

DESIGN AND OPERATION OF THE “HYBRID” PRESIDENCY – EVALUATION OF THE POWER SHARING IN THE CROATIAN TOP EXECUTIVE¹

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Constitutional experimentation with the organization of government in Croatia has not been completed in the twenty five years of independence. The discussion is ongoing and has been revived with each presidential elections. It is not limited exclusively to the academic community; the important political leaders, as usual, reopened the discussion during the presidential electoral campaign of 2014/2015. The previous discussions, often with the aim of examining the public opinion had, generally speaking, been disguised under the pretext of demanding “a pure parliamentary system”, as if the “hybrid” character of the constitutional system per se had created problems. Those arguments were scientifically rather easy to dismiss, since there has been virtually no “pure system” functioning in practice. The recent contention, however, puts an emphasis on the necessity to establish a more efficient government which would be energetic enough to deal with the serious and prolonged economic, social and political crisis. The analysis of this makes the primary purpose of this paper, departing from the question whether the time has come to amend the Constitution and to abandon the particular arrangement of checks and balances developed during the Constitutional reform of the year 2000, the primary objective of which has been to prevent a reoccurrence of the system of personalized and concentrated power, as developed during the first decade of independence under the pretext of the French model of a semi-presidential system.

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It is not our intention to analyze anew whether that might be “a pure semi-presidential system”, nor “a pure parliamentary system” or a real cohabitation à la française.² Rather, ours is the aim to provide an overview of and evaluate the actual functioning of the specific Croatian variation of “a two-headed executive”, as well as whether the expectations from it have been fulfilled. The question we pose is a crucial one: has the young Croatian republic achieved such a level of democratic development and the rule of law that the checks might be forgotten and the full authority be confined to the Government in order to strengthen its’ economic and reformist capacities, or do we still believe that the necessary checks should be maintained? Instead of a proposal for change, we conclude with a caveat: do not undertake substantial changes of the system without a solid scientific projection of possible consequences.

Keywords: Croatia, President of the Republic, Constitution, pure parliamentarism, crisis, “hybrid” presidency

‘A good principle not rightly understood, may prove as hurtful as a bad one.’

John Milton

‘To make use from the past experience, democracy has already to achieve a certain level of civilization and enlightening.’

Alexis de Tocqueville

*‘Than none was for the party, than all were for the state,
The Romans lived like brothers, in the brave days of old’*

Thomas Maculay

² As it had been asserted by Aarend Lijphart in his influential article *Constitutional Choices for New Democracies*, *Journal of Democracy*, Vol. I, No. 2, 1990, pp. 42 – 48. Among the immense body of literature cf. a recent summary in Podolnjak, Robert: *Utjecaj francuskog polupredsjedničkog sustava na oblikovanje ustavnog položaja predsjednika Republike u post-komunističkim državama: Hrvatska u komparativnoj perspektivi*, in Bačić, Arsen (ed.): *Foreign Influences and the Croatian Responses*, HAZU, Zagreb, 2012.

I. INTRODUCTION

The question of governmental organization is not a simple or an easy one.³ Moreover, the majority of politicians and their accompanying experts might be wrong when commending a concentration of power in order to confront the crisis and unemployment.⁴ The question, and we limit ourselves to our country, must be based on the analysis of the social environment of the country. The government must be efficient, but it must not be left without any control mechanisms. There exist countries where the process “of democratic transition” has not produced a responsible political community. It certainly has to do with the crisis of responsibility in the model countries.⁵

The executive, or the deciding authority, makes the very center of governmental power.⁶ The engineering business, or the design of the constitutional institutions, seeks a balance between the contradictory demands: an energetic but responsible government. While in certain societies and in certain periods of time, such demands sound like absurd theoretical exercises, in others they might be judged as relatively satisfied.⁷ In Croatia, the idea of

³ Even after the resignation of the President due to the Watergate affair, Theodore Sorensen warned: “The problem with checking the executive power arises because the power to cause a great damage in the same time means the authority to do a lot of good things!” Sorensen, Theodore C.: *A Different Kind of Presidency*, Wiley & Sons, New York, 1984, p. 23. It would be difficult to find out who was the first to compare it to the problems of *quadratura circuli*, respective *quadratura sphaerae*, which had been a concern of medieval mathematicians. Late in his life even Thomas Hobbes entered into disputes about those with the Oxford dons. After a long period of the ideological propaganda of the unity of power and the assembly rule, the issue was opened in Croatia on the eve of regime change. See Introduction in Sokol, Smiljko; Smerdel, Branko: *Organizacija vlasti*, Narodne novine, Zagreb, 1988. In Slovenia, the question was opened even earlier, cf. Bučar, France: *Da li nam je potrebna vlada?*, Moderna organizacija, Vol. 1, 1971.

⁴ Even the European Union might be wrong in praising the system of decision making which, ignoring the Lisbon Agreement, puts all the trust into the one political leader. This certainly is a caveat against accepting foreign recommendations uncritically.

⁵ Woodhouse, Diana: *Ministers and Parliament. Accountability in Theory and Practice*, Clarendon Press, Oxford, 1998.

⁶ The misleading vocabulary of politics would be better replaced with the more accurate one: there exists a ‘deciding power’ and the ‘control power’ (if any). Gaudemet, Paul M.: *Le pouvoir exécutif aux les pays occidentaux*, Éditions Montchrestien, Paris, 1966.

⁷ Dahrendorf, Ralph: *Reflection on the Revolution in Europe*, Random House, London, 1990, p. 115. V. also Linz, Juan J.; Stepan, Alfred: *Problems of Democratic Transiti-*

institutionalization of governmental institutions, is taking roots rather slowly and reluctantly.

One of the substantive elements of the constitution is the idea of ensuring sustainable development of legal, political and social relations towards democracy and the rule of law. The constitution is regarded as a great strategic plan which should gradually be implemented. The power chart so defined is expected to influence the further development of a political process within a political community.

The common truism has it that constitutions come into existence at the "constitutional moments" and that the fundamental constitutional choices are made by the people. However, such moments often arise after a violent regime replacement, often under control of not so democratically oriented leaders, and eventually bring various forms of practical autocracy. In other cases the truly democratic solutions are sought. To this kind we owe the survival of a dream of the constitutional revolution: social and political reconstruction effected by legal instrumentality.⁸

The result of a constitutional moment might be a legal document, basic law, i.e. the constitution. Its drafters express the ideas of political leaders and their supporters at home and internationally (the great powers or as usually called today, "the international community"), expecting the document to produce certain results.⁹

But, as the American Founding Fathers warned, "the words on paper and 'the parchment barriers', would not enforce themselves", and should not be expected to do so. They might, but do not have to be the instruments of the enlightened people nor does their political leadership have to be committed to a democratic development. They are declared to be a mighty instrument of using political power for good purposes, as defined by the constitution. There could have been a high consensus about expectations, but the results that

on and Consolidation, The John Hopkins University Press, Baltimore and London, 1996, pp. 55 – 65; Sajo, Andrasz: *Limiting Government, An Introduction to Constitutionalism*, CEU Press, Budapest, 1999, pp. 69 – 103.

⁸ Smerdel, Branko: *Central European Democratic Transition: The Paradigm of a Constitutional Revolution*, in Fleiner Basta, L.; Marinković, Tanasije (eds.): *Key Developments in Constitutionalism and Constitutional Law*, Eleven international publishing, The Hague, 2014, pp. 51 – 63.

⁹ Smerdel, Branko: *Teorija o ustavnopravnom inženjerstvu i njezin utjecaj na izgradnju demokratskih ustavnopravnih institucija Republike Hrvatske*, in Bačić, Arsen (ed.): *Ustavi i demokracija – strani utjecaji i domaći odgovori*, HAZU, Zagreb, 2012, pp. 71 – 104.

followed have always been far from certain. What follows the adoption of a constitution too often takes an unexpected direction. The process of implementation consists of a number of decisions on lower levels, from the legislature to the independent judiciary.

While the creation of a constitution is often compared to architecture, the implementation could be considered as engineering. The final constructions too often do not operate according to the designers' expectations. In particular, this is true for experiments with political institutions and concepts.

II. THE ARCHITECTURE, CONSTRUCTION AND BRICKWORK OF THE CONSTITUTION

1. The selection of a proper constitutional model

Constitutional choice could be defined as a process of collective decision-making at the largest possible scale, by which peoples and nations select their basic political commitments and political institutions by which they are to govern their affairs. This definition, thus, assumes that the selection between available alternatives needs to have a strong scientific foundation if a democratic rule upon the principles of the rule of law is the true aim of the constitution makers. The constitution of a tyranny or an autocracy cannot thus be considered a constitution in the proper sense. Giovanni Sartori warns: "To be sure (it should go without saying) constitutions are a plan or frame for *free government*. As a manner of speech we have fallen into a careless habit of calling any and all state forms constitutions. As a matter of correct understanding it should be understood, however, that for constitutionalism ... constitutions are only the state forms in which (as Rousseau said) we are free because we are governed by laws and not by other men."¹⁰

If and when agreed that the aim, or *a telos* of the process, is to establish an effective but responsible government, the certain principles established during the centuries of human experience with government could be regarded as guiding. On that, V. Ostrom writes: "Constitutional choice establishes the authority and limitations on that authority that is intended to apply to those who exercise governmental — law making — prerogatives in a society. The authority of citizens and persons can be defined in a way that limits the prero-

¹⁰ Sartori, Giovanni: *Comparative Constitutional Engineering*, 2nd ed., Macmillan Press Ltd., Basingstoke, 1994, p. 196.

gatives of officials frequently identified in a declaration of rights.¹¹ In turn, the exercise of governmental prerogatives should be subject to a division of labor associated with the separation of powers. Such prerogatives, in turn, can be subject to veto capabilities pertaining to a system of checks and balances. The basic architecture of governmental arrangements implies procedures involving a due process of law that facilitates contestation among those interested so that conflict resolution is obtained as complementarities among interested parties who now achieve their place in a shared community of understanding."¹²

The core of the problem arises from the real aims of the constitution makers, or the prevailing political elite. The drafting of constitutions and acts of constitutional importance makes only an initial, expert stage of constitutional engineering, which requires a deep insight into the nature of the means to be implemented, as well as of the community of people it is meant to obligate. Between the resulting constitutional act and "the living constitution" comes a process of implementation, which profoundly depends of the capacity of the political community and the society itself to accept the proposed solutions as its constituting and working principles. This explains why a different approach is needed for constitutional stipulations to be applied, rather than brute enforcement.

2. Sharing of the executive power: theory and practice

How properly to implement the theory of separated but shared powers depends on the answer to the question whether parliaments can control their leaders in the executive. If we still believe in the function of a ruling assembly, than the bicameral system deserves a special attention. But the doctrine of parliamentary sovereignty has been proved not to function a long time ago. This points the primary attention towards the executive. The functions within the executive have to be separated but regulated in a way to share their powers and thus control each other.

Although it has generally been abandoned in political analysis, the idea of parliamentary supremacy is still supported by the interests of politicians and

¹¹ Vile, M. J. C.: *Constitutionalism and the Separation of Powers*, 2nd ed., Liberty Fund, Indianapolis, 1998, pp. 131 – 192.

¹² Ostrom, Vincent: *The Political Theory of a Compound Republic. Designing the American Experiment*, 3rd ed., with Barbara Allen, Lexington Books, Lanham, 2008, pp. 240 – 243.

by the public which is unaware of the concentration and secrecy of political power. The doctrine of parliamentary democracy continues to be dominant in political life.¹³

Power, regardless of the application of a certain model of governmental organization, tends to be concentrated in the hands of the executive. Therefore, constitutionally drawn positions of the branches of power are actually in reverse with regard to functions they are intended to perform: the executive makes decisions and formulates texts, which are subsequently 'passed' by representative bodies in order to achieve legitimacy. There no longer exists a distinction between the executive power which rules and the legislative power which makes laws. The distinction is rather between the ruling power, which has the authority to act, and the controlling power, which has to balance it. The authority to act decides and issues commands to all governmental bodies and co-ordinates their activities as well. The controlling power is supposed to oversee and impose limitations on the authority to act, and to ensure that actions undertaken by the authority to act are both legal and in agreement with the political will of the nation.¹⁴

However, modern assemblies cannot perform even their fundamental controlling functions. During the 1960s and 1970s, this line of thinking prevailed in the constitutional literature in Western countries.¹⁵ Philip Norton, a distinguished British author, proposed in 1982 that the traditional formula of "the Queen in Parliament" should be replaced by "the Prime Minister in Cabinet", a metaphor which would make relationships in the highest political circles more transparent. Norton offers particularly important evidence that parliamentary control is weakest in such areas as foreign policy, defense and security services, while parliamentary involvement is most concentrated in the areas of public services and finance. While the latter is by no means unimportant,

¹³ See Suleiman, Ezra N.: *Parliaments and parliamentarians in democratic politics*, Oxford University Press, New York, 1986, p. 11.

¹⁴ Smerdel, Branko: *Ustavne institucije ministarske odgovornosti i njihovo moderno značenje*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 32, No. 2-3, 1977, pp. 67 – 83; Gaude-met, *op. cit.* (fn. 6), p. 19.

¹⁵ See e.g. Vile, *op. cit.* (fn. 11), pp. 21 ff.; Chardenagor, André: *Un Parlement, pourquoi faire?*, Gallimard, Paris, 1967; Bracher, Karl D.: *Problems of parliamentary democracy in Europe*, in Hirsh, Herbert; Hancock, Donald M. (eds.): *Comparative legislative systems*, Free Press, New York, 1971, pp. 343 – 360; Walkland, S. A.: *Whither the Commons?*, in Walkland, S. A.; Ryle, Michael (eds.): *The study of Parliament group: the Commons in the seventies*, Fontana Colins, Glasgow, 1977.

it demonstrates that the most sensitive fields of governmental action, those associated with the use of coercion, have remained outside any democratic scrutiny. An *Economist* editorial included similar comments about the British Constitution in November 1995.¹⁶

This theory must be considered while deciding on the fundamental constitutional choices, as well as in operational or specific decision making.¹⁷ Those of the first category have usually been completed during great historical events, such as constitutional conventions and popular referenda.¹⁸ They are inscribed into the "marble of the Constitution". The choices of the second category are done during the implementation, on a daily basis, through elaboration and adoption of legislation, adjudication of disputes, down to enforcement over those who have disobeyed the law. The process of implementation of the constitution should include decisions of legislators, courts of justice, the police, agencies, firms, and individuals.¹⁹

However, in regard to the constitutional design of a system of government, the knowledge, intentions and behavior of the political leaders is of crucial importance. The acts of the common citizens in everyday life are of importance to the extent that they were willing to tolerate deviations from the constitutional principles. The result of an interaction of both processes is called "a working constitution", which is usually quite different from the one on the books. But, not to be mistaken: neither the elites produce and form their attitude towards constitutionalism of their free will, nor does the will of the citizens to participate in political decision-making processes depend on free decision making. The dominant interests, the oligarhisation of the parties and the irresistible apparatus of coercion have brought a tendency to push the constitutions aside as a window dressing of the systems. The state repressions, weakening of union movements, as well as unemployment and other corollaries of the economic crisis have essentially diminished the impact of deliberative processes. The result is the immense and often violent public demonstrations we observe daily in the core countries of the free world. Something has gone

¹⁶ The *Economist*, November 4th, 1995, pp. 60 – 62.

¹⁷ Smerdel, Branko: *Republic of Croatia: Three Fundamental Constitutional Choices*, Croatian Political Science Review, Vol. 1, No. 1, 1992, pp. 60 – 78.

¹⁸ See more in Ostrom, Vincent: *The Political Theory of a Compound Republic*, University of Nebraska Press, Lincoln, 1987; and Smerdel, Branko: *American Theories of Federalism, introduction to the Croatian translation*, Informator, Zagreb, 1989, pp. 5 – 49.

¹⁹ Cf. Tribe, Lawrence H.: *Constitutional Choices*, Harvard University Press, Cambridge, Mass., 1985.

wrong with democracy, concludes the prestigious *The Economist*, not forgetting the question: “How to revive it?”²⁰

3. The role of the political parties

While constitutional documents might be elaborated with great scientific consideration and knowledge, there is no guarantee that they would function as their creators have intended and indeed tried to persuade the public to expect. Erroneous constitutional choices might be caused by a lack of knowledge. But they are time and again concealed under the democratic pretext, while inspired only by a desire for power, domestically as well as internationally.²¹

The key lies with the political parties. During the 1990s the constitutional arrangement supported a personalization of power. But its main instrument was control over the political parties. The CDU had been the main instrument of Tuđman’s wielding the power over the all branches of government. Since the year 2000 the party dominance has disfigured the democratic constitutional facade of the new parliamentary system and its deterioration lasts until the present. Parliamentarism actually functions as a system based on party obedience!²² What a nice surprise for the ignorant Croatian partitocracy!²³

During the Croatian constitutional “democratic transition” of the last twenty five years, an enormous gap was created between the proclaimed principles and the prevalent constitutional culture (*opinio constitutionis*). Because of that the constitutional system has been pushed into an entirely different direction, i.e. towards a concentration of all decision-making power in one single center of decision making, closely clustered around the one powerful individual. Since the Constitution provides for multiple such centers, one of which technically out of party control, this has induced a number of constitutional disputes, and also a permanent pressure towards abandoning the power sharing system.

²⁰ *The Economist*, March 1, 2014, pp. 43 – 50.

²¹ Smerdel, Branko: *Convention on the Constitution of Europe: relevance of the theory of a compound republic*, wow 4 conference, Indiana University, Bloomington, 2006. Available at: <http://www.indiana.edu/~workshop/>; Podolnjak, Robert: *Explaining the failure of the European constitution: a constitution-making perspective*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 57, No. 1, 2007, pp. 119 – 167.

²² Classic general survey of the role of political parties: Sartori, Giovanni: *Stranke i stranački sustavi: analitički okvir*, Politička kultura, Zagreb, 2002 (translated by Vladimira Mirković Blažević and Vesna Tomić).

²³ Smerdel, Branko: *Promijena vlasti i izgledi ustavne vladavine*, in Kregar, Josip; Ravlić, Slaven, et al. (eds.): *Hrvatska: kako dalje?*, Pravni fakultet, Zagreb, 2004, pp. 85 – 94.

4. The continuing challenges

The question remains therefore, whether it is really possible to use constitutional instruments to strengthen democratic forces and accelerate the process of institutionalization despite the patrimonial political culture amidst a bunch of dominant political leaders? Or are we, in Hamilton's words, forever destined in organizing the government to depend on accident and force?

The search for solutions leads us to two propositions. First, if the executive is the central obstacle to the prescribed role of the parliament, the focus should be on taming the executive, and if the separation of powers is the best institutional mechanism to tame the power holders, then our efforts to strengthen democratic elements of the system must be directed to the internal division of authority within the executive. Second, if the main instrument of dominance over the whole parliamentary system consists in control of the political parties, how to point those constitutional checks towards them, and by what means? In Croatia, as Tocqueville writes for the new republican system of the 19th century, those have been demonstrated as "ideas hitherto unknown or deemed impracticable".

III. THE POINT OF DEPARTURE: THE TENDENCY TOWARDS PRESIDENTIALISM

1. Strengthening the executive: the semi-presidential system (1990)

The term "semi-presidential system" has taken roots in Croatia, although a "presidential-parliamentary" or "a rationalized parliamentarism" would better denote the constitutional intentions. This would have to be distinguished from "presidentialism", the system of concentrated and personalized power with a number of variations, from the "Stalinist etatism" to the Latin American "caudillism". But the elements of centralization are implied in the model. It could even be said that the term "semi" took hold because it intentionally disguises its real nature, which without a doubt stresses the role of the president more than the "presidential system" based on a separation and sharing of power in the United States.²⁴ This goes for the pure constitutional distribution of

²⁴ First used by its oponent Maurice Duverger for the purpose of mocking it, the term has taken hold and became usual, and the model accepted by the earlier opponents. The last attempt from the French left to abandon it, was launched only as the end of the second Mitterrand's mandate approached in 1985.

powers, generally as well as in the French instance, which opens a possibility of development towards a full concentration of power in the presidency. This is particularly the case in Croatia, where the concentration of power, which would be, however, inevitable during the war and a prolonged state of fragile cease-fire, together with a personal political style of the incumbent, gave rise to allegations of “authoritative”, “personalized” or even “dictatorial” functioning of Tuđman’s presidency²⁵, and a perpetual discussion and demands for a change of the constitutional framework of an “imperial presidency”.

The key constitutional ground for such a development is found in the provisions by which the president is responsible (1) to ensure respect for the Constitution; (2) to guarantee the continuity and unity of the Republic, and (3) to ensure the regular functioning of the governmental institutions. From those, a number of “implied powers” might be, and indeed have been, derived. Broadly interpreted, such responsibilities include, particularly in the states of emergency, whether officially declared or not, a variety of means to intervene in any field of administration whenever deemed necessary, i.e. full control over governmental institutions, the armed forces and security services. When such circumstances occur is determined exclusively by the president himself, with the exception of a formal declaration of war which has been reserved for the parliament. Those constitutional provisions have been claimed by the president and his legal counsels in various cases when challenged for his actions in foreign and domestic politics.²⁶

2. The organization of presidential supremacy beyond the Constitution

Despite the constitutional provisions on the separation of powers, the focus of power in the Croatian political system very soon became firmly entrenched with the president and his office. The Office of the President and his advisory bodies make up the administrative and political basis. But the essential supremacy was ensured by the paramount presence of the ruling party in political life.

²⁵ Cf. for instance discussions of the time: Letica, Slaven: *Is Franjo Tuđman a Dictator*, Globus, Zagreb, November 29, 1992; Letica, Slaven: *The Serbian Strategy of War and All Tuđman’s Mistakes*, Globus, Zagreb, August 2, 1991.

²⁶ Cf. Babac, Branko: *O nekim općim problemima uobličavanja političko-upravnog ustrojstva u svezi s ostvarivanjem nacionalnih strategija razvoja Hrvatske i hrvatskoga građanskog društva: teorijske i istraživačke osnove*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 42, No. 1, 1992, pp. 63 - 67.

Under Article 106 of the Constitution, he appoints, chairs and dismisses the Presidential Council "and other advisory and auxiliary bodies". The advisory body had been founded under the title of the Supreme Council of the State. This title, unknown to the language of the Constitution, was a point of much criticism from the opposition. After the elections of 1992 it was replaced by two other advisory bodies: the *Presidential Council* and the *Council of Defense and National Security*.²⁷ The former consisted of about thirty top legislative, executive and the ruling party officials, whilst in the latter sat the chairman of the parliament, the Prime Minister, the ministers of defense and interior, together with the top military commanders and heads of the security agencies. Sessions of those bodies have always been closed to the public and only brief releases were issued after sessions. Reportedly, those were the places where the president after deliberations had the final word and made decisions, which were then executed by the government and by the party machine, passing through the legislature if necessary.

The president communicated with the public on his regular monthly press conferences held in the Official Residence of the President before invited domestic and foreign journalists, which were directly transmitted over the radio and television.²⁸ The intention to receive common citizens at the Residence once a month was announced after the elections, but was later forgotten. The top administration was organized in the Office of the President, located in the President's Residence. The number of advisors, which at one point on the eve of war counted dozens, threatened to transform into a parallel government.

The Office of the President became the main place from which people were detached to important positions at home and abroad if not eliminated from ranks of candidate for such positions.²⁹ Hrvoje Šarinić, Prime Minister from August 1992 to March 1993 had previously held the position of Director of the Office, and was appointed, after his resignation, Head of the Office for National Security which controls and coordinates activities of all intelligence and security services. In general, fast rotation of selected cadres makes a characte-

²⁷ After the Supreme Council of the State was abolished, president Tuđman explained that it had been necessary to form such a body in the situation when the Yugoslav Army generals, preparing a conspiracy and aggression against the Republic, would claim their right for membership in the Presidential Council.

²⁸ On one occasion in August, 1993 Tuđman had chatted on the TV in a relaxed way with a group of journalists, in an apparent attempt to improve his image in communicating with the public. But it has never been repeated.

²⁹ Letica, Slaven: *Obećana zemlja*, Globus, Zagreb, 1992.

ristic part of the Croatian political process. Of course, in such rapid rotation, there are those who are launched out of the circle.

The officially denounced “communist” principle of unity of power was replaced by the principle of “single state politics” meaning the single center of authority.³⁰ The democratic prospects were diminished by the urgent necessities of the armed conflict and its aftermath. Regarding the Constitution, the traditional function of being a window to the world was accepted and nourished by the new nationalist political elite. It was almost sacrificed to the patrimonial tradition after the victory in the war, when proposals to make Franjo Tuđman “a president for life” were advanced by some top functionaries. But the public reception of this proposal was unsympathetic, and has not been repeated.

IV. INTRODUCING THE POWER SHARING

1. The meaning and importance of the principle of separation of powers

The true meaning of the principle of separation of powers lies in dividing power, and thus the possibility to enable mutual checks and balances between the holders of the highest governmental functions, but not in a bare organizational and functional separation of the three fundamental branches of government. It encompasses the horizontal dimension, which regulates the relations between the holders of the legislative, the executive and the judicial branch, as well as the vertical dimension, regulating relations between the central government and the local self-governments.

Properly understood, the separation of powers represents, within the democratic political system, the most efficient and, in the practice of democratic governments, approved institutional means to prevent a concentration and personalization of power. In democratic states, it is implemented within the framework of several different systems of governmental organization: parliamentary, semi-presidential and presidential system of government.

Besides the general political oversight over governmental operations and a strengthening of the system of its responsibility, the role of the Parliament

³⁰ The Prime Minister Nikica Valentić (1993 – 1995) took a great care to publicly emphasize that he is “only to execute the single politics of the state”. The next Prime Minister Zlatko Mateša (1995 – 2000), consistently insisted on the “economic but not political” function of the Government. Cf. Smerdel, Branko, interview of May 25, 1992, in Šarin, Duška: *Nastanak hrvatskog Ustava*, Narodne novine, Zagreb, 1997, pp. 244 – 251.

is emphasized by the participation of its president in the decision making by the President of the Republic. In performing this function the president of the Parliament does not act as an independent constitutional and political factor, but represents the Parliament and must take good care of the opinions of the majority of legislators and continuously ensure their support.

1.1. What is the purpose of a double-headed executive?

It has been paradigmatically established in constitutional science³¹ that the word 'executive' has been intentionally used in order to misguide the understanding of the political process. In a word, the masters of the state power and assets have from the earliest times wisely pretended to be mere servants of the people. In modern democracies they are obligatory constitutionally defined as such servants of the ruling people, which by no means have changed the real nature of rulers-ruled relations in the modern society. This is why a study of the development of the organization and operation of the executive power might open a view to understanding the substantial problems and prospects of the democratic development of a particular country.

The ideas of the strengthening of parliaments as checks and controllers of real power holders, although still surviving, have been seriously challenged in a major part of the literature. Would it not then be more recommendable for the countries with no democratic traditions to introduce checks to the mechanisms which actually must be checked?

The Croatian presidency, as the instance at stake, has been created in the year 2000 for the purpose of preventing the occurrence of such a concentration and personalization of power as was the case in the previous decade. The idea of "separated but shared" powers was implemented, with a significant influence of the theory of checks and balances. The model was designed in order to enhance cooperation among the three leading functionaries: the President of the Republic, the Prime Minister and the President of the Parliament.³²

³¹ The science about comparative constitutionalism, being necessarily interdisciplinary, encompassing such scientific disciplines as constitutional political economy and social psychology, as well as law, might in our view be entitled constitutional science. See Smerdel, Branko: *Ustavno uređenje europske Hrvatske*, Narodne novine, Zagreb, 2013; Hirschl, Ron: *Comparative Matters*, Oxford University Press, Oxford, 2014.

³² For more see Smerdel, Branko: *Odgovornost Vlade u europskom kontekstu, kako europske (parlamentarne) institucije "rade svoj posao"*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 60, No. 3-4, 2010, pp. 7 – 42.

2. The Constitutional Status of the President of the Republic

2.1. *The model of cooperation*

In the elaboration of this cooperative model, the following instruments have been applied: a proposal of certain decisions; a counter-signature of the Prime Minister to the acts of the President of the Republic, requirement for an opinion to be given by the president of the Croatian National Parliament, or common decision making by those three highest officials of the Croatian government. Normally, it is up to the President of the Parliament to ensure the support of a majority of the members of the Parliament, and up to the Prime Minister to ensure the support of the members of this body. Although the right to dissolve the Parliament makes an essential element for the achievement of a balance between the legislative and the executive, which makes the basis of the parliamentary system, the Croatian political reformers of the year 2000 and 2001 decided to seriously limit such a possibility to only two situations: the vote of censure to the Government and the refusal to adopt the budget for the period of 120 days.

As of the constitutional revision of the year 2000 the Constitution of Croatia drops the reference to “Head of the State”, which is a *curiosum* in the constitutional world, being a result of the ignorant lessening of the role of the President. Still the President has a responsible authority: The President of the Republic of Croatia *represents and stands for* the Republic of Croatia at home and abroad, and assures the *regular and harmonized* functioning and stability of the government. The President of the Republic is *responsible for the defense* of independence and territorial integrity of the Republic of Croatia. The President of the Republic shall not perform any other public or professional duty, nor shall he be a member of a political party. The President of the Republic is the *Commander-in-Chief of the Armed Forces* of the Republic of Croatia, and he appoints and dismisses military commanders, in conformity with the law.

On the basis of a *decision of the Croatian Parliament*, the President of the Republic may *declare war and conclude peace*.

In the event of an immediate threat to the independence, unity and existence of the State, the President of the Republic may, with the counter-signature of the Prime Minister, *order the deployment of the Armed Forces* even if a state of war has not been declared.

2.2. *The source of authority: a direct election by the people*

The President of the Republic is elected in direct elections by secret ballot, on the basis of the universal and equal right to vote, for a term of *five years*.

No one can be elected President of the Republic *more than twice*.

The President of the Republic shall be elected by a *majority of voters who turned out*. If none of the candidates have obtained such a majority, new elections shall be held after 14 days.

The *two candidates* who obtained the largest number of votes in the first round shall have the right to stand in the second round. If one of these candidates withdraws, the candidate who obtained the next highest number of votes shall acquire the right to stand in the second round.

2.3. *Government formation*

It should be stressed that the President of the Republic gives *the mandate to form the Government* to the person who, *upon the distribution of seats* in the Croatian Parliament and *consultations held with the parliamentary clubs*, enjoys the confidence of the majority of MPs. Although he does not appoint or dismiss the Prime Minister, nor his deputies or Ministers, he might influence coalition formation, since there is no obligation to confer a mandate to the leader of the party with the greatest number of seats (relative majority).

During a state of war the President of the Republic may issue decrees with the force of law on the grounds of and within the authority obtained from the Croatian Parliament. If the Croatian Parliament is not in session, the President of the Republic is authorized to regulate any issue required by the state of war by decrees with the force of law.

This essentially corresponds to known legal standards, and the criteria to be applied at such times are established by the Constitution itself.

2.4. *Separated by shared executive powers*

Taking care of the regular and coordinated functioning of the institutions and the stability of the state (Article 94 of the Constitution) might potentially make room for an active intervention of the President into the political life. This provision has been interpreted differently by different Presidents.

The Government of the Republic of Croatia exercises executive powers and is accountable to the Croatian Parliament. The President of the Republic and

the Government of the Republic of Croatia *cooperate* in the formulation and execution of *foreign policy*.

The Government and the President cooperate in the coordination and direction of security services, and have to countersign the appointments of their chief officers.

The President of the Republic, at the Government's *proposal* and with the *countersignature* of the Prime Minister, decides on the establishment of diplomatic missions and consular offices of the Republic of Croatia abroad.

The President of the Republic, with the prior countersignature of the Prime Minister of the Republic of Croatia, appoints and recalls diplomatic representatives of the Republic of Croatia, *at the proposal* of the Government and upon *receiving the opinion* of the competent committee of the Croatian Parliament.

The President of the Republic receives credentials and letters of recall from foreign diplomatic representatives.

The President of the Republic may *propose to the Government* to hold a session and consider certain issues, and may *be present* at the session of the Government and take part in the discussion.³³

3. The functioning of the Croatian “hybrid presidency”

3.1. Deficiencies of institutionalization

Therefore, as we asserted earlier, the attitude towards the system of checks and balances among the Croatian political elite, could be compared to the metaphor on the “ideas hitherto unknown and deemed impracticable” in DeTocqueville's analysis of democracy (1830). By his qualification Tocqueville emphasizes the innovation and originality brought by the introduction of the system of checks and balances for the new American republic, whose founders were still in doubt whether they would be able to keep it.³⁴ John Dewey in his “The Public and its Problems” asserts: “Be the evils what they may, the

³³ Also: to call elections for the Croatian Parliament and call its first session; to call referenda, in conformity with the Constitution; to give the mandate to form the Government to the person who, upon the distribution of seats in the Croatian Parliament and consultations, enjoys the confidence of the majority of its members; to grant pardons; to confer decorations and other awards specified by law. To take care about the regular and coordinate functioning of the institutions of and the stability of the state.

³⁴ Cf. Ostrom, Vincent: *The Meaning of Democracy and the Vulnerability of Democracies*, The University of Michigan Press, Ann Arbor, 2000, pp. 14 – 15.

experiment is not yet played out. The United States are not yet made: they are not a finished fact to be categorically assessed." (1927). And John Stuart Mill warned that all the limits to the rulers, imposed by the modern civilization, obviously move human beings away from their nature (1885).³⁵

"There cannot be more than one power in this country!" This was boldly announced by the Croatian Prime Minister Milanović on February 24, 2015.³⁶ This statement best demonstrates how distant the sophisticated system of shared power and mutual checks, imposed by the constitutional revision of 2000 is to the prevalent Croatian political culture. At the same time this should explain why the process of institutionalization of the constitutionally provided cooperation between the three high dignitaries – two from the executive, and the third one from the legislative branch – has been slow, reticent, even absent during the last fifteen years. The rules have been passed as a matter of political bias and not to improve the institution³⁷, the cases have not been noted, analyzed or quoted, the constitutional disputes have been ignited anew, and no disagreements have been solved in the spirit of cooperation, which is imminent to the divided system. The expected process of mutual adoption of the power sharing system never took place. To rule together, people in power must share the common idea that the powers delegated to them by the people would certainly have to be returned and the account laid, and that the powers not only can but must be shared as provided by the Constitution. This then also explains the hypothesis that the operation of the Croatian presidency prevalently depends on the characters and tempers of the individuals involved.³⁸

³⁵ Dewey, John: *The Public and its Problems*, Holt, New York, 1927, quoted in Sunstein, Cass: *The Partial Constitution*, Harvard University Press, Cambridge, Mass., 1993, p. I.

³⁶ See in Večernji list, 25.02.2015. To make sure the fact we point out here that the Article 4 of the Constitution clearly regulates the separation of branches of government and their limitation by the constitutional guarantees of local selfgovernment.

³⁷ The case with the initiative to adopt the Law on the Office of the President as soon as "the leftist" President Josipović took office in 2011, Article 107 par. 2 of the Constitution.

³⁸ The basics of political psychology in: Houghton, Patrick: *Political Psychology*, Routledge, New York, 2009, available at: <http://www.al-edu.com/wp-content/uploads/2014/05/Houghton-Political-Psychology.pdf> (14.03.2015); the political psychology of the classical scientific analysts examines Elster, Jon: *Political Psychology*, Cambridge University Press, Cambridge, 1992.

3.2. *Three models of presidency*

We hold that three models of presidency have developed during the past twenty five years. First is the *imperial presidency* of Dr. Franjo Tuđman (1990-2000), which has been abandoned but deserves to be taken into account, since its ghost still threatens Croatian democracy. It actually represents the model rather close to parts of the Croatian political elite. It was based upon the Constitution of 1990, while the strong constitutional position of the President was also supported by the popular demand in the time of crisis, as well as the strong political party under presidential control. We have entitled this system “imperial presidency” after previous comparisons with the supreme military commanders from the ancient Roman Republic, the French revolution, and up to the instance of Yugoslavia. After the war, the victorious general transforms the system into “an elective monarchy” or a “Caesarian” form of dictatorship. This system was successfully abandoned in the year 2000.

The other two models, however, have operated within the same kind of constitutional framework, but in radically different modes. This explains our hypothesis about the overly accentuated impact of personalities in the functioning of institutions, as well as limits to honest cooperation due to the centralized character of the Croatian political parties.

The second model, *transitional presidency* (2000-2010) during the two mandates of Stipe Mesić, was expected to produce a stabile and institutionalized system of power sharing between the President of Republic and the Prime Minister. We refer to the first period after the end of imperial presidency as *transitional presidency*, since the question of whether such a system would be accepted as a working model has been constantly posed and reopened during the two mandates of Stipe Mesić. Mesić did not hesitate to make at least two hard choices claiming his constitutional and legal duties. One was the decision of 2000 to force into retirement a number of leading generals who had attempted to address the public in purely political matters. The second was to reject the decision of the government to join the U.S. action against Hussein’s Iraq in 2003 since it lacked the approval of the UN’s Security Council. Both prime ministers, however embarrassed with the presidential actions, continued to cooperate, which gave an impression that the system would rather easily enter into gear.³⁹

³⁹ Dikić, Ivica; Pavelić, Boris: *Mesić*, Novi list, Rijeka, 2010.

The third model is *self-restrained presidency* of Professor Ivo Josipović (2011-2015), which showed deep obstacles to power sharing between two dignitaries who had originated from the same political party or orientation. The main characteristic of the model was a strictly legally narrow interpretation of the authority of the president, which in our view justifies the qualification of a self-restrained presidency. Not only did the President interpret his competences strictly and fail to attempt a wider, contextual or teleological interpretation, but he also tended to give in when some important new pieces of legislation imposed further restrictions to his authority.⁴⁰ The president took the position of an impartial dignitary who cooperates with all parties, and supports any government. In regard to his competences, he applied the doctrine of self-restraint and scrupulously avoided any extensive interpretation of his authority and his duties in general. He tended to avoid any public disagreement with the government, any decisive intervention against unconstitutional legislation, and to give in on various questions of legislation related to his sharing of authority with the government. To the numerous grievances by the citizens he attempted to react in the manner of a Scandinavian ombudsman – by case work with various agencies of government and administration.⁴¹ This is why we have termed the Josipović presidency a self-restrained one.

3.3. Political parties disregard the Constitution

The causes of such differences lie in the dominance of the political parties: Dr. Franjo Tuđman followed the centralized party model, personally con-

⁴⁰ The Law on Cooperation between the Parliament and the Government (NN [Official Gazette] 81/2013) excluded the President from those aspects of politics, with the explanation that it has not been foreign policy any more. The Law on National Defense and the Law on the Service in the Armed Forces (NN 73/2013) were aimed to restrict the President's authority of the supreme commander, but Josipović denied that there are serious differences. "I do not demand any new authority, I just plead not to change the old law." he said in that occasion. Cf. *Josipović demantirao da je u sukobu s Vladom zbog Zakona o obrani: Ne tražim veće ovlasti!*, Index, June 8, 2013, <http://www.index.hr/vijesti/clanak/josipovic-demantirao-da-je-u-sukobu-s-vladom-zbog-zakona-o-obrani-ne-trazim-vece-ovlasti/682264.aspx> (30.03.2015).

⁴¹ At the beginning of his mandate in 2011, the attention he had paid to the rating pools had been generally interpreted in terms of gathering support for his very ambitious electoral program of "new Justice". But, despite the fact that his ratings were enormously high up to the very end of mandate, such an action had not taken place. See our *Profesor Josipović at the constitutional law exam*, in Smerdel, Branko: *O ustavima i ljudima*, Novi informator, Zagreb, 2011, pp. 35 – 37.

trolled his ever-strengthening party and that was the instrument of his political omnipotence. The destiny of the Constitution, and that means the separation of powers, eventually depended on his famous answer to the question as to what will happen if he loses in a future presidential election, when he replied “Only those who live to see it will know”.⁴² Our warning from 2003 that the party heads seeking dominance threatened the constitutional system was not only disregarded, like a number of other such caveats, but was completely confirmed.⁴³

Stipe Mesić dissociated himself very early on from his former party and operated as a truly non-conformist president. No doubt, his individualist attitude greatly contributed to the perception of a “maverick” president. But, nevertheless, he was ready for serious action when he deemed it necessary, as well as for various coalitions when demanded by the situation, or out of his own interest. Therefore, his presidency was a “transitional” one, as was the whole political environment.⁴⁴

Professor Ivo Josipović attempted to visibly detach himself from his former party and disassociate himself from the extremely unpopular President of SDP Zoran Milanović only later in his mandate. He tried to “move to the right” with the approaching electoral campaign, but it was too little and too late. Taking his presidency as a whole, his refined manners and a gentle political style constantly brought him an enormously high rating among active politicians, which supports our thesis about the decisive role of the incumbent’s personality. However, two sets of evidence go in favour of our thesis of the decisive impact of political parties. The first is the history of his constitutional disputes with the rightist-center Government and its Prime Minister Jadranka Kosor during the first year of his mandate. The second refers to his rare, late and reluctant interventions regarding various pieces of legislation and even the curious package of constitutional changes, which was negotiated and prepared to be adopted without any respect to the rules of legislative drafting. Some of his statements about the general disagreement with his former party during the first month after his failed re-election confirm our thesis.

⁴² The actual expression was “Kibi-dabi”, meaning in the old slang of Zagreb, “Only those who live to see it will know”. This was the answer the president gave in a TV interview. In fact, he had quite often expressed the opinion that there was nobody in view who could replace him .

⁴³ Smerdel, *op. cit.* (fn. 23), p. 89.

⁴⁴ Dekanić, Igor: *Demokratizacija hrvatske politike*, Prometej, Zagreb, 2004, pp. 282 – 287.

Considering the above, the future of the Croatian presidency has not yet been determined, nor is there a basis for a grounded scientific prediction. It should be decided during the next few years, depending on the results of the upcoming general elections, and the political character of Mrs. Kolinda Grabar-Kitarović. If she successfully establishes an independent position in the Croatian political realm, which has been subordinated to the leadership of the political parties, the system of mutual checks and balances might survive. If not, it is likely that constitutional changes would follow, which would relocate the focus of executive power to the head of the Government. And the key test takes place only when the two top officials, the President and the Prime Minister, come from opposed political orientations.

In conclusion, we hold that the further development of the system remains uncertain unless a serious planned effort is undertaken in order to recover the lost balance between the institutions.

V. INSTEAD OF A CONCLUSION

1. The initial reception of the principles of cooperation and power sharing

The formerly described concept, according to which a separation of powers requires an elaboration of various forms of collaboration and cooperation in decision making, as well as mutual checks of the heads of the three separate branches of government, has been consequently applied in all the relevant provisions of the proposal to amend the Constitution. The basic model presumes the participation of the President of the Republic, the Prime Minister and the Croatian National Parliament in the making of the most important political decisions.

That way, the concept known in modern political theory as "a rationalized parliamentary system" could be accomplished since it aims to avoid institutional weaknesses of the classical parliamentary system which might cause government instability, and to prevent at the same time a regression towards presidentialism as a system of concentrated and personalized power.

The very idea of sharing power has been a *novelty* not only to the Croatian political community, but also to a part of the scientific one. Important foreign observers held the new system to be a rather incongruous innovation within the Croatian tradition of strong leaders and its patrimonial political culture.⁴⁵

⁴⁵ As had been openly stated in the year 2000 to the author after the presentation of the system by the then very influential U.S. ambassador William Montgomery,

Ambitious political leaders did not and could not understand the system of divided but shared powers otherwise but as a window dressing for the masses.⁴⁶ It seems that this attitude has not changed much during the course of the last fifteen years. If anything, it has become stronger.

Since those days the discussion has constantly been simmering in Croatian politics, only to be intensified from time to time on the initiative of political leaders to “remove the remnants of the semi presidential system” and to introduce “the pure parliamentary system”. Those would be all the constitutionally provided forms of mutual cooperation which, as we have explained, make the core of the theoretical concept of governmental organization. The logically following question of whether the president of the Republic should be elected directly by the people or by the Parliament in such a pure system has usually caused new disputes among the proponents of “systematic purity”.⁴⁷

2. Is modern Croatia better prepared for a system of power sharing?

Apparently, it is not. As already mentioned here, the current Prime Minister Zoran Milanović, already well known for his particular interpretations of the Constitution and opposition to the system of checks and balances, openly proclaimed fifteen years later: “There cannot be two supreme authorities in this country!”⁴⁸ True, it was a fuming answer to the obviously unconstitutional request from the new President Mrs. Grabar-Kitarović who, being embarrassed by the previous messages from the Government, invited the Prime Minister to resign.

quoting from memory: “American political theory has no place in this area. The ultimate focus of power must be defined by the Constitution.”

⁴⁶ Described by Hrvoje Šarinić in his memoirs on negotiations with the Serbian leader Slobodan Milošević during the 1990s; Šarinić, Hrvoje: *Svi moji tajni pregovori s Miloševićem 1993-1995*, Globus, Zagreb, 1999.

⁴⁷ Thus the positive system has been named “the quarter – presidential one” and even “the filthy parliamentary one”. Smerdel, Branko: *Ustavne promjene i hrvatski parlamentarni sustav – argumenti u prilog pozitivnog ustavnog modela ustrojstva vlasti*, in Kačer, Hrvoje; Momčinović, Hrvoje; Žuvela, Mladen (eds): *Liber amicorum in honorem Jadranko Crnić (1928-2008)*, Novi informator, Zagreb, 2009, pp. 37 – 73; Smerdel, Branko: *Parlamentarni sustav i stabilnost hrvatskog Ustava: Slijede li nakon predsjedničkih izbora nove promjene ustrojstva vlasti?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 60, No. 1, 2010, pp. 7 – 44.

⁴⁸ See fn. 36.

To tell the truth, it was an angry response to a contemptuous invitation to attend meetings of the Government, but only if she is well prepared. This again being an angry response to hostile actions of the Government demanding an immediate fulfillment of the electoral promise to move out of Tito's old villa which has served as the presidential residence for the last twenty years. This and other similar quarrels suggest that a new cycle of constitutionally prescribed cooperation has begun and continued in the form of a quarrel. The impression that both top functionaries are ignoring or have not read the Constitution, or lack competent constitutional advisers might be wrong. It rather shows that neither of them takes it seriously enough. But, as the opposition leader Tomislav Karamarko asserted after the inauguration of the new President of the Republic, Mrs. Grabar-Kitarović: "cooperation in accordance with the Constitution has to be established, although, everything has started somewhat clumsily and maliciously." This is our purpose here: to warn about the inherent logic of such conflicts, which poison the political atmosphere and which could get out of control.

The moment when we examine the constitutional role of the Croatian president and its actual operation during the 15 years, and the prospects of the system, are particularly challenging, since the proposals to reform the system of the double-headed executive have been continuously challenged by party leaders.⁴⁹ Is there an opportunity for the power greedy party leaders entrenched in the Parliament to get rid of the directly elected head of state?⁵⁰

Aarend Lijphart, in his scientific bestseller on the times of drafting numerous constitutions for new democracies, has drawn two important conclusions, confirmed since by a whole body of literature on the topic: first, the constitution makers are far from being free to select the model of government, since its functionality crucially depends on the culture and traditions of the society.⁵¹ The second one, that the statistics demonstrates a relatively greater

⁴⁹ The new President of the Republic Mrs. Grabar-Kitarović was sworn in and assumed the duty of the President on February 19, 2015.

⁵⁰ In addition to the several assertions by the influential former Prime Minister Nikica Valentić from the opposition CDU, and other objections by the Prime Minister Zoran Milanović, from the ruling SDP, the opposition leader Tomislav Karamarko has recently expressed an opinion in favor of the "powers of the chancellor". See: www.vecernji.hr/.../smerdel-jedino-je-ivo-sanader-koristio-ovlasti-i-vlad...; and also: www.jutarnji.hr/komentar-jelene-lovric...zeli-ovlasti...je.../12573 (30.03.2015).

⁵¹ Lijphart, Aarend: *Parliamentary versus Presidential Government*, Oxford University Press, Oxford, 1992, p. 25. There has not been since a significant work which would have

stability of parliamentary regimes, has been constantly disputed in a number of research works published since.⁵² It is puzzling how the majority of those researchers failed to perceive that the conclusion about the decisive impact of culture and tradition warns against any conclusions based on statistical comparison of different societies, such as Latin American and Western European states.⁵³

3. Should Croatia in crisis return to the drafting table?

The answer depends on our understanding of the importance of the separation of powers, and our estimation of the readiness of political actors to observe the Constitution. All things considered, the system might be evaluated as working reasonably well during the three presidential mandates. Although, it might be judged differently, besides the instances of successful cooperation, we have also witnessed conflicts and arguments.

We hold those to be part and parcel of any longer cooperation in the political sphere, and in particular when the principle of separation of powers is observed. The key question is whether an elaborate procedure for solving such controversies has been established or not. And there we see the core of the problem. In an atmosphere of slow and hesitant political institutionalization, the personalities of the players involved, as well as their personal political ideas, have had the prevalent influence on the functioning of political institutions.

Donald Lutz formulates the following purposes of the application of what he calls “constitutional technology”: first, the rule of law; second, democracy; third, maintenance of public good. Those have been expressed by the American Founders as “the inalienable right to life, freedom and a pursuit of happiness”. But he emphasizes that the true purpose lies in the introduction of crucially important innovations into social life, which should serve to sustainable development encompassing the development of material goods as well

challenged this common sense conclusion, leaning upon huge historical evidence. See Elster, Jon: *Clearing and Strengthening the Channels of Constitution Making*, in Ginsburg, Tom (ed.): *Comparative Constitutional Design*, Cambridge University Press, New York, 2012, pp. 15 – 30.

⁵² The first were Mathew Soberg Shugart and John M. Carey in *Presidents and Assemblies*, Cambridge University Press, New York, 1992, pp. 40 – 46.

⁵³ Elgie, Robert (ed.): *Semi-presidentialism in Europe*, Oxford University Press, Oxford, 1999, pp. 285 – 292.

as of a social morality.⁵⁴ Are these not exactly the most important components of Croatian political life?

However, in Croatian politics the scientific approach to constitutional engineering has been almost completely neglected and subdued to the interests of the ruling party. This has been the case in particular with the present government, since its victory in the general elections of 2011. What worries us even more is that apparently similar processes can be seen in a number of European Union member countries, and that they have had an impact on the functioning of the Union bodies themselves, i.e. on the governing elites of the European Union.

The critical and final test of viability of any constitutional system are the situations of serious crises when the truth of power relations comes to light. But have there ever existed two generations in Europe who were spared from serious crises. The answer is there have not, but there actually exists one that has been spared from war, where Croatia unfortunately is an exception. As a matter of fact, the theory of constitutional engineering is a theory of how to deal with crises in a democratic manner. That is why it ever again returns from oblivion after conflicts and crises. Pessimistic evaluations of the mid 20th Century that "the Constitution has not fulfilled what was the most important expectation, to bring the social order safe from shocks and crises"⁵⁵, actually demonstrate how enormously excessive expectations had been nurtured by the Western constitutionalists in the aftermath of the Second World War. They have been emulated in the extremely optimistic ideas at the beginning of the 21st Century that the very constitution might bring answers to open questions of the future of civilization.⁵⁶

In our view a return to the constitutional approach is 'a must' on both levels (of political parties and the constitutional). This is why I consider it worth discussing such an impractical theory in this moment. We are in dire need of consolidation of constitutional systems in order to respond to new challenges, while simultaneously preserving the fundamental principles of democracy, human rights and freedoms and the rule of law. This requires a diffe-

⁵⁴ Lutz, Donald D.: *Principles of Constitutional Design*, Cambridge University Press, Cambridge, 2006, p. 5. For a history of ideas see Scott, Gordon: *Controlling the State. Constitutionalism from Ancient Athens to Today*, Harvard University Press, Cambridge, Mass., 1999.

⁵⁵ Loewenstein, Karl: *Political Power and the Governmental Process*, University of Chicago Press, Chicago, 1957, p. 161.

⁵⁶ Haberle, Peter: *Ustavna država*, Politička kultura, Zagreb, 2004.

rent approach to crises.⁵⁷ The concept of the rule of law includes a balance of shared powers wherever authority has been confined. Its purpose is to enable mutual control. The system of power sharing has been invented and designed by and for rational actors. Political struggle in a democracy does not necessarily bring that kind of leaders into governmental institutions.

4. Caveat to the leaders: we need to stabilize the Constitution

Constitutional checks and barriers, however, just like all the other constitutional institutions, could be employed for very different purposes. We hold it important to warn the relevant public about the existing idea of changing the Constitution in a citizen-initiated referendum.⁵⁸ The idea was launched by the former President Josipović during the electoral campaign.⁵⁹ In April 2014 the President had formed an expert task force for a project of constitutional changes. The project was essentially developed, but not completed, during the summer of 2014. Whilst the expert materials had been kept undisclosed by the President's decision⁶⁰, during his campaign Josipović included a series of elaborated profound constitutional reforms into his electoral program entitled "This is the right path".⁶¹

⁵⁷ At the moment when the final version of this article is being corrected, the proposals have been advanced that the conflict between the President and the Government be solved by the new constitutional legislation. Although the proponent demands that certain competences which have been narrowed by the particular pieces of legislation in the year 2013 be returned to the President, when once opened, the process would go according the party lines and interests. See <http://direktno.hr/en/2014/direkt/11416/Kolinda-treba-zakonsko-upori%C5%A1te-zabranu-od-opstruiraju%C4%87e-politike-Vlade.htm>.

⁵⁸ Art. 87 sec. 3 of the Constitution: "The Parliament shall call a referendum if so demanded by a ten percent of the total number of voters in the Republic of Croatia."

⁵⁹ Josipović: "I have been thinking about referendum if the parties reject my proposal.", see: https://www.google.hr/search?q=ustav+josipovi%C4%87&oq=ustav+josipovi%C4%87&aqs=chrome..69i57j69i60.5598j0j7&sourceid=chrome&es_sm=93&ie=UTF-8 (30.03.2015).

⁶⁰ The Constitutional Commission of the President of the Republic: Arsen Bačić, Petar Bačić, Sanja Barić, Đorđe Gardašević, Zvonimir Lauc, Robert Podolnjak, Branko Smerdel. Ivo Josipović had worked as a leader of the group, and fully participated in all discussions. In some cases of disagreement, the group would apply the rule of the primacy of the President's decision. Certain issues, such as the constitutionality of an usage of the civic initiative by the President have not been discussed.

⁶¹ *Josipović: Druga Republika je pravi put*, Poslovni tjednik, December 8, 2014, www.poslovni.hr/hrvatska/josipovic-druga-republika-je-pravi-put-285382 (30.03.2015).

Confronted with the rejection of the idea, not only by the opposing candidate Mrs. Grabar-Kitarović and the CDU leaders, Vladimir Šeks and Tomislav Karamarko, but also with strong criticism by the head of the Social Democratic Party, which supported his candidacy, Josipović took a new approach to constitutional interpretation. He revealed his plan to initiate a civic referendum about constitutional reform if the parties reject his project after his re-election, so that an initiative from the Parliament or together with the Government shows impossible.⁶² Thus, the President of the Republic assumes the role of a potential initiator of the referendum on constitutional reform, just like any other citizen. Such a bold constitutional interpretation by the previously self-restrained President came as a surprise to the political and scholarly community. But there was virtually no political dispute, or even an academic discussion about it. Its prevalently political substance was avoided due to the presidential campaign, and it is now time to warn about the possible implications.⁶³

After his electoral defeat, professor Josipović apparently abandoned the idea in explaining his political plans and priorities. But the idea of the President initiating a serious constitutional reform by putting into usage a civic referendum, with the help of his political supporters has been launched. It exists in the public realm, not contested by anyone, and thus being actually available to anyone courageous enough to employ it after the "Candidate Josipović's interpretation".⁶⁴ It could be employed by the actual President of the Republic to strengthen her authority, but also for various other purposes, one among them to forsake a direct election and power sharing of the President, as has been rather often proposed by the current Prime Minister Milanović, but also in a more modest way by the opposition leader Karamarko.

The main problem with the regulation of referendum in all the variations, we see in the constitutional provision that in all kinds of state referenda, the decision is made by a majority of those who had given their vote (Article 87/4

⁶² Josipović: *Pripreman promjenu Ustava, ali tek u idućem mandatu*, Večernji list, July 12, 2014, <http://www.vecernji.hr/hrvatska/novi-ustav-ponudit-cu-gradanima-na-referendum-jer-su-moji-prijedlozi-vecini-stranaka-neprihvatljivi-950052> (30.03.2015).

⁶³ Although the issue has been introduced on a purely juristic level of "a principle of certainty of the referendum question" by Kostadinov, Biljana: *Načelo jasnoće referenduskog pitanja u Europi i u SAD-u*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 65, No. 1, 2015, pp. 55 – 85.

⁶⁴ The President of the Republic using the civic initiative clearly reminds of a number of plebiscits which had been called in history by the great political leaders in several European countries.

of the Constitution). This solution, included into the Constitution in 2010 on the grounds that in a situation where the correct number of voters is unknown no quorum can be prescribed, but actually in order to prevent any possible resistance to the accession to the EU, has transformed referenda into potentially destructive instruments, dangerous for the viability of the democratic system.⁶⁵ When a needed number of signatures has been collected, the result is more than certain.

When it comes to constitutional reforms, in combination with the described “candidate Josipović’s interpretation”, a clear and present danger to the maintenance of the power sharing system can be noticed. Such a development should be prevented as soon as possible by entering the requirement of a considerable number of votes necessary to change the Constitution in a referendum.

⁶⁵ Podolnjak, Robert; Smerdel, Branko (eds.): *Referendum narodne inicijative u Hrvatskoj i Sloveniji: ustavnopravno uređenje, iskustva, perspektive*, Hrvatska udruga za ustavno pravo, Zagreb, 2014.

Sažetak

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**USTROJSTVO I DJELOVANJE "HIBRIDNOG PREDSJEDNIŠTVA"
– OCJENA DJELOVANJA DIOBE VLASTI UNUTAR HRVATSKE
IZVRŠNE VLASTI**

Hrvatski sustav ustrojstva vlasti kakav je uveden ustavnim promjenama iz 2000. godine, a posebno položaj predsjednika republike u tom sustavu, podvrgava se periodično vrlo oštrim kritikama, uglavnom s dvije polazne pozicije. Prvo, sa stajališta ustavnopravne teorije, kao "čtvrt-predsjednički sustav", za razliku od navodno postojećeg "čistog parlamentarizma", te kao "hibridni model", za razliku od "čistih" modela. Drugo, s praktičnog stajališta, kao nedjelotvoran sustav, koji ne određuje središte najviše vlasti, te tako pridonosi neželjenim sukobima. U tome bi imala biti razlika naspram "kancelarskog sustava", koji predsjedniku države dodjeljuje samo reprezentativne funkcije, dok izvršnu vlast koncentrira u rukama predsjednika vlade. Prigovor je i to što je dioba vlasti primijenjena unutar dvaju državnih tijela koja obavljaju funkcije izvršne vlasti (egzekutive). Neposredan izbor predsjednika republike kritizira se kao skup i nepotreban te se predlaže da se izbor povjeri Saboru kao "nositelju najviše vlasti".

Autor je sudjelovao u razradi modela i branio ga u različitim prilikama te sumira argumente njemu u prilog. Na teoriju o "čistom parlamentarizmu" odgovor je jednostavan: čisti modeli u životu ne postoje, inačice parlamentarizma bezbrojne su, od zemlje do zemlje. Dodatno, teorijsku "čistoću" teško bi bilo dovesti u vezu s djelotvornošću vlasti. Sa stajališta osiguranja održivog razvoja možemo ustvrditi upravo obratno: povijesno uspješni jedino su prikladno uređeni složeni modeli, prilagođeni potrebama konkretnih društava. Svrha kojoj dioba vlasti treba služiti nedvojbeno je uzajamno ograničavanje i nadzor svih nositelja vlasti, a posebno nositelja najviše vlasti, uz osiguravanje potrebne ravnoteže kako bi se očuvala djelotvornost. Na argument o mogućim sukobima odgovor je kako je najopasnije kad je sva vlast u rukama jednoga. Dioba vlasti, upravo obratno, navodi sudionike na razborito odlučivanje i kompromise. Kako je žarište vlasti egzekutiva, to je i locus gdje je treba primijeniti.

Polazi se od konstatacije kako tijekom triju mandata predsjednika republike izabranih u okvirima "hibridnog sustava", na početku četvrtog mandata s novom predsjednicom, institucija nije institucionalizirana te njezino dalje funkcioniranje u nedopustivoj mjeri zavisi od osobnih preferencija trenutačnog nositelja dužnosti. S obzirom na to, autor

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razlikuje tri tipa hrvatskog predsjedništva: imperijalno, tranzicijsko i samo-ograničavajuće. Autor u zaključku naglašava obvezu znanstvenika da stalno prate i propitkuju stvarno djelovanje tog ustavno zacrtanog sklopa institucija. Početak predsjedničkog mandata gospođe Grabar-Kitarović prilika je da pokušamo prosuditi perspektive njegova razvoja. Ključ je u okretanju strogom poštivanju Ustava i zakona, bez ustupaka stranačkim i drugim posebnim interesima. Bez toga sustav odijeljenih vlasti ne može služiti svrsi zbog koje je unesen u sve demokratske ustave: ograničavanje i odgovornost nositelja vlasti. Moguće je zaključiti kako sustav diobe vlasti neće moći u potpunosti zaživjeti sve dok se ne poduzme ozbiljan korak s ciljem primjene članka 6. Ustava Republike Hrvatske, koji obvezuje stranke na demokratsko ustrojstvo i djelovanje. Ali moguće je i obratno: da vodeće političke stranke potvrde svoju dominaciju i dokrajče taj iznimno vrijedan ustavni eksperiment.

Ključne riječi: Republika Hrvatska, predsjednik Republike, Ustav, čisti parlamentarni sustav, kriza, hibridno predsjedništvo

