

Balancing Free Market and Fundamental Rights in a Post-Communist European State – A Mission Impossible?

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I. Introduction

It is nothing new to say that the Constitution of the EU is a fragmentary one.¹ Moreover, it is fragmentary in at least two respects. First, it is not codified and contained in a single document, or a set of documents, and the ratification of the Lisbon Treaty will not change anything in this respect. Second, it is fragmentary in the sense that it is underinclusive and covers only some elements of a fully-fledged constitutional order.² The mentioned under inclusiveness enabled the European Court of Justice to gradually develop substantive constitutional law of the European Union.³ Regardless of being fragmentary, the legal order of the European Union is nevertheless a constitutional order. Being so it, by necessity, affects constitutional orders of the Member States.

In this paper I will address one specific issue, namely, how the Union's constitutional order affects judicial protection of fundamental rights on the national level. More specifically, I will address issues related to adjustment of the Croatian legal order to the requirements of EU membership. Similar to other post-communist European states Croatian constitutional heritage is characterised by tradition of non-justiciability of fundamental rights guarantees. Those guarantees were either absent, or, in case of social rights, unjusticiable. Indeed, while Croatia has a long pre-democratic history of social rights guarantees, experience of their exercise, especially judicial protection, in circumstances of market economy is largely absent. I will focus on Croatian constitutional foundations of proportionality in order to contrast it to the demands of EU membership. My main proposition is that the concept of public interest, as expressed by the Parliament and as interpreted by Croatian

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1 *Rodin/Ćapeta*, A View from a Candidate Country: Implications for Croatia of (Non) Ratification of the Treaty Establishing a Constitution for Europe, in: *Albi/Ziller* (eds.), *The European Constitution and National Constitutions: Ratification and Beyond*, 2007, at 189-201.

2 *Curtin*, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 (1993) *Common Market Law Rev.* 17-69, at 65.

3 From early cases: 26/62 *Van Gend en Loos* and 6/64 *Costa v. E.N.E.L.* to recent ones, such as C-105/03 *Pupino*, or C-176/03 *Commission v. Council* (Criminal Penalties Case).

courts, typically precludes proportionality analysis. I will try to explain this phenomenon by a specific understanding of separation of powers and the role of courts. That understanding, I claim, will need to change if Croatian courts are to take their share of responsibility in balancing fundamental rights and market freedoms.

II. Community Law Mandate for national courts

According to standing case law of the ECJ, the Member States, when implementing and applying Community law, must take care to rely on an interpretation which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.⁴ As far as social rights are concerned, it is standing practice of the ECJ since the Defrenne II case that Community pursues economic and social purposes. More recently, it confirmed that fundamental market freedoms have to be balanced against social policy objectives of the Community.⁵

Also, in application of national legislation implementing Community law, national courts must respect the principle of proportionality.⁶ National measures restricting fundamental market freedoms may be justified only if proportionate.⁷ The proportionality test itself was summarized by the ECJ in *Gebhard* when the Court

- 4 Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*: "Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order."
- 5 Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, para. 105: "Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour."
- 6 *Promusicae*, note 4 supra. "Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, Lindqvist, paragraph 87, and Case C 305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I 0000, paragraph 28)."
- 7 Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, para 36: "However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures".

re-iterated the four conditions.⁸ National measures have to be non-discriminatory and have to pass a legitimate aim test, an appropriateness test, and a least restrictive alternative test. Also, Member States enjoy margin of appreciation regarding the precise way of exercise of their respective public policy.⁹ Motivation for a restrictive measure may be tailored to best protect a fundamental right or legitimate interest at stake.¹⁰ These obligations pertain not only to national regulatory authorities but also to national courts.¹¹ Indeed, national courts, in application of Community law, need to balance public and individual interest taking Community interest into due account. In doing so, they have to apply the proportionality test. Certainly, assessment of national courts is subject to the ECJ's scrutiny.¹²

Situations that may prompt the balancing test may be either, horizontal (like in Viking), or vertical (like in Omega) i.e., may concern relationships among individuals, or between an individual and the state. In the former case, typically, a court of general jurisdiction will be seized with a case, in the latter, the administrative court. However, in either case, the competent court will have to do the balancing test.

- 8 Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para 37: "... they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32)."
- 9 *Omega*, note 7 supra, para 31: "The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (*Van Duyn*, paragraph 18, and *Bouchereau*, paragraph 34)."
- 10 *Omega*, note 7 supra, at para 37: "It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected."
- 11 Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, para 26: "in applying the national law and in particular the provisions of a national law specifically introduced in order to implement directive no 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 189".
- 12 See also C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti*, at para 85. "In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it."

In either way, under Community law, national courts will have to:

- establish legitimate aim of regulation taking into account Community interest, if necessary, by interpreting national law in the light of Community law. In doing so, establish whether a fair balance is present as between national regulatory measure and market freedom guaranteed by Community law
- balance individual interest concerned, against the general interest by application of the proportionality test.

These obligations of national courts under EU law obtain along with and irrespective of the constitutional reform of the Union envisaged by the Lisbon Treaty. However, without proper understanding of the Union's constitutional framework, national courts, as I will try to demonstrate, will have difficulties to fulfil their European mandate. Moreover, the most interesting developments in area of social rights are taking place irrespective of the Lisbon Treaty. For example, in the *Maruko* case¹³ the European Court of Justice extended the right to survivor's benefit to the same-sex partner. The decision completely ignores the Charter of Fundamental Rights and is based on interpretation of a directive.¹⁴ Fear that the Charter, becoming, by reference, an integral part of the Lisbon Treaty might "impose" gay-rights to Poland was one of the main reasons why Poland opted-out of the Charter of Rights.¹⁵

Also the Lisbon Treaty did not affect certain areas of law which are traditionally being understood as falling within social sphere, such as social benefits related to education, which, in interpretation of the ECJ fall within the scope of citizenship provisions, i.e. Articles 17 and 18 of the EC Treaty.¹⁶

The fact that the Court-defined social rights may "fly below the radar" in terms of national harmonisation requirements, puts an additional burden on the national courts. Typically, pre-accession harmonisation requirements are concentrated at regulatory adjustments to primary and secondary Community law, case law of the ECJ often being out of focus. However, when it comes to application of EU law, the national courts will still have to take into account the developments of case law, and to base their decisions on it.

13 C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*.

14 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

15 In words of the Polish president *Lech Kaczyński*, "An article of the charter, may go against the universally accepted moral order in Poland and force our country to introduce an institution in conflict with the moral convictions of the decided majority of our country." <http://www.lifesitenews.com/ldn/2008/mar/08031904.html> visited on May 22nd.

16 See joined cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*.

III. Croatian Law

In Croatian law, the obstacles for meeting the mandate described above are the following:

1. Understanding of public (State) interest as absolute;
2. Judicial deference to the legislature and to the Supreme Court;
3. Understanding of the Constitution as a political rather than a legal instrument and reluctance of ordinary courts to apply it;
4. Rudimentary proportionality analysis that is, by and large, restrained to the Constitutional court.

1. Public interest.

The concept of public interest in Croatia is unclear. Generally speaking, public interest is any such interest if declared by the legislature. First of all, it should be said, that there is no clear line between public interest and state interest and the latter is used more frequently in legislation, and the common utterance is "interest of the Republic of Croatia." Such interest can be either specified by legislation,¹⁷ or left to discretion of the Government, in which case a declaration of interest has to be adopted.¹⁸ There is a broad range of examples legislative enactment of state interest, such as "activity of theatres", tax-free industrial areas, or audio-visual activities.¹⁹ In any case, once such "state interest" is declared by legislation, the courts are extremely reluctant to challenge it. Interestingly, most of the cases concerning "state interest" which are decided by the Constitutional court are rising within abstract judicial review, and only a minor part within the constitutional complaint procedure. Decision of the Constitutional court of Sept. 23, 2004 is paradigmatic.²⁰ In cases where proper procedure is followed and state interest expressed in accordance with

17 See e.g. Zakon o šumama (Forests Act), Narodne novine 140/2005, article 2(1) which specifies: "Forests and forest land are goods of interest for the Republic of Croatia and enjoy her special protection".

18 See e.g. Decision on declaration of interest for the Republic of Croatia for building of a golf course "Marlera" etc... (Odluka o utvrđivanju interesa Republike Hrvatske Odluka o utvrđivanju interesa Republike Hrvatske za izgradnju igrališta za golf s pratećim sadržajima »Marlera« u k.o. Medulin i k.o. Ližnjan) Narodne novine No. 14/2008.

19 Zakon o kazalištima, Art. 2, Nn 71/2006; Zakon o slobodnim zonama, Art. 37, Nn 44/1996; Zakon o audiovizualnim djelatnostima, Art. 2, Nn 76/2007.

20 Decision No. U-III-3415/2003.

law, no balancing will take place and state interest will prevail.²¹ In the words of the Constitutional Court:

“In the concrete case, competent administrative and judicial authorities proceeded in accordance with Croatian procedural and substantive legislation, and stated relevant reasons. Having in mind that possible limitation or restriction of property of the applicant did not take place contrary to the law, the Constitutional Court has found that the applicant's constitutional right to property has not been infringed.”

In other words, as long as a fundamental right is restricted "in accordance with law" constitutionality of which is presumed, no balancing will take place and public interest will prevail." It should also be said that the Constitutional Court is not in practice of reviewing constitutionality of legislation within the constitutional complaint procedure, as it strictly separates the two branches of jurisdiction.

2. Judicial deference

Expression "judicial deference" is commonly used to describe reluctance of courts to deal with policy issues which, in their opinion, deserve consideration of the political branch. In Croatia, judicial deference applies also to the quasi-legislative decisions of the Supreme Court.

Due to historical and doctrinal reasons, Croatian courts interpret laws strictly. Interpretative autonomy of judges is not appreciated, and law is taken to have objective meaning that cannot be changed by interpretation. Legal reasoning is deductive, based on definitions that often do not correspond to reality but are transmitted from the top to the lower levels of judicial hierarchy. As the function of adjudication is understood as "applying the law" and not as solving disputes between parties, possible *lacunae* are often not filled by judicial interpretation, but by recourse to the Parliament, or to the Supreme Court. While I have tried to explain the reasons of the judicial deference to the legislature at another place,²² Croatian judicial system

21 See pt. 8 of the Decision: "Pursuant to Art 50(1) of the Constitution, constitutional right to property can be restricted by law, in interest of the Republic of Croatia, subject to compensation of market value. In the concrete case, the competent executive and judicial authorities have proceeded in accordance with procedural and substantive law of the Republic of Croatia, and have given relevant reasons for adoption of their decisions. Having in mind that possible restriction of or interference with right to property was not against law, the Constitutional Court finds that applicant's constitutional right to property was not infringed."

22 *Rodin*, Croatian Parliament in Transition: From Authoritarian Past to European Future, in: *Kiiver* (ed.), National and Regional Parliaments in the European Constitutional Order, Groningen: Europa Law Publishing, 2006, at 97-114; *Rodin*, Discourse and Authority in European and Post-Communist Legal Culture, 1 Croatian Yearbook of European Law and Policy [2005]; *Rodin*, Functions of Judicial Opinions and the New Member States, in: *Hulls/Bomhoff*, The Legitimacy of Highest Courts' Rulings, 2008 (forthcoming).

features another form of judicial deference to the quasi-legislative acts of the Supreme Court.

In the late 2005 amendments to the Judiciary Act were introduced, seeking to enhance the supervisory role of the Supreme Court.²³ Amendments to the Judiciary Act vested exclusive interpretative powers to the Supreme Court, at the same time denying interpretative autonomy to the courts below. As stipulated by Art. 59 of the Judiciary Act,

“if two or more Courts of appeal adopt different decisions in the same legal and factual situation (...) and there is no recourse (legal remedy) to the Supreme Court (...) a party may ask the Supreme Court to assess whether uniform application of law or equality of citizens is jeopardized. The Supreme Court may decide the legal issue in “meeting of a department”

(civil, criminal). The Supreme Court may also decide to stay (nationwide) all proceedings in which decision depends on its legal position, until the position is taken. Once adopted, the Supreme Court Legal position is *de facto* binding on all courts below in all pending cases. In this way the Supreme Court is not exercising persuasive but actual authority on lower courts while their interpretative autonomy is replaced by abstract decision making by a non-judicial panel of judges.²⁴ Contrary to my early expectations that the newly introduced provision will not be applied, the Supreme Court started to rely on it. The typical formula developed by the Supreme Court is the following:

“... pursuant to Art 59(4) of the Law on Courts, the Convention of Civil Law Department of the Supreme Court, held on June 11, 2007, adopted the mentioned legal position. This legal position is obligatory for courts in all relevant proceedings, where a final judicial decision has not been adopted prior to the date of adoption of this legal position.”²⁵

Needless to say, this practice runs against Croatia's obligations under the EU law, as formulated by the European Court of Justice in *Simmenthal II*,²⁶ as it prevents ordinary courts to set aside national law which is in conflict with EU law, and against the obligation under Art. 10 EC to interpret national law in accordance with Community law. Any such attempt by ordinary courts would be characterized as departure from uniform application of Croatian law and prompt the Supreme Court to pass a harmonizing opinion under Art. 59 (4) of the Law on Courts. It is possible to imagine a situation in which an ordinary court would give precedence to a free market interpretation of certain national rule, instead of a previously prevailing

23 Narodne novine 150/2005 of December 21, 2005. See also *Rodin*, Sedam ozbiljnih prigovora sadržaju članka 57. Prijedloga Zakona o sudovima, (Seven Serious Objections to Art. 57 of the Draft Judiciary Act) Informator. 53 (2005), 1-2.

24 *Rodin*, Functions of Judicial Opinions and the New Member States, in: *Hulls/Bomhoff* (eds.), *The Legitimacy of Highest Courts' Rulings*, 2008 (forthcoming).

25 Rješenje No Jpzg 38/07-3.

26 Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*.

"state interest" interpretation. In such a case the Supreme Court would have jurisdiction to pass an abstract opinion and bring the diverging practice of ordinary courts in line with it.²⁷

3. Non-normative understanding of the Constitution.

The readiness of the judiciary to apply the constitution directly can be taken as one of the indicators of self-understanding and the role of the judicial branch within a constitutional framework. In post-communist societies, the crucial question is whether the constitution is understood as a legal instrument and applied by the courts, or as a mere political declaration. In that respect situation in Croatia is not unique. As noted by Gabriel Andreescu, Romanian judges apply the Constitution reluctantly. "In the absence of an express article allowing the rights provided for by the Constitution to be directly enforced, the Romanian courts are extremely reluctant to consider them as such and have always asked for ordinary laws to include and develop such provisions with procedural terms."²⁸ Criticism of such an understanding is emerging only slowly,²⁹ primarily among legal scholars, and rarely among practitioners. Nevertheless, denial of the legal nature of the Constitution can still be found in law-school textbooks.³⁰ As a consequence, courts and public administration rarely apply the Constitution directly, if at all,³¹ and it cannot be explained by the

27 According to the May draft of the Law on Courts (Amendment Act) Art. 59 will be repealed and the problem of uniform interpretation of law will be solved through appellate recourse to the Supreme Court. As of August 2008, the amendment is still in the legislative procedure as a part of EU law harmonizing measures.

28 *Andreescu*, Right-Wing Extremism in Romania (2003) Cluj, at p. 56.

29 *Čapeta*, Preparing New European Judges: The Case of Croatia, unpublished. Similar arguments were presented by Branko Smerdel at the annual conference of the Croatian Judges Association, Zagreb, July 2004.

30 For example, *Borković*, *Upravno pravo* (1997), at pp. 59, 90, 91. *Borković* maintains through eight editions of his standard textbook of administrative law that the Constitution provides for a set of abstract principles that have to be concretised by (sic!) administrative law.

31 For example, in case No. II Kž-888/03-3 of January 07 2004, the Supreme Court stressed that Croatian courts have an obligation to apply statutes, regardless of whether the concrete legal basis for detention is harmonised with international treaties or the Constitution. The Supreme Court did not even attempt to apply constitutional or international standards directly. "The objections of the defence aimed critically at provisions of the Criminal Procedure Act, particularly concerning the said legal basis for detention, in respect of international treaties and the Constitution, are not founded. Courts in the Republic of Croatia have an obligation to abide by positive rules of law, and the validity of this legal basis for detention specified by the Criminal Procedure Act cannot be brought into question" (author's translation).

self-referential nature of statutes³² but by the dominance of a regulatory state relying on sub-regulation, which is often disempowering for the courts, as it divests them of judicial discretion. Even the concept of individual public rights (*subjektive öffentliche Rechte*) as defence against the state is not conceptualised. The Constitutional Court protects individual rights in constitutional appeal procedures, but ordinary courts rarely do so, if at all. In Croatia, ordinary courts have the power to stay proceedings and to institute constitutional review of legislation if they have to apply constitutionally suspect legislation. However, since the Constitutional Act on the Constitutional Court was enacted in 1991, until recently, there have been no instances of such review.³³ This attitude is slowly changing. In some recent decisions the Supreme Court applied the Constitution as a standard of review.³⁴ However, in some other cases, the Supreme Court indicated, quite surprisingly, that protection of fundamental rights guaranteed by the European Human Rights Convention, and implicitly, the Constitution, is not within judicial jurisdiction, within the meaning of Civil Procedure Act.³⁵ Seemingly, this position suggests that standards of fundamental rights may play role only where some positive rule of Croatian national law is violated, and not as an independent cause of action. This may create problems within the context of EU law, where the ECJ made clear that there is State liability for damages for violations of Community law committed by the national courts.³⁶

32 *Caruso*, The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration (1997) 3 ELJ 3, quoted from *Hesselink*, The new European Legal Culture (2001), para. 10 at p. 11.

33 *Rodin*, Discourse and Authority in European and Post-Communist Legal Culture, 1 Croatian Yearbook of European Law and Policy [2005].

34 See Supreme Court Decision No. I Kž 165/08-3: "The fact is that the envisaged punishment for that crime is up to 10 years of imprisonment, and that the same evidence has to be demonstrated, leading to the conclusion that reasons of economics of judicial proceedings and of concentration of the proceedings justify trial in absentia, can not represent especially important reasons within meaning of Art. 305(5) of the Criminal Procedure Act, which would prevail over the constitutional right guaranteed by the Art. 29 of the Constitution of the Republic of Croatia...".

35 Judgment of the Supreme Court No. Rev 1840/01-2 of Oct. 27th, 2004.

36 See case C-224/01, *Gerhard Köbler v Republik Österreich*. The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation."

4. Proportionality

Proportionality is a Constitutional principle under Art. 16 of the Croatian Constitution. However, its use is limited. Ordinary courts, in principle, do not perform the balancing test. When they do so, their reasoning is non-differentiated and the elements of proportionality test, namely legitimate aim test, appropriateness review, least restrictive alternative test and *stricto sensu* balancing, are not visible.

Practice of the Constitutional Court, after the initial acceptance of proportionality test during the Crnić Court,³⁷ gradually slipped back. One of the first decisions in which the Constitutional Court applied the proportionality test was delivered on 21st of April 1999.³⁸ As the Court said,

"This principle of proportionality of limits [to constitutional rights] to the aim pursued by legislation is a general principle of constitutional law which is an intrinsic part of all constitutional guarantees of fundamental rights and freedoms."

However, the proportionality analysis remained structurally underdeveloped. For example in its judgment 3rd of May 2000,³⁹ the Constitutional Court was satisfied to establish whether the aim of the restriction was legitimate in terms of the Constitution, what was followed by a briefly elaborated statement that the restriction was disproportionate.⁴⁰

After 2000, the practice of the Constitutional Court diverged. On the one hand the Court continued to apply the proportionality test. The other line of cases, however, indicates that, even on the Constitutional level, the principle of proportionality will not always be applicable.

In the first line of cases, where the proportionality test is applied, the analysis is not developed. In the most representative cases the Constitutional Court was satisfied to state that restrictions of fundamental rights have to be prescribed in pursu-

37 Judge Jadranko Crnić was the first president of the Croatian Constitutional Court. He served two terms from 1991-1995 and from 1995 to 2000.

38 U-I-673/1996, Narodne novine 39/1999.

39 Judgments Nos. U-I-236/1996 U-I-840/1997 of 3rd May 2000.

40 Despite of the fact that the mentioned restriction of the right to property (i.e. tenancy right) has a legitimate aim, in opinion of this Court, the said restriction is not proportionate to that aim. That is reflected, primarily and mostly, by the fact that property, under the contested provisions, was restricted without any compensation which is prescribed by Art. 50(1) of the Constitution. Infringement of the principle of proportionality is also evidenced by the fact that the contested provision of the Law did not determine the calendar date until which the restriction can last. There is only an indirect reference by wording "compulsory procedures for eviction of displaced persons shall be discontinued until the conditions for their return are met, or until time when, subject to their consent, other adequate accommodation is provided for..." Indeterminate duration of the restriction of right to property is aggravated by making eviction dependant on consent of the evictee, what indicates disproportionality of the restriction.

ance of a legitimate aim and must not go beyond what is necessary to achieve it.⁴¹ In other words, only the 2 elements of the 4-prong proportionality test are present. Interestingly, the Court does not engage into any analysis of criteria, even in respect of the two mentioned elements.

The second line of cases is characterised by a general statement that proportionality principle is not applicable to certain situations. For example, by judgment of November 15, 2007,⁴² the Constitutional Court denied a constitutional complaint against a judgment of the High Misdemeanour Court,⁴³ which, in effect, seized a multi-million € worth property on grounds of a relatively minor offence. Without having expressed reasons, the Court went to say:

"confiscation of a vessel by which the offence was committed was decided on grounds of Art. 1008(2) of the Maritime Law. The Law prescribes mandatory confiscation of a vessel by which an offence is committed. Therefore, Art. 16(2) [principle of proportionality] does not apply..."

Some Judges expressed their views about non-applicability of proportionality analysis in their dissents. For example, judge Davor Krapac thinks that proportionality is not applicable to assess criminal penalties which remain an exclusive domain of the legislature.⁴⁴

Similar is the opinion of Judge Petar Klarić, who thinks that Art. 49(4) freedom of entrepreneurship is not subject to proportionality analysis.⁴⁵

IV. Conclusion

The present state of Croatian legal system does not allow for fulfilment of the European mandate in field of protection of fundamental rights. Without being able to perform a fully-fledged proportionality analysis and without ability to balance individual and public interest, protection of Community based rights will not be possible. This insufficiency, if not remedied, will seriously affect not only exercise of fundamental rights as against freedoms of the market, but indeed, proper implementation of EU law obligations, such as, for example, the obligation to strike a fair balance between the social and market dimension of the EU. The present situation, if

41 Pursuant to the quoted Constitutional provisions it follows that limits [of fundamental rights] can be constitutional only if pursuing a legitimate aim prescribed by the Constitution, and proportionate to the aim that they seek to achieve. The Constitutional Court expressed the same understanding in its judgments U-I-1037/1995 i U-I-1156/1999.

42 Judgment No. U-III-4584/2005. The panel comprising judge Petar Klarić, presiding and judges Marijan Hranjski, Mario Kos, Davor Krapac, Ivan Matija, Ivan Mrkonjić, Željko Potočnjak, Agata Račan, Emilija Rajić, Smiljko Sokol, Nevenka Šernhorst and Vice Vukojević.

43 GŽ-5194/05 od 20. rujna 2005.

44 See dissenting (in part) opinion of judge Davor Krapac, Judgment No. U-III-4584/2005.

45 See dissenting opinion of judge Petar Klarić, Judgment No. U-I-4120/2003.

not remedied, will bear two different sets of negative consequences. First of all, improvement of the judicial system and quality of adjudication is one of the key requirements for Croatia's accession to the EU. Needed reforms include not only fight against the huge backlogs of cases, elimination of corruption and rationalization of the judicial system, but also the training of Croatian judges. However, the training is precisely the place where Croatia failed to make any progress. According to the 2007 Progress Report of the European Commission,⁴⁶ as regards *professionalism and competence* in the judiciary, a senior level Advisory Board was established in November 2006 with responsibility for providing the Judicial Academy with strategic direction on training. A Programme Committee was also set-up to design the training curricula. However, apart from a belatedly adopted programme for the second half of 2007, no multi-annual strategy and training curricula has been designed to date. No progress was made on pre-service training. The budget of the Judicial Academy was reduced even though its expenses increased and there has been no increase in the number of permanent staff. The Academy does not have a full time director.⁴⁷ The situation changed in May 2008 when a former diplomat was appointed director of the Academy.

All the issues that I have discussed in this paper have to do with specific post-communist legal culture that can be changed only by horizontal measures, most importantly by education. Quite interestingly, the Commission Progress Report does not mention any of the shortcomings presented in this paper. Some of the shortcomings are undoubtedly of Community law interest, as Croatian law has to be brought in line with its European mandate under *Simmenthal II*, *Von Colson and Kamann* and *Köbler*. As far as the Lisbon Treaty is concerned, similar problems can be expected in area of providing an effective national legal remedy under the Charter of Fundamental Rights.

The second negative consequence follows from the first mentioned. Even if all other requirements are met, formalistic recalcitrance and professional self-sufficiency of the judiciary that obtains in the Croatian legal culture does not provide for an advantage in the process of Europeanization. Croatian judges will remain locked within the national legal culture and will not be able to perform an active role in European dialogue and development of law. Croatian legal system will remain a recipient of legal concepts and will not become an active contributor to the shaping of the *acquis*.

46 Brussels, 6.11.2007, SEC (2007) 1431.

47 Id. pt. 4.23. at p. 49.

