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Predsjednik Republike

Mimikrija Ustava Republike Hrvatske prema ustavnom modelu Francuske

Ustav nije Demiurg, suprotno onom što konstitucionalisti ponekad imaju sklonost vjerovati, ne treba biti nestabilna i neizvjesna zrcalna površina društva u pokretu, suprotno onom što bi neki političari priželjkivali.

(Bertrand Mathieu¹)

Polazna točka izučavanja hrvatske ustavne demokracije donošenje je Ustava Republike Hrvatske od 22. prosinca 1990. godine. Oblik ustrojstva vlasti Ustava Republike Hrvatske (1990) određen je kao polupredsjednički sustav, a autori hrvatskog Ustava navode kao uzor Ustav Pete Republike. Uvoz francuskog ustavnog prava 1990. godine nije bio neutralan. Iz originalnog francuskog ustavnog teksta odstranjene su institucionalne prepreke, ustavne institucije za pružanje otpora volji predsjednika republike, a i ustavnopravni uvjeti za prednost predsjednika vlade u političkom sustavu u slučaju kohabitacije, nepodudarnosti parlamentarne i predsjedničke većine. Tekst je nadograđen ustavnim normama nepoznatima originalu. Francuske je ustavne norme bilo potrebno instrumentalizirati, protumačiti i pravno prilagoditi poželjnom političkom cilju: uspostavi djelotvorne državne vlasti u kojoj se nadmoć predsjednika republike širi i na vladu i zakonodavnu vlast. Mit o polupredsjedničkom sustavu poslužio je i za usvajanje odredbi o ustrojstvu vlasti u Ustavu Hrvatske (1990) i prilikom izmjene tih odredbi Ustavnim promjenama iz 2000. godine.

Ključne riječi: polupredsjednički sustav, predsjednik Republike, predsjednik Vlade, Francuska Peta Republika, hrvatski Božićni Ustav

1 ŠAH-MAT POLUPREDSJEDNIČKOM SUSTAVU

Polazna točka izučavanja hrvatske ustavne demokracije donošenje je Ustava Republike Hrvatske od 22. prosinca 1990. godine.² Konačnu redakciju teksta Prijedloga Ustava Republike Hrvatske (1990.) obavila je „Redakcijska skupina“ u sastavu Smiljko Sokol, Zdravko Tomac i Vladimir

Šeks.³ Oblik ustrojstva vlasti Ustava Republike Hrvatske (1990) određen je kao polupredsjednički sustav u prvom udžbeniku ustavnog prava u demokratskoj hrvatskoj državi.⁴ Moramo se zapitati nije li je mit o polupredsjedničkom sustavu, oruž-

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1 Mathieu 2008: 9.

2 Ustav Republike Hrvatske, NN 56/1990.

3 Smerdel & Sokol 2009: 89: „Valja pripomenuti da su u oblikovanju ustavnih rješenja najviše pridonijeli Smiljko Sokol i Vladimir Šeks. Franjo Tuđman, kao predsjednik Ustavotvorne komisije, izravno je utjecao na temeljna ustavna rješenja, a pisac je „Izvorisnih osnova“ (preambule ili proslova)“.

4 Sokol & Smerdel 1992: 151.

je svih novatora i reformatora hrvatskog ustavnog sustava, u osnovi, namjerno ili ne, izjednačen s mistifikacijom ili obmanom? Ako mistifikacija postoji danas, sastoji se u korištenju dvojbenog politološkog koncepta polupredsjedničkog sustava u okviru borbe za vlast, u određivanju značenja i težine koju on nema.

Autori hrvatskog Ustava određuju značajke polupredsjedničkog sustava prema konceptu M. Duvergera,⁵ koji tumači da ustavni sustav francuske Pete Republike nije jedinstven, već pripada skupini država gdje se državni poglavar bira neposredno i ima *znatne ovlasti*, a vlada je odgovorna parlamentu: Austrija, Finska, Portugal, Irska, Island, Weimarska Republika.

Francuska udruga za političku znanost na Kongresu 2009. godine u radionici *Što je ostalo danas od djela Maurice Duvergera?* utvrđuje da je M. Duverger, nekada zaštitna figura javnog prava i političkih znanosti, danas zaboravljen u Francuskoj. Posljednja referenca i posljednja počast iskazana mu je 1987. godine knjigom *Mélanges Duverger*.⁶

Pfersmann se distancira od uporabe koncepta „polupredsjedničkog“ sustava za određivanje Pete Republike:⁷

Riječ je o ideološkom instrumentu za opravdanje stalnih povreda Ustava od strane Predsjednika Republike i dobrovoljnom ropstvu političkog i pravničkog osoblja koje podrazumijeva pristup takvom „čitanju“ teksta.

Njezino ustrojstvo vlasti pravno nije ništa drugo do parlamentarni sustav, a primjena je u velikoj mjeri neustavna. Izmjena ustavnog ustrojstva vlasti druge države u „francuski“ sadrži u sebi rizik proizvodnje potpuno drugačijih učinaka,

stoga što *povreda Ustava ne može biti uokvirena ustavom*.

M. Duvergeru navedena obilježja polupredsjedničkog sustava nisu dostatna za razvrstavanje u skupinu, niti može samo pomoću njih objasniti klasifikaciju. Stoga u svom prvom članku na engleskom jeziku ukratko definira model, a u širem opsegu iznosi različitosti političkih sustava navedenih država, ocrtava figurativno predsjedništvo (Austrija, Island, Irska), nadmoćno (Francuska) i uravnoteženo predsjedništvo i vladu (Finska, Portugal i Weimarska Republika). Razmatra ustavne ovlasti tijela državne vlasti i uvjete uspostave sustava. Tumači da predsjedničke ovlasti ovise o opstojnosti i prirodi parlamentarne većine i da li parlamentarna većina podržava predsjednika ili mu se suprotstavlja.⁸ Autor za oblikovanje koncepta uzima i ustavne ovlasti i zbiljsko funkcioniranje vlasti. Neposredan izbor predsjednika države nužan je, ali nije dovoljan uvjet za razvrstavanje u skupinu polupredsjedničkih sustava, neposredno izabrani predsjednik mora biti i relativno snažna figura. Elgie ističe da takva logika u utvrđivanju kriterija klasificiranja neizbježno uvodi subjektivnost u proces, uključuje prosudbu o tome koliko je predsjednik države nadmoćan ili to može biti, što ohrabruje različite autore u razvrstavanju država u različite skupine.⁹ Navodi da su Stepan i Skach 1993. godine odredili samo Francusku i Portugal polupredsjedničkim sustavima, a Austriju, Island i Irsku parlamentarnim, zato što imaju slabe predsjednike iako su neposredno izabrani. Sartori ima isti pristup. 1997. godine iznosi da Austrija i Island nisu polupredsjednički sustavi zato što su im predsjednici „snažni samo na papiru“, zbiljski ustav ih je lišio ustavnih ovlasti.¹⁰ Cijena koštanja takvog pristupa je da se njime udaljavamo od postavljenih pravila rasprave o oblicima ustrojstva vlasti.

5 Duverger 1980: 166. Tekst na engleskom jeziku: "A political regime is considered as semi-presidential if the constitution which established it combines three elements: (1) the president of the republic is elected by universal suffrage, (2) he possesses *quite considerable powers*; (3) he has opposite him, however, a prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them." Vidi: Duverger 1971.

6 Colas & Emeri 1987. URL: www.congresafsp2009.fr/ (pristup 8.11.2011). *Slično* -

7 Pfersmann 2009: 275–286. Peta Republika ima parlamentarni sustav, no to nam ne govori puno.

8 Vidi šire: Duverger 1978.

9 Elgie 2004: 314–330. Elgie kao jednu od mogućnosti izučavanja nudi: "*We may choose not to study semi-presidentialism at all*. The veto players approach provides an alternative way of studying political institutions and overall may provide a more fruitful method of analysis." URL: <http://doras.dcu.ie/63/> (pristup 5.11.2011).

10 Elgie 2004. Autor navodi: Alfred & Skach 1993: 9; Sartori 1997: 126. Sartori izbacuje i Irsku.

Troper u radu *Klasifikacije u ustavnom pravu* iz 1989. godine o znanstvenoj vrijednosti klasificiranja izvan klasične dihotomije na predsjednički i parlamentarni sustav tumači:¹¹

Izvršnost usporedbe ovisi o tome da li su klase uspoređene u potpunosti. (...) Dakle, uzmemo li kao kriterij jednu značajku, prva klasa mora biti definirana tom značajkom a druga suprotnom, odnosno nepostojanjem značajke. To pravilo nije ništa drugo nego implementacija načela nekontradiktornosti. No, u slučaju političkih sustava, dva oblika - parlamentarni i predsjednički prikazani su strogo kao suprotni ili čisti. Prema tome, oni to jesu ukoliko, kako smo i naveli, predsjednički sustav ima neposredan izbor predsjednika i nedostatak političke odgovornosti, te parlamentarni sustav ima političku odgovornost i nedostatak neposrednog izbora predsjednika. Suprotno navedenom, „mješovit“ bi sustav sadržavao kontradiktorna obilježja: neposredan izbor predsjednika i nepostojanje neposrednog izbora, političku odgovornost i nedostatak političke odgovornosti, što bi naravno bilo apsurdno.

Klasifikacija može biti samo formalna, nema druge operative vrijednosti osim što klasificira sustave po tome da li njihov ustav ima parni ili neparni broj članaka. Autor kritizira svaki pokušaj klasifikacije, navodi da nikakav uzročni odnos ne bi mogao postojati između ustavnih struktura i stvarnog političkog sustava, te dodaje da klasificiranje sustava nema znanstvenu vrijednost.¹²

Kasapović iznosi:¹³

Izvorno Duvergerovo određenje novoga političkog sustava postalo je predmetom stalnih teorijskih prijedora koji su se koncentrirali oko triju pitanja. Prvo, jesu li navedena glavna obilježja dostatna da se konstituiraju novi sustav vlasti, odnosno novi politički režim? Drugo, što treba podrazumijevati pod „znatnim ovlastima“ predsjednika države i kako tu sintagmu diferencirati u konkretne ustavne ovlasti? Treće, kako se odnosi prema analitičkim pristupima, konstitucionalnom i empirijskome, što ih je Duverger primijenio u klasificiranju

polupredsjedničkih sustava, a koji daju različite rezultate?

Autori hrvatskog Ustava navode kao uzor Ustav Pete Republike,¹⁴ no francuski profesori ustavnog prava Burdeau, Troper i Hamon,¹⁵ tumače da njezin institucionalni sustav sadrži glavna obilježja parlamentarnog sustava: dualističku izvršnu vlast, političku odgovornost vlade parlamentu, pravo raspuštanja parlamenta i donekle, instituciju supotpisa akata državnog poglavara od strane vlade. Ističu da se od referenduma o neposrednom izboru predsjednika republike (1962.) narodna suverenost izražava i izvan parlamentarnih, na predsjedničkim izborima. Profesori iznose da je riječ o novom institucionalnom obliku parlamentarnog sustava, no ne žele mu dati određeni naziv ili izdvojiti mišljenje nekog drugog autora.

Maus, Colliard, Duhamel, Favoureu i Luchaire 1993. godine, okupljeni u Savjetodavnom ustavnom vijeću za izmjenu Ustava Francuske (1958.) pod predsjedavanjem Vedela, u zadržavanju političke odgovornosti vlade parlamentu Pete Republike vide dokaz o postojanju parlamentarnog sustava i odbacuju daljnju raspravu je li to sustav izvan tradicionalne diobe na predsjednički ili parlamentarni sustav i postoji li mješavina tih sustava.¹⁶

Cohendet 2002. godine tumači da je Peta Republika *ostala parlamentarnom*, s oblikom

14 Tako Vladimir Šeks o pozadini nastanka hrvatskog Ustava u *Glasi Slavonije* od 27. prosinca 2009. iznosi: „Svoj sam uradak prezentirao u veljači 1990. godine na prvom saboru HDZ-a u Dvorani Lisinski i u njemu su bile sadržane sve bitne odrednice našeg temeljnog pravnog dokumenta, po uzoru na francuski Ustav, prema kojem je predsjednik Republike faktičan šef države. Procjenjivao sam, naime, da će Hrvatska u razdoblju osamostaljenja trebati predsjednika s jakim ovlastima, a i u skladu sa svjetonazorom Franje Tuđmana predsjednik je morao biti državni poglavar.“ URL: http://www.glas-slavonije.hr/vijest.asp?rub=1&ID_VIJESTI=118459 (pristup 5.11.2011).

15 Burdeau, Hamon & Troper, 1997: 433. Autori tumače: „Ako bezuvjetno hoćemo prilijepiti etiketu francuskim institucijama, mogli bismo ih odrediti „polupredsjedničkim“ prema terminologiji M. Duvergera. Međutim, takva nam etiketa ne bi pomogla razumjeti način na koji djeluju naše institucije.“

16 Propositions pour une révision de la Constitution 15. février 1993., La Doc. française, Paris, 1993.

11 Troper 1989: 945–956.

12 Hamon & Troper 2007: 104–121 & 477.

13 Kasapović 2007: 29.

ustrojstva vlasti u kome je vlada odgovorna parlamentu. Iako je na početku sustav bio *monoreprezentativan*, od izmjene ustava 1962. godine je *bireprezentativan*:¹⁷

Često se sustav označava na upitan način „polupredsjedničkim“, što je denominacija kojoj manjka logike. Ne možemo istodobno odrediti kao parlamentarni sustav onaj u kome je vlada odgovorna parlamentu i iznijeti da sustav u kome vlada odgovara parlamentu nije parlamentarni sustav. Upravo je tako postupio M. Duverger.

Canelas Rapaz odbacuje i polupredsjedničko određenje portugalskog ustavnog sustava i ostanak Portugala u društvu „šest Duvergerovih Titanida, kćeri Geje i Urana, majke zemlje i oca neba.“¹⁸ Šah-mat Duvergerov koncept polupredsjedničkog sustava dobiva zbog slabosti kriterija i nedostataka u razradi. Apsolutni i univerzalni odgovor na pitanje da li je u Portugalu polupredsjednički sustav je zapravo postao trivijalan jer je jedini odgovor na to da „polupredsjednički sustav ne postoji“.¹⁹

Daly navodi da klasifikacija modernih ustavnih sustava izvan klasične dihotomije parlamentarni/predsjednički nailazi na nepoželjne tendencije: provincijalizam, pogreške u postupku, koncepcijsku rastezljivost i *degreism*.²⁰

Kasapović 2007. godine u radu *Komparativna istraživanja polupredsjedničkih sustava u Srednjoj i Istočnoj Europi: problemi koncepcijske rastezljivosti, selekcijske pristranosti, tipologiziranja i denominiranja* navodi autore osporavatelje polupredsjedničkog sustava kao sustava sui generis: primjerice, Steffani, Loewenstein, Pelinka, Avril, Colliard i Quermonne drže da je riječ o parlamentarnom sustavu, druga skupinu znanstvenika ga razvrstava u predsjednički sustav, a treća u podtipove parlamentarnih i predsjedničkih sustava.²¹

17 Cohendet 2002: 173.

18 Canelas Rapaz 2009: 10.

19 Canelaz Rapaz 2009. Autor u naslovu poglavlja rada *Echec et mat au concept par le manque d'opérabilité* aludira na M. Duvergerovu knjigu *Echec au Roi*.

20 Daly 2003: 96–108.

21 Kasapović 2007: 27–54. Prvi dio članka: 1.2. Osporavanje polupredsjedničkog sustava kao sustava sui generis: tri pravca interpretacija.

Koncept M. Duvergera odbačen je u Francuskoj krajem osamdesetih godina 20. stoljeća, ustrojstvo vlasti Pete Republike nije reinterpetirano, ostaje inačica parlamentarnog sustava.

2 DENATURACIJA USTROJSTVA VLASTI PETE REPUBLIKE U USTAVU REPUBLIKE HRVATSKE (1990.)

Sokol u radu Polupredsjednički sustav i parlamentarizam 1992. godine navodi da je hrvatski polupredsjednički sustav, po svojim ustavnopravnim obilježjima vrlo blizak, ali ne i posve jednak suvremenom francuskom ustavnom modelu ustrojstva vlasti, a kad je riječ o usporedbi zbilje hrvatskog i francuskog polupredsjedničkog sustava, ocjenjuje da je hrvatski polupredsjednički sustav najbliži francuskoj zbilji čistog degolističkog parlamentarizma kakav je postojao u razdoblju od 1962. do 1969. godine.²²

Potvrda pisaca hrvatskog ustavnog teksta o izvoru nadahnuća i sličnost između nekih ustavnih mehanizama u oba teksta nije dovoljna za zaključak da je francusko ustavno pravo bilo izvorom nadahnuća. Nužno je odrediti i što je bilo objektom uvoza, ali se i vratiti izučavanju dokumenata o izradi Ustava Republike Hrvatske iz 1990. godine.²³

Smerdel tumači da je odluka o prihvatanju polupredsjedničkog sustava u Republici Hrvatskoj donesena zbog političke koncepcije upravljanja državom Franje Tuđmana, nepostojanja demokratske tradicije i prevladavajuće sklonosti novih političkih elita sustavu koncentracije i personalizacije vlasti, te ocjene ustavotvoraca kako budućnost donosi takve probleme i opasnosti

22 Sokol 1992: 16.

23 Usporedba teksta prvog Prijedloga nacrtu Ustava Republike Hrvatske od 15. kolovoza 1990. godine i Nacrtu Ustava Republike Hrvatske od 23. studenog 1990. godine sa Ustavom Republike Hrvatske od 22. prosinca 1990. godine, te izučavanje zapisnika sa sjednica ustavotvornih komisija temelj su za utvrđivanje ustavne misli pisaca ustavnog teksta. Vidi: Šarin 1997. Usporedni tekst prvog Prijedloga nacrtu Ustava Republike Hrvatske, Nacrtu Ustava Republike Hrvatske i Ustava Republike Hrvatske, str. 263.-337.

koji zahtijevaju centralizaciju političkog odlučivanja.²⁴

Prigodom izbora ustavnog modela ustrojstva vlasti u Hrvatskoj veliku ulogu imao je ugled institucija utemeljen na izuzetnoj djelotvornosti francuskog ustrojstva vlasti, ali i prestiž prvog predsjednika Pete Republike, generala De Gaullea, simbola slobodne Francuske. Držimo da su autori hrvatskog Ustava (1990.) osim ustavnim tekstom bili nadahnuti i stvarnim načinom vladanja De Gaullea. Budući da jednostavno usvajanje ustavnih normi o položaju i ovlastima francuskog predsjednika Republike ne bi jamčilo poželjan način vladanja, pisci ustava su prešli granice originalnog francuskog ustavnog teksta. Konstitucionalizirano je i u bitnome ustavnopravno reproducirano funkcioniranje francuskih vlasti za vrijeme predsjedavanja Republikom generala De Gaullea (od 8. siječnja 1959. godine do 28. travnja 1969. godine).

Na taj su način ne samo otišli izvan okvira Ustava Pete Republike, već su denaturirali originalni ustavni tekst, izmijenili obilježja francuskog ustavnog modela. Uvoz francuskog ustavnog prava 1990. godine nije bio neutralan, nije bila riječ o prijevodu ustavnih normi, no ustavnopravna znanost uči da i pravnička transplantacija ustavnog teksta drugih država ne jamči identično djelovanje u matičnoj državi. Bilo je potrebno francuske ustavne norme instrumentalizirati, protumačiti i pravno prilagoditi poželjnom političkom cilju: uspostavi djelotvorne državne vlasti u kojoj se nadmoć predsjednika republike širi i na vladu i zakonodavnu vlast.

Iz originalnog francuskog ustavnog teksta odstranjene su institucionalne prepreke, ustavne institucije za pružanje otpora volji predsjednika republike, a i ustavnopravni uvjeti za prednost predsjednika vlade u političkom sustavu u slučaju kohabitacije, nepodudarnosti parlamentarne i predsjedničke većine. Tekst je nadograđen ustavnim normama nepoznatim originalu. Unatoč upozorenju profesora Bačića na 5. sjednici Komisije za ustavna pitanja Sabora (22. studeni 1990.) da su

ograničene kompetencije legislative u korist intervencionističke uloge egzekutive, koje su sačuvane tradicionalnim principima. Prije sve-

ga supremacije nad oružanim snagama, pravo imenovanja ministara, objavljivanje ratnog stanja, odlučivanje o intervenciji države, predlaganje ustavnim promjena

te s obzirom na upravo tu ustavnu evoluciju treba predložiti neke amandmane Prijedlogu Ustava i akcentirati ulogu hrvatskog Sabora²⁵ i parlamentarni sustav, strateški cilj ostvaren je u hrvatskom ustavnom tekstu jačanjem ovlasti predsjednika republike i legitimacijom postignute neravnoteže vlasti.

3 MIMIKRIJA USTAVA REPUBLIKE HRVATSKE (1990.) PREMA FRANCUSKOM UZORU

3.1 O odstupanju degolističke vladavine od Ustava Pete Republike (1958.)

Evoluciju političkog sustava obilježenu personalizacijom vlasti u razdoblju De Gaulleovog predsjedavanja Republikom (1959.-1969.) uspoređuje se s principatom, općim pojmom za određivanje svih suvremenih sustava gdje političkim tijelom upravlja jedna osoba.²⁶ Prema Quermoneu De Gaulle u govoru od 31. siječnja 1964. godine iznosi koncepciju vlasti u kojoj je predsjednik Republike izvor i nositelj vlasti, jamac budućnosti Francuske i Republike, narod mu je dodijelio nedjeljivu državnu vlast, niti jedna druga vlast ne može postojati ako je on nije dao i držao.²⁷ De Gaulle potvrđuje da djelovanje vlasti u vrijeme njegovog obnašanja predsjedničke funkcije odstupa od ustavnog teksta, prije parlamentarnih izbora 1967. godine, za koje se pribojavao da će donijeti pobjedu oporbi, izjavljuje: „Zapravo će biti zabavno gledati kako možemo vladati s Ustavom“.²⁸ Od investiture De Gaullea na dužnost posljednjeg predsjednika Vlade IV. Republike 1. lipnja 1958. godine do prvih parlamentarnih izbora (18. i 25. studenog 1962.), nakon referenduma o neposrednom izboru predsjednika Republike u Petoj Republici (28. listopada 1962.), u Francuskoj nema većinskog fenomena, ne

²⁵ Šarin 1997: 107.

²⁶ de Jouvenel 1964: 1053.

²⁷ Quermone & Chagnolland 1991: 84. Tekst govora od 31. siječnja 1964. godine vidi u: Maus 1998: 42–44.

²⁸ Duverger 1986: 7.

²⁴ Smerdel 2010: 13.

poznaje stabilnu parlamentarnu većinu istovjetnu s predsjedničkom političkom većinom, stoga uspostava nadmoći predsjednika Republike nije bila posljedica trostrukog političkog konsenzusa, alžirski rat je u tome odigrao najvažniju ulogu.²⁹

Alžirski rat neposredno doprinosi proširenju ovlasti predsjednika Republike na štetu predsjednika Vlade. Primjerice, 13. veljače 1960. godine osnovano je prvo *Vijeće za alžirske poslove* pod isključivim utjecajem državnog poglavara. To je poslužilo kao presedan običajnom prihvatanju institucije kojom se državnom poglavaru daje niz područja iz redovitog djelokruga Vlade. Početno razdoblje V. Republike obilježeno alžirskim ratom vodilo je prezidencijalizaciji sustava. Od ulaska De Gaullea u l'Elysée (8. siječnja 1959.) do proljeća 1962. godine predsjednička vlast presudno je utjecala na rješavanje alžirske krize. Uporaba ustavnih postupaka i institucija u navedenom razdoblju ostavit će trajne posljedice na ravnotežu vlasti u V. Republici. Već je na samom početku bilo jasno da sve značajne odluke oko Alžira donosi De Gaulle samostalno. Vijeće za alžirske poslove pod predsjedavanjem predsjednika Republike, u čijem sastavu su bili predsjednik Vlade i odgovorni ministri i časnici, neposredno će postaviti sve odgovorne osobe pod predsjedničko vodstvo. Riječ je o prvom institucionaliziranju jednog vladinog tijela pod predsjedavanjem predsjednika Republike, a *izvan* Ministarskog vijeća. Imenovanjem Joxe-a ministrom za alžirske poslove 22. siječnja 1960. godine De Gaulle pokazuje volju za neposredno vođenje pregovora s Alžiirom. Predsjednik Vlade neće se suprotstaviti toj odluci uvjeren da samo De Gaulle može alžirsku krizu i riješiti.³⁰ Zastupnici u Parlamentu bili su sličnog stava, donoseći Zakon o ovlastima Vlade od 4. veljače 1960. godine,³¹ za donošenje uredbi temeljem zakonske ovlasti (čl. 38. Ustava Francuske) zbog alžirske krize, određuju da se te uredbe donose uz potpis predsjednika Republike generala De Gaullea. Dodatak u tom Zakonu, da

uredbe mora potpisati De Gaulle, pravno znači kraj posebnih ovlasti u slučaju promjene predsjednika Republike! Teško je i zamisliti odredbu toliko suprotnu francuskoj parlamentarnoj tradiciji. De Gaulle tako dobiva ne samo ustavne ovlasti već i zadaću rješavanja alžirske drame. Alžir je bio povod uspostavi neposredne veze između De Gaullea i naroda, putem referenduma narod je plebiscitarno potvrđivao predsjedničku politiku. Četiri mjeseca po završetku alžirske krize dolazi do najznačajnije ustavno institucionalne posljedice rata, referenduma o neposrednom izboru predsjednika republike (28. listopada 1962.).³²

Neposredan izbor neće izmijeniti De Gaulleove misli o ustavnoj ulozi predsjednika republike, u predsjedničkoj kampanji 1965. godine odbija se svrstati uz neku stranku i sudjelovati u duelu s drugim predsjedničkim kandidatima. To će ga stajati drugog izbornog kruga u koji ide kao predstavnik narodnog ujedinjenja i zaštitnik institucija protiv kandidata ujedinjenih stranaka spremnih srušiti institucionalni sustav. Ni nakon neposrednog izbora neće se odreći uporabe referenduma, držeći da je to jedini postupak provjere predsjedničkog legitimiteta u narodu. Neposredni izbori nisu dovoljan dokaz predsjedničkog legitimiteta, De Gaulle mora taj legitimitet redovito provjeravati i zato odlazi s vlasti nakon negativnog referenduma o Senatu i regijama (27. kolovoza 1969.). Taj je čin bio njegova potvrda poštovanja demokracije.³³ Ustavnu zbilju opisa-

29 Tek nakon izbora u studenom 1962. godine degolistički U.N.R. sa 42% glasova osvaja apsolutnu većinu mandata (55%) u Nacionalnoj skupštini.

30 de Courcel 1988: 9–10.

31 Zapisnik sa sjednice Nacionalne skupštine od 2. veljače 1960. godine. URL: <http://archives.assemblee-nationale.fr/1/cr/1959-1960-extraordinaire/2001.pdf> (pristup 6.11.2011).

32 Tradicionalne političke snage suprotstavile su se neposrednom izboru, zahtijevaju „ubranu obnovu republikanskih institucija“, uklanjanje prezidencijalističkog tumačenja ustavne zbilje. Pokušan je atentat na De Gaullea u Pétit-Clamartu, M. Duverger iznosi da atentat nisu izvršili komandosi francuskog Alžira, već politički čelnici kako bi svim sredstvima spriječili referendum o neposrednom izboru predsjednika. Zaključuje da je u tu tezu teško dokazati: „no sve je bilo moguće u užasnoj atmosferi tog razdoblja“. Duverger 1986: 25.

33 Predsjednik Franjo Tuđman iznosi slično mišljenje o referendumu – sredstvu državnog poglavara na raspravi na 2. sjednici Uredničkog odbora ustavotvorne komisije Predsjedništva Republike (31.10.1990.). Na primjedbu o odbacivanju prava predsjednika republike za raspisivanje referenduma traži zadržavanje institucije: „jer može biti i različitih pitanja koje je moguće i potrebno postaviti, jer na kraju referendum je vrhovna demokratska institucija“. Navod iz: Šarin 1997: 94.

nog razdoblja mogli bismo usporediti s člankom 3. Ustava Drugog Carstva iz 1852. godine: „Predsjednik Republike vlada pomoću ministara, Zakonodavnog tijela i Senata“.³⁴

M. Duverger još početkom 1962. godine iznosi da je neposredan izbor predsjednika republike bio jedini način opstanka degolističkog poretka nakon odlaska utemeljitelja i traži uvođenje predsjedničkog sustava. Tumači da bi lišen neposrednog izbora De Gaulleov nasljednik *konačno trebao primijeniti Ustav*, za razliku od degolističke vladavine: „On je jedinstvena osoba. Držim da V. Republika ne postoji, to je osobni konzulat“.³⁵ Zbilja Pete Republike odbacuje Duvergerovu pogrešnu procjenu da će bez uvođenja predsjedničkog sustava biti dovoljna samo jedna general-ska urota za uništenje poretka. Upravo suprotno, *povratak* na fleksibilni ustavni tekst Ustava Pete Republike omogućio je političku stabilnost, nije spriječio europsko udruživanje, liberalnu ni dirigitiranu ekonomsku politiku, niti djelovanje javnih vlasti u kohabitaciji i ostale izazove pred kojima se našla Francuska u posljednjih pedeset godina.

Opis degolističkog razdoblja možemo donekle usporediti s opisom hrvatske ustavne zbilje od 1990. do 2000. godine. Smerdel u radu *Konstitucionalizam i promjena vlasti* iznosi:³⁶

Središte i simbol režima postalo je imperijalno predsjedništvo, koje je od početka građeno na interpretacijama stranim duhu, često i slovu Ustava, u procesu u kojem je vlast, zakonodavstvom i praksom koncentrirana u osobi predsjednika Republike, njegovom uredu i kvazisuvjetodavnim tijelima, od kojih je najizrazitiju ulogu odigralo Vijeće narodne obrane i nacionalne sigurnosti (VONS).

34 Constitution de 1852, Second Empire, Article 3. - Le président de la République gouverne au moyen des ministres, du Conseil d'Etat, du Sénat et du Corps législatif. URL: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1852-second-empire.5107.html> (pristup 6.11.2011).

35 Kostadinov 2004: 51.

36 Smerdel 2000: 20. Autor zaključuje da je sustav, posebno nakon predsjedničkih izbora 1997. godine, dobivao sve više značajki prerastanja iz imperijalnog ratnog predsjedništva u sustav izborne monarhije.

Želimo li konstitucionalizirati degolistički prezidencijalizam nije potrebno sastaviti novi ustavni tekst, većina odredbi može biti sačuvana. Trebamo ponovno napisati neke članke o predsjedniku republike i vladi, odbaciti diarhiju i uvesti nejednaki bicefalizam. No, zanemarili bi veliki rizik proizvodnje potpuno drugačijih učinaka, stoga što povreda Ustava Francuske ne može biti umetnuta u ustav.

Za ustavnopravno reproduciranje osnovnih načina djelovanja francuskih državnih vlasti nužno je u nacrtu zamijeniti političku odgovornost Vlade Parlamentu (čl. 20. st. 3. Ustava Francuske) s institucijom dvostruke političke odgovornosti vlade i predsjedniku republike i parlamentu, zadržati samostalnu ovlast predsjednika Republike za imenovanje i razrješavanje predsjednika Vlade (čl.8.) i izvanredne ovlasti (čl.16), a potom ukloniti institucionalne prepreke proširenju predsjedničkih ovlasti na štetu predsjednika Vlade. Predsjedničke ovlasti imenovanja i razrješavanja ostalih članova Vlade (čl. 8. st. 2), predsjedavanja Ministarskom vijeću (čl. 9.) i potpisivanja uredbi na temelju zakonske ovlasti (čl. 38.) i na temelju ustavne ovlasti (čl. 37.) koje donosi Ministarsko vijeće, pregovaranja i zaključivanja međunarodnih ugovora (čl. 52.), postavljanja i opoziva veleposlanika (čl. 14.), inicijativu za promjenu ustava (čl. 89.), imenovanja najznačajnijih civilnih čelnika i vojnih zapovjednika (čl. 13. st. 2. i 3.), podnošenja zakona na ponovno odlučivanje (čl. 10.) i vrhovno zapovjedništvo oružanim snagama i predsjedavanje vijećima narodne obrane (čl. 15.) trebalo bi lišiti *supotpisa predsjednika Vlade* potrebnog za njihovo obnašanje temeljem članka 19. Ustava Francuske (1958.). U nacrt bi dodali nove odredbe, institucionalizirali uspostavu tijela pod predsjedavanjem i vodstvom predsjednika Republike, a izvan Ministarskog vijeća. Nacrt bi zrcalio fragmentiranu ustavnu imitaciju ustavnog modela Pete Republike podastrijetu političkom subjektivizmu.³⁷

37 De Gaulle je isticao da je referendum je jedini postupak provjere predsjedničkog legitimiteta u narodu, J.-L. Débre vidi glavnu posljedicu principata u političkoj odgovornosti predsjednika republike. Iako je ustavno predsjednik politički neodgovoran, Débre tvrdi da je sustav evoluirao u smjeru priznavanja političke odgovornosti predsjednika republike. (Vidi: Debré 1974: 285.). Ustav Rumunji-

3.2 O duhu Ustava Republike Francuske (1958.) i hrvatskoj ustavnoj mimikriji

Izučavanje originalnog duha francuskog Ustava, ideje kojom je nadahnut, političkog plana ustavotvoraca, putokaz je u dvoznačnim situacijama. Ustavna misao ustavotvoraca Pete Republike vrijednosno je i institucionalno u okviru ustavnog modela parlamentarnog sustava, načelo diobe vlasti temelj je obnovljenog parlamentarnog sustava Pete Republike. Prigodom iznošenja konačnog teksta Prijedloga Ustava pred Državnim savjetom, ministar M. Débre, glavni redaktor ustavnog teksta, tumači:³⁸

To je ponajprije pokušaj uspostave vlasti bez koje nema ni države niti demokracije... Vlada je željela obnoviti parlamentarni sustav. Usudujem se kazati da ga treba uspostaviti jer su brojni razlozi što ga Republika nije uspjela uvesti.

Ustavna misao ustavotvoraca polazi od kritike parlamentarizma Treće Republike u kome je parlament uz zakonodavnu i nadzornu funkciju preuzeo i izvršnu vlast, te je stoga De Gaulleova koncepcija diobe vlasti u potpunosti suprotna tumačenjima ustavne doktrine prethodnih Republika. De Gaulle načelo diobe vlasti definira kao zabranu koncentriranja svih vlasti u rukama jednog tijela, izvršna i zakonodavna vlast moraju biti djelotvorno odvojene. Određujući diobu vlasti negativno, želi spriječiti konfuziju zakonodavne i izvršne vlasti u državi,³⁹ čija je posljedica anarhična nemoć i neodgovornost državne vlasti.⁴⁰ Teorijom diobe vlasti želi ograničiti razoran utjecaj Parlamenta Treće Republike koji je zbog opasne nemoći za vođenje državne politike doveo do

slabljenja državne vlasti, anarhije i propasti Republike u Drugom svjetskom ratu. Predsjednik Republike postaje središnja institucija obnovljenog parlamentarnog sustava, dobiva ustavne ovlasti za redovite i izvanredne prilike u državi, osigurava mu se neovisnost od zastupnika u parlamentu.⁴¹ Istodobno se, prvi put u ustavnoj povijesti Francuske, ustavno određuje zadaća Vlade.⁴²

U ustavnom modelu Pete Republike Vlada imenuje predsjednik Republike, a Vlada je politički odgovorna Nacionalnoj skupštini.⁴³ Time je jasno potvrđeno da je priroda novog francuskog sustava parlamentarna, a ne predsjednička. Upravo je ova odredba omogućila da predsjednik Republike može biti čelnik parlamentarne većine, ali i oporbe u razdoblju kohabitacije. Prema M. Débreu:⁴⁴

Ovo je načelo temeljno obilježje parlamentarnog sustava koje prijedlog Ustava želi uspostaviti. Odgovornost vlade ne znači da ona može biti dovedena u pitanje svakodnevno i neograničeno... Odgovornost vlade je utvrđena prema postupcima kojima će se izbjeći nestabilnost.

Na 11. sjednici Savjetodavnog ustavnog vijeća za izradu Ustava 8. kolovoza 1958. godine njegov predsjednik Paul Reynaud postavlja De Gaulleu pitanje: „Ako je predsjednik Vlade imenovan od predsjednika Republike, da li ga ovaj može i opozvati?“⁴⁵

De Gaulle potvrđuje da predsjednik Vlade ne bi mogao biti opozvan od predsjednika Republike.⁴⁶

[Z]ato što, da nije tako, ne bi mogao slobodno vladati [avec l'esprit libre]. Predsjednik vlade je odgovoran parlamentu, a ne državnom pogla-

ske (čl. 95., 1991.), uspostaviti će instituciju političke odgovornosti predsjednika republike, o njegovoj ostavci odlučivat će narod konačno na referendumu! Parlament je 19. travnja 2007. suspendirao predsjednika Băsescu, a na referendumu o ostavci 19. svibnja 2007. godine 74,48% izašlih birača (44,45% biračkog tijela) odbacuje ostavku. Băsescu ponovno preuzima dužnost 24. svibnja 2007. godine. Budući je politička odgovornost predsjednika države nepostojeća u francuskom Ustavu, riječ je o primjeru denaturalizacije originalnog teksta.

38 Discours de M. Débre devant le Conseil d'Etat le 27 aout 1958. Navod iz: Maus 1998: 2–8.

39 De Gaulle 1947: 103.

40 Vidi šire: Tardieu 1934.

41 Članak 5. st. 1. Ustava: „Predsjednik Republike brine za poštovanje Ustava. Svojim posredovanjem, on osigurava redovito djelovanje javnih vlasti kao i opstojnost države“.

42 Članak 20. st. 1. Ustava Francuske (1958.): „Vlada određuje i vodi državnu politiku“.

43 Članak 20. st. 3. Ustava Republike Francuske (1958.) određuje: „Vlada je odgovorna Parlamentu pod uvjetima i po postupku u člancima 49. i 50.“.

44 Discours de M. Débre devant le Conseil d'Etat le 27 aout 1958. Navod iz: Maus 1998: 2–8.

45 Debré 1974: 177.

46 Debré 1974: 177.

varu, nepristranoj osobi koja se ne treba miješati u političku konjunkturu, ali čija je temeljna funkcija briga o redovitom djelovanju javnih vlasti. On imenuje predsjednika vlade kao i pod Ustavom iz 1875. godine, što izostavlja investituru a da nipošto ne izbacuje primjenu pitanja povjerenja... Ako predsjednik vlade zatraži opoziv jednog od svojih ministara, predsjednik republike potpisuje odluku, ali ne može donijeti odluku iz vlastite pobude. Kada to ne bi bilo tako, ravnoteža vlasti bi bila kompromitirana.

J.-L. Débre ističe da navedena interpretacija političke odgovornosti vlade odbacuje dualistički parlamentarizam u kome je vlada politički odgovorna i parlamentu i državnom poglavaru (orleanski parlamentarizam), stoga Reynaud umiren predlaže Savjetodavnom vijeću prihvatanje teksta članka 8. o imenovanju vlade bez izmjena. Zbilja početnog razdoblja (1958.-1966.) Pete Republike otkriva da su sve De Gaulleove Vlade tražile glasovanje o povjerenju u Nacionalnoj skupštini.

Predsjednik Vlade M. Debré u Nacionalnoj skupštini 16. siječnja 1959. godine iznosi:⁴⁷

Naš novi Ustav određuje da vladu imenuje predsjednik republike, a drugi članak ovlašćuje vladu na eventualno postavljanje pitanja odgovornosti u svezi s njezinim programom. Ustav ne kaže izričito da ona to mora učiniti u trenutku imenovanja, ali je duh Ustava jasan i mi ga kanimo primijeniti. Imenovana vlada odlazi pred domove, ispred neposredno biranog doma izlaže svoj program i traži potvrdu... To je nužno... Parlamentarna vlada je vlada podvrgnuta nadzoru domova.

Predsjednik Vlade, nakon odluke u Ministarском vijeću, postavlja pred Nacionalnom skupštinom pitanje odgovornosti Vlade u svezi s njezinim programom ili deklaracijom o općoj politici koju provodi (članak 49. stavak 1. Ustava). François Mitterrand 18. travnja 1967. godine u Nacionalnoj skupštini, budući da III. Vlada G. Pompidoua nije tako postupila, govori: „Gosp. predsjedniče Vlade, ne trebate nas tražiti investituru, ali mora-

te dobiti naše povjerenje... Vaša Vlada započinje mandat na neustavan način“.⁴⁸ Mitterrand tumači da je general De Gaulle na sjednici Savjetodavnog ustavnog vijeća za izradu Ustava jasno razlikovao investituru Vlade od pitanja povjerenja, tada je čl. 49. st. 1 izmijenjen, umjesto teksta predsjednik Vlade može postaviti pitanje odgovornosti Vlade, konačni tekst određuje da predsjednik Vlade postavlja pitanje odgovornosti Vlade.⁴⁹

Predsjednik Republike imenuje predsjednika Vlade. Razrješava ga dužnosti kad on podnese ostavku Vlade. Na prijedlog predsjednika Vlade predsjednik Republike imenuje i razrješava ostale članove vlade (članak 8. Ustava).⁵⁰ Predsjedniku Republike je za imenovanje i razrješavanje ostalih članova Vlade potreban supotpis predsjednika Vlade, nužan je dogovor predsjednika Republike i predsjednika Vlade. Pactet tumači da do kolektivne ostavke Vlade može doći ili nakon izglasavanja nepovjerenja Vladi u Nacionalnoj skupštini (čl. 49.) ili dobrovoljnom ostavkom predsjednika Vlade podnesenom predsjedniku Republike. Predsjednik Republike može izazvati ostavku predsjednika Vlade samo u slučaju kada su oni politički bliski. U suprotnom, predsjednik Republike je razoružen, nema govora o traženju ostavke predsjednika Vlade koga podupire njemu politički suprotna većina. Provocirana ostavka mora biti dobrovoljni akt.⁵¹

Usporedimo li hrvatski Ustav (članak 98. st. 3. i st. 4.; 1990.): „Predsjednik Republike: - imenuje i razrješava dužnosti predsjednika Vlade Republike Hrvatske; - na prijedlog predsjednika Vlade Republike Hrvatske imenuje i razrješuje dužnosti njezine potpredsjednike i članove;“ s navedenim člankom 8. st. 1. Ustava Francuske vidimo da je u našoj odredbi izbačen slijedeći tekst: „kad on

48 Maus 1998: 222–223.

49 Vidi: Debré 1974: 238–239. Rasprava u Državnom savjetu 25. kolovoza 1958. godine.

50 Članak 8. Ustava Francuske. URL: <http://www.assemblee-nationale.fr/english/8ab.asp#> (pristup 6.11.2011). Engl.: „The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government. On the recommendation of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments“.

51 Pactet & Mélin-Soucrmanien 2004: 436.

47 Maus 1995: 211. Nakon imenovanja Vlade M. Débrea Nacionalna skupština je na njegov prijedlog sazvana na izvanredno zasjedanje kako bi postavio pitanje odgovornosti Vlade u svezi s deklaracijom o općoj politici (čl. 49. st. 1. Ustava).

podnese ostavku Vlade“⁵² Prema prvom Prijedlogu nacrtu Ustava: „Vlada je za svoj rad odgovorna Hrvatskom saboru“ (15. kolovoza 1990., čl. 120. st. 1.).⁵³ Međutim, u Nacrtu Ustava Republike Hrvatske (23. studeni 1990., čl. 113.) i Ustavu Republike Hrvatske (1990.) odgovornost vlade proširuje se i na predsjednika republike.

S. Sokol iznosi: „Dvostrukost odgovornosti vlade predsjedniku Republike i Hrvatskom Saboru jedno je od temeljnih obilježja ustrojstva vlasti u novom hrvatskom Ustavu“.⁵⁴ Tumači da su samo dvije dužnosti predsjednika Republike specifične za polupredsjednički sustav:⁵⁵

To je pravo da imenuje i razrješuje dužnosti predsjednika Vlade RH te na prijedlog predsjednika Vlade imenuje i razrješuje dužnosti njezine potpredsjednike i članove. Te dvije ovlasti predsjednika Republike povezane s odredbom članka 111. Ustava RH, prema kojoj je Vlada odgovorna predsjedniku Republike i Zastupničkom domu Hrvatskog Sabora, čine jednu od temeljnih razlika između ustavnog modela čistog parlamentarnog i polupredsjedničkog sustava.

Suprotno navedenom, takozvani polupredsjednički sustavi Rumunjske i Portugala imaju drugačija ustavna rješenja. Ustav Rumunjske od 8. prosinca 1991. godine s Ustavnim promjenama od 29. listopada 2003. godine (usvojenim na referendumu od 18. i 19. prosinca 2003.),⁵⁶ čije pre-

ma Tanasescu „čisto“ određenje teško možemo postaviti, „polupredsjednički ili poluparlamentarni u početku, a danas polupredsjednički s prezidencijalističkom tendencijom“,⁵⁷ određuje da je Vlada odgovorna isključivo Parlamentu (članak 108. st. 1. Ustav Rumunjske (1991.))⁵⁸; članak 109. st. 1. Ustav Rumunjske (2003.))⁵⁹ Predsjednik Republike ne može opozvati predsjednika Vlade (članak 107. st. 2. Ustava Rumunjske (2003.)).⁶⁰

Predsjednik Republike Rumunjske označava kandidata za predsjednika Vlade (čl. 103.), imenuje Vladu nakon investiture u Parlamentu (čl. 85. st. 1.). Međutim, predsjednik Republike nema ovlasti određivanja članova Vlade, odluka je u prepustena premijerskom kandidatu, a Parlament im iskazuje povjerenje. Rješenje o imenovanju Vlade predsjednik Republike ne donosi na zahtjev predsjednika Vlade, već na zahtjev predsjednika oba doma Parlamenta temeljem parlamentarne odluke o iskazivanju povjerenja, potvrdi programa i liste članova Vlade. Budući Vlada odgovara *in solidum*, za opoziv i imenovanje novih članova Vlade potreban je prijedlog predsjednika Vlade, a za promjenu strukture i političkog sastava Vlade i potvrda premijerskog prijedloga promjene od strane Parlamenta (članak 85. st. 2. i st. 3.). Ustavni sud Rumunjske u Odluci 356/2007⁶¹ iznosi da predsjednik Republike nema odlučujuće ovlasti prilikom imenovanja članova Vlade, mora ih imenovati na prijedlog predsjednika Vlade.

Pisci Ustava Portugala (2. travnja 1976) Miranda i Moreira željeli su udaljiti predsjednika

52 Vidi šire: Zakon o Vladi, NN 101/1998.: Članak 5.: „Mandat predsjednika, potpredsjednika, ministara i drugih članova Vlade počinje danom imenovanja, a prestaje danom razrješenja od strane predsjednika Republike Hrvatske. Dan imenovanja, odnosno dan razrješenja, određuje se odlukom o imenovanju, odnosno razrješenju“. Članak 8.: „Predsjednik Vlade, potpredsjednici, ministri i drugi članovi Vlade mogu podnijeti ostavku. Predsjednik Vlade podnosi ostavku predsjedniku Republike Hrvatske. Kad predsjednik Vlade podnese ostavku, smatra se da su ostavku podnijeli svi članovi Vlade. Članak 9.: „Ako predsjednik Republike Hrvatske prihvati ostavku predsjednika Vlade, raspustit će Vladu. U slučaju pojedinačne ostavke člana Vlade, predsjednik Republike Hrvatske donijet će odluku o razrješenju toga člana Vlade“.

53 Šarin 1997: 323.

54 Sokol & Smerdel 1992: 153.

55 Sokol & Smerdel 1992: 153.

56 Ustav Rumunjske (2003.). URL: http://www.cdep.ro/pls/dic/act_show?ida=1&tit=&idl=3 (pristup 7.11.2011).

57 Tanasescu 2008: 42.

58 Ustav Rumunjske (1991.). URL: http://www.cdep.ro/pls/dic/act_show?ida=1&tit=3&idl=2 (pristup 7.11.2011).

59 Članak 109. st. 1. Ustav Rumunjske (2003.), engl.: „The Government is politically responsible for its entire activity *only* before Parliament. Each member of the Government is politically and jointly liable with the other members for the activity and acts of the Government“.

60 Engl.: Article 107. (2) The President of Romania cannot dismiss the Prime Minister.

61 Odluka br. 356/2007, objavljena u M. Of. 322/14.05.2007. Povodom slučaja u kome je predsjednik Republike Traian Băsescu pokušao utjecati na imenovanje novog ministra vanjskih poslova predloženog od predsjednika Vlade dvomjesečnim odbijanjem potpisivanja ostavke dotadašnjeg ministra vanjskih poslova.

Republike od političkog upravljanja zemljom, od vladine vlasti i stranačkog svijeta.⁶²

Prema Ustavu Portugala predsjednik Vlade mora informirati predsjednika Republike o pitanjima vladine unutrašnje i vanjske politike,⁶³ time je on od tih područja odmaknut. Predsjednik Republike nazočan je i predsjedava sjednicama Ministarskog vijeća ako ga pozove predsjednik Vlade.⁶⁴ Predsjednički izbori održat će se s 100 dana nakon parlamentarnih izbora, ako je redovni datum predsjedničkih izbora *unutar* 90 dana prije ili poslije parlamentarnih izbora.⁶⁵ Predsjednici političkih stanaka upućeni su na utakmicu za premijersko mjesto, a ne za predsjedništvo države, predsjednička kampanja lišena je programskih rasprava iz parlamentarne kampanje. Parlamentarni izbori zadržavaju monopol u izboru vladine politike, na njihov rezultat i birače ne može utjecati pobjeda na predsjedničkim izborima.

Prvim Ustavnim promjenama (1982. godine) Ustava Portugala (1976.) odbacuje se *politička* odgovornost predsjednika Vlade predsjedniku Republike.⁶⁶ Jednostavno se u normi o odgovornosti Vlade briše riječ „politička“ kod odgovornosti predsjednika Vlade predsjedniku Republike, a zadržava politička odgovornost Vlade Parlamentu (članak 191. st. 1. Ustava Portugala). Dodaje se nova ustavna odredba. Od 1982. godine predsjednik Republike može opozvati Vladu samo zbog nužnog osiguranja redovitog djelovanja demokratskih institucija, a nakon prethodnog savjetovanja s Državnim vijećem (članak 195. st. 2.).⁶⁷ Isključena je mogućnost opoziva zbog

vođenja unutarnje ili vanjske politike, opoziv nije sredstvo protiv izvršne vlasti. Predsjednik Republike imenuje i razrješava članove Vlade na prijedlog Predsjednika Vlade (članak 133.h) i uz supotpis predsjednika Vlade (članak 140.).⁶⁸ Predsjednik Republike ima i pravo veta na zakone (članak 136.), u tom slučaju se zakon upućuje na ponovnu raspravu, a parlament ga mora potvrditi apsolutnom većinom svih zastupnika (traži se dvotrećinska većina nazočnih ako je veća od navedene za ponovno usvajanje organskih zakona i određenih ustavnih područja).⁶⁹

S. Sokol navodi da je za nadmoćan položaj predsjednika Republike bitno što u polupredsjedničkom sustavu načelno ne postoji institucija supotpisa akata predsjednika republike od predsjednika vlade ili nadležnog ministra, uz dva izuzetka, za raspuštanje Zastupničkog doma i raspisivanje referenduma: „U skladu s prihvaćenim modelom polupredsjedničkog sustava, u hrvatskom Ustavu nije prihvaćena institucija supotpisa akata predsjednika Republike od predsjednika Vlade“.⁷⁰

Kohabitacija u Francuskoj, prema Mitterrandu, „povratak na Ustav, samo Ustav i ništa osim Ustava“, najslikovitije osporava gore navedeno jer navodi na ponovno proučavanje ustavnog teksta Ustava Pete Republike kako bi ovlastima

the normal functioning of the democratic institutions and after first consulting the Council of State.

68 Članak 140. Ustava Portugala (1976.) određuje ovlasti koje predsjednik Republike obnaša uz supotpis Vlade.

69 Predsjednici Republike Mário Soares i Calvaco Silva iznose da proglašenje zakona ne znači nužno i temeljno slaganje o normama i da su bili suzdržani u predlaganju alternativa normama vraćenim u parlament, to nije zadaća predsjednika već vođe oporbe. Portugal usvaja prethodnu kontrolu ustavnosti zakona, predsjednik republike može, ako smatra da zakon nije u skladu s ustavom, prije proglašenja pokrenuti postupak za ocjenu ustavnosti zakona pred Ustavnim sudom (čl. 278. i 279.).

70 Prof. Sokol navodi: „Postoje samo dva izuzetka od tog pravila: predsjednik Vlade supotpisuje akt predsjednika Republike o raspuštanju Zastupničkog doma hrvatskog Sabora i akt kojim na prijedlog Vlade raspisuje referendum o prijedlogu promjene Ustava ili o drugom pitanju za koje drži da je važno za neovisnost, jedinstvenost i opstojnost Republike (čl. 104. i čl. 87. Ustava RH)“. Sokol & Smerdel 1992: 154.

62 Caneas Rapaz 2008.

63 Čl. 201.c) Ustava Portugala (1976.).

64 Čl. 133.i) Ustava Portugala (1976.).

65 Čl. 125. st. 3. Ustava Portugala (1976.).

66 Čl. 191. st. 1. The Prime Minister shall be *responsible* to the President of the Republic and, within the ambit of the Government's political responsibility, to the Assembly of the Republic. Tekst Ustava Portugala (1976) prije I. revizije (1982): Article 194 (1) The Prime Minister is *politically* responsible to the President of the Republic and, in the context of the Government's political responsibility, to the Assembly of the Republic.

67 URL: http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf. Ustav Portugala, čl. 195., st. 2: The President of the Republic may only remove the Government when it becomes necessary to do so in order to ensure

predsjednika republike odredila granice. Igra se po prvi puta vodi pravilima igre, stvarni nositelj izvršne vlasti postaje predsjednik vlade, a predsjednik republike može računati samo na samostalne ustavne ovlasti.

Jedna od tih ovlasti je raspisivanje referenduma, na prijedlog vlade u vrijeme zasjedanja parlamenta ili na zajednički prijedlog oba doma, kojim se potvrđuje sporazum u okviru Zajednice ili kojim se ovlašćuje na ratifikaciju međunarodnog ugovora koji bi, ako nije suprotan Ustavu, mogao utjecati na djelovanje institucija (članak 11. Ustava Francuske). U razdoblju kohabitacije predsjednika republike s politički suprotnom parlamentarnom većinom raspisivanje referenduma ne ovisi o samostalnoj odluci predsjednika republike. On samo može spriječiti vladu da upotrijebi instituciju bez njegovog pristanka. Iako predsjedniku republike ne treba supotpis predsjednika vlade za raspisivanje referenduma, ovlast je neprimjenjiva bez prijedloga vlade.

Samostalna ovlast predsjednika republike je raspuštanje Nacionalne skupštine (članak 12. Ustava Francuske), no nosi prevelik politički rizik da će se ponoviti rezultati parlamentarnih izbora koji su i doveli do kohabitacije, čime bi utrka na predsjedničkim izborima koji slijede bila izgubljena. Predsjednik imenuje predsjednika Vlade i razrješava ga dužnosti kad on podnese ostavku Vlade (članak 8. st. 1.), ali vlada mora imati povjerenje parlamenta, u kohabitaciji predsjedniku republike suprotnog političkog smjera.

Mogućnost primjene izvanrednih ovlasti (članak 16. Ustava Francuske) protiv volje naroda izražene na parlamentarnim izborima Capitant ocjenjuje kao monstruoznu ideju koja bi dovela do osobne diktature.⁷¹ Uporaba izvanrednih predsjedničkih ovlasti ograničena je Ustavnim promjenama iz 2008. godine. Nakon trideset dana primjene izvanrednih ovlasti, Ustavno vijeće može, na zahtjev 60 senatora ili zastupnika, predsjednika Nacionalne skupštine ili Senata, ispitati jesu li ispunjeni ustavni uvjeti primjene iz članka 16. st. 1. Ustava. O tome daje javno mišljenje. Nakon 60 dana primjene Ustavno vijeće samostalno pokreće postupak (novi stavak 6. članka 16. Ustava Francuske).⁷²

71 Capitant 1971: 419.

72 Članak 16. st. 6.: Après trente jours d'exercice des

Predsjednik se može obratiti Parlamentu okupljenom u Kongres (članak 18. st. 2.) no to je blijeda kopija ovlasti predsjednika SAD-a, na temelju koje se on u siječnju svake godine obraća Kongresu i građanima izlažući predsjednički zakonodavni program u Poruci o stanju u Uniji. Iako je predsjednik Republike Sarkozy povodom promjena Ustava Francuske iz 2008. godine tražio mogućnost neposrednog obraćanja Parlamentu jednom godišnje kako bi objasnio svoju politiku i naveo rezultate, prihvaćena je ublažena inačica američke Poruke o stanju u Uniji, jer se otvorilo pitanje što bi predsjednik republike predstavio kao djelovanje i rezultate, osim obrane i vanjskih poslova, u razdoblju kohabitacije.⁷³ Predsjednik Republike može podnijeti zakon prije proglašenja Ustavnom vijeću koje odlučuje o njegovoj suglasnosti s Ustavom (članak 65.) kao i međunarodne obveze prije ratifikacije (članak 54.). Imenovanje predsjednika Ustavnog vijeća, odnosno tri člana vijeća (članak 56.), imenovanje članova Visokog sudbenog vijeća i pravobranitelja je nakon Ustavnih promjena iz 2008. godine podvrgnuto mišljenju stalnog povjerenstva svakog doma Parlamenta (članak 13. st. 4.) koje može staviti apsolutni veto na nominacije poželjne predsjedniku. Predsjednik Republike ne može izvršiti imenovanje ako povjerenstva domova donesu negativno mišljenje o imenovanju tropetinskom većinom.

Preostaju nam ovlasti predsjednika republike koje se obnašaju uz supotpis predsjednika vlade prema članku 19. Ustava Francuske. Te ovlasti traže dogovor predsjednika republike i predsjednika vlade bilo na inicijativu predsjednika republike: imenovanje i razrješavanje članova vlade na prijedlog predsjednika vlade (članak 8. st. 2.), pregovaranje i zaključivanje međunarodnih ugovora (članak 52.), postavljanje i opoziv veleposlanika i posebnih izaslanika pri stranim državama (članak

pouvoirs exceptionnels, le Conseil constitutionnel peut être saisi par le Président de l'Assemblée nationale, le Président du Sénat, soixante députés ou soixante sénateurs, aux fins d'examiner si les conditions énoncées au premier alinéa demeurent réunies. Il se prononce dans les délais les plus brefs par un avis public. Il procède de plein droit à cet examen et se prononce dans les mêmes conditions au terme de soixante jours d'exercice des pouvoirs exceptionnels et à tout moment au-delà de cette durée.

73 Kostadinov 2008: 4.

14.), vrhovno zapovjedništvo oružanim snagama i predsjedavanje vijećima narodne obrane (članak 15.), proglašenje zakona i vraćanje zakona Parlamentu na ponovno odlučivanje (članak 10.), pravo davanja pomilovanja (članak 65.); ili na inicijativu predsjednika vlade: predsjedavanje Ministarskim vijeću (članak 9.), donošenje uredbi na temelju ustavne ovlasti i uredbi na temelju zakonske ovlasti u Ministarskom Vijeću (članak 13. st. 1.), imenovanje civilnih i vojnih dužnosnika (članak 13.). Svakodnevne odluke morale su se na zajedničkim područjima, vanjskoj politici i obrani, donositi sporazumno. Incidenti u francuskoj diplomaciji u razdoblju kohabitacije podsjetnik su da predsjednik Republike i predsjednik Vlade ostaju i dalje rivali u nestrpljivom iščekivanju kraja kohabitacije koja ih obojicu sputava. Niti jedna od suprotstavljenih strana nije mogla pokrenuti neku važnu međunarodnu inicijativu prije nego što je uvjerila drugu stranu u opravdanost projekta ili si je osigurala njezinu neutralnost oko tog pitanja. U slučaju neslaganja moralo se pregovarati. Stvarna inverzija moći unutar izvršne vlasti dovodi do toga da predsjednik vlade odlučuje hoće li se provoditi politika predsjednika republike, predsjednik vlade je glavni donositelj odluka. Međutim, predsjednik republike ne mora pomagati predsjedniku vlade u provođenju politike koju ne odobrava.

Hrvatski Ustav nadograđen je i ustavnim normama nepoznatim francuskom originalu.⁷⁴

4 ZAKLJUČAK - O RAZORENOM MITU O POLUPREDSJEDNIČKOM SUSTAVU

Mit nema funkciju reći istinu, već djelovati na stvarnost. Tako je i mit o polupredsjedničkom sustavu u Hrvatskoj, na „hrvatski“ ili „francuski“ način, trebao potaknuti demokratsku političku elitu s dozvolom konstruktivne kritike postojećeg poretka, a biračima ponuditi mobilizirajuću alternativu. Mit o polupredsjedničkom sustavu poslužio je i za usvajanje odredbi o ustrojstvu vlasti u Ustavu Hrvatske (1990.) i prilikom izmjene tih odredbi Ustavnim promjenama iz 2000. godine.

Cilj koji su postavili 2000. godine profesori ustavnog prava okupljeni u *Radnu skupinu Predsjednika Republike za izradu stručne osnove ustavnih promjena*,⁷⁵ sustav ustrojstva vlasti utemeljen na načelu diobe vlasti u njegovom suvremenom značenju, ostvaren je Ustavnim promjenama iz 2000. i 2001. godine.⁷⁶ Smerdel iznosi:⁷⁷

Osnovni koncept i pristup opisanoj zadaći Radna skupina je formulirala na sljedeći način. Svako od tri najviša državna tijela formira se odvojeno i svako djeluje u okviru svojega ustavnog djelokruga, ali je za donošenje većine najvažnijih odluka potrebna međusobna suradnja, dogovaranje ili suglasnost drugih tijela. Instrumenti poput supotpisa, zahtijevanja mišljenja ili konzultacija, imaju za svrhu usmjeriti, upravo natjerati, nositelje najvažnijih državnih funkcija na dogovaranje i, po potrebi, kompromise. Prema ovoj koncepciji predsjednik Republike ostaje važan čimbenik ustavnog sustava, s naglašenim pravom inicijative na najvažnijim područjima državne djelatnosti, ali pritom trajno surađuje s Vladom i Saborom. Ograničavanja njegovih ovlasti i nadzor nad njihovim obavljanjem nužna su, s obzirom na snažni politički položaj neposredno izabranog predsjednika, kao i činjenicu da ne postoji njegova politička odgovornost pred Parlamentom.

Oblikovan je sustav parlamentarne vlade s temeljnom značajkom političke odgovornosti vlade parlamentu uz postojanje prava raspuštanja parlamenta, uspostavljene su prepreke obnavljanju sustava personalizirane vlasti u rukama predsjednika Republike (1990.-2000.).

U Hrvatskoj su se pojavili novi prijedlozi promjene ustavnog ustrojstva vlasti, napose ustavnog položaja i uloge predsjednika Republike Hrvatske. Osamnaest godina od usvajanja Ustava RH (1990.) i nakon Ustavnih promjena 2000. i 2001. godine, u raspravu se uključuje i profesor S. Sokol. U kolumni Večernjeg lista pod naslovom *Četvrtpredsjednički ili parlamentarni sustav* iznosi da današnji sustav odnosa predsjednika Repu-

74 Prema Nacrtu Ustava (članak 98.) i Ustavu (članak 96., 1990.): „Predsjednik Republike ne može, osim stranačke, obavljati nikakvu drugu javnu ili profesionalnu dužnost“.

75 Mratović, Smerdel, Bačić, Crnić, Filipović & Lauc 2000.

76 Ustav Republike Hrvatske, Pročišćeni tekst s Ispravkom, NN 41/01 i 55/01.

77 Smerdel 2010: 33.

blike i Vlade nije polupredsjednički, jer Vlada politički ne odgovara predsjedniku Republike, nego isključivo Hrvatskom saboru.⁷⁸ Suvremeni ustavni model određuje kao osebuju novi hibrid polupredsjedničkog sustava, takozvani „četrtpredsjednički sustav“, te unošenjem nesigurnosti u obliku moguće blokade izvršne vlasti i svojevršne političko-ustavne krize zbog postojanja ustavnih odredbi koje traže suglasje predsjednika Republike i Vlade, traži da na području vanjske politike i obrane za svaki pravni ili politički akt predsjednik Republike treba dobiti supotpis predsjednika Vlade, a državna sigurnost prepusti u isključivu nadležnost predsjednika Vlade. Predlaže promjenu novog ustrojstva vlasti: „Zato, kad smo već 2000. godine odbacili polupredsjednički sustav, učinimo i još jedan korak i napustimo

četrtpredsjednički sustav. Tako bi konačno Hrvatska prihvatila sustav parlamentarne vladavine koji su mnogi toliko dugo zazivali i željeli.“⁷⁹ U tijeku predsjedničkog mandata Josipovića i nakon izbora sadašnje predsjednice Republike Grabar-Kitarović 2015. godine prijedlog se aktualizira u zahtjevu za izbor predsjednika republike u parlamentu.

Sustav se ostvaruje više od petnaest godina. Bilo bi stoga razumljivo da se ustavna znanost prestaje zanimati za polupredsjednički koncept. Međutim, živući mit o polupredsjedničkom sustavu dominira u političkom životu Hrvatske od prvih dana do danas te politički mobilizira za različite svrhe istim legitimitetom, ovisno o ciljevima predlagatelja i otvara više pitanja nego što ih može riješiti.

78 Sokol 2008.

79 Sokol 2008.

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President of the Republic

Croatian constitution's mimicry of the French constitutional model

The constitution is not a Demiurge, as opposed to what the constitutionalists sometimes want to believe, it need not be an unstable and precarious mirror surface of society in motion, as opposed to what some politicians would wish.
(Bertrand Mathieu¹)

The starting point for studying the Croatian constitutional democracy is the adoption of the Constitution of the Republic of Croatia on 22 December 1990. The said Constitution defines the system of government as semi-presidential and its authors state as their model the Constitution of the Fifth Republic. However, the importing, in 1990, of French constitutional provisions was not neutral since the original French constitutional text was stripped of institutional obstacles, constitutional institutions for opposing the will of the President of the Republic, constitutional-law conditions for the Prime Minister's primacy in the political system in case of co-habitation and discrepancies between the parliamentary and the presidential majority. The text was complemented by constitutional norms unknown to the original. French constitutional norms had to be put to good use, interpreted in line with and legally adapted to the desired political goal, i.e., the establishment of an effective state government in which the primacy of the President of the Republic would assert itself over both the Government and the legislature. The myth on the semi-presidential system was drawn on for both the adoption of the provisions regulating the organisation of government in the 1990 Constitution of the Republic of Croatia and their amendment in 2000.

Keywords: semi-presidential system, President of the Republic, Prime Minister, French Fifth Republic, Croatian Christmas Constitution

1 CHECKMATE TO THE SEMI-PRESIDENTIAL SYSTEM

The starting point for the study of Croatia's constitutional democracy is the adoption of the Constitution of the Republic of Croatia of 22 De-

cember 1990.²The final draft of the Proposal for the Constitution of the Republic of Croatia (1990) was prepared by the "Drafting Group" bringing together Sokol, Tomac and Šeks.³ The first

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1 Mathieu 2008: 9.

2 The Constitution of the Republic of Croatia, OG 56/1990.

3 Smerdel & Sokol 2008: 89: "It should be mentioned that it was Smiljko Sokol and Vladimir Šeks who contributed the most to the shaping of constitutional solutions. Franjo Tuđman, in his capacity of chairman of the Constituent Assembly, directly in-

constitutional law textbook in the democratic Croatian state defines the form of government as set out in the Constitution of the Republic of Croatia (1990) as semi-presidential.⁴ We have to ask ourselves whether the myth of the semi-presidential system, the weapon of all the innovators and reformers of the Croatian constitutional system, is essentially, intentionally or not, equal to mystification or deception. If mystification exists today, it consists in the use of a dubious political-science concept of the semi-presidential system within the framework of the struggle for power, in determining the meaning and weight it does not have.

The features of the semi-presidential system are defined by the authors of the Croatian Constitution according to the concept of M. Duverger⁵ who says that the constitutional system of the French Fifth Republic is not unique but shared by a group of states whose head of state is elected directly and has *considerable powers*, while the Government is accountable to Parliament: Austria, Finland, Portugal, Ireland, Iceland, the Weimar Republic.

At the workshop entitled *What remains today of Maurice Duverger's work?* held at the 2009 Congress the French Political Science Association found that M. Duverger, formerly the embodiment of public law and political science, had sunk into oblivion in today's France. The most recent reference and tribute to him date from as long ago as 1987, the year the book *Mélanges Duverger* was published.⁶

fluenced the basic constitutional solutions and is the author of 'Historical Foundations' (the preamble):

4 Sokol & Smerdel 1992: 151.

5 Duverger 1980: 166. The English text is as follows: "A political regime is considered as semi-presidential if the constitution which established it combines three elements: (1) the president of the republic is elected by universal suffrage, (2) he possesses *quite considerable powers*; (3) he has opposite him, however, a prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them." See: Duverger 1971.

6 Colas & Emeri 1987. URL: www.congresafsp2009.fr/ (Accessed on 8 November 2011).

In qualifying the Fifth Republic Pfersmann distances himself from the use of the concept "semi-presidential":⁷

What we principally have here is an ideological instrument for justifying the permanent violation of the Constitution by the President of the Republic and the voluntary enslavement of the political and juridical personnel which says it adheres to this "reading" of the text.

Legally its system of government is nothing but the parliamentary system and its application is to a large extent unconstitutional. A constitutional revision intending to transform a system of government into the "French" system of government risks producing completely different outcomes because *a violation of the Constitution cannot be framed by the Constitution.*

For M. Duverger the said features of the semi-presidential system are not sufficient for the system to be classified into a group and he cannot explain the classification solely by means of these features. Therefore in his first paper written in English he briefly defines the model, whereupon in a more extensive presentation he outlines the differences between the political systems of the mentioned states and describes figurative presidency (Austria, Iceland, Ireland), superior presidency (France) and balanced presidency and government (Finland, Portugal and the Weimar Republic). He considers the constitutional powers of state authorities and the conditions for the establishment of a system. He explains that presidential powers depend on the existence and nature of the parliamentary majority and on whether the parliamentary majority supports or opposes the president.⁸ The author shapes the concept by taking into account both constitutional powers and the actual functioning of government. For a system to be classified into the group of semi-presidential systems the direct election of the President of the State is a necessary but not a sufficient condition since the directly elected President also needs to be a relatively strong figure. Elgie points out that such a logic of establishing classification criteria

7 Pfersmann 2009: 275–286. The Fifth Republic has a parliamentary system of government but that does not mean much.

8 For more see: Duverger 1978.

necessarily introduces subjectivity into the process and includes the making of the judgment as to how much the President of the State is or can be superior, which prompts different authors to classify states into different groups.⁹ He notes that in 1993 only France and Portugal were identified as semi-presidential systems by Stepan and Skach, while the same authors described Austria, Iceland and Ireland as parliamentary systems because their Presidents, although elected directly, are weak. Sartori adopted the same approach. In 1997 he stated that Austria and Iceland are not semi-presidential systems because their presidents, having been deprived of constitutional powers by the actual constitution, are "strong only on paper".¹⁰ The price to be paid for adopting this approach is that of distancing ourselves from the set rules of discussion on the forms of government.

In his 1989 work *Classifications in Constitutional Law* that looks into the scholarly value of classifications outside the traditional dichotomy between the presidential and parliamentary systems Troper states the following:¹¹

The success of the comparison depends on whether the classes have been fully compared. (...) Thus if we take as the criterion one feature, the first class has to be defined by this feature and the other by its opposite, i.e. by the inexistence of this feature. This rule is no more than the implementation of the principle of non-contradiction. However, in the case of political systems two forms – the parliamentary and the presidential – are depicted as strictly opposite or pure. Indeed they are such if, as we have said, the presidential system has direct presidential elections and lacks political responsibility and the parliamentary system has political respon-

sibility and lacks direct presidential elections. By contract, a "mixed" system would contain contradictory features: direct presidential elections and the inexistence of direct elections, political responsibility and the lack of political responsibility, which, of course, would be absurd.

A classification may only be formal, it has no other operative value than that of classifying systems according to whether their *constitution has an even or an odd number of articles*. The author criticizes any attempt at classification, he states that no causal relationship can exist between constitutional structures and the actual political system and adds that classifications of systems is devoid of any scientific value.¹²

Kasapović states the following:¹³

Duverger's original designation of any new political system has become the subject matter of constant theoretical disputes that focus on three questions. First, are the stated main features sufficient for constituting a new system of government, i.e. a new political regime? Second, what is to be understood under 'considerable powers' of the President of the State and how is this syntagma to be differentiated into specific constitutional powers? Third, how are we to treat the analytical approaches, namely the constitutional and the empirical one, which Duverger adopted in order to classify semi-presidential systems and which produce different results?

The authors of the Croatian Constitution state that their model was the Constitution of the Fifth Republic¹⁴. However, French constitutional

9 Elgie 2004: 314–330. As one of the possibilities of study R. Elgie offers the following: "We may choose not to study semi-presidentialism at all. The veto players approach provides an alternative way of studying political institutions and overall may provide a more fruitful method of analysis." URL: <http://doras.dcu.ie/63/> (Accessed on 5 November 2011).

10 Elgie 2004. The author states: Alfred & Skach 1993: 9; Sartori 1997: 126. Sartori excludes Ireland as well.

11 Troper 1989: 945–956.

12 Hamon & Troper 2007: 104–121 and 477.

13 Kasapović 2007: 29.

14 Thus in referring to the background to the drafting of Croatia's Constitution in the *Glas Slavonije* interview of 27 December 2009 Vladimir Šeks says the following: "I presented my work at the first convention of the Croatian Democratic Union at the Lisinski Hall in February 1990 and it contained all the essential determinants of our fundamental legal document, after the model of the French Constitution under which the President of the Republic is the *de facto* head of state. In other words, I deemed that during the period of its gaining independence, Croatia would need a President with broad powers and, moreover, on Franjo Tuđman's world-view, the President had to be the head of

law professors Burdeau, Troper and Hamon¹⁵ note that its institutional system incorporates the main features of the parliamentary system, namely dualistic executive power, political accountability of Government to Parliament, the right to dissolve Parliament and, to some extent, the institution of the Government countersigning the acts of the Head of State. They point out that ever since the referendum on the direct election of the President of the Republic (1962) popular sovereignty is expressed not only at parliamentary but also at presidential elections. They state that this is an instance of a new institutional form of the parliamentary system but they neither want to dub it in any particular way nor refer to the opinion of some other author.

In 1993, Maus, Colliard, Duhamel, Favouereu and Luchaire, forming under the chairmanship of Vedel the Advisory Constitutional Committee Charged with Amending the French Constitution (1958), viewed the maintenance of the Government's political accountability to the Parliament of the Fifth Republic as proof that the parliamentary system exists and dismissed any further discussion on whether this system falls outside the traditional dichotomy between the presidential and parliamentary systems and on whether a mix of these two systems exists.¹⁶

In 2002, Cohendet stated that the Fifth Republic *had remained parliamentary*, with a form of government in which the Government is accountable to Parliament. Although at the outset the system had been *monorepresentative*, since the 1962 amendments to the Constitution it has been *birepresentative*.¹⁷

state." URL: http://www.glas-slavonij.e.hr/vijest.asp?rub=1&ID_VIJ_ESTI=118459 (Accessed on 5 November 2011).

15 Burdeau, Hamon & Troper 1997: 433. The authors state the following: "If one were to want unconditionally to label the French institutions, they could be designated as "semi-presidential" in line with M. Duverger's terminology. However, such a label would not help us understand the way in which our institutions function."

16 *Propositions pour une révision de la Constitution 15 février 1993*, La Doc. française, Paris, 1993. URL : <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000091.pdf>.

17 Cohendet 2002: 173.

Frequently a system is questionably designated as 'semi-presidential', which is a denomination devoid of logic. We cannot at one and the same time designate as a parliamentary system a system in which the Government is accountable to Parliament and state that a system in which the Government is accountable to Parliament is not a parliamentary system. That is exactly what M. Duverger did.

Canelas Rapaz discards both the designation of Portugal's constitutional system as semi-presidential and the remaining of Portugal in the company of "Duverger's six Titanesses, the daughters of Gaia and Uranus, Mother Earth and Father Heaven."¹⁸ Duverger's concept of the semi-presidential system is checkmated as a result of the weaknesses of its criteria and the deficiencies in its elaboration. The absolute and universal answer to the question of whether Portugal's system is semi-presidential has in fact become trivial since the only answer that can be given is that "the semi-presidential system does not exist."¹⁹

Daly states that the classification of modern constitutional systems outside the traditional parliamentary/presidential dichotomy runs into undesirable tendencies: provincialism, procedural errors, conceptual stretchability and *de-greism*.²⁰

Kasapović lists the authors that contest the *sui generis* character of the semi-presidential system: e.g., Steffani, Loewenstein, Pelinka, Avril, Colliard and Quermonne hold that this is a parliamentary system, another group of scholars classify it as the presidential system, and yet another as various subtypes of parliamentary and presidential systems.²¹

In the late 1980's M. Duverger's concept was discarded in France, the system of government of the Fifth Republic was not re-interpreted, a ver-

18 Canelas Rapaz 2009: 10.

19 Canelaz Rapaz 2009. The title of a chapter of the author's paper *Echec et mat au concept par le manque d'opérabilité* alludes to M. Duverger's book *Echec au Roi*.

20 Daly 2003: 96–108.

21 Kasapović 2007: 27–54. The first part of the paper: 1.2. Contesting the semi-presidential system as a *sui generis* system: three lines of interpretation.

sion of the parliamentary system thus continuing to exist.

2 THE CROATIAN CONSTITUTION'S (1990) DENATURATION OF THE SYSTEM OF GOVERNMENT OF THE FIFTH REPUBLIC

In his 1992 paper *The Semi-Presidential System and Parliamentarism* Sokol says that in terms of its constitutional-law features the Croatian semi-presidential system is very similar to, although not absolutely identical with the contemporary French constitutional model of government. When comparing the actual instances of the Croatian and the French semi-presidential systems, he estimates that the Croatian semi-presidential system is closest to the French instance of pure Gaullist parliamentarism as it existed in the period from 1962 to 1969.²² The acknowledgement by the authors of the Croatian constitutional text of their source of inspiration and the similarities existing between certain constitutional mechanisms in the two texts is not sufficient to conclude that French constitutional law served as the source of inspiration. It is necessary both to determine what elements were actually imported and to go back to studying the documents of 1990 concerning the drafting of the Constitution of the Republic of Croatia.²³

Smerdel explains that the decision on the adoption of the semi-presidential system in the Republic of Croatia was taken as a result of Tudman's political conception of state governance, the non-existence of the democratic tradition, the prevailing tendency of the new political

elites towards the system of concentration and personalisation of power, and the assessment of the framers of the Constitution that the future will bring such problems and threats which require the centralisation of political decision-making.²⁴

What was instrumental in choosing the constitutional model of government in Croatia was, on the one hand, the good repute of institutions which was based on the exceptional efficacy of the French system of government and, on the other, the prestige of the first president of the Fifth Republic, General de Gaulle, the symbol of Free France. We hold that the authors of the Croatian Constitution (1990) were inspired not only by the constitutional text but also by de Gaulle's actual governance. Since a straightforward adoption of the constitutional norms on the position and powers of the French President of the Republic would not guarantee a desirable manner of government, the drafters of the Constitution went beyond the limits of the original French constitutional text. What was constitutionalised and in essence constitutionally reproduced was the functioning of the French government during General de Gaulle's presidency of the Republic (from 8 January 1959 to 28 April 1969).

In this way they not only went beyond the Constitution of the Fifth Republic but also denatured the original constitutional text and changed the characteristics of the French constitutional model. The way French constitutional law was imported in 1990 was not neutral, it did not constitute a mere translation of constitutional norms but constitutional science teaches us that neither the legal transplantation of the constitutional text of another state guarantees a functioning identical to that in the parent state. French constitutional norms needed to be instrumentalised, interpreted and legally adapted to the desirable political goal, namely the establishment of an effective governmental power in which the superiority of the President of the Republic would be asserted over both the Government and the legislative power.

Out of the original French constitutional text were taken institutional obstacles, constitutional

22 Sokol 1992: 16.

23 A comparison of the texts of the first Proposal for the Draft Constitution of the Republic of Croatia of 15 August 1990 and the Draft Constitution of the Republic of Croatia of 23 November 1990 with the Constitution of the Republic of Croatia of 22 December 1990 and the study of the minutes of the sessions of the constituent commissions serve as the basis for determining the constitutional thought of the drafters of the constitutional text. See: Šarin 1997. Juxtaposed Texts of the first Proposal for the Draft Constitution of the Republic of Croatia, the Draft Constitution of the Republic of Croatia and the Constitution of the Republic of Croatia, pp. 263-337.

24 Smerdel 2010: 13.

institutions serving to offer resistance to the will of the President of the Republic, constitutional-law conditions for the Prime Minister's primacy in the political system in case of co-habitation, and discrepancies between the parliamentary majority and the presidential majority. Constitutional norms unknown to the original were built into the text. And this despite professor Bačić's warning at the 5th session of the Parliament's Commission for Constitutional Issues (22 November 1990) that

the competences of the legislative power, preserved by means of traditional principles, have been limited in favour of the interventionist role of the executive. Primarily the supremacy over the armed forces, the right to appoint ministers, proclamation of the state of war, decisions on state intervention, proposals for constitutional amendments

and in view of this constitutional evolution some amendments to the Proposal for the Constitution need to be made and the role of the Croatian Parliament²⁵ and the parliamentary system accentuated. In the Croatian constitutional text the strategic goal was achieved by strengthening the powers of the President of the Republic and legitimising the achieved imbalance of power.

3 CROATIAN 1990 CONSTITUTION'S MIMICRY OF THE FRENCH MODEL

3.1 On the deviation of the Gaullist rule from the Constitution of the Fifth Republic (1958)

The evolution of the political system characterised by the personalisation of power in the period of de Gaulle's presidency of the Republic (1959-1969) is compared with the principate, a general concept used for denoting all contemporary systems in which the political body is ruled by one person.²⁶ According to Quermonne, in his speech of 31 January 1964 de Gaulle presented a conception of government in which the President of the Republic is the source and the holder of power, a guarantor of the future of both France

and the Republic, indivisible governmental power has been delegated to him by the people, no other authority can exist unless he has conferred or held it.²⁷ De Gaulle confirmed that the manner of government at the time of his holding presidential office deviated from the constitutional text. Before the 1967 parliamentary elections, which he feared would bring victory to the opposition, he stated: "Actually it will be fun to see how one can govern with the Constitution."²⁸ From de Gaulle's investiture as the last Prime Minister of the Fourth Republic on 1 June 1958 to the first parliamentary elections (18 and 25 November 1962), after the referendum on the direct election of the President of the Republic in the Fifth Republic (28 October 1962), there was no majority phenomenon in France, France did not know of a stable parliamentary majority identical with the presidential political majority and therefore the establishment of supremacy of the President of the Republic was not the result of the threefold political consensus. Instead, it was the Algerian war that played the most important role in this.²⁹

The Algerian war directly contributed to the widening of the powers of the President of the Republic to the detriment of those of the Prime Minister. For example, on 13 February 1960 the first *Council of Algerian Affairs* was set up under the exclusive control of the Head of State. That served as a precedent to the customary acceptance of the institution by which the Head of State is given the authority to decide with respect to a number of areas that are regularly within the competence of the Government. The initial period of the Fifth Republic marked by the Algerian War led to the system's presidentialisation. From de Gaulle's entry into the Elysée (8 January 1959) to the spring of 1962 presidential power exerted a crucial influence on the resolution of the Algerian crisis. The use of constitutional procedures and institutions during the said period left a last-

27 Quermonne & Chagnolland 1991: 84. For the transcript of the speech of 31 January 1964 see: Maus 1998: 42-44.

28 Duverger 1986: 7.

29 It was only in the November 1962 elections that the Gaullist UNR, polling 42% of the votes cast, won an absolute majority of the National Assembly's seats (55%).

25 Šarin 1997: 107.

26 De Jouvenel 1964: 1053.

ing mark on the balance of power in the Fifth Republic. Already from the very outset it was clear that all the relevant decisions concerning Algeria would be taken by de Gaulle independently. The Council of Algerian Affairs, chaired by the President of the Republic and made up of the Prime Minister and the responsible ministers and officers, placed all the responsible persons directly under the leadership of the President. This was the first instance of the institutionalisation of a government body under the chairmanship of the President of the Republic and *outside* the Council of Ministers. By appointing, on 22 January 1960, Joxe the Minister of Algerian Affairs de Gaulle showed that he was willing to be directly in charge of the negotiations with Algeria. Convinced that only de Gaulle could indeed resolve the Algerian crisis, the Prime Minister did not oppose this decision.³⁰ Being of a similar view, on 4 February 1960 the members of Parliament passed, due to the Algerian crisis, the Law on the Powers of the Government³¹ which provided for the passing of ordinances (Art. 38 of the Constitution of France) and specified that in order to come into force these ordinances had to be signed by the President of the Republic General de Gaulle. An addition to this Law, i.e. that the ordinances had to be signed by de Gaulle, spelled in legal terms the end to special powers in case a new President of the Republic took office! It is difficult even to imagine a provision so at odds with the French parliamentary tradition. De Gaulle was thus given not only constitutional powers but also the task of resolving the Algerian crisis. Algeria was what triggered the establishment of a direct link between de Gaulle and the people, via referendum the people lent almost unanimous support to the presidential policy. Four months after the end of the Algerian crisis the most important constitutional institutional consequence of the war took place, namely the referendum on the direct election of the President of the Republic (28 October 1962).³²

30 de Courcel 1988: 9–10.

31 Minutes of the National Assembly session of 2 February 1960. URL: <http://archives.assemblee-nationale.fr/1/c/ri/1959-1960-extraordinaire2/001.pdf> (Accessed on 6 November 2011).

32 Traditional political forces opposed the direct election and requested "a speedy restoration of re-

Direct elections would not alter de Gaulle's thoughts on the constitutional role of the President of the Republic, in the 1965 presidential campaign he refused to side with any party or to participate in a duel with the other presidential candidates. That cost him the run-off election which he entered as the representative of the people's unification and the defender of the institutions against the candidates of allied parties that were ready to overthrow the institutional system. Not even after the direct elections did he renounce the use of the referendum, holding this to be the only procedure by which the President's legitimacy can be verified among the people. Direct elections are not sufficient proof of the President's legitimacy, de Gaulle had to verify this legitimacy regularly and that was the reason for his stepping down from power after the negative referendum on the Senate and the regions (27 August 1969), by this act he affirmed his respect for democracy.³³ The constitutional reality of the described period can be compared with Article 3 of the 1852 Constitution of the Second Empire: "The President of the Republic governs through the ministers, the State Council, the Senate and the Legislative Body".³⁴

publican institutions" and the doing away with the presidentialist interpretation of constitutional reality. There was an assassination attempt against de Gaulle in Petit-Clamart, M. Duverger says that the assassination was not carried out by the commandos of the French Algeria but by political leaders in order to prevent by all means the referendum on the direct election of the President. He concludes that this thesis is hard to prove: "but anything was possible in the horrible atmosphere of that period." Duverger 1986: 25.

33 President Franjo Tuđman expressed a similar opinion on the referendum – an instrument of the head of state – during a discussion at the 2nd session of the Editorial Committee of the Constituent Commission of the Presidency of the Republic (31 October 1990). Following a remark about the President of the Republic renouncing his right to call a referendum, he requested that the institution be maintained: "because there could also be various questions that can and should be asked, because after all the referendum is a supreme democratic institution." Quotation from: Šarin 1997: 94.

34 Constitution de 1852, Second Empire, Article 3. - Le président de la République gouverne au moyen des ministres, du Conseil d'Etat, du Sénat et du Corps législatif. URL: <http://www.conseil-constitu>

As early as the beginning of 1962 M. Duverger stated that the direct election of the President of the Republic was the only way in which the Gaullistic order could outlive its founder and demanded the introduction of the presidential system. He explained that without direct elections de Gaulle's successor *would finally have to apply the Constitution* as opposed to the Gaullist rule: "He is a unique person. I am of the opinion that the Fifth Republic does not exist, that it is a personal consulate."³⁵ The reality of the Fifth Republic proved Duverger wrong in his estimate that without the introduction of the presidential system, one generals' putch would be more than enough to destroy the order. Quite to the contrary, the *return* to the flexible constitutional text of the Constitution of the Fifth Republic rendered political stability possible and did not prevent European unification, or liberal or state-controlled economy, or the functioning of public authorities in times of cohabitation, or for that matter any other challenges that France had to face during the last fifty years.

The description of the Gaullistic period can to some extent be compared with the description of Croatia's constitutional reality in the period from 1990 to 2000. In his work *Constitutionalism and Change of Government* Smerdel noted the following:³⁶

The centre and symbol of the regime became the imperial presidency which from the outset was built on interpretations that were foreign to the spirit and, not infrequently, the letter of the Constitution, in a process in which power, by means of legislation and practice, was concentrated in the person of the President of the Republic, his office and quasi-advisory bodies, of which the most prominent role was played by the National Defence and Security Council (VONS).

tionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1852-second-empire.5107.html (Accessed on 6 November 2011).

35 Kostadinov 2004: 51.

36 Smerdel 2000: 20. The author concludes that the system, especially after the 1997 presidential elections, acquired an increasing number of features marking its development from imperial war presidency to a system of elective monarchy.

Should we wish to constitutionalise Gaullist presidentialism, we would not need to draft a new constitutional text, the majority of the provisions could be preserved. We would need to redraft certain articles relating to the President of the Republic and the Government, discard diarchy and introduce unequal dicephalism. However, we would thus be disregarding the huge risk of producing completely different results since a violation of the French Constitution cannot be inserted into the Constitution.

In order to constitutionally reproduce the basic ways in which the French state authorities function it is necessary to replace in the draft political accountability of the Government to Parliament (Art. 20(3) of the French Constitution) with the institution of dual political accountability of the Government to both the President of the Republic and Parliament, to maintain the autonomous power of the President of the Republic to appoint and terminate the appointment of the Prime Minister (Art. 8) as well as his emergency powers (Art. 16), and then to remove the institutional obstacles to the expansion of presidential powers to the detriment of the Prime Minister. The presidential powers of appointing and terminating the appointment of the other members of the Government (Art. 8(2)), presiding over the Council of Ministers (Art. 9), signing ordinances (Art. 38) and decrees (Art. 37) issued by the Council of Ministers, negotiating and concluding international agreements (Art. 52), accrediting and recalling ambassadors (Art. 14), initiating amendments to the Constitution (Art. 89), appointing the most important civil and military figures (Art. 13(2) and (3)), obliging Parliament to reconsider an act of parliament (Art. 10), supreme command over the armed forces and presiding over national defence councils (Art. 15) should be *deprived of the Prime Minister's countersignature* which pursuant to Art. 19 of the French Constitution (1958) is required for their exercise. The draft would incorporate new provisions and institutionalise the setting up of a body under the chairmanship and guidance of the President of the Republic and outside the Council of Minister. The draft would reflect a fragmented constitutional imitation of the constitutional model of the Fifth Republic subjected to political subjectivism.³⁷

37 De Gaulle emphasizes that the referendum was

3.2 On the spirit of the Constitution of the French Republic (1958) and the Croatian constitutional mimicry

The study of the original spirit of the French Constitution, of the idea animating it and of the political plan of the framers of the Constitution provides guidance in ambiguous situations. The constitutional thought of the framers of the Constitution of the Fifth Republic is valuewise and institutionally within the framework of the constitutional model of the parliamentary system, the principle of separation of powers is the foundation of the renovated parliamentary system of the Fifth Republic. When presenting the final text of the draft Constitution to the Council of State, the minister M. Debré, the principal drafter of the constitutional text, noted the following:³⁸

The purpose of this ... is, first and foremost, to try to establish the authority without which there is neither State nor democracy... The Government wanted to renovate the parliamentary system. I would even be tempted to say that it wants to establish it, because for many reasons the Republic has never been able to put it in place.

The constitutional thought of the framers of the Constitution proceeds from the criticism of the parliamentarianism of the Third Republic in

the only procedure for checking presidential legitimacy among the people, J.-L. Debré sees the main consequence of the principlism in the political accountability of the President of the Republic. Although constitutionally the President is not politically accountable, Debré claims that the system has evolved in the direction of recognising the political accountability of the President of the Republic (See: Debré 1974: 285.). The Constitution of Romania (Art. 95, 1991) will introduce the institution of political accountability of the President of the Republic, his removal from office will finally be decided on by the people in a referendum! On 19 April 2007 the Parliament suspended President Bănescu from office, while in the referendum on his removal from office held on 19 May 2007, 74.48% of those who voted (44.45% of the electorate) said no to his removal from office. On 24 May 2007 Bănescu reassumed office. Since the political accountability of the President of the Republic does not exist in the French Constitution, this is an instance of denaturation of the original text.

38 Discours de M. Debré devant le Conseil d'Etat le 27 août 1958. Cited from: Maus 1998: 2–8.

which the Parliament, besides fulfilling the legislative and the supervisory function, took over the executive power, for which reason de Gaulle's conception of separation of powers is utterly opposed to the interpretations of the constitutional doctrine of the previous Republics. De Gaulle defines the principle of separation of powers as the prohibition to concentrate all powers in the hands of one body, the executive and the legislative powers must be effectively separated. By characterising the separation of powers in negative terms, he wants to prevent the confusion of the legislative and the executive powers in the state,³⁹ which would result in anarchic powerlessness and the unaccountability of governmental power.⁴⁰ With the theory of the separation of powers he wants to limit the destructive influence of the Parliament of the Third Republic whose perilous inability to carry out state policies led to the weakening of governmental power, anarchy and the collapse of the Republic in the Second World War. The President of the Republic became the central institution of the renovated parliamentary system, he was conferred constitutional powers for ordinary states of affairs and states of emergency in the state, and was ensured independence from members of Parliament.⁴¹ At the same time, for the first time in the constitutional history of France the task of the Government was constitutionally determined.⁴²

Under the constitutional model of the Fifth Republic the Government is appointed by the President of the Republic and is politically accountable to the National Assembly.⁴³ This clearly confirms that the nature of the new French system is parliamentary and not presidential. It was precisely this provision which made it possible

39 De Gaulle 1947: 103.

40 For more see Tardieu 1934.

41 Art. 5(1) of the Constitution of the French Republic reads: "The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State."

42 Art. 20(1) of the Constitution of the French Republic (1958) reads: "The Government shall determine and conduct the policy of the Nation."

43 Art. 20(3) of the Constitution of the French Republic (1958) states: "It shall be accountable to Parliament in accordance with the terms and procedures set out in articles 49 and 50."

that the President of the Republic be not only the head of parliamentary majority but also, during periods of cohabitation, of the opposition. According to M. Debré:⁴⁴

This principle is the basic characteristic of the parliamentary system which the draft Constitution wants to establish. ... Nor does the accountability of the Government signify that it may be called into question in an unlimited manner as a daily occurrence ... The accountability of the Government is established according to procedures that need to prevent the risk of instability.

At the 11th session of the Consultative Constitutional Committee for the Drafting of the Constitution held on 8 August 1958 its president Paul Reynaud put the following question to de Gaulle: "If the Prime Minister is appointed by the President of the Republic, can the latter also terminate his appointment?"⁴⁵

De Gaulle confirmed that the President of the Republic could not terminate the appointment of the Prime Minister:⁴⁶

[B]ecause, were it otherwise, he would not be able to rule with a free spirit [avec l'esprit libre]. The Prime Minister is accountable to Parliament and not to the Head of State, an impartial person that need not meddle in the current political situation but whose basic function is to take care of the regular functioning of the public authorities. He appoints the Prime Minister as was the case under the 1875 Constitution, which leaves out investiture without thereby in any way discarding the application of the issue of confidence. ... If the Prime Minister asks for the termination of appointment of one of his ministers, the President of the Republic signs the decision, but cannot take the decision on his own initiative. Were it not so, the balance of power would be compromised.

J.-L. Debré pointed out that the said interpretation of the political accountability of the Government rejects dualistic parliamentarism in

which the Government is politically accountable to both the Parliament and the Head of State (the Orleans parliamentarism). Consequently Paul Reynaud, appeased, suggested to the Consultative Committee that the text of Article 8 on the Government's appointment be accepted without amendments. The reality of the initial period (1958-1966) of the Fifth Republic reveals that all de Gaulle's Governments requested a vote of confidence in the National Assembly.

On 16 January 1959, the Prime Minister M. Debré noted the following in the National Assembly:⁴⁷

Our new Constitution determines that the Government is appointed by the President of the Republic and the second article authorises the Government to put forward, if necessary, the question of accountability in relation to its programme. Although the Constitution does not explicitly state that the Government has to do this at the moment of its appointment, the spirit of the Constitution is clear and we intend to observe it. The appointed Government goes before the Houses, before the directly elected House it presents its programme and asks for approval. ... This is necessary. ... Parliamentary government is a government subjected to the supervision of the Houses.

The Prime Minister, after deliberation by the Council of Ministers, makes the Government's programme or general policy statement an issue of a vote of confidence before the National Assembly (Art. 49(1) of the Constitution). G. Pompidou's third Government having failed to do so, on 18 April 1967 François Mitterrand said before the National Assembly: "Mr. Prime Minister, you do not have to ask us for investiture, but you have to get our confidence. ... Your Government is starting its mandate unconstitutionally".⁴⁸ F. Mitterrand explained that at a session of the Consultative Constitutional Committee for the Drafting of the Constitution General de Gaulle

44 Discours de M. Debré devant le Conseil d'Etat le 27 août 1958. Cited from: Maus 1998: 2-8.

45 Debré 1974: 177.

46 Debré 1974: 177.

47 Maus 1995: 211. Following the appointment of M. Debré's Government, the National Assembly convened, on his proposal, in extraordinary session so that he would make the Government's general policy statement an issue of a vote of confidence (Art. 49(1) of the Constitution).

48 Maus 1998: 222-223.

had clearly differentiated the Government's investiture from the issue of confidence, Article 49(1) was then amended and instead of the text "the Prime Minister *may call for* a vote of confidence in the Government" the final text read "the Prime Minister *calls for* a vote of confidence in the Government".⁴⁹

The President of the Republic appoints the Prime Minister. He terminates the Prime Minister's appointment when the latter tenders the resignation of the Government. On the recommendation of the Prime Minister, the President of the Republic appoints the other members of the Government and terminates their appointments (Art. 8 of the Constitution).⁵⁰ In order to be able to appoint and terminate the appointments of the other members of the Government, the President of the Republic needs the Prime Minister's countersignature, an agreement between the President of the Republic and the Prime Minister is necessary. Pactet explains that the collective resignation of the Government is possible either after the National Assembly passes a vote of no-confidence in the Government (Art. 49) or if the Prime Minister tenders his voluntary resignation to the President of the Republic. The President of the Republic can bring about the Prime Minister's resignation only in cases where they are politically close. Where this is not the case, the President of the Republic is rendered defenceless, there is no question of his requesting the resignation of a Prime Minister that has the support of a majority that is politically opposed to him. A provoked resignation must be a voluntary act.⁵¹

If we compare the Croatian Constitution (Art. 98(3) and (4); 1990): "The President of the Republic shall: - appoint and relieve of duty the Prime

Minister of the Republic of Croatia; on the recommendation of the Prime Minister of the Republic of Croatia, appoint and relieve of duty its deputy prime ministers and members" with the above mentioned Art. 8(1) of the French Constitution, we can see that the following text is missing from the Croatian provision: "when the latter tenders the resignation of the Government".⁵² The first Proposal for the draft Constitution read: "The Government shall be accountable to the Parliament of Croatia for its work." (15 August 1990, Art. 120(1)).⁵³ However, in the draft Constitution of the Republic of Croatia (23 November 1990, Art. 113) and the Constitution of the Republic of Croatia (1990) the Government's accountability was extended to also include the President of the Republic.

Sokol stated the following: "Dual accountability of the Government to the President of the Republic and the Parliament of Croatia is one of the basic features of the system of government in the new Croatian Constitution."⁵⁴ He noted that only two duties of the President of the Republic are specific to the semi-presidential system:⁵⁵

52 For more see: Government of the Republic of Croatia Act, OG 101/1998:

Art. 5: "The terms of office of the Prime Minister, Deputy Prime Ministers, ministers and other members of the Government shall start on the day of their appointment and end on the day of termination of their appointment by the President of the Republic of Croatia. The day of appointment and termination of their appointment shall be specified in the decision on the appointment and termination of appointment, respectively." Art. 8: "The Prime Minister, Deputy Prime Ministers, ministers and other members of the Government may resign. The Prime Minister shall submit his resignation to the President of the Republic of Croatia. When the Prime Minister submits his resignation, it shall be deemed that all members of the Government have submitted their resignation." Art. 9: "If the President of the Republic of Croatia accepts the resignation of the Prime Minister, he shall dissolve the Government.

In the case of an individual resignation of a member of the Government, the President of the Republic of Croatia shall take the decision on the termination of appointment of this member of the Government"

53 Šarin 1997: 323.

54 Sokol & Smerdel 1992: 153.

55 Sokol & Smerdel 1992: 153.

49 See: Debré 1974: 238–239. Discussion at the Council of State on 25 August 1958.

50 Art. 8 of the French Constitution. "The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government. / On the recommendation of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments." URL: <http://www.assemblee-nationale.fr/english/8ab.asp#> (Accessed on 6 November 2011).

51 Pactet & Mélin-Soucrmanien 2004: 436.

These are the right to appoint and terminate the appointment of the Prime Minister of the Republic of Croatia and, on the recommendation of the Prime Minister, appoint deputy prime ministers and members of the Government and terminate their appointments. The said two powers of the President of the Republic, when viewed in conjunction with the provision of Article 111 of the Constitution of the Republic of Croatia according to which the Government is accountable to the President of the Republic and the House of Representatives of the Parliament of the Republic of Croatia, constitute one of the basic differences between the constitutional models of the pure parliamentary system and the semi-presidential system.

In contrast to the above, the so-called semi-presidential systems of Romania and Portugal feature different constitutional solutions. The Constitution of Romania of 8 December 1991 as amended on 29 October 2003 (amendments adopted at the referendum of 18 and 19 December 2003),⁵⁶ which having been “semi-presidential or semi-parliamentary at the outset and semi-presidential tending towards presidential today”⁵⁷ cannot, according to Tanasescu, be easily qualified as “pure”, specifies that the Government is accountable solely to Parliament (Article 108(1), Constitution of Romania (1991)⁵⁸; Article 109(1), Constitution of Romania (2003)).⁵⁹ The President of the Republic cannot dismiss the Prime Minister (Article 107(2) of the Constitution of Romania (2003)).⁶⁰

56 Constitution of Romania (2003). URL : http://www.cdep.ro/pls/dic/act_show?ida=1&tit=&idl=3 (Accessed on 7 November 2011).

57 Tanasescu 2008: 42.

58 Constitution of Romania (1991). URL: http://www.cdep.ro/pls/dic/act_show?ida=1&tit=3&idl=2 (Accessed on 7 November 2011).

59 Art. 109(1) of the Constitution of Romania (2003): The Government is politically responsible for its entire activity *only* before Parliament. Each member of the Government is politically and jointly liable with the other members for the activity and acts of the Government.

60 Article 107(2): The President of Romania cannot dismiss the Prime Minister.

The President of the Republic of Romania designates a candidate to the office of Prime Minister (Art. 103) and appoints the Government after its investiture in Parliament (Art. 85(1)). However, the President of the Republic is not authorised to designate the members of the Government, this decision is left to be made by the candidate for the Prime Minister, while Parliament is to grant them confidence. The President of the Republic decides on the Government's appointment not at the request of the Prime Minister but at the request of the speakers of both Houses of Parliament pursuant to an affirmative vote of confidence by Parliament and the acceptance of the Government's programme and the list of Government members. Since the Government is accountable *in solidum*, appointments are terminated and new Government members appointed on the proposal of the Prime Minister, while any change in the Government's structure and political composition also requires Parliament's approval of the Prime Minister's proposal for change (Art. 85(2), (3)). In its Decision 356/2007⁶¹ the Constitutional Court of Romania stated that the President of the Republic does not have decisive powers regarding the appointment of Government members, he is required to appoint them on the recommendation of the Prime Minister.

The drafters of the Constitution of the Portuguese Republic (2 April 1976) Miranda and Moreira wanted to move the President of the Republic away from the political running of the country and governmental power and to extricate him from the partisan world.⁶²

Under the Portuguese Constitution the Prime Minister must inform the President of the Republic about matters concerning the conduct of the Government's domestic and foreign policies,⁶³ which moves the President away from these areas. The President of the Republic

61 Decision no. 356/2007, published in M. Of. 322/14.05.2007. With respect to the case when the President of the Republic Traian Băsescu tried to influence the appointment of a new minister of foreign affairs proposed by the Prime Minister by refusing to sign for two months the resignation letter of the previous minister of foreign affairs.

62 Caneas Rapaz 2008.

63 Art. 201 c) of the Constitution of the Portuguese Republic (1976).

is present and chairs the sessions of the Council of Ministers when asked to do so by the Prime Minister.⁶⁴ Presidential elections take place 100 days *after* parliamentary elections if the regular date of presidential elections is *within* the period of 90 days preceding or following the date of parliamentary elections.⁶⁵ The leaders of political parties are directed to compete for the post of Prime Minister and not the presidency of the state, the presidential campaign is deprived of the programmatic debates of the parliamentary campaign. Parliamentary elections maintain their monopoly over the choice of government policy, their results and voters cannot be influenced by presidential election victory.

The first amendments (1982) to the Constitution of the Portuguese Republic (1976) dismiss the *political* accountability of the Prime Minister to the President of the Republic.⁶⁶ In the norm on the accountability of the Government, the word "political" in reference to the accountability of the Prime Minister to the President of the Republic is simply *deleted*, while the political accountability of the Government to Parliament is retained (Art. 191(1) of the Portuguese Constitution). In 1982 a new constitutional provision according to which the President of the Republic may remove the Government only when it becomes necessary to do so in order to ensure the normal functioning of the democratic institutions and after first consulting the Council of State (Art. 195(2)) was added.⁶⁷ The possibility of removing the Government for

reasons relating to the conduct of domestic or foreign policies was excluded, the removal is not a means to be employed against the executive. The President of the Republic appoints the members of the Government and terminates their appointments on the recommendation of the Prime Minister (Art. 133 h) and with the counter-signature of the Prime Minister (Art. 140).⁶⁸ The President of the Republic may also exercise the right of veto over legislation (Art. 136), in which case a law is to be submitted for reconsideration and Parliament must confirm it by an absolute majority of all its Members (for the re-adoption of organic laws and when certain constitutional areas are concerned a two-thirds majority of the Members present, if greater than the absolute majority of all the Members, is required).⁶⁹

Sokol states that the dominant position of the President of the Republic is essentially based on the fact that in the semi-presidential system the institution of the countersigning of acts of the President of the Republic by the Prime Minister or the minister concerned in principle does not exist, with the exception of the following two cases, the dissolution of the House of Representatives and the calling of referenda: "In accordance with the accepted model of the semi-presidential system, the Croatian Constitution has not accepted the institution of the countersigning of acts of the President of the Republic by the Prime Minister."⁷⁰

64 Art. 133 i) of the Constitution of the Portuguese Republic (1976).

65 Art. 125(3) of the Constitution of the Portuguese Republic (1976).

66 Art. 191(1): The Prime Minister shall be *responsible* to the President of the Republic and, within the ambit of the *Government's political responsibility, to the Assembly of the Republic*. The text of the Constitution of the Portuguese Republic (1976) before the 1st revision (1982): Art. 194(1) The Prime Minister is *politically* responsible to the President of the Republic and, in the context of the Government's political responsibility, to the Assembly of the Republic.

67 The Constitution of the Portuguese Republic, Art 195(2): The President of the Republic may only remove the Government when it becomes necessary to do so in order to ensure the normal functioning of the democratic institutions and after first consulting the Council of State.

68 Art. 140 of the Constitution of the Portuguese Republic (1976) lays down the powers which the President of the Republic exercises with the counter-signature of the Government.

69 Presidents of the Republic Mário Soares and Calvaco Silva note that the promulgation of acts of parliament does not necessarily imply fundamental agreement with the norms and that they were reserved with respect to proposing the alternatives to the norms returned to Parliament for reconsideration as this is not a task of the President but of the leader of the opposition. Portugal adopted the procedure of prior review of the constitutionality of laws. Thus, before promulgating a law, the President of the Republic may, if he deems the law contrary to the Constitution, institute the procedure of review of the law's constitutionality before the Constitutional Court (Articles 278 and 279).

70 Professor Sokol notes the following: "There are only two exceptions to this rule: the Prime Minister countersigns the act of the President of the Republic

This is most vividly refuted by cohabitation in France, according to Mitterrand "the return to the Constitution, the whole Constitution and nothing but the Constitution", since it prompts us to reconsider the text of the Constitution of the Fifth Republic in order to set the limits to the powers of the President of the Republic. For the first time the game is played by following the rules of the game, the Prime Minister becomes the actual holder of executive power, while the President of the Republic can only count on independent constitutional powers.

One of these powers is the calling of referenda, on the recommendation of the Government when Parliament is in session or on the joint motion of both Houses, in order to confirm an agreement within the framework of the Community or to authorise the ratification of a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions (Art. 11 of the French Constitution). During the cohabitation of the President of the Republic with a majority opposition in Parliament the calling of a referendum is not contingent on the decision which the President of the Republic takes independently. The only thing the latter can do is prevent the Government from using the institution without his consent. Although the President of the Republic does not need the Prime Minister's countersignature in order to call a referendum, the said power can only be exercised upon the recommendation of the Government.

One power which the President of the Republic exercises independently is the power to dissolve the National Assembly (Art. 12 of the French Constitution). However, the political risk that parliamentary election results that led to the cohabitation in the first place would be repeated, whereby the ensuing presidential election would be lost, are too high. The President appoints the

Prime Minister and terminates his appointment when the latter tenders the resignation of the Government (Art. 8(1)) but the Government has to enjoy the confidence of Parliament, during its cohabitation with a President of the Republic from the opposite end of the political spectrum.

Capitant assesses the possibility of the exercise of emergency powers (Art. 16 of the French Constitution) against the will of the people as expressed in parliamentary elections as a monstrous idea which would lead to personal dictatorship.⁷¹ The exercise of emergency presidential powers was limited by the 2008 constitutional amendments. After thirty days of exercise of emergency powers, the Constitutional Council may examine, at the request of sixty Members of the National Assembly or sixty Senators, the President of the National Assembly or the President of the Senate, whether the constitutional conditions for their exercise as laid down in Art. 16(1) of the Constitution are still fulfilled. The Constitutional Council makes its decision by public announcement. After sixty days of exercise of emergency powers, the Constitutional Council carries out such an examination as of right (the new paragraph 6 of Art. 16 of the French Constitution).⁷²

The President may take the floor before Parliament convened in Congress (Art. 18(2)).

⁷¹ Capitant 1971: 419.

⁷² Art. 16(6): Après trente jours d'exercice des pouvoirs exceptionnels, le Conseil constitutionnel peut être saisi par le Président de l'Assemblée nationale, le Président du Sénat, soixante députés ou soixante sénateurs, aux fins d'examiner si les conditions énoncées au premier alinéa demeurent réunies. Il se prononce dans les délais les plus brefs par un avis public. Il procède de plein droit à cet examen et se prononce dans les mêmes conditions au terme de soixante jours d'exercice des pouvoirs exceptionnels et à tout moment au-delà de cette durée. [After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It shall make its decision by public announcement as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter.]

lic on the dissolution of the House of Representatives of the Parliament of the Republic of Croatia and the act whereby the President of the Republic calls, on the recommendation of the Government, the referendum on a proposed amendment to the Constitution or on any other issue which he deems of relevance to the independence, unity and continuity of the Republic." (Articles 104 and 87 of the Constitution of the Republic of Croatia). Sokol & Smerdel 1992: 154.

This, however, is a pale copy of the power of the US President on the basis of which in January each year the President addresses Congress and citizens by outlining the presidential legislative agenda in the State of the Union Address. Although at the time of the 2008 amendments to the French Constitution the President of the Republic Sarkozy asked for the possibility to directly address Parliament once a year in order to explain his policies and present the results, only a weaker version of the American State of the Union Address was endorsed because the question arose of what, during cohabitation, the President of the Republic would present as actions and results, apart from those relating to defence and foreign affairs.⁷³ Before its promulgation or ratification, the President of the Republic may refer, respectively, a law or an international undertaking to the Constitutional Council which must decide on its conformity with the Constitution (Art. 65 and Art. 54). Following the 2008 constitutional amendments, the appointments of the president of the Constitutional Council, i.e., three members of the Council (Art. 56), members of the High Council of the Judiciary and the Ombudsman must be submitted for consultation to the standing committees of each House of Parliament (Art. 13(4)) which can exercise an absolute veto on the nominations that are desirable to the President. The President of the Republic cannot make an appointment if the committees of the Houses reject the appointment by a three-fifths majority.

What finally needs to be considered are the powers which under Article 19 of the French Constitution the President of the Republic exercises with the Prime Minister's counter-signature. These powers are subject to an agreement between the President of the Republic and the Prime Minister either on the initiative of the President of the Republic: appointments and termination of appointments of members of the Government on the recommendation of the Prime Minister (Art. 8(2)), negotiation and conclusion of treaties (Art. 52), accreditation and recalling of ambassadors and envoys extraordinary to foreign powers (Art. 14), supreme command over the Armed Forces and presidency over national defence councils (Art. 15), promulgation of Acts

of Parliament and returning Acts to Parliament for reconsideration (Art. 10), right to grant pardon (Art. 65), or on the initiative of the Prime Minister: presidency over the Council of Ministers (Art. 9), passing of ordinances and decrees in the Council of Ministers (Art. 13(1)), appointment of civil and military officials (Art. 13). Day-to-day decisions relating to joint areas, namely foreign policy and defence, had to be taken by mutual agreement. Incidents in French diplomacy during cohabitation are a reminder that the President of the Republic and the Prime Minister remain rivals while impatiently anticipating the end of cohabitation which restrains both of them. No important international initiative could be launched by either side before the opposing side had first been convinced of the project's justifiability or had decided to remain neutral with respect to the matter in question. In the case of any disagreement, negotiations had to be conducted. The actual inversion of power within the executive leads to the Prime Minister deciding on whether the policy of the President of the Republic will be carried out, the Prime Minister is the chief decision-maker. However, the President of the Republic does not need to assist the Prime Minister in carrying out a policy he disapproves of.

The Croatian Constitution has also been supplemented by constitutional norms unfamiliar to the French original.⁷⁴

4 CONCLUSION – ON THE DESTROYED MYTH ABOUT THE SEMI-PRESIDENTIAL SYSTEM

The function of myths is not to tell the truth but to affect the reality. In the same way the myth about the semi-presidential system in Croatia, "à la française" or "à la croate", was intended to, on the one hand, animate the democratic political elite that has the permission to constructively criticize the existing order and, on the other hand, offer the voters a mobilising alternative. Likewise, the myth on the semi-presidential system was drawn on at the time of adoption

⁷⁴ The draft Constitution (Art. 98) and the Constitution (Art. 96, 1990) included the following provision: "The President of the Republic may not, *except for party-related duties*, perform any other public or professional duty."

⁷³ Kostadinov 2008: 4.

of both the provisions on the system of government in the Croatian Constitution (1990) and amendments to these provisions by the 2000 constitutional amendments.

The goal set in 2000 by constitutional law professors gathered in the *Working Group of the President of the Republic for the Drafting of an Expert Basis for Constitutional Amendments*,⁷⁵ namely a system of government based on the principle of separation of powers as understood today, was achieved by means of the constitutional amendments of 2000 and 2001.⁷⁶ Thus Smerdel noted:⁷⁷

The basic concept and approach to the described task was formulated by the Working Group in the following way. Each one of the three highest-ranking state bodies is formed separately and each acts within its constitutionally set sphere of activity. However, the majority of the most important decisions require, in order to be taken, mutual cooperation, consultations or the consent of other bodies. Instruments such as the countersignature, requesting opinion or consultations, aim at directing, even forcing, the holders of the most important state offices to take part in consultations and, where necessary, reach compromises. On this conception the President of the Republic remains an important factor of the constitutional system, with a notable right of initiative with respect to the most important areas of state activity, but in doing so he has to constantly cooperate with the Government and the Croatian Parliament. Limits to his powers and the supervision of his exercising them are necessary in view of both the highly influential political position which the directly elected President holds and the fact that he is not politically accountable to Parliament.

A system of parliamentary government characterised primarily by the Government's political accountability to Parliament, combined with the existence of the right to dissolve Parliament, was formed while obstacles to the re-establishment

of the system of personalised power in the hands of the President of the Republic (1990-2000) were set up.

In Croatia new proposals for changing the constitutional system of government, in particular the constitutional position and role of the President of the Republic of Croatia, have been put forward. Eighteen years after the adoption of the Constitution of the Republic of Croatia (1990) and after the 2000 and 2001 constitutional amendments professor Sokol also joined the debate. In the column entitled *Quarter-Presidential or Parliamentary System* published by the daily *Večernji list* he noted that today's relationship between the President of the Republic and the Government is not that of the semi-presidential system since the Government is not politically accountable to the President of the Republic but solely to the Croatian Parliament.⁷⁸ The contemporary constitutional model characterises as singular a new hybrid of the semi-presidential system, the so-called "quarter-presidential system", and by instilling insecurity in the form of a possible blockade of the executive and a politico-constitutional crisis of sorts as a result of the existence of constitutional provisions calling for agreement between the President of the Republic and the Government, it requires that for any legal or political act within the spheres of foreign policy and defence the President of the Republic obtain the Prime Minister's countersignature and that state security be relinquished to the Prime Minister as an area falling within his exclusive competence. Professor Sokol thus argued for a change to the new system of government: "Therefore, since in 2000 we already discarded the semi-presidential system, we may as well take one step further and abandon the quarter-presidential system. Thus Croatia would finally adopt a system of parliamentary government that has been invoked and desired by many for so long".⁷⁹ During Josipović's presidential term-of-office and after the election of the current President of the Republic Grabar-Kitarović in 2015 this proposal has again become topical in the form of the request for the election of the President of the Republic in Parliament.

75 Mratović et al. 2000.

76 The Constitution of the Republic of Croatia, Consolidated text, including the corrigendum, OG 41/01 and 55/01.

77 Smerdel 2010: 33.

78 Sokol 2008.

79 Sokol 2008.

The new system has been in existence for more than fifteen years now and one would therefore expect constitutional law science to stop taking an interest in the semi-presidential concept. However, since the very beginning the living myth about the semi-presidential system

dominates Croatia's political life, with the same legitimacy politically mobilizes towards the achievement of different purposes depending on the goals of the proposers, and raises more questions than it can answer.

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