

# The clarity of referendums: an instrument for managing the (dis)continuity and perception of change

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## THE CLARITY OF REFERENDUMS: AN INSTRUMENT FOR MANAGING THE (DIS)CONTINUITY AND PERCEPTION OF CHANGE

**Abstract:** *Seen as a precondition for a referendum, clarity requires a clear referendum question and a clear majority for or against an outcome. In this article I argue clarity is not only an enabler of individual referendums but one way to politicize their context. In separating what is clear from what is obscure, clarity imposes the twin requirements of homogeneity and predictability. These, in turn, presuppose an interpretation of acceptable political (dis)continuities beyond the referendum as well as of perception of change. This reading of clarity shows how the referendum does not only manage change to which it is explicitly addressed, but that the purported voice of “the people” may at the same time be an instrument of clarity that imagines and normatively orders the referendum’s surroundings.*

**Key words:** direct democracy, referendum, clarity, constitutional law, constitutional theory.

### 1. INTRODUCTION

Referendums closely relate to change, particularly when coupled with constitutional amendments.<sup>1</sup> The nature of this relationship normally escapes direct scrutiny. When thought of in relation to change, referendums are imagined as its sources, fora, or boundaries. As sources, referendums provide an impetus for a broader process of change. A direct vote that provides a mandate for a constituent assembly is one example.<sup>2</sup> Brexit, with all the uncertainties leading from the UK’s decision to leave the EU,

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1 Tierney, S., Referendums in Federal States. Territorial Pluralism and the Challenge of Direct Democracy, in: Albert, R., Stacey, R. (eds.), 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, p. 113.

2 Colón-Ríos, J., 2020, *Constituent Power and the Law*, Oxford, Oxford University Press, p. 283.

is another, more challenging case.<sup>3</sup> It is ultimately possible to think of referendums only as sources of change, with any decision stemming from them being a mandate for broader representative processes.<sup>4</sup> As fora, referendums become specific political environments where change develops in two ways. They are opportunities for citizens to employ their political rights outside usual political processes, most importantly the right to vote for or against a particular outcome. Even if it is unrealistic to argue that citizens here gather in an extraordinary display of constitutional authorship and even if these occasions are not possible without a variety of mediating structures,<sup>5</sup> referendums are depicted as a departure from a regular situation marked by the dominant representative democracy.<sup>6</sup> In this regard, referendums tie to change in another way, as they may help incentivize the development of a broader “referendum culture”, although this may prove to be a precarious project.<sup>7</sup> Finally, referendums may form boundaries of change when popular ratification is expected to provide legitimacy to complete an ongoing process. For instance, citizens may be called upon to adopt a new constitution or a constitutional amendment<sup>8</sup> or to decide on a proposed self-determination that has already been prepared through other political processes.<sup>9</sup>

Whether a source, a forum or a terminal point, referendums are not synonymous with a specific kind of transformation but are instruments for managing change. In the literature on constitutional change in particular, their main function is to provide legitimacy, an imprimatur of

3 Issacharoff, S., Bradley, J. C., *The Plebiscite in Modern Democracy*, in: Sajó, A., Uitz, R., Holmes, S. (eds.), 2022, *Routledge Handbook of Illiberalism*, New York, Routledge, p. 513.

4 Trueblood, L., 2023, *Referendums as Representative Democracy*, New York, Hart Publishing.

5 Daly, E., 2019, *Translating Popular Sovereignty and Unfettered Constitutional Amendability*, *European Constitutional Law Review*, Vol. 15, No. 4, p. 620; Miloš, M., 2020, *Reimagining Direct Democracy as an Intersection of Different Forms of Representation*, *Pravni zapisi*, Vol. XI, No. 1, pp. 74–75.

6 Denquin, J.-M., 1976, *Referendum et plebiscite. Essai de theorie generale*, Paris, Librairie generale de droit et de jurisprudence, p. 309.

7 Kenny, D., *The Risks of Referendums. “Referendum Culture” in Ireland as a Solution?*, in: Cahill, M. et al. (eds.), 2021, *Constitutional Change and Popular Sovereignty. Populism, Politics and the Law in Ireland*, New York, Routledge, pp. 198–223; Kenny, D., Kavanagh, A., *Are the People the Masters? Constitutional Referendums in Ireland*, in: Albert, R., Stacey, R. (eds.), 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, p. 290.

8 Colón-Ríos, J., 2020, p. 291.

9 Friedrich, C. J., 1946, *Constitutional Government and Democracy*, Boston, Ginn and Company, p. 554.

“the people”.<sup>10</sup> This is not to say that they may not have additional effects, whether intended or not, such as an increased rigidity of the overall “amendment formula”,<sup>11</sup> adding an additional check on regular representative processes,<sup>12</sup> or pushing through an otherwise illegal change,<sup>13</sup> but their chief task remains representing the electorate. Even beyond the confines of constitutional amendment procedures where the identification of the referendum and the constituent power may play a significant role,<sup>14</sup> referendums remain tightly intertwined with popular sovereignty. In all cases, they enable an exercise of the citizens’ right to vote, meaning that holding any referendum will necessarily involve the need to work out the will of the voting people.

In order to function as an instrument of managing change, the “views of the people” expressed in a referendum must be “clear”.<sup>15</sup> The referendum is not merely a vote, but is supposed to involve a decision of the electorate, the very concept of a “decision” requiring some kind of a final choice.<sup>16</sup> Clarity thus appears as a core precondition for the validity of the referendum and, consequently, the acceptability of its influence on the process of change.

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- 10 Luciani, M., Introduzione, in: Luciani, M., Volpi, M. (eds.), 1992, *Referendum. Problemi teorici ed esperienze costituzionali*, Rome, Editori Laterza, pp. 4–5; Salerno, G. M., 1992, *Il referendum*, CEDAM, Milan, pp. 65–70.
  - 11 Contiades, X., Fotiadou, A., The People as Amenders of the Constitution, in: Contiades, X., Fotiadou, A. (eds.), 2017, *Participatory Constitutional Change. The People as Amenders of the Constitution*, New York, Routledge, p. 25.
  - 12 Sajó, A., Uitz, R., 2017, *The Constitution of Freedom. An Introduction to Legal Constitutionalism*, Oxford, Oxford University Press, p. 112.
  - 13 Denquin, J.-M., L’esprit des référendums sous la V<sup>ème</sup> République, in: Lauvaux, P. (ed.), 2012, *Théorie et pratiques du référendum. Actes de la journée d’étude du 4 novembre 2011*, Paris, Société de législation compare, p. 84.
  - 14 Barshack, L., 2006, Constituent Power as Body: Outline of a Constitutional Theology, *The University of Toronto Law Journal*, Vol. 56, No. 3, p. 190.
  - 15 Albert, R., Discretionary Referendums in Constitutional Amendment, in: Albert, R., Stacey, R. (eds.), 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, p. 86. While Albert notes this in relation to United States in particular, the requirement of clarity finds purchase well beyond the boundaries of that jurisdiction. (Kostadinov, B., 2015, Načelo jasnoće referendumskog pitanja u Europi i SAD-u, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 65, No. 1, pp. 55–85.)
  - 16 Tierney, S., 2012, *Constitutional Referendums. The Theory and Practice of Republican Deliberation*, Oxford, Oxford University Press, p. 260. Of course, in order to make this choice, the electorate must have an opportunity to deliberate on the proposal before them. Merely organizing a vote is insufficient. (Stacey, R., The Unnecessary Referendum. Popular Sovereignty in the Constitutional Interregnum, in: Albert, R., Stacey, R. (eds.), 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, p. 100.)

As a precondition, clarity takes two forms. One is related to the formulation of the question posed before the voters and to its consequences, while the other ties to the majorities considered decisive in determining if a referendum outcome can be considered valid. A referendum supported by only a fraction of a total number of voters may be suspect because the decision of a minority can hardly claim the mantle of democratic legitimacy.<sup>17</sup> A question unclear in its formulation or consequences may disassociate the referendum and the voters who, deprived of a chance to decide on a clearly delineated issue, may not deliberate nor cast their vote in an informed manner and with an eye to the effects that may emerge from their collective decision.<sup>18</sup> In both cases, a referendum lacking clarity is democratically suspect and, to the extent clarity is enshrined in law, illegal.

The aim of this paper is to probe the claims that preconditioning referendums with clarity “depoliticises” an inherently political process or merely subjects it to political opportunism.<sup>19</sup> While these arguments take clarity to be just a precondition for a valid popular vote, I explore homogeneity and predictability, the two qualities that clarity represents in a referendum, arguing that both involve a shift in perception that is not neatly contained to a referendum. In attempting to extract itself from the unclear, clarity must presuppose the content and shape of obscurity it is attempting to lock out in enabling a popular vote. This in turn means that clarity places demands on the context of a referendum, specifically on acceptable political (dis)continuities and the popular perception of change. By consequence, clarity is not only a precondition internal to referendums. It provides opportunities to manage broader change of the referendum’s context in a different and undertheorized way. Referendums thus fluctuate between being conditioned by clarity and being themselves performances of clarity that provide an interpretation of a referendum’s context.

In the first part of the paper, I explore the usual interpretation of clarity. I demonstrate that the existing literature conceptualizes clarity as internal to referendums, its only purpose being the integrity of the popular vote on a narrowly defined matter. (2.) I then begin to look at the sources

17 Tierney, S., 2012, p. 271.

18 Miloš, M., Ustavnosudski nadzor jasnoće referendumskih pitanja, in: Koprić, I., Staničić, F. (eds.), 2021, *Referendum i neposredna demokracija u Hrvatskoj*, Institut za javnu upravu, Zagreb, p. 128.

19 Taillon, P., 2012, *Le référendum expression directe de la souveraineté du peuple? Essai critique sur la rationalisation de l'expression référendaire en droit comparé*, Paris, Dalloz, p. 173; Verrelli, N., Cruickshank, N., 2014, *Exporting the Clarity Ethos: Canada and the Scottish Independence Referendum*, *British Journal of Canadian Studies*, Vol. 27, No. 2, p. 198.

of obscurity that clarity is expected to address and that require it to turn outwards, separating the imagined obscurity from the clarity within the referendum. To separate itself from obscurity, clarity relies on two central proxies, homogeneity and predictability. (3.) Finally, I explore how they interface with the context of the referendum, problematising acceptable political (dis)continuities and the perception of change (4.).

## 2. CLARITY: A PRECONDITION INTERNAL TO REFERENDUMS

As noted in the introduction, clarity in a referendum takes two forms. One relates to the formulation of the question to which the electorate must provide an answer, while the other sets the threshold for a majority that must vote for or against a particular outcome for the referendum to be valid. Although the requirements set by these two forms of clarity are different, what binds them together is their notional commitment to popular sovereignty and their shared existence with the referendum they enable. Here I will explore these two features of clarity, showing how they depict it as a filter internal to referendums, apparently isolating these forms of direct democracy from their context and enabling a simplification that allows the voters to decide “for” or “against” an issue.

Clarity is most often identified with qualities of a referendum question. Tierney differentiates three requirements a question must meet: it must be linguistically clear, its form and content must be unitary and its consequences must be predictable.<sup>20</sup> The most fundamental form of clarity is the one that relies on linguistics. In this sense, “[c]larity involves using words that are known to one’s audience and matching delivery to the intended meaning”.<sup>21</sup> Whether by failing to choose a specific enough wording by accident or through deliberate obfuscation,<sup>22</sup> a badly worded question is not sufficiently understandable and is thus not clear.

Linguistic criteria are not the only precondition for a question’s validity. According to the Venice Commission, the referendum question should meet the three criteria for “the procedural validity of texts submitted to a referendum: ‘unity of content’, ‘unity of form’ and ‘unity of hierarchi-

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20 Tierney, S., 2012, pp. 227–228.

21 Domenico, M. E., 2020, Civil Identity in Changing Cityscapes: Material Rhetorical Obscurity at Denver’s Lindsey-Flanigan Courthouse, *Western Journal of Communication*, Vol. 84, No. 4, p. 463.

22 Tierney, S., 2012, p. 227.

cal level”<sup>23</sup> Unity of content requires that the question be a topical whole and not a combination of several disparate matters.<sup>24</sup> Unities of form and of hierarchical level are similar in that they imagine a vertical scale and require that each referendum question be limited to a single level on this scale. For unity of form, the question must be about either a “specifically-worded draft amendment”, a “generally-worded proposal” or a “question of principle”, not a combination of these.<sup>25</sup> According to the unity of hierarchical level, the same question cannot “simultaneously apply to legislation of different hierarchical levels”, *e.g.* to the codified constitution and an ordinary law.<sup>26</sup>

Finally, a question that is clearly formulated in line with both criteria outlined above should produce foreseeable consequences. Clarity in this sense departs from the two of its forms described earlier. It cannot be guaranteed by the wording of the question itself, as even a clearly worded question may be unable to carve out a predictable unit that may be subjected to a yes or no vote.<sup>27</sup> At issue here, however, is which of the consequences must be predictable and to what extent for a question to be clear. Referendums may produce a variety of outcomes, both within the law and beyond it. Not all of them need to be encompassed by the text of the question. Take for instance the recently failed referendum on amending the Croatian constitution. The question itself would only add two terms, “pandemic” and “epidemic” to a list of scenarios, or “states of emergency”, in which the Croatian Parliament (Sabor) is obligated to enact any necessary restrictions of constitutionally guaranteed rights by a more demanding, two-thirds majority.<sup>28</sup> However, the governing majority in the Parliament had already decided that pandemic restrictions on fundamental rights would be limited as if the pandemic was not a state of emergency, which was later affirmed by the Constitutional

23 European Commission for Democracy Through Law (Venice Commission), *Revised Guidelines on the Holding of Referendums*, CDL-AD(2020)031, ([https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e), 12.9.2022) p. 14.

24 *Ibid.* A “total revision of a text” is an exception to this, *e.g.* when a referendum refers to an entire law or constitution. (*Ibid.*)

25 *Ibid.*

26 *Ibid.*

27 Tierney, S., 2012, p. 239.

28 The Constitution of the Republic of Croatia, *Official Gazette*. Nos. 56/90, 135/97, 8/98 [consolidated text], 113/00, 124/00 [consolidated text], 28/01, 41/01 [consolidated text], 55/01 [correction], 76/10, 85/10 [consolidated text] and the Amendment to the Constitution of the Republic of Croatia (citizens initiative), *Official Gazette*, No. 5/14 Decision of the Constitutional Court of the Republic of Croatia Nr. SuP-O-1/2014 (hereinafter: the Croatian Constitution), Art. 17(1).

Court.<sup>29</sup> At issue then was whether a referendum would be able to effect a predictable change in the existing political circumstances.<sup>30</sup> In a controversial decision that I will address in the final part of this paper, the Croatian Constitutional Court found that the referendum would not have such an effect and was thus found unconstitutional.<sup>31</sup> The wording of the question was not problematic nor was its content, but the expected impact of a decision on the political scene.

The predictability of the referendum outcome, the unity of the question's form and content and the fundamental linguistic clarity all draw their justification from popular sovereignty. The different forms of clarity are required so that the electorate may cast a vote for or against a specified outcome. The idea is that the referendum will only then produce an "authentic" will of the electorate.<sup>32</sup> A similar strand of authenticity permeates the other kind of clarity attached to referendums, that of a "clear majority". There is clarity in a referendum in this second sense insofar as enough voters support its outcome, an expectation that may be enforced by setting down turn-out and approval quorums.<sup>33</sup> Where these are not met, the decision reached is insufficiently clear because it is not supported enough by the electorate in order to be attributed to the popular sovereign.

In exploring the clarity of a majority expressing itself in a referendum, Oklopčić notes that the requirement contains a normative ideal that is itself not entirely clear, with "the language of popular sovereignty" deflecting attempts to ask whether a sufficient majority means that the "magnitude", "intensity" or "constancy" of the voters' backing is at

29 See Art. 16 of the Croatian Constitution. Others have written more extensively about the constitutional law aspects of Croatia's Covid response. See, in this journal, Gardašević, Đ., 2021, "Business as Unusual": Pandemic Concentration of Executive Powers in Croatia, *Pravni zapisi*, Vol. XII, No. 1, pp. 91–122. For a comparative regional perspective, see Miljojković, T., 2021, Emergency Governance (Un)bound: A Brief Reflection on Southeast Europe's Response to Covid-19 Pandemic, *Pravni zapisi*, Vol. XII, No. 1, pp. 123–145.

30 Miloš, M., 2022, Susprezanje autonomije političkog predstavništva građanskim inicijativama, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 43, No. 1, p. 30.

31 Decision of the Constitutional Court of the Republic of Croatia in case U-VIIR-2180/2022, 16 May 2022, *Official Gazette*, No. 112/22.

32 Taillon, P., 2012, pp. 173–174

33 Canepa, A., 2001, Referendum costituzionale e quorum di partecipazione, *Quaderni costituzionali*, 2, pp 289–312; Oklopčić, Z., Secession Reference and Its Intellectual Legacy: Sceptical Notes from the European Peripheries, in: Delledone, G., Martinico, G., (eds.), 2019, *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, Cham, Palgrave Macmillan, p. 218; Zwart, S., 2010, Ensuring a representative referendum outcome: the daunting task of setting the quorum right, *Social Choice & Welfare*, Vol. 34, pp. 643–677.



issue.<sup>34</sup> Because of this, Oklopčić continues, we are not asking how responsive to changing popular impulses should institutions be. We are instead preoccupied with the problem of justification, *i.e.* whether a majority clearly supports a referendum outcome at one point in time.<sup>35</sup> This also indicates that the clear majority is thought of as a filter internal to referendums, related only to a single popular vote and unconcerned with what goes on beyond it.

In essence, the interpretation of popular sovereignty as a matter of ensuring the prevalence of a clear majority at the moment the referendum is held invokes the understanding of popular rule dominant in the literature on referendums. As argued elsewhere, scholars identify “the people” as a representative construct with the electorate voting in the procedure,<sup>36</sup> meaning that popular sovereignty conflates with a clear majority achieved at a breaking point that the referendum symbolizes. Clarity of the question supplements this majority by providing it with a singular purpose, allowing all the participating voters to coalesce into one decision-maker that is “for” or “against” the outcome.

The concentration of the many into a single popular sovereign comes at a cost. By being transformed into a mass of individual votes, “the people” and its majority is merged with the referendum question, the individuals are stripped of all substance that is extrinsic to their “yes” or “no” and remain “sovereign” only in relation to a question asked by another.<sup>37</sup> This state is tolerable because the referendum reduces the people momentarily and within the bounds of the referendum only, so that a decision may be reached, and the sovereign people is disbanded by the act of deciding, freed at the same time from the reductive influence of a referendum. Their decision, however, remains as a symbolic representation of the sovereign will, making the electorate continuously and reductively represented by a single moment in time. As I will argue, this is a moment open to manipulation by political actors and is a source of trouble for jurists who struggle with the referendum’s temporality.<sup>38</sup> Even without the conundrum of a majority expressive of a vague normative standard, the issue of

34 Oklopčić, Z., 2019, p. 218.

35 *Ibid.*, p. 219.

36 Miloš, M., 2020, pp. 69–70.

37 Böckenförde, E. W., Democracia y representación. Crítica a la discusión actual sobre la democracia, in: 2000, *Estudios sobre el Estado de Derecho y la democracia*, Madrid, Editorial Trota, pp. 136–137.

38 See, for instance, Lanchester, F., 2011, *Il referendum elettorale: tra l’infanticidio e il miracolo di Lazzaro*, *Nomos*, N. 0, pp. 1–6; Mezzanotte, M., 2015, *La reviviscenza e i limiti finalistici del referendum abrogativo*, (<https://bit.ly/3CHR6PU>).

recognizing when may a decision be changed and how this may be done may plague those living in the aftermath of a referendum.

In this guise, clarity exists as a filter that is supposed to simplify a matter to the point where it can be decided by a mass of votes and qualify this collective act by requiring that it meet a numerical threshold. As a barrier between the referendum and its surroundings, clarity is supposed to allow only such content that empowers “the people” by providing it with a clear choice, thereby policing the entrance to the boundaries of the referendum. At the exit of the realm of the popular will, clarity imposes a quantitative standard that plays a triple function: distilling, substituting and isolating. Most obviously, the turn-out and approval quorums distil by not allowing all possible referendum results to achieve relevance but select them according to an ostensibly precise threshold.<sup>39</sup> They substitute in how they are supposed to replace the lack of certainty that a wide-ranging and deliberative process occurred before the votes were cast. If a heightened majority is required to successfully vote an outcome into being, we may argue or at least pretend that the requirement forced those participating in the referendum campaign to sway voters through a pluralistic and inclusive public debate.<sup>40</sup> Finally, the requirement of a clear majority isolates the referendum from contestation to the extent that the demand of a heightened popular assent is both achieved and accepted as a sign of a definite decision of the electorate on a particular political controversy. In this respect, clarity of the majority bolsters the isolating effects of the form of clarity placed on the question. Insofar as a question is clear, it too narrows a referendum’s remit, isolating it from other questions that may have been asked and the political and legal environment of a referendum.<sup>41</sup> The clarity requirement thus filters and distances, strengthening the exceptionality of the referendum as a device for managing change.

39 The precision is only ostensible given that the exact quantification of the quorums is a political decision that is ultimately not necessarily guided by any particular logic or theory.

40 See in this regard the dissent of judges Kušan and Selanec, joined by judge Abramović, in the decision of the Constitutional Court of the Republic of Croatia in U-VIIR-2180/2022, 16 May 2022, *Official Gazette*, No. 112/22, p. 50.

41 In this manner, regular political processes can continue without being entirely overriden by the referendum, which is unsurprisingly considered to be an undesirable scenario. See, e.g., Luciani, M., Referendum abrogativo e rappresentanza politica, in: Capezone, D., Eramo, M. et al. (eds.), 2000, *Referendum e legalità. “Tornare alla Costituzione”*, Torino, G. Giappichelli Editore, p. 62; Wittreck, F., Einleitung: Direkte und representative Demokratie zwischen Konkurrenz und Konkordanz, in: Wittreck, F., 2012, *Volks- und Parlamentsgesetzgeber: Konkurrenz oder Konkordanz?. Dokumentation eines Thüringer Verfassungskstreits*, Baden-Baden, Nomos, p. 9.

Seen as a filter and isolator internal to a referendum, clarity apparently has little to do with anything beyond the referendum itself. It is a “demand for one agreed-upon understanding of concepts that are by their very nature contested”.<sup>42</sup> It comes into being with the referendum and serves only its existence, absorbing only what empowers the voting public and ensures the autonomy of the referendum in relation to other political actors, structures and processes. Indeed, some form of clarity may be a necessary precondition for any referendum. If we are thinking about a form of decision-making that requires a question to be asked to the electorate, there must be sufficient clarity for a question to distinguish itself from other utterances. In this respect at least, referendum is clarity. More demanding forms of clarity build on this necessary feature of the procedure and complement it with the clear majority requirement.

However, even if clarity is defined only as a precondition for a referendum, its meaning cannot be interpreted beyond its context.<sup>43</sup> Clarity of consequences demonstrates this most obviously, as the consequences of a vote are not necessarily set out in the question itself. Indeed, insofar as the referendum is a boundary-drawing exercise, creating incentives, fora and terminal points for change, it is an exercise that must differentiate what is contained within the referendum from what remains outside it, clarity from obscurity. To do so, a referendum must necessarily place demands on the imagined “outside”. Thus, to interpret clarity “in context” is not just about attempting to find a contextualized understanding of its forms, but to ask how is it that clarity taxes its surroundings and, related to this, what are the changes to them required for a referendum to be “clear”.

A boundary does not only contain but repels so that it may maintain the integrity of what is within it.<sup>44</sup> At first sight, clarity helps in this by controlling the ambiguities of politics within the popular decision-making process, apparently depoliticising a referendum by striving, and failing, to eliminate all ambiguities from within.<sup>45</sup> This understanding, however, reads clarity only as a filter internal to a referendum and subservient to it. I suggest that clarity may itself be made clearer if it is seen as a source of a shift in perception whose impact may bring to light standards of clarity that exist independently of a referendum, thus allowing that they be prob-

42 Verrelli, N., Cruickshank, N., 2014, Exporting the Clarity Ethos: Canada and the Scottish Independence Referendum, *British Journal of Canadian Studies*, Vol. 27, No. 2, p. 211.

43 *Ibid.*, p. 206.

44 Wolin, S., *Fugitive Democracy*, in: Xenos, N. (ed.), 2016, *Fugitive Democracy and other essays*, Princeton, Princeton University Press, p. 100.

45 Verrelli, N., Cruickshank, N., 2014, p. 206.

lematised. To substantiate this claim, it is necessary to move beyond the forms of clarity that we are accustomed to meet in a referendum. I will turn to this in the next part of the paper.

### 3. CLARITY: A SHIFT IN PERSPECTIVE TOWARDS HOMOGENEITY AND PREDICTABILITY

In the literature on referendums, clarity is defined in relation to what it is supposed to protect, the voice of the people speaking with authority on a well-defined matter.<sup>46</sup> The obscurity that separates the people from achieving this state of decision-making is considered only peripherally, as an obstacle to achieving clarity. By being bonded to popular sovereignty, clarity is not only expected to simplify but is simplified in turn. It is imagined as a one-way device that sets out the parameters for defining and answering a question, selecting elements of the political and legal environment that can be drawn into a referendum without producing anything besides an apparently unequivocal decision-making process. Here I want to scrutinise this interpretation by first outlining the sources of obscurity that the clarity in referendums is expected to tackle and then by reflecting on how defining a standard of clarity relies on notions of homogeneity and predictability that are a matter of perception.

The ideal of “clarity” of the referendum presupposes that something may make it obscure. The literature usually identifies two sources of obscurity within the referendum. Chief among them is the threat of manipulation. Referendums are always to some extent grounded in an asymmetry of power, where a small group of actors determines the referendum question to which all other voters respond.<sup>47</sup> The clarity of the question addresses this challenge, as the idea behind it is to prevent actors controlling the referendum initiative from combining disparate issues under the umbrella of a single question.<sup>48</sup> Examples of this abuse include log-rolling and riding, where two issues are brought together under a single question to ensure that both are adopted or where a less popular issue is attached

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46 Tierney, S., 2012, p. 227; Klapper, R., 2015, *The Falcon Cannot Hear the Falconer: How California’s Initiative Process Is Creating an Untenable Constitution*, *Loyola of Los Angeles Law Review*, Vol. 48, No. 3, p. 779.

47 This holds even in cases of citizen-initiated referendums, where a smaller group of voters sets out the agenda by formulating the question. On various subjects that may hold the referendum initiative, see Issacharoff, S., Bradley, J. C., 2022, p. 506; Hamon, F., *Le referendum. Étude comparative*, Paris, L.G.D.J., pp. 111–183.

48 Tierney, S., 2013, *Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox*, *Election Law Journal*, Vol. 12, No. 4, pp. 516–517.

to a more popular one to secure its passage.<sup>49</sup> In this respect, obscurity is constituted by combining disparate themes under the guise of one referendum, allowing that those asking the question instrumentalise voters' support for achieving goals not unequivocally set out in the question.

Complexity is another source of obscurity. Scholars argue that contemporary governments operate in environments too complex to be hospitable to regular decision-making by voters, either because of the intricacy of the electorate or of the matter that is to be decided.<sup>50</sup> Indeed, for some authors there may be issues far too complex for any referendum.<sup>51</sup> If a referendum question cannot carve out a comprehensible and predictable unit that may be subjected to a yes or no vote, a clear referendum may not be feasible.<sup>52</sup> Thus, the question must not only be formulated clearly, but also must have consequences that may be foreseeable by voters. To have this effect, a question must be able to simplify its topic to a sufficient extent.

Here, clarity is expected to separate the uncertain from the reliable. As Tierney argues, uncertainty in this regard may emerge from the complex circumstances in which the referendum takes place or from vagueness produced by political actors.<sup>53</sup> In both cases, even a clearly formulated question may not eradicate the obscurity that surrounds the referendum. This also suggests that the way obscurity is constructed outside the referendum impacts the ability to claim that the referendum itself is clear and that the impact of obscurity on referendums, while undertheorized, may have a significant impact on enforcing the ideal of clarity.

A final source of obscurity, cutting across the other two but rarely identified as such, is the language of law in which clarity is expressed and apparently separated from obscurity. Although the argument is that the fundamental form of clarity is ensured by making the question linguistically clear,<sup>54</sup> "clarity" in law is not a simple achievement. According to Flückiger, clarity is in this respect thoroughly ambiguous. While reducible to "readability, simplicity and conciseness" in linguistics, in law clarity is expected to guide "the reader, immediately and unequivocally, with a

49 Kostadinov, B., 2015, p. 72.

50 Issacharoff, S., Bradley, J. C., 2022, p. 506; Promislow, J., *Deciding on the Future. First Nations Ratification Processes, Crown Policies, and the Making of Modern Treaties*, in: Albert, R., Stacey, R. (eds.), 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, p. 203.

51 Tierney, S., 2012, p. 239.

52 *Ibid.*

53 Tierney, S., 2012, p. 236. See also Tierney, S., 2013, p. 510.

54 Tierney, S., 2012, p. 227

precise solution in a concrete case”. The two imperatives conflict.<sup>55</sup> A law drafted with an emphasis in conciseness and readability may provide insufficient guidance when it comes to certainty in application.<sup>56</sup> Similarly, a referendum question that corresponds to clarity in a linguistic sense and even neatly meets the three requirements of form outlined earlier may remain unclear as to its consequences.

Take for instance a referendum question with budgetary implications. Given the complexity of the budget and the processes of its continuous negotiation, even an otherwise clearly formulated question may be excluded because it may produce consequences beyond those of voters’ imagination.<sup>57</sup> Nonetheless, this is not merely an issue of complexity addressed earlier, but a limit of the language of law. Once it restricts a referendum to a concrete subject matter and to a narrow set of options, e.g. whether the voters are for or against a particular expenditure or a specific tax, it may exclude any other consideration that may be relevant. Citizens may well deliberate on these, but the decision formulated in law need not consider them relevant. This was a basis for the Croatian Constitutional Court to reject earlier citizen-initiated referendums imposing a “blanket ban”, a legal category, on specific policies without regard for the budget.<sup>58</sup> It is not just the budgetary intricacies that are the barrier here, but the attempt to ambiguously close down a series of future processes that may occur and that were not expressly excluded from the “blanket ban” contained in the legal language of the proposed referendum, making the question insufficiently sensitive to its context and thus obscure.

The reliance of clarity on its legal medium ensures that a degree of obscurity may always be present in a referendum, even if the question may be considered clear by all the usual standards. This is in part because, as Boyd White forcefully argues, legal language obfuscates by simplifying. When it is applied, this professional idiom is apparently reduced to a practice of naming. We need only check whether the legal label fits the relevant piece of reality. This, however, occults the “process of judgment – of argument and thought – of a most difficult kind” required to create this

55 Flückiger, A., *The Ambiguous Principle of The Clarity of Law*, in: Wagner, A., Cacciaguidi-Fahy, S. (eds.), 2008, *Obscurity and Clarity in the Law. Prospects and Challenges*, Aldershot, Ashgate, p. 10.

56 *Ibid.*, p. 19.

57 Kuzelj, V., 2022, *Zabrana referenduma o proračunskim pitanjima u hrvatskoj i poredbenoj perspektivi*, *Hrvatska i komparativna javna uprava*, Vol. 22, No. 2, p. 335.

58 See, e.g., decision of the Constitutional Court of the Republic of Croatia in case U-VIIR-1159/2015, 8 April 2015, *Official Gazette*, No. 43/15, paras. 37 and 42.

legal sleight of hand.<sup>59</sup> Additionally, insofar as the referendum question relies on the law, it hands over at least some control over the definition of clarity and obscurity to those literate in the law.<sup>60</sup> What is clear to them need not be as clear to anyone else. Hence, clarity can always be injected with a degree of obscurity if the legal language it is expressed in may be declared too vague.

Intertwined with all three sources of obscurity is the problem of perception. In the case of manipulation, the question's content may hide an ulterior purpose invisible to the voter. With complexity, the problem is that the question itself or its consequences may not be sufficiently accessible to the voting public. Finally, the obscurities of the legal language are mercurial and depend on who is the observer. For instance, courts and voters may draw from different sources in interpreting a referendum question and may thus have a different understanding of its legal dimension.<sup>61</sup> Whether the question is clear may then depend on who is in the position to assess clarity and provide a normative judgment on it. Clarity is indeed "in the mind's eye of the beholder".<sup>62</sup>

The interplay of clarity and perception normally remains invisible because referendums conflate with an exercise of the right to vote, making clarity a quality subservient to this right. The ability to provide an informed vote on a defined issue is a shorthand for a voters' perception within the referendum that is then not discussed separately. An additional barrier to discussing perception and clarity is in the identification of referendum, change and a decision that was already hinted at in the introduction to this paper. Referendums are interpreted as creatures of will rather than reasoning,<sup>63</sup> of decisive moments instead of seeing political matters in a different light,<sup>64</sup> of (sometimes radical) transformations reflective of the constituent power instead of subtle shifts in perception.<sup>65</sup> Clarity may by consequence be easily attached to enabling the popular

59 White, J. B., 1973, *The Legal Imagination. Studies in the Nature of Legal Thought and Expression*, Boston, Little, Brown and Company, p. 230.

60 Miloš, M., 2021, p. 126.

61 Shacter, J. S., 1995, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, *The Yale Law Journal*, Vol. 105, No. 1, pp. 107–176.

62 Verrelli, N., Cruickshank, N., 2014, p. 212.

63 Urbinati, N., 2006, *Representative Democracy. Principles & Genealogy*, The University of Chicago Press, Chicago, p. 32.

64 Mathieu, B., *Le droit contre la démocratie?*, Paris, L.G.D.J., p. 288.

65 Roznai, Y., Amendment Power, Constituent Power, and Popular Sovereignty, in: Albert, R., Contiades, X., Fotiadou, A. (eds.), 2017, *The Foundations and Traditions of Constitutional Amendments*, Oxford, Hart Publishing, p. 44.

will, a decision and a change on the topic that is decided, and the way it does its work remains unrecognised.

A shift in the way clarity is conceptualized may be useful to move beyond clarity's identification with the will of the voting public on the one hand and the referendum on the other. It requires us to stop seeing clarity as a passive quality of a question or the threshold of an ostensibly clear majority and thinking of it more as an active factor that is not entirely constrained by the bounds of the referendum. To do so, I want to draw from important new work on transparency. In an insightful and highly original exploration of the concept, Ida Koivisto argues that transparency may be interpreted as a medium, an "inconspicuous one,"<sup>66</sup> invisible much like clarity that is defined in relation to popular sovereignty on the one hand and the common meanings attributed to the referendum on the other. As is the case with transparency, clarity "promises to be a disinterested messenger between the 'real thing' or 'the thing in itself' and the representation."<sup>67</sup> After all, clarity derives from the Latin *claritas*, meaning "clearness," "vividness" and the verb *claro*, i.e. "clear," "explain."<sup>68</sup> Thus, clarity apparently appears as a mediator that only reveals and expounds what is already there.

There are three important consequences that follow from imagining clarity as a mediator that cannot be identified just with the referendum or the perception of the voters, the first being that, just as transparency, clarity is about "regulating visibilities,"<sup>69</sup> not about the absence of obstacles between "the people" and political power, immediacy apparently required by the very notion of "direct democracy". It is about refocusing one's attention so what appears does not seem to be obscure. This is probably one of the points of greatest overlap between clarity discussed here and transparency.<sup>70</sup> As a medium for referendums, clarity does not remove the influence of political elites or any other parties that shape the process of decision-making, but, by imposing requirements on the question and the outcome of vote, seeks to make the actions of those actors more clear.

What this standard of greater clarity means, however, is not entirely evident. For instance, where clarity is arguably ensured beyond the referendum, a question that may otherwise appear unclear may be depicted

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66 Koivisto, I., 2022, *The Transparency Paradox. Questioning an Ideal*, Oxford, Oxford University Press, p. 31.

67 *Ibid.*, p. 32.

68 Oseid, J. A., 2012, The Power of Clarity: Ulysses S. Grant as Model of Writing "So That There Could Be No Mistaking It", *Legal Communication & Rhetoric*, Vol. 9, No. 1, p. 54.

69 Koivisto, I., 2022, p. 14.

70 *Ibid.*, p. 98.



as completely clear for the purpose of the referendum. For instance, in the wake of the Italian referendum on the constitutional reform of 2016, some have argued that the referendum question was unclear because, in addition to a bundle of different constitutional provisions, the voters had to decide on changes to an entire section of the Constitution without them being specified. Thus, there was a difference in the degree of generality in the question which could have made it unclear. However, it was found that the prior enactment of the bundle of constitutional changes by the Parliament, although with a majority insufficient to adopt the amendments without a referendum, sufficed for the question to be clear.<sup>71</sup> Were the actors behind the question not the elected members of parliament, the conclusion would likely be different. It is the legitimate parliamentary process of negotiating the constitutional amendments that provided the clarity of the question.

The second point of overlap with transparency lies in how clarity “implies selection, highlighting, omission, and following the conventions of the medium”.<sup>72</sup> A referendum question must, for example, select only a single topic it will deal with to be viable under the requirements of clarity. To do so, however, is not to obviate everything that remains outside the question. Indeed, referendums are acceptable only insofar they do not entirely eclipse political structures, processes and actors beyond it.<sup>73</sup> The very idea of a referendum as a form of participation in governing rather than a dominant site of power attests to this. Hence, the selection embodied in the clarity of a question does not involve an actual homogenisation of the subject matter the referendum deals with, but a shift in emphasis, an isolation of a specific part of it in the perception the referendum enables. Similarly, a referendum only foregrounds the political rights of individuals participating in it, particularly their right to vote, but it does not restrict their fundamental freedoms nor should it serve to strip anyone of their rights.<sup>74</sup> The voters are thus not actually transformed into a mass of

71 Rivosecchi, G., 2017, *La tutela del voto referendario. Note a margine del ricorso „Onida-Randazzo” al Tribunale civile di Milano*, Associazione italiana dei costituzionalisti – Osservatorio costituzionale, paper nr. 1, (<https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/guido-rivosecchi/la-tutela-del-voto-referendario-note-a-margine-del-ricorso-onida-randazzo-al-tribunale-civile-di-milano>, 9. 10. 2022), p. 14.

72 *Loc. cit.*

73 Greifeld, A., 1983, *Volksentscheid durch Parlamente. Wahlen und Abstimmungen vor dem Grundgesetz der Demokratie*, Berlin, Ducker & Humblot, pp. 105–106.

74 On fundamental rights and direct democracy, see Christmann, A., 2011, *Die Grenzen direkter Demokratie. Volksentscheide im Spannungsverhältnis von Demokratie und Rechtsstaat*, Baden-Baden, Nomos; Hartmann, B. J., 2005, *Volksgesetzgebung und Grundrechte*, Berlin, Duncker & Humblot.

voters that need only decide “for” or “against” an issue. They are only seen as such within the scopes of clarity’s lenses.

Finally, as is the case with transparency, clarity is an artifice that depends on someone’s agency, the “hand at work” in Koivisto’s exploration of transparency.<sup>75</sup> Much as transparency bears iconophilic and iconoclastic aspects, meaning that the “hand at work” either creates images that are argued to be reflective of reality or clears the way of different representations that ostensibly block one’s gaze,<sup>76</sup> clarity may be the work of several actors. Those with the power to define the question and turn out and approval quorums obviously do so with the understanding that these standards reflect reality, while those who strive to relativise and possibly remove such constructs consider them an obstacle to some other, more real vista. Courts play an important role in this project in a variety of jurisdictions when they are empowered to oversee the clarity of referendums.<sup>77</sup> Identifying and enforcing clarity is in any case not synonymous with articulating the question at the heart of the referendum because, as a medium, clarity does not hinge only on those in the position to ask the voters to decide on a matter. The act of asking a question invokes an underlying struggle over clarity as a medium, one that I will introduce in the next part of this paper.

The artifice of clarity shapes our vision so that, as it enables a clear referendum question and a clear majority, we are supposed to perceive two textures: homogeneity and predictability. A referendum that remains heterogeneous, unpredictable or both is to some extent obscure and as such suspect. In terms of the question posed before the voters, clarity sets out the requirement that the question must refer to a single subject matter, that it must not involve both a specific issue and a matter of principle and that it must not simultaneously change different legal acts. Homogeneity further expresses itself in the clear majority requirement by requiring that a significant number of voters coalesce in a single mass for or against a specified outcome. The theme of predictability attaches to the majority requirement by defining in advance a numerical threshold that quantifies the majority considered significant. The standard of predictability is incorporated most obviously in the idea that consequences of a referendum should be predictable and is in this sense reflected in the unity of form and content standards. Both require that a referendum question affects only a specified matter defined in advance.

Homogeneity and predictability brought about by clarity may be identified as “iconophilic representations”<sup>78</sup> in the theory of transparency, in

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75 Koivisto, I., 2022, pp. 37–40.

76 *Ibid.*, p. 39.

77 Miloš, M., 2021.

78 Koivisto, I., 2022, p. 34.

that they create representations of a homogenous and predictable reality that are supposed to represent clarity. They may then be defined as “performative imitations”<sup>79</sup> According to Koivisto, these are “constructs” that represent abstractions, such as governance.<sup>80</sup> If these constructs are taken to be the mediators of clarity, we are no longer required to attempt finding some universal form of clarity that is accurate, because we are aware that performative imitations are always that, imitations. The task of homogeneity and predictability is to ultimately represent the decision of “the people”, but we can never be certain how accurate the representation is and, in this light, we can never find an objective and universal standard of clarity.

To argue, as some scholars do,<sup>81</sup> that clarity is not itself clear because the law it relies upon contains obscurities is then entirely unexceptional. When seen in relation to the referendum, clarity is not only a filter that secures homogeneity and predictability within the bounds of a decision-making process. It is instead directed from the referendum outwards, throwing its light on a segment of a referendum’s context in a way that attempts to represent differently the heterogeneities and uncertainties that are the stuff of the regular political life. The referendum is then not only preconditioned by clarity, but may be seen as a performance of clarity. However, in observing this projection of homogeneity and predictability, we are reminded that clarity is the engine of political power.<sup>82</sup> While it may make a referendum appear homogeneous and predictable, doing so draws from political (dis)continuities and popular perceptions that exist independently of a referendum, thus bringing to light the terrain of clarity and obscurity beyond the boundaries of this decision-making procedure. This is the topic of the final section of this paper.

#### 4. CLARITY IN A CHANGE BEYOND THE REFERENDUM: A STRUGGLE OVER (DIS)CONTINUITY AND POPULAR PERCEPTION

There is a sense of closure embedded in a referendum, albeit a limited one. A referendum need not close a political development since it may induce political processes, particularly if it is imagined as a mandate to the elected representatives. However, each referendum is a closure in that it indicates a question that needs to be asked at a particular time and to

79 *Ibid.*, p. 35.

80 *Ibid.*, p. 36.

81 Taillon, P., 2012, p. 195.

82 Harris, W. F., *The Interpretable Constitution*, Baltimore, The Johns Hopkins University Press, 1993, p. 37.

a demos that is constituted in a specific way. In this sense, a referendum draws out an issue to make it more exceptional than its context, other political processes, structures and actors, some of which may compete with the referendum while others may remain entirely agnostic to it. A referendum thus emerges from a state of heterogeneity and uncertainty, the obscurity that is apparently countered by clarity.

Once the referendum singles out an issue, a struggle begins over the closure it produces, over the content and the form of the question and its timeliness, with clarity being drawn into the fray. Here I want to explore this process on a range of comparative illustrations to show how clarity is not only a part of the referendum, but resonates with clarity beyond it, participating in a process of change that transcends a single referendum. In this sense, even if the referendum may produce a certain form of closure regarding the question contained in it, the forms of clarity it projects interface with ongoing political (dis)continuities (4.1.) and the perception of change (4.2.).

#### 4.1. CLARITY AND (DIS)CONTINUITY

Homogeneity and predictability are the key themes of clarity in a referendum. Their antipode, obscurity, includes the heterogeneity and unpredictability that remain beyond the referendum's bounds. These are the staple of regular political life and their obscurity is not necessarily a bane that clarity must exorcise. Indeed, obscurity in general may be productive and even necessary. It "disrupts the audience's known universe and facilitates a shift toward new ideals, values, and states of self-awareness"<sup>83</sup> While it may make "audiences vulnerable to accepting a range of undetected special interests, values, and ideas,"<sup>84</sup> heterogeneity and unpredictability also allow for political processes that work out forms of homogeneity and predictability. These, as temporary and as limited as they may be, may also become a part of decisions reached in a polity. Indeed, for some authors, the inability or the intentional failure to attempt approximating clarity in law through written constitutional language remains crucial for maintaining spaces for unwritten political practices and for sustaining existing constitutional regimes.<sup>85</sup> These constitutional silences are an acknowledgment of the need for maintaining political heterogeneity and unpredictability in codified constitutions.

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83 Domenico, M. E., 2020, p. 463.

84 *Ibid.*, p. 464.

85 Foley, M., 1989, *The Silence of Constitutions. Gaps, "Abeyences" and Political Temperament in the Maintenance of Government*, New York, Routledge; Loughlin, M., *The Silences of Constitutions*, *International Journal of Constitutional Law*, Vol. 16, No. 3, pp. 922–935.

To bypass the heterogeneities of regular political life, clarity zooms onto the outcomes of such processes that take a legal form. A brief comparative look will demonstrate that the hierarchy of sources of law is one dominant criterion for determining the issues open to a referendum. For instance, in some jurisdictions it is possible to amend the constitution via referendums, even citizen initiated and discretionary referendums.<sup>86</sup> In some states of the United States, the law draws a difference between a constitutional amendment, a possible subject of a ballot initiative, and a revision that may not be carried out in this manner.<sup>87</sup> In other jurisdictions, such as Italy, constitutional referendums may be obligatory only in cases the parliament fails to reach a sufficient majority for a constitutional amendment, while citizen initiated referendums may be restricted to abolishing legislation and, even then, not any type of law may be submitted to a referendum.<sup>88</sup> In some rare cases, a referendum may be called only for very specific, extremely narrowly defined matters, such as the “structure and process” of the legislature in Illinois.<sup>89</sup> The clarity criterion as summarised in the first part of this paper, may include all these situations by requiring that the referendum refers to either the constitution or the legislation, a specific issue or an issue of principle and a single subject matter in all cases.

If it is able to single out the outcomes of political processes by following a referendum’s lead, clarity may use legal homogeneity and predictability, incarnated as “the constitution” or “an act of legislation”, to paper over conflicting interests and accompanying interpretations that might have emerged and might have had more of an impact in a different political process.<sup>90</sup> Clarity in this draws from law to establish continuity with

86 Hertig Randall, M., *Direct Democracy in Switzerland: Trends, Challenges and the Quest for Solutions*, in: Chommeloux, A., Gibson-Morgan, E. (eds.), 2017, *Contemporary Voting in Europe. Patterns and Trends*, London, Palgrave Macmillan, p. 132; Albert, R., 2022, *Discretionary Referendums in Constitutional Amendment*, in: Albert, R., Stacey, R., 2022, *The Limits and Legitimacy of Referendums*, Oxford, Oxford University Press, pp. 63–87.

87 Graves, E. L., 1998, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, *Loyola of Los Angeles Law Review*, Vol. 31, No. 4, p. 1307.

88 Chiappetti, A., 1974, *Lammissibilità del referendum abrogativo*, Milan, Giuffrè Editore, pp. 7–54.

89 Fitch, S. M., 2017, *Citizen Ballot Initiatives to Amend the Illinois Constitution*, *DCBA Brief*, Vol. 29, No. 1, pp. 15–16.

90 See, for instance, the projects that have led to a constitutionalisation of a prohibition of affirmative action in university enrolment in some states of the US. Bernstein, D. E., *Reverse Carolene Products, the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, *Cato Supreme Court Review (2013-2014)*, pp. 261–306.

the existing legal framework. However, in making such a claim, clarity also brings to light discontinuities, some of which may have been latent prior to the referendum and have lacked clarity that the invocation of direct democracy occasioned.

For instance, the very identity of a legal category may be at issue. If the voters are asked to amend a legislative act with a provision that might have arguably been made a part of a constitution, an attempt may be made to dispute the amendment's constitutionality. This was the case in the Swiss canton of Neuchâtel<sup>91</sup> where a legislative referendum was advanced to obligate the cantonal legislature to express an opinion on constructing a nuclear power plant should the federal government decide to build it on the territory of the canton. Clarity of a referendum question was not an issue, given that the referendum was focused on a single legal category. Nonetheless, the attempt to amend the relevant law and not the cantonal constitution created a conflict over the content of the legislation as opposed to the constitution. Clarity apparently undoubtedly established by the referendum question was problematic not because of the referendum itself, but because it would restrict the space for obscurity of political processes beyond it, creating a form of discontinuity.

In Germany, the attempt to introduce a new form of advisory referendum, one that the Bavarian executive power would be able to call on its own for the territory of the Land, resulted in unconstitutionality. Again, the clarity of the referendum itself was not at issue. The question as formulated was not found obscure at the slightest. The problem instead was in the interplay of a clear referendum question and the movements of clarity and obscurity beyond it. The Bavarian Constitutional Court found that a referendum that can be initiated by the government itself, even if it is only advisory, may be abused to bypass regular legislative processes and rely directly on "the people" to enact policies with a special aura of legitimacy.<sup>92</sup> This would generate a form of discontinuity with the existing constitutional order that was found unacceptable and thus unconstitutional. The guiding idea behind this decision is that the parliamentary process is the key channel for working out the will of the people and that its core cannot be subjected to arbitrary invocations of popular clarity through an advisory referendum.

Once clarity relies on legal categories to bypass regular political heterogeneity and unpredictability, its language beyond the referendum itself

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91 See, for example, the decision of the Supreme Court of the Swiss Confederation in case 104/343 of 5 July 1978 (*Annen et consorts contre Grand Conseil du canton de Neuchâtel*).

92 See the decision of the Constitutional Court of Bavaria in case Vf. 15-VIII-14, Vf. 8-VIII-15 of 21 November 2016, paras. 79 and 95.

may morph into that of (un)constitutionality. It is easy enough to discard conflicts this produces by claiming that clarity is only a precondition for a referendum and that it should be separated from unconstitutionality.<sup>93</sup> However, this would ignore clarity's separate existence as a medium that may be politically engaged beyond the forms of direct democracy. Indeed, to claim that voters may demand and may be exposed to clarity or obscurity in politics only within the bounds of a referendum is to think of "the people" as a passive element of political life, imagined and manipulated without any agency of its own, able to only respond to a question asked by another. Furthermore, it is to drain both clarity and obscurity of any relevance beyond forms of direct democracy, as if no other political process may generate and affect them. The perspective that takes this position is myopic at best, as even the forms of clarity that serve as its precondition and are interpreted by courts draw from existing legal and political content. The interpretation of clarity in the case law of the Constitutional Court of Italy, for example, draws its content from the relevant constitutional and legal provisions, as well as a positivist interpretation of law that is neatly separated from politics.<sup>94</sup> In some other jurisdictions, such as Switzerland,<sup>95</sup> the language of popular sovereignty might have a more powerful hold.

Clarity may also depart from legal forms or may appear in referendums that may lead to a break with the legality that ensures continuity of a constitutional order. The prime example of a referendum that breaks with the existing constitutional framework is a self-determination referendum as it, even if it is provided for in law, moves beyond the law in initiating a new constitutional order.<sup>96</sup> Other examples include referendums that depart from the existing law in bolstering the position of the executive, such as the well-known De Gaulle referendum of 1962.<sup>97</sup> In such cases, the

93 Miloš, M., 2021, p. 145.

94 See, for instance, the decision of the Constitutional Court of the Republic of Italy in case 28/1981, (ECLI:IT:COST:1981:28) of 10 February 1981, published in *Gazzetta Ufficiale*, No. 48 of 17 February 1981, para 6; Esposito, C., 1954, Commento all'art 1 della Costituzione, in: *La Costituzione Italiana – Saggi*, Padova, CEDAM, p. 11; Merryman, J. H., 1999, The Italian Style I: Doctrine, in: *The Loneliness of the Comparative Lawyer. And Other Essays in Foreign and Comparative Law*, Den Haag, Kluwer Law International, p. 186.

95 Auer, A., 1978, *Les droit politiques dans les cantons Suisses*, Geneva, Librairie de l'Université George et Cie S.A., p. 21.

96 Thus, Tierney argues that such referendums are constitution-framing rather than amending (Tierney, S., 2012, p. 14).

97 Reestman, J-H., A Future for Referendums in the Fifth French Republic?, in: Contia-des, X., Fotiadou, A. (eds.), 2017, *Participatory Constitutional Change. The People as Amenders of the Constitution*, New York, Routledge, pp. 54–55.

question may not be formulated clearly or, even if it is formulated clearly, produces interpretative disputes over political (dis)continuities that may only uneasily find a form of resolution in law.

An example of this scenario is the 1991 self-determination referendum held in Croatia. The referendum question was formulated in a way that left room not only for the dissolution of Yugoslavia, but also for a confederacy or some other form of federalism.<sup>98</sup> While contemporarily interpreted as an indisputable vote for independence, it occurred against the background Jović calls a “linguistic-philological-politological debate” on a range of concepts, such as “the people”, “self-determination” and “democracy”.<sup>99</sup> It is difficult to ascertain if the referendum whose definition of relevant issues was not exactly narrow could have had any definite impact on the already existing heterogeneity. The moment of decision-making it enabled was certainly used in later political processes to assert the certainty that might have not been produced by the referendum itself.

A case in which clarity was given a legal form after repeated attempts to achieve self-determination via referendum is the Clarity Act of 2000, enacted following the Supreme Court of Canada’s famous Secession Reference.<sup>100</sup> After the judicial impetus provided by the Reference, the federal government sought to set out the meaning of clarity in law so that future attempts at self-determination would be guided by a clear framework. However, commentators have noted that the attempt to stabilise a representation of clarity in law is not without dispute. While its legitimacy dovetails a widely recognised judicial ruling that makes it “difficult in the future for secessionist leaders in Quebec to ignore” it,<sup>101</sup> Quebec enacted its own Act Respecting the Fundamental Rights and Prerogatives of the Québec People and the Québec State.<sup>102</sup> Neither

98 Arbutina, P., *Dejan Jović: „1990. tek 11% Hrvata za nezavisnost“*, (<https://www.auto-graf.hr/dejan-jovic-1990-samo-11-gradana-srh-zagovaralo-nezavisnost/>, 9. 10. 2022).

99 Jović, D., 2017, *Rat i mit. Politika identiteta u suvremenoj Hrvatskoj*, Zagreb, Fraktura, p. 163.

100 See, in general, Monahan, P. J., Doing the Rules. An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference, *C.D. Howe Institute Commentary*, No. 135, pp. 3–39.

101 Mendes, E. P., The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally, in: Delledone, G., Martinico, G. (eds.), 2019, *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, Cham, Palgrave Macmillan, p. 28.

102 Gaudreault-DesBiens, J-F., The Law and Politics of Secession: From the Political Contingency of Secession to a “Right to Decide”? Can Lessons Be Learned from the Quebec Case?, in: Delledone, G., Martinico, G. (eds.), 2019, *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, Cham, Palgrave Macmillan, p. 45.



of the two has established a process that may lead to a completely clear outcome in the case of Québec's self-determination.<sup>103</sup> Thus, again, the referendum was used to project a form of clarity that remains in dispute, with the image it provided unable to set aside political heterogeneity and unpredictability.

Where attempts are made to articulate clarity through channels that either evade law or are not successfully contained by it, the language of law finds itself in a more precarious position. Continuities and discontinuities, as well as the impact of referendums and their clarity on the matter, gain their significance more from political practices than from legal codifications. In such cases, even relatively clearly formulated questions may be less decisive than the way the clarity or obscurity they provided becomes instrumentalized.

#### 4.2. PERCEPTION OF CHANGE

As representations of clarity, homogeneity and predictability also delineate the perception of change. Both the clarity of the question and the clear majority requirement play a pivotal role in this, as both are supposed to convey the issue to be decided and a threshold of relevance for the decision of the electorate. Homogeneity incorporated in the question and in qualified majorities is thus supposed to make the referendum unequivocal, while predictable consequences are to guarantee that changes enacted through a referendum would not lead to outcomes not evident at the time of the referendum. On a broader level, the representations generated by clarity in a referendum create a perception of change that may contrast with those advocated beyond the referendum. Because of this, clarity projected by this form of direct democracy may lead to conflicts over the meaning and scope of change.

An example from Italy may help illustrate this point. In 1981, the Italian Constitutional Court was called upon to decide on the constitutionality of a referendum that aimed at a wholesale reform of a segment of the existing criminal law. The referendum that advanced this reform was supposed to abolish thirty-one articles of the Criminal Code, which included a broad spectrum of crimes. As one might imagine, the issue was whether the question was clear given the apparent heterogeneity of the proposal. For those advocating the referendum, the different crimes that were to be abolished were connected by underlying themes. They all criminalised kinds of speech that offended the symbols of the state and the "reputation

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103 *Ibid.*, pp. 45–46.

of the Italian nation”.<sup>104</sup> At the same time, the different crimes covered not only speech, but also freedoms of public assembly and association. Additionally, those supporting the referendum argued that the voters have been sensitized to the meaning of the referendum despite the heterogeneity of its subject matter, arguing that this should lead the Court to find that the referendum is acceptable.

Following the already noted tendency towards focusing strongly on legal categories, the Italian Constitutional Court refused to confirm the clarity of the referendum question. The Court found that it could not verify what the voters perceived to be the change involved but decided instead to adjudicate solely on the basis of a set of legal norms affected by the referendum. It had found that the crimes that were suggested for removal from the legal order affected a panoply of different protected goods, such as public order, public administration and religious sentiment.<sup>105</sup> The perception of change that might have existed in the referendum campaign at the time was entirely set aside. This meant that the referendum could address changes to the legal order solely if individual referendums singled out individual crimes or if the changes to legal order were affected through other means, particularly regular representative processes.

While the Italian example arguably represents an easy case, it also illustrates the different perceptions of change that can be at play in a referendum. An attempted referendum on a constitutional amendment in Croatia recently provided the terrain for similar observations. As already noted earlier, the referendum was an attempted amendment to the Croatian Constitution which, in the context of the pandemic, was supposed to amend Article 17 of the Croatian Constitution with two words, “pandemic” and “epidemic”.<sup>106</sup> Article 17 provides that the Croatian Parliament is obligated to enact restrictions on fundamental rights with a two-thirds majority if the said restrictions address a state of emergency. The referendum responded to the failure of the Parliament to abide by this obligation, the idea being that adding the two terms to Article 17 would force the Parliament to change its original decision.

The Croatian case was laden with different changes and perceptions of their necessity and content. Motivated by the huge changes and challenges brought about by the pandemic, organised in the shadow of an increasingly empowered executive and questioning the changing role of

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104 See the decision of the Constitutional Court of the Republic of Italy in the case 28/1981 (ECLI:IT:COST:1981:28) of 10 February 1981, published in *Gazzetta Ufficiale*, No. 48 of 17 February 1981, Ritenuto in fatto, para 5.

105 *Ibid.*, Considerato in diritto, para. 6.

106 More on the referendum in Miloš, M., 2022.

human rights and their restrictions that shifted from a necessity to a matter of public health and security, an addition of two seemingly innocuous words turned out to be extraordinarily controversial. Indeed, the Court's decision to stop the constitutional amendment in its tracks, finding that the referendum cannot achieve its purpose just by adding two words to a constitutional provision, led the president of Croatia himself to argue for the abolition of the Court.<sup>107</sup>

In its decision, the Court invoked the standards of clarity advocated by the Venice Commission but did not use these to find the referendum question unclear. Instead, the question was found lacking because of the unclear consequences of the constitutional amendment.<sup>108</sup> On the other hand, the three dissenting judges argued that citizens were made aware of the intended purpose of the referendum and that they would be able to cast an informed vote to express their "constitution-making will" that would, for the dissenters, obligate the Constitutional Court to order the Parliament to change its approach to constitutional interpretation.<sup>109</sup> Hence, much like in the Italian case, the dissenting judges relied on the political and communicative dimension of the referendum to define standards of clarity, while the majority decided to adhere to an approach that somewhat unpersuasively predicted the unpredictable consequences of the referendum via a supposed violation of the rule of law that was based in misleading the voters.

In both the Italian and the Croatian case, the court-centric perspective reveals that clarity in a referendum can rely on two sources to flesh out the clarity in a referendum. One departs from existing legal categories, while the other defers to some extent to the supposed intention of the voters tied to their perception. As described in the existing literature, both have advantages and disadvantages, as a legalistic approach is easier to handle for a court while simultaneously creating room for introducing obscurity of the law into the decision-making process. The other may lead the court to abdicate its power to control the clarity of a referendum.<sup>110</sup> In either case, the perception advanced by the referendum has to face others that already exist and differ from the understanding of change advocated by the supporters of a referendum outcome. The Croatian referendum

107 Milanović napao Ustavni sud, (<https://www.tportal.hr/vijesti/clanak/milanovic-napao-ustavni-sud-ukinimo-ga-nema-razloga-postojati-nakon-ovog-ovo-je-drzavni-udar-foto-20220516>, 20. 9. 2022).

108 Decision of the Constitutional Court of the Republic of Croatia in case U-VIIR-2180/2022, 16 May 2022, *Official Gazette*, No. 112/22, para. 16.

109 See *Ibid.*, the dissenting opinions of judges Kušan and Selanec, joined by judge Abramović.

110 Miloš, M., 2021.

that introduced a definition of marriage into the Constitution serves to illustrate this point. While advocated by its supporters as a key recognition of the heterosexual marriage, uplifting a definition of marriage as a union of one man and one woman had a very limited impact. In its shadow, new legislation has been enacted that strengthens the rights of same-sex couples, thus leading to a co-existence of different perspectives of change.<sup>111</sup> Despite a completely clear question, the referendum did not depoliticize the issue, but created new arenas of struggle.

The argument that clarity expressed through a referendum involves a shaping of the perception of change opens new questions that can only be summarily posed in this paper. Most importantly, it requires us to ask what is the “perception” of change that is being affected by clarity identified in a referendum. The outline of the problem I have provided here conflates a visual perception of change with the clarity as an image that is created through words.<sup>112</sup> In referendums, clarity is not about seeing images without verbal mediation, but perceiving precisely through the medium of words. In both Italian and the Croatian examples, it is the distance between a verbal depiction of clarity and the outcome of the referendum that is the matter of dispute. For the supporters of the Italian referendum and the dissenting judges in the Croatian case, what is being changed is clear because the voters can be assumed to understand the referendum in a specific way. Thus, at issue is not the clarity of the perception as seeing, but the ability to reconstruct the image projected by the question through an act of will. It is the degree of obscurity that a perception of change allows that is the crux of the problem, rather than a binary distinction between a question that is unequivocal in its meaning and a question that may be interpreted in several different ways.

## 5. CONCLUSION

At the core of this paper is the claim that the clarity of the referendum can be mined for useful insight about clarity in constitutional law more broadly. The argument was that this requires a revisit of how clarity is understood in relation to a referendum. While originally seen as a precondi-

111 Miloš, M., Esej o emancipaciji posredstvom neposredne demokracije, in: Horvat Vuković, A., Kuzelj, V., Petričušić, A. (eds.), 2022, *Razvoj i zaštita prava LGBTIQ+ osoba. Zbornik radova s međunarodnog znanstvenog skupa „Razvoj i zaštita prava LGBTIQ+ osoba“ održanog 10. prosinca 2021. godine*, Zagreb, Za-Pravo LGBTIQ+ osoba, pp. 35–54.

112 For more on this distinction, see Thomas, M., 1986, *Iconology: Image, Text, Ideology*, Chicago, The University of Chicago Press, pp. 125–129.

tion that is internal to a form of direct democracy, serving to maintain its integrity and ultimately depoliticising it, I have argued that its representations also have an external dimension, one that interacts with interpretations of clarity that exist independently of a referendum and are brought to bear in the wake of the vote of “the people”. This argument illustrates how the referendum is not only preconditioned by clarity, but is a form of its performance, managing change beyond the question to which the referendum is explicitly directed. In this regard, two areas appear to be important: political (dis)continuities and perceptions of change.

Clarity does not invite us to embark on a quest for objectivity and depoliticization, as it itself politicizes in a different way. Referendums in particular, even when prefaced with clarity, do not cease to be political in this sense, precisely because clarity hinges on ambiguity and has to introduce ambiguity in order to define itself against it. The ambiguity or obscurity is not in itself to be discarded, as it plays a constructive role in politics and in law. Clarity should thus be seen in a broad interaction with its antipode, instead of it being identified with a simplistic depoliticization.

The key move of this paper that allowed me to take a step in a new direction was the brief exploration of the overlap between clarity and transparency, particularly the shift made from thinking about clarity as a filter existentially tied to a referendum to clarity as a projection of the referendum. The homogeneity and predictability that have been identified as referendum’s projections of clarity should be explored further, particularly in relation to other forms of clarity and obscurity that may be developed in different fora across constitutional democracies.

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## JASNOĆA REFERENDUMA: INSTRUMENT UPRAVLJANJA (DIS)KONTINUITETIMA I PERCEPCIJOM PROMJENE

Matija Miloš

APSTRAKT

Jasnoća se obično smatra preduvjetom valjanog referenduma. Ona traži da referendumsko pitanje bude jasno te da jasna demokratska većina bude za ili protiv određenog ishoda. U ovom radu tvrdim kako jasnoća nije samo nešto što omogućava pojedinačne referendume već jedan način na koji se njihov kontekst može politizirati. U činu odvajanja onoga što je jasno od onoga što ostaje opskurnim, jasnoća nameće dva zahtjeva, homogenost i predvidljivost. Ovi pak pretpostavljaju tumačenje prihvatljivih političkih (dis)kontinuiteta izvan granica samog referenduma, kao i određeno tumačenje percepcije promjene. Ovo tumačenje jasnoće pokazuje kako referendum ne upravlja samo promjenom na koju je neposredno usmjeren već da pretpostavljeni glas „naroda“ možemo istovremeno smatrati instrumentom jasnoće kojom se zamišlja i normativno uređuje okruženje referenduma.

**Ključne riječi:** izravna demokracija, referendum, jasnoća, ustavno pravo, ustavna teorija.

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