7 Popular initiatives, populism and the Croatian Constitutional Court

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7.1 Introduction

Unlike states that have been experiencing a populism agenda which derives from actors already in office, I believe there are two major reasons that explain the fact that in Croatia populist claims against constitutionalism have to be searched for in players acting outside of regular government.[1] The first reason for my claim is the lack, since 2000, of clear and solid parliamentary supermajorities, which over time has inevitably led to the need to create coalition governments. Consequently, in Croatia there has been no clear-cut case of governments taking over other constitutional institutions. Additionally, until the 2013 accession, Croatia was heavily engaged in preparations to join the EU, a task which also included adjustments to the European legal system. This made it quite difficult for a populist agenda to prevail within the institutions themselves. The second – and, for my purposes, more important – reason underlying my opening claim is that in Croatia there exists quite an easy method for organizing popular referendum initiatives.[2] Here I side, quite generally, with Carlo Ruzza, who states that

1 In their recent research dealing with differences between populism in an ideational sense and populism as a political communication style in the Croatian case, two prominent Croatian authors also, except for two cases, have focused on populism as emerging primarily from politicians acting outside of the state government. See Marijana Grbeša and Berto Šalaj, 'Textual Analysis: An Inclusive Approach in Croatia' in: Kirk A. Hawkins, Ryan E. Carlin, Levente Littvay, and Cristobal Rovira Kaltwasser (eds.), *The Ideational Approach to Populism: Concept, Theory, and Analysis* (Routledge 2018) 67–89.

2 Here I point to an observation made by Gianfranco Pasquino who states that 'the search for the conditions that give rise to the emergence of populism must continue' and, from the methodological point of view, links this, among other things, to the issue of 'the ways by which government by the people is exercised (through representational institutions or through popular initiatives and referendums?)'. Gianfranco Pasquino, 'Populism and Democracy' in D. Albertazzi and D. McDonnell (eds.) *Twenty-First Century Populism: The Spectre of Western European Democracy* (Palgrave Macmillan 2008) 19. On the other hand, appeals to popular initiatives and referendums have been integral parts of the populist agenda for a long time. For such an observation in reference to American developments in populist politics, see Camila Vergara, 'Crisis Government: The Populist as Plebeian Dictator' in Amit Ron and Majia Nadesan (eds.) *Mapping Populism: Approaches and Methods* (Taylor and Francis 2020) 212; Ronald Formisano, 'Populist Movements in US History: Progressive and Reactionary' in Bridget María Chesterton, York Norman, and

'one can often identify populist undertones in the now recurrent calls for greater public deliberation at local levels, and other forms of political participation by non-state actors, such as promoting referenda, which incorporate the actors of protest politics', and 'foster participation by social movements in decision-making'.[3]

From the substantive point of view, the Croatian Constitution allows nearly everything to be decided by a referendum. Apart from constitutional amendments, this includes proposals on bills, proposals on any other issue considered important for the independence, unity and existence of the Republic of Croatia or, even more extensively, proposals on any other issue within the parliament's competence.[4] Procedurally speaking, since the constitutional revision of 2000, referendums in Croatia may also be called through a popular initiative, if requested by at least 10 percent of all the voters in the State. Moreover, since 2010, a positive referendum vote is deemed successful if it is supported by a mere majority of those who actually participated in voting.[5] In addition, according to the strict letter of the Constitution, in the case of a popular initiative the Parliament must call a referendum. The only way to stop this is if the Constitutional Court decides that the question proposed to be put to a referendum vote is not in accordance with the Constitution or that procedural requirements for the call were not met.[6]

It is thus not a surprise that in recent years, such a fertile ground has triggered a series of popular initiatives.[7] Although, with the exception of the 2013 marriage referendum, they were all blocked either by the Constitutional Court or by the subsequent actions of other state bodies

Gary Marotta (eds.) *Transformations of Populism in Europe and the Americas: History and Recent Tendencies* (Bloomsbury 2016) 136–149. For a general argument that direct democracy can actually cure some of the problems created by populist parties and governments, see John G. Matsusaka, *Let the People Rule – How Direct Democracy Can Meet the Populist Challenge* (Princeton University Press 2020). For a completely different view, construing 'a defense of representative government' which may 'help to dampen the seductive appeal of the populist rhetoric promoting the expanded use of initiatives and referenda', see for instance: John Haskell, *Direct Democracy of Representative Government? Dispelling the Populist Myth* (Westview Press 2001).

3 Carlo Ruzza, 'Populism, Migration, and Xenophobia in Europe' in Carlos de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2019) 204.

4 Article 87 of the Croatian Constitution.

5 It is certain that such an extremely low threshold favors pursuance of 'majoritarianism' as one of the key dimensions of the 'populist constitutionalism' concept. Paul Blokker, 'Populist Constitutionalism' in Carlos de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2019) 113–128. See also Manuel Anselmi, *Populism: An Introduction* (Routledge 2018) 87–90.

6 Article 95 of the Constitutional Law on the Constitutional Court. However, notice the different, deferring view, that the Croatian Constitutional Court took in that respect in the last two cases I describe here (the 2018 Initiatives on the electoral system and the Istanbul Convention).

7 For a similar observation that direct democracy should not be discounted in analyses of populism, because relevant research shows that 'the public is eager to participate in deciding important issues', see Matsusaka (n 2) 61.

(Parliament and the Government),[8] I believe that specific Croatian constitutional arrangements regulating direct decision-making seem to present an almost perfect framework for populists of various sorts. The Croatian example of the popular referendum initiative in this context functions well because the initiative is constitutionalized, it transgresses the boundaries of an advisory institution, and it may be used to decide on a quite extensive range of issues. In this way, as Paul Taggart notes, it well may be a 'useful lightning rod for attracting attention' and 'building up support' for populist movements, used as 'a critique of the lack of participation in representative democracy or as an institutional mechanism to add to representative democracy to make it more participatory'. Popular initiative thus 'may embody a populist impulse'.[9]

My aim here is not to present different and varying definitions of populism, but rather to show its connection to referendums and the relevant practice of the Croatian Constitutional Court in this regard. This indeed is a difficult task. There exist significant theoretical differences both as to which particular direct decision-making institution is most linked to promoting populist ideas (referendums in general, plebiscites or, maybe, popular initiatives in the strict sense) and also as to whether referendums are a constitutive element of definitions of populism. Thus, for instance, Cathérine Colliot-Thélène argues that populist movements

> certainly show a strong preference for the referendum, rather than for the votes of the elected assemblies, but the referendum is part of the panoply of instruments of modern democracies. And governments that are usually not suspected of being populist also resort to referenda, often with plebiscitary intentions.[10]

On the other hand, my focus here is neither on populist presidents nor on populist political parties or governments already in power. It is certainly well known that all these actors play an inevitable role in theoretical discussions on populism, and it has already been clearly noted that referendums, along with

8 Here one may notice that the Croatian experience with referendums so far generally conforms to the evaluation which David Butler and Austin Ranney made already 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'. David Butler and Austin Ranney, 'Theory' in David Butler and Austin Ranney (eds.), *Referendums Around the World – the Growing Use of Direct Democracy* (The AEI Press 1994) 20.

9 Paul Taggart, *Populism* (Open University Press 2000) 103–105. On the other hand, from the rhetorical point of view, popular initiatives may serve the goal that Jan-Werner Müller well captures in the following words: 'The danger comes, in other words, from within the democratic world – the political actors posing the danger speak the language of democratic values'. Jan-Werner Müller, *What Is Populism* (University of Pennsylvania Press 2016) 6.

10 Cathérine Colliot-Thélène, 'Populism as a Conceptual Problem' in Gregor Fitzi, Jürgen Mackert, and Bryan S. Turner (eds.), *Populism and the Crisis of Democracy, Volume 1: Concepts and Theory* (Routledge 2019) 18.

other strategies, are used by populist governments to 'weaken the remaining checks and balances' inherent in a modern constitutional state.[11] Or, as Steven Levitsky and James Loxton note, in their conflicts with the 'traditional elite' presidents often use referenda to 'circumvent Congress and convoke a constituent assembly aimed at "re-founding" the institutional order'.[12] On the other hand, Ángel Rivero claims that direct democracy, which means 'the people's will', is characteristic of new European populism, where 'the vast majority of European populist parties, either from the right or from the left, are strong supporters of referenda (or, to be more precise, of plebiscites) as the paramount democratic institution'.[13]

In this contribution, I will rather focus on bottom-up popular referendum initiatives, since they are typical of the Croatian case. In addition, here I find support from Paris Aslanidis whose research on bottom-up populist social movements suggests that 'populism is not the exclusive domain of political parties and their leaders'. He stresses, instead, that populism must also be analyzed as a transformation of 'grassroots populism into an institutionalized force', a process in which a 'mode of articulation' of social grievances leads to a 'collective action frame' that 'aims at triggering a cognitive process that transforms discontent into action'.[14]

7.2 Popular initiative as the means of fostering populist claims

So far, popular initiatives in Croatia have addressed a wide range of issues: the status of members of military in proceedings related to alleged war crimes, Croatia joining NATO, state borders with Slovenia, amendments to the Labor Law, the constitutional definition of marriage, the official use

11 Gregor Fitzi, 'Introduction: Political Populism as a Symptom of the Great Transformation of Democracy' in Gregor Fitzi, Jürgen Mackert, and Bryan S. Turner (eds.), *Populism and the Crisis of Democracy, Volume 2: Politics, Social Movements and Extremism* (Routledge 2019) 6. For the same argument, and several examples of European states for this purpose, see also: Klaus Bachmann, 'The Role of Populist Parties and Movements in Transitions to Hybrid Regimes in Europe' in Gregor Fitzi, Jürgen Mackert, and Bryan S. Turner (eds.), *Populism and the Crisis of Democracy, Volume 2: Politics, Social Movements and Extremism* (Routledge 2019) 121–136. For Latin American experiences, see, for instance: Carlos de la Torre, 'The Contested Meanings of Populist Revolutions in Latin America' in Bridget María Chesterton, York Norman, and Gary Marotta (eds.), *Transformations of Populism in Europe and the Americas: History and Recent Tendencies* (Bloomsbury 2016) 330–344.

12 Steven Levitsky and James Loxton, 'Populism and Competitive Authoritarianism in Latin America' in Carlos de la Torre (ed.) *Routledge Handbook of Global Populism* (Routledge 2019) 337.

13 Ángel Rivero, 'Populism and Democracy in Europe' in Carlos de la Torre (ed.) *Routledge Handbook of Global Populism* (Routledge 2019) 286.

14 Paris Aslanidis, 'Populism and Social Movements' in Cristobal Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo, and Pierre Ostiguy (eds.) *The Oxford Handbook of Populism* (Oxford University Press 2017) 305–325. Although Aslanidis's analysis is further directed to transformations vis-à-vis political parties, I find these general elements very inspiring for my own approach to popular referendum initiatives.

of minority languages, the process of privatization, the prohibition on the 'outsourcing' of technical services in the public sector and the prohibition on the handing over of certain highways under concessions, two proposals on adopting new constitutional rules for parliamentary elections, constitutional requirements for popular initiatives themselves, denouncing the Istanbul Convention and amendments to the law regulating pensions.[15]

One additional point here also concerns the Croatian practice as related specifically to constitutional referendums. Since 1990, the Croatian Constitution has been amended five times in total, four times in the Parliament and once through a referendum (the 2013 'Marriage Referendum'). However, quite strikingly, popular constitutional referendum initiatives in Croatia have been far more frequent than this one successful example might suggest. In fact, apart from the 2013 case, to date there have been four more such initiatives, all of them within the last six years.[16] This growing use of popular initiatives thus might affirm what Cass Mudde and Cristóbal Rovira Kaltwasser state, i.e. that 'populists-in-opposition tend to call for more transparency and the implementation of more democracy', including referendums, in order to 'break the alleged stranglehold of the elite'.[17] Moreover, of these five popular constitutional initiatives, three have dealt with some sort of identity issue (the position of gender minorities in the case of marriage; the argument that the Istanbul Convention is primarily about introducing a gender ideology; the rights of national minorities). Four initiatives were substantively addressed against political 'elites' as such or their specific actions (the only exception here being, arguably, the 2013 marriage referendum). This, I believe, attests to the seriousness of the whole situation.

The populist note generally inherent in such specifically constitutional initiatives is clearly visible. To paraphrase Benjamin Krämer, they can be seen as instances in which the 'will of the people has to be registered once and for all' and a referendum thus becomes a 'redemptive act that brings an issue to a final decision and a lesson, or even punishment, for elites'.[18] This, it seems,

15 For a more extensive view on the Croatian popular referendum initiatives, see Djordje Gardasevic, 'Constitutional Interpretations of Direct Democracy in Croatia' (2015) 12 Iustinianus Primus Law Review 1–50.

16 Here, I exclude the 2019 proposal of the candidate running in presidential elections because this case never came about, although it represents a serious attempt which must not be underrated.

17 Cass Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 93. See also the claim by Paul Blokker that 'Populists call for making popular sovereignty a reality, which in constitutional terms means the creation of a more direct relation between the people and the constitutional complex of norms and values'. Blokker (n 5) 116.

18 Benjamin Krämer, 'Populist and Non-Populist Media: Their Paradoxical Role in the Development and Diffusion of a Right-Wing Ideology' in Reinhard Heinisch, Christina Holtz-Bacha, and Oscar Mazzoleni (eds.), *Political Populism: A Handbook, Volume 3 of International Studies on Populism* (Nomos 2017) 414. In my view, constitutional popular initiatives are thus very good at performing the task of creating of what Paul Blokker identifies as 'a durable majority'. Blokker (n 5).

also goes along with Jan-Werner Müller's observation that 'while populists often call for referenda, such exercises are not about initiating open-ended processes of democratic will-formation among citizens'. He rather stresses the following: 'Populists simply wish to be confirmed in what they have already determined the will of the real people to be. Populism is not a path to more participation in politics'.[19] Moreover, in constitutional referendum initiatives that have addressed the restructuring of the parliamentary electoral system, one may also, as Saskia P. Ruth and Kirk A. Hawkins claim, confirm the populist striving to 'value the seal of popular approval that only a formally open, competitive election can provide', and favoring, at the same time, 'direct participatory mechanisms such as recall, initiative and referenda – including those that can be initiated by citizens'.[20]

In the remaining part of this chapter, I will focus on the interpretative approaches of the Croatian Constitutional Court in several referendum cases which I believe are important for understanding my opening claim that in Croatia populist claims against constitutionalism have to be searched for in players acting outside of regular government. I also suggest that the analysis focuses on constitutional referendums, although, in order to get a wider picture of the Court's interpretative tools, I will also add some observations on other relevant initiatives, as they have been addressed by the Court in previous years.

The early case of the 2010 referendum on the Labor Law presents an opening example because it was the first instance in which the Court had to formally deal with the case of a popular initiative. Factually, a number of trade unions had started an initiative for a referendum on the rejection of the governmental proposal to amend the Labor Act and thus prevent restrictions on workers' benefits. However, once the initiative had collected enough signatures, the Government withdrew its amendment from the parliamentary procedure. This fact, in the view of the Court, meant that the referendum could not be called, because the referendum question itself was found to be technically connected to the governmental bill. Therefore, in quite a simple ruling, the Court actually proclaimed the Government to be the master of the procedure it had itself started in the first place.[21] However, confronted with some more difficult challenges that emerged a few years later, the Court abandoned this strict procedural reading of the Constitution and, in the two following cases, instead opted to invoke both the 'heavy' concept of 'constitutional identity' and a strict type of proportionality analysis.[22]

19 Müller (n 9) 102. This particular conclusion by Müller fits the 'Marriage' type of referendum I describe in the next section, but not popular initiatives aiming to reconstruct the parliamentary electoral rules.

20 Saskia P. Ruth and Kirk A. Hawkins, 'Populism and Democratic Representation in Latin America' in Reinhard Heinisch, Christina Holtz-Bacha, and Oscar Mazzoleni (eds.), *Political Populism: A Handbook, Volume 3 of International Studies on Populism* (Nomos 2017) 260.

21 Decision of the Constitutional Court U-VIIR-4696/2010, 20 October 2010.

22 I have previously offered an extensive analysis and critic of these two cases in Gardasevic (n 15).

7.3 The game becomes serious: the introduction of the constitutional identity concept

The central place in this era undoubtedly belongs to the 2013 'Marriage Referendum' which, as I said before, has so far been the only example of a popular constitutional referendum initiative to have actually succeeded.[23] The path to amending the Constitution, however, was initially marked by an attempt by the Parliament to qualify the expectedly successful referendum simply as the first step in the whole procedure. Therefore, the idea was to finish the amendment process through a subsequent parliamentary ratification – or, to express it better, rejection – because the governing majority at the time strongly opposed the whole plan for a new constitutional definition of marriage. This approach was resolutely rejected by the Court which specified that the Constitution contained two independent constitutional amendment procedures: one to be carried out by the Parliament[24] and another through a constitutional referendum.[25] Thus, the Court concluded that a decision made directly by the people on a referendum has a constitutive character and results in an immediate transformation of the constitutional text, taking legal effect on the actual day a referendum is held.[26] The interpretive tools the Court applied here were twofold. On one hand, it relied on a linguistic interpretation of two different and separate constitutional norms regulating constitutional amendments. On the other, it offered a systemic approach by which the Constitution should be read comprehensively, in accordance with the highest values of the constitutional order which themselves serve as the grounds for interpretation of the Constitution.

This systemic approach is visible in the following passage of the said in *Warning*:

> The Constitution should be read as a whole. It cannot be approached in such a way that from a unity of relationships which are constituted by it one particular provision is taken out and then interpreted separately and mechanically, independently from all other values which are protected by the Constitution. The Constitution possesses an internal unity and the meaning of a particular part of it is related to all other provisions. If seen in its unity, the Constitution reflects particular comprehensive principles and fundamental decisions according to which all its other individual

23 I believe that the examples of the 'Marriage Referendum', as well as those pertaining to the mandates of the parliamentary representatives of national minorities and the Istanbul Convention I describe later in this chapter, may well fit into a description of a populist agenda as essentially being opposed to pluralism in general and more specifically to 'procedures that ensure, most notably, minority rights'. For this claim, see Agnes Akkerman, Cas Mudde, and Andrej Zaslove, 'How Populist Are the People? Measuring Populist Attitudes in Voters' (2014) 47 Comparative Political Studies 1327. This is also in line with Jan-Werner Müller's general claims on populism as being inherently anti-pluralist and, as a form of identity politics, aiming at exclusive representation. Müller (n 9).

24 Chapter IX of the Constitution.

25 Article 87 of the Constitution.

26 Constitutional Court, Warning U-VIIR-5292/2013, 28 October 2013.

> 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 constitute the basis for interpreting the Constitution.[27]

To this general statement, the Court added that the highest values, in combination with the constitutional provision guaranteeing that the people shall exercise the sovereign powers through the election of representatives and through direct decision-making,[28] constitute the concept of the 'Croatian Constitutional Identity'. In practical terms, this meant that the Parliament did not have the power to substantively interfere with the direct expression of the will of voters. The main issue in this case, however, arose a few days later when the Court issued its second interpretation. The Statement made by the Court[29] merits attention in three points. Firstly, the Court rejected that the referendum question was contrary to both international[30] and domestic law.[31] Secondly, it reasoned that constitutional provisions regulating referendums meant 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'. Most notably, relying on the Venice Commission's statements[32] 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 the separation of powers, the Court concluded that this was an imperative to be obeyed in cases of both referendums and parliamentary enacted constitutional amendments.[33] Clearly, the Court thus introduced the theory of 'unconstitutional constitutional amendments'.

27 The highest values of the constitutional order are presented in Article 3 of the Constitution.

28 Article 1, para 3 of the Constitution.

29 Constitutional Court, Statement on the Popular Constitutional Referendum on the Definition of Marriage, SuS-1/2013, 14 November 2013.

30 In short, the Court here analysed the case in terms of Article 9 of the EU Charter of Fundamental Rights and articles 8, 12 and 14 of the European Convention on Human Rights.

31 Here, the Court invoked various provisions of the Family Law, the Law on Same-Sex Unions and the Law on the Prohibition of Discrimination.

32 *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, Venice Commission, Opinion 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013.

33 However, in the end, the Court somewhat relaxed its standing by claiming that there could be some exceptions to the prohibition on the incorporation of strictly legal institutes in the Constitution. Those exceptions, however, should be justified on the basis of their connection to deeply embedded social and cultural characteristics of the society (*Schalk and Kopf v. Austria* case).

The Statement marked a significant change in the practice of the Court because in previous cases it had explicitly argued that it had only the power to review the formal constitutionality of constitutional amendments. The same position was taken in doctrine.[34] Thirdly, the Court also provided an additional theory of its own constitutional review powers by reasoning that even in the absence of a proper parliamentary motion to examine popular referendum initiatives,[35] it could nonetheless, for that purpose, rely upon its general control powers.[36] This new systemic interpretation of the Court's powers is best captured in its following words:

> 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 the constitutionality of a state referendum, right up until the formal end of the referendum procedure. Accordingly, after the Croatian parliament decides to call a referendum on the basis of a popular constitutional initiative, without having previously acted upon the Article 95 par. 1 of the Constitutional Law, the Constitutional Court does not lose its general powers of control over the 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 that there exists such a formal or substantial unconstitutionality of a referendum question or such a grave procedural error that it threatens to undermine the structural features of the Croatian constitutional state, and its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). Primary 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.

34 Jasna Omejec, 'Kontrola ustavnosti ustavnih normi (ustavnih amandmana i ustavnih zakona' (2010) Godišnjak Akademije pravnih znanosti Hrvatske 21–22 and 25–26.

35 According to the strict letter of Article 95 of the Constitutional Law on the Constitutional Court, the Court can review the constitutionality of popular referendum initiatives only if requested by the Parliament.

36 Article 125 al. 9 of the Constitution gives the Court the 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'. Moreover, 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'.

7.4 Proportionality in action

The second case that marked a significant turn in the Court's approach to referendums came with the 2014 popular initiative that sought to change the Constitutional Law on the Rights of National Minorities.[37] The idea was to prescribe that in territories of local self-government, state administration and judicial units, the official use of a national minority language and script could be implemented only if members of a national minority made up at least half of the population in such units.[38]

The opening words of the Constitutional Court's reasoning in this case revealed several important standpoints.[39] Firstly, that the Constitution was not value-neutral, but that it defined the Republic of Croatia as a democratic state based on national equality, respect for human rights and rule of law principles, all of which must be realized without discrimination. Secondly, that democracy based on the rule of law and protection of human rights represents the only political model recognized by the Constitution. Thirdly, that pluralism, as a central feature of a democratic society, requires respect for diversities and particular identities, as well as dialogue and a search for balance which negates any abuse of a dominant position. Fourthly, that languages and scripts of national minorities must be qualified as universal and constant values which determine the identity of the Croatian constitutional state. Fifthly, that, consequently, any raising of the threshold required to activate the collective rights of minorities 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 sixthly, that the raising 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.

As a result of the application of this scheme, the Court declared the referendum unconstitutional because it lacked a rational basis and a legitimate aim to be pursued with the legal change sought. The Court also found that the initiative was principally undertaken because of the

> factual circumstances related to the Serbian national minority

and

> the legal obligation to secure official use of language and script on the basis of … the Constitutional Law on the Rights of National Minorities, for that minority, in a number of municipalities and towns, including the

37 For an additional analysis of this particular case, see also Jurij Toplak and Djordje Gardasevic, 'Concepts of National and Constitutional Identity in Croatian Constitutional Law' (2017) 42 Review of Central and East European Law 263–293.

38 In the existing version of the law, this threshold was settled at one-third of the whole population in local units.

39 Decision of the Constitutional Court U-VIIR-4640/2014, 12 August 2014.

> 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.

Finally, the Court explicitly also stated that

> to require a call for a referendum with the message that the Cyrillic alphabet in the town of Vukovar was 'seen as a symbol of suffering' is a deeply disturbing act which attacks an alphabet as a universal civilization heritage of a mankind that determines the very identity of the Croatian constitutional state. From that message emerges an irrationality which must be pointed out.

7.5 Back to the linguistic approach

Contrary to those two examples, which showed the Constitutional Court's willingness to undertake sophisticated and thorough analyses of popular referendum initiatives, the following case seems to mark the return to a more rudimentary type of analysis.

The 2014 referendum initiative on the electoral system came as the first major initiative to amend constitutional rules regulating elections. Technically, the initiative proposed the following: to prescribe that election of parliamentary representatives is to be done through the proportional system; to introduce preferential votes; to establish that electoral units conform to regional territorial units in which at least 20 representatives are elected; to lower the election threshold to 3 percent or 2 percent of votes in electoral units; to prohibit coalition lists of two or more political parties; to introduce a right to vote by electronic means. The Court declared that not enough signatures were collected, and this effectively stopped the referendum. In substance, the central issue in this case was linked to the interpretation of Article 87 of the Constitution, which prescribes that a popular referendum initiative can be accepted only if it has been supported by 'ten percent of all the voters in the Republic of Croatia'. For the Court, the phrase 'in the Republic of Croatia' had a strict territorial meaning and, therefore, the only relevant element to calculate what actually represented 10 percent of all the voters was the voters' legal place of residence.[40] Consequently, the Court concluded that 10 percent should be calculated from the total number of only those Croatian voters who reside within the territory of the State. This

40 Decision of the Constitutional Court U-VIIR-7346/2014, 10 December 2014.

condition was not in this case fulfilled. To this core holding, however, the Court added two more interpretations. In the first, it established that a right to vote on a referendum belonged to voters, regardless of exactly where they would be permanently or temporarily residing at the time the referendum was held. The diaspora was thus clearly included in this scenario. This rule was interpreted directly from Article 45 of the Constitution, which generally regulates the right to vote. 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. The only condition thereof was that such voters gave their signatures only within the proper territory of the Republic of Croatia. This also meant that diplomatic-consular offices of the State in other countries were thus excluded from the concept of territory. 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.

As can be seen, the interpretation of the Court in its entirety actually introduced the 'triple' categorization of voters: those who can generally vote on a referendum, those who can give their signatures in support of particular initiatives and those who must be included in the calculation of the 10 percent requirement. Such an outcome, however, is quite problematic for a number of reasons. First, by insisting on the 'territorial' element of the norm, the interpretation described actually results in an unacceptable division of voters constitutionally entitled to participate in political decision-making. Second, there is no plausible reason to pursue the 'territorial' element at the expense of a more comprehensive and teleological approach in conformity with the Court's general position that the Constitution should always be read as a whole. Third, the Court's triple scheme ends up in a completely unacceptable result that in the *same referendum the same voters* may participate in *different roles.*

7.6 Systemic interpretation in play

In 2015, however, the Court again switched to a more demonstrative way of systemic interpretation of the Constitution with two initiatives addressing the austerity measures.[41] These two cases include the initiative to enact laws to prohibit the 'outsourcing' of technical services in the public sector and to prohibit transfer of certain highways under concession. The interpretation of the Court in those two cases remained on the same general footing, and I will thus here describe only the first case.[42] As a response to the government's

41 For an additional description of those cases, see Djordje Gardasevic, 'Croatian Constitutional Adjudication in Times of Stress' in Zoltán Szente and Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe – a Comparative Perspective* (Routledge 2018) 27–44.

42 One notable difference, however, came when, in the second case, the Court explicitly incorporated entrepreneurial and market freedoms into the concept of the 'Identity of the Croatian Constitutional State'. Decision of the Constitutional Court U-VIIR-1158/2015, 21 April 2015.

'outsourcing' plan, several trade unions organized an initiative not only to prohibit it by a new law, but also to secure that complementary and non-basic services in the public sector are carried out only by those employed in that sector.

This time, the Court insisted upon the delimitation between the 'exclusive' constitutional powers of representative state bodies and the direct decision-making powers of the people.[43] For that purpose, it argued that the entirety of the Constitution implied that the Government had 'the exclusive constitutional power and obligation to propose the state budget and the annual accounts', while the Croatian Parliament 'had the exclusive constitutional power and obligation to adopt the state budget'.[44] In addition, it stressed that the Government was constitutionally empowered 'to direct and control the operation of the state administration, to direct the performance and development of the public services, and to take care of the economic development of the country'.[45] In a more comprehensive way, the Court further stated that 'direct democracy is, by the Constitution, permissible and legitimate, but is not the primary and ordinary way of deciding on the regulation of economic, legal and political relations in the Republic of Croatia'. Consequently, it reasoned that laws may not be subject to a referendum vote if they are not in accordance with the legal system as a whole or when they are directed to regulating issues that fall within the exclusive competence of the bodies of representative democracy.

Scrutinizing the proposed law, the Court found that general bans contained in it qualified as 'blanket' prohibitions, which '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'. In the Court's interpretation, those bans, seen as 'permanent measures', would prevent the Parliament and the Government from pursuing their constitutional responsibilities in the future. It also declared that the bans 'prevent changes in the organization of optimal labor law models … in terms of the economic capabilities of the State'. Additionally, the Court stated that the bans directly influenced 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 (of a popular initiative – note Dj. G.) … bear full responsibility.

All this meant that the proposed law was contrary to the Croatian legal system as a whole. Finally, the Court concluded that the 'exclusive powers' of the representative state bodies were infringed because the blanket prohibitions would 'restrict the Government and the Parliament in framing the state

43 Decision of the Constitutional Court U-VIIR-1159/2015, 8 April 2015.
44 Articles 113/2, 81/3 and 91 of the Constitution.
45 Article 113/6–8 of the Constitution.

budget' whose task is to define salaries and other remunerations for those employed in the public sector. Clearly, such an interpretation of the Court is wrong, at least because it erred in qualifying the proposed law, which can easily be changed afterwards in an ordinary parliamentary procedure, as a permanent ban.

7.7 The story continues: recent failed attempts

In 2018 two separate popular constitutional initiatives were organized in order to, respectively, denounce the Istanbul Convention and once again try to redefine rules for parliamentary elections. In both cases, the Constitutional Court deferred to the Parliament and the Government which found that not enough signatures for calling a referendum had been collected.

The Court's approach in these cases was obviously wrong because it had a clear jurisdiction to verify any lack of the required number of signatures itself. Be that as it may, however, it seems that those two cases might have been a great opportunity for the Court to present its own interpretation on the constitutionality of the said initiatives. I will try to offer here my own view of the possible outcomes thereof.

In the case of the Istanbul Convention, the organizers of the initiative firstly proposed that voters in a referendum should decide on whether to denounce the already ratified document. However, once they realized that the attempt could fail on the basis of the theory of the exclusive powers of the Parliament, which the Court introduced in the 'austerity' referendum cases, the Initiative supplemented the action with a proposal to amend the Constitution itself. For that purpose, the new amendment would allow that international treaties may formally be denounced in a referendum as well as in the Parliament. My strong hypothesis here, based on the previous case law of the Court, is that this would also fail. In fact, I guess that the Court, had it properly examined the merits of the case, would have relied on two arguments. The first would have been some explanation that the Initiative, despite its proclamation that it wished generally to regulate the reach of referendums in relation to international treaties, actually aimed at denouncing just one of them. And even though that, possibly, might not suffice to meet the element of the 'concealed aim' I have already described in the context of the referendum on national minorities' languages, the second argument would surely have been made. Concretely, that the Initiative in fact tried to pursue a purely political, and not a constitutional aim.[46]

The second 2018 Initiative, named 'The People Decides', sought to amend the Constitution again in reference to parliamentary electoral rules. In its most delicate part, the initiative wanted to redefine the mandate of national minorities' parliamentary representatives (NMPRs), who hold reserved parliamentary seats and are elected in a special electoral unit, in order to exclude them

46 Decision of the Constitutional Court U-I-3597/2010, 29 July 2011.

from voting on two crucial issues: confidence in the government and adoption of the state budget.[47] The Initiative based its action upon three principal arguments. First, that NMPRs are elected by a significantly smaller number of votes than other representatives and that they therefore lack legitimacy for participating in crucial decision-making. Second, that NMPRs should primarily represent the specific interests of minorities and not those of the general population. And third, that the NMPRs' mandates should be limited because of the 'frequent practice of undisguised political trading' with minority representatives in processes involving the creation of government and the adoption of the country's budget. I believe that the Court, had it taken the case into consideration, would have easily rejected all three arguments.

As for the argument based on the lack of legitimacy, it is clear that the smaller number of votes required for the election of NMPRs is simply a natural consequence of the definition of minorities as such, and that the whole NMPRs model in Croatia is a special expression of the affirmative action approach. This may be confirmed by the classical definition of minority given by Francesco Capotorti, by the Preamble of the Croatian Constitution and the Croatian Constitutional Law on the Rights of National Minorities. Furthermore, the secondary claim of the Initiative here was that national minorities in Croatia vote in general electoral units rather than in their special unit. However, statistically this statement is only valid for some minorities. This fact obviously makes the whole argument arbitrary and discriminatory. In other words, even if one supports the idea that, on account of their abstention from voting in the special electoral unit, national minorities should be deprived of the right to participate in deciding on the state budget and confidence in the government, this could, at most, only apply to some minorities; the Initiative's proposition regarding the restrictions on minority parliamentary mandates, however, extends to all national minorities. As for the Initiative's argument based on the nature of the minority parliamentary mandate, i.e. that the NMPRs should (primarily) represent the interests of minorities who elected them, the underlying reasoning thereof was that the minority representatives, because of the way in which and the purpose for which they are elected, have a special and not a general political mandate. Here, again, the case law of the Court for a long time held that, as an expression of popular sovereignty, parliamentary representatives in Croatia represent the interests of the people as a whole and not just of those voters who elected them.[48] And as for the third Initiative's argument, based on the claim regarding 'political trading', it may be said that any claim as to the existence of abusive

47 The analysis pertaining to the 'People Decides' referendum proposal is partly taken from the paper which I presented jointly with Prof. Jurij Toplak from the Faculty of Law, University of Maribor (Slovenia) at the 2019 Association for the Study of Nationalities World Convention, held at Columbia University, 2–4 May 2019. However, this previous paper, written under the title 'National Minorities' Rights Redesigned by Referendum Means: the 2018 Croatian Case', has not been published.

48 Decision of the Constitutional Court U-I-732/1998, 12 April 2001; Decision of the Constitutional Court U-I-3789/2003, 8 December 2010.

conduct by parliamentary representatives should be solved by applying individual criminal law measures and not by redesigning the political model of the country.[49] Similar answers to this particular argument may also be found in the case law of the Croatian Constitutional Court.[50]

7.8 Conclusion

I have tried here to show how the Croatian Constitutional Court has dealt with popular referendum initiatives both in general, and in the context of some populist claims they pursued. My attention was focused on the interpretive approaches the Court used for that purpose. Let me now offer some final remarks.

As can be seen, the approaches adopted varied significantly from case to case. The procedural reading of the Constitution which opened the whole series with the Labor Law case was replaced with the 'heavy' concept of 'constitutional identity' and the strict type of proportionality analysis in the 'Marriage referendum' and the referendum on minority rights. Taking into account the growing seriousness those initiatives presented, this might have been expected even though some significant differences between them can be observed. Whereas in the latter case the Court mainly applied the proportionality approach it usually uses when dealing with the constitutionality of restrictions of fundamental rights, in the former it not only relied on the new concept of 'constitutional identity' but also took an opportunity to extend its own powers of review. I have elsewhere argued that this might have been primarily because the Court wanted to strengthen its own position vis-à-vis other branches, rather than to solve the particular case at hand.[51] In that context, one may also notice the role of the *Warning* the Court first issued in the case, but even more its invocation of the Venice Commission report from the Hungarian case, not to mention the construction of the 'unconstitutional constitutional amendment' doctrine, applicable, in the Court's view, in cases of constitutional amendments enacted both by referendum and by Parliament. Interestingly, in the 2014 initiative on the electoral system the Court opted for a more robust linguistic approach which ended up in a curious division of the political community entitled to participate in different stages of referendum proceedings. In the two 2015 initiatives addressing the economic policy of the state, the Court again switched, this time in favor of a systemic reading of the Constitution and implied restrictions on referendum decision-making. However, the whole approach erred in proclaiming the proposed legal 'bans' as being permanent measures, which, as such, they simply could not have been.

49 In other words, strict requirements of criminal law demand precise evidence related to particular individuals and their conduct. Therefore, a general proposal to solve the problem by redesigning the whole system not only suffers from discrimination concerns, but also points to a possible criticism that it contains a 'concealed aim', as I have described before.

50 Decision of the Constitutional Court, U-I-3789/2003, 8 December 2010.

51 Gardasevic (n 15).

One must, however, notice that the 'constitutional identity' element appeared this time as well, when the Court incorporated into it entrepreneurial and market freedoms. Finally, in the two 2018 initiatives the Court simply deferred to the findings of political branches of government that not enough signatures required for calling the referendums had been collected, even though it had a clear constitutional mandate to take over.

Bearing all this in mind, one can conclude: that the Constitutional Court's interpretation methods *were* affected by cases emerging from popular initiatives; that there exists *no unified interpretive approach* to those initiatives; and that such diversity in interpretation, with the exception of the 'Marriage referendum', ended up in blocking all popular initiatives undertaken in the observed period. On the other hand, the Court *did construe some* 'precedents' which filled out the field of popular initiative referendum law and should be taken into account, if at least some type of a principled approach is expected, in future cases. That populist claims in this context still do appear in Croatian society is clearly visible in the last two initiatives organized in 2018. Certainly, the game is far from over.