

Robert Podolnjak

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Causes of Different Outcomes in Slovenia and Croatia

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Electronic reference

Robert Podolnjak, « Constitutional Reforms of Citizen-Initiated Referendum », *Revus* [Online], 26 | 2015, Online since 24 October 2015, connection on 11 January 2016. URL : <http://revus.revues.org/3337>

Publisher: Klub Revus - Center za raziskovanje evropske ustavnosti in demokracije

<http://revus.revues.org>

<http://www.revues.org>

Document available online on:

<http://revus.revues.org/3337>

Document automatically generated on 11 January 2016. The page numbering does not match that of the print edition.

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1 Introduction

- 1 In the last few decades, referendums and citizens' initiatives have become a significant supplement to representative democracy in many countries, especially as regards decisions on important constitutional and political questions.¹
- 2 On the other hand, it must be stressed that the institute of referendum, particularly pertaining to citizens' initiatives, is often judged critically because of the possibility of abusing direct democratic decision-making of the people, violations of fundamental human rights and freedoms and, in some cases, disrupting the regular functioning of the institutions of representative democracy.
- 3 In its Recommendation on referendums from 2005,² the Parliamentary Assembly of the Council of Europe stated that they are "one of the instruments enabling citizens to participate in the political decision-making process". I would also like to emphasise the Assembly's recommendation that, as to the initiators of referendums, "popular initiative should always be possible" (paragraph 13.b.). However, when we speak of popular or citizens' initiatives, there are different applications of this instrument of direct democracy. The terminology and meaning of these instruments of direct democracy differ from the same in English, not to mention other languages. As remarked by Markku Suksi, "there exists no universal referendum terminology".³
- 4 That being said, the dominant classification is based on Switzerland's direct democracy instruments, which is logical if we bear in mind the significance of the Swiss experience with popular referendums and citizens' initiatives.⁴ In its *Guidebook to Direct Democracy in Switzerland and Beyond*, the Initiative & Referendum Institute Europe gives a threefold classification of direct democracy procedures in Switzerland. The first procedure is the obligatory constitutional referendum initiated by the parliament for the adoption of a draft constitutional amendment or a new constitution. The second procedure is the facultative or optional popular referendum, when "new laws or changes to laws, which have been passed by parliament, are subject to /.../ referendum" if this is required by at least 50,000 voters. This procedure is also called a 'people's veto' or a 'rejective referendum', given that laws passed by parliament "receive final approval or rejection in a referendum vote". Finally, the third procedure is called the citizens' or popular initiative: "citizens have the right to make legislative proposals which must be decided in a referendum vote if the proposal gains the support of 100,000 voters. This allows a part of the electorate to place before the whole electorate issues which parliament does not wish to deal with, or which have not even occurred to parliament".⁵ While the obligatory constitutional referendum can be initiated by parliament, the other two procedures – the popular referendum and the popular initiative – can be initiated only by the people.
- 5 Swiss scholars explain that the different forms of direct democracy in their country
 - can be classified by two main dimensions. The source of the proposition describes who controls the issues which are subject to a popular vote, or in other words who sets the political agenda. In the Swiss case, this can be either the government or the parliament or the citizens. The other dimension relates to who can call for a vote. This can be either through a constitutional requirement or it can be through collecting signatures.⁶
- 6 In that sense, referendum procedures can be 'decision-controlling' when a referendum is demanded by a political actor who is not the author of the proposal (when, e.g., the people

demand a referendum on a legislative act of parliament), or they can be ‘decision promoting’ when a referendum is demanded by a political actor who is also the author of the proposal (when, e.g., the people demand a referendum on a new policy proposal).⁷ The popular referendum is clearly a ‘decision-controlling’ mechanism, while the popular initiative is a ‘decision-promoting’ mechanism.

7 Given these differences between the popular referendum and the popular initiative, I would like to point to two essential characteristics that bind them. They are both forms of citizen-initiated referendums.⁸ The essential precondition for such referendums is that the initiators must collect a specified number of signatures within a set period of time, both of which are prescribed in the constitution or the statute. The second characteristic that binds the two forms of citizen-initiated referendums is that they occur against the wishes of either government or parliament. Accordingly, according to Altman, both forms belong to the same class of mechanisms of direct democracy (in his terminology, a reactive referendum and a proactive popular initiative).⁹

8 It should also be mentioned, for instance, that abrogative initiatives in Italy (and abrogative referendums belong to the category of popular referendums) have been, according to Uleri, “more *decision-promoting* than *decision-controlling* initiatives”,¹⁰ rendering the differences between the popular referendum and the popular initiative sometimes blurred. My using the term ‘citizen-initiated referendum’ in this article relates to both the popular referendum and the popular initiative. Thus, Slovenia’s popular referendum and Croatia’s popular initiative are comparable. The general term ‘referendum’ is used to refer to all forms of popular votes, regardless of who the initiator is, or whether it is obligatory or facultative.

9 Although the institute of referendum is well established as a means of direct decision-making of the people in most European countries, it is equally true that the institute of citizen-initiated referendum is not usual in the older West European countries – only Switzerland and Italy have different forms of citizen-initiated referendums (and the tiny Lichtenstein). On the other hand, almost all newly adopted East European constitutions provide for various instruments of direct democracy.¹¹ What is even more interesting for my analysis is that the constitution-makers in several new democracies of Central and Eastern Europe embraced much more enthusiastically the idea of letting the people initiate referendums on constitutional or other matters normally within the jurisdiction of their parliaments. The institute of citizen-initiated referendum is part of the constitutional order in many post-Communist countries, such as Latvia, Lithuania, Slovakia, Ukraine, Hungary, Slovenia, Croatia, Albania, Macedonia and Serbia.

10 The forms of the institute of citizen-initiated referendum prescribed in the constitutions of these countries differ. Only a minority of these constitutions make it possible for citizens to initiate a constitutional referendum like in Switzerland, or an abrogative legislative referendum like in Italy. They also differ in respect of the questions that may be put to a ballot, the number of signatures that must be collected, or the turnout and/or approval quorums in the rules regulating the validity of referendum results. Ergo, no dominant model can be found.

11 Bearing in mind the experience with citizen-initiated referendums in the last two decades in the new democracies of Central and Eastern Europe, it can be concluded that the constitutional provisions related to popular referendums and popular initiatives, at least in some of them, had been designed without due knowledge of comparative experiences and without necessary constitutional safeguards. As to comparative experiences at national level, only Switzerland and Italy could have been a model. Paradoxically, the two countries with the most experience with different forms of citizen-initiated referendums at sub-national level (i.e., the United States and Germany) have had no experience of direct democracy at national level.¹²

12 In this article, I analyse only two new democracies which have constitutionalised citizen-initiated referendums – Slovenia and Croatia, two neighbouring countries, both federal republics of former Yugoslavia and both member states of the European Union. Both countries have, in my opinion, been neglected in comparative analyses of citizen-initiated referendums. Although Slovenia is undoubtedly one of the leading European countries with experience of direct democracy in terms of the number of referendums held in this country, it has been left out of most comparative analyses of citizens’ initiatives.¹³ The reason for this is that, prior to the

2013 constitutional reform, Slovenia had had the multifaceted legislative referendum which could be initiated by citizens (popular referendum), by the opposition (minority referendum similar to the Danish model), or by the second house of Parliament. But Slovenia has never had a citizens' initiative following the Swiss model. Although one of the latest comparative books on referendums in the world states that "the position (of referendum) in Slovenia has become one of the more interesting, perhaps approaching the position in Switzerland or California", a little more than half a page is dedicated to the referendum experience of this country, and the constitutional reform of 2013 is not even mentioned.¹⁴ As to Croatia, the institute of citizens' initiative was constitutionalised 15 years ago, but the first referendum demanded by the people was held in December 2013. Consequently, Croatia has not been analysed comparatively because no citizen-initiated referendum was held in the period between 2000 and 2013. Writing about the legal right to direct democracy, as opposed to the actual use of mechanisms of direct democracy, David Altman is correct in pointing out that "something does not exist until there is at least one case that proves that it exists. Otherwise, the inclusion of that right in the constitution or basic law of a country could be easily considered just a 'dead letter'".¹⁵ In the opinion of many Slovenian and Croatian scholars, the constitutional and legislative design of citizen-initiated referendums in their respective countries was in many ways flawed.¹⁶

13 Referendums initiated by citizens have caused, at least from the point of view of governments in these two countries, many unexpected constitutional, political and/or economic problems. Over the years, several unsuccessful constitutional reforms of the institute of referendum have been attempted both in Slovenia and Croatia. However, in May 2013, the Slovenian Parliament amended the Constitution as regards the design of legislative referendum. Half a year later, the Croatian Parliament's attempt to amend Croatia's constitutional provision on the institute of citizens' initiative came to nothing. In this article, my objective is to elaborate why the constitutional reform has been successful in Slovenia, and why it has failed in Croatia. I will first give a brief introduction to the similarities and differences between the original design of mechanisms of direct democracy in Slovenia and Croatia, and then between the experience with the same in these two countries.

2 The original design of mechanisms of direct democracy in Slovenia and Croatia: similarities and differences

14 Both Slovenia and Croatia were born in a referendum. The Slovenian referendum on sovereignty and independence was held in December 1990, and a similar plebiscite took place in Croatia in May 1991. Both countries also held referendums on EU membership (Slovenia in March 2003, and Croatia in January 2012). According to Stephen Tierney's methodology,¹⁷ all these referendums are, in a broad sense, constitutional referendums, although formally the subject matter of these referendums was not some constitutional provision. The said referendums on independence and on entry to the EU are the most comparable cases in the history of direct democracy in Slovenia and Croatia.¹⁸ Also, no obligatory referendum on enacting or amending the constitution is required in either the Slovenian or the Croatian constitution. Only the facultative constitutional referendum is prescribed in both countries.

15 On the other hand, the forms of direct democracy in the constitutional orders of these two countries differ greatly.

16 The Slovenian Constitution prescribes that 30,000 voters may propose a constitutional amendment. According to Article 168, "a proposal to initiate the procedure for amending the Constitution may be made by twenty representatives of the National Assembly, the Government or at least thirty thousand voters".¹⁹ Such proposals are decided on by the National Assembly by a two-thirds majority vote of the representatives present. The National Assembly adopts acts amending the Constitution by a two-thirds majority vote of all representatives (Art. 169 of the Constitution). However, the Constitution also gives a parliamentary minority (at least thirty representatives) the option to demand confirmation of proposed constitutional amendments by referendum (Art. 170). Constitutional amendments are adopted if a majority of those voting in a referendum voted in favour of the same, provided that a majority of all voters participated in the referendum. Thus, the validity of results of constitutional referendums

depends on fulfilling a participation quorum requirement. The Slovenian Constitution has been amended several times, but the optional constitutional referendum demanded by 30 representatives has never been required.²⁰

17 A much more interesting part of the Slovenian constitutional arrangement of the referendum was the original design of the legislative referendum. The original Article 90 of the Constitution prescribed that the National Assembly could call a referendum on any issue which is the subject of regulation by law on its own initiative. However, it had to call such a referendum if so required by at least one third of representatives by the National Council (the second house), or by forty thousand voters. Slovenian constitutional scholars emphasised that, comparatively speaking, this was a very high number of proponents that were allowed to initiate a referendum.²¹ It is also very important to note that, in contrast to the constitutional referendum, the decision in a legislative referendum would be valid if a majority of those voting cast their votes in favour of the same. So, the participation quorum or the acceptance quorum was not required in the constitutional provision on the legislative referendum drafted in 1991. And finally, the Constitution prescribed that any issue which was the subject of regulation by law could be the subject of a legislative referendum.

18 The original Croatian Constitution adopted in 1990 envisaged only the facultative referendum on constitutional or legislative matters (Art. 86 of the original Constitution, which is today Art. 87).²² The Croatian Parliament may call a referendum on a proposal for an amendment of the Constitution, on a bill, or any other issue within its competence. The President of the Republic may, at the proposal of the Government and with the counter-signature of the Prime Minister, call a referendum on a proposal for the amendment of the Constitution or any other issue which he/she considers to be important for the independence, unity and existence of the Republic of Croatia.²³ Neither the Parliament nor the President has ever called a referendum on a proposal for the amendment of the Constitution.

19 A great change happened in 2000, when the institute of citizens' initiative was constitutionalised. At the proposal of a small parliamentary party (the Croatian Party of Rights), whose votes were necessary for a two-thirds parliamentary majority for accomplishing the most significant constitutional transformation of Croatia's original semi-presidential system into a parliamentary one, Article 86 was amended prescribing that the Croatian Parliament shall call a referendum on all issues that may be put to a referendum by the Croatian Parliament or the President when so demanded by ten per cent of all voters in the Republic of Croatia.

20 With this constitutional provision, Croatian citizens acquired the full-scale popular constitutional initiative (to demand a constitutional referendum), while Slovenian citizens have at their disposal only the weaker form of constitutional agenda initiative, which must be debated by the Parliament and will, in no circumstances, lead to a referendum.

21 The final change in the design of the institute of referendum in the Croatian constitutional order which was highly relevant for the success of future referendums was the elimination of any quorum as the condition for the validity of the results of a referendum in 2010. The original Croatian Constitution²⁴ contained both the acceptance (or approval) quorum and the participation quorum. Article 135 (which is today Art. 142) prescribes calling an obligatory referendum as the final formal step required to allow the association (or, for that matter, disassociation) of Croatia with other states. Most importantly, any decision concerning the Republic's association must be reached by a majority vote of the total number of voters (the acceptance quorum of 50% + 1). For all other instances of state referendums, the Constitution prescribes (in Art. 86) that a decision is made by the majority of the votes cast, provided that turnout is above 50% of the electorate (the participation quorum).²⁵

22 It was obvious to the vast majority of Croatian politicians and constitutional scholars that the approval quorum required for referendums on state alliances is too high a barrier and that it could be the greatest obstacle in the process of Croatia's accession to the EU, considering that this organisation is a union of states of sorts (and not simply an international organisation). It was due to this that the Constitution was amended in 2010 and (amongst other changes) all quorums prescribed for the validity of referendum decisions were deleted.²⁶ The intention

of the constitution makers was only to facilitate the decision on the future EU membership referendum, but the consequences have been much larger. It is important to state that it is now much easier to reach any decision in a state referendum, even to amend the Constitution itself, by a simple decision of the majority of the votes cast.

23 When comparing the Slovenian legislative referendum and the Croatian constitutional arrangement regarding the institute of citizens' initiative, there are two particularly important similarities between the two. The first is a lack of any kind of participation or approval quorums which would prevent referendum decisions supported by a small minority of interested voters (for Croatia this has been valid since 2010).²⁷ The second is the possibility to call a referendum on any legislative issue (in Croatia on a constitutional issue as well), the consequence of which is that in both countries only their respective constitutional courts can determine whether a certain issue is constitutionally allowed to be decided in a referendum. The legal basis for the authority of the Slovenian Constitutional Court is contained in Article 21 of the *Referendum and Public Initiative Act*, according to which, "if the National Assembly deems that unconstitutional consequences could occur due to the suspension of the implementation of an act or due to an act not being adopted, it requests that the Constitutional Court decide thereon".²⁸ The legal basis for the authority of the Croatian Constitutional Court is contained in Article 95 of the *Constitutional Act on the Constitutional Court*: "At the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten 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 86, paragraphs 1-3, of the Constitution of the Republic of Croatia for calling a referendum have been met."²⁹

24 Keeping in mind the Slovenian referendum experience, Ciril Ribičič, a professor and former judge of the Slovenian Constitutional Court, wrote in 2011 that the arrangement should be changed so as to avoid the Constitutional Court being the sole instance that decides whether a referendum is to be allowed or not. His opinion is that the existing arrangement grants the Constitutional Court such broad discretion with regard to referendums that its decisions, even if well elaborated, are always deemed arbitrary by at least one party involved in the dispute over the possible referendum on some legislative act.³⁰

3 The referendum experience in Slovenia and Croatia

25 With respect to the number of referendums held, Slovenia is fourth amongst the European countries, preceded only by Switzerland, Italy, and Ireland (but third if only citizen-initiated referendums are counted). There were 21 referendums held in Slovenia, and only three in Croatia. Of these, as I have noted earlier, two were identical (the referendums on sovereignty and independence, and on EU membership). Some referendums called by the Slovenian Parliament on its own initiative (a referendum on Slovenia's membership in NATO and an advisory referendum on the establishment of regions) are not relevant for my topic, which means that we are left with 16 legislative referendums held in Slovenia in the period between 1996 and 2012. Not even a majority of these were held on the initiative of citizens: nine referendums were called at the request of one third of representatives at the National Assembly, seven were called at the request of 40,000 voters, and two were called at the request of the second house – the National Council (the first referendum on the electoral system was called on the initiative of all three authorised bodies). It is very important to emphasise that Slovenia's successful constitutional reform of the legislative referendum concerned the reform of not only the citizen-initiated referendum, but also the so-called 'opposition referendum'.

26 Slovenia was, together with Denmark, the only European country which constitutionalised the institute of legislative referendum required by a parliamentary minority, and it is precisely this form of referendum which is 'to be blamed' for the majority of legislative referendums held in Slovenia. More specifically, parliamentary oppositions have, in the case of almost all significant legislative projects proposed by the Government, initiated the procedure of demanding a referendum on an act passed by the Parliament, practically continuing the 'legislative battle' on the referendum field. Using the legislative referendum as a weapon of

choice of sorts by the defeated parliamentary opposition against the government of the day became almost a rule. In turn, the referendum was used not as an instrument of citizens, but as an instrument of opposition parties against the policies of the government. The implementation of important economic and social reforms was prevented and each legislative referendum was just another decision manifesting distrust of the government.³¹

27 Between December 2010 and March 2012, six legislative referendums were held in Slovenia against important acts that had earlier been passed by the National Assembly and in all of them the majority of voters voted against these acts. At the request of the parliamentary opposition (mainly representatives of the Slovenian Democratic Party, the then strongest opposition party), legislative referendums were held on the Radio and Television Corporation of Slovenia Act in December 2010, on the Act on the Prevention of Illegal Work and Employment and on the Act Amending the Protection of Documents and Archives and Archival Institutions Act in June 2011. At the request of voters, legislative referendums were held on the so-called Mini Jobs Act in April 2011, on the Pension and Invalidity Insurance Act in June 2011, and on the Marriage and Family Relations Act in March 2012. In each of these, large majorities of voters (i.e., over 70%) voted against the acts passed by the National Assembly (only in the case of the Marriage and Family Relations Act referendum 'only' 55% of the voters voted against).³² However, the turnout in these referendums was relatively low – less than 15% in the referendum on the Radio and Television Corporation of Slovenia Act, 30% in the referendum on the Marriage and Family Relations Act, and about 40% in the three referendums held on the same day in June 2011. The economic consequences of rejecting a very important Pension and Invalidity Insurance Act were most damaging,³³ because this prevented the necessary reform of Slovenia's pension system, and it presumably led to the downfall of the Social Democratic government in September 2011. On the eve of the referendums on the reform of the pension system, on the prevention of illegal work, and on so-called 'mini jobs', the then Prime Minister Borut Pahor predicted that, if these acts were to be repealed, the credit rating of Slovenia would also fall and the state would find itself in a debt crisis.³⁴

28 After early elections for the National Assembly held on 4 December 2011, a new centre-right government was formed. However, the structural reforms proposed by the new government led immediately to the already familiar model of vetoing the much needed legislative projects by demanding a legislative referendum. This time it was Positive Slovenia, the strongest opposition party, and some trade unions (by submitting the signatures of its members) that demanded a referendum on the Slovenian State Holding Act, designed to manage all state capital funds, and a referendum on the so-called 'Bad Banks Act' (i.e., Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act), aiming to strengthen the stability of banks.

29 The Government requested from the Constitutional Court to ban the holding of referendums on these two acts, claiming that their rejection would have unconstitutional consequences. Surprisingly for many Slovenian constitutionalists,³⁵ the Constitutional Court declared the referendums on both acts unconstitutional. The Constitutional Court held that the delay or rejection of these two acts in referendums would have unconstitutional consequences. On the basis of weighing several conflicting constitutional values (the right to request a referendum vs. safeguarding the efficient functioning of the state and guaranteeing the exercise of its vital functions), the Constitutional Court held that it is necessary to give priority to ensuring the undisturbed exercise of state functions (including the creation of conditions for the development of the economic system), to ensuring respect for the rights guaranteed by the Constitution (in particular, the rights to free enterprise, social security, healthcare, the rights of disabled persons, and security of employment) coupled with respect for the fundamental principles of international law and international treaties, and to ensuring the effectiveness of the legal order of the European Union, over the right to request a legislative referendum.³⁶ The Court's decision, which was decided almost unanimously (8-1), was harshly criticised. It seemed that the Court changed its earlier jurisprudence on the admissibility of a referendum taking account of changed economic circumstances.³⁷

- 30 With its unprecedented decision, the Court has effectively limited the right of the opposition or the voters to call a legislative referendum on key economic and social legislation. More importantly, after several earlier unsuccessful attempts, this decision influenced, in a way, the willingness of political parties in the Slovenian Parliament (and, in particular, of the opposition) to amend the Constitution with respect to the design of the legislative referendum. The previous main opposition party (i.e., the Slovenian Democratic Party), which had used the legislative referendum against government policies several times and successfully so, was now the governing party experiencing itself all the ‘evils associated with the legislative referendum demanded by the opposition’. On the other hand, the opposition parties, especially Positive Slovenia and the Social Democrats, realised that the referendum as a weapon against the economic policies of the Government could now be successfully blocked by the Constitutional Court. As a result, the referendum lost its relevance as a means of bringing down the Government. It is, hence, no coincidence that the process of amending the Constitution progressed expediently once the Constitutional Court had reached its decision banning referendums on the Slovenian State Holding Act and the so-called ‘Bad Banks Act’.³⁸
- 31 In comparison with Slovenia, Croatia’s experience with referendums is much more limited. As mentioned earlier, Croatia has held only three referendums to date. The great majority of Slovenian referendums have been legislative referendums, while all three referendums in Croatia have been constitutional. Slovenian voters demanded seven referendums, while Croatian voters only one – the already much debated referendum on the constitutional definition of marriage.
- 32 While in Slovenia only 40,000 signatures (i.e., about 2.5% of all voters) are to be collected within 45 days, in Croatia the signatures of as much as 10 per cent of all voters at the minimum (i.e., more than 400,000)³⁹ are to be collected within 15 days. The number of citizen-initiated referendums is, accordingly, clearly much higher in Slovenia. The constitutional and legislative requirements for collecting signatures in Croatia are, in comparison with other European countries which have the institute of citizens’ initiative, the most stringent. As a result, it is extremely difficult to collect the needed number of signatures for calling a referendum on a citizens’ initiative in Croatia. Evidently, this can be accomplished only by a very strong organisation or association.⁴⁰ In other countries with the institute of citizen-initiated referendum, such as Switzerland, Italy or Slovenia, political parties are often behind initiatives, lending their support and necessary infrastructure. In Croatia, however, political parties are, as a rule, in the background, while the leading role belongs to trade unions, war veterans associations, religious organisations, etc.
- 33 The constitutional provision on the citizens’ initiative came to the forefront of public debate in Croatia for the first time in April 2001. Namely, the leaders of a number of war veterans associations submitted a petition backed by 400,000 signatures to the President of the Croatian Parliament, requiring a legislative referendum that was to provide defenders who fought in the Croatian Homeland War the same legal treatment as the treatment granted to members of the winning and liberation armies in World War II. Moreover, in the petition they also asked not to be prosecuted for possible war crimes committed during the Homeland War. However, the parliamentary majority was not inclined to call a referendum on the basis of such a petition, since the then Referendum Act did not provide for the procedure of organising a citizen-initiated referendum and one was necessary to determine the conditions and criteria under which a referendum could be implemented.
- 34 In the coming years, several citizens’ initiatives tried to collect the necessary number of signatures so as to be able to demand a referendum on some important matters, but all of them were unsuccessful (repealing the Constitutional Act on the Cooperation of the Republic of Croatia with the International Criminal Tribunal, NATO membership, the Arbitration Agreement between Slovenia and Croatia on a maritime border dispute⁴¹). Following these three unsuccessful initiatives, Croatian citizens succeeded in collecting the necessary number of signatures on several occasions.
- 35 In June 2010, Croatian trade unions collected more than 800,000 signatures requiring a referendum against the Government’s Draft of the Act on Amendments to the Labour Act,

which contained provisions which would limit the continuation of workers' rights established by collective agreements to six months after the expiration or termination of collective agreements, and provisions which would make the cancelation of collective agreements between trade unions and employers possible. The Government quickly withdrew the proposed draft from parliamentary procedure, after which the Parliament refused to call a referendum, claiming that there is no legislation to be decided on. The trade unions lodged a complaint against the Parliament with the Constitutional Court, arguing that lawfully collected signatures cannot be ignored and that the trade unions have no guarantee that, in a few months' time, the Government would resubmit the same draft to the Parliament. The question was whether the trade unions would need to collect the signatures again to be able to bring the issue to a referendum.

36 The Constitutional Court ruled that there are no grounds for the referendum initiated by trade unions now that the Government withdrew from Parliament its proposed changes to the Labour Act. The decision was severely criticised by centre-left opposition parties (Social Democrats and the Labour Party), who claimed that the Court is under the influence of the governing Croatian Democratic Union. Ivo Josipović, the then President of the Republic and a distinguished professor of law, publicly expressed his dissatisfaction with the Court's decision, openly stating that he would have voted differently. He was of the opinion that the Court's decision could provoke further dissatisfaction of the citizens and reinforce a lack of popular trust in state institutions.⁴²

37 The second and most successful citizens' initiative to date in Croatia was the initiative of the 'In the Name of the Family' organisation backed by the Catholic Church, calling for a referendum on the question: "Are you in favour of the Constitution of the Republic of Croatia being amended with a provision stating that marriage is a life union between a woman and a man?" The Initiative was a response to the Government's alleged plans to legalise same-sex marriage. In May 2013, the Initiative collected almost 750,000 signatures,⁴³ thereby fulfilling the basic condition to call the first citizen-initiated constitutional referendum in Croatia.

38 This Initiative has sharply divided the Croatian public with regard to its content and caused considerable controversy. Moreover, individual actors both from within the Croatian Parliament and without offered different constitutional interpretations with respect to the treatment and obligation of the state authorities in relation to decision-making and the possible consequences of decisions made by citizens in a constitutional referendum.

39 The most important controversies were as follows: Is the Parliament obliged to call a referendum in all cases required by a popular initiative which met the constitutional requirements? Can the process of constitutional change through a referendum be carried out outside and beyond the procedure for changing the Constitution provided for in Chapter IX of the Constitution? Can the Croatian Parliament obstruct in any way the will of the people expressed either by signing a request for a referendum or through voting in a referendum? May MPs vote against calling a referendum required by a citizens' initiative claiming that they have no imperative mandate? Can the people decide in a referendum on issues which many consider to be discriminatory for a certain group of people? Should the Constitutional Court issue an opinion on the constitutionality of referendum questions even if not requested by the Croatian Parliament? These and other contentious issues have become the subject of intense political and scholarly discussion. 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.⁴⁴

40 In a joint statement, all professors of constitutional law from the law faculties in the country expressed their concern over the possibility that such opinions could lead to a constitutional and political crisis without precedent. Their joint statement highlights the following:

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 and 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 that comes into force upon confirmation that the referendum was held in accordance with the Constitution.⁴⁵

41 The request for the implementation of a referendum by the ‘In the Name of the Family’
Citizens’ Initiative pointed, yet again and even more so than previously, to all the shortcomings
in the constitutional and statutory regulation on the institute of popular initiative.⁴⁶

42 The six month long debate on the said citizen-initiated referendum culminated finally in
November 2013 with the Parliament’s decision to call a referendum and with several decisions
by the Constitutional Court declaring that the referendum is constitutionally admissible. It
should be emphasised that the Constitutional Court had intervened several times prior to
the calling of the referendum warning the Parliament to respect the Constitution not only in
its obligation to call a citizen-initiated referendum, but also in respecting the results of the
referendum vote as an act of the constituent power of the people to change the Constitution.⁴⁷

43 The first referendum demanded by a popular initiative was held on 1 December. With a
relatively modest turnout of 37.9%, almost two-thirds of voters (946,433 or 65.87%) voted
for amending the Constitution with the inclusion of the definition of marriage as a union of
man and woman.⁴⁸

44 Almost at the same time, a number of 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 of the total population.⁴⁹ At the request of the Croatian Parliament, the Constitutional
Court decided that the referendum question was constitutionally inadmissible.⁵⁰

45 Two more citizens’ 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.⁵¹ The first initiative demanded a referendum on preventing the outsourcing of
non-core services in the public sector, and the second demanded a referendum against the
monetisation of the Croatian motorways. Although the requested referendums were not held,
due to the Constitutional Court’s decisions, the Croatian Government nevertheless abandoned
its plans for the outsourcing of services in the public sector and the monetisation of the
motorways.⁵²

46 At the time of writing this article, no official report was made on whether the latest citizens’
initiative of trade unions and NGOs, who were collecting signatures in May-June 2015 on two
questions,⁵³ had collected the necessary number of signatures for calling a referendum.

4 Constitutional reform of the citizen-initiated referendum: success in Slovenia, failure in Croatia

47 Following several unsuccessful attempts over the years, in May 2013, the Slovenian
Parliament amended consensually, with the support of all political parties, Article 90 of the
Constitution regulating the institute of legislative referendum. At the same time, none of
the Croatian Parliament’s attempts to amend the constitutional provision on the institute of
citizens’ initiative, including the last one in December 2013, have borne fruit.

48 Slovenian constitutional experts have long been critical of the constitutional arrangement and
the practice of the legislative referendum in their country, although, it must be said, they were
not of the same opinion in proposing alternative solutions. In essence, the consensus reached
by constitutional scholars was that the legislative referendum should remain an instrument in
the hands of citizens alone, and should no longer be available to the parliamentary opposition

(or the second house) as a means of undermining not only the Government of the day, but also the parliamentary system as a whole. They also agreed, in principle, that some issues are not suitable to be decided in a referendum, but could not agree on the precise formulation of those issues. Finally, there were significant differences of opinion as to the issue whether a specific type of quorum for the validity of referendum decisions should be designed.⁵⁴

49 The length of this article does not allow me to comment on all the initiatives aiming to reform the constitutional arrangement of the legislative referendum submitted to the Slovenian National Assembly. There had been several unsuccessful initiatives prior to 2013, but none of them received the required two-thirds majority of MPs' votes. As commented by the Slovenian constitutional scholar Igor Kaučič, "changes of the Constitution are completely in the hands of the representatives – they shaped them and they are the ones who decide whether to let the people confirm them – the voters are completely excluded from the process."⁵⁵ Consequently, the long-awaited constitutional reform of the legislative referendum could be implemented only in a special constitutional moment. This moment finally arrived with the severe economic and financial crisis in Slovenia (which had been created partly by many referendum decisions). Moreover, the party that used the referendum as the 'opposition weapon' in 2010 and 2011 became the governing party after the early elections in December 2011, changing its benevolent attitude to the institute of the referendum now used by the opposition. Ultimately, opposition parties were prevented from using the referendum as a tool of subverting the government by the Constitutional Court's changed attitude to the right to request a call for a referendum vs. ensuring the undisturbed exercise of state functions. These were, in my opinion, the crucial preconditions for setting the stage for a successful constitutional reform.

50 In September 2012, fifty representatives of the National Assembly submitted a draft proposal to amend the Constitution,⁵⁶ and amendments to Articles 90, 97 and 99 of the Constitution⁵⁷ were accepted by 86 (and only one against) MPs in May 2013. The amendments were adopted consensually following a prolonged public debate, with Slovenian constitutional scholars in a supporting role.

51 The first and most important change adopted is that, in the future, the National Assembly is obliged to call a referendum on the entry into force of an act that it has adopted if so required by only forty thousand voters, with the right of either a parliamentary minority (30 MPs) or the second house to call a referendum having been eliminated. This part of the reform was the *sine qua non* of any meaningful reform of the legislative referendum, and it was the least controversial for all the actors involved in the constitution-making process (except, of course, the second house – the National Council). The accepted solution was elaborated as a consistent application of the principle that only voters should have the right to require a referendum, because they do not participate directly in the law-making process.

52 The second most important aspect of the reform was the exclusion of some issues from the referendum vote. In the future, popular votes will be banned on legislation on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters, on legislation on taxes, customs duties and other compulsory charges, on acts adopting the state budget, on acts ratifying treaties, and on acts eliminating unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality. The most controversial aspect of these bans was the exclusion of financial issues from the referendum vote. The original formulation in the draft proposal had been even more restrictive than the one adopted.⁵⁸ In its Opinion on the draft proposal, the Expert Group of constitutional scholars, appointed by the Constitutional Commission of the National Assembly, elaborated that the definition of legislation on financial issues that would be banned from being voted on in a referendum is too restrictive and that, in practice, it could mean "a ban of referendum for the majority of laws, since they dominantly regulate fiscal issues or, at least, directly or indirectly affect them".⁵⁹ The Opinion of the Expert Group was accepted by the National Assembly, but the final formulation is still too restrictive for some constitutional scholars.⁶⁰

- 53 The third innovation is the adoption of the model of the ‘rejective’ referendum, according to which an act is rejected in a referendum if the majority of voters who have cast valid votes voted against the act, provided that at least one fifth of all qualified voters voted against the act. The most significant features of this model are: the issue put to a referendum is a complete act, and not only its specific provision/s; a referendum is subsequent (to an act already adopted by the National Assembly, yet still not published and not enforced); in a referendum, voters decide on the enforcement of an act (the so-called suspensive referendum, because the calling of a referendum delays the enforcement of the act until the referendum decision has been made); the referendum vote concerns the rejection, and not the validation of an act.⁶¹
- 54 The initial concept formulated by 50 MPs in the draft proposal from September 2012 was completely different. It had prescribed that an act comes into force if it is supported by the majority of voters, with the additional condition that the result is valid if at least 35% of the citizens who have the right to vote have attended the referendum.⁶² The Expert Group was against this participation quorum, rightfully pointing to negative experiences with this form of quorum (e.g., Italy), and proposed instead the approval quorum, which is, in the Slovenian context, the quorum of rejection of an act passed by the National Assembly.⁶³
- 55 The National Assembly accepted the concept of ‘rejective’ referendum, but in the final stage of the adoption of the constitutional amendments it changed the percentage of voters needed to reject an act, reducing it from the 25% recommended by the Expert Group to 20%. This decision has been strongly objected to by the majority of constitutional scholars involved in the Expert Group.⁶⁴
- 56 Let us now turn to Croatia’s attempts to reform the constitutional design of the citizen-initiated referendum. There have been three initiatives in this regard to date and all of them unsuccessful. The first came in the process of amending the Constitution in 2010. The then opposition parties (i.e., the Labour Party and the Social Democrats) proposed the lowering of the number of signatures required to call citizen-initiated referendums from 10% (i.e., around 450,000 signatures) to 200,000. The Social Democrats also proposed that some issues be excluded from the referendum vote: matters diminishing the constitutionally defined human rights, fundamental freedoms and equality, and the protection of minority rights, as well as proposals relating to the tax system and the state budget. However, the Social Democrats did not insist on their proposal in the final bargaining with the governing Croatian Democratic Union over the package of constitutional amendments, which was mainly related to Croatia’s accession to the EU.
- 57 The second initiative came following the last parliamentary elections in October 2012. Labour party MPs (the most referendum-friendly party in recent years) and other opposition party MPs (mainly representatives of the Croatian Democratic Union) proposed lowering the number of signatures required to call citizen-initiated referendums to 200,000. As emphasised by the proponents of the initiative, since 2000, when the institute of citizens’ initiative was introduced into the Croatian Constitution, not one referendum demanded by citizens has been called, and that obviously represents “a great democratic deficit”.⁶⁵
- 58 The Government of Prime Minister Zoran Milanović (the Social Democratic Party) did not accept the initiative, claiming that constitutionally the referendum on the institute of citizens’ initiative is well positioned and that, for a country of the size of Croatia, “10 per cent of voters is not too high, but a sensible number”. He announced that the Referendum Act will be changed and that the deadline for collecting signatures will be extended from 15 to 30 days, holding that to be enough in further ‘liberalising’ citizens’ initiatives. The Prime Minister concluded that, in his opinion, referendums are “the ideal space for populists and they will be showed to be the pinnacle of democracy and popular decision-making”.⁶⁶ It should be noted that, to date, his Government has not proposed amendments to the Referendum Act with the purpose of extending the time set for collecting signatures. I would also like to remind that Zoran Milanović, as the leader of the parliamentary opposition in 2010, had once been much friendlier to citizens’ initiatives. He publicly signed the request for a referendum on the amendments to the Labour Act, and formally proposed lowering the number of signatures required for citizen-initiated referendums to 200,000.⁶⁷

59 The third and almost successful initiative to amend the constitutional provision on the citizen-initiated referendum came in November 2013, unintentionally coinciding with the call of the first citizen-initiated referendum. The initiative to amend the Constitution had been launched by MPs from the governing Social Democrats several months earlier with a draft of constitutional amendments, according to which there would be no statute of limitations for politically motivated killings.⁶⁸ In September 2013, the proposal was changed so that now the statute of limitations was to be removed from the Constitution for all first-degree murders and not just politically motivated murders. However, the parliamentary majority needed the support of some smaller opposition parties to achieve the two-thirds majority necessary for amending the Constitution, because the main opposition party – the Croatian Democratic Union – was unwilling to support the proposed constitutional amendment. One of the opposition parties (i.e., the regional Croatian Democratic Alliance of Slavonia and Baranja, HDSSB) insisted on the constitutional recognition of regions, and another opposition party (i.e., the Labour Party) conditioned its support with the lowering of the number of signatures required for citizen-initiated referendums to 200,000, which they have been proposing on several occasions since 2010. The demands of these opposition parties were accepted, and so for the first time since the introduction of the institute of citizens' initiative in the Croatian Constitution this institute became a question of wider constitutional and political debate.

60 The Draft Amendments to the Constitution proposed by the Parliament's Committee on the Constitution, Standing Orders and Political System put forward three significant changes in the institute of citizen-initiated referendum.

61 First, the number of requisite signatures would be lowered to 200,000. This part of the proposal was acceptable to all actors involved in the process of amending the Constitution.

62 Second, some issues would be banned from being voted on in a referendum: issues relating to the limitation or reduction of human rights and fundamental freedoms, issues referring to Croatia's international obligations, the adoption and implementation of the state budget and the tax system, defence and national security issues, and appointments within the scope of the Croatian Parliament's authority. This proposal had, from the point of view of constitutional design of the citizen-initiated referendum, two errors, as was emphasised by Professor Branko Smerdel:

First, the list of situations on which a citizen-initiated referendum would be banned is too extensive and undefined. By citing whole chapters of the Constitution instead of specific provisions, half of the Constitution is under ban. If such a proposal were to be accepted, almost any referendum would become impossible. With such a solution, the right to call a referendum is practically abrogated. Secondly, it is not defined who decides whether some specific referendum issue belongs to the list of banned matters. I think this is not an accidental, but a deliberate attempt to eliminate the Constitutional Court."⁶⁹

63 The third aspect of the said change was the introduction of the participation quorum: referendums will be considered valid on the condition that at least 40% of all voters attended it.⁷⁰

64 In a very short, almost nonexistent public debate,⁷¹ and without Croatian constitutional law experts playing any formal advisory role in the process, the final Draft Proposal of Constitutional Amendments was submitted to the Parliament in early December 2013, with only one change entered in comparison to the initial draft. The 40%-of-all-voters participation quorum was replaced with the approval quorum, as a result of objections coming from some scholars and non-governmental organisations. According to the new proposal, the Constitution could be changed in a referendum only if the change was supported by more than 50% of all eligible voters, organic laws with the support of at least 35% of all voters, and ordinary laws with the votes of more than 25% of the electorate.⁷²

65 An extraordinary session of the Parliament was convened with the only purpose of adopting the proposed constitutional amendments. On the very eve of the parliamentary vote, the Croatian Democratic Alliance of Slavonia and Baranja (HDSSB) demanded a postponement and asked for an extension of the public debate on some of the amendments proposed. Without this party's MPs, the needed 2/3 parliamentary majority could not be achieved. Why HDSSB

changed its mind is not clear – one of the possible reasons could be that this party was the only rightist party in the Parliament to support the amendments initiated by a centre-left government. At the beginning of 2014, there were some signs that the debate on constitutional amendments could be reopened, but the constitution-making moment had already passed.

66 All initiatives to amend the constitutional provision on the institute of citizen-initiated referendum in Croatia have come, as a rule, at moments when an initiative succeeded in collecting the necessary number of signatures (in 2010 when trade unions demanded holding a referendum on the Labour Act; in 2013 when Catholic and war veterans associations demanded referendums on marriage and the language rights of national minorities respectively) and when the calling of a referendum became the most important political issue of the day. It could hence be predicted that the next constitutional debate is highly likely to arise with some new controversial citizens' initiative.

5 Conclusion

67 Both Slovenian and Croatian constitutional law experts and other scholars have for years argued that the constitutional design (and in Croatia the legislative design too) of the institute of citizen-initiated referendum in their respective countries has serious shortcomings. The most important amongst them was the possibility to call a referendum on any constitutional (in Croatia) or legislative (in both countries) issue, the consequence of which was that only the two countries' respective constitutional courts could determine whether a certain issue was constitutionally allowed to be decided on in a referendum. Another shortcoming in both countries was a lack of some form of participation or approval quorum which would prevent referendum decisions supported by a small minority of interested voters.⁷³ In Slovenia, there was the additional problem of misuse of referendums initiated by a parliamentary minority.

68 The shortcomings of the Slovenian legislative referendum caused serious economic problems, preventing the needed economic and social reforms. In Croatia, constitutional problems were brought into the public eye due especially to a popular constitutional initiative and the issue dealt with in the very first constitutional referendum (definition of marriage) in Croatia. Nevertheless, there are similarities between Slovenia's and Croatia's issues put to citizen-initiated referendums. The citizens of both countries demanded a referendum looking to proscribe same-sex marriages – in Slovenia it was against the Marriage and Family Relations Act in 2012, and in Croatia it was for the constitutional definition of marriage as a union of woman and man in 2013. Also, the legislative regulation of labour relations was a referendum issue in both countries.

69 Up to 2013 there had been several unsuccessful attempts to reform the constitutional design of the referendum in both countries. In 2013, Slovenia finally reached its 'constitutional moment' in which it was possible to reach an almost universal consensus in the National Assembly on constitutionally redesigning the institute of legislative referendum. This consensus was a result of several interconnected factors: negative experiences with citizens' initiatives during a long period of time; both as opposition or governing parties, the major parties (the Social Democrats and the Slovenian Democratic Party in particular) were facing problems caused by successful citizen's initiatives; the Constitutional Court effectively limited the right of the opposition or the voters to call legislative referendums on essential economic and social legislation, which resulted in the referendum losing most of its value for opposition parties as a way of continuing the legislative battle by other means. Of course, the serious economic and social crisis that struck Slovenia was also instrumental in bringing together the relevant parties to accept the necessary constitutional amendments.

70 The Slovenian constitution-makers concentrated exclusively on the reform of the institute of legislative referendum, which encompassed the following three important aspects: the creation of the model of 'rejective' legislative referendum initiated only by voters, the exclusion of some issues from the referendum vote (with the additional side effect restricting the role of the Constitutional Court, which was unpredictable in its rulings on the admissibility of referendums), and the installation of the quorum of rejection of an act passed by the National Assembly.

- 71 On the other hand, the Croatian Parliament's several attempts to amend the constitutional provision on the institute of citizens' initiative have come to nothing so far. The fact is that these attempts were made in 2010, 2012 and 2013 only in response to some successful initiatives, and because the issues that these successful initiatives brought into the public eye became much more serious once all quorums prescribed for the validity of referendum decisions were eliminated in 2010. Unlike Slovenia, the major parties in Croatia (i.e., the Social Democrats and the Croatian Democratic Union) did not play a direct role in either proposing or supporting citizens' initiatives – this was mainly reserved for various organisations and associations of war veterans, trade unions, Catholic associations, etc. However, when it suited them, the said parties did support these initiatives indirectly. It is a fact that the two major parties have not been the initiators of the constitutional reform of the citizen-initiated referendum in recent years (this role is reserved for the small Labour Party), and when they did officially support a proposal for a constitutional amendment to redesign the institute of citizens' initiative (the Social Democrats in 2010, the Croatian Democratic Union in 2012), it was never at the same time and both did it from the opposition. Both major parties have experienced great problems in dealing with successful initiatives (the Croatian Democratic Union in 2010, and the Social Democrats in 2013), but this has not motivated the leaders of either party to propose a new constitutional arrangement of the citizens' initiative. An additional problem in Croatia is that the Constitutional Court is not perceived by all parties as a neutral umpire, especially when dealing with citizen-initiated referendums.
- 72 The process of amending the Croatian Constitution from the second half of 2013 was fraught with several difficult and disconnected topics. Regulation of the institute of citizen-initiated referendum was only one of them. From the very onset, the process was a hostage of political trade-offs, and the two major parties were on opposite sides during this process. The process of amending the Constitution was extremely short and mostly secret, without a serious public debate and with almost no formal participation by Croatian constitutionalists. Their opinion was, from the beginning, that the Parliament should establish an Expert Group of professors of constitutional law who would prepare a draft of amendments related to the issues of citizen-initiated referendum (and other issues within the scope of the proposed constitutional changes), as had earlier been done by the Slovenian National Assembly. This suggestion was never accepted, although such expert groups of constitutional lawyers had been appointed in 2000 by the President of the Republic and in 2009 by the Government to prepare draft amendments, and in both cases these groups formulated drafts which were later, with only small modifications introduced, passed by the Parliament in 2000 and 2010.
- 73 It can be concluded that, unlike Slovenia, Croatia is still waiting for its 'constitutional moment' to solve the pressing problem of its exceptionally dysfunctional constitutional (and legislative) framework of the institute of citizens' initiative.

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Notes

1 See generally Butler & Ranney (1994), Gallagher & Uleri (1996), Qvortrup (2002, 2013, 2014), Altman (2011), Hamon (2012), Setälä & Schiller (2012), Morel (2012) and Tierney (2012).

2 Recommendation 1704 (2005): Referendums: towards good practices in Europe, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17329&lang=en> (last accessed on 6 February 2015).

3 Suksi (1993: 10).

4 See Altman (2011).

5 See Kaufman, Büchi, Braun (2010: 9). More specifically, Swiss citizens cannot launch a popular initiative to enact a new law, but only a procedure for a partial or complete revision of the Constitution. For more about the historic genesis of different instruments of direct democracy in Switzerland, see Serdült (2014: 70–75).

6 Lutz (2012: 20).

7 See Ulery (2012).

8 See Qvortrup (2013: 26–56).

9 See Altman (2013: 621–622).

10 Uleri (2012: 80).

11 See Brunner (2001: 222).

12 However, it should be noted that it was Carl Schmitt who warned already in 1927 that the institute of citizen-initiated referendum at state level cannot be compared with the same at the level of federal units of a federal state, such as the states of the USA or the Swiss cantons, because they are not states in the full sense of the word. They do not decide on all issues of state importance (e.g., on foreign policy issues), so the range of possible citizens' initiatives is narrowed, and even when an issue to be decided in a referendum at the level of federal units of a federal state is similar to the issue at federal level, the difference between the two could be qualitative. Schmitt writes: "The financial governance of a state of a union or a canton is legally something different from the financial governance of a sovereign state", in Schmitt (2014 (1927): 64–66).

13 See Setälä & Schiller (2012), and Qvortrup (2013).

14 See Hill & White (2014: 36–37). David Altman briefly mentions Slovenians (together with the Swiss, Italians and Lithuanians) when writing about European countries which excel in terms of the implementation of citizen-initiated mechanisms of direct democracy at national level. See Altman (2013: 622).

15 Altman (2013: 622).

16 See Ribičič & Kaučič (2014), Toplak (2013), Tomljanović (2001), and Podolnjak & Smerdel (2014).

17 See Tierney (2012: 11).

18 There is another comparable case. The citizens of both countries had the opportunity to vote against same-sex marriage – in Slovenia against the Marriage and Family Relations Act in 2012, and in Croatia for a constitutional amendment of the definition of marriage as a union of woman and man in 2013.

19 The Slovenian Constitution, as amended up to 2006, is available at http://www.servat.unibe.ch/icl/si00000_.html (last accessed on 6 February 2014).

20 The answer is simple. There are 90 representatives at the National Assembly and a 2/3 majority (i.e., 60 MPs) is required for passing constitutional amendments. Only if amendments are voted for by exactly 60 representatives at the National Assembly would there be a sufficient number of MPs in the minority to call a constitutional referendum.

21 See Kaučič (2010).

22 The only obligatory referendum prescribed in the Croatian Constitution is the referendum on the Republic of Croatia's association with or disassociation from other states.

23 An analysis of the original constitutional design of referendum may be found in Rodin (2001).

24 The text of the original Constitution is available at http://www.servat.unibe.ch/icl/hr01000_.html (last accessed on 6 February 2014).

- 25 See Rodin (2001: 29–30).
- 26 See Smerdel (2010, 93).
- 27 On the issue of quorum for the validity of referendum decisions see Žuber (2014).
- 28 See <http://www.us-rs.si/en/about-the-court/legal-basis/the-referendum-and-public-initiative-act/> (last accessed on 28 February 2014).
- 29 The Constitutional Act on the Constitutional Court is available at http://www.usud.hr/default.aspx?Show=ustavni_zakon_o_ustavnom_sudu&m1=27&m2=49&Lang=en (last accessed on 28 February 2014).
- 30 See Ribičič (2011).
- 31 See, e.g., Zajc (2012).
- 32 Even before these referendums, the Slovenian constitutional scholar Ciril Ribičič commented in early 2011: “It is inconsistent with the constitutional idea of referendum that referendum becomes an everyday final phase of the legislative process and threatens to become the inglorious end to all major legal projects. Today it is not difficult to predict that a referendum vote could be called on any substantial law, and also that the law would fail in the referendum.” See Ribičič (2011).
- 33 The redesigned Pension and Invalidity Insurance Act, agreed amongst all social partners, was unanimously adopted by the National Assembly in December 2012.
- 34 “Sezona Svetlikovih referendumov” (“The Season of Svetlik’s Referendums”), *Večer*, 11 April 2011.
- 35 See Ribičič (2012), Bučar (2013), “Bugarič: Odložba US je ena najslabše napisanih odločb v zgodovini”, *Delo*, 19 December 2012, available at <http://www.delo.si/novice/politika/bugaric-odlocba-us-je-ena-najslabse-napisanih-odlocb-v-zgodovini.html> (last accessed on 28 February 2014).
- 36 The decision of the Constitutional Court U-II-1/12, U-II-2/12 (in English) is available at <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/399443A23488727DC1257AFA004A8AC6> (last accessed on 6 February 2014).
- 37 See Bučar (2013: 3). For an opposing argument, see Avbelj (2013).
- 38 See the Report on the Draft to Start the Procedure of Amending the Constitution of the Republic of Slovenia with the Draft Constitutional Law, submitted to the National Assembly on 15 January 2013.
- 39 The requisite number of signatures was a question decided on by the Croatian Constitutional Court in December 2014. The ‘In the Name of the Family’ Citizens’ Initiative collected more than 380,000 signatures for the initiative called ‘Let Us Elect Deputies by Name’. The Croatian Parliament refused to call a referendum maintaining that the requisite number of signatures is approximately 450,000, which is 10% of all registered Croatian voters. The Constitutional Court decided that “ten per cent of the total electorate of the Republic of Croatia” refers, within the meaning of Article 87.3 of the Constitution, to all Croatian citizens who have reached eighteen years of age with a registered domicile in the Republic of Croatia who are registered as voters in the electoral register on the day set as the first day of collecting signatures for calling a referendum (i.e., reference day). The Constitutional Court established that on 21 September 2014 there were 4,042,522 such voters. This implies that Croatian diaspora voters are excluded from the requisite number of voters’ signatures, because signatures for the purpose of calling a referendum can, according to the law, be collected only within the Republic of Croatia. See the Constitutional Court’s Decision No. U-VIIR-7346/2014 from 10 December 2014.
- 40 In October 2011, the Slovenian scholar Cirila Toplak wrote that, “in Croatia, the Constitution provides for the possibility of referendum under such conditions that it is virtually impossible to hold one /.../ Therefore, it is not surprising that, in Croatia, only a single referendum has been held so far, the one on secession from Yugoslavia in 1991 /.../ Only the largest political parties in Croatia have the infrastructure to collect nearly half a million signatures necessary to call a referendum and, so far, not a single one has done it”. See Toplak (2011).
- 41 Interestingly, in June 2010 the same issue was put to a referendum in Slovenia (called by the National Assembly on its own initiative), and 51.54% of voters voted for the law ratifying the Arbitration Agreement. The official results of the referendum are available at <http://www.dvk-rs.si/index.php/si/arhiv-referendumi/referendum-o-zakonu-o-arbitraznem-sporazumu-6-junij-2010> (last accessed on 28 February 2014).
- 42 “Constitutional Court decides against referendum on labour law”, *Croatian Times*.
- 43 Officially, only 683,948 signatures were accepted by the state authorities, but that was also more than was needed to call a referendum.
- 44 The above-mentioned chapter IX titled “Amending the Constitution” (Articles 147–150) prescribes only the parliamentary route of the amending process. The constitutional referendum is mentioned only in Art. 87. The Constitution is available in English at <http://www.sabor.hr/Default.aspx?art=2405> (last accessed on 28 February 2014).
- 45 The statement (in Croatian) is published in Podolnjak & Smerdel (2014: 233–235).

46 This much was also confirmed by Professor Jasna Omejec, President of the Croatian Constitutional Court, when, following the referendum on marriage, she stated: “So far, the legislator has not developed sufficiently 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 own practice; build the rules which must be followed when it comes to the implementation of popular constitution-making initiatives.” See Omejec (2014).

47 See especially the Warning with regard to 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, No. U-VIIR-5292/2013, and the Communication on the Citizens’ Constitutional Referendum on the Definition of Marriage (SuS-1/2013, 14 November 2013).

48 State Electoral Commission of the Republic of Croatia, Report on the National Referendum held on 1 December 2013, available at <http://www.izbori.hr/2013Referendum/rezult/rezultati.html> (last accessed on 20 December 2013).

49 See “Anti-minority referendum in Croatia to go to the Constitutional Court for review”, available at <http://www.minorityrights.org/12252/press-releases/antiminority-referendum-in-croatia-to-go-to-the-constitutional-court-for-review.html> (last accessed on 28 February 2014).

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

51 See the Constitutional Court’s Decisions No. U-VIIR-1159/2015 from 8 April 2015 and No. U-VIIR-1158/2015 from 21 April 2015.

52 See, e.g., “Deputy PM regrets halting of reform by anti-outsourcing initiative”, available at <https://vlada.gov.hr/news/deputy-pm-regrets-halting-of-reform-by-anti-outsourcing-initiative/16719> (last accessed on 20 May 2015), or “Croatia backs up from monetization of highways”, available at <http://www.globalpost.com/dispatch/news/xinhua-news-agency/150313/croatia-backs-monetization-highways> (last accessed on 20 May 2015).

53 The first referendum question relates to the lowering of the number of signatures required for calling a citizen-initiated referendum (“Do you agree that 200,000 signatures should be enough for calling a referendum?”) and the second to the way the signatures could be collected (“Do you agree that collecting referendum signatures should be allowed in areas where public assembly is allowed?”).

54 See Kaučič (2010), Kristan (2012), and Ribičič (2011).

55 An interview with Igor Kaučič, available at <http://www.dnevnik.si/objektiv/intervjuji/1042553184> (last accessed on 27 February 2014).

56 The proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act is available (in Slovenian) at http://stres.a.gape.org/prenova_slo/Prenova_SLO/sprememba_ustave_RS/Predlog_sprememb_ustave_13_9_12.pdf (last accessed on 28 February 2014).

57 See the Constitutional Act Amending Articles 90, 97, and 99 of the Constitution of the Republic of Slovenia, adopted on 24 May 2013 and entered into force on 31 May 2013 (*Official Gazette of the Republic of Slovenia* No. 47/2013 of 31 May 2013, available at <http://www.us-rs.si/en/about-the-court/legal-basis/constitution/constitutional-acts-amending-the-constitution-of-t/>, last accessed on 28 February 2014).

58 The draft proposal included the formulation that a referendum would be banned not only on all legislation on taxes, customs duties and other compulsory charges, but also on *acts on which the direct execution of the state budget depends, and acts that have impact on other public expenditures or guarantees*. It was rightly concluded in the public debate that such a formulation excludes almost all acts from the referendum vote, because almost all acts have an impact on public expenditures.

59 The Opinion of the Expert Group, in *Report related to the proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act*, available at <http://imss.dz-rs.si/imis/f9650d809e82f514027c.pdf> (last accessed on 28 February 2014), 13.

60 Miro Cerar reminded that Slovenia changed its Constitution, adopting not only a new constitutional design of the legislative referendum, but also the balanced budget rule (“Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing” Art. 148, para. 2), available at <http://www.us-rs.si/en/about-the-court/legal-basis/constitution/constitutional-acts-amending-the-constitution-of-t/> (last accessed on 28 February 2014). Fiscal issues are made impossible as referendum issues in the future, although each legislative referendum may impact on balancing the public finances. Thus, it would be necessary to analyse in each particular case if the demand for a legislative referendum has an impact on the balance of public revenues and expenditures. Keeping in mind that the Constitution also contains the principle of the social state and certain social rights, only the Constitutional Court can decide on the possible conflict of these constitutional principles. See Cerar (2013). From amongst Slovenian constitutional scholars, Ivan Kristan has been the most critical of the content of the constitutional amendments regarding the legislative referendum, maintaining that the ban on future legislative referendums has been defined too broadly, and that, prior to these constitutional changes, the people could decide on all legislation, while in the future they will not be able to decide

on any act of importance. Consequently, Kristan argues, the people are no longer sovereign in Slovenia, regardless of what the Constitution writes. See Kristan (2013: 16–19).

61 See Kaučič (2013; 2014).

62 The proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act is available (in Slovenian) at http://stres.a.gape.org/prenova_slo/Prenova_SLO/sprememba_ustave_RS/Predlog_sprememb_ustave_13_9_12.pdf (last accessed on 28 February 2014).

63 The Opinion of the Expert Group, 14.

64 However, Slovenia's first experience with citizen-initiated referendums after the constitutional reform (on the issue of rejection of the Archives Act) shows that the originally proposed rejection threshold could have been sufficient. In the referendum held in June 2014, the act was rejected by 67% of voters, but the referendum itself was invalidated by a small voter turnout of only 12%, far below the rejection quorum of 20% of the electorate.

65 The draft proposal to initiate changing the Constitution with a Draft of the Changes of the Constitution of the Republic of Croatia, October 2012 (available at <https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//61.%20-%2019.a.pdf>) (last accessed on 28 February 2014).

66 The citations are given according to the audio recording of the session of the Government held on 15 November 2012.

67 It seems to me that the best analysis of just how different Zoran Milanović's opinions were in 2010 (when he was the opposition leader) and 2012 (when he became the Prime Minister) on the value and usefulness of citizens' initiatives is given by Bruno Frey's following point: "The decision-makers in all political areas, be it the executive, the legislative or the legal branch, find it difficult or even impossible to imagine that the citizens are motivated and capable of participating in politics. This is a general feature of all such decision-makers – once they are in power. The reason is simple: they do not want to share power with the population. Many opposition parties and opposition movements strongly favour citizen participation in politics, but once they get into power, they very quickly see things differently and no longer want to give up part of their power." See Frey (2003: 44).

68 This pertained to the problem of applying the European Arrest Warrant to some Croatian citizens, after the Croatian Parliament had adopted the controversial Act on Judicial Cooperation in Criminal Matters with EU Member States (the so-called *Lex Perković*), but this is not the subject matter of this paper.

69 An interview with Professor Smerdel ("SDP vrijeđa Josipovića"), *Jutarnji list*, 27 January 2014, p. 10.

70 Proposal to Establish the Draft Bill of Amendments to the Constitution, November 2013, available at www.sabor.hr/fgs.axd?id=26061 (last accessed on 28 February 2014).

71 Professor Branko Smerdel, the doyen of Croatian constitutionalists, commented that "he has never heard of secret public debates, such as the one now taking place on constitutional amendments. Not even the former (Communist) regime could produce anything of the sort", available at <http://www.vecernji.hr/hrvatska/je-li-ustavni-sud-prekoracio-ovlasti-905695> (last accessed on 28 February 2014).

72 Draft Proposal of Amendments to the Constitution, December 2013, available at <http://www.sabor.hr/prijedlog-promjene-ustava-republike-hrvatske> (last accessed on 28 February 2014).

73 This problem manifested itself in Croatia following the constitutional amendments from 2010, when all types of quorums were removed.

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Bibliographical reference

Robert Podolnjak, « Constitutional Reforms of Citizen-Initiated Referendum », *Revus*, 26 | 2015, __–__.

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Abstracts

In the opinion of many Slovenian and Croatian scholars, the constitutional and legislative design of citizen-initiated referendums in their respective countries was in many ways flawed. Referendums initiated by citizens have caused, at least from the point of view of governments in these two countries, many unexpected constitutional, political and/or economic problems. Over the years, several unsuccessful constitutional reforms of the institute of referendum have been attempted both in Slovenia and Croatia. In 2013, Slovenia finally attained its 'constitutional moment' in which it was possible to reach an almost universal consensus in the National Assembly on constitutionally redesigning the legislative referendum. On the other hand, several attempts by the Croatian Parliament to amend the constitutional provision relating to citizens' initiatives have come to nothing due to the interests of the major parties in the constitutional amendment process being different.

Ustavne reforme referendum na zahtevu volivcev. Razlogi za različne izide v Sloveniji in na Hrvaškem. Po mnenju mnogih slovenski in hrvaških strokovnjakov je bila ustavna in zakonska zasnova referendum na zahtevu volivcev v njihovih državah v mnogočem pomanjkljiva. Referendumi, sproženi s strani volivcev, so po mnenju vlad v teh dveh državah povzročili številne nepričakovane ustavne, politične in/ali ekonomske probleme. V preteklih letih je bilo tako v Sloveniji kot na Hrvaškem več neuspelih poskusov ustavne reforme referendum. Leta 2013 je Slovenija končno doživela svoj 'ustavni trenutek', v katerem je bilo mogoče v Državnem zboru doseči skoraj popoln konsenz glede ustavnega preoblikovanja zakonodajnega referendum. Po drugi strani so bili številni poskusi hrvaškega parlamenta, da bi spremenili določbe glede ljudske iniciative neuspešni zaradi interesa največjih strank, da bi bil postopek spreminjanja ustave drugačen.

Index terms

Keywords : Citizen-initiated referendum, popular initiative, constitutional reform, Slovenia, Croatia

Ključne besede (sl) : referendum na pobudo volivcev, ljudska iniciativa, ustavna reforma, Slovenija, Hrvaška