

SUNICOP



Working paper

SUNICOP 8/2012

Presented in Osijek, Croatia

**Contemporary legal challenges:
EU – Hungary – Croatia**

16-18 February 2012

This working paper is the draft version of the paper presented in the Conference.

Suggested reference of the working paper:

Sanja Barić: Principles of Good governance and the Republic of Croatia. Working paper, SUNICOP 8/2012, <http://sunicop.eunicop.eu/publications.html>

PRINCIPLES OF GOOD GOVERNANCE AND THE REPUBLIC OF CROATIA

I. Introduction

The purpose of every legal order is to organize a stabile and peaceful coexistence of human beings in any given socio-political community by honoring certain fundamental material and formal values. Legal orders of European countries have as their focal value rights of persons (individuals), while the main idea and goal of such orders became creation of adequate social environment for a complete and free development of every single person. As the Declaration of Independence put it, it is exactly the “life, liberty and pursuit of happiness” that defines core values of contemporary Western European/Anglo-American type of civilization. Every organized political community has a sort of governance, i.e., a set of rules, processes and behaviors that (in)formally organize and shape the way in which powers are exercised. The system of governance that seems to promote to the best the above described values is often labeled as “liberal democracy”, “constitutional democracy” or simply “good (decent) governance”. The issue here is how to define such a democracy and, even more important, which are its main features that can serve as relevant measures of its “adequacy” or “decency”.

Although the terms freedom and democracy are often used interchangeably, the two are not synonymous. Democracy can be seen as a set of practices and principles that institutionalize and ultimately protect freedom. Even if a consensus on precise definitions has proved elusive, most observers today would agree that, at a minimum, the fundamental features of a democracy include government based on majority rule and the consent of the governed, the existence of free and fair elections, the protection of minority rights and respect for basic human rights. Democracy presupposes equality before the law, due process and political pluralism. A question arises whether reference to these basic features is sufficient for a satisfactory concept of democracy.

There is no consensus on how to measure democracy, definitions of democracy are contested and there is an ongoing lively debate on the subject. At present, the best-known measure is produced by the US-based Freedom House organization.² It measures a narrow concept of democracy, the so called “electoral democracy”. However, in order to evaluate the state of affairs in our country, the Republic of Croatia, we have chosen to present and use a more inclusive and, to our mind, more informative standards. The measure used is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. The five categories are inter-related and form a coherent conceptual whole.

In that view this paper presents the newest, 2010 and 2011 Economist Intelligence Unit’s Index of Democracy results. It then continues by tackling the EU standards on good governance which are of even higher importance for our discussion. Furthermore, we focus on those standards that have, under previous criteria, been demonstrated to be significantly

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² The average of indexes on a 1 to 7 scale of two factors: a) political freedom (based on 10 indicators) and b) civil liberties (based on 15 indicators). The index is available for all countries since the early 1970s. For details see <http://www.freedomhouse.org/>.

hampered in Croatia, i.e., principles of transparency and popular participation, coupled with general underdevelopment of political culture.

II. Measuring democracy worldwide: the 2010 EIUID and 2011 reports

The global record in democratization since the start of its so-called third wave in 1974, and acceleration after the fall of the Berlin Wall in 1989, has been impressive. According to the Economist Intelligence Unit's Index of Democracy (hereafter: the EIUID),³ one-half of the world's population now lives in a democracy of some sort. The EIUID classifies countries in four types of regimes: full democracies (26 countries); flawed democracies (53 countries); hybrid regimes (33 countries); and authoritarian regimes (55 countries).⁴ However, there has been a decline in democracy across the world since 2008. The decades-long global trend in democratization had previously come to a halt in what Diamond⁵ called a "democratic recession". Now democracy seems to be in retreat.

³ The third edition of the Economist Intelligence Unit's democracy index reflects the situation as of November 2010. The first edition, published in The Economist's *The World in 2007*, measured the state of democracy in September 2006 and the second edition covered the situation towards the end of 2008. The index provides a snapshot of the state of democracy worldwide for 165 independent states and two territories, which covers almost the entire population of the world and the vast majority of the world's independent states (micro states are excluded). In addition to experts' assessments the EIUID uses, where available, public opinion surveys mainly the World Values Survey. Other sources that can be leveraged include the Eurobarometer surveys, Gallup polls, Asian Barometer, Latin American Barometer, Afrobarometer and national surveys. Indicators based on the surveys predominate heavily in the political participation and political culture categories, and a few are used in the civil liberties and functioning of government categories. Economist Intelligence Unit, *Democracy index 2010: Democracy in retreat - A report*, (The Economist Intelligence Unit Ltd. 2010), http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf

⁴ **Full democracies:** Countries in which not only basic political freedoms and civil liberties are respected, but these will also tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracy. **Flawed democracies:** These countries also have free and fair elections and even if there are problems (such as infringements on media freedom), basic civil liberties will be respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation. **Hybrid regimes:** Elections have substantial irregularities that often prevent them from being both free and fair. Government pressure on opposition parties and candidates may be common. Serious weaknesses are more prevalent than in flawed democracies--in political culture, functioning of government and political participation. Corruption tends to be widespread and the rule of law is weak. Civil society is weak. Typically there is harassment of and pressure on journalists, and the judiciary is not independent. **Authoritarian regimes:** In these states political pluralism is absent or heavily circumscribed. Many countries in this category are outright dictatorships. Some formal institutions of democracy may exist, but these have little substance. Elections, if they do occur, are not free and fair. There is disregard for abuses and infringements of civil liberties. Media are typically state-owned or controlled by groups connected to the ruling regime. There is repression of criticism of the government and pervasive censorship. There is no independent judiciary. The EIUID report, op. cit., n. 3, pp. 32 - 33.

⁵ L. Diamond, "The Democratic Rollback - The Resurgence of the Predatory State", *Foreign Affairs* (March-April 2008) p. 2: „(...) But celebrations of democracy's triumph are premature. In a few short years, the democratic wave has been slowed by a powerful authoritarian undertow, and the world has slipped into a democratic recession. Democracy has recently been overthrown or gradually stifled in a number of key states, including Nigeria, Russia, Thailand, Venezuela, and, most recently, Bangladesh and the Philippines. In December 2007, electoral fraud in Kenya delivered another abrupt and violent setback. At the same time, most newcomers to the democratic club (and some long-standing members) have performed poorly. Even in many of the countries seen as success stories, such as Chile, Ghana, Poland, and South Africa, there are serious problems of governance and deep pockets of disaffection. In South Asia, where democracy once predominated, India is now surrounded by politically unstable, undemocratic states. And aspirations for democratic progress have been thwarted everywhere in the Arab world (except Morocco), whether by terrorism and political and religious

According to the EIUID the dominant pattern in all regions over the past two years has been backsliding on previously attained progress in democratization. The global financial crisis that started in 2008 accentuated some existing negative trends in political development. For example, France, Italy, Greece and Slovenia dropped from the category of full democracies to flawed democracies.⁶ Reversals in or erosion of democracy and rising disenchantment with the results of some political liberalizations appear to have a variety of causes.⁷ A key factor in non-European and non-American countries is the delegitimation of much of the democracy-promotion agenda, which has been associated with military intervention and unpopular wars in Afghanistan and Iraq. A combination of double standards in foreign policy (autocrats can be good friends as well as foes) and growing infringements of civil liberties has led to charges of hypocrisy against Western states. In the US, there has been an erosion of civil liberties related to the fight against terrorism. Problems in the functioning of government have also become more prominent. In the UK, there has also been some erosion of civil liberties, but the main feature is an exceptionally low level of political participation across all dimensions (voting turnout, membership of political parties and willingness to engage in and attitudes to political activity). Thus, the US and UK are near the bottom of the “full democracy” category in the EIUID.

Eastern Europe was the region with the largest decline in its average score between 2008 and 2010, although in only one country was the difference large enough to precipitate a change in the regime type categorization (Slovenia).⁸ There are a number of possible reasons for this fragility. Most important is that although democratic forms are in place in the region, much of the substance of democracy, including a political culture based on trust, is absent. This is manifested in low levels of political participation beyond voting (and even turnout at elections is low in many countries), and very low levels of public confidence in institutions.⁹ The

violence (as in Iraq), externally manipulated societal divisions (as in Lebanon), or authoritarian regimes themselves (as in Egypt, Jordan, and some of the Persian Gulf monarchies, such as Bahrain).”

⁶ See detailed analysis of these four European countries in The EIUID report, op. cit., n. 3, pp. 17-18.

⁷ „The pace of democratization was bound to slow after the “easy cases”, i.e., eager-to-liberalize east-central Europe after the fall of the Berlin Wall and African regimes susceptible to outside pressure for political change. “Hard cases” such as China and Middle East autocracies were always going to be a more difficult proposition. Autocrats have also learned how better to protect themselves; many of them preside over energy-rich states and have been strengthened by sustained high oil prices.” The EIUID report, op. cit., n. 3, p. 3. However, the direction of causality between democracy and income is also debatable. The standard modernization hypothesis that economic development leads to, and/or is a necessary pre-condition for democracy, is no longer universally accepted. Instead, it has been argued that the primary direction of causation runs from democracy to income. The EIUID report, op. cit., n. 3, p. 17.

⁸ Out of the 28 countries in Eastern Europe, 19 recorded a decline in their democracy scores between 2008 and 2010. The deterioration has affected all sub-regions. The most significant decline in scores took place in Ukraine, where some of the democratic gains stemming from the “Orange Revolution” of several years ago are under threat, and in the Balkan countries. Slovenia was previously one of only two countries in Eastern Europe that was considered a full democracy (in addition to the Czech Republic). In 2008 Slovenia ranked 30th out of 167 countries, putting it at the bottom of the list of full democracies. Slovenia’s relatively strong position owes much to its high scores in the electoral process and civil liberties categories. In these areas it compares well with some long-established democracies. However, political participation in Slovenia has been declining and there is widespread popular apathy and disaffection with the political elite. In recent years, there has been an extraordinary deterioration in a range of attitudes associated with democracy. In particular, surveys show a sharp decline in public confidence and trust in political institutions (political parties, government and parliament). Scarcely more than one-third of Slovenes are satisfied with the way democracy functions in their country — a significantly lower proportion than in any west European state.

⁹ Levels of public trust are exceptionally low in the Eastern Europe -12 (the 10 new EU member states and EU candidate countries Croatia and Macedonia). Less than 10% of people in this sub-region trust political parties and less than one fifth trust their governments and their parliaments. The proportion that is satisfied with the way democracy functions in their countries fell from 40% in 2007 to only 33% in 2009. See further details in the EIUID report, op. cit., n. 3, pp. 19-20.

newest EIUID report 2011¹⁰ reflects the situation as of the beginning of December 2011 demonstrating further decline in democracy throughout the world and in particular in Eastern Europe.¹¹

Taking a closer look on our two neighboring countries, Hungary and Croatia, both are placed in a “flawed democracies” category. In 2010 Hungary was placed on 43rd and Croatia on 53rd place among 165 surveyed countries,¹² while in 2011 Hungary dropped to 49th place.¹³

Table 1. Excerpt from the EIUID report 2010 in relation to Hungary and Croatia
(Scale: from 0 to 10, 10 representing the best possible result)

Country	Electoral process and pluralism	Civil liberties	Functioning of government	Political participation	Political culture	Average score
Hungary	9.58	8.53	6.07	5.00	6.88	7.21
Croatia	9.17	8.24	6.07	5.56	5.00	6.81

Source: Economist Intelligence Unit, 2011.

Table 2. Excerpt from the EIUID report 2011 in relation to Hungary and Croatia
(Scale: from 0 to 10, 10 representing the best possible result)

Country	Electoral process and pluralism	Civil liberties	Functioning of government	Political participation	Political culture	Average score
Hungary	9.58	8.24	6.07	4.44	6.88	7.04
Croatia	9.17	8.24	5.71	5.56	5.00	6.73

Source: Economist Intelligence Unit, 2012.

As it has already been pointed out in introduction, the EIUID report is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Both countries reflect unsatisfactory political participation (especially declining in Hungary, as well as the level of civil liberties),

¹⁰ Economist Intelligence Unit, *Democracy index 2011: Democracy under stress* (The Economist Intelligence Unit Ltd. 2011), <http://tinyurl.com/bu8dijnw> (30. 1. 2012.).

¹¹ „Key developments in 2011 include:

- Popular confidence in political institutions continues to decline in many countries.
- Mounting social unrest could pose a threat to democracy in some countries.
- US democracy has been adversely affected by a deepening of the polarisation of the political scene and political brinkmanship and paralysis.
- The US and the UK remain at the bottom end of the full democracy category. There has been a rise in protest movement. Problems in the functioning of government are more prominent.
- Although extremist political forces in Europe have not yet profited from economic dislocation as might have been feared, populism and anti-immigrant sentiment are on the rise.
- Eastern Europe experienced another decline in democracy in 2011. In 12 countries of the region the democracy score declined in 2011.
- Rampant crime in some countries - in particular, violence and drug-trafficking - continues to have a negative impact on democracy in Latin America.” The EIUID 2011, op. cit., n. 10, pp. 1-2.

¹² The EIUID report, op. cit., n. 3, pp. 3-8.

¹³ The EIUID 2011, op. cit., n. 10, pp. 3-8.

somewhat weak functioning of government, while Croatia proved to be significantly low in political culture. “Political culture” feature includes citizens’ views on value and content of democracy, including state – church relationship, while “political participation” measures, i. a., literacy, interest for politics, openness of political process to civil society organizations and readiness of citizens to engage in political process outside the mere voting procedure.

Some negative trends have recently become worse. Hungary is the prime example among the EU’s new member states in the region. In the April 2010 election, an extreme nationalist party, *Jobbik*, gathered almost as many votes as the former ruling Socialists. Since winning a two-thirds parliamentary majority in the election, the centre-right *Fidesz* party has systematically been taking over the country’s previously independent institutions (Hungarian national bank, State auditors’ office, constitutional court, etc.), consequently enacting new Constitution (introduced by private bill procedure) and broadly criticized legislation (e.g., media law).¹⁴

Prior to more detailed analysis of governance in Croatia we now proceed to presentation of the EU definition of “good (decent) government” and its elements.

III. Principles of good governance: the EU perspective

The European Commission has adopted in 2001 the *White Paper on European Governance* (hereafter: the White Paper)¹⁵ with the original aim to commence a wide discussion on reforming EU governance “addressing the question of how the EU uses the powers given by its citizens.” It was about “how things could and should be done.”¹⁶ Doubtlessly, the White Paper looks well beyond Europe and contributes to the debate on global governance.¹⁷

Five principles underpin good governance and the changes proposed in this *White Paper*: openness, participation, accountability, effectiveness and coherence. Each principle is important for establishing more democratic governance. They are basic principles of democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local. It is made clear that the functioning of these principles is underlined by the further two quintessential EU standards: proportionality and subsidiarity¹⁸ on which we do not need to elaborate in this paper. Thus, it

¹⁴ Details on situation in Hungary are elaborated in several papers within this edition.

¹⁵ European Commission, *European Governance: A White paper*, COM (2001) 428 final, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf.

¹⁶ A White paper, op. cit., n. 15, p. 8.: “The goal is to open up policy-making to make it more inclusive and accountable. A better use of powers should connect the EU more closely to its citizens and lead to more effective policies.” Moreover, the White Paper sets down markers for the future of Europe and identifies where new ways of working will be held back without corresponding changes to the EU Treaties. See p. 3: „The Commission cannot make these changes on its own, nor should this White Paper be seen as a magic cure for everything. Introducing change requires effort from all the other Institutions, central government, regions, cities, and civil society in the current and future Member States. The White Paper is primarily addressed to them. It proposes a series of initial actions.”

¹⁷ The Commission underlines even the EU responsibilities on international level: „Global governance. The Union should seek to apply the principles of good governance to its global responsibilities. It should aim to boost the effectiveness and enforcement powers of international institutions.” A White paper, op. cit., n. 15, p. 5. See also pp. 26-27.

¹⁸ A White paper, op. cit., n. 15, p. 10-11.: „From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically (a) if public action is really necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.“

can fairly be said that these explicitly named seven principles of good governance derive from a common European legal tradition.

What we wish to draw readers' attention to is the importance attributed to civil society organizations in the modern explication of the term "governance". Civil society¹⁹ plays an important role in giving voice to the concerns of citizens and in delivering services that meet people's needs.²⁰ Of course, the Commission emphasizes that civil society itself must follow the principles of good governance, which include accountability and openness. The Union has encouraged the development of civil society in the applicant countries, as part of their preparation for membership. Non-governmental organizations play an important role at global level in development policy. They often act as an early warning system for the direction of political debate.²¹ In the ambit of Croatian path toward the EU, civil society organizations are mentioned in the Accession Treaty in the context of monitoring procedures, most notably regarding judiciary reform, human rights protection and fight against corruption.²²

In Commission's view organized civil society presents „a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest. ... Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role.“²³ It continues to emphasize the need for a reinforced culture of consultation and dialogue, but also explains the way it should be done: „Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of *ad hoc* consultations.“ Not wishing to analyze to what extent has the EU managed to establish a more inclusive and participatory model of governance (and there is some serious criticism in that

¹⁹ Civil society includes the following: trade unions and employers' organizations ("social partners"); nongovernmental organizations; professional associations; charities; grass-roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. For a more precise definition of organized civil society, see the Opinion of the Economic and Social Committee on "The role and contribution of civil society organizations in the building of Europe", OJ C329, 17.11.99 p. 30.

²⁰ The organizations which make up civil society mobilize people and support, for instance, those suffering from exclusion or discrimination.

²¹ Trade unions and employers' organizations have a particular role and influence. The EC Treaty requires the Commission to consult management and labor in preparing proposals, in particular in the social policy field. Under certain conditions, they can reach binding agreements that are subsequently turned into Community law (within the social dialogue). The Economic and Social Committee plays a role in developing a new relationship of mutual responsibility between the Institutions and civil society, in line with the article 300 (2) of the TFEU: "The Economic and Social Committee shall consist of representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio- economic, civic, professional and cultural areas." OJ 2010/C 83/47.

²² *The Accession Treaty: Treaty Concerning the Accession of Croatia*, art. 36 (1.1), last sentence: „(...)Throughout the monitoring process, the Commission shall also draw on input from Member States and take into consideration input from international and civil society organizations as appropriate. (emphasis S.B.)“ <http://tinyurl.com/7bnmc2n>.

²³ A White paper, op. cit., n. 15, p. 15.

respect),²⁴ it is doubtlessly important to point out a necessity of developing such practices on a national level.

IV. The Republic of Croatia: analysis of “weak points”

Keeping in mind all of the above, we continue by examining governance in the Republic of Croatia focusing on two criteria: openness and participation. Clearly, a state's legitimacy today depends on involvement and participation. It would seem that both the EIUID reports and *the White paper* draw our attention to these features as particularly interesting²⁵ and still partly problematic in our county. The best understanding of these two criteria emerges from analysis of a normative procedure in the Republic of Croatia.

1. Openness/transparency

Under the United Nations Public Administration Network standards,²⁶ transparency of a public administration, especially of executive and legislature (government and parliament) is reflected in:

- application of laws on access to information,
- transparency of normative procedures,
- broadcasting of parliamentary sessions,
- publishing of auditing reports on parliament's and government's activities.

On the other hand, transparency is endangered by:

- discretionary decisions,
- untimely publishing of decisions rendered by public bodies,
- insufficient resources for publishing of information,
- non-accessibility of information to persons with disability,
- lack of political culture of civil servants in institutions that are providing public services to citizens.

Let us analyze the performance of the Government of the Republic of Croatia in light of the above said.

In the Republic of Croatia functioning of the Government is regulated in details by the *Law on Government*,²⁷ however there is no special mentioning of a principle of transparency, nor

²⁴ C. Shore, “‘European Governance’ or Governmentality? The European Commission and the Future of Democratic Government”, 17 *European Law Journal* (2011) pp. 287–303.

²⁵ There are other issues emphasized by the White Paper that are also crucially hampering Croatian legal order (e.g., what the level of quality, effectiveness and simplicity of regulatory acts really is and how it in turn adversely affects coherence of the normative system). See our earlier papers on these aspects, e.g. S. Barić and D. Švabić, "Organski zakoni i antinomije u hrvatskom pravnom poretku - primjer zabrane diskriminacije po osnovi spola i spolne orijentacije" [Organic laws and antinomies in Croatian legal order – case of antidiscrimination laws related to gender and sexual orientation], *Ustavni vidici* (4), *Informator* no. 5797 of 26. 9. 2009 and S. Barić, "Sistematizacija pravnih propisa u usporednoj i hrvatskoj normativnoj praksi" [Systematization of legal regulations in comparative and Croatian legal practice], *Informator* no. 5939. of 5. 2. 2011.

²⁶ See further details on www.unpan.org.

²⁷ *Zakon o Vladi* [Law on Government], NN no. 101/98, 15/00, 117/01, 199/03 and 77/09.

there are any particular norms on that issue, apart from art. 31. para. 1 that explicitly demands publishing of regulations and rules of procedure in the Official Gazette of the Republic of Croatia (*Narodne novine*). Nevertheless, it is interesting and - from the standpoint of the principle of transparency - even disputable, to note a further article that enables publishing of decisions, conclusions and other individual acts, meaning they *may* be published, but *do not have to be* published, depending on a discretionary decision of the Government.²⁸ It is impossible to examine how this provision is being implemented, i.e., whether unpublished individual acts are only those falling under a certain category of secrecy provided by the law.

*Rules of Procedure of the Government of Croatia*²⁹ in articles 48, 49 and 50 provide for a public operation of the Government. These articles regulate public sessions of the Government enabling presence of the media representative to whom order of the day must be delivered prior to the sessions together with relevant working materials. The Government may during a public session decide to exclude media representatives from discussion on certain issues, while all the materials declared to be secret according to a special law (official, military or state secret) are not made available to the public.

Public Relations Office of the Government informs the public on the issues discussed and decisions taken during governmental sessions closed for public within one hour of the closure of a session, unless the Government decides not to inform the public on a certain matter.³⁰

A very well known and respected NGO in Croatia, *GONG*, has been systematically following and analyzing the functioning of the Croatian Government since 2008. It particularly examines open, closed and telephone sessions as well as distribution of budgetary reserves, and informs public on its findings by publishing yearly reports.³¹ In that view it examines the Government's web page, press releases, news, laws, and it several times requested specific decisions rendered by the Government, and also several clarifications of information published on the Government's official web page.

In 2008, Croatian government held 52 public sessions (54,17% of the total number of sessions), in 2009 51 public sessions (47,67%) and in 2010 55 public sessions (50,93%). There is no track of sessions held over the phone (they cannot be found on the web page of the Government) and legal regulations on the Government do not mention this kind of discussions. Namely, *Rules of Procedure* do not establish a possibility to hold the whole session over the phone (or other means of telecommunication) but regulate solely a case when prime minister or the cabinet may decide to hold a session even without physical presence of the majority, while absent member may cast their vote over the phone, fax or by e-mails. Furthermore, consultations may be held over the phone, but not full sessions. Nevertheless, the Government held in 2008 10, in 2009 9 and in 2010 4 full sessions over the phone. Similar practice has not been recorded in other countries. Pointless to emphasize, the Government should call and hold its sessions according to the prescribed procedure, while clearly

²⁸ This provision is from original *Law on Government* from 1998 and it is still in force.

²⁹ *Poslovnik Vlade Republike Hrvatske* [Rules of Procedure of the Government of the Republic of Croatia], NN no. 138/99, 16/00, 36/00, 105/00, 107/00, 24/01, 154/04, 22/05, 68/07, 10/08, 102/09, 107/09, 140/09 and 144/09 (consolidated version).

³⁰ It should be kept in mind that art. 49. para. 2. of the *Rules of Procedure* enables the Public Relations Office of the Government to revoke accreditation of a media representative who inaccurately and falsely informs the public on materials or discussions during sessions. An extensive interpretation could enable revoking of accreditation based on the evaluation of a particular writing. In that respect, it seems that the Government has an indirect influence on the freedom of press. However, this provision has not been misused.

³¹ *GONG, Izvještaj GONG-a o transparentnosti rada Vlade RH za pojedine godine* [Report on transparency of the Government of Croatia for a particular year – prepared by GONG], the last published is the [Report for 2010.] *Izvještaj za 2010. godinu*. See: <http://www.gong.hr/news.aspx?newsID=3627&pageID=124>.

identified need for urgent deliberation should doubtlessly be regulated by adequate provisions of the law and/or *Rules of Procedure*.

Full orders of the day and documents to be discussed during sessions, as well as reports on discussion and decisions taken, are still not being published several days in advance unabling public information on the matters that will be discussed and preventing timely reaction of interested parties.³² Moreover, since order of the day of closed session is unavailable to public, which in itself presents a denial of basic information on its functioning, it is impossible to evaluate press release of closed sessions and reach a founded conclusion on the following: does the Government discuss and/or decide in its closed sessions solely on the matters reported in its press releases or does it tackle other issues, too? Although the information released to public related to closed sessions has become more inclusive after the first *GONG Report* of 2008, it is still unclear what is the justification for closed session related to issues such as negotiation standards in the pre-EU accession period.³³

GONG has further analyzed reports on budgetary reserve usage in the period between 2007 and 2010.³⁴ The fact that the amount of 180.490.489,52 kn was transferred exclusively in sessions closed for public seems quite disturbing.³⁵ Transfers continued to be performed in 2010 in a non-transparent manner, contrary to both good democratic practice and declared promotion of austerity measures, and, needless to say, without clear criteria of distribution.³⁶ For the purpose of this paper it is unnecessary to engage in detail analysis of these transfers, however, it needs to be emphasized that transfers have been made without known criteria to regional and local self-government units (i.e., counties, cities and communes) mostly for “financing of unexpected needs and other necessary tasks in their jurisdiction.” It is also indicative, and worth comparing, the structure of political parties in power on local and state level. Vast majority of the units receiving transfers had the same ruling political party.³⁷

³² During 2010 Croatian government has not published on its web page, under heading “Sessions and decisions of the Government of the Republic of Croatia”, orders of the day and material from 12 of the total of 108 sessions. From *GONG Report 2010*.

³³ Press release related to closes sessions of the Government can be found on the following web page: http://www.vlada.hr/hr/naslovnica/priopcenja_za_javnost.

During 2010 the following issues have been discussed in closed sessions: appointment and removal from public offices, issuing state guarantees to a number of banks in favor of state owned company HAC (*Croatian highways*) for highway construction, sponsorship of the 12. International manifestation of olive and oil producers “*Noćnjak 2010*”, budgetary transfer in the amount of 1.000.000,00 kn to the Croatian Red Cross for victims of the earthquake in Haiti and in the amount of 200.000,00kn to the city of Vukovar for organizing a Memorial day to victims in Vukovar, and finally a number of sponsorships (World Congress of Humanists United “Children of the world with wounded childhood”, historical boat race between two islands Komiža and Palagruža, professional conference “Professional rehabilitation of persons with disabilities – a door to world of labor” and celebration of the 85th anniversary of the Croatian hunting alliance).

³⁴ See the Croatian Parliament's web page: *Hrvatski sabor*, <http://www.sabor.hr/Default.aspx?art=33527> and <http://www.sabor.hr/Default.aspx?art=39519>

³⁵ See the Croatian Parliament's web page: *Hrvatski sabor, Izvješće o korištenju sredstava proračunske zalihe državnog proračuna za siječanj – lipanj 2008. godine* [Report on the use of budgetary reserve, for January – June 2008], <http://www.sabor.hr/fgs.axd?id=12378>.

³⁶ Namely, the web page of the Government does not list all the decisions on budgetary reserve transfers, only those made for humanitarian purposes, rewarding sportsmen and similar. Data on all the other transfers may only be found in general reports on State Budget.

³⁷ Thus in 2007 133 communes, cities and counties received budgetary reserve transfers and almost all of them were ruled by parties forming coalition in power on the state level. The Government also made transfers in 2010, a year after local elections. Out of 24 units that received transfers only two were not ruled by a leading party on the state level and its coalition partners: Pula (ruled by left-wing opposition) and Punitovci (ruled by independent politicians). Moreover, it can only be inferred that all the presented transfers where decided on sessions closed

Within its project research “Implementation of the *Law on Right of Access to Information*”, GONG requested a copy of all the orders of the day of closed governmental session during the mandate of the previous government (2007 - 2011). It received the answer that all of these relate to matters designated with different level of secrecy under the *Rules of Procedure*. However, art. 50 of the *Rules* provides that *materials* shall not be made public if they are marked as official, military or state secret under the appropriate law. The issue here is whether the term “materials” includes order of the day itself. In our opinion, this provision of the *Rules* should be interpreted narrowly as to apply only to the *content* of materials or *content* of discussions, not to the very information that the Government deliberated on a *certain issue*.

In mid-January 2012, the Croatian Journalists’ Association (hereafter: CJA) sent a public appeal to the new Croatian Government demanding that it abandons bad and unacceptable practice of holding sessions closed for public, practice that was established in 2004 by the ex prime minister Ivo Sanader and his Spokesman’s office led by Ratko Maček. The CJA warns that in that way journalist do not have the possibility to ask questions after regular governmental sessions. Moreover, the CJA demanded publication of the orders of the day and decisions reached in closed sessions, according to the standards of good democratic practice.³⁸

Standards of good practice would direct the Government to explicitly set criteria for closing its sessions to the public coupled with publication of the order of the day and reasons for which the session is closed to the public before the session, and finally publication of more inclusive press releases after the sessions containing necessary information on topics discussed and decisions reached. In reality, as we demonstrated, the operation of the Croatian Government is open and transparent up to the level it chooses itself. Closed sessions should be held exceptionally and certainly should not be a standard of operation which, as it would seem, the Croatian Government has adopted to a significant degree.

2. Participation

Citizens and civil society organizations (hereafter: CSOs) should be able to co-operate with state bodies (executive and legislative) through active participation, and not only periodically and passively in the period of national parliamentary elections. Participation is deemed to present a higher level of two-way process: citizens are actively involved in public policies creation (e.g., membership in law-drafting working groups), while a government remains responsible for the final decision on policy choices and their efficient implementation. A decision-making political process consists of six different steps: creation of agenda (a list of goals to be attained), policy drafting, decision-making, implementation, monitoring procedure and policy reformulation.

for public, since there is no mentioning of any such transfer neither in orders of the day, nor in press releases of the Government.

³⁸ „A grotesque practice was introduced: the Government before cameras demonstrates only those activities that it chooses to show without giving possibility to journalists to question members of Government on decisions taken or future plans; this practice was continued by the Jadranka Kosor’s Government. We expect from the new prime minister, Zoran Milanović, and his government to return to the practice existing during the prime minister Ivica Račan, when journalists had opportunity to pose questions to, and demand clarifications from, prime minister and other ministers both on decision and issues discussed during the session and on other important issues pertaining to their department after each and every regular session. (...) We wish for the Public Relations Office of the Government, which during last eight years ignored most of the journalist’s questions or responded by hollow phrases, to become a true information providing service on the Government’s actions,” states the open letter sent by the CJA to the Croatian Government. See New Portal Net.Hr, www.net.hr, 13th January 2012.

The need to establish rules of good practice in relation to public consultation was clearly identified on regional/European level. It is interesting to analyze efforts undertaken by the Council of Europe (hereafter: CE) in that ambit. In June 2007 on the CE *Forum for the Future of Democracy* held in Stockholm, the International Non-Governmental Organizations Conference (hereafter: INGO Conference; it is one of the CE institutions) has been called to prepare the *Code of Good Practice for Civil Participation in the Decision-Making Process*.³⁹ The main purpose of this document is meant to be a major contribution for creation of enabling environment for an active civil society. It provided for a set of general principles and directing rules on the all-European level, related to CSO participation in the political decision-making process. The *Code* is applicable on both national and local levels of power in the CE member states and Belorussia.

DRAFT CODE HAD BEEN PREPARED IN SUMMER OF 2008 FOLLOWED BY FOUR REGIONAL CONSULTATIONS WITH THE NGOS.⁴⁰ INGO CONFERENCE ADOPTED THE CODE ON OCTOBER 1ST, 2009. THE MOST IMPORTANT PARTS OF THE CODE DESCRIBE DECISION-MAKING PROCESS AND DIFFERENT LEVELS OF PARTICIPATION FOLLOWED BY A SUMMARY CROSS-TABLE COMPARING AND MATCHING TWO VARIABLES, I.E., STEPS OF DECISION-MAKING AND LEVEL OF PARTICIPATION RECOMMENDED. LET US NOW ANALYZE THE SITUATION IN THE REPUBLIC OF CROATIA.

The *National strategy for the creation of an enabling environment for civil society development 2006-2011*,⁴¹ adopted on July 12, 2006 by the Croatian Government, states that the Republic of Croatia develops a democratic society relying, among other principles, on the principle of participatory democracy in which citizens are participating in the whole of social and political processes. It then emphasizes that developed civil society requires efficient procedures of public consultation and participation (including citizens as individuals, their initiatives and CSOs) in defining, creation, implementation and monitoring of public policies. *Rules of Procedure of the Government of the Republic of Croatia* contain in article 27 paragraph 5 an especially important provision to that effect: “Ministries and state administration bodies shall, as a rule, in preparing draft laws and governmental opinions consult professional and other associations in whose competence fall the issues of these drafts by sending them draft proposals and collecting their viewpoints.” This provision presents a basis for CSOs involvement in the law-making process. However, until the end of 2011 it has too often been neglected by the competent state administration bodies.

Provisions of the *Rules of Procedure of the Croatian Parliament* regulate details of the legislative process and models of public participation. The main criticism is twofold, it relates to: a) the possibility of arbitrary decisions on excluding public from parliamentary sessions and b) election of external members of working bodies, who are supposed to present additional human resources in view of improving legislative quality. The criticism of the latter is especially significant in relation to parliamentary committees, their imprecise and diversified regulation (e.g., no explanation or justification why some of them have external members and others do not, and no clear procedure of their nomination and election).⁴²

³⁹ See details on the following web page: http://www.coe.int/t/ngo/code_good_prac_en.asp.

⁴⁰ These were held in Stockholm (October 2008), Penza, Russian Federation (December 2008), Istanbul (January 2009) and Madrid (April 2009).

⁴¹ Available on: http://www.uzuvrh.hr/userfiles/file/Nacionalna_Strategija_ENG.pdf.

⁴² See also A. Vela, *Sudjelovanje organizacija civilnog društva u zakonodavnom procesu u Republici Hrvatskoj – Analiza stanja, problemi i preporuke* [Participation of the CSOs in legislative process in the Republic of Croatia – Analysis of present state, problems and recommendations] (Zagreb, Ured za udruge Vlade Republike Hrvatske) 2008, p. 25.

Furthermore, under art. 20 para. 2 of the *Law on the right of access to information*,⁴³ „public administration bodies competent for preparation of draft laws and by-laws, shall publish drafts of these acts and enable addressees of the right [of access to information] a reasonable period to give their opinions thereon.” The same recommendation is repeated in the Croatian *Code on practice of consultation with the interested public in procedures of adopting laws, other regulations and acts*, adopted by the Croatian Government on November 21st, 2009.⁴⁴ In the ambit of its mission, GONG has also analyzed the implementation of the aforementioned article of the *Law on the right of access to information*.⁴⁵ After a draft law was prepared and sent to the Croatian Government in order to be discussed on its session, GONG has examined when, in what manner and content, and even whether at all, the draft would be published on the web-page of the relevant department. Results demonstrated that only eight draft laws were actually published, which makes only 8,5% of the total number of draft laws that were tracked.⁴⁶ Furthermore, during the research period only 3 calls for public consultations were launched, while a vast number of ministerial web pages proved to be extremely non-functional and/or complicated for public usage and search for relevant documents and other information. This research was the first one to prove that implementation of the 2010 *Law on the right of access to information* is still to a large extent problematic, pregnant with significant shortcomings.

Citizens' and CSOs' participation in policy making process of Croatian governments, as well as their involvement in its implementation, is still on quite a low level. During 2010 and 2011 public at large in Croatia witnessed newest examples of unreasonable normative products enacted on different levels, normative acts that were adopted and published without sufficient elaboration, CSO participation and deliberation. Some of them were consequently rewritten, reversed or even quashed due to their evident low quality. In this instance we wish to specifically emphasize two cases: a) urgent adoption of the *Constitutional law on revisions of the Constitutional law on the rights of national minorities*⁴⁷ and subsequent adoption of the new electoral law,⁴⁸ and b) proposals of three laws forming the so called “Scientific and higher education legislative package”. As it is well known, the former example resulted in the Croatian Constitutional Court’s intervention, which declared a significant number of provisions unconstitutional and removed them from our legal system. Solutions adopted and afterwards quashed, were results of unacceptable and shortsighted political trade with the view of securing sufficient number of votes for the forthcoming constitutional revision.⁴⁹ The second case, involving three law proposals, demonstrated in even more obvious manner the extent to which public administration ignores rules of good normative practice and applies the *Code* in the very awkward way. Undoubtedly, this case marked the depths of misunderstanding in the actual implementation of the principle of participation. Namely, during 2010 the first drafts of three different pieces of legislation - directed toward a general

⁴³ NN no. 172/03, 144/10, 37/11 (Decision of the Constitutional Court of the Republic of Croatia) and 77/11.

⁴⁴ NN no. 140/09. Detailed analysis of the *Code* see in D. Romić, „Kodeks savjetovanja sa zainteresiranom javnošću“ [Code of practice of consultation with the interested public] *Informator* no. 5844 of 10.3.2010., p. 14

⁴⁵ Implementation analysis of the *Law on right of access to information* in the period between November 2009 and September 2010 is available on the following web-page: <http://www.gong.hr/page.aspx?PageID=69>.

⁴⁶ Out of these 8 draft laws, 5 were published on the web page of the Ministry of Tourism, 2 of the Ministry of Justice and 1 Ministry of Culture.

⁴⁷ NN no. 80/10.

⁴⁸ *Law on revisions of the Law on election of representatives in the Croatian Parliament*, NN no. 145/10.

⁴⁹ The Constitutional Court’s decision also suffered a significant amount of criticism as to the timing since the Court eventually decided in the last year before the parliamentary elections although it did have enough time to decide well before. The main issue here was the right to vote of members of national minorities and whether they should have preferential treatment (two votes). The matter remains open for the new Government and requires cautious deliberation in many regards.

reform of the system of scientific research and higher education in Croatia – were prepared by expert groups in which participated only few members of academic community, “sample” being non-representative and certainly not legitimate. Drafts were kept in secrecy and finally the competent Ministry called for a public consultation that lasted only 19 days. Due to numerous comments new groups were appointed, this time including members of academic community proposed by the individual universities. However, regardless of permanent and well founded criticism of the original drafts exposed and argued by the overwhelming part of the Croatian academics, the Ministry decided to send the proposals to the parliament before the ending of summer parliamentary term of 2011 turning a deaf ear to most of the criticism, even risking the beginning of academic year 2011/2012. As it is well known, the bills were stopped in the parliamentary procedure (since they were not given “green light” by the competent parliamentary committee), however, the fact remains that the Croatian Government was not willing to hear what the interested public had to say about the subject-matter.

Experience of the CSOs points out that there are further unsettling facts in relation to the principle of participation in the Republic of Croatia. The main problems they face while attempting to actively participate in the legislative process are the following:

- inexistence of complete and timely announcement on time-table of future activities of law-drafting and other regulations-drafting public bodies, which in turn reduces the possibility for adequate preparation,
- non publication of draft law afore-head but only after a draft has been adopted into official proposal on the session of the Government,
- complete lack or very rare meaningful public consultation procedure, without clear criteria for its organization,
- limited access to information and existence of only minimal legal framework for cooperation formed primarily of declarative non-binding provisions/statements,
- adoption of a vast number of laws in shortened, emergent legislative procedure which often allows for a non-quality legislation,
- general reduction of the actual role and influence of the parliament, and
- unreliability and lack of information on the actual legislative text to be adopted and published in the Official Gazette “*Narodne novine*”.

Here we need to mention the new *Law on impact estimation of legal regulations*,⁵⁰ that entered into force on the January 1st, 2012. It creates obligation to adopt a yearly Plan of normative activity introducing new legal obligation of public consultation for a number of state bodies when preparing draft laws, or preparing estimation of their impacts on economy, state finances, social status of citizens and environment. While the general goal of the impact estimation system for laws is stated to be “consideration of possible non-normative solutions and creation of a number of possible normative solution when a regulation is being prepared, all in view of optimizing the final result with the highest possible level of economic efficiency and purposefulness”, among special goals there is a following passage: “encouraging co-operation and inter-departmental co-ordination of law drafting bodies for the purpose of simpler and faster integration of common goals, *fostering transparency of normative initiative phase of process by including public and interested public in the procedure of estimating the need for normative intervention, contributing to development of consultation with public and*

⁵⁰ NN no. 90/11.

interested public in proposal and drafting procedures (emphasis S.B.), and contributing to more efficient use of state budget” (art. 6).

As it has been shown, in case of principle of participation we may detect the already well-known problem of the Croatian legal system: relatively good, or at least, acceptable regulation, but significantly problematic practice and doubtlessly insufficient political culture of both bearers of political power and civil servants in public administration bodies. These will eventually shape the positive potential of the new *Law on impact estimation*.

V. Concluding remarks

Democracy is more than the sum of its institutions. A democratic political culture is also crucial for the legitimacy, smooth functioning and ultimately the sustainability of democracy. The electoral process periodically divides the population into winners and losers. A successful democratic political culture implies that the losing parties and their supporters accept the judgment of the voters, and allow for the peaceful transfer of power.

Participation is a further necessary component, as apathy and abstention are enemies of democracy. A culture of passivity and apathy, an obedient and docile citizenry, are not consistent with democracy. In a democracy, government is only one element in a social fabric of many and varied institutions, political organizations, and associations. Citizens cannot be required to take part in the political process, and they are free to express their dissatisfaction by not participating. However, a healthy democracy requires the active, freely chosen participation of citizens in public life. Democracies flourish when citizens are willing to participate in public debate, elect representatives and join political parties. Without this broad, sustaining participation, democracy begins to wither and become the preserve of small, select groups. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels.

Accountable governments are inclined to further their transparency in order to improve citizen's confidence in their work, confidence in operation of all public bodies and in relation to public expenditures, having prevention of corruption as a final goal. Without trust in public bodies there would be no citizen's and public participation in public decision-making, which in turn reduces the quality of both rules enacted, and their implementation. Only a well informed public may act as an efficient democratic mechanism of control over power, while the task of institutions in modern democracies is to educate public and to operate in as transparent as possible manner in order to enable information on public authorities. Knowing procedures, and good regulation of procedures themselves, are the main preconditions for adequate participation of the civil society organization in legislative and other relevant normative processes. In that respect, we believe a creation of a general regulation on normative procedures to be of utter importance. However, it can never be emphasized enough that the final result is mainly dependant on the level of legal and political culture that is to be demonstrated primarily by the elected officials and civil servants.

Nevertheless, and without subjectivity, it is fair to conclude this paper in a slightly optimistic tone. Namely, the new center-left coalition, that won Croatian parliamentary elections in December 2011, seems to demonstrate more sensitivity and readiness for improvement in this field. Commentators claim that electoral defeat of a previously ruling center-right coalition

led by the HDZ represents „a breakdown of a particular model of governance“.⁵¹ Namely, transparency, participation and accountability have been named as the core values of new government’s political program, at least on a declaratory level.⁵² It is still far too early to give a significant evaluation of its course of action.

⁵¹ See M. Kasapović, „Drugi kritični izbori u Hrvatskoj – slom jednog modela vladanja“ [Second critical elections in Croatia – breakdown of a particular model of governance], *Političke analize* 8 (December 2011), pp. 3-9.

⁵² The new prime minister Zoran Milanović, in his speech on the night of elections (December 4th, 2011): „(...) never again shall we have a non-transparent governance“, deputy prime minister Milanka Opačić on public TV channel 1 (*HTVI*), interviewed the day after elections (December 5th, 2011): „(...) We need clear, understandable laws, efficient and created in cooperation with civil society“, and again, this same day, prime minister Milanović in further interviews always pointed out the need for „transparency and participation“.