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**The Croatian Parliament in Transition**

From Authoritarian Past to European Future

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## 1 Introduction

Croatian parliamentary history reaches beyond the history of the modern Croatian state. The first documented session of the Croatian parliament and the first mention of its present name – Sabor – reaches back as far as to 1273. Following that year, the Croatian parliament existed in various forms and frameworks, such as under the Habsburg monarchy, the Kingdom of Yugoslavia under the dynasty of Karadordevic, or under the Communist rule of Josip Broz Tito. At the same time the Sabor transformed from a feudal representation of the nobility into a representative body of the people, although the inclusiveness of popular representation varied from period to period. The Sabor led Croatia's way out of feudalism in 1848, out of the Habsburg monarchy in 1918, out of fascism in 1944, out of centralised Communist power in 1974, and out of the Yugoslav Socialist federation in 1990. Now, for the first time in history, the Croatian democratic parliament has an opportunity to lead Croatia *into* something – the European Union.

It is not the purpose of this contribution to explore the history of the Croatian parliament, nor to evaluate its role in the creation of the Croatian state. Nor it is my intention to discuss the general constitutional setting in which the Croatian parliament operates today. My intention is rather limited to an attempt to show that regardless of the democratic transition facilitated by the adoption of Croatia's first-ever democratic constitution on the eve of 1991,<sup>1</sup> some of Croatian parliamentary practices still carry the baggage of the authoritarian past, and that the said baggage is loaded not primarily in the constitutional framework as developed after 1990, but in Croatian legal and political culture, understood as the system of shared beliefs, values, customs, behaviours, and artifacts that the members of society use in order to cope with their world and with one another, and that are transmitted from generation to generation through learning.<sup>2</sup> Within this limited objective I will focus on two parliamentary practices that have crystallised from the 1990s onwards, namely, the practice of so-called authentic interpretation of laws, and the practice of stringent control of governmental action, especially in the domain of external relations. Both practices, I submit, can be explained by a number of factors, such as an insufficient legislative framework, post-communist inertia, and selective perception of key political actors, or a specific political landscape. As such practices are significantly impairing the ability of Croatia to integrate into decision-making structures of the European Union, they will, arguably, have to be changed before accession.

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<sup>1</sup> The first-ever democratic constitution of Croatia was adopted on 22 December 1990. See e.g. Šarin (1997). The constitution was drafted by a committee composed of 229 members.

<sup>2</sup> Bates (2005).

## 2 Enforcing Interpretative Supremacy

The powers of the Croatian parliament are defined by the constitution and by the parliamentary rules of procedure. Although, in the words of the first President of the Republic ‘...the Constitution makes the final departure from the system of communist, so-called socialist-self-management, based on social ownership...’<sup>3</sup> the constitution was, in fact, adopted pursuant to the constitution of Socialist Croatia of 1974. Following the free elections held in May 1990, the old constitutional structure<sup>4</sup> was accommodated to the democratic principle. In constitutional terms, Croatia’s institutional transition to independence was evolutionary rather than revolutionary. In the following years, Croatia went through a number of constitutional amendments that gradually changed the model of governance from a French-modelled semi-presidential to a parliamentary system, and from a bicameral to a unicameral structure.<sup>5</sup> The mentioned changes, introduced in late 2000 and early 2001, respectively, represent a major shift in the Croatian constitutional structure since independence. Above all, they signalled a possible revival of the traditionally dominant place that the parliament had in Croatian history. Though often suppressed, the perception of the parliament ‘above which there is only God’<sup>6</sup> started to re-emerge in the minds of the political class. The practice of so-called *authentic interpretation* emerged in the same political context.

The power of the parliament to interpret laws is based on its rules of procedure<sup>7</sup> and is accepted by the constitutional court.<sup>8</sup> According to Articles 172 and 173 of the rules of procedure, the power to pass interpretation is vested in the parliamentary committee for legislation acting subject to a proposal from the government, and after having obtained a prior opinion of the parliamentary committee that had originally introduced the bill. The committee for legislation

<sup>3</sup> *Vjesnik*, 22 December 2005.

<sup>4</sup> Under the 1974 constitution, the Croatian parliament comprised three houses: the house of municipalities, the socio-political house and the house of associated labour.

<sup>5</sup> The consolidated constitutional text is published in *Narodne novine* No. 41/2001 of 7 May 2001. Earlier publications and subsequent amendments include the *Ustav Republike Hrvatske*, *Narodne novine* 56/1990, the *Ustavni zakon o izmjenama i dopunama Ustava Republike Hrvatske*, *Narodne novine* 135/1997, *Promjena Ustava Republike Hrvatske*, *Narodne novine* 113/2000 and *Promjena Ustava Republike Hrvatske*, *Narodne novine* 28/2001.

<sup>6</sup> This was first formulated as one of the political principles in 1861 by the 19th century politician Ante Starcevic, in the context of the republican resistance to the Austro-Hungarian monarchy. Carl Schmitt (1988) noticed the perseverance of theological concepts in democratic societies: ‘All significant concepts of the modern theory of the state are secularized theological concepts.’

<sup>7</sup> *Poslovnik Hrvatskog sabora*, *Narodne novine* No. 9/2001.

<sup>8</sup> See the decision of the constitutional court No. U-II-1265/2000, of 21 September 2004. According to the constitutional court, the power of the parliament to interpret laws is inherent to its general legislative powers.

formulates the final text of the interpretation and submits it to the parliament for adoption. It is to be published like any other piece of legislation, and courts apply it as an integral part of the act which it interprets.<sup>9</sup> So far the parliament passed 19 decisions on authentic interpretation,<sup>10</sup> six of those rejecting the interpretative bill.<sup>11</sup> The number of interpretations escalated after 1998.

The practice of authentic interpretation gradually evolved in two directions. On the one hand, it became widely accepted at the municipal<sup>12</sup> and administrative<sup>13</sup> level. On the other hand, the parliamentary committee for legislation started to issue interpretative 'comfort letters' to different constituencies, and such letters became generally understood as valid statements of law.<sup>14</sup> As far as the substance of such interpretative acts is concerned, they cover a wide range of legislative areas and, typically, have retroactive effects. They also affect cases pending before courts by changing the legal positions of parties.<sup>15</sup>

The practice of passing interpretative laws is not unknown to some other European legal systems, such as the Belgian, French, Greek, or Italian. However, there it is subject to a prohibition of retroactivity, and to a prohibition of interference with pending judicial disputes. These requirements are also

<sup>9</sup> See e.g. the decision (*Rješenje*) of the supreme court, No. Rev-629/00-2. The supreme court applied authentic interpretation as an integral part of interpreted law with retroactive effect.

<sup>10</sup> These decisions were published in *Narodne novine*: N.n. No. 91/1992; N.n. No. 175/2004; N.n. No. 28/1996; N.n. No. 58/2004; N.n. No. 3/94, 100/1996, 131/1997 and 129/2000; N.n. No. 101/2003; N.n. No. 78/2003; N.n. No. 33/2001; N.n. No. 60/2001; N.n. No. 48/1999; N.n. No. 127/2000; N.n. No. 119/2000; N.n. No. 109/2000; N.n. No. 64/2000; N.n. 34/99; N.n. No. 121/1999; N.n. No. 96/1993 and 39/1995; N.n. No. 29/1999; N.n. No. 23/1999 and N.n. No. 25/1999; N.n. No. 21/1996; N.n. No. 16/1998; N.n. No. 19/1990 and 19/1992; N.n. No. 34/1992.

<sup>11</sup> Sometimes the parliament interprets a law by a decision rejecting the interpretative bill. In such cases it usually states that the law needs no authentic interpretation since it bears a clear meaning which is normally specified in such decisions. Such decisions are entitled 'Decision on not-giving an authentic interpretation.' See e.g. N.n. No. 167/2003; N.n. No. 33/2001 and 60/2001; N.n. No. 106/2003; N.n. No. 150/200; N.n. No. 22/2002; N.n. No. 22/2002.

<sup>12</sup> The constitutional court is seemingly not prepared to allow the same power of authentic interpretation to municipal representative bodies as it allows to the parliament. See Odluka Ustavnog suda br. U-II-1362/2005U-VIII-3569/2005 of 12 October 2005, *Narodne novine* 125/2005.

<sup>13</sup> See e.g. Overview of interpretations of the joint committee for interpretation and monitoring of the implementation of the basic collective agreement for public servants (*Pregled tumačenja zajednicke komisije za tumačenje i pracenje primjene temeljnog kolektivnog ugovora za službenike i namještenike u javnim službama*, Zagreb, October 2004, *Uduga poslodavaca u Zdravstvu*, Zagreb, 2004).

<sup>14</sup> Such comfort letters are issued by the parliamentary committee on legislation, or sometimes by its chairperson. They are sent out on the official letterhead of the committee. Reported by HINA news agency and Index.hr news service on 10 November 2005 at [www.index.hr/clanak.aspx?id=291440](http://www.index.hr/clanak.aspx?id=291440).

<sup>15</sup> See e.g. authentic interpretation of 26 March 1999, *Narodne novine* No. 29/99, in which the parliament 'interpreted' the concept of 'honest possessor' and thereby changed the legal positions of certain possessors.

upheld by the European Court of Human Rights, as clarified in the leading *Stran Greek Refineries case*.<sup>16</sup>

Apart from being contrary to the European Convention on Human Rights, the Croatian art of authentic interpretation is problematic on at least two other counts. First, it diverts the interpretation of laws from the judicial to the legislative and administrative branch, restricts the parliamentary discourse on the meaning of rules, and substitutes the democratic process. Its further negative effects can be described as limiting interpretative autonomy of judges, and adversely affecting the self-awareness of the judiciary. Second, it is especially problematic in the light of Croatia's prospective membership of the European Union. On this count, problems can be identified in a semantic, normative and structural dimension.

In its *semantic* dimension, a problem emerges as to the meaning of rules of European Community law. According to Article 220 of the EC Treaty, '[t]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.' One of the principal methods by which Community law is interpreted by the ECJ is preliminary rulings jurisdiction under Article 234 EC. The Croatian practice of authentic interpretation, as it stands today, opens the possibility of authentic interpretation of any legislation, including legislation implementing Community law, and that interpretation, and thus the meaning of the law, could, conceivably, be different from the interpretation given by the ECJ under its preliminary rulings jurisdiction.

In its *normative* dimension, authentic interpretation is limited by principles of supremacy and direct effect of Community law. As explained by the ECJ in *Costa*<sup>17</sup> and *Simmenthal*,<sup>18</sup> all national law, both substantive and procedural, that

<sup>16</sup> *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR 22/1993/417/496; see also *Agoudimos and Cefallonian Sky Shipping Co. v. Greece*, ECtHR 38703/97, 28 June 2001: 'The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute'; *Zielinski and Pradal and Gonzalez and Others v. France*, ECtHR 24846/94 and 34165/96 to 34173/96, 28 October 1999; *Papageorgiou v. Greece*, ECtHR 97/1996/716/913, 22 October 1997.

<sup>17</sup> Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 585: 'The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question'.

<sup>18</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629, at pt. 22: 'Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law'.

stands in the way of the application of Community law, has to be set aside by national courts, and according to the ECJ, the validity of Community law cannot be affected by allegations that it runs counter to principles of national constitutional practice.<sup>19</sup> In other words, it is the normative demand of Community law that rules of Community law have immunity from authentic interpretation.

This brings us to the *structural* dimension of the problem where interpretative jurisdiction of the ECJ and of the Croatian parliament would collide. In the area of the application of Community law, the ECJ holds a firm position about its interpretative supremacy. Any claim as to authentic interpretation would create a conflict with the attitude<sup>20</sup> and the standing practice<sup>21</sup> of the ECJ.

### 3 Establishing Control over the Executive

Although parliamentary supremacy is nothing unusual in parliamentary practice in Europe, at least since the English Glorious Revolution of 1688, the question regarding the proper allocation of external relations powers between the legislative and the executive branch remains an issue in many jurisdictions. The issue that I will focus on concerns the insistence of the Croatian parliament to control the government in the exercise of its external relations powers. While parliamentary supremacy does not in any respect adversely affect Croatia's envisaged membership of the EU, the proper allocation of powers may significantly influence the efficiency of the fulfilment of Croatia's commitments and obligations. In that respect I maintain that the Croatian executive needs more explicitly defined constitutional authority in European affairs, whether when acting within the Stabilisation and Association Council<sup>22</sup> or within the Council of Ministers. At the same time, the Croatian parliament will need broader and more efficient supervisory powers, and a more clearly defined role in supranational decision-making.

As Croatian law stands today, the role of the parliament in external relations is limited. The parliament has to ratify treaties that require legislative enactment, treaties of 'military' and 'political' nature, and treaties implying financial

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<sup>19</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

<sup>20</sup> Opinion 2/94 of 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759.

<sup>21</sup> Case 11/70, footnote 19 *supra*.

<sup>22</sup> The Stabilisation and Association Council is established pursuant to Article 110 of the Stabilisation and Association Agreement. Under Article 111 thereof, it 'shall consist of the members of the Council of the European Union and members of the Commission of the European Communities, on the one hand, and of members of the Government of Croatia, on the other', OJ C 332 E/31.

obligations.<sup>23</sup> International treaties that have the effect of delegating constitutional powers to an international organisation or alliance have to be ratified by a two-thirds majority. Finally, treaties that lead to an association of Croatia into alliances with other states are subject to a specific procedure set by Article 141 of the constitution.<sup>24</sup> The mentioned provisions do not envisage any role of the parliament in external relations prior to the stage of ratification. Supervision of the government is possible through regular mechanisms of parliamentary control, such as parliamentary questions, interpellation or debate in the parliamentary committee for international relations, which discusses ratification bills. All these instruments have, however, limited effects.

On the other hand, direct constitutional authority for governmental action in the implementation of international treaties is also limited. Under Article 112 (4) of the Croatian constitution, the government is authorised to pass sub-regulations in order to implement 'laws', this expression being widely understood as *Gesetz* or *Loi*, i.e. acts of parliament. Although international treaties under Article 140 of the constitution form part of the national legal order and have legal force superior to laws, the government does not exercise its Article 112 (4) power to implement non-self-executing treaties. Apart from that, the government can also exercise delegated powers under Article 87 of the constitution. Subject to that Article, the parliament can authorise the government to pass regulations during a one-year term and subject to subsequent parliamentary ratification. The same article defines the exclusive regulatory powers of the parliament (German: *Gesetzesvorbehalt*). Those are regulations concerning constitutional rights and liberties, ethnic rights, the electoral system, the organisation, jurisdiction and methods of work of state authorities, and local self-government. Thus, they cannot be delegated to the government. The practice of extending the authority for delegated regulation in matters of internal policy has however been very generous. Laws delegating regulatory authority use broad language such as 'regulation of commerce'. In the light of such generous delegation, the constitutional court has warned the parliament to be more specific when delegating regulatory powers to the government.<sup>25</sup>

While the Croatian parliament is generally unspecific about the delegation of internal powers to the government, this is different in external relations. Briefly put, there is a relatively widespread understanding among Croatian political parties that the government should be under strict parliamentary supervision

<sup>23</sup> Article 139 of the constitution. To the same effect see also Article 18 of the law on the making and implementation of international treaties (Zakon o sklapanju i izvršavanju meunarodnih ugovora), N.n. 28/1996.

<sup>24</sup> That Article requires a two-thirds parliamentary majority and a national referendum.

<sup>25</sup> Decision of the constitutional court U-II-66/1994 of 25 February 1994, *Narodne novine* No. 16/1994; see also Crnic (1994) 20. The Croatian constitution does not entail any provisions that would restrict a delegation of powers, such as e.g. Article 80 of the German Grundgesetz which makes delegation subject to a strict definition of its contents, purpose and scope.



when external or European policy is at stake. The latter attitude was exemplified in political practice in several instances. One of the most significant attempts of the parliament to control governmental action in European affairs is related to the implementation of the Stabilisation and Association Agreement (SAA) with the EU.<sup>26</sup>

During the ratification of the SAA, the issue emerged whether regulatory powers have to be transferred to the Stabilisation and Association Council – a decision-making body envisaged by Article 112 of the SAA. Due to the political balance in the Croatian parliament, the Agreement was ratified by a majority of all representatives, yet falling short of the two-thirds majority which is required for a transfer of powers.<sup>27</sup> In response to the right-wing parties claiming that the SAA is stripping Croatia of her national sovereignty, the Croatian prime-minister and the minister for European integration assessed the SAA as an ordinary international law treaty, and did not push for a two-thirds majority ratification which would have been required by the constitution in case of a delegation of regulatory powers to supranational bodies.<sup>28</sup> This method of ratification gave rise to questions whether the Stabilisation and Association Council would have law-making authority, and if so, whether its decisions could create individual rights in the Croatian legal order. The Croatian parliament subsequently adopted a law implementing the Stabilisation and Association Agreement,<sup>29</sup> apparently in line with the position that the Stabilisation and Association Council may not, without further implementing measures, exercise constitutional regulatory powers. Accordingly, as Croatian law stands today, law made under the SAA cannot have direct effect in the Croatian legal order. Article 6 of the mentioned law applies a radical dualist approach according to which decisions of the Association Council are subject to parliamentary ratification. This is a clear departure from the constitutional mandate of monism stipulated under Article 140 of the constitution, which renders ratified international treaties part of national law. For that reason, compatibility of the SAA implementation law with the constitution is questionable.

By limiting the regulatory powers of the Stabilisation and Association Council, the parliament also restricted the government's autonomy to participate in making secondary legislation subject to the SAA. In this way the parliament limited the shift of power from the legislative to the executive branch, which is a well-known phenomenon both in EU member states and candidate coun-

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<sup>26</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, OJ L26, 28 January 2005, p. 1.

<sup>27</sup> *Izvjješća Hrvatskog Sabora* (Croatian Parliament's Reports), No. 315, 20 December 2001.

<sup>28</sup> See e.g. the speech by minister Neven Mimica held before the Croatian parliament on 24 October 2001, saying that no constitutional regulatory authority will be delegated to the Stabilisation and Association Council, see [www.mei.hr](http://www.mei.hr).

<sup>29</sup> Zakon o provedbi sporazuma o stabilizaciji i pridruživanju, *Narodne novine, International Me unarodni ugovori*, No. 15/2001.

tries.<sup>30</sup> However, what is quite remarkable in the Croatian case, is an attempt of the parliament to subject the application of legal sources under the SAA to more stringent requirements than is the case with sources of other international treaties. The more precise an obligation, the more stringent the parliamentary control.

Another attempt to limit the playground of the executive in European affairs came from the Croatian Peasants' Party, which on 15 March 2004 instituted an interpellation concerning negotiations on protocol 7 to the SAA.<sup>31</sup> The main claim on which the interpellation was based was excess of powers of the executive, i.e. an objection that the government was negotiating the protocol without having obtained the consent of the parliament, even though such a consent is not required under Croatian law.<sup>32</sup> Insistence on parliamentary approval in the stage of negotiations is an indicator of the understanding that the government's position to the parliament is subordinate, even in cases where the government is acting pursuant to an explicit legal basis. Namely, subject to article 112 of the constitution, the government has the authority to pursue external policy. This is to be exercised within the limits set by the parliament, but it does not imply an obligation to consult the parliament every time an external policy action is taken. So far the Croatian parliament has expressed its European policy views on many occasions, just to mention the resolution on accession of Croatia to the European Union of 18 December 2002, the national programme for accession to the EU, or the application for membership of the EU submitted to the Greek EU presidency on 21 February 2003. These, as well as other political instruments, are providing for the political framework within which the government can exercise its constitutional authority without day-to-day parliamentary supervision. In any case, the new position of the government in the European decision-making process, as well as the need for passing implementing legislation to give full effect to European secondary law, calls for a rethinking of the present constitutional framework.

While the supervisory role of the parliament in European affairs is not questioned, and its participatory role has to be enforced,<sup>33</sup> it is also desirable to estab-

<sup>30</sup> See Sadurski (2004).

<sup>31</sup> Protocol to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ L26, 28 January 2005, p. 222.

<sup>32</sup> Law on the making and implementation of international treaties (Zakon o sklapanju i izvršavanju meunarodnih ugovora), N.n. No. 28/1996.

<sup>33</sup> See e.g. Protocol on the role of national parliaments in the European Union, OJ C310/204 of 16 December 2004, providing for '... greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft European legislative acts as well as on other matters...'

lish a direct constitutional authority that would provide the government with a constitutional basis for making decisions in European institutions, and for implementing them into national law, where required by Community law. This would preferably be accompanied by a simultaneous obligation to inform the parliament regularly about forthcoming regulatory activities. Also, as decisions of the government, when it exercises delegated powers, are subject to a parliamentary mandate and subsequent approval, the discretion of the government in European affairs will strongly depend on the parliamentary definition of the mandate, and the parliament's readiness to approve the measures adopted by the government. This can potentially make the government's role in implementing Community law more difficult.

Generally speaking, at present, the Croatian parliament leaves the government more discretion to pursue national policy, whereas it exercises stricter supervision in external affairs. As government involvement in European affairs becomes more frequent and substantial, turning European and formerly external affairs into domestic ones, the need for a re-definition of parliamentary supervision will become more pressing. As the involvement of national parliaments in EU affairs is a matter for every member state to decide on its own, and approaches in member states differ, Croatia is in need of opening a public debate on this issue, within the framework of the constitutional adjustment for EU membership.

#### 4 Explaining the Parliament's Vigilance

Examples of authentic interpretation of laws, and scrutiny of the government's action in European affairs, indicate the vigilant stance of the Croatian parliament in the exercise of some of its alleged powers. As we have seen, the parliament has shown its intention to control the interpretation and application of the law in the grey zones of the constitutional separation of powers.<sup>34</sup> While this creeping supremacy may seem to be a predictable consequence of institutional logic, there are some other possible explanations of the described process, notably: a normative deficit (section 4.1 below), post-communist inertia / selective perception (4.2) and the political landscape (4.3).

##### 4.1 Normative Deficit

First, by asserting its powers, the parliament is substituting normative deficits at the constitutional and legislative level, where the existing constitutional and legislative framework for both the allocation of external powers between the three branches of government, as well as for the interpretation of laws, is insufficient.

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<sup>34</sup> Constitution, Article 4.

The parliamentary role in external relations is limited, and the parliament has a voice only in the ratification procedure. In the absence of communication with the government during treaty negotiations, there is a risk of international treaties being negotiated and signed by the government without a permissive political consensus. This has occurred in at least two instances: in July 2001, the parliament of Croatia has declined to ratify an already initialled draft border treaty with Slovenia that was due to solve the border issue between the two states.<sup>35</sup> In the absence of parliamentary approval, the treaty was not signed. Similarly, a draft treaty on restitution of property with Austria was initialled on 4 April 2005, but not signed due to heavy parliamentary opposition.<sup>36</sup>

As far as European affairs are concerned, the situation started to change in the second half of 2005, on the eve of negotiations for membership with the EU. The normative deficit was addressed by the Croatian parliament by adopting three instruments: a resolution on strategic positions for negotiations with the EU, a declaration of the parliament on fundamental principles of negotiations for membership of the EU, and a common statement of the parliament and the government on joint action in the process of negotiations for membership of the EU.<sup>37</sup> The mentioned instruments provided for modalities of co-operation between the government and the parliament via the establishment of a national committee for monitoring negotiations. The committee comprises 15 members of the parliament, six of whom, as well as the chairman, are drawn from the parliamentary opposition; four members are external and are appointed by the President of the Republic, the academic community, employers' associations and unions, respectively. The committee can discuss negotiating positions and give recommendations to the government. The government has to report on the progress in negotiations at least once every three months. This arrangement clearly demonstrates the need to provide for permissive political consensus in advance of undertaking international commitments. It is a welcome innovation that might minimise the need for informal political pressure on the government in the process of negotiations, and channel political debate. However, it is highly desirable to transform the emerging political practice into legislative instruments that would serve not only the purpose of treaty negotiations, but possibly the decision-making process at European level once the time comes.

The practice of authentic interpretation of laws can be also explained, at least in part, by the parliament's wish to remedy a normative deficit. Due to histori-

<sup>35</sup> See e.g. Branko Podgornik in *Novi list*, 25 September 2001.

<sup>36</sup> See information of the ministry of justice at [www.pravosudje.hr/default.asp?ru=1&gl=200511290000001&sid=&jezik=1](http://www.pravosudje.hr/default.asp?ru=1&gl=200511290000001&sid=&jezik=1).

<sup>37</sup> Rezolucija o strategijskim odrednicama pregovora Republike Hrvatske s Europskom unijom, N.n. No. 122/2005; Deklaracija Hrvatskoga sabora o temeljnim nacelima pregovora za punopravno članstvo Republike Hrvatske u Europskoj uniji, N.n. No. 12/2005; Izjava Hrvatskoga sabora i Vlade Republike Hrvatske o zajedničkom djelovanju u procesu pregovora za članstvo u Europskoj uniji, N.n. 12/2005.

cal and doctrinal reasons, Croatian courts interpret laws strictly. Interpretative autonomy of judges is not appreciated, and law is taken to have an objective meaning that cannot be changed by interpretation. Legal reasoning is deductive, based on definitions that often do not correspond to reality but are transmitted from the top to the lower levels of the judicial hierarchy. As the function of adjudication is understood as ‘applying the law’, and not as solving disputes between parties, possible lacunae are often not filled by judicial interpretation, but by recourse to the parliament.

#### 4.2 Post-Communist Inertia / Selective Perception

I am using term post-communist inertia to describe a situation in which different concepts or practices of socialist law are disassociated from their ideological contents and applied within the democratic constitutional framework. Examples of such concepts or practices are, for example, the understanding of the constitution as a political, rather than legal instrument, a top-down instead of bottom-up approach to the political process or to legal interpretation and, certainly, the understanding of the role of the executive and the judiciary in terms of unity instead of separation of powers, both branches being subservient to the legislature – once the people’s assembly, today the parliament.<sup>38</sup> Both parliamentary practices discussed in this contribution can be explained by post-communist inertia, as they both result from a perpetuation of the concept of unity of power. Seen in this light, authentic interpretation of laws and strict parliamentary control of the government in external relations are just different instances of failure to fully implement the constitutional principle of separation of powers.<sup>39</sup> They originate from the same conceptual background according to which, for example, emperor Justinian threatened interpreting the *Corpus Iuris Civilis* with capital punishment,<sup>40</sup> or according to which the constitution of the Soviet Union of 1936 vested *ius interpretandi* in the presidium of the Supreme Soviet.<sup>41</sup>

<sup>38</sup> For these and other instances of post-communist inertia see Rodin (2005).

<sup>39</sup> Another example is the perpetuation of a dualist approach to international law, despite the constitutional mandate of monism. See e.g. Rodin (2003).

<sup>40</sup> According to the maxim ‘*eius est interpretari leges, cuius est condere*’, see Schott (2002).

<sup>41</sup> Article 121 of the constitution of the USSR (1936). Authentic interpretation probably originates from Justinian, see Moyle (1912); it can also be found in other legal systems, e.g. canonic law. In the law of contemporary democracies (e.g. Italy and Belgium) authentic interpretation is restricted by a prohibition of retroactivity, a prohibition of interference with adjudication and pending proceedings. On the other hand, it is not present in Germany, or the United States. For the US, see e.g. Holmes (1898-1899) 420: ‘In this country, at least, for constitutional reasons, if for no other, if the same legislature that passed it should declare at a later date a statute to have a meaning which in the opinion of the court the words did not bear, I suppose that the declaratory act would have no effect upon intervening transactions unless in a place and case where retrospective legislation was allowed.’

Having said this, I do not want to suggest that Croatian parliamentarians, civil servants or judges are deliberately following some hidden nostalgic agendas. My claim is rather based on the theory of perception originally presented by Bruner and Postman in 1949.<sup>42</sup> The basic axioms of the theory are that perceiving is a process ‘...which results from the stimulation of a prepared or *eingestellt* organism’ and that perceptions are organised in such way ‘...as to maximize percepts relevant to current needs and expectations and to minimize percepts inimical to such needs and expectations.’ The theory is based on an experiment in which subjects were shown a pack of playing cards and were asked to distinguish between normal and ‘trick’ cards, such as a red king of spades. The experiment showed that, instead of reality, subjects selectively perceived what they expected to see. Other experiments showed that personal values play a significant role in the learning process. ‘Since individuals tend to perceive selectively in accordance with their basic values, or interests, it seems reasonable to suppose that they will also acquire new perceptual habits in a manner consistent with their particular value orientation.’<sup>43</sup> In other words, individuals incline to see what is familiar to them, and to suppress unfamiliar things as irrelevant. For the purposes of the present discussion, de-ideologised legal and political concepts are perceived, while the new democratic constitutional framework is suppressed. New legal and political concepts, such as separation of powers or interpretative autonomy of the judiciary, being imported instead of developed, are being suppressed as irrelevant by key political actors. Therefore authentic interpretation, therefore the subservience of the government.

### 4.3 The Political Candscape

More intensive parliamentary involvement in the government’s day-to-day affairs may also be explained by the specific political structure following the parliamentary elections of 3 January 2000 and 3 December 2003.

The political coalition that won a mandate to form the government in 2000 comprised six parliamentary political parties led by the Social-Democratic Party. The politically heterogeneous coalition was driven by a common goal: to democratise the political system, and to introduce constitutional changes that would dismantle presidential governance. In circumstances where not every coalition party was participating in the government to the same extent, coalition partners started to exercise more stringent parliamentary control of the executive. It was exactly in the period following the parliamentary elections of 2000 when the contentious law implementing the Stabilisation and Association Agreement was adopted, and the number of authentic interpretations started

<sup>42</sup> Bruner and Postman (1949-1950).

<sup>43</sup> Bruner and Goodman (1947) understand perceptual fixation as being characterised by *selection*, *accentuation* and *fixation*, processes which ultimately lead to the ‘persistence and preferential retention of certain selected precepts.’

to escalate.<sup>44</sup> The relatively weak political position of the government continued following the elections of 2003. The government led by the Croatian Democratic Union was formed almost as a minority government, only with the support of representatives of national minorities and the small Croatian Pensioners' Party. The described political landscape provided for a fertile ground for frequent opposition, such as the described interpellation of 25 March 2004, but it was not limited to the area of external relations.

The precarious position of the government is amplified by the legislative procedure envisaged for passing organic laws under article 82 of the Croatian constitution. Subject to that provision, laws regulating rights of national minorities have to be passed by a two-thirds majority, while several other areas of regulation, including human rights and freedoms, have to be passed by a majority of all votes.<sup>45</sup> A stricter majority is also required for the ratification of international treaties delegating constitutional powers and, by implication, treaties regulating human rights. In the absence of meaningful consultation procedures prior to ratification, parliamentary parties can only have recourse to regular instruments of parliamentary supervision, such as interpellations, specific restrictive laws, or soft-law instruments.<sup>46</sup> In brief, the political heterogeneity of government coalitions, the particularly uneven representation and voice of coalition partners at governmental level, as well as the weak political position of the two recent governments, have undoubtedly contributed to the enhanced parliamentary control of the government's work.

## 5 Conclusion

The Croatian constitution is a democratic one, providing for parliamentary democracy, separation of powers, government limited by law, and protection of human rights and freedoms, including the rights of minorities. These constitutional choices are supported by democratic institutions, and guaranteed by political and legal procedures. However, an insufficient normative framework accompanied by selective perception on the side of key political actors, and specific political circumstances, have contributed to the perpetuation of certain parliamentary practices that have their origin in the pre-democratic political order. Both authentic interpretation of laws and parliamentary super-

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<sup>44</sup> On 5 December 2001, see footnote 29 *supra*.

<sup>45</sup> The constitutional court is interpreting the notion of human rights legislation broadly, see e.g. a recent decision setting aside the public assembly act, due to an insufficient number of votes. Decision of the constitutional court U-I-3307/2005 of 23 November 2005. See also decision U-I-2566/2003, U-I-2892/2003 of 27 November 2003 setting aside the criminal code amendment act for the same reason. In both decisions the constitutional court held that the contested legislation regulated human rights based on an insufficient parliamentary majority.

<sup>46</sup> See footnote 37 *supra*.

vision of the executive are of course also exercised in other democratic states. However, the parliamentary interpretation of laws is always subject to a prohibition of retroactivity and a condition of non-interference with pending judicial cases, while scrutiny of the government is driven by interests of democratic pluralist control, and the constitutional principle of checks and balances, rather than by an understanding of the government as an executive committee of the assembly. As far as Croatia is concerned, in both areas there is a need for change of the legislative framework. Authentic interpretation can easily be dismantled by changing the parliamentary rules of procedure. Nevertheless, the change will have to be facilitated by changing legal and political culture as well. That would imply courts taking the responsibility for legal interpretation, instead of relying on ready-made legislative precepts. In that way the meaning of law will gradually start being developed in an inter-institutional and social dialogue, instead of being defined and communicated downwards from the top.

As far as the government's powers in European and, more generally, external affairs are concerned, Croatia's membership of the EU calls for substantial constitutional amendments. In the political sphere, the government needs more autonomy in negotiating national positions in European institutions, while in the legal sphere acts adopted at European level in which the government is participating have to be availed direct effect without further parliamentary action. Also, the government will need an explicit constitutional authority for passing regulations for the implementation of non-self-executing European acts. At the same time, the parliament needs a voice in the formulation of European policies, as well as procedures for the exercise of subsidiarity competencies. Also, the Croatian constitution will have to find a solution for a constructive, co-operative, pluralist and transparent relationship between the parliament and the government in European law and policy-making. Although the mentioned changes are certainly needed for Croatia's EU membership, they would in fact be highly desirable as soon as possible, bearing in mind Croatia's commitments under the Stabilisation and Association Agreement.

The described parliamentary practices developed as a result of a number of historical, psychological and practical factors. It will not be possible to change them by legislation only. As we have seen, harmonisation of law does not necessarily entail semantic harmonisation. Newly introduced democratic institutions and laws have first to be perceived by the relevant audience in order to be incorporated into day-to-day practices. In other words, institutions and laws need not only to be formally harmonised to apparently resemble their European model. They have to be *selected*, *accentuated*, and *fixed* in the minds of key social players. They need to bear the meaning assigned to them within the framework of the democratic and pluralist paradigm. That goal cannot be achieved by vertical measures, such as legislation, only. What is needed is an implementation of horizontal measures, such as education, discussion, and communication. At the same time, any political or legal practices suppressing transparency, participation and democratic pluralist control will not stand up to scrutiny either.



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