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## CONSTITUTIONAL DEMOCRACY IN SLOVENIA BETWEEN THE SCYLLA AND CHARYBDIS OF THE LEGISLATIVE REFERENDUM

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*The article presents the Slovenian experience concerning the regulation and practice of the legislative referendum which has followed a path leading from an extremely liberal to a considerably restrictive model. The new regulation explicitly narrowed the scope of the referendum by excluding four sets of legislation on which a referendum may not be called. A rejection quorum was established, vitally affecting the chances of successful adoption of the referendum decision. The author explains and confronts both regulations. On this basis he briefly shows the benefits and dangers of each model. He concludes that from the premise of constitutional democracy the crucial question is not whether to limit the referendum as one of the main instruments of direct democracy, but how and to what extent. One should strive to achieve a sensitive balance. Direct democracy should undoubtedly be limited, but as narrowly as possible.*

### KEYWORDS:

direct democracy, legitimacy, referendum abuse, referendum prohibition, referendum restrictions, rejection quorum, rejective referendum, unconstitutionality

### 1. INTRODUCTION

According to the Constitution of the Republic of Slovenia, power is vested in the people. Citizens exercise this power directly and through elections.<sup>1</sup> Direct participation in the management of public affairs, in accordance with the law, is a constitutional right of every citizen.<sup>2</sup> Among the various instruments of direct democracy, the referendum is the most important.

Ten forms of referendums are established in Slovenia on the local and state levels. Leaving aside the local level,<sup>3</sup> there are four forms of referendums on the state level: the constitutional referendum, the referendum on international associations, the consultative referendum, and the legislative referendum. All of these except the consultative referendum are a constitutional matter, which means that the Slovenian Constitution stipulates basic rules on each of them. Specific regulations concerning the four referendums on the state level and containing more detailed provisions<sup>4</sup> are stipulated by the Referendum and Popular Initiative Act.<sup>5</sup>

In a constitutional referendum, voters decide whether to confirm a constitutional change adopted by the National Assembly prior to its promulgation. The National Assembly must submit a proposed constitutional amendment to voters for adoption in a referendum if so required by at least thirty deputies. A constitutional amendment is adopted in a referendum by an absolute majority.<sup>6</sup> The National Assembly is bound by the result of such a referendum for two years.<sup>7</sup>

A referendum on international associations serves to confirm the transfer of the exercise of part of Slovenia's sovereign rights to international organisations or to confirm entry into

1 Constitution of the Republic of Slovenia (hereinafter: CRS), Official Gazette of the Republic of Slovenia, Nos. 33/1991, 42/1997, 66/2000, 24/2003, 69/2004, 68/2006, 47/2013, Art. 3. In this paper the official translation of the Constitution of the Republic of Slovenia and of the Constitutional Acts amending the Constitution are cited. The translation is available on the homepage of the National Assembly of the Republic of Slovenia: [www.dzrs.si/wps/portal/en/Home/PoliticiSistem/UstavaRepublikeSlovenije](http://www.dzrs.si/wps/portal/en/Home/PoliticiSistem/UstavaRepublikeSlovenije).

2 CRS, Art. 44. The number of eligible voters in Slovenia in the elections to the National Assembly in June 2014 was 1,713,067 (source: State Election Commission of the Republic of Slovenia).

3 The referendums on the local level are the following: referendums on a general legal act of a municipality, referendums on statutory issues, referendums on self-imposed contributions, consultative referendums, referendums on the establishment and territorial reorganisation of a municipality, and regional referendums.

4 The law that regulates referendums requires a two-thirds majority vote of deputies present. CRS, Art. 90.

5 The Referendum and Popular Initiative Act (hereinafter: RPIA), Official Gazette of the Republic of Slovenia, No. (15/1994), 26/2007: official consolidated text (an official translation does not exist at the time of writing this paper). The popular initiative differs from referendum in the fact that voters propose a change in the Constitution or a law instead of confirming or rejecting one (CRS, Art. 168: *A proposal to initiate the procedure for amending the Constitution may be made by twenty deputies of the National Assembly, the Government, or at least thirty thousand voters. Such proposal is decided upon by the National Assembly by a two-thirds majority vote of deputies present.* RPIA, Arts. 57, 59; CRS, Art. 88: *Laws may be proposed by the Government or by any deputy. Laws may also be proposed by at least five thousand voters.* RPIA, Arts. 58, 59).

6 I.e. if a majority of those voting voted in favour of the amendment, provided that a majority of all voters participated in the referendum. CRS, Art. 170. RPIA, Arts. 4–6.

7 RPIA, Art. 8.

a defensive alliance, before the National Assembly ratifies such treaty. It may be called by the National Assembly on its own initiative or on the proposal of the government, at least ten deputies, or a parliamentary group. A proposal is passed in a referendum by a relative majority.<sup>8</sup> The National Assembly is bound by the result of such a referendum. If one has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.<sup>9</sup>

A consultative referendum is called by the National Assembly in order to gain feedback on the matters within its competence that are of wider importance to the citizens. It may be called before the National Assembly finally decides on the matter. In accordance with its consultative nature, the result of such referendum is not binding.<sup>10</sup>

According to current regulation, a legislative referendum is used to reject a law passed by the National Assembly, prior to its promulgation.<sup>11</sup> It has been the most common type of referendum and also the most controversial form of direct democracy in Slovenia, which is why it is the focus of this paper. In addition, Slovenian experience concerning the regulation of the legislative referendum is interesting because it followed a path leading from an extremely liberal to a considerably restrictive model. As such, it may be considered a useful example.<sup>12</sup>

## 2. THE REGULATION AND PRACTICE OF THE LEGISLATIVE REFERENDUM FROM A DYNAMIC PERSPECTIVE

### 2.1. From 1991 to 2013

Shortly after Slovenia gained its independence from the federal authoritarian state of Yugoslavia in 1991 a democratic constitution was adopted.<sup>13</sup> The legislative referendum was regulated in Article 90 thereof as follows:

*The National Assembly may call a referendum on any issue which is the subject of regulation by law. The National Assembly is bound by the result of such referendum.*

*The National Assembly may call a referendum from the preceding paragraph on its own initiative, however, it must call such referendum if so required by at least one third of the deputies, by the National Council, or by forty thousand voters.*

8 I.e. if a majority of those voting have cast valid votes in favour of it. CRS, Art. 3a.

9 CRS, Art. 3a. RPIA, Arts. 25a–25g.

10 RPIA, Arts. 26–29. Thus far, the Slovenian National Assembly has respected the results of consultative referendums.

11 CRS, Art. 90. RPIA, Arts. 9–25.

12 For more detailed insight into the regulation of the legislative referendum and examples of Constitutional Court practice in referendum disputes, see: RIBIČIČ, CIRIL; KAUČIČ, IGOR: *Constitutional Limits of Legislative Referendum: The Case of Slovenia*, Lex Localis, 12(2014)/4, 2014, 899–928. Cf. also: Robert PODOLNJAČ: *Constitutional Reforms of Citizen-Initiated Referendum – Causes of Different Outcomes in Slovenia and Croatia*, Revus, 26(2015), 120–149. For Slovenian regulation and practice in comparative context see: KOMÁROMI László: *Közvetlen demokratikus hagyományok és modellek: alapkérdések, kockázatok és esélyek = A népszavazás szabályozása és gyakorlata Európában és Magyarországon*, eds. GÁVA Krisztián, TÉGLÁSI András, Budapest, NKE Szolgáltató Nonprofit Kft., 2016, 137–168.

13 See: fn. 1.

*The right to vote in a referendum is held by all citizens who are eligible to vote in elections. A proposal is passed in a referendum if a majority of those voting have cast votes in favour of the same.*

*Referendums are regulated by a law passed in the National Assembly by a two-thirds majority vote of deputies present.*

As can be seen, the regulation of the legislative referendum was exceedingly permissive. There were no explicit restrictions concerning the subject matter of the referendum. Furthermore, the Constitution stated that any issue that is the subject of regulation by law could be a subject of a referendum.<sup>14</sup>

The number of authorised proposers was extensive, even in comparison to some liberal foreign regulation. Five possible proposers were determined: the National Assembly, at least one third of the deputies of the National Assembly (i.e. thirty deputies out of ninety), the National Council,<sup>15</sup> and (at least) forty thousand voters.<sup>16</sup> The National Assembly was able to call a referendum by its own decision (if so decided by a majority of all deputies) on the initiative of either at least ten deputies, a parliamentary group, the proposer of the statute, or the Government.<sup>17</sup>

There was no actual threshold or quorum set for the success of the referendum. A decision on a referendum was successfully passed if a majority of those who voted cast votes in favour of it, thus a relative majority sufficed.

In addition, the Constitution did not establish the form of the legislative referendum. That was completed in the year 1994 by the Referendum and Popular Initiative Act, which provided two forms of the legislative referendum, preliminary (also termed precursive) and subsequent. The preliminary referendum enabled voters to decide on specific issues regulated by the draft of a statute before its adoption by the National Assembly. A subsequent referendum was to be conducted on a statute as a whole and after it had already been adopted by the National Assembly. It had a confirmatory nature, which meant that voters had to decide whether to approve the law. Both of the aforementioned forms of referendum had a suspensive effect. The Slovenian regulation of the preliminary referendum was very peculiar compared to foreign regimes and was abolished in 2006, therefore only the subsequent confirmatory referendum remained in force.<sup>18</sup> Since then, voters have only been able to decide on an adopted law before its promulgation, as well as on a statute as a whole and not on a particular issue regulated by the statute.

14 In 1994, the RPIA introduced some express limitations of the referendum (concerning extraordinary measures in the field of defence and natural disasters, certain budgetary laws and laws concerning the ratification of international treaties) but the Constitutional Court annulled them for being, briefly stated, unconstitutional – declaring that the restriction of constitutional rights by law is not permissible. Constitutional Court Decision, U-1-47/94, 19 Jan. 1995. For more on the Decision, see: RIBIČIČ, KAUČIČ: *op. cit.*, 903–904.

15 The Slovenian National Council is a kind of upper house of legislature, representing social, economic, professional, and local interest groups. See: CRS, Arts. 96–101.

16 Forty thousand voters was less than 3 % of the eligible voters at that time. The number is low, compared to the majority of similar foreign regulations.

17 RPIA, Art. 11.

18 See: RIBIČIČ, KAUČIČ: *op. cit.*, 900, 901, 922, note 3.

Due to the lack of the constitutional restrictions on the subject matter of the referendum, the Referendum and Popular Initiative Act authorised the National Assembly to request that the subject of the referendum be examined by the Constitutional Court, if it deemed that unconstitutional consequences could occur due to the suspension of the implementation of a law or due to a law not being adopted.<sup>19</sup>

The Referendum and Popular Initiative Act also stipulated that the National Assembly was bound by the result of a legislative referendum for a period of one year.<sup>20</sup> It regulated important issues of the referendum procedure as well, prescribing detailed formal conditions and fixed terms for its phases.<sup>21</sup> The provisions of the Referendum and Popular Initiative Act have been amended several times.

For years, such constitutional arrangement of the legislative referendum was one of the most controversial political and legal issues.<sup>22</sup> It was criticised for being inappropriate, insufficient, vague, and of a voluntary nature. The opponents of the referendum regulation argued that the relatively broad and simple access to the referendum, as well as the inadequate normative framework, enabled it to be abused in order to achieve narrow political party interests and the interests of well-organised civic groups. They claimed that the referendum was abused to resolve inter-party conflicts (since opposition deputies were the dominant proposers of the referendums), stating that such regulation was excessively oriented towards parliamentary political parties and less towards voters. Moreover, issues decided by voters in referendums were in their view for the most part unrelated to broader social interests and therefore could not be qualified as issues of public concern.<sup>23</sup> Some constitutional experts feared that such regulation of referendums would lead to delays and blockades in the functioning of the parliamentary system.<sup>24</sup> The critics of the regulation of referendums admitted that the so-called weaknesses manifested only occasionally, but they stressed that they literally erupted with the occurrence of the economic crisis, when unpopular urgent financial-economic and reform regulation should have been passed.<sup>25</sup>

From the adoption of the Constitution in 1991 until the reform of the legislative referendum in 2013, sixty different initiatives, proposals, and request for a legislative referendum

19 RPIA, Art. 21. According to the regulation, the Constitutional Court has thirty days to decide on the matter, but actually it has not been respecting this deadline.

20 RPIA, Art. 25: *For one year after the promulgation of the referendum decision, the National Assembly must not adopt any law substantially contradicting the decision of the voters.*

21 As an example, let us take a look at the procedure for initiating the collection of signatures. Within seven days of the adoption of the statute in the National Assembly, 2,500 signatures in support of an initiative need to be collected. Once this is accomplished, the President of the National Assembly shall be duly notified. The National Assembly shall suspend the proclamation of the statute (i.e. its publication in the Official Gazette) and the thirty-five day deadline to collect 40,000 signatures in support of the request shall be determined. RPIA, Arts. 12.a, 13, 16, 16.a.

22 RIBIČIČ, KAUCIČ: *op. cit.*, 901.

23 See: *ibid.* 900–903. In my opinion, not all of the criticisms are justified; in keeping with the nature of this paper, I am not going to challenge them herein.

24 *Ibid.*, 902.

25 *Ibid.*

were made but only seventeen were actually carried out.<sup>26</sup> Eight were called at the request of (at least) one third of the National Assembly deputies, seven were called at the request of forty thousand voters, and one at the request of the National Council; one was called following simultaneous requests by the three mentioned authorised proposers.<sup>27</sup>

Due to the lack of constitutional restrictions as to the referendum subject matter, the Constitutional Court played a role of utmost importance, deciding on the right to call a referendum.<sup>28</sup> In the disputed cases the Constitutional Court established (at the request of the National Assembly)<sup>29</sup> whether a proposed referendum could have unconstitutional consequences. In those cases where the Constitutional Court prevented a referendum from taking place it referred to the principles of constitutional democracy, the protection of fundamental constitutional values, as well as human rights and the rights of minorities. It reached the decisions by applying tests of legitimacy and proportionality, weighing the constitutional right to request the calling of a referendum against other constitutionally protected values.<sup>30</sup>

The Constitutional Court reviewed nineteen requests for calling a legislative referendum, of which it allowed seven and prohibited twelve, assessing that the result could give rise to unconstitutional consequences.<sup>31</sup> For instance, the Constitutional Court allowed the referendum on the pension reform (2011) and on the Marriage and Family Relations Act (2012), but prevented a referendum on the Health Care and Health Insurance Act (2006), on a statute regulating judge's salaries (2009), and on intervention measures in the field of financing (2012).

In the years 2001 and 2011 new regulations on the referendum were unsuccessfully proposed.

## 2.2. From 2013 to 2015

The regulation of the legislative referendum was changed (with the required two-thirds majority vote of the deputies of the National Assembly) in the year 2013, by a Constitutional Act amending the Constitution of the Republic of Slovenia (UZ 90, 97, 99).<sup>32</sup> Below there follows the text of the crucial novelties:

*I. Art. 1 – The first paragraph of Article 90 is hereby amended to read as follows:*

“The National Assembly shall call a referendum on the entry into force of a law that it has adopted if so required by at least forty thousand voters.”

26 See: Supplement.

27 Cf.: RIBIČIČ, KAUCIČ: *op. cit.*, 924., note 25 (with mistaken numbers).

28 Although in Slovenia court decisions do not constitute a legally binding precedent, they represent an important and respected legal source.

29 According to the RPIA, Art. 21.

30 See: RIBIČIČ, KAUCIČ: *op. cit.*, 902–914., with a rather subjective analysis of selected Constitutional Court decisions. The findings could be challenged together with the conclusion.

31 *Ibid.*, 925., note 32.

32 Constitutional Act amending the Constitution of the Republic of Slovenia (UZ 90, 97, 99), Official Gazette of the Republic of Slovenia, 47/2013.

*The second paragraph thereof is hereby amended to read as follows:*

“A referendum may not be called:

- on laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters;
- on laws on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget;
- on laws on the ratification of treaties;
- on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality.”

*The fourth paragraph thereof is hereby amended to read as follows:*

“A law is rejected in a referendum if a majority of voters who have cast valid votes vote against the law, provided at least one fifth of all qualified voters have voted against the law...”<sup>33</sup>

*II. – The Referendum and Popular Initiative Act (Official Gazette of the Republic of Slovenia No. 26/07 – official consolidated text) shall be harmonised with Article 1 of this Constitutional Act within one year of its entry into force.*

“Until the Referendum and Popular Initiative Act is harmonised, the provisions of Article 1 of this Constitutional Act shall apply directly in conjunction with mutatis mutandis application of the Referendum and Popular Initiative Act. Until the Referendum and Popular Initiative Act is harmonised, Article 21 of the Referendum and Popular Initiative Act shall apply mutatis mutandis such that the Constitutional Court shall decide on any dispute between the proposer of a referendum and the National Assembly, if the latter rejects a request for the calling of a legislative referendum.”<sup>34</sup>

Considering the constitutional amendments, we can say that the system was largely set anew in its core substance.

The confirmatory nature of the referendum was replaced with a rejective one in which the voters decide not on adopting but on rejecting a law adopted by the National Assembly before its promulgation.<sup>35</sup>

The number of authorised proposers was reduced to a single one. The initiative was left exclusively to the voters, while the required number of the voters entitled to request the calling of a referendum remained the same (i.e. at least forty thousand).

<sup>33</sup> Constitutional Act (UZ 90, 97, 99), I. Art. 1.

<sup>34</sup> Constitutional Act (UZ 90, 97, 99), II.

<sup>35</sup> The model was changed according to the Slovenian referendum practice, showing that referendums were being called for by those opposing a law adopted by the National Assembly. With the change in the nature of the referendum, the subsequent form and suspensive effect were not altered. As before, voters could also decide only on the whole statute and not on a particular issue thereof. Since such a referendum intends to prevent the implementation of a law, it is also called a “popular veto”. Cf.: RIBIČIČ, KAUCIČ: *op. cit.*, 914–915.

The referendum procedure concerning the voter’s initiative has so far remained the same. See: fn. 21.

The new regulation explicitly narrowed the scope of the referendum by excluding four sets of legislation on which the referendum may not be called.

The first set consists of laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters. Not all of the legislation in the listed areas is excluded, but only that pertaining to urgent measures. The inadmissibility of a referendum on these laws arises, however, from their purpose, i.e. from the need for rapid, effective, and urgent action, which would otherwise be obstructed by a referendum procedure.<sup>36</sup>

The second set comprises laws on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget. The express enumeration of the laws shows that not all financial and budgetary laws are included, but only those that the legislature considers vital to ensure fundamental fiscal and financial resources for funding the state and for executing its duties in these fields. It is deemed that a rejection of such laws would directly threaten the financial stability of the country and prevent the stable financing of the state budget and other public funds.<sup>37</sup>

The third set includes laws on the ratification of treaties, since in Slovenia international treaties are ratified by a law. This prohibition stems from the nature of concluding international treaties.<sup>38</sup> Furthermore, legal mechanisms exist to resolve possible problems prior to ratification.<sup>39</sup> International treaties that require a two-thirds majority vote of the deputies of the National Assembly for ratification are exempt from this set of laws. These treaties can be subject to either a legislative referendum or a referendum on international associations.<sup>40</sup>

The fourth set contains laws eliminating unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality. Here the right to a referendum is limited in order to protect another constitutional value, a violation of which already exists and must therefore be eliminated by a new law, or when the existing legislation is unconstitutional and a new law is adopted to eliminate this unconstitutionality. The prohibition of the referendum is therefore intended to prevent possible rejections of laws that eliminate unconstitutional conditions, which includes the elimination of violations of human rights and fundamental freedoms.<sup>41</sup> From the point of view of the principle of constitutional democracy such an express provision would in fact be unnecessary. According to constitutional law experts, it was expressly included in the Constitution in order to further emphasise the importance of the protection of constitutional rights and freedoms.<sup>42</sup> In comparison with the first three sets of prohibitions, here the laws are not identified. The

<sup>36</sup> RIBIČIČ, KAUCIČ: *op. cit.*, 917.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 917–918.

<sup>39</sup> See, for example: CRS, Art. 160, Par. 2: *In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.*

<sup>40</sup> RIBIČIČ, KAUCIČ: *op. cit.*, 918, CRS, Art. 3a. RPIA, Arts. 25a–25g.

<sup>41</sup> *Ibid.*, 918.

<sup>42</sup> *Ibid.*

open clause as to the elimination of unconstitutionality therefore leaves space for broad interpretation (thus possibly restricting referendums).

Last but not least, the new referendum regulation established a rejection quorum, which means that a referendum is successful if a majority of voters who have cast valid votes vote against the law, provided that at least one-fifth of all qualified voters have voted against the law. According to the former regulation, only a relative majority sufficed. The main reason for this change, as stated by the framers of the constitutional amendments, is to achieve a higher level of referendum legitimacy and higher standards of democratic decision-making.<sup>43</sup> At the same time, they confess that the inclusion of a rejection quorum significantly increased the threshold of legitimacy.<sup>44</sup> Compared to the former regulation, it vitally affects the chances of successful adoption of the referendum decision (i.e. the rejection of a law).

At the end, the amendment requires the Referendum and Popular Initiative Act to be harmonised with the new constitutional arrangement within one year of its entry into force. In the meantime, the new constitutional provisions shall apply directly in conjunction with *mutatis mutandis* application of the Referendum and Popular Initiative Act. The amendment emphasises that until the Referendum and Popular Initiative Act is harmonised therewith, Article 21 of the Referendum and Popular Initiative Act shall apply with the necessary changes such that the Constitutional Court shall decide on any dispute between the proposer of a referendum and the National Assembly if the latter rejects a request for the calling of a legislative referendum. This amendment actually changed the previous regulation of a referendum dispute, which authorised the National Assembly to only request that the subject be examined by the Constitutional Court, if it deemed that unconstitutional consequences could occur due to the suspension of the implementation of a law or due to a law not being adopted.<sup>45</sup> The National Assembly did not have the right to refuse a request to call a referendum. This decision was left to the Constitutional Court in each individual case. According to the new constitutional regulation, the right to reject a request to call a referendum was given to the National Assembly and the proposer of a referendum gained standing to file an appeal before the Constitutional Court. The basic question on which the Constitutional Court has to decide remains the same, i.e. whether the law in question is such that a legislative referendum thereon would be constitutionally inadmissible. I do not want to speculate whether the Constitutional Court will interpret the new constitutional prohibitions regarding the referendum restrictively or extensively.

Although more than three years have passed since the promulgation of the constitutional amendments, the Referendum and Popular Initiative Act has not yet been harmonised with the new constitutional arrangement.<sup>46</sup>

43 A quorum is considered to be an integral part of the rejective nature of the referendum. So the intent to establish a quorum actually determined the nature of the legislative referendum in Slovenia. See: RIBIČIČ, KAUCIČ: op. cit., 918–919.

44 *Ibid.*, 920.

45 RPIA, Art. 21.

46 According to the amendment, it should have been done within one year.

Thus far, only two referendum proposals have been submitted to the National Assembly. The first one (in 2014) concerned the amendment of the so-called “Protection of Documents and Archives and Archival Institutions Act”. The referendum was carried out but did not achieve the rejection quorum. The second proposal (in March, 2015), regarding the Amendment of the Marriage and Family Relations Act, was rejected by the National Assembly even before the period for the collection of the forty thousand signatures expired on the alleged grounds of its unconstitutionality (according to Article 90, line four of the Constitution of the Republic of Slovenia).<sup>47</sup> The proposer filed an appeal and the Constitutional Court annulled the decision of the National Assembly.<sup>48</sup> The Amendment was successfully rejected in a referendum (in December 2015).

### 3. CONCLUDING REMARKS

Like the other Member States of the European Union, Slovenia is a constitutional democracy. This essentially means that the sovereignty of the people is limited by the Constitution. Accordingly, some say that the concept of a constitutional democracy is *contradictio in adiecto* (a contradiction in itself) as the adjective *constitutional* goes against (or at least substantially limits) the basic democratic principle. Majority decisions are acceptable only when in accordance with the Constitution. Constitutional values hence rise above the will of the people and reduce their sovereignty. In other words, they limit the scope of the democratic decision-making legitimacy.<sup>49</sup>

From this premise, the restrictions on direct democracy, including limitations on the referendum, are perfectly understandable. As are, from the utilitarian or pragmatic point of view, those enabling the normal functioning of the state.<sup>50</sup>

The crucial question, therefore, is not whether to limit the referendum as one of the main instruments of (direct) democracy, but how and to what extent. Here the legislature navigates between two hazards: completely liberal, permissive, or loose regulation, on the one hand, and extremely restrictive regulation, on the other. By approaching very close to the first, direct democracy profits, but the constitutional values and the functioning of the state are threatened.<sup>51</sup> Coming too near to the other hollows out one of the fundamentals of

47 Decision to reject the calling of a legislative referendum on the Act Amending the Marriage and Family Relations Act (ZZZDR-D, EPA 257 – VII), Official Gazette of the Republic of Slovenia, 20/2015.

48 Constitutional Court Decision, U-II-1/15-20, 28 Oct. 2015.

49 This is also the tenor of numerous Constitutional Court decisions.

50 The limitations in this field lead to a certain paradoxical situation as voters are trusted with exercising power through elections (i.e. indirectly) and mistrusted while exercising power directly. So a noble idea of democracy is pragmatically adapted to suit the unpleasant reality of life: voters have to be protected from themselves. Let me point out that in the past “mistrust” was present also concerning indirect democracy, which is evident in the exclusions and limitations of suffrage (according to sex, wealth, social class, race, etc.).

51 In such a situation, the burden of safeguarding the constitutional values lies heavily on the body that decides on the referendum issues.

constitutional democracy, the institute of direct democracy, and renders it *de facto* inexistent. One should strive to achieve a sensitive balance between these two dangers.<sup>52</sup>

The regulation and practice of referendums is quite a challenge. European countries are dealing with it each in their own way, according to their specific historical, social, economic, and political circumstances. A uniform magical formula does not exist. Every nation has to find its own way to navigate between Scylla and Charybdis.

Let me conclude with the thought that when restricting instruments of direct democracy, either by law or by practice, one should stick to the wisdom attributed to doctors prescribing medications: “*quod necessarium, sed minima*” (i.e. what is indispensable but in the lowest possible portion). Direct democracy should undoubtedly be limited, but as narrowly as possible. Whether Slovenia succeeded in achieving this goal is a question I leave to the reader.

<sup>52</sup> This applies not only to the legislature, but also to those who have to solve referendum issues by interpreting the legislation.

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Legislative referendums in the Republic of Slovenia from the adoption of the Constitution in 1991 to 2016							
REFERENDUM SUBJECT	DATE (D.M.Y)	ELIGIBLE VOTERS	BALLOTS CAST	TURNOUT	IN FAVOUR (%)	AGAINST (%)	Note
ELECTORAL SYSTEM	8.12.1996	1,537,459	583,380	37.94			a
FINANCING THE CONSTRUCTION OF A THERMAL POWERPLANT	10.1.1999	1,564,170	427,443	27.33	19.76	78.04	b
INFERTILITY TREATMENT AND BIOMEDICALLY ASSISTED PROCREATION ACT	17.6.2001	1,592,650	567,878	35.66	26.38	72.36	b
RESTRUCTURING AND PRIVATISATION OF THE PUBLIC COMPANY SLOVENIAN RAILWAYS	19.1.2003	1,610,180	501,499	31.15	47.17	50.84	b
RETURN OF INVESTMENTS IN THE PUBLIC TELECOMMUNICATIONS NETWORK	19.1.2003	1,610,180	501,780	31.16	76.72	22.15	b
RETAIL STORE HOURS ON SUNDAY	21.9.2003	1,618,978	445,842	27.54	57.53	41.67	b
“TECHNICAL ACT” REGARDING PERMANENT RESIDENCE	4.4.2004	1,626,913	513,195	31.54	3.89	94.59	b
PUBLIC BROADCASTER ACT	25.9.2005	1,644,275	504,925	30.71	50.30	48.92	b
OWNERSHIP TRANSFORMATION OF INSURANCE COMPANIES ACT	11.11.2007	1,720,152	997,285	57.98	28.88	71.12	c
ACT RATIFYING THE ARBITRATION AGREEMENT BETWEEN THE GOV. OF THE REP. OF SLOVENIA AND THE GOV. OF THE REP. OF CROATIA	6.6.2010	1,705,086	727,361	42.66	51.54	48.46	c
PUBLIC BROADCASTER ACT 2	12.12.2010	1,707,209	252,408	14.78	27.67	72.33	c
OCCASSIONAL EMPLOYMENT ACT	10.4.2011	1,707,534	580,347	33.99	19.93	80.07	c
PREVENTION OF UNDECLARED WORK AND EMPLOYMENT ACT	5.6.2011	1,707,299	690,430	40.44	24.59	75.41	c
PENSION AND DISABILITY INSURANCE ACT	5.6.2011	1,707,299	690,812	40.46	27.95	72.05	c
PROTECTION OF DOCUMENTARY AND ARCHIVAL MATERIALS AND ARCH. INSTITUTIONS ACT	5.6.2011	1,707,299	690,043	40.42	29.12	70.88	c
MARRIAGE AND FAMILY RELATIONS ACT	25.3.2012	1,709,417	518,207	31.31	45.45	54.55	c
PROTECTION OF DOCUMENTARY AND ARCHIVAL MATERIALS AND ARCH. INSTITUTIONS ACT 2	8.6.2014	1,712,733	201,087	11.74	32.63	67.37	c d
MARRIAGE AND FAMILY RELATIONS ACT 2	20.12.2015	1,714,055	623,541	36,38	36,49	43,51	c d

a: Special provisions on the outcome (3 options);

b: Total not equal to 100% due to void ballots;

c: Outcome according to the amendment of the RPIA in 2007 (in favour + against = 100%);

d: After the Constitutional Amendments

Data: State Election Commission of the Republic of Slovenia, Sept. 2016.