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VSEBINA

V tokratni številki so objavljeni prispevki v angleščini, slovenščini in hrvaščini. Za slovenske povzetke in ključne besede glej strani 97–101.

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UVODNIK

V kakšnem smislu so dokončne sodne odločbe lahko pravno zmotne

To je poziv k redefiniciji pojma pravne nepravilnosti dokončnih sodnih odločb. Njegovo običajno razumevanje (tj. da so dokončne sodne odločbe pravno zmotne, kadar so v nasprotju z obstoječim pravnim redom) je precej bolj problematično, kot pa se navadno predpostavlja. V tem zapisu želim pokazati, da običajno razumevanje, ki ga sicer utrjuje tudi Hart (1961: 7. pogl.), vodi v paradoks.

Težavo, ki iz tega izhaja, bo mogoče hitro doumeti, če se za uvod ustavimo ob s pravom nepovezanem paradoksu brivca, ki ga je pred sto leti širši javnosti oznanil Russell (1919: 355). Zgodba gre takole: Brivca je mogoče opredeliti kot človeka, ki brije vse tiste in zgolj tiste ljudi, ki se ne brijejo sami. Zdaj pa se vprašajmo: Kdo brije brivca? Z odgovorom na to vprašanje vznikne paradoks. Če se brivec brije sam, potem samega sebe ne brije (saj brivec brije *zgolj* tiste ljudi, ki se ne brijejo sami). Če pa se brivec ne brije sam, potem se vendarle brije (saj brivec brije *vse* tiste ljudi, ki se ne brijejo sami). Nauk zgodbe je, da brivca ni mogoče zadovoljivo opredeliti kot človeka, ki brije vse tiste in zgolj tiste ljudi, ki se ne brijejo sami, ker takšna opredelitev vodi v protislovje. Predpostavka (»Brivca je mogoče opredeliti kot človeka, ki brije vse tiste in zgolj tiste ljudi, ki ...«) je napačna.

Menim, da je treba podobno pomanjkljivost pripisati splošno sprejetemu prepričanju, po katerem je mogoče, da so dokončne sodne odločbe pravno zmotne. Razlog za mojo trditev je kratek in preprost. Predpostavimo, da sta izpolnjena naslednja dva pogoja:

(*a*) soočeni smo z dokončno sodno odločbo, ki je pravno zmotna;

(*b*) v obstoječem pravnem redu je pravno pravilno izpolniti dokončne sodne odločbe.

V tem primeru imamo opravka s protislovjem, saj je pravno pravilno potemtakem izpolniti to, kar je pravno zmotno. Z drugimi besedami:

(*) Pravno pravilno je storiti to, kar je pravno nepravilno.

Po analogiji z naukom zgodbe o paradoksu brivca bi kdo lahko zaključil, da je napačna ena od izhodiščnih predpostavk, in sicer (*a*). To pomeni, da dokonč-

na sodna odločba, ki bi bila pravno zmotna, ne obstaja. Prepričanje, da so takšne odločbe lahko pravno zmotne, je zgrešeno, ker vodi v protislovje. Nemogoče je, da bi bila v našem pravnem redu dokončna sodna odločba pravno nepravilna.

Tu moram seveda dodati, da ta zaključek ni edina možnost. Kot bomo videli, bi kdo lahko zavrnil tudi drugo predpostavko (in obdržal prvo) ali pa bi paradoks razrešil na katerega od bolj zapletenih načinov, ki se za to navadno uporabljajo. V kratkem preostanku tega članka bom zdaj skušal pokazati, da omenjene možnosti niso nič bolj ugodne za splošno sprejeto prepričanje, po katerem so dokončne sodne odločbe lahko pravno zmotne.

Zavrnitev druge predpostavke (to je: »V obstoječem pravnem redu je pravno pravilno izpolniti dokončne sodne odločbe.«) povzroči, da teorija izgubi vsak stik z dejanskostjo. Zavrnitev druge predpostavke namreč omeji polje uporabe takšne teorije na »nezrele« pravne rede brez instituta dokončnosti. Negotovo je, ali se takšni redi sploh štejejo za pravne. Hart (1961: 142) jih je imel v mislih, vendar niso bili v središču njegove pozornosti in tudi danes niso v središču pravoslovnega zanimanja. To pa še ni vse. Opustitev druge predpostavke, (*b*), pomeni, da v pravnih redih, ki jih takšna teorija obravnava, predmet, na katerega se pojem pravne nepravilnosti dokončnih sodnih odločb nanaša, sploh ne obstaja. Ta možnost je torej neuporabna.

Kot sem že nakazal, pa obstaja še nekaj bolj zapletenih načinov rešitve. Tu bom omenil dva. Eden od teh načinov je, da razdvoumimo besedno zvezo »pravno pravilno«, ki je vzrok protislovja v (*). V ta namen bi kdo lahko razlagal, da z dokončno odločbo kršeno pravilo nalaga dolžnosti sodnikom in uradnikom, medtem ko je dolžnost izpolnitve dokončnih sodnih odločb naložena posameznikom. V skladu s to razlago naj bi (*) dejansko pomenil tole: »Pravno pravilno *za posameznike* je storiti to, kar ni pravno pravilno *za uradnike*.« Paradoks bi bil s tem razrešen. *Ali pač ne* – saj imajo prav gotovo tudi uradniki dolžnost izpolniti dokončne sodne odločbe, to pa pomeni, da je paradoks še vedno tu. Uporabnejšo rešitev z razdvoumljenjem prinaša razlaga, da je, *gledano v celoti*, pravno pravilno storiti to, kar pravno ni pravilno, *če upoštevamo vse, razen enega pravila* (tj. tistega, ki nalaga izpolnitev dokončnih sodnih odločb). S tem je paradoks razrešen, vendar je tudi ta rešitev v nasprotju s splošno sprejetim prepričanjem, da so dokončne sodne odločbe lahko pravno zmotne. Kot se namreč izkaže, *gledano v celoti*, ni tako.

Za konec si na hitro poglejmo še rešitev, ki nam bo pravnikom morda celo najbližja. Ugotovili bomo, da obravnavana težava ni prav nič posebnega. Opravka imamo z antinomijo med pravilom, ki nalaga izpolnitev dokončnih sodnih odločb, in pravilom, ki ga odločba krši. Antinomije so v pravu pogoste, pravniki pa jih razrešujemo v skladu z merili nadrejenosti, posebnosti in kronologije. Ker je pravilo, po katerem je pravno pravilno izpolniti dokončno sodno odločbo, nedvomno ustavnega ranga (izhaja namreč iz načela pravne države),

sta možnosti dve. V primeru, da je drugo pravilo hierarhično podrejeno prvemu, prevlada slednje. V primeru, da je ustavnega ranga tudi drugo pravilo, pa bo antinomijo mogoče razrešiti le z razlaganjem, ki ga izvedejo sodišča z dokončno sodno odločbo. V obeh primerih prevlada rešitev, potrjena z dokončno sodno odločbo, običajno razumevanje pa se tako izkaže za zgrešeno.

V tem zapisu sem pokazal, da običajno razumevanje, po katerem so dokončne sodne odločbe lahko pravno zmotne, vodi v paradoks. Na hitro smo preizkusili tudi tri načine razrešitve paradoksa (zavrnitev ene od predpostavk, razdvoumljenje in razrešitev antinomije). Kot se je izkazalo, nobena od obravnavanih rešitev ne pritrdi razumevanju, da so dokončne sodne odločbe lahko pravno zmotne. To ne izpodbije dejstva, da je takšno razumevanje intuitivno utemeljeno, pokaže pa, da moramo biti (tudi) v pravnem govoru bolj pozorni pri sprejemanju prepričanj, ki temeljijo na intuiciji.

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Legal disagreements

A pluralist reply to Dworkin's challenge

In this paper I analyse the problem of legal disagreements, initially raised by Ronald Dworkin against Hartian positivism. According to Dworkin, disagreements are pervasive, since law is an argumentative practice in which participants invoke normative arguments; Positivists, who claim that law depends upon agreement among officials, have difficulties to make sense of the fact that lawyers frequently disagree. I first present the main arguments in the debate; I then go on to distinguish different levels at which lawyers disagree. Taking these levels into consideration, I articulate a pluralist reply that shows that the fundamental positivist tenets remain untouched by Dworkin's challenge.

Keywords: legal disagreements, Dworkin, legal positivism, direct reference theories

1 INTRODUCTION

There are widespread philosophical beliefs about law that are seemingly beyond question. It is commonly accepted that, in order for a legal system to exist, certain social facts have to obtain. However, many characterizations of these changeable facts have been attempted. According to the Hartian model, law is dependent upon a convergence in certain individuals' conduct and attitudes. In particular, officials share the same criteria to identify the law of their legal system, and they are committed to them.[1] At the same time, it is also difficult to dispute that there are disagreements among lawyers, for example about the interpretation of the law or the relevance of morality to deciding cases.

The problem of legal disagreements as sketched by Ronald Dworkin seeks to identify the difficulties that positivists such as Hart face when they attempt to maintain the conventional nature of law (in the sense mentioned) while recognizing the fact that there are disagreements – at least apparently – about what the law establishes. The problem for positivists is even worse, since they defend that the beliefs and attitudes of participants must be taken into account and, in many cases, they see themselves as having meaningful disagreements regarding the law. However, the very fact of the officials' disagreement shows, according to Hart, that there is no unique legal answer for the case. The idea of parties disagreeing on which answer the law really requires would make no sense.

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1 Hart 1994: 82 and ff.

It is not easy to determine in what way positivism is committed to a conventionalist conception of the law.[2] In fact, it can be said there are as many "positivisms" as conventionalist theories. I will focus on those conceptions that take law as depending on the existence of a convergence of certain kinds of conduct and attitudes. My main aim is to examine the merits of Dworkin's critique of legal positivism. I first describe the main arguments that have been offered in the debate over legal disagreements. I then distinguish different levels at which officials disagree; I conclude the paper with the presentation of a pluralist reply to Dworkin's challenge.

2 THE HART-DWORKIN DEBATE

The Hart-Dworkin debate has persisted for quite some time, changing course many times and involving a wide range of scholars who disagree even on the very object of the dispute. However, it is unquestionable that the problem of disagreements in law is one of the main aspects of the debate.

Some authors held that the problem does not have the importance that Dworkin and others claim it has; others argued that it is indeed an important challenge for positivism.[3] I claim that it is a very important critique, deserving of a reply from positivists; however, I argue that Dworkin's challenge has remained constant: what has changed are the *explanations* he has offered as to why positivism is incapable of reconstructing hard cases on which officials disagree.[4]

In *Taking Rights Seriously*, Dworkin points out that, if we have a look at what actually happens in a courtroom, it is not difficult to notice the fundamental role of principles in resolving cases. Positivists, who assume that legal norms are identified by criteria related to their pedigree, cannot accommodate principles because their legality depends on substantive considerations.[5] Dworkin claims that individuals have rights that do not depend for their legality on their prior recognition by legal systems, and that it is the judges' duty to guarantee them. They have to determine who has the right to win the case by using arguments

2 See Marmor 2009 and Vilajosana 2010.

3 Although Shapiro (2007) and Leiter (2007) identify it as a new challenge, Leiter argues that it is not a serious one.

4 I do not want to deny that the kinds of disagreements emphasized by Dworkin have changed. In this sense, I do agree with Ratti (2008), who distinguishes between disagreements about the sources, to which Dworkin makes reference during the first period, and interpretive disagreements, relevant during the second one. What I want to defend here is that Dworkin's challenge (regarding the existence of hard cases and disagreements) has remained, in an important sense, constant.

5 Dworkin 1977: 17 and ff.

based on principles. In contrast to rules, principles are non-conclusive standards that are quite often in conflict. Their application depends on the relative weight of the principles involved and, according to Dworkin, there is always a right answer provided by the correct balance of the values at stake. So, lawyers often disagree about what the law establishes even if one side in the disagreement is wrong.[6]

Some years later, Dworkin further developed many of his previous ideas in *Law's Empire*, emphasizing the interpretative nature of legal practices. Legal argumentation is creative and constructive. Much as it happens in the case of art, law requires the exercise of creative interpretation, in which participants attempt to interpret something created by individuals as an entity distinct from them. For that reason, determining what the practice requires is different from determining the participants' beliefs. Legal reasoning is also an exercise of constructive interpretation. It is a matter of imposing a purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong. Dworkin maintains that that purpose determines what the practice requires. However, it is not the case that "anything goes", because the way in which a practice or object has previously developed restricts the number of possible interpretations.[7] Following Dworkin, the purpose of law is the justification of state coercion by law, taking into account individuals' rights and responsibilities that derive from past political decisions.[8]

The disagreements that make the argumentative nature of law clear are not restricted to general disputes about whether morality is a condition for legal validity, nor are they restricted to the role of principles in legal reasoning. They are also apparent, for example, when participants advocate for different ways of interpreting legal statements. Why is legal positivism unable to offer an accurate reconstruction of these cases? According to what Dworkin emphasizes in his later work, the problem is that, for positivists, the truth of legal propositions (statements concerning what the law of a particular legal system establishes) depends exclusively on certain historical facts that constitute the grounds of law. Positivism may be able to reconstruct empirical disagreements about whether certain historical facts obtain, but is unable to account for disagreements about which elements are legally relevant. Therefore, they cannot offer an accurate reconstruction of theoretical disagreements, and they are forced to understand them as disagreements about what the law *should* be.

Dworkin claims that legal theorists often rule out the possibility of theoretical disagreements because they subscribe to *semantic* theories of law, which see meaning of words as dependent upon shared criteria. In law, this means

6 Dworkin 1977: 81 and ff.

7 Dworkin 1986: 45 and ff.

8 Dworkin 1986: 93.

assuming that officials use the same criteria in order to consider something as law. According to Dworkin's reconstruction of positivism, the very meaning of the word "law" makes law dependent on shared criteria and, therefore, agreement on the grounds of law is fundamental. This is the well-known *semantic sting* argument, introduced by Dworkin to explain why positivists require that the criteria that we employ to determine what counts as law be established by agreement.[9] People agree, if they are competent in the use of the term, about the grounds of law. Controversies would not make sense because people would be using the same word ("law") with different meanings and, if meaning determines the object of controversy, they would be arguing about *different things*.

If we take into account Hart's work as a whole, Dworkin's critique generates some perplexity: Hart did not try to provide a definition of the word "law", but rather an analysis of the concept of law,[10] and he explicitly rejects semantic theories that relate words to necessary and sufficient conditions.[11] Moreover, although he claimed that every legal system has a rule of recognition that specifies the criteria for identifying the law, he clarified that it is not part of the meaning of the word "law" that the rule of recognition is present in every legal system.[12]

Dworkin's critique may be responded to by using two groups of arguments: 1) he associates Hartian positivism with criterial semantics, but there are no elements in Hart's work that lead us to that conclusion and there are alternative semantic models which are more plausible than the one attributed by Dworkin; 2) the connection that Dworkin establishes between the semantic position (or, strict speaking, the *metasemantic* position[13]) regarding the word "law" and the criteria for considering something as law is questionable.

If we focus on the first question, Dworkin's critique seems easy to refute: positivistits do not reach their conclusions by analysing the meaning of the word "law"; they attempt to understand the nature of law, and often proceed by analysing the concept of law. Even if we accept that positivism is concerned with the analysis of the word, Dworkin's conception may be objected to on the grounds that he attributes a naïve criterial model to positivists. This model assumes that we associate some descriptions with certain words, that they are transparent to us, and that they determine the objects to which the words apply. This is too demanding with respect to the knowledge that speakers have, since their knowledge is often very poor and is frequently wrong. Moreover,

9 Dworkin 1986: 31-37.

10 Hart 1994: 81.

11 Hart 1994: 15.

12 Hart 1994: 246.

13 That is, it concerns the question of how to determine the semantic content of words and expressions, which is different from debates about specific conceptions of the meaning of the word "law".

the model cannot make sense of disagreements, given that individuals would be associating the same word with different descriptions, which would refer to different objects. In contrast, there exist more plausible models, for instance, the model that claims that we possess a family of (indeterminate and vague) descriptions and direct reference theories, which reject the necessity of descriptions to refer to objects.[14]

Even if we were to accept that the positivist model is concerned with the analysis of the word "law", and that positivists hold something like a criterial model, Dworkin's critique still would not be well grounded. He assumes the existence of a relation between the conception that positivism holds regarding the word "law", and the criteria used by officials in order to consider something as law. That relation is, however, problematic: determining the meaning of the word is a different undertaking from determining the grounds of law of a particular legal system. There may be a disagreement about the criteria that determine the extension of "law" without there being any disagreement with respect to the grounds of law, and vice versa. For example, linguistic practice in the United States may agree on the meaning of the word "law", understanding (for example) that it is a group of principles and norms, which express an idea of justice and order, that regulate human relations, and whose observance may be imposed coercively. Nonetheless, individuals may disagree about the grounds of law of the American legal system. It is also possible that the opposite occurs: widespread agreement about the grounds, but significant disagreement about which is the meaning of the word.[15]

Let us consider that positivism is trying to capture the main features of legal practice by analysing the *concept* of law. Dworkin could be read as claiming that positivism understands that individuals share the concept that they are trying to elucidate, and that to share the concept requires sharing the criteria for applying it. In the case of law, this means the necessity of convergence about the grounds of law of particular legal systems. This requires assuming three theses: 1) conceptual analysis is based on the identification of shared criteria for the application of the concept; 2) people cannot disagree about the criteria that they share; 3) the criteria for applying the concept of law are the criteria that officials use to identify the law. Although it may be controversial in its details, conceptual analysis is not based on the elucidation of shared and transparent criteria about the concept of law. If it were so, its job would not be very different from linguistic analysis. Positivists try to clarify the main features of law, taking into account obvious truths about law and elaborating theories that accommodate

14 Regarding the relevance of a family of descriptions, see Searle 1958 and Strawson 1959. Supporting direct reference theories, Kripke 1980 and Putnam 1975.

15 Coleman-Simchen 2003: 8.

them in a kind of reflective equilibrium.[16] In addition, a good explanation of the concept does not require a commitment to an analysis in terms of necessary and sufficient conditions for its application, but instead often emphasizes features that are not unique to it, defeasible conditions, and it offers a reconstruction of its relation to other concepts.[17] Even if we accept the relevance of shared criteria, individuals may disagree given the opacity and the anti-individualist character of those criteria.[18] In fact, it is very usual to hold that an individual has acquired a concept even if she has very deficient knowledge about its criteria of application. So, it can be said that Dworkin mischaracterizes the idea of criterial semantics and criterial explanations. Finally, it is at least strange to say that the shared criteria for using the concept are the criteria that determine the grounds of law. Individuals from two different legal systems may employ different criteria to identify the law, but may share the same concept. And although we may sometimes assert that an individual has acquired the concept of law, it is possible that she does not know which criteria determine what counts as law in her legal system.

The semantic sting argument, then, is not a problem for positivists. Convergence in the identification of the law is relevant not because of the kind of word or concept involved (criterial or not), but because it is the *result* of conceptual analysis. Using conceptual analysis, positivism concludes that convergence in the identification of the law is relevant, but this does not follow from the claim that words or concepts require the existence of shared criteria.[19] Let us now turn to analysing the critique that positivism, which requires convergence, is unable to provide an accurate characterization of disagreements in the criteria of legal validity, the sources of law, and its interpretation.

3 THREE REPLIES

If we take into account legal practice, individuals seem to disagree about what the law claims. They do not typically disagree about empirical questions, nor do they seem to disagree about how to decide cases when the law does not provide a solution or when they consider that the answer that it provides is unfair. Positivism, which concedes a central role to convergence, seems unable to properly reconstruct these cases. Many attempts have been made to respond

16 Shapiro 2011: 13 and ff.

17 Raz 2001: 6 and ff.

18 Raz 2001: 14 and ff.

19 I do not want to assume a specific form of conceptual analysis, nor to attribute it to positivism. I just want to defend that positivists are not committed to the relevance of convergence *because* they are committed to the existence of shared and transparent criteria regarding the word "law" or the concept of law.

to these criticisms while preserving the basic positivistic tenets. I will briefly analyse three of them.

3.1 Disagreements are marginal

In order to determine whether the problem posed by Dworkin is powerful enough to undermine positivism, it is important to note that nearly all of our daily actions are regulated by legal norms. Even if this kind of "intuitive statistics" may be seen as problematic, it is hard to argue that the number of disputes that end up in court is very small if we compare it with our relationship to norms.

Many cases that are discussed before a court of law concern problems of proof or other considerations that cannot be characterized as disputes about the grounds of law. Parties sometimes use the legal system as an instrument to preserve their interests, for example to delay a payment. Only in a limited number of cases, especially in procedures that reach the higher courts, do disagreements arise that appear to involve the question of what the law establishes.[20]

Moreover, not all disagreements concerning what the law requires are problematic for positivism. The relevant disagreements (which would throw into question the idea of convergence defended by Hart) are only those that take place between officials. That is, although other individuals, for example attorneys, use shared criteria to identify the law and may disagree about them, they are not part of the relevant practice, and, as a result, their arguments do not show that the practice does not exist. In addition, the fact that a group of individuals who are officials argue about the law does not in itself undermine the conventional nature of law, which requires a generalized practice of recognition, not unanimity.

Therefore, one line of response to Dworkin's critique is to claim that, given that positivism to a large extent clarifies the phenomena, we should not abandon it because of what turns out to be a minor problem. When we compare the explanatory importance of different theories, it is preferable to choose the theory that offers a simpler explanation, that explains more aspects of the phenomena, and that leaves well-established beliefs and theories untouched. The fact that a theory does not explain *all* the facts does not commit us to abandoning it.[21]

It could be argued that many disagreements that are seemingly about what the law establishes are in fact disagreements about how to interpret legal texts, and that these disagreements do not threaten positivism, which only requires an agreement on the legal sources. Consequently, even if it were claimed that

20 Leiter 2007: 1228 and ff.; Vilajosana 2010: 173 and ff.

21 Leiter 2007: 1239.

disagreements about the interpretation of the law are frequent (because there are multiple canons that allow multiple interpretations, and frequently the rank between them is not pre-established) it could be replied that such disagreements do not threaten positivism. In this way, the number of disagreements that need to be explained is considerably reduced.[22]

I claim that some level of agreement about the content of the sources is necessary in order to make sense of the function performed by the sources and the criteria for identifying them. I also claim that disagreements about interpretation are not as widespread as is sometimes assumed.

On the one hand, the existence conditions of a legal system cannot be exhausted by the practice of identifying texts without a critical-reflexive attitude toward certain ways of attributing meaning to them. Let us imagine that an individual considers the U.S. Constitution to be part of the American legal system but also believes that its meaning should be determined by using a computer program that assigns meaning by chance. Let us imagine another individual who believes that the content depends on what her son says. Finally, a third individual understands that what is expressed by the Constitution depends on ordinary language. Would we say that there is an agreement among these individuals regarding the fact that the Constitution is part of the law? If these individuals hold an interpretation radically different from the others in relation to what the Constitution establishes, invoking it becomes superfluous. In other words, if interpretive activity is not constitutive of legal activity, convergence with respect to sources may bring about the same results as its absence (a complete disagreement about which norms are valid) and so may be entirely irrelevant. It seems, then, that the convergence characteristic of the positivistic model would be deprived of sense were there no agreement about how to interpret the sources.

On the other hand, those descriptions that emphasize the availability of several interpretative options exaggerate the controversial character of legal interpretation. It has been claimed that the existence of a plurality of interpretative instruments in the legal systems we are familiar with means that the interpreter has discretion to choose between several possible norms.[23] I think it very difficult to question that, in contemporary legal systems, there are many interpretive instruments, that they depend on the practice of interpreters, and that they can change if the practice changes. However, if we consider every individual judge from the synchronic perspective, there are interpretations that are correct, and others that are not. To argue that there is always a framework of possible interpretations, and that judges always have discretion, is a distor-

22 Ratti 2008: 308 ff.

23 Guastini 2011.

tion of legal practice, which exaggerates the controversial character of some cases.[24]

For these reasons, it is necessary to take into account disagreements about interpretation, but this should be done without exaggerating the number of disagreements that the different instruments produce.

Positivism, then, would not be fatally weakened by Dworkin's critique because it sheds considerable light on legal phenomena. However, in attempting to gauge the significance of disagreements one must take into account not only their number, but also their relevance to the legal system as a whole and to the matter at hand. Moreover, Dworkin's critique threatens one of the main tenets of positivists, since they emphasize the relevance of convergence as a central feature of legal systems.[25] If the Dworkinian critique sheds light on a relevant feature and threatens one of the central arguments of the positivistic model, the small number of disagreements does not render the problem marginal. Consequently, to retain positivism as a good theory of law it is necessary to look for plausible alternative explanations for these cases. Moreover, positivism should be tested against the *possibility* of pervasive disagreement in law, not merely against factual limited disagreement. However, the small number and significance of disagreements is not entirely inconsequential, since it facilitates the discovery of alternative explanations for these limited number of cases, as we will see in the next section.[26]

3.2 They are not genuine theoretical disagreements

Two main strategies have been employed to defend that disagreements are not genuine disagreements about the law. On the one hand, it has been claimed that those individuals that disagree are mistaken. On the other hand, that they

24 The most accurate description of the situation is that ordinary language plays a fundamental role in our understanding of what is expressed by rules, and in many cases the solution given by taking into account ordinary language cannot be dismissed by invoking other instruments, because they all lead to the same solution. See Moreso 1997: 222.

25 Shapiro 2011: 290.

26 It may be argued that the number and importance of disagreements is irrelevant for Dworkin because, even if there were a pervasive agreement, he could claim that participants attribute some purpose to the practice and understand that what the practice requires depends on that purpose also in easy cases. However, it would be a remarkable coincidence. Dworkin would have to show why this reconstruction is better than a simpler one based on shared criteria (which, as Hart points out, can be accepted by officials for all sorts of reasons). Hart's theory is able to explain the legal practice in easy cases without assuming that lawyers are (in some sense) engaged in an exercise of political philosophy. Be that as it may, even if Dworkin has a hard time explaining agreement in law, positivists still need to account for legal disagreements. It may also be argued that, even if there is a pervasive agreement about how to decide many cases, participants do not agree on the specific details of the theory of law they assume. However, in the last part of this paper I will defend the irrelevance of this kind of disagreements.

are disingenuous in that they are aware that there is no right answer, but are trying to conceal what are essentially normative arguments.[27]

An error theory with a general scope has been defended in moral theory. To reconstruct certain cases that take place in law as cases of error seems to be somewhat easier than holding that every moral judgement is somewhat mistaken. It is not implausible to say that sometimes individuals are wrong because they believe there is a legal answer where there is none. In other cases, individuals seem to be aware that the solution they have chosen is not the one established by the law. Officials decide according to what they think the law should be, because they do not like the law, or because there is no law.

Still in need of explanation, however, is the issue of why disagreements take place as if they were genuine. The obvious answer seems to be that those who are in error are not aware of it, and that those that are disingenuous do not want to acknowledge the real situation. If this is so, why have these facts not been discovered yet? A possible answer may be that individuals do not have much knowledge about law, they may feel intimidated by those they consider to be experts, or they may just defer to them. However, lawyers who are not judges are also part of the debate and are aware of it, which makes it more difficult to accept that disagreements about law are always cases of error or disingenuity.[28] Even if many cases may be said to be cases of error and disingenuity, other cases require an alternative explanation. To understand that error and disingenuity explain all the cases offers an image of the practice that many participants would reject. Therefore, it cannot be a good explanation, at least as a matter of internal analysis, because it does not take into account the participants' perspective.

3.3 Positivism can account for theoretical disagreements

Many cases can be said to be located in the penumbra of the rule, where the judge has discretion to decide. That does not imply that the decision is arbitrary, only that the law does not provide a unique solution. For example, at the level of the sources of law, it may happen that, in a specific legal system, individuals believe that the results of the activities of parliament are law, but they may doubt whether those decisions can bind future parliaments.

On the other hand, if disagreements about the identification of the law were widespread, we would probably acknowledge that it is a pathological legal system, and perhaps even doubt that it is in fact a legal system at all.[29]

27 Leiter 2007 and Vilajosana 2010: 173–175.

28 Shapiro 2007: 42.

29 Vilajosana 2010: 173 and ff.

However, despite the fact that not everything is always debated and that disagreements may usually be understood as marginal, sometimes disputes are about pivotal cases and they seem to represent opposing conceptions emphasizing different features of the *same* phenomenon. We have seen that Dworkin conceives law as an interpretive practice, in which a purpose is attributed to the practice, and that what the practice requires depends on that purpose. When officials disagree what is implicitly being discussed is what best justifies state coercion. For that reason, disagreements are intelligible and inherent in legal practice. In Dworkin's conception, then, disagreements are not problematic, but in fact show that his theory reconstructs the practice correctly. However, they are a threat to positivism.

Two main strategies which attempt to accommodate theoretical disagreements have been developed. They call either for a refinement of the conventionalist model, or for its abandonment.

With respect to the first strategy, deep conventionalism has been defended. Positivism seems to face a dilemma regarding the reconstruction of social rules and the (well-known) problem of following them. Both horns of the dilemma imply that it cannot offer an accurate account of the problem of disagreements. If we claim that a conventional rule is exhausted by explicit agreement on its correct application, theoretical disagreements are not intelligible, because the lack of agreement implies that there is no answer provided by the rule; if we claim that agreement extends only to which texts are important, we would be assuming a very poor conception about the relevant convention. In contrast, Professor Bayón emphasizes the relevance of agreement in paradigmatic cases, which shows the existence of public criteria that are not limited to those applications.[30] According to Bayón, acknowledging that there are paradigmatic cases implies mastering a technique. This, however, requires no more than tacit knowledge of the criteria for the correct application of the rule, which need not be transparent to every individual. Generalized agreement neither guarantees that the correct answer has been identified, nor does lack of agreement necessarily imply that there is no correct answer. However, leaving aside the difficulties of relying on the existence of a conventional answer despite disagreement, these positions are committed to the claim that disagreements are about what the convention is, which does not seem to be the case in many situations.[31]

Following the second strategy, Shapiro holds a position in many respects similar to Dworkin's.[32] Shapiro rejects supporting interpretive conventions. Like Dworkin, he believes that to make sense of disagreements, it is fundamen-

30 Bayón 2002: 76 and ff.

31 For example, it is not very plausible to argue that the debate regarding what is a cruel punishment concerns our deep conventions.

32 Shapiro 2011: 357 and ff.

tal to take into account the purpose of the practice. Both claim that the best interpretive methodology in a legal system depends on which one better fits its objectives. However, he claims that his conception is positivistic. He does not think that the attribution of a purpose requires an exercise of moral and political philosophy, but the search for legal facts. The interpreter has to determine which political purposes the designers of the legal system tried to achieve. In order to discover these purposes the interpreter has to analyse the institutional structure and determine the objectives and values that better explain the form of the system. The correct interpretive methodology will be the one that best harmonizes with these objectives. The relevant purposes are those that explain the practice, not those that justify it, and they may be morally deficient.

Shapiro claims that his motivation for insisting on the relevance of social facts is not to preserve positivism at all costs. He claims that it by paying attention to certain social facts regarding the designers of the system that we can make sense of having authorities. We use the law to try to achieve complex purposes; given the difficulties we face in determining partial objectives that contribute to the satisfaction of further purposes, the motivational deficiencies of some individuals and the incapacity that some of them have in order to develop their roles, it would be very hard to satisfy complex purposes without the law. There are therefore deficiencies related to the trust in individuals that would make it very difficult to achieve the objectives, and the law tries to compensate for them. In this sense, law enables the achievement of complex objectives determining a distribution of roles by virtue of the trust relative to the capacities and character of the different participants. For this reason, the proper interpretive methodology in a concrete legal system depends on the attitudes of trust and distrust of those who designed it. For example, literal interpretation fits better with distrust in some individuals' ability to fulfil their role in the shared activity, than does an interpretation that concedes more freedom. Not taking into consideration the distribution of trust of the system would threaten the point of having authorities to achieve complex objectives and would likely prevent achieving them.[33]

Disagreements are then intelligible because individuals may be discussing: a) what are the general and partial purposes of the system; b) what are the roles of the different individuals to achieve the objectives; c) what is the distribution of trust in the system; d) what levels of trust are most consistent with the different interpretive methodologies; and e) what interpretive methodologies are coherent with the purposes and distributions of the system. In these cases, disagreements are genuine theoretical disputes that depend not only on the mere determination of facts, and obey the same principles usually adopted in the

33 Shapiro 2011: 336 and ff.

elaboration and evaluation of scientific theories.[34] In this way, Shapiro's reconstruction not only makes disagreements intelligible, but also explains why they are as prevalent as they are. It also has the virtue of making room for theoretical disagreements but not as conflicting conceptions about the grounds of law.

In some cases, since there are many designers, it is possible that there is no single ideology underlying the system, or that it is of such little importance that it does not determine interpretive debates. It may also be possible that the designers' position relative to the distribution of trust is not too stable. Nevertheless, Shapiro claims, we will eliminate some possibilities if we take into account the different steps just presented, and, even more relevant to the issue of disagreements, their intelligibility does not depend on the existence of an answer. He explains why they take place and are prevalent; the existence of a correct answer is a different and contingent question.[35] Some of the features related to Shapiro's planning theory of law that have just been analyzed will be useful in formulating the pluralist reply to be introduced at the end of the paper.

4 LEVELS OF DISAGREEMENTS

Taking into account the arguments that have appeared in the debate, it is possible to distinguish different levels at which disagreements take place. The list does not pretend to be exhaustive, but it will be made clear that, in the debate about disagreements in law, a range of arguments at different levels have been offered. As a consequence, the problem seems to be more difficult to overcome than it actually is. I will argue that it is not possible to offer a single answer to Dworkins's critique, but different arguments that take into account the level of disagreement under consideration. Although none of the answers to Dworkin is conclusive, a combination of them may be so.

On the *methodological* level, discussions have been focused on what type of concept the concept of law is. On this level, Dworkin has defended his interpretive model and has attributed the criterial model to positivism. As we have seen, positivists have opposed to that characterization by claiming, among other things, that their project does not focus on the analysis of the word "law", or that to understand the nature of law does not require identifying shared and transparent criteria to apply the concept. In general, it may be stated that Hartian positivism has confidence in the capacity of conceptual analysis to apprehend the content of the concept of law and, in this way, to clarify the legal phenomenon.[36]

34 Shapiro 2011: 367.

35 Shapiro 2011: 383.

36 Anyway, I do not mean to claim that positivists have presented the best theory of conceptual analysis available. Indeed, I think that the reflection on methodological issues in legal theory is still underdeveloped.

Second, on the level of the *central elements of law*, disputes are about what law in general is. Along these lines, once we adopt an interpretive methodology, the advantages and disadvantages of defending conventionalism or law as integrity may be discussed. Or, in the framework of non-interpretive conceptions, it is possible to claim the relevance of certain social facts but debate about what these facts are. The position adopted on this level is not determined by the one adopted on the methodological level. It may be possible to defend similar positions on this level even if different methodologies are endorsed.

Third, on the level of *abstract interpretation*, it is possible to hold a general position (e.g. emphasizing the relevance of the legislators' intentions), or a particular position in relation to some groups of cases (e.g. regarding the question of how to attribute meaning to moral terms in law). Disagreements at this level will often involve disputes about the different standards of interpretation, their content and their abstract hierarchy. There may be agreement at this level and disagreement at previous ones, but theorists quite often derive their position on this level from what they claim about the central elements of law. For example, a scholar who focuses on the authoritative nature of law will probably take into consideration the legislators' intention.[37]

Is the existence of disputes on these levels a problem for positivism? Dworkin seems to assume that it is. He conceives law as an argumentative practice in which individuals disagree. Not only officials disagree about the law of a particular legal system, but also theorists have an interpretive attitude towards it. This is so because, according to Dworkin, either we understand that theorists endorse semantic theories, which implies not being able to reconstruct disagreements, or they are conceived of as proposing competing normative theories in the framework of an interpretive conception about law. In this way, he holds that the debate he maintains with Hart and other theorists shows the argumentative nature of law and that the different theories of law compete on the normative level.[38] The main questions to consider are whether the very existence of disputes between theorists at the previous levels shows that law is argumentative, and if the fact that Dworkin may be able to make sense of other positions within the framework of his interpretive conception constitutes an argument in favour of his position.

Let us think about the practice of obtaining knowledge. In that practice there are individuals who, following the scientific method, develop scientific theories about the world. Let us imagine that a group of shamans say that we obtain knowledge by reading coffee grounds. In doing so, shamans believe that they

37 Marmor 2005: Ch. 8.

38 In fact, Dworkin reconstructs Hart's answer in the *Postcript*, where he defended the conventional nature of law and the neutrality of his project, as a substantive conception about legality.

are invoking gods, and that gods manifest themselves by giving different forms to the sediment, in this way allowing knowledge about different aspects of the world to be acquired. Shamans think that the practice of obtaining knowledge consists precisely in invoking gods, and they believe that scientists have developed a different way in order to do that. They could then discuss with scientists about the best way to invoke gods. In contrast, under scientific standards, the discussion with shamans makes no sense. If we evaluate both conceptions, the fact that one of them is able to explain why controversies between scientists and shamans make sense, and the other is not, is inconclusive. This example attempts to show why making sense of disagreements between theorists cannot count as an argument in favour of one theory over another. It does not count in Dworkin's favour the fact that, in his reconstruction, positivism may be able to adopt an interpretative attitude and so he is able to make sense of disagreements between theorists. In fact, it is not surprising that legal theorists disagree. This is an invariable feature of philosophical reflection. What would threaten Hartian positivism are disagreements between *participants*, that is, officials, regarding the identification of the law.[39]

On the three levels just presented, disagreements are about law in general. The following four levels that I will mention relate to disagreements that take place within specific legal systems.

On the level of the identification of the law we find disputes which deal with the shared *criteria of validity* that are part of the rule of recognition of a specific legal system.

There may also be disagreement about what the concrete *legal sources of a specific legal system* are and about their organization into a hierarchy. Here, it is fitting to distinguish between the *sources-as types* level and the *sources-as tokens* level.

Regarding the *sources-as types*, it may be questioned whether customs, or precedents, are sources of law or not. It may be thought that these types of disagreements are nothing more than disagreements about the rule of recognition, but they are disagreements of a different kind. There may be agreement about the sources-as types, but disagreement about the rule of recognition. For example, it is possible for a group of judges to understand that custom is a source of law because that is what the Constitution establishes. Another group may understand that the law of the legal system is constituted by the content of laws and customs. If the Constitution were modified and no longer mentioned customs, the first group would not consider them a source of law, but for the second this fact would not change the status of customs as a mechanism to gener-

39 I do not want to deny that participants disagree about the identification of the law *because* they disagree (in some sense) about theoretical issues. What I want to claim here is that disagreements among theorists are irrelevant in the dispute between Hart and Dworkin.

ate legal norms. This shows that judges identify the same sources but the rule of recognition they use is different.

Regarding *sources-as tokens*, we should take into consideration that, even if we agree on the rule of recognition and the sources-as types, officials may disagree about whether a concrete custom is part of commercial law, for example. Let us suppose that nobody doubts that custom in general is a source-as type, but it is controversial whether the factual conditions necessary for the generation of a specific custom have been instantiated. In any case, this seems to be a purely factual disagreement, which does not affect the positivistic conception.

The controversy may also be focused on the *meaning of the sources of a specific legal system*. On the one hand, there may be disagreement about which canons of interpretation are valid and how they are organized into a hierarchy. As we saw, a certain degree of agreement at this level is decisive. In addition, disagreement may be about the meaning of the sources-as tokens; that is, even in the presence of agreement about everything else, there may be a disagreement about the meaning of a concrete legal statement. However, these disagreements do not seem to be theoretical in nature. In this sense, if there is agreement regarding the criteria of interpretation, but disagreement about the content of a concrete statement, we should conclude that either there is no real agreement on the previous level (the criteria are in fact controversial), or the disagreement is factual (over whether the agreed criteria are fulfilled).

Another level includes the *solution of a specific case*. It is important to make a distinction at this level because there may be agreement in meaning but disagreement about how to solve a case (for example, because it is acknowledged that there are multiple criteria of interpretation that may be considered, but there may be discussions about which way to solve a case is best[40]), and there may be agreement about how to solve a case but disagreement about specific criteria of interpretation (in fact, different criteria very often coincide in the solution).

5 A PLURALIST ANSWER

In the discussion about disagreements, a range of examples belonging to different levels have been employed. However, I think that the focus should be set on whether there are frequent disagreements among participants on the level of the legal solution of cases that arise as a result of a disagreement on the level of the criteria of validity or interpretation. This is so because those disagreements

40 Anyway, this dispute would be practical, about the best way to decide, and not theoretical, about what the law establishes (participants agree on the fact that there are, according to the law, several solutions for the case at stake).

may be understood as questioning the convergence that constitutes, according to positivism, one of the main elements of law.

If we consider what has been previously explained, it is easy to formulate a partial reply to Dworkin. First, *the number of disagreements is small* if we consider the incidence that law has in our lives, which facilitates finding alternative explanations to those cases in which disagreements seem to take place.

Second, *disagreements about the criteria of validity are not frequent*, and may be explained in a plausible way as *marginal cases* in which judges have discretion, which is compatible with the convergence necessary for positivism. Moreover, if disagreements about the criteria were common within a community, we would have doubts about whether it did in fact have a legal system.[41] We would think that it is a pathological practice, unable to satisfy most of the functions we commonly associate with law. On the other hand, disagreements about the *sources* may be reconstructed, either as empirical disagreements, or as disagreements about the criteria of validity.[42]

Third, regarding *interpretive disagreements*, one cannot avoid the problem by saying that there is convergence in the sources. Some degree of convergence regarding the correct way to interpret them is necessary for the law to accomplish its function as a guide for conduct and to make sense of the rule of recognition. These *disagreements are also marginal* and, if they were extensive, we would doubt whether it is a legal system. In any case, to acknowledge the existence of interpretive instruments does not entail that everything is controversial: there is broad agreement about how to solve many cases.[43]

41 This is only a simplification; in fact, since legal systems should be understood as a web of numerous interconnections and relations, it is conceivable to have a system where controversies are quite common and important for particular agents, but are not destabilizing the system in general.

42 This is, again, a simplification. It is possible to imagine a legal system with an awkward rule of recognition that establishes that both statutes and morality are law; all officials may agree on that. However, in cases where statutes and morality give opposite prescriptions the controversy would arise. So disagreements about the sources but not about the criteria of validity would take place. However, I think this would not be a theoretical disagreement about the sources, but would have an extra-legal nature and lead us to disagreements about the existence of moral principles. Making the same point but regarding interpretation, see Ratti 2008. According to Ratti (2008: 308 ff.) many disagreements consist of the selection of an interpretation from among a set of different and incompatible, but equally justified, legal solutions. The presence of moral considerations in these interpretive controversies does not require us to concede that Dworkin is right, from Ratti's point of view, since those disagreements cannot be reconstructed as disagreements about the sources; they are not disagreements about, for example, whether natural law is or is not a legal source. They are disagreements about second-order sources, that is, about extra-legal criteria to choose between antithetic legal solutions that may be used when legal instruments have run out. Taking into account this reconstruction, many disagreements are moral and not legal, and are about what the law should be, not about what it is.

43 For this kind of cases, see the metalinguistic response offered by Plunkett & Sundell 2014.

In this area, it may be observed that individuals sometimes invoke different interpretive criteria in order to support different solutions for the same case. Are these genuine theoretical disagreements that question the positivists' thesis? It is important here to determine if what makes the most sense of disagreements is a reconstruction *à la* Dworkin, in which participants try to offer the best justification of the legal practice. If we take into account the arguments used by lawyers, and the way in which they discuss with each other, Dworkin's position does not seem to be right. Lawyers often use different arguments to defend their position, trying to maximize their likelihood of winning the case. They accumulate arguments of different kinds, which makes it difficult to understand that they are assuming a coherent iusphilosophical position. And it does not seem that the relevant agents, judges, are essentially different in this regard. Very often they adhere to an interpretive canon that they leave aside in other decisions, without emphasizing any distinctive feature of the case that would justify the change.[44] An analysis of jurisprudential repertoire shows that judges, far from engaging in theoretical disputes, present a façade of justification to ground their decisions. I think it is appropriate to argue that in problematic cases we have conventions which are eminently legal and which enable the defence of different positions. Moreover, although in these cases individuals present their opinions by claiming that law establishes that solution, *error theory* and *disingenuity* seem to explain what really occurs. Additionally, in many cases the best interpretation of what individuals say and do leads us to conclude that, even if they assume that there is no law, they believe it is *part of their function to adopt a decision for the case*, and they try to identify the answer that fits best with the system, the one that they think to be more defensible on moral grounds, the one that they consider to have the best consequences, etcetera.

A final group of cases may be problematic. Sometimes the discussion has to do with the *meaning of a word*, in the sense that different participants in the dispute present conflicting conceptions regarding the main features of the object to which the word refers. If, according to the positivistic model, the truth value of legal propositions depends on the existence of a convergence among participants with respect to the interpretation of legal statements, these disagreements would not make sense. The occurrence of the debate would show the absence of a pre-existing answer. However, I believe that positivism may reconstruct these cases if we take into account the arguments advanced by *direct reference theories*.[45]

In a way similar to what happens in our daily linguistic practices, some words in legal texts show certain features emphasized by the defenders of di-

44 Leiter 2007: 1232.

45 Kripke 1980 and Putnam 1975. I do not need to assume that those are the only theories available, but just that they are useful to provide an answer to Dworkin's challenge.

rect reference. Sometimes we use words to refer to a kind that we assume has a deep nature, and we are capable to refer even if we have deficient information about it. We are able to refer successfully since we are part of a chain of communication, which is ultimately related to exemplars of the kind, even if our beliefs regarding the objects that pertain to the kind are very poor and fallible. In order to have a meaningful discussion, individuals do not have to agree on information that identifies the object, but to take part in the same chain of communication, which goes back to instances of the same kind. Disagreements are intelligible because individuals try to discover the nature of the kind. According to the defenders of these theories, the identification of the relevant features may depend on ordinary speakers or on experts. In any case, since the determination of these features requires theorization, disagreements may be explained as competitive arguments that try to identify the fundamental features of the kind.[46]

I find it difficult to question that law tries to guide our conduct and it is to a large extent expressed in ordinary language. If ordinary language is sometimes better reconstructed in the way the defenders of direct reference claim, it is reasonable to believe that sometimes the language of the law may be reconstructed in the same way. In addition, since the impact of direct reference theories depends (in general, but also in the legal field) on how these words are used, taking them into account does not threaten the convergence relevant for positivism. That is, direct reference theories will be a good reconstruction of the phenomena only in those cases in which legal interpreters share certain assumptions while using legal terms: they assume that the information they have about the object may be deficient and that the features of the object to which they refer may transcend them. In short, the conventionality of law need not imply a conventional conception of our linguistic practices that requires the existence of shared and transparent criteria.[47]

In these cases, individuals are discussing about the meaning of a legal statement. Accordingly, contrary to what has been previously defended in this paper, there may be disagreements at the level of the meaning of the sources-as tokens even if there is an agreement at the previous level. We may accept that ordinary

46 This is so even if, at the end, we discover that there is not a unique essential feature. The model makes it intelligible why disagreements take place, even though in certain cases there is no unique answer.

47 Even if the argument has only been sketched in the text, I hope to have established that direct reference theories are in principle compatible with positivism since it requires taking into account the conduct and attitudes of legal interpreters. It is compatible with positivism to the extent that, according to my reconstruction, social facts (regarding the rule of recognition and the interpretation of the rules identified by the rule of recognition) are relevant, and there is no necessary connection between law and morality. And it is not assumed that law (itself) is a natural kind. In a similar way, inclusive legal positivists have claimed that there is a contingent connection between law and objective morality. See Ramirez Ludeña 2015.

language is the interpretive standard for the case, but disagree, for example, on whether fungi are or not plants, what toxicity is, or about the nature of cruelty. These disagreements are not (merely) empirical disagreements, but theoretical.

On the other hand, other kinds of disagreements are also intelligible if we consider direct reference theories. First, a question may arise as to whether we may reconstruct the use of a certain word according to direct reference theories or under the conventionalist scheme: to determine that individuals are using a word according to direct reference theories requires not only empirical verification, but also an analysis of our assumptions regarding the use of words, which is made evident in our reactions to counterfactual situations, and the conventional character of a word does not have to be transparent to those who use it.

Second, there may be two different chains of communication, one that goes back to the common use of the word and another to the experts' use, resulting in a dispute about which chain of communication the term of the law belongs to. The determination of the proper chain of communication requires theorization, so there may be meaningful disagreements about those matters. This would be the case, for example, if a law introduces a tax on fruit and it is debated (since it is evident that there are differences between the ordinary and the expert's use) whether tomatoes are included in the regulation or not.[48]

Third, when the word is included in a law, it may be debated if a new chain of communication has been generated, and whether or not the meaning of the word in the law is different from the extra-legal meaning. Let us imagine that a law forbids the trafficking of hallucinogenic plants and that there is a dispute about whether hallucinogenic fungi are or not included. The fact that there are doubts regarding whether or not fungi are regulated makes it clear that it is controversial whether legal language assumes the use in ordinary language (which, in this case, defers to the experts' use and excludes fungi) or if it may be understood that a new chain of communication, strictly legal, has taken place (and so fungi are, according to the law, plants).[49]

In addition, it will be frequently debated which individuals are responsible for identifying the main features of the kind. The considerations pointed out by Shapiro regarding the distribution of trust are important in determining who the relevant individuals are. For example, regarding the term "causality", what distribution of trust is expressed in the system? In criminal law, conduct is usually regulated in a precise way and the judge *merely* applies the law. However,

48 Therefore, even if it is controversial whether fruits and vegetables are natural kinds, I think that the best way to reconstruct disagreements about tomatoes is to assume the existence of two different chains of communication. I am here using an example similar to the case decided in *Nix v. Helden* (149 US 304, 1893). The case is analyzed in Moreso 2010: 41 and ff.

49 This case was discussed by German judges and ended in a decision by BGH (25. 10. 2006). See Montiel-Ramírez Ludeña 2010; Moreso 2010: 31 and ff; and Philips 2014.

the legislator (normally) does not establish criteria for the correct application of "causality", even if it has the opportunity to do so. Judges, on the other hand, (normally) use in their decisions the reconstructions developed by criminal law theory. They take into account several theories, assuming that as time goes by they make more sense of problematic cases, and that they are progressive attempts to discover the nature of causality. When the legislator has modified other parts of the regulation, it has not introduced new considerations regarding causality, it has not assumed a specific conception of causality. It may be concluded that the system shows an attitude of trust towards criminal law theory regarding the meaning of some words. The determination of the appropriate experts will require analysis, but this does not ultimately prevent the investigation from looking for social facts.[50]

These kinds of disagreements are possible in a positivistic framework because the way in which the words are used by officials is decisive. They are not conflicting views about the grounds of law, but disputes about the nature of specific objects to which legal statements contingently refer.

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50 Dworkinians may point out that, according to my reconstruction, positivism is affected by the semantic sting argument. However, I am just claiming that, if we take into account how legal interpretation works, sometimes direct reference theories are the best reconstruction of the use of *some* legal terms.

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Diego M. Papayannis*

Independence, impartiality and neutrality in legal adjudication

This paper presents an analysis of the various dimensions of independence and impartiality. Among other things, I will argue that the two concepts, both of which are profoundly implicated in the rule of law, can be conceived as values and are perfectly distinguishable from each other. I will also propose a conception of neutrality, as a third distinct value that satisfies the requirement for non-redundancy with regard to independence and impartiality. Hence, judges and arbitrators must be independent, impartial and neutral. Each of these values contributes in different ways to enabling the law to fulfil its distinctive function of facilitating social interaction in complex and plural societies.

Keywords: independence, impartiality, neutrality, judicial decision, arbitration

1 INTRODUCTION

The literature on the independence and impartiality of adjudicators and, in particular, international arbitrators, is plentiful but not always entirely clear. The first difficulty for those approaching the issue is to identify what the authors mean when they talk of independence and impartiality. Are they referring to values, legal principles, institutional conditions or genuine duties? Or do they mean the adjudicators' own personal nature, their states of mind (beliefs, desires, attitudes, and so on) or one of many other possibilities? The second difficulty is the discrepancy concerning the conceptual relationship between independence and impartiality. Are the two concepts interchangeable?[1] That is to say, are the two terms synonymous or, conversely, do they each have a distinct content? Is there a relationship of implication between them? Is it possible for an adjudicator to be impartial but not independent, or else independent but not

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1 Some authors use the concepts of independence and impartiality interchangeably (Tupman 1989: 29). Others declare, for example, that "... it is not easy and, perhaps, unnecessary to distinguish between independence and impartiality" (Jijón Letort).

impartial? And, in addition, what is the relationship between independence and impartiality, on the one hand, and neutrality, on the other? This last question, of course, requires a full understanding of the nature of neutrality. Again, is it a value, a principle, a duty, etc.?

In this paper I will argue that legal discourse on independence, impartiality and neutrality can be clarified only by distinguishing their different dimensions. Any account of the role played by these concepts in legal reasoning has to explain the importance of institutional conditions and the adjudicator's states of mind. At a different level, I will argue that independence, impartiality and neutrality are *values* and I will attempt to identify where the value of each notion lies. Furthermore, the fact that independence, impartiality and neutrality are values imposes a duty on adjudicators to be independent, impartial and neutral, at least as far as this is possible. It goes without saying that this brief essay does not address the nature of these values in political philosophy, but confines itself to the context in which someone is called upon to decide a case in accordance with the law. What I shall say about each value and their mutual relationships is limited to judicial decisions and arbitral awards. I do not see, *prima facie*, any significant differences between the two types of decision with regard to the reasons why an adjudicator has an obligation to be independent, impartial and neutral.

I will proceed as follows: first I shall provide an initial overview of the discussions on *independence* and *impartiality* in the literature, and the relationships that have been established with *neutrality*, where this third concept has been introduced. Then I will offer an analysis of the three concepts that enables us to articulate them coherently and give us some clues as to where the value of each one may lie. Finally, I will discuss some jurisprudential considerations to try to define the scope of the duties that these values impose upon an arbitrator and I will show how they are related to the rule of law and the equality of the parties involved in the legal resolution of their differences.

2 WHAT IS MEANT BY INDEPENDENCE AND IMPARTIALITY?

In a purely exploratory fashion, I will analyze some of the alternatives mentioned in the literature. My idea is that they are, as I said, values, but not only that. There are multiple dimensions of independence and impartiality, which explains why they are defined in the literature with such diversity.

Probably, the most widespread idea is that independence and impartiality are distinct, but closely related, concepts.[2] Independence, under the influence

2 See Kleyn and others vs. The Netherlands, European Court of Human Rights, May 6, 2003, especially at § 192.

of positive state law, is usually associated with certain institutional guarantees or safeguards that allow adjudicators to free themselves to some extent from external pressures when making their decisions. Such safeguards include, among many others, the neutrality of the appointment procedure (i.e., an absence of political intervention), the stability of the position, autonomy from other branches of government, a reasonable sphere of immunity, and the inviolability of their salary.[3] In the world of international arbitration, for obvious reasons, such guarantees do not exist. Therefore, independence is understood differently as an absence of family or social ties, professional or business relationships, etc.,[4] between the arbitrator and one of the parties or any third party that has an interest in the proceedings.[5] (Note that this idea of independence runs the risk of being confused with the notion of impartiality, but for now I am merely describing the different interpretations that can be found in the literature.) Similarly, resistance to the pressure of international public opinion should not be underestimated when assessing the independence of an arbitrator.

Impartiality, in contrast, is usually associated with the objectivity of the decision[6] or the absence of prejudice toward one or other of the parties.[7] There is also a distinction made between *personal* impartiality, which depends on having no stake in the outcome of the proceedings (with the adjudicator simply being one more actor in the conflict that is being resolved) and *institutional* impartiality, which is rather more related to what is usually referred to as independence.[8] This latter distinction has perhaps led to a widespread thesis with regard to these ideas: it is commonly said that independence is an indispensable requirement of impartiality; in other words, independence would be a necessary condition of impartiality, but not sufficient in itself.[9] At this point, it is important to note that, as I will show in Section 3, this statement might hold true in one dimension of independence and impartiality, but be false in another.

This initial outline will serve to get us thinking about the nature of impartiality and independence. Let us consider some possibilities.

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3 For a complete study of judicial independence at the domestic level, see Martínez Alarcón 2004. For arguments against the possibility of automatically applying tests of independence and impartiality - valid at the domestic level - in the international context, see Gélinas 2011. A comparative law study on independence can be found in Seibert-Fohr 2012.

4 Gélinas (2011: 8) explains that international arbitration is full of ad-hoc tribunals, with judges appointed and paid by the parties. This means that the institutional dimension of independence is almost completely attenuated.

5 For more on the different kinds of third parties, see Entelman 2002: Chapter 8.

6 Romero Segel 2001: 518.

7 Brown 2003: 75.

8 Taruffo 2009: 102.

9 Andrés Ibáñez 2009: 52; Taruffo 2009: 98; Atienza 2009: 174; Jiménez Asensio 2002: 71. See also § 2.02 of the Montreal Declaration (Universal Declaration on the Independence of Justice).

2.1 States of mind

In some ICSID arbitral awards, it has been argued that independence and impartiality are states of mind that "can only be inferred from conduct either by the arbitrator in question or persons connected to him or her".[10] Initially, this thesis seems doubtful as far as independence is concerned, since states of mind are purely subjective. On the contrary, as I have outlined briefly above, authors often take an objective view of independence: judges are independent if they navigate in an appropriate institutional framework that protects them from outside influences or, in the case of international arbitration, if they have no previous or current relationship with the parties or any third party with an interest in the litigation. Both such conditions can be verified without reference to the adjudicator's state of mind. Arbitrators may feel themselves to be independent, even when they do not have the benefit of the minimum institutional safeguards to this end. Moreover, they may believe that any previous relationship with one of the parties will not affect their ability to resolve the dispute objectively. Nevertheless, it is reasonable to think that the independence of an arbitrator who does have a personal, social or economic relationship with one of the parties, or a judge who does not enjoy the minimum protection at the institutional level, is seriously compromised. This being so, independence cannot be considered as a mere state of mind.

Having said that, we need to qualify this position a little, since it is also clear that independence, in the sense of institutional protection or a lack of relationship with the parties, does not guarantee the complete impermeability of judges and arbitrators in all cases. A judge protected in this way may still be tempted; she may have political aspirations or be subject to pressure via mechanisms that are different to those that the rules on independence assume to be normal. In this case, judges are not independent if they feel the pressure and it affects their reasoning in their ruling of the dispute. It seems, then, that in such a case, independence is a state of mind. Note, however, that to disqualify an arbitrator, it is not necessary that she feels this pressure, since pre-existing relationships (which are a matter of fact, i.e., objective) are usually sufficient in themselves –both in domestic law and international arbitration. This shows that not only is it important that the adjudicator *be* independent, but they must also *appear to be* independent.[11] I will say more about the "appearances rule" in section 5.

Impartiality, on the other hand, is a different matter. The lack of impartiality – through links with one of the parties due to shared interests, a favourable

10 See Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), at § 30, and the discussion in Crawford 2013: 3.

11 For an analysis of this question in international arbitration, see Bottini 2009: 347, 352.

attitude towards one party or an unfavourable view of the other– necessarily presupposes certain states of mind, either conscious or unconscious. In general, any convergence of interests will be consciously perceived by the arbitrator. This is not to deny that there are also such things as *objective* interests. In fact, many of our interests as human beings are of this nature, which means they are not dependent on our state of mind: some good examples of this, among many others, include the interest we have in avoiding what is detrimental to our health or physical integrity, in furthering our economic prospects, or the prestige, recognition or appreciation we enjoy in our community.[12] However, it is not these objective interests – shared by all human beings – that affect the impartiality of a judge. On the contrary, it is only the kind of motivation brought on by subjective interests that a disqualification of the adjudicator seeks to counteract. It is for this reason that impartiality can indeed be seen as a state of mind in this regard.

Prejudices, meanwhile, can also be characterized as states of mind. An arbitrator may think, for example, that people from Argentina commonly fail to meet their obligations. This belief is a state of mind. But not all states of mind are conscious. An arbitrator may be predisposed to evaluate negatively any recidivist behaviour by an Argentine party or to demand a higher standard of conduct from someone they perceive as systematically defaulting, without being aware that she conceives all Argentineans as systematic defaulters. If it is possible that an adjudicator's own cognitive biases and prejudices go unnoticed by the adjudicator himself, then the adjudicator may not notice her lack of impartiality. This is precisely the danger of bias and prejudice; that we are often incapable of controlling all the factors that affect our judgments.[13]

Ultimately, I will argue that there are both subjective and objective components in independence and impartiality. However, it seems correct to emphasise the subjective element in impartiality and characterize it mainly as a state of mind. In regard to independence, on the contrary, the subjective element appears to be less important, since in many cases the lack of independence relates purely to matters of fact concerning the level of institutional protection enjoyed by the adjudicator (the clearest case being that of a lack of autonomy from other branches of government) or any pre-existing relationships with the interested parties or third parties.

2.2 Institutional conditions

Obviously, independence in the realm of municipal legal systems is open to institutional analysis, given that the safeguards referred to above can only

12 I am thinking along the lines of what Wiggins (1998: 6) calls "necessity", as opposed to desires.

13 See Kahneman 2011: 3-4.

be implemented by rules that establish an operational framework in which the adjudicator is protected against external pressures. But, as I suggested in the previous section, even the best institutional design is unable to prevent all possible influence by third parties (or by any of the parties) on the adjudicator. This is because adjudicators are people who also have a social life before, during and after performing their jurisdictional duties. At best, the institutional safeguards will limit *certain* sources of specific influence, but not all the ones imaginable. In international arbitration, it turns out, the idea of institutional conditions or guarantees is much less relevant. Therefore, only one aspect of independence is related to meeting the proper institutional conditions.

What about impartiality? The institutional conditions constitute a formal aspect of impartiality, i.e., a set of restrictions regarding the actions of the adjudicator which tend to reduce the effects of bias, thus setting out how the arbitrator should proceed with respect to the parties involved:[14] when they should be heard, the manner in which evidence is to be produced, and the form the adjudicator must use to justify the final decision taking into account the arguments and the evidence produced. Such conditions would appear to limit, to some extent, even a partial adjudicator. Therefore, the procedural rules are one of the components of impartiality, and so it can be said that there is one aspect of impartiality related to the institutional restrictions imposed on the work of the adjudicator, but it is certainly not the most important one. Respect for the formal conditions of impartiality remains compatible with a good deal of arbitrariness in the decisions of the adjudicator.

A more interesting link between institutional conditions and impartiality can be highlighted by a careful analysis of the contribution of legal procedures in creating a proper environment in which adjudicators form their beliefs and legal opinions. Some functional-organizational structures heighten the adjudicator's vulnerability to different biases more than others. The most common cases are *anticipated judgment* (e.g., when the same judge participates in the preliminary investigation and in the adjudication), *inappropriate judgment* (e.g., when the same person who acted as prosecutor at an earlier stage acts as a judge in the appeal court) and *confirmation bias* (e.g., when the same judge acts in the first instance and then, years later, is part of the court that has to decide the appeal).[15] I will return to this point in Section 5.

2.3 Values

In complex and plural societies, in which there are many divergent belief systems (or comprehensive doctrines), even individuals of good faith, who rec-

14 See Andrés Ibáñez 2009: 60, 63, 64.

15 For a good discussion of this, and other impartiality problems related to functional-organizational issues see Fernández Blanco 2016: 231.

ognize their fellow men and women as free individuals, deserving of equal consideration and respect, may nevertheless have serious difficulties in resolving their disputes.[16] In these contexts, the law can play a key role, since it can serve, as Bruno Celano put it, as a *neutral device for social interaction*.[17] It is possible to put together a set of rules of engagement and rules for resolving disputes that are identifiable without resorting to moral judgments – and in pluralist societies, moral judgments are likely to be highly controversial. Such a set of rules can fulfil this function of coordination and interaction among people whose beliefs, desires and interests may often be in conflict at the most basic levels.

However, for a legal system to be capable of promoting peaceful social interaction, its rules must be able to guide the behaviour of the citizens; and these legal rules can only guide the behaviour of the citizens if they are correctly applied by the adjudicators. Otherwise, if individuals cannot expect that their case will be decided by a court applying the law, what reasons do they have to act in accordance with the law? If judges, rather than deciding by the reasons provided by the law, act for other reasons, then the citizens lose all guidance regarding their behaviour and the function of law is utterly defeated.[18]

Thus, the capacity of the law to resolve problems of interaction in a complex and diverse world depends largely on adjudicators acting with independence and impartiality. Certainly, a judge who is under strong external pressure or who has an ingrained prejudice against one of the parties is acting for reasons other than those the law provides for and therefore undermines the value of the law in promoting peaceful interactions. In short, the value of independence and impartiality is that they are both necessary components for enabling social interaction that respects freedom and equality among people with divergent beliefs, interests and desires. Of course, independence and impartiality are not sufficient conditions in themselves for this kind of respectful interaction; they are, however, *necessary* conditions.

2.4 Duties: rules or principles?

Of the three dimensions described so far – state of mind, institutional conditions and values – only the last reflects the normative aspect of independence and impartiality. The duty to be independent and impartial is imposed on the adjudicator by dint of the fact that independence and impartiality are necessary conditions for the law to peacefully regulate social interaction. In a similar vein,

16 Shapiro (2011: 213) talks about the circumstances of legality to refer to the contexts in which "a community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary". In such circumstances, collective deliberation or spontaneous coordination are insufficient for interaction; hence the necessity of law.

17 Celano 2013: 184.

18 See Raz 1979: 216-217.

Josep Aguiló Regla has pointed out that independence and impartiality are genuine duties and not simply institutional conditions or the absence of kinship, friendship or enmity with any of the parties, or the absence of any other interest in the outcome of litigation.[19] Although I agree with this statement, I would like to emphasize that the various dimensions of independence and impartiality are important in understanding their role in the decisions of judges and arbitrators.

Aguilo Regla's idea is that an independent and impartial judge applies the law for the reason that she has a duty to apply it. In this sense, the motives for their ruling coincide perfectly with the justification supplied when making that ruling.[20] This understanding of the duties of independence and impartiality imposes on judges the duty to resist any external influences or to step aside when their personal interests or prejudices prevent them from making the best judgment in accordance with the requirements of the law. Wherever the assessment of evidence or the interpretation of legal provisions, among other things, requires the exercise of judgment that a judge, affected by personal interests or negative or positive attitudes towards one party, is unable to perform, then that judge's duty of impartiality requires him or her to withdraw from the case.[21]

A second question worth asking is whether these duties of independence and impartiality function as rules or as principles. An old classification of norms, popularized in the theory of law by Ronald Dworkin almost 50 years ago,[22] distinguishes between rules, which are standards that are applied in an all-or-nothing way, so to speak, and principles whose application requires being sensitive to their weight or substance. Both rules and principles can lead to the establishment of obligations, but rules resolve the issue incontrovertibly. When a rule imposes the obligation to pay taxes, taxes must be paid and the adjudicator, from the point of view of the rule, should not consider anything else: the taxes must be paid and that is final. If there is a conflict between two rules, we must decide which rule is valid and act accordingly. In contrast, we cannot claim that principles can be as conclusive. They indicate what one should do, but if there is a conflict between principles, the right solution depends on the relative weight of each one in the circumstances of each case. The final decision taken does not negate the validity of any of the other conflicting principles, but only decides the precedence of one over the other in a specific case.

That said, do independence and impartiality function as rules or as principles? In the context of municipal legal systems it would appear that independence and impartiality function as rules. It would be rare to conceive the two

19 Aguiló Regla 2009: 142-143.

20 Aguiló Regla 2009: 143-144.

21 Aguiló Regla (2009: 145) does not put it in these terms, exactly, but rather, in terms of the duty to "control the motives of the judge in the light of influences extraneous to the Law".

22 Dworkin 1967: 22 and ff.

duties as principles and then weigh the values at stake in each case in order to see if a decision influenced by third parties or taken by a biased judge may, nevertheless, be legitimate. A lack of independence and impartiality is a reason for the adjudicator to step aside or, alternatively, for him to be disqualified by the parties. The only acceptable arguments to challenge this disqualification seem to be those that deny her lack of independence or impartiality.

Things might not be so simple in the field of international arbitration. In some very specific contexts, such as investment arbitration, there are relatively few specialists in the subject compared to the number of specialists in commercial arbitration in general. This makes it common for a professional to be called on to decide a dispute whose ruling turns out to be relevant in other cases in which this professional acts as a lawyer.[23] Therefore, "[t]he need for the tribunal members to be and to be seen to be as independent and impartial must […] be balanced against the need to have the best qualified people performing as arbitrators."[24]

These particularities of international arbitration mean that, in practice, the duties of independence and impartiality seem to work more as principles rather than as rules, depending on the context. The suggestion that the circumstances of the case must be weighed in order to determine whether an arbitrator who has pre-existing professional relationships with one of the parties is in violation of her duty of independence or impartiality indicates that these duties do not operate as conclusive or binding guidelines. In some cases, the arbitrator's background will not be relevant, but in others, it may be decisive in her disqualification.[25] It is important to point out that, in contrast to what happens in the domestic sphere, in international arbitration it seems that the dangers inherent in these situations are less severe. Since the prestige of arbitrators is built on their experience and the good results obtained (i.e., how satisfactory their decisions are), arbitrators are encouraged to maintain a certain decorum, expressed in an appearance of independence and impartiality. Being markedly biased in such a case would be like shooting themselves in the foot, since they would be less likely to be appointed as arbitrators in the future.[26]

23 Horvath-Berzero 2013: 5-6.

24 Horvath-Berzero 2013: 5-6.

25 The typical case is that of a person who acts as an arbitrator in a case against a State, while at the same time representing companies in other litigation claims against that same State. Obviously, one cannot wear "two hats"; that of the independent and impartial arbitrator in one dispute, and of the lawyer committed to her cause on the other. It seems reasonable to require the person in question to choose one of the two roles. For a general view on this issue, see Horvath & Berzero 2013: 5-6.

26 See Harris 2008: 1.

3 CONCEPTUAL RELATIONS BETWEEN INDEPENDENCE AND IMPARTIALITY

In the literature, all kinds of conceptual relationships between independence and impartiality have been suggested. Here we shall concentrate on only four:[27]

Thesis 1: independence is a necessary condition of impartiality;[28]

Thesis 2: impartiality, together with neutrality (on which I am yet to comment), are prerequisites of independence;[29]

Thesis 3: without there being conceptual links between each other, both concepts are characterized by their contribution to the rule of law,[30] a point that can be understood more or less in the terms that I explained in Section 2.3; and, finally,

Thesis 4: it is possible to understand the two notions in terms of the duty to remain independent (i.e., to control one's motivations) in the face of forces that are external or internal to the decision process. Resistance to external motivations, such as those from other branches of government, other judges, stakeholders, etc., define the duty of independence itself. The duty of impartiality, in contrast, is a duty of independence with respect to the parties involved in litigation or the object of such litigation.[31]

These theses can be true in terms of one dimension of independence and impartiality and yet false in respect to another. There is no sense contending that independence is a necessary, but not sufficient condition of impartiality in terms of *states of mind*, since it is entirely possible that an arbitrator may be biased or have some interest in the litigation, without feeling pressure or interference from any outside influence. Neither does it appear to hold true in terms of institutional conditions, since the guarantees of independence that protect the judge are not necessary for conducting a procedure whose formal protocol allows equal and reasonable space to all parties to present their evidence and arguments. Meanwhile, as far as the dimension of values is concerned, since both independence and impartiality enhance the rule of law in different ways,

27 The list here is by no means exhaustive. Neither does my analysis cover all the logical possibilities that would result from combining the four dimensions of independence and impartiality that I have mentioned with the four theses that I deal with below. For reasons of space, I have focused on those I consider most interesting for their theoretical value, but this point undoubtedly deserves more attention in further work.

28 See footnote 9.

29 Bernini 2006: 273.

30 See, among many others, Mahoney 2008: 320-321; Park 2009: 635-638; Sheppard 2009: 133.

31 Aguiló Regla 2009: 145.

it is difficult to argue that there is any relation of implication between them. How could the value of the absence of prejudice or interests in the proceedings depend on the value of the adjudicator being free from external pressures? The same, I think, should be argued for independence and impartiality as duties: since the content of each is different, it is conceptually possible to fulfil one without fulfilling the other. An interesting conclusion, then, is that Thesis 1, which argues that independence is a necessary condition of impartiality, is not strongly supported in any of the dimensions that I have analyzed. If the conventional characterization from which I began is correct (see Section 2), we have reasons to abandon this thesis.

For similar reasons, we should also rule out Thesis 2 stated above. I see no problem, however, in sustaining Thesis 3 with regard to the institutional dimension, and both Theses 3 and 4 together in terms of the value and deontic dimensions.

4 NEUTRALITY

There is a methodological reason for treating neutrality separately and to do so only after an analysis of independence and impartiality. The strategy thus far has been to begin with some generally accepted ideas in order to clarify the discourse on independence and impartiality, showing that it makes sense to talk about these concepts in various dimensions (only four of which I have addressed). Having done this, it was then possible to establish and discard certain conceptual relationships between the two. We cannot proceed in the same way with the concept of neutrality, however, because I cannot find a sufficiently robust shared core from which to start the analysis. Hence, I think the best option is to try to determine which notion of neutrality best fits the concepts of independence and impartiality that I have outlined above.

I shall start with the obvious: whatever the notion of neutrality, if it is worth introducing into the discourse of judicial and arbitration decisions, it cannot be *redundant* with respect to independence or impartiality, or a combination of the two. If it were redundant, in the sense that any statement concerning the neutrality of an adjudicator could be replaced by statements concerning their independence and/or impartiality, then the concept of neutrality could be removed from legal discourse without loss of meaning; and, for the sake of simplicity and clarity, it would be better to eliminate it.

Given this condition of non-redundancy, certain positions become objectionable. For example, the conceptualization of the Code of Ethics for Arbitrators in Commercial Disputes, jointly approved by the *American Arbitration Association*

and the *American Bar Association*, does not satisfy this condition. The authors of the document declare that

> The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards.[32]

Unquestionably, this Code of Ethics does not genuinely incorporate neutrality as a *third value* or *duty*, since everything that neutrality has to offer in normative terms is already offered by independence and impartiality.[33]

There have been other attempts to approach neutrality that do not define it by reference to independence or impartiality, beyond the fact that there are implied relationships between these concepts. Neutrality may refer to the absence of some kind of nearness, and an adjudicator may have that nearness or affinity or proximity without it necessarily compromising her impartiality. The idea is that such nearness, unlike *some* biased behaviour, is not evidence of bad faith, but merely of an objective fact (such as the adjudicator sharing the same nationality or culture with one of the parties).[34]

The problem with this notion of neutrality, in my opinion, is that the avoidance of redundancy comes at the high price of *normative irrelevance*. This kind of proximity could lead to the adjudicator's disqualification only if it affects her reasoning, in the sense that it makes him vulnerable to pressure from one of the parties or that it clouds her judgment in such a way as to provoke a favourable attitude towards the party to which she is close (or an unfavourable attitude towards another). In the first case, the basis for disqualification is lack of independence; in the second, lack of impartiality. The proximity, in itself, does not translate into any of these vices, and therefore offers no basis for recusal or disqualification; consequently, the lack of proximity can have no value, nor the mere proximity can ground a duty to excuse oneself or to resist certain conditions which, being objective, are beyond the control of the adjudicator. In short, if neutrality is to gain a place in legal discourse it must not be redundant with respect to other values and, at the same time, it must be normatively relevant.

The vision of neutrality which I think fits best with independence and impartiality – as values and duties – is that of the *non-evaluative* adjudicator. In this sense, arbitrators or judges are neutral if and only if, they commit themselves to ground their reasoning on the valid rules of the legal system applicable

32 The text of this Code is available at URL : https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867> (Consulted on March 16, 2015).

33 There are many conceptions of neutrality that share these problems. Take, for example, two of the five notions dealt with by Calvo Soler (2006: 148-156): 1) the absence of alliances with the parties; or 2) equal treatment accorded to the parties in the process. Both notions seem to subside into independence or impartiality.

34 See the explanation by Bernini 2006: 274 and ff.

to the case at hand and to justify their decisions on this basis only. This is not to defend a formalist model, as perhaps Atienza might think,[35] or to promote the idea of an arbitrator who adheres personally to positive law. In the conception of neutrality I defend, the arbitrator may be in complete disagreement with the content she identifies as legal. However, neutrality, precisely, consists of reasoning with the values that are provided by law and not with one's own. A neutral judge is one who agrees to analyse any matter that is subjected to her consideration *from the legal point of view*.[36]

This notion of neutrality clashes head on with other ideas that also enjoy some acceptance in the literature. How to reconcile the idea of a *non-evaluative* adjudicator with the fact that arbitrators (and also Supreme Court judges) are often chosen precisely for the values and/or preferences they profess?[37] Additionally, some authors have argued that a good arbitrator is the one who imposes her own ethical values, knowing that her reputation depends on it.[38]

It is true that the designation of arbitrators and also of Supreme Court judges is usually mediated by these kinds of considerations. Otherwise, the only reason to choose an arbitrator or Supreme Court judge should be that she has an adequate knowledge of the law and, very often, this is less relevant than the political-philosophical view she holds. I believe, however, that the two ideas can be reconciled. A neutral judge, in the non-evaluative sense, is not an automaton able to subsume an individual case within a generic case and apply the appropriate regulatory solution without exercising her judgment in any part of her reasoning. On the contrary, the idea of an adjudicator who mechanically applies the law is an already outdated myth. Today, no one disputes that identifying and applying the law requires a certain degree of discernment. Interpretation plays an undeniable fundamental role in legal practice, and where there is interpretation there is some margin for discretion, which explains the preferences for certain arbitrators or Supreme Court judges over others. But now we risk going to the opposite extreme because, if interpretation plays a dominant role in contemporary systems, guided by broad fundamental principles, it turns out that there are more occasions where the adjudicator creates law at her discretion than when she simply applies it. The space for neutrality appears to be rather small.

35 See Atienza 2009: 175.

36 There are many authors who have defended perspectivism. See, among others, Raz 1979: 139-142; Shapiro 2011: 184-188. I do not wish to adhere to any particular position here, but rather, to a very general idea according to which the adjudicator may suspend her own moral judgment and perform her reasoning perfectly with a system of rules and values that is provided by the law.

37 See Harris 2008: 1.

38 See Fernández Rozas 2010: 597.

This brings us to an old dispute between legal realists and normative positivists. I do not wish to delve into this ongoing discussion here except to briefly explain my view on the matter. As Herbert Hart expressed in a famous essay, legal practice does not reflect the noble formalist dream, nor the realist's nightmare; the truth is somewhere in between: while there is a significant common core of agreement, there is still room for the discretion of the adjudicator.[39] From this standpoint, it can be said that a neutral judge applies the law when there is a law to be applied, and ceases to be neutral when she has to create it in order to fill gaps or resolve contradictions or when deciding between several alternatives. When an adjudicator is presented with several options, or the system in some way grants him discretion, she will certainly endeavour to make a decision that is consistent with the overall system.[40] Nevertheless, the task cannot be neutral, since it will inevitably be governed by the adjudicator's own evaluations – her assessment of which solution is the most consistent or which best fits the values expressed by the law which she must apply. Many of the rules governing the interactions of the agents in the national or international arena do not require the adjudicator, when applying them, to develop a theory of the system. In other words, the adjudicator need not determine whether the principle that provides unity, integrity, consistency, etc., to the system is, for example, efficiency, the stability of the markets, some conception of distributive justice, certainty and predictability, the pace of the transactions, human rights or any of a number of other possibilities. Identifying the law, ordinarily, presents no major difficulties. When difficulties do arise, the duties of neutrality are exhausted, but not those of independence and impartiality.

At this point, we can ask whether the value of neutrality satisfies the condition of non-redundancy with respect to independence and impartiality, while maintaining normative relevance. As I have defined it, it is not redundant because the value of neutrality is that it maximizes the idea that the law is a device for interaction between individuals who have different views about the world. A judge who has a non-neutral attitude (for example, because she believes that correctly identifying and applying even the most fundamental and well-known rules on basic questions of procedure requires him to make a moral reading of legal provisions) would undermine the idea that the law is a device for peaceful interaction in the terms that I have described. However, she would still be able to embody the values of independence and impartiality which, being only necessary conditions for the rule of law, would have little impact on its achievement. Expressed in terms of *duties*, one consequence of the reconstruction I

39 See Hart 1983: 123-144.

40 Hart (1994: 274) explains that judges, in deciding difficult cases, do not deviate totally from the guidelines offered by the law, since they try to cite certain general principles or some purpose that is considered relevant so that the new law being created remains consistent with the existing law.

have proposed is that the duty of neutrality may be breached if an arbitrator makes moral judgments when interpreting legal provisions (i.e., when she makes what she considers is *the best moral interpretation* of the law), but she can still fulfil her duties of independence and impartiality provided she resists any outside pressure and does not allow any outside interests, desires or prejudices to affect her decision (stepping aside, if necessary). Neutrality, then, is a non-redundant duty with respect to independence and impartiality, and maintains a high degree of normative relevance. That said, the relationships between these values/duties imply that an adjudicator cannot be neutral if she fails to maintain her independence or her impartiality diminishes. This confirms my previous assertions that independence and impartiality are necessary but not sufficient conditions for the rule of law.

5 ATTITUDES AND CONTEXTS

Now we can recast the difference between independence, impartiality and neutrality in terms of the different *attitudes* held by the adjudicators. As Jackson (2012: 21) points out:

> Attitudinal factors may be the most important in practice to achieving impartiality; it is difficult to achieve an impartial and open-minded attitude through legal rules and structures alone, although some structures or legal rules may make it harder to maintain an attitude of independent impartiality than others.

In line with this, we can formulate the following definitions:

1. Independence is an attitude towards all external pressure or influence. Independent adjudicators resist or reject all such pressure or influence.

2. Impartiality is an attitude towards the parties involved and the subject matter of the dispute. Impartial adjudicators have an unprejudiced view of all parties and have no personal interest in the outcome of the dispute.

3. Neutrality is an attitude towards the law. Neutral adjudicators are committed to the legal point of view.

It might seem that conceiving independence, impartiality and neutrality as attitudes stresses the subjective aspect of all three. But from this point of view, it is clear that the nature of independence, impartiality and neutrality involve both institutional dimensions and states of mind. This is because the proper attitudes can normally be held only in specific institutional contexts. In certain contexts, it is simply impossible for adjudicators to hold the proper attitude; in others, successfully holding such an attitude is highly unlikely.

Let us consider neutrality first. The adjudicator can be committed to the legal point of view, but only provided that there is some law to apply. A legal

system severely affected by normative gaps, or full of normative inconsistencies, does not provide a sufficiently adequate institutional background in which the adjudicator can exercise her neutrality. By the same token, it is unlikely that an unprotected adjudicator would have the ability to handle external pressures with reasonable confidence. In this case, though it is not a logical impossibility, the adjudicator's vulnerability still provides grounds to think that her independence is undermined by the lack of institutional safeguards.

Finally, impartiality does also depend to some extent on the institutional issues. For example, in *De Cubber vs. Belgium*, the European Court of Human Rights claimed that the "successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case" compromised her impartiality.[41] The problem such situations engender *confirmation bias*, which we mentioned in Section 2.2. A judge would be little disposed, during the trial, to change her mind about what she learned during the preliminary investigations. Changing her views would be tantamount to criticizing her own previous decisions or judgments. Another extreme case is strictly related to poor institutional designs. In Uruguay, for example, criminal judges (not prosecutors) lead the preliminary investigation, they admit and reject evidence, they adjudicate the case, they issue orders for preventive detention, and they decide pre-trial release, among other things.[42] In this institutional context, arguably, biases take over. The object of criticism is not necessarily the judges' behaviour, but the system itself, for it undermines the chances of the judge making a rational decision.[43]

Of course, even in the best possible institutional context, adjudicators can fail to hold the proper attitudes that are necessary for independence, impartiality and neutrality. But such attitudes by themselves are not enough, since there might still be objective reasons for disqualifying an adjudicator who holds all the proper attitudes. This is what lies behind the "appearances doctrine" or the "objective approach" to independence and impartiality. Also in *De Cubber*, the European Court of Human Rights stated that

> it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of

41 See De Cubber vs. Belgium, European Court of Human Rights, October 26, 1984, at §§ 27-30.

42 I'm indebted to Carolina Fernández Blanco for the example and for providing me with the details of the Uruguayan legal system.

43 In Delcourt vs. Belgium, at a certain point, Delcourt's claim was interpreted as addressed against the institution which gave advantage to the general prosecutor's department. According to the Belgian law, the prosecutor could participate in the private deliberations of the Court of Cassation from which the parties are excluded. Delcourt vs. Belgium, European Court of Human Rights, January 17, 1970, at § 15.

> 17 January 1970 (Series A no. 11, p. 17, para. 31), "justice must not only be done: it must also be seen to be done" (…) [w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[44]

The same rule applies in international arbitration. The *IBA Guidelines on Conflicts of Interest in International Arbitration* impose on arbitrators the duty to decline the appointment (or refuse to continue if the arbitration has already begun) when, from the standpoint of a reasonable person who is aware of the relevant facts, there are justifiable doubts as to the arbitrator's impartiality or independence (article 2.b). And then it adds that doubts are justifiable if a reasonable third person, with the information at hand, "would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching her or her decision" (article 2.c).

Appearances are important mainly for epistemic reasons.[45] Since in certain contexts there are grounds to believe that the likelihood of holding the proper attitudes is relatively low, it follows that our assessment of independence, impartiality and neutrality is negatively affected by those circumstances. An adjudicator is generally not expected:

1) to present an epic battle against political (or other external) influences when she is in a precarious institutional position;

2) to be indifferent to the outcome of litigation when she has a personal interest in what is being decided or a relationship with one of the parties;

3) to take an unprejudiced stand towards the parties when because of her culture, education, social background or other personal conditions she lacks the required character to hold the proper attitude;

4) to be unbiased when the institutional framework puts her in a situation in which her judgments and legal opinions are shaped by factors that should be considered irrelevant;

5) to be committed to the legal point of view when, regarding specific legal issues, she a) publicly militates for legal reform; or b) publicly holds strong moral or religious views that are at odds with the values expressed in our liberal legal systems.

In all these circumstances, as well as others, the adjudicator has a duty to withdraw from the case and, if she does not withdraw voluntarily, there are good grounds for disqualification.

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44 De Cubber vs. Belgium, European Court of Human Rights, October 26, 1984, at § 26.

45 A second reason is, as stated in De Cubber and other cases, the confidence that courts should inspire in a democratic society.

An alternative view would be to conceive the so-called *objective* aspect of impartiality as nothing but a legal presumption of partiality; one which can be defeated when proof to the contrary is provided by the adjudicator. This is Fernández Blanco's proposal regarding ex post assessments, that is, when the judicial decision has already been taken, and another court, like the European Court of Human Rights, is judging whether to void the previous decision and/or award damages to the party whose right to an impartial judge was not respected.[46] I think this approach might work for this kind of ex post assessments, but it does not provide a general account of impartiality. A general account should shed light on the duty to withdraw from the case and, especially, it should make sense of the normal legal bases for disqualification. In other words, even if framing the problem like this might provide some insight for ex post assessments, I do not think it can capture the truly objective element in our ex ante assessments of impartiality, where the adjudicator's impartiality is often irrelevant and therefore proof to the contrary is not admitted; rather, we simply do not want the adjudicator to decide the case because the chances that she will remain free of biases during the whole process are lower than if someone else were appointed. Thus, the proper attitudes are central, but they do not exhaust all avenues in the judgment of impartiality. There is also the matter of judging the likelihood of an adjudicator holding these attitudes, and such a likelihood is an objective matter.

6 CONCLUSION

The above analysis shows that notions of independence, impartiality and neutrality are elusive, since the terms are employed with several different meanings in legal discourse and this deprives us of a useful scheme for evaluating the performance of judges and arbitrators in specific instances. I have shown that, in legal discourse, at least four senses of independence and impartiality can be identified: they can be referred to at various times as 1) states of mind, 2) institutional conditions, 3) values related to the rule of law or 4) duties (which operate, as the context requires, as either rules or principles). Distinguishing between these senses is essential if we are to bring some order to the debate.

Having discussed these conceptions, I then attempted to offer an argument aimed at identifying where the value of independence and impartiality lies and how the value of neutrality fits in with the first two. I claimed that, if introducing the value of neutrality in legal discourse is to be worthwhile, it must be a non-redundant value with respect to independence and impartiality and have normative relevance. The content of each value should be identified by its con-

46 See Fernández Blanco 2016: 245, fn. 25, and 249-250.

tribution to the rule of law, understood as a neutral device to promote interaction between free and equal individuals who have different comprehensive views about the world. I have also said that these values are the foundation of the duty of the adjudicator to be independent, impartial and neutral. The duty of independence consists of resisting any pressure from any of the parties, or third parties, involved in the dispute. The duty of impartiality, however, imposes on the adjudicator a duty to apply her reasoning while leaving aside all prejudices and interests attached to the object of the litigation – and, where necessary stepping aside. Finally, the duty of neutrality requires the adjudicator to adopt the point of view of the law in her reasoning and her decision regarding the case. All three duties are necessary for the law to fulfil its role as a neutral device for social interaction.

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The logical structure of principles in Alexy's theory

A critical analysis

This paper offers a critical analysis of the logical structure of principles proposed by Robert Alexy and, in particular, of their structure as optimisation commands. Its first part opens the question whether the optimisation element in the logical structure should be understood as part of modalisation, as part of the consequent, or as an independent element. In the second part, the author analyses possible forms of inter-definability of deontic operators. Finally, some questions are raised on the conditional structure proposed by Alexy for principles.

Keywords: logic of principles, deontic modalisations, inter-definability, conditional norms

1 INTRODUCTION

In this work, I intend to analyse the logical structure of principles proposed by Robert Alexy, in particular their structure as optimisation commands.

In a paper on ideal ought published in German and Spanish, Alexy describes his proposal on the logical structure of principles as derived from the logical structure of norms.[1] Alexy starts from what could today be labelled a standard logic of norms (that which accepts the classic deontic modalities of obligation – including "duty" or "command" – prohibition and permission).[2] In Alexy's view, rules express real or definitive commands. Principles, on the other hand, express ideal or *prima facie* requirements, or "*pro tanto* mandates": the command of principles applies once other opposed considerations are discarded.[3]

As to the logical structure of principles, Alexy presents it as a derivation of the deontic modality "Obligatory", to which he adds one aspect: optimisation.

While a rule of obligation imposes a plain and simple duty to do *p* ("O*p*"), a principle, according to Alexy, imposes the obligation to optimise *p* ("O Opt *p*").

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1 Alexy 2010.

2 Alexy 2010: 42. A description of this standard logic of norms may be found in Echave, Urquijo and Guibourg 1995: 119 ff.

3 Alexy 2010: 43.

For Alexy, in this logical structure, *p* "would be an empirical object of optimisation, that is, not a normative one".[4]

Alexy holds that, alternatively, an optimisation mandate can be reconstructed so that the object to be optimised is not empirical but normative. The structure, in this case, would be "O Opt O*p*". Following the author's line of reasoning, this formulation is the counterpart of the "ideal obligation" ("$O_i p$"). Between these two formulations, there is a relation of mutual implication in so far as "optimisation commands and the ideal obligation are two sides of the same thing":[5]

(1) $\quad O\ Opt\ Op \leftrightarrow O_i p$

By contrast, between the first formulation and the ideal obligation there is a relation of simple implication, because the existence of an optimisation command is a sufficient condition for the existence of an ideal obligation:[6]

(2) $\quad O\ Opt\ p \rightarrow O_i p$

Given the mutual implication of the formula "O Opt O*p* ↔ $O_i p$", the following implication is also valid for Alexy:

(3) $\quad O\ Opt\ p \rightarrow O\ Opt\ Op$ [by hypothetical syllogism in (2) and (1)]

This Alexyan logic of principles is complemented by predicate logic and quantifiers.[7] Accordingly, the complete logical structure of principles for Alexy derives from the logical structure of conditional norms, with the addition of "Opt" to the consequent, and hence the following ideal deontic modalities are obtained: "ideal obligation" ($O_i p$), "ideal permission" ($P_i p$) and "ideal prohibition" ($\neg P_i p$). Let us examine two examples proposed by Alexy for this structure.

(4) $\quad (x)\ (T_1\, x \rightarrow P_i\, R x)$

For every *x*, if *x* is an expression of an opinion (T_1), then (→) it is *prima facie* permitted (P_i) to do *x* (R).[8]

(5) $\quad (x)\ (T_2\, x \rightarrow \neg P_i\, R x)$

For every *x* (x), whenever *x* is a restriction on the right to personality (T_2), then (→) it is not permitted (P_i) to do *x* (R).[9]

4 Alexy 2010: 45.
5 Alexy 2010: 47.
6 Alexy 2010: 55
7 Alexy (1989: 214 ff) already used this combination (standard deontic modalisations, predicate logic, and quantifiers).
8 Alexy 2010: 50.
9 Alexy 2010: 50-51.

I aim to probe Alexy's proposal, in particular the logical functions attributed to "Opt" within the general logical structure. Specifically, I intend to analyse whether "Opt" should be understood (i) as part of modalisation, (ii) as part of the consequent, or (iii) as an independent element. The criticisms laid at the element "Opt" will refer to the most basic formula "O Opt *p*", although they could also be applied to the more complex formula "O Opt O*p*".

Likewise, I shall question the way in which the notions of ideal permission ($P_i p$) and ideal prohibition ($\neg P_i p$) can be derived from the basic form "O Opt *p*".

Finally, some questions are raised on the conditional structure proposed by Alexy for principles.

2 ON THE LOGICAL FUNCTION OF "OPT"

I shall initially analyse the following three possible hypotheses: 1) "Opt" is an independent element; 2) "Opt" is part of a modalised action (or state of affairs); 3) "Opt" is part of a deontic modaliser.

Hypothesis 1	Hypothesis 2	Hypothesis 3
O Opt p	O Opt p	O Opt p
¬O Opt p	¬O Opt p	¬O Opt p
O ¬Opt p	O ¬Opt p	·
¬O ¬Opt p	¬O ¬Opt p	·
O Opt ¬p	·	O Opt ¬p
¬O Opt ¬p	·	¬O Opt ¬p
O ¬Opt ¬p	·	·
¬O ¬Opt ¬p	·	·

Although Alexy does not accept expressly any of the said hypotheses, it seems that, since he accepts the implication "O Opt $p \rightarrow$ O Opt O*p*", hypothesis 3 would be correct. This is so because Alexy states that his logic of principles derives from deontic logic, and some models of deontic logic do accept the theorem "Op $\rightarrow$ O O*p*".[10] Therefore, in this case it seems that Alexy holds that "Opt" is part of deontic modalisation, because, otherwise, the theorem would be "O Opt $p \rightarrow$ O O Opt p" if "Opt" was part of a modalised action or state of affairs, and Alexy does not hold this theorem to be valid.

From a different, very intuitive point of view, it seems that hypothesis 2 is correct, given that optimisation ("Opt") is an action that, much like any other action, could be subject to modalisation (normativisation).

10 For instance, the S4 deontic system proposed by Navarro and Rodríguez 2014: 31.

However, this reasoning would also imply the viability of hypothesis 1, because both actions (optimisation and *p*) could be combined both with their action and with their omission, i.e., we could have a norm (specifically, a principle) making the optimisation of the welfare of less favoured citizens obligatory (Opt *p*), another principle could make not optimising the welfare of wealthy citizens obligatory (¬Opt *p*), while a third one could make the optimisation of the non-welfare of those who have breached the most important rules of life in society obligatory (Opt ¬*p*). Option 1 entails the consequence that there would be no longer four,[11] but eight basic normativisation forms. This does not seem to be Alexy's view, since he proposes three ideal forms – ideal obligation ($O_i p$), ideal prohibition ($\neg P_i p$), and ideal permission ($P_i p$) – and it can safely be assumed that Alexy would accept the fourth: ideal permission to omit ($P_i \neg p$).

Based on these considerations, my first concern about the logical function of the element "Opt" is the following: it is not clear which is Alexy's conception of this element, because it could be considered to be part of deontic modalisation, part of an action modalised, or to be an independent element.

3 THE RULES OF TRANSFORMATION AND INFERENCE OF THE LOGIC OF PRINCIPLES

Alexy notes that his logic of principles is part of deontic logic. One of the features of the latter is the existence of four basic modalisations, which are mutually inter-definable using the deontic operators obligatory (O), permitted (P) and prohibited (V):[12]

Obligatory p:	O*p*	≡	¬P¬*p*	≡	V¬*p*
Prohibited p:	O¬*p*	≡	¬P*p*	≡	V*p*
Permitted p:	¬O¬*p*	≡	P*p*	≡	¬V*p*
Permitted ¬p:	¬O*p*	≡	P¬*p*	≡	¬V¬*p*

Alexy shows how to pass from simple obligation to *p* (O*p*) to the obligation to optimise *p* (O Opt *p*), from there to the ideal obligation by implication ($O_i p$), and from there to the obligation to optimise the norm "O*p*" (O Opt O*p*) by mutual implication (bi-conditional).

11 The four basic forms of normativisation are obligation (O*p*), prohibition (V*p* ≡ O¬*p*), permission to do (P*p* ≡ ¬O¬*p*), and permission to omit (P¬*p* ≡ ¬O*p*). For further details, refer to section 3 below.

12 Echave, Urquijo and Guibourg 1995: 123.

He also uses the notions of ideal permission ($P_i p$ is his notation) and ideal prohibition ($\neg P_i p$ in his notation). He does not explain, however, either how this inter-definability between these ideal deontic modalisers works, or how to pass from the simple logical forms of deontic logic to ideal permission or ideal prohibition.

To determine how inter-definability works, it is necessary to first provide an answer to the question posed above, because if optimisation "Opt" is an independent element of the modaliser and of the modalised action (hypothesis 1 of section 2 above), then we would no longer have four basic forms, but eight – unless any (or some) of the eight forms should be eliminated under any given criterion.

Nevertheless, regardless of which hypothesis in the previous section is chosen, there would still be doubt as to the sequence (rules of transformation and inference) to be followed so as to reach ideal permission and ideal prohibition. There are several options, and they are as follows:

Option A | Keeping the above hypothesis 3 and following the inter-definability rules of deontic logic:

O Opt p	→	$O_i p$	(ideal obligation to p)
O Opt $\neg p$	→	$V_i p$	(ideal prohibition to p)
$\neg$O Opt p	→	$P_i \neg p$	(ideal permission to not p)
$\neg$O Opt $\neg p$	→	$P_i p$	(ideal permission to p)

Option B | Using the above hypothesis 2 and following the inter-definability rules of deontic logic:

O Opt p	→	$O_i p$	(ideal obligation to p)
O $\neg$Opt p	→	$V_i p$	(ideal prohibition to p)
$\neg$O Opt p	→	$P_i \neg p$	(ideal permission to not p)
$\neg$O $\neg$Opt p	→	$P_i p$	(ideal permission to p)

It is clear that choosing either of the two options affects neither the ideal obligation or duty nor the ideal permission to omit (they remain equivalent). Albeit, in both options the content of ideal prohibition and ideal permission changes substantially. Indeed, as far as ideal prohibition is concerned, option a) establishes something such as "it is obligatory to optimise the non-welfare of those who committed murder", while option b) establishes something such as "it is obligatory not to optimise the welfare of wealthy citizens". As far as ideal permission is concerned, the results are similar.

Other options could also be proposed. For example:

Option C | Using the Alexyan notion of normative (not factual) optimisation and creating new inter-definability rules:[13]

O Opt O*p*	↔	$O_i p$	(ideal obligation to *p*)
O Opt V*p*	↔	$V_i p$	(ideal prohibition to *p*)
O Opt P¬*p*	↔	$P_i \neg p$	(ideal permission to not *p*)
O Opt P*p*	↔	$P_i p$	(ideal permission to *p*)

Indeed, more options are possible, although I understand that it is senseless to keep exploring this path.

Based on the said considerations, my second question is: how does Alexy move the inter-definability of deontic logic to the logic of principles? More specifically, which are the transformation and inference rules to pass from the prohibition to *p* ($O\neg p$) to the ideal prohibition to *p* ($\neg P_i p$), and from the permission to *p* ($\neg O\neg p$) to the ideal permission to *p* ($P_i p$)?

4 THE CONDITIONAL STRUCTURE OF PRINCIPLES

Many legal philosophers (e.g., Alexy, Atienza and Ruiz Manero, or Alchourrón and Bulygin)[14] hold that the logical structure of principles is to a certain extent analogous to the logical structure of conditional norms. Other scholars claim that the logical structure of principles should be reconstructed with the schemes of preference logic[15] or other semantic structures, but their view is not the majority view.

Those who hold that there is a structural analogy between principles and conditional norms usually also claim that principles are a "weakened" version of norms. In this regard, there are three possible options: (i) weakening the antecedent, (ii) weakening the consequent, and (iii) weakening the connective between them. Atienza and Ruiz Manero exemplify option (i), Alexy option (ii), and Alchourrón options (iii) and (i).

Atienza and Ruiz Manero[16] propose an elegant scheme to separate the different types of principles and rules:

13 This option has been suggested by Hugo Zuleta.

14 See Alchourrón and Bulygin 2012: 118 ff.

15 See Navarro and Rodriguez 2014 and Alonso 2013.

16 Atienza and Ruiz Manero 1996.

		Antecedent (case)	Consequent (solution)
Rules	ACTION RULES	*closed*	*closed*
	END RULES	*closed*	*open*
Principles	STRICT SENSE	*open*	*closed*
	DIRECTIVES	*open*	*open*

As is obvious, for Atienza and Ruiz Manero the central feature of the genus "principles" is that the case is open, that is, subject to further precision. This is what differentiates the genus "principles" from the genus "rules" (whose antecedent or case is closed). Clearly, the two Spanish authors choose to weaken the antecedent of the conditional, maintaining at the same time that for principles in the strict sense the solution is closed. Once the case is defined or specified, the solution is of the "O*p*" or "¬P*p*" type, that is, a logical formula of standard, non-modified deontic logic.[17]

We shall see that Alexy's proposal seems to be opposed to Atienza and Ruiz Manero's, since for Alexy the case of principles in the strict sense is closed and the solution is open (or "weakened" or "*prima facie*").

Now, while Alchourrón does not state expressly his views on the structure of principles, his thesis on the defeasibility of norms is, in my opinion, applicable to the issues in hand.[18]

Alchourrón analyses different proposals to weaken the classic conditional connective (in any of its versions, such as material implications, generalised conditionals, etc.), replacing it with a connective that does not satisfy the law of strengthening the antecedent and *modus ponens*. For instance:

(6) $p > Oq$

According to Alchourrón's analysis, the problem of weakening the connective lies in the loss of inferential capacity. In other words, a connective that does not satisfy the strengthening of the antecedent and *modus ponens* is not useful to justify deductively any practical decision, i.e., a judicial sentence.

Additionally, Alchourrón claims that those who use defeasible conditionals also hide the weakening of the antecedent in the common conditional. In other words, the use of defeasible conditionals mistakenly transfers to the connective a problem that in fact belongs to the antecedent of the conditional.

17 I should clarify that I do share some of the criticisms of Atienza and Ruiz Manero's proposal mounted by Ratti 2013. I cannot, however, elaborate further on this matter in this work.

18 Alchourrón 1988.

Hence, Alchourrón proposes abandoning the use of defeasible conditionals (also called "*prima facie* conditionals"), keeping a strong connective (he proposes the generalised conditional "⇒") that satisfies the strengthening of the antecedent and the deontic *modus ponens*, and adding a revision operator to the antecedent. The formula is as follows:

(7) $f(p) \Rightarrow Oq$
If p occurs, and no circumstances arise that may cause the revision of p ($f(p)$), then (strong conditional ⇒) it is obligatory to q (Oq).

A revision is a function which affects the antecedent of the conditional, and which selects a certain subset of p cases (the most usual ones or those for which no exceptions have been verified).

In my view, Alchourrón's proposal is the best theory for the claim that there is a structural analogy between principles and conditional norms. In any event, the question of whether there is a best reconstruction of the logical structure of principles that draws no analogies with the logical structure of conditional norms (i.e., a structure as in preference logic) remains open.

Alexy's position seems to be opposite to that of Alchourrón, and of Atienza and Ruiz Manero. His paper on ideal ought (Alexy 2010) brings the following logical structure of principles:

$(x)\ (T_1 x \rightarrow P_i Rx)$

$(x)\ (T_2 x \rightarrow \neg P_i Rx)$

As is evident, the connective used by Alexy is material implication (→), a connective that satisfies the strengthening of the antecedent and the deontic *modus ponens*. The antecedent, on the other hand, lacks revision functions or any other weakening mechanisms. Weakening, apparently, affects only the consequent.

But the weakened consequent proposed by Alexy does not, in my view, solve the problems suggested in my above two objections.

5 CONCLUSIONS

In my view, Alexy's logical structure of principles is faced with the problems I have outlined in the preceding paragraphs. First, the logical function of the "Opt" element is unclear; it could be considered to be part of deontic modalisation, to be part of the action modalised, or to be an independent element. Second, it is unclear whether inter-definability governs deontic logic in Alexy's

principles. If so, what are the transformation rules and inference rules to pass from prohibition of *p* (O¬*p*) to ideal prohibition of *p* (¬P_i*p*), and from permission of *p* (¬O¬p) to ideal permission of *p* (P_i*p*). Third, the logical structure that Alexy attributes to principles is the rejection of the position that weakens the antecedent of the conditional, the position which is, in my opinion, the strongest and is held by those who claim that the structure of principles has saved the analogy with the structure of conditional rules.

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Biljana Kostadinov*

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 Mathieu[1])

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 „Izvorišnih 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 političkog 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]

> *Izvrsnost 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, „mješoviti" bi sustav sadržavao kontradiktorna obilježja: neposredan izbor predsjednika i nepostojanje neposrednog izbora, političku odgovornosti i nedostatak političke odgovornosti, što bi naravno bilo apsurdno.*

Klasifikacija može biti samo formalna, nema druge operativne 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 prijepora koji su se koncentrirali oko triju pitanja. Prvo, jesu li navedena glavna obilježja dostatna da se konstituira 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 odnositi 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

11 Troper 1989: 945–956.

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

13 Kasapović 2007: 29.

14 Tako Vladimir Šeks o pozadini nastanka hrvatskog Ustava u *Glasu 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.

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 rastezljivosti i *degreeism*.[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]

Koncept M. Duvergera odbačen je u Francuskoj krajem osamdesetih godina 20. stoljeća, ustrojstvo vlasti Pete Republike nije reinterpretirano, 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 prihvaćanju 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

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.

22 Sokol 1992: 16.

23 Usporedba teksta prvog Prijedloga nacrta Ustava Republike Hrvatske od 15. kolovoza 1990. godine i Nacrta 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 nacrta Ustava Republike Hrvatske, Nacrta 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 svega 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 Sabora[25] 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 Quermonneu 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

24 Smerdel 2010: 13.

25 Šarin 1997: 107.

26 de Jouvenel 1964: 1053.

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

28 Duverger 1986: 7.

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 prihvaćanju 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 Alžirom. 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/cri/1959-1960-extraordinaire2/001.pdf (pristup 6.11.2011).

32 Tradicionalne političke snage suprotstavile su se neposrednom izboru, zahtijevaju „ubrzanu 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 tu tezu teško dokazati: „no sve je bilo moguće u užasnoj atmosferi tog razdoblja". Duverger 1986: 25.

33 Predsjednik FranjoTuđman 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 generalska urota za uništenje poretka. Upravo suprotno, *povratak* na fleksibilni ustavni tekst Ustava Pete Republike omogućio je političku stabilnost, nije spriječio europsko udruživanje, liberalnu ni dirigiranu 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 kvazisavjetodavnim tijelima, od kojih je najizrazitiju ulogu odigralo Vijeće narodne obrane i nacionalne sigurnosti (VONS).*

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 podastrjetu političkom subjektivizmu.[37]

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.

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 Rumunj-

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. Usuđujem 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 Vladu 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'ésprit libre]. Predsjednik vlade je odgovoran parlamentu, a ne državnom pogla-*

ske (čl. 95., 1991.), uspostavit će instituciju političke odgovornosti predsjednika republike, o njegovoj ostavci odlučivat će narod konačno na referendumu! Parlament je 19. travnja 2007. suspendirao predsjednika Băsescua, 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 konjukturu, 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 prihvaćanje 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 Ministarskom 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 morate 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 razoružan, 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

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).

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-Soucramanien 2004: 436.

podnese ostavku Vlade".[52] Prema prvom Prijedlogu nacrta 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 prema 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 prepuštena 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 356/2007[61] 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 s se 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

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 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 sladu 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.

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]

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

71 Capitant 1971: 419.

72 Članak 16. st. 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.

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 osebujan novi hibrid polupredsjedničkog sustava, takozvani „četvrtpredsjednički sustav", te unošenjem nesigurnosti u obliku moguće blokade izvršne vlasti i svojevrsne 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 četvrtpredsjednički 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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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 Mathieu[1])

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 December 1990.[2] The 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. Duverger[5] 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]

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

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).

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 responsibility 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 Republic[14]. 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 Hamon[15] 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, Favoureu 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]

> *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 *degreeism*.[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-

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.

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 Parliamentarianism 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 parliamentarianism 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 Tuđman'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 Parliament[25] 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-

25 Šarin 1997: 107.

26 De Jouvenel 1964: 1053.

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%).

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 Government[31] 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 referenda 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]

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]

30 de Courcel 1988: 9–10.

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

32 Traditional political forces opposed the direct election and requested "a speedy restoration of republican 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).*

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

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.

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 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

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the only procedure for checking presidential legitimacy among the people., J.-L. Debré sees the main consequence of the principate 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 Băsescu 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 Băsescu 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.

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 parliamentarianism in which the Government is politically accountable to both the Parliament and the Head of State (the Orleans parliamentarianism). 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]

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-Soucramanien 2004: 436.

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.

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 parliamentarian 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]

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 356/2007[61] 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

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.

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 Repub-

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)).

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.

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.]

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

73 Kostadinov 2008: 4.

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."

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 *Quater-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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Synopsis

Andrej Kristan

V kakšnem smislu so dokočne sodne odločbe lahko pravno zmotne

SLO. | To je poziv k redefiniciji pojma zmotljivosti dokončnih sodnih odločb. Njegovo običajno razumevanje, ki temelji na delu Harta, je precej bolj problematično, kot pa se navadno predpostavlja. Avtor tu pokaže, da običajno razumevanje vodi v naslednje protislovje: (včasih) je pravno pravilno storiti to, kar pravno ni pravilno.

Ključne besede: pravo, sodna odločba, dokončnost, zmotljivost, Hart

ENG. | *In what sense are final judicial decisions said to be fallible?* This is an appeal to redefine the concept of fallibility of final judicial decisions. Its standard understanding, based on Hart's work, is far more problematic than it is usually assumed. The paper shows that it gives rise to a contradiction. Namely, it is (sometimes) legally correct to do that which is not legally correct.

Keywords: law, judicial decision, finality, fallibility, Hart

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Synopsis

Lorena Ramírez Ludeña

Legal disagreements
A pluralist reply to Dworkin's challenge

SLO. | *Pravna nesoglasja. Pluralistični odgovor na Dworkinov izziv.* V članku je obravnavan problem pravnih nesoglasij, ki ga je kot prvi izpostavil Ronald Dworkin v svojem napadu na Hartov tip pozitivizma. Po mnenju Dworkina so nesoglasja v pravu pogosta, ker je pravo argumentativna praksa, katere udeleženci uporabljajo normativne argumente. Pozitivisti naj teh nesoglasij ne bi mogli osmisliti, ker pravo opredeljujejo kot soglasje uradnikov. V članku so najprej predstavljeni argumenti z obeh strani razprave, ki se je razvila iz te kritike. Zatem avtorica loči več ravni, na katerih se med pravniki pojavljajo nesoglasja. Na tej razčlembi končno temelji njen pluralistični odgovor na Dworkinov izziv. Po tem odgovoru Dworkinova kritika ne prizadane temeljnih načel pozitivizma.

Ključne besede: pravna nesoglasja, Dworkin, pravni pozitivizem, teorije neposrednega nanašanja

ENG. | The author analyses the problem of legal disagreements, initially raised by Ronald Dworkin against Hartian positivism. According to Dworkin, disagreements are pervasive, since law is an argumentative practice in which participants invoke normative arguments. Positivists, who claim that law depends upon agreement among officials, have difficulties to make sense of the fact that lawyers frequently disagree. The author first present the main arguments in the debate; she then goes on to distinguish different levels at which lawyers disagree. Taking these levels into consideration, she articulates a pluralist reply that shows that the fundamental positivist tenets remain untouched by Dworkin's challenge.

Keywords: legal disagreements, Dworkin, legal positivism, direct reference theories

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Synopsis

Diego M. Papayannis

Independence, impartiality and neutrality in legal adjudication

SLO. | *Neodvisnost, nepristranskost in nevtralnost pri razsojanju*. Avtor obravnava več razsežnosti neodvisnosti in nepristranskosti. Med drugim trdi, da je pojma (oba sta tesno povezana z vladavino prava) mogoče razumeti kot vrednoti in da sta eden od drugega povsem razločljiva. Posebej oriše še takšno pojmovanje nevtralnosti, ki slednjo razume kot tretjo, od neodvisnosti in nepristranskosti ločeno vrednoto. Zaključi, da morajo biti sodniki in arbitri hkrati neodvisni, nepristranski in nevtralni. Vsaka od teh vrednot na svoj način prispeva k temu, da pravo lahko v zapletenih in pluralnih družbah odigrava zase značilno vlogo: tj. da omogoča družbeno sožitje.

Ključne besede: neodvistnost, nepristranskost, nevtralnost, sodna odločba, arbitraža

ENG. | This paper presents an analysis of the various dimensions of independence and impartiality. Among other things, the author argues that the two concepts, both of which are profoundly implicated in the rule of law, can be conceived as values and are perfectly distinguishable from each other. He also proposes a conception of neutrality, as a third distinct value that satisfies the requirement for non-redundancy with regard to independence and impartiality. Hence, judges and arbitrators must be independent, impartial and neutral. Each of these values contributes in different ways to enabling the law to fulfil its distinctive function of facilitating social interaction in complex and plural societies.

Keywords: independence, impartiality, neutrality, judicial decision, arbitration

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Synopsis

JuanPablo Alonso

The logical structure of principles in Alexy's theory

A critical analysis

SLO. | *Logična struktura načel v Alexyjevem nauku. Kritčina razčlemba.* Avtor obravnava Alexyjev oris logične strukture načel, posebej v luči njihove vloge optimizacijskih ukazov. V prvem delu je v središču vprašanje, ali je treba optimizacijski člen v logični strukturi razumeti kot del modalnosti, poreka (konsekvensa), ali pa kot neodvisen člen. V drugem delu avtor preverja možnosti vzajemne opredelitve deontičnih modalnosti, na koncu pa obravnava še strukturo pogojnika, ki jo Alexy pripisuje načelom.

Ključne besede: logika načel, deontične modalnosti, možnost vzajemne opredelitve, pogojne norme

ENG. | This paper offers a critical analysis of the logical structure of principles proposed by Robert Alexy and, in particular, of their structure as optimisation commands. Its first part opens the question whether the optimisation element in the logical structure should be understood as part of modalisation, as part of the consequent, or as an independent element. In the second part, the author analyses possible forms of inter-definability of deontic operators. Finally, some questions are raised on the conditional structure proposed by Alexy for principles.

Keywords: logic of principles, deontic modalisations, inter-definability, conditional norms

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Synopsis

Biljana Kostadinov

President of the Republic
Croatian constitution's mimicry of the French constitutional model

SLO. | *Predsednik Republike. Mimikrija hrvaške ustave po francoskem modelu.* Izhodišče za preučevanje hrvaške ustavne demokracije predstavlja sprejetje Ustave Republike Hrvaške z dne 22. decembra 1990. Ta opredeli obliko vladavine kot polpredsedniški sistem, njegovi avtorji pa kot vzor navajajo francosko Ustavo pete republike. Navkljub temu uvoz ustavnih določb iz Francije leta 1990 ni bil nevtralen, saj so bile iz francoskega besedila izločene institucionalne ovire, ustavni instituti za omejevanje volje predsednika republike, ustavni pogoji za prevlado predsednika vlade v primeru kohabitacije in razlike med parlamentarno in predsedniško večino. Besedilo je bilo dopolnjeno z normami, ki so izvirniku neznane. Francoska ustavna določila je bilo treba razlagati in pravno prilagoditi želenim političnim ciljem, tj. vzpostavitvi učinkovite vladavine, v kateri bi imel predsednik republike primat tako nad vlado kot nad zakonodajalcem. Mit polpredsedniškega sistema je služil tako za sprejetje določil o organizaciji oblasti v ustavi iz leta 1990 kot za njen amandma leta 2000.

Ključne besede: polpredsedniški sistem, predsednik republike, predsednik vlade, Peta francoska republika, hrvaška Božična ustava

ENG. | 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

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