

Republic of Croatia

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I. Constitutional history, territory, people

I. INTRODUCTION

Croatia is a parliamentary republic, which has been internationally recognized as an independent state since January 1992. It has been a member of the UN since 1992 and a NATO member since 2009; EU membership commenced on 1 July 2013 after the accession treaty was ratified by all the Member States. The territory comprises an area of 56,594 sq.km. The population numbers 4,290,612 inhabitants. Ethnically the population consists of 90.4 % Croats, 4.4 % Serbs, 5.2 % others/ unspecified. The adherence to religions is as follows: Catholic 86.28 %; Orthodox 4.4 %; Muslims 1.47%; not religious 3.81 %; the rest unspecified (census 2011).

From ancient times, Croatia had existed as a member state within various compound entities, from the personal union with Hungary of 1102 until the socialist federation from 1945 until 1990. In these quasi federal arrangements, the country had been guaranteed its constitutional sovereignty but, as a weaker partner, was often unable to realize those autonomous rights. This was reflected in the original Preamble of the 1990 Constitution. Its purpose being to serve as the Croatian Declaration of Independence, it enumerates a number of such historical state forms in which the country had formally preserved its statehood and its sovereign rights. Thus, the Historical Foundations, which is the title of the Preamble of the Constitution, offer the best insight into the legal position of the Croatian leading elite demanding sovereignty.¹

2. CONSTITUTIONAL FOUNDATIONS OF THE REPUBLIC OF CROATIA

The Constitution of the Republic of Croatia was adopted on 21 December 1990, primarily in order to establish foundations for a new independent state of the Republic of Croatia. Its claim for independence through the dissolution of the communist Yugoslav federation was grounded upon the inalienable right to self-determination. Through a protracted process (1991 – 1995), which had included an armed conflict (Homeland War) against Serbia and Montenegro, followed by the peace-making intervention of the international community, Croatia was established and recognized as “a national state of the Croatian people, which guarantees equality to all members of national minorities”. In order constitutionally to transform the communist State into a democracy, it was established on the basis of respect for human and national rights and fundamental freedoms and for the rule of law. The Constitution was adopted as an expression of the popular will to establish a sovereign, independent, and democratic state.

The people’s will for the establishment of an independent and sovereign state was expressed at the first free multiparty elections, held in April and May of 1990, whereby

1. It is worth noting that, against better advice, the Preamble has been amended twice in order to demonstrate a democratic political orientation of Croatia on its path towards European and North Atlantic integration.

the first assembly of the Croatian Parliament was constituted; it was then confirmed at a referendum on independence held on 19 May 1991. Pursuant to that decision, on 25 June 1991, the Croatian Parliament passed a *Declaration on the Establishment of an Independent and Sovereign Republic of Croatia*, and finally the *Decision on severing all legal and state ties with the states forming the former Yugoslav federation* on 8 October 1991.

The body of this Decision reads:

- “1. As of 8 October 1991, the Republic of Croatia severs all legal and state ties on the basis of which it has, together with other republics and provinces, constituted the former Socialist Federal Republic of Yugoslavia (SFRY).
 2. The Republic of Croatia denies legitimacy and legality to all bodies of the former federation – the SFRY.
 3. The Republic of Croatia does not recognize the validity of any legal act of any body acting in the name of the former federation – the SFRY.
 4. The Republic of Croatia recognizes the independence and sovereignty of other republics of the former SFRY on the basis of reciprocity, and is ready to establish, maintain and develop friendly, political, economic, cultural and other relations with those republics with which it is not in an armed conflict.
 5. As a sovereign and independent state that guarantees and ensures the fundamental human and minority rights expressly guaranteed by the Universal Declaration of the United Nations, the Final Act of the Helsinki Conference, documents of the OSCE and the Paris Charter, the Republic of Croatia is willing to enter, in the context of European integration, into interstate and inter-regional associations with other democratic states.
 6. The Republic of Croatia shall continue the process of determination of the mutual rights and obligations towards other republics of the former SFRY as well as towards the former federation.
 7. This Decision enters into force at the time of its adoption, on 8 October 1991”.²
- The implementation of these Decisions depended significantly on the ability of the new independent Croatian state to defend itself, and that ability was confirmed by its victory in the defensive war (and accentuated in an amendment of 1997 of the “Historical Foundations”, the preamble of the Croatian Constitution) as well as by the international recognition of the Republic of Croatia on 15 January 1992.³

2. This Decision was published in Official Gazette No. 53/91.

3. Croatia was defined as a federal state in the 1974 Constitution of the SFRY, which confirmed a right to self-determination and secession. Considering the negotiations on the resolution of the state crisis in the (former) SFRY, the President of the Republic of Croatia, in order to determine and realize the will of the Croatian people and of all citizens of the Republic of Croatia, issued a *Decision on calling a referendum* (Official Gazette No. 21 of 2 May 1991), at which referendum of 19 May 1991 turnout was 83,56 % of enlisted voters. 94.17 % voted in favour of sovereignty. Only 1.2 % of votes was against sovereignty. The Serbian population at the time was estimated at 11-12 %. Report of the Referendum Commission a http://www.izbori.hr/arhiva/pdf/1991/1991_Rezultati_Referendum.pdf, (Official Gazette No. 24 of 27 May 1991); Smerdel, Branko, Sokol, Smiljko: *Ustavno pravo*, IV. izdanje (*Constitutional Law*, 4th edition), *Narodne novine*, 2009. See also the first constitutional law textbook: Smiljko Sokol, Branko Smerdel: *Ustavno pravo (Constitutional Law)*, Školska knjiga, 1992.

II. Sources of constitutional law

I. THE SIGNIFICANCE OF THE CONSTITUTION AND THE RULE OF LAW

Constitutions have a number of basic functions and characteristics, of which we hold the following to be the most important. As the supreme legal act, a constitution establishes the basis for relations between citizens and government bodies and all those who are vested with public authority; it is for this purpose that constitutions guarantee human rights and fundamental freedoms, and provide for legal means for their protection. Constitutions prohibit certain actions of government bodies (negative rights), but at the same time also mandate other actions (social, cultural and other rights).

Firstly, a constitution “forms” (constitutes) a state and its legal system, and “checks” all those who would wish to subjugate the institutions of the state to their interests. Through the system of the organization of government and by applying the principle of the separation of powers, the constitution enables mutual checks between the holders of power. Secondly, as a strategic political act of a state and of a people – the agents of sovereignty – the constitution establishes the fundamental principles of a political community as a democracy founded on respect for human rights and fundamental freedoms, and the rule of law. Thirdly, as an act that legitimizes a democratic state vis-a-vis the international community and towards its citizens, the constitution declares the fundamental values and objectives of a society’s development *urbi et orbi* (“to the city and the world”) and expresses the will and intent to respect the achievements of modern legal civilization; in that way it sets the framework for a democratic adjustment of interests and for their expression through legislation.

The constitution is a tool of the popular will, used to control and direct the holders of state power, so that they may use these instruments put at their disposal by the people in the people’s interest. As an act of the sovereign himself (the people as a community of equal citizens), the constitution of a democratic state limits the holders of state power. According to the very essence of the idea of democratic constitutionality forged in 18th century liberal political thought, the constitution is adopted by the people and therefore it is of a higher legal force than the laws enacted by representative bodies. For this reason, all persons, even the highest state officials, are obliged to uphold the constitution.

The constitution is the supreme legal act, applied directly, and everyone is entitled to claim constitutionally guaranteed rights and freedoms and is entitled to use the guaranteed ways and means of protecting these rights. Everyone is entitled to warn and call to order those, especially state and public servants and officials, who do not comply with constitutional provisions. The constitution is an instrument of a multitude of citizens against the arbitrariness of a few powerful holders not only of state power but social power in general. Therefore, literally everyone, every female and male citizen, should be familiar with the provisions of their constitution and consider them to be the best guarantee of their interests. As is visible from a variety of provisions of the Croatian Constitution, the objective of constitutional norms is, moreover, to educate citizens and officials in democratic decision-making and the resolution of conflicting interests. Considering it

is the foundation for life in a democratic society, the basics of the concept of constitutionality should be made familiar to children in kindergartens as well, and especially to pupils in elementary and high-schools, preparing them in such a way for the role of active and responsible citizens in a democratic society.

2. CONSTITUTIONAL AND ORGANIC LAWS

A “constitutional law” can denote two different kinds of legal acts in the Croatian constitutional system. First, it denotes a law which must be adopted according to the procedure of constitutional revision and has a legal strength above all legislation. An example of such an act is The Constitutional Law on the Constitutional Court – this is hierarchically above acts of parliament, in order to enable the review their constitutionality. The other example should have been The Constitutional Law on Implementation of the Constitution, which usually accompanies new constitutions. However, on the last two occasions, the last one due to the urgency arising from negotiations on accession to the European Union, such laws were adopted by a majority of votes. The opposition concurred, with no objections. The Constitutional Court issued a warning about the necessity to respect the hierarchy of legislation, but did not undertake any further measures.

The notion of “organic laws” was to give them legal force above ordinary legislation, requiring a special majority for their adoption. The legislation elaborating human rights and freedoms, the electoral system, and regulating local government and the system of government bodies must be adopted by a majority of all deputies. Further, the legislation on protection of ethnic minorities has to be passed by a two-third majority of deputies. However, in practice, the Constitutional Court reviews only the procedural requirements for passing such a piece of legislation, but does not have jurisdiction regarding the material content. Therefore, it means that such legislation is more difficult to adopt and to change.

3. PROCEDURES FOR AMENDING THE CONSTITUTION

The Constitution can be amended by Parliament in a special procedure which has been laid down in Articles 147 to 150 of the Constitution or by the voters in a referendum. Amendments to the Constitution of the Republic of Croatia may be proposed by at least one fifth of members of the Croatian Parliament, the President of the Republic, and Government of the Republic of Croatia. In such a case the Parliament decides whether to start proceedings to amend the Constitution by a majority of all members. Draft amendments to the Constitution are also determined by a majority of all members of the Croatian Parliament. The decision to amend the Constitution, however, is taken by a two-thirds majority of all members of the Croatian Parliament. Amendments to the Constitution that have thus been adopted are promulgated by Parliament.

The other way to amend the Constitution, which is by the people’s vote in a referendum, has not been employed so far. A referendum on constitutional changes must be called when so demanded by at least one tenth of registered voters, or by the Parliament, or by the President with the counter signature of the prime minister.

4. REVISIONS OF THE CONSTITUTION

4.1. *The constitutional revisions of 1997-2001*

Constitutional revisions reflect the needs of a society's progress as well as the priorities of state policy. Political developments under the first Constitution were neither simple nor linear, so the Constitution has been repeatedly amended and adapted to the exigencies of the times.

The objective of the first Revision of the Constitution in 1997 was, on the one hand, to strengthen the constitutional guarantees of state independence in response to the dangers of aggression against Croatia, and on the other hand, to clarify the constitutional guarantees of rights and freedoms, in accordance with the requirements of Croatia's then impending membership in the Council of Europe. It is for these reasons that its provisions were supplemented with a constitutional ban on any initiation of a procedure of associating in alliances if such an association would result in a renewal of "Balkan interstate bonds of any kind" (Art. 141 Const., i.e. Art. 142 of the consolidated version). In addition, it was further clarified that the constitutional guarantees of equality do not only protect Croatian citizens, but every person within the national jurisdiction. Although such a conclusion was obviously implied in the provision that "all shall be equal before the law" (Art. 14 Const.), the opinion that it was necessary to clearly and unequivocally state that "everyone" should enjoy the rights and freedoms guaranteed by the Croatian Constitution won in the end.

The objective of the profound constitutional reform of 2000 was to strengthen the constitutional guarantees of democratic development and parliamentary democracy, as well as to prevent the concentration of authority and decision-making power within the institution of the President. For this reason, the whole system of government was altered in order to check and supervise the President of the Republic within the model of parliamentary government.⁴

The revision of 2001 was, in fact, a belated supplement to the reform made in 2000, caused by the difficulties of adjusting the various positions within the ruling coalition. The most important change was the abolition of the House of Counties, and therefore the institution of a unicameral Croatian Parliament.

Finally, the objective of the 2010 constitutional revision was to create and strengthen the constitutional basis for Croatia's full membership in the European Union, as part of its process of fulfilling the strategic goals of joining the Euro-Atlantic organizations, objectives which were proclaimed in the Historical Foundations as early as 1990 at the time of the adoption of the Constitution. All these amendments have preserved the baseline for the constitutional order: democracy, human rights and the rule of law, which are the fundamental values of the Republic of Croatia in the context of European and international organizations.⁵

4. See: Veljko Mratović, Branko Smerdel, Arsen Bačić, Jadranko Crnić, Nikola Filipović and Zvonimir Lauc: *Expert Grounds for a Proposal to Amend the Constitution*), *Zbornik Pravnog fakulteta u Zagrebu (Collected Papers of the Zagreb Faculty of Law)*, 50 (5) 393-450 (2000).

5. For more see: Branko Smerdel, Smiljko Sokol: *Ustavno pravo (Constitutional Law)*, Narodne Novine, Zagreb, 2009; Branko Smerdel, *Ustavne promjene 2010. godine: problemi formulacije, interpretacije i implementacije (Constitutional amendments of 2010: the issues of formulation, interpretation and implementation)*, Informator No. 1-3 of 14 July 2010.

4.2. *Constitutional Revision of 16 June 2010*⁶

The set of important constitutional amendments that were adopted, promulgated and entered into force on 16 June 2010 pursuant to a decision of the Croatian Parliament can be classified into the four categories which follow.

1. *Amendments required by the accession negotiations with the European Union*

These amendments were adopted at the request of European negotiators, in order to facilitate the accession to the EU: they concern the constitutional status of the Central Bank, the determination of the constitutional status of the State Auditing Office, the abandonment of the principle of non-extradition of own citizens, as well as the adjustment of the decision-making procedure to Croatia's membership in the NATO (Art. 7).

Some of these amendments have fully realized their purpose, since they are precisely what was demanded during the accession negotiations: that they should be included in the Constitution or, more accurately, that the constitutional provisions on the Central Bank and the State Auditing Office should be harmonized with current EU law. The abandonment of the principle of non-extradition of own citizens to foreign states is a significant amendment (Art. 9). The application of the European arrest warrant was delayed until Croatia became a full member of the European Union, although the negotiators demanded its direct application even before reaching full membership. The constitutional position of the Central Bank (Art. 53) is made more precise, and the position of the State Auditing Office (Art. 54) is constitutionally regulated. In order to abolish constitutional impediments to EU membership, provisions regulating decision-making on association and disassociation referenda have been altered, to which topic we will return later (Art. 142).

2. *Amendments required for adaptation of the legal system to membership of the EU*

This important new Title VIII of the Constitution named "The European Union" (Arts. 143-146 Const.) was based on the demands of the legal profession and the experience of other members of the European Union, particularly those undergoing transition, and is applied in full only upon reaching full membership.⁷ It sets forth the legal basis for membership and the transfer of constitutional powers to the Union's institutions; the participation of government bodies in decision-making within the institutions of the European Union; the supremacy of the European Union's *acquis communautaire* over the Croatian legal system; and the rights of the European Union citizens within the Republic of Croatia (see further section 7 below). This Title of the Constitution entered into force on the day Croatia became a full member of the Union.⁸

3. *Amendments declaring intentions to correct injustices*

These amendments encompass the changes to the text of the Historical Foundations, as well as the (potentially) very meaningful abolition of the statute of limitations for certain

6. Official Gazette No. 76 of 18 July 2010. NB: the framers of the Constitution again decided (like in 2001) to alter the numbering of constitutional articles. In the present text, we always cite the new constitutional numbering of articles, using the consolidated version (Official Gazette No. 85/10), except when we explicitly point to the old numbering.

7. The basic draft was drawn up in February and March of 2009 by a working group of professors: leader S. Rodin, members: A. Bačić, Z. Lauc, R. Podolnjak and B. Smerdel. It was accepted by the Government's Working Group in the session of 3 September 2009. Within the framework of a "twinning" project, the question of the national parliament's role was elaborated by Hungarian experts in cooperation with Vesna Pusić, President of the Observation of the Accession Negotiations Committee of the Croatian Parliament.

8. Art. 152 of the Constitution, as well as the provisions of Art. 133(4), concerning electoral rights of European citizens and of Art. 9(2) regulating the European arrest warrant.

criminal offences committed during the Homeland War (the new paragraph 4 of Art. 31 Const.). The inclusion of a list of 22 national minorities in the Historical Foundations text, as well as the formulation on how the Croatian “nation and its defenders” have defended the state “in a justified, legitimate, defensive Homeland War for the liberation (1991-1995)” serves to declare certain good intentions: to correct the mistakes committed in the 1990s – considering that the Preamble is not and cannot be legally binding (though it may be legally relevant for the interpretation of the legally binding provisions of the Constitution). In our opinion, abolishing the statute of limitations for wartime profiteering and crimes committed in the process of privatization of property has the same significance, since the current formulation of Article 31 is inapplicable without elaboration in a constitutional law with the legal force of the Constitution itself.⁹

4. Amendments to the political decision-making system

These are very important changes, addressing a number of old (as well as new) outstanding political issues. They concern the following points.

a. Positive discrimination of national minorities

An additional voting right is guaranteed to members of the national minorities that make up less than 1.5% of the population, and a guarantee of three seats in the Croatian Parliament for the minorities whose numbers are greater than the aforementioned percentage (the Serb minority) is provided for. This amendment, based on paragraph 3 of Article 15 of the Constitution, was introduced by urgent amendment of the Constitutional Law on the Rights of National Minorities,¹⁰ in parallel with the constitutional amendments. Those amendments, which had formally aimed at an unprecedented form of positive discrimination, but were actually a result of negotiations within the ruling coalition of the time, were rescinded by the Constitutional Court on 29 July 2011 holding them in conflict with the fundamental guarantee of equal voting rights.¹¹

b. Voting of Croatian citizens residing in foreign countries (Art. 45 Const.)

Croatian citizens who are abroad on the day of the elections may vote in diplomatic and consular offices of the Republic of Croatia. Instead of the “non-fixed quota” that applied so far, making the number of their representatives contingent upon voter turnout, they are now guaranteed three seats in the Croatian Parliament, regardless of voter turnout.

c. Decision-making in referenda

The conditions for the decision-making in referenda have been significantly alleviated by the amendments to the previous Articles 86 and 141 (in the consolidated version published in Official Gazette No. 85/10, these are now Arts. 87 and 142). The referendum decisions will be made by a majority of voters who turn out. In this way, the previous strict provision of Article 86 (Constitution pre-2010), providing that a majority of all voters take part in the referendum, and that a majority of all voters should vote for a decision on association or disassociation (Art. 135(4) Constitution pre-2010), has been abandoned

9. As early as in 1997 and 2000, as well as on this occasion, I have advocated that the Historical Foundations, as a historical declaration comparable to the American Declaration of Independence, be left to history. However, the enormous symbolic and therefore political significance of the Preamble provoked successive interventions, at the time of the constitutional amendments of 2010.

10. Official Gazette No. 80/10; Constitutional Law on Amendments and Modifications of the Constitutional Law on the Rights of National Minorities (155/02 and 80/10). Incidentally, paragraph 3 of Art. 15 was included in the 2001 Revision of the Constitution.

11. Declared unconstitutional and invalidated by the Constitutional Court by decision U-I/3597 /2010 of 29 July 2011.

since it contained a practically impossible requirement in light of the disorder of the list of voters due to the large number of persons with double citizenship.¹²

d. Decision-making in the Croatian Parliament

A majority of all representatives of the Croatian Parliament decides on the budget (Art. 91 (2)), and a two-thirds majority of all representatives was made necessary to elect the judges of the Constitutional Court (Art. 126). The roles of the parliament and of the government with regard to their future relations of joint consideration and adoption of political decisions within the bodies of the European Union have also been determined (Art. 144). The Law on the Relations Between the Government and the Parliament in European matters underwent long negotiations regarding the role of the Parliament, although it had to be adopted by the end of June, 2013.¹³

e. Amendments aimed at the reform of the judiciary

The amendments lay the foundations for a substantial reform of the judiciary and of the judges' profession. The status of judges and the process of their election have been altered; the obligation to re-appoint judges after the first five years on the bench is abolished; and judgeship has become personal and permanent. The purview of the Supreme Court as well as the new powers of its President have been additionally specified, and the composition and the competences of the National Judicial Council, as well as of the Office of the Public Prosecutor and the National Council of the Public Prosecution Service, have been altered.¹⁴ These extremely significant changes of long-term strategic importance for the development of the Croatian judiciary have not been sufficiently discussed in public.¹⁵

f. Amendments strengthening human rights and fundamental freedoms

Articles 38 (right of free access to information), 66 (right to free education) and 93 (the People's Ombudsman) have been amended. Important improvements to the right of free access to information have been added. However, the opportunity was not taken to strengthen the protective mechanisms for assessing whether public interest was strong enough to override the right of access to information.¹⁶

12. During the 1990s, Croatian citizenship had been granted to several hundred thousand people living abroad, most of them in Bosnia Herezegovina. Although the "permanent lists of voters" were supposed to be continuously corrected by erasing those who left or passed away and by including those who moved in or came of age, etc., this permanent correcting has been however a fiction. In January 2009, while the negotiations on accession were nearing completion, it was estimated that there were some five hundred thousand fictive voters on the electoral lists. The number of voters was around 4.5 million at the general elections in November 2011, despite the claims about several hundred thousand fictive names. The new government undertook to put the lists in order in spring 2013; after a process in which citizens had to register to vote anew (as is done in the US), it proclaimed that 3.7 million voters were registered for the local elections.

13. It was adopted on 26 June 2013 and published in the Official Gazette 81/2013.

14. The purpose of the reform was stated by Minister Ivan Šimonović as follows: "A judge shall be appointed and advance within the judiciary according to objective and transparent criteria".

15. The proposals on how to resolve the relationship between the judiciary and the legislature have drawn the special attention of the Judges' Association. The Association refused the proposal that the Supreme Court should report to the Croatian Parliament annually, as being "contrary to the principle of independence of the judiciary". In our opinion, it seems undeniable that, as the body "vested with the legislative power", the Croatian Parliament has and should have the right to demand every possible information on the functioning of public bodies, so as to be able to perform its parliamentary activity in a satisfactory manner. This was a solution adopted in the United States of America a long time ago.

16. However, there is no reason that this should not be done through the amendments and modifications of the Free Access to Information Act. The instances where the statutory obligation of the government bodies and self-government bodies to release information has been ignored underline the need for an efficient means of protecting this right.

5. THE PREAMBLE OF THE CONSTITUTION

The text of the Constitution of the Republic of Croatia begins with a Preamble with the title: I. Historical Foundations. The Historical Foundations, although not legally binding are of political importance and seriously influence the interpretation of the Constitution; this text, together with the amendments made to it, is intended to serve as an expression of historic orientation in the development of the Constitution.

The Preamble is of a great historical significance, and the part on national sovereignty has served as one of the most important grounds and guidelines for the interpretation of individual constitutional provisions and the Constitution as a whole. This part runs as follows: “.....the Republic of Croatia is established as the national state of the Croatian people and the state of the members of national minorities...is hereby founded and shall develop as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted”. Positive discrimination – the grant of special rights to national minorities – is a substantial part of the 2010 constitutional reform.¹⁷

As the national state of the Croatian people, the Croatian State has accordingly been given its name, anthem, flag, coat-of-arms and other state attributes and symbols, and the Croatian language as the official language of the country.

As a democratic state, Croatia has guaranteed a special status and protection to members of all national minorities since it came into being.

The objective of the constitutional Historical Foundations, comparable to the American Declaration of Independence (1777) and the French Declaration of the Rights of Man and of the Citizen (1789), has been to explain to the world the historical constitutional basis and the reasons, based on the referendum Decision, behind the actions taken by the Croatian authorities in their pursuit of the “Croatian dream of independence”, of establishing an independent and sovereign state, as well as to bring the foundations of this new state’s make-up in line with the highest achievements of the modern world’s national and human rights’ development.

Despite their primarily historical significance, the Historical Foundations have an enormous symbolic and therefore political significance, which is why the text has been repeatedly supplemented and amended in order to express the fundamental values which, in the opinion of the framers, must be highlighted at a given historical moment.

The most recent Revision of the Constitution has supplemented the Historical Foundations with two elements:

1) The enumeration of all national minorities within the state (22 in total) in a historical rather than alphabetical or some other order (for instance, according to the size of a respective minority), accompanied by an addition “and others who are its citizens”. The enumeration of national minorities and the guarantee of their equality with Croats have particular and symbolic significance for the interpretation of the Constitution and the legislation in the national state of the Croatian people.

17. The eight representatives of all national minorities are of enormous importance for the maintenance of a parliamentary majority of the coalitions, which gives to their parliamentary group a disproportionate bargaining power. In 2011 they had negotiated the provisions on electoral legislation for an additional vote for each member of the national minorities (Article 15(3) Const.), as well as a special arrangement (electoral system) for the Serbian minority which was guaranteed 3+1 seats, in the Constitutional law on Minorities. Since the aforementioned Constitutional Law does not have the same legal force as the Constitution, it could be declared unconstitutional and was annulled by the Constitutional Court in July 2011.

2) The emphasis on the just and legitimate nature of the defensive Homeland War for liberation in which the nation and its defenders defended the Republic of Croatia (1991-1995).

A distinguished European constitutional theorist, Peter Häberle, concluded his commentary of the Historical Foundations of the Croatian Constitution by saying the following: “The introductory text is the essence of a Constitution of sorts and in its last section, which speaks of the rights of man and citizen, it includes a provision on progress and welfare (‘economic and cultural progress and social welfare [are] promoted’); actually this is a case of reformulating the postulates of the general good, so that they pertain to individual citizens.”¹⁸

6. BASIC PRINCIPLES OF THE CONSTITUTION

6.1. *Popular sovereignty*

The Republic of Croatia is primarily defined as a unitary and indivisible democratic and social state (Art. 1 Const.), wherein the power derives from the people and belongs to the people as a community of free and equal citizens. There is no doubt about who is meant by “the people”: it is all Croatian citizens. Popular sovereignty is thereby determined as the basis of state power. The Croatian state is a Republic, it uses Croatian as the official language, and its state attributes and symbols are also in accordance with this fact. All Croatian citizens are equal and they participate in the exercise of power in the State. The provision stating that the power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens applies to all citizens of the Republic of Croatia, without any differences based on national or other characteristics. Democracy means the rule of the majority but it is accompanied by guarantees and the protection of equal rights of (all) minorities. The people exercise power by electing their representatives and by direct decision-making, in referenda, for example.

6.2. *State sovereignty is limited by international law and international agreements*

Article 2 of the Constitution defines the state sovereignty of the Republic of Croatia as “inalienable, indivisible and nontransferable”. The concept of state sovereignty signifies the supremacy (highest power) of the state and its bodies throughout the state territory, including the sea, the seabed and subsoil thereof as well as the airspace, and all national treasures and wealth. It is expressed by a simple well-known formula: supremacy is the highest power within (towards the subjects) and independent without, deciding freely on entering into international agreements as well as on war and peace (with other states and international organizations).

In a globalized and plural world order, such a concept of sovereignty has been abandoned altogether: even the greatest of the world powers are not free from the

¹⁸. Peter Häberle, *Ustavna država (The Constitutional State)*, Politička kultura, Zagreb, 2002. In yet another part of the text, this respected European author says: “It is noticeable that this fundamental text describes the history of Croatia’s development in special detail...and represents a sort of a legitimizing ‘history class’, surely envisioned and appropriate for even the schoolchildren – once more, it is shown that constitutions have a pedagogical dimension! In addition to that, the text etches out the fundamental values: ‘universally accepted principles of the modern world’, formulates anew the ‘right to self-determination’ flowing from sovereignty and cites a multitude of national minorities: from Serbs to Jews and equates them with Croats, invoking the UN and the ‘countries of the free world’. The inclusion of national minorities remains a tall order, presented daily anew to the constitutional practice”.

restrictions imposed by the international legal order. At the same time, all states are faced with an imperative to form associations in order to secure peace and prosperity. A state cannot renounce its sovereignty, but it can limit it pursuant to the will of the people and (or) its national representatives. Such a limitation cannot be permanent or irrevocable.

For this reason, the Constitution enumerates the limitations of the theoretically conceived total state sovereignty: international law, as well as the principles and customs of the international legal order. Along these lines, the Constitution stipulates that the Croatian Parliament, by a two-thirds majority of all representatives, as well as directly by the people at a referendum, decides on the transfer of sovereign powers to international bodies and organizations.

In anticipation of the need to join the process of European and Euro-Atlantic integration, it is provided that:

“The Croatian Parliament (Sabor) or the people directly shall, independently and in accordance with the Constitution and law, decide:

- on the regulation of economic, legal and political relations within the Republic of Croatia;
- on the preservation of natural and cultural wealth and its utilization;
- on association into alliances with other states.

When entering into alliances with other states, the Republic of Croatia shall retain its sovereign right to decide on the powers thereby granted, as well as the right to withdraw freely from such associations.”

Article 140 refers to the transfer of sovereign powers:

“International agreements which grant international organizations or alliances powers derived from the Constitution of the Republic of Croatia shall be subject to ratification in the Croatian Parliament by a two-thirds majority of all representatives.”

6.3. *The “highest values of the constitutional order” as basis for its interpretation*

Since the beginning of modern constitutionality, constitutions have been based on a certain ethical concept, or a concept of values. An example of a wide and generally core value in all Western societies is the Old Testament’s “golden rule”, which in its in different versions says: “treat others as you would have them treat you”, or “do not unto others as you would not have them do unto you”. In addition, among such classic values are justice, equality, freedom, the right to life, and the right to the pursuit of happiness. An important modern achievement is the obligation to respect “human dignity”.

Article 3 of the Constitution establishes the “highest values of the constitutional order” of the Republic of Croatia, as the grounds for the interpretation of the entire constitutional text as well as its individual provisions. The Constitution enumerates the following values:

- 1) freedom, as a democratic ideal and every individual’s basic right in a democratic political order. Freedom also includes, as indicated in the American Constitution, “the right to the pursuit of happiness”.
- 2) equal rights, meaning the equality of all before the law in terms of the protection of their rights and freedoms.
- 3) national equality, as a basis for a democratic national state which does not discriminate, but grants special protection to ethnic and national minorities in the recognition of their collective rights.

- 4) equality of the sexes, as an ideal of the democratic order which still has not been achieved.
- 5) love of peace, as a traditional orientation of the Croatian state (as well as of the international community) which, nevertheless, does not exclude the right to self-defence from aggression, or to participation in international actions of peacekeeping and peace restoration.
- 6) social justice, as a basic ideal of a welfare state that ensures certain minimal living conditions and social protection to all its citizens, regardless of their social status.
- 7) respect for human rights, as the axis of actions undertaken by government and other bodies, and of the relationships between individuals in the state.
- 8) inviolability of ownership, as a basic right constituting the backbone of entrepreneurial freedom and a market economy.
- 9) conservation of nature and the environment, as one of the key issues of the sustainable development of all states and of the whole of the modern world.
- 10) the rule of law, as an ideal of the concept of constitutional governance and a basic principle of the relationship between the government and those whom it governs, expressing the idea that free citizens must be ruled by laws and not by men.
- 11) democratic multiparty system, as a guarantee of freedom and of the fundamental constitutional principles realized through the competition between political parties and through a peaceful transition of government, pursuant to the will of voters expressed at elections.

For the most part, these concepts are more extensively elaborated in the individual constitutional provisions guaranteeing specific human rights and fundamental freedoms. However, the provision of Article 3 is in itself the ground for the interpretation of other constitutional provisions, and therefore an instruction to be observed by the legislature when elaborating particular rights and freedoms. After some uncertainty, the Constitutional Court took the view that Article 3 may not be claimed as a direct, independent constitutional ground for seeking protection through a constitutional complaint. However, it must still be taken into account in conjunction with other guarantees of rights and freedoms. It must also serve as a guideline for judges when deciding in concrete cases since, pursuant to paragraph 3 of Article 118 of the Constitution, they “administer justice according to the Constitution, law, international agreements and other sources of law in force”.

6.4. The separation of powers as the basic principle of the system of government

Not only does Article 4 of the Constitution provide for the principle of separation of power, but it also elaborates on it as the means of achieving the guaranteed rights and freedoms through mutual checks and balances between the holders of power. State power is limited by a constitutionally guaranteed right to local self-government. The division of power does not mean a simple separation of branches, but also supervision of their cooperation and reciprocal checks.

The system of government is at the same time a question of protecting constitutional guarantees of human rights. The Constitution places much emphasis on the limitation of power. It is an eternal experience which the famous political philosopher Montesquieu described in his work, “The spirit of laws” (1755) by saying that any man who possesses unlimited power is inclined to use it, and therefore that the concentration of power in a

single office is equal to tyranny.¹⁹ Therefore, the issue of the division of power (between the three branches of government) is of extreme importance to their reciprocal control, to their separation and to the realization of human rights. The Croatian Constitution regulates these, “inventions of prudence”,²⁰ as the author of the American Constitution James Madison puts it, in a truly extraordinary way, including clarifications with the intent to educate.

In the Republic of Croatia (Art. 4 Const.), the government is organized on the principle of separation of powers and state power is limited by being divided into three branches. According to the principle of the division of power, state power is constituted as the legislative, the executive and the judicial. Clearly, this Article also has an educational purpose: to explain the necessity of mutual checks and balances between the branches of government to officials and public servants, as well as citizens.

The point of the principle of the division of power is not an organizational or functional separation of the three basic branches of government which should, as it is often misinterpreted, function independently of each other. Such separation is not only impossible to be implemented, but its very attempt would also have a disastrous effect on the unity of the legal system and the efficiency of government. Contrary to such ideas, the objective of applying the division of power is to organizationally enable the existence of mutual checks and balances between the holders of the highest state functions. Along with a horizontal dimension, whereby the relations between the legislative, the executive and the judicial branches are constituted, the division of power also has a vertical dimension in terms of the relations between central government and local self-government, based on the constitutional division of power pursuant to the principle of a constitutionally guaranteed right to local self-government.²¹ For this reason, paragraph 2 of Article 4 of the Constitution states: “The principle of separation of powers includes the forms of mutual cooperation and reciprocal checks and balances provided by the Constitution and law.” This does not in any way question the autonomy and independence of the judiciary, since it is autonomous and independent by virtue of the express provision of Article 118 of the Constitution. The forms of mutual cooperation and of reciprocal checks and balances do not in any way intrude into this autonomy and independence, since they do not in any way refer to the decision-making process in concrete legal matters.

Here we must add that, regarding the division of power, the status of the Constitutional Court remains unaltered as a constitutional exception that does not formally belong to any of the three branches of government. It is rather positioned “in between branches” or as “the supervisory branch” which, as the “guardian of the Constitution”, oversees all branches of government (the legislative, the executive, and the judiciary) by possessing the competences laid down in the Constitution, and governed by a constitutional law of equal legal force to the Constitution, as explained above.²²

According to Article 4(1), central government is also “limited by the right to local and regional self-government guaranteed by this Constitution.” This stresses the fact that, along with a horizontal dimension, the division of power also has a vertical dimension,

19. The authors of the French Declaration of the Rights of Man and Citizen of 1789 wrote: “Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution.”

20. The Federalist No. 51, quoted by Vincent Ostrom: *Politička teorija složene republike (The Political Theory of a Compound Republic)*, Informator, Zagreb, 1989. However, these “inventions of prudence” had already been applied by the Romans during their antique republic, by entrusting the executive power to two consuls for a one-year period. An individual assumed the role of a dictator only at the time of a great crisis, and only for a year.

21. Branko Smerdel: *Novi sustav ustrojstva vlasti (The New System of Organization of Government)*, Informator No. 4881, 16 December 2000.

22. Jadranko Crnić, *Vladavina Ustava (The Constitution's Reign)*, Informator No. 5, Zagreb, 1994.

and that central government is limited by a constitutionally guaranteed right to local self-government protected by the Constitution itself, which cannot be abolished or restricted by any constitutional means.

6.5. *The rule of law demands respect for the Constitution, the law and the entire legal system*

The principle of the rule of law in Article 3 of the Constitution, as one of the highest values of the constitutional order of the Republic of Croatia, is also reflected in the first paragraph of Article 5, pursuant to which all laws in the Republic of Croatia have to conform to the Constitution, and other rules and regulations must conform to the Constitution and the law, as well as in the subsequent paragraph, pursuant to which everyone must abide by the Constitution and the law and respect the legal order of the Republic of Croatia.

Article 5 regulates the principle of constitutionality and legality, and obliges the legislature, as well as all those enacting subordinate legislation, to strictly abide by the Constitution and the law. Paragraph 2 mandates adherence to the “law” in the sense of the entire legal order already including the law created by the Council of Europe (the most important document, the European Convention on the Protection of Human Rights and Fundamental Freedoms, has been a part of the internal legal system since 1997).²³ It now also includes EU law, the “*acquis communautaire*” (Art. 145 Const.), *i.e.* the entire legal system of the European Union. The request to uphold the law in principle differentiates between what is mandated to government bodies and what is demanded of citizens. A citizen is, in principle, allowed to do anything not prohibited by the Constitution or by a rule enacted pursuant to the Constitution. Regarding administrative and judicial bodies, which directly apply legal rules, the situation is reversed: these bodies may only act within the boundaries set by law and act on the basis of statutory authority.

6.6. *Ex post facto (retroactive) application of law is generally prohibited, with exceptions*

Article 90 of the Constitution states: “Before entering into force, laws and other rules and regulations of governmental bodies shall be published in *Narodne Novine*, the Official Gazette of the Republic of Croatia...A law shall enter into force not earlier than on the eighth day after its publication unless otherwise specified by law for exceptionally justified reasons...Only individual provisions of a law may have a retroactive effect for exceptionally justified reasons.”

In other words, a law cannot be applied retroactively as a whole, and regulations enacted pursuant to statutory authority can never be applied retroactively. The Constitution does not allow for the retroactive application of subordinate legislation (other rules and regulations), so such provisions of other rules and regulations may be annulled by the Constitutional Court. The laws and other regulations of government bodies (*i.e.* the rules of a lower legal force than that of acts of parliament) must be published in *Narodne novine* (Official Gazette) prior to their entry into force. Rules and regulations of bodies vested

23. The European Convention for the Protection of Human Rights and Fundamental Freedoms was ratified by the Republic of Croatia on 17 October 1997 (Official Gazette No. 18/97 – addendum: International Agreements, of 28 October 1997, and 6/99 – consolidated version, 8/99 – correction, 14/02 and 1/06).

with public authority must be publicized in an accessible way before entering into force, in accordance with law.²⁴

The new paragraph 4 of Article 31 of the Constitution also provides for an important exception to the prohibition of *ex post facto* laws, since it retroactively abolishes the statute of limitations for certain criminal offences which had been committed during the Homeland War and the privatization of property.

6.7. *Political parties are at the heart of political life in a democracy*

Political parties are citizens' organizations founded with the purpose of participating in political life, as well as in a democratic struggle to win political power in the elections. The pluralism of political parties (the existence of an opposition) is necessary, since it provides criticism of the government and offers an alternative to voters.

Competition between political parties is meant to assure accountability before the Constitution and the law, as well as a general check on the incumbent officials performing state functions. Single-party systems have historically demonstrated their incompetence to secure the rule of law and an effective democratic political order. Almost without exception in the modern world, in the absence of a periodic check and without the threat of losing power, the parties descend into corruption and incompetence. The alternation of the ruling parties is considered to be one of the greatest achievements of a democratic political order. It is necessary even if it causes difficulties regarding the continuity of policy and problem resolution.²⁵

Article 6 of the Constitution guarantees the free establishment of political parties:

Internal organization of political parties must be in accordance with the fundamental constitutional democratic principles. Parties must publicize accounts of the sources of their assets and property. Political parties which aim to undermine the free democratic order or endanger the existence of the Republic of Croatia by their programmes or violent activities are unconstitutional. A violent activity, or even a mere call to violence, crosses the threshold of tolerance of the democratic political system. In the performance of its function as a supervisory body, the Constitutional Court may ban such a party.

6.8. *Peace is indivisible: whoever wants to live in peace must take part in its preservation*

Love of peace undoubtedly remains one of the highest constitutional values, but as a member of the NATO international defence alliance (North Atlantic Treaty Organization), the Republic of Croatia has, through amendments to Article 7 of the Constitution, assumed its new obligations regarding international missions of restoring and maintaining peace. Article 7 sets forth the following:

"The Armed Forces of the Republic of Croatia shall protect its sovereignty and independence and defend its territorial integrity. In protecting its sovereignty and independence and in defending its territorial integrity, the Republic of Croatia may be assisted by the allied states pursuant to the concluded international agreements. The

24. The Croatian Parliament obviously does not feel restrained by this provision: by virtue of its Art. 31, the Revision of the Constitution entered into force on 16 June 2010 – the day of its promulgation, *i.e.* prior to its publication in Official Gazette No. 76 of 18 June 2010.

25. This is of particular importance considering a false but often accentuated belief that the government has a mandate to do whatever it wishes between elections: contrary to this, the government's accountability to citizens is a part of the constitutional concept, as well as of the European principles of good governance – for more see: Smerdel, Sokol: *Ustavno pravo (Constitutional Law)*, 2009, pp.55-59.

Armed Forces of the allied states may cross the border and enter the Republic of Croatia or operate within its borders pursuant to the concluded international agreements, upon a decision by the Croatian Parliament enacted after a proposal by the Government of the Republic of Croatia and providing prior consent by the President of the Republic of Croatia.

The Republic of Croatia may offer assistance to its allied states in case of an armed attack launched against one or more of them, pursuant to the concluded international agreements, upon a decision by the Croatian Parliament enacted after a proposal by the Government of Croatia and providing prior consent by the President of the Republic of Croatia has been granted.

The Armed Forces of the Republic of Croatia may cross or operate beyond its borders upon a decision of the Croatian Parliament enacted after a proposal by the Government of Croatia, and providing prior consent by the President of the Republic of Croatia has been granted.

Upon a decision by the Government of the Republic of Croatia and providing prior consent by the President of the Republic of Croatia the Armed Forces of the allied states may cross the borders of the Republic of Croatia to conduct exercises and training organized by international organizations which the Republic of Croatia has joined or is in the process of joining on the basis of international agreements, or to offer humanitarian aid.”²⁶

6.9. *Alterations of the state border are within the exclusive competence of the Croatian Parliament*

One of the basic provisions is also Article 8, according to which the borders of the Republic of Croatia can only be altered by a decision of the Croatian Parliament. The Parliament must take such decisions by a two-thirds majority of all representatives (Art. 83(3) Const.).

6.10. *Croatian citizenship is the basis for the exercise of political and other rights*

Croatian citizenship, its acquisition and termination, is regulated by law. No Croatian citizen may be exiled from the Republic of Croatia nor may he be deprived of citizenship. By altering Article 9, the Constitution has abandoned the traditional principle of the non-extradition of its own citizens, to the effect that a Croatian citizen cannot be extradited to another state unless in pursuance of a decision to extradite or hand over, made in accordance with an international agreement or the *acquis communautaire* of the European Union. Upon attaining full EU membership, the provisions on the “European Arrest Warrant” will also enter into force.

Regarding foreign citizens, Article 33 of the Constitution provides: “Foreign citizens and stateless persons may obtain asylum in the Republic of Croatia, unless they are prosecuted for non-political crimes and activities contrary to the basic principles of international law.” This confirms the constitutional grounds for the right of asylum. “No alien lawfully residing within the territory of the Republic of Croatia shall be expelled or

²⁶ The emphasis we made points to the key solutions: within NATO membership, the decision to deploy Armed Forces, even in the case of an attack against one of the member states, must be retained by the Croatian Parliament.

extradited to another state, except in pursuance of a decision made in accordance with an international agreement or law” (Art. 33(2) Const.).

6.11. *The protection of the rights and interests of the Croatian Diaspora*

In addition, the basic provisions do not fail to regulate the concern that the Republic of Croatia shows towards its citizens living or residing abroad, i.e. towards parts of the Croatian nation in other countries. Article 10 of the Constitution provides: “The Republic of Croatia shall protect the rights and interests of its citizens living or residing abroad, and shall promote their ties with the homeland. Parts of the Croatian nation in other states shall be guaranteed special concern and the protection by the Republic of Croatia.”

6.12. *Language and script in official use: The Croatian and the minority languages*

Article 12 of the Constitution provides: “The Croatian language and the Latin script shall be in official use in the Republic of Croatia. In individual local units, another language and the Cyrillic or some other script may be introduced into official use along with the Croatian language and the Latin script under conditions specified by law.”

7. EUROPEAN UNION LAW²⁷

7.1. *The legal basis for membership and the transfer of constitutional powers*

Pursuant to Article 143 of the Constitution, the Republic of Croatia, as a Member State of the European Union, participates in the creation of a European community so as to ensure, together with other European states, lasting peace, freedom, security and prosperity and to realize other common objectives, in accordance with the fundamental principles and values underlying the existence of the European Union.

Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia entrusts institutions of the European Union with such powers as are necessary for the realization of rights and the fulfilment of obligations assumed on the basis of membership.

7.2. *Participation in the institutions of the European Union*

Article 144 of the Constitution provides that the citizens of the Republic of Croatia are to be directly represented in the European Parliament, where they decide on matters within its jurisdiction through their elected representatives. The Croatian Parliament takes part in the European legislative process, in accordance with the Treaties the European Union is founded upon. To this effect, the Government of the Republic of Croatia must report to the Croatian Parliament on proposals of legal acts and decisions in the adoption of which it participates within the institutions of the European Union. The Croatian Parliament

27. In our opinion, the conclusion of the Stabilization and Association Agreement back in 2001 represented the key strategic decision of constitutional significance on the accession to the European Union. Cf. Act on the Ratification of the Stabilization and Association Agreement (International Agreements No. 14 of 27 December 2001).

may reach conclusions on these proposals, in pursuance of which the Croatian Government must then act in the institutions of the European Union. The Croatian Parliament's supervision of the Government of Croatia's actions in the institutions of the European Union is regulated by law.²⁸

In the Council and in the European Council, the Republic of Croatia is represented by the Government or the President of the Republic, in accordance with their constitutional powers.²⁹

7.3. *The Law of the European Union*

Article 154 of the Constitution provides that the exercise of rights derived from the *acquis communautaire* of the European Union is equivalent to the exercise of rights guaranteed by the Croatian legal order. Legal acts and decisions which the Republic of Croatia has accepted within the institutions of the European Union apply in the Republic of Croatia, pursuant to the *acquis communautaire* of the European Union. Croatian courts must protect individual rights grounded on the *acquis communautaire* of the European Union. Government bodies, bodies of local and regional self-government, as well as legal entities vested with public authority, must directly apply the law of the European Union.

7.4. *Rights of EU citizens*

The citizens of the Republic of Croatia are citizens of the European Union, enjoying rights guaranteed by the *acquis communautaire* of the European Union. Article 146 of the Constitution mentions especially:

- freedom of movement and of taking up residence in any Member State,
- the active and passive right to vote in elections for the European Parliament, and in local elections in another member state, in accordance with that state's regulations,
- the right to diplomatic and consular protection of any Member State equal to the protection of its own citizens, when in a country where the Republic of Croatia has no diplomatic or consular missions,
- the right to submit petitions to the European Parliament and complaints to the European Ombudsman, as well as the right to communicate with the institutions and advisory bodies of the European Union in the Croatian language, as well as in any official language of the European Union, and to receive a reply in the same language.

All rights are exercised in accordance with the conditions and limitations prescribed by the founding treaties of the European Union, and by measures adopted pursuant to these Treaties. All citizens of the European Union enjoy all rights guaranteed by the *acquis communautaire* of the European Union when in the Republic of Croatia.

28. Considering the fact that this is a constitutional matter it should, in our opinion, be regulated by a constitutional law, adopted by a two-thirds majority of all parliamentary representatives.

29. The organic law on participation and representation of the country in the bodies of the Union is still pending in parliament. It has to regulate the issue in greater detail due to the rather ambivalent constitutional division of powers between the President and the Government. There is a strong inclination to exclude the President.

8. INTERNATIONAL RELATIONS

8.1. *International agreements*

Chapter VII of the Croatian Constitution concerns international relations. Article 139 of the Constitution concerns the treaty making power in general and provides: "Pursuant to the Constitution, the law and rules of international law, the conclusion of international agreements shall be within the authority of the Croatian Parliament, President of the Republic, or the Government of the Republic of Croatia, depending on the nature and content of the respective international agreement."³⁰

Next, the Constitution distinguishes between treaties that require the approval of parliament and those which do not. The ones that require parliamentary approval are, according to Article 140(1) Constitution, "international agreements which entail the passage or amendment of laws, international agreements of a military and political nature, and international agreements which financially commit the Republic of Croatia". Moreover, international agreements which grant international organizations or alliances powers derived from the Constitution of the Republic of Croatia are subject to approval by the Croatian Parliament by a two-thirds majority of all representatives (Art. 140(2) Const.).

The President of the Republic signs the documents on ratification, approval or acceptance of, and accession to, international agreements approved by the Croatian Parliament (Art. 140(3) Const.).

The international agreements which are not subject to parliamentary approval are concluded by the President of the Republic at the proposal of the Government, or by the Government of the Republic of Croatia (Art. 140(4) Const.).

As to the status of treaty law in the national legal order, the Constitution provides in Article 141: "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above legislation in terms of legal effects."³¹

30. The law means the statute regulating the procedure of concluding and ratifying international agreements, Official Gazette 28/1996.

31. The basic concept is "monism", as an international agreement is *above* the statute (law, *zakon*) but *below* the Constitution. Since there is no express authority for the Constitutional Court to examine the constitutionality of international agreements, there exists an interpretation that the court actually might examine the statute by which an international agreement is implemented in the Croatian legal order. This, however, does not apply to European Union Law which has a direct and, according to authorities (Rodin), supra-constitutional effect (Art. 5 and 135 Const.).

III. The system of government

I. THE PARLIAMENT: FRAMER OF THE CONSTITUTION, LEGISLATURE, AND SUPERVISOR OF THE EXECUTIVE

As the representative and the legislative body of the State, the Parliament has had different names throughout Croatian history. However, the Croatian professional public and the public at large have used the term “Croatian Parliament” (Hrvatski Sabor) or the “Croatian State Parliament” (Hrvatski Državni Sabor) since the mid-19th century. The name “Croatian Parliament” was accepted not only because of the Parliament’s historical significance in the preservation and development of the idea and reality of Croatian national identity and statehood of the Croatian people, but also because it most fully expresses its current constitutional position and significance.

The 1990 Constitution established a bicameral system, with a House of Representatives and the House of Counties. During the preparations for the constitutional revision of 2000,³² the Expert Grounds³³ suggested abolishing the House of Counties. At that time, such a proposal was not accepted, but it was successful in the subsequent revision.³⁴ With the abolition of the House of Counties, a unicameral parliamentary system was established.

By implementing the basic provisions on the division of power, as well as the provisions stating that people exercise power by the election of their representatives, Article 71 of the Constitution defines the present Croatian Parliament as the representative body of the people and the body vested with legislative power in the Republic of Croatia.

1.1. *Members of the Parliament*

Deputies are elected for a period of four years. They do not have an imperative mandate, which means that the voters cannot recall them before the expiry of their mandate. Deputies receive regular monetary remuneration and have other rights specified by law. Deputies enjoy immunity protecting them from criminal prosecution, so that they may perform their duties without interference from the executive. The Parliament itself decides on immunity, and when it is not in session, this duty falls to the Credentials and Immunity Committee of the Parliament.

1.2. *Sessions of the Parliament*

The Croatian Parliament sits in regular sessions twice a year: in the period between January 15 and July 15, and from September 15 to December 15. The Croatian Parliament

32. The text of the revision was published in Official Gazette 113/00.

33. See footnote 4.

34. Official Gazette 28/01.

convenes for an emergency session at the request of the President of the Republic, the Government or a majority of MPs. The President of the Croatian Parliament may call for an emergency session upon prior consultation with the parliamentary groups.

1.3. *Dissolution of the Parliament*

The Croatian Parliament may be dissolved in order to call early elections, upon a decision of the majority of all MPs. The President of the Republic may dissolve the Parliament, upon a proposal from the government, with the prime minister's counter-signature and after consultations with the representatives of parliamentary groups, if the Parliament has:

- 1) passed a vote of no confidence on the government's call to a vote of confidence,
- 2) not approved the state budget within 120 days of its proposal.

The President of the Republic cannot dissolve the Croatian Parliament upon the government's proposal if impeachment proceedings for the violation of the Constitution have been instituted against him (Art. 105 Const.).

1.4. *Powers of the Croatian Parliament*

The duties and powers of the Croatian Parliament are (Art. 81 Const.):

- 1) to decide on the adoption and amendments to the Constitution;
- 2) to pass laws;
- 3) to adopt the state budget;
- 4) to decide on war and peace;
- 5) to adopt documents which express the policy of the Croatian Parliament;
- 6) to adopt the Strategy of national security and the Strategy of defence of the Republic of Croatia;
- 7) to realize civilian control over the Armed Forces and security services of the Republic of Croatia;
- 8) to decide on alterations of the borders of the Republic of Croatia;
- 9) to call referenda;
- 10) to carry out elections, appointments and dismissals from office, in conformity with the Constitution and law;
- 11) to supervise the work of the Government of the Republic of Croatia and other public officials accountable to the Croatian Parliament, in conformity with the Constitution and law;
- 12) to grant amnesty for criminal offences;
- 13) to conduct other affairs as specified by the Constitution.

1.5. *Delegation of legislative powers: decrees with the force of law*

As a matter of principle, legislation is passed exclusively by the Croatian Parliament. However, there is an extraordinarily important exception to this rule. The Croatian Parliament may authorize the Government of the Republic of Croatia to regulate certain

issues within its competence by decrees, for a maximum period of one year, excluding those issues relating to:

- 1) the elaboration of constitutionally defined human rights and fundamental freedoms,
- 2) national rights (see below, section VI.2),
- 3) the electoral system,
- 4) the organization, authority and operation of governmental bodies and local self-government.

Decrees based on statutory authority cannot have a retroactive effect. They cease to be in force upon the expiry of one year from the date when such authority was granted, unless otherwise decided by the Croatian Parliament.

Here we are presented with the question of whether laws may be changed by such decrees. In the preparations for the constitutional revision, it was suggested that it should expressly be stipulated that a decree based on statutory authority may not change laws. However, this was not accepted, and so decrees amending and modifying existing laws are actually often enacted in times when the Parliament is not in session.³⁵

1.6. Commissions of inquiry

The Croatian Parliament may form commissions of inquiry regarding any issue of public interest. The composition, competence and powers of the commissions of inquiry must be in accordance with law. The chairperson of the commission of inquiry must be appointed by a majority of representatives, from among the representatives of the opposition.

2. REFERENDA AS THE MOST IMPORTANT FORM OF A DIRECT DEMOCRACY

In Section II.5.1 above, we have already stated that people also exercise power by direct decision-making. The referendum is a form of direct decision-making. The Constitution allows for the Croatian Parliament to call referenda on a proposal for the amendment of the Constitution, on a bill, or on any other issue within its competence. The President of the Republic may call referenda on a proposal for the amendment of the Constitution, or on any other issue he deems to be important to the independence, unity and the existence of the Republic of Croatia, upon a proposal by the government and with the prime minister's counter-signature. The Parliament will call a referendum when required to do so by ten percent of the electorate.³⁶

35. For more see: Sanja Barić, *Zakonodavna delegacija i parlamentarizam u suvremenim europskim državama (Legislative Delegation and Parliamentarism in Modern European States)*, Organizator and the Rijeka Faculty of Law, 2009; B. Smerdel, *Hrvatski pravni sustav i ustavno načelo vladavine prava (The Croatian Legal System and the Constitutional Principle of the Rule of Law)*, Collected Papers of the Zagreb Faculty of Law, 6/2001, pp.1149-1162.

36. See also the Referendum and Other Forms of Personal Participation in the Exercise of State Power and of the Local and Regional Self-government Act (Official Gazette 33/96, 92/01, 44/06 and 58/06 – decision of the Constitutional Court of the Republic of Croatia; sec. 13 of the Act ceased to be in force pursuant to sec. 27(4) of the National Electoral Commission of the Republic of Croatia Act). For more on this issue see: Biljana Kostadinov: *Referendum građanske inicijative: Italija, Švicarska i Hrvatska (People's initiative referendum: Italy, Switzerland and Croatia)*, Informator No. 5887-5889 of 7 and 11 Aug. 2010. See also footnote 12 above, concerning the disorder of the

Article 87 of the Constitution, which essentially implements the basic provision of Article 1(3) of the Constitution stating that the people also exercises power by direct decisions, has now been supplemented by the following provision: “At referenda, decisions shall be made by a majority of voters who turned out. Decisions made at referenda shall be binding”.

The amended Article 142 of the Constitution contains a new provision on “association and disassociation”, in the sense of accession into and possible secession from compound associations of states: “Any decision concerning the association of the Republic of Croatia shall be made at a referendum by a majority of voters who turned out”. Therefore, no special majority is required for such a decision. This is the best illustration of the political aims of the 2011 constitutional reform: to complete the long-lasting process of joining the European Union.

3. THE PRESIDENT OF THE REPUBLIC OF CROATIA: NON-PARTISAN CHIEF OF STATE, COMMANDER-IN-CHIEF, GUARANTOR OF GOVERNMENT STABILITY AND A PARTICIPANT IN POLICY FORMULATION³⁷

The President of the Republic of Croatia represents and personifies the Republic of Croatia at home and abroad, and assures the regular and harmonized functioning and stability of the government.

The President of the Republic is responsible for the defence of independence and territorial integrity of the Republic of Croatia. The President of the Republic may not perform any other public or professional duty, nor may he be a member of a political party. The President of the Republic is the Commander-in-Chief of the Armed Forces of the Republic of Croatia, and appoints and dismisses military commanders, in conformity with law.

On the basis of a decision of the Croatian Parliament, the President of the Republic may declare war and conclude peace. In the case of an immediate threat to the independence, unity and existence of the State, the President of the Republic may, with the counter-signature of the prime minister, order the deployment of the Armed Forces even if a state of war has not been declared.

lists of voters: in May 2013 2103, the government declared that in order to call a popular referendum, ten % of the total number of voters from the last general elections was needed, despite the fact that in the meantime it had established an electoral register with 25% fewer people on it. Regardless of the legal explanation given, this was in fact an attempt by the government to prevent a referendum on the issue of whether “a marriage” can only be between a woman and a man, or can be same-sex.

37. For more see: B. Smerdel, *Ustavne promjene i hrvatski parlamentarni sustav – argumenti u prilog pozitivnog ustavnog modela ustrojstva vlasti (Constitutional Amendments and the Croatian Parliamentary System – Arguments in Favor of the Current Constitutional Model of the System of Government)*, in: Liber Amicorum in honorem Jadranko Crnić (1928-2008) / Kačer, Hrvoje; Momčinović, Hrvoje; Žuvela, Mladen (eds), Zagreb, *Novi informator*, 2009, pp.37-73; B. Smerdel, *Parlamentarni sustav i stabilnost hrvatskog Ustava: Slijede li nakon predsjedničkih izbora nove promjene ustrojstva vlasti? (The Parliamentary System and Stability of the Croatian Constitution: Will the Presidential Elections be followed by New Changes in the System of Government?)*, Collected Papers of the Zagreb Faculty of Law, 60, 1/2010, pp.7-44; B. Smerdel, *Odgovornost Vlade u europskom kontekstu, kako europske (parlamentarne) institucije “rade svoj posao” (The Government’s Accountability in the European Context, How the European (parliamentary) Institutions “Do their Work”)*, Collected Papers of the Zagreb Faculty of Law, 60, 3-4/2010, pp.7-42.

3.1. *The election*

The President of the Republic is elected in direct elections by secret ballot, on the basis of the universal and equal right to vote, for a term of five years. No one may be elected President of the Republic more than twice.

The President of the Republic is elected by a majority of voters who turned out. If none of the candidates have obtained such a majority, new elections are held after 14 days. The two candidates who obtained the largest number of votes in the first election have the right to stand at the new election. If one of these candidates withdraws, the candidate who obtained the next highest number of votes acquires the right to stand at the new election.

3.2. *Inability to perform the duties*

Numerous questions arose in public in November and December of 1999 regarding the replacement of the President of the Republic due to illness, death or resignation. These questions have been extensively answered by Article 97 of the Constitution, as follows:

“In the case where the President of the Republic is temporarily prevented from performing his duties because of his absence or illness or vacation, the President of the Republic may entrust the President of the Croatian Parliament with the duty of substituting him. The President of the Republic shall decide on his return to duty.

If the President of the Republic is prevented from performing his duties for a longer period of time due to illness or inability, and particularly if he is unable to decide on entrusting his duties to a temporary substitute, the President of the Croatian Parliament shall assume the duty as a temporary President of the Republic upon a decision issued by the Constitutional Court. The Constitutional Court shall render such a decision upon the Government’s proposal.

In the case of death or resignation submitted to the President of the Constitutional Court of the Republic of Croatia and of which the President of the Croatian Parliament shall be notified, or when the Constitutional Court establishes the existence of reasons for the termination of the mandate of the President of the Republic, the duty of the temporary President of the Republic shall be assumed by the President of the Croatian Parliament by force of the Constitution.

When the President of the Croatian Parliament issues an act to promulgate a law as a temporary President of the Republic, such an act shall be countersigned by the Prime Minister of the Republic of Croatia.

The elections for the new President of the Republic shall be held within 60 days from the day the temporary President of the Republic assumed the duty in accordance with paragraph 3 of this Article.”

3.3. *The constitutional competences of the President of the Republic*

The President of the Republic has the following powers and duties under Article 98 of the Constitution.

- 1) to call elections for the Croatian Parliament and call its first session;
- 2) to call referenda, in conformity with the Constitution;
- 3) to give the mandate to form the Government to the person who, upon the distribution of seats in the Croatian Parliament and consultations, enjoys the confidence of the majority of its members;

- 4) to grant pardons;
- 5) to confer decorations and other awards specified by law;
- 6) to perform other duties specified by the Constitution.

According to Article 89 of the Constitution, laws are promulgated by the President of the Republic

3.4. *Cooperation with the Government and the Croatian Parliament*

The President of the Republic and the Government of the Republic of Croatia cooperate in the formulation and execution of foreign policy. The President of the Republic, on the government's proposal and with the counter-signature of the Prime Minister, decides on the establishment of diplomatic missions and consular offices of the Republic of Croatia abroad. The President of the Republic, with the prior counter-signature of the Prime Minister of the Republic of Croatia, appoints and recalls diplomatic representatives of the Republic of Croatia, on the proposal of the government and upon the received opinion of the authorized committee of the Croatian Parliament.

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

The President of the Republic may propose to the government to hold a session and consider certain issues, and may be present at the session of the government and take part in the discussions. It should be stressed that the President of the Republic merely gives the mandate to form the government to the person who, upon the distribution of seats in the Croatian Parliament and consultations held with the parliamentary groups, enjoys the confidence of the majority of MPs. He does not appoint or dismiss the Prime Minister, nor his deputies or Ministers.

During a state of war the President of the Republic may issue decrees with the force of law on the grounds of and within the authority obtained from the Croatian Parliament. If the Croatian Parliament is not in session, the President of the Republic is authorized to regulate any issue required by the state of war by decrees with the force of law. This essentially corresponds to known legal standards, and the criteria to be upheld at such times are established by the Constitution itself.

4. THE GOVERNMENT

The Government of the Republic of Croatia exercises executive powers in conformity with the Constitution and law. It consists of a prime minister, one or more of his deputies, and ministers. We have already said that the President gives the mandate to form the government to one of the parliamentary representatives – that person, the mandatary, presents the government and its programme to the Croatian Parliament and requires a vote of confidence before taking up office.

Immediately after the government is formed, but no later than 30 days from the acceptance of the mandate, the mandatary presents the government and its programme to the Croatian Parliament and demand a vote of confidence. The government takes up office when a vote of confidence is passed by a majority of all members of the Croatian Parliament. The prime minister and the members of the government must take a solemn oath before the Croatian Parliament. The text of the oath is determined by law.

Upon the Croatian Parliament's vote of confidence in the new Government of the Republic of Croatia, the President of the Republic issues a decision on the appointment of the prime minister, counter-signed by the president of the Croatian Parliament, and the prime minister issues a decision on the appointment of the members of the government, counter-signed by the president of the Croatian Parliament.

If the mandatary fails to form the government within 30 days of accepting the mandate, the President of the Republic may decide to extend the term for no more than 30 additional days. If the mandatary fails to form the government during the extended term, or if the proposed government fails to obtain a vote of confidence from the Croatian Parliament, the President of the Republic must give the mandate to form the government to another person.

If the government has not been formed in accordance with Articles 110 and 111 of the Constitution, the President of the Republic appoints a provisional non-partisan government and simultaneously calls early elections for the Croatian Parliament.

4.1. *Government competences*

The duties and powers of the government of the Republic of Croatia are (Art. 113):

- 1) to propose legislation and other acts to the Croatian Parliament,
- 2) to propose the state budget and the annual statement of accounts,
- 3) to execute laws and other decisions of the Croatian Parliament,
- 4) to enact decrees to implement the laws,
- 5) to conduct foreign and internal policies,
- 6) to direct and control the operation of the state administration,
- 7) to take care of the economic development of the country,
- 8) to direct the performance and development of public services,
- 9) to perform other duties determined by the Constitution and law.

4.2. *The government's responsibility to the Croatian Parliament*

The government is responsible to the Croatian Parliament. The prime minister and members of the government are jointly responsible for decisions made by the government, and are personally responsible for their respective competencies.

Members of the Croatian Parliament have the right to pose parliamentary questions to the government or to any of its individual members. At least one tenth of the representatives of the Croatian Parliament may submit an interpellation on the work of the government of the Republic of Croatia as a whole or of any one of its individual members.

Article 116 of the Constitution regulates in detail the procedure to put in motion a vote of confidence in the Prime Minister, in individual ministers or in the government as a whole. However, as in the majority of other parliamentary regimes, party discipline, prevailing even in coalitions, has prevented an effective use of those institutions. Thus the only instrument remains the questions in Parliament, with no significant influence on the government.

5. THE STATE ADMINISTRATION EXECUTES LAWS, ENACTS REGULATIONS AND DECIDES ON RIGHTS

The organization and responsibilities, as well as the operation of state administration, must be regulated by law, so Article 117 provides. The law may entrust certain responsibilities of the state administration to bodies of local and regional self-governments, or to legal entities vested with public authority. The status of civil servants and the legal status of state employees is regulated by law and other rules and regulations.

IV. The Judiciary

I. BASIC PROVISIONS

Judicial power is exercised by the courts. Judicial power is autonomous and independent.

The courts administer justice according to the Constitution, domestic legislation, international agreements and other sources of law in force (the latter means EU law). As the highest court, the Supreme Court of the Republic of Croatia has to ensure the uniform application of laws and equal justice for all. The President of the Supreme Court of the Republic of Croatia is appointed and dismissed by the Croatian Parliament on the proposal of the President of the Republic, with the prior opinion of the general session of the Supreme Court of the Republic of Croatia and of the authorized committee of the Croatian Parliament. The President of the Supreme Court is appointed for a four-year term of office. The establishment, jurisdiction, composition and organization of the courts, as well as court proceedings, must be regulated by law.

Court hearings are open to the public and judgments must be pronounced publicly in the name of the Republic of Croatia. The public may be barred from a hearing or part thereof for such reasons as may be necessary in a democratic society in the interest of morals, public order or State security, especially if minors are on trial, or in order to protect the parties' private lives, or in marital disputes and proceedings in connection with guardianship and adoption, or for the purpose of the protection of military, official or business secrets and of the protection of the security and defence of the Republic of Croatia, but only to the extent which is, in the opinion of the court, absolutely necessary in the specific circumstances in which the presence of the public might be harmful to the interests of justice.

The office of judge is entrusted to judges personally. Lay assessors and court advisers participate in the administration of justice, in conformity with law.

Judges enjoy immunity in accordance with law. Judges and lay assessors who take part in the administration of justice cannot be called to account for an opinion or a vote given in the process of judicial decision-making unless there is a violation of law on the part of a judge.

A judge may not be detained nor be on remand in criminal proceedings initiated for a criminal offence committed in performance of his judicial duty without the consent of the National Judicial Council. A judge discharges his duties as a permanent office.

A judge must be removed from office:

- at his own request;
- if he has become permanently incapacitated and cannot hold office;
- if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office;
- if, in conformity with law, the National Judicial Council so decides due to the commission of an act of serious infringement of discipline; and upon reaching seventy years of age.

A judge must have the right to appeal the decision on removal from office to the Constitutional Court within 15 days from the day the decision was served. A judge must have the right to appeal the decision of the National Judicial Council on disciplinary liability to the Constitutional Court of the Republic of Croatia within 15 days from the day the decision was served. The Constitutional Court must decide within 30 days from the day the appeal was submitted. The decision of the Constitutional Court excludes the right to a constitutional complaint.

A judge cannot be transferred against his will, except when a Court is abolished or reorganized in conformity with law.

A judge is not allowed to hold an office or perform work defined by law as being incompatible with his judicial office.

2. THE NATIONAL JUDICIAL COUNCIL

The National Judicial Council is an autonomous and independent body that must assure the autonomy and independence of the judiciary in the Republic of Croatia, and must, in conformity with the Constitution and law, autonomously decide on the appointment, advancement, transfer, removal from office, as well as the disciplinary liability of individual judges and the presidents of courts, except regarding the President of the Supreme Court of the Republic of Croatia. It must render these decisions impartially, pursuant to criteria defined by law. The National Judicial Council participates in the training and education of judges, and other employees within the judiciary.

The National Judicial Council consists of eleven members, namely seven judges, two university professors of law as well as of two members of the Croatian Parliament, one of whom must be from the ranks of the opposition. Members of the National Judicial Council select their president among themselves. Presidents of courts may not be elected as members of the National Judicial Council. Members of the National Judicial Council are elected for a four-year term and no one may be a member of the National Judicial Council for more than two subsequent terms. The jurisdiction, organization, process of electing members, and the proceedings of the National Judicial Council, must be regulated by law.

3. THE OFFICE OF THE PUBLIC PROSECUTOR IS AUTHORIZED TO PROCEED AGAINST PERPETRATORS OF PUNISHABLE OFFENCES

The Office of the Public Prosecutor is an autonomous and independent judicial body empowered and authorized to proceed against those who commit criminal and other punishable offences, to undertake legal measures for the protection of the property of the Republic of Croatia and to provide legal remedies for the protection of the Constitution and law.

The Chief Public Prosecutor of the Republic of Croatia is appointed by the Croatian Parliament for a four-year term, at the proposal of the Government of the Republic of Croatia and with the prior approval of the authorized committee of the Croatian Parliament. Deputy Public Prosecutors are, in conformity with the Constitution and law, appointed, dismissed and have their disciplinary liability decided upon by the National Council of the Public Prosecution Service. Deputy Public Prosecutors assume their duty permanently.

The National Council of the Public Prosecution Service consists of eleven members, namely of seven Deputy Public Prosecutors, two university professors of law, as well as two members of the Croatian Parliament, one of which must be from the ranks of the opposition; they are elected for a four-year term but no one may be a member of the National Council of the Public Prosecution Service for more than two subsequent terms. Members of the National Council of the Public Prosecution Service select their president among themselves.

Chief officials of public prosecution offices may not be elected as members of the National Council of the Public Prosecution Service. The jurisdiction, organization, process of electing members, and the proceedings of the National Council of the Public Prosecution Service must be regulated by law. The establishment, organization, jurisdiction and competence of the Office of the Public Prosecutor must be regulated by law.

4. THE PEOPLE'S OMBUDSMAN REPRESENTS CITIZENS BEFORE GOVERNMENTAL BODIES AND BODIES OF LOCAL AND REGIONAL SELF-GOVERNMENT

Article 93 of the Constitution provides for the office of the People's Ombudsman:

"The People's Ombudsman is a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms established by the Constitution, laws and international legal acts on human rights and freedoms to which the Republic of Croatia has acceded.

Any person may file a complaint with the People's Ombudsman if it considers that his or her constitutional or statutory rights have been endangered or violated by the illegal or irregular conduct of governmental bodies, bodies of local and regional self-government or legal entities vested with public authority.

The People's Ombudsman is elected by the Croatian Parliament for a term of eight years. The People's Ombudsman must be autonomous and independent in his work.

The conditions for the election and dismissal from office, as well as the jurisdiction and functioning of the Ombudsman and his Deputies must be regulated by law. In order to protect fundamental constitutional rights, a law may also delegate certain powers concerning individuals and legal entities to the People's Ombudsman.

The People's Ombudsman and other commissioners of the Croatian Parliament entrusted with the promotion and protection of human rights and fundamental freedoms enjoy the same immunity as representatives of the Croatian Parliament."

This is the first time that the Constitution mentions "other commissioners of the Croatian Parliament", established by law and specialized in the protection of human rights: children's rights ombudsperson, the equality of genders ombudsperson, the ombudsperson for the freedom of information, and the ombudsperson for the rights of persons with disabilities. By granting them immunity, the framer of the Constitution has confirmed the constitutional foundations of the institution of ombudspersons.

Principles of conduct of the People's Ombudsman, as well as of specialized ombudspersons, may be defined in the following way:

- 1) independence and autonomy of actions,
- 2) respect for constitutionality and legality

- 3) fairness and morality,
- 4) informality of operations,
- 5) the possibility of preventive actions.

5. THE CONSTITUTIONAL COURT: THE GUARDIAN OF CONSTITUTIONALITY AND LEGALITY

5.1. *Constitutional status and competence*

The Constitutional Court is an independent and authoritative expert body with wide competences, most important among which are: its oversight of the constitutionality of laws (constitutionality review) and the protection of human rights and freedoms in proceedings instituted by a constitutional complaint. It is called “the guardian of the Constitution” and a “watchdog of democracy”.

In order to be able to perform its extremely important functions successfully, the Constitutional Court enjoys a special constitutional status; it is excluded from the judicial hierarchy and separate from the legislative and the executive branches.

Proceedings before the Constitutional Court as well as the election of its judges and other details of his functioning are regulated by a Constitutional Law adopted in the same procedure as the Constitution itself.³⁸

The Permanent Committee for the Constitution and Standing Rules of the Croatian Parliament carries out the candidacy proceedings and the nomination of the judges of the Constitutional Court of the Republic of Croatia.

The new text of paragraph 1 of Article 126 of the Constitution determines that:

“The Constitutional Court of the Republic of Croatia shall consist of thirteen judges elected by a two-thirds majority of members of the Croatian Parliament from among notable jurists, especially judges, public prosecutors, lawyers and university professors of law, in such a way and procedure as is regulated by the Constitutional Law. The judges of the Constitutional Court shall be appointed for a term of eight years, which term shall be extended if a new judge has still not been elected or has not taken up office upon the expiry of the previous judge’s term, until such a time as a new judge shall take up office, but for no longer than six months.”

The Constitutional Court of the Republic of Croatia selects its president for a term of four years.

The competence of the Constitutional Court is elaborated in Article 129 of the Constitution, and it is much wider than in the original text of the Constitution. Since 2000, the Constitutional Court may review the constitutionality of laws and the constitutionality and legality of other rules and regulations which have lost their legal force, provided that not more than one year has passed from the moment of their loss of legal force until the submission of a request or a proposal to institute the review of the

38. The Committee of the Croatian Parliament on the Constitution, Standing Rules and the Political System has established the consolidated version of the Constitutional Law on the Constitutional Court of the Republic of Croatia in a session held on 23 April 2002, pursuant to the conclusion of the Croatian Parliament of 15 March 2002 and its authority under Art. 57 of the Standing Rules of the Croatian Parliament. The consolidated version of the Constitutional Law on the Constitutional Court of the Republic of Croatia encompasses the Constitutional Law on the Constitutional Court of the Republic of Croatia (Official Gazette 99/99), as well as the Constitutional Law on Amendments and Modifications of the Constitutional Law on the Constitutional Court of the Republic of Croatia (Official Gazette 29/02). These documents indicate the time of their entry into force (published in Official Gazette 49/02).

constitutionality of a law,³⁹ or the constitutionality and legality of other rules and regulations.

The Constitutional Court oversees the realization of constitutionality and legality and notifies the Croatian Parliament of the instances of unconstitutionality and illegality which come to light thereby. Should the Constitutional Court ascertain that the authorized body has, against his obligation to do so, not enacted a rule or a regulation needed for the enforcement of the Constitution, law or other regulations, it must notify the government thereof, while the Croatian Parliament must be notified of the rules and regulations which the government has been obliged to enact.

The Constitution also grants the Constitutional Court competence in the protection of human rights and fundamental freedoms, as well as the rights to local and regional self-government, guaranteed by the Constitution and protected by the Constitutional Court on a constitutional complaint or a proposal for the review of the constitutionality of laws against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority.⁴⁰

Though traditionally rather self-restrained, in the period from 2008 to 2013, the Court has rendered a number of enormously important decisions on the constitutionality of certain laws. For instance such decisions include: the decision on the working hours of shops of 2008; the decision on the constitutionality of additional reserved votes for members of national minorities of 2011; the decision on the Law of Criminal Procedure of 2011; the Decision on the Law on Prevention of Conflicts of Interest of 2012. Currently the Court has often been brought into the focus of deep social dilemmas and conflicts, such as related to medically stimulated procreation, the crisis taxation and concerning the popular initiative proposing a referendum on the constitutional provision on the nature of marriage (as community of a woman and man) in June 2013. In its jurisprudence the Court follows the case law of the ECtHR and often quotes the documents of the Venice Commission.

39. From the beginning of the process of “transition” there has been such a rapid succession of new laws and regulations, that the Constitutional Court had to decide constitutional complaints at a moment in time when the law was not in force any more. It was still important to settle the issue, because of compensation for possible damages.

40. Beside Arts.126-132 of the Constitution, the Constitutional Law on the Constitutional Court of the Republic of Croatia (Official Gazette 49/02 – consolidated version) also contains detailed provisions regulating particular issues regarding the Constitutional Court of the Republic of Croatia.

V. Local and regional self-government

Since independence, Croatia has become an enormously centralized country, despite the great number of municipalities and townships which exist, but cannot sustain their own administration. The local government reform has been on the agenda for decades, but even the current government, which had promised it in its manifesto “Plan 21” has not mustered the strength to respond to that challenge. Of course this influences political processes in a fundamentally undemocratic manner. This is why we deem it important to emphasize the importance of local democracy. In his “Democracy in America”, Alexis de Tocqueville used precisely the notion of strong and democratic local self-government in order to interpret the essence of the American (and any other) democratic system. He wrote: “It is in the commune that the strength of a free people resides. Municipal institutions are to liberty what primary schools are to knowledge; they bring it within the reach of people, give them a taste for its peaceable exercise, and practice in its use. Without municipal institutions, a nation may give itself a free government, but it has not the spirit of freedom.”

The European Principles of Good Governance, an important European Commission document of 2001, stresses the importance of the principle of subsidiarity, according to which all decisions in a system of governance must at the same time be efficient, and closest to the citizens, *i.e.* they must be made at the lowest possible level.⁴¹ In line with this, the Constitution also states: “Citizens shall be guaranteed the right to local and regional self-government.” (Art. 133(1))

The right to self-government is realized through local, respectively regional representative bodies, composed of members elected in free elections by secret ballot on the grounds of direct, equal and general voting rights. However, the meaning of this provision, as well as the whole concept of the system of local self-government, were somewhat altered by the legislation on the direct elections of mayors and county governors, as well as by direct elections of these officials held in May 2009.⁴²

Citizens may directly participate in the administration of local affairs through meetings, referenda and other forms of direct decision-making, in conformity with law and statute.

Municipalities and towns are units of local self-government and their areas are determined in the way prescribed by law. Other units of local self-government may be provided for by law. Counties are units of regional self-government. The area of a county is determined as prescribed by law. Forms of local self-government may, in conformity with law, be established in localities and parts thereof.

41. For more see. B. Smerdel, *Temeljni problemi ustavnog izbora u Europskoj Uniji: pokušaj preliminarne prosudbe rezultata Konvencije o budućnosti Europe (Fundamental Problems of Constitutional Choice in the European Union: an Attempt at a Preliminary Assessment of Results of the Convention on the Future of Europe)*, Collected Papers of the Zagreb Faculty of Law, vol.53, 3-4/2003, pp.509-527.

42. Elections of the Heads of Municipalities, Mayors, County Governors and the Mayor of Zagreb Act (Official Gazette No. 109 of 24 October 2007, with amendments and modifications in Official Gazette No. 125 of 29 October 2008). For more see: Robert Podolnjak, *(Grado)načelnik i vijeće: novi institucionalni okvir hrvatske lokalne samouprave u komparativnoj perspektivi (Heads of Municipalities, Mayors and Councils: New Institutional Framework for Croatian Local Self-government in a Comparative Perspective)*, Priprom, Varaždin, 2010.

The Constitution grants considerable competences to the units of local, as well as regional, self-government. Article 135 of the Constitution states: "Units of local self-government shall carry out the affairs within local jurisdiction that directly fulfil the needs of citizens, in particular affairs related to the organization of localities and housing, area and urban planning, public utilities, child care, social welfare, primary health care, education and elementary schools, culture, physical education and sports, technical culture, customer protection, protection and improvement of the environment, fire protection and civil defence.

Units of regional self-government shall carry out the affairs of regional significance, in particular affairs related to education, health services, area and urban planning, economic development, traffic and traffic infrastructure and the development of a network of educational, health, social and cultural institutions."

Article 137 is yet another very important provision, providing that units of local and regional self-government are autonomous and subject only to the review of constitutionality and legality by authorized governmental bodies when carrying out affairs within their jurisdiction. Furthermore, the Constitutional Court protects the right to local self-government in emergency proceedings when requested to do so by a representative body of the local self-government. It is important that the units of local and regional self-government have the right to their own revenues, of which they dispose freely when carrying out affairs within their jurisdiction. The revenues of local and regional units of self-government are to be proportional to their authorities provided by the Constitution and law.

The State must assist financially weaker units of local self-government in conformity with law.

VI. Protection of human rights and fundamental freedoms

I. GENERAL PROVISIONS: THE PROHIBITION OF DISCRIMINATION IN THE ENJOYMENT OF RIGHTS AND FREEDOMS

In its Article 14, the Constitution elaborates the basic legal rule of equality of all people, nationals as well as foreigners, regarding their enjoyment of rights, prohibiting any discrimination of human beings on any ground, specifying that: "Everyone in the Republic of Croatia shall enjoy all rights and freedoms, regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics".

The guarantee of equality before the law is not only limited to Croatian citizens, but protects everyone within the borders of the Republic of Croatia. This is additionally stressed in the second paragraph of the same constitutional article: "All shall be equal before the law". Article 26 sets forth that both Croatian citizens and aliens enjoy the same rights before the courts, and governmental and other bodies.

It must be kept in mind that this does not mean that all people enjoy equal rights in every aspect. Clearly, children's rights and the rights of minors differ from the rights of adults, and the political rights of foreigners from those of Croatian citizens. The provisions of this Article only mean that in Croatia there should be no discrimination.

The concept of discrimination has been substantially altered in the modern world. The Croatian Act on the Elimination of Discrimination reflects the most recent developments in the European countries, elaborating on the constitutional grounds in great detail pursuant to these developments.

2. NATIONAL RIGHTS AND THE PROTECTION OF NATIONAL MINORITIES

A democratic constitutional order is based on domination by the majority, but within constitutionally mandated restrictions of that majority rule as required in order to protect various minorities. The protection of national minorities in political communities of mixed nationalities is of great importance to their definition as democracies and even to their survival. This protection requires a correction of the system based on the guarantee of individual rights to citizens as single persons, and its enhancement with certain collective rights pertaining to the members of individual communities as collectives.

In line with the acts and definitions of the UN, Article 5 of the Constitutional Law on the Rights of National Minorities of the Republic of Croatia provides that: "In the sense of this Constitutional Law, a national minority is a group of Croatian citizens whose members traditionally inhabit the territory of the Republic of Croatia and possess ethnic, linguistic, cultural and/or religious characteristics different from those of other citizens, and are driven by the desire to preserve these characteristics". According to the Constitutional Law, every citizen of the Republic of Croatia has the right to identify himself freely as a member of a national minority, and to enjoy all the ensuing rights.

2.1. *Constitutional guarantees of national equality*

In various Articles, the Constitution of the Republic of Croatia places special emphasis on the principle of national equality in the Republic of Croatia. These guarantees logically follow from the constitutional provision in Article 1 which entrenches the principle of popular sovereignty, whereby power in the Republic of Croatia belongs to the people as a “volk”, or demos, and where the concept of “the people” is determined as a “community of free and equal citizens”. It is already written in the constitutional Preamble that members of national minorities are guaranteed “equality with citizens of Croatian nationality as well as realization of national rights in accordance with the democratic norms of the United Nations Organization and the countries of the free world”.

Article 15 of the Constitution provides: “Members of all national minorities shall have equal rights in the Republic of Croatia. Equality and protection of the rights of national minorities shall be regulated by the Constitutional Law which shall be adopted in the procedure provided for the adoption of organic laws. Besides the general electoral right, a special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law.” This right was introduced by the revised version of the Constitutional Law on National Minorities of 16 June 2010, and will have to be fully elaborated in the electoral legislation.

Members of all national minorities are guaranteed: 1) freedom to express their nationality; 2) free use of their language and script; 3) cultural autonomy.

Regarding the language and the script in official use, the relevant provision is contained in Article 12, which prescribes the official use of the Croatian language and the Latin script. However, in its second paragraph, this Article provides for the use of another language besides Croatian, and for Cyrillic or some other script, to be introduced in the official use “in individual local units” by law, or pursuant to the conditions laid down by law.

Article 39 of the Constitution prohibits and determines as punishable any incitement, *inter alia*, “to national, racial or religious hatred, or any form of intolerance”.

Pursuant to Article 17, the extraordinary measures employed in the cases of state emergency may not lead to the inequality of citizens on the basis of, among other reasons, religion or national origin.

These guarantees have been institutionally strengthened by the provision in paragraph 1 of Article 83 of the Constitution providing that the laws regulating national rights are passed by a two-thirds majority of all members of the Croatian Parliament. This is a special majority, which is also employed when amending the Constitution. However, in this case, it is not accompanied by the same procedure as for a constitutional revision, but in a legislative procedure used to pass organic laws, where the requirement of a two-thirds majority gives the national rights’ legislation a greater legal force than that of other organic laws (requiring the majority of all representatives). For this reason, the legal force of these laws places them between the Constitution and other organic laws.

3. LEGAL LIMITATIONS TO RIGHTS AND FREEDOMS

3.1. *All rights are restricted by the equal rights of others and by the interests of the community*

When individuals or groups use their guaranteed rights, their actions are limited. Equal rights and freedoms of others, as well as joint interests of the members of the political

community, demand the placing of restrictions on the enjoyment of their rights and freedoms. The restrictions need to be imposed to ensure that individual rights do not contradict each other, and so that individual rights may not be misused at the expense of others, or in a way which would have a detrimental effect on individuals.

As the social contract theorists have pointed out, a political community is created to ensure simultaneously both security and freedom. One may sometimes override the other, which creates a necessity to regulate by law, i.e. act of parliament, the use of constitutionally guaranteed rights and freedoms. It is the reality of all modern states that legal regulation encompasses an ever expanding range of social behaviour so as to guarantee both the safety of citizens as individuals, and of the community as a whole.

3.2. *Restrictions may be imposed only by the law*

Article 16 of the Constitution of the Republic of Croatia determines that rights and freedoms may only be restricted by law (i.e. act of parliament), in order to:

- 1) protect the rights and freedoms of others;
- 2) protect public order;
- 3) protect public morality;
- 4) protect health.

Article 50 of the Constitution establishes additional criteria for the statutory restriction of entrepreneurial freedom and property rights, namely:

- 1) the protection of the interests and security of the Republic of Croatia;
- 2) the protection of nature and the human environment;
- 3) the protection of public health.

It is especially important to emphasize the principle of proportionality applied to every case of a restriction of rights and freedoms. The Constitution explicitly expresses this principle of proportionality, since any limitation of rights or freedoms must be proportional to the nature of the necessity for restriction in each individual case (Art. 16(2) Const.). Even during a state of war or an imminent threat to the independence and unity of the Republic of Croatia, or in the event of severe natural disasters, the Constitution only allows for such restrictions of individual rights and freedoms that are proportional to the "nature of the danger"; some of them cannot be restricted even during a state of war (Art. 17).

4. "THE SAFEGUARD OF THE REPUBLIC SHALL BE THE SUPREME LAW": RESTRICTING RIGHTS AND FREEDOMS IN SITUATIONS OF PUBLIC DANGER

4.1. *State of emergency and extraordinary measures*

Certain difficult situations that can befall any country usually demand certain extraordinary but very severe restrictions of constitutionally guaranteed rights and freedoms. The necessity of defending the country against a foreign enemy, a rebellion, terrorism or civil unrest, as well as severe natural disasters such as earthquakes, floods etc. do not only preclude citizens from the effective enjoyment of their rights and freedoms, but also demand actions that will counteract the dangers and preserve the very existence of a political community. The problem is in ensuring that the measures taken be proportional

to the nature of the danger, do not endanger the basic standards of human rights, and that they are applied only for the duration of the danger. Article 17 of the Constitution of the Republic of Croatia fully respects the demands prescribed in international instruments regarding the suspension of the constitutional guarantees of rights and freedoms.

It is impossible to fully predict, and therefore to enumerate in the Constitution or in the laws, all situations perilous to the state or to its individual parts. Therefore, recourse is made to relatively wide formulations as legal standards. The Constitution allows for: the restriction of constitutional rights (Art. 17) as well as for the enactment of decrees with the force of law (Art. 101).

4.2. *Restricting constitutional rights under the Article 17 of the Constitution*

Article 17 of the Constitution provides that the rights and freedoms guaranteed by the Constitution may be restricted in the following situations:

- 1) State of war. This situation arises when the President of the Republic of Croatia declares a state of war pursuant to a decision by the Croatian Parliament;
- 2) Immediate danger to the independence and unity of the Republic.

In the legal sense, the state of war is formally non-existent here, but there may be a threat of war, or a situation where war is actually waged against the Republic, even if not formally declared. Here we must keep in mind that during the period following World War II, most wars that were waged had never been declared. The war waged against the Republic of Croatia from 1991 was also not formally declared.

- 3) Severe natural disasters.

The Croatian Parliament decides on the necessary restrictions of rights and freedoms by a two-thirds majority of all representatives. If the Parliament is unable to assemble due to the existing circumstances, the President of the Republic is authorized to make that decision.

The Constitution determines the *criteria* to be upheld by the Parliament, and by the President, when deciding on the restrictions of such nature.

- (1) The scope of the restriction must be adequate to the nature of the danger (the principle of proportionality).
- (2) The restrictions may not lead to the inequality of citizens in respect of their race, colour, gender, language, religion, or national or social origin.
- (3) Certain fundamental rights may not be restricted even in the case of a direct threat to the existence of the State. These are:
 - the right to life,
 - the prohibition of torture, cruel or degrading treatment or punishment,
 - the provisions on the legal definitions of criminal offences and punishments,
 - the freedom of thought, conscience and religion.

4.3. *Decrees with the force of law (emergency decrees) referred to in Article 101 of the Constitution*

Some measures warranted in emergency situations may be enforced even without the restriction of constitutional rights, through Presidential decrees with the force of law, which in the legal theory are called emergency decrees. The wide powers that the Croatian President possessed under the constitutional text of 1990 (Art. 101) and which were used

during the Homeland War (1991-1995) have been substantially limited by the constitutional Revision of 2000. Article 101 of the Constitution differentiates between the following situations:

- 1) state of war
- 2) immediate danger to the independence, unity and existence of the state,
- 3) situations of equal gravity to the aforementioned ones, when the government bodies are prevented from regularly performing their constitutional duties.

During a state of war, the President of the Republic of Croatia is authorized to issue decrees with the force of law on the grounds of, and with the authority delegated by, the Croatian Parliament. If the Croatian Parliament is not in session, the President is authorized to regulate all the issues required by the state of war using decrees with the force of law.

In the case of an immediate threat to the independence, unity and existence of the State, or if the government bodies are prevented from performing their constitutional duties regularly, the President of the Republic may issue decrees with the force of law, on the proposal of the prime minister and with his counter-signature. When issuing decrees with the force of law, the President of the Republic must submit them for approval to the Croatian Parliament as soon as it is in a position to assemble. If he should fail to execute this duty, the decree with the force of law ceases to be in force.

4.4. *No one may order the commission of a crime: personal responsibility for violations of rights and freedoms*

Article 20 of the Constitution determines that anyone who violates the provisions on the fundamental rights and freedoms of man and citizen must be held personally responsible and may not be exculpated by invoking a superior order. Human rights and freedoms may not be violated even under an order from a superior (officer, official, Minister, etc.).

This provision is undoubtedly founded in natural law, according to which the violation of human rights releases a subordinate from the obligation to comply with the superior's order. In this way, an individual is presented with a tremendous responsibility to oppose such orders at all costs. No one may order a subordinate to commit a criminal offence. Whoever issues such an order, will be personally responsible on the basis of so-called command responsibility; however, this does not exculpate the subordinate executing such an order of his responsibility. Pursuant to this concept, Nazi war criminals were sentenced in Nuremberg and Tokyo after World War II having, without exception, justified their actions by claiming compliance with superior orders. It places every state official, soldier, officer or police officer in a position where they carry the full weight of personal responsibility for their actions. This principle is also applied by the International Tribunal for war crimes committed in the former Yugoslavia, which was founded in The Hague in 1993.

5. "WITHOUT THE MEANS OF ITS PROTECTION, THERE IS NO RIGHT TO SPEAK OF": THE RIGHT TO AN APPEAL AND TO A FAIR DECISION RENDERED IN REASONABLE TIME

The right to an appeal against individual first-instance decisions made by the courts or other authorities is guaranteed. The appeal is a basic legal remedy in all legal proceedings.

It has devolutive and suspensive effect. It is decided before a second-instance body, superior to the one that rendered the decision. Filing an appeal suspends the enforcement of the first-instance decision.

The right to an appeal may exceptionally be excluded in cases specified by law, provided other legal remedies are ensured. Individual decisions of administrative agencies and other bodies vested with public authority must be grounded in law.

Judicial review of decisions made by these bodies is guaranteed in an administrative dispute before the Administrative Court, where the Court decides on the legality of an individual administrative act, or in other ways (Arts.18 and 19 of the Constitution of the Republic of Croatia).

Article 29 of the Constitution provides that: “Everyone shall have the right to have his rights and obligations, or a suspicion or charge of a punishable offence decided upon fairly by an independent and impartial court established by law within a reasonable time,” This conforms largely to Article 6 of the European Convention on Human Rights (which however specifies “civil rights and obligations” rather than “rights and obligations”).

6. PERSONAL RIGHTS AND FREEDOMS

6.1. *The right to life, liberty and personal integrity*

Article 21 of the Constitution of the Republic of Croatia guarantees every human being the right to life, and as a logical consequence provides that: “In the Republic of Croatia there shall be no capital punishment”. As a basic human right, the right to life is also mentioned in other constitutions as well as international documents because, as natural as this right is considered to be, it has often been violated in the past as well as today.

There are many questions regarding the aforementioned constitutional formulation: How do we determine who a “human being” is? What about the death penalty in time of war? Can a human being renounce his right to life and demand euthanasia, i.e. mercy killing? Determination of the notion of a human being intrudes into the very foundations of a society’s perception of ethics, especially in relation to the problem of curtailing the right to freely decide on having children, i.e.: is an embryo already a human being and is abortion actually a criminal act of murder? These issues have not yet been the subject of constitutional review, although a number of proposals have been submitted by the religious communities, in particular with regard to the woman’s right to choose.

It should be mentioned that the 13th Protocol to the European Convention on Human Rights prescribes total abolition of the death penalty, thereby confirming the validity of the decision made by the Croatian framers of the Constitution.

The guarantee of liberty and integrity, which is proclaimed inviolable, is another important issue concerning this part of the Constitution. Article 22 of the Constitution states: “No one shall be deprived of liberty, nor may his liberty be restricted, except upon a court decision in accordance with law”. The main point of this guarantee is that any restriction or deprivation of liberty must be based upon the law and executed with the utmost respect for procedure laid down by statute. A number of constitutional provisions regulate precisely the basic principles of conduct to be upheld when restricting freedoms of individuals, as well as the guarantees of the rights of the accused in all forms of criminal proceedings. A general provision in Article 23 prohibits any maltreatment or subjection to medical or scientific experiments without consent. The second paragraph of that Article prohibits any forced and compulsory labour.

6.2. *The rights of arrested, charged or prosecuted persons*

The length and detailed character of this chapter of the Constitution reflects the fact that it was drafted after the end of communist rule, under the strong influence of the experience of former political prisoners and prisoners of consciousness. Many of its detailed provisions have in the meantime been modified by international law and also by the rapidly changing legislation. In these provisions, the Croatian Constitution – as the first of the post-communist constitutions in Europe – illustrates the spirit of the time.

6.2.1. *The presumption of innocence*

The basic principle regulating the treatment of persons accused of criminal offences is contained in Article 28, which affirms the general legal rule that: “Everyone shall be presumed innocent and may not be considered guilty of a criminal offence until his guilt has been proved by a final court judgment”. Therefore, neither the arrest nor the opening of investigation, the institution of judicial proceedings, a confession, nor even the first instance judgment itself constitutes the guilt of the person charged. It is only after the finality of the judgment that a person can be considered guilty of an offence. Until then, he or she enjoys the full legal protection and all rights, regardless of the gravity of the crime he or she is charged with.

From the presumption of innocence of the accused, as well as from the demand to establish the material truth in all proceedings resulting in punishments for violations of the law, and primarily in criminal proceedings, a range of constitutional provisions arises designed to protect the person charged and to enable the defence against the accusations. The indictment charges must be proven by the Public Prosecutor and it is wrong, although quite common, to speak of a charged person’s duty to prove his innocence.

6.2.2. *Arrest*

The police-conducted arrest procedure is an especially important and sensitive problem from the viewpoint of human rights’ protection and of police effectiveness in preventing crimes and apprehending perpetrators. The police must have the right to deprive certain persons of freedom, even if based on nothing more than their discretionary assessment. However, this procedure must assure the judicial review of legality and the protection of the arrested person’s rights. In this procedure, since it represents a restriction of a constitutional right, the police are bound by the principle of proportionality, i.e. they are responsible for an excessive use of force or for the violation of the arrested person’s human dignity.

Article 24 of the Constitution prescribes: “No one shall be arrested or detained without a written court warrant issued pursuant to law. Such a warrant shall be read and served on the person at the time of the arrest.” The demand that a court warrant be read while making the arrest represents a very high level of judicial review of the constitutionality of police actions. In most cases, however, the circumstances will not allow for this. To demand, without exception, a court warrant as a precondition for the deprivation of freedom would prevent the police from performing a range of important functions in safeguarding public peace and order, and preventing crimes. For this reason, according to paragraph 2 of Article 24 of the Constitution, the police can make an arrest even without a court warrant if there is a reasonable suspicion that the person has committed a serious criminal offence defined by law, provided that they immediately bring such a person before the court.

The arrested person must be promptly informed, in understandable terms, of the reasons for the arrest and of his rights determined by law. Any person arrested or detained must have the right to appeal to a competent court, which must decide on the legality of the arrest without a delay. The European Court of Human Rights has established the principle that a person detained has the direct right of appeal to that Court, without having previously exhausted all domestic legal remedies.

In general, pursuant to the provision of Article 25, all arrested persons must be treated humanely and their dignity must be respected. Anyone who is detained or charged with a criminal offence must have the right to be brought before the court within the shortest term specified by law, and to be acquitted or sentenced within the statutory term. This provision is crucial for the prevention of long-term detentions in the custody of the police, where the basic rights of defence guaranteed in court proceedings could be denied. The gist of this provision has been determined by the British *Habeas Corpus Act* of 1679: the arrested person must promptly be brought to a court with a charge, or be set free. A detainee may be released on a legal bail. Bail is, as a rule, a monetary deposit the amount of which is set by the court and forfeited in the case of the suspect's failure to appear in court; the details are regulated by the Criminal Procedure Act. Any person illegally deprived of liberty or convicted is, in conformity with the law, entitled to damages and a public apology.

6.2.3. *Rights of suspects and persons charged*

A person suspected of or charged with a criminal offence is in a grave situation. Even though it is a general principle of law that guilt must be proven by the prosecutor, such a person is often forced to gather information in order to prove his innocence. In order to enable him to do this, the Constitution guarantees the following rights to the person charged:

- 1) the right to a fair trial before a competent court established by law, within reasonable time. Criminal proceedings may only be instituted before a court at the request of an authorized prosecutor;
- 2) to be informed in the language he understands, within the shortest possible time, of the nature and reasons for the charges against him and of the evidence incriminating him. In connection to this, he has a right to the free assistance of an interpreter if he does not understand the language used in court;
- 3) to have adequate time and opportunity to prepare his defence, and defend himself in person or with the assistance of a defence counsel of his own choosing (and if he has insufficient means to engage a counsel, to have a free counsel under the terms specified by law), and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him,
- 4) to engage a defence counsel and communicate with him freely, and to be informed of this right. In connection with this, Article 27 of the Constitution points to the Bar as an autonomous and independent service providing everyone with legal aid in conformity with law,
- 5) to be tried in his presence, if he is accessible to the court,
- 6) he cannot be forced to incriminate himself or to admit his guilt,
- 7) evidence illegally obtained may not be admitted in court proceedings. This means that such evidence or testimony of the accused or a witness must be excluded from the proceedings, and that the court must regard them as non-existent and reach its decision without taking them into account.

6.2.4. *Legal effects of a sentence*

A sentenced person, who has served his or her sentence, is generally considered equal to all others. However, it is necessary to allow for the exceptions to this rule. In conformity with law, a sentence for a “serious and exceptionally dishonourable” criminal offence may lead to a loss of acquired rights to perform certain types of work, or to a ban on their acquisition for a specific period of time if that is required for the protection of legal order.

6.3. *Principle of legality in criminal law*

Article 31 of the Constitution determines one of the basic principles of criminal law, expressed by a Latin legal phrase *Nullum crimen, nulla poena sine praevia lege penali*. The constitutional provision provides: “No one shall be punished for an act which was not defined as a criminal offence by law or international law prior to its commission, nor may be sentenced to a penalty which was not defined by law. If a less severe penalty is prescribed by law after the commission of an act, such penalty shall be imposed.”

This complements the principle of *ne bis in idem*, which means that no one can be tried anew for an act he has already been sentenced for by a final court judgment. In addition, criminal proceedings cannot be instituted anew against a person already acquitted by a final court judgment.

The new paragraph 4 of Article 31 of the Constitution states: “There shall be no statute of limitations for the criminal offences of wartime profiteering, nor for criminal offences committed in the process of transformation and privatization of property during the Homeland War and peaceful reintegration, state of war or immediate threat to the independence and territorial integrity of the country, provided they were prescribed by law or, pursuant to international law, do not fall under the statute of limitations. All material gains acquired as the result of such offences or in connection with them, shall be confiscated.” In our opinion, the implementation of this provision will require careful elaboration in an organic law.⁸⁵

6.4. *Personal rights*

6.4.1. *Guarantee of personal life, reputation and honour*

Everyone must be guaranteed respect for and legal protection of personal and family life, dignity, reputation and honour (Art. 35 Const.). It is difficult to enumerate all the possible ways in which these basic values of a democratic society, founded on freedom and equality under law, can be violated. Stemming from this constitutional stipulation, there is a range of concrete demands, primarily addressing the way in which the public authorities treat individuals. The basic request in this regard, to which respect for human dignity is key, may be best described by a demand used in everyday speech: that the authorities should treat every individual “as a human being”.

6.4.2. *Freedom of movement*

Anyone legally residing within the territory of the Republic of Croatia enjoys freedom of movement and freedom to choose his place of residence. Every citizen of the Republic of

85. Branko Smerdel, *Znanost, struka i politika: ustavne promjene 2009* (Science, Profession and Politics: Constitutional Amendments of 2009), *Informator*, 15 November 2009; Branko Smerdel, *Ustavne promjene 2009* (Constitutional Amendments of 2009), Yearbook of the City of Zagreb Lawyers' Forum, 2009.

Croatia has the right to leave the State territory at any time and settle abroad permanently or temporarily, and to return to his homeland at any time. Freedom of movement within the Republic of Croatia and the right to enter or leave it may exceptionally be restricted by law if this is necessary in order to protect legal order, health, or the rights and freedoms of others (Art. 32 Const.).

6.4.3. *Inviolability of the home*

Article 34 of the Constitution stipulates: "Homes shall be inviolable". This would mean that no one could enter an apartment, house or any object considered a home, *i.e.* a permanent residence, without the tenant's consent. However, the need to conduct criminal proceedings may call for the search of an apartment, or for belongings to be removed from it, and even for the ability of the police to promptly decide on entering someone's home without a warrant. This constitutional Article tries to precisely determine these situations.

Only a court is authorized to issue a reasoned written warrant, in conformity with law, ordering that a home or other premises be searched. It is the right of the tenant that he or his representative, and the mandatory two witnesses, be present during the search of the home or other premises.

Pursuant to the conditions stipulated by law, the police authorities may enter a home or premises even without a court warrant or consent given by the tenant and search it without any witnesses, in the following situations:

- 1) if it is necessary to enforce an arrest warrant,
- 2) if it is necessary to apprehend an offender,
- 3) if it is required to prevent a serious danger to the life and health of people, or to a large amount of property.

A search conducted in order to find or secure evidence for which there is a grounded probability to be found in the home of the perpetrator of a criminal offence may only be carried out in the presence of witnesses.

6.4.4. *Privacy of correspondence, protection of personal data and conditions of their restriction*

The freedom and privacy of correspondence and all other forms of communication is guaranteed and inviolable. However, restrictions necessary for the protection of state security or the conduct of criminal proceedings may be prescribed by law.

Everyone must be guaranteed the safety and secrecy of personal data. Without the consent of the person concerned, personal data may be collected, processed and used only under conditions specified by law. The use of personal data contrary to the purpose of their collection must be prohibited. The protection of data and the supervision of the operation of information systems in the State must be regulated by law (Art. 37 Const.).

The covert collection of data, and the monitoring and wiretapping of citizens outside of criminal proceedings with the purpose of preventing serious criminal offences, especially terrorism, is a particularly sensitive issue. Democratic states, however, use statutory regulation and oversight of intelligence services in order to ensure that, even while instituting the necessary means of protection, these activities do not result in a violation of human rights and fundamental freedoms.

6.4.5. *Freedom of thought and public expression of opinion.*

As a personal right, freedom of thought is the basis of a democratic political system. This freedom does not mean that an individual is free to covertly think whatever he wants

while in fear of communicating it further, relying on the principle that no one may be called to account for his secret thoughts (*"cogitationes poenam nemo patitur"*). Many "state secrets" have reached the public forum only after the institution of the freedom of thought in the true sense of the word. In a democratic system, it necessarily includes the freedom to express opinions publicly. Pursuant to Article 38 of the Constitution, the freedom of thought encompasses:

- 1) freedom of the press and all other media of communication,
- 2) freedom of speech and public expression,
- 3) free establishment of all institutions of public communication.

Censorship, i.e. the official supervision by government bodies over the means of public communication, which allows publication of only that which is approved by the authorities, is forbidden. However, more dangerous still is informal auto-censorship where journalists, aware of the risks attached to the freedom of the press, are careful not to offend the government, its officials, and the owners of the media employing them or simply other people in power.⁸⁶

Nevertheless, freedom of expression also has its limits. As we have already warned, any call for or incitement to war or use of violence, or to national, racial or religious hatred or any form of intolerance, is prohibited and punishable by law. The interests of others that might be infringed by the criminal offences of insult or defamation (Art. 39 Const.) also limit this freedom. The right to correction is guaranteed to anyone whose constitutional rights have been violated by public information. This right also includes the liability of news reporters or institutions whose information has violated the right of an individual.⁸⁷

The new paragraph 4 of Article 38 of the Constitution guarantees the right of free access to information, popularly called "the public's right to know", otherwise already introduced in the Croatian legal system by the Freedom of Access to Information Act of 2005. This paragraph reads:

"The right of access to information in the possession of public authorities shall be guaranteed. Restrictions on the right of access to information must be proportional to the nature of the necessity for restriction in each individual case, as well as be necessary in a free and democratic society, and shall be prescribed by law."

6.4.6. *Freedom of conscience and religion*

Freedom of religion is closely connected with the freedom of thought. The Constitution guarantees the freedom of conscience and religion, as well as the freedom of publicly manifesting faith and other beliefs. All religious communities are equal before the law and are separated from the State.

Religious communities are free, in conformity with law, to perform public religious services, to open schools, educational and other institutions, social and charitable establishments and to manage them, and in their activity enjoy the protection and assistance of the State. It is important to uphold the principle of separation of religious communities from the State, thus ensuring the equality of citizens belonging to different faiths and religious communities.

86. During the accession negotiations, The European Commission was especially dissatisfied with inadequate protection of journalists in Croatia, manifested in unresolved murders, beatings and also numerous dismissals during 2008 and 2009. "The EU warns Croatia to pay special attention to investigations and judicial proceedings regarding the intimidation of journalists and violence against them, especially regarding those journalists dealing with cases of corruption or organized crime". Cf. "Secret document on Chapters 23 contains 21 requirements for Accession to the EU", Seebiz 20.07.2010.

87. Branko Smerdel, *Ustavna osnova prava javnosti na informaciju (The Constitutional Basis for the Right of the Public to Information)*, Informator No. 5527, pp. 1-2 (2007).

6.5. *Political rights and freedoms*

6.5.1. *Freedom of association and its restrictions*

Citizens are guaranteed the right to freely associate for the purposes of the protection of their interests or the promotion of their social, economic, political, national, cultural and other convictions and objectives. Citizens may freely form trade unions and other associations, join them or leave them in conformity with law (Art. 43 Const.).

Freedom of association is the basis of a political system founded on the recognition of political pluralism which in itself is an expression of the pluralism of interests of individual societal groups. Freedom of citizens to form political parties is a precondition for the effective functioning of the democratic political system based on the competition between political parties and expressed in free elections.

Freedom of association in trade unions and various citizens' associations should establish a balance and partnership between different interest groups in society. It is the basis of a civil society that is different from the state and therefore serves as a foundation of civil liberties. However, the Constitution also establishes the criteria for the statutory limitation of this freedom, i.e.: "This right shall be restricted by the prohibition of any violent threat to the democratic constitutional order and independence, unity and territorial integrity of the Republic of Croatia."

6.5.2. *Equality of access to public employment*

Everyone in the Republic of Croatia has the right to take part in the conduct of public affairs and to have access to public employment under equal conditions (Art. 44 Const.). Naturally, the focus of this guarantee is on the equal conditions that must be ensured for all. This provision should be considered in conjunction with other constitutional provisions guaranteeing the equality of citizens under the law and prohibiting discrimination on any grounds, including nationality, gender or social origin. Implicitly, it prohibits any form of *nepotism* (privileges on the basis of kinship) and *clientelism* (privileged treatment resulting from an exchange of favours, or based on connections and acquaintance) regarding access to public employment.

Most importantly, this Article prohibits the application of any criteria of political suitability regarding the access to public employment, which would give an advantage to the citizens who support a particular political party etc.

To apply the criteria of political suitability is to undermine the foundations of a multiparty political system and to open up the possibility of the re-establishment of a single party's or the ruling coalition's control over the entire state apparatus. This is called the "spoils system", named after a concept of the early era of American democracy, according to which the party victorious at the elections is entitled to fill the public bodies with their supporters, i.e. their trusted persons, since the state is considered as "spoils" won in the elections. In contrast to this system is the criterion of competence and merit, assuring the equality of citizens *in their access to public functions and public employment*, depending on their demonstrated suitability i.e. competence, for a particular service.

The spoils system produces detrimental effects on the stability and efficiency of the state administration, and it must be recommended that it be determined by a statute providing which positions within the state administration are "political", so that the individuals occupying them may expect to be replaced in the case of a change in government, and which are to be exclusively professional, so that their occupants remain in office even under a new government.

6.5.3. *The right of public assembly and peaceful protests*

Everyone is guaranteed the right to public assembly and peaceful protest in conformity with law (Art. 42 Const.). It is one of the basic human rights and a condition for the functioning of a democratic political system. Individuals have the right to assemble and express their opinions by manifestations, gatherings, public assemblies and debates, as well as in demonstrations. This is under the condition that such an assembly be held without violence or call to violence, and with respect for the general safety of people and assets.

Safeguarding public peace and order, i.e. assuring tolerance between politically opposed citizens, is the most sensitive of the issues concerning the right to public assembly and peaceful protest, especially considering the possibility of issuing a prior order prohibiting a public assembly in order to prevent possible disorders.

Pursuant to the requirement that public assembly be peaceful and safe, the law requires that the police receive prior notice of the intention to hold a public assembly and provides that, in the absence of an intervention by the police authorities, the assembly may be held. However, if the police should prohibit an assembly, a regular legal remedy, i.e. the protection of the courts, and in the final instance, access to the Constitutional Court, must be accessible. A licence regime, whereby every public assembly would have to receive the prior approval of the police, would be contrary to the spirit of a democratic society, as well as to the constitutional guarantees of political rights and freedoms.

Pursuant to international standards, the Croatian legislature only allows for such “restrictions of the right of public assembly which are necessary in a democratic society for the protection of rights and freedoms of others, public order, public morality and health”. Naturally, the measures taken in such cases have to be proportional to the nature of the danger.

6.5.4. *The right to vote*

Article 45 of the Constitution has been amended and modified, and it reads as follows:

“All Croatian citizens who have reached the age of eighteen shall have universal and equal right to vote in elections for the Croatian Parliament, for the President of the Republic of Croatia or for the European Parliament, as well as at state referenda, in accordance with law.

In elections for the Croatian Parliament, voters not residing in the Republic of Croatia have the right to elect three representatives, in accordance with law. In elections for the Croatian Parliament, for the President of the Republic and for the European Parliament, as well as at state referenda, the right to vote is exercised in direct elections by secret ballot, whereby voters not residing in the Republic of Croatia exercise their right to vote at polling stations in the seats of the diplomatic-consular missions of the Republic of Croatia in the countries where they reside.

In elections for the Croatian Parliament, for the President of the Republic and for the European Parliament, as well as at state referenda, the Republic of Croatia must ensure the right to vote to its citizens residing in the Republic of Croatia who are abroad at the time of the elections and may vote in the seats of diplomatic-consular missions of the Republic of Croatia in the respective countries, or in any other way specified by law.”

6.5.5. *The right to submit petitions*

The right of an individual or a group of citizens to submit a petition consists in the right to address governmental bodies. Everyone – citizen or foreigner, natural or legal person –

has the right to submit petitions and complaints and to make proposals to government and other public bodies, and to receive answers thereto (Art. 46 Const.).

6.5.6. *The duty to defend the Republic of Croatia*

A state must have its armed forces, but they must be under the control of the civilian government. According to Article 81 of the Constitution, the Croatian Parliament “shall adopt the Strategy of national security and the Strategy of defence of the Republic of Croatia” and “realize civilian control over the Armed Forces and security services of the Republic of Croatia”. The Parliament is the body that “decides on war and peace”. “Military service and the defence of the Republic of Croatia shall be the duty of every capable citizen.”

Military service in the Armed Forces in time of peace is therefore mandatory for Croatian men and is regulated by law (Art. 47(1) Const.).

However, in line with the orientation of the most progressive European constitutional systems, the Constitution allows for a “conscientious objection”. Citizens who are unwilling to participate in the performance of military service in the armed forces, i.e. to take up arms, due to their religious or moral convictions, have the right to claim this objection. Such persons are then obliged to perform other duties in the armed forces, or to serve in another way specified by law (Art. 47(2) Const.).

7. ECONOMIC RIGHTS

7.1. *The right of ownership*

Paragraph 1 of Article 48 of the Constitution of the Republic of Croatia provides that “The right of ownership shall be guaranteed.” This provision is a return to the roots of civil constitutionality, since it removes all restrictions on the right of ownership introduced by the Communist regime. It requires the enactment of legislation enabling the transformation of “communal” ownership, making up a huge part of overall rights of ownership, into a variety of proprietary relationships. The problem of “wild privatization” which has too often led to the usurpation of public property during times of war and emergency, now represents a chronic problem for Croatian society, for which the constitutional revision offered new solutions (see Art. 31(4) Const.).

In paragraph 2 of Article 48, the Constitution provides that: “Ownership implies obligations. Property owners and beneficiaries shall contribute to the general welfare”. Therefore, ownership is not merely the right to dispose of personal property and to exclude all others from such a disposition but it also implies a duty to contribute to the general welfare, in correspondence with the scope of the assets. This provision may also serve as the constitutional ground for the statutory regulation of property taxation.

Foreign persons may acquire property under special conditions determined by law. A large number of states have enacted separate legislation regarding the right of foreigners to acquire property, limiting their rights to acquire real-estate in their territories; however, in the Member states of the European Union such limitations are in principle not possible, although new members may be granted additional time in order to adapt to this new regime.

7.2. *Entrepreneurship and the market*

Article 49 of the Constitution states:

“Entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia.

The State shall ensure all entrepreneurs an equal legal status on the market. The abuse of the monopoly position as defined by law shall be forbidden.

The State shall stimulate economic progress and social welfare and shall care for the economic development of all its regions.

The rights acquired through the investment of capital shall not be diminished by law, or by any other legal act.

Foreign investors shall be guaranteed free transfer and repatriation of profits and the capital invested.”

The entrepreneurial freedom and market-based regulation of economic relations are the backbone of all successful economies. This constitutional provision originally enabled a return to the market economy and free entrepreneurship as the historically confirmed methods of organizing successful economies. It specifies the State’s role in the maintenance and development of the market economy.

In such a system, the role of the State remains in a significantly altered form. First, the State must ensure that certain rules of conduct are upheld in market competition between economic subjects, so that all entrepreneurs may enjoy an equal legal position in the market; second, it must use its regulatory activity to prevent the abuse of a monopoly situation, which in its essence represents an elimination of market relations and the preclusion of market competition, even if its existence may be necessary in certain industries determined by statute (for example with railroads, electrical energy, water management etc.).

However, the market itself is only an imperfect mechanism of social regulation. Therefore, modern states use various instruments of economic policy in order to intervene in market relations, for example *taxes, local income taxes, customs, subventions, state investments*. In the circumstances of hardship and severe economic crisis, such a role of the State is especially emphasized. This is why the Constitution obliges the Republic of Croatia to stimulate economic progress and social welfare, and to care for the economic development of all its regions.

The rights acquired through the investment of capital may not be diminished by law. This provision prohibits all state interventions in the right of ownership, so that attempts at the new nationalization of property cannot be carried out in a constitutional way.

A foreign investor must be guaranteed the free transfer and repatriation of profits and capital invested. This basic provision is directed at stimulating foreign investments in the economy of the Republic of Croatia. Its starting point is the fact that foreign, just like domestic, investors make investment decisions by following the market logic of capital, i.e. by searching for profit. A state which intervened in acquired profits, or prevented their transfer and repatriation, or interfered with the capital invested, would eliminate itself from the international market, and thereby from international economic relations.

7.3. *Expropriation*

Interventions consisting in the restriction or even seizure of property may still be necessary for the public interest. For example, when building on a large scale, e.g. roads or power plants, requisition of some parts of real estate may be necessary to enable the

construction of objects; however, the owner must be compensated for the market value of the property. This institution is called expropriation, and is familiar to all modern legal systems. Article 50(1) of the Constitution determines: "Property may, in the interest of the Republic of Croatia, be restricted or expropriated by law upon the payment of compensation equal to its market value."

Entrepreneurial freedom is also not absolutely unlimited: "The exercise of entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature, the environment and public health" (Art. 50(2) Const.). This enables the regulation of market relations, so that any entrepreneurship harmful to the above-mentioned interests may be prevented.

7.4. *The tax system*

On taxation, the Constitution provides as follows: "Everyone shall participate in the defrayment of public expenses in accordance with their economic capability. The system of taxation shall be based on the principles of equality and equity." (Art. 51 Const.).

7.5. *Goods of interest to the Republic*

Pursuant to a constitutional provision, the following goods are under the special protection of the Republic of Croatia: the sea, seashore and islands, waters, airspace, mineral wealth and other natural resources. A law may also place other goods under the special protection of the Republic of Croatia: the land, forests, fauna and flora, other parts of nature, real estate and goods of special cultural, historic, economic or ecological significance. A law must regulate the way in which goods of interest to the Republic of Croatia may be used and exploited by their owners and by other holders of rights to them, and the compensation for restrictions imposed on them (Art. 52 Const.).

8. SOCIAL RIGHTS

8.1. *Right to work and freedom of work*

By accepting the standards of human rights guarantees established in international documents, the Constitution has also included the following provision in its Article 55:

"Everyone shall have the right to work and enjoy freedom of work.

Everyone shall be free to choose their vocation and occupation, and all jobs and duties shall be accessible to everyone under the same conditions."

However, the right to work does not imply a guarantee of employment. In market conditions, its foremost significance is the right and freedom to conduct market and other economic activities in full freedom and under equal conditions with all other citizens. Therefore, paragraph 2 of that Article should be interpreted as a clarification and elaboration of paragraph 1. By doing this, the focus of responsibility for society's economic progress is placed on the individual citizen, while the State retains its role of ensuring respect for the rules of free market competition, and using its economic policy measures only for limited interventions. However, even such interventions must certainly include

the obligation to create and expand the possibilities and conditions in which citizens may realize their right to work.

Forced and compulsory labour are forbidden (Art. 23 Const.).

8.2. *Fair remuneration and working conditions*

Article 56 of the Constitution specifies:

“Employees shall have the right to a fair remuneration, such as to ensure a free and decent standard of living for them and their families”.

This right, if understood literally, is contrary to the principles of a market economy where remuneration depends on market success, and therefore on the individual’s status in the employment market. Therefore, it is to be interpreted as a guarantee of the right to remuneration under equal conditions with other workers, without discrimination on any grounds, and as the employer’s obligation to fairly remunerate workers for the work done while taking into account their and their families’, living conditions. It enables the workers to claim their rights to remuneration, either individually or organized in trade unions and other organizations.

In the following paragraphs, this constitutional Article guarantees certain concrete rights and establishes a constitutional basis for their statutory regulation: maximum working hours must be regulated by law. Every employee must have the right to a paid weekly rest and annual holidays and these rights may not be renounced.

Paragraph 4 stipulates: “In conformity with law, employees may participate in the decision-making process in their enterprise”. This presents a possibility to introduce by statute the participation of employees in decision-making in their enterprises (workers’ participation), in one of the forms used by modern European states. This is a process of co-decision and employees’ oversight over the enterprise’s business, and not of self-governance based on the abandoned concept of communal property. The formulation “may participate” also means that the Constitution does not mandate an introduction of a general system equal for all workers, but enables a differentiation between the various categories of enterprises, which is especially necessary considering the forms of enterprise ownership.

8.3. *Social security*

The right of employees and members of their families to social security and social insurance must be regulated by law and collective agreements.

“The rights in connection with childbirth, maternity and childcare shall be regulated by law” (Art. 57 Const.).

A collective agreement is an employment law institution, created and developed in market economies. A collective agreement is concluded between a trade union, as the representative of employees in a particular industry, and an employers’ organization. It regulates particular rights of employees as well as their working conditions. The State uses laws to regulate the general conditions and minimal rights guaranteed to workers, while leaving the specifics of the employment relationship to the interested categories of citizens – to workers and their employers.

The State assumes complete responsibility for the social security of certain parts of the population, and regulates the relations in these areas by law. Therefore, Article 58 of the Constitution provides that:

“The State shall ensure the right to assistance for weak, helpless and other citizens unable to meet their basic needs owing to unemployment or incapacity to work.

The State shall devote special care to the protection of persons with disabilities and their integration in social life.

The State shall devote special care to the protection of Croatian defenders, Croatian war veterans with disabilities, widows, parents and children of Croatian defenders killed in the war.

Receiving humanitarian aid from abroad may not be forbidden.”

These provisions stem from Article 1 and its definition of the Republic of Croatia as a social state. The guarantee of the right to health care in Article 59 of the Constitution is also a part of this concept.

8.4. *Trade unions and the right to strike*

In order to protect their economic and social interests, all employees have the right to form trade unions and are free to join and leave them. Trade unions may form their federations and join international trade union organizations. The formation of trade unions in the armed forces and the police may be restricted by law (Art. 60 Const.).

Article 61 guarantees the right to strike as an unlimited workers’ right, except in the armed forces, the police, public administration and some public services where it may be restricted by law.

8.5. *Constitutional grounds for the protection of families*

Articles 62-65 of the Constitution provide the constitutional grounds for the statutory regulation of legal relations in a family. The family enjoys the special protection of the State. Marriage and legal relations in marriage, common-law marriage, and the family are regulated by law.

The Republic of Croatia must protect maternity, children, and young people, and must create social, cultural, educational, material and other conditions promoting the right to a decent life.

Parents have the duty to bring up, support, and educate their children, and have the right and freedom to decide independently on their upbringing. Parents must be responsible for ensuring their children’s right to the full and harmonious development of their personalities. Children are bound to take care of parents who are aged and in need of assistance.

The Republic of Croatia must take special care of parentless minors or parentally neglected children. Physically and mentally disabled and socially neglected children have the right to special care, education and welfare.

Everyone has the duty to protect children and persons in need of help. Young people, mothers, and persons with disabilities are entitled to special protection at work. Children may not be employed under legal age, nor may they be forced or allowed to do work which is harmful to their health or morality.

9. CULTURAL RIGHTS

9.1. *The right to education*

In the Republic of Croatia, education is accessible to everyone under the same conditions and in accordance with abilities. Compulsory education is free in accordance with law. The provision on “compulsory” education is new, enabling the statutory prolongation of minimal education beyond the eight years of “elementary” schooling. The demand to guarantee free education “until a vocation is obtained” has not been accepted, notwithstanding the many years of the “land of knowledge” propaganda.

9.2. *The autonomy of the University*

Article 68 of the Constitution guarantees the autonomy of the universities, and stipulates that universities are independent in deciding on their organization and work in conformity with law. The autonomy universities have in deciding on their organization and work is a condition of the successful functioning of the highest educational institutions, since they offer an education based on scientific research. The restrictions on the independence of universities result in significant damage to science, and therefore to academic education in general. The inviolability of university premises is one of the oldest traditional freedoms guaranteed to universities. It implies the following:

- (1) The premises of a university are inviolable.
- (2) The authorized governmental bodies may act on the university premises only with the approval of its Head, pursuant to a decision of a competent court or provided there is an imminent danger to the lives and health of people or to assets.

In connection with this, Article 69 of the Constitution provides that:

“Freedom of scientific, cultural and artistic creativity shall be guaranteed.

The State shall encourage and assist the development of science, culture and arts.

The State shall protect scientific, cultural and artistic goods as its national spiritual values.

The protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative activities shall be guaranteed.

The State shall promote and assist in the care for physical education and sports.”

10. ECOLOGICAL RIGHTS

Article 70 of the Constitution stipulates:

“Everyone shall have the right to a healthy life.

The State shall ensure conditions for a healthy environment.

Everyone shall be bound, within their powers and activities, to pay special attention to the protection of public health, nature and environment”.

This is a guarantee of a very broadly formulated positive right, establishing a range of duties for the State and its citizens. As is the case with other similar rights, the question is in what aspects, and how, can its legal protection be assured? The legislature is thereby given instructions as well as the legal basis for a strict regulation of this extremely important issue, focusing on the responsibility towards future generations.

II. INTERNATIONAL GUARANTEES OF HUMAN RIGHTS AND DOMESTIC LAW

Here we must emphasize that the list of constitutional guarantees of human rights and freedoms, contained in the Constitution, has not been envisioned as final and closed. It is supplemented by the provisions of international agreements to which the Republic of Croatia has acceded.

Pursuant to Article 141 of the Constitution: "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above legislation in terms of legal effects".

Therefore, upon the accession to a particular international instrument regulating human rights and freedoms, the provisions of it enter into force in the Republic of Croatia, even when the statutory regulation of certain issues differs from its provisions.

In this way, the Republic of Croatia has, as a sovereign state, accepted the principle that the realization of human rights, and especially of national rights and of the protection of minorities, is no longer just an internal matter for the Republic of Croatia, but also a shared concern of the international community. It is not a limitation of sovereignty. It is the acceptance of the rules which apply in the modern World of today, among whose equal members is also the Republic of Croatia.

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