"Paper Presented at the 2019 ASN World Convention, Columbia University 2-4 May 2019"
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NATIONAL MINORITIES' RIGHTS REDESIGNED BY REFERENDUM MEANS: THE 2018 CROATIAN CASE

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I. INTRODUCTION

The present model of parliamentary representation in Croatia provides that out of 151 representatives in total, 8 are reserved for minorities, 3 for diaspora and 140 for other citizens. For the past fifteen years, this model has generally worked well.

However, in June 2018 the citizens' initiative named "The People Decides" requested a referendum in order to, among other things, redefine the mandates of national minorities' parliamentary representatives (NMPRs) so as to prohibit them to vote on two crucial issues: confidence to the government and adoption of the state budget. The Initiative bases its action upon three principal arguments. The first is that NMPRs are elected by a significantly smaller number

of votes than other representatives and that they therefore lack legitimacy for participating in crucial decision-making. The second is that NMPRs should primarily represent the specific interests of minorities and not those of the general population. And the third is that the NMPRs' mandates should be limited because of the "frequent practice of undisguised political trade" with minority representatives in processes of creation of government and adoption of the country's budget.

In this text we first give a description of the general constitutional and political contexts from which the said Initiative emerged.

We then address the highlighted aspects of the Initiative's proposal and formulate some counter arguments to it. Specifically, we claim that the smaller number of votes required for election of NMPRs is just a natural consequence of the definition of minority as such and that the whole NMPRs model in Croatia is one rather crucial expression of the affirmative action approach that deserves particular protection. Similarly, the Initiative fails to recognize that in recent years not also the diaspora representatives were elected by small percentages of their respective voters but that some minorities' voters participated in elections in great numbers as well. This obviously raises important discrimination concerns. Furthermore, as an expression of popular sovereignty, it has for a long time been accepted that parliamentary representatives in Croatia represent the interests of the people as a whole and not just of those voters who elected them. In addition, any claim as to the existence of abusive conduct of parliamentary representatives should be solved by applying the relevant criminal law measures and not through redesigning the political model of the country.

In the final part we formulate our general claim that the Initiative runs contrary to the constitutional prescriptions addressing the position of national minorities in Croatia. In fact, the

Constitution expressly guarantees national minorities "equality with citizens of Croatian nationality" and provides that their national rights will be exercised "in compliance with the democratic norms of the United Nations and the countries of the free world". This seems to be the core meaning of the "National Identity" concept and arguably one of the unamendable parts of the Constitution.

II. THE GENERAL CONTEXT

The popular referendum initiative was introduced in Croatia with the constitutional amendments of 2000. According to it, a referendum must be called if at least 10 percent of all the voters in the country request it and it shall pass if supported by a majority of voters taking part in referendum. From the procedural point of view, moreover, in the case of a popular initiative the Parliament must call a referendum and the only way to stop it is if the Constitutional Court decides so. According to Article 95 of the Constitutional Law on the Constitutional Court, the Court has the power to verify whether a referendum is substantially in accordance with the Constitution and whether the procedural requirements for the call were met. Since the introduction of the popular initiative, Croatia has had a series of popular referendum initiatives addressing a wide variety of issues. Those initiatives may easily be categorized in two distinct groups, depending on whether they had succeeded or not.[1]

[1] For a more extensive view on the Croatian popular referendum initiatives, see: Gardasevic, Dj., *Constitutional Interpretations of Direct Democracy in Croatia*, Iustinianus Primus Law Review No. 12 Vol. VII (Winter 2015), pp. 1-50. For a general overview and additional proposals for legal regulation of referendums in the Croatian context, see also: Branko Smerdel, *The Constitutional Order of the European Croatia (Ustavno uređenje europske Hrvatske)*, Narodne novine, Zagreb (2013), pp. 385-394; Branko Smerdel, *An Overview of the (Sad) History of Popular Initiative Referendum in Croatia* (*Pregled (tužne) povijesti referenduma građanske inicijative u Hrvatskoj*), in: *Referendum of*

The first such initiative was organized by former members of the military requiring a referendum on the enactment of the Constitutional Law regulating the status of members of the military before the courts in proceedings related to the alleged war crimes. Despite enough signatures collected, the referendum was not called due to the explanation that a new implementing law, which would in detail regulate the process itself, had not yet been enacted.

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

In 2010 a number of trade unions collected far more than enough signatures to call a referendum on preventing the governmental proposal for amending the Labor Act. However, once the signatures have been collected, the Government decided to withdraw the amendment from the procedure. This, in the view of the Constitutional Court, effectively prevented the holding of the referendum.

In December 2013 another civic initiative submitted enough signatures requiring changes to the Constitutional Law on the Rights of National Minorities so as to prescribe that official use of minority languages in territory of units of local self-government, state administration or

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Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects (*Referendum narodne inicijative u Hrvatskoj i Sloveniji – Ustavnopravno uređenje, iskustva i perspektive*), (Robert Podolnjak and Branko Smerdel – eds.), Croatian Association for Constitutional Law (Hrvatska udruga za ustavno pravo), Zagreb (2014), pp. 15-44; Smerdel, Branko: *Direct Decision-Making and Its Constitutional Limits* (*Neposredno odlučivanje i njegove ustavne granice*), in: *Building Democratic Constitutional Institutions in the Republic of Croatia in Developmental Perspective* (*Izgradnja demokratskih ustavnopravnih institucija Republike Hrvatske u razvojnoj perspektivi*), (Branko Smerdel and Đorđe Gardašević – eds.), Croatian Association for Constitutional Law (Hrvatska udruga za ustavno pravo), Zagreb (2011), pp. 183-203; Biljana Kostadinov, *Popular Initiative Referendum* (*Referendum građanske inicijative*), in: *Referendum of Civic Initiative in Croatia and Slovenia – Constitutional Regulation, Experiences and Prospects* (op. cit.), pp. 132-134; Robert Podolnjak, *Constitutional Engineering of Citizen Initiated Referendum: Some Recommendations to the Croatian Constitution-Maker* (*O "ustavnom inženjeringu" referendum narodne inicijative: neke preporuke hrvatskom ustavotvorcu*), in: *Referendum of Civic Initiative in Croatia and Slovenia– Constitutional Regulation, Experiences and Prospects* (op. cit.), pp. 179-232.

judiciary was possible only if a minority made one half of the local population, instead of one third. The Constitutional Court, however, declared the referendum question contrary to the Constitution. To this it may also be added another case known as the "The Referendum Uprising", which represented an attempt to annul the privatization process, to prohibit the selling of natural resources, prohibit the production of genetically modified organisms etc. In this case, the organizers did not collect enough signatures.

In July and November 2014, two initiatives were addressed to the Parliament requiring the enactment of one law which would prohibit the "outsourcing" of technical services in the public sector and the enactment of another law which was intended to ban the governmental plan to give certain highways under concession. Both of these initiatives were also declared contrary to the Constitution by the Constitutional Court.

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

On the other hand, the list of successfully held referendums consists of three examples.

Here, by far the most significant case in political terms was the referendum on the status of Croatia within the former Yugoslav federation, held on May 19th 1991. Technically, 83.56 percent of all the registered voters actually voted, out of which 93.24 percent voted for the independence/confederation option.[2] Consequently, Croatia declared its independence on June 25th 1991, and this decision became effective on October 8th of the same year.

[2] See:https://www.izbori.hr/arhiva-izbora/data/referendum/1991/rezultati/1991_Rezultati_Referendum.pdf, April 6th 2019.

Referendum on joining the European Union was held on January 22nd 2012. Since 43.51 percent of all the eligible voters actually voted on the referendum, out of which 66.27 percent voted for the accession[3], Croatia effectively joined the Union on July 1st 2013.

The third popularly initiated national referendum took place on December 1st 2013. This initiative addressed the issue of the constitutional definition of marriage and was supported by 683.948 signatures. 37,90% of all the voters actually voted on the referendum and 65,87% of those voted for the proposal.[4] A direct result of the vote was the change of the Constitution, which now defines marriage as a life union between a woman and a man.[5]

Apart from the case we are examining here, it should also be noted that in May 2018 another initiative was organized in an attempt to call a referendum on repealing the Istanbul Convention dealing with the prevention and combating of violence against women and domestic violence.[6] This initiative seems now to be blocked by the findings of the state bodies that not enough signatures were collected. And the most recent example includes the pending case of the trade unions' initiative to call a referendum on the amendments to the law regulating pensions.

The overall evaluation of both the legal regulation and the practice of referendums in Croatia so far reveals a number of factors that actually foster popular initiatives. A possible relevant list of factors thereof may include: a wide range of possible issues to be put on vote; few formal requirements for organizing initiatives; lack of an appropriate legal framework on financing of referendum initiatives and campaigns; and erasure of a turnout quorum which took place with the 2010 constitutional amendments. To this may be added social and political factors, especially

[3] See: https://www.izbori.hr/arhiva-izbora/data/referendum/2012/izabrani/i_81_000_0000.pdf, April 6th 2019.
[4] See: https://www.izbori.hr/arhiva-izbora/data/referendum/2013/izabrani/i_81_000_0000.pdf, April 6th 2019.
[5] Constitution of the Republic of Croatia, Article 62. For the English text of the present Constitution of the Republic of Croatia, see: https://www.constituteproject.org/constitution/Croatia_2013?lang=en, April 6th 2019.
[6] See: http://istinaoistanbulskoj.info/, April 6th 2019.

those supported by economic crisis or purely ideological confrontations. Normative factors that restrict direct democratic practice are to be found in a relatively high number of signatures required for starting a popular referendum initiative and a short period (up to fifteen days) during which such signatures must be collected. Additionally, possible restrictive factors could also be located in the growing Constitutional Court's case-law and interpretation methods that surely tend to put significant boundaries on the list of issues whose resolution on referendums could be constitutionally acceptable. Also, the existing experiences of direct democracy in Croatia should be viewed in an overall context of social and political relationships. From that point of view, referendum surely becomes a means of disagreement with governing structures, the fact that is probably best understood in the context of the governmental economic policies and, especially in the Croatian settings, in reference to deep ideological divisions in the society. This conclusion is also supported by the fact that the most recent popular initiatives have aimed at adopting either measures with clear economic or ideological impacts or measures aimed at restructuring the whole system of representative democracy in its roots. At the same time, this explains the growing interest of citizens in the use of direct democratic tools.[7] Finally, instruments of direct democratic in

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

Croatia are most often used by civic associations[8], although it may be said that governments generally are only partially influenced by referendum initiatives.[9]

On the other hand, the modern Croatian system for parliamentary elections defines three categories of voters.[10] "General" Croatian citizens vote in ten general electoral units, each one represented by fourteen representatives. Citizens who reside outside of the state (diaspora) elect their special representatives (three in total) in the eleventh electoral unit. And national minorities elect eight representatives in the special, twelfth unit.

As for national minorities, a few observations must be made here. Croatia is among few countries that provides for the election of deputies intended to represent national minorities.[11] From 1992 on national minorities in Croatia were recognized as a separate electorate within the system but until 2002 their electoral rights were regulated only through ordinary legislation. The original version of the 1990 Constitution did not mention special electoral rights of national minorities. It did however specify that Croatia was established as the nation state of the Croatian people, as well as the state of all of its other peoples and minorities who were its citizens and who were therefore guaranteed equality with citizens of Croatian nationality. In addition, the exercise

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

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

[10] The following part of the text is partly based on our previous article in which we more precisely and in detail described the July 2011 Croatian Constitutional Court case dealing with electoral rights of national minorities, as well as the basic contours of the Croatian parliamentary electoral system. See: Toplak, Jurij and Gardasevic, Djordje, Concepts of National and Constitutional Identity in Croatian Constitutional Law, 42 Review of Central and East European Law (2017), pp. 266-267.

[11] Electoral Law, Council of Europe Publishing, Strasbourg (2008), p. 55

of minorities' national rights was assured to be taken out "…in compliance with the democratic norms of the United Nations and the countries of the free world" and national minorities were specifically guaranteed "…freedom to express their nationality, freedom to use their language and script, and cultural autonomy."[12]

The amendments to the Constitution made in 2000 however introduced a substantive change. Article 15 of the new document stated the following: "Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law."[13] The present model of organization of national minorities' voting rights of is based on provisions of the Constitutional Law of 2002. According to it, national minorities' representation in the Parliament is guaranteed in a way that members of such minorities elect at least five and the most eight of their representatives in special electoral units, in accordance with the Law on Elections of Representatives to the Croatian Parliament. Furthermore, those minorities are technically divided into two principal categories: those national minorities which in the general population participate with more than 1.5 percent of citizens are guaranteed at least one and the most three representatives, while members of smaller minorities may elect at least four representatives.[14] The subsequent amendments to the Electoral Law fully defined the model based and established that national minorities elect eight representatives in total. Those representatives are elected in the following way: Serbs elect three representatives, Italians and Hungarians each elect one, Czechs and Slovaks together elect one, Austrians, Bulgarians, Germans, Poles, Roma, Romanians, Rusyns, Russians, Turks, Ukrainians, Vlachs and Jews

[12] The Constitution of the Republic of Croatia of 1990, Preamble and Article 15.
[13] The Constitution of the Republic of Croatia of 2000, Article 15.
[14] Article 19 of the Constitutional Law on the Rights of National Minorities (Official Gazette 155/2002).

together elect one and Albanians, Bosnians, Montenegrins, Macedonians and Slovenians all together elect one.

The described model was significantly amended in 2010. Those amendments were soon struck down by the Constitutional Court the following year. Since this particular case merits special attention for our purposes here, we will come back to its more thorough examination in the following part of our paper.

III. THE 2018 POPULAR REFERENDUM INITIATIVE

As said before, the 2018 popular initiative was organized as an attempt to redefine several elements of the parliamentary electoral system in Croatia. Most importantly, it was proposed that mandates of national minorities' parliamentary representatives were to be reduced in a way that those representatives could not vote on two crucial issues: confidence to the government and adoption of the state budget.[15]

We have already said that the main arguments on which the Initiative relied upon for such a move could be summarized in three crucial points. In the following text, we are first addressing each one of those arguments separately and try to formulate some counter-arguments to them. To this we also add two additional reasons we deem important for concluding that the Initiative is actually unconstitutional.

[15] Additionally, the Initiative seeks to increase the number of preferential votes to three, lower the minimum election threshold to join parliament to 4%, rearrange the criteria for establishing electoral districts and introduce voting by correspondence and by electronic means. For more information on the Initiative, including the detailed explanations in reference to particular questions proposed on the referendum, see: https://narododlucuje.hr/, April 5th 2019. In reconstructing the claims of the Initiative here we also used the official request for calling a referendum submitted by the Initiative to the Croatian parliament, dated June 16th 2018 (in the following text: the Initiative's Request).

1. The Argument Based on the Lack of Legitimacy

The first argument in support of the initiative is that representatives of national minorities are elected by significantly smaller number of votes than representatives elected in "general" electoral units. Moreover, they benefit from the electoral system in which they are guaranteed "reserved" parliamentary seats, unlike the rest of the representatives. Consequently, such a disproportion leads to their lack of legitimacy and requires their exclusion from voting on crucial issues. In addition, it is claimed that the data shows that minority voters actually opt for participating in elections as 'general voters', rather than as members of national minorities. This, in the view of the Initiative, means that a great number of national minority voters in Croatia actually does not consider minority representatives as "their own". In reference to this last claim, it is noticeable that the Initiative in its official request for calling a referendum, submitted to the Parliament on June 16th 2018, stressed the following:

"It is of course worth additionally to stress that two-thirds of the members of national minorities do not vote for their special representatives but for lists in general electoral units. Precisely, according to the Report of the State Electoral Committee from September 2016, 82.656 of voters – members of national minorities – voted for candidates in general electoral units, while in the special, 12th electoral unit voted only 37.957 of voters, or 31.5 percent."[16]

[16] See: the Initiative's Request, p. 9.

Several important observations must be made in reference to this first argument of the Initiative.

Firstly, it may be stressed that the smaller number of minority votes required for electing their representatives is a rather obvious consequence of the concept of minority as such. In other words, minorities are by definition such parts of population which are outnumbered by a majority. This is also confirmed by the general definition given by Francesco Capotorti who stated that the minority group is "a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[17] It is therefore not irrational to assume that special rules regulating electoral right of minorities must at the first glance already be viewed as some sort of affirmative measures for such particular groups.

Moreover, the Preamble of the Croatian Constitution enumerates national minorities and guarantees them 'equality with citizens of Croatian nationality and the exercise of their national rights in compliance with the democratic norms of the United Nations and the countries of the free world'. At the same time, the Constitution nowhere conditions the fulfillment of minority rights with their actual number. In fact, the Croatian Constitutional Law on the Rights of National Minorities in its Article 5 defines minorities in the following way:

"In the sense of this Constitutional Act, a national minority shall be a group of Croatian citizens whose members have traditional domicile in territory of the Republic of Croatia and whose

[17] Petričušić, Antonija, The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations, Croatian International Relations Review (2005), p. 4. In the following text see, however, the definition given in Article 5 of the Croatian Constitutional Law on the Rights of National Minorities.

ethnic, linguistic, cultural and/or religious traits differ from the rest of the population, and who are motivated by the desire to preserve these traits."

Secondly, the claim that national minorities vote in general electoral units rather than in their special unit may statistically stand only for some minorities. For instance, the official data for the 2016 parliamentary elections show that out of 138.539 of voters of the Serbian minority, only 19.534 (or 14.10 percent) voted in the special electoral unit.[18] However, it must be stressed that the relevant data published by the State Electoral Committee show that there indeed are some minorities who do use their special electoral rights in a way that they do vote in the special electoral unit reserved for national minorities, rather than as other general voters. The same data also confirms that the electoral turnout of voters of those minorities is quite in line with the average national turnout of voters in general units. Thus, the data reflecting parliamentary elections held in 2016 shows that out of the total number of 9.981 of voters of the Hungarian national minority 5.212 actually voted in their special electoral unit. This made 52.22 percent of those voters.[19] In 2015, the Hungarian minority voters voted in their special electoral unit by 49.02 percent (4.475 voted, out of a total number of 9.129).[20] And for the representative of the Czech and Slovak national minorities, out of 6.763 of voters in total, 1.590 (or 23.51 percent) voted in the special electoral unit.[21]

This data, therefore, unequivocally reveal that the general claim pursued by the Initiative in that context simply cannot stand because, even if taken as valid in the first place, it discriminates at least against some minorities. In other words, even if one supports the idea that, on account of their abstention to vote in the special electoral unit, national minorities should be deprived of the

[18] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2016/izabrani/i_13_012_0000.pdf, April 6th 2019.
[19] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2016/izabrani/i_23_012_0000.pdf, April 6th 2019.
[20] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2015/izabrani/i_23_012_0000.pdf, April 6th 2019.
[21] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2016/izabrani/i_43_012_0000.pdf, April 6th 2019.

right to participate in deciding on the state budget and confidence to the government, this could, at most, go only for some minorities. And the Initiative's proposition regarding the restrictions of minority parliamentary mandates extends to all minorities.

Situation in the context of the argument based on the lack of legitimacy becomes even more interesting if one takes into account the data related to the diaspora voters. Here, the data for the 2016 parliamentary elections show that out of the total number of 21.223 of voters, 21.210 actually voted (99.93 percent).[22] But this specific percentage should nevertheless be taken in relation to the fact that, according to the present Croatian legislation, the total number of the diaspora voters is counted only after they actively register themselves for each particular election. In other words, those who do not register are not counted. And the current estimation of the Initiative is that there is approximately 800.000 of the Croatian diaspora citizens, who obviously may or may not choose to register.[23] Therefore, since the actual turnout on the 2016 elections shows a significant abstention for those voters as well, one may also ask whether they also refuse to accept their particular parliamentary representatives "as their own". In addition, the data for the 2011 elections show that out of 411.758 of the diaspora voters, only 21.100 (or 5.12 percent) voted.[24] In 2007, prior to the 2010 constitutional amendments, only 90.402 or 22.32 percent, out of 404.950 of voters in total, actually voted in the diaspora electoral unit.[25]

Finally, similar "abstention" can also be observed in relation to the elections for the EU Parliament. In 2014, out of the total number of 3.767.343 of voters, only 950.980 or 25.24 percent did vote.[26] In 2013, the turnout was even lower, 20.83 percent.[27]

[22] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2016/izabrani/i_02_011_0000.pdf, April 6th 2019.
[23] See: https://narododlucuje.hr/pitanja-i-odgovori/, April 6th 2019.
[24] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2011/izabrani/i_02_011_0000.pdf, April 6th 2019.
[25] See: https://www.izbori.hr/arhiva-izbora/data/parlament/2007/izabrani/i_02_011_0000.pdf, April 6th 2019.
[26] See: https://www.izbori.hr/arhiva-izbora/data/euparlament/2014/izabrani/i_14_000_0000.pdf, April 6th 2019.
[27] See: https://www.izbori.hr/arhiva-izbora/data/euparlament/2013/izabrani/i_14_000_0000.pdf, April 6th 2019.

2. The Argument Based on the Nature of the Minority Parliamentary Mandate

The second argument of the supporters of the initiative is that the NMPRs should (primarily) represent the interests of minorities who elected them. The underlying reasoning thereof is that the minority representatives have a special and not a general political mandate because of the way in which and the purpose for which they are elected. In fact, the Initiative in this context argued that rights and freedoms of national minorities, as guaranteed in the Croatian constitutional system, were relative rights and freedoms and therefore subject to possible restrictions in accordance with the principle of proportionality. Thus, the exclusion the NMPRs from voting on the two issues was not qualified by the Initiative as being too restrictive. The Initiative saw this rather as the restrictions of the least possible degree. The objective sought that the Initiative pursued here was to establish a constitutionally more acceptable relationship between highest values of the constitutional order of the Republic of Croatia (national equality and equality in general). The Initiative also explained that it wanted to secure that NMPRs avoid responsibility for the process of formation of government and at the same time argued that such a decision must be given exclusively to the representatives elected by the "majority people". Additionally, it said that members of national minorities were free to, together with other citizens, equally participate in election of general representatives. Moreover, the Initiative explained that participation of NMPRs in voting on the confidence to the government and adoption of the state budget was not compatible with the purpose of their representation in the Parliament and that voting on those issues placed before NMPRs the burden of accountability which was not inherent to the mandate in which creation could participate only citizens who were members of national minorities.[28]

[28] See: the Initiative's Request, pp. 9-10.

The answer to this particular argument of the Initiative may be found in the case-law of the Croatian Constitutional Court. Already in its 2001 Decision, this Court was dealing with the constitutionality of the Article 17 of the Constitutional Law on Human Rights and Freedoms and on Rights of Ethnic and National Communities or Minorities in the Republic of Croatia.[29] This Law, among other things, prescribed special reserved seats for the parliamentary representatives of those minorities which counted for less than 8 percent of the total population. The contested provision, more precisely, prescribed that those representatives were "…the representatives of all ethnic and national communities or minorities that elected them and (that they were – note: authors) obliged to protect their interests." In addition, two other contested paragraphs provided for the recall of such representatives.

The Court started its reasoning by invoking Article 74 of the Constitution, which defined that "Representatives in the Croatian parliament do not have an imperative mandate." Explaining that therefore the mandate of parliamentary representatives was free, the Court emphasized that the purpose of such a mandate was to reflect the system of the representative government and that in such a model representatives in their deliberations and voting were not bound by the views of the voters which had elected them. Moreover, the Court construed its approach on the basis of the theory of an indivisible state sovereignty and said that the elected representative was holding a collective mandate which it acquired through election. Accordingly, parliamentary representatives were expected to represent interests of the people as a whole and not just those of voters who elected them or constituencies in which they were elected. Consequently, the Court concluded that the contested provisions were unconstitutional because they actually provided for the imperative mandate for one group of parliamentary representatives, and at the same time put them into an

[29] Decision of the Constitutional Court of the Republic of Croatia, U-I-732/1998, April 12th 2001.

unequal position towards other representatives.[30] The same reasoning was repeated by the Court in a more recent decision from 2010.[31]

To all said in this special segment, we may also add one additional observation. If one presupposes that parliamentary mandates of NMPRs should be restricted because they emerge from just one part of the population, there still remains the question whether the same logic may also extend to "general" mandates in which members of national minorities did not participate. More precisely, if the NMPRs should (primarily) represent the interests of minorities who elected them, the question is whether the general representatives should therefore not participate in voting on the questions specifically regulating the position of minorities. The same seems to be the question with the representatives of the diaspora. It seems that the answers to these questions are quite obvious.

3. The Argument Based on the Claim of "Political Trade"

The third crucial argument pursued by the Initiative is that the mandate of NMPRs should be limited because of a "frequent practice of undisguised political trade" with minority representatives in processes of creation of government. The Initiative explained this argument in the following words:

"Participation of the representatives of minorities in the creation of government extensively politicizes them, we dare to say, it connects them with political trade which is neither in the interest

[30] Decision of the Constitutional Court of the Republic of Croatia, U-I-732/1998, April 12th 2001.
[31] Decision of the Constitutional Court of the Republic of Croatia, U-I-3789/2003, December 8th 2010.

of the general good nor of the good of our fellow citizens from various minorities. This is because the meaning of representation of minorities through "reserved parliamentary seats" is not to decide on the Government or to participate in it, but to advocate for the interests of their national minority."[32]

The answer to this particular argument of the Initiative may also be found in the case-law of the Croatian Constitutional Court which in 2010 stated the following:

> "*...the Constitutional Court notes that the constitutional nature of an MP's representative mandate should not be challenged because the MP could commit a dishonorable act or criminal offence. For dishonorable acts that are not criminal, MPs carry political responsibility that may result in them not being re-elected in the next elections. In the case of an alleged crime, the Constitutional Court recalls that the Constitution allows the detention and criminal prosecution of an MP and that a final court verdict of guilt, under certain circumstances, leads to the loss of his/her seat as MP.*"[33]

Moreover, the Croatian Criminal code also contains a very specific provision which makes bribery of a parliamentary representative a crime punishable with the penalty of imprisonment from one to eight years.[34]

Apart from these objections to the "political trade argument" we made here in reference to both the previous case-law of the Constitutional Court and the relevant legislation, it is also worth

[32] See: https://narododlucuje.hr/pitanja-i-odgovori/, April 6th 2019.
[33] Decision of the Constitutional Court of the Republic of Croatia, U-I-3789/2003, December 8th 2010.
[34] Croatian Criminal Code (Official gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18), article 339.

saying that the said argument may be put in a "non-positivistic" context as well. In fact, a kind of a natural approach to claims that certain institutions, such as parliamentary mandates, in practice suffer from unacceptable, or illegal, influences should inevitably take into account that whoever puts forward such claims must also prove them in each particular case. In other words, if it is stated that, for example, NMPRs are somehow engaged into a "frequent practice of undisguised political trade" or are "politicized", it should also be precisely clarified which exact representatives could be blamed for such a conduct, where it took place, when etc. Above all, it should be clearly proved whether this applies to all the NMPRs or only to some of them. This is, of course, indispensable exactly in those cases where a proposal for a general reform of a certain institution is pursued. Therefore, quite clearly, if one proposes that all the NMPRs mandates should be limited than it should be clear that all the NMPRs are in the same situation. Et vice versa. It is beyond doubt that such an approach further complicates the case and opens the floor for further "discrimination" concerns. Quite in line with this is yet another previously expressed standing of the Croatian Constitutional Court by which it denied constitutional legitimacy to referendum questions which in themselves contained a "concealed aim".[35]

In the foregoing text we have tried to locate and formulate some concrete answers to the main arguments upon which the 2018 Initiative based its referendum proposal. However, it seems that the whole case offers an opportunity to extend the analysis to some other issues which also raise constitutional objections. The first one is directed to our proposal for a more extensive and

[35] In 2014 the Croatian Constitutional Court decided that the referendum on the public use of national minority languages and scripts was unconstitutional. Among other things, the Court stressed that the referendum initiative, as it emerged from the arguments submitted by its organizers, was principally undertaken because of the factual circumstances related to one specific minority. It consequently concluded that "…in the proposed referendum question, considering its content and the way it was formulated, in a legal sense there exists a concealed aim which, as such, cannot be assessed as a legitimate one." See: Decision of the Constitutional Court U-VIIR-4640/2014, August 12th 2014.

systemic reading of the Croatian Constitution. The second one leads us to a specific reading of one landmark decision of the Croatian Constitutional Court in which some important lessons may be seen for the present discussion as well. This is our task in the two following subchapters.

4. The Counter-Argument Based on the Systemic Reading of the Constitution

Firstly, whichever theory or existing data one takes in supporting the claim that NMPRs mandates should be limited, it is still the fact that the proposal in its nature is selective, because it does not appropriately take into account all the powers of the Croatian parliament, but just some. As already explained, the Initiative's proposal is that the NMPRs should not have the power to decide on just two issues: vote on the confidence of the government and adoption of the state budget. It is of utmost importance to notice here that, according to the Croatian Constitution, these two issues are to be decided by an absolute majority of all the representatives in the Parliament.[36]

Despite the fact that those two are undoubtedly important powers of the Croatian parliament, the question is how to deal here with all other parliamentary powers, in which, according to the Initiative, the NMPRs should nevertheless be entitled to participate.

To give an appropriate answer to this question, it is first necessary to see what powers do belong to the Croatian parliament.

[36] Constitution of the Republic of Croatia, articles 91 (adoption of the state budget), 110 (vote on confidence to the government during the process of creation of government) and 116 (vote of no confidence to the government). See also Article 98 of the Constitution by which the President of the Republic shall "Confide the mandate to form the Government to the person who, upon the distribution of the seats in the Croatian Parliament and consultations held, enjoys confidence of the majority of its members".

According to Article 80 of the Constitution of the Republic of Croatia, the Parliament has the power to:

"…

- Decide on the enactment and amendment of the Constitution;
- Pass laws;
- Adopt the state budget;
- Decide on war and peace;
- Pass documents which express the policy of the Croatian Parliament;
- Adopt the Strategy of national security and the Strategy of defense of the Republic of Croatia;
- Realize civil control over the armed forces and the security services of the Republic of Croatia;
- Decide on alternations of the borders of the Republic of Croatia;
- Call referenda;
- Carry out elections, appointments and reliefs of office, in conformity with the Constitution and law;
- Supervise the work of the Government of the Republic of Croatia and other holders of public authority responsible to the Croatian Parliament, in conformity with the Constitution and law;
- Grant amnesty for criminal offenses;
- Conduct other affairs as specified by the Constitution."

This central constitutional provision which enumerates the powers of the Parliament is supplemented by other articles that also deserve due attention here. According to those other provisions, the Croatian parliament also:

- elects judges of the Constitutional Court[37];
- elects the President of the Supreme Court and the Prosecutor General[38];
- decides on the alteration of state borders[39];
- initiates the procedure on the constitutional accountability of the President of the Republic[40];
- decides on the conclusion of some of international treaties and has the power to ratify some of those international agreements[41];
- may initiate the procedure for the association (and disassociation) of the Republic of Croatia into alliances with other states[42];
- decides on the crossing of the national borders of both the allied and domestic armed forces[43];
- decides on the assistance rendered by the Croatian armed forces to allied states[44];
- decides on restrictions of fundamental rights and freedoms in case of states of emergency[45];

[37] Constitution of the Republic of Croatia, Article 126.
[38] Ibid., articles 119 and 125.
[39] Ibid., Article 8.
[40] Ibid., Article 105.
[41] Ibid., articles 139 and 140.
[42] Ibid., Article 142.
[43] Ibid., Article 7.
[44] Ibid.
[45] Ibid., Article 17.

- decides on the delegation of powers to the President of the Republic in in case of states of emergency[46];
- decides on its own dissolution.[47]

From this point of view emerge some obvious concerns that directly touch upon the very core of the Initiative's proposal. More precisely, it is quite difficult to explain how the proposal to restrict the mandate of the NMPRs could in a constitutionally valid way be limited only to the two parliamentary powers mentioned before without reconciling this proposal with the definition of other powers of the same body. It is in fact obvious that at least some of those other powers merit equal, if not greater, value in the definition of prerogatives that are constitutionally conferred upon the Croatian representative assembly. It really does not take one to be a trained constitutional lawyer to see, for instance, that the enactment of or amendments to the Constitution or decisions concerning state borders or election of constitutional judges are strategic decisions which deeply affect the conduct of public affairs in the state, even more than the election of government and adoption of the state budget. To this we may also notice that the Initiative fails to recognize that decisions on some of those parliamentary powers, left unaffected by the referendum proposal, are bound by greater majorities than the decisions on the confidence to the government and adoption of the budget. But this is not all. Going to the extreme in the systemic reading of the Constitution we may also further some additional objections to the proposal.

For instance, the President of the Republic is constitutionally obliged to "take care of regular and harmonized functioning and stability of the state government".[48] One of his other

[46] Ibid., Article 101.
[47] Ibid., Article 78.
[48] Ibid., Article 94 par. 2.

duties is to "Confide the mandate to form the Government to the person who, upon the distribution of the seats in the Croatian Parliament and consultations held, enjoys confidence of the majority of its members".[49] Imagine a scenario in which the President establishes that no solid parliamentary majority to form a government exists and that he or she consequently cannot confide the mandate to anyone unless this stable majority is formed with the participation of the national minority representatives. In such a case the President would obviously be stretched between his duty to follow the prescriptions on the process of formation of government on one side and his obligation to secure "regular and harmonized functioning and stability of the state government".

Or take the so-called "joint powers" of the President of the Republic and the Government in the realm of foreign policy or security services.[50] With the realization of the Initiative's proposal that the NMPRs would not participate in the creation of the government, national minorities would actually have only 50 percent of the influence on the further decision-making in such joint activities of the two bodies, that is only through their right to elect the President of the Republic.[51] The same objection applies to situations in which the President and the Government together participate in the enactment of the emergency decrees.[52]

Furthermore, the Initiative does not explain what should be done in a case where for, instance, a person holding a mandate for the creation of government decided to nominate a member of a national minority for one of his or hers cabinet ministers. Or, even more strikingly, in a case where the President of the Republic decided to give a mandate for the creation of government exactly to the member of one of the minorities.[53] According to the referendum question proposed,

[49] Ibid., Article 98.
[50] Ibid., articles 99 and 103.
[51] Ibid., Article 95.
[52] Ibid., Article 101.
[53] Ibid., Article 110.

in such cases national minorities would not be able to vote on the confidence to the persons who belong to those same minorities.

5. The 2011 Decision of the Croatian Constitutional Court

As we said before, the Croatian parliamentary electoral system was significantly amended in 2010. Those amendments were, however, struck down by the Constitutional Court the following year in a landmark decision which thoroughly explained the constitutional parameters of possible designing of electoral system for minorities. This particular case merits special attention for our purposes here and we will now briefly try to explain the fundamental lessons it conveyed. By far the most important instruction of the Constitutional Court was that the NMPR's mandates indeed could be limited, but only in the case where national minorities would have double voting rights.[54]

The 2010 amendments to the Constitutional Law on the Rights of National Minorities introduced a new model election of NMPRs. The said Law prescribed that minorities participating in general population with more than 1.5 percent were guaranteed at least three seats in the Croatian parliament. Furthermore, the NMPRs of such minorities would be elected on the basis of the general right to vote in general electoral units for party lists of such minorities or for lists proposed by voters of national minorities, in accordance with the parliamentary electoral law. In contrast, national minorities participating in the general population with less than 1.5 percent of citizens were given dual voting rights: rights to vote for general electoral lists in general electoral

[54] For our previous and more extensive description of the case, see: Toplak, Jurij and Gardasevic, Djordje, Concepts of National and Constitutional Identity in Croatian Constitutional Law (op. cit.), pp. 267-275.

units and special rights to elect at least five of their minority parliamentary representatives in special electoral units.

The 2011 Decision of the Croatian Constitutional Court by which it struck down the said amendments to the Constitutional Law focused on three main issues. The first one was whether it was constitutionally acceptable that national minorities' had reserved parliamentary seats within the general electoral system based on equal and general right to vote. The second was dealing with the question whether national minorities could generally be given dual voting rights. The third was examining whether it was acceptable to introduce the dual voting rights as belonging to some and not all national minorities.[55]

For the specific purposes of this paper, we are here just reminding what the Court said in reference to the second issue examined. Here the Court started with the interpretation of Article 15 of the Constitution, which mentions the "special right" of the members of national minorities to elect their representatives to the Croatian Parliament. The Court pointed that such "special right" indeed could include the right to dual voting but that this was not the only way to work it out. Most importantly, though, the Court linked the right to the "second" vote to the very nature of mandates of NMPRs elected on the basis of such a second vote. In very concrete terms, the Court concluded that mandates of those representatives needed to be distinguished from the mandates of representatives elected in the general electoral units because they would be elected exclusively on the basis of the second, thus the additional votes of minority voters. And as such, the election of NMPRs would not be resulting from the will of the People as a whole. Therefore, the Court posited that, prior to the activation of the "second vote" model, a special law of strictly constitutional legal force needed to be enacted in order to work out details defining such special mandates. Those

[55] Decision of the Constitutional Court of the Republic of Croatia U-I-3597/2010, July 29th 2011.

mandates, in turn, might, or might not, have the same quality as mandates of general representatives.

This, therefore, is the clearest explanation of the present, and bounding, interpretation of the Constitutional Court in terms of which parliamentary mandates in the Croatian system could be restricted. It is also quite clear that this specific interpretation runs directly contrary to the 2018 Initiative proposal.

IV. CONCLUSION

The systemic and comprehensive approaches to reading of the Constitution of the Republic of Croatia have firmly been established as proper methods of interpretation in the Croatian constitutional setting. This has indeed been a message that the Constitutional Court tried to emphasize in its rulings for a number of times. Perhaps the best way to remember that important message is to remind of the words of the Court itself:

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

of context and interpreted independently. In other words, each particular constitutional provision must always be interpreted in accordance with the highest values of the constitutional order which make the basis for interpreting Constitution."[56]

In addition to this "structural unity" argument, the Court has previously also been keen to state that the Croatian Constitution was not a value-neutral document. In the Court's view, the Constitution rather defined the Republic of Croatia as a democratic state, based on, among other things, national equality, respect for human rights and rule of law principles, all of which must be realized without discrimination. To this, the Court added that democracy based on the rule of law and protection of human rights represented the only political model recognized by the Constitution and that pluralism, as the central feature of a democratic society, required respect for diversities and particular identities, as well as a dialogue and a search for balance, both of which negated any abuse of a dominant position.[57]

Beyond all we have already said, it is our general claim that the 2018 Initiative runs contrary to the constitutional prescriptions addressing the position of national minorities in Croatia. It is worth mentioning that the Croatian Constitution establishes Croatia as the nation state of the Croatian people, but it also expressly guarantees national minorities "equality with citizens of Croatian nationality" and provides that their national rights will be exercised "in compliance with the democratic norms of the United Nations and the countries of the free world".[58] This seems to be the core meaning of the "National Identity" concept embedded in the Constitution. And since

[56] Decision of the Constitutional Court of the Republic of Croatia U-I-3597/2010, July 29th 2011.
[57] Decision of the Constitutional Court U-VIIR-4640/2014.
[58] Constitution of the Republic of Croatia, Preamble.

it is expressed in its Preamble, it may also be one of the unamendable parts of the Constitution or the so-called concept of the "Constitutional Identity of the Republic of Croatia".

After all, the constitutional concept of "the People" emerges from the "civil concept of the State" and should be understood as a community of all of Croatian citizens, free and equal, regardless of their strict national origin. Constitutional provisions thus prescribe that the Republic of Croatia is a democratic state in which power derives from the people and rests with the people, as a community of free and equal citizens.[59] Moreover, the people exercises this power through direct and representative decision-making.[60] In such a model equality in general and national equality, among other things, represent the highest values of the constitutional order and as such serve for interpretation of the Constitution.[61] Needless to say, all constitutional values must be realized without any discrimination on any basis. Consequently, distinguishing minority groups on the basis of their national origin actually divides the concept of "the People" in a constitutionally unacceptable manner.[62]

[59] Constitution of the Republic of Croatia, Article 1.
[60] Ibid.
[61] Constitution of the Republic of Croatia, Article 3.
[62] Some of the views we expressed here are based on the binding case-law of the Croatian Constitutional Court. See, for instance: Decision of the Constitutional Court of the Republic of Croatia U-I-3597/2010, July 29th 2011.