**UNEXPECTED DEGRADATION:**

**CROATIAN CONSTITUTIONALISM SINCE THE FULL EU MEMBERSHIP[[1]](#footnote-1)**

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1. **Democratic transition and the EU membership**

Harold Berman, the prominent legal historian, asserts that the Mankind should head towards the future walking, so to speak, backwards, turning back and ever again looking for signs and landmarks from which to learn how to deal with that future.[[2]](#footnote-2) On the eve of the long expected full membership in the European Union, I held such an approach recommendable for Croatian government and durably attempted to warn about the necessity to apply the lessons of recent and antique history, which have been learned the hard way by the Croatian people. The centuries of living in the various forms of alliances of states, all of which have had in common that Croatian state made a weaker or the weakest of partners, should have taught us that, to join a compound community of states, regardless of how it perceive itself, one must make an effort to learn about the real nature of such a community, in order to be able to estimate its position, as the newest member, when finally within the community. This is the reason why since the beginning of negotiations on accession, I have argued in favor of “euro realism”, instead of excessive expectations nurtured by the governmental propaganda.[[3]](#footnote-3)

Such an approach requires, Ron Hirschl writes:

In all of this, a simple yet powerful insight is often overlooked: constitutions neither originate nor operate in a vacuum. Their import cannot be meaningfully described or explained independent of the social, political, and economic forces, domestic and international, that shape a given constitutional system. Indeed, the rise and fall of constitutional orders—the average lifespan of a written constitution since 1789 is 19 years—are important manifestations of those struggles.[**5**](http://icon.oxfordjournals.org/content/11/1/1.full#fn-5) Culture, economics, institutional structures, power, and strategy are as significant to understanding the constitutional universe as jurisprudential and prescriptive analyses.[**6**](http://icon.oxfordjournals.org/content/11/1/1.full#fn-6) Any attempt to portray the constitutional domain as a predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, a-historical, overly doctrinal or formalistic accounts of the origins, nature and consequences of constitutional law. From Montesquieu and Weber to Douglass North and Robert Dahl, prominent social thinkers who have engaged in a systematic study of constitutional law and institutions across polities and through the ages have accepted this plain (and possibly inconvenient) truth.[**7**](http://icon.oxfordjournals.org/content/11/1/1.full#fn-7)

Ideas and concepts ‘hitherto unknown’ have been introduced and immediately applied in the country of very different legal and political traditions. This is how Alexis de Tocqueville, at the beginning of 19 Century, summarized the appearance of democracy in America. And this was indeed similar to the changes that have happened in Croatia during the process of accession to the European Union.

For the Old regime which had been destroyed by the revolution, Tocqueville had noted another kind of problem: ‘An abundance of laws, but a lenient implementation.’ And this is indeed what we notice around us at the moment, in the Croatian and *mutatis mutandis* the European constitutional order.

Tocqueville considered the three factors as the most important for a success of great reforms and viability of the new system of republicanism. These were: geography and natural wealth of the land things are done and the way the rules are formally applied, differ from the language of the rules on the book.

Since that time, political reformers and their scientific advisors, struggle with the question which of those factors has prevalence. As a witness of se; the laws and, third *mora,* ‘the habits of heart and mind’ of the people. The way several serious attempts to reform the state and a society by introduction of new legislation, I deem necessary to point out the limited capacity of the state and the new legislation.

When contemplating reforms, leaders should take into account a specific combination of the three factors which enables or prevents certain legal solutions from becoming effective. Otherwise the apparently neat system of the rules on the book, do not correspond to the working rules.

1. **Croatian experience and political culture**

In Croatia, the years of dictatorship resulted in a strong tradition of:

* governmental secrecy,
* selective application of laws,
* disregard of the constitutionally stipulated rights and freedoms,
* absence of popular control and responsibility of power-holders
* very low participation in political decision making.

The purpose of reminding us to such a Croatian tradition and political culture is not to spoil celebrations with criticism and a cost – benefit analyses. Since festivities have already begun, I must say that I have been very much pro Europe oriented. I think the membership is in the best interest of Croatia. But I still think that we have to learn from our and European past in order better to understand our role in controlling the future of the complex community of states.

After all, their *raison d*’*être* is to create, legitimize, allocate, and check power. Given their entrenched or “higher law” status, constitutions provide an ideal platform for “locking in” certain worldviews, policy preferences, and institutional structures, and disadvantaging, limiting or precluding the consideration of others. Constitution drafting, like constitutional interpretation does not occur out of thin air. Power will be differentially allocated at the drafting table and the likelihood of pertinent political, economic, and judicial stakeholders voluntarily conceding power, prestige or privilege during this process is not very high.

1. **The Constitution of 1990**

The fundamental democratic constitutional concept, as it had been understood at the time, was introduced by the Constitution of December of the year 1990. The Croatian one was the first among the post-communist constitutions in Middle and Eastern Europe.

While drafting it, and looking for a model documents we turned to the constitutions created as reactions to overturn of autocracies in Europe. Thus, we were looking up the constitutions of the countries which had themselves passed earlier through the process of the first European democratic transition in the second part of the 20th Century: Germany and Italy, at the end of the forties; than only gradually France, followed by the beginning of a democratic revolution in the seventies: Portugal and Spain. The main international human rights instruments of the time had also been consulted. At the first place the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Constitutional concepts new to the Croatian tradition were introduced during the following two decades lasting processes of accession, with the consent and advice, first by the Council of Europe, and later during the process of accession into the European Union.

They were necessary in order to follow developments in the very model Western constitutional systems at the end of the Century.

1. **Institutional design in theory and practice**

As usually happens in human history the process has not developed as expected. The theory of constitutional design takes the original constitutional text as the point of departure. It is adopted in a ‘constitutional moment’ and after that serves as a ground for development of legislation and jurisprudence, as well as behavior of dignitaries and parliamentarians. This is expected to initiate and indeed offer guidance to the expectations of common people who take the Constitution as an important instrument to protect and promote their interests. But everything happens differently.

As a matter of fact, the Constitution has been to the great extent ignored during the process. The substantial changes were introduced predominantly by the adoption of new legislation, according to the established tradition, without even consulting the Constitution. Opposite to the theory of constitutional design, the Constitution has been only subsequently and partially brought into accordance to the legislation, most often on demands from the European monitors and advisors. In order to create required majorities, the additional, some of them very important, provisions have been introduced into the constitutional guarantees of rights. This was the main meaning of the extensive constitutional reform of 2010. But it should be noted that the process of ‘structural reforms’ never ends in the new as well as the old members, and the legal framework of the Union itself.

This is why we consider this the right moment to look back and around us, and try to evaluate the achievements as well as the prospects, costs and threats in the rapidly changing political and constitutional environment of the European Union on the eve of the full Croatian membership.

1. **The method of negotiations and its effects**

The very process of negotiations on accession had taken over seven years (2005 – 211). After the screening of the Croatian legal system, passing through 35 chapters, the negotiators predominantly worked on dictation and transcription of the existing European Union law into the Croatian legal system. Constitutional issues were discouraged and hardly even mentioned by either side. Year after year, on the grounds of new chapters and new insights, further changes to the recently accepted legislation have been required and urgently passed through the parliamentary procedure. The coherency of the legal system has been lost during this ‘legislative stampede’ (Jakša Barbić). The new legal system has been compared to ‘a patchwork’ of various mutually contradictory elements (Jasna Omejec).

As expected, the crucial problems had been concentrated around the reform of judiciary and fundamental rights (Chapter 24), justice, freedom and security (Chapter 25) and a financial responsibility (Chapter 32).

Since the *acquis communitaire* already encompasses over 100 thousands pages, a little could have actually been a subject of negotiation. Still, year after year the public had an impression that they would never end and the expectations from membership were gradually seriously reduced. Financial crisis of the Union have certainly contributed to that a great deal.

On the eve of the full membership, only 20 percent of voters decided to participate in elections for the European parliament on April 14 of this year.[[4]](#footnote-4)

1. **Happy to oblige: Constitutional reform of 2010**

*3.1. The constitutional revisions of 1997-2001*

Constitutional revisions reflect the needs of a society’s progress as well as the priorities of a state policy. Political developments under the first Constitution were neither simple nor linear, so the Constitution has been repeatedly amended and adapted to the exigencies of the times.

The objective of the first Revision of the Constitution in 1997 was, on the one hand, to strengthen the constitutional guarantees of state independence in response to the dangers the aggression against Croatia, and on the other hand, to clarify the constitutional guarantees of rights and freedoms*,* in accordance with the requirements of Croatia’s then impending membership in the Council of Europe. It is for these reasons that its provisions were supplemented with a constitutional ban on any initiation of a procedure of associating in alliances if such an association would result in a renewal of “Balkan interstate bonds of any kind” (Art. 141 Const., i.e. Art. 142 of the consolidated version)*.* In addition, it was further clarified that the constitutional guarantees of equality do not only protect Croatian citizens, but every person within its jurisdiction. Although such a conclusion was obviously implied in the provision that “all shall be equal before the law” (Art. 14 Const.), the opinion that it was necessary to clearly and unequivocally state that “everyone” should enjoy the rights and freedoms guaranteed by the Croatian Constitution won in the end.

The objective of the profound constitutional reform of 2000 was to strengthen the constitutional guarantees of democratic development and parliamentary democracy, as well as to prevent the concentration of authority and decision-making power within the institution of the President. For this reason, the whole system of government was altered in order to check and supervise the President of the Republic within the model of parliamentary government*.*[[5]](#footnote-5)

The revision of 2001 was, in fact, a belated supplement to the reform made in 2000, caused by the difficulties of adjusting the various positions within the ruling coalition. The most important change was the abolition of the House of Counties, and therefore the institution of a unicameral Croatian Parliament.

Finally, the objective of the 2010 constitutional revision was to create and strengthen the constitutional basis for Croatia’s full membership in the European Union, as part of its process of fulfilling the strategic goals of joining the Euro-Atlantic organizations, objectives which were proclaimed in the Historical Foundations as early as 1990 at the time of the adoption of the Constitution. All these amendments have preserved the baseline for the constitutional order: democracy, human rights and the rule of law, which are the fundamental values of the Republic of Croatia in the context of European and international organizations.[[6]](#footnote-6)

*3.2. Constitutional Revision of 16 June 2010[[7]](#footnote-7)*

The set of important constitutional amendments that were adopted, promulgated and entered into force on 16 July 2010 pursuant to a decision of the Croatian Parliament can be classified into the four categories which follow.

1. *Amendments required by the accession negotiations with the European Union*

The amendments were adopted at the request of European negotiators, in order to facilitate the accession to the EU: they concern the constitutional status of the Central Bank, the determination of the constitutional status of the State Auditing Office, the abandonment of the principle of non-extradition of own citizens, as well as the adjustment of the decision-making procedure to Croatia’s membership in the NATO (Art. 7).

Some of these amendments have fully realized their purpose, since this is precisely what was demanded during the accession negotiations: that they should be included in the Constitution or, more accurately, that the constitutional provisions on the Central Bank and the State Auditing Office should be harmonized with the current EU law.

The abandonment of the principle of non-extradition of own citizens to foreign states is a significant amendment (Art. 9). The application of the European arrest warrant has been delayed until Croatia becomes a full member of the European Union, although the negotiators demanded its direct application even before reaching full membership. The constitutional position of the Central Bank (Art. 53) is made more precise, and the position of the State Auditing Office (Art. 54) is constitutionally regulated. In order to abolish constitutional impediments to EU membership, provisions regulating decision-making on association and disassociation referenda have been altered, to which topic we will return later (Art. 142).

*2. Amendments required for adaptation of the legal system to (a future) membership in the EU*

This important new Title VIII of the Constitution named “The European Union” (Arts.143-146 Const.) was based on the demands of the legal profession and the experience of other members of the European Union, particularly those undergoing transition, and will be applied in full only upon reaching full membership.[[8]](#footnote-8) It sets forth the legal basis for membership and the transfer of constitutional powers to the Union’s institutions; the participation of governmental bodies in decision-making within the institutions of the European Union; the supremacy of the European Union’s *acquis communitaire* over the Croatian legal system; and the rights of the European Union citizens within the Republic of Croatia (see further section 6 below). This Title of the Constitution entered into force on the day Croatia became a full member of the Union.[[9]](#footnote-9)

*3. Amendments declaring intentions to correct injustices*

These amendments encompass the changes to the text of the Historical Foundations, as well as the (potentially) very meaningful abolition of the statute of limitations for certain criminal offences committed during the Homeland War (the new paragraph 4 of Art. 31 Const.). The inclusion of a list of 22 national minorities in the Historical Foundations text, as well as the formulation on how the Croatian “nation and its defenders” have defended the state “in a justified, legitimate, defensive Homeland War for the liberation (1991-1995)” serves to declare certain good intentions: to correct the mistakes committed in the 1990s - considering that the Preamble is not and cannot be legally binding (though it may be legally relevant for the interpretation of the legally binding provisions of the Constitution). In our opinion, abolishing the statute of limitations for wartime profiteering and crimes committed in the process of privatization of property is of the same significance, since the current formulation of Article 31 is inapplicable without elaboration in a constitutional law with the legal force of the Constitution itself.[[10]](#footnote-10)

*4. Amendments to the political decision-making system*

These are very important changes, addressing a number of old (as well as new) outstanding political issues. They concern the following points.

*a. Positive discrimination of national minorities*

An additional voting right is guaranteed to members of all the national minorities that make up less than 1.5% of the population, and a guarantee of three seats in the Croatian Parliament for the minorities whose numbers are greater than the aforementioned percentage (the Serb minority) is provided for. This amendment, based on paragraph 3 of Article 15 of the Constitution, was introduced by urgent amendments of the Constitutional Law on the Rights of National Minorities,[[11]](#footnote-11) in parallel with the constitutional amendments. Those amendments, which had been formally aimed to an unprecedented form of positive discrimination, but were actually a result of negotiations within the ruling coalition of the time, were rescinded by the Constitutional Court on July 26, 2011 holding them in discordance to the fundamental guarantee of equal voting rights.[[12]](#footnote-12)

*b. Voting of Croatian citizens residing in foreign countries (Art. 45 Const.)*

Croatian citizens who are abroad on the day of the elections may vote in diplomatic and consular offices of the Republic of Croatia. Instead of the “non-fixed quota” that applied so far, making the number of their representatives contingent upon voter turnout, they are now guaranteed three seats in the Croatian Parliament, regardless of voter turnout.

*c. Decision-making in referenda*

The conditions for the decision-making in referenda have been significantly alleviated by the amendments to the previous Articles 86 and 141 (in the consolidated version published in Official Gazette No. 85/10, these are now Arts. 87 and 142). The referendum decisions will be made by a majority of voters who turn out (Arts. 87 and 142). In this way, the previous strict provision of Article 86 (Constitution pre-2010), providing that a majority of all voters take part in the referendum, and that a majority of all voters should vote for a decision on association or disassociation (Art. 135(4) Constitution pre-2010), has been abandoned since it contained a practically impossible requirement in light of the disorder of the list of voters due to the large number of persons with double citizenship.[[13]](#footnote-13)

*d. Decision-making in the Croatian Parliament*

A majority of all representatives of the Croatian Parliament decides on the budget (Art. 91(2)), and a two-thirds majority of all representatives became necessary to elect the judges of the Constitutional Court (Art. 126). The role of the Parliament and of the Government with regard to their future relations of joint consideration and adoption of political decisions within the bodies of the European Union have also been determined (Art. 144). The Law on the Relations Between the Government and the Parliament in European matters has underwent long negotiations regarding the role of the Parliament, although it had to be adopted by the end of June, 2013.[[14]](#footnote-14)

*e. Amendments aimed at the reform of the judiciary*

The amendments lay the foundations for a substantial reform of the judiciary and of the judges’ profession. The status of judges and the process of their election have been altered, the obligation to re-appoint judges after the first five years on the bench is abolished, and judgeship has become personal and permanent. The purview of the Supreme Court as well as the new powers of its President have been additionally specified, and the composition and the competences of the National Judicial Council, as well as of the Office of the Public Prosecutor and the National Council of the Public Prosecution Service, have been altered.[[15]](#footnote-15) These extremely significant changes of long-term strategic importance for the development of the Croatian judiciary have not been sufficiently discussed in public.[[16]](#footnote-16)

*f. Amendments strengthening human rights and fundamental freedoms*

Articles 38 (right of free access to information), 66 (right to free education) and 93 (the People’s Ombudsman) have been amended. Important improvements to the right of free access to information have been added. However, the opportunity was not taken to strengthen the protective mechanisms for assessing whether public interest was strong enough to override the right of access to information.[[17]](#footnote-17)

Despite his positive attitude towards the interpretation of the aforementioned provision it has been recorded that Professor Rodin never agreed to insert it into the Constitution.65 The Subcommittee of which he was a member was no longer assembled when Article 145 was re-drafted and accepted in the Government’s proposal for the constitutional amendment.

Whether such a lack of transparency was purposefully created in order to ‘cover up’ the adoption of constitutional amendments which are evidently in contradiction to some of the fundamental principles of EU law, by withholding them from the expert community and the public in general, or whether it was unintended, is unclear.66

In any case, our main concern is the motivation of the constitution-framers for inserting such a provision and more importantly, the effects it will generate in the future. For this we will have to await a judgment by the Croatian Constitutional Court. It is very uncertain whether the interpretation will indeed be pro-European and in the way Professor Rodin has argued or perhaps very different and hence problematic for further EU integration.

“Some authors have taken a different position. Professor Smerdel, for instance, argues that it would not be wise give complete supremacy to EU law and to give up on the Croatian Constitution. The claim for ‘reserved constitutional domain’ should not only be made by larger EU Member States such as Germany and France, but also by smaller ones which are smaller but still equal. On the basis of the doctrine of constitutional identity, constitutional courts may decide to give supremacy to national constitutions over EU law.67 In order to support this argument, Professor Smerdel makes explicit reference to the case law of the German Constitutional Court as well as to other constitutional courts which have developed the theory of constitutional identity. This theory was the fundamental basis for decisions of those courts in which primacy is given to national constitutional law. As for Croatia, there are no provisions in the Croatian Constitution precluding the Constitutional Court from adopting the same approach, according to Smerdel. It is in fact fairly easy to construe a constitutional basis for the supremacy of national constitutional law over EU law in relevant matters, even though it is not explicitly stated in the Constitution (Croatian negotiators in the accession process have warned that including such a provision in the Constitution would mean the end of negotiations).68 Relevant provisions in this respect are Articles 2, 3 and particularly Article 5 of the Constitution. Article 2 is a sovereignty clause stating that the sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable. It further states that Croatia may conclude alliances with other states but it retains its sovereign right to decide upon the powers to be delegated and the right to freely withdraw therefrom. Article 3 outlines the highest values of the constitutional order of the Republic of Croatia69 and Article 5 proclaims that laws shall comply with the Constitution and other regulations with the Constitution and law. This certainly puts the Croatian Constitution in the central position and indeed leaves space for the interpretation of the Constitution’s supremacy over all laws, including EU law. The key question is thus how the Constitutional Court will approach all these issues? At present, it is difficult to predict the direction of the Constitutional Court’s future jurisprudence in this respect.”**[[18]](#footnote-18)**

1. **Essential legislative reforms**

The prevalent majority of these reforms had been done by legislation, and only some of them were later brought in accordance to the Constitution. Warnings against neglecting the Constitution were limited to a few constitutional scholars and mostly ignored for the sake of efficiency. Let us look at those reforms:

Minority rights (2002)

Freedom of Information Act (2003)

Anti-discrimination law (2008)

Independent regulators (2005)

Independent National bank

Independent Accountant Office

Prevention of the conflict of interest (2011)

Hierarchy of norms (2010)

Direct application of the constitutional provisions /long-lasting problems)

Direct application of the international law (ECHR 1997)

Primacy and supremacy of the European Union Law (2013)

1. **The price of excessive expectations: the transition of the EU since the dawn of the Century**

The idea of ‘a democratic transition’ was widely accepted in the last decade of the 20th Century. It has been asserted that ‘the new democracies’ would, with the intellectual and material help of their elder and more mature sisters, during the process of some fifteen to twenty years, succeed to close the gap in the development of market economy, political democracy and a rule of law which divided them form the developed ‘model’ countries.

This evident simplification had been widely accepted and preached, being accompanied with great expectations regarding the new world order (even the ‘end of history’ as it had been previously known). It was obvious that while ‘the newcomers’ attempted to narrow the gap, ‘the elders’ would not sit and wait for that to happen. Even further, the process obviously could not have been irreversible. The transition was twofold and far from incremental.

Therefore, Republic of Croatia and its constitutional order have indeed substantially changed during the process of accession.

But the same could be said for the European Union, its legal nature and the dominant theory (of financial federalism), as well as for its constitutional order. Secondly, the most severe crisis of the Union is still under way and is further exacerbated, questioning the Union’s very survival and even the maintenance of the fundamental objectives and unquestionable achievements of European integrations.[[19]](#footnote-19) As always in crisis situations, structures of power within the Union as an association of formally equal states are completely transparent, revealing German and French hegemony and leadership. The crisis has unearthed the attitude of the leading powers towards the „constitutional treaty“, laboriously negotiated over the past decade and finally won in 2009, upon which the Union formally rests after the great reform begun in 2001.[[20]](#footnote-20) We can consider the Lisbon Treaty *tacite* suspended as far as basic ways and means of creating policy decisions are concerned.[[21]](#footnote-21) The European Fiscal Compact remains an object of suspicion, both in regard to the Great Britain and Czech Republic's opposition as well as possibilities of its implementation and oversight.[[22]](#footnote-22)

The Eurozone crisis is as much a banking as it is a sovereign debt crisis. Foremost, however, it is a crisis of governance structures and political constraints. The crisis has been exacerbated by half-baked approaches and unsustainable policies. Political inaction has put greater responsibility and stress on the ECB, expanding its realm far beyond monetary stability and its democratically assigned responsibilities, and forcing it to go for second- or third-best solutions. If the Eurozone countries are not to be caught in the downward spiral of a failed currency union, it is time to act now. We economists have certainly made our contribution, showing different alternative paths and policy options. It is time for Eurozone governments to think outside the box and act!

To paraphrase the famous metaphor by Karl Marx “the specter is out of the bottle and is hovering around Europe …”. Actually, there are the two specters:

* the specter of a federation whether of a new or the old design (the question of the living constitution of the EU)
* the specter of proper place for national constitutions, which must not be ignored and should be brought into accordance with the European order.

This requires a new constitutional theory. In the words of the American Founding fathers, “an erroneous choice might bring upon us a catastrophe”.

1. **What about the national constitutions?**
2. The constitution as an obstacle to “the European” law on prevention of the conflicts of interest

On November 7, 2012, Croatian Constitutional Court invalidated the major parts of the Prevention of Conflict of Interest Act of 2011, because it had seriously violated the fundamental constitutional principles, such as separation of powers, as well as certain fundamental constitutional rights.

The notion of a conflict of interest has been new to the traditional and parochial Croatian political culture. The history of legislating on the matter demonstrated that on a number of occasions during the course of twenty years. Politics has traditionally been considered an activity in which the actors should help themselves, as well as their relatives and friends. Until today, the concept that the highest state dignitaries should enjoy lesser legal protection than the common citizens, have not taken serious roots. In addition, the spoils system still prevails in alternation of government on central and local levels.

Amid the frenzy to fulfill the expectations the Parliament had adopted the new Prevention of Conflicts of Interest Act by which a Commission had to be established by the majority parliamentary vote, with the authority to oversight the enumerated officials regarding the potential conflict of interest.

The problem was that it had the combination of the police, judicial and constitutional authority over all the supreme officials of the state without the serious remedies provided.

It has been noted in literature that such bodies could be abused as lethal means in political struggles. The final result of the experiment is that the new Commission lacks most of the serious competences such bodies should have in democratic systems.

But the most important caveat should be that the Constitution must not be neglected and should be reestablished as the source of ultimate authority as well as of the delegation of such an authority.

1. The constitution as an obstacle to “the European” economic policies: maintaining the social state

The Constitutional Court of Portugal on April 2, 2013 found unconstitutional the governmental budget proposal providing for the austerity measures, which were negotiated with the European Commission. Apparently it has done so in defense of the constitutional concept of social state.

Mr Passos Coelho wants the constitution to be revised to slim down the state and allow the cuts he has promised. He would probably like to change the clauses that led directly to the court ruling. But the biggest concerns surround the welfare state. The IMF has proposed reducing the range of state-provided health services and increasing small, point-of-delivery charges. Large-scale redundancies seem inevitable among Portugal’s 600,000 state workers (12.4% of the workforce). What the IMF calls “excess employment” is concentrated in education and the security forces. Despite entreaties from the government, the president and international lenders, the PS refuses to discuss such reforms, which it sees as an ideological attack.

The trouble for Mr Passos Coelho is that the PS is also against any constitutional amendments, depriving his government of the two-thirds majority in parliament that is needed to pass them. The opposition would prefer an early election, enabling a victorious PS to negotiate a new bail-out. And now the court has amplified doubts over the prime minister’s ability to diminish the size and cost of the state without a constitutional revision. If Mr Passos Coelho is blocked both in parliament and by the court, then his plans for Portugal will be doomed from the outset.

1. Preserving the Eurozone: German Federal Constitutional Court, June 2011 Aid to Greece.

The Second Senate of the Federal Constitutional Court has decided that the Monetary Union Financial Stabilisation Act (*Währungsunion-Finanzstabilisierungsgesetz*), which grants the authorisation to provide aid to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), hereinafter: Euro Stabilisation Mechanism Act (*Euro-Stabilisierungsmechanismus-Gesetz*), which relates to the euro rescue package, do not violate the right to elect the *Bundestag* under Article 38.1 of the Basic Law (*Grundgesetz* – GG). By adopting these Acts, the German *Bundestag* did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments.

However, § 1.4 of the Euro Stabilisation Mechanism Act is only compatible with the Basic Law if it is interpreted in conformity with the constitution. The provision is to be interpreted to the effect that the Federal Government is obliged to obtain prior approval by the Budget

Committee before giving guarantees within the meaning of the Act.

Furthermore, the Senate determines the boundaries under constitutional law for authorisations to give guarantees for the benefit of other states in the European monetary union.

1. The constitution as the final line of defending “the European principles”: the bail out of the Cypriot banks in March 2013.

Cyprus, which has been a member of the European Union since 2004 and the Euro zone since 2008, was recently on the brink of financial collapse. Its two major banks, the Popular (Laiki) and the Bank of Cyprus were abruptly closed on March 15, 2013 until further notice. A chaotic situation ensued when on March 16, 2013, the seventeen Eurozone members announced their decision to impose a one-time tax on deposits held in Cypriot banks in exchange for a 10 billion euro bailout by the European Union. The tax would amount to 9.9% for deposits exceeding €100,000 ($130.000) and 6.7% for deposits less than that. The decision was endorsed by the European Central Bank, the European Commission and the International Monetary Fund (IMF). The [message](http://www.mof.gov.cy/mof/mof.nsf/All/BB670607715A44D6C2257B3200368FE9/%24file/agreemenfinancialassistance.pdf) was delivered to the Cypriots by their newly-elected President, a conservative leader, [Nicos Anastasiades,](http://www.parliament.cy/parliamenteng/003_02_biography/anastasiadis.htm)who replaced the former government of Demetris Christophias with the mandate to secure a bailout. Anastasiades claimed that he had [no choice but to accept the deal](http://www.euractiv.com/euro-finance/president-eu-blackmailed-cyprus-news-518572).

A move to impose a tax on deposits less than €100,000 would have been incompatible with EU law, which guarantees deposits of up to €100.000, specifically [Directive  1994/19 on Deposit Guaranteed Schemes](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1994:135:0005:0014:EN:PDF) (OJ. (L 135) 5), as amended by [Directive 2009/14/EC](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:068:0003:0007:EN:PDF)(O.J. (L68) 3). The EU’s guarantee deposit schemes were designed to prevent situations such as the one affecting Cyprus. The rationale behind the guarantee deposit schemes is to curb mass withdrawals from banks on the verge of a collapse but also to mitigate the overall effects of loss of public confidence in banking institutions. Some have opined that the introduction of taxation of deposits, for the first time in the euro zone history, would place at risk and undermine the entire guarantee deposit scheme that the EU has put in place. Roberto Henriques, an analyst at JPMorgan Chase & Co. in London, was quoted in a news article as having written in a report to clients that the new tax “[will be the death knell for an EU Common Deposit Guarantee scheme](http://www.bloomberg.com/news/2013-03-19/cyprus-bank-levy-threatens-european-plan-for-deposit-guarantees.html).”

A [new EU proposal for a Directive on Deposit Guarantee Schemes](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0368:FIN:EN:PDF)is currently under consideration before the EU Parliament and the Council. The proposal aims to provide a more secure legal regime for deposits. It requires that all banks and financial institutions without exception must join a deposit guarantee scheme. The proposal also defines more clearly what falls within the definition of deposits. More importantly, it requires that prior to making a deposit all depositors must sign a form, which will indicate as to whether their deposits are guaranteed.  It allows EU Member States to cover deposits arising from real estate transactions and deposits relating to particular life events above the limit of €100,000, provided that the coverage is limited to 12 months. In addition, the proposal gives EU Member States discretion to establish a separate system, apart from the Deposit Guarantee Schemes to protect pensions, certain deposits for social reasons or in relation to real estate transactions for private residential purposes.

Cypriots reacted swiftly and angrily to this measure by storming ATM machines and banks in a desperate attempt to withdraw their savings. Being a financial center due to its low corporate tax rate and favorable bank interest rates, Cyprus has attracted many Russian investors who deposited large amounts of money in its banks. Mr. Putin called the tax on deposits “unfair, unprofessional and dangerous.” According to an article by Andrew E. Kramer, titled [Protecting Their Own, Russians Offer an Alternative to the Cypriot Bank Tax](http://www.nytimes.com/2013/03/20/business/global/protecting-their-own-russians-offer-an-alternative-to-the-cypriot-bank-tax.html?pagewanted=all), published on March 19, 2013 by the New York Times, a report prepared by Moody’s rating agency estimated that Russians depositors were in danger of losing about $3.1 billion from a total of $31 billion held in Cypriot banks.

On March 19, the 56-seat Cyprus Parliament voted against a proposed tax on bank accounts irrespective of amount and called it a “bank robbery.” Meanwhile, the Cypriot Minister of Finance, Michael Sarris, paid an [emergency visit to Moscow](http://www.euractiv.com/euro-finance/kremlin-moves-save-cyprus-dirty-news-518647?utm_source=EurActiv%20Newsletter&utm_campaign=88dea61d40-newsletter_daily_update&utm_medium=email), to request for an additional €5 billion on top of a five-year extension and lower interest on an existing €2.5 billion loan. [Mr. Saris did not strike a deal in Russia and Cyprus faced a deadline of March 25 to secure the bailout](http://www.euractiv.com/euro-finance/cyprus-races-plan-meet-ecb-ultim-news-518672?utm_source=EurActiv%20Newsletter&utm_campaign=d795b00dcb-newsletter_weekly_update&utm_medium=email).  The Parliament convened on March 22 to [review a  bill to reform its banking system](http://euobserver.com/news/119566). It adopted measures to restrict the amount of funds taken or transferred electronically in order to avoid bank runs. The daily allowed amount of money from both banks is limited to a maximum of €100 or €120.

An article written by Gabrielle Steinhauser, Marcus Walker and Matina Stevis, [Bailout Strains European Ties](http://online.wsj.com/article/SB10001424127887323605404578382943506534114.html), and published by the Wall Street Journal on March 26, 2013 reported that a new deal had been reached on March 25, 2013, between Cyprus and EU and IMF officials. Accordingly, the Popular Bank will close down, while the Bank of Cyprus will be restructured. Deposits of less than €100.000 in both banks will remain unaffected while depositors with larger deposits are expected to bear a hefty price.

The Cyprus banking crisis may have wider repercussions, as it is anticipated that it will have a negative impact on other Euro zone countries that face similar financial problems. An additional article by Liz Alderman and Landon Thomas Jr.,With or Without Bailout, Cypriots Lose Trust in Banks, published by the New York Times on March 25, 2013 reported that [Jeroen Dijsselbloem,](http://en.wikipedia.org/wiki/Jeroen_Dijsselbloem)the Chief of Euro group, had made it clear recently by stating that [the idea of reaching private savings to bailout troubled banks will be used as “a template” in similar situations](http://www.nytimes.com/2013/03/26/business/global/bailout-or-no-cypriots-simply-want-their-money.html?pagewanted=all&_r=0).  His statement was later[rebuked by Commission officials](http://www.euronews.com/2013/03/26/eurogroup-chief-under-fire-over-cyprus-bailout/).

By the time this blog is published, April 3, 2013, Cypriot banks have reopened and public anxiety seems to have tapered off.

1. **The great design: the PR’s project of a true constitutional reconstruction**

The development of the positions of the leaders of the European Union have, under the pressure of crisis, already discarded some of the fundamental values of its constitutional order, at the first place the respect for the national constitutions and, second, the respect to the Council of Europe’s European Social Charter. Without any inclination to dramatize, I would warn again against that. Otherwise we would face the hardest choice: whether to reform the European or to abandon the national constitutional orders.

This political economy analysis of the Eurozone is consistent with what several authors refer to as the Eurozone’s Tragedy of Commons problem. It is in the interest of every member government with fragile banks to “share the burden” with the other members, be it through the ECB’s liquidity support or the TARGET2 system. Rather than coming up with crisis resolution on the political level, the ECB and the Eurosystem are being used to apply short-term palliatives that deepen distributional problems and make the crisis resolution ultimately more difficult. And at the same time, national supervisory authorities restrict the single banking market further and further, acting out of national interests but ultimately undermining the currency union.

1. Prepared as a part of the research project: New Croatian Legal System, The University of Zagreb Law Faculty, 2013. [↑](#footnote-ref-1)
2. Harold Berman: Law and Revolution. The Formation of the Western Legal Tradition, Harvard University Press, London 1983. p. 44. [↑](#footnote-ref-2)
3. Branko Smerdel: Primjena federalnog načela i ustavni amandmani iz 1971. godine, Pravni fakultet Zagreb i Centra Miko Tripalo, 2007. [↑](#footnote-ref-3)
4. On referendum held on January 22, 2012, 66, 27 out of 33,13 voters outcome made a final decision to join EU. [↑](#footnote-ref-4)
5. See: Veljko Mratović, Branko Smerdel, Arsen Bačić. Jadranko Crnić, Nikola Filipović and Zvonimir Lauc: *Expert Grounds for a Proposal to Amend the Constitution)*, *Zbornik Pravnog fakulteta u Zagrebu* (*Collected Papers of the Zagreb Faculty of Law)*, 50 (5) 393-450 (2000). [↑](#footnote-ref-5)
6. For more see: Branko Smerdel, Smiljko Sokol: Ustavno pravo (*Constitutional Law*), *Narodne Novine*, Zagreb, 2009; Branko Smerdel, Ustavne promjene 2010. godine: problemi formulacije, interpretacije i implementacije (*Constitutional amendments of 2010: the issues of formulation, interpretation and implementation*), *Informator* No. 1-3 of 14 July 2010. [↑](#footnote-ref-6)
7. Official Gazette No. 76 of 18 July 2010. NB: the framers of the Constitution again decided (like in 2001) to alter the numeration of constitutional articles. In the present text, we always cite the new constitutional numeration of articles, using the consolidated version (Official Gazette No. 85/10), except when we explicitly point to the old numeration. [↑](#footnote-ref-7)
8. The basic concept was drafted in February and March of 2009 by a working group of professors: leader S. Rodin, members: A. Bačić, Z. Lauc, R. Podolnjak and B. Smerdel. It was accepted by the Government’s Working Group in the session of 3 September 2009. Within the framework of a “twinning” project, the question of the national parliament’s role was elaborated by Hungarian experts in cooperation with Vesna Pusić, President of the Observation of the Accession Negotiations Committee of the Croatian Parliament. [↑](#footnote-ref-8)
9. Art.152 of the Constitution, as well as the provisions of Art.133(4), concerning electoral rights of European citizens and of Art. 9(2) regulating the European arrest warrant. [↑](#footnote-ref-9)
10. As early as in 1997 and 2000, as well as on this occasion, I have advocated that the Historical Foundations, as a historical declaration comparable to the American Declaration of Independence, belong to history and should have been left alone. However, the enormous symbolic and therefore political significance of the Preamble provoked successive interventions, at the time of the constitutional amendments of 2010. [↑](#footnote-ref-10)
11. Official Gazette No. 80/10; Constitutional Law on Amendments and Modifications of the Constitutional Law on the Rights of National Minorities (155/02 and 80/10). Incidentally, paragraph 3 of Art. 15 was included in the 2001 Revision of the Constitution. [↑](#footnote-ref-11)
12. Declared unconstitutional and invalidated by the decision of the Constitutional Court by the decision U-I/3597 /2010 of July 29, 2013. [↑](#footnote-ref-12)
13. During the 1990s the Croatian citizenship had been granted to several hundred thousand people living abroad, most of them in Bosnia Herezegovina. In January 2009, while the negotiations on accession were approaching completion, it was estimated that there existed some five hundred thousand fictive voters on the electoral lists. By the means of voter registration, those figures were reduced to 3.7 milion regitered voters for the local elections held in 2013. [↑](#footnote-ref-13)
14. It was adopted on June 26, 2013 and published in the Official Gazette 81/2013. [↑](#footnote-ref-14)
15. The purpose of the reform was stated by Minister Ivan Šimonović the following way: "A judge shall be appointed and advance within the judiciary according to objective and transparent criteria". [↑](#footnote-ref-15)
16. The proposals on how to resolve the relationship between the judiciary and the legislature have drawn the Judges’ Association’s special attention. The Association refused the proposal that the Supreme Court should report to the Croatian Parliament annually, as being "contrary to the principle of independence of the judiciary". In our opinion, it seems undeniable that, as the body "vested with the legislative power", the Croatian Parliament has and should have the right to demand every possible information on the functioning of government bodies, so as to be able to perform its legislative activity in a satisfactory manner. This was a solution adopted in the United States of America a long time ago. [↑](#footnote-ref-16)
17. However, there is no reason that this should not be done through the amendments and modifications of the Free Access to Information Act. The instances where the statutory obligation of the governmental and self-government bodies to release information have been ignored underline the need for an efficient means of protecting this right. [↑](#footnote-ref-17)
18. European Parliament: National Constitutional Avenues For Future European Integration, at http://www.europarl.europa. eu/studies, 11.03.2014. [↑](#footnote-ref-18)
19. Statements on the possibility of a new war indicated the state of mind in November of 2011: [http://danas.net.hr/svijet/page/ 2011/12/11/0052006.html](http://danas.net.hr/svijet/page/%202011/12/11/0052006.html) (USA general M. Dempsey on the possibility of a breakup of the European union and war in Europe), [http://videoteka.novatv.hr/multimedia/ iz-vijesti-u-17-moguc-novi-rat-u-europi.html](http://videoteka.novatv.hr/multimedia/%20iz-vijesti-u-17-moguc-novi-rat-u-europi.html) (Polish Foreign Minister J. Rostowski) (accessed on March 9, 2012). [↑](#footnote-ref-19)
20. Rodin, S., Ćapeta, T., Goldner Lang, I. (eds.), Reforma Europske Unije: Lisabonski ugovor (*European Union reform: The Treaty of Lisbon*), Narodne novine, Zagreb, 2009. Especially see Robert Podolnjak, Od Laekena do Lisabona – uspon i pad ustavnog ugovora (*From Laeken to Lisbon – the Rise and Fall of the Constitutional Treaty“*), *ibid.*; pp.27-65. [↑](#footnote-ref-20)
21. This is what the new president of the European Parliament Martin Schulz repeatedly warned about in the beggining of 2012. [↑](#footnote-ref-21)
22. Editorial Comments: Some thoughts concerning the Draft Treaty on a Reinforced Econmic Union, 49 Common Market Law Review 1 (2012); pp.1-14. [↑](#footnote-ref-22)