Working paper

SUNICOP 18/2012

Presented in Osijek, Croatia

Contemporary legal challenges: EU – Hungary – Croatia

16-18 February 2012

This working paper is the draft version of the paper presented in the Conference.
Suggested reference of the working paper:
Antal Visegrády – Ivana Tucak: Hungarian and Croatian legal culture. Working paper, SUNICOP 18/2012, http://sunicop.eunicop.eu/publications.html

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HUNGARIAN AND CROATIAN LEGAL CULTURE

The present paper endeavours to present the common and different features of the legal cultures of the two countries. Hungary and Croatia have a common past. They established and stayed in a commonwealth for more than eight centuries (1102-1918). In the 20th century, they struggled under communist regimes. Today, one of them has joined the European Union and the other is on the verge of joining it.

1. The notion of legal culture

Between culture and law there is continuous interaction and manifold interconnection,[1] which may be summed up in two fundamental propositions: firstly, law constitutes a component of the culture of the given society and secondly, there is no law or legal system that is not permeated by the culture of the society. Legal culture has developed through history just like political culture, and its characteristics and realization have been influenced, moreover, shaped by the latter.[2] Legal culture always stands between tradition and innovation. The development of legal culture is a long-term process which does not only imply organic growth but also the task of fostering the existing culture. Therefore, legal culture does not merely mean adherence to the values that have developed, neither does it mean change for the sake of change only.[3] Elements of legal culture include:

a) written and living law,
b) institutional infrastructure (court system, legal profession),
c) legally relevant models of conduct (e.g. litigation) and
d) legal consciousness.[4]

From a certain aspect, legal culture can be divided into *external* (lay) and *internal* (professional) legal culture.[5] Another approach speaks directly of *legal subcultures*. It mentions as an example that persons refusing army service for reasons of conscience are convicted by the courts in Northern and Southern Norway, while they are acquitted in Western and Central Norway.[6] Worldwide, one may distinguish between *regulative* (*Euro-Atlantic)* and *orientative* legal cultures.[7]

2. The main historical characteristics of Hungarian legal culture

[1] Cf. e.g. Max Ernst MAYER: Rechtsnormen und Kulturnormen, Breslau, 1903. p. 24.
Karl M. FEZER: Teilhabe und Verantwortung, München, 1986. p. 22 et seq.
[2] Giovanni TARELLO: Alteggiamenti dottrinali e mutamenti strutturali dell' organizzazione guiridica. Materiali per una storia della cultura guiridica. Vol. XI. No. 1. guigno 1981. pp. 157-166.
[3] Heinz SCHÄFFER: Társadalmi környezet és jogi kultúra. [Social Environment and Legal Culture] Magyar Jog, 1996/2
[4] Cf. VISEGRÁDY Antal: A jog- és állambölcselet alapjai. [Foundations of the Philosophy of Law and State] Budapest-Pécs, 2001. p. 11.
[5] Cf. Lawrence M. FRIEDMAN: Law and Society. Prentice Hall, N.J. 1977. p. 76.
[6] Adam PODGÓRECKI: Dreistufen-Hypothese über die Wirksamkeit der Rechts. In: E. HIRSCH-M. REHBINDER (Hrsg.): Studien und Materialen zur Rechtssoziologie. Köln/Opladen, 1967. pp. 40-43.
[7] KULCSÁR Kálmán: Jogszociológia. [Legal Sociology] Budapest, 1997. pp. 137-147.

The legal cultures of the societies of the Eastern and Central European region were also mainly of regulative character, although during their history some features of orientative legal culture also became mixed into them. This may be explained by two reasons. On the one hand, the legal systems of this region had strong regulative features in some respects, for example, with regard to the inclination to litigate, especially in Hungary. In other respects, however, the willingness to evade the law did not simply exist for centuries and exists even today but it also became an accepted form of behaviour in legal culture. Although the idea of the rule of law had an impact on royal law-making – as proven by Hungarian legal history -, until the beginning of the 16th century royal law-making practically created legal rules lasting only for the length of the reign of the king. Until the 16th century neither court judgments nor charters referred to statutes, but to the ancient custom of the country (antique regni consuetudo). This circumstance diverted Hungarian legal development – together with legal culture - from Western legal systems to some extent, later re-raising the question of the need for adaptation.[8]

In Hungarian legal culture, the social standing of the court and, together with it, of the judge has remained ambivalent. It was only in 1869 that Hungarian judicial organization was separated from public administration and, at the same time, the independence of the judiciary as a principle was laid down by statute. On the one hand, the role of the judge has never become so significant and prestigious in Hungary as it has, for example, in Anglo-Saxon systems of law. On the other hand, the inclination to litigate manifested in Hungarian legal culture indicates the importance of the court as the institution participating in the resolution of legal disputes. In the „socialist" era, unrestricted legislation became a dominant feature, the number of bureaucratic type legal instruments of symbolic and technical nature started to increase quickly, and as a result of the above – normativity was pushed to the background. All this led to a significant decrease in the social prestige of law and the legal profession, which was further damaged by artificially generated political show trials serving political purposes.

3. Hungarian legal culture after the democratic political transformation

3.1. Written and living law

Looking at the historical past we must consider the question whether the changes within institutional and political cultures are a result of continuity or discontinuity. In Hungary the following spheres may be differentiated:

- the political institutions: *discontinuity*, a revolutionary new system of government,
- the legal system: *continuity*.[9]

Within this field, special attention must be paid to the famous decision of the Constitutional Court (1992), which amongst other things laid down clear statements in the sphere of what becomes Rule of Law and the legal importance of a change of regime.

> *The classification of Hungary under the Rule of Law is both a clarification and a policy at the same time. The Rule of Law is established when a Constitution truly and unconditionally is put into practice. A legal change of regime is only possible if made compatible with the country's Constitution and in the same way, in the field of legislation, the whole legal system has to be in concordance. Not only the provisions of law but also the operation of government organizations have to be*

[8] KULCSÁR Kálmán: op.cit.
[9] Cf. PACZOLAY Péter: Constitutional Transition and Legal Continuity. Connecticut Journal of International Law 8 /Spring 1993/2, pp. 559-574.

in strict harmony with the constitution and then the conceptual culture and value scale of the Constitution also has to affect the entire society. This is the reign of law; this is how a constitution is materialised. The achievement of the Rule of Law is a process.

The change of regime took place on a legal basis and the principle of legality constituted the basis for the norms of the legal system to become effective unconditionally. The Constitution which induced revolutionary changes in the field of politics, and the fundamental provisions of law respecting the principles of the old legal system, were impeccable in form and this is the source of their strength. The former legal system also remained in effect. Because of its effectiveness, there is no difference between the law before or after the Constitution. The legitimisation of the different systems over the past 50 years in this sense is superfluous, and regarding the constitutionality of provisions of law, it is an un-interpretable category. Whatever their origin articles of law have to be in accordance with the new Constitution. There is no dichotomy in constitutional investigation – there are not two different yard sticks to measure them by. The date of application of an article of law is only significant when earlier articles become unconstitutional when a new Constitution came into effect.

The decision of the Constitutional Court also refers to the importance of changes in ways of thinking and attitudes within the legal (and therefore political) culture. This democratic political transformation, having taken place by way of a revolution to the rule of law and on the ground of legality and continuity, required masses of legislation. The emphasis in norm-making became shifted towards the apex of the hierarchy of sources of law, this is how more than one and a half thousand effective Acts of Parliament were created (the legal provisions in force at present comprise almost six thousand legal instruments).[10] Since the beginning of the 1990s the number of Acts of Parliament has been increasing continuously. Three fourths of the Acts have been passed since 1990; consequently, the most important level of the legal system became exchanged after the democratic transition. While, for example, Parliament passed 104 and 145 acts in 1990 and 2000 respectively, the number of acts passed by Parliament between May 2010 and May 2011 reached 200, including new Fundamental Law replacing the Constitution of 1949. A high level of activity can be observed in the case of delegated legislation (legislation by decree) as well. The judges of the Constitutional Court exercise permanent control over legislation.

As far as „living law" is concerned, its most important scene is judge-made law. Courts do not merely „carry out" the orders of legal norms, but also interpret[11], apply and thereby necessarily develop all branches of law. Accordingly, *praetor ius facit inter partes*. Therefore, the permanent and uniform practice of the courts as well as the precedent-setting law uniformity decisions, decisions in individual cases and some opinions of the Supreme Court developing this uniform practice may be considered norms in the way of sources of law. Just for the sake of example: 46 criminal, 37 administrative and 24 civil precedents were born between 2008 and 2010.[12]

3.2. The legal profession

Before the democratic transition the Hungarian legal profession had been characterised by two traits basically. On the one hand, their prestige had decreased and on the other hand, in

[10] FLECK Zoltán: Változások és változatlanságok. [Changes and Continuities] Budapest, 2010. p. 55.
[11] Cf. Marek ZIRK-SADOWSKI: Court as Judges' Interpretative Community. JURA 2011/1.
[12] Cf. VISEGRÁDY Antal: Judge-Made Law in Hungary (under publication)
[12] Cf. VISEGRÁDY Antal: Judge-Made Law in Hungary (under publication)

spite of the four decades of „socialist" – and under its cover: Eastern – influence, they had preserved continuity of traditional Hungarian legal thinking to a significant degree. This latter characteristic proved to be of decisive importance during Hungarian democratic transformation.[13] After the first elections, Parliament was to a great extent filled with lawyers, independent intellectuals and philosophers.

The attractive force of the legal career increased suddenly – corresponding to Hungarian development into a democratic state governed by the rule of law. Instead of the approximately 4000 people pursuing a traditional career in law at the time of the democratic political transformation, today in these fields there work 15 000 lawyers, more specifically: 2800 judges, 1729 prosecutors, approximately 10 000 attorneys and 313 notaries. Instead of the earlier four law faculties, training takes place at nine law faculties. At the beginning of the 1990s there were 3000 law students; today there are more than 18 000. On graduation most of them choose to become attorneys.

3.3. Litigation

The inclination to litigate, which had always characterised Hungarian legal culture throughout its history, as a matter of course, increased even further in the conditions of market economy, and courts had difficulty in coping with the burden of the increasing numbers of cases. While, for example, in 1998 the number of cases filed with local and county courts amounted to 402,884, in 2010 this number increased to 456,188. The number of resolved cases was 410,810 and 453,325 in the respective periods.

Hungary is closer to the countries of short lawsuits, but on average all types of lawsuits last somewhat longer in Hungary than in Germany (6 months) or in France (4 months). Although Hungary can boast – in proportion to the population - the second largest judiciary (2800 judges) after Germany, first-instance and second-instance proceedings last one year on average, and in most overloaded courts the length of proceedings may reach even two years (e.g. Pest County).[14]

3.4. Legal consciousness

Changes in the legal consciousness of the Hungarian population following the democratic political transformation are excellently demonstrated by the main results of the analysis conducted in 1997-98 on a sample of 219 persons.[15] Out of the branches of law, criminal law proved to be known the best and administrative law and procedural law were known the least. 90% of those questioned knew that the court did not accept it as a defence from the litigant or the accused that they had not been aware of the legal rules based on which the court wants to condemn them. Compared with the survey of 1965, there was a 15% increase in the number of those who gave the right answer mentioned above. A fortunate consequence of Hungary being a democratic state governed by the rule of law is that 30% more people think that it is just to enforce this fundamental principle. In other words, there has been a change in the quality structure of legal consciousness.

87% of the population involved in the analysis knew that in Hungary acts are passed by Parliament, 10% did not answer the question and 3% gave wrong answers. At the time of the survey of 1965, the percentage of people that chose Parliament was only 45%! The reason for the remarkable difference also lies in the democratic transition, since the weight and

[13] KULCSÁR: op. cit. p. 135.
[14] Cf. POKOL Béla: Jogszociológiai vizsgálódások. [Legal Sociological Analyses] Budapest, 2003. pp. 46-49.
[15] KORMÁNY Attila: Jogismeret és jogtudat a mai magyar társadalomban. [Legal Knowledge and Legal Consciousness in Modern Hungarian Society] De Jure, March 1999.

power of Parliament has increased significantly and citizens follow – may follow – the work of Parliament. It is regrettable, however, that to the question as to how it is possible – without any preliminary permission - to participate at a public court hearing, the proportion of right answers was altogether 33%. This may be explained by citizens" apathetic attitude toward the courts and by the fact that confidence in the system of administration of justice has greatly deteriorated in recent years.

Finally, mention should be made of the dichotomy that while three quarters of the 219 people asked recognized the difference between homicide and attempted homicide, they mixed up the notions of legislation and administration of justice and they were not able to distinguish between natural and legal persons either. In consideration of all this, when being content to observe the consolidation of Hungarian legal culture we still must not forget about spreading information about the law and developing legal consciousness.

4. The impact of EU-membership on Hungarian legal culture

The paper provides space only to give short answers to two questions. Firstly: was Hungarian legal culture ready for the accession in 2004? Secondly: can Hungary bring any positive additions to the legal culture of the EU? The law of the EU is not „European legal culture", but the product of European legal cultures.[16] The new „European legal culture" is evolving now, which is indicated by, for example, the proliferation of technical laws and at the same time, the increasing unification and vertical plurality of the legal system. One must proceed from the fact that, besides national endeavours, some harmonisation factors have always been present in Hungarian legal development looking back for a millennium. The main forces behind this harmonization process have been: Hungary's similar economic and social structure to the Western-European one and endeavours to catch up with the European standard of living. In this respect, therefore, the legal harmonisation dimension of Hungary's accession to the EU is not the first challenge in Hungarian history.

Since the democratic transition it has been possible to observe several positive tendencies in the development of Hungarian legal culture pointing towards Euro-conformity. Such include, for instance, the fact of the legality of the democratic political transformation as well as the advantageous influence exercised by the consistent practice of the Constitutional Court on Hungary's legal culture. On the other hand, the approximation of laws plays a significant role in consolidating Hungary's regulative legal culture. Let us only refer to the fact that the Union legal instruments laid down in the White Paper were harmonised by Hungary between 1990 and 2003. The further training of judges and civil servants in languages and European law has taken place, but obviously, the final solution may be expected of the mass employment of the new generation graduating from universities.

However, it must be emphasized that Hungary's integration into Europe does not exclude the preservation of the individuality of the country's legal culture. Integration has a double aim. On the one hand, it has to guarantee the realization of some common effects; on the other hand, for this purpose it has to build guarantees into the processes in order to ensure that similar resultants would lead to similar results. „All this translated into law means that only those elements of our legal culture can – and in some cases: must – be unified that, caused by their sine qua non role, are of instrumental importance with regard to the fundamental aims to be achieved by all means."[17]

[16] Cf. e.g. A. FEBBRAJO – W. SADURSKI (eds.): Central and Eastern Europe after Transition. Cornwall, 2010.

[17] VARGA Csaba: Európai integráció és a nemzeti jogi kultúrák egyedisége. [European Integration and the Individuality of National Legal Cultures] Jogtudományi Közlöny [Legal Science Journal] 1992/10. p. 446.

Therefore, when working to make Hungarian legal culture Euro-conform, attention should also be paid to fostering Hungarian existing culture! I do not think that it is an exaggeration to claim that Hungarian legal culture could also make a contribution to the development of European Union legal order if Hungarian legal politics could initiate the adoption and utilization of some of Hungarian legal solutions for improving legal institutions still unelaborated in the Community *acquis*. Such a solution might be, for example, the Hungarian Ethnic Minorities Act.

5. Main Historical Features of the Croatian Legal Culture

This chapter is focused on the development of the Croatian legal culture by going into various legal systems which have had effect on the territory of the current Croatian state. The contemporary Croatian legal system has emerged from long-lasting development which can be denoted as "periphery" and "belated" with respect to western European centres.[18] The legal system of the Croatian-Hungarian Union was based on traditional foundations and relied on a collection of rules of customary law called - Tripartitum.[19] Having existed within the Habsburg Monarchy and the Austro-Hungarian Empire, this system was subject to modernization and radical reforms, particularly in the second half of the 19th century.[20] The crucial period of the shaping of the Croatian legal culture and "civil-type living culture", as agreed by most theoreticians, lasted from the mid 19th century to the fall of the Austro-Hungarian Empire in 1918. At that time, Croatian institutions went through the formation stage which included their development and seeing the state as a stable institution. [21] In this period, a number of laws were adopted and these laws introduced, through their principles and scope, modern institutions of a liberal state into the Croatian legal system and thus modified its nature. The most significant of these laws is definitely the General Civil Code.[22] According to Croatian legal historian Dalibor Čepulo, it was the time when the Croatian legal system acquired features of western law: *rationality, positivism, secularism* and *professionalism.*[23]

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[18] Vidi D. Vrban, "Croatian Law Theory at the Doorstep of the 3rd Millenium", in *Közjogi intézmények a XXI. században: Jogfilozöfiai és politikatudomañyi szekció* (Pécs, Université de Pécs, 2004) pp. 129-144, D. Čepulo, "Tradicija i modernizacija: "Iritantnost" Općeg građanskog zakonika u hrvatskom pravnom sustavu" [Tradition and Modernization: the "Irritability" of the General Civil Code in the Croatian Legal System], in I. Gliha *et. al.*, eds., *Liber amicorum Nikola Gavella* (Zagreb, 2007) p. 1 at 3.

[19] See Čepulo, loc. cit. n. 18, at pp. 6-7.

[20] Ibid., p. 5.

[21] Čepulo, "Vladavina prava i pravna država - europska i hrvatska pravna tradicija i suvremeni izazovi" [The Rule of Law and Rechtsstaat –European and Croatian Legal Traditions and Contemporary Challenges], 51 *Zbornik PFZ* (2001), 1337 at pp. 1359 and 1354.

[22] The General Civil Code came into force in Dalmatia in the 1820s while on the territory of Croatia-Slavonia, it was applicable from 1853 to 1946. Due to its influence in central and eastern European countries, the Code tends to be described as 'the focal point of the European legal culture'. See Čepulo, loc. cit. n. 18, at pp. 1-2.
Čepulo finds the adoption of the Code to be a certain transfer of law within the framework of G. Teubner's theory on 'legal irritants' and hence investigates the conflict with the tradition, particularly with the institution of communal joint family. Communal joint family was part of the Croatian tradition founded on completely different ground from those laid down in the Code. This particularly refers to the concept of private property. The principles of property law had not been applicable for the majority of the Croatian population until the mid 20th century. Čepulo, loc. cit. n. 18, at pp. 45-47. Com. A. Uzelac, "Survival of the Third Legal Tradition"", 49 *S.C.L.R.* (2010) 377 at p. 378 n. 6.

[23] In Čepulo's opinion, the crucial period of the shaping of the Croatian legal culture lasted from 1848 (resolution of the Croatian Parliament on abolition of feudalism and serfdom and on equality before the law) to 1918. See Čepulo, loc. cit. n. 21, at 1347. Čepulo, loc. cit. n. 18, at p. 6. See also Uzelac, "Pravo na suđenje u razumnom roku" [The Right to a Fair Trial within a Reasonable Period of Time], in D. Vujadinović et al., eds., *Između autoritarizma i demokratije, Srbija, Crna Gora, Hrvatska* Knjiga II [Between authoritarianism and

The Croatian legal culture underwent major changes only with Viceroy Ivan Mažuranić's reforms (1873-1880) when the judicial system was separated from the government and when judges were granted a permanent position. Also, it was the time when the independent organization of state attorney was established.[24] However, these solutions were not in force for a long time. As soon as in 1884, the Croatian Parliament abolished the permanence of the position of a judge. This was to be restored not before 1917.[25]

The situation changed to a great extent after 1918. From 1918 to 1991, the Croatian legal culture was being developed in "instable systems of government" and within the scope of "instable models of institutions".[26] A fair number of systems of government were present on the territory of the current Croatian state within only one century. In the period from 1918 to 1941, Croatia was part of the first Yugoslav state which was first initially called the Kingdom of Serbs, Croats and Slovenes and later the Kingdom of Yugoslavia. During World War II, Croatian territories were dominated by the Independent State of Croatia but also by the rule of partisans.[27] The last era, the era of federal state of Yugoslavia, lasted from 1945 to 1991. Although this state was the successor of the Kingdom of Yugoslavia from the viewpoint of international law, its system of government represented a radical change with respect to the former state.[28]

Čepulo points out that all the constitutions following the year 1918 were imposed while their adoption was conditioned by political reasons. This is why they can be characterized as short-term and of limited importance.[29] Resolution of issues by frequent constitutional amendments prevented the rule of law in the sense of self-restriction of the power of government and legal security.[30]As far as the status of the judiciary in the first Yugoslav state was concerned, the conditions for appointment of judges match those for appointment of clerks, which enabled the authorities to exercise their influence on the judicial system and election of "eligible judges".[31]

The second Yugoslav state was the socialist one. The socialist legal tradition had special features which made it different from both the tradition of civil law, which the former had been derived from, and from the tradition of common law.[32] The socialist legal tradition used law for instrumental purposes. Law had to serve new economic and social policies, i.e. it

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democracy, Serbia, Montenegro, Croatia, Volume II] (Civilno društvo i politička kultura, Beograd, CEDET, 2004) p. 379, at 381.

''The Croatian legal system is based on a new normative paradigm by the 1848 proclamation of the principle of equality of citizens and by transfer of the General Civil Code and a number of Austrian, at that time contemporary laws referring to the period of pseudo-constitutionality and Habsburg absolutism (1849-1860)'' Čepulo, loc. cit. n. 18, at p. 47.

[24] Čepulo, loc. cit. n. 21, at 1346.

[25] The 1890 Act on Personal Relations, Official Duties and Disciplinary Proceedings against Judicial Officials provided the government with the power to freely dislocate judges. The 1917 amendment of this Act terminated this possibility. Due to the relation between the judiciary and administrative authorities, Čepulo denotes Austria-Hungary as well as Croatia as an 'administrative' and not as a 'judicial' state. Čepulo, loc. cit. n. 21, at 1347, n. 8.

[26] Ibid., p. 1359.

[27] Ibid., p. 1355 n. 23.

[28] Vrban, loc. cit. n. 18.

[29] In Čepulo's opinion, the attitude towards the constitution was "voluntaristic", "experimental" and "overpoliticized". Čepulo, loc. cit. n. 21, at p. 1355.

[30] Ibid., pp. 1359, 1343 and 1344.

[31] Ibid., p. 1348.

[32] See J. H. Merryman, *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, Stanford University Press, 1985) p. 1. quoted pursuant to Uzelac, loc. cit. n. 22, at p. 377.

should remedy the injustice done by bourgeoisie capitalistic law.[33] Law as an "instrument of the ruling political class", at that time the proletariat, should primarily protect its interests. Jurists primarily needed to be "skilful technicians" who were supposed to shape and protect the interests of the new ruling class defined by the Communist Party.[34] The Yugoslav legal system contained numerous experimental and unique solutions, out of which the system of self-management socialism was the most significant one. This system of self-management socialism also served as the role model for many leftist in the West.[35] In reality, this system facilitated unlimited and excessive legislation as well as frequent amendments of legal documents, including both legal documents of the lowest rank – by-laws and those which had a permanent character – constitutions.[36]

In terms of the status of the judiciary, the socialist Yugoslavia, like other socialist states, adopted the doctrine of the unity of state power.[37] It means that the independence of the judiciary did not exist in reality. The election of judges was affected by the politics and people's representative bodies. Membership in the Communist Party was a condition precedent to their appointment.[38] Also, during the entire communist reign in Yugoslavia, there were various forms of influence on judicial decision-making.[39] Nevertheless, it should be noted that Yugoslavia differed from other socialist regimes in liberality and openness to the external (non-socialist) world.[40] Repression was not such an obvious thing as it was in other socialist states since there was no *prokuratora*.[41] In compliance with the above lines, one can say that judges in the socialist Croatia did not have the reputation of professional, independent and impartial officials. Croatia in its long history has not been featured by consistence of judicial independence as one of the prerequisites of the rule of law.[42]

6. Croatian Legal Culture after the Democratic Political Metamorphosis

The following subsections are focused on evaluation of the contemporary Croatian legal culture by means of the above mentioned indicators.

6.1. Written and living law

[33] Ibid. According to Uzelac, the thesis that law is an instrument of economic and social policies is ideologically neutral. Law is an instrument of economic and social policies which can be differently defined by regimes of different ideologies. Uzelac, loc. cit. n. 22, at p. 380.
[34] Ibid., p. 382.
[35] Čepulo, loc. cit. n. 21, at p. 1350. In the former Yugoslavia, the concept of social property was coined in the 1950s and it was a form of public property. As considered by Padjen and Matulović, this was an alternative to the soviet model of statist socialism. In compliance of the self-government doctrine, public property is defined as a socio-economic relationship wherein means of production belong to every single member of society and, at the same, to all of them jointly. I. Padjen and M. Matulović, "Cleansing the Law of Legal Theory", 1 *Croatian Critical Law Review* (1996) p.1at 31.
[36] Notably, four constitutions and a number of constitutional amendments were adopted from 1945 to 1990. Čepulo, loc. cit. n. 21, at pp. 1352 and 1355 n. 23,
[37] Uzelac, loc. cit. n. 22, at p. 386 n. 20.
[38] Čepulo, loc. cit. n. 21, at p. 1350.
[39] Tito's words that a judge must not strictly adhere to the law are often cited. Accordingly, judges were supposed to interpret laws in a creative fashion. Uzelac, loc. cit. n. 22, at p. 382, Čepulo, loc. cit. n. 21, at p. 1351.
[40] Uzelac, loc. cit. n. 22, at p. 381.
[41] E. Blankenburg et al., eds., *Legal Culture in Five Central European Countries*, WRR Working Documents no. W111, The Hague, 2000, p. 14.
[42] Com. Čepulo, loc. cit. n. 21, at p. 1358.

With the fall of the Berlin Wall and communist / socialist regimes at the end of the 1980s in Europe, the socialist legal tradition should have met its end. The Republic of Croatia's Constitution of 1990 adopted liberal and democratic standards and was based on the principles of separation of powers and the rule of law. The rule of law and other related values, such as the respect for human rights, freedom, equality, non-discrimination on the basis of nationality, were established as the foundations for the interpretation of the Constitution. [43] However, since no change of legal and political culture is instantly possible and this being a long-term process, to denote the situation Croatia and other Eastern European countries found themselves in at the time, the term of "countries in transition" was coined.[44] Croatia faced, due to insufficient legal and cultural foundations, a gradual and lengthy process of adopting new values and behaviours.[45] After a long-lasting constitutional-political crisis, Croatia was to face another particularly aggravating circumstance. That was the dissolution of the Socialist Federal Republic of Yugoslavia. Based on a binding referendum, the Croatian Parliament adopted the Declaration of the Sovereignty and Independence of the Republic of Croatia in June 1991.[46] Article IV of the Decision prescribed that "in the territory of the Republic of Croatia only those laws shall be in effect as passed by the Parliament of the Republic of Croatia, and until the disassociation is ended those federal regulations that have not been repealed as well".[47] The military aggression against the Republic of Croatia, which lasted until 1995, was an immediate consequence of the declaration of independence. In a very short period, Croatia went through a transition from a federal unit to an internationally recognised state. However, with regard to "living law", some theoreticians argue that the declarative adoption of the principle of divided power and independent judicial system has failed to bring any major shifts compared to the previous authoritative state practice. Alan Uzelac sees remnants of the socialist tradition in the fact there is still a prevailing opinion in Croatia that important political goals should have precedence over law. In this context, he finds no differences between the statement of former Yugoslav president Josip Broz Tito claiming that jurists should not strictly adhere to the law and the statement of Mr Franjo Tuđman, the first Croatian president, asserting that the main task of courts is to defend national interests.[48] These two statements undoubtedly represent features of "legal voluntarism".[49]

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[43] Article 3 of the Constitution. The Constitution of the Republic of Croatia – consolidated text (Off. Gaz. 85/10). Čepulo has detected certain disharmony between the fact that the Croatian legal culture was shaped in the 19th century under the influence of the German and Austrian legal culture that both preferred the concept of the legal state (*Rechtsstaatprinzip*) and the fact the 1991 Constitution was based on the Anglo-Saxon concept of the rule of law. The constitution makers were aware of their choice of terminology. The term of ''legal state'' implies negative connotations among Croatian people since it is often connected with ''repressive use of force'' for the purpose of implementation of legal regulations. See Čepulo, loc. cit. n. 21, at pp. 1340 and 1338. The term of the rule of law refers not only to respecting laws but also to deeper meta-juristic principles. Duško Vrban depicts the rule of law as ''an idea of human freedoms applied to the constitutional-legal order and related to protection of personal freedoms, respect for human rights and the appertaining role of courts". D. Vrban, *Država i pravo* [State and Law] (Zagreb, Golden Marketing, 2003) p.43.

[44] Uzelac, loc. cit. n. 22, at p. 378.

[45] Com. Čepulo, loc. cit. n. 21, at p. 1358.

[46] The issue of human rights granted by the constitution appeared immediately after Croatia had become independent. During the military aggression against the Republic of Croatia or precisely at the end of 1991, the president of the Republic of Croatia enacted, within the framework of his constitutional powers, a number of emergency decrees, out of which some denied constitutional human rights. For more details see Padjen and Matulović, loc. cit. n. 35, at p. 50.

[47] See *Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia*. http://narodne-novine.nn.hr/clanci/sluzbeni/254485.html.

[48] What is worth noting is a novelty generated by the Constitution of the Republic of Croatia referring to the manner of election of judges and state prosecutors by the body mostly constituted of judges and prosecutors (National Judicial Council and National Prosecutorial Council). Furthermore, particular association of judges

In that respect, Croatia's Constitutional Court played a significant role of using its special powers to make up for the weakness of a political culture. The Constitution awarded the Constitutional Court with a jurisdiction comparable to that of the German and Austrian models.[50] Interpretations (of constitutionality) by the Constitutional Court are binding upon regular courts. Even though the institution of constitutional court was known in the former Yugoslavia since 1963, the Constitutional Court of the Republic of Croatia gained its role of "the guardian of the Constitution" only with the foundation of the independent Croatia.[51] In that respect, its role in deciding constitutional complaints for breaches of constitutionally guaranteed human rights is especially important.[52] Judicial activism is essential for the realisation of the rule of law, and for the realisation of human rights in particular.[53] The Constitutional Court has proved by its decisions that the rule of law is "more than a mere requirement to act in accordance with a law: it also involves requirements that concern the contents of the law". [54]

6.2. The legal profession

Judicial independence is one of the prerequisites for the rule of law and valuation of judicial authority.[55] Under socialism, judges enjoyed neither independence nor renown, as already indicated, their re-election depended upon various political bodies. In practice, their "political and moral suitability" was examined. [56] Decisions of importance were not made by courts, but by the leadership of the Communist Party.[57] The relevance of their work was

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were established for the purpose of protection of the independence of Croatian courts. See Uzelac loc. cit. n. 22, at pp. 382 and 395.

[49] Čepulo, loc. cit. n. 21, at p. 1351.

However, the Croatian legal culture shows signs of change even in this area. Namely, the Association of Croatian Judges has promptly reacted to the statement of the vice-president of the Croatian Govenment, Mr Radimir Čačić, relating to the appointment of Mr Srećko Ferenčak as a member of the Supervisor Board of JANAF (Adriatic Oil Pipeline). Mr. Ferenčak has been pronounced by a non-final court judgement guilty for illegal acquisition of property. Mr. Čačić stated that he believed that Mr Ferenčak was going to prove his innocence in a political show trial. This Association has seen it as an attack to the independence of Croatian courts. See S. Abramov, D. Ciglenečki and J. Marić "Suci: Izjave političara narušavaju povjerenje javnosti u pravosuđe" [Judges: Politicians' statements shake the public reliance in the judicial system], *Glas Slavonije*, 4th and 5 February 2012, pp. 4-5.

[50] Matulović and Padjen analyzed and criticized early judgments of judges of the Constitutional Court of the Republic of Croatia (in the period from 1990 to 1994) since they had neither created nor adhered to human rights doctrines. At that time, the Constitutional Court made a number of decisions which entailed reaction of scholars and professionals as well as of a broader public. These decisions concerned the conditions for getting Croatian citizenship, eviction from flats owned by the former Yugoslav People's Army, violation of human rights by means of emergency decrees enacted by the Croatian president and freedom of press. See Padjen and Matulović, loc. cit. n. 35, at pp. 28 and 42.

[51] Blankenburg, loc. cit. n. 41, at p. 47.

[52] Ibid., pp. 47 and 75.

[53] See Padjen and Matulović, loc. cit. n. 35, at p. 28.

[54] The decision of the Croatian Constitutional Court: U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000, t. 11. See more about judicial activism in A. Blagojević, "O ulozi ustavnih sudova post-komunističkih europskih država u tranziciji prema demokraciji: hrvatski slučaj" [On the role of constitutional courts of post-communist European countries in transition to democracy: the Croatian case] in *Ustavi i demokracija: strani utjecaji i domaći odgovori* [Constitutions and Democracy: international influences and national responses], HAZU, Zagreb (in print)

[55] Čepulo, loc. cit. n. 21, at p. 1359.

[56] Uzelac, loc. cit. n. 23, at p. 383. See arts. 11, 75 and 87 of *Law on Regular Courts* (Off. Gaz. 5/77, 17/86, 27/88, 32/88, 16/90, 41/90, 14/91 and 66/91) See Uzelac, loc. cit. n. 21, at p. 386 n. 22.

[57] Uzelac, loc. cit. n. 22, at p. 385.

minimised also by the fact that private ownership was limited, and most companies were state-owned.[58] According to Croatian civil and procedural law expert Alan Uzelac, an outside observer would hardly notice the difference between the positions of judges and other civil servants in the state administration.[59] The number of judges in the former Yugoslavia corresponded to the average high in Austria and Germany.[60] The profession of attorneys as private professionals, who enjoyed freedom and were not subjected to strict state control, was also maintained in existence.[61]

At the end of 2010, in all Croatian judicial bodies there were a total of 10, 292 employees, 2, 464 of whom were judicial officials, i.e. 1, 887 judges and 577 state attorneys and their deputies.[62] The number of attorneys in Croatia is on a major rise today. While they counted 737 in 1979, their number rose to 3,733 in 2009 to 4,155 in 2012.[63] The reasons for this increase are various. Some think that the rise has resulted from an increasing need for lawyers' services whereas others attribute it to the collapse of large companies having operated in the era of workers' self-management and relating dismissal of a great number of workers as well as to the fact that university enrolment quotas include too many future jurists which are currently not needed on the labour market and hence young jurists are forced to start a carrier as attorneys.[64]

As far as the legal profession is concerned, Croatia has, like in the period preceding its independence and transition, four law faculties. The legal science, just like other social sciences and humanities in Croatia, has been linked with Western European standards thanks to prominent jurists since the era of the Socialist Federal Republic of Croatia.[65] The overall number of students enrolled in Croatian law colleges in the academic year 1989/1990 totalled 5, 458 while in the academic year 2008/2009, this figure jumped to 11,113.[66]

6.3. Litigation

One of the most significant indicators of a judicial crisis is the lengthiness of court proceedings.[67] Under socialism, judicial efficiency was not a political priority, and judges

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[58] Ibid., p. 386. In a society having usually been dominated by the "collectivistic doctrine", judicial procedure was reduced to the level of a "second class mechanism of social regulation" aimed at resolution of secondary issues and regulation of "private delicts" such as personal and property disputes. Uzelac, loc. cit. n. 23, at p. 382.

[59] Uzelac, loc. cit. n. 22, at p. 386.

[60] Uzelac, 2010:387. In 1989, there were 1,615 judges in Croatia administering justice at regular courts, commercial and misdemeanour courts. Also, there were 372 public prosecutors and their deputies and 115 state attorneys and their deputies. One should emphasize that at that time, Croatia also involved a Court of associated labour of the Republic of Croatia and nine basic courts of associated labour. See Statistical Yearbook of the Republic of Croatia, 1990, pp. 345-347.

[61] Being a lawyer was often considered a family tradition in Croatia. In the former Yugoslavia, advocacy was regulated by special laws (1946, 1957 and 1970 Act). A Professional Code of Ethics was adopted too (1967). The Socialist Republic of Croatia included the 1972 Act on Lawyers and Legal Assistance, the purpose of which was to diminish the social importance of advocacy. See Ž. Bartulović, "Iz povijesti odvjetništva" [From the history of the legal profession], 74 *Odvjetnik*, (2001), pp. 26-32, Uzelac, loc. cit. n. 22, at p. 387.

[62] Statistical review of the Croatian ministry of justice, 2010, at p. 2. www.pravosudje.hr/lgs.axd?t=16&id=2381

[63] See M. Matasović „U dvadesetak godina broj odvjetnika u Hrvatskoj povećan za čak 400 posto" [In twenty years the number of lawyers in Croatia increased by 400 percent]. See http://www.glas-slavonije.hr/vijest.asp?rub=1&ID_VIJESTI=115965, October 29 2009.

[64] Ibid. As stated by Mr Leo Andreis, president of the Croatian Bar Association, the Croatian Constitution does not allow rejection of registration in the Bar to those who have met the formal requirements for the Bar membership.

[65] Padjen and Matulović, loc. cit. n. 35, at p. 17.

[66] See Statistical Yearbook of the Republic of Croatia, 1990, p. 308, Statistical Yearbook of the Republic of Croatia, 2009, p. 468.

[67] Uzelac, loc. cit. n. 23, at p. 379.

were guaranteed protection from political persecution by long and "formalised" court proceedings.[68] Thus, in 1989 Croatian courts had 1,240,000 new cases, 485,000 of which were backlogs. After gaining its independence, the number of backlogs almost doubled by 1998, when there were 1,006,000 new cases and 895,000 unresolved cases. After becoming a member of the Council of Europe and being subjected to the jurisdiction of the European Court of Human Rights as the highest judicial body for the interpretation of the European Convention on Human Rights, Croatia lost its initial cases specifically for breaching the right to trial within reasonable time limit. [69] Thus, solving the backlogs problem became a priority. To that end, changes to procedural laws were made.[70] There are different explanations for court backlogs. From the inefficiency of judges themselves, slow transition to the insufficient number of judges.[71] The latter is certainly not the case in Croatia. Uzelac claims that the problem of long court proceedings has its roots in legal and political culture, primarily that which evolved during socialism. It is considered that socialist judges, due to the insecurity of their position and in fear from retribution, developed special methods of avoiding responsibility for decisions made. This was facilitated, as Uzelac indicates, by the almost absolute constitutional right to complaint which had come into the legal system via Article 214 of the 1974 SFRY Constitution, which has survived until today in an almost identical form under Article 18 of the Croatian Constitution.[72] Still, it is obvious that a significant step forward regarding justice efficiency has been made in the last years. The total number of unresolved cases at courts amounted to 1,640,365 as of 31 December 2004 while this figure went down to 795,722 cases as of 31 December 2009 and to 785,561 cases as of 31 December 2010.[73]

7. The impact of EU membership on Croatian legal culture

The Treaty of Accession of the Republic of Croatia into the European Union was signed in Brussels on 9 December 2011. Croatia put great efforts in the accession procedure in terms of harmonization of its legislation with the *acquis communautaire* of the European Union.[74] In 2010, the Croatian Parliament introduced a new chapter (Chapter VIII) entitled *European Union* regulating, among other things, the legal basis for the membership and the

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[68] Ibid., pp. 382-3.

[69] See cases *Rajak* (49706/99), *Mikulić* (53176/99) *et al*. For an analysis see Uzelac, loc. cit. n. 23, at p. 380.

[70] Numerous procedural acts have been amended: Misdemeanour Act, Criminal Procedure Act, Administrative Dispute Act, Civil Procedure Act and Enforcement Act. From the document Judicial reform 2011- 2015 (Off. Gaz. 145/10) V. 4.

[71] Compare survey of the legal culture in Slovenia which is facing the same problems as other transitional countries. N. Tromp, "Republic of Slovenia" in E. Blankenburg et al., eds., *Legal Culture in Five Central European Countries*, WRR Working Documents no. W111, The Hague, 2000, p. 57 at p. 69.

[72] Notably, Uzelac singles out the following methods which help judges stay anonymous, i.e. not to make and take responsibility for their decisions: *deconcentrated proceedings, excessive formalism, the pursuit of material truth, lack of procedural discipline, multiplicity of legal remedies that delay enforceability*. Even appellate judges, in Uzelac's opinion, possess their own strategies, out of which the most important one is forwarding a case to a lower instance court for a retrial. Uzelac, loc. cit. n. 22, at pp. 390 and 385.
The ratio between retrial and resolved cases numbered 3.5:1 in the period from 2006 to 2008. Uzelac, loc. cit. n. 22, at p. 393 n. 38.

[73] From the document Judicial reform 2011- 2015 (Off. Gaz. 145/10) V. 4. at p. 3. According to the data published in the Report of the European Commision for the Efficiency of Justice ("CEPEJ"), the average time needed for resolution of a civil or commercial dispute at first instance courts in Croatia amounted to 498 days while the equivalent figure in Hungary totalled 170 days. See European judicial systems, Edition 2010 (data 2008): Efficiency and quality of justice (Croatian edition, Zagreb, Ministarstvo pravosuđa Republike Hrvatske, 2011) p. 149.

[74] The integration of EU law in the Croatian legal system can be compared with the influence of the General Civil Code on the Croatian legal culture. Čepulo, loc. cit. n. 18, at p. 2-3.

status of EU law in the national legislation. However, the harmonization of the Croatian legal system with the legal heritage of the EU does not only encompass harmonization of legal rules but also harmonization of the meaning of these rules.[75] In Siniša Rodin's view, the starting points of Croatia and new members of the EU, i.e. mostly members of the former communist bloc, significantly differ from the starting points of its old members. According to Rodin, the legal and political cultures of old EU member states are traditionally based on "democratic pluralism" whereas those of "post-communist member states" still possess features of their communist heritage – authoritarian acceptance of one "ultimate truth".[76] The culture of the latter states is reflected in the role of courts. The Croatian legal system does not find judges very relevant for the development of law.[77] Croatian judges do not have "creative powers" when resolving cases.[78] The willingness of judges to directly apply the constitution and ratified international treaties is a good indicator of the status of courts within a constitutional order.[79] With respect to the Croatian legal order, it happens very rarely at regular courts which base their judgments mostly on laws and bye-laws.[80] Therefore, the constitution makers felt an urge to explicitly stipulate by Article 115 paragraph 3 of the 2010 Constitution that judges shall administer justice based on the Constitution, laws (acts), international treaties and other "other valid sources of law".

Strictly linguistic interpretation of legal provisions is a wide-spread occurrence in the Croatian legal practice.[81] When making decisions, judges rely on legal logic and do not take the political background into consideration, probably just to avoid the connection with the communist past. Justification of judgments is derived from the text of a respective provision and not from its meaning and purpose.[82] Resolution of the described issue would be significantly facilitated by establishment of a Judicial Academy, priorities of which should include vocational training of judges and state attorney deputies.[83]

No comprehensive empirical survey on the legal consciousness has been conducted in the Republic of Croatia since it became independent. Instead, there was a recent survey of the level of familiarity and acceptance of EU institutions and law by Croatian citizens. According to the results, Croatian citizens possess average knowledge of European institutions and treat

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[75] S. Rodin, "Diskurs i autoritativnost u europskoj i postkomunističkoj pravnoj kulturi" [Discourse and autoritarianism in European and post-communist legal culture], XLII *Politička misao* (2005), p. 41 at p. 60

[76] Ibid., pp. 42 and 47.

[77] In Rodin's opinion, the Croatian judicial practice has no effect on the legislators. Unlike other European countries that support codification of judicial practice by legislators, Croatia does the opposite, the legislators often pass regulations which are contrary to the judicial practice. Moreover, these regulations consequently delete the judicial practice. See S. Rodin, "Interpretativna nadležnost Vrhovnog suda RH po novom Zakonu o sudovima" [Interpretative jurisdiction of the Supreme Court of the Republic of Croatia under the new Law on Courts], authorized presentation at the 10th panel of the Faculty of Law of the University of Zagreb and Zagreb Lawyers Club, Zagreb, 19th April 2006.
http://www.pravo.unizg.hr/_download/repository/INTERPRETATIVNA_NADLEZNOST_VS_RH_PO_NOVOM_ZAKONU-31-01-06.pdf, at p. 11. See also T. Ćapeta, "Interpretativni učinak europskog prava u članstvu i prije članstva u EU" [Interpretative effect of European law in and before EU membership], 56 *Zbornik PFZ* (2006) pp. 1443-1494, T. Ćapeta, "Court, Legal Culture and EU Enlargement", 1 *Croatian yearbook of European law & policy* (2005) pp. 23-53.

[78] Ćapeta, 2006, loc. cit. n. 77, at p. 9

[79] Rodin, loc. cit. n. 75, at p. 16.

[80] Ibid., p. 50-1.

[81] Ibid., p. 56 and 58. See also I. Padjen, "Izvori prava po prijedlozima promjene Ustava RH 2009" [The sources of law according to proposed changes to the Croatian Constitution 2009] in O. Cvitan, ed., *Ustavne promjene Republike Hrvatske i Europska unija* [Constitutional changes in Croatia and the European Union] (Split, Pravni fakultet u Splitu, 2010) pp. 13-18.

[82] Rodin, loc. cit. n. 75, at p. 58.

[83] See Uzelac, loc. cit. n. 22, at p. 396, n. 42. See also the web-site of Judicial Academy http://www.pak.hr/eng/.

them neutrally.[84] In the end, it is important to bring up that now, when accessing the EU, Croatia should keep on maintaining and developing its constitutional order. The constitution represents a basis for every form of international integration and human rights protection. On the other hand, it should prevent unauthorized interference into internal affairs of a state as well.[85]

8. Concluding Remarks

Legal institutions are part of legal cultures of states.[86] Numerous empirical surveys have shown that legal results differentiate between legal cultures in some way, but this "some way" is not explicable by "written law".[87] Legal culture implies various historically rooted attitudes on the nature of law, its application, generation and studying.[88] It is not exclusively a result of current circumstances, but it is, to a great extent, subject to the legal-political traditions of the past.[89] Both Hungary and Croatia are successors of the Austrian legal tradition. During their long historical development, both countries have failed to establish independent judicial systems and hence their judiciary, unlike in Anglo-Saxon countries, has never had a proper reputation. Nevertheless, both countries have facilitated adoption of two important constitutional decisions in the last 20 years. The first one refers to the return to the capitalistic ideology while the second one relates to accession into European integrations.[90] These two resolutions have affected the legal awareness and culture of the two respective states. However, even today, many issues of the legal system arise from the authoritarian legal culture originating from the communistic period. The Croatian legal science includes various issues such as numerous unresolved cases, long-lasting judicial proceedings and the perception of courts as bare applicators of law possessing no creative powers. Regardless of the current differences between the two states (for instance, Croatia belongs to the group of countries featured by long-lasting judicial proceedings while Hungary is characterized by short judicial proceedings), they have both shown great advancement in the development of institutions of the rule of law.

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[84] L. Burazin and M. Krešić, "U kojoj mjeri hrvatski građani poznaju i vrijednosno prihvaćaju institucije i pravo europske unije?- važnost empirijskih istraživanja za teoriju prava" in I. Šimonović, ed., "Poznavanje i vrijednosno prihvaćanje europskog i međunarodnog prava u Republici Hrvatskoj" [Knowledge and acceptance of European and international law in the Republic of Croatia], Zagreb, 2012 (in print).
The Croatian public opinion was pro-European even prior to the democratic transition. That fact is clearly indicated by a survey comprising 2, 608 examinees in 13 municipalities who were asked to opt for two out of eight political values which should be supported by the party of their choice at the first parliamentary elections in Croatia in 1990. The biggest number of citizens chose pro-European orientation (72, 61%) followed by Croatian independence (44, 37%). See I. Grdešić *et al*., *Hrvatska u izborima '90* (Zagreb, Naprijed, 1991) p. 13 according to Padjen and Matulović, loc. cit. n. 35, at pp. 67-8.

[85] B. Smerdel, "Apel eurorealista: sačuvati hrvatski Ustav" [Appeal from a eurorealist: preserve the Croatian Constitution], *Informator* 5949 (2011) p. 3. See also I. Padjen, Project Proposal "Legal System: Croatian Identity and Croatian Value" submitted to the Croatian Science Foundation on 27 May 2011 and supplemented on 6 June 2011.

[86] Com. Blankenburg, loc. cit. n. 41, at p. 11.

[87] L. M. LoPucki, "Legal Culture, Legal Strategy, and The Law in Lawyers' Heads", 90 *Nw. U. L. Rev.* (1995-1996), 1498 at 1555.

[88] Uzelac, loc. cit. n. 22, at p. 379.

[89] Čepulo, loc. cit. n. 18, at p. 1137.

[90] On fundamental constitutional decisions and "constitutional choices" see B. Smerdel, „Zadaće pravne znanosti i pravničke struke na dvadesetu obljetnicu 'Božićnog ustava'" [Tasks before the legal science and legal profession on the 20th anniversary of the "Christmas Constitution" - constitutional choice and processes of realization of highest constitutional values and strategic goals of the Republic of Croatia] in A. Bačić, ed., "Dvadeseta obljetnica Ustava Republike Hrvatske" [Twentieth anniversary of the Croatian Constitution] (Zagreb, HAZU, 2011) pp. 41 at 47.