article 21(2)(2) of the AJCEU.

2.3.4.2 As Croatia only acceded to the EU on 1 July 2013, there are no final judgments regarding persons who have been surrendered to another EU state.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.2 See Sect. 2.3.2.

2.3.5.3 In the case explained in Sect. 2.3.2, the only role of the Croatian courts was to be actors of loyal co-operation, efficiency and trust. They have expressly assumed this role themselves. By way of examples from court decisions:

> To achieve the goals and to respect the principles expressed in EU law, national courts are bound to apply national law in the light of the letter and spirit of EU law. This means that national law must be interpreted in the application as much as possible in the light of the wording and the purpose of relevant framework decisions and directives, in order to achieve the result pursued by such framework decisions and directives;[90]
>
> Criminal proceedings in another state have priority over criminal proceedings conducted before a Croatian court;[91]
>
> The European arrest warrant is an instrument of mutual judicial cooperation between the Member States of the European Union that is based on the principles of mutual recognition between Member States and effective cooperation, and contains a legal obligation and moral responsibility of the national courts of the Member State of execution to grant the surrender of the person requested, unless there are the few and expressly prescribed grounds for refusal to surrender.[92]

2.3.5.4 The opinion of the author is that a proportionality test should be introduced. The author does not recommend the reinstatement of verification of sufficient evidence that an offence has been committed.

2.4 The EU Data Retention Directive

2.4.1 The Data Retention Directive has not raised constitutional issues in Croatia. This is probably, at least partly, due to the fact that Croatia acceded to the EU only recently so that the implementation of the Directive in the Croatian legal system took place as part of the process of alignment of the national system with the *acquis*. Probably for this reason, the Directive was not viewed separately or

[90] VSRH, Kž-eun 5/14-4, Kž-eun 14/14-4.

[91] County court in Varazdin, Kv-eun 2/14, 9 January 2014.

[92] VSRH, Kž-eun 17/14-4.

differently from other, less controversial EU measures which required amendments of national legislation. Discussion started only upon the annulment of the Directive on 8 April 2014. Logically, the central point of the discussion at that point was not the constitutionality of the Directive but the effects of its annulment on Croatian rules which regulate data retention in Croatia. The Ministry of Foreign and European Affairs asked the Department of European Public Law of the Faculty of Law of the University of Zagreb for a legal opinion in the matter, as there was well-founded concern that certain national norms could be contrary to EU law for the same reasons provided by the Court of Justice in its judgment in Joined Cases C-293/12 and C-594/12.[93]

Further, the Ministry gathered the analyses of different national bodies in charge of data retention. Each body had to analyse national rules within its competence in terms of the compatibility of such rules with the four criteria set by the judgment of the Court of Justice. In its analysis, the Ministry of Maritime Affairs, Transport and Infrastructure identified the provisions of the Law on Electronic Communications which need to be amended, and it is expected that this will be taken into account when the Law, which needs to be aligned with the new Directive 2014/61 of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, is amended. Also, the amendment of the Criminal Procedure Act from December 2014 narrowed down the cases in which it is possible to conduct checks to determine whether communications have taken place, allowing for such checks only in relation to criminal offences for which the prescribed sentence is more than five years of imprisonment.

The relevant constitutional provisions provide as follows:

> Article 34
>
> The home is inviolable.
>
> …
>
> Article 35
>
> Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.
>
> Article 36
>
> The freedom and privacy of correspondence and all other forms of communication shall be guaranteed and inviolable. Restrictions necessitated by the protection of national security and the conduct of criminal prosecution may be prescribed solely by law.
>
> Article 37
>
> The safety and secrecy of personal data shall be guaranteed for everyone. Without consent from the person concerned, personal data may be collected, processed, and used only under the conditions specified by law.

[93] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

> Protection of data and oversight of the operations of information systems in the state shall be regulated by law.
>
> The use of personal data contrary to the express purpose of their collection shall be prohibited.

2.5 Unpublished or Secret Legislation

2.5.1 Article 90 of the Croatian Constitution provides that laws and other regulations of government bodies as well as ordinances of bodies vested with public authority have to be published in the Official Journal of the Republic of Croatia (*Narodne novine*) before their entry into force. In judgment U-II-296/2006 of 27 October 2010, the Constitutional Court reviewed the constitutionality of the Decree on the Internal Structure of the Ministry of the Interior, which came into force in 2001, but had not been published in *Narodne novine* and was marked as a 'state secret'. The Constitutional Court ruled that a decree cannot be a 'state secret' and, therefore, cannot be exempt from the obligation to be published in the official journal. The Constitutional Court stated that any other conduct is contrary to both Art. 90 of the Constitution and to the rule of law and the principle of legal certainty. The Court, therefore, ruled that the Decree had to be published in *Narodne novine* and ordered the Croatian Government to ensure such publication within 90 days of the publication of the Court's decision.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 No such issues have yet arisen in Croatia in relation to EU measures, which is primarily due to Croatia's relatively short EU membership.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Croatia has not signed the Treaty Establishing the European Stability Mechanism (ESM Treaty) due to the fact that Croatia is not a euro area state. It has also not signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact) due to the fact that the Fiscal Compact was signed before Croatian accession to the EU. For this reason, the Croatian position vis-à-vis the Fiscal Compact is unique in comparison to all other

EU Member States and remains open. The Croatian Government has, so far, not given any official position in respect of possible signature of the Fiscal Compact in the future.

2.7.2 There has not been any public discussion about the constitutionality of other proposed measures. This is (probably) due to the fact that Croatia has decided not to enter the banking union prior to adopting the euro. Therefore, there is no additional financial exposure for Croatian citizens above other costs associated with EU membership.

2.7.3 Croatia has not been subject to any EU bailout or subsequent related austerity procedures which would initiate a strong negative reaction in the state. However, as all other EU Member States, Croatia is subject to economic governance procedures, which require the adoption of policies and measures recommended by the Council. Excessive macroeconomic imbalances identified by the Commission led to strong policy recommendations for Croatia. The Excessive Deficit Procedure, initiated on 28 January 2014, obliges Croatia to correct its excessive deficit by the end 2016.[94] The EU recommendations are mostly in line with domestic policy priorities – fiscal consolidation and return to a path of sustainable growth. Croatia is adhering to these recommendations. In this context, the Croatian Government has not (yet) imposed aggressive austerity measures which would disproportionately hurt Croatian citizens. So far, only modest measures have been taken, the most visible being the adoption of two laws of temporary character: the Law on the Denial of Payment of Certain Material Rights to Employees in the Public Service,[95] in force as of 31 March 2015, and the Law on the Denial of the Right to Increase Salaries Based on Seniority,[96] in force as of 1 April 2014. The former act denies public servants the right to a 2015 Christmas bonus and the regress for using annual leave in 2015, while the latter denies the right to increase the coefficient for the complexity of work in the public service based on the number of years of service. The latter act was subjected to a constitutional review procedure initiated by nine trade unions and a number of Croatian citizens. In its judgment, dated 30 March 2015, the Constitutional Court rejected the proposal and declared that denial of the right to increase salaries based on seniority is in accordance with the Croatian Constitution.[97] The Court based its judgment on the argument that 'there are imperative reasons of public interest which justify its application (correction of excessive deficit in accordance with the Council recommendations)'.[98]

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[94] The Excessive Deficit Procedure was initiated at the Economic and Financial Affairs Council meeting on 28 January 2014, based on Council decision 17908/13, dated 21 January 2014, establishing the existence of an excessive deficit in Croatia, and Council recommendation 17904/13 dated 21 January 2014.

[95] Official Gazette of the Republic of Croatia 36/15.

[96] Official Gazette of the Republic of Croatia 41/14, 157/14 and 36/15.

[97] Judgment U-I-1625/2014 and others, U-I-241/2015, U-I-383/2015, U-II-1343/2015, 30 March 2015.

[98] Ibid., para. 66.

Nevertheless, the Constitutional Court warned that potential further extension of the application of the law in question could turn the measure into a permanent one, which would raise the question of the functioning of the rule of law and the principle of legal certainty and could call the citizens' confidence in pubic authority into question.[99] If further austerity measures are introduced, further constitutional review procedures can be expected.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Due to its relatively recent EU membership, there have so far only been a few preliminary references from Croatia, all dealing with the interpretation of EU law. Two of them concern public notaries in the context of judicial cooperation in civil matters,[100] two deal with EU rules on consumer credit,[101] and one with the price of water consumption in the context of the EU water policy.[102]

There are also four actions for damages, dealing with similar issues, which are currently pending before the General Court,[103] as well as an action for annulment initiated by the ferry port Split asking for the annulment of a Commission decision[104] stating that the measure subject to the complaint does not constitute state aid within the meaning of Art. 107(1) TFEU.[105]

2.8.2 There has been no public debate on the standard of review of the EU Courts in Croatia.

2.8.3 The Croatian Constitutional Court has in certain instances taken a rather vigorous approach to the review of constitutionality of Croatian legislation. In the most recent controversial case the Constitutional Court suspended the new Family Law.[106]

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[99] Ibid., para. 67.

[100] Case C-484/15 *Zulfikarpašić* [2017] ECLI:EU:C:2017:199 and C-551/15 *Pula Parking* [2017] ECLI:EU:C:2017:193.

[101] C-511/15 *Horžić* and C-512/15 *Pušić* [2016] ECLI:EU:C:2016:787.

[102] C-686/15 *Vodoopskrba i odvodnja* [2016] ECLI:EU:C:2016:927. This reference follows on an earlier one, from the same court, on the same issue, which was inadmissible since the facts preceded accession (C-254/14 *VG Vodoopskrba* [2014] ECLI:EU:C:2014:2354).

[103] Case T-108/14 *Burazer and Others v. European Union*; Case T-109/14 *Škugor and Others v. European Union*; Joined Cases T-546/13, T-108/14 and T-109/14 *Šumelj and Others v. European Union* [2016] ECLI:EU:T:2016:107; Case T-507/14 *Vidmar and Others v. European Union* [2016] ECLI:EU:T:2016:106.

[104] C(2013) 7285 final.

[105] Case T-57/15 *Trajektna luka Split v. Commission* [2016] ECLI:EU:T:2016:470.

[106] Decision of the Constitutional Court U-I-3101/2014, U-I-3173/2014, U-I-3264/2014, U-I-6341/2014, U-I-6401/2014, U-I-6541/2014, U-I-6701/2014, U-I-6907/2014, U-I-7133/2014 of 12 January 2015.

Based on the statistical data available to the rapporteurs, out of the total number of cases received by the Croatian Constitutional Court in 2014, 19.5% were proceedings to review the constitutionality of laws, while 14.8% were proceedings to review the legality of other regulations. The majority of cases, i.e. 62.7% were constitutional complaints regarding violations of human rights and fundamental freedoms guaranteed by the Constitution. Interestingly – when compared to 2011, 2012 and 2013–2014 is marked by a visible increase in the percentage of cases involving review of the constitutionality of laws and the legality of other regulations. In the total number of cases received by the Constitutional Court in 2011, 6% were reviews of the constitutionality of laws, while there were only 2% of such cases in 2012 and 3.6% in 2013. Similarly, in 2011 only 2% of cases were reviews of the legality of other regulations, while in 2012 such cases represented only 1% of the total, and in 2013 they represented 2.4% of the total. On the other hand, the percentage of constitutional complaints relating to violations of human rights and fundamental freedoms guaranteed by the Constitution decreased in 2014 when compared to the percentages in 2011, 2012 and 2013. In 2011 such complaints represented 88% of the total, in 2012 they amounted to 91%, and in 2013 they represented 89% of the total number of cases before the Constitutional Court.

Out of the total number of 5,820 cases for review of the constitutionality of laws launched in the Constitutional Court between 1991 and the end of 2014, the application was rejected in 5,354 cases, while in 466 cases a law or some of its provisions were repealed. On the other hand, in the period from 1991 until the end of 2014, the Constitutional Court reached 3016 decisions on the review of the legality of other regulations. Out of 3,016 cases, 2,778 applications for review were rejected, while in 238 cases a regulation or some of its provisions was repealed.

2.8.4 There have not yet been any judgments in Croatia in which the national constitutional court or supreme court would have reviewed measures that implement EU legislation, nor have there been any such doctrinal statements or debates.

2.8.5 Not applicable.

2.8.6 The issue of equal treatment of citizens falling under the scope of EU law and falling under the scope of domestic law has not (yet) arisen in Croatia.

2.9 Other Constitutional Rights and Principles

2.9.1. Issues such as those described in this question have so far not arisen in the context of the implementation of EU law in Croatia, at least to the knowledge of the rapporteurs. If they were to arise, the constitutional disciplines described in the answer to question 2.1.3 would be relevant.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 'Common constitutional traditions' are generally recognised values that can be accepted by a supranational adjudicator without attracting controversy or opening fissures with the constitutional orders of the Member States. Formulated at a sufficient level of generality, many aspects of the constitutions of the Member States could be described as such. In our view, it is neither possible nor desirable, and it actually misses the point of the whole exercise, to formulate a catalogue of 'core' rights and principles that qualify and others that do not. 'Common constitutional traditions' are primarily a vehicle for judicial dialogue and pluralism, enabling European and national constitutional courts to engage in dialogue beyond the controversies of simple supremacy of EU law, and without retrenching themselves in national categories. They are not meant to differentiate 'important' from 'unimportant' constitutional rules.

Interestingly, whereas 'common constitutional traditions' were initially used by the CJEU as an integration tool – building up European fundamental rights protection as a guarantee of the legitimacy of EU law – today's debates on 'constitutional identity' seem to pull in the opposite direction.[107] Yet both seem to be a way of reinforcing judicial dialogue, and there is some promise in that. In that light, the increased reliance of national constitutional courts on preliminary references would certainly be made more fruitful by including references to national constitutional law, without however framing them as 'ultimatums'.

For a possible indication of the Croatian Constitutional Court's approach to these issues, see the discussion of its comparative approach in the answer to question 1.1.1.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As a general proposition, both the ECHR and the EU Charter allow Member States to protect a particular fundamental right to a higher degree. In reality, of course, rights tend not to be adjudicated in isolation, but in cases of conflict with other rights or legitimate interests. The problematic issue is precisely how to deal with conflicts between two different fundamental rights, or between a fundamental right and a rule of EU law. Can a higher national standard prevail over supranational norms in some cases? Can a national constitution protect, for example, the right to privacy *more* if that means that it protects freedom of expression *less* than the EU/ECHR benchmark provides? The CJEU *Melloni*[108] decision would argue

[107] See Millet 2014.

[108] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

against such an interpretation, even when the EU norm is not in itself a fundamental right, at least as long as we are not talking about a trivial or purely technical EU provision.

In Croatia, there does not seem to have been much debate on these issues. The Constitutional Court rarely deals with EU law in any depth, but it tends to rely heavily on the case law of the ECtHR. It often reproduces, in applying national constitutional law, the legal tests developed by the ECtHR in the context of analogous provisions of the Convention. In doing so, it usually does not discuss whether the standard of protection in Croatian law could or should be higher or lower. It even employs the ECtHR language of granting a margin of appreciation to national legislators when simply addressing the Croatian legislator.

Some good examples include several Constitutional Court decisions on extradition proceedings and the right to a fair trial, in which the Court found no violation of constitutional rights by relying largely on ECtHR case law, even though the latter was developed in the context of a general unavailability of Art. 6 ECHR in (administrative) extradition proceedings (i.e. the ECtHR doctrine was developed to expand Art. 6 protection but was used by the Constitutional Court to narrow protection under the Croatian Constitution).[109] The Constitutional Court cited the *Soering v. UK*[110] argument that extradition is usually not an issue under Art. 6, unless a petitioner has suffered a flagrant denial of a fair trial in the requesting country. Also, the court relied on a definition of the concept of flagrant denial of a fair trial in *Ahorugeze v. Sweden*[111] to support its finding of no violation. There is nothing in the Croatian constitutional provisions that would suggest that only 'flagrant denials of a fair trial' fall under the relevant constitutional provisions. Therefore, these cases would seem to be good candidates for establishing a higher level of protection than the one granted by the ECHR. Nevertheless, the Constitutional Court did not venture into that discussion.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Both developments referred to in this question took place before Croatia's accession to the EU and did not lead to a significant debate at the time, even though there was considerable academic discussion about the EAW. More generally, there was extensive debate on the EAW immediately upon Croatia's accession, but this was not really principled deliberation, rather, it concerned the politically salient issue of EAWs against former Yugoslav-era intelligence agents and whether Croatian legislation could prevent the execution of those EAWs, in potential

[109] See, most recently, U-III-1358/2014, 17 April 2014, para. 6.

[110] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

[111] *Ahorugeze v. Sweden*, no. 37075/09, 27 October 2011.

violation of EU law.[112] As for the Data Retention Directive, there has been some public discussion on whether or not data must be, may be or cannot be retained in the aftermath of the decision of the CJEU in *Digital Rights Ireland*,[113] i.e. before Croatian legislation is harmonised with the Court's interpretation of the requirements of EU privacy rules. As in other Member States, there seems to be some confusion on the part of Croatian authorities on how to deal with a situation where the implementing legislation that the EU Commission previously insisted on is now considered to be contrary to EU law (see also the answer to question 2.4.1).[114]

2.12.2–2.12.3 The first suggestion is intuitively attractive, but there seem to be many practical or institutional problems. While some constitutional courts may object, other Member States may have already implemented EU measures or may have themselves faced legal challenges for violating them. Such a mechanism might therefore affect certain legitimate expectations of private parties and create legal uncertainty, especially if it would lead to suspending the application of EU law. Another problem is who exactly should suspend and/or review the EU measure. In our view, while the Commission or even relevant national authorities could usefully analyse and report on a measure, and while the Commission could file a legislative proposal, it should ultimately be for the EU legislator to decide that an EU measure should be suspended or changed. Perhaps something like a 'yellow card' procedure for legislative proposals could be sensible – if numerous constitutional courts were to consider a piece of EU legislation to be unconstitutional, it should be reviewed by the EU legislator. Whether and how this could be operationalised is a different matter – in all likelihood, given the diversity of national judicial systems and the unpredictability of judicial review, it is hard to imagine a formal procedure. Finally, of course, it is for the CJEU to ensure the conformity of EU law with fundamental rights, and constitutional courts – individually – are always free to take that road, which can in fact lead to the suspension of the application or review of an EU measure.

As for the second suggestion, it should not be supported. It has in fact already been rejected by the CJEU on numerous occasions, not least in *Simmenthal*,[115] and more recently in *Kücükdeveci*:[116] national rules on constitutional review cannot detract from the binding nature of EU law. The fact that a Member State has delayed implementation because of constitutional review could at best be taken into account when addressing the gravity of an infringement or deciding on sanctions.

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[112] See (2013, August 27) Justice row over arrest warrant sours EU-Croatia ties. BBC news. http://www.bbc.com/news/world-europe-23847788.

[113] Supra n. 93.

[114] See Srdoč, S. (2014, July 23). *Podaci o komunikaciji Hrvata zadržavaju se unatoč presudi europskog suda* (Croatian's communications data retained despite of European Court judgment). Tportal. http://www.tportal.hr/vijesti/svijet/343337/Podaci-o-komunikaciji-Hrvata-zadrzavaju-se-unatoc-presudi-europskog-suda.html.

[115] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* (1978) ECR 00629.

[116] Case C-555/07 *Kücükdeveci* [2010] ECR I-00365.

Some space for domestic constitutional processes could, in that sense, be also created in the context of infringement proceedings (with regard to question 2.12.2). On the other hand, with the average duration of infringement proceedings currently at 27 months and the average period Member States take to comply with CJEU findings of an infringement (not necessarily covering further CJEU proceedings on sanctions) at 20 months,[117] infringement proceedings are hardly lightning-fast.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 Insofar as it is possible to generalise, EU accession seems to have bolstered, rather than weakened the protection of fundamental rights in Croatia (see however the remarks in Sect. 2.3). On the level of legislation protecting fundamental rights, EU accession has led, e.g. to far better and more detailed anti-discrimination rules, as well as the formation of institutions in charge of the protection of fundamental rights (such as the Ombudspersons for gender equality and children's rights). At the same time, though not necessarily as a consequence of accession, the ECHR has become a much more widely used instrument in the adjudication of constitutional rights, at least in the case law of the Constitutional Court (see above).

Broadly speaking, the encounter with EU and ECHR fundamental rights has improved, rather than diminished the legitimacy of the Constitutional Court in adjudicating fundamental rights. In addition, there seems not to have been any pronounced conflicts between Croatian constitutional rights and EU law, at least not yet. Such a conflict could of course happen.

2.13.2 Not applicable.

2.13.3–2.13.4 The case of the EAW has been debated in detail in other sections of this Report. Double criminality, similarly as in *Advocaten voor de Wereld*,[118] has been a salient issue, albeit not in the sense of a direct conflict with fundamental rights, but as a way of re-interpreting a seemingly mandatory ground for refusal to execute an EAW.

There have, however, been no constitutional conflicts between Croatian and EU law, as of yet. EU law seems, for the time being, largely 'off the radar' for the Croatian Constitutional Court, in contrast to the frequent references to the judgments of the ECtHR.

More broadly, the likelihood of conflict, but also of cooperation and dialogue, in the adjudication of fundamental rights has increased along with the expansion of EU law across policy fields and territorially, with EU enlargement. National

[117] See http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm.

[118] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633.

constitutions and EU law now intersect at a wider variety of points. The direct effect of third-pillar law and the broader ability to refer to the CJEU will certainly add to this.

This has already had its consequences in EU law. The debate on national constitutional identity can be read in the light of an increasing encounter with national constitutional rights. This debate has not yet had a major impact in Croatia. Some academics have suggested possible changes to the interpretation of constitutional provisions, or a richer understanding of constitutional disciplines in terms of 'constitutional identity', rather than new amendments to the constitutional text. Smerdel, for example, has argued that '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'.[119]

More generally, the recent CJEU opinion on accession to the ECHR could also be seen as a way of protecting the dialogue with national constitutional systems. From the point of view of the national courts, the recent trend of constitutional courts referring to the CJEU can also be seen in this light.

Perhaps EU law is only in the very early stages of a development similar to what took place with the introduction of fundamental rights through CJEU case law as a response to *Solange*[120] in the 1970s. More concrete mechanisms of accommodation for national constitutional rights may emerge. Beyond salutary statements, not much has been developed so far – *Melloni* being a good example of a judgment that seemingly pays tribute to national constitutional rights but reverts to the supremacy of EU law. This could also be understood in the context of relatively weak implementation of the EAW in the Member States, and perhaps a fear of further fragmentation in a nascent area of EU policy. The case law may develop in different directions, but what seems clear is that judicial dialogue between the CJEU and national courts, especially with a fundamental rights dimension, must be further developed. In practice, the CJEU is likely to include more detailed references to national constitutional rights in its judgments.

Recent developments such as the expansion (and deepening) of EU law in domains such as criminal law, foreign affairs and third-country migration, the process of EU accession to the ECHR and the complex relationship between the ECtHR and the CJEU, as well as the increasingly high-profile dialogue between the CJEU and the highest national courts, will necessitate a level of accommodation both on the national and EU level. The CJEU is likely to take national courts and their concerns more seriously in its judgments. More general procedural reforms like introducing dissenting opinions do not seem probable, but increasing judicial dialogue is likely to affect the nature and quality of its reasoning.

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[119] Smerdel 2014, p. 516.

[120] BVerfGE 37, 271 (Solange I); BVerfGE 73, 339 (Solange II); Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 01125.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.2 The Constitution (Arts. 139 and 140) provides that treaties may be concluded, depending on their nature and content, by the Parliament, the President of the Republic or the Government. The Parliament ratifies treaties that require laws or legislative amendments, those of a 'military and political nature', and those that give rise to financial commitments. The President signs the documents of ratification, accession, approval or acceptance of treaties ratified by the Parliament. Treaties not subject to ratification by the Parliament are concluded by the President on a proposal by the Government, or by the Government. If a treaty grants an international organisation or alliance powers derived from the Constitution, the ratification by the Croatian Parliament is by a two-thirds majority of all deputies. There are separate rules for the entry into associations and alliances with other states, which ultimately require the approval of two-thirds of all deputies in Parliament, as well as a positive outcome of a referendum (Art. 142).

The only provisions of this nature that contain some references to values and objectives are those that pertain to the European Union. Article 143 provides that, in the EU, Croatia will 'participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union'.

3.1.3–3.1.4 EU accession has been the only event in recent history to have provoked a significant debate on the relationship between the Constitution and transnational or global governance. This has resulted in new constitutional provisions (see Sect. 1.2).

3.2 The Position of International Law in National Law

3.2.1 The application of treaties is governed by Art. 141 of the Constitution:

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

Some constitutional provisions refer to international law other than treaties. Article 2, for example, provides that 'the Republic of Croatia, in accordance with international law, shall exercise sovereign rights and jurisdiction over the maritime zones and seabed of the Adriatic Sea outside its state territory up to the borders of

neighbouring countries'. Article 31 provides that 'no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law' and that the statute of limitations shall not apply to 'those not subject to the statute of limitations under international law'.

3.2.2 The split between monism and dualism can be seen as describing two deeply opposed understandings of international law and national sovereignty. On the other hand, the two notions may not be much more than two techniques by which international law is given effect in national legislation. The real test of the openness of a legal order to international law, in our view, should rather take place before courts and administrative bodies.

Legal commentary is largely committed to the view that Croatia accepts monism, citing the clear constitutional provisions cited above. Doctrine also tends to hold the view of a Kelsen-like hierarchy of legal sources, with the Constitution superior to international law and international law superior to legislation. On the other hand, some sources of international law, and in particular the ECHR, are held in higher esteem. The President of the Constitutional Court has, for example, written that 'the case-law of the Croatian Constitutional Court shows that international treaties actually enjoy a quasi-constitutional status in the Croatian constitutional legal order: international treaties do not formally have the power of a constitutional law, but nevertheless their role is the same as that of the Constitution because they serve as standards for the review of the national legislation, in particular of the acts of Parliament'.[121] The Constitutional Court has indeed found that a law violating the Convention is also contrary to the principle of the rule of law contained in Art. 3 of the Constitution, as well as to the principle of legality (Art. 5) and the principle of legal monism.[122]

Others have noted that, in practice and depending on the area of law in question, the principle of monism is not always strictly followed and is sometimes combined with a dualist understanding.[123] Indeed, empirically speaking, it is quite rare for courts, especially if the Constitutional Court is taken out of the picture, to make any use of international law whatsoever.

3.3 Democratic Control

3.3.1 For the involvement of the Parliament in ratification, see above. The Act on the Conclusion and Execution of International Treaties[124] does not foresee a specific role for Parliament in the negotiation stage. The negotiation is conducted by a delegation that is named by the President or by the Government. The Parliament

[121] Omejec 2009, p. 2.

[122] Ibid., p. 11.

[123] Rudolf 2014, p. 569.

[124] Zakon o sklapanju i izvršavanju međunarodnih ugovora (Narodne novine 28/1996).

does, however, have a role in scrutinising the execution of a treaty: the Government is required to report on the execution of a treaty upon the Parliament's request. A special and much more detailed law regulates the involvement of the Parliament in European Union issues (for details, see the answer to question 1.4.1).

3.3.2 Only the EU Accession Treaty has been subject to a referendum, as per specific constitutional requirements (see Sect. 1.2).

3.4 Judicial Review

3.4.1 There are no explicit constitutional provisions of any kind regarding the judicial review of international law. The Constitutional Court's authority extends to laws and other national measures. Indeed, the Constitutional Court considers substantive challenges to international treaties as inadmissible,[125] but it is unclear whether this extends to challenges to laws on the ratification of treaties.[126] In practice, there have not been many challenges to provisions of international law, and certainly not high-profile ones. In time, this may change, as EU accession exposes Croatia to a greater variety of sources of transnational law in a broader range of domains.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 See the answer to question 2.7.3.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 No significant issues have arisen in Croatia.

References

Bagić S. (2013) The principle of proportionality in the case-law of European courts and its impact on the case-law of the Croatian courts. Doctoral dissertation, University of Zagreb.

Ćapeta T. (2008) Ustavne promjene i clanstvo u EU (Constitutional amendments and membership in the EU). Informator 5646:1–3.

[125] Omejec 2009, p. 12.

[126] Ibid., pp. 13–15.

Đurđević Z., Goldner Lang I., Munivrana Vajda M. (2012) Croatia. In: Laffranque J. (ed.) The Area of Freedom Security and Justice, Including Information Society Issues, Reports of the XXV FIDE Congress Tallinn 2012, Vol. 3. Tartu University Press, Tallinn, pp. 235–259.

Harris D.J., O'Boyle M., Warbrick C. (2009) Law of the European Convention on Human Rights. Oxford University Press, Oxford.

Hrvatin B. (2010) Presentation by the President of the Supreme Court of the Republic of Croatia at the international conference 'Assessing the Legacy of the ICTY', The Hague, 23–24 February 2010.

Millet F.-X. (2014) How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court Of Justice. CML Rev. 51:195–218.

Morgan C. (2005) The European Arrest Warrant and Defendant's Rights: An Overview. In: Blekxtoon R. (ed.) Handbook on the European Arrest Warrant. T.M.C. Asser Press, The Hague, pp. 195–208.

Omejec J. (2009) Legal Framework and Case-Law of the Constitutional Court Of Croatia in Deciding on the Conformity of Laws With International Treaties' Report CDL-JU(2009)035. European Commission for Democracy Through Law (Venice Commission), The Constitutional Court of Montenegro and OSCE.

Rodin S. (2007) Regulatorna autonomija država članica i ustavna osnova za pristupanje RH Europskoj uniji (Regulatory autonomy of Member States and the constitutional basis for Croatia's accession to the European Union). In: Barbić J. (ed.) Pristupanje RH Europskoj uniji (Accession of the Republic of Croatia to the European Union). HAZU, Zagreb, pp. 247–277.

Rodin S. (2010) Pravo Europske unije i pravni poredak Republike Hrvatske nakon 20 godina hrvatskog Ustava (European Union law and the legal order of the Republic of Croatia 20 years after the Croatian Constitution). Opatija Inter-University Centre of Excellence Working Paper H2/2010.

Rudolf D. (2014) Zajednička sigurnosna i obrambena politika Europske unije prema Lisabonskom ugovoru (EU common foreign and security policy according to the Lisbon Treaty). Zbornik radova Pravnog fakulteta u Splitu 51:557 et seq.

Smerdel B. (2010) Ustav RH nakon ustavnih promjena (The Constitution of the Republic of Croatia after constitutional changes). Hrvatska pravna revija 1 et seq.

Smerdel B. (2014) In Quest of a Doctrine: Croatian Constitutional Identity in the European Union. Zbornik Pravnog fakulteta u Zagrebu 64:513 et seq.