10. Croatia

Robert Podolnjak

1. INTRODUCTION

The Croatian constitution provides for various instruments of direct democracy at the national as well as the local and regional levels, which, at least at first glance, makes Croatia one of the countries with significant opportunities for direct decision-making by the people. However, these instruments have become part of the Croatian constitutional order at different times, with some of them having been designed more or less without due deliberation and with no enthusiastic support of the representatives in Parliament. They are inconsistent in some essential aspects and, in the case of the popular initiative, fraught with significant procedural hurdles and legal loopholes, which makes their practical application difficult. The most severe constitutional problem related to the functioning of direct democracy in Croatia has been the legal deficiency of constitutional and statutory regulation of the popular initiative. The second crucial problem has been the absence of legal limits in the Constitution as to the issues which may be the subject of a referendum. As a consequence, only three referendums have been held at the national level (of which just one upon the request of the citizens) and not many more at the local and regional levels since the establishment of the Croatian state some 30 years ago.

2. DIRECT-DEMOCRATIC INSTRUMENTS IN THE CROATIAN CONSTITUTION AND STATUTORY LAW

All democratic constitutions express, in similar formulations, the principle of popular sovereignty. The Croatian Constitution specifies this principle in the very first article, stating that power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens.

The people shall exercise this power through the election of representatives and direct decision-making.¹

The original Constitution from 1990 contained only provisions related to the mandatory and the optional (facultative) referendums on the national level. The popular initiative was constitutionalized as part of a comprehensive constitutional reform in 2000 and, finally, the provision on an advisory referendum was added by an amendment of the Constitution in 2010.²

As to the instruments of direct democracy on the regional (counties) and local (municipalities and cities) level, the constitutional amendment in 2000 established the constitutional right of the citizens to participate directly in the administration of local affairs, through meetings, referendums and other forms of direct decision-making, in compliance with law and local ordinances.³ The Local and Regional Self-Government Act prescribes several instruments of direct democracy: an optional local referendum, called by the representative body, the popular initiative and the recall procedure for removal of directly elected mayors/county governors.⁴ However, these instruments of local direct democracy are used very rarely and their influence on the overall state of direct democracy in Croatia is negligible.⁵ Therefore, this chapter shall analyse only the instruments of direct democracy on the national level.

2.1 Mandatory Referendum

The Constitution prescribes a mandatory referendum (*law-initiated referendum*) for only one instance, that is, in case of association (or disassociation) of the Republic of Croatia into alliances with other states. Article 142 of the

¹ Art. 1 (2)–(3) Constitution of the Republic of Croatia (consolidated text published in the Official Gazette No. 85/2010) in Jefri Jay Ruhti (ed.), *World Constitutions Illustrated – Croatia* (William S. Hein & Co. 2010).

² Art. 87 (6) Constitution. Currently an advisory referendum may be held on the reorganization of local self-government units. See Art. 57 Act on Referendum and Other Forms of Individual Participation in the Functioning of State Authority and the Local Self-Government 1996 (the Official Gazette, No 33/96, 92/01, 44/06, 58/06, 38/09, 100/16 and 73/17).

³ Art. 133(3) Constitution.

⁴ Local and Regional Self-Government Act, the Official Gazette, No. 33/2001, 60/2001, 129/2005, 109/2007, 36/2009, 125/2008, 36/2009, 150/2011, 144/2012, 123/2017, 98/2019.

⁵ Since 1999, only 15 local referendums were held in 555 local government units, mostly in smaller municipalities. Most of them failed because the turnout quorum of participation of the majority of the voters in a local government unit was not reached. The turnout quorum is prescribed in Art. 6 (2) Referendum Act. See: Anita Blagojević and Ana Sesvečan, 'Ustavnopravni okvir referendum u Republici Hrvatskoj: Trenutno stanje i budući izazovi' (2019) 56 Zbornik Pravnog fakulteta u Splitu 835, 866–67.

Constitution stipulates that any association of the Republic of Croatia shall first be decided upon by the Parliament by a two-thirds majority of all deputies. Then the final decision concerning the association of the Republic of Croatia shall be made in a referendum by a majority vote of all voters voting in the referendum.⁶

The approval quorum, according to which the decision on the referendum shall be made by a majority vote of the total number of electors in Croatia, for the mandatory referendum was eliminated by the 2010 constitutional amendment. It was the prevalent opinion of constitutional scholars and the representatives in the Parliament that the approval quorum for the referendum on accession to the European Union (EU) should be removed 'since it contained a practically impossible requirement in light of the disorder of the list of voters due to a large number of persons with double citizenship'.⁷ In the Croatian EU membership referendum, held on 22 January 2012, 1,299,008 voters (66.67 per cent) voted for the accession of Croatia to the EU, with a turnout of only 43.51 per cent.⁸

2.2 Optional Referendum

The optional referendum is regulated in Article 87 of the Constitution. The Parliament may call a referendum on a proposal to amend the Constitution, a bill or any other issue within its competence (*legislative-initiated referendum*). The President of the Republic (President) may, at the proposal of the Government and with the countersignature of the Prime Minister, call a referendum on a proposal for the amendment of the Constitution or any other issue which the President considers to be important for the independence, unity and existence of the Republic of Croatia (*executive-initiated referendum*).⁹

The pre-2010 Constitution prescribed that decisions shall be made by the majority of voters who voted in a referendum, provided that the majority of the total number of voters have taken part in the referendum.¹⁰ The 2010 constitutional amendment has abolished the turnout quorum and now a simple majority

⁶ Art. 142(3)–(4) Constitution.

⁷ Branko Smerdel, 'Republic of Croatia' in Leonard Besselink and others (eds), *Constitutional Law of the EU Member States* (Kluwer 2014) 199–200.

⁸ Državno izborno povjerenstvo, Izvješće o državnom referendumu o pristupanju Republike Hrvatske Europskoj Uniji (The State Electoral Commission, Report on the state referendum on the accession of the Republic of Croatia to the European Union) https://www.izbori.hr/arhiva-izbora/data/referendum/2012/izabrani/i_81_000_0000.pdf, accessed 10 December 2019.

⁹ Art. 87(1)–(2) Constitution.

¹⁰ Art. 87(3) Constitution of 1990.

of voters is sufficient for accepting proposals in a national referendum. The referendum decision is binding. The Referendum Act¹¹ stipulates further that a state authority does not have the right to pass a legal act or decision which contradicts the referendum decision within one year after the referendum. Another referendum cannot be called about the same issue or issues before a deadline of six months expires from the day when the referendum was held.¹²

The Parliament has never called an optional referendum on its initiative. The President called the first national referendum on an issue vital for the independence, unity and existence of the Republic of Croatia – it was the referendum on Croatian independence held in May 1991.

2.3 Popular Initiative

The popular initiative (*proactive citizen-initiated referendum*) became part of the Constitution in 2000. The then Article 86 (now Article 87) was amended, prescribing that the Parliament shall call a referendum on any issue that may be put to a referendum by the Parliament or the President when so demanded by 10 per cent of all voters of the Republic of Croatia. With this constitutional provision, Croatian citizens have acquired the full-scale popular initiative to request a constitutional or legislative referendum or a referendum on some other issue important for the independence, integrity and existence of the Republic of Croatia. A citizen-initiated referendum can also be called with the goal to abrogate an existing law or some part of a law, or to replace existing law with a new one, or to enact a completely new law. Formally speaking, no issues are excluded from the citizen-initiated referendum.

In the last 20 years, since the popular initiative has been a part of the Constitution, only one citizen-initiated referendum has been held. It was the most successful popular initiative to date in Croatia by the ‘In the Name of the Family’ association, calling for a referendum on the question: ‘Do you agree that a provision be added to the Constitution of the Republic of Croatia whereby marriage constitutes a living union between a woman and a man?’ (the so-called ‘marriage referendum’). In May 2013, the initiative collected almost 750,000 signatures,¹³ thereby fulfilling the necessary condition to call the first citizen-initiated constitutional referendum in Croatia.

¹¹ The Act on Referendum and Other Forms of Individual Participation in the Functioning of State Authority and Local Self-Government, the Official Gazette, No 33/96, 92/01, 44/06, 58/06, 38/09, 100/16 and 73/17, hereinafter: Referendum Act.

¹² Art. 8(2) Referendum Act.

¹³ Officially, only 683,948 signatures were valid, but that was also more than was needed to call a referendum.

At the time, there were different constitutional interpretations concerning the possible consequences of a decision taken in a citizen-initiated constitutional referendum.¹⁴ The most important constitutional questions were whether the Parliament is obliged to call a referendum in all cases when a popular initiative meets the constitutional requirements and whether it can in any way obstruct the will of the people expressed in a referendum.

The opinion of some leading MPs from the governing coalition was that the Parliament could not be forced to call a referendum whose goal is to diminish the rights of same-sex partners and that the constitution-making power belongs, under the Constitution, solely to the Parliament.¹⁵

In a joint statement, all professors of constitutional law from the law faculties in the country stated the fundamental principles of the Constitution regarding the popular initiative and the consequences of the referendum decision:

The Croatian Parliament is obliged to hold a constitutional referendum if one is requested by 10 per cent of the total number of voters /.../ Rejection by the Croatian Parliament to call a referendum when an initiative has fulfilled all the necessary formal and legal requirements would be a denial of the very essence of a citizen-initiated referendum. It could have incalculable consequences for the constitutional stability of the country. Any decision made by the citizens in a constitutional referendum would be, by its very nature, constitutional in character, and would be binding on all state bodies. It would represent a change in the Constitution and come into force upon confirmation that the referendum was held according to the Constitution.¹⁶

Nevertheless, the Committee on the Constitution, Standing Orders and Political System of the Parliament proposed a decision to call a national referendum only ‘to *begin* the procedure to amend the Constitution’. Second, the Committee suggested that in the referendum ‘a decision will be made on

¹⁴ The following passages are adapted from Robert Podolnjak, ‘Constitutional Reforms of Citizen-Initiated Referendum: Causes of Different Outcomes in Slovenia and Croatia’ (2015) 26 *Revus – Journal for Constitutional Theory and Philosophy of Law* 129, 138–39.

¹⁵ See the opinion of Pedja Grbin, the chairperson of the Committee on the Constitution, Standing Orders and Political System in ‘Građani na referendumu ne mogu izmijeniti Ustav!’ (Citizens cannot change the Constitution in a referendum!), <https://www.tportal.hr/vijesti/clanak/gradani-na-referendumu-ne-mogu-izmijeniti-ustav-20131024>, accessed 22 May 2020.

¹⁶ The statement (in Croatian) is published in Robert Podolnjak and Branko Smerdel (eds), *Referendum narodne inicijative u Hrvatskoj i Sloveniji: Ustavnoopravno uređenje, iskustva i perspektive (Referendum of Popular Initiative in Croatia and Slovenia: Constitutional Regulation, Experience, and Prospects)* (Croatian Association for Constitutional Law 2014) 233–235.

beginning the procedure to amend the Constitution'.¹⁷ In the Committee's opinion, the referendum decision would only be the first step in the process of changing the Constitution, which could only be made, in the Committee's view, by a two-thirds majority of MPs and not directly by the people in the referendum.

Before this proposed decision was debated by the Parliament, the Constitutional Court issued, for the first time, an 'unusual and unprecedented act'¹⁸ called 'Warning' to the Parliament, stating that parts of the proposed decision were contrary to Croatian constitutional law.¹⁹ The Court grasped the real intention of the proposed decision of the Constitution Committee – that the referendum decision, based on the popular initiative, would be just a first phase in the process of amending the Constitution and not a decision with the effect of a regular constitutional amendment. That would be, in the Court's opinion, constitutionally unacceptable. The Constitutional Court emphasized:

(T)he voters in a national constitutional referendum called based on a people's constitutional initiative within the meaning of Article 87 of the Constitution ... (in relation to Article 1 of the Constitution), always decide on the merits of the case, that is, on the very referendum question, which means: the people directly decide to change the Constitution, which is proposed – in the form of a referendum question – by at least 10 per cent of the total number of voters, by voting for or against the proposal ... Accordingly, a decision where the Constitutional Court confirms that a specific popular referendum to amend the Constitution – where the people ... had voted FOR a proposed referendum question – was conducted in conformity with the Constitution also means that the Constitution is amended on the day the referendum is held with immediate legal effect.²⁰

After the Court's Warning, the Parliament changed the disputable parts of the decision to call the referendum according to the Court's opinion. The Court's Warning to the Parliament to respect the Constitution was of utmost impor-

¹⁷ Committee on the Constitution, Standing Orders and Political System, Draft of the Decision on the calling of the State Referendum, 24 October 2013 <https://www.sabor.hr/hr/radna-tijela/odbori-i-povjerenstva/prijedlog-odluke-odbora-za-ustav-poslovnik-i-politicki-sustav-8>, accessed 22 June 2020.

¹⁸ Sanja Barić, *The Transformative Role of the Constitutional Court of the Republic of Croatia: From ex-Yu to the EU* (Analitika, Center for Social Research 2016) 24.

¹⁹ See the 'Warning concerning the Proposal of a Decision by the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament to call a national referendum of 24 October 2013', Constitutional Court, No. U-VIIR-5292/2013, 3–4 <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=56FBA104F615D85AC1257E5F003E9519>, accessed 15 December 2019. See also *Bulletin on Constitutional Case-Law* (The European Commission for Democracy through Law 2014) 477–78.

²⁰ *Ibid.*, 5.

tance not only by stressing its obligation to call a citizen-initiated referendum but also in recognizing the results of the referendum vote. It has significance also for future citizen-initiated referendums in Croatia.

The first referendum demanded by a popular initiative was held on 1 December 2013. With a relatively modest turnout of 37.9 per cent, almost two-thirds of voters (946,433, or 65.87 per cent) voted for amending the Constitution with the inclusion of the definition of marriage as a union of man and woman.²¹

Besides the 'marriage referendum', there have been several other important popular initiatives that had either collected the necessary number of signatures for triggering the referendum or claimed that they had done so but this was not confirmed by the authorities. For instance, two popular initiatives, 'The People Decide' and 'The Truth about the Istanbul Convention', claimed that they had collected the necessary number of signatures in May 2018, but this was not confirmed after the signatures' verification made by the Ministry of Administration.

In all these cases, the Constitutional Court had the final word. In some cases, the Court decided that the initiatives had not collected enough signatures (accepting the respective official reports that the formal condition of the signatures of 10 per cent of voters in Croatia had not been fulfilled).²² In other instances, it decided that the referendum question was not in accordance with the Constitution.²³ In one particular case, the referendum was not called because the Constitutional Court ruled that it is not necessary to conduct a formal referendum because the Government had accepted the popular initiative demands by withdrawing a bill from the parliamentary procedure. The Court emphasized that 'this conduct of the Croatian Government proves that in a democratic society, direct voter participation in political decision-making can be realized just by meeting the requirements for holding a referendum and that the administration of a referendum is not even necessary.'²⁴

²¹ State Electoral Commission of the Republic of Croatia, Report on the National Referendum held on 1 December 2013, <http://www.izbori.hr/2013Referendum/rezult/rezultati.html>, accessed 20 December 2019.

²² See Constitutional Court's rulings U-VIIR-3620/2018, U-VIIR-2626/2019, and U-VIIR-114/2019/U-VIIR-1623/2019 (dismissing the complaints of two popular initiatives on procedural grounds).

²³ On the Court's decisions on the constitutionality of the referendum questions of popular initiatives see Djordje Gardasevic, 'Constitutional Interpretations of Direct Democracy in Croatia' (2015) 17 *Iustinianus Primus Law Review*, 1 and Sanja Barić (n 18) 22–26.

²⁴ The decision No U-VIIR-4696/2010 <https://sljeme.usud.hr/usud/prakswen.nsf/fOduka.xsp?action=openDocument&documentId=6937DFB8D37F2A2FC1257E5F003E9712>, accessed 15 December 2019 (para. 23).

The last (successful) popular initiative from 2019 is the best example of the shortcomings in the constitutional and statutory regulation of the institution. Several Croatian trade union confederations initiated the collection of signatures for the popular initiative ‘67 is too much’, directed against the government pension reform of 2018. The key demands of the trade unions were the reduction of the retirement age from 67 to 65 years and the lowering of the penalization of early retirement from 0.3 to 0.2 per cent per month. The referendum question was formulated as a specifically worded draft law (the Draft Act Amending the Pension Insurance Act). In May 2019, the popular initiative collected almost 750,000 signatures (approximately 20 per cent of all registered voters in Croatia). The Parliament did not ask the Constitutional Court to decide whether the referendum question is in accordance with the Constitution, but neither did it call the referendum, as it should have done. Instead, on the Government’s proposal, the Parliament enacted the Act Amending the Pension Insurance Act, with the same text that was contained in the referendum question.²⁵ In that way, the goal of the popular initiative was accomplished without the formal referendum decision-making process. However, such a procedure is prescribed neither in the Constitution nor in any other legal act.²⁶ It was based on an analogy with the Constitutional Court’s decision of 2010 holding that there is no reason to call a referendum if the goal of the initiative can be achieved without it. Responding to the request of the parliamentary Committee on the Constitution, the Standing Orders, and the Political System, the Constitutional Court answered in May 2020 two questions regarding the initiative ‘67 is too much’. The first question related to the further course of the referendum procedure after the Parliament enacted the bill proposed by the popular initiative. The Court stated that by the enactment of the new law, which is identical in its content to the bill proposed in the referendum question, the popular initiative ‘achieved the goal for which the voters gave their signatures for calling the referendum, so in such a situation the implementation of the referendum lacks legal meaning and objective and reasonable justification.’²⁷ The second question related to the legal interpretation of the one-year limit for not changing the decisions enacted at the referendum. The Court repeated its standpoint from 2010 that in this concrete case no bill could be submitted to the parliamentary procedure which would change any

²⁵ Pension Insurance Act amended <https://www.sabor.hr/en/press/news/pension-insurance-act-amended>, accessed 15 December 2019.

²⁶ Such a procedure was, for example, specified in the Weimar Constitution (Article 73(3)–(4)), but was never implemented.

²⁷ U-VIIR-343/2020, 5.

part of the bill contained in the referendum question of the popular initiative '67 is too much' during the one-year period.²⁸

3. LEGAL LIMITS

The Constitution does not specify any legal limits for optional referendums or popular initiatives, except that a referendum question must be within the competences of the Parliament or the President, respectively. However, the Constitution does not clarify whether 'any issue within the competence of the Parliament' could indeed be a matter for a referendum.²⁹ For example, does that mean that enacting the state budget could be put to a referendum by a popular initiative?

The only substantive legal limit is that a referendum question must be in accordance with the Constitution. This limit applies only to popular initiatives; it is prescribed by the Constitutional Act on the Constitutional Court (Constitutional Court Act),³⁰ which has the same legal force as the Constitution.³¹ Because of the lack of proper regulation of the popular initiative, it has been up to the Constitutional Court to develop its constitutional interpretations regarding the role and legal limits of referendums initiated by the citizens.³²

²⁸ Ibid, 6.

²⁹ Formally speaking, yes; however, leading constitutional lawyers argue that 'you cannot decide on a referendum, for example, on the responsibility of the President of the Republic for violating the Constitution (Article 105), because it is a quasi-judicial procedure that requires adequate guarantees (it is a matter of establishing the material truth). Nor could a referendum be called on the issues that belong to the foundations of the legal order, such as the affiliation of the Republic of Croatia to the international community (historical foundations of the Constitution), national equality or gender equality (Article 3). A referendum cannot be initiated on the abolition of political pluralism and multi-party system, nor, for example, on the abolition of taxes ... Equally, on a referendum cannot be decided on the political responsibility of the government or its individual members, nor collect signatures for such a referendum.' See Branko Smerdel, *Ustavno uređenje europske Hrvatske* (The Constitutional Order of the European Croatia) (Narodne novine 2013) p. 391.

³⁰ The Constitutional Act on the Constitutional Court of the Republic of Croatia (consolidated text) https://www.usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf, accessed 15 December 2019.

³¹ Article 95 Constitutional Court Act.

³² Professor Jasna Omejec, the former President of the Croatian Constitutional Court, confirmed this: 'So far, the legislator has not developed the rules of procedure and the method of implementation of popular constitution-making initiatives within the /.../ constitutional norms. Accordingly, the Croatian Constitutional Court had to, in its practice, build the rules which must be followed when it comes to the implementation

Formally, the Constitutional Court's legal basis for dealing with popular initiatives at the national level is contained in Article 95 of the Constitutional Court Act. This provision was inserted in the Constitutional Court Act in 2002, two years after the popular initiative had been constitutionalized. It states that:

upon the request of the Croatian Parliament, the Constitutional Court shall, in the case when 10 per cent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 87, paragraphs 1–3, of the Constitution of the Republic of Croatia for calling a referendum, have been met.³³

The Court must reach its decision within a term of 30 days from the day the Parliament has requested the Court's opinion.³⁴

3.1 Substantive Limit: Conformity with the Constitution

Two weeks before the 'marriage referendum' was held, the Constitutional Court had issued another important opinion called the 'Communication on the citizens' constitutional referendum on the definition of marriage'.³⁵ This stated its views on the constitutional limits of the referendum by citizen initiative and the Constitutional Court's general supervisory authority over the conformity of a referendum initiated by citizens with the Constitution.

In the Communication, the Constitutional Court formulated the most important substantive limit regarding referendum questions submitted to voters by a popular initiative. The referendum question should not threaten to destroy the structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). Article 1 establishes the Republic of Croatia as a unitary and indivisible democratic and social state. It also proclaims the principle of popular sovereignty. Article 3 lists the highest values of the Croatian constitutional order: freedom, equal rights, national

of popular constitution-making initiatives.' See Jasna Omejec, 'Narodna ustavotvorna inicijativa i razgraničenje nadležnosti između Hrvatskog sabora i Ustavnog suda' (The Popular Constitutional Initiative and the Delimitation of Competences between the Croatian Parliament and the Constitutional Court) (2014) Informator No. 6258, 1–3.

³³ Art. 95(1) Constitutional Court Act.

³⁴ Art. 95(2) Constitutional Court Act.

³⁵ The Communication on the Citizens' Constitutional Referendum on the Definition of Marriage, SuS-1/2013, 14 November 2013, <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=56C91B7316EAF361C1257E5F003D7476>, accessed 17 December 2019.

equality and equality of genders, pacifism, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multi-party system. These highest values serve as the basis for the interpretation of the Constitution.

The doctrine of the unconstitutional constitutional amendment in Croatia was a *novum*, at least in the context of a popular initiative for amending the Constitution and as a case of preventive constitutional review. The long-standing doctrine of the Court was expressed in its ruling in 2001 that it does 'not have the jurisdiction to review the constitutional provisions on substantive grounds'. Only the 'procedure of the adoption and changes to the Constitution may be subject to constitutional review in terms of whether the Constitution is adopted or amended in accordance with the provisions of the Constitution'.³⁶ In a recent report, the Constitutional Court stated that the 'Constitution does not provide for unamendable (eternal) provisions. Nevertheless, the Constitutional Court, indirectly, through its powers to monitor the constitutionality of referendum questions, has succeeded in arriving at constitutional interpretation, opening the door to the thesis that in the Croatian Constitution, there are values that must be considered as an eternal Croatian clause.'³⁷

³⁶ Case U-I-1631/2000, See also the Constitutional Court of Croatia, National Report – Answers to the Questionnaire for the XVIIth Congress of the Conference of European Constitutional Courts (Batumi, 29 June to 1 July 2017) 29–30, https://www.usud.hr/sites/default/files/dokumenti/Questionnaire_and_the_topic_of_the_XVIIth_Conference_of_European_Constitutional_Courts_Batumi_Georgia_28_June_-_1_July_2017.pdf, accessed 10 December 2019.

The former President of the Constitutional Court wrote in a scholarly article in 2010 that the Croatian Constitution does not foresee the power of the Court to review constitutional norms for their constitutionality. The Croatian Constitution does not contain an explicit eternal clause (like the German *Grundgesetz* does), nor is this power 'inherent to the Croatian constitutional law tradition'. See Jasna Omejec, 'Kontrola ustavnosti i ustavnih normi (ustavnih amandmana i ustavnih zakona)' (Control of Constitutionality of Constitutional Norms (Constitutional Amendments and Constitutional Laws)) (2010) 1 Yearbook of Croatian Academy of Legal Sciences, 1, 21–22, 26.

³⁷ The Court also admitted that 'there is a tendency of enhancing the authority of the Constitutional Court in terms of its jurisdiction to review amendments to the Constitution.' It also recognized that 'academic scholars openly advocate the expansion of the Constitutional Court's jurisdiction and its authority to review substantive amendments as well'. See 'Role of Constitutional Courts in upholding and applying constitutional principles, Report of the Constitutional Court of Croatia – Summary', XVIIth Congress of the Conference of European Constitutional Courts (Batumi, 29 June to 1 July 2017) 4–5 available at https://www.confconstco.org/reports/rep-xvii/croatia_S_EN.pdf, accessed 15 December 2019. See also Biljana Kostadinov, 'Constitutional Identity' (2011) 4 *Iustinianus Primus Law Review*, 1, 17–20; Anita Blagojević, 'Procedures Regarding National Identity Clause in the National Constitutional Court's

However, the Court did not find that inserting a definition of marriage as a heterosexual union in the Constitution would be in conflict with the highest values of the Croatian constitutional order. In its Communication, the Court stated that the content of the referendum question is already a positive legal provision contained in the Family Act.³⁸ The Court acknowledged that it had received a proposal to review the constitutionality of the entire Family Act and also regarding the definition of marriage, but had not acted upon it. It stated that in the specific procedure of assessing the constitutionality of the referendum question it cannot conduct the procedure of abstract review of the conformity of a legal provision in an existing act with the Constitution. Therefore, the Court concluded that its:

(d)ecision in finding a referendum question not to be in conformity with the Constitution would not only lead to a prohibition to call the referendum, but it would spill over into the existing legislative order in the legal area to which that question related.

In view of Article 5 of the Family Act, this is precisely the case with the referendum question on the definition of marriage: ‘Do you agree that a provision be added to the Constitution of the Republic of Croatia whereby marriage constitutes a living union between a woman and a man?’ With the possible establishment of the unconstitutionality of the content of this referendum question, the Constitutional Court would, in fact, be finding Article 5 of the Family Act to be unconstitutional.³⁹

In the Court’s reasoning that would be contrary to the principle of the rule of law, one of the highest values of the constitutional order of the Republic of Croatia.

On the other hand, after an analysis of the existing regulation of marriage and same-sex civil unions ‘within the framework of today’s European legal standards’ in the legislation of the Council of Europe member states and the Croatian legislation,⁴⁰ the Court stated that Croatia legally recognizes marriage, common-law marriage and same-sex unions and thus ‘Croatian law is today aligned with the European legal standards regarding the institutions of marriage and family life’.⁴¹ The Court stressed that Article 35 of the Constitution

and CJEU’s Case-Law’, in Dunja Duić and Tunjica Petrašević (eds), *Procedural Aspects of EU Law* (Faculty of Law, Josip Juraj Strossmayer University of Osijek 2017) 210–237.

³⁸ Art. 5 Family Act: ‘Marriage is a legally governed life union between a woman and a man.’

³⁹ The Communication on the Citizens’ Constitutional Referendum on the Definition of Marriage 8–9.

⁴⁰ Act on Same-sex Civil Unions and the Anti-discrimination Act.

⁴¹ The Communication on the Citizens’ Constitutional Referendum on the Definition of Marriage, 12.

protects the rights of all persons, regardless of gender and sex, to respect for and legal protection of personal and family life and human dignity. Therefore, according to the Court, the ‘marriage referendum’ was not a referendum on the right to respect for family life; this right was guaranteed by the Constitution for all persons, regardless of gender and sex, and was under the direct protection of the Constitutional Court and the ECtHR.⁴²

There is one more important statement in the Court’s Communication. That is the warning of the Court that it ‘could not accept as a rule the new aspect that in a citizen’s constitutional referendum already existing legislation would be transformed into constitutional law’. A possibility of ‘systematic “constitutionalization” of legislation’ is unacceptable for the Court and could be used as a specific argument in assessing the constitutionality of future popular initiatives.⁴³

Besides the Court’s statements regarding the ‘marriage referendum’, there are three crucial Court decisions relevant for the formulation of constitutional limits of referendum questions submitted by popular initiatives. In the respective cases, popular initiatives had collected enough signatures for calling a legislative referendum and the Parliament asked the Court to determine the constitutionality of the questions. In all three cases, the Court decided that the referendum questions were not in conformity with the Constitution.

In December 2013, several war veterans’ associations (officially, the Committee for the Defence of Croatian Vukovar) succeeded in collecting the necessary number of signatures for a referendum to amend the Constitutional Act on the Rights of National Minorities. More specifically, they intended to change minority language rights in the sense that a minority language can be granted only in local self-government units where at least half of the population is from an ethnic minority. Under the current legislation in Croatia, national minorities must comprise at least one-third of the population to claim these rights. The problem with the minority language rights escalated with the instalment of bilingual public signs in Vukovar, where, according to the last census, the Serbian minority constitutes more than one-third (but less than half) of the total population. At the request of the Parliament, the Constitutional Court decided that the referendum question was constitutionally inadmissible.⁴⁴ The Court emphasized that such a ‘general intervention of national dimensions in the threshold already achieved for the official use of languages and scripts, which form the very essence of the identity of the national minorities in the

⁴² Ibid, 8.

⁴³ Ibid, 8–9.

⁴⁴ Decision No. U-VIIR-4640/2014 of 12 August 2014. <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=D79E16416D87711AC1257E5F003E99B2>, accessed 15 December 2019.

Republic of Croatia', has no clear and rational basis. In the Court's opinion, 'there are no relevant or sufficient reasons deriving from recognized and precisely defined urgent social needs' for a general increase in the threshold.⁴⁵

Two further popular initiatives by several trade unions were successful in collecting the requisite number of signatures in 2014, but the Constitutional Court decided that their referendum questions, formulated as specifically worded draft laws, were also constitutionally inadmissible.⁴⁶ The first initiative demanded a referendum on preventing the outsourcing of non-core services in the public sector, the second a referendum against the monetization of the Croatian motorways. Although, due to the Constitutional Court's decisions, the requested referendums were not held, the Government nevertheless abandoned its plans for the outsourcing of services in the public sector and the monetization of the motorways.⁴⁷

In the outsourcing decision, the Court established an additional legal limit for referendum questions submitted by popular initiatives. The Court stated that the fundamental goal of the proposed bill was to prescribe two general prohibitions. One is the prohibition of outsourcing auxiliary and non-core activities in the public sector and the second is the prohibition of performing these activities in any other way except by workers who are employed in the public sector. In the Court's opinion, 'blanket prohibitions' foreseen by the draft act 'a priori, automatically, unselectively and permanently prevent changes in organizing optimum labour-law models for auxiliary and non-core activities in the public sector'. Additionally, these prohibitions would also directly affect the functionality of the state and the budget framework in processes of economic, social, political and administrative reforms. The Court concluded that 'blanket legal prohibitions whose aim is to prevent changes in such a legal model permanently ... do not have a legitimate goal, and are contrary to the purpose and constitutional concept of state and public services in a democratic

⁴⁵ Ibid, 12. See also Endre Dudas, 'Croatian Constitutional Court: The Referendum on the Cyrillic Script' (2015) 9 *Vienna Journal on International Constitutional Law* / *ICL Journal*, 126–33.

⁴⁶ See the Constitutional Court's Decisions No. U-VIIR-1159/2015 of 8 April 2015 <https://sljeme.usud.hr/usud/prakswen.nsf/fOdIuka.xsp?action=openDocument&documentId=9393347C501C6FA7C125800B002B0806>, accessed 16 December 2019, and No. U-VIIR-1158/2015 of 21 April 2015 <https://sljeme.usud.hr/usud/prakswen.nsf/fOdIuka.xsp?action=openDocument&documentId=1B89597C08C3BA87C125800B002B12EA>, accessed 16 December 2019.

⁴⁷ See, e.g., 'Deputy PM regrets halting of reform by the anti-outsourcing initiative', <https://vlada.gov.hr/news/deputy-pm-regrets-halting-of-reform-by-anti-outsourcing-initiative/16719>, accessed 20 December 2019, and 'Croatia backs up from monetization of highways' <http://www.globalpost.com/dispatch/news/xinhua-news-agency/150313/croatia-backs-monetization-highways>, accessed 20 December 2019.

society.’ The Court emphasized that the drafters of the Constitution did not explicitly state questions that are in the exclusive jurisdiction of representative bodies and cannot be the subject of a referendum, so they must be derived from the Constitution as a whole. Based on that, the Court stated that the blanket prohibitions foreseen by the proposed draft law would affect the exclusive authorities of the Government and the Parliament concerning issues relevant to the state budget. Therefore, they were unconstitutional.⁴⁸

In its decision concerning the referendum on the motorways, the Court similarly held that a blanket legislative measure that includes an absolute prohibition to award concessions on all existing public roads in Croatia impinges upon the very essence of the economic system stipulated in Article 49.1 of the Constitution (free enterprise and free markets as the foundation of the economic system).⁴⁹

3.2 Formal Limits

3.2.1 Statement of reasons

In its decision on the official use of languages and scripts of national minorities, the Constitutional Court noticed that ‘current legislation does not contain rules on the obligation to explain the request to call a referendum’.⁵⁰ Considering that such an explanation of the request would be relevant for the Parliament and eventually for the Court, especially in terms of deliberating on the issue of the constitutionality of a referendum question, the Court declared:

Each future request to call a referendum submitted to the Croatian Parliament pursuant to Article 87.3 of the Constitution must contain a detailed presentation of the facts and circumstances which were the reason for setting the referendum question in the proposed content, and a sufficient and relevant statement of reasons for the request to call a referendum.

Any new submissions which organizing committees for voting on the need to request the calling of a referendum may prepare and send to the Constitutional Court after the Croatian Parliament has requested the Court to proceed pursuant to Article 95 of the Constitutional Act cannot be deemed to be a part of their request since they have not been previously sent to the Croatian Parliament. The Constitutional Court will not consider such submissions.⁵¹

⁴⁸ Constitutional Court’s Decision No. U-VIIR-1159/2015 of 8 April 2015.

⁴⁹ Constitutional Court’s Decision No. U-VIIR-1158/2015 of 21 April 2015.

⁵⁰ Decision No. U-VIIR-4640/2014 of 12 August 2014.

⁵¹ Decision No. U-VIIR-4640/2014 of 12 August 2014, 13–14. See also Biljana Kostadinov, ‘Direct Participation of the People in Public Power – Advantages and Disadvantages of a Referendum, Croatian and European Perspective’ in Reiner Arnold and JI Martinez-Estay (eds), *Rule of Law, Human Rights and Judicial Control*

A detailed explanation of reasons for a referendum must be prepared and published by the organizing committee not later than at the time of submitting the collected signatures to the Parliament.

3.2.2 Unity of form, unity of content and unity of hierarchical level

Neither the Croatian Constitution nor the relevant legislative acts prescribe detailed requirements of procedural validity for texts submitted to a referendum, such as elaborated in the Code of Good Practice on Referendums of the Venice Commission (Code of Good Practice).⁵² The Referendum Act prescribes only that the decision of the organizing committee of a popular initiative to call a referendum must contain ‘a clear question on which it wants the calling of a referendum’.⁵³ This clarity requirement does not have an extensive practice, because in all cases where the Court had to decide on the constitutionality of a referendum question, this question was related to a specific law (a legislative referendum). Therefore, in each case, there was a simple and clear referendum question: ‘Are you in favour of passing the following law in a referendum?’

Starting with the popular initiatives regarding the outsourcing of non-core services in the public sector and the monetization of the Croatian motorways, the Constitutional Court has tested the procedural validity of a proposed text of the referendum questions, with specific reference to the Code of Good Practice.⁵⁴ In several cases, it concluded that the respective proposals did have the required form and included all the necessary elements of a legal text – that they satisfy the unity of form, content and hierarchical levels.⁵⁵

of Powers: Some Reflections from National and International Law (Springer 2017) 119–120.

⁵² See the ‘Code of Good Practice on Referendums’ (CDL-AD(2007)008rev-cor, point III. 2), 12–13. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e), accessed 15 December 2019.

⁵³ Art. 8b Referendum Act.

⁵⁴ U-VIIR-1159/2015 of 8 April 2015 and U-VIIR-1158/2015 of 21 April 2015.

⁵⁵ Decision No. U-VIIR-1159/2015 of 8 April 2015, 11–12, and Decision No. U-VIIR-1158/2015 of 21 April 2015, 20–21.

4. THE INSTITUTIONAL AND PROCEDURAL FRAMEWORK

4.1 Popular Initiative

Procedural issues relevant for holding a referendum on the initiative of voters are regulated in the Referendum Act.⁵⁶ First of all, the voters have to set up an organizing committee. The committee makes a decision which must contain a clear referendum question and the deadline for collecting voters' signatures, which must not exceed 15 days. This decision has to be published in daily newspapers and other public media.⁵⁷

In 2018 a popular initiative was denied setting up stands to collect signatures in a major city. The organizing committee filed a complaint to the State Electoral Commission (SEC). The SEC held that the Commission controls the legality of referendums *after* the decision of the competent body on calling a referendum had been made and that the authority of the SEC does not extend to pre-referendum activities. The organizing committee of the popular initiative appealed to the Constitutional Court because under Article 49 of the Referendum Act, 'the constitutionality and legality of the state and local referendums are monitored by the State Referendum Commission and the Constitutional Court of the Republic of Croatia.'

However, the Court rejected the appeal, claiming that its competences, like the SEC's, do not extend to the pre-referendum phase. The Court declared that it does not exclude, exceptionally, its intervention also in the pre-referendum period, but only in a situation of a drastic breach of a democratic procedure that would derogate or seriously violate the right of citizens to request a referendum. In the concrete case, the Court did not find the circumstances to be of such character. In a vigorous dissent, one justice claimed that the Court should intervene and force the mayor to respect the legal order because a 'basic common sense leads to the conclusion that preventing the collection of signatures for a referendum initiative undermines the very essence of the right to a referendum'.⁵⁸

The law does not say anything about verifying the voters' signatures. As a rule, the Parliament requires the Government to check the number and credibility of signatures. In recent cases, the Constitutional Court has given up its competence to determine whether the formal prerequisites for calling a ref-

⁵⁶ The Local and Regional Self-Government Act also regulates the popular initiative on the local and regional levels.

⁵⁷ Art. 8a and 8b Referendum Act.

⁵⁸ See Decision of the Court U-VIIR/1960/2018 of 5 June 2018.

erendum on popular initiative, namely whether there are enough valid signatures, have been fulfilled.⁵⁹ In previous cases, the Court had always determined whether the formal conditions for calling a referendum had been met, regardless of Parliament's earlier statements that there were enough valid signatures. Consequently, the Court left it to the Government and the Parliament to freely choose a procedure of checking voters' signatures of future popular initiatives, apply their standards of (non)transparency of the procedure and reach a final decision on the fulfilment of formal conditions for calling a referendum.

If enough signatures have been collected, the organizing committee shall deliver the signatures to the Parliament and ask for the calling of the referendum.⁶⁰ There is no deadline in the law for delivering the collected signatures to the Parliament and also no deadline for the Parliament to call the referendum.

Based on Article 95 of the Constitutional Court Act, Parliament can make a request to the Constitutional Court regarding the fulfilment of the conditions for calling a referendum on the popular initiative: whether the question is in accordance with the Constitution and whether the formal conditions have been met. However, the Court has established that, exceptionally, it can intervene and decide on the constitutionality of the referendum question even if not asked by the Parliament. In its 'Communication on the citizens' constitutional referendum on the definition of marriage', the Court admitted that, because of Article 95, it can deal with the constitutionality of the referendum question and whether the requirements have been met to call a national referendum only at the request of the Croatian Parliament and that 'any other conduct by the Constitutional Court would border on inadmissible voluntarism'. But then the Court proclaimed:

[The Constitutional Court] ... has the general constitutional task to guarantee the respect of the Constitution and to oversee the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure.

Accordingly, after the Croatian Parliament had rendered a decision to call a national referendum based on a citizens' constitutional initiative, and it had not before that acted on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not cease.

However, out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, the Constitutional Court believes that it is only permissible to make use of its general supervisory authorities in that situation as an exception when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity

⁵⁹ The relevant Court's decisions regarding these two popular initiatives are U-VIIR/3592/2018 of 18 December 2018, U-VIIR/3260/2018 of 18 December 2018 and U-VIIR/2626/2019 of 4 September 2019.

⁶⁰ Art. 8g Referendum Act.

that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). The primary protection of those values does not exclude the authority of the framer of the Constitution to expressly exclude some other questions from the circle of permitted referendum questions.⁶¹

After the Communication of 2013, the Constitutional Court has not made use of its 'general supervisory authority over the conformity with the Constitution' of a referendum question. Still, the reason for this is simple – in the cases of subsequent popular initiatives which had collected enough signatures (except the last one regarding the pension reform), the Parliament has always invoked Article 95 and asked the Court to determine whether the referendum question is in accordance with the Constitution.

Participation rights are not regulated in any law or the parliamentary standing orders. The Referendum Act is completely silent about the procedures related to the popular initiative between the delivery of voters' signatures to the Parliament and the calling of a referendum. The parliamentary Committee on the Constitution, the Standing Orders, and the Political System is responsible for all issues-related popular initiatives. This Committee makes all draft decisions and conclusions for the Parliament regarding every matter concerning a particular popular initiative. This includes the verification of the necessary number of signatures, the evaluation of the Government's report on the fulfilment of the requisite number of signatures, the assessment of the constitutionality of a referendum question and the request to the Constitutional Court to decide on the matter. The representatives of a particular popular initiative may be present at a Committee session. It is up to the chairperson of the Committee to let them participate and speak on the relevant issues. However, in the latest case of two popular initiatives in 2018 the representatives were not allowed to speak at the Committee session. The representatives of popular initiatives have no legal right to participate in any of the proceedings regarding the verification of voters' signatures or in the parliamentary deliberation.

4.1.1 Mandatory and optional referendum

There are no particular provisions either in the Constitution or in the Referendum Act that would prescribe any kind of control of the process for calling a referendum on the initiative of the Parliament or the President. As stated before, Article 95 of the Constitutional Court Act gives the Court the explicit authority to determine the fulfilment of the formal and substantial

⁶¹ The Communication on the Citizens' Constitutional Referendum on the Definition of Marriage 2–3.

conditions only in case of the popular initiative, and only when asked by the Croatian Parliament. However, if the constitutional provisions which make up the Croatian 'constitutional identity' cannot be changed in a referendum demanded by a popular initiative, as stated by the Court, the same should also logically apply to all other possible ways of amending the Constitution.⁶²

5. CONCLUSION

In the past 30 years since Croatian independence, only three national referendums have been held, just one of which was called as a result of the popular initiative. Although Croatia belongs to the small group of countries having a 'large popular initiative on constitutional and legislative matters',⁶³ the full potential of the popular initiative has not been realized. The reasons for that are twofold: first, the very high number of signatures required and the procedural difficulties in collecting these signatures and, second, the decisions of the Constitutional Court on the constitutionality of popular initiatives.

There is an 'ever more restrictive practice of the Constitutional Court related to referendums requested by way of the popular initiative', which 'are leading to considerable closure of the route of citizen-initiated referendums'.⁶⁴ In the cases related to the popular initiatives against outsourcing and monetization of highways, the Constitutional Court has proclaimed that it would apply a more stringent test of constitutionality for bills proposed by popular initiatives as compared with similar laws enacted in the Parliament. The reason for this, according to the Court, is the fact that bills proposed by popular initiatives are not prepared, written, controlled, corrected and discussed in a democratic procedure, which would make them substantively different from bills enacted in the Croatian Parliament.⁶⁵ However, it is difficult to accept that the Court's

⁶² See Ana Horvat Vuković, 'U ime ustava – materijalne granice promjene ustava' (In the Name of the Constitution – Substantive Limits of Constitutional Change), (2015) 65 *Collected Papers of the Zagreb Law Faculty*, 481, 492–93.

⁶³ Laurence Morel, 'Types of referendums, provisions and practice at the national level', in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge 2018) 44.

⁶⁴ See Ana Horvat Vuković, 'Ustavni sud Republike Hrvatske i referendum narodne inicijative 2013–2015: Analiza i prijedlozi' (Constitutional Court of the Republic of Croatia and Citizen-Initiated Referenda in the 2013–2015 Period: Analysis and Proposals) (2016) 37 *Collected Papers of the Faculty of Law of the University of Rijeka* 805, 806.

⁶⁵ In one case, the Court stated that 'as opposed to the abstract review of the constitutionality of a law, where the Constitutional Court examines whether a law conforms to the Constitution, in the procedure of referendum review, bills must have

controlling powers are substantially different depending on the identity of the body proposing and/or enacting the legislative act.⁶⁶

The fact is that whenever the Court has been asked by the Parliament to determine whether the formal conditions have been fulfilled or whether the referendum question is in accordance with the Constitution, its decision has been negative. The greatest successes of popular initiatives have been achieved when the Parliament had not asked the Court to determine whether the referendum question was in accordance with the Constitution. That occurred in 2013, when the Parliament called the ‘marriage referendum’ and in 2019, when the Parliament enacted the act proposed by the popular initiative, instead of calling the referendum.

It should also be stated that some other popular initiatives have achieved political success without the formal implementation of a referendum.⁶⁷ When these initiatives had collected enough signatures for calling a referendum, the Government gave up its bills or other measures that were the reason for the organization of the popular initiatives in the first place, before the formal decisions of the Constitutional Court that the referendum questions were unconstitutional. In those cases, the popular initiatives had functioned as a sort of people’s veto, despite the absence of the formal referendum decisions.

Finally, it must be emphasized that several attempts of the Parliament to solve the pressing problem of the exceptionally dysfunctional constitutional (and legislative) framework of the institution of the popular initiative have come to nothing so far.⁶⁸ The fact is that these attempts have only been made in response to some successful initiatives and because the issues that these successful initiatives brought into the public eye became much more severe once all quorums prescribed for the validity of referendum decisions had been eliminated in 2010.⁶⁹

the highest degree of substantive alignment with the Constitution’. See the Decision U-VIIR-1159/2015, 7.

⁶⁶ See Vuković, ‘Ustavni sud’ (n 64) 825.

⁶⁷ All were the popular initiatives of the Croatian trade unions: against the Amendment of Labour Act, the outsourcing of auxiliary services and the monetization of highways. See also the 2019 ‘67 is too much’ initiative.

⁶⁸ See the Proposal to Amend the Constitution regarding the referendum from 2013 <https://www.sabor.hr/sites/default/files/uploads/sabor/2019-0118/080622/PRIJEDLOG%20PROMJENE%20USTAVA%20RH.pdf>, accessed 9 July 2020.

⁶⁹ More on these attempts, Podolnjak, ‘Constitutional Reforms’ (n 14) 143–147.