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## **Referendum Challenges in the Republic of Slovenia**

**Abstract:** The article presents fundamental characteristics of legislative referendum as the most significant form of direct democracy in Slovenia. In addition, it examines the reasons leading to the amendment of constitutional arrangement of legislative referendum in Slovenia in 2013. Fundamental aspects of judicial and Constitutional Court control of legislative referendum are considered. Focusing on jurisdiction of the Constitutional Court and its role in referendum matters in a broader sense, the article also illustrates trends of extensive Constitutional Court practice in referendum matters. An example of a referendum on disputed social issues is illustrated by means of referendums on two acts that have changed the definition of family and equalised same-sex and opposite-sex partners. Furthermore, the article tackles the impact that legislative referendum in Slovenia has exerted on the legal and political system of the country. In that context, on the basis of a particular case, it presents the impact of a referendum campaign and acts of individual participants involved upon voters' will.

**Keywords:** legislative referendum, permissibility of referendum, constitutional democracy, constitutional review of referendum

### **1. Introduction**

The Constitution of the Republic of Slovenia (hereinafter referred as the Constitution)<sup>1</sup> provides all the most relevant and well-known instruments of direct democracy, namely the referendum, popular initiative and citizens' assembly. Judging

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1 Official Gazette RS no 33/91-I, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13 and 75/16.

by the number and the diversity of these instruments, Slovenia ranks among the states with the most developed direct democracy in Europe.<sup>2</sup>

The aim of this paper is to analyse the role of legislative referendum as the most important and frequently used form of direct democracy in the Republic of Slovenia (hereinafter referred as Slovenia) in general and its role in resolving problematic social issues, particularly on definition of family and same-sex marriages. Another goal of this paper is to open a discussion on whether legislative referendum is an adequate mechanism for dealing with controversial social dilemmas. Part of the analyses focuses on impacts of legislative referendums on Slovenian political and legal system. In addition, the article also presents factors that most influence the voters' will and assesses the role of the government and of mass media in the referendum procedure, particularly in the referendum campaign.

## **2. General characteristic of referendum decision-making in the Republic of Slovenia**

The Slovene legal system institutionalizes ten forms of referendum. On the state level these are: the constitutional referendum, the legislative referendum, referendum on international associations and the consultative referendum. On the local level, the following referendums are provided: referendum on a general legal act of a municipality, referendum on statutory issues, referendum on self-imposed contributions, consultative referendum of a municipality, referendum on the establishment and referendum on territorial reorganization of the municipality.

In Slovenia, the legislative referendum is by far the most important and the most frequently used form of direct decision-making. The legislative referendum in Slovenia is regulated in Article 90 of the Constitution.

The fundamental characteristics of the legislative referendum, prior to constitutional changes in 2013, were its voluntary nature and wide accessibility, the fact that it could be called on any issue, which is the subject of regulation by law, and, finally, in order for a decision to pass, a simple majority sufficed.<sup>3</sup> This constitutional regulation of the legislative referendum largely deviated from those of comparable European countries, particularly in regard to the initiative and the restrictions on the subject-matter of the referendum.<sup>4</sup>

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2 More on the fact that Slovenia is one of the leading European countries regarding direct democracy mechanisms, see: R. Podolnjak, *Constitutional Reform of Citizen-Initiated Referendum: Causes of Different Outcomes in Slovenia and Croatia*, *Revus*, 2015, no. 26, p. 131.

3 More on previous arrangement of legislative referendum in Slovenia see: I. Kaučič, *Temeljne značilnosti zakonodajnega referendum v Sloveniji*, (in:) I. Kaučič (ed.), *Zakonodajni referendum: Pravna ureditev in praksa v Sloveniji*, Ljubljana 2010, pp. 51-73.

4 More on referendum arrangements in European and some other countries see: M. Qvortrup (ed.), *Referendums around the world: The Continued Growth of Direct Democracy*, Basingstoke and

Based on the above constitutional arrangement, Slovenia encountered significant normative and practical problems when holding referendums.<sup>5</sup> The constitutional arrangement of the legislative referendum was one of the most controversial political and expert issues as relatively broad access to the referendum and inadequate normative framework enabled its use for achieving narrow political interests and interests of well-organised civil groups.<sup>6</sup> After years of effort by politicians and experts, the constitutional body finally passed a constitutional amendment that changed the legislative referendum arrangement in 2013.<sup>7</sup> Since then Article 90 of the Constitution provides: “(1) The National Assembly shall call a referendum on the entry into force of a law that was adopted if so required by at least forty thousand voters. (2) 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.(3) The right to vote in a referendum is held by all citizens who are eligible to vote in elections. (4) 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. (5) Referendums are regulated by a law passed in the National Assembly by a two-thirds majority vote of deputies present.”

In 2013, the constitutional amendment instead of the confirmation legislative referendum model established the rejective one. Its purpose is to prevent the enforcement of a law adopted by parliament (a popular veto).<sup>8</sup> At the same time, three main sets of changes were introduced in Slovenian constitutional order i.e.:

- changes regarding referendum initiative (according to the new arrangement the referendum can only be proposed by voters<sup>9</sup>),

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New York, 2014, pp. 17-121.

5 E.g. a very high number of subjects had the possibility to initiate a referendum, the Constitution did not set any limitations regarding the questions that can be decided upon a legislative referendum, no quorums were provided. More on this see: I. Kaučič, *Zavrnitveni zakonodajni referendum*, *Javna uprava*, 2013, no. 1/2, pp. 33-51, 109-110.

6 I. Kaučič, *Zakonodajni referendum s suspenzivnim učinkom – de lege ferenda*, *Zbornik znanstvenih razprav*, 2000, no. 1, pp. 160-178.

7 Constitutional Act Amending Articles 90, 97, and 99 of the Constitution of the Republic of Slovenia, which was adopted on 24 May 2013 and entered into force on 31 May 2013 (*Official Gazette of the Republic of Slovenia* no. 47/13). Before that there were three unsuccessful proposals lodged to change the Constitution in Slovenia i.e. in 2001, 2011 and 2012.

8 More on referendum as a popular veto see: M. Qvortrup, *A comparative study of referendums: Government by the people*, Manchester and New York 2005, pp. 44-61.

9 More on general characteristics of citizen initiated referendums worldwide see: M. Qvortrup, *Direct democracy: a comparative study of the theory and practice of government by the people*,

- limiting the scope of the referendum’s subject-matter (establishing referendum restrictions and prohibitions; it is inadmissible to call on referendum for four groups of laws),
- changes regarding the legitimacy of the referendum decision (establishing a quorum of rejection).<sup>10</sup>

Compared with the previous constitutional arrangement of the legislative referendum, the new one represents an important and comprehensive change, based on domestic experience and twenty years of practical use of the legislative referendum as well as on referendum arrangements in some other European countries that can be compared to Slovenia (e.g. Ireland, Denmark, and Italy).<sup>11</sup>

Table 1 shows the most important data about holding legislative referendums in Slovenia from 1994 to 2018.

Table 1: Legislative referendums in Slovenia from 1994 to 2018

	Type of Legislative Referendum	Referendum Subject	Referendum Initiative	Date
1.	Preliminary <sup>1</sup>	Elections for National Assembly	Members of Parliament	8/12/1998
2.	Preliminary	Financing the construction of the Trbovlje Thermal Power Plant	Members of Parliament	10/12/1999
3.	Confirmatory	The Act Amending and Supplementing the Infertility Treatment and Fertility Treatment Procedures with Biomedical Assistance	Members of Parliament	17/01/2001
4.	Preliminary	Restructuring of the public company Slovenske Železnice d.d. Act	Request of voters	19/01/2003
5.	Preliminary	Act Amending the Return of Investments in the Public Telecommunications Network Act	Request of voters	19/01/2003
6.	Preliminary	Act Amending the Trade Act	Request of voters	21/09/2003
7.	Confirmatory	Act implementing point 8 of Decision of Constitutional Court of the Republic of Slovenia No. U-I-246/02-28	Members of Parliament	04/04/2004
8.	Confirmatory	Act on Radio Television Slovenia	Members of Parliament	25/09/2005
Legislative referendums after abolishing preliminary legislative referendum in 2006				
9.	Confirmatory	Law on Amendments and Supplements to the Law on Ownership Transformation of Insurance	Request of Republic of Slovenia National Council	11/11/2007
10.	Confirmatory	Act ratifying the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia	Members of Parliament	06/06/2010
11.	Confirmatory	Act on Radio Television Slovenia	Members of Parliament	12/12/2010
12.	Confirmatory	Mini jobs act	Request of voters	10/04/2011

Manchester and New York 2013, pp. 26-56.

10 At least one fifth of the voters is needed to reject the referendum proposal. More on quorum of rejection see: B. Žuber, *Kvorum na zakonodajnem referendum v našem in v primerjalnem pravu*, *Pravnik*, 2014, no. ½, pp. 61-88, 137-138.

11 More on legislative referendum arrangement in Ireland, Denmark and Italy see: B. Žuber: *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2017, pp. 173-181.

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13.	Confirmatory	Act Amending the Protection of Documents and Archives and Archival Institutions Act	Members of Parliament	05/06/2011
14.	Confirmatory	Pension and Disability Insurance Act	Request of voters	05/06/2011
15.	Confirmatory	Act on the prevention of illegal work and employment	Members of Parliament	05/06/2011
16.	Confirmatory	Family code	Request of voters	25/03/2012
Legislative referendums after amending the Constitution in 2013				
17.	Rejective	Act Amending the Protection of Documents and Archives and Archival Institutions Act	Request of voters	08/06/2014
18.	Rejective	Act on Amendments and Supplements to the Law on Marriage and Family Relations (ZZZDR-D)	Request of voters	20/12/2015
19.	Rejective	Act on the Construction and Management of the Second Railway Track of the Divača to Koper Railway Line	Request of voters	24/09/2017
20.	Rejective	Act on the Construction and Management of the Second Railway Track of the Divača to Koper Railway Line	Request of voters <sup>2</sup>	13/05/2018

1. *The Slovenian Referendum and Popular Initiative Act from 1994 initially prescribed two forms of legislative referendum: the subsequent and the preliminary. In the preliminary legislative referendum, the voters' will was expressed in advance on a question that is the subject matter of the legislative referendum. Generally, the preliminary referendum tended to be more consultative in its nature, representing more or less mandatory guidelines for the parliament when adopting a legal act. Slovenia used to apply preliminary referendum but the practice has shown that it complicates the entire legislative procedure. Later on Slovenian Constitutional Court with decision no U-I-217/02-34 of 17 February 2005 (Official Gazette RS no 24/05) annulled the provisions that pertained to preliminary referendum. Since the Slovenian National Assembly did not regulate the preliminary referendum in compliance with the Slovenian Constitution in a period of one year (as ordered by the Constitutional Court) provisions lost their force and the institute of preliminary referendum was thereby abolished.*

2. *There were two referendums on the same law as after the first voting there was an appeal lodged and the Slovenian Supreme court annulled the voting and ordered new voting due to referendum campaign irregularities.*

*Source: Official web page of Slovenian State Election Commission (access 02.11.2018).*

### 3. Judicial review of the referendum

The judicial review of the legislative referendum is a collective denomination for all forms of legal review carried out by the constitutional or other courts or bodies that are competent in each country for the review of the constitutionality and legality of regulations, procedures and decisions in connection with the institute of the legislative referendum.<sup>12</sup> In the broadest sense, all forms of judicial review of the legislative referendum have a common goal, namely to strengthen the confidence of voters in the fair conduct of the referendum. In the narrower sense, there are several objectives of the judicial review of the legislative referendum, namely to ensure the

<sup>12</sup> More on general trends of referendum juridicization see: L. Morel, Referendum, (in:) M. Rosenfeld, A. Sajó (ed.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 514-522.

effective exercise of referendum rights, to prevent the referendum from being called if all the conditions have not been met, to ensure compliance with the rules of the referendum process and to ensure the credibility and fairness of the referendum decision.<sup>13</sup>

In general, authorities exercising judicial review of referendums are sometimes political bodies,<sup>14</sup> but more often courts. In this case, it might be an administrative court, other court or constitutional court, which checks the regularity of the referendum procedure and is in charge of reviewing the issue. In this regard we can divide review of legislative referendum into judicial review (if review is carried out by national courts with general or specialised jurisdiction) and constitutional review (when review is carried out by constitutional court).<sup>15</sup>

### **3.1. Referendum and the role of the Constitutional court in Slovenia**

To a large extent, the importance of judicial review of referendums in a specific country reflects the general situation of judicial review in a particular country. Slovenia has a well-developed system of judicial review,<sup>16</sup> and judicial review in the field of the legislative referendum is no exception. In general, the Constitutional court is authorised to exercise judicial review of the referendums. In line with Articles 53 and 53.a of the Referendum and Popular Initiative Act,<sup>17</sup> Slovenian administrative court and Slovenian Supreme court are authorised for protection of the right to vote in the referendum. With respect to this fact, Slovenia can be classified among those states that divide review of legislative referendum into constitutional and judicial review.<sup>18</sup>

The constitutional review of the legislative referendum in Slovenia, in consideration of the implementation periods, is carried out as preliminary review, as review of the process during the implementation of the referendum, and as a follow-up review. Within the framework of the preliminary review, the right of initiative of the voters to call for a referendum, the right to demand the calling of a referendum, and the procedure of gathering signatures in support of referendum are protected; within the context of review during the referendum, in particular, the right to vote in a referendum is protected. Within the framework of the protection of the right to

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13 More on definition and purpose of judicial review of referendums see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 19-32.

14 E.g.: Federal Assembly in Switzerland.

15 More on definition and purpose of judicial review of referendums and on types of concrete review in comparative law see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, p. 19-32 and pp. 172-232.

16 More on judicial system in Slovenia see: [https://e-justice.europa.eu/content\\_judicial\\_systems\\_in\\_member\\_states-16-si-en.do?member=1](https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-si-en.do?member=1) (access 04.11.2018).

17 Official Gazette RS no. 26/07, 6/18.

18 More on this division in Slovenia see: J. Sovdat, *Sodno varstvo referenduma*, *Pravnik*, 2013, no. 9/10, 623-648 and 763-764.

demand the calling of a legislative referendum, we also include the assessment of the admissibility of referendum decision-making. The reason for this inclusion is that the right to demand the calling of a referendum is already very limited at the outset due to the constitutionally established prohibitions and restrictions of referendum decision-making.<sup>19</sup>

Constitutional court practice is highly wide-ranging in regard to review of legislative referendum. In most cases, the Constitutional Court decided on permissibility to call the referendum, while a part of decisions related to other stages of the referendum procedure (gathering signatures in support of referendum, other violations in referendum procedure that is part of legislative procedure in a broader sense, determining the referendum outcome, and review of voting violations in referendum). Constitutional Court review in referendum matters is generally characterised by an in-depth approach, upgrading of case-law and doctrine in the field of referendum review and efforts for protection of referendum rights.<sup>20</sup> On the other hand, the Constitutional Court was the one to draw attention of the legislator to the shortcomings of the constitutional arrangement of the legislative referendum prior to 2013, and therefore, for a period of time, departed from its previously adopted positions, which initially took the public and the profession by great surprise.<sup>21</sup> After that, case-law settled for a brief period, only to be followed by amendments to constitutional arrangement of legislative referendum. As such it exerted a significant impact on the constitutional review of the legislative referendum, and therefore it is to be expected that it will take the Constitutional Court some time and decision-making in various referendum matters before constitutional case-law on referendum has finally been settled.<sup>22</sup>

### 3.2. Constitutional practice on problematic referendum issues

Referendum decision-making distinguishes between constitutionally permissible referendums, where sensitive social issues can be decided, and constitutionally impermissible referendums. The latter entail all referendums whose implementation is explicitly prohibited by the Constitution, as well as those referendums where

19 More on this see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 19-31.

20 More on Constitutional court practice see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 69-231 and S. Nerad, *Zakonodajni referendum v praksi Ustavnega sodišča*, (in:) I. Kaučič (ed.), *Zakonodajni referendum: Pravna ureditev in praksa v Sloveniji*, Ljubljana 2010, pp. 117-155.

21 More on this see the following decisions of the Constitutional court: no U-II-1/11 of 10 March 2011 (Official Gazette RS no 20/11), no U-II-2/11 of 14 April 2011 (Official Gazette RS no 30/11), no. U-II-3/11 of 8 December 2011 (Official Gazette RS no 18/16).

22 More on this see: C. Ribičič, *Constitutional review of a referendum*, (in:) C. Ribičič, I. Kaučič, *Referendum and the Constitutional Court of Slovenia*, Regensburg 2016, pp. 66-89, B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 69-231.

a majority vote could affect fundamental constitutional values. Referendum decision-making is in such cases prohibited by the principle of constitutional democracy,<sup>23</sup> essentially placing fundamental constitutional values above the majority vote, be it a parliamentary majority or even a referendum majority.

Prior to the amendment of constitutional arrangement of legislative referendum in 2013, prohibitions and restrictions on referendum decision-making had not been laid down in the Constitution, and consequently, the Constitutional Court reviewed each particular case, in line with Article 21 of the Referendum and Popular Initiative Act, required by the National Assembly, whether delaying adoption of law or its refusal in a referendum could cause unconstitutional consequences. In case the review of the Court found no unconstitutional consequences, the demand of the National Assembly was rejected, and consequently, the referendum was allowed; otherwise, the decision of the Constitutional Court prohibited the referendum. On the whole, there have been eight reviews of permissibility to call an approval legislative referendum by the Constitutional Court. In one instance, the request of the National Assembly was lodged late and was therefore rejected, in four other instances referendum decision-making was prohibited, whereas in three cases it was allowed.<sup>24</sup>

Current constitutional arrangement excludes four groups of laws from referendum.<sup>25</sup> In line with new constitutional arrangement National Assembly decides on permissibility to call a referendum. In case of a dispute between the proposer of a referendum and the National Assembly, which rejected to call a referendum, the Constitutional Court will decide on this matter. The main question of this dispute is whether the National Assembly rejected to call a referendum on a law that is formally and substantially excluded from referendum by the Constitution. Moreover, a constitutional review of permissibility to call a referendum on other laws is not excluded, especially when protecting important constitutional principles and values.<sup>26</sup> In line with new constitutional arrangement the Constitutional Court decided on permissibility to call a referendum in two instances, allowing to call a referendum in one case and rejecting the other.<sup>27</sup>

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23 More on the principle of constitutional democracy in referendum matters see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma z vidika nekaterih temeljnih ustavnih načel*, *Pravnik*, 2017, no. 9/10, pp. 623-352, 731-732.

24 More on this see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 119-151.

25 More on this see point 2 of this article.

26 B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, p. 151-200. See also: I. Kaučič, *Ustavnosodna presoja zakonodajnega referenduma po novem*, *Podjetje in delo*, 2015, no. 6/7, pp. 1345-1357.

27 More on this see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 151-198. See also: I. Kaučič, *Ustavne omejitve in prepovedi zakonodajnega referenduma*, *Zbornik znanstvenih razprav*, 2014, vol. 74, pp. 59-92, 186-187 and I. Kaučič, *Ustavnosodna presoja zakonodajnega referenduma po novem*, *Podjetje in delo*, 2015, no. 6/7, pp. 1345-357.



As an example of referendum decision-making on sensitive social issues, the following referendums are presented - namely the Family Code referendum,<sup>28</sup> carried out on 25 March 2012, and the referendum on Act Amending the Marriage and Family Relations Act (hereinafter ZZZDR-D),<sup>29</sup> carried out on 20 December 2015. Both the Family Code and ZZZDR-D similarly affected the regulation of domestic communities and family relations. The following provisions were assessed as the most controversial by the general public:

- broadening of the term family to a community between a child and an adult who is neither their parent nor adoptive parent,
- determining a partnership as a domestic community of two women or two men, where equal legal consequences apply as for a marriage, unless otherwise provided by the law,
- changes regarding adoptions, where it was foreseen that partners in a civil partnership or an extramarital union are not allowed to adopt children together, however, a partner in a civil partnership or a partner in an extramarital union can adopt the child of their partner.

For similar reasons, the general public viewed ZZZDR-D as socially particularly problematic as well. The act modified the definition of a marriage stipulating that a marriage is a regulated community of two people, introducing same-sex marriage in place of same-sex civil partnership, and equating same-sex non-marital partnerships with heterosexual non-marital partnerships. Both the Family Code as well as ZZZDR-D eliminated unconstitutionality in individual acts established by the Constitutional Court, comprehensively regulated and equated same-sex and heterosexual couples in all rights and obligations at general and system level respectively.<sup>30</sup>

In the referendum, the voters first rejected the Family Code, followed by ZZZDR-D as well. The main issue of the referendums on these two acts was the fact that the majority decided on the rights of a stigmatised and discriminated minority, namely same-sex couples, endeavouring for a recognition of their dignity and equality before the law. Such decision-making and potential prejudicing of constitutional rights of a minority could have been prevented solely by an advance prohibition of

28 Relevant materials for preparation and adoption of Family code are available at: [http://web.archive.org/web/20110926104357/www.mdds.gov.si/si/delovna\\_podrocja/druzina/zakonska\\_zveza\\_in\\_druzinska\\_razmerja/druzinski\\_zakonik1/](http://web.archive.org/web/20110926104357/www.mdds.gov.si/si/delovna_podrocja/druzina/zakonska_zveza_in_druzinska_razmerja/druzinski_zakonik1/) (access 11.11.2018).

29 Relevant materials for preparation and adoption of ZZZDR-D are available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5751> (access 11.11.2018).

30 More on controversial social dilemmas regarding the Family Code and ZZZDR-D see: M. Zadavec, O čem bomo glasovali na referendumu o noveli ZZZDR, *Pravna praksa*, 2015, no. 48, pp. 12-14, N. Kogovšek Šalamon, *Družinski zakonik v luči diktature večine in ustavne demokracije*, *Pravna praksa*, 2011, no. 26, pp. 14-16, N. Kogovšek Šalamon, *Ustavni razlogi za prepoved referenduma o porokah istospolnih partnerjev*, *Pravna praksa*, no. 24/25, pp. 15-16.

the referendum, which did not occur since the Constitutional Court had allowed both referendums and thus left the final decision on the rights of a minority in voters' hands.

The Family Code referendum was carried out on the basis of the previous regulation of legislative referendum. It was the opinion of the National Assembly that further delaying the implementation or on the basis of the rejection of the Family Code, unconstitutional consequences would occur in terms of non-compliance with the Constitutional Court decision as well as non-equivalence between same-sex and heterosexual partners, and it was thus proposed that the decision be made by the Constitutional Court. The Court adopted an exceptionally technical decision that took the profession and the general public by surprise.<sup>31</sup> The decision to allow the referendum was justified by the Court as follows: "Due to the fact that the Family Code starts to apply not earlier than one year following its implementation, the outcome of the referendum will not influence the occurrence of unconstitutional consequences. In the event of the rejection of the Family Code at the referendum as well as in the event of its confirmation, the legal position remains the same, and thus one year after the promulgation of the decision adopted at the referendum, the Marriage and Family Relations Act and the Registration of Same-Sex Civil Partnership Act will still apply. This period is the same, with minor deviations, as the period in which the National Assembly is bound by a referendum decision in accordance with the Referendum and Public Initiative Act. The possible rejection of the Family Code at the referendum can therefore not cause unconstitutional consequences."<sup>32</sup>

The referendum on ZZZDR-D was carried out in view of the current constitutional arrangement of the referendum expressly providing for restrictions and prohibitions of referendum decision-making. The request to call the referendum on ZZZDR-D was rejected by the National Assembly by means of a decision stating that referendum decision-making on an act that eliminates the unconstitutionality and equates same-sex and heterosexual couples in all rights and obligations is not admissible (fourth indent of the second paragraph of Article 90 of the Constitution). Referendum petitioners disputed the decision before the Constitutional Court which repealed the decision and allowed referendum decision-making. The explanation stated: "The wording of the fourth indent of the second paragraph of Article 90 of the Constitution, which refers to the elimination of an unconstitutionality, is to be understood in a manner such that it is not admissible to call a referendum only with regard to laws that eliminate an unconstitutionality that the Constitutional Court has already established by a decision and also with regard to laws eliminating a violation

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31 Decision of the Constitutional Court of the Republic of Slovenia of 8 December 2011, no U-II-3/11, Official Gazette RS no. 18/16.

32 See point no B.-II. of decision of the Constitutional Court of the Republic of Slovenia of 8 December 2011, no. U-II-3/11.

of human rights established by a judgment of the European Court of Human Rights. The fourth indent of the second paragraph of Article 90 of the Constitution cannot be interpreted in such a manner that it is not admissible to call a referendum in cases where the legislature adopts a statutory regulation by which it indirectly, by means of the effects that such statutory regulation produces in other legal fields, eliminates an unconstitutionality that the Constitutional Court or the European Court of Human Rights has already established.<sup>33</sup> The decision was severely criticised by the professional public for it limits the constitutional provision on the prohibition of referendum in respect of elimination of unconstitutionality, making it inadmissible in constitutional democracy.<sup>34</sup>

The case of the Family Code referendum and the referendum on ZZZDR-D proved legislative referendum an inappropriate means for resolving controversial social issues in cases when referendum decision-making prejudices the rights of minorities and prevents the elimination of rights violation respectively. The essence of referendum decision-making is to let the voters make a decision on suitability of a specific law which is in line with the Constitution, but not a decision whether violation of the rights of minorities should continue to take place.

#### **4. Impact of legislative referendum on political and legal system**

In Slovenia, referendum practice has undoubtedly had a significant impact on the legal system. Increasing implementation of legislative referendums in practice has highlighted weaknesses and shortcomings of the referendum arrangement.<sup>35</sup> New constitutional arrangement on legislative referendum is beyond doubt more appropriate than the previous one. The implementation of rejective legislative referendum with rejection quorum as well as determination of referendum prohibitions and restrictions have proved particularly effective in practice. As indicated in the previous point of this article, all open issues of referendum decision-making cannot be resolved by means of a constitutional amendment. There are certain decisions in the referendum procedure which are inevitably left to the National Assembly, the Constitutional Court, and subsequently, voters as well. All of them should make a joint effort to seek balance between the right to referendum decision-making and protection of constitutional democracy.

33 See point no B.-I. of decision of the Constitutional Court of the Republic of Slovenia of 28 September 2015, no. U-II-3/11, Official Gazette RS no. 80/15.

34 More on this see: B. Žuber, *Ustavnosodni nadzor zakonodajnega referenduma*, Ljubljana 2018, pp. 193-199. See also: B. Žuber, *Presoja dopustnosti izključevanja referenduma o nekaterih zakonih*, *Podjetje in delo*, 2018, no. 6/7, pp. 1241-1253.

35 More on reasons for changing the constitutional arrangement of legislative referendum see point 2 of this article.

The problem of referendums in Slovenia is the disinterest of voters in referendum outcome, commonly resulting in high voting abstinence.<sup>36</sup> Providing voters with information, which can be ensured in various manners and in various time periods, is essential in respect of exercising the right to a free vote. The impact of the media on the formation of public opinion on specific socially relevant issues is undoubtedly powerful. However, what has been called into question lately is not the role of the media in referendum campaigns, but the role of the government.

One of the critical ways of informing voters is a referendum campaign, which is specifically regulated in the Election and Referendum Campaign Act.<sup>37</sup> In March 2018, the Constitutional Court established the unconstitutionality of this act and stated in its decision: “The statutory regulation determined by the first paragraph of Article 3 of the Election and Referendum Campaign Act, which enables the Government to participate in a referendum campaign as an organiser in the same manner as all other organisers of such, entails an excessive interference with the right to participate in the management of public affairs determined by Article 44 of the Constitution, which protects the right to vote in a legislative referendum determined by the third paragraph of Article 90 of the Constitution.”<sup>38</sup> The Constitutional court explained that in view of its constitutional position, the Government is authorised and may even have the obligation to advocate in a public debate a law adopted by the National Assembly and to present its position thereon, and it may also present the consequences of the law not entering into force that it deems negative. The Government can also fulfil this duty during a referendum campaign; however, it must convey information in a fair and reserved manner, namely information both in favour of and opposing the law at issue. Nevertheless, the Government may express its position thereon. Thus, such provision of information must be objective, comprehensive, and transparent. However, referendum propaganda is incompatible with the position of the Government in the system of state power.<sup>39</sup>

Aside from legal, this decision had numerous political impacts as well. In view of the decision, the Slovenian Supreme Court decided that the government should not have allocated budget funds for appearance in the referendum campaign, and furthermore, that its actions might have affected the referendum outcome. The Court consequently repealed referendum voting on the Act on the Construction and Management of the Second Railway Track of the Divača to Koper Railway Line and ordered a new one. In light of the Supreme Court decision, the Slovenian Prime

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36 For turnouts on legislative referendums in Slovenia see: <http://www.dvk-rs.si/index.php/si/arhiv-referendumi> (access 14.11.2018).

37 Official Gazette RS no. 41/07, 103/07, 11/11, 28/11, 98/13.

38 More on this see point B-II of decision of the Constitutional Court of the Republic of Slovenia of 25 January 2018, no. U-I-191/17, Official Gazette RS no. 6/18.

39 More on this see point B-II of decision of the Constitutional Court of the Republic of Slovenia of 25 January 2018, no. U-I-191/17, Official Gazette RS no. 6/18.

Minister at the time resigned, and the action was followed by a call to early elections to the National Assembly.

## 5. Conclusion

Slovenia is among the countries with a developed system of direct democracy, which is demonstrated by the number of implemented legislative referendums in practice. It was referendum practice in itself that highlighted the shortcomings of the constitutional arrangement of legislative referendum and paved the way to a change in constitutional arrangement. One could say, Slovenia has a very well-established legal basis for referendum decision-making at normative level. Nevertheless, referendum practice continues to raise new issues that need to be resolved by subjects involved on a continuous basis, all the while seeking balance between the right to a referendum and any other values that stand in the way of this right,

In the past, Slovenians have been face-to-face with referendums on socially sensitive issues as well. The referendum has not proved to be an appropriate means of resolving socially sensitive dilemmas in all cases when the implementation of the referendum could prevent elimination of unconstitutionality, as well as in cases when a referendum decision conflicts with constitutional values.

Referendum decision-making in Slovenia is affected by numerous factors. Recently, the problem of referendums seems to be the disinterest of voters in referendum outcome, resulting in referendum voting abstinence. Voters can obtain most information on the subject of the referendum from the referendum campaign. Unlike in some other countries, what has been called into question lately is not the position of the media in referendum campaigns, but the role of the government. As of now, the government is not allowed to be an organiser of a unilateral referendum campaign; nevertheless, it can take part in it and transparently, objectively, wholly and in a balanced way provide the public with information, and in doing so, is allowed to use budget funds to this end.

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