Robert Podolnjak*, Đorđe Gardašević**

Neposredno izabrani gradonačelnik i problem kohabitacije

Slučaj hrvatskog glavnog grada Zagreba

Novi sustav neposredno izabranih gradonačelnika, implementiran u Hrvatskoj 2009. godine, suočio se s najozbiljnijim teškoćama u jedinicama lokalne samouprave s podijeljenom vlašću, gdje gradonačelnik i većina u vijeću predstavljaju različite političke opcije. Zbog konfliktnog odnosa između gradonačelnika i Skupštine Grada Zagreba nova hrvatska Vlada predložila je promjene u zakonima koji reguliraju izbor i odnos predstavničkog i izvršnog tijela u sustavu lokalne samouprave godinu dana prije lokalnih izbora 2013. godine. Gradonačelnicima je dana izričita ovlast imenovanja i opoziva predstavnika jedinice lokalne samouprave u lokalnim ustanovama i trgovačkim društvima. Drugi najvažniji aspekt "mini reforme" hrvatskog sustava lokalne samouprave odnosi se na uvođenje mogućnosti istodobnog raspuštanja predstavničkog tijela i razrješenja izvršnog tijela, s novim prijevremenim izborima za oba tijela u slučaju neusvajanja proračuna jedinice lokalne samouprave.

Ključne riječi: gradonačelnik, vijeće, lokalna i regionalna samouprava, kohabitacija, Hrvatska

1 UVOD

U mnogim europskim državama u posljednjih 15 godina provedene su značajne reforme institucionalnog okvira njihovih jedinica lokalne samouprave.[1] Najvažnija među njima, prema našem mišljenju, uvođenje je neposrednog izbora gradonačelnika. To se priznaje i u Rezoluciji 139 Kongresa lokalnih i regionalnih vlasti Europe, koja navodi da je "neposredni izbor gradonačelnika od strane naroda procedura koja se sve više koristi u državama članicama Vijeća Europe pri izboru šefa izvršne vlasti".[2] U drugom izvješću konstatira se da "uzimajući u obzir sve čimbenike, čini se kako postoji jedna odlučna i doista rastuća sklonost neposrednijem izboru" lokalne izvršne vlasti u državama članicama Vijeća Europe.[3] Skoro sve države u hrvatskom okruženju usvojile su ovaj ili onaj model neposredno izabrane lokalne izvršne vlasti.[4]

* robert.podolnjak@pravo.hr [1] Profesor na Pravnom fakultetu Sveučilišta u Zagrebu.

** gardasevic_99@yahoo.com | Docent na Pravnom fakultetu Sveučilišta u Zagrebu.

1 Loughlin (2001) i Berg & Rao (2005: 1-14).

2 CLRAE, 2002: Rezolucija 139 o odnosima između javnosti, lokalne skupštine i izvršne vlasti u lokalnoj demokraciji (institucionalni okvir lokalne demokracije). Taj je trend prisutan ne samo u zapadnoeuropskim državama (Njemačka, Austrija, Italija, Španjolska, čak i Engleska), nego još više u bivšim socijalističkim državama. Neposredni gradonačelnički izbori uvedeni su početkom 1990-ih u Slovačkoj, Bugarskoj, Rumunjskoj, Sloveniji, Albaniji i Ukrajini, 1994. u Mađarskoj, 1995. u Makedoniji i 2002. u Poljskoj. Ipak, u tri baltičke države (Latvija, Litva i Estonija), kao i u Češkoj Republici i Srbiji, lokalnu izvršnu vlast još uvijek biraju vijeća. Komparativnu analizu institucionalnog ustroja sustava lokalne vlade u državama bivše Jugoslavije vidi u Koprić (2009: 335-365).

3 CLRAE, *Advantages and disadvantages of directly elected local executive in the light of the principles of the European Charter of Local Self-Government - CPL (11) 2 Part II,* izvjestitelji Ian Micallef i Guido Rhodio (2004).

4 O različitim tipologijama sustava lokalnih vlada vidi Bäck (2005: 65-101), Bennett (1993: 1-27),

Donošenjem dvaju zakona prihvaćenih u listopadu 2007. (Zakona o izborima općinskih načelnika, gradonačelnika, župana i gradonačelnika Grada Zagreba i Zakona o izmjenama i dopunama Zakona o lokalnoj i (područnoj) regionalnoj samoupravi) taj je sustav uveden i u Hrvatskoj, propisivanjem ukidanja poglavarstava kao kolektivnih izvršnih tijela biranih od lokalnog vijeća i uvođenjem umjesto njih neposredno izabrane lokalne izvršne vlasti. Riječ je, kako je priznala sama Vlada, o najfundamentalnijoj promjeni u sustavu lokalne samouprave u Hrvatskoj od njegova uvođenja 1992.-1993. godine. Novi sustav je implementiran 2009. s redovnim lokalnim izborima. Prema podacima Državnog izbornog povjerenstva sudjelovanje birača u tim izborima bilo je prosječno 10 posto veće nego 2005. godine i to se može povezati s provedbom novog sustava neposredno biranih gradonačelnika.

Nakon održanih neposrednih gradonačelničkih izbora 2009. imamo prva iskustva glede toga kako funkcionira novi sustav. Naši su preliminarni zaključci da su neposredni gradonačelnički izbori pridonijeli većoj legitimnosti gradonačelničke dužnosti, većoj identifikaciji građana s lokalnom vladom (mjereći to barem prema većem sudjelovanju u izborima) i većem stupnju kontinuiteta u funkcioniranju lokalne izvršne vlasti, jer nijedan gradonačelnik nije razriješen putem opoziva na referendumu. Međutim, pokazalo se da je glavni problem novog sustava bio u preklapajućim ili nejasnim ovlastima gradonačelnika i lokalnih vijeća naročito u situacijama kohabitacije, tj. kada gradonačelnik nema većinsku potporu u vijeću za donošenje svojih politika.

Kohabitacija je tijekom nekoliko godina bila prisutna u Zagrebu, glavnom gradu Hrvatske pa je taj Grad predstavljao neku vrstu testnog slučaja novog sustava, koji još uvijek ima mnogo protivnika. Sukob između gradonačelnika i Skupštine Grada Zagreba tijekom posljednjeg mandata između 2009. i 2013. otkrio je mnoge slabosti pravne arhitekture novog sustava. Očiti nedostaci novog sustava uvjetovali su donošenje izmjena Zakona o lokalnoj i područnoj (regionalnoj) samoupravi u prosincu 2012. godine. Promjena Zakona predstavljala je svojevrsnu "mini reformu" sustava lokalne vlade, sa zacrtanim ciljem da se osigura "jača politička stabilnost u odnosima između predstavničkog i izvršnog tijela, veća učinkovitost u obavljanju poslova tih dvaju tijela i jasnije utvrđivanje njihovih prava, obveza i odgovornosti".[5]

U ovom radu analiziramo dva ključna sukoba između gradonačelnika i Gradske skupštine u Zagrebu. Prvi se odnosi na pitanje tko ima ovlast imenovanja članova skupština i nadzornih odbora trgovačkih društava koja su osnovale jedinice lokalne samouprave, a drugo se odnosi na pitanje tko ima posljednju riječ glede gradskog proračuna. U odjeljku 5. ukazujemo na to kako su ti sukobi doveli do najznačajnijih promjena Zakona o lokalnoj i područnoj (regionalnoj) samoupravi.[6]

2 PROBLEM KOHABITACIJE IZMEĐU GRADONAČELNIKA I LOKALNOG PREDSTAVNIČKOG TIJELA NAKON IZBORA 2009.

Protivnici novog sustava neposredno izabranih gradonačelnika često navode da bi najveći problem novog sustava mogao biti sukob između predstavničkog tijela i neposredno izabranoga gradonačelnika, u situaciji kada on/ona ne uživa povjerenje većine u vijeću i da bi to moglo vjerojatno voditi paralizi u funkcioniranju te jedinice lokalne samouprave.

Nakon lokalnih izbora 2009. u mnogim općinama i gradovima neposredno izabrani općinski načelnici i gradonačelnici bili su suočeni s činjenicom da nemaju većinsku potporu u vijeću.

Heinelt & Hlepas (2006: 21-42), Hambleton (1998), Ivanišević (2008) i Podolnjak (2010).

5 Vlada Republike Hrvatske, Prijedlog zakona o izmjenama i dopunama Zakona o lokalnoj i područnoj (regionalnoj) samoupravi, listopad 2012. URL: http://www.vlada.hr/hr/content/download/229927/.../file/57.%20-%201.pdf (28. studenoga 2013).

6 Naš je rad izvorno predstavljen na 22. IPSA World Congress u Madridu u srpnju 2012. pod naslovom *"Institutional Reform in Croatian Local Government: From Cabinets to Directly Elected Mayors"* u okviru panela RC05 "Mayors in Comparative Perspective". U prosincu 2012., prije dovršetka postupka recenzije rada, Hrvatski sabor donio je izmjene Zakona o lokalnoj i područnoj (regionalnoj) samoupravi. Te su izmjene izrazito značajne za temu našega rada te smo odlučili osvrnuti se na njih u posebnom odjeljku 5.

Prema jednoj neobjavljenoj analizi GONG-a (hrvatska nevladina organizacija koja se bavi nadzorom izbora), izrađenoj nakon izbora 2009. godine, proizlazilo je da će, s obzirom na političku pripadnost izabranog čelnika lokalne izvršne vlasti, u 11 jedinica (svega 2 %) postojati kohabitacija, jer u njima apsolutnu većinu u predstavničkom tijelu ima politička opcija kojoj ne pripada izvršni čelnik. U 347 jedinica (60 %) izabrani čelnik lokalne izvršne vlasti imao je većinsku potporu u predstavničkom tijelu, zahvaljujući vijećnicima vlastite političke opcije ili koalicije koja ga je kandidirala. I na kraju, u 219 jedinica (38 %) izabrani čelnik lokalne izvršne vlasti nije imao zajamčenu većinu u predstavničkom tijelu jer je ona bila na strani političkih opcija koje nisu zastupljene u izvršnoj vlasti. To, međutim, ne znači da je u tim jedinicama postojala kohabitacija, jer je moguće da su u mnogim jedinicama neke političke opcije podržale u predstavničkom tijelu izvršnog čelnika, bez obzira na to što ne participiraju u lokalnoj izvršnoj vlasti.

U situaciji kada gradonačelnik može računati na potporu predstavničkog tijela novi sustav će vjerojatno funkcionirati kao i raniji "lokalni parlamentarni" sustav. Međutim, istinski test novog sustava bit će njegovo funkcioniranje u situacijama sukobljenog odnosa gradonačelnika i vijeća zbog kohabitacije. U nekim hrvatskim gradovima ta situacija se pojavila nakon izbora 2009. (gradovi Velika Gorica, Vrbovec, Beli Manastir i naročito Zagreb, uz mnoštvo malih općina). Stoga se sada okrećemo najistaknutijem i najvažnijem slučaju kohabitacije između gradonačelnika i vijeća koji se manifestirao u razdoblju između 2010. i 2013. u Gradu Zagrebu, glavnom gradu Hrvatske. Zbog političke, financijske i gospodarske snage toga grada funkcija gradonačelnika je druga najvažnija izvršna funkcija u državi.

3 SUKOB IZMEĐU GRADONAČELNIKA I GRADSKE SKUPŠTINE U ZAGREBU - TKO PREDSTAVLJA GRAD?

Problem kohabitacije u Zagrebu nastao je kao rezultat prilično posebne političke situacije. Kroz niz godina gradonačelnik Zagreba Milan Bandić bio je član Socijaldemokratske partije Hrvatske (SDP), koja ga je i nominirala kao kandidata za lokalne izbore u svibnju 2009. godine. Sukladno novom zakonodavstvu, koje je tada već bilo na snazi, Bandić je još jednom postao gradonačelnik Zagreba, nakon što je u drugom krugu izbora, održanih 31. svibnja 2009. godine, porazio drugog kandidata.

Nedugo nakon toga, u srpnju 2009. godine, SDP je organizirao unutarnje izbore za stranačkog kandidata na izborima za Predsjednika Republike Hrvatske. U oba slučaja, te izbore je dobio trenutačni hrvatski Predsjednik Ivo Josipović. Međutim, nezadovoljan takvim ishodom događaja, Bandić je odlučio djelovati samostalno te je u ranom studenom 2009. godine najprije zamrznuo svoje članstvo u SDP-u, a potom objavio svoju odluku da se u svojstvu nezavisnog kandidata natječe u izboru za predsjednika države.[7] Posljedično tomu, nakon što je u statutarnim odredbama pronađena pravna osnova kojom su zabranjene nezavisne kandidature članova, SDP je odmah objavio kako je Bandićevo članstvo u SDP-u prestalo. Sve navedeno, prema tome, rezultiralo je situacijom u kojoj je Grad Zagreb trebao biti voditi nezavisni gradonačelnik, sada politički razdvojen od stranke koja ga je ranije kandidirala za tu poziciju, očito u potencijalno konfrontirajućoj poziciji s gradskom skupštinom.

Kao što je ranije već rečeno, problem kohabitacije na lokalnim razinama u Hrvatskoj nije bio ograničen samo na glavni grad. U određenom broju primjera, jedan od tipičnih problema koji je postupno nastao proizašao je iz sporova između gradonačelnika i vijeća u odnosu na ovlast imenovanja članova skupština i nadzornih odbora trgovačkih društava koja su osnovale jedinice lokalne samouprave.[8]

Ranija je praksa glede toga bila neujednačena - odlukama o osnivanju trgovačkih društava jedinice lokalne ili županijske samouprave predstavnička tijela su često prava i ovlasti osnivača, kao jedinog člana društva, povjeravala poglavarstvima jedinica, a ona su potom, zasjedajući u funkciji skupštine društva, imenovala upravu društva i članove nadzornog odbora. U određe-

7 Posljednji predsjednički izbori u Hrvatskoj održani su 27. prosinca 2009. (prvi krug) i 10. siječnja 2010. godine (drugi krug).

8 Drugi poseban problem koji se u tom kontekstu opisuje u ovom članku odnosi se na usvajanje proračuna jedinica lokalne samouprave.

nim su slučajevima i predstavnička tijela obavljala funkciju skupštine društva pa je, slijedom toga, predstavničko tijelo imalo ovlast imenovanja uprave i nadzornog odbora. No, u ranijem sustavu, bez obzira na neujednačenu praksu, do problema nije dolazilo jer su predstavnička tijela svojom odlukom o osnivanju trgovačkog društva povjeravala određene ovlasti izvršnom tijelu, a izvršno tijelo je imalo zajamčenu potporu većine u predstavničkom tijelu. U novom sustavu situacija se bitno mijenja, pa kada ne postoji političko suglasje izvršnog i predstavničkog tijela, u pravilu dolazi do spora i nastojanja da se određene ovlasti "prisvoje".

Imajući u vidu učestale upite oko nadležnosti imenovanja članova skupština trgovačkih društava u vlasništvu jedinica lokalne i županijske samouprave i različita postupanja pojedinih tijela u praksi Ministarstvo uprave je u rujnu 2009. godine dalo svoje mišljenje, koje je dostavljeno svim jedinicama.[9]

Upućujući na odgovarajuće odredbe Zakona o lokalnoj i područnoj (regionalnoj) samoupravi,[10] gdje je propisano da predstavničko tijelo, između ostalog, "imenuje i razrješuje druge osobe određene zakonom, drugim propisom ili statutom" te da to tijelo osniva javne ustanove i druge pravne osobe za obavljanje gospodarskih, društvenih, komunalnih i drugih djelatnosti od interesa za jedinicu lokalne ili područne samouprave, Ministarstvo je zaključilo kako je nesporno da je upravo predstavničko tijelo ono koje je nadležno za sva imenovanja pa i ona koja se odnose na članove skupštine trgovačkih društava u vlasništvu jedinice. Istodobno, Ministarstvo je odbacilo tumačenje da ovlasti čelnika lokalne izvršne vlasti koje su navedene u članku 48. Zakona na neki način podrazumijevaju njihovu ovlast donošenja odluka o imenovanjima i razrješenjima. Štoviše, prema mišljenju Ministarstva, "neposredno izabrani općinski načelnik, gradonačelnik, odnosno župan ne može preuzeti više ovlasti nego što mu je dodijeljeno zakonom". Ministarstvo se u svom mišljenju pozvalo i na jednu odluku Vrhovnog suda RH u kojem je taj Sud zauzeo stajalište da je predstavničko tijelo u ime osnivača trgovačkog društva ovlašteno imenovati članove trgovačkog društva u vlasništvu jedinice.[11] Ministarstvo je na kraju iznijelo stajalište da je tu ovlast imenovanja predstavničkog tijela potrebno utvrditi statutom jedinice lokalne i područne (regionalne) samouprave.

Svega dan nakon dopisa ministra uprave uslijedit će reakcija Udruge gradova putem dopisa predsjednika te udruge Ministarstvu uprave, u kojem će se vrlo oštro odbaciti stajalište Ministarstva.[12] U tom se dopisu navodi da je Ministarstvo pogrešno protumačilo zakonske odredbe te neposredno izabranim gradonačelnicima umanjilo i u bitnome ograničilo ovlasti dodijeljene im čitavim nizom posebnih zakona koji su prije ljetne saborske stanke usklađeni sa Zakonom o lokalnoj samoupravi. U dopisu se iznosi stajalište da je temeljem članka 42. stavak 1. ZOLPRS koji propisuje da grad kao jedinicu lokalne samouprave zastupa gradonačelnik, odnosno po gradonačelniku ovlaštena osoba, nesporno da je upravo izvršno tijelo ono koje ima ovlast da zastupa jedinicu u skupštini trgovačkog društva. Upravo je to činjenica, kaže se u dopisu, koju "Ministarstvo uprave u spornom i pravno neutemeljenom mišljenju u potpunosti ignorira, dodjeljujući drugim, neovlaštenim tijelima, u pravilu gradskim vijećima, striktno propisane i definirane ovlasti neposredno izabranih gradonačelnika". U dopisu se ukazuje i na dosadašnje postupanje trgovačkih sudova i stajalište Radne skupine za pitanja sudskog registra pri Visokom trgovačkom sudu od 2. veljače 2006. da skupštinu društva s ograničenom odgovornošću čine njegovi osnivači, što se odnosi i na društva kojima je jedini osnivač lokalna samouprava, odnosno grad, koji zastupa gradonačelnik, a ne poglavarstvo, kako je to uređeno u nekim izjavama o osnivanju, odnosno društvenim ugovorima. Posebno nam je važno naglasiti

9 Nadležnost za imenovanje članova skupština trgovačkih društava u vlasništvu jedinica lokalne i područne (regionalne) samouprave - mišljenje, KLASA: 023-01/09-01/283, URBROJ: 515-01-09-1 od 21. rujna 2009.

10 Zakon o lokalnoj i područnoj (regionalnoj) samoupravi od 10. travnja 2001, *Narodne novine,* br. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13. Članak 35. stavak 1/3 i stavak 1/5.

11 Revt 34/04-2, 27. listopada 2004.

12 Dopis je dostupan na internetskoj stranici Udruge gradova. URL: http://www.udruga-gradova.hr/Default.aspx?art=145&sec=18.

da je u dopisu Udruge navedeno kako mišljenje Ministarstva "u osnovi nije pravno obvezujuće, niti može predstavljati izvor prava" i kako je ono "u potpunosti suprotno svim odlukama predstojnika ureda državne uprave, profesionalaca čija je primarna zadaća briga o zakonitosti rada i akata svih lokalnih jedinica, te praksi trgovačkih sudova diljem Republike Hrvatske" te se Udruga nada da trgovački sudovi "svoje postupanje neće mijenjati temeljem mišljenja Ministarstva uprave".

Iznijeli smo širi prikaz stavova Ministarstva uprave i Udruge gradova[13] jer smatramo da je riječ o vrlo značajnom pitanju nadležnosti tijela jedinica lokalne, odnosno županijske samouprave. U komparativnoj literaturi o lokalnoj izvršnoj vlasti smatra se da je jedna od bitnih značajki "jakog" gradonačelnika i ovlast imenovanja svih izvršnih dužnosnika, odnosno integracija svih upravnih odjela i pravnih osoba kojima je jedinica osnivač ili vlasnik pod nadzorom gradonačelnika.[14] U tom smislu, jasno je da je pitanje nadležnosti imenovanja osoba u trgovačkim društvima u vlasništvu lokalne samouprave upravo pitanje koje u značajnoj mjeri definira hoćemo li imati "jakog" ili "slabog" čelnika lokalne izvršne vlasti. Nama je predmetni spor važan ne samo iz razloga različitog tumačenja zakonskih ovlasti tijela lokalne samouprave (je li mjerodavna ovlast imenovanja predstavničkih tijela ili ovlast zastupanja čelnika lokalne izvršne vlasti) već i uloga središnjih državnih tijela u rješavanju sporova o nadležnosti. Treba pritom reći da mišljenja Ministarstva nisu, u pravnom smislu, dobro rješenje. Činjenica je da mišljenje državnog tijela nije propis u smislu normativnog, općeobveznog pravnog pravila,[15] pa se protiv mišljenja Ministarstva uprave ne bi mogao pokrenuti nikakav postupak ocjene ustavnosti ili zakonitosti. S druge strane, Ministarstvo nema na raspolaganju nikakvih instrumenata kojima bi moglo spriječiti donošenje, primjerice, odluke gradonačelnika o imenovanju članova nadzornog odbora trgovačkog društva u vlasništvu jedinice lokalne samouprave jer je riječ o pojedinačnom aktu koji ne potpada pod nadzor zakonitosti. Kao što je dobro poznato, u hrvatskom sustavu postoji samo nadzor zakonitosti općih akata predstavničkog tijela. Ne postoji nikakva zakonom propisana obveza čelnika lokalne izvršne vlasti da dostavi akte koje donosi nadležnom tijelu državne uprave, niti postoji mogućnost ocjene ustavnosti i zakonitosti tih akata. Protiv nekog pojedinačnog akta čelnika lokalne izvršne vlasti, temeljem članka 77.a Zakona o lokalnoj i područnoj (regionalnoj) samoupravi, mogao bi se pokrenuti samo upravni spor.

S obzirom na takve pravne praznine, smatramo da bi najbolje rješenje bilo Zakonom precizno utvrditi nadležnosti tijela lokalne samouprave u svezi imenovanja osoba u pravnim osobama kojima je jedinica lokalne samouprave osnivač ili vlasnik. Što se aktualnog spora o imenovanjima u trgovačkim društvima tiče, naše je mišljenje da ta nadležnost pripada predstavničkom tijelu. Kako predstavničko tijelo odlučuje o osnivanju javnih ustanova i drugih pravnih osoba za obavljanje gospodarskih, društvenih, komunalnih i drugih djelatnosti od interesa za jedinicu lokalne ili područne samouprave to ono već u samoj odluci o osnivanju može utvrditi tko će činiti, primjerice, skupštinu društva i tko će imenovati upravu i članove nadzornog odbora. Činjenica je da su u mnogim slučajevima predstavnička tijela izvršavanje osnivačkih prava povjerila poglavarstvima, ali to nedvojbeno govori da je riječ upravo o ovlasti predstavničkog tijela, a ne o nadležnosti koja bi se mogla iščitati iz funkcije zastupanja jedinice od strane izvršnog tijela. Jednako tako, Zakonom o ustanovama[16] propisano je da ustanovom upravlja upravno vijeće ili drugi kolegijalni organ i da se način izbora odnosno imenovanja uređuje zakonom, aktom o osnivanju (koji donosi predstavničko tijelo) i statutom ustanove (koji se donosi uz suglasnost osnivača, a to je predstavničko tijelo), a što se tiče imenovanja ravnatelja ustanove to može biti u nadležnosti upravnog

13 Kada je riječ o Udruzi gradova, dopis je uputio predsjednik Udruge, inače gradonačelnik Grada Rijeke. U praksi, Udruga funkcionira i kao tijelo koje zastupa interese gradonačelnika pa to treba imati u vidu kod prosudbe njenih stavova.

14 Vidi u tom smislu, primjerice, definiranje ovlasti "jakog" neposredno izabranoga gradonačelnika u Sjedinjenim Američkim Državama u Zimmerman (1999: 171-177).

15 Ustavni sud Republike Hrvatske ovo je potvrdio još 1993. godine. Vidi Crnić (1994: 32).

16 Zakon o ustanovama od 5. kolovoza 1993, *Narodne novine,* br. 76/93, 29/97, 47/99, 35/08. Članci 35. i 38.

vijeća, a zakonom ili aktom o osnivanju može se odrediti da to na razini lokalne samouprave bude predstavničko tijelo. Dakle, ovlast zastupanja jedinice lokalne samouprave ni na koji način nije relevantna za imenovanja osoba u ustanovama jedinica lokalne samouprave. Zašto bi za trgovačka društva vrijedila drukčija logika?

Situacija istovjetna ovoj upravo opisanoj ubrzo se pojavila u Gradu Zagrebu, a rezultirala je formalnim donošenjem gradonačelnikove odluke kojom je suspendirana primjena dviju odredaba gradskog statuta, kao i donošenjem dvaju zaključaka gradske Skupštine koji su se odnosili na imenovanja predstavnika u skupštinama dvaju trgovačkih društava u vlasništvu Grada.[17]

U tom pogledu, odgovarajuće odredbe Gradskog statuta propisivale su kako je Skupština Grada imala ovlast odlučivati o sastavu skupština trgovačkih društava koja su bila u stopostotnom vlasništvu Grada, odnosno da je imala ovlast određivati tko bi bili predstavnici Grada u skupštinama takvih društava u kojima Grad ne bi imao stopostotno vlasništvo. Temeljem ovih statutarnih odredaba, naknadni zaključci Gradske skupštine potom su definirali kako skupštine društava u kojima Grad ima stopostotno vlasništvo čine njihovi predsjednici (funkcija koja pripada gradonačelniku) te deset dodatnih članova (koje iz reda svojih predstavnika bira Gradska skupština).

Suprotno onome što je bilo propisano spornim odredbama Gradskog statuta te naknadnim zaključcima, gradonačelnik je temeljio svoje stajalište na nekoliko tvrdnji: prvo, da "član trgovačkog društva *ex lege* čini skupštinu trgovačkog društva"; drugo, hrvatski Zakon o trgovačkim društvima "vrlo jasno i nedvojbeno utvrđuje" da skupštinu društva s ograničenom odgovornošću čine članovi društva (jedan ili više njih); treće, da je jedini član dvaju društava povezanih s ovim slučajem Grad Zagreb; te, četvrto, da je slijedom svoje ovlasti zastupanja upravo gradonačelnik Zagreba praktično jedini član skupština dvaju društava.[18]

Kao što je to jasno vidljivo iz ranijeg opisa događaja, ovaj poseban problem konfrontacije između gradonačelnika i gradskih vijeća, kao i Ministarstva uprave, postao je sasvim očit u posljednjim danima 2009. godine te je konačno završio donošenjem Rješenja od strane Ustavnog suda Republike Hrvatske, u korist predstavničkih tijela.[19] Premda se ovo Rješenje nije odnosilo na situaciju u hrvatskom glavnom gradu, već u gradu Belom Manastiru, njegove su posljedice primjenljive na sve slične slučajeve.

Ukratko, osporene odredbe Statuta Grada Belog Manastira, koje je gradsko vijeće usvojilo u srpnju 2009. godine, propisivale su ovlasti Vijeća da imenuje i razrješava članove upravnih vijeća, odnosno odbora javnih ustanova, tvrtki i drugih pravnih osoba osnovanih od strane Grada, kao i ovlasti Vijeća da obavlja izbore, imenovanja i razrješenja predstavnika Grada Belog Manastira u skupštinama trgovačkih društava u kojima je Grad suvlasnik vlasničkih udjela te u upravnim vijećima ustanova kojih je Grad Beli Manastir osnivač.[20]

U svojem prijedlogu za ocjenu suglasnosti s Ustavom i zakonom gradskog Statuta, predlagateljica je, kao i u ranijim sličnim slučajevima koji su već spomenuti, tvrdila da je Gradsko vijeće oduzelo izravno izabranom gradonačelniku njegovu pravnu ovlast zastupanja Grada (kako je ona izričito bila propisana člankom 42. stavkom 1. Zakona o lokalnoj i područnoj (regionalnoj) samoupravi), obrazlažući pritom kako je sudjelovanje u skupštini trgovačkog društva u pravnom smislu zastupanje osnivača. Slično tome, predlagateljica je tvrdila kako Gradsko vijeće nije imalo ovlast usvajanja drugih ovdje opisanih statutarnih odredbi, te je istaknula kako su one ne samo suprotne Ustavu, već i nizu zakona, aktima ureda državne uprave donesenim u postupku nadzora zakonitosti, kao i stajalištima različitih trgovačkih sudova.[21]

17 Zaključak gradonačelnika Grada Zagreba, 012-03/09-01/4; 251-02-01-09-1 (18. studenog 2009.). *Službeni glasnik Grada Zagreba,* br. 25. od 30. studenog 2009.

18 Nadalje, gradonačelnik se u svojem obrazloženju pozvao i na dva rješenja Visokog trgovačkog suda Republike Hrvatske: XLIII Pž-2677/06-05 od 18. listopada 2006 i LVIII Pž-5961/09-3 od 20. listopada 2009.

19 U-II/38101/2009 od 17. ožujka 2010.

20 Statut Grada Belog Manastira od 2. srpnja 2009. *Službeni glasnik Grada Belog Manastira,* br. 4/09, 6/09.

21 Pored ustavnih odredaba u kojima su navedene najviše vrednote ustavnog poretka Republike Hrvatske, zajamčena načela ustavnosti i zakonitosti,

Potpuno odbacujući relevantnost ostalih zakona na koje se pozvala predlagateljica, Ustavni sud svoje je Rješenje bazirao isključivo na odredbama Ustava Republike Hrvatske i Zakona o lokalnoj i područnoj (regionalnoj) samoupravi. Na strogo ustavnopravnoj razini, Sud se usredotočio na one članke kojima su: zajamčena opća načela ustavnosti i zakonitosti te pravo na lokalnu i regionalnu samoupravu; navedeni određeni poslovi čije obavljanje je Ustavom rezervirano za jedinice samouprave, odnosno definirani načelni modaliteti njihova obavljanja; uspostavljena nadležnost jedinica lokalne i regionalne samouprave da svojim statutima uređuju vlastito unutarnje ustrojstvo, kao i djelokrug vlastitih tijela (članci 5., 132. stavci 1. i 2., 134., 135. i 136. Ustava Republike Hrvatske). U pogledu Zakona o lokalnoj i područnoj (regionalnoj) samoupravi, Sud je citirao one odredbe kojima su specificirana područja čije se daljnje pravno uređenje razrađuje statutima lokalnih i regionalnih jedinica te kojima su definirane specifične ovlasti predstavničkih i izvršnih tijela u takvim jedinicama, uključujući i najproblematičnije pravo zastupanja (članci 8., 35., 42. i 48. Zakona o lokalnoj i područnoj (regionalnoj) samoupravi).

U relevantnom dijelu svojeg obrazloženja, Ustavni sud je razjasnio nekoliko bitnih pitanja.

Prvo, da je pravo zastupanja jedinica lokalne i regionalne samouprave koje imaju čelnici izvršne vlasti, iako je načelno uspostavljeno zakonom, usmjereno "prema trećim osobama" (primjerice, prema sudovima i drugim državnim i javnim tijelima) te da kao takvo ono ne uključuje "inherentno" pravo imenovanja članova i predstavnika jedinica lokalne samouprave u skupštinama ili upravnim vijećima trgovačkih društava i javnih ustanova kojih je osnivač jedinica lokalne samouprave.

Drugo, da pravo imenovanja članova i predstavnika jedinica lokalne samouprave u skupštinama ili upravnim vijećima prije svega pripada lokalnim predstavničkim tijelima i to stoga što sam Zakon o lokalnoj i područnoj (regionalnoj) samoupravi ne sadrži specifične odredbe koje bi to pitanje precizno definirale, a pored činjenice da Zakon daje ovlast lokalnim predstavničkim tijelima da "imenuju i razrješuju druge osobe određene zakonom, drugim propisom ili statutom" (dakle, ostavljajući, s obzirom na to da je riječ o pitanju koje spada u područje samouprave, da se ono uredi statutom lokalne jedinice) te stoga što lokalna ili regionalna predstavnička tijela ionako imaju ovlast osnivanja različitih pravnih osoba (javnih ustanova, trgovačkih društava ili drugih pravnih osoba) za obavljanje djelatnosti i zadataka od lokalnog interesa.

I treće, međutim, da lokalna predstavnička tijela, a s obzirom na to da imaju pravo urediti to pitanje vlastitim statutima, na raspolaganju imaju dvije opcije: ili da pravo izbora priznaju čelniku izvršne vlasti ili da ga zadrže za sebe.

Rješenje Ustavnog suda konačno je riješilo prvi veliki sukob između gradonačelnika i Gradske skupštine u Zagrebu. Ovome bismo željeli dodati nekoliko posebnih komentara.

Na prvom mjestu, treba uočiti kako je Ustavni sud samo površno spomenuo potencijalno najvažniju odredbu Ustava Republike Hrvatske koja se odnosi na uređivanje lokalne i regionalne samouprave, konkretno, na onu koja izričito propisuje da se pravo na lokalnu i regionalnu samoupravu ostvaruje preko lokalnih i područnih (regionalnih) predstavničkih tijela (članak 132. stavci 1. i 2. Ustava Republike Hrvatske). Uzimajući to u obzir, Sud je mogao znatno više naglasiti da određena vrsta "načelne prevlasti" u dvojbenim slučajevima, kao što je to bio ovaj predmetni, pripada onim granama lokalne vlasti koje su izričito uređene samim Ustavom, a ne onima koje svoje ovlasti temelje na određenom zakonu.[22]

uspostavljena ovlast jedinica lokalne i područne samouprave da u okviru zakona svojim statutima samostalno urede unutarnje ustrojstvo i djelokrug svojih tijela, predlagateljica se također pozvala i na odgovarajuće odredbe Zakona o lokalnoj i područnoj (regionalnoj) samoupravi, Zakona o ustanovama, Zakona o trgovačkim društvima i Zakona o proračunu.

22 Ipak, treba priznati, kao što je to već istaknuto, da je Ustavni sud Republike Hrvatske također uputio na onu ustavnu odredbu koja se odnosi na ovlast jedinica lokalne i područne samouprave da u okviru zakona svojim statutima samostalno urede unutarnje ustrojstvo i djelokrug svojih tijela (članak 135. Ustava Republike Hrvatske). Ali osnova argumentacije Suda u nastavku je bila konstruirana prije svega na razini zakonskog, a ne ustavnog tumačenja.

Ovo je još važnije u svjetlu činjenice da se izvršna grana vlasti, u pravilu, često pozivala na argument da su, sukladno novom sustavu, gradonačelnici birani izravno te da, prema tome, uživaju ne samo posebnu političku legitimnost, već i veće ovlasti.[23] Ovakva linija argumentacije važna je, međutim, samo ukoliko se razmatra pitanje njihove moguće odgovornosti i opoziva. S druge strane, u državi vođenoj vladavinom prava (članak 3. Ustava Republike Hrvatske), osobit problem pojedinih ovlasti trebao bi biti precizno uređen pravnim normama, ostavljajući potencijalne prijepore po strani koliko je god to moguće. Valja priznati kako taj cilj nije jednostavno postići, ali što je još zanimljivije, on može, barem za potrebe teorijske debate, biti povezan s jednom drugom vrstom pravnog tumačenja, što nas vodi na sljedeću točku.

Nastojanja izvršne vlasti da se gradonačelnička ovlast imenovanja kvalificira kao "inherentna" njegovoj funkciji Ustavni je sud, kao što je to ovdje i objašnjeno, odbacio, što je prema našem mišljenju bilo ispravno. Ta činjenica ne bi se smjela podcijeniti kada se razmišlja o ograničenjima lokalnih izvršnih ovlasti koja su uvedena hrvatskim zakonodavstvom iz 2009. godine, kojima je uređena lokalna i regionalna samouprava. Rješenje Ustavnog suda je, s druge strane, dopuštajući da kroz svoje statute lokalna predstavnička tijela mogu odlučiti žele li priznati pravo imenovanja gradonačelnicima ili ga zadržati za sebe, priznalo i određeni oblik "delegacije ovlasti". Na taj način Sud je praktično utvrdio da mogu postojati "jaki" i "slabi" gradonačelnici, ovisno već o tome kakve su im ovlasti delegirane statutima.

Nadalje, također treba naglasiti da je u svojem Rješenju Ustavni sud Republike Hrvatske odbacio prijedlog predlagateljice da se na predmet primijene i odgovarajuće odredbe drugih zakona (Zakona o ustanovama, Zakona o trgovačkim društvima i Zakona o proračunu). Mi smo u ovom članku već istaknuli kako određene pravne analogije u tom kontekstu, barem teorijski, ipak mogu biti izvedene (npr. ranije spomenuta situacija imenovanja osoba u ustanovama jedinica lokalne samouprave). Bez obzira na to, čini se kako ovaj specifičan segment slučaja otvara jedan izrazito važan načelni problem odnosa između običnih i tzv. "organskih zakona".[24]

4 TKO IMA POSLJEDNJU RIJEČ GLEDE GRADSKOG PRORAČUNA?

Drugi veliki sukob između gradonačelnika i Gradske skupštine odvijat će se oko ovlasti određivanja mjerila za naplatu usluga predškolskih ustanova Grada Zagreba od roditelja - korisnika usluga. Taj sukob je bio povezan s još važnijim pitanjem glede toga tko ima posljednju riječ oko gradskog proračuna.

Proračun je, zajedno sa statutom jedinice lokalne samouprave, najvažniji akt u nadležnosti lokalnog vijeća. Prema Zakonu o lokalnoj i područnoj (regionalnoj) samoupravi, prije no što je izmijenjen 2012. godine, ti su akti morali biti usvojeni većinom glasova svih članova predstavničkog tijela, a ako predstavničko tijelo u zakonom predviđenom roku nije donijelo proračun ili ako uopće nije donijelo odluku o privremenom financiranju, Vlada ga je mogla raspustiti. U ranijem "lokalnom parlamentarnom" sustavu u Hrvatskoj većina raspuštanja predstavničkih tijela dogodila se upravo zbog nedonošenja proračuna. Nedonošenje proračuna predstavljalo je neku vrstu izglasavanja nepovjerenja lokalnom izvršnom tijelu od strane vijeća, u kojem je postojala većina koja se ne slaže s gradonačelnikovim prijedlogom, ali ne i većina koja bi mogla izabrati novoga gradonačelnika. Raspuštanje predstavničkog tijela nudilo je stoga mogućnost da se na-

23 U tom je kontekstu jedan od gradonačelnika izjavio sljedeće: "Prvi put smo imali neposredne izbore i po njima ne mogu imati manje ovlasti nego što sam ih imao kada sam biran iz redova vijeća." Vidi "Gradonačelnici: Neka Mlakar misli što hoće, mi ne damo ovlasti" *Novi list,* Rijeka (11. listopada 2009), str. 5.

24 Ustavni sud Republike Hrvatske u gore spomenutom predmetu nije se bavio ovim posebnim problemom, ali ovdje je važno voditi računa o činjenici da su u hrvatskom ustavnom sustavu zakoni koji, između ostaloga, uređuju lokalnu i područnu (regionalnu) samoupravu kvalificirani kao "organski zakoni" koji se donose većinom svih zastupnika u Hrvatskom saboru (članak 83. Ustava Republike Hrvatske). S toga stajališta, u hrvatskoj je doktrini već istaknuto kako organski zakoni imaju veću pravnu snagu od običnih zakona te da ovi drugi stoga moraju biti u skladu s odredbama onih prvih. Vidi Barić (2009: 251-283).

kon izbora izabere novi gradonačelnik i njegovo poglavarstvo.

Neki analitičari novog sustava smatrali su da će neuspjeh pri usvajanju proračuna zbog sukoba između neposredno izabranog gradonačelnika i vijeća biti glavni razlog za raspuštanje vijeća. To su temeljili i na činjenici da je ovlast predlaganja proračuna vijeću, prema Zakonu o proračunu, dana isključivo gradonačelniku i da ne postoje propisane sankcije u slučaju ako on tu obvezu ne bi izvršio.

U nekim američkim gradovima sa sustavom "jakoga gradonačelnika" u procesu usvajanja proračuna gradonačelnik ima pravo veta nad amandmanima vijeća na njegov prijedlog proračuna, a vijeće može preglasati gradonačelnikov veto s dvotrećinskom većinom svih predstavnika. Slično tomu, gradonačelnik u Engleskoj predlaže proračun koji može biti izmijenjen ili odbačen samo dvotrećinskom većinom u vijeću.[25] Međutim, gradonačelnici u Hrvatskoj nemaju ovlast veta nad amandmanima vijeća i, kao što smo ranije napomenuli, za usvajanje proračuna potrebna je samo većina svih članova vijeća.

U nekim jedinicama lokalne samouprave u procesu donošenja proračuna u prvoj godini nakon uvođenja neposredno izabranog izvršnog tijela počeo se koristiti novi instrument gradonačelničkih ovlasti koji nije bio predviđen zakonom. U slučaju amandmana vijeća na njegov prijedlog proračuna načelnici (ili gradonačelnici) jednostavno su "povlačili" proračun iz procedure prije odlučivanja o njemu, odnosno amandmanima, ostavljajući vijeće u situaciji bez prijedloga o kojem bi moglo odlučivati. Gradonačelnici su koristili svoju ovlast isključivog predlagatelja proračuna, a također i superiorna sredstva i poznavanje svih relevantnih informacija koje su nužne u izradi složenog financijskog dokumenta kakav je proračun. Takvim ponašanjem gradonačelnici su apsolutno zlorabili svoje zakonske ovlasti, ali zakon nije propisivao da je takvo njihovo ponašanje zabranjeno i podložno sankcijama. Povlačenje prijedloga proračuna od strane pojedinih načelnika ili gradonačelnika, u slučaju amandmana vijeća, dogodilo se u određenom broju hrvatskih općina i gradova krajem 2009. godine. Našavši se na nepoznatom terenu, koji pravno nije bio definiran, vijeća su se ponašala različito - neka su prihvatila prijedlog gradonačelnika, neka su izglasovala svoje amandmane na proračun, bez obzira na njegovo povlačenje predloženog proračuna i usvojila su izmijenjeni proračun, a neka jednostavno nisu znala kako postupiti pa nisu ni glasovala o proračunu, ostavljajući tako svoju jedinicu lokalne samouprave bez proračuna za narednu godinu.

Rezultat tih različitih akcija vijeća doveo je, naravno, do različitih posljedica. Ovdje ćemo se osvrnuti samo na dva različita završetka 'proračunske krize' u dvije jedinice. Prvi slučaj odnosi se na Grad Vrbovec, u kojem su većina u vijeću i gradonačelnik bili iz suprotstavljenih političkih stranaka. Suočen s amandmanima vijeća na svoj prijedlog proračuna, gradonačelnik ga je povukao iz procedure, pozivajući se na poslovničke odredbe prema kojima ovlašteni predlagatelj ima pravo povući svoj prijedlog prije no što je o njemu vijeće odlučilo. Suprotno mišljenju gradonačelnika, vijeće je interpretiralo poslovničke odredbe na način da je procedura prihvaćanja proračuna započela s glasovanjem o amandmanima vijeća i u toj fazi procedure gradonačelnik više ne može povući svoj prijedlog. U skladu s takvim stajalištem, vijeće je prihvatilo u glasovanju podnesene amandmane i potom je izglasovalo proračun. Gradonačelnik je smatrao da proračun nije donesen u skladu sa zakonom i odbio ga je objaviti u službenom glasilu. Umjesto toga, zatražio je od Ministarstva uprave da Vladi RH predloži raspuštanje vijeća zbog nedonošenja proračuna. Ministarstvo je izvršilo inspekcijski nadzor u kojem je zaključeno da je vijeće proračun donijelo u skladu sa zakonom. Osobito je važno citirati obrazloženje takve odluke Ministarstva:

> *Povlačenje prijedloga proračuna, nakon zaključenja rasprave, u tijeku odlučivanja o amandmanima, na dan 29. prosinca tekuće godine predstavljalo bi uskraćivanje mogućnosti predstavničkom tijelu za donošenje proračuna u zakonom određenom roku (prije početka godine za koju se donosi) /.../*
> *Važno je ukazati i na odredbe Europske povelje o lokalnoj samoupravi koja je donošenjem Zakona o potvrdi Europske povelje o lokalnoj samoupravi/.../postala dio pravnog poretka Republike Hrvatske i čije odredbe (paragrafi) su stupile na snagu za Republiku Hrvatsku u*

25 Vidi Copus (2009: 55).

cijelosti. Iz koncepcije lokalne samouprave utvrđene u članku 3. Europske povelje proizlazi da se pod lokalnom samoupravom podrazumijeva pravo i mogućnost lokalnih jedinica da, u okvirima određenim zakonom, uređuju i upravljaju, uz vlastitu odgovornost i u interesu lokalnog pučanstva, bitnim dijelom javnih potreba, a koje pravo će se provoditi preko vijeća ili skupština.

U konkretnom slučaju, uskraćivanje mogućnosti donošenja proračuna predstavničkom tijelu i eventualno stvaranje uvjeta za njegovo raspuštanje direktno utječe na pravo i mogućnost lokalne jedinice da u interesu lokalnog pučanstva upravlja bitnim dijelom javnih potreba.

U potpunosti se slažemo s navedenim mišljenjem - ono je napisano u skladu s duhom i slovom Europske povelje.

Međutim, slučaj Vrbovca i način kako je tamo riješena "proračunska kriza" mišljenjem Ministarstva uprave nisu u to vrijeme bili poznati široj javnosti.[26] Mnogo više pozornosti pridano je drugom slučaju, u kojem je Ministarstvo uprave predložilo Vladi da raspusti vijeće u jednoj maloj općini (Stari Mikanovci) jer nije donijelo proračun, a niti odluku o privremenom financiranju. Vijeće je raspušteno jer je načelnik povukao svoj prijedlog proračuna suočen s amandmanima vijeća. U toj situaciji vijeće nije usvojilo svoje amandmane i tako izmijenjeni proračun u cijelosti, kao što je bio slučaj u Vrbovcu, već je, umjesto toga, donijelo odluku o privremenom financiranju, ali ne na prijedlog načelnika. U postupku nadzora Ministarstvo uprave je zaključilo da je vijeće postupilo suprotno zakonu. Očito je da u dva navedena slučaju zaključci Ministarstva nisu bili sukladni. U "Vrbovečkom slučaju" Ministarstvo je zaključilo da gradonačelnik nije mogao povući prijedlog proračuna u procesu odlučivanja o njemu. U drugom slučaju (moguće druge inspekcije Ministarstva) konstatirano je da vijeće ne može usvojiti proračun ili odluku o privremenom financiranju ako ti akte nije predložio načelnik.

26 Zapisnik Ministarstva uprave o provedenom nadzoru bio je interni dokument Ministarstva i zbog toga nepoznat široj javnosti. Taj smo dokument dobili od predsjednika Gradskog vijeća Grada Vrbovca.

Na kraju je Vlada raspustila vijeće Općine Stari Mikanovci, a potom je tu odluku potvrdio i Upravni sud. Bio je to prvi slučaj raspuštanja vijeća nakon izbora 2009. i stoga je stvoren dojam u javnosti da gradonačelnik može prouzročiti raspuštanje vijeća jednostavno povlačeći svoj prijedlog proračuna, ako vijeće na njega podnese amandmane.[27] Na žalost, treba reći da tadašnje Ministarstvo uprave nije reagiralo na način da predloži promjene zakona koje bi spriječile takvu praksu. Stoga su nedorečenosti zakona i nedosljednosti u djelovanju Ministarstva uprave stvorile krivi utisak da gradonačelnici imaju *de facto* veto na amandmane vijeća na prijedlog proračuna.

Morali smo objasniti tu situaciju, stvorenu tijekom prve godine nakon izbora novih gradonačelnika i vijeća 2009. godine, jer je ona značajna za našu raspravu o sukobu između gradonačelnika i Gradske skupštine u Zagrebu.

Sukob oko proračuna Grada Zagreba nije se zbio 2009., jer je u to vrijeme pozornost bila usredotočena na nadolazeće predsjedničke izbore održane u prosincu te godine, u kojima su gradonačelnik Bandić i kandidat Socijaldemokratske partije Ivo Josipović bili glavni kandidati za Predsjednika. Kada je Bandić izgubio u drugom krugu predsjedničkih izbora u siječnju 2010., njegov odnos s Gradskom skupštinom, u kojoj je dominirao SDP, rapidno se pogoršao.

Treba naglasiti da je Bandić bio bez ikakve potpore u Skupštini - nije mogao računati da će ga poduprijeti bilo koja stranka. Također je važno primijetiti da je glavna oporbena stranka u Zagrebu, Hrvatska demokratska zajednica, u to vrijeme vladajuća stranka u Hrvatskoj, politički eksploatirala sukob između SDP i njegova bivšeg dugogodišnjeg člana u svoju korist. To je bilo posebno očito 2011., kada je izbio sukob između gradonačelnika i Skupštine glede mjerila za naplatu usluga predškolskih ustanova Grada Zagreba.

Sukob je započeo usvajanjem gradskog proračuna za 2011. godinu. U popratnom Programu javnih potreba u predškolskom odgoju i obrazovanju gradonačelnik je predložio da će roditelji

27 Sveukupno je 15 predstavničkih tijela u različitim jedinicama lokalne samouprave raspušteno nakon izbora 2009., a njih 12 zbog toga što nisu donijela proračun.

koji imaju djecu u predškolskim ustanovama Grada Zagreba plaćati naknadu prema novom kriteriju, naime, prema njihovom prosječnom obiteljskom dohotku. Dotad su roditelji plaćali naknadu bez obzira na prihode, što je, prema gradonačelnikom mišljenju, bilo suprotno načelu socijalne pravičnosti. U vrijeme gospodarske krize i manjih prihoda u gradskom proračunu on je smatrao da roditelji s većim prihodima trebaju sudjelovati s višom naknadom za predškolsku skrb o njihovoj djeci. Skupština je bila protiv gradonačelnikova prijedloga jer je većinski SDP smatrao da bi bilo politički pogrešno podići naknade za tisuće roditelja u glavnom gradu prije nadolazećih parlamentarnih izbora. Međutim, Skupština nije predložila i izmijenila gradonačelnikov prijedlog proračuna. Objašnjenje za takvo ponašanje može se naći u sljedećem odlomku iz zaključaka Skupštine: "Neprihvaćanjem programa javnih potreba koji je vezan uz proračun, Gradska skupština ne bi mogla prihvatiti i donijeti proračun, a to bi dovelo do raspuštanja Gradske skupštine."[28]

Skupština je bila suočena s prijetnjom gradonačelnika da će povući svoj prijedlog proračuna u slučaju skupštinskih amandmana, a tada Skupština ne bi imala nikakav prijedlog proračuna o kojem bi mogla glasovati. SDP-ova većina u Skupština bila je prilično uvjerena da bi Vlada HDZ-a iskoristila tu mogućnost da raspusti Skupštinu i da okrivi Socijaldemokrate za uzrokovane troškove prijevremenih skupštinskih izbora, koji su rezultat unutarnjeg sukoba između SDP-a i njegova bivšeg dugogodišnjeg gradonačelnika.

Prihvaćajući proračun koji predložio gradonačelnik Skupština je privremeno odustala od toga da dovodi u pitanje gradonačelnikovo stajalište glede naknada za brigu o predškolskoj djeci. Međutim, to je pitanje ponovno iskrsnulo u travnju 2011., kada Skupština nije prihvatila gradonačelnikov Prijedlog odluke o načinu ostvarivanja prednosti pri upisu djece i mjerilima za sudjelovanje roditelja-korisnika usluga u cijeni programa predškolskih ustanova Grada Zagreba, a koja odluka se temeljila na programu koji je usvojen zajedno s Proračunom. Umjesto toga, Skupština je usvojila svoju odluku, temeljenu na potpuno različitim kriterijima za naknadu za brigu o predškolskoj djeci. Dan kasnije gradonačelnik je obustavio od primjene tu odluku, tvrdeći da je ona suprotna Proračunu Grada i zatražio od Skupštine da otkloni uočene nepravilnosti odluke u roku od petnaest dana. Ta ovlast obustave akta vijeća pripada izvornim ovlastima gradonačelnika, ali je korištena vrlo rijetko. Ali sada, u situacijama kohabitacije, ta ovlast je dobrodošla gradonačelnicima suočenima s neprijateljskim vijećem. Ukoliko bi predstavničko tijelo propustilo otkloniti nepravilnosti gradonačelnik je dužan

0 tome obavijestiti čelnika središnjeg tijela državne uprave nadležnog za nadzor zakonitosti rada tijela lokalne i regionalne samouprave u roku od osam dana.

Skupština je reagirala na gradonačelnikovu obustavu svoje odluke tvrdnjom da ima pravo donositi opće akte i naročito da se njena odluka temelji na Zakonu o predškolskom odgoju i obrazovanju, koji daje predstavničkom tijelu ovlast da odredi naknade i olakšice za roditelje s djecom u predškolskim ustanovama jedinice lokalne samouprave. U svojim zaključcima Skupština je konstatirala da ako njena odluka nije sukladna gradskom Proračunu dužnost je i obveza gradonačelnika da predloži izmjenu Proračuna. Međutim, gradonačelnik je to odbio učiniti i umjesto toga obavijestio Ministarstvo uprave o svojoj obustavi skupštinske odluke. S druge strane, Skupština je zatražila mišljenje od Ministarstva znanosti, prosvjete i sporta glede zakonitosti svoje odluke. Tako je lokalni sukob između gradonačelnika i predstavničkog tijela podignut na državnu razinu.

Narednih su mjeseci čak tri državna ministarstva dala svoja mišljenja glede neslaganja između tijela lokalne samouprave u Zagrebu. Ministarstvo uprave, Ministarstvo znanosti, prosvjete 1 sporta te Ministarstvo financija konstatirali su da Skupština ima zakonsko pravo usvojiti odluku glede naknada i olakšica za roditelje s djecom u predškolskim ustanovama. Međutim, Ministarstvo financija je također konstatiralo, što je bilo očito od samog početka spora, da skupštinska odluka iz travnja 2011. nije sukladna gradskom

28 Obrazloženje Zaključka Skupštine povodom Zaključka gradonačelnika kojim se obustavlja od primjene Odluka o načinu ostvarivanja prednosti pri upisu djece i mjerilima za naplatu usluga predškolskih ustanova Grada Zagreba od roditelja-korisnika usluga od 17. svibnja 2011. URL: http://web.zagreb.hr/sjednice/sjednice_skupstine_nova.nsf/CPDNW?OpenFrameset (11. svibnja 2012).

proračunu jer su ta dva akta propisivala različite kriterije za naknade roditelja u financiranju predškolskog odgoja.

Stoga je Ministarstvo zaključilo da "ne postoje zakonske zapreke provođenja Odluke Gradske skupštine, ali ista mora biti popraćena izmjenama i dopunama Proračuna Grada Zagreba za 2011. i izmjenama i dopunama Programa (javnih potreba u predškolskom odgoju i naobrazbi te skrbi o djeci predškolske dobi).[29]"

Nakon više mjeseci pravnih rasprava sukob nije bio riješen. Bio je, zapravo, tek započeo - Skupština je bila uvjerena da je djelovala u skladu sa Zakonom, a gradonačelnik je stajao iza vrijedećeg gradskog Proračuna, koji je donijela Skupština i nije htio predložiti njegove izmjene. Treba naglasiti da tijekom većeg dijela godine roditelji s djecom u gradskim predškolskim ustanovama nisu znali koju naknadu trebaju plaćati - je li to naknada prema njihovu dohotku, kakva je bila propisana u Proračunu Grada i popratnom programu ili prema odluci Skupštine, čije izvršenje je obustavio gradonačelnik. Oprečne izjave gradonačelnika i predsjednika Gradske skupštine bile su zbunjujuće za roditelje i čitava priča djelovala je poput noćne more. Činilo se da ne postoji nikakvo pravno rješenje kojim bi se razriješio sukob.

Zašto Skupština nije pokrenula proces gradonačelnikova razrješenja putem opoziva na referendumu? Predstavničko tijelo moglo je pokrenuti opoziv lokalnog izvršnog tijela u dva slučaja, a jedan među njima je i ako ono krši i ne izvršava odluke predstavničkog tijela. Stoga je sigurno postojao pravni temelj da se inicira referendum, a također i nužna većina u Skupštini koja bi mogla usvojiti takvu odluku. Problem s referendumom bio je u odredbi prema kojoj kod referenduma o opozivu gradonačelnika moraju biti ispunjena dva uvjeta - jedan je da većina glasača glasuje za opoziv, ali da također većina svih birača u jedinici lokalne samouprave mora sudjelovati na referendumu (tzv. kvorum sudjelovanja). I upravo je taj drugi uvjet smatran problematičnim za vođe Skupštine i SDP-a. U gradonačelničkim izborima 2009. godine sudjelovanje birača u prvog kruga izbora iznosilo je svega 41,69 %, a u drugom krugu tek 33,62 %. Zbog prognoze da postoje mali izgledi da se ispuni taj kvorum sudjelovanja Skupština je odustala od ideje da inicira referendum. Treba naglasiti da je taj kvorum bio glavni uzrok što smo svjedočili samo jednom referendumu o opozivu gradonačelniku u Hrvatskoj u posljednje tri godine, a i taj je proveden u jednoj maloj općini. Čak i u njoj taj kvorum nije postignut, premda je većina glasača koji su sudjelovali na referendumu glasovala za opoziv gradonačelnika.

Sve se promijenilo krajem 2011. godine, nakon što je SDP pobijedio na parlamentarnim izborima 4. prosinca. U novoj situaciji, gradonačelnik je shvatio da ne može nastaviti svoj sukob sa Skupštinom (u kojoj je dominirala ta stranka), s obzirom da je sada postojala stvarna prijetnja da će parlamentarna većina, predvođena SDP-om, po hitnom postupku izmijeniti Zakon o lokalnoj i regionalnoj samoupravi i učiniti opoziv gradonačelnika mnogo lakšim, o čemu se već spekuliralo. U novim uvjetima gradonačelnik Bandić je odjednom postao kooperativan prema Skupštini - prihvatio je skupštinske amandmane na svoj Prijedlog proračuna za 2012. godinu, čak je prihvatio (konačno) i odluku Skupštine o naknadama i olakšicama za roditelje s djecom u predškolskim ustanovama (onu istu koju je odbio provesti u travnju 2011.). Zauzvrat, SDP je odustao od toga da pokrene referendum o opozivu gradonačelnika Bandića. Na kraju krajeva, već je bilo prošlo više od polovice redovnog gradonačelničkog mandata, a referendum bi donio značajne troškove i eventualne nove gradonačelničke izbore svega 15 ili 16 mjeseci prije redovnih izbora 2013.

5 IZMJENE I DOPUNE ZAKONA O LOKALNOJ I PODRUČNOJ (REGIONALNOJ) SAMOUPRAVI IZ 2012. (POSLJEDICE "SUKOBA")

Novi sustav izravno biranih gradonačelnika koji je 2009. godine implementiran u Hrvatskoj suočio se s najvećim poteškoćama u gradovima s podijeljenom vlašću, tamo gdje su gradonačelnici i većine u vijećima predstavljali različite političke opcije. U takvim se slučajevima pravni okvir pokazao nedostatnim, osobito u pogledu pitanja gradonačelničke odgovornosti u vezi izvršenja

29 Priopćenje Ministarstva financija oko određivanja cijena u dječjim vrtićima. URL: http://dalje.com/hr-zagreb/priopcenje-ministarstva financija-oko-odredjivanja-cijena-u-djecjim-vrticima/368140 (11. svibnja 2012).

odluka vijeća te nadzora akata lokalne vlasti od strane središnje državne uprave.

Raniji opisi slučajeva koje smo ponudili na ovom mjestu otkrivaju da bi značajan dio problema kohabitacije, barem kao što je to bilo u hrvatskom glavnom gradu, mogao biti rezultat određene "*expost* emancipacije" gradonačelnika od političkih stranaka koje su ih nekada podržavale. Takvi "razvoji događaja" vjerojatno više ovise o konkretnim osobama i njihovim posebnim interesima ili sasvim karakterističnim političkim okolnostima trenutka nego o činjenici da novi sustav zamišlja odvojenu i neovisnu političku legitimnost izravno izabranih izvršnih čelnika. Drugim riječima, da bi se održala tvrdnja kako je takva opasnost političke emancipacije po definiciji inherentna i neizbježna, najprije bi trebalo dokazati da se ona redovito pojavljuje na svim razinama (primjerice, u slučaju izravno izabranih predsjednika države). To nije slučaj, ali predstavlja li ipak politička legitimnost izravno izabranih izvršnih čelnika u novom sustavu, da posudimo poznate riječi suca R. H. Jacksona, "napunjeno oružje"[30] koje se može koristiti u budućim slučajevima, tek treba vidjeti.

Zbog konfliktnog odnosa između gradonačelnika i zagrebačke Gradske skupštine, nova hrvatska Vlada je predložila promjene u zakonima koji uređuju izbor i odnos predstavničkog i izvršnog tijela u sustavu lokalne samouprave godinu dana prije lokalnih izbora 2013. godine. Kao što smo uvodno naznačili, Vladin službeni cilj "mini-reforme" sustava lokalne samouprave bio je da se osigura "jača politička stabilnost u odnosima između predstavničkog i izvršnog tijela, veća učinkovitost u obavljanju poslova tih dvaju tijela i jasnije utvrđivanje njihovih prava, obveza i odgovornosti". Međutim, prema našem mišljenju, promjena Zakona dovela je do mnogo snažnije sveukupne pozicije gradonačelnika u hrvatskom sustavu lokalne samouprave.

Hrvatski sabor usvojio je izmjene i dopune Zakona o lokalnoj i područnoj (regionalnoj) samoupravi u prosincu 2012. godine. Usredotočujući se na one članke Zakona koji su se prije pokazali važnima za izvođenje argumenata na koje su se pozivale različite strane, kao i sam Ustavni sud, trebali bismo naglasiti dvije presudne stvari.

Prvo, u jednom od najvažnijih dijelova nove verzije Zakona, lokalni (i regionalni) izvršni čelnici dobili su, osim ako posebnim zakonom ne bi bilo drukčije određeno, izričito pravo imenovanja i razrješenja predstavnika jedinice lokalne, odnosno područne (regionalne) samouprave u tijelima javnih ustanova, trgovačkih društava i drugih pravnih osoba osnovanih za obavljanje gospodarskih, društvenih, komunalnih i drugih djelatnosti od interesa za jedinicu lokalne, odnosno područne (regionalne) samouprave.[31] Štoviše, to pravo nije ograničeno u pogledu samoga izbora, a jedina obveza izvršnih čelnika je da svoje odluke o imenovanju ili razrješenju dostave predstavničkom tijelu u roku od 8 dana od donošenja, odnosno da ih objave u službenom glasilu jedinice lokalne odnosno područne (regionalne) samouprave.[32]

Na taj način gradonačelnicima je dan snažan instrument da utječu ne samo na odluke svih lokalnih ustanova i trgovačkih društava, nego i da osiguraju većinsku potporu u predstavničkom tijelu imenovanjem članova vijeća u različita upravna vijeća lokalnih ustanova i nadzorne odbore lokalnih trgovačkih društava. Logika Vlade za davanje tako velikih ovlasti lokalnom izvršnom tijelu bila je u tome da ga se učini odgovornijim za funkcioniranje lokalnih ustanova i trgovačkih društava. Međutim, s tom ovlašću lokalna izvršna vlast ima velike mogućnosti "korumpirati" lokalno vijeće, ne samo radi osiguranja potpore svojem programu, nego i radi eliminiranja, koliko je to moguće, nužne kontrole vijeća nad gradonačelnikovim politikama.

Izmjene i dopune Zakona nisu promijenile niti opće pravo zastupanja lokalnih i regionalnih jedinica koje pripada izvršnim čelnicima (članak 42. Zakona o lokalnoj i područnoj (regionalnoj) samoupravi) niti opće odredbe kojima je definiran opseg ovlasti pripadajućih kako lokalnim predstavničkim tijelima, tako i lokalnim izvršnim čelnicima.[33]

30 *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (R. H. Jackson, izdvojeno mišljenje).

31 Zakon o lokalnoj i područnoj (regionalnoj) samoupravi od 10. travnja 2001, *Narodne novine,* br. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13. Članak 48.

32 Ibid.

33 U odnosu na predstavnička tijela, ovo se odnosi na njihovo pravo imenovanja i razrješenja "drugih

Prema tome, s obzirom na to da trenutačna inačica Zakona o lokalnoj i područnoj (regionalnoj) samoupravi sada sadrži izričitu odredbu o tome tko ima pravo imenovanja i razrješenja predstavnika u trgovačkim društvima koja su osnovale jedinice lokalne i regionalne samouprave, čini se kako u tom posebnom segmentu općih odnosa između lokalnih izvršnih i predstavničkih tijela ne bi trebalo biti daljnjih sukoba. Ali, prema našem mišljenju, trenutačno vrijedeći Zakon također reafirmira jednu drugu prilično važnu „poruku": konkretno, da široko pozivanje na "inherentne ovlasti" i široka tumačenja "ovlasti zastupanja" nisu legitimni te da vrlo konkretne pravne definicije posebnih ovlasti tijela lokalne i regionalne samouprave čine nezaobilazan uvjet čije ispunjenje zahtijeva sustav u kojem vrijedi načelo vladavine prava. Dodatno, čini se kako trenutačno vrijedeći Zakon potvrđuje i jedan vrlo važan načelni zaključak: da, a s obzirom na to da je sada cijeli problem uređen samim Zakonom i nije ostavljen uređenju od strane različitih lokalnih statuta, ne bi smjelo, barem u ovom specifičnom segmentu, biti razlikovanja između "jakih" i "slabih" lokalnih izvršnih čelnika. Takav se "uniformni" pristup, prema tome, čini kao dobro rješenje.

Ipak, ovdje moramo naglasiti kako smo u našim ranijim komentarima cijeloga problema ponudili normativno tumačenje koje je prilično drugačije od pristupa koji je zauzeo Hrvatski sabor. Stoga, moramo ponoviti kako smo se tada zalagali za rješenje prema kojemu bi pravo imenovanja i razrješenja predstavnika u trgovačkim društvima i drugim subjektima koje su osnovale lokalne jedinice trebalo pripadati predstavničkim, a ne izvršnim tijelima.[34]

Naše je početno stajalište u tom pogledu bilo da bi, uzimajući u obzir vrlo značajne pravne praznine koje su postojale u vrijeme kada smo pisali te prethodne komentare, najbolje rješenje bilo da se zakonom precizno propišu ovlasti tijela lokalne samouprave koje se odnose na imenovanja osoba u pravnim subjektima koje su osnovale jedinice lokalne samouprave ili koji su u njihovu vlasništvu.[35]

Nadalje, što se tiče konkretnog spora glede imenovanja vezanih uz trgovačka društva, naše je mišljenje bilo da takva ovlast imenovanja pripada predstavničkom tijelu. Mi smo svoje tumačenje u bitnome konstruirali tvrdeći sljedeće: s obzirom na to da predstavničko tijelo odlučuje hoće li osnovati javne ustanove i druge subjekte za obavljanje gospodarskih, društvenih, komunalnih i drugih djelatnosti od interesa za jedinicu lokalne, odnosno područne (regionalne) samouprave, ono također može (već u svojoj odluci o osnivanju) odrediti tko će, na primjer, biti članovi skupštine društva te tko će izabrati članove uprave i nadzornih odbora.[36]

Također smo naglasili kako je činjenica da su u brojnim slučajevima predstavnička tijela delegirala izvršavanje vlasničkih prava na poglavarstva te smo zaključili kako to nedvojbeno potvrđuje da takva ovlast pripada upravo predstavničkom tijelu, odnosno da se ne može tumačiti na način da ona proizlazi iz funkcije zastupanja koja inače pripada izvršnoj vlasti.[37]

Konačno, upozorili smo na, prema našem mišljenju, dvije prilično relevantne moguće us-

osoba", kao i na pravo osnivanja javnih ustanova i drugih subjekata za obavljanje gospodarskih, društvenih, komunalnih i drugih djelatnosti od interesa za jedinicu lokalne, odnosno područne (regionalne) samouprave. S druge strane, u odnosu na lokalne izvršne čelnike, trenutačno vrijedeća inačica Zakona i dalje propisuje da oni obavljaju (druge) poslove kao što je to utvrđeno lokalnim statutima, u skladu sa zakonom (članci 35., 42. i 48. Zakona o lokalnoj i područnoj (regionalnoj) samoupravi).

34 U cilju očuvanja legitimnosti našeg doktrinarnog pristupa, ovdje moramo naglasiti da su naši raniji komentari u tom smislu napisani kada smo cijeli problem razmatrali u vrijeme prije zadnjih izmjena i dopuna Zakona o lokalnoj i područnoj (regionalnoj) samoupravi (usvojenih 2012. godine).

35 Kao što je to jasno vidljivo iz ranijeg opisa razvoja pravnog uređenja, Hrvatski sabor je 2012. godine zauzeo upravo ovaj smjer djelovanja te je precizno definirao te ovlasti.

36 Drugim riječima, mi smo, prema tome, manje ili više, tvrdili isto što je i Ustavni sud Republike Hrvatske protumačio u svojem Rješenju iz 2010. godine.

37 Ovdje ponovno valja naglasiti kako je i Ustavni sud Republike Hrvatske odbacio tvrdnju da izvršna "ovlast zastupanja" uključuje i pravo imenovanja i razrješenja članova i predstavnika jedinice lokalne samouprave u skupštinama i upravnim vijećima trgovačkih društava odnosno javnih ustanova kojih je osnivač jedinica lokalne samouprave.

poredbe sa Zakonom o ustanovama: prvo, da je taj Zakon propisao da ustanovom upravlja upravno vijeće ili drugi kolegijalni organ i da se način izbora, odnosno imenovanja uređuje zakonom, aktom o osnivanju (koji donosi predstavničko tijelo) i statutom ustanove (koji se donosi uz suglasnost osnivača, a to je predstavničko tijelo); i drugo, da imenovanje ravnatelja ustanove može biti u nadležnosti upravnog vijeća, a zakonom ili aktom o osnivanju može se odrediti da to na razini lokalne samouprave bude predstavničko tijelo.[38] U zaključku smo iznijeli mišljenje da, s obzirom na to da pravna (izvršna) ovlast zastupanja jedinice lokalne samouprave ni na koji način nije relevantna za imenovanja osoba u ustanovama jedinica lokalne samouprave, nema logike da se takav pristup primijeni kada se radi o trgovačkim društvima.[39]

Uzimajući u obzir cjelokupan naknadni razvoj događaja u ovom području (izmjene i dopune Zakona o lokalnoj i područnoj (regionalnoj) samoupravi), te se naše ranije interpretacije danas čine zastarjelima. Ipak, ovdje bismo željeli dati jedan konačni komentar cijelog problema. Usprkos činjenici da trenutačno vrijedeći Zakon o lokalnoj i područnoj (regionalnoj) samoupravi sada izričito propisuje kako izvršni čelnik ima pravo imenovanja i razrješenja predstavnika jedinica lokalne i regionalne samouprave u tijelima "njihovih" ustanova, trgovačkih društava i drugih pravnih osoba, čini se kako takvo rješenje, barem na teorijskoj razini, samo po sebi provocira određenu nekonzistentnost u značenju. Ukoliko se, naime, "osnovni sadržaj" egzekutivne vlasti sastoji u tome da ona "izvršava", a "osnovni sadržaj" predstavničke vlasti da "predstavlja", čini se da bi logičniji pristup Zakona bio da se propiše kako predstavnička tijela lokalne i regionalne vlasti, a ne izvršni čelnici, imaju pravo imenovanja i razrješenja.[40] Ili, drugim riječima, čini se kako takvo pravo logično i "inherentno" proizlazi iz sasvim načelne, a, što je još i važnije, i ustavne (članak 133. Ustava Republike Hrvatske) "ovlasti predstavljanja" građana na lokalnoj i regionalnoj razini te da su upravo predstavnička tijela ona koja takvu ovlast predstavljanja logički mogu "delegirati" dalje.

Drugi najvažniji aspekt 'mini-reforme' hrvatskog sustava lokalne samouprave je uvođenje mogućnosti istodobnog raspuštanja predstavničkog tijela i razrješenja izvršnog tijela, s prijevremenim izborima za oba tijela, u slučaju neusvajanja proračuna lokalne samouprave. To obostrano raspuštanje/razrješenje mogu izazvati obje strane: gradonačelniku je dana isključiva ovlast da predloži lokalni proračun, a i ovlast da povuče prijedlog proračuna prije nego što ga vijeće usvoji. S druge strane, vijeće naprosto može glasovati protiv gradonačelnikova prijedloga proračuna.

To istodobno raspuštanje predstavničkog tijela i razrješenje izvršnog tijela ima neke sličnosti s talijanskim modelom izglasavanje nepovjerenja vijeća prema gradonačelniku, s automatskim raspuštanjem obaju tijela i raspisivanjem novih izbora. Međutim, u talijanskom modelu takav scenarij moguć je bilo kada tijekom mandata. Lokalno ili regionalno vijeće može usvojiti obrazloženi prijedlog za izglasavanje nepovjerenja gradonačelniku apsolutnom većinom članova vijeća. S druge strane, ostavka gradonačelnika

38 Zakon o ustanovama od 5. kolovoza 1993, *Narodne novine,* br. 76/93, 29/97, 47/99, 35/08. Članci 35. i 38.

39 Kao što se to jasno može iščitati iz Rješenja Ustavnog suda, takav argument nije uzet kao relevantan.

40 U tom smislu, termin "predstavljanje" ovdje ne koristimo u njegovom tehničkom smislu u kojem on svakako pripada izvršnim čelnicima i odnosi se na, kao što je to Ustavni sud pravilno istaknuo, "treće osobe", već u njegovom političkom smislu, na način koji uključuje različite društvene, političke, gospodarske i druge interese koji se moraju reflektirati u sastavu samih predstavničkih tijela, bez obzira je li riječ o predstavničkim tijelima jedinica lokalne i regionalne samouprave ili o predstavničkim tijelima različitih trgovačkih društava, ustanova i drugih pravnih osoba koje "pripadaju" tim jedinicama. Međutim, također se čini točnim i to da bi se ovdje mogla napraviti jedna daljnja distinkcija, uzimajući u obzir činjenicu da trgovačka društva, ustanove i drugi subjekti također imaju svoja vlastita "predstavnička" i "izvršna" tijela te da bi stoga, možda, određene ovlasti imenovanja i razrješenja ipak mogle biti dane lokalnim izvršnim čelnicima, ali samo kada se to odnosi na imenovanja i razrješenja "izvršnih predstavnika" u takvim trgovačkim društvima, ustanovama i drugim pravnim osobama. Ovo posebno pitanje ostavljamo za neku buduću raspravu.

podrazumijeva ne samo njegovo razrješenje, već i raspuštanje vijeća.[41]

Hrvatski model ima više nedostataka u usporedbi s talijanskim.[42] Kao prvo, istodobno raspuštanje obaju tijela može se dogoditi samo kao posljedica neusvajanja lokalnog proračuna, a ta procedura se događa samo jednom godišnje. Drugo, u slučaju neusvajanja proračuna, raspuštanja obaju tijela i prijevremenih izbora jedinica lokalne samouprave bila bi paralizirana više mjeseci, a možda čak i duže.

Treće, i najvažnije prema našem mišljenju, gradonačelnički veto nad proračunom lokalne samouprave nije sukladan ne samo hrvatskom Ustavu, nego i nekim važnim dokumentima Kongresa lokalnih i regionalnih vlasti. Prema hrvatskom Ustavu, pravo na lokalnu samoupravu ostvaruje se putem lokalnih predstavničkih tijela, a ne putem gradonačelnika (članak 133., st. 2.). Što se tiče dokumenata Kongresa lokalnih i regionalnih vlasti, oni jasno pozicioniraju lokalno vijeće kao najviši organ odgovoran za sveukupne lokalne nadležnosti. Primjerice, u Rezoluciji 139 (2002) o odnosima između javnosti, lokalne skupštine i izvršne vlasti u lokalnoj demokraciji konstatira se da "u svim uvjetima i ma kako bili izabrani ili postavljeni, svi izvršni organi imaju obvezu da odgovaraju, u određenim vremenskim intervalima, za način na koji izvršavaju svoju vlast" i da "predstavničke skupštine moraju uživati jamstva prema unutarnjem pravu, koja osiguravaju učinkovit nadzor nad izvršnom vlasti sukladno članku 3., odjeljku 2., Povelje, naročito putem ovlasti da odobravaju lokalni proračun (podcrtali autori) i lokalne poreze, usvajaju izvješća o izvršavanju proračuna i projekata gradskog prostornog planiranja i odobravaju lokalne politike, za čitav njihov izborni mandat".

Međutim, naše je mišljenje da ta načela nisu ozbiljena, ne samo u praksi, već također i u samom Zakonu, jer prema Zakonu lokalna izvršna vlast ima svojevrsni apsolutni veto nad usvajanjem općinskog proračuna od strane vijeća.

6 zAKLJUČAK

Teško je predvidjeti funkcioniranje novog sustava i odnos između gradonačelnika i lokalnog vijeća narednih godina. U vrijeme pisanja ovog članka (šest mjeseci nakon lokalnih izbora u svibnju 2013.) proces usvajanja prvih lokalnih proračuna još nije započeo i stoga nije moguće analizirati taj proces u samoupravama s podijeljenom vlašću. Međutim, uvjereni smo da će pozicija gradonačelnika u mogućem sukobu s lokalnim vijećem biti mnogo povoljnija nego u prošlom mandatu, poglavito zbog njegove goleme ovlasti imenovanja, koja mu daje kontrolu nad svim ustanovama i trgovačkim društvima lokalne samouprave.

Ironično je da je nova, pretežno socijaldemokratska Vlada, odgovorna za najnoviju reformu lokalne samouprave, dizajnirala novo "imperijalno gradonačelništvo" uvjerena da će SDP ponovno osvojiti lokalnu izvršnu vlast u najvažnijim hrvatskim gradovima, a posebno u Zagrebu, nakon lokalnih izbora 2013., ali ta očekivanja nisu ispunjena. Milan Bandić, aktualni gradonačelnik, pobijedio je na gradonačelničkim izborima u Zagrebu kao nezavisni kandidat, a Socijaldemokratska partija, prvi puta nakon 12 godina, izgubila je većinu u Gradskoj skupštini.

41 O talijanskom modelu vidi Fabbrini (2001: 47-70).

42 Vidi Podolnjak (2013).

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Robert Podolnjak,* Đorđe Gardašević**

Directly Elected Mayors and the Problem of Cohabitation

The Case of the Croatian Capital Zagreb

The new system of directly elected mayors implemented in Croatia in 2009 faced its most severe difficulties in municipalities with divided power, where the mayor and council majority represent different political options. Due to the uneasy relationship between the Mayor and the City Assembly in Zagreb, the new Croatian government decided to propose changes in the laws regulating elections and the relationship between the representative and executive bodies in the local government system one year ahead of the 2013 local elections. Mayors were explicitly given the right to elect and revoke the representatives of units of local and regional self-government in local institutions and companies. The second most significant aspect of the 'mini-reform' of the Croatian local government system is the introduction of the possibility of the simultaneous dissolution of the representative body and dismissal of the executive body, with new early elections for both bodies, in cases of the non adoption of the municipal budget.

Keywords: mayor, council, local and regional self-government, cohabitation, Croatia

1 INTRODUCTION

In many European countries, significant reforms of the institutional framework of their local self-government units have occurred in the last 15 years.[1] The most important among them is, in our opinion, the introduction of the direct election of mayors in local government. That much is admitted also in the Resolution 139 of the Congress of Local and Regional Authorities of Europe, which says that "direct election of mayors by the people is a procedure increasingly used in Council of Europe member states to appoint the head of the executive".[2] In another report it is stated that "on balance, there would seem to be a decided and indeed growing preference for more direct election" of local executive in Council of Europe countries.[3] Almost all of Croatia's neighbours have adopted one or the other model of a directly elected local executive.[4] With

* robert.podolnjak@pravo.hr | Professor at the Faculty of Law, University of Zagreb.

** gardasevic_99@yahoo.com | Assistant professor at the Faculty of Law, University of Zagreb.

1 Loughlin (2001) and Berg & Rao (2005: 1-14).

2 CLRAE, 2002: Resolution 139 on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy). This trend is present not only in Western European countries (Germany, Austria, Italy, Spain and even the United Kingdom), but even more in former communist countries. Direct elections of mayors were introduced at the beginning of 1990's in Slovakia, Bulgaria, Romania, Slovenia, Albania and Ukraine, in 1994 in Hungary, in 1995 in Macedonia, and in 2002 in Poland. However, three Baltic States (Latvia, Lithuania, and Estonia), as well as the Czech Republic and Serbia still elect their local executive by the council. For a comparative analysis of institutional design of local government systems in the countries of former Yugoslavia, see Koprić (2009: 335-365).

3 CLRAE, *Advantages and disadvantages of directly elected local executive in the light of the principles of the European Charter of Local Self-Government - CPL (11) 2 Part II,* rapporteurs Ian Micallef and Guido Rhodio (2004).

4 On different typologies of local government sys-

two laws enacted in October 2007 - the Law on Elections of Municipality Heads, Mayors, County Governors and the Mayor of the City of Zagreb and the Law Amending the Law on Local and Regional Self-Government - this system has also been introduced in Croatia, specifying the abolition of cabinets, as collective executive bodies elected by the local council, and the introduction of a directly elected local executive instead. It was, as admitted by the Croatian Government, the most fundamental change of the local government system in Croatia since its introduction in the years 1992-1993. The new system was implemented in 2009 with regular local elections. According to the data of the State Electoral Commission, the turnout in these elections was on average 10 percent higher than in 2005, and this higher turnout could be attributed to the implementation of the new system of directly elected mayors.

After the first direct mayoral elections held in 2009 we have had the initial experience of the new system operates in practice. Our preliminary conclusions are that direct mayoral elections have brought greater legitimacy to the mayoral office, because of their direct election, greater identification of citizens with the local government (at least measured in terms of the higher turnout in elections), and a greater degree of continuity in the functioning of the local executive, because not one mayor has been dismissed by recall referendum. However, the main problem of the new system seems to be in the overlapping or ambiguous powers of mayors and local councils, especially in the situation of cohabitation, i.e. when mayor does not have majority support in council for the enactment of his/her policies.

Cohabitation was the case for several years in the Croatian capital Zagreb and the city represented a sort of test case for the new system, which still has many opponents. The conflict between the Mayor and the City Assembly in Zagreb in the last mandate between 2009 and 2013 has revealed many weaknesses of the legal architecture of the new system. The apparent shortcomings of the new system have been addressed in the amended Law on Local and Regional Self-Government passed in December 2012. The amended Law represented a sort of a 'mini-reform' of the local government system with the stated goal of securing "a stronger political stability in the relations between representative and executive bodies, greater efficiency in executing the tasks of these two bodies, and to define more clearly their rights, obligations and responsibilities".[5]

In this paper we analyse two crucial conflicts between the Mayor and the City Council in Zagreb. The first relates to the question of who has the power of appointing the members of assemblies and supervisory boards of the companies created by the self-government units, and the second relates to the question of who has the last word over the city budget. In the conclusions we point out that these two conflicts have led to the most significant changes in the Law on Local and Regional Self-Government.[6]

2 THE PROBLEM OF COHABITATION BETWEEN THE MAYOR AND THE LOCAL REPRESENTATIVE BODY AFTER THE ELECTIONS IN 2009

The opponents of the new system of directly elected mayors often argue that the greatest problem of the new system could be the conflict between the representative body and the directly elected mayor, in a situation when he/she does not have the confidence of majority in the council, and that this would probably lead to a pa-

tems, see Bäck (2005: 65-101), Bennett (1993: 1-27), Heinelt & Hlepas (2006: 21-42), Hambleton (1998), Ivanišević (2008) and Podolnjak (2010).

5 Excerpt from the Government's proposal to amend the Law on Local and Regional Self-Government. URL: http://www.vlada.hr/hr/content/download/229927/.../file/57.%20-%201.pdf (November 28th, 2013).

6 Our paper was originally presented at the 22nd IPSA World Congress in Madrid in July 2012 under the title *Institutional Reform in Croatian Local Government: From Cabinets to Directly Elected Mayors* at RC05 panel Mayors in Comparative Perspective. Before the peer review process had been finished, the Croatian Parliament enacted amendments to the Law on Local and Regional Self-Government in December 2012. Those amendments are extremely relevant for the theme of our paper so we decided to address them in the conclusions.

ralysis in the functioning of the local government unit in question.

After the local elections of 2009 in many municipalities, cities and counties with directly elected mayors and county governors were confronted with the situation that they no longer had the support of the majority of those in the council. According to an unpublished analysis of GONG (a Croatian NGO dedicated to the supervision of elections) considering the political membership of the mayor after the elections of 2009 in 11 local government units (about 2%) there was cohabitation of mayor and council, because in these units the absolute majority of councillors belong to different political options to the mayor. In 347 units (about 60%) the directly elected mayor had majority support in the council based on his party and/or parties that had stood behind his or her candidacy. Finally, in 219 units (about 38%) the directly elected mayor didn't have majority support in council because the majority of councillors belonged to political options which didn't participate in the local executive. However, this situation did not automatically mean that in all of these local government units cohabitation would prevail, although it was not excluded.

In a situation when the mayor could count on the support of the representative body, the new system would probably function as before in the 'local parliamentary' system. However, the true test of the new system would be its functioning in situations of conflicting mayor- council relationship due to cohabitation. In some larger Croatian municipalities this situation emerged after the elections of 2009 (the cities of Velika Gorica, Vrbovec, Beli Manastir, and especially Zagreb, along with many more small municipalities). Therefore we turn now to the strongest and also the most important case of cohabitation between the mayor and the local council that was present in the period between 2010 and 2013, namely that in the City of Zagreb, the capital of Croatia. Because of the political, financial and economic power of this city, the function of the Mayor is the second most important executive function in the state.

3 THE CONFLICT BETWEEN THE MAYOR AND THE CITY ASSEMBLY IN ZAGREB - WHO REPRESENTS THE CITY?

The cohabitation problem in Zagreb came as a result of a rather peculiar political situation. For a number of years, the mayor of Zagreb, Milan Bandić, had been a member of the Social Democratic Party (SDP) which also nominated him as a candidate for local elections that took place in May of 2009. According to the new legislation already in force, Mr. Bandić became mayor of Zagreb once again, after defeating another candidate in the second round, on May 31st 2009.

Shortly after that, in July 2009, the SDP organized internal elections for a party candidate for the elections of the President of the Republic of Croatia, both of which were later won by the present President of the Republic, Ivo Josipović. However, having been dissatisfied with such an outcome, Mr. Bandić decided to take action himself and in early November 2009 he first suspended his membership of the SDP and then announced his decision to run for the state presidency office as an independent candidate.[7] Consequently, having found a legal basis in its party statutory provision that precluded the independent candidacies of its members, the SDP immediately announced that Mr. Bandić's membership of the SDP ceased. All of this, therefore, resulted in a situation that the city of Zagreb was to be run by an independent mayor, now politically disconnected from the party that had once nominated him for the position, and obviously in a potentially confrontational position with the city council.

The problem of cohabitation on local levels in Croatia has, as we have said before, not been restricted to the capital. In a number of cities one of the typical issues that gradually evolved arose out from the dispute between mayors and councils in relation to the power of appointing the members of assemblies and supervisory boards of the companies created by the self-government units.[8]

7 The last presidential elections in Croatia were held on December 27th 2009 (the first round) and January 10th 2010 (the second round).

8 The other particular issue that this paper describes

Earlier practices in that respect have not been uniform - through decisions on the founding of companies of units of local and regional self-government, the representative bodies had often been given the rights and powers of a founder, as a single member of a company, to units' cabinets, which in turn, sitting in a function of a company's assembly, have elected the company's management and members of supervisory board. In some cases, the representative bodies themselves have performed the function of a company's assembly and, consequently, have also directly elected members of the management and supervisory boards. Notwithstanding those differences, such practices, however, have not been problematic, due to the fact that representative bodies, through their decisions on the founding of companies, have been giving particular powers to local executive bodies, which themselves had a guaranteed majority support in representative bodies. The newly established legal framework significantly changed the situation: the absence of a political consensus between the executive and representative bodies typically leads to a dispute and various attempts at the seizure of particular powers.

Bearing in mind the frequent requests related to the problem of the election of members of assemblies in companies owned by units of local and regional self-government, as well as differing practices thereof, in September 2009 the Croatian Ministry of Administration delivered and distributed to all local and regional units its own opinion on the issue.[9]

Pointing to the relevant provisions of the Law on Local and Regional Self-Government[10] which prescribed that representative bodies, among other things, had the power of "electing and revoking other persons determined by law, regulation or statute", and that it was them who had a power of founding institutions and other juridical persons for performing the economic, social, communal and other activities in the interest of local and regional units, the Ministry stated that it was undisputable that representative bodies were also competent for all elections, including those pertaining to the members of assemblies in companies owned by local and regional units. On the other hand, the Ministry declined to interpret that the enumeration of powers of mayors in the article 48 of the Law on Local and Regional Self-Government in any way implied the mayors' powers of election and revocation. Moreover, according to the opinion, "a directly elected head of a municipality, city or a county cannot have more powers than it has been given to him by law". In its reasoning the Ministry also invoked one earlier decision of the Supreme Court of the Republic of Croatia, where it stated that a representative body, acting in the name of a founder of a company, had the power of the election of members of a company owned by a local unit.[11] Finally, the Ministry stated that the power of election belonging to a representative body should also be specified in a statute of a local or regional self-government unit.

Only one day passed from when the Ministry delivered its opinion to when it was harshly disputed by the Association of Cities.[12] In substance, the Association claimed that the Ministry wrongly interpreted the Law and significantly restricted powers that the directly elected mayors were given by a number of other laws which, just before a parliamentary summer break, had been harmonized with the Law on Local and Regional Self-Government. In particular, the Association claimed that, by his legally conferred power of representation (contained in article 42 par. 1 of the Law on Local and Regional Self-Government), it was exactly the mayor who had the power to represent a city in the company assembly, a fact that "the Ministry in its disputable and legally unfounded opinion completely ignored, giving other, incompetent bodies (city councils), stric-

in this context is the problem of a local self-governing unit's budget enactment.

9 Competence of election of assembly members in companies owned by units of local and regional self-government (Opinion: 023-01/09-01/283; 515-01-09-1, September 21st 2009).

10 [Law on Local and Regional Self-Government] Zakon o lokalnoj i područnoj (regionalnoj) samoupravi from 10th April 2001, *Narodne novine,* No. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13. Article 35 par. 1/3 and par. 1/5.

11 Revt 34/04-2, October 27th 2004.

12 The opinion of the Association of Cities (URL: http://www.udruga-gradova.hr/Default.aspx?art=145&sec=18, May 14th 2012) (in Croatian).

tly prescribed and defined powers of directly elected mayors". The Associations' opinion also pointed to the prevailing practices of Croatian commercial courts and a separate conclusion written by the Working Group for the Issues of a Judicial Registry with the High Commercial Court (dated February 2nd 2006), interpreting that the assembly of a limited liability company is composed of its founders, which itself also relates to those companies whose only founder is a self-government unit (city), represented by a mayor, and not its cabinet (as it has been regulated in some founding statements or company contracts). The Association also stressed that the opinion delivered by the Ministry of Administration "was not legally binding, nor could it be a source of law", that it was "completely contrary not only to all decisions of heads of state administration, professionals whose primary task was to see that the legality of work and acts of all local units is respected, but also to the practice of all commercial courts throughout the Republic of Croatia", and expressed hope that commercial courts "would not alter their procedures, so as to adjust them to the opinion of the Ministry".

Here, we have given a wider presentation of statements made by the Ministry and the Association of Cities[13] because we think they are directly related to a very significant issue of the competencies of the units of local and regional self-government. The comparative literature on local executive bodies asserts that one of the important qualities of a "strong" mayor is his power of election of all executive officials, i.e. his power of integration of all administrative offices and juridical persons, whose founder or owner is a local unit, under his supervision.[14] In that sense, it is obvious that the issue of the competence in electing persons in companies owned by the units of local self-government significantly determines whether there is a "strong" or a "weak" head of local executive. The dispute that was described here is important to us not only because of the various interpretations of powers legally conferred to bodies of local self-government (whether the appropriate competence derives from the power of election belonging to representative bodies or from the power of representation belonging to the head of a local executive), but also because of the role performed by the central state bodies in resolving disputes of competence. It should be emphasized in this context that the opinions of the Ministry, in legal terms, are not a good solution. It is a fact that the opinion of a state body is not a regulation in a sense of a normative, generally binding legal act.[15] Therefore, there is no legal possibility to request the review of constitutionality or legality of such an opinion. On the other hand, the Ministry does not dispose of any instruments through which it could prevent the adoption of a mayor's decision on, for example, electing the members of advisory board of a company owned by the unit of local self-government (taking into account that this would be done by an individual legal act which cannot be subject to the legality review). In the Croatian legal system, there exists only the possibility of a review of legality of general legal acts enacted by a representative body. There is no legally prescribed obligation of a local executive head to submit acts that he enacted to the competent state administration body, and no possible review of constitutionality or legality of such acts. The only legal solution to challenge an individual act of a local executive head is to, according to Article 77.a of the Law on Local and Regional Self-Government, request the administrative court proceedings.

Taking into account such legal gaps, we think that the best solution would be to precisely prescribe by law the competencies of the bodies of local self-government pertaining to the election of persons in juridical entities founded or owned by the local self-government unit. As far as the actual dispute on the issue of elections related to companies is concerned, it is our opinion that such a power belongs to a representative body.

13 It should be stressed here that on behalf of the Association of Cities the opinion was signed by its president, a person who otherwise holds the position of mayor of the city of Rijeka. In practice, the Association operates as a body which represents interests of mayors, a fact that should be taken into consideration when estimating its opinions.

14 In that respect, for definition of powers belonging to "strong'; directly elected mayors in the US, see Zimmerman (1999: 171-177).

15 This was confirmed by the Croatian Constitutional Court already in 1993. See Crnić (1994: 32).

Since a representative body decides on whether to establish public institutions and other entities for performing economic, social, communal and other activities in the interest of local and regional units, it can also (in its very decision on founding) determine who will, for example, be members of a company assembly and who will elect members of management and advisory boards. It is a fact that in numerous cases representative bodies delegated the execution of ownership rights to cabinets, but this unequivocally confirms that such a power belongs exactly to a representative body, and that it cannot be interpreted as deriving from the function of representation otherwise given to the executive branch. Equally, the Law on Institutions[16] prescribes that the institution is governed by its administrative council or another collective body, whose mode of election or appointment is regulated by law, act of founding (enacted by a representative body) and an institution's statute (enacted with the consent of a founder and, that is, a representative body). At the same time, the power of electing an institution's administrative head can belong to its administrative council, while a law or an act of founding can determine that, on a local self-government unit level, this power belongs to a representative body.

In other words, the legal power of representation of a local self-government unit is in no way relevant for the appointments of persons in the institutions of local self-government units. Why should a different logic be applied to companies?

An identical situation to the one just described appeared in the City of Zagreb shortly afterwards, resulting in a mayor's formal decision to suspend the application of two provisions of the City Statute, as well as two other conclusions by the City Council related to the appointment of representatives in the assembly of two companies owned by the City.[17]

In this respect, the relevant provisions of the City Statute prescribed that it was within the City Council's authority to decide on the composition of the assembly of companies which are 100% owned by the City and to determine the City's representatives in assemblies of such companies in which the City does not participate with a 100% of ownership. Based on these statutory provisions, the subsequent conclusions of the City Council then clarified that the assembly of companies which are 100% owned by the City is composed of its president (a function belonging to the mayor) and 10 additional members (elected by the City Council from its representatives).

Contrary to what was prescribed by the contested provisions of the City Statute and subsequent conclusions, the mayor founded his case on several claims: firstly, that "the member of the company is *ex lege* a member of its assembly"; secondly, that the Croatian Law on Companies "clearly and unequivocally determines" that the (limited liability) company assembly is composed of its members (one or more); thirdly, that the only member of two companies related to the case was the City of Zagreb; and fourthly, that it is exactly the mayor of Zagreb, by its authority of representation, who is practically the sole member of assemblies of two companies.[18]

As it can clearly be seen from the previous description of events, this particular problem of confrontation between mayors and city councils, as well as the Ministry of Administration, became obvious by the closing days of 2009 and it finally resulted in the Croatian Constitutional Court's decision in favour of representative bodies, delivered on March 17th 2010.[19] This decision, however, was not related to the situation in the Croatian capital, but in the City of Beli Manastir, but its consequences are applicable to all other similar cases.

In short, the contested provisions of the City Statute of Beli Manastir, enacted by the City

16 [Law on Institutions] Zakon o ustanovama from 5th August 1993, *Narodne novine,* No. 76/93, 29/97, 47/99, 35/08. Articles 35 and 38.

17 The decision of the Mayor of the City of Zagreb, 012-03/09-01/4; 251-02-01-09-1 (November 18th 2009). *Narodne novine,* No. 25 from November 30th, 2009.

18 Moreover, in his reasoning, the mayor also invoked two decisions of the Higher Commercial Court of the Republic of Croatia: XLIII Pž-2677/06-05 from 18th October 2006; LVIII Pž-5961/09-3, from 20th October 2009.

19 U-II/38101/2009 from 17th March 2010. This decision, however, was related to the situation not in the Croatian capital, but in the City of Beli Manastir, but its consequences were applicable to all other similar cases.

Council in July 2009, prescribed the authority of the Council to elect and revoke the membership of executive boards of institutions, companies and other juridical persons founded by the City, as well as its authority to elect, nominate and revoke the representatives of the City in the assemblies of those companies which are partially owned by it, and in the executive boards of those institutions which have been founded by the City.[20]

In her motion for the review of constitutionality and legality of the City Statute, the applicant, as in previous similar cases already mentioned, claimed that the City Council deprived the directly elected mayor of their legal authority to represent the City (as explicitly prescribed in article 42 par. 1 of the Law on Local and Regional Self-Government), arguing that the representation in the company assembly is, in legal terms, representation of the founder of a company. Similarly, the applicant claimed that the City Council had no authority to enact other here described statutory provisions, having found them to be contrary not only to the Constitution, but also to a number of other laws, acts of state administration bodies delivered in the review of legality procedures, and opinions of various Croatian commercial courts.[21]

By completely ruling-out the relevancy of other laws invoked by the applicant, the Constitutional Court based its decisions solely on the relevant provisions of the Croatian Constitution and the Law on Local and Regional Self-Government. On the strictly constitutional level, the Court relied on those articles which guaranteed the general principles of constitutionality and legality and the right to local and regional self-government, which described the particular local affairs that the Constitution reserved for the units of self-government as well as the general modalities of their conduct, and which established the authority of units of local and regional self-government to regulate by statute their internal composition and competencies according to law (articles 5, 132 par. 1 and 2, 134, 135 and 136 of the Constitution of the Republic of Croatia). As to the Law on Local and Regional Self-Government, the Court cited those provisions which specified domains to be further regulated by the statute of the local and regional units and which defined the specific powers of representative and executive bodies in such units, including the most problematic right of representation (articles 8, 35, 42, 44 and 48 of the Law on Local and Regional Self-Government).

In the relevant part of its reasoning, the Constitutional Court clarified several points. Firstly, the mayors' right of representation of units of local and regional self-government, although generally established by law, is principally directed to "third persons" (e.g. courts and other state and public bodies) and as such it does not include their "inherent" right to elect members and representatives of units of local self-government in assemblies or executive boards of companies and institutions founded by the local self-government unit.

Secondly, the right of the election of members and representatives in the assemblies and executive boards belongs primarily to the local representative bodies, this being so because the Law on Local and Regional Self-Government itself does not contain a specific provision that would regulate the matter specifically, apart from the fact it gives the power to local representative bodies to "elect and revoke other persons defined by law, other regulation or statute" (leaving thus the issue, designated as belonging to the self-government domain, in this case to be resolved by the local unit's statute), and because the local or regional representative bodies have the right anyway to establish various juridical persons (institutions, companies and other) for the fulfilment of activities and tasks of local interest.

Thirdly, however, having the power to regulate the issue by their statutes, local representa-

20 [Statute of the City of Beli Manastir] Statut Grada Belog Manastira from 2nd July 2009, *Službeni glasnik Grada Belog Manastira* (http://www.beli-manastir.hr/sgl.htm), No. 4/09, 6/09.

21 Apart from the constitutional provisions enumerating the "highest values" of the Croatian constitutional order, guaranteeing the principles of constitutionality and legality and establishing the authority of units of local and regional self-government to regulate by statute their internal composition and competencies according to law, the applicant also relied on the relevant provisions of the Law on Local and Regional Self-Government, the Law on Institutions, the Law on Companies and the Law on Budget.

tive bodies also have two options at their disposal: either to give a right of election to mayors or to retain it for themselves.

The decision of the Constitutional Court finally settled the first great conflict between the Mayor and the City Council in Zagreb. To this, we would like to make some additional comments.

In the first place, it should be noted that the Constitutional Court only briefly mentioned possibly the most relevant provision of the Croatian Constitution related to the regulation of local and regional self-government, namely the one explicitly prescribing that the right to local and regional self-government is to be exercised through local and regional representative bodies (Article 132 par. 1 and 2 of the Constitution of the Republic of Croatia). That being so, the Court could also have emphasized much more that a kind of an "overall precedence" in ambiguous cases, like the present one, belongs to those branches of local government which are explicitly regulated by the Constitution itself, and not to those that derive their authority from a particular law.[22]

This is even more important in light of the fact that the executive stream, as a rule, often invoked the argument that, according to the new system, mayors were directly elected and therefore enjoyed not only a separate political legitimacy, but also more powers.[23] This line of reasoning, however, is relevant only insofar as their possible accountability and revocation is concerned. On the other hand, in a state governed by the rule of law (Article 3 of the Constitution of the Republic of Croatia), the very problem of particular competencies should be precisely regulated by legal provisions, leaving potential controversies aside as much as possible. Admittedly, this is not an easily achievable task, but what is more interesting, it can, at least for the purposes of a theoretical debate, be linked to another separate kind of legal interpretation, which leads us to the next point.

The executive stream's attempt to qualify the mayors' power of election as "inherent" to their function was, as it was explained here, rejected by the Constitutional Court and, in our opinion, rightly so. That fact should not be underestimated when thinking of the boundaries imposed upon the local executive competencies through the 2009 Croatian legislation regulating local and regional self-government. The Constitutional Court's opinion, on the other hand, by allowing that through their statutes local representative bodies could decide whether to give the right of election to mayors or to retain it to themselves, sanctioned a particular form of "delegation of powers". Also, by doing this, the Court practically said that there could be 'strong' and 'weak' mayors, depending on the statutory powers delegated by council.

Moreover, it should also be stressed that in its opinion the Croatian Constitutional Court rejected the applicant's motion to apply the relevant provisions of other laws (the Law on Institutions, the Law on Companies and the Law on Budget). In this paper, we have already pointed out that certain legal analogies in that context, at least theoretically, could still be drawn (e.g. previously explained situation of appointments of persons in the institutions of local self-government units). Nevertheless, it seems that this particular segment of the case opens quite an important general problem of the relationships between ordinary and the so-called "organic laws".[24]

22 However, it should be admitted, as it has already been pointed out, that the Constitutional Court also invoked another constitutional provision pertaining to the right of local and regional self-government units to regulate their "internal composition and competencies according to law" (article 135 of the Constitution of the Republic of Croatia). But the core of the Court's argument was from thereon construed mainly on the level of a legal, and not constitutional, interpretation.

23 In that context, one of the mayors stated the following: "For the first time we had direct elections and thus I cannot have fewer powers now than I had had after I had been elected by the council". See "Gradonačelnici: Neka Mlakar misli što hoće, mi ne damo ovlasti", *Novi list,* Rijeka (October 11th 2009), p. 5.

24 The Croatian Constitutional Court in the above mentioned case did not deal with this particular issue, but it is important to bear in mind that in the Croatian constitutional system the laws that, among other things, regulate the local and regional self-government are qualified as the "organic laws" which have to be enacted by a majority of all representatives in the Parliament (article 84 of the Constitution of the Republic of Croatia). From this point of view, in the Croatian doctrine it has already been stressed that the organic laws have a

4 WHO HAS THE LAST WORD OVER THE CITY BUDGET?

The second major conflict between the mayor and the city assembly was over the power to determine the criteria for charging for the services of preschool care for children in the institutions of the City of Zagreb. This conflict was connected to the more important issue of who has the last word over the city budget.

The budget is, along with the statute of the local government unit, the most important act in the jurisdiction of the local council. According to the Law on Local and Regional Self-Government, before it was amended in 2012, these acts must be adopted by the majority vote of all the members of the representative body. Moreover, the local council may be dissolved by the Croatian Government if it fails to adopt the budget in the legally defined deadline or if it fails to make the decision on temporary funding. In the former 'local parliamentary' system in Croatia most of the dissolutions of local councils had occurred because of a failure to adopt the budget. The failure to adopt the budget was a sort of a vote of non-confidence to the local executive cabinet by a council, which had a negative majority against the mayor's proposal, but not a positive majority to elect a new mayor. The dissolution of the representative body meant that there would be an opportunity after the election to elect a new mayor and his executive cabinet.

Some analysts of the new system thought that the failure to adopt the budget because of the conflict between the directly elected mayor and the council would be the major cause of council's dissolution. This was predicted because the power to propose a budget to the council had been exclusively given to the mayor according to the Budget Law, and there are no sanctions prescribed in case he fails to fulfil this obligation.

In some American cities with the system of a 'strong mayor', in the process of the adoption of the city budget the mayor has the right to veto the council's amendments to his budget's proposal, and the council has the power to overrule mayor's veto with the two-thirds majority of all representatives. Similarly, English mayor proposes a budget which may be amended or overturned only by a two-thirds council majority.[25] However, mayors in Croatia don't have the power to veto the council's amendments, and, as we have said before, there is only a majority of all the council's representatives required for the adoption of the budget.

In some municipalities, the process of budget adoption in the first year after the introduction of the directly elected mayors witnessed the use of a new instrument of mayoral power not anticipated by the legislation. In case of council's amendments to the mayor's draft budget he simply withdrew his proposal before the voting on the amendments leaving the council in situation of not having any budget proposal to adopt or amend. Mayors had been using their exclusive right to propose the budget, and also their superior means of information required to propose this complex financial document. With such conduct mayors have completely abused their legal powers, but the law did not stipulate that such conduct is prohibited and thus sanctioned. The withdrawal of the draft budget by the mayor, in the case of the council's amendments, occurred in several Croatian municipalities in December 2009. Having found themselves in strange territory, not legally defined, the councils behaved differently - some of them agreed reluctantly to the mayor's proposal, some of them voted their amendments, despite the mayor's withdrawal of the draft budget, and thus adopted the amended budget, and some of them did not know what to do and simply left their municipality without a budget for the next year.

The results of the different actions of individual councils were also different, and it must be said that many contradictory statements could be heard or read at the time from one or the other side. Let me just point to two different endings of the budgetary crisis in two municipalities. The first case concerns the City of Vrbovec in which the council's majority and the mayor were of opposing political parties. Confronted with the council's amendments to his draft budget, the mayor withdrew it referring to the council's rules of procedure according to which the authorized

higher legal value than ordinary laws, and that the latter therefore should conform to the provisions of the former. See Barić (2009: 251-283).

25 Copus (2009: 55).

proposer has the right to withdraw its proposal before it is decided upon by the council. Contrary to the mayor's opinion, the council interpreted the disposition of the rules of procedure differently, considering that the procedure of adopting the budget had begun with voting on the council's amendments and that in this phase of the procedure the mayor has no authority to withdraw his proposal. Accordingly, the council finished with the voting, adopted all of the submitted amendments and finally voted on the amended budget. The mayor thought that the budget had not been adopted lawfully and refused to publish it in the official gazette of the municipality. Instead, he requested the authorized Ministry of Administration to recommend the disbandment of the council to the Government. The Ministry conducted an inspection which concluded that the council had lawfully adopted the city budget. The inspection gave the following explanation for its conclusion:

> *The withdrawal of the draft budget, after conclusion of the discussion, in the midst of deciding upon the amendments, on the 29th December, would represent the denial of the possibility for adopting the budget to the representative body in the lawfully prescribed time (before the beginning of the year for which the budget is adopted) /../*
> *It is important to point to the dispositions of the European Charter of Local Self-Government, which had by the adoption of the Law on confirmation of the European Charter of Local Self-Government /... / become the part of legal order of the Republic of Croatia and which paragraphs had entered into force in relation to the Republic of Croatia in full. From the conception of the local self-government determined in the Article 3 of the European Charter follows that the local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population, and which right shall be exercised by councils or assemblies.*
> *In the concrete case, the denial of the possibility of adoption of the budget to the representative body and possible creation of conditions for its disbandment directly influences the right and the possibility of the local unit to manage the essential parts of its public needs in the interest of the local population.*

We agree completely with this observation - it is written with full regard to the letter and the spirit of the European Charter.

However, the Vrbovec case and the opinion of the inspection of the Ministry of Administration were little noticed in public.[26] Much greater attention was given to another case in which the Ministry recommended the Government disband one council in a small municipality (Stari Mikanovci), because it had not adopted the budget and the decision on temporary funding. The council was dissolved because the mayor had withdrawn his draft when confronted with the council's amendments. In this situation the council did not adopt its amendments and the budget as amended, as was the case in Vrbovec. Instead, the council adopted the decision on temporary funding, but not on mayor's proposal. The inspection of the Ministry concluded that the council had been acted unlawfully. It is evident that in two different cases the Ministry's inspection conclusions were opposite. In the Vrbovec case, the inspection stated that the mayor could not withdraw the draft budget in the process of council's decision-making on the draft budget. In the other case, the (presumably different) inspection stated that the council could not adopt the budget or the decision on temporary funding if these acts had not been proposed by the mayor.

In the end, the council in the Municipality Stari Mikanovci was disbanded by the Government, and afterwards this decision was confirmed by the Administrative Court. It was the first case of the disallowance of a representative body after the election of 2009, and therefore the impression was, especially among the councillors in many municipalities, that the mayor could cause the disallowance of council simply by withdrawing his draft budget, if confronted with

26 The minutes of the inspection are an internal document of the Ministry, and therefore not available to the public. We obtained this document from the president of the City council of Vrbovec.

unwanted amendments.[27] Regretfully, it must be pointed out that the Ministry of Administration did not react in this situation by proposing changes to the Law on Local and Regional Self-Administration or to the Budget Law. Therefore, the ambiguities in the law and the inconsequential nature of the actions of the authorized Ministry created a false impression that mayors have a de facto veto on the council's amendments to their draft budget. We had to explain this situation, created in the first year after the 2009 election of new mayors and councils because it is of relevance for our discussion of the conflict between the mayor and the city assembly in Zagreb.

The conflict over the budget in the City of Zagreb did not occur in 2009, because at the time the attention was focused on the forthcoming presidential elections in December 2009, in which Mayor Bandić and the candidate of the Social Democratic Party Ivo Josipović were the favourites for the Presidency. When Bandić lost the election in the second round in January 2010, his relationship with the city assembly, dominated by the SDP, rapidly deteriorated.

It has to be emphasized that Bandić was without any support in the assembly - he could not count on any party to support him. It is also important to notice that the main opposition party in Zagreb, the Croatian Democratic Union, was also the governing party in Croatia at the time, and used the conflict between the SDP and its former long standing member to its advantage. This was especially visible in 2011, when the conflict between the assembly and the Mayor erupted over the issue of the compensation of services for the preschool care in Zagreb.

This conflict began with the adoption of the city budget for 2011. The mayor proposed in the accompanying program of public needs in the preschool upbringing and education and the care of children of preschool age that parents who have their children in the preschool institutions of the City of Zagreb would have to pay for daily care according to new criteria, namely according to their average family income. Up until then the parents had paid compensation regardless of their income, which was, in the Mayor's opinion, contrary to the principle of social justice. In times of economic crisis and smaller revenues in the city budget he thought that parents with higher incomes should participate with higher compensation for their children. The assembly was against the mayor's proposal, because the leading SDP thought it would be politically wrong to raise the compensation for thousands of parents in the capital just ahead of forthcoming parliamentary election. However, the Assembly did not propose and voted amendments on the mayor's draft budget. The explanation for this behaviour could be found in the following passage from the assembly's conclusions: "By not accepting the program of public needs, which is connected to the budget, the City Assembly could not accept and adopt the budget, and that would lead to the disallowance of the City Assembly."[28]

The Assembly was faced with the Mayor's threat of the withdrawal of his draft budget in case of the Assembly's amendments and then the Assembly would have no budget to vote upon. Politically, the SDP majority in the Assembly was pretty certain that the CDU Government would use this opportunity to disband the Assembly, and to blame Social Democrats for the ensuing costs of the premature Assembly election as a result of inner conflict between the SDP and its former long standing Mayor.

By accepting the budget proposed by the Mayor, the Assembly temporarily declined to challenge the Mayor's position on the issue of parental compensation for preschool daily care. However, in April 2011 this issue arose again because the Assembly did not approve the Mayor's draft decision concerning the criteria for the payment of compensation for preschool care and benefits for some parents, a decision which was based on the program adopted along with the budget. Instead, the Assembly adopted its decision based on completely different criteria for preschool compensation. The day after, the Mayor suspended this decision from execution,

27 Altogether, 15 councils in different municipalities were dissolved after the election of 2009 and 12 were because they had not adopted the budget.

28 The City Assembly conclusions of 17th May 2011 regarding the Mayor's suspension of the City Assembly Decision.

claiming that the decision was contrary to the City budget and requested the Assembly to remove the detected shortcomings within fifteen days. This power of suspension is among the longstanding powers of Croatian mayors, but it has been used extremely rarely. But now, in situations of cohabitation, this power was welcomed by mayors faced with hostile councils. As we have said before, if the representative body fails to remove shortcomings, the mayor is obliged to inform the head of the central body of the state administration competent for the supervision of the legality of work of the bodies of local or regional self-government units about it, within eight days.

The Assembly reacted to the Mayor's suspension of its Decision by claiming that it has the right to adopt general acts and specifically that its decision is based on the Law of preschool upbringing and education, which gives the representative body the power to determine compensation and benefits for parents with children in the preschool facilities of a local government unit. In its conclusions, the Assembly stated that if its decision was not consistent with the City budget, it is accordingly the duty and obligation of the Mayor to propose changes in the budget. However, the Mayor declined to do so and instead informed the Ministry of Administration of his suspension of the Assembly's decision. On the other side, the Assembly requested from the Ministry of Science, Education and Sport its opinion as to the legality of the Decision. So, the local conflict between the mayor and the representative body was raised to the state level.

In the following months, no fewer than three state ministries issued their opinions regarding the disagreement between the local government bodies in Zagreb. The Ministry of Administration, the Ministry of Science, Education and Sport and the Ministry of Finance stated that the Assembly had the legal right to adopt the decision regarding the compensation and benefits for parents with children in preschool facilities. However, the Ministry of Finance also stated, which was obvious from the beginning, that the Assembly's decision from April 2011, was not in agreement with the city budget, because these two acts prescribe different criteria for parental participation in the financing of preschool care. So, the Ministry concluded that "there are no legal obstacles for the implementation of the decision of the City Assembly, but this decision must be accompanied with changes to the city budget for 2011 and the changes of the program (of public needs in preschool care)".[29] After months of legal discussions, the conflict was still not resolved. It was, moreover, only at the beginning - the Assembly was convinced that it had acted lawfully, and the Mayor was supporting the valid city budget, which had been adopted by the Assembly and was unwilling to propose amendments to it. It has to be emphasized that during most of the year parents with children in the city preschool facilities didn't know what they would have to pay - was it to be according to their income, as proscribed in the City budget and the accompanying program, or according to the Assembly's decision, which was suspended by the Mayor. Conflicting statements from the Mayor and the president of the City Assembly confused parents and the whole story looked like a nightmare. It seemed that there was no legal solution for the impasse.

Why did the Assembly not initiate the process of the Mayor's removal through a referendum? As we have said before, the representative body could initiate a referendum for the dismissal of the local executive in two cases and one was if they violate or fail to execute the decisions of the representative body. So, there were certainly the legal grounds to initiate a referendum, and there was also the necessary majority in the Assembly which could have adopted this decision. The problem with the referendum was in the disposition that in the referendum on the Mayor's removal two conditions has to be fulfilled - one is that the majority of voters have to vote for dismissal, but also that a majority of all voters in the local government unit have to participate in the referendum (the so called quorum of participation). And precisely this second condition was seen as problematic by Assembly leaders and the SDP. In the mayoral election in 2009 the turnout in the first round was only 41, 69 %, and in the second round only 33,62 %. Because of the prog-

29 The opinion of the Ministry of Finance (URL: http://dalje.com/hr-zagreb/priopcenje-ministarstva financija-oko-odredjivanja-cijena-u-djecjim-vrticima/368140, May 11th 2012 (in Croatian).

nosis that there was little chance of fulfilling this quorum of participation, the Assembly gave up the idea of initiating a referendum. It has to be pointed out that this quorum was the main reason why we have witnessed only one referendum on mayoral dismissal in Croatia in the last three years, and this had been implemented in a small municipality. Even there the quorum was not attained, although the majority of voters participating in the referendum voted for the mayor's dismissal.

All this changed at the end of 2011, after SDP won the parliamentary election held on 4th December. In the new situation, the Mayor grasped that he could not continue his conflict with the Assembly (dominated by the same party), as now there was real and imminent threat that the SDP-led parliamentary majority could quickly change the Law on Local and Regional Self-Government, making the dismissal of the mayor much easier, as had already been speculated. In the new circumstances, Mayor Bandić suddenly became cooperative with the Assembly - he accepted all of the Assembly's amendments to his draft budget for 2012, he even accepted (finally) the Assembly's decision on the compensation and benefits for parents with children in preschool facilities (the same one he refused to implement in April 2011). In return, SDP gave up initiating a referendum on the dismissal of Mayor Bandić. After all, more than half of the regular mayoral term had already passed and the referendum would bring excessive costs and eventually a new mayoral election just 15 or 16 months before the regular elections in 2013.

5 THE 2012 AMENDMENTS TO THE LAW ON LOCAL AND REGIONAL SELF-GOVERNMENT (THE AFTERMATH OF THE "CONFLICT")

The new system of directly elected mayors implemented in Croatia in 2009 faced its most severe difficulties in municipalities with divided power, where the mayor and council majority represent different political options. In those situations, the legal framework has proved insufficient, especially as to the questions of mayor's responsibility to execute the council's decisions and the supervision of central state administration of local government acts.

The previous descriptions of the cases we offered here revealed that a significant part of the problem of cohabitation, at least as it was in the Croatian capital, could be a result of an "ex post emancipation" of mayors from the political parties who had once supported them. Such "developments" probably depend more upon the actual personalities involved and their particular interests or peculiar political circumstances of the day, than upon the fact that a new system envisages the separate and independent political legitimacy of directly elected executive officials. In other words, if a claim that such a danger of political emancipation is by definition inherent and unavoidable is to be sustained, one would first have to prove that it regularly appears on all levels (e.g. with directly elected state presidents). That is not the case, but whether the political legitimacy of directly elected executive officials in a new system nevertheless, to borrow the famous words of Justice R. H. Jackson, "lies about like a loaded weapon"[30] to be invoked in future cases, remains to be seen.

Due to the uneasy relationship between the Mayor and the City Assembly in Zagreb, the new Croatian government decided to propose changes in the laws regulating elections and relationship of representative and executive bodies in the local government system one year ahead of the 2013 local elections.

As we have mentioned in the introduction, the Government's officially stated goal of the local government system 'mini-reform' was to secure "a stronger political stability in the relations between representative and executive bodies, greater efficiency in executing the tasks of these two bodies, and to define more clearly their rights, obligations and responsibilities". However, in our opinion, the amendments to the Law have led to a much stronger overall position of the mayor in the Croatian local government system.

The Croatian Parliament enacted amendments to the Law on Local and Regional Self-Government in December 2012. Focusing thus

30 *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (R. H. Jackson, dissenting).

on those articles of the Law which previously appeared relevant for the arguments submitted by the various parties and the Constitutional Court itself, we should emphasize two crucial points.

Firstly, in one of the most important parts of the new version of the Law, local (and regional) executive heads were, unless otherwise prescribed by a special law, explicitly given the right to elect and revoke the representatives of units of local and regional self-government in bodies of institutions, companies and other juridical persons founded for performance of economic, social, communal and other activities in the interest of local and regional self-government units.[31] Moreover, this right of election and revocation of executive heads is not limited in choice and their only obligation is to submit their decisions to local representative bodies within eight days of their enactment and to publish them in the local official gazette.[32]

In this way mayors have been given a strong instrument to influence not only the decisions of all municipal institutions and companies, but also to secure majority support in the representative body by appointing the members of the council to various governing councils of municipal public institutions and supervisory boards of municipal companies. The government's logic for giving such great authority to the local executive has been to make it more accountable for the functioning of municipal institutions and companies. However, with this particular power the local executive has ample means to 'corrupt' the local council, not only to secure its support for his program, but also to eliminate the necessary control of the council over mayoral policies as much as possible.

The amendments to the Law changed neither the overall right of representation of local and regional units belonging to the executive heads (Article 42 of the Law on Local and Regional Self-Government) nor the general clauses defining the scope of powers belonging to both the local representative bodies and local executive heads.[33]

Therefore, in light of the fact that the present version of the Law on Local and Regional Self-Government now contains an explicit provision as to who has the right of election and revocation of representatives in companies founded by local and regional units of self-government, it seems that in this particular segment of general relationships between local executive and representative bodies there should be no further conflicts. But, in our opinion, the present Law also reaffirms another rather important "message": namely, that broad invocation of "inherent powers" and broad interpretations of a "power of representation" is not legitimate and that a very specific legal definition of particular prerogatives of bodies of local and regional self-government is an indispensable solution in a system governed by the rule of law. Additionally, it seems that the present Law also affirms another very important general conclusion: that, insofar as the whole problem is now regulated by the Law and not left to regulation by various local statutes, there should, at least in this particular segment, be no differences between "strong" and "weak" local executive heads. Such a "uniformity" approach thus seems a good solution.

However, we should also emphasize that in our previous commentaries to the whole problem, we offered a normative interpretation of the whole issue which was quite different from the approach taken by the Croatian Parliament. Therefore, we stress that we opted for a solution according to which the right of election and revocation of representatives in companies and other subjects founded by local units should belong to representative, and not executive bodies.[34]

31 [Law on Local and Regional Self-Government] Zakon o lokalnoj i područnoj (regionalnoj) samoupravi from 10th April 2001, *Narodne novine,* No. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13. Article 48.

32 *Ibid.*

33 As this concerns the local representative bodies, this pertains to their right of election and revocation of "other persons" as well as their right to found institutions and other juridical persons for the performance of economic, social, communal and other activities in the interest of local and regional self-government units. On the other hand, in relation to local executive heads, the present version of the Law still prescribes that they perform (other) tasks as they are prescribed by local statutes and law (articles 35, 42 and 48 of the Law on Local and Regional Self-Government).

34 Here, and for the sake of legitimacy of our doctrinal approach, we emphasize that our previous

Our starting point in that respect was that, taking into account very important legal gaps that existed at the time we were writing our earlier commentaries, the best solution would be to precisely prescribe by law the competencies of bodies of local self-government pertaining to the election of persons in juridical entities founded or owned by local self-government units.[35]

Furthermore, as far as the actual dispute on the issue of elections related to companies was concerned, it was our opinion that such a power belonged to a representative body. We essentially construed our interpretation by arguing the following: since a representative body decides on whether to found public institutions and other entities for performing the economic, social, communal and other activities in the interest of local and regional units, it can also (in its very decision on founding) determine who will, for example, be members of a company assembly and who will elect members of management and advisory boards.[36]

We also stressed that it was a fact that in numerous cases representative bodies delegated the execution of ownership rights to cabinets, and concluded that this unequivocally confirmed that such a power belonged exactly to a representative body, and that it could not be interpreted as deriving from the function of representation, otherwise given to the executive branch.[37]

Finally, we pointed to two, in our opinion, rather relevant possible comparisons to the Law on Institutions: first, that this Law prescribed that the institution is governed by its administrative council or another collective body, whose mode of election or appointment is regulated by law, act of founding (enacted by a representative body) and an institution's statute (enacted with the consent of a founder, and that is a representative body); and second, that the power of electing an institution's administrative head could belong to its administrative council, while a law or an act of founding can determine that, on a local self-government unit level, this power belonged to a representative body.[38] In conclusion, we stated that since a legal (executive) power of representation of a local self-government unit is in no way relevant for appointments of persons in the institutions of local self-government units there was no logic to apply such an approach where companies were concerned.[39]

Taking into account all of the further developments in the field (i.e. amendments to the Law on Local and Regional Self-Government), these earlier interpretations of ours nowadays seem obsolete. However, we would nevertheless like to make one final comment on the whole issue. Despite the fact that the present Law on Local and Regional Self-Government now explicitly prescribes that the executive head has a right of election and revocation of representatives of local and regional self-government units in bodies of "their" institutions, companies and other juridical persons, it seems that such a solution in itself, at least theoretically, provokes a kind of inconsistency in meaning. If the "core meaning" of executive branch is to "execute" and the "core meaning" of the representative branch is to "represent", it seems that a more logical approach of the Law would be to prescribe that local and regional self-government representative bodies, and not executive heads, have the right of election and revocation.[40] Or, in other words, it seems that such

commentaries in that respect were made when we discussed the whole problem in a period prior to the last relevant amendments to the Law on Local and Regional Self-Government (enacted in 2012).

35 As it is clearly seen from the previous description of developments of legal regulation, the Croatian Parliament in 2012 took exactly the same course and precisely defined these competencies.

36 In other words, we thus claimed more or less the same as the Croatian Constitutional Court argued in its 2010 Decision.

37 Again, the Constitutional Court also rejected the executive "power of representation" claim as including the right of election and revocation of members of and representatives in assemblies and boards in companies and institutions founded by local and regional units.

38 [Law on Institutions] Zakon o ustanovama from 5th August 1993, *Narodne novine,* No. 76/93, 29/97, 47/99, 35/08. Articles 35 and 38 of the Law on Institutions.

39 As it could clearly be read from the Constitutional Court's Decision, such an argument was not seen as relevant.

40 In that respect, we are using the term "representation" not in its technical meaning as it surely belongs to executive heads and extends, as the Constitutional Court rightly pointed out, towards "third persons'; but in its political meaning, as

a right logically and "inherently" emerges from representative bodies' general, and even more importantly constitutional (Article 133 of the Croatian Constitution), "power of representation" of citizens on local and regional level and that it is exactly them who could logically "delegate" this power of representation further on.

The second most significant aspect of the 'mini-reform' of the Croatian local government system is the introduction of the possibility of the simultaneous dissolution of the representative body and the dismissal of the executive body, with new early elections for both bodies, in cases of the non-adoption of the municipal budget. This mutual dissolution/dismissal could be triggered from both sides: the mayor was given the sole authority to propose the municipal budget and also the power to withdraw the draft budget before its approval by the council; and the council, on the other hand, could simply vote against the mayor's budget proposal.

This simultaneous dissolution of the representative body and dismissal of the executive body has some resemblance to the Italian model of the non-confidence vote of the council against the mayor, with the automatic disbandment of two bodies and new elections. However, in the Italian model such a scenario is possible at any point during the mandate. The local or regional council may adopt a reasoned motion of no confidence against the executive that is adopted by roll call vote with an absolute majority of members. On the other hand, the voluntary resignation of the executive implies not only his resignation, but also the dissolution of the council.[41]

The Croatian model has several shortcomings in comparison to the Italian one.[42] Firstly, the automatic disbandment of two bodies could only occur as a consequence of the non-adoption of the municipal budget, and this procedure only occurs once a year. Secondly, in the case of the non-adoption of the municipal budget, the disbandment of two bodies and the following early election, the concerned municipality would be paralysed for several months, perhaps even longer. Thirdly, and most importantly in our opinion, the mayoral veto over the municipal budget is hardly compliant with not only the Croatian Constitution, but also with some major documents of the Congress of Local and Regional Authorities. According to the Croatian Constitution, the right to self-government is to be realized through local representative bodies and not through mayors (Article 133, par. 2). As to the documents of the Congress of Local and Regional Authorities they clearly position the local council as the highest organ responsible for overall local responsibilities. For example, in the Resolution 139/2002 on relations between the public, the local assembly and executive in local democracy it is stated that "at all events and however they are elected or appointed, all executive organs have an obligation to account, at regular intervals, for the way in which they exercise their authority" and also that "representative assemblies must enjoy safeguards under domestic law which provide for effective supervision of the executive in accordance with Article 3, paragraph 2 of the Charter, notably through powers to approve the local budget (underlined by the authors) and local taxes, adopt reports on the execution of the budget and town planning projects, and approve local policies, for the full term of their electoral office".

However, in our opinion, these principles have not been met, not only in practice, but also in the Law itself, because according to the Law the local executive has a sort of absolute veto over the council's adoption of the municipal budget.

including various social, political, economic and other interests which are to be reflected in the composition of representative bodies themselves, be they representative bodies of local and regional self-government units or representative bodies of various companies, institutions and other juridical persons "belonging" to those units. However, it also seems true that an important further distinction could be made as far as it is a fact that companies, institutions and other subjects also have their own "representative" and "executive" bodies and that therefore, perhaps, some powers of election and revocation should still be given to local executive heads, but only when it comes to election and revocation of "executive representatives" in such companies, institutions and other subjects. We leave this particular issue for some future discussion.

41 On the Italian model see Fabbrini (2001:47-70).

42 See Podolnjak (2013).

6 CONCLUSION

It is difficult to predict the functioning of the new system and the relationship between the mayor and local council in subsequent years. At the time of the writing of this article (six months after the local elections of May 2013) the process of the adoption of the first municipal budgets has not even started, and therefore it is impossible to analyse this particular process in municipalities with divided power. However, we are convinced that the mayoral position in potential conflict with the local council would be much better than in the former mandate, chiefly because of its immense power of appointment, which gives control over all municipal institutions and companies.

It is somewhat ironic that the new, predominantly Social - Democratic government which was for the latest local government reform had designed the new 'imperial mayoralty' convinced that it would regain local executive power in the major Croatian cities, and especially in Zagreb, after the local elections of 2013, but this expectation was not fulfilled - Milan Bandić, as incumbent, won the mayoral election in Zagreb as an independent candidate, and the Social Democratic Party lost its majority in the City Assembly for the first time in twelve years.

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Synopsis

Robert Podolnjak and Đorđe Gardašević

Directly Elected Mayors and the Problem of Cohabitation
The Case of the Croatian Capital Zagreb

SLOV. | *Neposredno izvoljeni župani in problem kohabitacije. Primer hrvaškega glavnega mesta Zagreb.* Novi sistem neposrednih volitev župana, ki je bil na Hrvaškem uveljavljen v letu 2009, se je z največjimi težavami soočil v tistih lokalnih skupnostih, v katerih župan in večina v (mestnem) svetu zastopajo različne politične opcije. Zaradi konfliktnega odnosa med županom in skupščino mesta Zagreb je leto dni pred lokalnimi volitvami leta 2013 nova hrvaška vlada predlagal spremembe zakonodaje, ki ureja volitve in odnos med predstavniškim in izvršnim telesom v sistemu lokalne samouprave. Ta je županom dala izrecno pooblastilo za imenovanje in odpoklic predstavnikov lokalne skupnosti v lokalnih institucijah in podjetjih. Drugi najpomembnejši vidik »mini reforme« hrvaškega sistema lokalne samouprave zadeva uveljavitev možnosti istočasne razpustitve predstavniškega telesa in razrešitve izvršnega telesa in sicer z novimi predčasnimi volitvami v oba organa in sicer v primeru nesprejetja proračuna lokalne skupnosti.

Ključne besede: župan, mestni svet, lokalna in regionalna samouprava, kohabitacija, Hrvaška

ENG. | The new system of directly elected mayors implemented in Croatia in 2009 faced its most severe difficulties in municipalities with divided power, where the mayor and council majority represent different political options. Due to the uneasy relationship between the Mayor and the City Assembly in Zagreb, the new Croatian government decided to propose changes in the laws regulating elections and the relationship between the representative and executive bodies in the local government system one year ahead of the 2013 local elections. Mayors were explicitly given the right to elect and revoke the representatives of units of local and regional self-government in local institutions and companies. The second most significant aspect of the 'mini-reform' of the Croatian local government system is the introduction of the possibility of the simultaneous dissolution of the representative body and dismissal of the executive body, with new early elections for both bodies, in cases of the non adoption of the municipal budget.

Keywords: mayor, council, local and regional self-government, cohabitation, Croatia

Robert Podolnjak is a Professor at the University of Zagreb, Faculty of Law. | Address: Gundulićeva 10, 10000 Zagreb, Croatia. E-mail: robert.podolnjak@pravo.hr

Đorđe Gardašević is an Assistant Professor at the University of Zagreb, Faculty of Law. | Address: Gundulićeva 10, 10000 Zagreb, Croatia. E-mail: gardasevic_99@yahoo.com