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## Direct Democracy in Croatia\*

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### Summary

Author discusses forms of direct democracy envisaged by the Croatian Constitution of 1990 which defined Croatia as semi-presidential republic, before constitutional amendment of 1997. Article describes normative regulation of referenda and speculates about reasons for their absence. One of the main reasons seems to be specific institutional framework and political consensus existing among the Parliament, the Government and the President of the Republic which is of dynamic nature. Referendum, having a gridlock breaking capacity offers a solution in form of recourse to the People upon initiative of the President of the Republic, or of the Parliament in absence of political consensus. However, due to existence of such consensus, referenda never took place in Croatia. Author also discusses citizens' right to petition the government in light of an important decision of Croatian Constitutional Court.

### *Introduction*

Popular sovereignty in Croatia can be exercised either by representation, or by direct democracy, i.e. by direct popular involvement in decision making. The legal framework for exercise of direct democracy is provided by the Constitution<sup>1</sup> and by two Laws: namely: the Referendum Act,<sup>2</sup> and the Local Self-Government and Local Government Act.<sup>3</sup> However, among a large number of possible constitutional choices which could have been introduced in order to define exercise of direct democracy,<sup>4</sup> Croatian constitution has adopted a rather limited approach. This led some scholars to note that certain forms of direct democracy, particularly popular initiative, are omitted altogether in the constitutional text, where some other solutions are inadequately implemen-

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<sup>1</sup> Consolidated text, *Narodne novine*, No. 8 of January 26<sup>th</sup> 1998.

<sup>2</sup> Zakon o referendumu i drugim oblicima osobnog sudjelovanja u obavljanju državne vlasti i lokalne samouprave, *Narodne novine*, No. 33 of April 30<sup>th</sup> 1996.

<sup>3</sup> Zakon o lokalnoj samoupravi i upravi, *Narodne novine*, No. 90/1992, 94/1993 and 117/1993.

<sup>4</sup> For comparative overview see e.g. Friedrich Kojan, *Allgemeine Staatslehre*, Manz Verlag, Wien 1993, at pp. 85-90.

ted.<sup>5</sup> Following initial overview of legal rules regulating exercise of direct democracy in Croatia, it will be demonstrated that almost complete absence of national referenda over the past eight years of Croatia's independence can be explained by specific political consensus among the President of the Republic, the Parliamentary majority and the Government. I will also present relevant decisions of the Constitutional Court on the point and try to answer to what extent probability of referenda in Croatia depends on institutional balance.

### *Legal Framework for Direct Democracy*

The Constitution defines only the ground rules for exercise of direct democracy and leaves the more detailed regulation to the legislature.<sup>6</sup> Under the Constitution,<sup>7</sup> the House of Representatives can call national referendum concerning a proposed constitutional amendment, a draft law, or any other subject matter falling within its jurisdiction. In this case regular legislative procedure applies, i.e. a simple majority. The President of the Republic can call a referendum concerning constitutional amendment, or any other issue which he deems important for independence, unity and existence of the Republic. However, the President can act only subject to Government's proposal and has to obtain countersignature of the Prime minister. Once a referendum is called, decision can be reached by majority of votes cast, provided a turnout of more than 50%. Outcome of a referendum is binding.

Another instance where a national referendum can be called is in process of association with other States under Article 135 of the Constitution.<sup>8</sup> Under this article, a referendum is a final formal step required to permit association of Croatia with other States, and the decision has to be reached by majority of votes of all voters. The main issue here is whether this kind of referendum is needed for possible accession of Croatia to the European Union and possibly other international alliances such as NATO. This provision has to be seen in conjunction with article 133 of the Constitution, pursuant to

<sup>5</sup> Nado Grubić, *Oblici neposrednog odlučivanja u Ustavu Republike Hrvatske iz 1990. godine*, 3 *Vladavina prava* 1 (1999) 61.

<sup>6</sup> This led Grubić to note that exercise of direct democracy is underregulated. However, this refers to period before enactment of the Referendum Act. Compare Grubić, *supra*, note 5 at p. 61.

<sup>7</sup> Article 87.

<sup>8</sup> Article 135 (1) Procedure for the association of the Republic of Croatia in alliances with other states may be instituted by at least one third of the members of the Croatian National Parliament, the President of the Republic, and the Government of the Republic of Croatia. (2) It is prohibited to initiate any procedure for the association of the Republic of Croatia in alliances with other states if such association leads, or might lead, to renewal of a South Slavic state community or to any Balkan state alliance of any kind. (3) Any association of the Republic of Croatia shall first be decided upon by the House of Representatives of the Croatian National Parliament by a two-thirds majority vote of all members. (4) Any decision concerning the association of the Republic of Croatia shall be made on a referendum by a majority vote of the total number of electors in the Republic. (5) Such a referendum shall be held within 30 days from the date when the decision was rendered by the Croatian National Parliament. (6) The provisions of this Constitution concerning association shall also relate to conditions and procedure for disassociation of the Republic of Croatia.

which international treaties delegating constitutional powers to international organizations or alliances have to be ratified in Parliament by two thirds majority of all representatives. Therefore it seems that there is no obligatory referendum requirement for accession to international organizations, including the EU and NATO. However, such a referendum could be called by the President of the Republic under article 87 of the Constitution, however subject to simple majority of votes cast.

In addition to these constitutional provisions regulating national referenda, additional forms of direct democracy are provided for by several other legislative instruments: the Referendum Act (hereinafter: the RA), The Act Regulating Territory of Units of Counties, Cities and Municipalities in the Republic of Croatia (hereinafter: the ART),<sup>9</sup> and by the Local Self-Government and Local Government Act (hereinafter: the LSGA)<sup>10</sup>.

The RA provides for direct participation of voters in deciding issues falling to autonomous jurisdiction of counties, cities and municipalities (local referenda), and for other forms of direct decision making, particularly consultative referenda, municipal meetings and petitions.

(a) *Facultative referenda*: Under article 57 of the RA the Government can call a facultative referendum in the territory of one or more units of local self-government or local government in order to obtain opinion of inhabitants of the respective area concerning its territorial organization. All residents of the territorial unit are eligible to vote, and the decision is reached by majority of votes cast. Local referenda can be called also by local authorities. Under art. 17 of the LSGA. In such a case referendum can be called for purpose of ammendment of municipal or city statute, for matters falling within municipal or city jurisdiction, as well as for matters specified by law and by the local statute. Referendum can be called upon proposal of one third of municipal representatives, and the decision is binding on the local representative body. In 1994, in a landmark the Constitutional Court decision allowed Counties to call referenda concerning their self-government authority, and this decision shall be discussed below.

(b) *Municipal meetings*: Municipal meetings can be organized under article 60 of the RA in order to enable citizens to express their opinions on local issues. Decision of a municipal meeting is binding for the local council, but not for a municipal or city assembly. Voting is public, save where majority of present voters decides otherwise.

(c) *Petitions*: Under articles 63 to 65 of the RA citizens eligible to vote are entitled to file petitions with central and local state authorities. Petitions have to be signed and petitioners have to identify themselves. State authorities have an obligation to respond to a petitioner, but petitions can not create any obligations for state authorities.

(d) *Other forms of direct democracy*: The ART recognizes certain elements of direct democracy, particularly in its article 9 which makes territorial changes of counties, cities or municipalities dependant on a prior consultation of respective population. More-

<sup>9</sup> *Narodne novine*, No. 90/1992.

<sup>10</sup> *Narodne novine*, No. 90/1992, 94/1993 and 117/1993.

over, under article 10 thereof, one third of local population is entitled to propose territorial changes of municipal and city boundaries (not County boundaries).

Finally, article 6 of the LSGA provides that territory of municipalities, cities and counties are to be determined by law, subject to prior opinion of the respective population. At the same time Article 17 thereof introduces a possibility of referendum for making decisions falling within jurisdiction of municipal or city councils, as well as for making decisions concerning other issues specified by law, and by the statute of a respective local community.

### *Subject matters of popular votes*

As I have mentioned earlier in the text, direct democracy in Croatia can be exercised by national referenda, local referenda, municipal meetings, and by filing individual petitions. Subject matter of the said forms of direct democracy therefore largely depend on territorial breath of referenda.

Generally speaking, facultative national referenda could be implemented for decision making on any legal issue being in jurisdiction of national parliament. Referendum could be called for passing constitutional amendment, ordinary legislation, or for making any other decision falling within such jurisdiction.

Also, the President of the Republic can call a referendum concerning Constitutional amendment, or on any other issue he deems important for independence, unity and existence of the Republic.

Mandatory national referendum is envisaged for association – dissociation of Croatia with and from other States, respectively.

On local level, representative bodies of local territorial units can call referenda involving any issue falling within their local jurisdiction.

### *Techniques and procedures*

In order to call a referendum, appropriate authority has to pass a decision. Under the RA<sup>11</sup> such a decision has to specify the calling authority, the territory in which the referendum is going to take place, designation of act which has to be decided upon or question on which voters will have to decide, has to have an explanatory note clarifying the issue to be decided, and has to designate the date when the referendum is going to take place. Once passed, decision has to be published in the official journal, either on national, or on local level.

The RA vests authority for implementation of referenda in a State Referendum Commission (and appropriate local commissions; hereinafter: Commission), and Referendum Committees (hereinafter: committees). State Commission comprises president

<sup>11</sup> Art. 9.

and four members appointed by the House of Representatives from ranks of "...judges of the Supreme Court and other outstanding graduate lawyers." Similar pattern is followed in respect of local Commissions. Referendum Committees are established for each polling station and comprise president, two members and their deputies.

Authority of the national referendum Commission is wide and includes general issues of organization of a referendum. It designates polling stations, appoints presidents and members of Committees in diplomatic missions and foreign offices of the Republic abroad, designates time of voting, issues mandatory guidelines for work of local Commissions and committees and supervises their work, designates forms needed for implementation of referendum, establishes and publishes official results of national referenda and performs other duties.

Committees supervise voting and take care that law is observed. Their members have to be appointed not later than 8 days before commencement of referendum.

Voting on national referenda is organized at polling stations in Croatia, and abroad – in diplomatic missions and foreign offices of the Republic. Citizens residing outside the country, and citizens who find themselves abroad at time of referendum are eligible to vote at such polling stations abroad. It is estimated that some 400,000 Croatian citizens making some 10% of eligible voters do not have permanent residence in Croatia. Polling stations have to be designated not later than 5 days prior to date of referendum. Commissions have an obligation to publish the list of voters eligible to vote at each particular polling station. However, citizens serving in military forces shall vote at polling stations designated by the Minister of Defense, merchant sailors aboard ships shall vote at polling stations designated by the Minister of Navigation, and citizens serving prison sentence shall vote at polling stations designated by the Minister of Justice.

Polling tickets have to formulate questions, or proposals to be voted for on referendum. Questions have to be phrased in such way that simple answer YES or NO can be given.

Costs of national referenda shall be paid from the state budget, and costs of local referenda from local budgets of respective territorial units.

### *Form of Government, referendums and plebiscites*

Croatian system of governance was framed according to the French model.<sup>12</sup> The President of the Republic is directly elected, and the Governmental responsibility can be invoked either by the President or the Parliament. This opens, like in the French case, a possibility of cohabitation – a political situation where the President of the Republic has different political affiliation than parliamentary majority. On the other hand, in periods of the so-called triple consensus, the President, the Parliamentary majority and the Government all belong to the same part of political spectrum, what turns the system of governance into what Karl Schmitt calls the "executive state" or in other terms, into a par-

<sup>12</sup> However, the Constitutional Court and its jurisdiction is reflection of German, and to certain extent Austrian experience.

liamentary system where the balance of the legislative and executive branch is seriously bent towards the latter. In such circumstances my proposition is the following: in the triple consensus situation, there is no major need for political arbitration, and no need for referenda. All major issues which can be solved by facultative referenda, are being solved in the Parliament which is acting along with the executive. At the same time, there is no need for plebiscites, since the directly elected President enjoys confidence in the Parliament as an additional expression of popular support. Since the Croatian Constitution was passed in 1990, the President of the Republic has never resorted to referendum in form of plebiscite, and as we have shown, only one national referendum was held.<sup>13</sup> At the same time, since simple majority is required to call a national referendum, the parliamentary majority did not feel any political need to call a national referendum, while minority did not have enough parliamentary seats to initiate one. Accordingly, one could not speak about any influence on national referenda that political parties could exert.

This could radically change during cohabitation. It may be speculated that changed political balance could prompt executive to resort to popular will more frequently in cases where no political consensus can be found with the Parliament. However, such development is not very likely due to the privileged access of the executive to the Constitutional Court. President of the Republic is one of the so-called “privileged applicants”<sup>14</sup> before the Constitutional Court, and can move for abstract constitutional review of legislation passed by hostile parliamentary majority. Having in mind that 8 out of 11 justices of the Constitutional Court will be appointed by the “friendly” parliamentary majority before parliamentary elections, it is more likely to expect a rise of constitutional litigation, then a revival of plebiscite. On the other hand, if the President succeeds in his attempt to block legislative initiatives proposed by the new parliamentary majority, either in Constitutional Court, or by suspensive veto of the House of Counties of the Parliament, the new parliamentary majority could possibly resort to national referendum in order either to amend the Constitution or pass legislation which has been blocked by the House of Counties in the parliamentary procedure. Namely, under the Constitution, the House of Counties of the Parliament may pass a vote rejecting a bill moved by the House of Representatives. In such a case, in order to become law, the bill must be passed in the House of Representatives by qualified majority, i.e. by majority of all representatives. Generally speaking, the in dynamics of Croatian system of governance probability of referendum is counter-proportionate to political consensus between the President of the Republic and parliamentary majority.<sup>15</sup>

<sup>13</sup> Sokol, S., Referendum i mogućnosti njegove primjene u Hrvatskoj, *I Vladavina prava* 1 (1997) 10.

<sup>14</sup> Under the Constitutional Act on Constitutional Court, the Court has to proceed if a request is filed by one of the privileged applicants, President of the Republic being one of them.

<sup>15</sup> On basis of the above mentioned proposition, within Croatian constitutional system of governance one could detect several basic political situations. The following list is not exhaustive. However, situations which are not relevant in respect of referenda are omitted: (a.) President of the Republic and both houses of Parliament representing the same political majority; this is the present situation. In such circumstances probability of national referenda is low. All political goals can be achieved through regular parliamentary procedures, and opposition lacks sufficient majority to call a referendum; (b.) President of the Republic representing one political option, while both houses of Parliament are controlled by majority of another

### *Participation and turnout*

The first and the only national referendum held in Croatia was the one concerning self-determination. Namely, the Republic of Croatia emancipated herself from the former state on basis of referendum held on May 19<sup>th</sup> 1991, which path the way to independence and international recognition. The referendum had been called by the President of the Republic on May 25<sup>th</sup> 1991<sup>16</sup>, turnout was 84,94%, and 95% of the votes cast were in favour of establishment of independent and sovereign Croatian state.<sup>17</sup> This experience of direct democracy, however, remains the only one on national level so far. It can be observed that participation on this referendum was quite high. It is completely understandable having in mind importance of the referendum and high motivation of population to gain independence from the former Yugoslavia.

This referendum created significant political effects. The ruling party – the HDZ (Croatian Democratic Community) still claims its credits in calling and organizing the referendum which led to Croatia's independence. In political debate these credits are

political option provided this majority in the House of Representatives is at least 1/2 but not more than 2/3; In this situation parliamentary majority is sufficient to pass legislation but not to amend the Constitution. Also, newly passed legislation is subject to constitutional review before the Constitutional Court. Facultative legislative referendum could increase weight of legislation, though it would not preclude constitutional review; (c.) President of the Republic and simple majority in the House of Representatives representing one political option, and House of Counties is controlled by majority of another political option; In this situation the House of Counties could block laws passed by simple majority in the House of Representatives. Failing to get qualified majority (1/2 of all seats + 1) the House could resort to a referendum; (d.) President of the Republic representing one political option, the House of Representatives controlled by at least 1/2 but not more than qualified majority (1/2 of all seats + 1) of another political option, and the House of Counties controlled by majority loyal to the President of the Republic; In this situation it is to expect that the House of Representatives would wish to resort to referendum to pass legislation. However, even an attempt to call a referendum could be blocked by the House of Counties; (e.) President of the Republic representing one political option, the House of Representatives controlled by at least qualified majority, but not more than 2/3 majority of another political option, and the House of Counties controlled by majority loyal to the President of the Republic; In this situation the House of Counties could not block a referendum bill, and the House of Representatives could move for a constitutional amendment; (f.) President of the Republic representing one political option and the House of Representatives controlled by at least 2/3 majority of another political option (in this case majority in the House of Counties is irrelevant); (g.) President of the Republic representing one political option and the House of Representatives controlled by qualified majority of all representatives (in this case majority in the House of Counties is irrelevant). This is situation where majority in the House of Representatives can change the Constitution even without referendum.

<sup>16</sup> Odluka o raspisu referenduma, *Narodne novine*, No. 21/1991 of May 2<sup>nd</sup> 1991. The referendum was called pursuant to Articles 98 and 87 of the Croatian Constitution and Article 3 of the Referendum Act. Voters were asked to answer YES or NO to the following two questions: (1) Do you want the Republic of Croatia to be a sovereign and independent State that guarantees cultural autonomy and all civil rights to Serbs and members of all other nations in Croatia, which could enter into an alliance of sovereign states with other republics (in accordance with the proposal for solution of crisis of the SFRY proposed by the Republic of Croatia and the Republic of Slovenia)?; and (2) Do you want Republic of Croatia to remain part of Yugoslavia – a single federal state (in accordance with the proposal for solution of crisis of the SFRY proposed by the Republic of Serbia and the Socialist Republic of Montenegro)?

<sup>17</sup> See Sokol, S., *supra*, note 13 at pp. 7 and 10.

often used to further different policies and agenda which do not emanate from mandate conferred by the people on the referendum.

### *Regional and Local Experience*

In addition to this unique experience of national referendum, different forms of direct democracy have also been exercised under relevant provisions of Croatian legal order on local level. However, information about local referenda are difficult to be found. They are usually called by local representative bodies, and their documentary trail is recorded in local official journals. Such referenda become a national issue only in case where a complaint is filed with the Constitutional Court, and such instances are relatively rare.

One of the first lessons learned from the Constitutional Court is that issues subject to local referenda must not distort Croatian legal order. Back in 1990 the Court annulled a decision of municipality Vrginmost of January 15<sup>th</sup>, to call local referendum asking citizens to decide whether their municipality should join the puppet entity under Serbian control called “Serbian Autonomous Region Krajina.”<sup>18</sup> The Court held that this territorial restructuring was aimed at distortion of Croatian legal order. Approximately at the same time, i.e. still prior to enactment of the RA the Court has struck down a decision of local council of Gomirje calling a referendum purporting to annex it to municipality Ogulin.<sup>19</sup> The legal grounds of this decision was that local referenda under legislation in force could have been called by municipal representative bodies only.

However, in 1994, the Constitutional Court extended the list of territorial units that can call a referendum. Namely, under legislation then in force,<sup>20</sup> only municipalities and cities, and not counties were specifically authorized to call a referendum. The Constitutional Court clarified the issue and allowed a county to organize a referendum to decide issues falling within her self-government authority. In this important decision the Constitutional Court directly applied art. 1 (3) of the Constitution.<sup>21</sup> In a later case<sup>22</sup> the Court had to deal with the issue whether municipal statute can envisage a referendum as means for consultation of citizens in process of changes of boundaries between counties. Namely, under the LSGA it was not clear whether municipalities have any say in process of changing of county borders. The court upheld the local statute supporting the consultative referendum in such matters.

<sup>18</sup> Decision of the Constitutional Court No. U/I-14/1991 of January 29<sup>th</sup> 1991, *Narodne novine*, No. 4/1991 of February 2<sup>nd</sup>.

<sup>19</sup> Decision of the Constitutional Court No. U/I-173/1990 of November 15<sup>th</sup> 1990, *Narodne novine*, No. 57/1990 of December 27<sup>th</sup>.

<sup>20</sup> Particularly, under article 17 of the Local Self-Government and Local Government Act.

<sup>21</sup> Decision of the Constitutional Court No. U-II-433/94, of October 2<sup>nd</sup> 1995, *Narodne novine*, No. 146/1995.

<sup>22</sup> Decision of February 15<sup>th</sup> 1995, *Narodne novine*, No. 240/1995.



### *Right to petition*

Another form of direct participation of citizens – the right to petition – is guaranteed by article 46 of the Constitution, and elaborated by articles 63 to 65 of the RA.

Under the Constitution, every citizen has right to file petitions and complaints to state authorities and to receive an answer. Subject to article 64 of the RA, state authorities have an obligation to respond within appropriate time. In a recent controversial decision the Constitutional Court denied a constitutional complaint filed from a Supreme Court decision on grounds of alleged violation of this right by the Prime Minister.<sup>23</sup> The Court held that "... constitutional right to petition amounts to individual constitutional freedom and right which, however does not enjoy judicial protection within meaning of article 67 of the Administrative Review Act (*Narodne novine* Nos. 53/91, 9/92 and 77/92)...". This pitiful decision stands in contrast to otherwise liberal practice of the Constitutional Court. It revives the Weimar concept of "leerlaufende Rechte" and denies judicial protection of subjective public rights.

### *Final remarks*

As it follows from what has been said above, normative arrangements for exercise of direct democracy in Croatia do exist, however, in practice such exercise is scarce. One of the main reasons for this seems to be specific institutional framework and political consensus existing among the Parliament, the Government and the President of the Republic. To reiterate once again, this consensus is of dynamic nature and is subject to change. Referendum, indeed, has a gridlock breaking capacity. Provided lack of political consensus, solution may lay in consulting the People, whether upon initiative of the President of the Republic, or of the Parliament.

<sup>23</sup> Decision No. U-III-234/1998 of April 28<sup>th</sup> 1999, *Narodne novine*, No. 46 of May 14<sup>th</sup> 1999. Applicant sued the Prime Minister under the Administrative Review Act for failing to respond to his petition and asked for an injunction ordering the Prime Minister to Comply. The Supreme Court dismissed the case as inadmissible.