CONSTITUTIONAL INTERPRETATIONS OF DIRECT DEMOCRACY IN CROATIA

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1. INTRODUCTION

As it is the case with legal systems in general, institutions of constitutional law also develop as the time goes by. It is only through their application in real life circumstances that they begin to reveal their true meaning and impact on political, social, economic or cultural environment. At the same time, scientific evaluation of any institution could become comprehensive only when it might focus on a sample that is appropriate for research. And this requires not only some relevant period of time which could be examined, but also some actual examples possible to be put in various comparisons.

It seems that developments in the field of direct democracy, represented here by its most distinctive institution of referendum, for the last twenty-five years of Croatian experiences represent such an appropriate sample. During that period, not only that referendum has been more or less successfully used on a number of occasions, but it also, as a result of its interpretation, produced significant case-law of the Croatian Constitutional Court.[1] It is therefore my aim to give an insight into that specific development from a critical point of view. My principal objective thereof in this article is connected to constitutional interpretations given by the mentioned Court in several notable cases. As I will show, those cases show that a significant portion of the constitutional regulation of referendum in Croatia so far has proved as problematic in practice and, consequently, has required some further interpretations. It is thus exactly through relevant case-law that this regulation has been upgraded with additional substance.[2] General outcomes of the process are at least twofold.

On one hand, decisions delivered by the Court surely deserve attention as notable attempts to overcome the problem of legal gaps embedded in the legal regulation of referendum itself. That way, they could be seen as indispensable responses to exigencies of time by which the Court acted where the law-making power remained silent. Addressing that

[1] For a more general context of judicial role in reviewing tools of direct democracy, see: Matt Qvortrup, *Direct Democracy – A comparative Study of the Theory and Practice of Government by the People*, Manchester University Press, Manchester (2013), pp. 130-140.

[2] In this context that I point to other relevant concepts and theoretical evaluations dealing with, for instance, the political impact of constitutional judiciary, its tendencies to fill existing legal gaps in regulation so that constitutional systems may meet requirements of the moment, and the general concept of the "Living Constitution". For this, see: Branko Smerdel, *The Constitutional Order of the European Croatia (Ustavno uređenje europske Hrvatske)*, Narodne novine, Zagreb (2013), pp. 91-92 and 450-453. In the same context, as to the concept of the factual changing of a constitution through constitutional case-law, see: Svetomir Skaric and Gordana Siljanovska-Davkova (Светомир Шкариќ, Гордана Силјановска-Давкова), *Constitutional Law* (*Уставно право*), Култура, Скопје (2009), pp. 215-219.

particular legal problem, however, in the subsequent text I will devote much of my attention to methods of interpretation which the Court has used in construing its arguments. To that end, I will especially try to point to intriguing divergences which have resulted from the Court's mixed, and in my opinion not completely consequential, use of different methods of interpretation in referendum cases.

On the other hand, I would claim that the decisions of the Court in those cases also reflect some deeper controversies arising out from relationships between various constitutional actors, most respectively between the Constitutional Court itself and the Croatian Parliament. Even though controversies as such between the two in general are by no means something unexpected, taking into account the general idea that the former institution is conceived as having a role of scrutinizing the activities of the latter, I stress that my research sample contains something quite exceptional. It is in this overall context that I must immediately point that the evolving practice of referendums in Croatia resulted in, not arguably, the most far-reaching constitutional "product" the Constitutional Court has ever made: the conclusion that it had a power to review constitutionality of constitutional amendments. Whether this special aspect of the Court's stance came only as a collateral consequence of its attempts to correct legal gaps or to prevent procedural abuses of the Parliament faced with direct-democracy pressure, admittedly, could be arguable. However, I believe that the main reason for introduction of the theory of "unconstitutional constitutional amendments" in Croatia came as a result of the Court's desire, or perhaps even necessity, to construe its own theory of "self-defense". In the following text I will try to explain this in-depth.

In the next chapter I briefly give an overview of legal regulation of referendum in Croatia. Its main purpose is quite introductory. This is followed by a detailed description of actual referendum cases which are separately examined in several sub-chapters. In this core part of my article I address the fundamental issues I have already pointed to. And before going to conclusions, I add some general observations on the constitutional position and practical impact of referendums in Croatia.

2. NORMATIVE FRAMEWORK

Fundamental rules on direct democratic instruments in Croatia are contained in the Constitution.[3] The Law on Referendum[4] is the basic piece of legislation thereof, but further regulation is contained in other sources as well: The Constitutional Law on the Constitutional Court of the Republic of Croatia, The Law on Local and Regional Self-Government and The Law on the Registry of Voters.

In the past 25 years, there were some significant changes in the legal regulation of referendum. On a constitutional level, these changes include the introduction of institutions of

[3] For a general overview of the Croatian regulation of referendum, see: Branko Smerdel, *The Constitutional Order of the European Croatia (Ustavno uređenje europske Hrvatske)* (op. cit.), pp. 381-394; Robert Podolnjak, *Constitutional Regulation and Application of Referendum and Popular Initiative in Croatia* (*Ustavnopravno uređenje i primjena referenduma i građanske inicijative u Hrvatskoj*), in: *Building Democratic Constitutional Institutions in the Republic of Croatia in Developmental Perspective* (*Izgradnja demokratskih ustavnopravnih institucija Republike Hrvatske u razvojnoj perspektivi*), (Branko Smerdel and Đorđe Gardašević – eds.), Croatian Association for Constitutional Law (Hrvatska udruga za ustavno pravo), Zagreb (2011), pp. 205-243.

[4] The Law on Referendum and other Means of Direct Participation in Administration of State Powers and Local and Regional Self-Government (Zakon o referendumu i drugim oblicima osobnog sudjelovanja u obavljanju državne vlasti i lokalne i područne (regionalne) samouprave), Official Gazette 33/1996, 92/01, 44/06, 58/06, 69/07, 38/09 (in the following text: The Law on Referendum). The official website of the Croatian Official Gazette (Narodne novine) is available at: https://www.nn.hr/, January 18th 2016.

popular referendum initiative and local referendum in 2000 and of an advisory referendum in 2010. Also, in 2010 the approval quorum for referendum was lowered to absolute majority of those voters who have actually voted and a strictly constitutional right to vote on a referendum in general was more precisely regulated (explicit qualification of a right as being direct, secret, universal and equal). On the other hand, a modern Croatian Law on Referendum was enacted only in 1996. Prior to that date, an old law from 1979 was in force.[5]

Thus, on the national level, there exist various particular instruments. The only case of a mandatory referendum is envisaged as a part of a procedure of entering into alliances with other states (or of dissolution thereof).[6] As for facultative referendums, there are no explicit prohibitions on possible issues to be put on vote. In fact, the range of questions thereof is quite wide and relates to change of the Constitution, to enactment of a law, to resolving an issue deemed important for the independence, unity or existence of the Republic of Croatia or to "other issue" within the Parliament's competence.[7][8] Popular referendum initiatives are required to be supported by signatures of ten percent of the voters in the Republic of Croatia and they can relate to all the issues mentioned. After the 2010 constitutional amendments, there is no specific turnout quorum for referendum, while approval quorum requires an absolute majority of those voters who actually have voted. The exceptions to this rule relate to local referendum, where a turnout quorum is fifty percent of all the voters having residence on a territory of a local or regional unit, and referendum on a recall of a local or regional executive head where turnout quorum is one third of locally or regionally residing voters with approval quorum of absolute majority thereof.

Referendum in the Croatian legal system is generally an institution having binding legal effect and the Law on Referendum to that end provides for two important safeguards. First, that a new referendum on the same question(s) for which referendum has already been held may not be called before the expiration of the six months period and, second, that a decision made on a referendum cannot be altered by an act or a decision by a state or local (regional) body, including thus the Parliament, within a period of one year following the referendum.[9] However, this rule does not apply to two specific situations: if a decision is made on a referendum which makes part of the procedure for entering into associations with other states (or for disassociation from them) and if a referendum itself has been initiated by a

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[5] Prior to 1989/1990, on a legislative level, two laws on referendum were enacted in Croatia (these laws, however, also covered other instruments of direct democracy. Therefore, the official title of the 1967 law was The Law on Referendum and Other Means of Direct Governing while the 1979 law was titled the Law on Referendum and Other Means of Personal Decision-Making). The version from 1967 distinguished between four institutions: referendum, meetings of voters, meetings of working people and meetings of service users. This Law already recognized mandatory and optional referendums, the binding legal effect of the referendum, prohibition on the new call of a referendum on the same issue within a certain time limit (one year), prohibition on the enactment of an act contrary to the decision voted on a referendum within a certain time limit (one year), institutions of the popular referendum initiative and popular referendum proposal and secrecy of voting. The rule for the approval quorum requested majority of all the registered voters, although the Law provided for possible exceptions (e.g. two-thirds majority for certain cases). Legal control over referendum was given to referendum commissions and regular courts, it included both complaints in the former and lawsuits in the latter case, and could result in the annulment of particular procedural steps or the annulment of the referendum as a whole (i.e. a new voting could be ordered for a particular voting place or for all of them). See: The 1967 Law, Official Gazette 17/1967, 47/1978. The Law from 1979 distinguished between referendum, meetings of workers, meetings of working people and citizens and a rather special institution of giving a personal written statement. However, in terms of design of legal institutions already mentioned, the Law was similar to the previous one. See: the 1979 Law, Official Gazette 15/1979, 13/1987.

[6] The Constitution of the Republic of Croatia (Ustav Republike Hrvatske), Official Gazette 85/10, 5/14, Article 142.

[7] The Constitution of the Republic of Croatia, Article 87.

[8] However, for the most recent interpretations of the Croatian Constitutional Court in terms of some "implicit" prohibitions on the issues to be put on the referendum decision-making, see the following text.

[9] The Law on Referendum, Article 8/2 and 3.

popular referendum initiative.[10] Apart from a regular popular referendum initiative which requires signatures of ten percent of all the voters in the Republic, there are no "mixed" instruments available since referendum may be initiated by a parliamentary majority (provided that at least fifty percent of parliamentary representatives are present during a vote) and by the President of the Republic (with the counter signature of the Prime Minister).

Procedural steps for holding a referendum initiated through a popular referendum initiative are precisely regulated in the Law on Referendum. If voters assess that a referendum on a particular legally allowed issue is needed, they have to set up an organizational committee which makes formally decides to open a procedure for collection of signatures. The decision, which needs to be published in daily newspapers and other media, must contain information on the exact issue (question) to be submitted on referendum and on the time period during which signatures will be collected, provided that it does not exceed fifteen days. The organizational committee must, five days in advance, notify locally competent police authority of the exact places in which collection of signatures will be organized. The collection of signatures themselves may be organized in any for that purpose appropriate place, in accordance with decision of a local self-government representative body. Organizational committee has a duty to verify whether signatures have been collected according to law and if it establishes that indeed a required number of signatures has been collected, it formally addresses the President of the Parliament with a request for calling a referendum. Parliament then calls a referendum on a specific day by enacting a formal decision thereof which must be published in the Official Gazette and other media. After referendum has been held, the State Electoral Committee (national election authority) determines its result, submits a report thereof to the body which called referendum and publishes the decision adopted in the Official Gazette, daily newspapers and the Croatian Radio-Television.

According to the Constitutional Law on the Constitutional Court of the Republic of Croatia [11] and the Law on Referendum, powers of control over referendums are given to two institutions: the State Electoral Committee and the Constitutional Court.

Regular procedure includes a right of voters to complain on "irregularities" in relation to the exercise of a referendum. A formal complaint must be addressed to the State Electoral Committee within 48 hours from an alleged irregularity and the Committee must adopt its formal decision on the case within further 48 hours. The Committee has a power to dissolve lower ranking referendum committees and to, if irregularities resulted in impossibility to establish the real results of referendum, order a repeat of voting. The decision of the State Electoral Committee may be challenged before the Constitutional Court within 48 hours and the Court must enact its own decision in the case in the following 48 hours.[12] On the other hand, certain subjects may, during a referendum or within 30 days after its results have been published, make an appeal to the Constitutional Court with a claim that participants in a referendum acted contrary to the Constitution or law. In reference to this situation, the Constitutional Court may inform the public on the alleged breaches through media, warn the competent authorities of these breaches or even annul specific or all actions and acts undertaken during a referendum, if those had or could have an effect to the results of a referendum.[13]

However, by far the most significant power of control over referendum is contained in the Constitutional Court's power to verify the fulfillment of conditions prescribed for the popular referendum initiative case. When ten percent of voters address the Parliament

[10] The Law on Referendum, Article 8/4.

[11] The Constitutional Law on the Constitutional Court of the Republic of Croatia (Ustavni zakon o Ustavnom sudu Republike Hrvatske), Official Gazette 49/02 – consolidated version (in the following text: the Constitutional Law).

[12] The Law on Referendum, articles 49-56. The Constitutional Law, articles 87 and 91.

[13] The Constitutional Law, articles 88 and 89.

requesting a call of referendum, the Parliament "may" ask the Constitutional Court to verify whether ten percent of voters' signatures have really been collected, whether the referendum question really is related to one of the issues that might be decided about on referendum and, most significantly, whether the "contents of the referendum question" itself is in accordance with the Constitution.[14]

The Law on Referendum prescribes that a referendum must be held between twenty and forty days from the publication of the (parliamentary) decision on its call.[15] On the other hand, there is no exact legal rule on the time limit to be respected between the start of collection of signatures (in case of a popular referendum initiative) and the holding of a referendum itself. So far, the practice showed that this process may be slowed down due to the need to verify the authenticity of a large number of collected signatures. Also, so far, referendums have not been held simultaneously with parliamentary elections and other referendums.[16]

3. A VIEW TO EVOLVING PRACTICE OF REFERENDUMS IN CROATIA

In sum, the practice of referendums in Croatia in the past 25 years includes eleven cases which may be divided into two categories, depending on whether the referendums were actually held or not.[17] As for the failed attempts, the situation may be summarized as follows.

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[14] The Constitutional Law, Article 95.

[15] The Law on Referendum, Article 11.

[16] The Croatian Constitution establishes that the main form of exercise of local or regional self-government is to be achieved through local and regional representative bodies, but it also provides for several forms of direct democracy, including a referendum. See: The Croatian Constitution, Article 133. The relevant legislation (The Law on Referendum and the Law on Local and Regional Self-Government) furthermore prescribes that direct democratic instruments of local democracy are referendums, meetings and petitions. Local referendum may be used for deciding issues that are normally part of the self-governing competence of local or regional representative bodies. These bodies also have a power to call local referendum. Right to participate on a local referendum, an advisory referendum and on (local) meetings belongs to voters having residence on a territory of a particular local or regional unit for which a referendum is called. As already stressed, the turnout quorum on a local referendum is 50 percent of the voters residing in a local or regional self-government unit and a decision made on a referendum cannot be altered by other local bodies within a period of one year following the referendum. A new referendum on the same issue may be called only after the expiration of six months. Decision on a call for a referendum is to be published in local media. Institutions that participate in a local referendum procedure are local or regional referendum committees and boards. The above mentioned procedure of complaints on "irregularities" in relation to the exercise of a referendum is also used in a case of local referendums. Additionally, government may decide to call an advisory referendum on a local or regional level in relation to the issue of organization of local or regional units of self-government. In such a situation, the approval quorum is fifty percent of voters who have participated in a referendum. On the other hand, local meetings are foreseen as a possibility to acquire an opinion of local residents on issues and interests of local significance, but their outcomes are not obligatory for local representative bodies. And finally, petitions only require an answer to be given by state or local or regional bodies. In Croatia, there is no official data on the exact number of local referendums held so far, although it has been estimated that in practice these referendums are not invoked often. See: Ivan Koprić and Romea Manojlović, *Citizen Participation in Local Self-Government – New Croatian Legal Regulation and Some Comparative Experiences* (*Participacija građana u lokalnoj samoupravi – nova hrvatska pravna regulacija i neka komparativna iskustva*), Četvrti Skopsko-zagrebački pravni kolokvij, Zbornik radova, Skopje (2013), p. 26. However, two most notable examples in that sense may be mentioned. A series of simultaneous advisory local referendums held in 10 local and regional self-government units in 1996 was called by the Government and was related to territorial issues (i. e. the question was to which county would particular towns or municipalities territorially belong). According to my own calculation, based on the available and published data, average turnout on these local referendums was around 51.5%. See: See: http://www.izbori.hr/arhiva/pdf/1996/1996_Rezultati_Referendum.pdf, September 15th 2014. Another example, from April 2013, involved a referendum on an urban plan in the local unit in Dubrovnik. The initiative aimed at prohibiting building of various tourist and leisure resources in near surrounding of the city. However, the referendum failed since only 31.51 percent of the voters in that case actually voted.

[17] For general overview Croatian referendums in practice, see: Branko Smerdel, *The Constitutional Order of the European Croatia (Ustavno uređenje europske Hrvatske)*, (op. cit.), pp. 385-394; Branko Smerdel, *An Overview of the (Sad) History of Popular Initiative Referendum in Croatia* (*Pregled (tužne) povijesti referenduma*

Shortly after the 2000 constitutional amendments introduced the institution of popular initiative, the first such initiative was organized by former members of the military requiring a referendum on the enactment of the Constitutional Law regulating the status of members of the military before the courts in proceedings related to the alleged war crimes. The initiative collected more than 400.000 signatures but the referendum was not called. The explanation forwarded thereof was that, even though the Constitution provided for the popular referendum initiative, the new implementing law, which would in detail regulate the process itself, has not yet been enacted.

In 2008 and 2009 respectively two additional popular initiatives were launched by civic associations, requiring referendums on the joining of Croatia to the NATO alliance and on the regulation of state borders between Croatia and Slovenia. However, both initiatives failed due to the fact that neither collected a necessary number of supporting signatures.

In 2010 a number of trade unions collected 717.149 signatures (15.95 percent of the registered voters) in an initiative to call a referendum on preventing the governmental proposal for amending the Labor Act. Technically, the Government proposed amendments to the Act in an attempt to restrict workers' benefits and the referendum question called for preservation of the status quo. However, once the signatures have been collected, the Government decided to withdraw its bill from the parliamentary procedure and the Constitutional Court consequently decided that the referendum could not be held, because the referendum question itself was declared to be technically connected to the governmental bill.[18]

In December 2013 another civic initiative submitted 576.388 signatures requiring changes to the Constitutional Law on the Rights of National Minorities in a way as to prescribe that official use of minority languages in territory of units of local self-government, state administration or judiciary was possible only if a minority made one half of the local population, instead of one third. However, in its decision from August 2014 the Constitutional Court declared the referendum question contrary to the Constitution.[19]

In July and November 2014, two separate national referendum initiatives were addressed to the Parliament requiring the enactment of one law which would prohibit the "outsourcing" of technical services in the public sector and the enactment of another law which was intended to ban the governmental plan to give certain highways under concession.

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građanske inicijative u Hrvatskoj), in: *Referendum of Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects* (*Referendum narodne inicijative u Hrvatskoj i Sloveniji – Ustavnopravno uređenje, iskustva i perspektive*), (Robert Podolnjak and Branko Smerdel – eds.), Croatian Association for Constitutional Law (Hrvatska udruga za ustavno pravo), Zagreb (2014), pp. 15-44; Robert Podolnjak, *Constitutional Engineering of Citizen Initiated Referendum: Some Recommendations to the Croatian Constitution-Maker* (*O "ustavnom inženjeringu" referendum narodne inicijative: neke preporuke hrvatskom ustavotvorcu*), in: *Referendum of Civic Initiative in Croatia and Slovenia– Constitutional Regulation, Experiences and Prospects* (op. cit.), pp. 179-232.

[18] This case, however, is worth of attention because the Constitutional Court, on the other side, interpreted that the initiative would be "activated" should the Government again try to introduce the same bill into the procedure within one year following the Court's decision. This has never happened but it must be noted that in this very part of its reasoning the Court actually presented a rather activistic reading of the Law on Referendum. The reason for such a conclusion stems from the fact that the Law on Referendum nowhere prescribes such an outcome (a sort of a "suspended" validity of collected signatures and their possible further "activation" in a one year period). The only "possible analogy" to be drawn here is to be found in previously mentioned article of the Law which specifies that a referendum decision cannot be altered by an act or a decision by a state or local (regional) body, including thus the Parliament, within a period of one year following the referendum. However, the "analogy" fails, since these are two rather different situations.

[19] It is to be noticed here that yet another civic association, called "The Referendum Uprising", failed to collect required number of signatures in its attempts to initiate referendum on several issues, such as the annulment of the privatization process, prohibition of selling of natural resources, prohibition of production of genetically modified organisms etc. I omit this example from examination here due to the lack of precise information (by the time of this writing, the web page of the initiative has become inactive).

Both of these initiatives were also declared contrary to the Constitution by the Constitutional Court.

And in October 2014 the Constitutional Court declared that another initiative, aimed at reforming the constitutional regulation of elections, was inadmissible, due to the lack of a required number of signatures which needed to be collected.

It is also worth mentioning that in late 2014 the former President of the Republic publicly announced an idea to have his plan of amending the Constitution put on another new referendum. However, this has never happened due to the fact that he lost the presidential elections in January 2015.[20]

On the other hand, the list of successfully held referendums consists of three examples. Out of these three cases, by far the most significant instance in political terms was the referendum on the status of Croatia within the former Yugoslav federation, held on May 19th 1991. Technically, the referendum was called for resolving the questions of whether Croatia should remain in the Federation or should be able, as an independent and sovereign country, to possibly enter into a new state alliance on a "confederative" ("alliance of sovereign states with other republics") basis. The referendum was called by the President of the Republic, as a facultative referendum on the "other issue deemed important for the independence, unity or existence of the Republic." In total, 83.56 percent of all the registered voters actually voted, out of which 93.24 percent voted for the independence/confederation option.[21] The imminent consequence of the referendum was the proclamation of the state independence on June 25th 1991, which became effective on October 8th of the same year.

Referendum on joining the European Union was held on January 22nd 2012. According to the Croatian Constitution, this was a mandatory referendum called by the Parliament.[22] In total, 43.51 percent of all the eligible voters actually voted on the referendum, out of which 66.27 percent voted for the accession.[23] Consequently, Croatia effectively joined the Union on July 1st 2013.

The third successfully held national referendum took place on December 1st 2013. As an example of the use of the popular referendum initiative, organized by the citizens' initiative "In the Name of the Family", it was supported by 683.948 signatures of the voters. The only referendum question was related to the constitutional definition of marriage. In total, 37,88% of all the voters actually voted on the referendum and 65,87% of those voted for the proposal submitted by the initiative.[24] A direct result of the vote was the change of the Constitution, which now defines marriage as a life union between a woman and a man.[25] Besides other significant elements[26], the overall importance of this particular case is to be located in its impact on the constitutional interpretation given by the Constitutional Court on

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[20] As it can be clearly seen from these facts, national referendum in Croatia has so far only twice been successfully initiated by state institutions (President of the Republic in 1991 and Parliament in 2012), and this happened only in two major cases concerning state dissolution from the former Yugoslavia and its accession to the European Union. In other cases, actions were undertaken by different civic associations, and only once with a successful outcome (referendum on the constitutional definition of marriage in 2013).

[21] See: http://www.izbori.hr/arhiva/pdf/1991/1991_Rezultati_Referendum.pdf, October 16th 2015.

[22] See the Constitution of the Republic of Croatia, Article 142.

[23] See: http://www.izbori.hr/izbori/dip_ws.nsf/public/index?open&id=9B1A&, October 16th 2015.

[24] See: http://www.izbori.hr/izbori/dip_ws.nsf/public/index?open&id=FDF6&, October 16th 2015.

[25] See: the Constitution of the Republic of Croatia, Article 62.

[26] In a political and social context, this referendum provoked rather significant confrontations, principally arising out from disagreements whether conservation of cultural concepts should have prevalence over individual autonomy. Campaign suffered from the lack of legislative regulation on the financing, and the State Electoral Committee issued its statement on how to publish the data on the exact sources and amounts of financing of referendum promotion. It took more than five months after the collected signatures were handed over to the Parliament that the Parliament actually called the referendum. Technically, delay was caused by the process of verification of collected signatures, but the case also reveals another flaw in the legal regulation of referendums in Croatia, the fact that there is no strictly prescribed time period within which state institutions in case of popular referendum initiatives are required to act.

two principal occasions in late October and mid November of 2013. I now turn to them first, in order as they were issued.

3.1. THE "MARRIAGE" REFERENDUM: The October 24th 2013 "Warning"

In order to properly understand the specific problem that arose from this case, it is first necessary to point out that the Croatian Constitution contains two distinct sections pertaining to its own amending. The first one is found in its Article 87, while the second makes its Chapter IX.[27]

The first interpretation of the Constitutional Court in this case arose from the expressed Parliament's intention to accept the collected signatures and to actually call the referendum, but then to treat the potential positive result thereof merely as a starting step of a wider procedure for amending the Constitution. This wider procedure, itself defined in Chapter IX of the Constitution, would then be finally carried out by the Parliament. However, in its "Warning" issued on October 24th 2013[28] the Court firmly rejected that approach and emphasized that the Constitution clearly defined two separate and independent constitutional amendment procedures: one to be (and in practice most usually used) carried out by the Parliament (Chapter IX of the Constitution) and another through a constitutional referendum (article 87 of the Constitution). Consequently, the Court concluded that a decision made directly by the people on a referendum has a constitutive character and results, should a change be approved by voters, in an immediate transformation of the constitutional text, taking legal effect on the actual day a referendum was held, a fact that is only declaratory

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[27] Article 87 of the Croatian Constitution prescribes this: *"(Par. 1) The Croatian Parliament may call a referendum on a proposal for the amendment of the Constitution, on a bill, or on other issue within its competence. (Par. 2) The President of the Republic may, at the proposal of the Government and with the counter-signature of the Prime Minster, call a referendum on a proposal of the amendment of the Constitution or any other issue which he considers to be important for the independence, unity and existence of the Republic of Croatia. (Par. 3) The Croatian Parliament shall call a referendum upon the issues from sections 1 and 2 of this Article when so demanded by ten percent of all voters in the Republic of Croatia. (Par. 4) At such a referendum, the decision shall be made by the majority of the voters taking part therein. (Par. 5) Decisions made at referendum shall be binding. (Par. 6) A law on referendum shall be passed. Such law may also stipulate the conditions for holding a consultative referendum."*

On the other hand, Chapter IX of the Constitution includes four articles which prescribe the following: *"Article 147: The right to propose amendment of the Constitution of the Republic of Croatia belongs to at least one-fifth of the members of the Croatian Parliament, the President of the Republic and the Government of the Republic of Croatia. Article 148: The Croatian Parliament shall decide by a majority vote of all representatives whether or not to start proceedings for the amendment of the Constitution. Draft amendments to the Constitution shall be determined by a majority vote of all the members of the Croatian Parliament. Article 149: The decision to amend the Constitution shall be made by a two-thirds majority vote of all the members of the Croatian Parliament. Article 150: Amendment of the Constitution shall be promulgated by the Croatian Parliament."*

[28] As stressed before, a distinctive feature of the Croatian system in terms of judicial review over referendums is found in the fact that the Constitutional Court may rule on (un)constitutionality of a referendum only if the Parliament decides to file a motion thereof. Should that be the case, and the parliamentary decision to challenge constitutionality of a referendum is in its discretionary powers, the Court verifies both formal (whether required number of signatures for a popular initiative has been collected and whether referendum question belongs to a category of question that may be decided about on referendum) and substantial issues (whether referendum question itself is in accordance with the Constitution). Moreover, this procedure is reserved only for those referendums that have been triggered by popular initiatives and not for those that may be called by the Parliament or the President of the Republic. Accordingly, it is important to emphasize that in this case the Croatian Parliament did not formally challenge constitutionality of the said referendum. Devoid of a possible formal declaration thereof, the Constitutional Court therefore did not issue its "decisions", but rather special acts which it called "Warning" and "Statement".

established by the Constitutional Court whose statement thereof is to be published in the Official Gazette.

In reaching such a conclusion, the Court relied upon several interpretive elements, most notably on its rather strict reading of the constitutional text. To that end, the Court insisted that there was an indispensable need to differentiate the express wording of Article 87 (which specified that organizers of a popular initiative could request the Parliament to call a referendum if there was a "proposal *for the amendment* of the Constitution") from that found in Article 147 (Chapter IX) of the Constitution (which specified that the Parliament could pursue the amendment procedure if there existed an appropriate "proposal *of the amendment* to the Constitution").[29] In the Court's view, this has meant that the Parliament had different powers in those two different procedures (meaning, of course, that while in the latter case the Parliament was the sole master of the procedure, in the former it could not intervene in order to continue the process once already started by a valid popular initiative and, possibly, overturn the decision already adopted on referendum).

However, the Constitutional Court's desire to differentiate the two constitutional provisions on such a purely linguistic basis seems to suffer from some rather significant problems.

Firstly, and taking into account my knowledge of the Croatian language as the native speaker, I think it is quite difficult to reach a conclusion made by the Court. The result of such an analysis, if one really insists on the proposed linguistic difference, could have well, in my personal opinion, resulted in quite a contrary result. In other words, if there even was a constitutional regulation (stemming from the exact language of the Constitution presented here) which aimed at saying that voters on referendum had a power only and really to propose an amendment, this could primarily derive from the very Article 87, and not Article 147. In that respect, a "proposal *for the amendment* of the Constitution" may bear a kind of a procedural meaning, i.e. it could presuppose that someone is furthering an opening of the procedure during which an amendment yet has to be drafted. And on the contrary, the stipulation "proposal *of the* amendment" or, even more, the "*proposed amendment*" clearly may embrace a situation in which an actual amendment as such has already been framed.

Secondly, and even more importantly, the Court's approach completely ignored a need to read the relevant constitutional provision in its entirety. To be clear enough: Article 87, in its officially published form in the Croatian language and in its relevant parts, provides exactly the following:

"(Par.1) The Croatian Parliament may call a referendum on a proposal for the amendment of the Constitution, on a bill, or on other issue within its competence.

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[29] This exact part of the Court's "Warning" of October 24th 2013 is, of course, emphasized here because it clearly reveals the Court's insistence on linguistic method of interpretation. Admittedly, however, due to a difficulty to correctly translate the exact wording of the Croatian Constitution in articles 87 and 147, it may also have a somewhat confusing effect to non-Croatian speaking readers. In order perhaps to better clarify the whole problem, I can suggest two alternative translations thereof. Firstly, the part of Article 87 referring to the "proposal *for the amendment* of the Constitution" could perhaps also be translated as a "proposal *for amending* the Constitution", while the part of Article 147 mentioning the "proposal *of the amendment* of the Constitution" could maybe translated into English as a "proposal *of amending* the Constitution". Secondly, and for this exact part of the Croatian constitutional text, non-Croatian speakers may also consult the translation made by the "Constitute Project" which, on one hand, mentions "a proposal for the amendment of the Constitution" (Article 87) and, on the other, "proposed amendments" to the Constitution (Article 147). For this notable translation of the Croatian Constitution, see: https://www.constituteproject.org/constitution/Croatia_2010?lang=en#675, October 16th 2015. The same translation may also be found in yet another authoritative version made by Branko Smerdel and Ana Horvat Vuković in: *The Constitution of the Republic of Croatia*, Novi informator, Zagreb (2010), pp. 15-67. However, neither of these two translated versions differentiate between the wordings of paragraphs 1 and 2 of Article 87 and in this case the Constitutional Court for the first time focused exactly on this particular issue.

(Par. 2) The President of the Republic may, at the proposal of the Government and with the counter-signature of the Prime Minster, call a referendum on a proposal of the amendment) to the Constitution or on other issue which he considers to be important for the independence, unity and existence of the Republic of Croatia.

(Par. 3) The Croatian Parliament shall call a referendum upon the issues from sections 1 and 2 of this Article when so demanded by ten percent of all voters in the Republic of Croatia."[30]

Therefore, paragraph 3 of Article 87 (read literately, as the Court instructed), means that a popular initiative may be launched in relation to both situations defined in paragraphs 1 and 2. However, the Court in its "Warning" mentioned only the paragraph 1 and used it as a decisive point of difference in relation to the expression of Article 147 of the Constitution. Yet, since in that significant part there really is no difference between articles 147 and 87 paragraph 2, this means that the whole argument of the Constitutional Court should simply fail (meaning, that, should the Court be right in its reasoning, a popular initiative could also be a trigger for the procedure in which an amendment of the Constitution would strive for a more extensive role of the Croatian Parliament).[31]

However, had the Court wanted to avoid such a kind of a "trap", it should have construed a far more detailed analysis, consequentially taking into account all the elements it had already offered in the same case. To be precise, and apart from the linguistic method, the Court also stressed the need of: a) using the systemic approach to reading the Constitution and b) the need of respecting the co-called "important characteristics of the identity of the Croatian constitutional state". Now, let us examine how these two elements were presented in the "Warning" of October 24th 2013.

As for the systemic approach, the Court stated the following:

"Constitution should be read as a whole. It cannot be approached in a way that from a unity of relationships which are by it constituted one particular provision is taken out and then interpreted separately and mechanically, independently from all other values which are protected by the Constitution. Constitution possesses an internal unity and meaning of a particular part of it is related to all other provisions. If seen in its unity, Constitution reflects particular comprehensive principles and fundamental decisions according to which all its other individual provisions must be interpreted. Therefore, none of the constitutional provisions may be taken out of context and interpreted independently. In other words, each particular constitutional provision must always be interpreted in accordance with the highest values of the constitutional order which make the basis for interpreting Constitution."[32]

Two important aspects of the Court's statement, underlined above, are worth of notice: first, that the Constitution be read comprehensively, and second, that this should be done in accordance with the highest values of the constitutional order which themselves serve as the grounds for interpretation of the Constitution. According to the exact formulation of the

[30] It must be stressed here, however, that in this exact part the translation given, for instance, by the Constitute Project is missing an important fact: that, in its official Croatian version, paragraph 2 of Article 87 uses a different formulation than in paragraph 1. Moreover, the formulation in paragraph 2 is identical to the one used in Article 147. I have therefore provided potential readers of this article with my own translation which corrects this error.

[31] This example has been shown here not only to emphasize the problem of a literal and towards "isolated" constitutional provisions (articles 87 and 147) oriented linguistic method, but also to stress the Court's "decisive" reliance upon the method itself. However, as it will be shown in the following cases, this method has so far not been applied consistently and this seems to have become the most troublesome aspect of the Court's case-law.

[32] Constitutional Court of the Republic of Croatia, Warning U-VIIR-5292/2013, October 28th 2013. In the following text – the Warning.

Constitution, the highest values of the constitutional order are presented in its Article 3. However, they include neither direct nor indirect democracy and are for that reason, apart from invoking the concept of the "Rule of Law" in general, of little guidance here. To be true, they were not further relied upon by the Court either.[33] On the other hand, a comprehensive approach to reading the Constitution is beyond any doubt an indispensable tool of interpretation which in practice, as rightly pointed by the Court itself, means that none of the constitutional provisions may be taken into consideration without a prior identification of the impact of other provisions related to it. Accordingly, the Court stressed that, apart from the provisions of articles 87 and 147 already mentioned, there was also a systemic requirement to take into play Article 1 of the Constitution, which, together with Article 3 of the same document, made a part of the "Croatian constitutional identity" concept. However, the Court did not further rely on Article 3 and the remaining part of its reasoning in this context merely draw a line of reference between paragraph 3 of Article 1 and Article 87 of the Croatian Constitution[34], but without any deeper revelation as to the interpretation of their mutual interplay.[35]

Generally, it seems that the sole reliance on Article 1 in this part of the Court's "Warning" was a bad solution, an easy target for critics, especially when fueled either by the Court's own insistence on linguistic details or by mixing them with the systemic approach model. Consequently, it must have been concluded that Article 1 only was inconclusive for resolving the present case.[36]

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[33] See article 3 of the Croatian Constitution, which states: *"Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution."*

[34] To be clear enough, the Court has so far in its case-law consequentially been stating that the concept of the Croatian constitutional identity is to be found, among other provisions, in articles 1 and 3 in their entirety. However, in this particular case the Court pointed only to paragraph 3 of Article 1 and it explicitly stated that this case presented the first example of a *"direct decision-making of the people in the sense of Article 1 paragraph 3 of the Constitution"*. My elaboration of the problem therefore focuses exactly on paragraph 3. For a broader view on the concept of "constitutional identity" in Croatian doctrine, see also: Branko Smerdel, *In Quest of a Doctrine – Croatian Constitutional Identity in the European* Union, Zbornik Pravnog fakulteta u Zagrebu 64 (2014) 4, pp. 514-534; Biljana Kostadinov, *Constitutional Identity* (*Ustavni identitet*), in: *The Twentieth Anniversary of the Constitution of the Republic of Croatia* (*Dvadeseta obljetnica Ustava Republike Hrvatske*) (Bačić, J. – ed.), Croatian Academy of Sciences and Arts (Hrvatska akademija znanosti i umjetnosti), Zagreb (2011) pp. 305-337.

[35] Instead, as I have already pointed out before, the Court went on to explaining the meaning of two distinctive amendment procedures (articles 87 and 147 of the Croatian Constitution).

[36] I emphasize here the Court's reliance on Article 1 paragraph 3 of the Croatian Constitution (and its connection to Article 87, as stressed by the Court) simply because, as I have explained before, it was the Court who itself insisted that this provision was the crucial point of reference for interpreting the popular initiative and subsequent referendum procedure in the instant case. From that point of view, the crucial issue, therefore, could be this: what would be the result of the Court's interpretation had it consequently continued to interpret this specific link it had established? In order to find a right answer, it must be clarified that Article 1 of the Constitution states the following: *"(Par.1) The Republic of Croatia is a unitary and indivisible democratic and social state. (Par.2) Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. (Par.3) <u>The people shall exercise this power through the election of representatives and through direct decision-making</u>."* Had the Court, therefore, continued to pursue its quite strict linguistic approach it otherwise emphatically used as shown before, it seems that it would have inevitably been faced with at least two interpretive problems. The first one is the exact wording of paragraph 3 of Article 1, which clearly uses the conjunction "and". As, I believe, it is commonly understood worldwide that this conjunction means that there are two elements which only go in combination and are not mutually exclusive (or alternative to each other), this would then also (literally) mean that, in the instant case, the voters maybe could decide directly, but that this does not exhaust the second requirement placed upon them: that they also have to elect their representatives. This conclusion, admittedly, is absurd, but I emphasize it, of course, just in order to reveal potential risks of insisting on literal linguistic interpretation. Moreover, when it comes to the position of representatives in the Parliament, the whole problem becomes even more interesting if one wishes to further the argument that representatives in the Croatian Constitution do not have an imperative mandate (see Article 75 of the Croatian Constitution). This line of reasoning was presented in some of political debates at the time

What could have been done instead is that the Constitutional Court could have taken other paths and provided its own interpretation thereof. The first one could have been to argue that articles 87 and 147, by having been defined in two different sections of the Constitution, have regulated two distinct procedures which cannot be mixed.[37] And the second could have been to put more reliance on another aspect of Article 87, the one contained in its paragraph 5, which clearly prescribes that *"Decisions made at referendum shall be binding"*.[38]

But, in my opinion, the Court should have ultimately proceeded towards further elaboration of Article 2 of the Constitution, which specifies that *"...The Croatian Parliament or the people directly, independently, in accordance with the Constitution and law, shall decide: On the regulation of economic, legal and political relations in the Republic of Croatia ..."*. This specific provision seems to offer a better solution for someone wishing to argue that the popular vote on a referendum is not subject to subsequent parliamentary approval (or, in other words, that it may not only be used just to start the constitutional amendment procedures, which themselves should finally be completed by the Parliament). Such a conclusion would stem not only from the fact that Article 2 uses the conjunction "or" (a specialty for all those who "cherish" the linguistic arguments and who decidedly distinguish between "and" and "or"), but also from its specification that the "decision-making" here aims "on the regulation" of certain relations and thus have a somewhat clearer substantive meaning.[39]

(although outside of the formal procedure), meaning that a non-binding mandate concept should be extended in a way as to allow the representatives to decide on the whole issue independently from any possible decision made at referendum. Moreover, since Article 1 in that respect is silent on the issue of when these two actions (election of representatives and direct decision-making) should take place (simultaneously or at a different time), a sole reliance on that particular provision could provide grounds for arguing that the two actions do not have to be taken at the same time, but that they still have to be taken. Consequently, the people could then elect their representatives, who are from that point independent (since they have a non-binding mandate and may decide at their own will), and then they could decide for themselves (on a referendum). However, should that be the conclusion, then there is really no place for claiming that Article 1 gives the people a true prerogative of a direct decision-making. I stress this point only, once again, to show the puzzle one faces when insisting on a sole reading of Article 1. In further text I explain that, therefore, an indispensable continuation of Article 1 is Article 2 of the Croatian Constitution. Yet another problem with paragraph 3 of Article 1 stems from the fact that it uses the words "decision-making". And "decision-making", of course, may for itself have different meanings: in the absence of a further explanation within Article 1, it may well mean that the decision-making can be either substantive (resulting, for instance, in a constitutive transformation of the constitutional text amended on a referendum) or procedural (meaning only that a decision has been made to initiate the process of amending the Constitution).

[37] Consequently, that would possibly mean that the Parliament does not possess a power to finish the very procedure which has once already been started by the people (except for its duty to formally call a referendum and, possibly, address the Constitutional Court in order to challenge its constitutionality). This particular path, however, is also problematic, not only because it is contrary to the concept of the systemic reading of the Constitution, but also because Article 87 itself belongs to that part of the Croatian Constitution which regulates specific powers of the Parliament. For this specific line of reasoning (emphasizing the exact location of specific norms in the constitutional text) see the following case concerning the referendum on the electoral system.

[38] For that part, though, it also should be stressed that the mentioned provision of paragraph 5 brings in itself other interpretational problems, since a "binding" nature of decisions made at referendum could also have its merely procedural aspect. In other words, this could, and without further indispensable interpretation, lead to the conclusion that the Parliament would be bound only to respect the will of the people, without really distinguishing whether that will presupposes an already framed amendment to the Constitution or merely an initiative to start the amending procedures as such. I here stress that the Constitutional Court in this case eventually did come to the conclusion that the referendum decision was binding, but not by interpreting paragraph 5 of Article 87. The Court, instead, relied upon the distinction between two separate constitutional procedures, as they are described in the Article 87 and Chapter IX of the Constitution.

[39] In order to respect potential critics, I emphasize that this solution may only offer some degree of a "clearer" (and therefore not completely "clear") substantive meaning. In fact, should someone be really persistent, one could furthermore argue that the very combination of "deciding" and "regulating" also suffers from the lack of explanation of whether this presupposes only the procedural element (i.e. that, within Article 2, it may only be decided, by the people for instance, that a regulation of certain relations is needed, but leaving the regulation itself to be finished in another procedure) or the substantive one (i.e. that a decision on a certain regulation has a

Nevertheless, despite the fact that Article 2 of the Constitution provides enough ground for arguing that the people could in such cases act independently, it may be concluded that the Constitution in that context is still open to further misunderstandings and should be somehow revised. A good solution, beyond any doubt, would be to specifically distinguish and arrange separate amendment procedures, the one reserved for the Parliament and another for the people directly, with an indispensable and quite clear power of review by the Constitutional Court in both cases.

3.2. THE "MARRIAGE" REFERENDUM: The November 14th 2013 „Statement"

The second relevant piece of interpretation by the Constitutional Court in the same case came three weeks later in its "Statement" issued on November 14th 2013.[40] As explained before, an indispensable prerequisite for the Court's action was still missing since the Parliament had still not formally asked the Court to give a ruling on the referendum constitutionality.[41] Nevertheless, in by now undoubtedly the most far-reaching statement it had ever made the Court offered its view, this time both interpreting its own powers and going into the very merits of the case. The seminal character of the case is to be found in the Court's approach to its own review powers, interpretation of which came as a curious combination of powers explicitly conferred to the Court by the Constitution and the Constitutional Law on one hand and a rather activistic reading of them on the other.[42] Since the Court's reading of

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constitutive impact for the regulation itself; that it finishes up the job of introducing a completely new regulation into the legal system). However, and notwithstanding the fact that I personally am not a supporter of the idea that a constitution is a "perfect" document, I firmly believe that this potential case should be clearly resolved in favor of the substantive option. A closer examination of the wording used in Article 2 cannot mean that both subjects mentioned there (the Croatian parliament and the people) are only instrumental to each other (or to someone else) and that their prerogatives are merely the procedural ones. A contrary conclusion, and necessarily taking into account the obvious equality of the two subjects in Article 2, would inevitably lead to absurd constructions that, for example, a decision on regulating something may be made by the one only to be finished by the other (and thus practically erasing the meaning of the word "or"). In other words, I argue that the dispute over different potential meanings should nevertheless be finished at some point and I think that the presented wording of Article 2 in this respect is quite a good candidate for the task. To be completely honest, however, I must also stress that Article 2, but only at a first glance, contains another interpretational problem because it also states that *"…The Croatian Parliament or the people directly, independently, and in accordance with the Constitution and law, shall decide: … On association into alliances with other states."* Read in isolation to other constitutional provisions, this one could lead to the conclusion that a power to decide on international alliances is an exclusive authority of either the Parliament or the people. But the fact is that the Croatian Constitution, and unlike with other types of referendums, further specifies the role of these two subjects in such cases, requiring first that an initial decision thereof is to be made by the Parliament and that the second is then adopted by the people on referendum. For this specific case involving alliances with other states, see: The Constitution of the Republic of Croatia, Article 142.

[40] Statement on the Popular Constitutional Referendum on the Definition of Marriage (Priopćenje o narodnom ustavotvornom referendumu o definiciji braka), SuS-1/2013, November 14th 2013. In the following text: the Statement.

[41] The referendum itself was officially called by the Parliament on November 8th 2013.

[42] In short, with this Statement, the Constitutional Court declared that it had a right to rule on constitutionality of constitutional amendments. Therefore, the Decision marks a significant change in the practice of the Court: in previous cases it argued that it had only a power to review formal constitutionality of constitutional amendments. See the following acts of the Constitutional Court: Rješenje U-I-1631/2000, March 28th 2001; Rješenje U-I-597/1995, U-I-622/1997, U-I-1231/1997, U-I-349/1998, U-I-503/1998, U-I-387/1999, U-I-921/1999, U-I-947/1999, February 9th 2000. For further claims of Jasna Omejec, the President of the Croatian Constitutional Court, that substantial control of constitutionality of constitutional norms could not be derived from the constitutional text, not even implicitly, that such a review was inherent neither to the Croatian system of constitutional judiciary nor to the Croatian constitutional tradition, that the Croatian Constitution did not contain

law was scattered in different parts of the Statement, I am presenting here first those extracts which dealt with the constitutionality of the referendum question in its substance and then proceed to the more complex issue of the Court's jurisdiction.

As I previously said, this referendum initiative aimed at producing the constitutional definition of marriage, as *"a life community between a man and a woman"*.[43] In this context, the Court declined that the question itself was contrary to both international[44] and domestic law.[45]

Arguing on some quite systemic elements of the case, the Court reasoned that relevant provisions of the Constitution regulating referendum actually implied that *"…a constitutional referendum may be called in order to introduce some changes in the state constitutional order"*, and that this was also *"…in accordance with the legal purpose of popular initiatives, which may be summarized in the following formula: to change something already existing in the legal order or to include in the legal order something new…"*. From that point of view, the Court further argued that the introduction of an existing definition from a law into the Constitution could not be accepted as such a "novelty". Moreover, in that particular context, it referred to the Venice Commission's statements[46] that *"systemic constitutionalisation of legal institutes in a democratic society"* was unacceptable, due to the fact that it would undermine democratic principles of checks and balances and separation of powers, and concluded that this was an imperative to be obeyed in cases when constitutional amendments would be pursued either through constitutional referendums or through parliamentary proceedings.[47]

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an eternity clause, that the Constitution did not prescribe such a power of review for the Constitutional Court and that a formal type of review in such cases would be sufficient to prevent abuses by the Parliament when enacting constitutional amendments, see: Jasma Omejec, *Constitutional Review of Constitutional Norms* (*Constitutional Amendments and Constitutional Laws*) (*Kontrola ustavnosti ustavnih normi (ustavnih amandmana i ustavnih zakona*)), Godišnjak Akademije pravnih znanosti Hrvatske, 1 (December 2010) 1, pp. 21-22 and 25-26.

[43] After the referendum was held, this definition was incorporated into Article 62 of the Croatian Constitution.

[44] Referring to international law, the Court concluded that marriage and family life are neither the same legal concepts nor the same legal institutes, that Article 9 of the EU Charter of Fundamental Rights neither prohibits nor imposes an obligation on states to recognize the status of marriage to persons making same sex unions, that articles 8 and 14 of the European Convention on Human Rights cannot be interpreted in a way as to impose the same obligation, although states can do so on the basis of Article 12 of the same document, and that the international law in general still allows for a wide margin of appreciation in regulating those issues, taking into account cultural, social and other differences. In construing its arguments, the Court also referred to two notable cases from the Strasbourg Court: Vallianatos and Others v. Greece, November 7th 2013 and Schalk and Kopf v. Austria, June 24th 2010. In one further specific reference to the latter Strasbourg judgment, the Croatian Court pointed that the law of the European Convention nowadays enables that stabile cohabitation relationships of same-sex couples could be categorized under the notion of the family life (as prescribed in Article 8 of the European Convention). For a broader view on referendums regarding "moral issues", as well as for limitations on general conclusions in that respect, see: Mads Qvortrup, *A Comparative Study of Referendums – Government by the People*, Manchester University Press, Manchester and New York (2002), pp. 82-85.

[45] In reference to domestic law, the Court invoked various provisions of the Family Law, Law on Same-Sex Unions and the Law on the Prohibition of Discrimination. Its principal conclusion thereof was that the domestic law, with its present legal regulation of marriage as a life community between a man and a woman and legal recognition of same-sex communities, conforms to contemporary European legal standards. Furthermore, the Court also concentrated on the fact that the proposed constitutional definition of marriage was textually identical to the definition already existing in the Family Law. Consequently, it declined to formally decide on constitutionality of the referendum question, because the consequence of such a decision would be a simultaneous proclamation of unconstitutionality of the Law itself and that would be problematic because the procedure reserved for deciding upon constitutionality of referendums (Article 95 of the Constitutional Law) did not contain the same procedural qualities as the one normally prescribed for reviewing constitutionality of laws (Article 129 of the Constitution). Thus, it must be emphasized, the previous Court's interpretation of the constitutionality of the referendum question was issued as informal dicta.

[46] Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session /Venice, 14-15 June 2013/, Opinion 720/2013, CDL-AD(2013)012, Strasbourg, June 17th 2013.

[47] However, at the end the Court somewhat relaxed its standing, claiming that *"…the incorporation of legal institutes in the Constitution should not become a systemic phenomenon, and exceptional individual cases must be justified on the basis of their connection to, for instance, deeply embedded social and cultural characteristics*

Turning now to the issue of the Court's jurisdiction, and in order to clearly establish what had really happened, it is important to first focus on the relevant provisions regulating referendum, as they are contained both in the Croatian Constitution and the Constitutional Law, and as they were invoked by the Court.

Apart from the already mentioned Article 87, Article 125 al. 9 of the Constitution gives the Court a power to *"Supervise the constitutionality and legality of elections and national referendums, and decide on the electoral disputes which are not within the jurisdiction of courts"*.

On the other hand, the baseline provision of the Constitutional Law is contained in its Article 95 which prescribes that *"(1) On the request of the Croatian parliament, the Constitutional Court shall, when ten percent of the total number of voters in the Republic of Croatia request a call of a referendum, determine whether the contents of the referendum question is in accordance with the Constitution and whether the preconditions for a call laid down in its Article 87 par. 1 to 3 are fulfilled. (2) The Constitutional Court will deliver the decision from paragraph 1 of this Article within 30 days from the day it had received the request thereof."*

In addition, Article 2 par. 1 of the Constitutional Law prescribes that the Court *"guarantees respect for and application of the Constitution and bases its actions on the provisions of the Constitution and Constitutional Law on the Constitutional Court"* while its Article 87 al. 2 empowers it to *"supervise the constitutionality and legality of a state referendum"*.

In revealing the interpretation related to the issue of its proper jurisdiction, at the very opening of the Statement the Court first said this: *"Article 95 of the Constitutional Law prohibited the Constitutional Court, in the Warning" of October 24th 2013, to deal with any aspect of two questions on which, before a decision on calling a referendum was made, it could have decided only upon a request from the Croatian parliament (whether the contents of the referendum question was in accordance with the Constitution and whether constitutional conditions for calling a referendum were met). Any other way of proceeding of the Constitutional Court would represent an inacceptable voluntarism."*[48]

This conclusion was then followed by a new systemic interpretation of the Court's powers: *"On the basis of Article 125 al. 9 of the Constitution and articles 2 par. 1 and 87 al. 2 of the Constitutional Law, the Constitutional Court possesses the general constitutional duty to guarantee respect for the Constitution and to supervise constitutionality of a state referendum, right until the formal end of the referendum procedure. Accordingly, after the Croatian parliament decides on calling a referendum on the basis of a popular constitutional initiative, without before acting upon the Article 95 par. 1 of the Constitutional Law, the Constitutional Court does not lose its general control powers over constitutionality of such a referendum. However, taking into account the constitution-making power of the Croatian parliament as the highest law-making and representative body in the State, the Constitutional Court assesses that it can use general control powers in such a situation only exceptionally, when it determines such a formal or substantial unconstitutionality of a referendum question or such a grave procedural error which threaten to undermine the structural features of the Croatian constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (articles 1 and 3 of the Constitution). Primary*

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of the society, as it was, for the institute of marriage, recognized by the European Court of Human Rights in par. 62 of the Schalk and Kopf v. Austria case." In general, therefore, this part of the Court's reasoning merits special attention since, as it is clearly visible, the Court actually stated it had a concrete power to forbid special constitutional amendments if they are a product of "systemic constitutionalisation" of legal institutes, be they furthered by the parliament or the people, and provided that they are not substantially founded on social and cultural characteristics of a society.

[48] The Statement, par. 3.

protection of these values does not exclude the power of the constitution-maker to expressly exclude some other issues from the range of permitted referendum questions."[49]

As it can be read from these two extracts, the Court actually presented a new "systemic" scheme for determining its own powers of review. Combining this with the exact language of the Constitution and the Constitutional Law, two conclusions need to be made.

Firstly, on the basis of Article 95 of the Constitutional Law, regular review of constitutionality of referendums initiated by popular initiatives may be started only if the Parliament officially addresses the Court to that end. At the same time, this course of action may be used only before the Parliament itself decides whether to call a referendum and is reserved only for referendums started by popular initiatives.[50] The exact scope of review thereof is of both procedural and substantial character.[51] What is missing here, however, is the exact answer to the question of whether specific "constitutional" referendums – as the one in this case, which aimed at producing the constitutional definition of marriage – may also be this way reviewed in reference to the substance of the question they offer. In other words, since neither the Constitution nor the Constitutional Law make no further clarifications in that respect, there remains some space for arguing in favor of the "unconstitutional constitutional amendment" doctrine and, in my opinion, the Court could have well stopped exactly here.[52]

And secondly, even in the absence of a proper parliamentary motion, the Court, according to its own view, may nonetheless rely upon its general control powers, which themselves are to be found in other provisions of the Constitution and the Constitutional Law (Article 125 al. 9 of the Constitution and articles 2 par. 1 and 87 al. 2 of the Constitutional Law).[53]

However, the most troubling aspect arising from these articles is that, contrary to Article 95, they are framed as general norms. As such, they may be interpreted in two possible ways: either as a kind of an "introduction" to other specific norms which further work them out in detail or as independent and separate norms of their own standing and legal effect. It is by now evident that the Court in this case took the latter position. I believe there are enough reasons to claim otherwise.

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[49] The Statement, par. 5.

[50] In other words, and according to the exact language of the Constitutional Law, the review of constitutionality of referendums this way may be used only for those referendums that are started by popular initiatives, leaving thus aside those that are called by the Parliament or the President of the Republic.

[51] From the procedural point of view, the Court checks whether the actual referendum question is related to one of the categories of questions that may generally be decided about on a referendum and whether a required number of signatures have been collected, while on the substantial side it reviews whether the referendum question is "in accordance" with the Constitution (Article 95 of the Constitutional Law, read in conjunction with Article 87 of the Constitution).

[52] For the same argument, see: Đorđe Gardašević (Djordje Gardasevic), *Unconstitutional Constitutional Amendments and the Constitutional Court of the Republic of Croatia* (*Neustavni ustavni amandmani i Ustavni sud Republike Hrvatske*), in: *Constitutionalisation of Democratic Policy* (*Konstitucionalizacija demokratske politike*) (Arsen Bačić – ed.), Croatian Academy of Sciences and Arts (Hrvatska akademija znanosti i umjetnosti), Zagreb (2014), p. 105. On focusing on the Article 95 of the Constitutional Law in the Croatian context, see also: Kostadinov, B., *Constitutional Identity* (*Ustavni identitet*) (op. cit.) pp. 326-327. For a defense of an even broader judicial activism in this sense, see also: Ana Horvat Vuković, *Popular Initiative Referendum in 2013 – Constitutional Identity as the Basis Constitutional Court's Activism* (*Referendum narodne inicijative 2013. – ustavni identitet kao osnova ustavnosudskog aktivizma*), in: *Referendum of Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects* (op. cit.), pp. 149-177. Additionally, for this part of the problem, it is again to be noticed that this type of proceedings (and the foregoing conclusions about it) is explicitly prescribed in Article 95 of the Constitutional Law, read in conjunction with Article 87 of the Constitution.

[53] And just like the "specific control powers" found in Article 95 of the Constitutional Law, these "general control powers" are also based "within the law" and are not a result of some kind of a judicial imagination. Consequently, it may be concluded that to this part of its interpretation the Court was also firmly relying upon the exact wording of law and pursued a kind of the "positivistic" approach to the problem.

Above all, Article 125 al. 9 of the Constitution and article 87 al. 2 of the Constitutional Law are in essence the same provisions and they both provide for the Court's role in *"supervision of the constitutionality and legality of referendums"* and nothing more. It is quite clear that neither of these two provisions specify further details of procedures to be carried out in such cases. If, however, they are read in conjunction with other provisions which obviously "work them out", such procedures are completed. These other provisions are found exactly in chapter IX of the Constitutional Law (entitled "Supervision of Constitutionality and Legality of Elections and State Referendum and Electoral Disputes"). There, it is precisely defined in what cases and who may initiate appropriate actions, in reference to which exact issues, in which time periods and with what legal consequences arising from the Court's actions thereof.[54]

Moreover, the same approach is clearly visible in reference to other Constitutional Court's powers as they derive from articles 129 and 130 of the Constitution.[55] All these powers of the Court and the exact legal way of how they are to be carried out are further specified in the Constitutional Law.

The same conclusion may be stated for Article 2 par. 1 of the Constitutional Law which is situated in its very first Chapter (entitled "General Provisions"). This specific Chapter defines the scope of the Law, determines the institutional and financial independence of the Constitutional Court, establishes that the Court performs its actions in public and defines the justices' criminal immunity.

Therefore, and quite simply, it cannot be concluded that articles 125 al. 9, 2 par. 1 and 87 al. 2 may somehow "overcome" the legal details prescribed in the Constitutional law through the claim that these articles are some sort of "dormant" provisions which may be activated once the specific procedures found in subsequent chapters of the Constitutional Law have not been exhausted. This, however, seems to be the exact stance of the Court.

In sum, the Constitutional Court's Statement from November 14th 2013 introduced the theory of "unconstitutional constitutional amendments" into the Croatian constitutional scheme and this is its most important consequence. It is a fact that this was done in the course of one particular referendum case and the foregoing analysis shows other elements that were also added to the interpretation of the institution of referendum in general. From a broader point of view, however, this whole case revealed some deeper political tensions between various constitutional actors, most precisely by the Croatian parliament and the Constitutional Court. Thus, on one hand, it may be true that the primary objective of the Court's activism was linked to its concern to resolve possible unconstitutionalities arising from the case, even if that meant pushing its review powers to their limits, or maybe even beyond them.[56] On the

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[54] Apart from the already examined Article 95, the Constitutional Law in its Chapter IX also contains provisions related to two other separate Constitutional Court's procedures to be carried out in case of elections and referendums (the procedure of supervision of constitutionality and legality on one hand and the procedure dealing with electoral disputes on the other). In addition, the Constitutional Law in its Chapter II (entitled "Procedures before the Constitutional Court – General Provisions") defines general aspects of the Court's procedures.

[55] These two constitutional articles define the following Constitutional Court's procedures: the review of constitutionality and legality of laws and other by-laws; decisions on constitutional complaints; observance of the realization of constitutionality and legality in general; jurisdictional disputes between the legislative, executive and judicial branches; decision on the impeachment of the President of the Republic; supervision of the constitutionality of the programs and activities of political parties; and determinations as to the requirement of enactment of rules or regulations needed for the enforcement of the Constitution, law or other regulations.

[56] Of course, the problem does not stop here, because *there indeed are* certain, and rather serious, deficiencies in the language of the Constitutional Law which may give rise to worries of those concerned with constitutional imperfections. This, for instance, is the case with the fact that the Court's role in formal and material review of constitutionality and legality of referendums, should the exact wording of Article 95 of the Constitutional Law be followed, is to be performed only in cases of popularly initiated referendums, and not also in those cases where referendums are called by the Parliament or the President of the Republic. Yet another relevant example could be located in the Court's power to decide on the impeachment of the President of the Republic, but only after the procedure itself has been started by a political body (the Parliament) and on the basis of one, at the core,

other hand, and in my opinion this really is the case, the Court here started to develop a new framework for its own sake: anticipating further clashes with the Parliament in the future, it seems that the Court here actually started to construe its own theory of "self-defense". I will come back to this last observation in the conclusions to this paper.

3.3. THE REFERENDUM ON MINORITY RIGHTS

In addition to this seminal case, in the following text I will in some more detail examine three more examples which, for analytical reasons, deserve special attention. These quite recent examples include the referendum initiatives on minority rights, on constitutional regulation of the electoral system and on the ban of "outsourcing" of technical services in public sector.

In December 2013 the "Headquarters for the Defense of the Croatian Vukovar" submitted a request to the Croatian Parliament to call a referendum on the change of Article 12 par. 1 of the Constitutional Law on the Rights of National Minorities. According to the referendum question, a new provision of the mentioned Law would prescribe that in territories of local self-government, state administration and judicial units the equal official use of a national minority language and script could be implemented if members of a national minority made at least half of the population in such units. In the existing version of the Law, this threshold was settled at one third of the whole population in local units. Factually, the initiative was organized after the Government announced its plan to fully implement the provisions of the Constitutional Law on the Rights of National Minorities as related to the use of minority languages and scripts, and especially as related to the intention to secure that bilingual plates would be placed on public institutions buildings. Moreover, the plan included that these measures also be applied in Vukovar, a town which was particularly devastated during the Croatian War of Independence. The organizers of the initiative consequently claimed that the Cyrillic letter amongst the population in war torn areas was still seen as a symbol of suffering and that a certain moratorium on its introduction in official use was thus required.[57]

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political decision (the impeachment may or may not be initiated on the initiative of the two-thirds majority of parliamentary representatives). Similarly, the Constitutional Court may only repeal, and not annul, the laws enacted by the Parliament, meaning that the legal effect of the Court's decision thereof extends, with a few reservations, only *pro futuro*. Legal regulation of the Court's powers in all these examples, as a matter of principle, *is* problematic, because it potentially *may lead* to unresolved "unconstitutionalities", but the real question is: who should resolve such problems, the Constitutional Court or the constitution-maker? Admittedly, this specific problem is probably as old as the discussion on the proper limits of judicial review in general and I must emphasize that I am personally quite willing to argue in favor of the advantages of judicial activism, provided that such activism does not lead to unjustified and unlimited expansion of judicial power and that it is pursued on the basis of consistent claims. It, however, seems to me that both of these two concerns of mine are present here. As to the problem of unacceptable expansion of judicial power, I will here only point to the need of further examination, based on the propositions construed in the "Statement" from November 14th 2013, of where exactly the Court's method may end up in other cases involving its jurisdiction, outside of the realm of referendum cases. And as to the consistency of the Court's arguments, one can already notice that the Court has been willing to produce arguments based on rather different basis in substantially the same cases. To prove this, it is sufficient to notice that the Court's insistence on the linguistic interpretation it had used in reference to its "Warning" of October 24th 2013 would have obviously lead to a completely different outcome had it also been applied in its "Statement (notice that both cases principally dealt with competencies of particular state bodies). In other words, reading the Article 95 of the Constitutional Law literally, the Court could not have dispensed with its strict instruction: that it may have acted only if the Parliament had actually addressed it.

57 On the description of the reasons that led to the initiative, see: Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014 (par. 27-29).

In July 2014 the Parliament asked the Constitutional Court to rule on the fulfillment of conditions necessary for calling a referendum and on the constitutionality of the referendum question. As to the procedural requirements, the Court declared that more than 10 percent of the voters' signatures had been collected.[58] And as to the substance of the referendum question, the Court started its arguing on the following claims: that the Constitution was not a value-neutral, but rather a document which defines the Republic of Croatia as a democratic state, based on, among other things, national equality, respect for human rights and rule of law principles, all of which must be realized without discrimination; that democracy based on the rule of law and protection of human rights represents the only political model recognized by the Constitution; that pluralism, as a central feature of a democratic society, requires respect for diversities and particular identities, as well as dialogue and search for balance which negates any abuse of a dominant position; that languages and scripts of national minorities must be qualified as universal and constant values which determine the identity of the Croatian constitutional state; that, consequently, any increase of the threshold required to activate the collective right of minorities on the official use of languages and scripts must be rationally justified exclusively on reasons which emerge from the democratic society based on the rule of law and protection of human rights; and that the increase of the threshold must have a clearly expressed legitimate aim in the public interest, as well as that it must be necessary in a democratic society or "strictly proportional" to this legitimate aim. Consequently, the Court declared the referendum unconstitutional on the grounds of the lack of a rational basis and a legitimate aim to be pursued with the legal change sought.[59]

From the technical point of view, therefore, the case did not, as in some other examples presented here, mark a change in the Court's attitude in interpreting referendum constitutional provisions. However, it is important noticing that the Court here pointed that the positive legal regulation of referendums in Croatia still did not contain specific rules on the obligation to explain the causes of and reasons for organizing popular initiatives, which, in the Court's view, was indispensable both for the Parliament to decide on whether to immediately call a referendum or to address the Constitutional Court and for the Court itself to deliver its appropriate decision on the basis of Article 95 of the Constitutional Law. In filling this legal gap, the Court thus instructed that all future initiatives should announce such causes and reasons, in any case prior to the Parliament's official decision to request the review of constitutionality of a popularly initiated referendum.[60] Taking into account that at the time this Decision was delivered the Croatian Law on Referendum has still not been changed, as to reflect both the 2010 constitutional amendments and the prior warnings of the

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[58] Since the State Institute for Statistics confirmed that there have been collected 576.388 of voters' signatures, the condition of 10 percent of signatures needed to pursue an initiative was evidently met.

[59] Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014 (par. 10-14). In addition to that, the Court also stressed that the proposed referendum initiative, as it emerged from the arguments submitted by its organizers, was principally undertaken because of the *"factual circumstances related to the Serbian national minority"* and that the *"...legal obligation to secure official use of language and script on the basis of Article 12 par. 1 of the Constitutional Law on the Rights of National Minorities, for that minority, in a number of municipalities and towns, including the town of Vukovar, would cease to exist with the proposed increase of the threshold."* This, in the Court's view, meant that *"...in the proposed referendum question, considering its content and the way it was formulated, in a legal sense there exists a concealed aim which, as such, cannot be assessed as a legitimate one."* In yet another important passage of its Decision, the Court explicitly stated this: *"...to require a call of referendum with the message that the Cyrillic letter in the town of Vukovar was "seen as a symbol of suffering" is a deeply disturbing act which attacks a letter as a universal civilization heritage of a mankind that determines the very identity of the Croatian constitutional state. From that message emerges irrationality which must be pointed at."* See: Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014 (par. 21.3 and 29).

[60] Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014 (par. 18). In this particular case, however, the Constitutional Court still accepted two documents submitted by the referendum organizing committee to the Parliament, from which it construed its arguments as described.

Constitutional Court that further improvements of the Law were anyway indispensable, the Court's interpretive activism in this particular aspect must be appreciated.[61]

However, this case remains important due to the fact that it was the first referendum case in which the Court officially acted under the authority of the Article 95 of the Constitutional Law. From the institutional point of view, it must therefore be noticed that the case marked a switch in the practice of the Croatian Parliament, which from that time on started to require the Constitutional Court to deliver its decisions on possible unconstitutionalities of popular referendum initiatives. In addition, of course, the Court's Decision bears a great political significance in terms of the use of referendums in relation to national minorities' position. The Court's approach to framing of a proper balance between majority and minority legitimate constitutional interests, as well as its declaration that the respect for minority languages makes part of the Croatian constitutional identity, were thus probably the most prominent features of the case.[62]

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[61] The requirement that the Law on Referendum should appropriately be changed was thus twofold. On one hand, it stemmed directly from the 2010 amendments to the Croatian Constitution which, among other things, changed the condition of the majority needed for adoption of a referendum decision. Accordingly, the Constitutional Law on the Implementation of the Constitution of the Republic of Croatia of October 22nd 2010 directed that a law regulating referendum must be harmonized with the Constitution within a time period of six months. However, this has not happened even to the day of this writing. On the other hand, the Constitutional Court has already on several occasions before this case pointed that a change of the Law on Referendum was needed in order to better regulate certain issues. Thus, in its previously mentioned Warning of October 24th 2013 the Court said that the legal provisions regulating the procedure of carrying out the popular constitutional initiative and regulating the necessary content of the referendum question were lacking appropriate precision. See: Warning U-VIIR-5292/2013, October 28th 2013. And, in its Decision dealing with the referendum related to the 2010 proposed amendments to the Labor Act the Court noted that the Law on Referendum did not exactly regulate possible legal consequences in a situation in which a referendum was organized in order to prevent the adoption of the said amendments but which themselves were, before a referendum was actually held, withdrawn from the parliamentary procedure. See: Decision of the Constitutional Court U-VIIR-4696/2010, October 20th 2010. I must, however, point here to one significant difference between the Decision on the Labor Act and the Decision on Minority Languages referendums: while in 2010 the Court engaged itself in a somewhat dubious interpretation, construing a specific rule without a "tangible" basis in the legal system, in the case of minority languages, in my opinion, it just rightly extended the ordinary rule of providing reasons for enacting laws in a parliamentary procedure to the case in which laws are adopted on a referendum.

[62] It must, however, be added here that in the last part of its Decision the Court also ordered that the Law on the Official Use of Languages and Scripts of National Minorities on the territory of the town of Vukovar would not be implemented with the use of coercive means until that Law has appropriately been amended in a way as to secure a legal mechanism for cases where representative bodies in local self-government units would not fulfill the obligations stemming from the Law or where they would obstruct its application. In addition, the Court ordered the Vukovar town council to, within one year, precisely regulate in the local statute the individual rights of national minorities' members on the official use of their languages and scripts, as well as public law obligations of state and public institutions thereof, taking into account that the Law on the Official Use of Languages and Scripts of National Minorities prescribed a possibility that these rights exceptionally could be recognized only in a part of a local territory or in a limited scope. See: Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014 (par. 30-32). This specific part of the Court's Decision represents its further attempt to reconcile the opposed interests and is, as such, quite interesting from the political theory aspect. Its analysis from the constitutional point of view, on the other hand, inevitably leads to further examination of the exception mentioned in the Law on the Official Use of Languages and Scripts of National Minorities, not so much in view of the possibility that language and script rights could be reserved only for a part of a local territory, but more in a possibility of providing only a limited scope of their use. However, since this particular type of analysis pertains to the rights theory which is not a direct part of this article, I am leaving it for future occasions. The same goes for other very important parts of the Decision which dealt with claims directly related to the issue of rights (e.g. the following Court's conclusions: that an increase of the threshold for activating language and script rights must not be reviewed as to whether it actually harms certain collective rights, but as to whether it contributes to them or improves them; that the actual number of members of a minority may determine some of their rights; that a possible increase of the threshold to more than a half of the whole of population in a local unit cannot lead to the conclusion that a minority is required to become a majority; that actually not only an ordinary but the "strict proportionality" standard and the "compelling social need" proof are required for increasing the threshold; that the fact that in the prior Constitutional Law which regulated rights of national minorities the threshold was already (once) defined as a requirement for an absolute majority in local

3.4. THE REFERENDUM ON THE ELECTORAL SYSTEM

In October 2014 the citizens' initiative "In the Name of the Family" submitted to the Parliament another referendum proposal, this time aiming at changing Article 73 of the Croatian Constitution and thus introducing a new regulation for election of representatives in the legislative body.[63] On December 10th 2014, however, the Constitutional Court declared the initiative inadmissible due to the fact that not enough signatures were collected.[64]

The case, therefore, for the first time dealt with the procedural issue arising out from Article 87 of the Constitution, which prescribes that a popular referendum initiative could be accepted only if it has been supported by *"...ten percent of all the voters in the Republic of Croatia."*

In short, when determining the parameters for establishing what actually represents ten percent of all the voters, the Court pointed that the phrase *"in the Republic of Croatia"* had a strict territorial meaning and that, therefore, the only relevant element was the place of residence of voters. Consequently, the Court concluded that ten percent should be counted from the total number of only those Croatian voters who reside within the territory of the State. Apart from the strict textual interpretation of Article 87, however, the Court also pointed to the "structural" constitutional difference which, in its view, stemmed from the fact that the Constitution regulated the conditions for calling a referendum (Article 87) and the general right to vote on elections and referendums (Article 45) in different sections (while the former norm was contained in the constitutional chapter dealing with organization of the Parliament, the latter was put in the part regulating political rights).[65] Moreover, the Court established the general rule that the exact number of relevant signatures for each particular referendum in such cases should be determined on the basis of data from the evidence (list) of voters on the first day of the period during which signatures would to be collected.

To this core holding, however, the Court added two more interpretations. In the first, it established that a right to participate (vote) on a referendum belonged to each Croatian citizen having at least an age of 18 years, regardless of where exactly those citizens would have a permanent or temporary residence at the time of holding a referendum. This rule was interpreted directly from Article 45 of the Constitution, which generally regulates a right to vote. And in the second interpretation, the Court determined that a right to give their signature in support of a particular popular initiative belonged to every eligible Croatian citizen, regardless of their permanent residence, but under a condition that such voters gave their signatures only within the proper territory of the Republic of Croatia, thus excluding

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units does not inevitably presuppose the constitutionality of its increase in the present circumstances; and that the present case dealt primarily with collective rights of national minorities as they are provided by the Article 12 of the Croatian Constitution, and not so much with their individual rights as they stem from the Article 15 of the same document).

[63] Article 73 of the Croatian Constitution prescribes the following: *"(1) Members of the Croatian Parliament shall be elected for a term of four years. (2) The number of members of the Croatian Parliament, and the conditions and procedures for their election, shall be regulated by law."* In short, the proposed constitutional amendment aimed at: prescribing that election of parliamentary representatives is to be done through the proportional system; introducing a right to preferential votes; establishing that electoral units should conform to the regional territorial organization of the State and that in each unit at least 20 representatives should be elected; lowering the election threshold to 3 percent or 2 percent of votes in electoral units; prohibiting coalition lists of two or more political parties; and introducing a right to vote by electronic means.

[64] It was established during the case that a total number of 380.649 of signatures were actually collected. The Constitutional Court, however, determined that there should have been at least 404.252 of signatures.

[65] Decision of the Constitutional Court U-VIIR-7346/2014, December 10th 2014 (par. 17-18).

diplomatic-consular offices of the State in other countries.[66] The decisive element for such a construction of the rule was, again, the territorial principle embodied in the formulation of Article 87 of the Croatian Constitution although the Court here also invoked the Law on Referendum which in its relevant parts prescribed that signatures could be collected only on the territory of the State.[67]

As it may be seen, the principal outcome of this Decision was the Court's interpretation of the *"...ten percent of all the voters in the Republic of Croatia"* constitutional standard. Moreover, this also resulted in a sort of a "triple" scheme the Court invented to describe three categories of voters: those who generally may vote on a referendum, those who may give their signatures in support of particular initiatives and those who must be counted against the requirement of ten percent. Such an outcome, however, is rather problematic because, by insisting on the "territorial" element of the norm, it actually results in an unacceptable division of the notion of political community.[68] Simply said, the Croatian political community should be read as a whole of citizens that are eligible for voting *and* making-political decisions (this, therefore, should be the real meaning of the phrase "*all the voters in the Republic of Croatia*") and there is no plausible reason thus to divide that community into separate parts and to give such separate parts different rights in political decision-making. Three additional arguments in support of such a conclusion may be added here. Firstly, the very phrase *"...ten percent of all the voters in the Republic of Croatia"* is quite far from being clear whether it imposes strictly the "territorial" imperative. In my opinion, it should be read in a comprehensive and teleological way.[69] Secondly, the argument that diaspora voters may give their signatures of support to a particular referendum initiative only on the proper territory of the State was again construed on the basis of the "territorial" element of the constitutional norm, but also by invoking yet another legal instrument: the Law on Referendum. However, not only that the Law on Referendum itself has been regarded by the Court as deficient source of law, but the Constitution also contains specific norms which could have been used here to conclude that diaspora voters may give signatures even outside of the internal territory of the country.[70] Thirdly, and by far most significantly, the Court's

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[66] Decision of the Constitutional Court U-VIIR-7346/2014, December 10th 2014 (par. 14-16).

[67] As stressed before, the Croatian Law on Referendum prescribes that the collection of signatures may be organized in any for that purpose appropriate place, in accordance with a decision of a local self-government representative body.

[68] For a theoretical discussion on the issue of how to "frame the People", either through some concept of a physical space or of a group of people, see: See: Stephen Tierney, *Constitutional Referendums – the Theory and Practice of Republican Deliberation*, Oxford University Press, Oxford (2012), pp. 58-97.

[69] After all, such an approach would be in conformity with the general proposition of the Constitutional Court that the Constitution should always be read as a whole. On this proposition, see the previous chapter here in reference to the Court's Warning of October 28th 2013.

[70] The Constitutional Court's approach to this specific issue was, in my view, problematic for at least three additional significant reasons. Firstly, even if one insists on the "territorial" meaning of the legal standard *"voters in the Republic of Croatia"*, that should, as a matter of well-established principle, inevitably lead to the conclusion that such a "territory" must include diplomatic-consular offices of the State in other countries. Secondly, when describing the rights of diaspora voters, the Court invoked Article 45 of the Constitution which, in its relevant paragraph 3, prescribes the following: *"In elections for the Croatian Parliament, the President of the Republic of Croatia and the European Parliament and in decision-making procedure by national referendum, suffrage shall be exercised in direct elections by secret ballot, wherein voters who do not have registered domicile in the Republic of Croatia shall vote at polling stations in the premises of diplomatic-consular offices of the Republic of Croatia in the foreign countries in which they reside."* Therefore, if the Constitution itself already prescribes that diaspora voters may vote in Croatian diplomatic-consular offices abroad, there is no plausible technical reason to claim that they cannot also collect their signatures of support in such places (such a technical reason was stressed by the Court in its reference to the fact that the Law on Referendum provided only for collection of signatures within the proper state territory). And thirdly, paragraph 3 of Article 45 is the norm which regulates the procedures to be carried out both in the cases of elections and national referendum. From that point of view, it is true that the norm speaks about the right of diaspora voters to *"...vote..."*, but it also speaks of their right to participate "*...in decision-making procedure by national referendum...*". Consequently, if one does not to end up in a division of the "political community", it must be

triple scheme ends up in a completely unacceptable result that on a *same referendum same voters* may participate in *different roles*.

3.5. THE REFERENDUM ON THE BAN OF "OUTSOURCING"

In December 2013 the Croatian government officially started to pursue its plan through which the providing of "complementary and non-basic services" (further: technical services) in state and public institutions and bodies would no longer be carried out by the persons employed in such institutions and bodies, but would rather be given to private subjects, or, in other words, "outsourced".[71] As a reaction, trade unions organized an initiative for a referendum on which a new Law on Carrying Out Complementary and Non-Basic Services in the Public Sector would be enacted. The Law itself would prescribe both that these technical services are carried out only by those employed in the public sector and that the measure of outsourcing thereof is prohibited. Already in the period during which the organizers of the initiative were collecting signatures of support, the Government publicly announced the withdrawal of its plan. Nevertheless, the trade unions successfully collected 563.815 signatures and in July 2014 requested the Parliament to call the referendum. In February 2015 the Parliament decided to put the issue before the Constitutional Court.

Acting again under the Article 95 of the Constitutional Law, the Court this time confirmed that enough signatures were collected and that the referendum question was aimed at producing an act foreseen by the Article 87 of the Constitution (i.e. enactment of a new law), but declared the question unconstitutional on substantial grounds.

In construing the proper scheme of its review, the Court first started by emphasizing that Article 95 of the Constitutional Law prescribed *"an especially strict legal imperative"*, requiring the Court not to *"decide on the conformity of laws with the Constitution"*, as it is the case in ordinary review of legislation[72], but rather to see whether a referendum question (and also, therefore, a specific law as its possible outcome) is *"in accordance with the Constitution"*. Clearly, the starting point of the Court's reference here was thus made to the textual type of interpretation of Article 95, although to it the Court added a further explanation that such a strict type of review was also rationally required, because the process of enactment of laws on referendums did not have the same procedural quality like the one undertaken in the Parliament.[73] All this, in the Court's view, led to the conclusion that Article 95 commanded that laws proposed to be adopted on referendums should undergo a stricter scrutiny than ordinary laws, i.e. that such laws should have *"the highest level of substantial compliance with the Constitution"*.[74]

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concluded that the notion of "decision-making" here also means a right of diaspora voters to make a decision of whether to support a particular referendum initiative through giving signatures, including the case where such signatures would be given in the premises of diplomatic-consular offices abroad.

[71] These "technical services" would thus include the administrative, technical and supplementary activities in the public sector which are indispensable for properly carrying out main activities of public institutions and bodies.

[72] See: the Constitution of the Republic of Croatia, Article 129.

[73] To that end, the Court argued that, as opposed to laws adopted on referendums, final versions of laws enacted by the Parliament benefit from several procedural requirements (i.e. that bills undergo a lengthy process of preparation, verification, correction and deliberation in a democratic procedure, which includes actions of various parliamentary and non-parliamentary bodies).

[74] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 12-13). For arguments in favor and against a type of "stricter scrutiny" in reviewing direct democracy decisions, see: Matt Qvortrup, *Direct Democracy – A comparative Study of the Theory and Practice of Government by the People*, (op. cit.), pp. 130-140.

In addition to that, and referring to its prior ruling in the minority languages case, the Court further clarified its vision on how the referendum bills should be justified in terms of particular causes and reasons that inspired the proposal of their adoption. To that end, the Court stressed that such bills, as opposed to ordinary bills that go through parliamentary procedure, should contain *"all the necessary data"*, including the information on the required financial resources for their carrying into execution.[75] From that point of view, these specific interpretations thus added new substance to the legal framework regarding referendums in general, although the Court specified that these new "rules" were not applicable to the instant case because they were first revealed by the Court only after this particular referendum initiative on the ban of outsourcing had already been submitted to the Parliament.[76]

However, the most intriguing part of the Court's reasoning in this case came with its interpretation of delimitation between the "exclusive" constitutional powers of state bodies (the Parliament and the Government) and the (remaining) powers of the people which may be carried through a referendum.

Although the Court admitted that in the Croatian constitutional scheme *"...the constitution-maker did not expressly enumerate issues which are within the exclusive competence of the bodies of representative democracy"*, it reasoned that they nevertheless *"...derive from the entirety of the Constitution"*[77] and then stated that the Government had *"...the exclusive constitutional power and obligation to propose the state budget and the annual accounts"* and that the Croatian Parliament *"...had the exclusive constitutional power and obligation to adopt the state budget"*.[78] In addition, the Court also stressed that the Government was constitutionally empowered *"...to direct and control the operation of the state administration, to direct performance and development of the public services, and to take care of the economic development of the country"*.[79] It could thus be said that these latter powers of the Government were therefore qualified by the Court as "important", although not strictly "exclusive".

On the other hand, the Court argued that *"...direct democracy is, by the Constitution, permissible and legitimate, but not primary and ordinary, way of deciding on the regulation of economic, legal and political relations in the Republic of Croatia"* and then construed two general rules: that the adoption of laws on a referendum is not allowed when these laws are a) either not in accordance with the legal system as a whole or b) when the laws are directed to

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[75] As stressed by the Court, bills that enter the ordinary parliamentary procedure must contain the information on the constitutional basis for their adoption, exposition of relevant circumstances and issues that need to be regulated by a law as well as consequences of regulation, financial resources required for the implementation of a law and explanation of particular provisions of a law. See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 19.1).

[76] The specific requirements seeking the explanation of causes and reasons for organizing popular referendum initiatives were for the first time construed by the Court in its decision on minority languages which was published in August 2014. However, this particular initiative had been submitted to the Croatian Parliament for further procedures already in July of the same year.

[77] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 34.4). Up to this point the Court generally reasoned in line with its prior rulings in which it also stressed the need to read the Constitution as a whole. For the requirement to read the Constitution as a whole, among other decisions of the Croatian Constitutional Court, see the Warning of October 28th 2013. There is really no dispute that by the time the Decision on the referendum initiative in this case was delivered, this type of reasoning had already been firmly established as the principle of constitutional interpretation.

[78] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 34.2). See: the Constitution of the Republic of Croatia, articles 113/2, 81/3 and 91.

[79] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 34.2). See: the Constitution of the Republic of Croatia, Article 113/6-8. Curiously enough, the Court did not expressly qualify these specific powers as the "exclusive" powers of the Government, even though their legal basis was found in the same constitutional provision (Article 113) which already served for interpreting as such those powers related to state budget and annual accounts.

regulating issues that, either explicitly or from the entirety of the Constitution, fall within the exclusive competence of the bodies of representative democracy.[80]

The Court then passed on to examine the proposed Law and found that it actually contained two general bans: a ban of outsourcing of technical services and a ban of their carrying out in any other way as except by those who are employed in the public sector. Qualifying these two bans as "blanket" prohibitions[81], the Court came to the conclusion that the Law was contrary to the legal system as a whole on account of several grounds: first, because its principal outcome would be to prevent the Parliament and the Government from pursuing any further modifications of the legal (labor) model regulating the status of those performing technical services in the public sector (bans as preventive or "a priori" measures); second, because the bans contained in the Law would be of a *"more permanent nature, because they would be prescribed by a law enacted on a referendum"* (bans as "permanent" measures); third, because these bans would be applied "automatically" (ex lege) and would prevent any possible changes in the field *"…as long as such legal bans are in force"* (bans as

[80] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 34.3). When construing the first rule mentioned above (that referendum bills are not allowed when they are not in accordance with the legal system as a whole) the Court pointed to two separate sources of inspiration. On one hand, it referred to the Code of Good Practice on Referendums, adopted by the Venice Commission in 2009. On the other, it referred to Article 2 par. 4/1 of the Constitution which literally prescribes that *"The Croatian Parliament or the people directly, independently, in accordance with the Constitution and law, shall decide: On the regulation of economic, legal and political relations in the Republic of Croatia…"*. The Court, however, kind of rewrote this provision and stated that it said this: *"Article 2 par. 4/1 of the Constitution prescribes that the regulation of economic, legal and political relations in the Republic of Croatia shall be decided by: - the Croatian Parliament or - the people directly, independently, in accordance with the Constitution and law*". Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 34.1). The resulting change of the formulation is more than evident: in the Court's view, thus, it is the people only which is bound to act "*in accordance with the Constitution and law*" when deciding on these regulations. Such a conclusion is obviously unacceptable, not only because it completely reverses the exact language of the Constitution, but also because, in a state governed by the rule of law principle, it is conceptually wrong. In other words, the Court imposed the constitutional command of obedience to "the Constitution and law" only to the people, therefore neglecting that the Parliament is also in that respect restrained in its general regulatory activities. I refer to this particular change as the matter of principle, merely to show how the language of the Constitution was rewritten by the Court. It is true, however, that in one of the following sentences, when explaining the reasons for striking down the referendum law, the Court admitted that it would do the same had the case been dealing with the law enacted by the Parliament. See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 43.3). But, it is also true that in the final part of the Decision the Court gave yet another formulation of the limitations imposed on the bodies of parliamentary democracy in their general regulatory activities. There, the Court said this: *"By not entering into the issues of expediency and appropriateness of various possible measures of outsourcing of complementary and non-basic services in the public sector, the Constitutional Court determines that the competent state bodies (the Croatian Parliament and the Government) are constitutionally empowered to carry out such measures at any time and without any special conditions which would derive from the Constitution, except for the respect of democratic procedures and general conditions which are imposed upon the institutional regulators of social relations by the rule of law."* See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 48). It seems, therefore, that the Court finally *did admit* that some limitations on the regulatory powers of the Parliament and the Government in such cases existed, although they were not, in the Court's view, deriving from the Article 2 par. 4/1 of the Constitution, but rather from the Court's dicta. Moreover, one may notice that the exact command of Article 2 par. 4/1 of the Constitution (that a regulation of various relations must be done *"in accordance with the Constitution and law"*) differs from the one given by the Court (that a parliamentary or governmental regulation is subject to restraints requesting obedience to *"democratic procedures"* and *"general conditions"* arising from the rule of law). It is worth noticing, finally, that the Court here also pointed to Article 1 par. 3 of the Constitution, which prescribes that "*The people shall exercise this power* (power in the Republic of Croatia – note Đ.G.) *through the election of representatives and through direct decision-making"*, but then gave no further explanation as to where, in terms of "proper" delimitations between powers of the people and state bodies, this exact provision would lead whatsoever.

[81] When referring to the concept of "blanket prohibitions", the Court furthermore stressed that, in cases dealing with *"…the functioning of the state and its apparatus…"* such prohibitions *"…may lead to automatic and non-selective limitation or repeal of a possibility of changes without which there can be no progress in the implementation of necessary economic, social, political and administrative reforms…"*. See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 39.1).

"automatic" measures); and fourth, because the bans would be applied "unselectively", because they would *"...cover all the bodies and institutions that make public sector"* and *"...their application would not depend on the nature of an activity or work undertaken by these bodies and institutions"* (bans as "unselective" measures).

Furthermore, the Court concluded that qualified as such the bans (i.e. as a priori, automatic, unselective and permanent measures) also *"...prevent changes in the organization of optimal labor law models for complementary and non-basic services in the public sector, in terms of economic capabilities of the State"* and that they directly influence *"...the functionality of the State and the budget framework in processes of economic, social, political and administrative reforms for which – according to the Constitution – bodies of representative democracy, and not the Organizational Committee* (committee organizing popular initiative – note Đ.G.) *or a group of employees whose partial interests that Committee intends to protect, bear full responsibility."*

To this the Court also added the view that labor law models generally are "inherently" changeable and that any "permanent" prohibitions thereof through blanket legal bans not only do not have a "legitimate aim", but are also *"contrary to both the purpose and the constitutional concept of state and public services in a democratic society."*[82]

All this, as I already stressed, led the Court to conclude that the proposed Law was contrary to the Croatian legal system as a whole. And as to the issue of the "exclusive powers" of the state bodies, the Court shortly concluded that the mentioned blanket prohibitions were contrary to the Constitution because they would *"...restrict the Government and the Parliament in framing the state budget"*. The Court's only argument thereof was that, since salaries and other material remunerations for those employed in the public sector are reserved in the state budget, the Government and the Parliament would be that way bound by the Law.

Apart from all said, in the concluding remarks the Court yet gave additional two announcements, revealing further elements pertaining to its view of the whole case. On one hand, it pointed that *"...the use of referendum in order to achieve an a priori and preventive prohibition of future changes of the existing legal regulation, which itself is neither in the course of a process of change nor there exists a formalized or institutional intent of the Government to change it, is not – from the rule of law aspect – in accordance with the Croatian legal order as a whole."*[83] And on the other hand, it stressed the following: *"By not entering into the issues of expediency and appropriateness of various possible measures of outsourcing of complementary and non-basic services in the public sector, the Constitutional Court determines that the competent state bodies (the Croatian Parliament and the Government) are constitutionally empowered to carry out such measures at any time and without any special conditions which would derive from the Constitution, except for the respect of democratic procedures and general conditions which are imposed upon the institutional regulators of social relations by the rule of law."*[84]

Several observations regarding the Court's interpretation should be made here.

Firstly, it is completely unclear how the enactment of a law could be prohibited on account of the argument that it invades the exclusive powers of the Parliament and the Government in budgetary matters. Truly, a legislative project financially *can be* unsound, but that does not mean that in principle it is legally (or constitutionally) unacceptable. It may only politically be a bad legislation, but it is a legislation nevertheless. If a law is enacted, it becomes a part of the state's obligations towards its subjects, including the task of providing enough resources for its implementation. In other words, it is exactly through their budgetary prerogatives that the bodies of representative democracy are then called upon to act in new circumstances and to readjust financial capacities of the state to meet new obligations. Simply

[82] Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 43.3).
[83] See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 45).
[84] See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 48).

said, a law produces a framework within which the state subjects are bound to operate, each one in its own role, even if that role is taken as the exclusive one.[85] Moreover, the same could be said in reference to other powers of the Government which the Court did not label as exclusive. Thus, the Government's powers to direct and control the operation of state administration, to direct performance and development of public services, and to take care of economic development of the country are merely powers that must be performed in accordance with existing laws, be those enacted by the Parliament or the people. In addition, should either the Parliament or the Government think that a new law represents an obstacle to appropriate fulfillment of these tasks, they may replace it with a new one, in a proper parliamentary procedure.[86]

Secondly, the Court's interpretation of the exclusive powers of the Parliament in this case also lacked systemic constitutional justification. When construing the claim that the Parliament had the exclusive power to enact the state budget, the Court invoked Article 81 of the Constitution.[87] However, reliance upon this particular norm goes with at least two problems. On one hand, Article 81 embodies rather different powers, not all of which exclusively belong to the Parliament. Therefore, if the Court really wished to properly distinguish between various powers within that particular constitutional provision, it should have provided a more solid systemic explanation why some powers therein would be exclusive and some would not. And on the other hand, Article 87 of the Croatian Constitution, which here must be read in conjunction with Article 81, allows also that actually some *"other issue within the competence of the Parliament"* may be put on a referendum vote. Thereby, absent any further theoretical and non-strictly textual justification for defining exceptions to, this equally seriously undermines the Court's position.[88]

Thirdly, taking into account that the mentioned bans would actually be regulated by a law, the Court's claim that they would have a "permanent" character is completely absurd. Just as any other law, this one would also, beyond any doubt, be subject to possible further modifications, or even repeal, provided only that such modifications are made through another proper legislative procedure. Constitutional prerogatives of either the Government (to possibly propose a new legal regulation if such a solution is needed in order to pursue other

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[85] In other words, the enactment of a law on a referendum does not in any way foreclose the powers of either the Government or the Parliament to exclusively propose or adopt a new state budget.

[86] It should be noted that the Court here recognized the importance of the Government's power to propose new legislation, in order to fulfill its other constitutional tasks, but it provided an explanation thereof which, in my view, is absurd: in fact, the Court said that the bans contained in the Law on Carrying Out Complementary and Non-Basic Services in the Public Sector would actually prohibit the Government from proposing new legislative changes in the field. See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 43).

[87] Apart from Article 81, the Court here also invoked Article 91 of the Constitution. However, since Article 91 only provides that *"State revenues and expenditures shall be determined by the state budget"*, that *"The Croatian Parliament shall enact the central budget by a majority vote of all deputies"* and that *"A law whose implementation requires financial funds shall specify the sources of such funds"*, it is of no importance for the present discussion.

[88] Besides adoption of the state budget, Article 81 of the Constitution gives the Parliament powers to enact or amend the Constitution, to pass laws, to decide on war and peace, to decide on alterations of state borders, to call a referendum etc. As stressed before, since at least some of these powers *are not* exclusively given to the Parliament (e.g. amendments to the Constitution or passing of laws), a proper (con) textual interpretation of this Article undoubtedly requires a more thorough scrutiny than the one given by the Constitutional Court. Admittedly, giving some of these powers on a referendum vote would be completely absurd (e.g. declaration of war), but any justified imposition of prohibitions for such issues would nevertheless also need stronger supporting arguments. When, for the same purpose, having construed both exclusive and other "important" powers of the Government, the Court invoked Article 113 of the Constitution, the norm which also contains various types of powers. However, it seems that in this segment the Court concluded well because some of those powers could easily be distinguished as the "exclusive". Thus, for instance, a power of the Government to propose legislation is not the exclusive power since the Constitution itself explicitly prescribes that the same power belongs also to each representative in the Parliament, to parliamentary clubs of representatives and the working bodies of the Croatian Parliament. See: the Constitution of the Republic of Croatia, Article 85.

governmental objectives) or the Parliament (to enact a new law) thus would not in any way be jeopardized.[89]

And fourthly, the Court's arguments that labor law models generally are "inherently" changeable and that any "permanent" prohibitions thereof through blanket legal bans not only do not have a legitimate aim, but are also *"contrary to both the purpose and the constitutional concept of state and public services in a democratic society"* also require further clarifications as to what the "concept of state and public services in a democratic society" would be and what such legitimate aim would possibly consist of. Moreover, putting here the decisive emphasis again on the problem of "permanence" of such prohibitions, the Court almost completely ignored the relevance of the fact that the proposed Law was actually only confirming what had already been established in various prior laws: that complementary and non-basic services in the public sector *have for years already been carried out* by those employed in that sector.[90]

This was, in short, the "contribution" of this particular case to the general development of the referendum practice in Croatia. It should be noted that, among all the elements mentioned, the main emphasis must be put on the Court's efforts to construe the concept of "exclusive" powers of state bodies and to present them as juridical exceptions to general powers of referendum decision-making.[91]

4. FINAL REMARKS ON REGULATION AND PRACTICE OF REFERENDUMS

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[89] Curiously though, in describing the bans contained in the proposed Law on Carrying Out Complementary and Non-Basic Services in the Public Sector, the Court actually gave two types of interpretation which conceptually stand in opposition. On one hand, it explicitly stated that the Law would prohibit the Parliament and the Government *"...from taking any further intervention in the existing legal model"* and that *"...through the adoption of the Law on the referendum, it is intended to in advance (preventively) prohibit any eventual future change of the existing legal regulation of the labor status of employees who carry out complementary and non-basic services in the public sector..."*. On the other, the Court qualified these bans as having *"...a more permanent basis, because they would be prescribed by a law adopted on a referendum"* and would consequently block any further reforms *"...as long as such legal bans are valid."* See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 41.1 and 43). Not only that the difference between these two qualifications is self-evident, but the first one is also completely untrue for the reasons I have already stressed above (i.e. another future, parliamentary enacted, law could well change the one adopted on a referendum). Moreover, even if the latter qualification (of the bans being "more permanent") is taken as the true one, and in my opinion it should be, there would really be no problem, because the Law would just direct the conduct of constitutional actors in the manner as by that particular Law, without, however, in any way preventing that the Law itself could be changed in a proper parliamentary procedure, should circumstances so require.

[90] In fact, in that last aspect, the Court only focused on the claims of the organizers of the referendum initiative that the proposed Law was not introducing anything new and rejected them, arguing again, in a quite inapprehensible conclusion, that the principal impact of the Law would be to *"...prevent the Government and the Parliament to change the existing laws."* See: Decision of the Constitutional Court U-VIIR-1159/2015, April 8th 2015 (par. 40).

[91] In April 2015 the Constitutional Court delivered yet another decision, this time related to a referendum popular initiative seeking adoption of a law which would actually prescribe a prohibition on the governmental plan to give public roads in Croatia under concessions for public services. Since this decision in significant part mainly follows the argumentation given in the foregoing Decision on the prohibition of "outsourcing", I am omitting here its more extensive evaluation. In addition to that, however, it must be noted that the Court in this latter case found that a blanket legal prohibition foreseen by the proposed law (described by the Court also as an "a priori", "automatic", "unselective" and "more permanent" measure) would go contrary to the governmental constitutional power of *"taking care of the economic development of the country"* (Article 113/7 of the Croatian Constitution) and would, moreover, be contrary to the "comprehensive constitutional principle", making part of the Croatian constitutional identity and embodied in Article 49/1 of the Constitution, which prescribes that *"Entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia."* From a more technical point of view, the Court refused to establish a rule that organizers of the initiative should generally give explanation of causes and reasons for organizing referendums not later than at the very moment of starting collection of signatures. See: Decision of the Constitutional Court U-VIIR-1158/2015, April 21st 2015. For some general tendencies regarding referendums on economic issues, and especially for a conclusion that those lead to rejection by the voters, see: Mads Qvortrup, *A Comparative Study of Referendums – Government by the People*, (op. cit.), pp. 82-88.

As for evaluation of the legal regulation of referendums and according to the practice in Croatia so far, it can be stated that legal factors which enhance them are: a wide list of possible issues to be put on vote; few formal requirements; a lack of an appropriate legal framework on financing of referendum initiatives and campaigns; and, after the 2010 constitutional amendments, erasure of a turnout quorum. To this may be added social and political factors, especially as they are fueled by economic crisis or purely ideological confrontations. Normative factors that restrict direct democratic practice should be sought in relatively high number of signatures required for starting a popular referendum initiative and a short period (up to fifteen days) during which such signatures must be collected. Additionally however, possible restrictive factors could also be located in the growing Constitutional Court's case-law and interpretation methods that surely tend to put significant boundaries on the list of issues whose resolution on referendums could be constitutionally acceptable.

As for evaluation of the practice, existing experiences of the use of direct democratic instruments in Croatia should be viewed in an overall context of social and political relationships. From that point of view, referendum surely becomes an expressive means of disagreement with governing structures, the fact that is probably best understood in the context of a rather long-lasting economic crisis. This conclusion is also supported by the fact that the most recent popular initiatives have aimed at adopting either measures with clear economic or ideological impacts or measures aimed at restructuring the whole system of representative democracy in its roots.[92] At the same time, this explains the growing interest of citizens in the use of direct democratic tools.[93]

A reasonable discussion on various political issues in the practice of direct democracy in Croatia is burdened by similar factors. Disappointment with governmental social and economic measures most often leads to highly emotional responses by the citizens who try to block certain governmental measures. A majority of cases in which the referendum has so far been used shows that they have been related to rather complex questions whose determination and legal regulation cannot merely be decided through referendums, but rather through complex and "adversarial" political process in the parliament.

Since in majority of cases referendums have been initiated (or have been tried to be initiated) by popular initiatives[94], it could be concluded that they more create the gap between governmental politics and preferences of citizens than they reduce it.

Instruments of direct democratic are most often used by civic associations.[95] Since there are no exact rules on financing of referendums, there is no exact answer on the involvement of specific economic groups in support of specific referendum initiatives.

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[92] For example, the referendum attempting to regulate preferential vote system.

[93] For general evaluation of referendum as the tools for citizens, see: Francis Hamon, Le Référendum - Étude comparative, 2e édition, L.G.D.J., Paris (2012), pp. 211-220; Biljana Kostadinov, *Citizens' Initiative Referendum and Citizens' Initiative – A Comparative Study and Suggestions for Regulation in Croatia (Referendum građanske inicijative i građanska inicijativa – poredbena studija i prijedlozi za uređenje u Hrvatskoj)*, in: *Elections of Representatives in the Croatian Parliament and Referendum (Izbori zastupnika u Hrvatski sabor i referendum)* (Barbić, J. – ed.), Croatian Academy of Sciences and Arts (Hrvatska akademija znanosti i umjetnosti), Zagreb (2011) pp. 119-147; Biljana Kostadinov, *Popular Initiative Referendum in Europe: Switzerland, Italy and Croatia* (*Referendum građanske inicijative u Europi: Švicarska, Italija i Hrvatska*), in: *Building Democratic Constitutional Institutions in the Republic of Croatia in Developmental Perspective* (*Izgradnja demokratskih ustavnopravnih institucija Republike Hrvatske u razvojnoj perspektivi*), (op. cit.), pp. 245-258.

[94] The exceptions to this are referendums on the independence from 1991 and the EU membership from 2012.

[95] For example, popular initiatives which include trade unions, ideological groups and war veterans. However, one must notice that the Croatian experience with referendums so far generally conforms to the evaluation which David Butler and Austin Ranney made in 1994: *"...in the few polities with both government-controlled referendums and popular initiatives, referendum measures referred to the voters by governments have generally succeeded more than measures placed on the ballot by popular initiatives."* See: David Butler and Austin Ranney, *Theory*, in: Referendums Around the World – the Growing Use of Direct Democracy, (David Butler and Austin Ranney – eds.), The AEI Press, Washington D.C. (1994), p. 20.

So far, and due to a relatively small number of cases, it may be said that governments generally are only partially influenced by referendum initiatives[96], that referendums have not been turned into tools that are systemically dangerous to the political system and that popular referendum initiatives have neither paralyzed state institutions in their regular roles nor significantly delayed urgent political decision-making processes.

Generally, popular participation in law-making processes generally is not necessarily opposed to the concept of consensual democracy in Croatia. This may be concluded at least for those cases where referendum can be used either for adopting decisions of not the highest political or social value[97] or for approving the most serious, that is strategic decisions.[98] On the other hand, popular participation in law-making processes could be problematic if frequently used as the tool for enactment of special (i.e. "organic") laws[99] or as the means of decision-making on some *"other issue"* within the Parliament's competence. However, taking into account that in the last 25 years referendum was successfully used on only a few occasions, it cannot be deduced that it undermines the parliament's monopoly of law-making.

When observing the constitutional regulation of referendums in Croatia, one cannot escape the impression that a significant portion of it either proved (or could prove to be) problematic in practice or required (or still require) further interpretations. Apart from the deficiencies already pointed in this conclusion, this can also be confirmed by focusing on Article 87 of the Croatian Constitution. Out of six paragraphs that are contained in this principal constitutional norm regulating referendum, at least five deserve special attention.[100]

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[96] This would include withdrawals of certain bills or other projects. From that point, see the claim that *"...Most likely…the growing use of the referendum will act to complement party democracy, not to replace it. Rather than weakening parties, the selective use of the referendum to inform and legitimize important policy decisions may actually strengthen them."* See: Lawrence LeDuc, *The Politics of Direct Democracy – Referendums in Global Perspective*, Broadview Press (2003), p. 188.

[97] For example, enactment of "ordinary" laws or local referendums.

[98] These "strategic" decisions would thus include the cases of deciding on entering into associations with other states, or on dissolution of state alliances. In those cases, it must be moreover stressed, a referendum approval is only the second step in a procedure which firstly requires a decision enacted by the two-thirds majority in the Parliament. See: the Constitution of the Republic of Croatia, Article 142.

[99] In the Croatian Constitution, the so-called „organic laws" regulate the rights of national minorities and elaborate the constitutionally defined human rights and fundamental freedoms, the electoral system, the organization, authority and operation of government bodies and the organization and authority of local and regional self-government. See: the Constitution of the Republic of Croatia, Article 83.

[100] On various occasions in the previous text I have tried to point to some particular problems related to regulation and practice of referendums in Croatia. The most important lessons, as they are reflected through Article 87 of the Croatian Constitution, I will try to repeat in subsequent lines. Generally, however, there remains a question of how to frame future legal regulation. As it suggests Matt Qvortrup, overall measures to this end may include restrictions on signature gathering, limits on campaign contributions and campaign spending, pre and post-election judicial review, single-issue restrictions, super-majorities and Disclosure laws. For this, see: Matt Qvortrup, *Direct Democracy – A comparative Study of the Theory and Practice of Government by the People*, (op. cit.), pp. 142-143. For additional proposals and critical reviews in the Croatian context, see: Smerdel, B., *The Constitutional Order of the European Croatia (Ustavno uređenje europske Hrvatske)*, (op. cit.), pp. 167-168 and especially 385-394; Branko Smerdel, *Direct Decision-Making and Its Constitutional Limits* (*Neposredno odlučivanje i njegove ustavne granice*), in: *Building Democratic Constitutional Institutions in the Republic of Croatia in Developmental Perspective* (op. cit.), pp. 183-203; Branko Smerdel, *An Overview of the (Sad) History of Popular Initiative Referendum in Croatia* (*Pregled (tužne) povijesti referenduma građanske inicijative u Hrvatskoj*), in: *Referendum of Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects* (*Referendum narodne inicijative u Hrvatskoj i Sloveniji – Ustavnopravno uređenje, iskustva i perspektive*), (Robert Podolnjak and Branko Smerdel – eds.), Croatian Association for Constitutional Law (Hrvatska udruga za ustavno pravo), Zagreb (2014), pp. 25-44; Biljana Kostadinov, *Popular Initiative Referendum* (*Referendum građanske inicijative*), in: *Referendum of Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects* (op. cit.), pp. 132-134; Robert Podolnjak, *Constitutional Engineering of Citizen Initiated Referendum: Some Recommendations to the Croatian Constitution-Maker* (*O "ustavnom inženjeringu" referendum narodne inicijative: neke preporuke hrvatskom ustavotvorcu*), (op. cit.), pp. 203-230. I would here most insist on better regulation of exceptions to the issue which could be put on a popular vote and on better regulation of judicial review, which would not only cover all cases of referendum decision-making but would also be more precise in terms of procedural rules.

In reference to the requirement that at least ten percent of the voters' signatures should be collected in order to pursue a popular referendum initiative[101], it should be recalled that this was interpreted by the Constitutional Court as requiring only ten percent of those voters who actually reside on the proper territory of the state. Consequently, by insisting on the "territorial" element of the norm, the voters belonging to diaspora were excluded from the formula which, in my opinion, resulted in a rather problematic conception of a political community that should consist of all the eligible citizens. A "gap" that was created this way was even further pursued through the "triple scheme" of evaluating the status of voters who may vote on a referendum, give their signatures in support of particular initiatives or, as said, be counted against the requirement of ten percent.[102]

The constitutional command that decisions adopted on a referendum shall be made by a majority of voters taking part therein (thus, without a turnout quorum)[103], provoked significant criticism as to legitimacy of such decisions. These specific critics were related to the referendum on the Croatian accession to the European Union and will probably be reappearing in political discourse in future also, especially if fueled by the ongoing European crisis. However, it must be noted that such constitutional regulation form 2010 was not introduced merely out of fear from an unsuccessful popular decision on such an important matter, as the usual reasoning suggests, but can also be explained as the result of rather untidy official lists of eligible Croatian voters at the time.[104] It nevertheless can be said that the regulation itself should not be problematic, because it does not prevent anybody from voting, it just requests counting of votes of those who have decided to participate in political processes and prevents the abstained from blocking them.

Truly, the impact of the constitutional paragraph prescribing that decision made at referendum shall be binding[105] was confirmed by the Constitutional Court when it declared that such a decision has a constitutive character and results in an immediate transformation of the constitutional text, taking legal effect on the actual day a referendum was held, which is only declaratory established by the Constitutional Court.[106] This confirmation, however, was done only implicitly.[107] Moreover, the meaning of the "binding" nature of referendum initiatives was further extended by the Court as to include also the cases in which referendums themselves, although not actually held, could have further legal consequences.[108]

As to the part in which the Constitution requires that a special law on referendum must be enacted[109], it should be recalled that even up to now such new law has not been adopted

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[101] See: the Constitution of the Republic of Croatia, Article 87 par. 3.

[102] See: Decision of the Constitutional Court U-VIIR-7346/2014, December 10th 2014. I must emphasize that I am here only insisting on the appropriate reading of the Constitution which in its Article 87 literally requires that ten percent is counted from *"…all voters in the Republic of Croatia"*. Contrary to the position of the Constitutional Court, I would argue that this expression must relate to all the voters in the Republic of Croatia, understood as the political (and not territorially based) community. Or, in other words, if the voters in diaspora *do have* a status of Croatian voters, a fact which eventually was not denied even by the Constitutional Court, then they should also be recognized as a part of the political (voting) community as a whole. This, however, for me does not have any further reference as to whether such voters *should have* voting rights, which is a completely separate issue that I also leave for some further examinations.

[103] See: the Constitution of the Republic of Croatia, Article 87 par. 4.

[104] For this particular problem, see Branko Smerdel, *The Constitutional Order of the European Croatia* (*Ustavno uređenje europske Hrvatske*), (op. cit.) pp. 160-161.

[105] See: the Constitution of the Republic of Croatia, Article 87 par. 5.

[106] See: the "Warning" of October 24th 2013.

[107] Thus, I have previously pointed that the "binding" nature of a decision adopted on referendum was interpreted by the Constitutional Court not through invocation of paragraph 5 of the Article 87, but rather through the distinction between two separate constitutional procedures contained in Article 87 and Chapter IX of the Constitution.

[108] See the previously mentioned Decision of the Constitutional Court related to the referendum on the Labor Act. For similar consequence see also the Decision regarding the referendum on the status of public roads in Croatia.

[109] See: the Constitution of the Republic of Croatia, Article 87 par. 6.

although the constitutional text in 2010 was amended, among other things, also in relation to the regulation of referendums.

But above all, the most troubling aspect of Article 87 is contained in its paragraph 1 which prescribes that a referendum may be called, among other things, on *"...other issue within (the Parliament's* – note Đ.G.*) competence."*[110] This formulation is undoubtedly too broad and, taking into account the range of issues that may be decided in Parliament, seriously problematic.[111] As it was described above, the Constitutional Court has already started to make some exceptions to the popular decision-making powers, although not in strict reference to this particular paragraph.[112] Nevertheless, it could be expected that in the future some serious work on these matters will, and should, follow. From that point of view, I would already argue in favor of the necessity to substantially narrow the area of questions which can be put on referendum vote. Additionally, I can stress that in this context even the present Croatian Constitution itself contains some "inherent" restrictions. One quite evident example includes the case of entering into alliances with other states (or of dissolution thereof).[113] Since this exact procedure must strictly include, first, the decision of the Parliament and, then, the referendum confirmation, there is no way of claiming that the people could, on the basis of Article 87 par. 1, vote on referendum and replace the parliamentary decision through the argument that this was a vote on *"...other issue within the Parliament's competence."* This would obviously end up in a situation where the people in the same case would vote twice.[114]

5. CONCLUSION

I have tried here to show the history of Croatian experiences with referendums and to point to some of its most interesting aspects, both good and bad. And as for the future, it is, of course, difficult to foresee possible developments. Nevertheless, one significant case in that respect is worth noticing. At the time of this writing (January 2016), Croatia is approaching a rather serious constitutional crisis which may come up if the Parliament does not in time elect new judges of the Constitutional Court. Should that be the case, the Court will not have enough members to make a quorum and will consequently be blocked for the most part of its activities. Similarly, although not officially confirmed by any state body or official, debates on possible abolishment of the Constitutional Court in general, through amending the Constitution, have in previous months again started to enter Croatian public discourse. In light of the previously stressed anticipation of further clashes between the Parliament and the Court, as well as the desire of the Court to construe its own theory of "self-defense"[115], it is thus probably of no surprise that in a recent interview the President of the Court announced, although quite implicitly, yet another new "strategy". To the journalist's question on possible abolishment of the Court, its President answered the following:

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[110] According to paragraph 1 of Article 87, such a referendum may be called by the Parliament. If read in conjunction with paragraph 3 of the same article, it means that such a referendum may also be requested through a popular initiative.

[111] The basic scope of the Croatian Parliament's powers ss defined in Article 81 of the Constitution and it, among other things, includes the decision-making on war and peace, on alternations of state borders, on appointments of state officials (including judges of the Constitutional Court), on state budget, on enacting laws (including those that regulate fundamental rights and freedoms), on confidence to the government etc. See: the Constitution of the Republic of Croatia, Article 81.

[112] In this sense, one must note the previous Court's decision in cases of the "outsourcing" and "public roads" referendums.

[113] See: The Constitution of the Republic of Croatia, Article 142.

[114] See: Đorđe Gardašević, *Unconstitutional Constitutional Amendments and the Constitutional Court of the Republic of Croatia (Neustavni ustavni amandmani i Ustavni sud Republike Hrvatske)*, (op. cit.) p. 110.

[115] In this respect, see the previous text in the chapter related to the Constitutional Court's „Statement" issued on November 14th 2013.

"Generally speaking, even if the amendment on the abolishment of the Constitutional Court would be allowed, such a decision on the change of the Constitution should be made on a referendum, because without the Constitutional Court Croatia would no more be the same state that we created in 1990. I hope that our academic community will also say a word on this issue."[116]

Since I am myself making part of the Croatian academic community, let me, finally, say few words on this last statement. The statement, above all, confirms the viability of the theory of "unconstitutional constitutional amendments" in our domestic constitutional context and may legitimately be linked to its "stealth" purpose: the Court's "self-defense" approach. And even more, from the present point of view, it is now completely clear why in Croatia the theory itself started to be construed in a reference to one very special document: the Opinion on the Fourth Amendment to the Fundamental Law of Hungary.[117] Now, in my opinion, a "strategic" decision to abolish the Constitutional Court in Croatia would be completely unwise. In some aspects good and in some not so good, the Court, as the whole constitutional system and political culture, is an institution subject to professional and academic criticism, as well as to change and development. Upon my own evaluation, the Croatian Constitutional Court has, in the last 26 years, made a significant progress for the better.[118] In our conception of the checks and balances system, it makes an inevitable part. From a stricter legal point of view, however, I can only once more repeat that, so far, the theory on "unconstitutional constitutional amendments" in Croatia has been quite limited. Any future developments of it should, therefore, be counting with how to, consequentially, justify its expansion.[119]

Apart from that, the above statement made by the President of the Court anticipates yet another tool of the Court's "self-defense" and yet another role for the institution of referendum. Although not completely unveiled in the mentioned interview, I can guess that the argument goes as follows: since the Croatian constitutional system was fundamentally construed with the 1990 Constitution and since the Constitutional Court was thus confirmed as an indispensable part of it, a legal fact that was subsequently confirmed on the 1991 referendum on independence, any further fundamental change of that system, which would include the complete abolishment of constitutionally defined body, should inevitably be put on a new referendum vote.[120]

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[116] See: *Playing with Basic Constitutional Institutions Evolves into a Dangerous State Experiment* (*Poigravanje s temeljnim ustavnim institucijama prerasta u opasan državni eksperiment*), interview with Jasna Omejec, Politički magazin Obzor, Večernji list, Zagreb, January 9th 2016, p. 6.

[117] Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session /Venice, 14-15 June 2013/, Opinion 720/2013, CDL-AD(2013)012, Strasbourg, June 17th 2013. As it is widely known, this Opinion, among other things, reflects the clashes between the Parliament and the Constitutional Court in Hungary. I have already tried to point to that specific link in one of my previous articles. See: Đorđe Gardašević, *Unconstitutional Constitutional Amendments and the Constitutional Court of the Republic of Croatia (Neustavni ustavni amandmani i Ustavni sud Republike Hrvatske)*, (op. cit.) p. 104.

[118] On the same conclusion based on the gradual development of the institution of Constitutional Court in Croatia with other authors, see: Jasna Omejec, *The Issue of Accountability and the Role of Constitutional Adjudication (Pitanje odgovornosti i uloga ustavnog sudovanja)*, in: *Constitutional Democracy and Accountability (Ustavna demokracija i odgovornost)* (Arsen Bačić – ed.), Croatian Academy of Sciences and Arts (Hrvatska akademija znanosti i umjetnosti), Zagreb (2013) pp. 74-91; Branko Smerdel, *The Constitutional Order of the European Croatia* (*Ustavno uređenje europske Hrvatske*), (op. cit.) pp. 452-453.

[119] I remind here that in its Statement from November 14th 2013 the Constitutional Court limited its interpretation to the conclusion that it had a concrete power to forbid special constitutional amendments if they are a product of "systemic constitutionalisation" of legal institutes (i.e. institutes embedded in laws), be they furthered by the parliament or the people, and provided that they are not substantially founded on social and cultural characteristics of a society.

[120] It seems that a broader theoretical discussion on this issue would undoubtedly benefit from further relying upon the distinction between the "command sovereignty" and "constituent sovereignty", where the latter involves a "constituent subject" which *"...shapes not only the governmental structure of a community but also*

By the strict letter of the Constitution, it can be amended either on by the people directly or by the Croatian Parliament.[121] Whether, nevertheless, there is enough space to argue to the contrary, I leave for future academic discussions and for the imagination of respectable readers of this article.

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its juridical and political identity…" See: Stephen Tierney, *Constitutional Referendums – the Theory and Practice of Republican Deliberation*, (op. cit.), pp. 11-12. In addition, it is worth noticing here that the constitutional amendments from 2000 and 2001 in Croatia, enacted in a purely parliamentary procedure, first abolished the "semi-presidential" system and then abolished the second chamber of the Parliament. They, however, did not abolish an institution in its entirety and the collateral argument would thus obviously be that those amendments are clearly distinguishable from the present case.

[121] However, for a kind of a warning to the contrary, Lawrence LeDuc stresses the following: *"Once a precedent is set in a particular country for holding a referendum on issues involving major political change, it becomes unlikely that further changes of similar magnitude will be attempted without again consulting the people, even when such consultation is not constitutionally mandated."* See: Lawrence LeDuc, *The Politics of Direct Democracy – Referendums in Global Perspective*, (op. cit.), p. 186. For another in this context relevant evaluation, that *"…in other former communist countries, too, a referendum to adopt a new constitution represented an exercise of popular sovereignty in which a newly independent people had an opportunity to assert its identity as a nation…"* whereas referendum *"…signaled in a formal sense its acceptance of symbols, institutions and procedures that could be presented as embodying the spirit of the nation…"*, see: Ronald J. Hill and Stephen White, *Referendums in Russia, the Former Soviet Union and Eastern Europe*, in: *Referendums Around the World – the Continued Growth of Direct Democracy*, (Matt Qvortrup – ed.), Palgrave MacMillan (2014), p. 38.

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