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Foreword

There are many reasons for examining the notion of a referendum at the national level. Apart from elections, a referendum is one of the key procedures to enable citizens to influence political life. The smaller a democratic body, the greater the possibility of citizens' participation, and the smaller the need to give a decision-making power to the representatives. For a long time and throughout the world, Switzerland has been cited as a model of (semi-) direct democracy. As such, one is tempted to think, Switzerland attaches a particularly strong importance to referenda and has got a long-standing experience with the impact of their outcomes in socially controversial issues. Does Switzerland hence provide us with lessons to be considered when it comes to the topic of the present volume? "Yes, however…", may be the neutral Swiss reply.

Indeed, referenda are an important component of Swiss democracy. However, we need to precise that they only form one pillar of the direct-democratic instruments of our State's institutional infrastructure. In the Swiss context, a "referendum" is to be understood as an opposition to an amendment to the law being subject to a popular vote. Most often, the term refers to so-called "optional referenda", which need to gather the signatures of 50 000 citizens within 100 days in order to be subject to the national ballot. Besides "optional" referenda in article 139, the Swiss Constitution provides in specific cases (e.g. the adhesion to supranational communities, article 140) also for "mandatory" ones.

The referendum as a constitutional instrument was introduced in Switzerland as early as in 1874. Since then, 185 optional referendums have been held, 80 of which were unsuccessful. In addition to that, we need to mention that popular votes in Switzerland can also take the form of "initiatives". In contrast to referenda, these are civic proposals for constitutional changes which require the collection of 100 000 signatures within 18 months.

Although initiatives are historically less likely to be successful than referenda (until 2018, only 22 out of 209 popular initiatives have been accepted), they experience an almost inflationary use in recent decades. Moreover, their traditionally modest chances of getting approved by popular vote seem to get ever higher in recent

times. In fact, not less than 10 initiatives (i.e. almost half of all successful initiatives in Swiss history) were approved in the current, still relatively young millennium.

By definition, citizen's requests whose support reaches a minimum of 50 000 or 100 000 signatures should deserve to be described as "socially controversial issues". However, the increasing use of initiatives is not the only sign that such social controversies tend to be on the rise in Switzerland. Undoubtedly, we also observe changes in their nature.

One of them is e.g. the fact that in recent times, certain polarising social issues gathered support for not only one, but several popular votes and, consequently, are recurring topics of political campaigns. To mention some striking examples, crime and sexual abuse were subject to no less than three successfully adopted initiatives since the year 2000. Similarly, immigration proved to be a constant hot potato in recent ballots.

A second one arises from the legal nature of the mentioned direct-democratic instruments in Switzerland. In fact, unlike in other countries, the admissibility rules of referenda and initiatives in Switzerland include comparatively little restrictions in terms of content. Consequently, public debates and votes on even socially polarising issues are per se nothing unfamiliar to Swiss citizens. However, while popular initiatives are only meant to amend or introduce *constitutional* provisions, referenda aim at merely 'correcting' the legislator. Virtually, there is hence no direct-democratic instrument in the citizens' hands in order to introduce new ordinary laws. This leads to the somewhat paradoxical situation that trivial, but yet highly controversial issues, which perhaps would be better resolved on a statutory level, end up being the subject of constitutional public debates.

The questions of whether such anomaly is wishful or not for the future of Swiss democracy, and – if not – how it needs to be resolved, are open ones. Meanwhile the fact remains that polarising social issues will keep engaging Swiss public debates. The example of Switzerland for now shows how perceived legislative inaction in socially delicate issues may provoke and spark constitutional debates.

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Introduction

In recent years more and more decisions about political matters have been made through referendums and popular initiatives. The level of civic participation in decision-making is an important element of discussions on the condition of contemporary democracy. The opportunity to participate in what is broadly understood as political life, and people's influence on the authorities are among the fundamental principles of democracy. The real and effective participation of citizens in the decision-making process is recognized as a phenomenon crucial to the development of a strong and stable democracy.

This volume of „Białostockie Studia Prawnicze" [Bialystok Legal Studies] is devoted to the referenda on problematic issues. The referenda on social controversial issues such as abortion, same-sex marriage, divorce, and affirmative actions have been carried out in some European countries (Ireland, Italy, Malta, Croatia) and provided an impetus to the topic selection for the volume. In the Republic of Ireland, the referendum on divorce was held twice: in 1976 (people voted against legalization of divorce) and in 1995. Italian referenda on abortion were held three times: in 1983, 1992 and 2018. In 1974, a record of 87% turnout occurred in voting on the repeal of the law on divorce. Finally, in 1981 two referenda were carried out regarding the law legalizing abortion. In Malta the referendum on divorce was held in 2011. Malta was the only European country and one of three (together with the Philippines and the Vatican City) in the world to not allow divorce. In December 2013 Croatian citizens voted in the referendum and rejected legalization of same-sex marriages by approving constitutional amendment defining marriage as a union between a man and a woman. In 2015 Slovakian citizens made the same decision. In addition to the European examples, American cases may constitute a major focus of study on the presented topic.

These numbers demonstrate that social controversial issues are very intensive and that particular states are willing to transfer these matters to their citizens. At present, referenda are gaining greater and greater importance. We are witnessing the era of choice, of the decision-making by citizens which is called "referendumania" by these who are skeptical about this approach.

Therefore, in the present volume of the BSP we present high quality multidisciplinary contributions analysing, in particular, the following: What is the role of referendum in problematic issues? E.g. does more liberal response lead to more liberal attitude of society?; Do the referenda actually solve the controversial social dilemmas?; Which factors influence the vox populi?; What are the results of referenda? Do they impact on the political and legal system?; What is the role of mass media in the framing of the controversial dilemmas?

I hope the readers will find this project interesting and inspiring.

Elżbieta Kużelewska
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Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe

Abstract: Marriage is a successful institution and it makes sense to open it to as many people as possible. The issue of same-sex marriage sparked emotional and political clashes between supporters and opponents. Denial of marriage rights to same-sex people can be seen as a kind of discrimination. This paper explores legal recognition of same-sex marriages. It thereby focuses on the role of Constitutional (Supreme) Courts engaging with the legal arguments over same-sex relationship recognition and marriage. It highlights the effects of policy evolution towards same-sex marriage as well as society's attitudes. The paper examines the role of referendum held in five European states (Croatia, Slovakia, Ireland, Slovenia and Romania) devoted to (in general) same-sex marriage. It discusses the results of referendums and voters' choice.
Keywords: dignity, legalisation, partnership, referendum, same-sex marriage

1. Introduction

The change of approach to homosexuality and to the homosexual relationship took place gradually. In the interwar period and in the first two decades after the Second World War, depenalization of homosexual acts took place in developed countries. The culmination of this stage was the official deletion of homosexuality from the list of mental disorders by the American Psychiatric Association in 1973[1],

1 J. Drescher, Out of DSM: Depathologizing Homosexuality, „Behavioral Sciences" 2015, vol. 5(4), pp. 565-567.

and in 1990 by WHO from the International Classification of Diseases and Health Problems[2].

In Western European societies, in the post-war period, there was a prevailing conviction that the state should not interfere with the private life of the individual. With the gradual increase in social acceptance of homosexual people[3], the conviction about discrimination against homosexuals, especially in the field of civil law in the case of a desire to create a stable relationship, grew[4]. Same-sex relationships could not benefit from legal protection for heterosexual couples after they were registered.

Since the late 1970s, there has been a slow process in Western and Northern Europe to legalize same-sex relationships[5]. Then there was the stage of "semi-marriage" or quasi-marriage, often referred to as partner relationships – when same-sex couples were given the opportunity to conclude lawful relationships with significantly smaller rights in comparison with marriage (half-marriages) or different from marriage only by excluding a few rights – first of all adoption (quasi-marriage)[6].

At the beginning, the parliaments of many countries offered limited rights to same-sex couples through registered partnerships[7]. Denmark was the first country to allow same-sex couples to register as domestic partners in 1989. Partnership recognition granted property and inheritance rights to same-sex Danish couples enjoyed by heterosexual couples[8]. Nowadays there are only 29 countries that allow same-sex couples to marry. In the majority of them the parliament gave the law. Only in Ireland the citizens positively decided in referendum about the same-sex marriage.

The paper has two aims: first, to analyse the legalisation of same sex-marriage, second, to discuss the results of referenda on the same-sex marriage and their consequences for the society and political system. The hypothesis to be examined is

2 World Health Organisation https://www.who.int/bulletin/volumes/92/9/14-135541/en/ (access 12.01.2019).

3 A.R. Flores, E.A. Park, Polarized Progress. Social Acceptance of LGBT People in 141 Countries 1981-2014, Los Angeles 2018; P. Hart-Brinson, The Social Imagination of Homosexuality and the Rise of Same-Sex Marriage in the United States, "Socius: Sociological Research for a Dynamic World" 2016, vol. 2, p. 4.

4 M. King, A. Bartlett, What same sex civil partnership may mean for health, "Journal of Epidemiology & Community Health" 2006, vol. 60(3), pp. 188-191.

5 K. Kollman, M. Waites, United Kingdom: changing political opportunity structures, policy success and continuing challenges for lesbian, gay and bisexual movements, (in:) M. Tremblay, D. Paternotte, C. Johnson (eds.), The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship, Farnham 2011, p. 190.

6 V. Vermeulen, Developments in European law and European Union policy on same-sex couples: An overview of judicial, legislative and policy developments in the recognition of same-sex couples in Europe, Coder 2008, pp. 8-10.

7 K. Waaldijk, Same-Sex Partnership, International Protection, „Oxford Public International Law" 2013, p. 3.

8 M. Glass, N. Kubasek, E. Kiester, Towards a European Model of Same-Sex Marriage Rights: A Viable Pathway for the U.S., "Berkeley Journal of International Law" 2011, vol. 29(1), p. 141.

the following: popular votes (e.g. referendum) are zero-sum and conflict maximising, leading to the possibility that unchecked majoritarianism allows minorities to be oppressed in a way that is unlikely in representative government. The paper is composed of two sections. Section one presents the states in which the same-sex marriage is allowed. The US referenda and legal solutions regarding the same-sex marriage are also discussed. Section two analyses the referenda on the same-sex marriage held in European states. The statistical data methods and legal analyses have been used in this paper.

2. The same-sex marriage regulations

Regarding the same-sex marriage legal regulations, Europe is both, the leader in the number of states that allow same-sex marriage (16) as well as the pioneer, as the first countries that allowed the same-sex marriage were the Netherlands in 2001[9] and Belgium in 2003[10] and "the sky did not fall"[11]. Other countries, such as Germany, Croatia, Estonia, Hungary, Slovenia, Czechia and Italy recognise civil unions, or registered partnership, or unregistered cohabitation[12].

Table 1. Legalisation of same-sex marriages in the world

State	Year of legalisation of same-sex marriage
Netherlands	2001
Belgium	2003
Canada, Spain	2005
South Africa	2006
Norway, Sweden	2009
Portugal, Iceland, Argentina	2010
Denmark	2012

9 K. Kollman, Pioneering marriage for same-sex couples in the Netherlands, „Journal of European Public Policy" 2017, vol. 24(1), p. 109.

10 T. Scali, S. D'Amore, Same-sex marriage and same-sex adoption: Socio-political context of the rights of gay and lesbian people in Belgium, „Psychology of Sexualities Review" 2015, vol. 6(1), p. 84.

11 L.D. Wardle, The Attack of Marriage as the Union of Man and a Woman, "North Dakota Law Review" 2007, vol. 83, p. 1372.

12 M. Fichera, Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape, "German Law Journal" 2016, vol. 17(3), p. 387.

Uruguay, New Zealand, France, Brazil	2013
England, Scotland, Wales	2014
Greenland, Luxembourg, Ireland, United States of America[1]	2015
Colombia, Estonia, Gibraltar	2016
Germany, Malta, Faroe Islands	2017
Austria	Since 2019
Taiwan	Since 2019

1. The United States Supreme Court made marriage equality federal law in 2015.
Source: https://businessinsider.com.pl/international/the-25-countries-around-the-world-where-same-sex-marriage-is-legal/kw38chk (access 18.11.2018).

The right to marry someone of one's own sex was a fundamental issue not only for regular persons, but also for politicians. In Iceland then-Prime Minister Jóhanna Sigurðardóttir married her longtime partner Jonina Leosdottir as the law came into effect. In Luxembourg the bill was spearheaded by the country's Prime Minister, Xavier Bettel who married his long-time partner Gauthier Destenay a few months after the legislation passed.

The concept of human dignity has been used in a few states to overturn discriminatory practices. The Constitutional Court of Austria in 2017 ruled that giving same-sex couples only the right to enter into partnerships, not marriages, is a kind of discrimination[13]. The Constitutional Court was examining a complaint about a 2009 law which meant a couple was denied permission to enter a formal marriage by Viennese authorities[14]. It said in a statement that "the distinction between marriage and civil partnership can no longer be maintained today without discriminating against same-sex couples," adding that keeping the two institutions separate suggests that "people with same-sex sexual orientation are not equal to people with heterosexual orientation"[15]. By virtue of this resolution, persons of the same gender will be able to get married in Austria at the latest in 2019.

Among Asian and African states only one in each continent legally recognise same-sex marriage – Taiwan and South Africa. In May 2017 Taiwan's Constitutional

13 VfGH 04.12.2017, G258/2017: Distinction between marriage and registered partnership violates ban on discrimination (Summary/Bulletin on Constitutional Case-Law 2017/3).

14 H. Horton, Austrian Constitutional Court rules same-sex couples can marry by 2019, „The Telegraph", https://www.telegraph.co.uk/news/2017/12/05/austrian-constitutional-court-rules-same-sex-couples-can-marry/ (access 03.01.2019).

15 https://www.news24.com/World/News/austrian-court-rules-that-same-sex-couples-can-marry-20171205 (access 03.01.2019).

Court issued a judgement[16] in which it recognized a provision of the Civil Code allowing only marriages of persons of the opposite sex to be inconsistent with the Constitution. The Court gave the parliament the period of two years to introduce appropriate legislative changes. If such changes are not introduced, same-sex couples will be entitled to marry by filing an appropriate declaration at the office with at least two witnesses[17]. In South Africa the Constitutional Court used dignity as a justification for opening marriage to same-sex couples in the 2015 *Fourie* decision[18]. *Fourie* not only opened the space for same-sex couples to access marriage, but on its way to achieving that, it created the conditions necessary for future decisions to focus on the protection of diverse families outside the marriage model[19].

As far as the United States are concerned, same-sex marriage had been legal in 37 out of the 50 US states, plus the District of Columbia, prior to the 2015 ruling. The United States Supreme Court made marriage equality federal law in 2015. In 2015 the Supreme Court of the United States ruled that the Fourteenth Amendment of the Constitution requires all states to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state. The same-sex marriage is the law mandated by the Supreme Court's application of the Fourteenth Amendment's promise of due process and equal protection[20]. Legal recognition and sanctioning of same-sex relationships has occurred in various fits and starts across the United States. The legal battle over the status of same-sex relationships began with a 1993 Hawaii State Supreme Court decision[21] that publicly suggested discrimination against same-sex couples from marrying might constitute sex discrimination.[22] In the subsequent decade, Hawaii and other states moved to enact new laws that explicitly limited the legal institution of marriage to heterosexual couples. The US Congress followed with the Defense-of-Marriage Act of 1996 (DOMA[23]), which allowed states to ignore same-sex marriages performed in other states, and defined marriage as

16 Judicial Yuan Interpretation no. 748 and Reasons, www.jirs.judicial.gov.tw/GNNWS/NNWSSøø2.asp?id=267570 (access 03.01.2019).

17 K. Hikita, Can human rights of a sexual minority in Japan be Guaranteed? A Comparison with Taiwan's efforts for Gender Equality, „Journal of Asian Women's Studies" 2017, vol. 24, p. 1.

18 Case CCT234/15, www.saflii.org/za/cases/ZACC/2016/44.pdf (access 3.01.2019).

19 M. Saez, Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World, "Duke Journal of Comparative & International Law" 2014, vol. 25, pp. 149-150.

20 S.E. Isaacson, *Obergefell v Hodges*: The US Supreme Court Decides the Marriage Question, "Oxford Journal of Law and Religion" 2015, vol. 4(3), pp. 530-533.

21 *Baehr v. Lewin*, Hawai'i Supreme Court 74 Haw. 645, 852 P.2d 44 May 5, 1993.

22 National Council of State Legislatures. Same Sex Marriage Laws. Washington, DC: National Council of State Legislatures; 2014; B. Lennox Kail, K.L. Acosta, E.R. Wright, State-Level Marriage Equality and the Health of Same-Sex Couples, "American Journal of Public Health" 2015, vol. 105(6), pp. 1101-1105.

23 Pub. L. No. 104-199, 110 Stat. 2419.

"a legal union between one man and one woman." In 2004, Massachusetts was the first state to fully legalize same-sex marriage. Referenda on same-sex marriage were held in Michigan (2004), Washington (2012) and California (2012). Referring to other states, the Supreme Court's ruling in *Windsor*[24] requires the federal government to recognize legally performed marriages of same-sex couples. The Supreme Court also dismissed an appeal of the federal district court ruling that struck down California's Proposition 8 (which overturned marriages of same-sex couples in California) as unconstitutional in *Hollingsworth v. Perry*[25] leaving intact the district court's ruling that Proposition 8 is unconstitutional and can't be enforced.

3. Referenda on same-sex marriage in Europe

In Europe same-sex marriage has been the subject of a referendum in five states: Slovenia, Slovakia, Croatia, Ireland and Romania. Only the Irish supported same-sex marriage by a popular vote. The fundamental question is why the people began to demand a referendum on moral issues? Is it true that political parties have apparently been willing to concede to these demands and to refinish their monopoly on legislating?

Table. European referenda on the same-sex marriage

State	Date of referendum	Subject of referendum/question	Turnout in %	Results
Croatia	1 December 2013	"Are you in favour of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?"	37.88%.	For 65,87%
Slovakia	7 February 2015	Do you agree that only a bond between one man and one woman can be called marriage?	21,4	For – 94.50%; Against – 4.13%
		Do you agree that same-sex couples or groups should not be allowed to adopt and raise children?	21,4	For – 92.4%; Against – 5.54%
		Do you agree that schools cannot require children to participate in education pertaining to sexual behaviour or euthanasia if the children or their parents don't agree	21,4	For – 90.3%; Against – 7.34%
Ireland	22 May 2015	The same-sex marriage	60,52	Accepted 62,07% for

24 *Windsor v. United States*, No. 12-2335 (2d Cir. 2012).
25 *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

Slovenia	25 March 2012	Amendment to the family code	30,31	Not accepted 54,55%
	20 December 2015	The same-sex marriage	36,38	Not accepted (63,51% against)
Romania	6-7 October 2018	Constitutional amendment to specify that marriage can only be between a man and a woman	20,4	Not accepted

Source: Author's own studies based on Research Centre on Direct Democracy, http:// c2d.unige.ch (access 28.11.2018); www.portal.statisctics.sk (access 28.11.2018).

Before the brief analysis of the data specific for particular states will be done, a few general remarks are given. Firstly, only in five European states the referendum on same-sex marriage was held. Secondly, all countries but Romania have dominant catholic religion. Thirdly, in all states except from Ireland, the turnout was below 50% and here arise two questions – 1) can the people decide in a referendum on issues which many consider to be discriminatory for a certain group of people?; 2) what about legitimacy in the situation where a minority of voters participated in the referendum? Finally, the same-sex marriage was approved by the citizens in a referendum only in Ireland.

In Croatia the referendum on defining marriage as a union between a man and a woman was held on 1 December 2013. Although Croatia has already defined marriage as a heterosexual union in the Law on Family (2009), the citizens' initiative In the Name of the Family (*U Ime Obitelji*) wanted to introduce this definition into the constitution in order to guarantee legal protection of children, marriage, and the family, and to prevent putting the same-sex unions and marriage on equal footing[26]. All this happened just five months after Croatia became a member of the EU[27]. The Initiative was a response to the Government's alleged plans to legalize same-sex marriage[28]. The Catholic organization In the Name of the Family, supported by the Catholic Church, collected 750 000 signatures to complete the condition to call the citizen initiated constitutional referendum. The motion was submitted to the Parliament on 14 June 2013 and voted on 8 November 2013. The Parliament supported the initiative with 104 votes "for" and 13 "against"[29]. The citizens answered the question: "Are you in

26 V. Trstenjak, General Report: The Influence of Human Rights and Basic Rights in Private Law, (in:) V. Trstenjak, P. Weingerl (eds.), The Influence of Human Rights and Basic Rights in Private Law, Springer 2016, p. 37.

27 K. Slootmaeckers, I. Sircar, Croatia, the EU, and the marriage referendum: The symbolic case of LGBT rights, ECPR General Conference 2014, https://ecpr.eu/Filestore/PaperProposal/f3af562f-e97a-4143-8292-ac4d2150062f.pdf (access 14.01.2019).

28 R. Podolnjak, Constitutional Reforms of Citizen-Initiated Referendum. Causes of Different Outcomes in Slovenia and Croatia, „Revus. Journal for Constitutional Theory and Philosophy of Law" 2015, vol. 26, p. 138.

29 M. Marczewska-Rytko, Direct Democracy in Croatia, (in:) M. Marczewska-Rytko (ed.), Handbook of Direct Democracy in Central and Eastern Europe After 1989, Opladen-Berlin-Toronto 2018, p. 79.

favour of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?". The government wanted the Constitutional Court to review the constitutionality of the referendum question because it infringed on the rights of the minorities, provided for in the Constitution. On 13 November 2013 the Constitutional Court ruled that the voting was in compliance with the law and its result was binding[30]. The final results of the referendum were announced on 12 December 2013. The turnout was 37.88%, 66.28% of the total voters voted "Yes" while 33.72% voted "No"[31].This law turnout fits the rule that referendum attracts fewer voters than elections and raises the question of the legitimacy[32].

The 2015 Slovak "Referendum on Family" was initiated not by the political parties, but by citizens' activists[33]. In the referendum of February 2015 the Slovaks answered three questions. The forth question on registered partnership was interpreted by the Constitutional Court as infringing upon the fundamental rights of citizens from the LGBT community guaranteed by the Slovak Constitution – and finally it was rejected from appearing on the ballot[34].

The first question concerned the introduction of the constitutional ban on marriages between same-sex persons, by confirming that the term "marriage" is reserved exclusively for a union between a man and a woman, and cannot apply to any other form of relationship. The question was evidently unconstitutional and that was the stance adopted by the Constitutional Court[35]. The second question concerned the ban on adoption of children by same-sex couples or groups. The last question was associated with the possibility that children could refuse to attend classes during which sexual behaviours or problems of euthanasia are discussed if the parents or children do not agree with the content of instruction. The initiative to call a referendum on controversial moral questions was launched by a Catholic community organization called Alliance for Family (*Aliancia za rodinu, AZR).*

All the three questions were directly linked with a specific worldview. With their liberal approach to the worldview questions, the Slovaks boycotted the referendum

30 B. Kostadinov, Direct Participation of the People in Public Power – Advantages and Disadvantages of a Referendum, Croatian and European Perspective, (in:) R. Arnolde, J.I. Martínez-Estay (eds.), Rule of Law, Human Rights and Judicial Control of Power. Some Reflections from National and International Law, Springer 2017, p. 119.

31 Državno Izborno Povjerenstvo Republike Hrvatske; Centre for Research on Direct Democracy.

32 H. Butković, The Rise of Direct Democracy in Croatia: Balancing or Challenging Parliamentary Representation?, „Croatian International Relations Review" 2017, vol. XXIII(77), p. 44.

33 M. Rybar, A. Sovcikova, The 2015 Referendum in Slovakia, „East European Quarterly" 2016, vol. 44, no. 1-2, p. 79.

34 https://www.hrw.org/news/2015/02/08/slovakia-low-turnout-scuttles-discriminatory-referendum(access 14.01.2019).

35 See more: D. Krošlák, The referendum on the so-called Traditional Familyin the Slovak Republic, „Central and Eastern European Legal Studies" 2015,vol. 1, pp. 152-153.

hence the turnout was low and the referendum was invalid[36]. It should be emphasized that from the legal standpoint the 2015 referendum was pointless as the amendment to the Slovak Constitution defining in traditional way a marriage as "a unique union between a man and a woman" has already been adopted[37] (Art. 41). The amendment of 2014 excludes the possibility of recognizing the relationship between people of the same sex. This means that the Slovak law does not permit either same-sex marriages or registered partnerships[38]. It should be also noted that the legal solutions pertaining to the definition of marriage in Slovakia's Constitution contradict Article 8 of the European Convention of Human Rights[39]. The referendum was referred to as "anti-homosexual", "in defence of traditional family", or "selfish"[40]. The initiators emphasized concern for the protection of traditional family, the interests of children growing up in the family with father and mother, and for stopping inappropriate sexual education at school. The main goal of the AZR was to change the attitude of citizens towards family values, which was the purpose of the referendum. The Catholic Church strongly encouraged people to participate in the referendum. It used emotional language to manipulate the people. In the pastoral letter the promoters of gender equality have been called as "the followers of the culture of death"[41].

The Slovenians voted twice: in 2012 and in 2015. In 2012 the referendum on the family law was held. The National Assembly decided to address the request of civil initiative to the Constitutional Court about the compliance of the proposed referendum with the Constitution. The Constitutional Court rejected the request for a review and the National Assembly called referendum[42]. As Krasovec rightfully states, in accordance with the legislation, the National Assembly is obliged not to pass any law whose content would be in contrast to the will of the people expressed in referendum for a period of one year after the referendum was held[43]. Very soon in 2014 announced another attempt to introduce equal rights for same-sex couples by

36 E. Kużelewska, Referendum ogólnokrajowe w Słowacji – nieudany eksperyment, „Acta Politica Polonica" 2018, nr 1(43), p. 57.

37 M. Sekerák, Same-Sex Marriages (or Civil Unions/Registered Partnership) in Slovak Constitutional law: Challenges and possibilities, „Utrecht Law Review" 2017, vol. 13(1), p. 41.

38 E. Kużelewska, How Far Can Citizens Influence the Decision-Making Process? Analyses of the Effectiveness of the Referenda in the Czech Republic, Slovakia and Hungary in 1989-2015, "Baltic Journal of European Studies" 2015, vol. 5, no. 2 (19), p. 182.

39 Ruling of the European Court of Human Rights, 2010.

40 E. Kużelewska, Direct Democracy in Slovakia, (in:) M. Marczewska-Rytko (ed.), Handbook of Direct Democracy in Central and Eastern Europe After 1989, Opladen-Berlin-Toronto 2018, p. 281.

41 P. Durinová, Slovakia, (in:) E. Kováts, M. Põim (eds.), Gender as a symbolic glue. The position and role of conservative and far right parties in the anti-gender mobilizations in Europe, Friedrich-Ebert-Stiftung Budapest 2015, p. 115.

42 M. Haček, S. Kukovič, M. Brezovšek, Slovenian Politics and the State, Lanham 2017, p. 151.

43 A. Krašovec, The 2015 Referendum in Slovenia, „East European Quarterly" 201, vol. 43(3), p. 305.

redefinition of marriage. In March 2015 the Parliament passed a bill defining marriage as a "union of two" instead a "union of a man and a woman"[44]. According to the proposed law, the union between two consenting adults also would grant the same-sex couples the right to adopt children[45]. The conservatives opponents (supported by the Catholic Church) were successful in collecting signatures to hold a referendum on this issue, however, the parliament refused to organise a referendum on the ground of unconstitutionality of human rights and fundamental rights freedom. The Constitutional Court (by a narrow majority of 5 judges to 4) founded the National Assembly as not entitled to declare referendum unconstitutional and allowed to hold a referendum[46]. In the 2015 referendum Slovenian rejected a law giving same-sex couples the right to marry and adopt children. The voters rejected the bill[47]. Arguments of fundamental rights have been beaten by traditional understanding of family.

Ireland was the first country that approved the same-sex marriage by referendum in 2015. Following the words of Mary McAleese "In a most democratic way possible Ireland became the first country in the world to embrace her gay and lesbian children by way of popular referendum"[48], Ireland is a unique example of a liberal society (*sic*!). The Catholic Church opposed the referendum[49]. However, the Yes side won by 62.1% to 37.9%, with a high turnout of 60.5%. Roscommon-South Leitrim was the only county to reject same-sex marriage. It is a Catholic, rural constituency with the oldest population in the country[50]. The No vote there finished with 51.4%. The final outcome of the referendum resulted in a new amendment into the Constitution by giving a clause as a new article 41.4: "Marriage maybe contracted in accordance with law by two persons without distinction as to their sex". That means equal rights to marry for same-sex and opposite sex couples. As McAleese mentioned: "It was wonderful to be able to celebrate the constitutionally recognized equality our only

44 E. Kużelewska, Demokracja bezpośrednia w Słowenii, „Studia Wyborcze" 2018, tom XXV, p. 104.

45 A. Krašovec, S.P. Ramet, Liberal Democracy in Slovenia: From Seventh Heaven to the Lobby of Hell in Only Two Decades?, (in:) S.P. Ramet, Ch.M. Hassenstab, O. Listhaug, Building Democracy in the Yougoslav Successor States. Accomplishments, Setbacks, and Challenges since 1990, Cambridge 2017, p. 277.

46 P.M. Ayoub, When States Come Out. Europe's Sexual Minorities and the politics of Visibility, New York 2016, p. 186.

47 E. Kużelewska, Direct Democracy in Slovenia, (in:) M. Marczewska-Rytko (ed.), Handbook of Direct Democracy in Central and Eastern Europe after 1989, Opladen-Berlin-Toronto 2018, p. 299.

48 M. McAleese, Foreword, (in:) G. Healy, B. Sheehan, N. Whelan (eds.), Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won, Merrion Press 2016.

49 F. Ryan, Ireland's Marriage Referendum: A Constitutional Perspective, DPCE Online 2015, vol. 2, p. 16 http://eprints.maynoothuniversity.ie/8934/1/FR-Ireland-2015.pdf (access 3.01.2019).

50 https://www.thejournal.ie/roscommon-south-leitrim-voted-no-why-2121899-May2015/ (access 3.01.2019).

son can now enjoy. No longer will he be a second-class citizen. Now he has the same marriage rights as his twin and older sister"[51]. The referendum had also another significance. The parliament finally passed the Gender Recognition Act 2015 which allowed transgender people to be treated for legal purposes as being of their preferred gender[52]. So, the Irish 2015 referendum was a "wind of good changes" for sexual minorities. The social context seems to be really interesting. Conservative Ireland with a majority Catholic population[53] supports a "gay marriage".

Romania does not recognize gay marriage or civil unions. The president of the pro-referendum Coalition for Family, told the BBC ahead of the vote they were trying "to protect, at a constitutional level, the definition of marriage – between one woman and one man". The referendum was held in October 2018. The No campaign's strategy – to boycott the vote in the hope the turnout fell below the 30% needed to validate the referendum – was successful. It should be noted that the marriage is regulated by the Romanian Constitution and the Civil Code. The Constitution in the art. 48(1) states: "The family is founded on the freely consented marriage of the spouses (…)". The intention of the referendum's initiators was to include "man and woman" in the definition of "spouses" illustrated by the Civil Code in the art. 258(4) – "the man and the woman united through marriage". The Civil Code in the art. 259(1) states that marriage is "the freely consented union between one man and one woman". Moreover, the Civil Code in art. 277(2) states that "marriage shall be prohibited between persons of the same sex." Furthermore, Article 277 (2) of the Civil Code emphasizes that Romania shall not recognize same-sex "marriages" contracted abroad (either by Romanian or foreign citizens). In accordance with Article 277 (3), the same is applicable to civil partnerships[54].

4. Conclusions

The hypothesis has been positively examined. Popular votes, in particular a referendum, seems to be a zero-sum and conflict maximising, leading to the possibility that majority of voters allows sexual minorities to be oppressed. In general, popular votes can be democratic, although they can fail basic democratic norms and can be deployed for non-democratic ends. In Slovenia a civic initiative leading to a referendum resulted in a law voted by the parliament being rejected by

51 M. McAleese, Foreword, *op.cit*.

52 F. Ryan, Ireland's Marriage Referendum..., *op.cit*., p. 18-19.

53 J.A. Elkink, D.M. Farrell, T. Reidy, J. Suiter, Understanding the 2015 Marriage Referendum in Ireland: Constitutional Convention, Campaign, and Conservative Ireland, https://www.researchgate.net/publication/283714146_Understanding_the_2015_marriage_equality_referendum_in_Ireland (access 18.11.2018).

54 A. Portaru, Marriage at a Crossroads in Romania, https://coalitiapentrufamilie.ro/wp-content/uploads/2017/05/Marriage-at-a-crossroads-in-Romania.pdf (access 22.01.2019), p. 30.

the people. However, the parliament and the government supported equal rights to marry, while citizens turned out be more conservative. Only the Irish society in the referendum said "yes" to same-sex marriage.

The reasons for "no" to same-sex marriage expressed in a referendum in other analyzed states have been connected with a feeling of erosion of a culture of marriage and marital families. According to the conservatives, marriage establishes the moral core of the family and the moral base-line and standards for society in many ways. Critics argue that changing the definition of marriage as the union of a man and a woman would go against natural law and risk undermining both the institution of marriage and the family's role in holding society together. The same-sex marriage is legalized on the principle of personal choice and the rule of human dignity. In the XXI century idea to refuse the same-sex marriage can be recognized as a kind of (sexual minority) discrimination. All countries mentioned in this paper are the EU Member States and thus have to implement the general principle of non-discrimination and the directives of non-discrimination in their legislation.

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Mechanisms of Direct Democracy in the United States. The Case of Same-Sex Marriages under the Popular Vote in California

Abstract: The article mainly deals with mechanisms of direct democracy used under the state law of California. In the opening part, however, it explains the differences between the two main direct democracy devises: the initiative and referendum. It then provides overview of the basic rules of federal and state law on direct democracy pointing to the differences and lack of regulation on the direct democracy in the federal constitution. The article further follows with the introduction of the initiative and referendum legal grounds in California. To introduce the practical use of the direct democracy devices, the article uses the coverage of the Californian battle over the same-sex marriage under the propositions submitted to popular vote in this state together with the judicial decisions resulting from the battle. The article ends with the final say given by the United States Supreme Court in the problematic question of the legality of same-gender marriages and final conclusions on the state of direct democracy in California.
Keywords: initiative, referendum, Proposition 8, same-sex marriage

1. Introduction

The main goal of the presented article is to focus on one particular issue that went under the popular vote in California and that is the right to marry by same-sex couples, a social dilemma widely discussed and dealt by several states in the United States and a dilemma that divided the states, their regulations and judicial decisions severely enough for the United States Supreme Court to take the final vote and end the battle. The history and regulations of initiatives and referendums in California are taken as an example, due to the fact that Californian residents participate in the popular vote most often comparing to other American states.

To clearly analyze the problem it is necessary to explain the terminology used in the United States when referring to two instruments (two ballot measures) mainly used when the voice of the people is to be heard directly.

An initiative (also called popular initiative, voter initiative, citizen initiative or, simply, initiative) is an instrument used when a given number of voters in a state effectuate the placement of an amendment or proposal on the ballot for acceptance bythe voters in the particular state. Through initiatives citizens may amend their state constitutions (constitutional initiatives) or they may be used for the introduction of the citizens' legislative schemes (statutory initiatives).[1]Depending on the state regulations the initiatives may be direct or indirect while proposing constitutional amendments or statutes.

A referendum allows citizens to decide on a statute passed by the state legislature. They may enact or repeal the provisions in question. Referendums fall within two basic categories. The first type entails the suspension of any previous legislative action on the subject until the electorate determines the outcome of the proposed measure. In the second type, all legislative acts remain in effect until the decision of the electorate is final.[2]

It should be noted that both initiatives and referendums might be used on the lower level – in communities within a state. It should also be noted that there are many variations concerning the two instruments as their legal regulations differ from state to state.[3]

2. Direct democracy under federal and state constitutions in the United States

The Constitution of the United States of America does not specifically provide for any form of direct democracy on the federal level. There has never been a national referendum or initiative where the proposal on government action would be submitted to popular vote.[4]

1 P.F. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, "Urban Law Annual" 1981, vol. 22, p. 135.

2 *Ibidem*.

3 More on the types and terminology issues: D.S. Greenberg, The Scope of the Initiative and Referendum in California, "California Law Review" 1966, vol. 54, p. 1717.

4 W.B. Fish, Constitutional Referendum in the United States of America, "American Journal of Comparative Law" 2006, vol. 54, p. 485. It should be noted that there were attempts to consider the right to initiative and referendum unconstitutional as contrary to the provision of the federal Constitution guaranteeing the republican form of government. See: W.A. Coutts, Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United States?, "Michigan Law Review" 1908, vol. 6, p. 304.

The Supreme Court of the United States confirmed however, that the decisions of particular states to provide for direct democracy use under their legal orders do not violate the federal constitution.[5]

The closest it ever got to the nation-wide and citizen-made decision was the repeal of the Eighteenth Amendment to the Constitution (the prohibition Amendment) in 1933. It was the only situation in the history of the constitutional amending procedure where the ratification of the Amendment was done through state ratifying conventions. The US Constitution provides for two forms of Amendment ratification – by state legislatures or by state conventions. In all other cases the ratification was processed through state congresses. Amendment Twenty First however, was decided by the conventions called in every of (back then) forty-eight states. While some states chose the form of direct ballot, in other states voters had chosen special delegates, who later casted their ballots deciding „for" or „against" the repeal of prohibition. In a way, citizens of all states were able to provide their vote – directly or indirectly on the most controversial issue of the times – the legality of „intoxicating liquors". [6]

On the state level, the situation is quite different as many various forms of direct democracy mechanisms have been present in the state constitutions and state traditions since the 17th century when ordinances were voted on during hall meetings in New England. In 1778 the first legislative referendum was organized in Massachusetts in which the draft constitution was rejected only to be ratified after another referendum held two years later. Further amendments to the state constitution were submitted to the popular vote.[7]

At the same time other states used the direct democracy mechanisms to build their constitutional structures based on the involvement of the citizens. By 1830,ten of 24 American states had used some form of popular vote in constitutional issues.[8]

Presently 26 out of 50 American states provide for some kind of direct democracy mechanism (power of initiative or referendum) under state laws and the regulations vary depending on what kind of laws may be subject to the popular vote (constitution, statutes or both).

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5 *Pacific States Telephone and Telegraph Company v. Oregon*, 223 U.S. 118 (1912).

6 More on the repeal of the Prohibition Amendment see: J.M. Rotter, J.S. Stambaugh, What's Left of the Twenty-First Amendment, "Cardozo Public Law, Policy & Ethics Journal" 2008, vol. 6, p. 601, J.H. Crabb, State Power over Liquor under the Twenty First Amendment, "University of Detroit Law Journal" 1948, vol. 12, p. 11, R.H. Skilton, State Power under the Twenty-First Amendment, "Brooklyn Law Review" 1938, vol. 7.

7 G.H. Haynes, How Massachusetts Adopted the Initiative and Referendum, "Political Science Quarterly" 1919, vol. 34, no. 3, p. 460.

8 J.G. Matsusaka, For the Many Or the Few: The Initiative, Public Policy, and American Democracy, University of Chicago Press 2004, p. 125, R. Tuck, Democratic Sovereignty and democratic government: the sleeping sovereign [in:] R. Bourke, Q. Skinner (eds.), Popular Sovereignty in Historical Perspective, Cambridge University Press 2016, p. 136.

In 15 states all options are allowed. In all but one state (Delaware) popular vote is required to approve amendments to the state constitution. But for example in three states (Florida, Illinois, Mississippi) only constitutional amendments may be initiated or constitutional convention may be called through initiative. No legislation may be initiated or repealed through the referendum. In three other states (Alaska, Idaho, Maine) the popular vote proposing constitutional amendment is not possible, but statutes can be initiated and statute referendum can be called. 24 states do not provide for any form of initiative or referendum.[9] The power of initiative or referendum is granted to the citizens directly under the state constitution and detailed procedures are included in statutes.[10]

The direct democracy mechanisms in the states allowing them, are widely used to get the people's voice on an extensive range of issues, including problematic social dilemmas. The voting is usually organized together with political elections. Every two years citizens of all states elect members of the House of Representatives and one-third of the Senators, so the questions submitted to popular vote come together during election time. In the recent elections in November 2018, different ballot measures were introduced in 36 states. In 22 states providing for initiatives and referendums a variety of questions were raised including legality of marijuana (Michigan Missouri, North Carolina and Utah), abortion (Alabama, Oregon and West Virginia) and other specific problems, such as Gender Identity Anti-discrimination Veto Referendum in Massachusetts or Voter Approval of Casino Gambling Initiative in Florida. In 14 additional states constitutional amendments were subject of citizens' decision. What is worth mentioning is the fact that there is usually more than one issue put into question during one voting, so a total of 155 issues were decided upon on November 6, 2018.[11]

Looking at the map of the United States it is clear that the ballot measures through which citizens directly participate in the legislative process have developed mostly in the West, while the South and East stayed away from these types of direct actions historically afraid of the power they would vest in the hands of African Americans and immigrants.[12]

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9 Ballotpedia Information available at: https://ballotpedia.org/States_lacking_initiative_or_referendum (access 27.12.2018).

10 For example art. 4 of the Arizona Constitution is supplemented by Arizona Statutes Title 19, 19-101, 19-102 and further provisions. Art. 5 of the Colorado Constitution finds its extension in Colorado Statutes 1-40-101 and further provisions. Art. 2 of the Ohio Constitution provides for the basic rights and the procedures are included in Ohio Statutes Chapter 3519.

11 Ballotpedia Information available at: https://ballotpedia.org/Ballot_Measure_Scorecard,_2018#November_6 (access 27.12.2018).

12 A. Debray, Governing by the people: the example of California's propositions (1990-2012), "Mémoire(s), identité(s), marginalité(s) dans le monde occidental contemporain" 2015, no. 14, p. 2.

3. Constitutional regulations and main principles regarding the initiative and referendum in California

Direct democracy instruments were introduced in California during the wave of progressive movement that introduced reforms in 22 states providing for initiatives and referendums to become part of the state's legal orders. The movement went across the country in the early 1900's and reached California in 1911. Hiram Johnson was the leading Californian politician at the time (governor of the Golden State between 1911 and 1917) and strong supporter of progressivism. Under his leadership California adopted the initiative and referendum into the state system as a weapon against the dominance of the monopolist company in the railroad industry that had controlled the state politics at the time.[13]Johnson believed that the people can be best armed to protect themselves by the powers granted in the instruments of direct democracy such as referendum, initiative and recall.[14]

On October 10, 1911 three milestone propositions (proposed legislations) were submitted to popular vote (among many other propositions voted in the same time). Proposition 7 extended the use of direct democracy devices in California. In addition to the obligatory vote on constitutional amendments through referendum, now the optional initiative and referendum were options possible to be used. Proposition 4 granted women in California the right to vote and Proposition 8 introduced another instrument known as recall that allows citizens to remove and replace a public official before the end of a term of office.[15]

The presented article further focuses on two measures used in California that is initiative (including constitutional amendment initiative and state statute initiative) and the veto referendum, leaving other instruments (such as recalls, bonds or legislatively referred constitutional amendments and state statutes) outside of the scope of the research.

Basic rules for the initiative and referendum are provided for in the state constitution and supplementary regulations are passes by the legislatures in the state statutes. According to the California Constitution, initiative and referendum powers may be exercised by the electors of each city or county. Statutes passed by the state

13 More on the history of progressive reforms in California: B.P. Janiskee, K. Masugi, Democracy in California: Politics and Government in the Golden State, Rowman & Littlefields Publishers 2011, pp. 20-23.

14 F. Hichborn, Story of the Session of the California Legislature of 1911, San Francisco 1911, p. 93.

15 G. Gendzel, The People versus the Octopus: California Progressives and the Origins of Direct Democracy, "Siècles" 2013, vol. 37, p. 5. The recall is now governed by the constitutional provisions together with the initiative and referendum.

legislature provide for the specific provisions on the circulation, presentation, and certification of signatures for both mechanisms.[16]

3.1. Constitutional regulations on initiative

Presently article II of the California Constitution provides fundamental rules for the initiative and referendum. Section 8 is dedicated to initiative defined as „the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them". Any citizen or group of citizens may present to the Secretary of the State an initiative measure by signing a petition including the text of the proposed statute or proposed constitutional amendment. The petition must be signed by certain amount of signatures representing percentage of the total number of ballots cast for governor in the last election – eight percent in the case of the amendment and five percent in the case of the proposed statute. The Secretary of State then submits the measure at the next general election at least 131 days after it qualifies or at any special statewide elections held within that time. If necessary, a special statewide election may be organized by the Governor of the state.[17]

There are some constitutional limitations on the initiative. It may not embrace more than one subject. Furthermore, it may not or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision. Finally, the initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.[18] Additional limitation is set forth to prevent putting into the initiative vote any particular names of individuals to hold any office, or names or identifies of any private corporation to perform any function or to have any power or duty.[19]

If the majority of the votes supports the proposition, it becomes law, even though it never went through the legislative procedure in the state congress and it was not signed by the governor of the state, as would happen in the regular legislative process.

16 *Ibidem*, Art. II Sec 11. California Statutes (California Code, Elections Code) provide for specific, detailed instructions for the initiative and referendum procedures. See: Division 9: Measures Submitted to the Voters CA ELEC § 9000-9610. On-line version available at: https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=ELEC&tocTitle=+Elections+Code+-+ELEC (access 27.12.2018).

17 California Constitution, Art. II Sec. 8 a-c. The on-line version of the Constitution is available at: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=II (access 27.12.2018).

18 *Ibidem*, Art. II Sec. 8 d-f.

19 *Ibidem*, Art. II Sec 12.

In this way the progressive reform gave citizens supreme authority by granting them the mechanism that would limit the power of politicians and allow the people to bypass the legislative procedure.[20]

3.2. Constitutional regulations on referendum

Section 9 of the Art II of the Constitution provides for the referendum process in California stating: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."[21]

This instrument is used to repeal the law that has already been passed. The referendum measure can be proposed by presenting the Secretary of the State a petition signed by the number of signatories equal to five percent of the votes for all candidates for Governor at the last gubernatorial election. The Secretary then submits the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. Special statewide elections may also be organized.[22]

The constitutional limitations for referendum provide the deadline for the proposition of the measure. It must be done within 90 days after the enactment date of the statute. Furthermore, some restrictions regard the case of a statute enacted by a bill passed by the Legislature on or before the date the Legislature adjourns for a joint recess to reconvene in the second calendar year of the biennium of the legislative session, and in the possession of the Governor after that date, the petition may not be presented on or after January 1 next following the enactment date unless a copy of the petition is submitted to the Attorney General, in accordance with the relevant constitutional provisions, before January 1.[23]

There is a mechanism allowing the state Legislature to amend or repeal the referendum statute. It is done through passing of another statute. However, this statute becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.[24] It is worth noting that California is the only state in which the initiative cannot be repealed or amended by the Legislature.[25]

A simple majority of votes is required for the initiative statue or referendum to take effect. If provisions of two or more measures approved at the same election

20 G. Genzel, The People..., *op. cit.*, p. 4.
21 California Constitution, Art. II Sec 9 a).
22 *Ibidem*, Art. II Sec. 9 b-c.
23 *Ibidem*, Art. II Sec 9 b).
24 *Ibidem*, Art. II Sec 10 c).
25 A. Debray, Governing…, *op. cit*., p. 2.

conflict, the provisions of the measure receiving the highest number of affirmative votes shall prevail.[26]

4. Propositions on socially controversial issues in California

The numbers of ballot measures introduced for the popular vote in California grants this state the winning position among other states in terms of the use of direct democracy devices.

Already in 1912 three initiatives were voted on regarding the consolidation of local government, bookmaking prohibition and set procedures for local taxation.

Between 1912 and 2017 a total of 1996 initiatives were titled of which 376 (19.26 percent) qualified for the popular vote. Out of those, 132 initiatives (35,11 percent) were approved by the voters, 241 were rejected and 3 were removed from the ballot by court order. [27]

During the same time a total of 89 referendums were titled and 50 of them (56.18 percent) were qualified for the ballot and voters approved 21 (42 percent) and rejected 29 (58 percent) of them.[28]

Only in 2018 16 statewide ballot propositions were certified (five in June and eleven in November) including eight initiatives and no referendums.[29]

Through initiatives and referendums Californians propose or repeal the laws covering a wide range of issues. Some of them regard housing regulations, tax regulations or school system. Some of the voting aims at issues that may be qualified as socially controversial including those regarding the sexual orientation, gun possession, abortion, marijuana use and death penalty.

Narrowing the scope of the research, the Californian decisions concerning the right to marry of same-sex couples were chosen for the presented article as they provided the full spectrum of problems – from the initiatives taken down by the state court decisions up to the federal courts' ruling and the two decisions issued by the United States Supreme Court.

26 *Ibidem*, Art. II Sec 10 a-b.

27 History of California Initiatives. Data Provided by the Secretary of State in California. On-line version available at: https://elections.cdn.sos.ca.gov/ballot-measures/pdf/summary-data.pdf (access 27.12.2018).

28 History of California Referenda. Data Provided by the Secretary of State in California. On-line version available at: https://elections.cdn.sos.ca.gov/ballot-measures/pdf/referenda-data.pdf (access 27.12.2018) The law which is voted on during the referendum is repealed only if majority of voters reject the referendum (cast NO votes).

29 Other included bonds and legislatively referred statutes and constitutional amendments.

4.1. Propositions concerning same-sex issues

California has been generally known as a liberal state strongly supporting the Democratic Party in all political elections.[30]However, the popular vote on issues concerning sexual orientation has not always reflected the liberal atmosphere of the Golden State.

In 1978, the so called Briggs Initiative (Proposition 6) was submitted to popular vote to pass the law banning gay and lesbian teachers from working in public schools in California. Only a year before, Harvey Milk had been elected to the San Francisco Board of Supervisors marking the historical victory of the LGBT movement and becoming the first openly gay politician to win public office. The anti-gay ballot initiative turned out to be an important test to Californians and their views in the times when gays and lesbians faced intense discrimination across the country, but also in California itself. Harvey Milk was the face and the voice of the dedicated movement fighting the measure.[31]

The initiative was supported by gay rights opponent – Senator John Briggs and required firing of gay and lesbian schoolteachers and officials or anyone with openly pro-gay positions working at schools. With voter turnout reaching 70.41 percent, the Proposition 6 was defeated with 58.4 percent of "no" votes and became a symbol of the LGBT movement for the fight of their rights. [32]

The right to marry of same-gender couples had constituted a nation-wide problem among the states through all the years prior to the US Supreme Court verdict in 2015 confirming the right from the federal level and thus making it impossible for state laws to ban it.

Same-sex marriage measures were put on ballots in many states in 1990s starting with Hawaii, after the state Supreme Court ruled that refusing same-sex marriage constituted sex discrimination under the state Constitution.[33] The results in most of

30 President Barack Obama won 60.9 percent of the state vote in the presidential elections in 2008 and 34 out of 53 seats in House of Representatives were taken by Democrats. In 2016 Hilary Clinton received 61.5 percent of the votes and 39 seats in the House of Representatives were taken by the Democrats. Data available on the New York Times websites: 2008: https://www.nytimes.com/elections/2008/results/states/california.html and 2016: https://www.nytimes.com/elections/2016/results/california (access 27.12.2018).

31 Harvey Milk was assassinated in November 1978 together with the San Francisco Mayor George Moscone. R. Eyerman, Harvey Milk and the Trauma of Assassination, "Cultural Sociology" 2012, no. 6(4), pp. 399-421.

32 J.J. Dyck, S. Pearson-Merkowitz, The Conspiracy of Silence: Context and Voting on Gay Marriage Ballot Measures, "Political Research Quarterly" 2012, no. 65(4), pp. 745-746.

33 *Baehr v. Lewin*, 852 P. 2nd 44 (Hawai'i 1993). More on the case: M.D. Sant' Ambrogio, S.A. Law, Baehr v. Lewin and the Long Road to Marriage Equality, "University of Hawai'i Law Review" 2011, vol. 33, p. 705.

the states came out as conservative and showed a high margin of votes supporting the ban on same-sex marriage.[34]

In 2000 the problem reached California when voted on Proposition 22 stated that the California Family Code should amend section 2 to include the statement: only marriage between a man and a woman is valid or recognized in California.[35] It was approved by 61.2 percent of voters in favor. The amended law stayed in force for seven years.[36] It was struck down by the decision of the California Supreme Court on May 15, 2008, when in the 4-3 decision the judges decided that limiting marriage to opposite-sex couples is in violation of the California Constitution.[37]

The reaction was immediate and surprising. In November 2008 California Proposition 8 qualified for the ballot with the same goal as Proposition 22, only now aiming at amending the state constitution with the same statement: "only marriage between a man and a woman is valid and recognized in California". With almost 80 percent turnout, the same-sex marriage was hold constitutionally banned in the state by the 52.24 percent of votes in favor of the amendment.

As introducing a constitutional provision, the Proposition overturned the California Supreme Court's decision addressing the statutory provisions and making the same-gender marriages illegal in the state of California. Worth noting is the fact that during the same election President Obama was elected the first African American President of the United States.[38]

4.2. The legal and court battle over Proposition 8 on same-sex marriage in California

The legal rollercoaster in the same-gender ride took another sharp turn as, immediately after the vote on Proposition 8, lawsuits were submitted to invalidate the Proposition and the Supreme Court of California decided to consider the cases.

In the 6-1 decision issued on May 26, 2009 the Court upheld the constitutionality of the Proposition stating that the right of same-sex couples to enter in civil unions type of relationship allowed to "choose one's life partner and enter with that person into a committed, officially recognized and protected family relationship that enjoys

34 A. Debray, Governing…, op. cit., pp. 12-13.

35 The act was cited as "California Defense of Marriage Act". N. Kubasek, Ch. Glass, K. Cook, Amending the Defense of Marriage Act; A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples, "American University Journal of Gender Social Policy and Law" 2011, no. 3, p. 6.

36 On the Anti-Proposition 22 Campaign see: T. Broaddus, Vote No If You Believe in Marriage: Lessons from the No on Knight/No on Proposition 22 Campaign, "Berkeley Women's Law Journal" 2000, vol. 15, pp. 1-13.

37 *In re Marriage Cases*, No. S147999 (Cal. May 15, 2008).

38 N.D. Wadsworth, Intersectionality in California's Same-Sex Marriage Battles: A Complex Proposition, "Political Research Quarterly" 2011, vol. 64(1), pp. 200-202.

all of the constitutionally based incidents of marriage". Civil unions then fulfilled the goal and the definition of marriage stayed as including opposite-sex couples only.[39]

The procedural state level has been therefore closed and the problem had to be raised to the federal level for the battle to be continued. The federal level was opened by the Federal District Court Judge Walker who decided that Proposition 8 was in violation with the provisions of the federal and thus supreme the United States Constitution, namely the Due Process and the Equal Protection clauses of the Fourteenth Amendment. The judge, who admitted to being gay himself, concluded that the Proposition 8 "unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation"[40]. As a result, the enforcement of the law was barred and the marriages could be resumed.

Twelve days later however, the 9th U.S. Circuit Court of Appeals put the same-sex marriages on hold indefinitely pending theappellate procedures. Those were eventually held by the three-judges panel of the Court. The ruling came after some complicated legal battles and turns on February 7, 2012 and eventually held Proposition 8 unconstitutional. For the purpose of this article it is necessary to quote the passage from the verdict stating: „although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted."[41]

Worth noting is the fact that the decision did not consider all bans on same-sex marriages as unconstitutional but argued specifically on the Proposition 8 and the revocation of previously granted right to marriage. The request, made by the Proposition 8 proponents to the 9th U.S. Circuit Court of Appeals, to re-hear the case *en banc* was denied and the only further appeal possibility was to the Supreme Court of the United States.[42]

4.3. The semi-final and the final decision of the United States Supreme Court

The Californian struggle with the same-sex marriage law was not the only struggle on the issue in the country. In 2012 the case originating in New York addressed the validity of federal law that denied benefits to gay couples who entered into marriages.[43]

39 *Straus v. Horton*, 46 Cal. 4th 364 (2009).

40 *Perry v. Schwarzenegger*, 591 F. 3d 1126 (9th Cir. 2009). See also: C.J. Rosky, Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law, "Arizona Law Review" 2011, vol. 53, p. 914 and next.

41 *Perry v. Brown,* Nos. 10-16696, 11-16577, 671 F.3d 1052 (9th Cir. 2012).

42 W.N. Eskridge Jr., The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality, „Stanford Law Review Online" 2012, vol. 66, p. 93.

43 *Windsor v. United States* No. 12-2335 (2d Cir. 2012).

At the same time, in November 2012 referendums in three states (Maryland, Maine and Washington) legalized marriages of same-sex couples marking the first time in the US history that such decisions were made through the popular vote. Still, in over 30 states the bans on same-sex marriages were upheld by the citizens' decisions.[44]

Under such divided circumstances the United States Supreme Court decided to hear the combined cases – the New York case and the Californian case – to enter the complicated nationwide debate on legality of same-gender marriage. The Court ruled that the same-sex married couples do have the right to federal benefits and the law defining marriage as a union of man and woman violates this right. The Court did not however rule on the substance of the Californian case regarding Proposition 8 (on the grounds that the official proponents of the Proposition lacked the standing for appeal), but by declining to decide, the Court effectively invalidated Proposition 8 and thus allowed same-sex marriage in California but in California only.[45]

Based on this case then, the United States Supreme Court did not provide for the nation-wide applicable rule on the same-sex marriage, so both the proponents and opponents were to find other grounds.

The final say of the United States Supreme Court on the same-gender marriage came on June 26, 2015, that is eight years after the famous Proposition 8 had been put to popular vote in California.

Several groups of same-sex couples sued the state institutions in Kentucky, Michigan, Ohio and Tennessee and challenged the constitutionality of theprovisions banning the marriage or refusing to recognize those, which were performed in states allowing them. Each of the suits used the argument of unconstitutionality of the laws with the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. The trial courts supported the plaintiffs' arguments and ruled in their favor, however the US Court of Appeals for the Sixth Circuit reversed and decided there was no violation of the Amendment. Since other appellate courts and district courts ruled in favor of same-sex marriage rights in that time, the problem of split interpretation occurred providing a clear path for the United States Supreme Court to provide final answers.[46]

As much as the country was divided, so were the justices of the US Supreme Court and the decision was made with the 5:4 vote. Majority of the justices argued

44 E. Honan, Maryland, Maine, Washington approve gay marriage, Reuters, November 7, 2012. On-line version: https://www.reuters.com/article/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107 (access 27.12.2018).

45 Hollingsworth v. Perry, 570 U.S. 693 (2013). The case originated from the Perry v. Schwarzeneger and Perry v. Brown. For the procedural explanation see: C.E. Borgmann, Hollingsworth v. Perry: Standing Over Constitutional Rights, "CUNY Law Review" 2013, vol. 17, p. 27 and next.

46 S.E. Isaacson, Obergeffel v Hodges: the US Supreme Court Decides the Marriage Question, "Oxford Journal of Law and Religion" 2015, vol. 4(1), pp. 530-532.

that Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and that it also applies to the same-sex couples in the same manner as it does to opposite-sex couples.[47]

Despite the dissents written by other justices, the decision was final and became a landmark one in the civil rights field. The laws prohibiting same-sex marriages in the states represented in the case were struck down due to the violation of the federal constitution and, as a consequence, so were similar laws in all other states throughout the country.

The long-fought battle came to an end, at least until the possible reverse decision of the United States Supreme Court itself, which may happen with the change in the bench and strengthening of the conservative wing among the justices.

5. Closing remarks

The issue of same-gender marriages was selected as the topic of research for the presented article but it was not the only socially sensitive field touched upon in the citizens' vote in California.

The state is also known for the decisions taken through popular vote regarding legalization of marijuana. Already in 1996 through Proposition 215 marijuana for medical use was legalized in California as in the first state in the United States. In 2010 the initiative providing for legalization of recreational marijuana was lost in the vote and it took Californians another 6 years before the "Control, Regulate and Tax Adult Use of Marijuana Act" was approved by means of Proposition 64 in 2016.[48]

It is interesting to note that during the same voting in 2016, Proposition 62 focusing on the capital punishment was submitted to popular vote. The punishment was originally reintroduced into the state law by Proposition 17 voted in 1972 to change the ruling of the California Supreme Court. Since then citizens rejected two initiatives to repeal the capital punishment - in 2012 and in 2016. The liberal state has shown a conservative face in this socially difficult issue.[49]

California is called "the big western tail that wags the American dog when it comes to direct democracy" but at the same time the arguments have been recently heard that the state's political and financial troubles can be caused by the same direct democracy.[50]

47 *Obergefell v. Hodges*, 576 U.S. (2015).

48 T. Todd, The Benefts of Marijuana Legalization and Regulation, „Berkeley Journal of Criminal Law" 2018, vol. 23, p. 100 and next., J. Wong Jessica, Proposition 64 Legalizes Marijuana in California but the War on Drugs Continues, „The Contemporary Tax Journal" 2017, vol. 6(2), p. 21 and next.

49 V. E. Bravo, J. Gosney, Proposition 62: Death Penalty, "The Justice at Works Act of 2016", California Initiative Review (CIR) 2016, p. 1 and next.

50 G. Genzel, The People..., *op. cit.*, p. 1.

It seems however that the citizens of the Golden State do not pay much attention to such comments, as they prove to use the initiative and referendum in the same manner and with the same involvement as ever.

There are a couple of conclusions worth unerlining based on the Californian popular vote use. Most importantly the turnout is high which proves that citizens are eager to participate in the law-making process. It seems also that sometimes it takes more than one attempt to finalize the idea and introducing the new law and the proponents of certain Propositions have learned their lessons well. In addition, the same-sex marriage case and some other examples prove that the popular vote is used as a way to overrule the state highest court's decisions and that society is aware of such a possibility. From the social perspective the results of the popular vote show that California is not that liberal when it comes to the sensitive, difficult issues and the battles fought to change the mind of the voters are long, complicated and challenging.

A short analysis of the most recent popular vote confirms those conclusions. There were a total of 16 statewide ballot propositions certified for the vote together with the elections in 2018 (5 in June and 11 in November) again with high turnouts reaching over 70% in the November round. Among those, citizens' initiatives aimed for example to amend the statutes to allow ambulance providers to require workers to remain on call during breaks paid or to ban the sale of meat of animals from confined spaces below specific sizes (both with positive results). The citizens' initiative also provided for issuance of $1.5 billion in bonds for children's hospitals. The most controversial one – proposing to divide California into three separate states was removed from the ballot.[51] The initiative touching upon gender issues (The California Free Exercise of Gender Identity Initiative 2018) did not make it to the ballot[52], but additionally proves that the citizens are eager to decide on socially controversial dilemmas and that the use of direct democracy devices continues to be strong as a guarantee of the power of the people in the state.

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Rights of Sexual Minorities as the Subject of Referenda in the Republic of Slovenia

Abstract: Slovenia is a country that in terms of the number of referendum votes held belongs to the forefront in Central and Eastern Europe. In the years 1996-2016, 16 legislative referenda were held, and 22 issues were put to the vote. This testifies to the opening of the political elite to the processes of democratization and the introduction of direct democracy institutions not only to constitutional regulations, but also to political practice.

The article presents referenda on the rights of homosexual people in Slovenia. Even with ballots being frequently held in the country, this still fails to raise the voters' turnouts or their political participation. The referenda described in the article were on the broadening of rights of homosexual people, including their rights to adopt children. Even with openness of the political elites to the new trends and phenomena the Slovenian society proved very conservative and opposed the proposals. The referenda significantly inhibited the process of liberalization of social policy in Slovenia.

Keywords: Slovenia, countries of former Yugoslavia, direct democracy, referendum

1. Introduction

Slovenia is the sole one, of the five countries on the Balkan Peninsula, which declared independence in the early 1990s after the disintegration of the Socialist Federal Republic of Yugoslavia. On December 23, 1990, an independence referendum was held, the result of which became the basis for the proclamation of the independence of the state by the Slovenian parliament. The conducted referendum proved that referring to instruments of direct democracy, such as a referendum,

is not only possible in a newly created state, but can also form an effective tool for exercising power that successfully complements indirect democracy[1].

Slovenia is one of the leaders in terms of the number of votes conducted so far in post-Yugoslav and Central and Eastern European countries[2]. Although the turnout in general votes does not exceed 40% on average, the most important decisions in the country are made with the participation of citizens. Undoubtedly the referendum of 1990 and of March 2003 on joining the European Union should be considered some of the most important events in the history of Slovenia[3].

Relying on referenda in an emerging political democracy of the countries of Central and Eastern Europe was a gesture of ruling elites reaching to the nation, which led to agreement and the mitigation of social conflicts. In the process of political transformation, the referendum took on a different meaning. For the first time, this form of expressing the will of the people was in favor of gaining independence. In the process of national and state rebirth, the independence referendum took place in countries belonging to two different Soviet and Yugoslav federations[4].

Referenda on independence issues were announced by the remaining republics, while Slovenia and Croatia accelerated their decisions to separate (still not leave) from SFRY, reaching them in parliamentary votes on June 25, 1991, recognizing each other as full-fledged subjects of international law and calling for broad international recognition of their statehood[5].

In the case of Slovenia, the vote on independence was a plebiscite and in the process of creating the foundations of the state system was a one-off event, as the option of holding a referendum was not exercised when adopting the new constitution[6].

The purpose of this article is to present the votes on sexual minorities and their rights in the state. Slovenia has recognized civil partnerships from 24 February 2017 onwards[7]. They provide same sex partners with all rights of a marriage, except for the possibility of child adoption and in vitro fertilization. However, despite the adoption of two bills permitting the adoption of children by homosexual couples, they did not

1 A. Rytel-Warzocha, Referendum ogólnokrajowe w państwach Europy Środkowo-Wschodniej, Warszawa 2011, p. 190.

2 E. Kużelewska, Direct Democracy in Slovenia, (in:) M. Marczewska-Rytko (ed.), Handbook of Direct Democracy in Central and Eastern Europe after 1989, Opladen-Berlin-Toronto 2018, p. 290.

3 M. Musiał-Karg, Referenda państwach europejskich, Toruń 2008, p. 269.

4 M. Podolak, Instytucja referendum w wybranych państwach Europy Środkowej i Wschodniej (1989-2012), Lublin 2014, p. 221.

5 J. Stańczyk, Przeobrażenia międzynarodowego układu sił w Europie na przełomie lat osiemdziesiątych i dziewięćdziesiątych, Warszawa 1999, p. 137.

6 E. Kużelewska, Demokracja bezpośrednia w Słowenii, "Studia Wyborcze" 2018, vol. 25, p. 95.

7 Zakon o registraciji istospolne partnerske skupnosti (ZRIPShttp://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4335 (access 12.01.2018).

receive social approval, and further referenda were initiated, in which the proposal to amend the Family Code was rejected.

The foundations of the political system of Slovenia were defined by the Constitution of the Republic of Slovenia, adopted on December 23, 1991 by Skupstina, in line with democratic constitutionalism trend that had been shaped since 1989 in post-communist European countries[8]. The basic law of Slovenia refers to the ideas and principles of democratic European constitutions. Similarly to other countries that regained or gained independence, the *Preamble* of the Constitution referred to national aspirations along with the universal question of respecting the rights and freedoms of individuals.

The Constitution in art. 1 defines Slovenia as a "democratic republic", establishing a republican form of government. The sovereign in the state is the people – art. 3. Pursuant to this article, the sovereign may exercise power directly or through the election of representative organs.

The political system of Slovenia contains important elements of direct democracy. On the basis of constitutional regulations, the sovereign – the people have two main instruments – a legislative referendum and a citizens' initiative (according to art. 88 – of at least 5,000 people) – for their participation in deciding on important matters of state policy. Pursuant to the provisions of the Constitution, a well-developed referendum structure was included in articles 3, 44, 90, 170. The right to participate in the referendum was granted to citizens with electoral rights. Pursuant to the provisions of Slovenian Constitution, there are three types of nationwide referenda in Slovenia: the constitutional, legislative and consultative referendum[9].

Pursuant to the amendment of the Constitution of 2013, the exclusive right to initiate a referendum was granted (left) to a group of 40.000 citizens. These rights are no longer held by the deputies and the State Council[10]. Such a referendum is optional.

A referendum is considered valid if the majority of voters participating in it votes in favor of the proposal[11]. A provision was also introduced, according to which the act is rejected in a referendum if at least one fifth of those eligible to vote votes against its adoption. Such referendum is suspending in its character, because a referendum on the adoption of a law delays (suspends) their entry in force until a decision is taken in a vote. The new law also limits the scope of cases in which a referendum can be held: referendums cannot be organized in relation to laws on the implementation of the state budget; provisions on defense and national security or disaster response;

8 P. Winczorek, Wstęp, (in:) Konstytucja Republiki Słowenii, tłum idem., Warszawa 1994, pp. 7-8.

9 M. Kambič, Constitutional democracy in Slovenia between the Scylla and Charybdis of the legislative referendum, "Pro Publico Bono Magyar Közigazgatás" 2016, no. 2, pp. 104-117.

10 C. Ribičič; I. Kaučič, Constitutional Limits of Legislative Referendum: The Case of Slovenia, "Lex Localis" 2014, vol. 12, no. 4, pp. 899-928.

11 E. Zieliński, I. Bokszczanin, J. Zieliński, Referendum w państwach Europy, Warszawa 2003, p. 62.

ratification of international treaties, and unconstitutional matters concerning human rights and other areas[12].

There were 24 votes held in Slovenia so far, in which only 8 proposals were approved. Voting concerned the following issues: 1996 – the electoral system; 1999 – construction of the TET 3 power plant; 2001 – artificial insemination of unmarried women; 2003 – refund of excess telephone charges and railway privatization; 2003 – the membership in NATO and the EU; 2003 – limiting retail sales on Sundays to ten Sundays per annum only; 2004 – restoration of rights of ethnic minorities from former Yugoslav autonomous republics; 2005 – laws concerning mass media; 2007 -the Act on the abolition of insurance property; 2010 – agreements on the shape of the Slovenian-Croatian border; 2010 – mass media law; 2011 – amendment of the labour code; 2011 – Act on the legal protection of documents and archives; 2011 – disabled persons' pensions and insurance act; 2011 – acts against illegal employment; 2012 – Family Code; 2014 – Act on the legal protection of documents and archives; 2015 – same-sex marriages; 2017 extension of the railway network[13].

2. The legal status of homosexual people in Slovenia

During the communist period, the situation of homosexuals in Slovenia, and in the entire former Yugoslavia, was unfavourable for them. In 1959, the penal code prohibited sexual contacts between men. At the same time, similar regulations were not adopted for women. This right ceased to apply in 1977 after the adoption of an amendment to the penal code, which depenalized homosexual relations. Other regulations only appeared in the 1990s. The Act on registration of partnerships in matters of persons of the same sex was ready as early, as in 1998, but it was adopted by the National Assembly only in 2005[14]. Protection was introduced in favour of sexual minorities in the workplace, which is required by the EU as part of the accession process, which Slovenia initiated the same year. The couples were then granted just the right to inherit, to access medical information in case of hospital treatment, and also the system of premiums and social insurance cover was extended to them. In July 2006, same-sex civil partnerships were legalized in Slovenia[15]. The regulations do not include solutions regarding the right to adopt and in vitro fertilization. For this reason, the law introduced was strongly criticized by the LGBTQ community

12 R. Podolnjak, Constitutional Reforms of Citizen-Initiated Referendum – Causes of Different Outcomes in Slovenia and Croatia, "Revus" 2015, no. 26, pp. 120-149.

13 E. Kużelelewska, *op. cit.*, p. 100.

14 Zakon o registraciji istospolne partnerske skupnosti (ZRIPhttp://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4335 (access 22.11.2018).

15 Slovenian lawmakers approve same-sex marriage, adoption amid protests from conservative groups (Eng.) US News. https://www.usnews.com/news/world/articles/2015/03/03/slovenian-lawmakers-approve-same-sex-marriage-adoption (access 10.10.2018).

in Slovenia. However, not only sexual minorities protested the introduction of civil partnerships. The opposition to the conservative government also recognized that this solution was not complete and left the assembly when the bill was passed, in sign of their protest against it[16].

Same-sex marriages are now legal in the Netherlands, Belgium, Spain, Canada and South Africa, and at least 18 countries offer some form of legal recognition for same-sex relationships[17].

In 2006, a Eurobarometer survey was conducted, in which two questions were asked, regarding homosexual marriages and their right to adopt children:

Do you agree with homosexual marriages being allowed throughout Europe?

Do you agree with authorizing the adoption of children for homosexual couples throughout Europe? In the case of Slovenia, 31% of respondents answered yes to the first question, but only 17% agreed to the adoption of children by homosexual couples[18].

The MAGNUS gay organization, a branch of ŠKUC (Student Cultural Center in Ljubljana) was active in Slovenia since 1984, being established as a "cultural organization for the socialization of homosexuality", as well as a proletarian feminist group Lilit (LL from 1987 onwards). In 1990, MAGNUS and LL founded a national gay and lesbian organization called Roza Klub.

3. The 2012 Referendum

When the center-left government led by Borut Pahor took over in 2008, the legislative process for the homosexual minority became more dynamic. Already in 2009 it presented the draft of the new Family Code, which assumed full equality of all citizens on family matters, including adoption[19].

According to activists of gay organizations, the definition of marriage should be changed from a "male-female relationship" to a "two-person relationship". However, this was not possible due to the resistance of the conservative opposition, which blocked the adoption of a new family law for months.

Representatives of the Democratic Party argued that the equality of homosexual couples would lead to the devaluation of the traditional family. The government had no choice but to partially equate gays and lesbians: already in June 2009, the Supreme

16 Referendum w sprawie małżeństw homoseksualnych w Słowenii https://www.euractiv.pl/section/demokracja/news/referendum-w-sprawie-malzenstw-homoseksualnych-w-slowenii/ (access 10.10.2018).

17 A. Koppelman, The gay rights questions in contemporary American law, London 2002, pp. 127-140; E. Gerstmann, Same-sex marriage and the Constitution, Cambridge 2004, pp. 50-61.

18 Eight EU Countries Back Same-Sex Marriage http://web.archive.org/web/20080905233521/http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/14203 (access 10.09.2018).

19 Natural Order Of Things (Everyone Needs A Family, http://www.pengovsky.com/2009/10/15/natural-order-of-things-everyone-needs-a-family/ (access 10.09.2018).

State Constitutional Court assessed the unequal treatment of registered partners and heterosexual spouses as discrimination prohibited by the Slovenian Constitution[20].

It was not until 2011 that the draft was adopted by the Slovenian Parliament. The proposed law contained two controversial provisions that caused enormous disputes in the society: one stating that marriage is a lifelong community of two people of the same or opposite sex; and the second was that two partners of the same sex can adopt a child[21]. The draft granted registered partners of the same sex the same rights as that of a married couple and allowed them to adopt the biological children of their partners. However, the adoption of a child unrelated to any of the partners was excluded.

After the adoption of the draft a conservative civic group was formed consisting of representatives of Civic Initiative for Family and Children's Rights and Catholic representatives and collected the required 40.000 signatures to question the adopted law in a referendum.

The ballot took place on 25 March 2012[22] and the citizens were to answer the question whether they agree with the proposed amendment to the family code. Turnout during the voting amounted to over 30 percent and just short of 55 percent of participating citizens were in favor of rejecting the new family code[23].

The rights of same-sex couples are a constant problem throughout Europe. The European Court of Human Rights ruled that the right of a married person to adopt a child of his partner is not protected under the European Convention on Human Rights. The case concerned a French woman who was refused to adopt the child of her civil partner, which was conceived by in vitro fertilization (IVF). She argued that rejection of adoption infringes Articles 8 and 14 of the Convention on Human Rights, which protect against violations of family privacy and discrimination. In its decision, the court found that the refusal does not discriminate against same-sex couples, because opposite sex couples are also deprived of the right to adopt in civil partnerships[24].

20 Slowenien schreckt vor Ehe-Öffnung zurück, https://www.queer.de/detail.php?article_id=14458; Constitutional Court of Slovenia Upholds Equal Rights for Same Sex Partners, http://www.equalrightstrust.org/news/constitutional-court-slovenia-upholds-equal-rights-same-sex-partners (access 10.09.2018).

21 Novi družinski zakonik – revolucionarni korak naprej ali nepremišljeni zdrs nazaj? http://mladi.net/content/view/1757/88/ (access 10.09.2018).

22 Državni zbor sprejel družinski zakonik http://www.rtvslo.si/slovenija/drzavni-zbor-sprejel-druzinski-zakonik/259944 (access 10.09.2018).

23 Zakonodajni referendum o družinskem zakoniku – 25. marec 2012http://www.dvk-rs.si/index.php/si/arhiv-referendumi/zakonodajni-referendum-o-druzinskem-zakoniku (access 10.09.2018).

24 A. Bottoroff, Slovenia referendum rejects law granting same-sex rights, https://www.jurist.org/news/2012/03/slovenia-referendum-rejects-law-granting-same-sex-rights/ (access 15.10.2018).

4. The 2015 Referendum

In December 2014, the United Left presented a draft amendment to the 1976 Law on Marriage and Family Relationships that would introduce same-sex marriages[25]. The draft received support from the centrist party of Prime Minister Miro Cerar.

On 3 March 2015, the Slovenian parliament passed a law establishing same-sex marriages. 51 deputies were in favour of the bill, while 28 were against[26]. The Social Democratic Party – ZLSD United List of Social Democrats (*Združena lista socialnih demokratov*, ZLSD), liberals -Liberal Democracy of Slovenia (*Liberalna demokracija Slovenije* all voted in favour of the new legislation, while the right-wing representatives of Slovenian Democratic Party (*Slovenska demokratska stranka*, SDS) and the New Slovenia – *Nova Slovenija*, NSi were against[27].

Despite only a minor amendment introduced in the Marriage and Family Relations Act, it caused great dissatisfaction among the representatives of more conservative parties and people in Slovenia due to its redefinition of marriage[28]. According to the amendments, marriage was no longer defined as a relationship between a man and a woman, but as a relationship between two adults. What's more, this small change has also ensured that same-sex couples would have the right to have children[29]. During the debate on the revolutionary law some 2.000 people gathered in front of the parliament building to demonstrate in defense of marriage[30].

The day after the adoption of the amendments, its opponents began collecting voters' signatures to demand a referendum. At the end of March 2015, the majority of the National Assembly rejected the referendum application initiated by the conservative group supported by the Church, citing amendments to the Constitution of 2013 prohibiting referendums on matters regarding unconstitutional

25 Pričela se je javna obravnava Zakona o partnerski skupnostihttp://www.mddsz.gov.si/nc/si/medijsko_sredisce/novica/7404/ (access 23.09.2018).

26 Sprememba zakonske zveze potrjena, istospolni pari se lahko poročijo http://www.rtvslo.si/slovenija/sprememba-zakonske-zveze-potrjena-istospolni-pari-se-lahko-porocijo/359579 (access 11.10.2018).

27 T. Anžlovar, Redefinicija družine v smer enakosti dobila zeleno luč http://www.rtvslo.si/slovenija/redefinicija-druzine-v-smer-enakosti-dobila-zeleno-luc/358063 (access 30.08.2018).

28 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.

29 MPs Vote to Ban Gay Marriage Referendum, http://www.sloveniatimes.com/mps-vote-to-ban-gay-marriage-referendum (access 30.08.2018).

30 FLC, Słowenia wprowadza homoseksualne „małżeństwa". Obrońcy rodziny zapowiadają referendum, http://www.pch24.pl/slowenia-wprowadza-homoseksualne-malzenstwa--obroncy-rodziny-zapowiadaja-referendum,34378,i.html#ixzz5a7alMeZk (access 15.10.2018).

circumstances[31]. The Slovenian left tried to refuse a referendum, arguing that human rights (and marriage is a human right) should not be subject to national ballot[32].

In October 2015, the Constitutional Tribunal disagreed with the decision of the National Assembly and with the majority of 5 judges to four, it ruled that a referendum can be held in this matter. The required 40.000 signatures were collected and on 20 December 2015 the ballot was held. Due to the change in the referendum regulations, at least one-fifth of the 1.7 million entitled to vote had to vote against the law, because the law requires a quorum of 20%. This means that about 340.000 people had to vote against it[33].

Opponents of same-sex marriages stand for further support of a definition of marriage as a relation between a woman and a man, opposing in particular the adoption of children by homosexual couples. Proponents of the amendment, in turn, indicate that it would equate the rights homosexual and heterosexual couples.

39 parties, associations, movements and people joined in the referendum campaign. The government supported the amendments but did not participate in the campaign itself. Two positions were clearly visible: the camp against the amendments worked under the patronage of the Children Are at Stake group. It was organized mainly around appeals to ensure children's rights and the future of families. On the other hand, the "It's time for Yes" group called for "the right of the child to be adopted in the most appropriate environment" and "to extend these rights to all, which will not change our rights at the same time". Due to the huge mobilization of people in both camps, the campaign was even more intense than that of 2012. During the campaign both camps also received international support; the 'Yes' camp received the support of Human Rights Watch NGO, which joined the large movement of Slovenian human rights NGOs, calling for marital equality. "The right to marry is a fundamental human right, as is the right to non-discrimination, and homosexual couples should not be denied the right to marital equality[34]."

The Roman Catholic church was also involved in the campaign. Both Pope Francis and the representatives of Slovenian church appealed to the society to "guard the

31 Slovenia Times, 2015. Constitutional Court Allows Gay Marriage Referendum, October 22. http://www.sloveniatimes.com/constitutional-court-allows-gay-marriage-referendum (access 30.08.2018).

32 B. Surk, S. Chan, Slovenians Deliver Major Setback to Same-Sex Marriage in Referendum. New York Times, December 21.2015, http://www.nytimes.com/2015/12/22/world/europe/slovenians-deliver-major-setback-to-same-sex-marriage-in-vote.html (access 10.10.2018).

33 Sprememba zakonske zveze potrjena, istospolni pari se lahko poročijo, http://www.rtvslo.si/slovenija/sprememba-zakonske-zveze-potrjena-istospolni-pari-se-lahko-porocijo/359579 (access 30.08.2018).

34 A. Krasovec, The 2015 referendum in Slovenia, "East European Quarterly" 2015, vol. 43, no. 4, p. 307.

family as the basic social unit"[35]. With regard to the proposed act, they took a decidedly negative position, believing that "we are experiencing an attempt to define a new family as undermining the foundations, on which we stand as a Church and the society"[36].

On 20 December, after a very fierce and often intolerant campaign and debates, 394,482 people or 63.5% of all voters opposed the amendments, with a turnout of 36.4%. The referendum question was: Do you agree that the Act on Changes and Amendments to the Marriage and Family Relations Act, as passed by the National Assembly (ZZZDR-D) on 3 March 2015 should come in force?

Two days after the referendum a draft bill was brought to the Slovenian parliament, extending the list of rights vested in same-sex couples in civil partnerships – bringing them closer to marriages[37]. However, the Act did not take adoption and artificial insemination into account. The draft is signed by Jani Möderndorfer – politician of the Modern Center Party, of the country's prime minister, Miro Cerar. The government signaled that it supports the initiative, and Möderndorfer pointed out that it was meant to be a temporary solution, until another attempt at marital equality is made[38].

The project received government support in March 2016 and on 21 April 2016, it was passed by the parliament, with 53 to 15 votes[39.] The Act came in force on 24 May 2016, nevertheless the art. 10 thereof envisaged a 9-month transitional period, which is why it was only applicable from 24 February 2017 onwards[40]. This Act introduces a new institution of a civil partnership (partner zveza), enabling such relationships to be formed a register office in a ceremony that is identical to that of a marriage[41]. The civil partnerships registered to date will cease to exist within 6 months – and will be converted into this new legal form, which will grant them rights equal to marriages (zveza convent) with two exceptions, i.e. without the right to adopt and the right of access to assisted reproductive technology (in vitro). The world media erroneously presented the provisions of the Act on civil partnerships as enabling same-sex marriages.

35 Papież apeluje do Słoweńców o obronę "wartości rodzinnych" https://queer.pl/news/196711/slowenia-referendum-papiez-franciszek-malzenstwa-jednoplciowe (access 11.10.2018).

36 A. Krasovec, *op.cit.,* p. 308.

37 After referendum, new bill submitted to protect gay couples https://english.sta.si/2213642/after-referendum-new-bill-submitted-to-protect-gay-couples (access 13.10.2018).

38 M.M. RSi, Green light for the debate about the amendment to the law on marriage and family, http://www.rtvslo.si/news-in-english/green-light-for-the-debate-about-the-amendment-to-the-law-on-marriage-and-family/358087 (access 15.10.2018).

39 Same-sex partnership act passed https://english.sta.si/2255355/same-sex-partnership-act-passed (access 30.08.2018).

40 Zakon o partnerski zvezi (ZPZ), stran 4815 (access 10.10.2018). https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2016-01-1426?sop=2016-01-1426 (access 30.08. 2018).

41 Zakon o registraciji istospolne partnerske skupnosti (ZRIPS, http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4335 (access 15.10.2018).

2015 opinion polls demonstrated that 42 percent of Slovenians support marital equality, and 54 percent believe that same-sex couples should be able to marry all over Europe. Most were also against holding a referendum on this matter[42].

5. Conclusions

The ruling elites in Slovenia see the value of direct democracy institutions and, on the example of the more experienced European states, have introduced them in the group of state institutions. Slovenians are often involved in popular ballots, but our attention should point at their low turnouts. The referenda on the rights of homosexual people were the first such referenda to be held in the countries of Central and Eastern Europe. This demonstrates the progress and opening of political elites, but also the conservatism of citizens. While there is acceptance for homosexual couples, a traditional approach to adopting and raising children is marked.

Slovenia is a progressive state, not only in Central and Eastern Europe, but it also stands out from all other EU countries that joined the EU in 2004. It also introduced legal solutions that reach further than the regulations in some old EU countries, e.g. Austria, where only civil partnerships can be concluded.

The current legislation on the rights of homosexual couples in Slovenia is one of the most progressive ones in the countries of the former Yugoslavia as well as European countries.

If Slovenia were to grant the right to enter same-sex marriages, it would be the first country in Central and Eastern Europe and the first country of the former Yugoslavia to introduce marriages between homosexual couples.

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Referendum on Abortion in Poland. Submitted Proposals and Main Topics of the Debate

Abstract: Considerations undertaken in this article relate to requests to hold a referendum on abortion, which were submitted in the years 1989-2018. In the period covered by the research, the eligible entities submitted 7 initiatives, which in whole or in part concerned the postulate of conducting a nationwide referendum in the analyzed subject matter. Thus, regulation of legal principles for protection of a conceived child was an important point in the public debate and aroused great public interest. Importantly, the citizens themselves attempted to initiate a nationwide referendum. In this context, the question arises as to why, despite so many applications, the representatives have not decided to apply direct democracy procedures to the issue of admissibility of pregnancy termination? An attempt to refer to such a research problem was the goal of this research.
The obtained research results indicate a significant discrepancy between parties of the political dispute regarding permissibility of the referendum on abortion. Supporters of such a solution argue that this is the best way to resolve a public issue because of the direct involvement of the sovereign. In turn, opponents of the referendum indicate that the right to life is a natural human right and lasts from the conception to the natural death. Therefore, there is no way to limit it through a referendum.

Keywords: democracy, direct democracy, referendum, abortion

1. Preliminary considerations

Referendum, as one of the forms of direct (semi-direct)[1] democracy, enables the citizens of contemporary democratic states to make decisions or express opinions

1 Considerations on nature of direct, semi-direct and representative democracy have been addressed by the author in his work on functions of popular initiative in Poland. "Direct democracy means a decision-making procedure, which citizens have full control over (they decide on the final shape of the adopted solutions), whereas in the case of semi-direct democracy there is cooperation between citizens and representative bodies. The term representative democracy

on public matters[2]. Referendum is applied at the level of the state or constituents of a political community (e.g. at the local level). From the point of view of the construction of currently dominant model of democracy, i.e. the representative democracy model, the use of a referendum is an exception, as the vast majority of public affairs are settled by representatives of the sovereign[3]. By way of direct voting, citizens express their position e.g. in matters related to the shape of the political system, European integration and they make decisions (express opinions) about social and moral problems, such as legal protection of a conceived child (including the admissibility of pregnancy termination, abortion)[4].

In the years 1989-2018, the eligible entities (among others, the President of the Republic of Poland, deputies, groups of at least 500,000 citizens) submitted more than 40 applications for a nationwide referendum, of which 7 concerned the whole or partial legal protection of a conceived child. What is important, all applications regarding the abortion referendum were submitted in the years 1989-1997, and therefore in the initial period of political transition, when the works on new constitution and laws specifying conditions for admissibility of pregnancy termination were underway. Thus, the analysed issue was among those most often proposed to be resolved through a referendum in the initial period of political transition in Poland, besides such issues as the shape of political system of the Republic of Poland and the issue of reprivatisation and privatization of the state property. Ultimately, the referendum on admissibility of terminating a pregnancy did not take place. Why, in spite of so many applications, the representatives did not decide to yield the right to make a decision in the analysed area to the sovereign itself? An attempt to refer to such a research problem was the goal of this research, the results of which were presented on pages of this scientific article.

During the research, the historical genetic method (research on the genesis of political phenomena), the institutional and legal method (analysis of legal provisions) as well as the system analysis were particularly important. The basis for writing this article were primarily parliamentary prints, as well as monographs on the referendum.

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describes a situation where the representative bodies retain full control over the decision-making procedure"; M. Rachwał, Funkcjonowanie obywatelskiej inicjatywy ustawodawczej w Polsce. Podstawy prawne – praktyka – perspektywy rozwoju, Poznań 2016, p. 6.

2 M. Rachwał, Demokracja bezpośrednia w procesie kształtowania się społeczeństwa obywatelskiego w Polsce, Warszawa 2010, pp. 60-92.

3 E. Kużelewska, Do the Poles Influence the Decision-Making Process by Applying Direct Democracy Instruments?, "Annales Universitatis Mariae Curie-Skłodowska. Sectio M" 2016, vol. I, p. 123.

4 M. Marczewska-Rytko, Demokracja bezpośrednia w teorii i praktyce politycznej, Lublin 2001, pp. 114-117; E. Kużelewska, Referendum w procesie integracji europejskiej, Warszawa 2006, p. 39.

After formulating initial and methodological assumptions, the submitted initiatives to conduct a referendum on abortion were discussed. In the next part of the article, the arguments of supporters and opponents of applying the referendum to define principles for legal protection of a conceived child were presented in a synthetic form. The considerations are crowned with a summary in which an attempt was made to refer to the research problem as well as a forecast regarding the possibility of conducting a referendum on abortion in Poland was formulated.

2. Initiatives to conduct a nationwide referendum on abortion

The Sejm of the 10th term (1989-1991) received two initiatives to conduct a referendum on abortion. It was the initial period of political transition, during which the analysed issue was an important element of public debate. "A particularly extensive discussion about legal regulation of pregnancy termination have been taking place in Poland since 1989"[5]. According to the opinion of applicants, due to significant variety of assessments on abortion, "this problem should have been subjected to a national referendum (...). A number of circles and groups of citizens demanded a referendum in this case"[6].

According to the initiative, which was received by the Sejm in 1991[7], the citizens of the Republic of Poland were to address the following questions:

1. "Are you for a complete ban on abortion?
2. Are you for legal admissibility of abortion on medical grounds? (woman's life and health).
3. Are you for legal admissibility of abortion due to social indications? (social situation of the pregnant woman or her family).
4. Are you for legal admissibility of terminating a pregnancy resulting from a crime? (incest, rape).
5. Are you for legal admissibility of abortion on woman's request?"[8].

Both proposals for holding a referendum on abortion submitted during the 10th term of the Sejm proved to be ineffective. As it turned out, each subsequent application reported in the analysed subject matter had the same fate.

The next term of the Sejm (1991-1993) received three initiatives to hold a nationwide referendum, two of which concerned abortion. Proposals in this respect were formulated by representatives of the Democratic Left Alliance, the

5 M.T. Staszewski, J.B. Falski, Referendum w praktyce parlamentarnej X, I i II kadencji Sejmu Rzeczypospolitej Polskiej, (in:) M.T. Staszewski, D. Waniek (eds.), Referendum w Polsce i w Europie Wschodniej, Warszawa 1996, p. 20.

6 *Ibidem,* p. 20.

7 Druk nr 833, Sejm X kadencji.

8 *Ibidem*, quoted in: M.T. Staszewski, J.B. Falski, Referendum…, *op. cit.*, p. 20.

Polish People's Party, the Democratic Union and the Labour Union[9]. The indicated circles postulated that the scope of legal protection for a conceived child should be determined precisely by means of a referendum, and therefore directly by the sovereign. Consistently against the idea of organizing the referendum on regulating the analysed social issue was, among others, the Catholic Church.

On March 30, 1992, a parliamentary draft resolution on nationwide referendum regarding admissibility of terminating pregnancy was submitted[10]. "Due to the variety of socio-legal assessments of abortion and the parliamentary tendency to substantially limit the conditions for admissibility of pregnancy termination in relation to legal regulations which were in force since 1956, there is (according to the applicants) a need to subject the problem to a nationwide referendum (...). The applicants referred to opinions of many circles and groups of citizens who had been requesting a referendum in this matter for many months. The results of informal social consultations and public opinion research carried out on this issue have undeniably shown the diversity of attitudes in this matter and a great interest in the problem itself"[11].

Parliamentary debates regarding the referendum on abortion were conducted in an emotional atmosphere. Opponents of resolving the analysed issue by means of a general voting argued that "one cannot use referendum to solve problems of moral nature, while the supporters claimed that the project concerns legal problems"[12].

When the Sejm rejected the above-mentioned initiative to conduct a referendum on legal protection of a conceived child, another draft postulating a decision on the issue directly by the sovereign was submitted[13]. Similarly to the previous initiative, this was a project submitted by circles being opposed to introduction of significant restrictions within the right of women to abortion. In this context, it should be recalled that (during the Sejm of the 1st term) works on the act determining the conditions for admissibility of abortion were being carried out concurrently. Ultimately, these works ended with the adoption of the Act of January 7, 1993 on family planning, protection of the human foetus and conditions for admissibility of abortion. The said act significantly reduced the possibilities of terminating a pregnancy as compared with the previous legal status. According to the original wording of the 1993 Act, a physician, who performed an abortion in a public health care facility, could not be held liable for an offense in case of death of a conceived child, provided that:

1) pregnancy constitutes a life threat or a serious hazard to the mother's health, confirmed by a decision of two physicians other than the abortion doctor,

9 A. Dudek, Historia polityczna Polski 1989-2005, Kraków 2007, pp. 244-245.
10 Druk nr 194, Sejm I kadencji.
11 M.T. Staszewski, J.B. Falski, Referendum…, *op. cit.*, p. 22.
12 *Ibidem*, p. 22.
13 Druk nr 578, 578-A, 578-B, Sejm I kadencji.

2) death of a conceived child occurred as a result of actions taken to save the mother's life or to counteract serious damage to the mother's health, the danger of which was confirmed by judgment of two different physicians;
3) prenatal tests, confirmed by a decision of two physicians other than the abortion doctor, showed severe and irreversible damage to the foetus,
4) there was a justified suspicion, confirmed by a public prosecutor's statement, that a pregnancy is a result of a prohibited act[14].

Thus, the Act of 1993 on family planning, protection of human foetus and conditions for admissibility of abortion allowed it only in a few cases that required a solid documentation and justification. An earlier legal act regulating the subject matter, i.e. the Act of April 27, 1956 on conditions for admissibility of pregnancy termination, indicated that abortion was possible if justified by medical advice or difficult living conditions of the pregnant woman, as well in the case of reasonable suspicion that the pregnancy arose as a result of the crime[15].

Applicants justifying the need to conduct a referendum on abortion have referred to the results of surveys, according to which over 2/3 of respondents were convinced that "the decision in this matter should ultimately be taken not by the parliament, but by the entire nation"[16]. In the original version, the Sejm's draft resolution assumed that citizens will address the following questions:

1. "Are you for legal admissibility of abortion on the grounds of woman's life and health?
2. Are you for legal admissibility of terminating pregnancy if the foetus is affected by severe, irreversible developmental defects or an incurable disease?
3. Are you for legal admissibility of terminating a pregnancy resulting from a crime? (incest, rape)?
4. Are you for legal admissibility of terminating pregnancy because of a particularly difficult living, material or family situation of the pregnant woman?"[17].

After conducting proceedings in Sejm committees, as well as after a discussion at the plenary session of the Sejm, on January 7, 1993, Sejm members rejected the draft resolution, and therefore no referendum on legal protection of the conceived child was held.

14 Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Dz.U. Nr 17, poz. 78 ze zm., art. 7 pkt 2).
15 Ustawa z dnia 27 kwietnia 1956 r. o warunkach dopuszczalności przerywania ciąży (Dz.U. Nr 12, poz. 61 ze zm., art. 1 ust. 1).
16 M.T. Staszewski, J.B. Falski, Referendum…, *op. cit.*, p. 23.
17 Druk nr 578…, *op. cit.*; quoted in: M.T. Staszewski, J.B. Falski, Referendum…, *op. cit.*, p. 23.

In the next term of the Sejm (1993-1997), the entitled entities formulated three applications to use referendum in order to decide on conditions for admissibility of abortion.

In 1995, from the initiative of the Labour Union's parliament members, a proposal to conduct an initial constitutional referendum (a referendum on principles, which the new constitution was based on) was put forward. Possibility of conducting a referendum in such a form was introduced into the political system on the basis of the Act of 22 April 1994 amending the constitutional act on the mode of preparation and adoption of the Constitution of the Republic of Poland[18]. The Parliamentary Group of Women has launched an initiative to add the issue of abortion to the request for a preliminary constitutional referendum[19]. Ultimately, however, this general voting was not organized and, therefore, questions about legal protection of the conceived child were not resolved directly by the sovereign.

Another initiative regarding the referendum aimed at formulating a few questions about reprivatisation, payments for education, local self-government structures as well as abortion. As far as the latter issue is concerned, it was suggested that citizens should answer the following question: "Do you think that the right to terminate pregnancy should: a) remain unchanged, b) be restricted in relation to the current legal situation, c) be extended to cases when a woman is in a difficult material or social situation"[20]. Proposal to reject the draft resolution in the first reading was supported by 222 Sejm members, and therefore this initiative did not lead to a referendum.

At the end of the Sejm's second term, one more initiative was taken to hold a referendum regarding admissibility of abortion, which was submitted by members of the Democratic Left Alliance[21]. Applicants formulated a proposal to ask three questions concerning non-punishment for termination of pregnancy in the following situations: when pregnancy poses a threat to woman's life or health, when the foetus is severely and irreversibly damaged, when the pregnant woman is in dramatic life situation[22]. As much as 178 Sejm members voted for the initiative, thus actually in favour of the referendum, while 197 supported the motion to reject the draft resolution in the first reading. Such a voting result meant that the referendum was not applied to resolve the analysed social issue.

18 Ustawa z dnia 22 kwietnia 1994 r. o zmianie ustawy konstytucyjnej o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej (Dz.U. Nr 61, poz. 251).

19 M. Jabłoński, Referendum ogólnokrajowe w polskim prawie konstytucyjnym, Wrocław 2001, p. 140.

20 Druk nr 1383, Sejm II kadencji.

21 Druk nr 2428, Sejm II kadencji.

22 *Ibidem*.

3. Attitudes to the idea of holding a referendum on abortion

Initiatives reported in the initial years of political transition assumed admission of pregnancy termination (under the condition of obtaining majority support, of course) in certain circumstances, such as: threat to health or life of the pregnant woman, severe and irreversible foetus malformation or incurable foetal disease, pregnancy resulting from an forbidden act (rape, incest), woman's difficult social situation (material, living). In addition, it was concluded that citizens should be asked about the admissibility of abortion without the need for a pregnant woman to give a reason. The applicants "expressed an opinion that referring to the public through referendum is the only fair way to make a decision on this matter, as it will directly reveal the actual attitude of the society"[23].

Results of the survey conducted on November 13-15, 1992 by the Public Opinion Research Centre indicated that 74% of the respondents were in favor of holding a nationwide referendum on the admissibility of abortion[24]. Thus, the vast majority of respondents supported the formulated initiatives to conduct a referendum on abortion. At the same time, it should be added that there was a clear advantage of allowing abortion in three cases: due to health and life of women (81% of respondents supported such a solution), if the foetus is affected by severe and irreversible developmental defects or incurable disease (80%), if the pregnancy is the result of a crime (74%). Significantly fewer respondents expressed their approval for legalizing abortion due to a particularly difficult living, material or family situation of the pregnant woman, although it was still more than half of the research participants (53%). Definitely the fewest people supported the legal admissibility of abortion without any restrictions (29%)[25]. As authors of the study pointed out, "a decreasing percentage of positive responses indicates there is a certain hierarchy of consent for termination of pregnancy within social consciousness"[26].

Representatives of the Catholic Church invariably presented a "negative attitude towards the abortion referendum. This position was formulated in official documents of the Church dedicated to protection of the right to life, family and abortion. It was connected with fundamental issues of democracy, the axiological foundations of legislation"[27]. In its argument, the Church referred to the idea of natural rights, indicating that there are laws "which man did not establish and therefore cannot

23 M.T. Staszewski, Referendum oprotestowane, (in:) D. Waniek, M.T. Staszewski (eds.), Referendum w Polsce współczesnej, Warszawa 1995, p. 90.

24 Centrum Badania Opinii Społecznej, Opinia społeczna o przerywaniu ciąży. Komunikat z badań BS/409/104/92, Warszawa, listopad 1992, https://www.cbos.pl/SPISKOM.POL/1992/K_104_92.PDF (access 12.11.2018).

25 Data as in: *Ibidem*.

26 *Ibidem*.

27 M.T. Staszewski, Referendum…, *op. cit.*, p. 93.

change them"[28]. As a result, the referendum can be applied to regulate those areas of social life that remain within decisive power of people, "whereas natural rights, universally recognized in the civilized world, cannot be subjected to a vote because it violates human rights and harms the natural order"[29].

The bishops, in one of the letters, referred to the accusation that opposition to the idea of a referendum on legal protection of a conceived child is in fact an objection to democratic procedures for making public decisions. "According to the bishops, the publicists and politicians who presented such a position misunderstood the notion of necessary condition of democracy: the social consensus on the most elementary matters, which include human life, cannot be decided in a democratic voting"[30].

Referring to the above-mentioned position of the Catholic Church, M. Staszewski stressed that "in conflict situations, with different positions, one of the methods of just and socially acceptable manner of making decisions may be to appeal to the referendum. (...) Entrusting decisions on this issue (the abortion - note of MR) to the parliament did not guarantee that this particular problem would be settled in a manner that is consistent with the views of the majority of society"[31]. It seems that not only the issue of abortion belongs to the problems, of which decisions taken by representative bodies remain (may remain) in contradiction with the will of the majority of society (and therefore with the will of a sovereign being the subject of supreme power in a democratic state). It is an element of a wider research problem, namely the acceptable subjects of a referendum. "Hierarchy of the Church and related circles have been consistently against referendum projects (regarding abortion - MR)"[32]. A different position was expressed by left-wing circles, according to which the issue of admissibility of abortion, due to social importance of this case, should be made by the sovereign through direct voting. In this context, it is worth noting that the analysis of the legal bases of the nationwide referendum allows for the conclusion of the admissibility of the referendum on abortion[33].

4. Conclusion

The extent of legal protection of a conceived child, including the idea of resolving this issue by referendum, constituted (and still constitutes) an important

28 Biskupi polscy w obronie prawa do życia, „L'Osservatore Romano" (wyd. polskie) 1991, nr 7, p. 56; quoted in: M. T. Staszewski, Referendum…, *op. cit.*, p. 93.

29 M.T. Staszewski, Referendum…, *op. cit.*, p. 93.

30 *Ibidem*, p. 95.

31 *Ibidem*, p. 95.

32 *Ibidem*, p. 96.

33 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 ze zm.); ustawa z dnia 14 marca 2003 r. o referendum ogólnokrajowym (tekst jedn. Dz.U. z 2015 r. poz. 318 ze zm.).

topic of public debate. Supporters of the referendum pointed out that this is the best way to make decisions in a very important and emotionally significant field. As emphasized by A. Malinowski, Poland did not take advantage of the experience of many democratic states that were referring to referenda when resolving the issue of abortion. "Thus, despite the growing role of referendum in modern democratic states, in Poland people have been deprived of the opportunity to take advantage of this form of direct democracy and resolve an important social problem. It can also be interpreted in a way that the government considered society as immature to make decisions. This is a sign of limiting the sovereignty of nation"[34].

The circles associated with the Catholic Church (referring in their programs to the values of the Catholic Church) consistently oppose abortion as well as a referendum on this subject. It is emphasized that human life begins at the moment of conception and lasts until natural death. Therefore, consenting to abortion would be a violation of the right to life (the natural law). "Protection of dignity of human life applies from the very moment of binding reproductive cells"[35]. John Paul II in the encyclical *Evangelium Vitae* emphasized that nowadays "the first and non-transferable right to life becomes the subject of discussion or it is even denied through a voting of the parliament or at the will of a part of the society, even if it is predominant. This is a disastrous result of an unrestrained domination of relativism: «law» ceases to be a law because it is no longer based on the firm foundation of the inviolable dignity of a person, but becomes subordinated to a will of the stronger. In this way, democracy acting against its own principles in fact transforms into a totalitarian system"[36].

So far, there has been no referendum on abortion, mainly due to opposition of the Catholic Church (as well as the majority of Sejm members) to such a solution. Considering the current situation within the political scene, and thus the dominance of conservative groups that refer in their programs to the teachings of the Catholic Church, it is difficult to assume that a referendum on abortion may take place in Poland in a few or a dozen or so years. In this context, it should be remembered that long-term changes in social awareness may lead to accept the idea of a referendum. Ireland is a perfect example illustrating such an evolution. There, a very restrictive law regarding termination of pregnancy was in force. Nevertheless, in a referendum carried out in 2018, 2/3 of voters was in favour of abolishing the constitutional ban on abortion.

34 A. Malinowski, Społeczne uwarunkowania referendum, (in:) M.T. Staszewski, D. Waniek (eds.), Referendum w Polsce i w Europie Wschodniej, Warszawa 1996, p. 113.

35 Kiedy zaczyna się ludzkie życie? http://niedziela.pl/artykul/26045/nd/Kiedy-zaczyna-sie-ludzkie-zycie (access 12.11.2018).

36 Evangelium Vitae, http://w2.vatican.va/content/john-paul-ii/pl/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html (access 12.11.2018).

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Citizens' Legislative Initiative in Socially Controversial Matters Submitted to the Sejm of the 8th Term

Abstract: The institution of a citizens' legislative initiative has been functioning in the Polish legal order for over 20 years now. It is a very important instrument co-creating civil society because it is one of the forms enabling citizens to express themselves in topics that are of relevance for them. The subject of this article is to present parliamentary works in the field of socially controversial projects that were submitted to the Sejm of the 8th term. It is the citizens' bill amending the act on prevention and combating infections and infectious diseases in humans, as submitted by the "STOP NOP" Committee for Citizens' Initiative.

This project had already aroused huge controversy and discussion at the stage of collecting signatures among eligible citizens. Also in the Sejm, during parliamentary work, he shared the political scene and experts who have been appointed by both, supporters and opponents of the anti-vaccine movement. The MPs of the majority party in the parliament advocated the necessity to proceed with the civic project, due to the need to appreciate and respect due to every initiative of the citizens.

Keywords: citizens' legislative initiative, the legislative process, the anti-vaccine law, Sejm of the 8th term

1. Introduction

The institution of a citizens' legislative initiative has been functioning in the Polish legal order for over 20 years now, as it was introduced to the Constitution of the Republic of Poland of 2 April 1997. According to the referral regulations of art. 118 s. 2 sentence 2 of the Basic Law, the detailed procedure for the citizens' legislative initiative was included in the Act on the Implementation of Legislative Initiative by Citizens of 24 June 1999. Some fifty committees of citizens' initiatives were formed from that date, which successfully registered their drafts and submitted then to the

Speaker of Sejm[1] in order to initiate legislative procedure. Millions of Poles signed these drafts, as the awareness of the functioning of this institution and its popularity has been noticeably increasing in recent years.

The Citizens' Legislative Initiative is one of the institutions that co-creates broadly understood mechanisms of civic activity[2]. Entitled subjects (a group of at least one hundred thousand citizens who have active electoral rights to the Sejm)[3] undertake efforts and exercise diligence to prepare a bill consistent with formal requirements. It should be remembered that the act on the implementation of the legislative initiative by citizens does not assume any assistance from state authorities, which would facilitate the shaping of the draft normative act, for example to make it consistent with the principles of legislative technique, and intentions of the entity initiating the legislative process.[4]

The provisions of the Act on the implementation of the Citizens' Legislative Initiative do not specify the dates in which the various stages of the legislative procedure in the Sejm should take place. When the practice is considered, this very often results in the fact that the legislative process takes much longer than the applicant would expect, moreover, a lot longer than in the case of drafts submitted by other entities, as listed in art. 118 s. 1 of the Constitution, which have the right of legislative initiative[5]. The Act regulating the procedure for the implementation of a citizens' initiative by the legislator, specified in its art. 4 s. 3 an exception to the principle of discontinuation of the work of the Sejm. According to its regulation, drafts submitted in the course of a citizens' legislative initiative for which the legislative procedure was not completed during the term of office of the Sejm in which they were brought, will be subject to further consideration by the Sejm of the next term of office. Parliamentary practice proves that despite the establishment of

1 Data from the Sejm website: www.sejm.gov.pl -archiwum: (downloaded on 10 January 2019) 5 citizens' drafts were submitted to the Sejm of the 3rd term, 11 citizens' drafts were submitted to the Sejm of the 4th term, 1 citizens' drafts were submitted to the Sejm of the 5h term, 18 citizens' drafts were submitted to the Sejm of the 6th term, 18 citizens' drafts were submitted to the Sejm of the 7th term.

2 See P. Uziebło, Inicjatywa ustawodawcza obywateli w Polsce na tle rozwiązań ustrojowych państw obcych, Wydawnictwo Sejmowe, Warszawa 2006, p. 30 and following pages.; S. Grabowska, Instytucja ogólnokrajowej inicjatywy ludowej w wybranych państwach europejskich. Studium prawno-porównawcze, Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2005, pp. 18-19.

3 Article 118 s. 2 of the Constitution of the Republic of Poland of 2 April 1997 and article. 2 of the Act of 24 June 1999 on the implementation of legislative initiative by citizens.

4 It should be emphasized that each of the other four entities with the right of legislative initiative in Poland has, at its disposal, adequate organizational facilities and auxiliary units that professionally prepare draft normative acts, e.g. offices and legal departments of individual ministries or the Government Legislation Center or the Chancelleries of Sejm, Senate and of the President.

5 Article 118 s. 1 of the Constitution of the Republic of Poland of states that the legislative initiative is vested in MPs, the Senate, the President of the Republic and the Cabinet of Ministers.

a statutory exception to the principle of discontinuation of the Sejm's proceedings, citizens' drafts often fail to be subjected to full legislative procedure after the term of Sejm that they were submitted to, pursuant to the regulation of art. 4 s. 3 of the Act on the implementation of citizens' legislative initiative, and they end up in the trashcan. It may seem that prolonging the legislative process is a deliberate action[6]. Due to a very formal manner of implementing the constitutional right of citizens to submit bills in the form of a citizens' legislative initiative, this form of initiating the legislative process accounts for a negligible percentage of all bills, when compared to the number of projects submitted by other entitled entities. In addition, formalism (e.g. the requirement to collect 100,000 signatures within 3 months, when compared to MP's initiative, which is only required to be supported by 15 other MPs) and the lack of funding (apart from the possibility of organizing public collection) discourage citizens from using this form of participation in democracy. The norms of the Act on the implementation of citizens' legislative initiative determine that real applicants for a citizens' initiative are usually groups of people supported by dynamically operating associations and non-governmental organizations that provide legal and organizational assistance as well as a wide range of the undertaking. Propagating their postulates and attempts to make changes in the legal system are also tempting for these organizations, because they ensure media coverage and in case of a successful submission of their draft to the Sejm it may take advantage, e.g. of the exception to the principle of discontinuation of parliamentary work.

Over 70 percent of projects submitted for consideration over the last two decades concerned the amendment of legal acts already in force and about one in four of the submitted projects contained completely new, comprehensive legal regulations. The projects submitted were very diverse in terms of their subject matter. They mainly concerned matters of administrative law, labour and social security law, but also criminal law, financial law or family and guardianship code[7]. There were also projects in very important, often emotional and controversial, social issues, such as the introduction of a total statutory ban on abortion (9 times), raising the starting age of compulsory education, or the so-called "anti-vaccine" project filed in the current eighth term of the Sejm.

The subject of this article is to present parliamentary works in the field of one of socially controversial project that were submitted to the Sejm of the 8th term. Analysing the subject scope of citizens' legislative initiatives and the discussion they

6 B. Malewski, Czy obywatelska inicjatywa ustawodawcza spełnia swoja rolę? Kilka uwag o funkcjonowaniu inicjatywy ludowej i jej skuteczności, "Kortowski Przegląd Prawniczy" 2016, no. 1, p. 22.

7 Sz. Wójcik, Inicjatywy ustawodawcze obywateli. Analiza socjologiczna, doctoral dissertation, Warszawa 2017, https://depotuw.ceon.pl/bitstream/handle/item/2597/3402-DR-SC-122796.pdf?sequence=1, (access 20.01.2019).

caused, it should be recognized that in the current parliamentary term, we have two such drafts, i.e. the bill amending the act on preventing and combating infections and infectious diseases in humans, and the citizens' draft amending the Act of 7 January 1993 on family planning, protection of the human foetus and conditions for the admissibility of termination of pregnancy. In this article it will be analyzed the citizens′ draft amending the act on preventing and combating infections and infectious diseases in humans.

On 11 July 2018, the citizens' bill amending the act on prevention and combating infections and infectious diseases in humans, as submitted by the "STOP NOP" Committee for Citizens' Initiative (notice on the creation of the Citizens' Committee of the Legislative Initiative of 28 March 2018, was submitted to the Sejm). On 11 April 2018, the Speaker of Sejm issued a decision in which the notification about the establishment of a citizens' initiative committee was confirmed (decision of the Speaker of the Sejm No. 7 of 11 April 2018) and the committee called Ogólnopolskie Stowarzyszenie Wiedzy o Szczepieniach [National Association of Vaccination Knowledge] "STOP NOP" formed. The draft law has been supported by over 100 000 correctly filed signatures of eligible citizens, which have been verified by the Legal and Employment Bureau of the Chancellery of the Sejm (letter from the Chief of the Sejm Chancellery of 25 July 2018, Ref. BPSP -020-3 (12)/18) and the person authorized to represent the Committee during the legislative procedure of the project was Justyna Anna Socha (letter from the Citizens' Committee of the Legislative Initiative of the "STOP NOP" National Association of Vaccination Knowledge, dated 1 August 2018).

The subject project was referred to the first reading on 28 August 2018 by the Speaker of Sejm (Sejm print no. 2796). The project involved several changes to the content of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans[8]. Applicants have attached a very extensive justification to the draft, which spanned on over ten pages. The discussed project assumed, as a rule, the elimination of the obligation of preventive vaccinations and the introduction of a voluntary principle in this respect. Mandatory vaccinations would be limited solely to the situations, when an epidemic or an epidemic state is declared (Art. 1 section 8 of the citizens' draft), when the minister competent for health matters or the Voivode could impose this obligation by way of a separate regulation[9].

In addition, the project postulated a change of the entity entitled to publish the list of recommended (no longer obligatory) vaccinations for the respective calendar

8 Journal of Laws of 2008, No. 234, item 1570.

9 Interestingly, the aforementioned provision also allows imposing the requirement of preventive vaccinations by means of a regulation whose addressee may be a single person ("... they may impose the obligation of protective vaccinations against persons or groups of persons indicated in the Regulation...„). Such a regulation seems to contradict the idea of a normative act whose addressee must be defined in a general way.

year, from the Chief Sanitary Inspector to the minister competent for issues of public health and changing the form of information: from the communication to the regulation, and thus the form of a normative act that would bind all entities in the whole jurisdiction. The proposed change was to contribute to greater transparency in the creation of the Protective Vaccination Program and allow, according to the applicants, the participation of social organizations in the creation of the Program (justification to the citizens' bill amending the act on prevention and combating infections and infectious diseases in humans, p. 1).

A change in reporting and registration of adverse events following immunization was also postulated. Pursuant to art. 1 s. 4 of the citizens' draft, the person suffering from adverse events following immunization or its legal guardian could personally report this fact to the district sanitary inspector who, by way of an administrative decision, would record it in the relevant register. The draft elaborates on the regulations defining the course of the vaccination qualification examination and the extension of the medical history preceding the vaccination to obtain information on the health status of relatives.

The applicants argued that mandatory vaccinations were abolished in many European countries, and the formula in force in Poland is characteristic of former socialist bloc states and functions, for example in Hungary or Bulgaria. Reference was also made to the case law of the European Court of Human Rights, which stated that vaccinations, as compulsory health services, constitute an interference with the right to respect for private life[10] (justification of the project, p. 9).

2. Submitted draft, stage of parliamentary work

The assessment of effects of citizens' draft Act amending the act on preventing and combating infections and infectious diseases in humans, prepared by the Sejm Analysis Office of the Sejm Chancellery, was negative. It was pointed out that the project is controversial, and the proposed change in law radical (opinion of 14 September 2018). The opinions presented by the Supreme Council of Nurses and Midwives (position of 28 August 2018) and the Polish Chamber of Physicians and Dentists (position 6/18/8 of 31 August 2018) were also negative. The Supreme Council of Nurses and Midwives requested the rejection of the draft in its entirety, due to the fact that it "harms the public interest of Polish society"[11] and the Polish Chamber of Physicians and Dentists argued that the adoption of the project "will result in an increase in infectious diseases and... may lead to epidemics, and the bill

10 For more details see ECHR 31534/96, 42197/98.

11 http://orka.sejm.gov.pl/Druki8ka.nsf/0/B2D640C1A66D2CC7C125830100378528/%24File/2796-002.pdf (access 15.01.2019).

should be assessed as dangerous for health security"[12] It was also emphasized that the project assumptions are in conflict with art. 68 s. 4 of the Constitution of the Republic of Poland[13].

On 2nd of October the Sejm Chancellery received the government's position in which the Council of Ministers presented arguments in favor of maintaining the current legal status[14] and pointed to errors in the draft consisting, for example, in the lack of consistency in the proposed changes. The final conclusion of the Council of Ministers' position was negative[15] .

Two days later, at the 69th session of the Sejm, the first reading of the citizens' bill amending the act on preventing and combating infections and infectious diseases in humans took place. The project involved a stormy, more than two-hour long debate.

Former Minister of Health in the PO-PSL government, Bartosz Arłukowicz, criticized the ruling camp and recalled the letter that was sent in 2016 to the Chief Sanitary Inspector, by the current deputy minister of justice, Patryk Jaki. The letter states that the obligation to vaccinate is a manifestation of discrimination against citizens of the Republic of Poland. Mr Arłukowicz, who claimed that proposed further work on the draft would be a scandal, called his political opponents "medical ignorants"[16]. Joining him was Joanna Scheuring-Wielgus, appealing that the submitted citizens' draft forms a threat, and parliamentarians supporting the initiative, will be responsible for the outbreak of the epidemic in the state (p. 337 of the transcript). MP Stefan Niesiołowski reminded that vaccinations were introduced in the 18th century, and the idea of their voluntariness is "... just an idiotic idea" (p. 335 of the transcript).

The parliamentarians of the Kukiz'15 Movement, who supported the anti-vaccine movement, supported the changes in the current legal situation. The necessity of an in-depth discussion on the alleged harmfulness of vaccinations was declared by the deputies of Law and Justice, despite the government's negative attitude towards the project. Law and Justice MPs voted in favour of referring the draft to work in committees. They argued their position with a promise of not giving up citizens'

12 (http://orka.sejm.gov.pl/Druki8ka.nsf/0/B2D640C1A66D2CC7C125830100378528/%-24File/2796-002.pdf (access 15.01.2019).

13 Article 68 s. 4 of the Basic Law "Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment."

14 At the press conference, Łukasz Szumowski, the Minister of Health, said the following about the civic project: "If the immunized population is reduced below a certain level, we will have epidemics. Our families, our children will die. We cannot allow this to happen" https://www.mp.pl/szczepienia/aktualnosci/195820,szumowski-rzad-jest-przeciwny-zniesieniu-obowiazku-szczepien (access 12.01.2019).

15 http://orka.sejm.gov.pl/Druki8ka.nsf/0/C1DC2A10F70497A5C125831A0046C993/%-24File/2796s.pdf (access on 15 January 2019).

16 Transcript of the 69th session of the Sejm of 3 October 2018, pp. 335-336.

projects at first reading[17] and directing them to further work[18]. Deputy Anna Maria Siarkowska emphasized that the Sejm is to listen to people, and those who will vote against referring the draft to the commission "... show exceptional contempt and insolence" (p. 335 of the transcript). In addition, in the continuation of the initiative the opportunity was seen to educate the public on the legitimacy of vaccinations[19] .

An ardent and emotional speech by a representative of the Legislative Initiative Committee, Justyna Anna Socha, was interrupted by malicious comments by opposition MPs. The applicant asked parliamentarians if they did not represent the interests of the vaccine manufacturers ("Big Pharma"), negating the citizens' initiative so much. She admitted that the project was prepared in response to the expectations of parents who want to decide about medical procedures performed on their children. She cited examples of adverse events following immunization and pointed to numerous, according to the applicants, failures of the state authorities to supervise the implementation of vaccinations. She thanked parliamentarians who had "a difficult and controversial topic and ... dialogue and debate" (p. 337 of the transcript).

The parliamentary majority opted for the submitted drafts to form the basis for further work in committees. In the vote on the draft, which took place on 4 October 2018, 172 MPs voted for rejection of the draft in the first reading, 230 were against and 5 abstained (vote no. 41). Then, the application to refer the citizens' draft to the Social Policy and Family Commission was put to the vote. 252 deputies supported the motion[20], 152 were against and 2 abstained (vote no. 42).

A month later, on 8 November 2018, a joint meeting of the Social Policy and Family Commission and the Health Commission was held[21]. During the meeting of the Commissions opinions were voiced by the representative of the Minister of Health, experts and applicants. The Chief Sanitary Inspector argued that experts speaking on behalf of the government side are authorities in the field of vaccinology, virology and vaccination issues devoted, who their scientific and professional life

17 This argument was questioned by MP Joanna Schmidt, Liberal-Social circle, who said "I will remind you that you threw almost 1 million signatures into the basket - it was also a citizens' initiative - when the referendum on education reform was to be held" (transcript of the Sejm sitting on 4.10.2018, p. 334).

18 See also: Minister of Health: Government is against the voluntary vaccination, https://www.newsweek.pl/polska/polityka/minister-zdrowia-rzad-jest-przeciw-dobrowolnosci-szczepien/zkz8r45 (access 12.01.2019).

19 Szczepienia będą obowiązkowe. Sejm odrzucił obywatelski projekt, https://www.newsweek.pl/polska/polityka/szczepienia-beda-obowiazkowe-sejm-odrzucil-obywatelski-projekt/g1cpmj3 (access 12.01.2019).

20 Full list of MPs voting for the citizens' draft: K. Bagiński, Poselska "lista hańby". To oni poparli w Sejmie projekt antyszczepionkowców, https://innpoland.pl/146881,pis-glosuje-jak-antyszczepionkowcy-chca-252-poslow-poparlo-ich-projekt (access 18.01.2019).

21 The committee was chaired by Bartosz Arłukowicz.

(bulletin of the Commission meeting no. 3723/VIII), and accused the opponents of having knowledge derived solely from the Internet and their eristic-narrative skills. The President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products rejected the arguments of the applicants regarding the harmful composition of vaccines and the deputy of the Chief Sanitary Inspector reported the issue of the negligible frequency of adverse events following immunization.

Experts proposed by the committee of the citizens' legislative initiative talked about the presence of harmful metals in vaccines, which were dangerous for human health (statement by D. Sienkiewicz, MD), an ineffective (in their opinion) procedure of registering adverse events following immunization and irregularities in vaccinations of children, especially premature babies and children with low birth weight (statement by K. Bross-Walderdorff, MD).

It should be noted that the discussants referred to mainly emotional arguments, based on fear. Experts invited by committee members raised the dangers related to the outbreaks of infectious diseases and the applicants cited arguments regarding the harmfulness of vaccinations and the vaccine compositions that were dangerous for health (bulletin of the Commission meeting no. 3723/VIII).

A report was prepared on the meeting of the Health and Social Policy and Family Committees on the citizens' draft amending the act on preventing and combating infections and infectious diseases in humans (Sejm print no. 2993), in which the bill was rejected. The report was presented as part of the second reading at the sitting of the Sejm on 9 November 2018 (meeting No. 71, point 41 of the agenda). Non-affiliated MP Robert Winnicki accused the members of the Commission of failing to deepen the debate and throwing away a citizens' draft into the basket, and Deputy of Kukiz'15, Paweł Skutecki, spoke about the compromise of the idea of parliament as a place for discussion and exchange of opinions[22] . Supporting the bill, he further argued that the project, although "... contains a lot of uncontroversial solutions that build confidence in the Polish immunization system" was still called an anti-vaccine one. He also accused the Minister of Health[23] of gagging the mouths of "... authorities outside of the salons".

Deputy Alicja Chybicka (Civic Platform), responding to the previous speakers, appealed to the basic values of life and health, and perceived a threat to Polish women and men in the draft submitted to the Sejm. Ryszard Petru (Liberal-Social association) quoted the argument that the deputies who voted in the first reading for further proceedings of this law are responsible for the diseases of children who have not been vaccinated.

22 P. 240 of the transcript of 71 session of the Sejm.

23 It should be noted that the position of the Council of Ministers was consistently negative throughout the entire consideration of the citizens' draft by the Sejm.

During the discussion, deputy Witold Zembaczyński (Nowoczesna), addressing Kukiz'15 and Law and Justice deputies who voted in the first reading in favour of the citizens' draft, charged them with responsibility for propagating anti-vaccine movements[24]. Repelling the attacks, the reporter, Tomasz Latos (Law and Justice) unequivocally stressed that the Law and Justice club had been against its adoption since the beginning procedure of the citizens' project, and its transfer to work in committees was only aimed at educating the public in the subject matter of the initiative, thus forming a manifestation of respect for this form of direct democracy.

Michał Kamiński (Polish People's Party-Union of European Democrats) ended the speeches of MPs, jokingly referring to the deputies supporting the project: "I am a patriot, I'm fighting against ignorance."[25]

The Speaker of the Sejm put the Commission's request for rejection of the citizens' draft to the vote. 354 deputies voted in support, 10 were against and 16 abstained (vote 114). The draft citizens' bill amending the act on preventing and combating infections and infectious diseases in people was rejected by the Sejm, thus terminating the legislative procedure.

In response to the "STOP NOP" draft and in connection with the significant increase in the incidence of measles in Poland, a preview of the citizens' legislative initiative entitled "Szczepimy, bo myślimy" ("We vaccine because we do think") appeared. The rationale of the project's legislation was to award additional points for children vaccinated according to the vaccination calendar, in terms of recruitment to state-owned educational institutions[26].

3. Conclusions

Citizens' initiative is understood as "an institution of civic participation that allows a numerically defined group that is part of a collective sovereign to present, to the legislature or directly to the people themselves, an application proposing the adoption, amendment or rejection of a normative act" [27]. It grants the citizens the opportunity to shape their rights and obligations directly and enables citizens to become active around matters that are important to them[28]. Practice indicates that the institution of a citizens' legislative initiative is used in Poland to a limited extent

24 P. 241 of the transcript of 71 session of the Sejm.

25 The voting took place on the eve of Independence Day.

26 K. Kowalska, Nowe propozycje przepisów dotyczących szczepień, Rzeczpospolita of 7 November 2018.

27 M. Dane Waters, The Initiative and Referendum Process in the United States, Initiative and Referendum Institute, Washington 2002, pp. 9-10 (quoted after: P. Uziębło, Inicjatywa ustawodawcza..., *op. cit.,* p. 31).

28 J. Kuciński, Konstytucyjny ustrój państwowy Rzeczypospolitej Polskiej, Warszawa 2003, p. 157; E. Kużelewska, Referendum w procesie integracji europejskiej, Warszawa 2006, p. 13.

only. It seems that formal restrictions effectively deter and sometimes even make it impossible for citizens to effectively influence the existing legal norms[29]. To discourage citizens from taking up a citizens' legislative initiative, the percentage of laws that have been passed to the Sejm in accordance with art. 118 of the Constitution[30]. Citizens' legislative initiative is, however, a very important instrument co-creating civil society because it is one of the forms enabling citizens to express themselves in topics that are of relevance for them. It also reveals to decision-makers what scope of social relations, according to the sovereign, should be regulated differently from the existing legal solutions, and this can be applied, for example, in election campaigns. It also allows citizens to unite around matters that are important to them, consistent with their world-view, values and needs that initiate the decision-making process, which the citizens' legislative initiative undoubtedly forms[31].

Projects submitted in the mode of art. 118 s. 2 of the Constitution have a strong legitimacy because they come directly from an entity having sovereign power in the state, that is, from the sovereign. Parliament members elected in elections are obliged to listen and represent their electorate because the settlement it reaches at the next elections may cost them dearly. The systemic practice proves that in most cases, citizens' projects are supported during parliamentary work, officially or informally, by specific parties and political groups[32]. It seems that the fact of the civic genesis of the project apparently obliges the members of the group holding power to continue work on the initiative, which is justified by care and respect for civic activities in the name of supporting civil society.

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Referenda as a Threat to Democracy and Constitutionalism: a Few Lessons from the 'Brexit' Vote

Abstract: The use of referendums as a way to complement representative democracy can pose fundamental risks to the democratic system of decision making, where the question on ballot paper lacks clarity either due to the complexity of the issue to be decided, or to poor phrasing. Another set of risks relate to the challenges of ensuring high standards of veracity, transparency and accountability in an era where illicit use of digital technology might influence voters. Potential partisan capture of the process is yet another example of a systemic threat to manipulate the vote.
These types of risks came into sharp focus during and in the aftermath of the UK 'Brexit' poll on the 23 June 2016. I use this unique case study to discuss a selection of issues that emerged from the referendum vote under the UK's uncodified constitution, and to evaluate the place of referenda in political decision -making in constitutional democracies more generally.

Keywords: referendums – design and risks, constitutional matter, Brexit

1. Introduction

The need for the use of referenda in representative democracies has never been fully accepted.[1] Opponents stress the seriousness of potential risks to democracy and constitutionalism that can occur when the essential standards of design and

1 In the global context, referenda are used with increasing frequency in a diverse range of countries. See, for instance, Qvortrup, M., 2018. The Paradox of Direct Democracy and Elite Accommodation: The Case of Switzerland. In *Consociationalism and Power-Sharing in Europe* (pp. 177-196). Palgrave Macmillan, Cham. By choosing to focus on institutionally stable democracy such as the UK, I hope to offer a more meaningful analysis, as this relatively narrow focus allows for a more in-depth investigation without the need to consider a wide range of factors.

regulation, as well as of the process itself, are found wanting. Proponents point to the unquestionable value of allowing the direct democratic process to be used in a narrow class of constitutional decision-making, as a way of bolstering legitimacy of Parliamentary democracy with a dose of peoples' power. These dilemmas came into sharp focus during and in the aftermath of the UK 'Brexit' referendum. Almost two years after the vote, the debacle remains far from settled, as it represents a unique case study for evaluating the place of referenda in political decision-making in representative democracies.

2. Risk factors in the design of the UK Brexit referendum

The absence of constitutional matter in the UK constitution

The leading rationale for using referendums is to settle some of the most fundamental constitutional questions faced by a state.[2] That requires a high degree of clarity on what kind of issues could be considered as possessing the essential characteristic of 'constitutionality'. Codified or written constitutions are the main and necessary, though not always sufficient, reference framework for deciding this. Under the UK's uncodified constitutional system, there is no such clarity.[3]

Yet, the crucial importance of clear delineation of the parameters of constitutional issues from any other political question of the day matters in at least two respects; pragmatic – referenda are time-consuming and expensive to run; and, more crucially, the designation of 'constitutionality' should protect the decision on issues from the vagaries the partisan politics to ensure that decisions in such matters are guided by public/state interest and do not fall victim to partisan contest of popularity.

The UK proved to be particularly vulnerable to such a risk: blurring of delineation of constitutionality of a matter under consideration and, more crucially, the weak regulation of referendums under the UK's uncodified constitution, arguably led to

2 The Independent Commission of Referendums stated that 'although there is broad consensus that referendums should be held on "constitutional issues", there is lack of cross-party agreement on what should be considered a "constitutional issue"'. See full report available on: Full report available at: http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendumshttp://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendums (access 22.10.2018).

3 In 2010 the House of Lords Constitution Committee was tasked with considering the problem of an absence of definition of what is a 'constitutional matter'. Disappointingly, it suggested that this should come down to the Parliament's decision on case-by-case bases, rather than be determined any specific set of parameters. See Debates, Parliamentary. "House of Lords." *Official Reports. Fifth Series* 114 (2010). This matter is further complicated by the legally non-binding character of constitutional referendums in the UK, in order to respect the Supremacy of the Parliament.

partisan capture and can be linked to widespread manipulation of the electorate by campaign of misinformation. Let us consider these issues in turn.

The legal and political status of the UK's EU membership has not been clearly defined as 'constitutional'. Even though the European Communities Act 1972, which regulates the accession of the UK to the EU has been described as a 'constitutional statute' already in *Thoburn*,[4] and more recently confirmed in *Miller,*[5]this designation does not affect the legislative and political Supremacy of the Westminster Parliament.[6] This limitation was never likely to help remove the potential for manipulation of Brexit referendum process for political ends, mainly due to adversarial party politics that dominates the UK Parliament, which operates as 'elected dictatorship'; system of whip-enforced, majority-party decision-making.[7] The suggestion of the Supreme Court that 'the article 50 [TEU] process must and will involve a partnership between Parliament and the Executive'[8]suggests that this is an issue of fundamental importance for the constitutional order of the UK, which requires cross-party cooperation – a call which so far has been largely ignored by Theresa May's government.[9]

The existing evidence strongly suggests that a number of aspects of the UK Brexit referendum were affected by manipulations and distortions not just in the Parliamentary politics.[10] The lack of rules on who, and under what conditions, can call for a referendum in the UK further increased the potential for malpractice.

The initial instance of manipulative behaviour could be ascribed to the then Prime Minister, David Cameron, when he attempted to strengthen his position among the Conservative backbenchers, and, by fending off the threat of UKIP, to

4 See Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, paras 37-47.

5 The Supreme Court in Miller (*R v Secretary of State for Exiting the EU*2017 UKSC 5) refers to the 1972 ECA as 'constitutional' and as having 'constitutional consequences'.

6 The European Communities Act 1972, the legal basis for the accession of the UK to the EU, is considered 'constitutional', along a handful of other Statues only. Such recognition is mainly due to the *de-facto,* time limited entrenchment – until the Parliament expressly repeals such acts.

7 This is how Lord Hailsham's famously described the British system of Parliamentary politics in the Richard Dimbleby lecture, BBC, 14 Oct.176.

8 *Miller* judgement, n. 5 above, at p. 95.

9 After suffering the biggest defeat in the Commons over the EU Withdrawal Agreement on the 15 Jan. 2019, the PM appeared to seek a cross party talks. However, this offer was perceived as an empty formality by the opposition party. See for instance: https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-theresa-may-brexit-talks-cross-party-withdrawal-agreement-a8735561.html https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-theresa-may-brexit-talks-cross-party-withdrawal-agreement-a8735561.html (access 23.01.2019).

10 The best known is the promise of £350 million to go to the NHS instead of the EU. Another is the use of Turkey as a source of potential migration on Turkey's acceptance into the EU. See for instance: https://www.theneweuropean.co.uk/top-stories/boris-johnson-caught-out-over-lies-about-turkey-in-channel-4-interview-1-5857836 https://www.theneweuropean.co.uk/top-stories/boris-johnson-caught-out-over-lies-about-turkey-in-channel-4-interview-1-5857836 (access 19.01.2019).

bolster the standing of the Conservatives as the governing party.[11]The containment of UKIP's growing popularity within a traditional Conservative electoral base was also to serve as a way to appease Eurosceptics within his party. Arguably, David Cameron forced the EU membership decision and was able to set the date for Brexit referendum in an arbitrary fashioning reflecting his own political agenda.[12]

The setting of the referendum question creates another potential risk of manipulative behaviour. The Political Parties, Elections and Referendums Act 2000 (PPERA)[13] imposes a duty on the Electoral Commission to test intelligibility and 'neutrality' of the question – to avoid leading phrasing.[14] The question on the ballot paper of the 2016 EU membership referendum appears clear and neutral. Closer examination reveals, however, that the question was in fact far from either of these two standards, particularly in the specific context of the UK. I suggest that the meaning of neither continuing EU membership nor the consequences of leaving were intelligibly explained to the electorate, who were asked to express their views on precisely these issues. Nor, for that matter, was there even any basic information about the EU provided to the wider public.[15] This neglect clearly violated the core standard

11 E. Kużelewska, B. Puchalska, Two British Referenda on the EU, Two Different Directions of Travel, "Athenaeum. Polskie Studia Politologiczne" 2017, no. 57, p. 82.

12 R. Inglehart, P. Norris, Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash. *HKS Faculty Research Working Paper No. RWP16-026No. RWP16-026*, 2016,1–57. The European Union Referendum Act 2015 only requires a four-months notice period for any change of the procedural rules.

13 See also EU Referendum Act 2015. The Act made additions and amendments to the framework set out in PPERA to establish a regulatory framework for a referendum on the UK's membership of the EU. For a full overview of the regulatory framework see Electoral Commission *Report on the regulation of campaigners at the referendum on the UK's membership of the European Union held on 23 June 2016*, March 2017. Available at: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdfhttps://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdf (access 19.01.2019).

14 Compare the most recent Code of Good Practice on Referendums published by the Council of Europe (Venice Commission). Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-ehttps://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e (access 19.01.2019).

15 The morning after the vote Google trend reported a spike in searches for 'What is the EU?' followed by 'What is Brexit?' See: http://fortune.com/2016/06/24/brexit-google-trends/http://fortune.com/2016/06/24/brexit-google-trends/ Although these two spikes are not necessarily indicative of a widespread lack of knowledge about the EU and Brexit, the two years that elapsed since the vote exposed a serious degree of ignorance about the EU prevalent in the UK's government, Parliament, and the media. See: 'I work in Brussels alongside Brexit negotiators and I find it incredible how little the UK government understands about' at:https://www.independent.co.uk/voices/brexit-latest-news-eu-talks-brussels-uk-theresa-may-a8416076.htmlhttps://www.independent.co.uk/voices/brexit-latest-news-eu-talks-brussels-uk-theresa-may-a8416076.html (access 24.10.2018).

of national referendums, confirmed recently by the Independent Commission on Referendums report.[16]

It is reasonable to assume that the vast majority of British voters simply did not know what the EU is and what the impact was of EU membership on the UK.[17] The potential consequences of leaving the EU were even more obscured due to their very unpredictable nature, but more so, because of a lack of any projections studies, which would consider a number of different possible case scenarios.[18]

3. The EU in British media and political discourse surrounding the Brexit referendum

The prevailing ignorance in the UK of all things related to EU can in large measure be explained either by the lack of coverage of the EU in the UK media or by misleading type of coverage, focussing on 'bend bananas' and other 'Euro-myths' that dominated the media stories, long before the Brexit vote.[19] The little reporting that was to be found in the UK papers was so strongly anti-EU that it resulted in distortions and misconceptions rather than informative coverage. There were some exceptions, such as *The Independent* and *The Guardian,* but the circulations of these titles has always been relatively small, and the frequency of reporting from the EU very low.[20]

One of the more aggressively anti-European papers is *The Sun*, a Rupert Murdoch title, which is said to have a huge influence over the UK electorate. *The Sun*, and the Murdoch empire more generally, is widely considered as determining the final outcome of elections in the UK – the clearest example of such influence. With a circulation of 2.5 million (down from 3.5 million in 2003) *The Sun* is by far the most popular of the British tabloids, followed by *The Daily Mail*, at just under 2 million. By comparison, the quality broadsheet *The Guardian* sells only just over 200 thousand copies a day on average.

All in all, the British public have either been not informed at all about the EU and what it does, or have been misinformed – the only stories that seemed to have made

16 See n. 2.

17 Exceptions to this are students, lawyers, academics, and civil servants who possess professional knowledge and expertise in this field.

18 Many commentators point out the very rushed triggering of Article 50 TEU by Theresa May without first commissioning such studies.

19 http://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/bendybananas.htmlhttp://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/bendybananas.html (access 19.01.2019).

20 The United States focus has always been much more visible in the UK's media. Even major European events are often ignored. There was no mention of recent anniversary of German re-unification (3 Oct.) in the UK media.

it into the UK's media were those about wrongly curved bananas and insufficiently straight cucumbers.[21] Another type of coverage fed to the public were stories about national sovereignty that was allegedly under constant threat from Brussels, particularly after the ratification of the Maastricht Treaty of the EU.

It is highly likely that the media have decisively influenced the public perception of EU-related matters.[22] Hence, it can be suggested that British media have been successful in infecting the British public with Euroscepticism of an aggressive variety. A contributing factor was the UK politicians' tacit acquiescence to the hostility in the UK media's style of reporting on Europe. Another was the unavailability of any competing coverage of European matters on European level. The British people were never informed about what the EU is and what it does. Instead, they were fed a diet of sustained one-sided Euro-bashing.[23]

All in all, it is clear that the general British public had not been encouraged or enabled to gain even a basic understanding of the complex matter that is the UK's membership of the EU, neither by the media, nor was such encouragement likely to come from the government or MPs. The EU was always considered a 'toxic' or 'poisonous' issue in the UK political discourse, hence discussing the EU was avoided as it could bear negatively on the prospects of political career.

This situation was not helped by a very weak grasp of even the basic knowledge on the nature of the EU, the Single Market and the Customs Union by the UK government and the MPs; they were exposed by the public debate taking place since the vote.[24] As late as October 2018 most of the publicly expressed views and opinions by the leading political figures clearly demonstrated the embarrassingly poor knowledge and understanding of a number of core, pertinent aspects of the EUs functioning.[25]

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21 '…the way the media covers an EU political development is more prevalent and relevant to the public than often considered in the literature' in O. Dursun-Ozkanca, European Union Enlargement and British Public Opinion: The Agenda-Setting Power of the Press,"Perspectives on European Politics and Society" 2011, vol.12, no. 2, pp. 139-160.

22 J. E. Fossum, and P. Schlesinger, The European Union and the Public Sphere: A Communicative Space in the Making? (in:) J.E. Fossum, P. Schlesinger (eds.), The European Union and the Public Sphere: A Communicative Space in the Making? Routledge, Oxon: Routledge 2007, p. 20.

23 *Ibidem*.

24 See for instance https://www.express.co.uk/news/politics/1029843/Brexit-news-Theresa-May-Brexit-negotiations-Chequers-EU-Ivan-Rogers-Boris-Johnsonhttps://www.express.co.uk/news/politics/1029843/Brexit-news-Theresa-May-Brexit-negotiations-Chequers-EU-Ivan-Rogers-Boris-Johnson, https://www.theguardian.com/politics/2018/may/24/uk-stop-blather-face-reality-brexit-trade-ivan-rogers (access 23.10.2018).

25 This EU ignorance continues in the camp of Brexiteers led by the European Research Group. This powerful group failed to produce their own plan for Brexit beyond vague calls for Canada ++, an arrangement that is neither feasible nor economically viable for the UK. See also n. 11 above.

4. Secrecy of the UK-EU negotiations

From the beginning of the process of negotiating the post-Brexit relationship with the EU, Theresa May defended the secrecy of the talks. According to her, this was needed not to weaken the UK's negotiating position. There was to be no 'running commentary' on the talks. Nor, it seems, was any debate allowed (even in the Parliament) on the potential impact of the outcome of such negotiations. The Government's own series of reports and impact studies were not made available to MPs or the public. Only during the last two months did the Government start to publish the so called 'technical notes', whose aim is to help prepare the UK for the potential no-deal Brexit.[26]

These notices, however, are simply not sufficiently detailed to be of any real help in the post-Brexit planning, but they serve to outline the scope and complexity of the potential impact on almost every aspect of the UK economy.

The approach taken by the UK government contrasts unfavourably with the actions taken by Scottish government in preparation for the Independence Referendum in 2014. The Scottish Government published a White Paper of 670 pages, 'Scotland Future', in the form of a guide to what an Independent Scotland was likely to look like.[27] No document of that kind was published by Theresa May's government.

All in all, this level of secrecy surrounding the most serious constitutional matter that can have a profound and long-lasting impact on most aspects of peoples' lives is deeply undemocratic and goes against most basic standards of constitutional conduct. As such, it can lead to questioning the legitimacy of the referendum, which in turn risks further deepening the divisions between the 'leavers' and the 'remainers'.

As argued by Tierney, 'the narrowness of the result emphasises the importance of Parliament playing a full role in informing and scrutinising the implementation of the referendum result'.[28] It is obvious that Parliament not only failed in that duty, but that it was kept in the dark by the Government. The saga of the non-existent impact assessment reports that the Government was refusing to publish for months, is a testimony to that failure.[29]

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26 https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-dealhttps://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal (access 23.10.2018).

27 https://www.gov.scot/resource/0043/00439021.pdfhttps://www.gov.scot/resource/0043/00439021.pdf (access 23.10.2018).

28 S. Tierney, 'Was the Brexit Referendum Democratic?' U.K. Const. L. Blog (25th July 2016) (available at: http://ukconstitutionallaw.orghttp://ukconstitutionallaw.org) (access 24.10.2018).

29 See the following: https://www.independent.co.uk/news/uk/politics/labour-brexit-reports-government-theresa-may-uk-keir-starmer-economy-impact-urgent-question-a8185231.htmlhttps://www.independent.co.uk/news/uk/politics/labour-brexit-reports-government-theresa-may-uk-keir-starmer-economy-impact-urgent-question-a8185231.html;https://www.independent.co.uk/voices/david-davis-brext-impact-assessments-parliament-sovereignty-will-of-people-a8080326.htmlhttps://

5. Standards of verity in the referendum campaign

A number of blatant lies and false statements were made during the Brexit referendum campaign. Such misrepresentations were allowed to persist and to shape popular understanding of some of the most pertinent issues related to the nature of the UK's membership of the EU.[30] Yet, making false statements in the referendum campaign is not an offence under the UK law. Should it be? There is a strong democratic and public interest argument for such a recognition, as argued by Doherty.[31] Otherwise, decisions of constitutional magnitude will remain vulnerable to lies and distortions to a much greater degree than decisions about buying a second-hand car – where the contract law protects potential buyers from the harmful effects of misrepresentation. Regardless of how complex and challenging, there must be a way of protecting the electorate, hence the national interests from most obvious, blatant lies. As the Brexit campaign showed, relying on the so-called free media is not enough.[32]The Electoral Commission is a body best placed to police the boundaries between fact and fiction, and should have semi-judicial powers to impose injunctions and demand retractions. Arguably, this could have prevented the worst and loudest lies that were spread by mainly the Leave campaign.[33]

www.independent.co.uk/voices/david-davis-brext-impact-assessments-parliament-sovereignty-will-of-people-a8080326.html ; https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8128https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8128 (access 24.10.2018).

30 The blatant lies of the Leave campaign are still taken as the truth by nearly a half of the British public according to *The Independent*, 27 Oct. 2018: https://www.independent.co.uk/news/uk/politics/vote-leave-brexit-lies-eu-pay-money-remain-poll-boris-johnson-a8603646.htmlhttps://www.independent.co.uk/news/uk/politics/vote-leave-brexit-lies-eu-pay-money-remain-poll-boris-johnson-a8603646.html (access 24.10.2018). See also: https://www.independent.co.uk/infact/brexit-second-referendum-false-claims-eu-referendum-campaign-lies-fake-news-a8113381.htmlhttps://www.independent.co.uk/infact/brexit-second-referendum-false-claims-eu-referendum-campaign-lies-fake-news-a8113381.html (access 24.10.2018).

31 M. Doherty, 'Should Making False Statements in a Referendum Campaign Be an Electoral Offence?', U.K. Const. L. Blog (4th Jul 2016) (available at https://ukconstitutionallaw.org/) (access 23.10.2018).

32 The role of the media as the Fourth Estate holding the government to account was seriously undermined by their private ownership and editorial policy agendas. Other factors, such as political correctness and the perceived need to avoid accusations, pose yet another series of challenges to the ability of the media to successfully play that role.

33 It is obvious that establishing an offence of this kind would be very challenging, as pointed out by Doherty. See n. 21.

6. Other factors in Brexit referendum campaign

Other factors that very likely influenced how the UK electorate voted remain unconfirmed, but also difficult to dismiss. The improprieties in financing the Leave campaign[34] and the alleged interference of Cambridge Analytica[35] add to the picture of secrecy and lack of accountability.

7. Conclusion

The use of referendums in representative democracies is widely accepted as an important element of a democratic system of governance. However, in order to fulfil its democratic promise and to prevent referendums from turning into a threat to democracy and constitutionalism, a number of criteria and requirements must be satisfied:

The issue to be settled by a referendum must be of unqualified most fundamental, constitutional type.

The referendum (including the timing) must never be driven by partisan political agenda – as it was the case with the Brexit vote.

The referendum question must be clear not just in a narrow, formal sense. The substance of the phenomena that are at the centre of the referendum question must be recognised as being capable to be comprehended by the electorate. I suggested that the EU, and the nature of the UK's EU membership appears as too complex an issue which requires an expert knowledge to be fully grasped.

There should be agreed high standards of veracity, transparency and accountability in the way the referendum campaign is conducted. The potential for creating an offence of deception and misrepresentation, specific to referendums should be considered. The Electoral Commission, or a similar body, should be equipped with the power to demand retractions of false statements and/or clarification, as well as a judicial power to punish offenders, by, potentially banning their participation in the official referendum campaign.

34 https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/leave.eu-fined-for-multiple-breaches-of-electoral-law-following-investigationhttps://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/leave.eu-fined-for-multiple-breaches-of-electoral-law-following-investigation (access 25.10.2018).

35 https://uk.reuters.com/article/uk-facebook-cambridge-analytica-britain/lawmakers-publish-evidence-that-cambridge-analytica-work-helped-brexit-group-idUKKBN1HN2GVhttps://uk.reuters.com/article/uk-facebook-cambridge-analytica-britain/lawmakers-publish-evidence-that-cambridge-analytica-work-helped-brexit-group-idUKKBN1HN2GV (access 25.10.2018). See also: https://www.theguardian.com/politics/2018/nov/21/vote-leave-loses-legal-challenge-over-brexit-spending-breachhttps://www.theguardian.com/politics/2018/nov/21/vote-leave-loses-legal-challenge-over-brexit-spending-breach (access 19.01.2019).

The full impact assessment of the potential case-scenarios related to the implementation of referendum results should be provided before the vote is put to the electorate.

The process of implementation of referendums should be fully transparent.

The above are just a small number of essential requirements that must be considered in designing a referendum if the risks to democracy and constitutionalism are to be mitigated. The UK referendum on the EU membership in June 2016 showed that necessity very clearly.

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Brexit Referendum in Gibraltar. Result and Effect

Abstract: Almost complete unanimity of the small Gibraltar community during 2016 referendum on Brexit remained nearly unnoticed because of including this British Overseas Territory into "combined electoral region" with South West England where most of people were in favour of the United Kingdom withdrawing from the European Union. No political differences with the UK (i.e. England and Wales) but concern about future possibilities of economic development outside the Single Market stimulated an intense discussion among the Gibraltarians. The vision of being non-subject of the EU's four freedoms (i.e. damage or lost present prosperity basis) would force Gibraltar to re-orientate its economic relations especially by creating and developing new trade links which could gradually replace the existing ones. Despite that Gibraltarians have consequently rejected Spanish proposals of remaining inside the Single Market for the price of sharing sovereignty between the UK and Spain. It is therefore beyond doubt that the people of Gibraltar can be characterised as more British than European.
Keywords: Brexit, European Union, Gibraltar, United Kingdom

The specificity of Gibraltar's referendum on Brexit expressed itself not only because it was the first time for any British Overseas Territory (BOT) to participate in the United Kingdom-wide referendum but also because the Gibraltarians were straight included in the decision-making process related to one of the most important question in the UK's modern history. Gibraltar's position in the British dilemma "to be or not to be" in the European Union structures was determined by geographical and economic factors. Being "almost entirely surrounded by water but still connected to mainland by Spain"[1] this small territory (located in area of 6,7 km^2 with population of ca. 35.000 inhabitants[2]) remains almost entirely dependent on free inflow of external (i.e. European) workers, products and services. "Access to the EU Single Market, and

1 BBC News, Gibraltar: What's it Got to do with Brexit?, http://www.bbc.com/news/news-beat-46316965 (access 5.01.2019).

2 HM Government of Gibraltar, Census of Gibraltar 2012, Gibraltar 2013, p. 3.

the pool of over 10.000 workers who cross daily (…) over the border of Spain, has underpinned the development of Gibraltar's vibrant, service-based economy over recent decades. While Gibraltar's most important economic relationship is with the UK itself, any loss of access to the Single Market in services, or to its cross-border workforce, could significantly harm Gibraltar's economy"[3]. Taking into account these circumstances the vast majority of the Gibraltarians considered that continuation of the UK's membership in the EU was a clear need. Paradoxically, under rules of law making by the British Parliament, i.e. European Union Referendum Act 2015 as well as by the Gibraltar Parliament, i.e. European Union (Referendum) Act 2016 (Gibraltar) inhabitants of this BOT voted in the referendum within "combined electoral region" which included also South West England (SWE)[4] where more than 50% people were in favour of removing the UK from the EU. After the referendum the Gibraltarians were placed therefore in a situation very similar to the one in Scotland or Northern Ireland where the majority of votes (respectively 62% and almost 56%[5]) were cast for the UK's remaining in the EU. In this paper the Brexit referendum results in Gibraltar is presented against the background of the results in other districts being parts of "combined electoral region". The main objective is to analyse foreseeable impact (in short- and long-term perspective) of the referendum for social, economic and political situation of this "Britain (…) at the bottom of Spain"[6].

1. Result of the referendum

The United Kingdom European Union membership referendum took place in the whole UK (i.e. England, Wales, Scotland and Northern Ireland) and Gibraltar (as the only BOT located inside the EU) on 23 June 2016. Out of the total number of 24.119 people entitled to vote in Gibraltar in the referendum 20.172 (83,6%) took part. This indicator was the highest in the whole "combined electoral region" because the turnout oscillated in other districts between 69,4% (in Bournemouth) and 81,4% (in East Dorset). It was also higher than analogical indicators for other English electoral regions (i.e. East, East Midlands, London, North East, North West, South East, West Midlands, Yorkshire and the Humber), Wales, Scotland and

3 House of Lords. European Union Committee, Brexit: Gibraltar. 13th Report of Session 2016-17, London 2017, p. 3.

4 European Union Referendum Act 2015, c. 36, section 2(1)(c)(i); European Union (Referendum) Act 2016 (Gibraltar), L.N. 2016/034, 1st schedule, section 2(a).

5 The Electoral Commission, EU Referendum results, https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information (access 5.01.2019).

6 BBC News, *op. cit*.

Northern Ireland[7] with the average turnout of 70,9%. In favour of continuing the UK's membership in the EU voted overwhelming majority i.e. 19.322 (95,91%) of the Gibraltarians and against mere 823 (4,09%). That remained in stark contrast with the rest of "combined electoral region" where in 28 of 37 SWE districts most voters (from 51,03% to 63,16%) opted for Brexit[8].

Table 1. Brexit referendum results in SWE "combined electoral region" districts

No.	Electoral District	Turnout %	Votes "remain"		Votes "leave"	
			No.	%	No.	%
1.	Bath and North East Somerset	77,2	60.878	57,9	44.352	42,1
2.	Bournemouth	69,4	41.473	45,1	50.453	54,9
3.	Bristol, City of	73,2	141.027	61,7	87.418	38,3
4.	Cheltenham	75,9	37.081	56,2	28.932	43,8
5.	Christchurch	79,3	12.782	41,2	18.268	58,8
6.	Cornwall	77,1	140.540	43,5	182.665	56,5
7.	Cotswold	79,8	28.015	51,1	26.806	48,9
8.	East Devon	79,0	40.743	45,9	48.040	54,1
9.	East Dorset	81,4	24.786	42,4	33.762	57,6
10.	Exeter	74,0	35.270	55,3	28.533	44,7
11.	Forest of Dean	77,5	21.392	41,4	30.251	58,6
12.	Gibraltar	83,6	19.322	95,9	823	4,1
13.	Gloucester	72,1	26.801	41,5	37.776	58,5
14.	Isles of Scilly	79,2	803	56,4	621	43,6
15.	Mendip	77,1	33.427	51,1	32.028	48,9
16.	Mid Devon	79,4	22.400	46,7	25.606	53,3
17.	North Devon	76,9	24.931	43,0	33.100	57,0
18.	North Dorset	79,7	18.399	43,6	23.802	56,4
19.	North Somerset	77,5	59.572	47,8	64.976	52,2
20.	Plymouth	71,5	53.458	40,1	79.997	59,9

7 Turnout rates for East, East Midlands, London, North East, North West, South East, West Midlands, Yorkshire and the Humber, Wales, Scotland and Northern Ireland electoral regions were respectively: 75,7%, 74,2%, 69,7%, 69,3%, 70%, 76,8%, 72%, 70,7%, 71,7%, 67,2% and 62,7%.

8 The Electoral Commission, *op. cit.*

21.	Poole	75,4	35.741	41,8	49.707	58,2
22.	Purbeck	79,0	11.754	40,9	16.966	59,1
23.	Sedgemoor	76,3	26.545	38,8	41.869	61,2
24.	South Gloucestershire	76,3	74.928	47,3	83.405	52,7
25.	South Hams	80,3	29.308	52,9	26.142	47,1
26.	South Somerset	78,7	42.527	42,8	56.940	57,2
27.	Stroud	80,1	40.446	54,6	33.618	45,4
28.	Swindon	75,9	51.220	45,3	61.745	54,7
29.	Taunton Deane	78,2	30.944	47,1	34.789	52,9
30.	Teignbridge	79,5	37.949	46,1	44.363	53,9
31.	Tewkesbury	79,2	25.084	46,8	28.568	53,2
32.	Torbay	73,7	27.935	36,8	47.889	63,2
33.	Torridge	78,5	16.229	39,2	25.200	60,8
34.	West Devon	81,3	16.658	46,8	18.937	53,2
35.	West Dorset	79,5	31.924	49,0	33.267	51,0
36.	West Somerset	79,2	8.566	39,4	13.168	60,6
37.	Weymouth and Portland	75,9	14.903	39,0	23.352	61,0
38.	Wiltshire	78,9	137.258	47,5	151.637	52,5
TOTAL		76,7	1.503.019	47,4	1.669.711	52,6

Source: The Electoral Commission, EU Referendum results, https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information (6.01.2019).

The distinctive evidence of the Gibraltarians' almost total unanimity on continuing the UK's membership in the EU matter was coherent and a consistent position in this question of all (i.e. 17) local parliamentarians. As well as forming governing coalition Gibraltar Socialist Labour Party and Liberal Party of Gibraltar as the opposition Gibraltar Social Democrats and the only independent MP Marlene Hassan Nahon were strongly advocated voting "remain" and formally supported the referendum campaign group Gibraltar Stronger in Europe (equivalent to operating in the UK group Britain Stronger in Europe) that brings together the UK membership in the EU proponents. For comparison Vote Leave group of Brexit advocates was composed and supported by only private persons. Widespread awareness of absolutely essential for social and economic development of Gibraltar need to remain inside the Single Market induced Gibraltarian Chief Minister Fabian Picardo to warn the UK Government that "even the most rabid anti-Europeans do not want to sever

all economic ties with Europe. (...) Everybody who is serious about the subject (...) talk about retaining access to Europe as a member of the European economic area"[9]. Alarmist tone of his utterances was modified somewhat as the referendum deadline approached with becoming increasingly probable Brexit perspective. Nevertheless the position of F. Picardo (and thereby the whole Government of Gibraltar) remained unchanged when he pointed: "if we were no longer to have that access, if the United Kingdom were to leave the European Union and the European Economic Area, and if we were not able to renegotiate EFTA, then we would have to carefully reconsider what the economic prospects for Gibraltar are and how we would be positioned"[10]. There were therefore no doubt inhabitants of this small BOT were the most pro-Europeans of all the referendum on Brexit participants.

2. The economic implications

On the assumption that Gibraltar will be excluded from the Single Market (i.e. it will not be covered by free movement of persons, capitals, services and goods between the EU member states) it already seems clear that the local economy will have to change substantially. As a part of the European Economic Community (since 1973) and especially after accession of Spain to the EEC (in 1986) Gibraltar economy has been driven by geographical factors, "which left no room for manufacturing or heavy industry, and had been underpinned by access to the EU Single Market in services"[11]. Services have provided work not only for citizens of Gibraltar but also many people from the surrounding area (who have made up ca. 40% of the total workforce). If then Brexit leads to introducing restrictions in the free movement of frontier workers this will seriously weaken or even damage several key sectors of Gibraltar's economy including port, tourism, financial services and aviation[12]. Negative features may occur with particular intensity in tourism industry contributing each year ca. £ 200 million of revenues. Almost 95% of tourists "arrived through the frontier, which the Government of Gibraltar described as the 'vital artery of Gibraltar tourism sector'. Any restrictions on people's ability to visit Gibraltar via the border would therefore have a significant impact on the sector"[13]. A related question is the weakening of Gibraltar's position as one of the Mediterranean's leading bunker ports operating in the EU's area but outside the EU's VAT jurisdiction, which allows it to offer low-cost

9 The Telegraph, Gibraltar suggest it wants to stay In EU in the event of Brexit, https://www.telegraph.co.uk/news/worldnews/europe/gibraltar/11534580/Gibraltar-suggests-it-wants-to-stay-in-EU-in-the-event-of-Brexit.html (access 5.01.2019).

10 The Guardian, Gibraltar: Profile of chief minister Fabian Picardo, https://www.theguardian.com/the-report-company/2015/oct/08/profile-of-chief-minister-fabian-picardo (access 5.01.2019).

11 House of Lords. European Union Committee, *op. cit.*, p. 7.

12 *Ibidem*, p. 12.

13 *Ibidem*, p. 8.

(i.e. VAT-free) fuel. Most of the stocks are frequently stored on the Spanish side (in Algeciras) but it would have to change in case of implementing border restrictions. Readily foreseeable result of uncertainty over the movement of parts, provisions and labour would be the port of Gibraltar's losing attractiveness to visiting ships. Moreover the necessity of importing more goods by sea would involve the need of reconfiguration or even reconstruction of the port[14].

Another important consequence of leaving the EU by the UK will be cutting off Gibraltar from European funds. Between 1990 (since the first location of the EU funds) and 2017 the Gibraltarians received almost € 60 million which (in chief of the local government opinion) "might not sound like much (…) but for Gibraltar it has meant kick-starting a lot of businesses and giving them opportunities they might not otherwise have had"[15]. Another source of financing was the Konver Programme (in the 1990s) which was generally focused on "areas particularly hard hit by reductions in defence-related activities including the decline in the industries and the closure or run down of military bases"[16] but in case of this BOT (as well as the UK) it was rather a form of compensation for non-satisfactory amount of the EU's Structural Funds assistance for degraded (but not only post-military) areas. During present (i.e. 2014-2020) the EU's financial perspective Gibraltar receives resources of the European Regional Development Fund, the European Social Fund and the interregional programmes of South West Europe (SUDOE) and Mediterranean Sea (MED)[17]. Gibraltarian projects gains financial assistance of ca £ 5,16 million in the ERDF frames only[18]. Providing discontinuation of those undertakings financing after Brexit, the UK Government announced that "all European structural investment fund projects signed or with funding agreements in place (…) would be fully funded, even where those projects continue beyond the UK's departure from the EU. (…) Those guarantees cover funding awarded to participants from Gibraltar as part of the European territorial cooperation programmes"[19]. However, the UK Government promises' value in that matter could be verified only as from the date of Brexit implementation or yet longer perspective.

Undisputable, the Gibraltar exclusion of the Single Market will give even worse effects (in both economic and social dimension) for surrounding Spanish region (autonomous community) of Andalusia and especially for bordering county Campo

14 *Ibidem*.

15 *Ibidem*, p. 9.

16 European Commission, Press Release Database (1993), http://europa.eu/rapid/press-release_IP-93-1015_en.htm (access 5.01.2019).

17 HM Government of Gibraltar, EU Funding, https://www.gibraltar.gov.gi/new/eu-funding (access 5.01.2019).

18 Gibraltar EU Programmes Secretariat Website, Beneficiaries ERDF-ESF-ETC, http://www.eufunding.gi/index.php?url=beneficiaries (access 5.01.2019).

19 House of Lords. European Union Committee, *op. cit*., p. 9.

de Gibraltar. The BOT is the basic place of employment for ca 25% of people living in entire Campo (which indicates one of the highest levels of structural unemployment in Spain) and contributes ca € 800 million to Andalusian GDP through trade and visitor spending. For example the Gibraltarians imported almost £ 381 million in goods and services and spend £ 73 million on shopping, food and other goods and services in Andalusia (of which £ 46 million was within the Campo) due to 2013 data[20].

Table 2. GDP created by Gibraltar spending in Campo de Gibraltar (2013)

Source	Gross Domestic Product			
	direct (Ł million)	indirect (Ł million)	induced (Ł million)	total (Ł million)
Gibraltar business imports	151.639	95.215	102.470	349.324
Spanish frontier workers spending	102.569	45.797	64.803	213.169
Other frontier workers spending	83.745	37.392	52.910	174.047
Gibraltar residents spending	26.054	12.360	15.565	53.979
Gibraltarians with 2nd homes in Spain spending	27.644	12.343	16.050	56.037
Total GDP effect	391.651	203.107	251.798	846.556

Source: J. Fletcher, Y. Morakabati, K. Male, An Economic impact study and analysis of the economies of Gibraltar and the Campo de Gibraltar, Gibraltar 2015, p. 26.

Any restriction of the movement of people and goods over the frontier could therefore affect the normal development of Andalusia and might upset the base of Campo de Gibraltar economy.

3. The Spanish factor and the question of sovereignty

The British sovereignty over Gibraltar began with the capture of this territory during the War of Spanish Succession (1701-1714), i.e. in 1704. After several failed attempts of recapture Spain finally "yield to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications and forts thereunto belonging; and (...) gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever"[21] under the Treaty of Utrecht in 1713 and confirmed that statement in subsequent treaties. However, in the next 300 years Spain tried

20 *Ibidem*, p. 10-12.

21 V. Miller, Gibraltar, "House of Commons Research Papers", London, 1995, no. 80, p. 35.

multiple times to regain control over Gibraltar using different methods (from military actions to political pressure). In response the UK strengthened its position through fivefold enlargement of local garrison and allowing non-British citizens to settle down (which caused the civilian population growth from 1.113 in 1725 to 20.355 in 1901)[22]. However, the perception of the sovereignty over Gibraltar changed after the "self determination principle" formulating in the United Nations General Assembly resolution no. 1541 in 1960. On that bases the UK Government formulated conception of possible transferring sovereignty due to the will of the Gibraltarians expressed explicitly in local referendum only. Such referendums were held in 1967 and 2002. In both of them an overwhelming majority (respectively 99,64% and 98,84%) of voters rejected possibilities of as well cancellation the Treaty of Utrecht and subsequent returning Gibraltar to Spain (1967) as sharing the sovereignty over Gibraltar by the UK and Spain (2002).

Table 3. Gibraltar sovereignty referendums in 1967 and 2002 results

Year of the Referendum	Question		Votes		Turnout %
			No.	%	
1967	"to pass under Spanish sovereignty (...)		44	0,36	
	or voluntary to retain their link with the United Kingdom with democratic local institutions and with the United Kingdom retaining its present responsibilities"[1]		12.138	99,64	95,80
2002	"Do you approve of the principle that Britain and Spain should share sovereignty over Gibraltar?"[2]	yes	187	1,03	87,9
		no	17.900	98,48	

1. HM Government of Gibraltar, 50th Anniversary of the Referendum, http://www.nationalarchives.gi/gna/Ref50_main.aspx (access 5.01.2019).
2. C. Grocott, G. Stockey, op. cit., p. 116.
Source: own study based on V. Miller, Gibraltar, "House of Commons Research Papers", London, 1995, no. 80, p. 5; Committee of Observers, Gibraltar Referendum Observers Report, Gibraltar 2002, p. 10.

In the run-up to the Brexit referendum (when differences of opinion about positive and negative points of the EU membership between the British and the Gibraltarians gradually increased) Spain returned to the joint-sovereignty proposal "as the only avenue for Gibraltar to maintain free trade and free movement with the EU"[23]. Following the referendum results the Spanish Government renewed its offer as involving "at least five advantages (…): (1) it takes into account the will

22 C. Grocott, G. Stockey, Gibraltar. A Modern History, Chippenham 2012, p. 14 and 45.
23 House of Lords. European Union Committee, *op. cit.*, p. 20.

of the Gibraltarians; (2) the positive economic potential for the inhabitants of the Campo de Gibraltar and the Gibraltarians is enormous; (3) the alternative scenario of isolation would be extremely damaging to Gibraltar; (4) it would put an end to a quarrel between allies and friends; and (5) it would enable Gibraltar's specific but definitive integration into the EU"[24]. Reacting to the Spanish proposal F. Picardo in a speech on 10 September 2016 (Gibraltar's national day) said: "If anyone thinks we are going to sell our homeland for access to Europe, they don't know the Gibraltarians. (…) If Brexit means Brexit, then British means British. No means no. Never means never. Gibraltar is British for ever"[25]. In the same vein was his address to the Special Political and Decolonization Committee (Fourth Committee) of the UN General Assembly pointing that despite of leaving the EU the Gibraltarians will seek a strong future relationship with Spain (as well as other European states and regions) based on mutual respect and economic benefits for all sides. Readiness for creating and enhancing economic (and social) links could not be interpreted, however, as an openness for changing present Gibraltar political status. "What we do like is our peaceful, Gibraltarian way of life. We like our deep human relationships with neighbours north and south of us. We like British respect for our right to choose, for our democracy and for the rule of law. That is why we will never surrender our nation. We will never surrender our right to choose. We will never surrender our children's right to our land. (…) British we are and British we stay. That spirit will never die"[26].

Clear position of the BOT authorities with silent but explicit support of the UK Government caused Spanish irritation which expressed in Prime Minister Mariano Rajoy statement of January 2017 that "while Spain wished to be construction during the negotiations [between the UK and the EU], it would not accept any deal which jeopardised its claim to Gibraltar"[27]. Although the Spanish Government had very few (if any) possibilities to intervene in the negotiation on Brexit conditions process (which participants were the UK Government and the European Commission) but engaged actively when the final proposal of the agreement between the UK and the EU was submitted to the European Council. With the knowledge that the EU leaders were interested in achieving unanimity of all member states in the question of Brexit (despite the withdrawal agreement draft was formally the subject to a qualified majority only), Spain decided to announce a possible veto if the sovereignty over Gibraltar dispute would not be resolved to the Spanish contentment. However, that threat began to look rather for political game (directed at enhancing the Spanish

24 M.O. Carcelen, The joint sovereignty proposal for Gibraltar: benefits for all, "Analisis del Real Instituto Elcano", Madrid, 2017, no. 50, p. 1.

25 J. Carberry, J. Lis, Brexit and Gibraltar, London 2017, p. 3.

26 HM Government of Gibraltar, Address by the Chief Minister of Gibraltar: United Nations General Assembly Fourth Committee, Gibraltar 2017, p. 6.

27 J. Carberry, J. Lis, *op. cit*., p. 4.

Government position in internal relations) only after Prime Minister Pedro Sanchez (in office since June 2018) declared he is fully satisfied with the British ambassador in Madrid Tim Barrow vague statement that "the political, legal and geographical relationship of Gibraltar and the EU would pass through Spain after Brexit"[28]. In result the only tangible implication of the UK and Spain dispute have been setting of "three committees (…) to tackle tobacco smuggling, oversee cross-border worker rights and co-operate on environmental protection and border control"[29] but the main question of the joint-sovereignty over Gibraltar have remained inconclusive.

The side effects of aggressive Spanish rhetoric have been the Gibraltar Government representatives' inclusion to the British delegation in negotiations on Brexit agreement on any matter relating to this BOT. Simultaneously the UK Government have given the warranty that future agreement with the EU would not be able to have binding power unless the Gibraltar Government (or all Gibraltarian community) will express its opinion about any regulation relating to Gibraltar itself or as a part of British Realm.

4. Conclusion

In the 2016 referendum on Brexit almost 96% of the Gibraltarians voted for continuing the UK's membership in the EU however their voice went nearly unnoticed because of Gibraltar's including into "combined electoral region" with SWE where people were mostly in favour of withdrawal the UK from the EU. Not so much political disappointment of huge disparity of interests with their dominant power but rather great concern about economic development circumstances outside the Single Market have provoked among the Gibraltarians much discussions about their future. Not being covered by the EU's four freedoms (especially without regular inflow of cross-border workers and having no possibility to import and storage goods in Spain on preferential conditions as between the EU member states) Gibraltar would no doubt lose foundations of its present prosperity. In consequence it would have to define a new formula of economic relations with the EU as a whole and particular member states as well as actively look for new partners which could effectively replace existing trade links. Despite the high probability of that scenario the Gibraltarians have consequently rejected Spanish proposals of shared sovereignty (with the UK) over this BOT as a solution making possible its remaining inside the Single Market or maintain at least privileged position in relations with the

28 J. Wallen, Gibraltar will be included in post-Brexit trade deals: official, https://www.aljazeera.com/news/2018/11/gibraltar-included-post-brexit-trade-deals-official-181129232127270.html (access 5.01.2019).

29 The Week, Gibraltar and Brexit: what are the main issues?, https://www.theweek.co.uk/brexit/92166/gibraltar-and-brexit-what-are-the-main-issues (access 5.01.2019).

EU. Rebuffing pragmatic, i.e. economic arguments in favour of the political ones the people of Gibraltar have proved (just like in 2002 sovereignty referendum) they are more British than European.

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Popular Initiative as an Instrument of Criminal Policy Towards Foreigners in Switzerland

Abstract: The article presents the proceedings of the popular initiative „Expulsion of foreign citizens" that was launched by Swiss People's Party. The initiative aimed in contributing to internal security threatened by the criminality of foreigners in Switzerland by the controversial idea of expulsion of foreign criminals. The author presents the main idea and arguments of the Swiss People's Party. The paper presents the background of the initiative and its development. In this case even a counter-proposal was prepared by the Federal Council. The whole process led to the final stage that was the adding of 4 extra paragraphs to art. 121 of Federal Constitution in 2010. The case of this initiative presents how vulnerable society can be to popular arguments not necessary confirmed by scientific research. In consequence of this amendment the expulsion obligation was introduced into Swiss criminal Code. It was a new penal measure that as a rule is obligatory. Some exceptions are possible under extraordinary circumstances. This federal regulation is strict and poses an important question concerning even the violation of human rights.
Keywords: people's initiative, foreigners, criminality

1. Introduction

Popular initiative and referendum are the most common form of direct democracy in European countries.[1] They both exist in Swiss law on federal

1 M. Musiał-Karg, Czym jest demokracja bezpośrednia? (in:) M. Rachwał (ed.), Uwarunkowania i mechanizmy partycypacji politycznej, Poznań 2017, p. 40. See also: M. Marczewska-Rytko, Inicjatywa ludowa i referendum w Szwajcarii w latach 2000–2010, "Polityka i Społeczeństwo" 2012, no. 9, pp. 272-283, I. Rycerska, Demokracja bezpośrednia, (in:) T. Branecki, M. Gołoś, K. Krzywińska (eds.), Konfederacja Szwajcarii, Toruń 2014, pp. 22-37, E. Kużelewska, Referendum w procesie integracji europejskiej, Warszawa 2006, p. 13, E. Myślak, System polityczny Konfederacji Szwajcarskiej, Kraków 2014, pp. 28-36, E. Myślak-Bodek, Natura

and cantonal level. Those instruments are described in Title 4 of Swiss Federal Constitution[2] entitled "The People and the Cantons". Popular initiative is a way to request an amendment to the Federal Constitutionand may propose total or partial revision of Federal Constitution. In case of total revision of constitution its proposal must be submitted to a vote of the People. Popular initiative may be proposed by 100,000 persons eligible to vote may be within 18 months of the official publication of their initiative. A popular initiative for the partial revision of the Federal Constitution may take theform of a general proposal or of a specific draft of the provisions proposed. If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part. In case of general proposal the Federal Assembly shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. Also if the Federal Assembly rejects the initiative, it shall submit it to a vote of the People. The People decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draftthe corresponding bill. An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative. It is required that the People vote on the initiative and the counter-proposal at the same time. Any amendments to the Federal Constitution must be put to the vote of the People and the Cantons. This is called a double referendum.[3] Proposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them. The result of a popular vote in a Canton determines the vote of the Canton.

Until the 28 of January 2019 there were 463 of popular initiatives of which:

– 118 failed,
– 333 succeeded,

demokracji Szwajcarskiej. Formy aktywności obywatelskiej, "Państwo i Społeczeństwo" 2006, no. 1, pp. 109-118. S. Grabowska, Inicjatywa ludowa w sprawie przeprowadzenia ogólnokrajowego referendum wpływającego na ustawodawstwo (na przykładzie uregulowań szwajcarskich, włoskich i polskich), "Annales Universitatis Mariae Curie-Skłodowska" Lublin- Polonia 2003/2004, Vol. L/LI, p. 46 ff, S. Grabowska, Inicjatywa ludowa w sprawie zmiany konstytucji na przykładzie Konfederacji Szwajcarskiej, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2004 Prawo, no. 2 pp. 47-63, E. Kużelewska, Udział szwajcarskiego Zgromadzenia Federalnego w postępowaniach referendalnych, (in:) T. Mołdawa, J. Zaleśny (eds.), Parlamentaryzm w świecie współczesnym: między ideą a rzeczywistością, Warszawa 2011, pp. 308-325, Z. Czeszejko-Sochacki, Referendum i inicjatywa ludowa w systemie politycznym Konfederacji Szwajcarskiej, "Studia Prawnicze" 1989, no. 2/3, pp. 27-39, E. Kużelewska, Do the Swiss not want to join the EU? Swiss referenda on European integration, "Przegląd Politologiczny" 2013, no. 3, pp. 85-97.

2 Federal Constitution of the Swiss Confederation of April 18, 1999, SR 101.

3 M. Aleksandrowicz, System prawny Szwajcarii: historia i współczesność, Białystok 2009, p. 118.

– 100 withdrawn,
– 2 classified,
– 4 declarednull,
– 215 submitted to a vote of people,
– 22 accepted by people and cantons.[4]

The initiative presented in this article concerned both criminal law and migration policy while it led to provisions stating the expulsion of foreign nationals who committed a criminal offence.

2. Initiative „Expulsion of foreign citizens"

The initiative „Expulsion of foreign citizens" was launched by Swiss People's Party[5] in 2007, when they started to collect the signatures for the initiative.[6] Their aim was to contribute to internal security and clarify the legal situation. In the explication of this idea the Party used the following arguments. The main issue was the rate of criminality of foreigners in Switzerland. For example it was indicated that almost half offences committed in Switzerland were committed by foreigners. 59% of offenders who committed a murder were foreign citizens, and the proportion was even higher in case of rape – 62%. As well they improperly claim for social insurance or social assistance benefits. It was also highlighted that Swiss citizens feel insecure in their

4 Source of data Federal Chancellery https://www.bk.admin.ch/ch/f/pore/vi/vis_2_2_5_9.html (access 17.07.2018).

5 Schweizerische Volkspartei (Ger.) Union Démocratique du Centre (Fr.) Unione Democratica di Centro (It.) has following policy concerning immigration, foreigners and security: "Switzerland has always welcomed foreign workers generously, but in a controlled manner, offering them opportunities for professional development. During several votes, the Swiss people made it clear that they wanted a controlled immigration with clear rules valid for all. People who want to live in Switzerland must respect the legal system of this country, integrate and ensure their own subsistence. Only immigrants who meet these conditions must have the opportunity to naturalize after a certain period of time. […] Switzerland was once one of the safest countries in the world. A negligent policy, lax enforcement of existing laws and the opening of borders with membership of the Schengen area have resulted in Switzerland becoming one of the countries in Europe with a high crime rate. In order to prevent Switzerland from becoming a criminal Eldorado, the sentences must be toughened and the enforcement of the criminal law must be more rigorous." https://www.udc.ch/parti/positions/themes/politique-des-etrangers/https://www.udc.ch/parti/positions/themes/politique-de-la-securite (access 17.07.2018).

6 The popular initiative is often used by political parties to increase their popularity. This also concerns Swiss People's Party which gained the electorate thanks to its conservative opinions and idea concerning limitation of immigration into Switzerland, and become the leading party in the Parliament. See: A. Vatter, Demokracja bezpośrednia w Szwajcarii, historia, debaty i skutki, (in:) M. Góra, M. Koźbiał (eds.) Demokracja bezpośrednia. Szwajcarska demokracja bezpośrednia modelem dla XXI wieku?, Warszawa 2011, p. 47, G. Lutz, Inicjatywa obywatelska jako metoda kontroli politycznej w Szwajcarii, (in:) M. Góra, K. Koźbiał (eds.), *op. cit.* p. 89.

own country.[7] Authors indicated that the obligation of expulsion written in Federal Constitution will have stronger legacy and have an obligatory character for cantons. The provision of Foreign Nationals Act and Integration concerning expulsion (art. 62, 63, 68) have potestative character and should have an imperative one. Moreover is will be no longer a measure used by police for foreigners but a penal measure pronounced in the sentence of judicial authority.[8]

The list of collected signature was presented to Federal Chancellery on the 19 of June 2007 and was accepted on the 16 of June 2007.[9] The initiative was presented to the Federal Chancellery on the 15 of February 2008 in the form of specific draft of the provisions proposed. Initiative succeeded on 7 of March 2008 as the it fulfilled the conditions required by the art. 139 para. 1 of Federal Constitution.[10]

According to the idea of initiative the art. 121 of Federal Constitution was supposed to change by adding 4 extra paragraphs:

"3. Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland ifthey:
   a. are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or
   b. have improperly claimed social insurance or social assistance benefits.
4. The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.
5. Foreign nationals who lose their right of residence and all other legal rights toremain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry is for 20 years.
6. Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions."

7 https://www.udc.ch/campagnes/apercu/initiative-populaire-pour-le-renvoi-des-etrangers-criminels-initiative-sur-le-renvoi (access 31.01.2019).

8 https://www.udc.ch/campagnes/apercu/initiative-populaire-pour-le-renvoi-des-etrangers-criminels-initiative-sur-le-renvoi/ (access 17.07.2018).

9 Initiative populaire fédérale "Pour le renvoi des étrangers criminels (initiative sur le renvoi)"Examen préliminaire, FG 2007 4725.

10 Initiative populaire fédérale "Pour le renvoi des étrangers criminels (initiative sur le renvoi)"Aboutissement, FG 2008 1745.

On the 24 of June 2009 the draft of amendment of the constitution was prepared by Federal Council with the recommendation to reject the project.[11] The Federal Council argued that despite the fact that the project is compatible with Federal Constitution and peremptory norms of international law it can violate basic rights conferred in this act. Especially in the area of protection of family rights and proportionality of measures taken by the authorities. Also it can be hard to follow non-imperative norms of international law resulting from European Convention of Human Rights and Agreement on Free Movement of Persons between Switzerland and European Union.[12]

Moreover the Federal Council revealed the question of integration of foreigners indicating that the authorisation of stay is unlimited and unconditional. It can be only admitted if the foreigner is well integrated. That is also guaranteed to family members admitted on the base of family reunification.The good integration presupposes the respect to Swiss legal order and acceptance of fundamental values from the Federal Constitution, accompanied by the good language skills of one of the official languages. On the other hand the existing law on foreigners gives the possibility to withdraw the stay permit or not to extend the temporary one, or issue an entry ban in case when foreigner commits an offences.[13]

The Federal Council went further by proposing an counter-proposal to the initiative that would have required an evaluation of every single case, balancing public interests against the fundamental rights of person threatened with deportation[14]. The counter-proposal led to precise the reason of withdraw of permit referring to the degree of integration. Also it proposes that foreigners can be expelled if he commits an offence liable to an imprisonment of a minimum of one year or convicted for a penalty of a minimum two year imprisonment. The margin of appreciation to decide to revoke the authorization should be restricted, subject to the constitutional principle of proportionality measures taken by the authority and public international law. This counter-proposal was supposed to help to unify the practice in cantons and make the expulsion policy more consequent.[15]

The counter-project was more flexible as it gave the judge the possibility to expel a foreigner whereas the initiative left no choice and gave the obligation. So there was any margine of appreciation given to the judge, under any circumstances (e.g. level of integration). Moreover the counter-project introduced the minimum of the pronounced penalty towards the foreigner, that was not included in the initiative.

11 Message concernant l'initiative populaire "Pour le renvoi des étrangers criminels (initiative sur le renvoi)» et la modification de la loi fédérale sur les étrangers, FG 4571.

12 *Ibidem*, p. 4572.

13 *Ibidem*, p. 4573.

14 W. Haller, The Swiss Constitution in Comparative Context, St Gallen 2016, p. 272.

15 *Ibidem*.

According to the idea of initiative conviction to any, even the minimum penalty, gave the obligation for expulsion.

The initiative "Expulsion of foreign citizens" was voted on the 28 November 2010. The 52,93% of voters took part in it. There were 1.397.923 (52,3%) votes for the initiative and 1.243.942 (46,5%) against.[16] As in this case the double referendum was required the majority of people and the majority of canton was required according to art. 142 para 1. Constitution. There results for canton were 15 and 5/2[17] voted for. The minority 5 and 1/2 cantons voted against, and they were cantons of Fribourg, Vaud, Neuchatel, Geneva, and Basel-City.[18] Those cantons have the highest proportion of foreign inhabitants for example: Geneva 40%, Basel-City 36% and Vaud 34%.[19] Therefore it should not be surprising that people in those cantons voted against the initiative. In the case of counter-proposal votation all cantons were against, whereas 52,6% of people were against and 44,5% voted for.[20]

It is worth reminding that according to art. 139b para. 2 of the Constitution people may vote in favour of both proposals. In response to the third question, they may indicate the proposal that they prefer if both are accepted. If in response to the third question one proposal to amend the Constitution receives more votes from the People and the other more votes from the Cantons, the proposal that comes into force is that which achieves the higher sum if the percentage of votes of the People and the percentage of votes of the Cantons in the third question are added together. In this case there was a third question. In answer to the third question 1 252 761 people and 13 4/2 cantons have chosen initiative while 1.271.365 people and 7 and 2/2 cantons have chosen the counter-project. In case of such result the third question had no significance.[21]

The results of the vote revealed that the arguments of the Swiss People's Party were closer to the people than the ideas of Federal Council presented in the form of counter-proposal. The initiative was promoted by the party on large scale in the radio, TV, internet, social media, posters on the streets etc. They indicated the growth of the foreign population in Switzerland. Up until 2009 21% of the Swiss population were foreigners, joined by the rising immigration rates. The different criminality rates were presented as the fact that around half of the offenders were foreigners and more than a half of convicts. Together with the presentation of growing number of the

16 Arrêté du Conseil federal constatant le résultat de la votation populaire du 28 novembre 2010, p. 2593.

17 According to art. 142 para 4. of the Constituri on the Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Country, Appenzell Ausserrhoden and Appenzell Innerrhoden each have half a cantonal vote.

18 Arrêté du Conseil federal constatant…, *op. cit.,* p. 2595.

19 Federal Statistical Office, Switzerland's population 2016, Neuchâtel 2017, p. 7-8.

20 Arrêté du Conseil federal constatant…, *op. cit*., p. 2596.

21 *Ibidem.*

foreign population. Those facts were true,[22] however simple presentation of statistical data is not enough without criminological analysis, and can be misleading. It was also strongly stressed that foreigners commit mostly violent crimes such as homicide, assault, robbery, rape, human trafficking, false imprisonment and abduction.[23] That information was simply given on the base of statistical data from the Federal Statistical Office without any criminological analysis. Their interpretations were simplified and did not correspond to any scientific method of data analysis.[24] Moreover it was also emphasised that foreigners are coming from distant countries with different than democratic order and a different religion. They try to implement their legal rules into Swiss ground such as polygamy or even v*endetta* and honour killings. The unlawful claim of social benefits was also one of the arguments.[25]

As the initiative presented a specific draft was adopted on the 28 November 2010 and according to art. 15 para. 3 of Federal Act of Political Rights it entered into force the same day.[26] However this was only the first step to the expulsion of foreigners. Than the works on execution of those amendments of Constitution have started. The amendments made to the Constitution resulted in the need to define in different legal act following issues: loss of the right of residence and all other legal rights to remain in Switzerland, execution of expulsion and deportation, resident status in case of postponement of expulsion, ban on entry to Switzerland, legal sanctions in case of breach of ban and elements of criminal offences resulting in expulsion.[27] In further part of this article author will focus on the elements of criminal offences resulting in expulsion and penal provisions in this area.

22 In years 2009-2015 offences against life and limb and violent crimes constitute the second largest group of offences committed both by Swiss nationals and foreigners. Extreme violent criminal offences such as murder, grievous bodily harm, rape and robbery constitute less than 5% of all violent crimes recorded by the Swiss law enforcement authorities. Other violent offences include domestic violence such as offences against physical integrity and sexual offences with most being connected with violent behaviour between couples. Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, p. 8, S. Steiner, Häusliche Gewalt, Migrationshintergrund und Strafverfolgung, (in) D. Fink, A. Kuhn, C. Schwarzenegger, *Migration,* Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité, Berne, 2013, p. 171. Perkowska M., Criminality by foreign nationals in Switzerland – criminological approach, Białytsok 2019, fortcoming.

23 Union démocratique du centre, Oui à l'initiative populaire pour le renvoi des étrangers criminels (initiative sur le renvoi). Argumentaire pour la votation du 28 novembre 2010, p. 6-7.

24 As an example it was indicated that: Around a half of offenders are foreigner. The rate of foreigners in population is 21,7%. What means that foreigner s commit offences four times more often than the Swiss. Union démocratique du centre, Oui à l'initiative populaire…, *op. cit.,* p. 6.

25 *Ibidem*, p. 9-10.

26 Federal Decree of 18 June 2010, Federal Council Decree of 17 March 2011, AS 20111199.

27 The detailled analysis is in document: Rapport du groupe de travail pour la miseen oeuvre des nouvelles dispositions constitutionnelles sur l'expulsion des étrangers criminels à l'intention du Département fédéral de justice et police, Berne 2011, pp. 140.

3. Penal provisions executing the initiative

According to Article 121 (4) of the Swiss Constitution, the legislature will define the offences covered by paragraph 3 in more detail and it is vested with the competence to extend the catalogue of offences included therein. As a result of the amendments[28] a new penal measure i.e. expulsion was introduced into the Swiss Criminal Code[29], which may only be imposed on foreigners – Articles 66a-66d of the Swiss Criminal Code.

Article 66a SCC stipulates prerequisites of mandatory expulsion. A foreigner is obligatorily expelled for the period from 5 to 15 years if s/he is convicted for one of the offences enlisted therein regardless of the sentence imposed. The catalogue of the prohibited acts covered by mandatory expulsion is exhaustive[30] and specifies

28 When the Federal Council presented the project of provisions concerning expulsion of foreign offenders the Central Democratic Party launched a new popular initiative called „For the effective expulsion of foreign citizens – the implementation initiative". They claimed that the federal authorities will implement the initiative into criminal law against the will of the people. This is the consequence of this form of direct democracy when the project is launched by the people, however the final result is elaborated by their representatives (parliament and/or government). Therefore sometimes the popular initiative is called as semi-direct democracy. The new initiative aimed in introducing into Federal Constitution regulation concerning the mandatory expulsion by introducing paragraph 9 to article 197 of the Constitution. This article stated that the tribunal or public minister pronounce the expulsion if case of conviction of foreign national to one of enumerated offences. This expulsion is mandatory and can be limited only if contrary with imperative norms of international law. However this initiative was rejected by the people on the 28 February 2016. The majority - 58,0% voted against and 41,1% for the initiative. https://www.bk.admin.ch/ch/f/pore/vi/vis433.html (access 15.08.2018).

29 Swiss Criminal Code of 21 December 1937, CO311.0, hereinafter SCC.

30 Art. 66a SCC enumerates: a) intentional homicide (Art. 111), murder (Art. 112), manslaughter (Art. 113), inciting and assisting suicide (Art. 115), illegal abortion (Art. 118 para. 1 and 2); b) serious assault (Art. 122), female genital mutilation (Art. 124 para. 1), abandonment (Art. 127), endangering life (Art. 129), attack (Art. 134); c) aggravated misappropriation (Art. 138 para. 2), aggravated theft (Art. 139 para. 2 and 3), robbery (Art. 140), fraud for commercial gain (Art. 146 para. 2), computer fraud for commercial gain (Art. 147 para. 2), misuse of a cheque card or credit card for commercial gain (Art. 148 para. 2), aggravated extortion (Art. 156 para. 2-4), profiteering for commercial gain (Art. 157 para. 2), handling stolen goods for commercial gain (Art. 160 para. 2); d) theft (Art. 139) in conjunction with unlawful entry (Art. 186); e) fraud (Art. 146 para. 1) related to social insurance or social assistance, unlawful claims for social insurance or social assistance benefits (Art. 148a para. 1); f) fraud (Art. 146 para. 1), fraud in relation to administrative services and charges (Art. 14 para. 1, 2 and 4 of the Federal Act of 22 March 1974 on Administrative Criminal Law) or tax fraud, misappropriation of taxes deducted at source or any other offence related to public charges that carries a maximum penalty of a one-year custodial sentence or more; g) forced marriage, forced registered partnership (Art. 181a), trafficking in human beings (Art. 182), false imprisonment and abduction (Art. 183), aggravated false imprisonment and abduction (Art. 184), hostage taking (Art. 185); h) sexual acts with children (Art. 187 para. 1), indecent assault (Art. 189), rape (Art. 190), sexual acts with persons incapable of judgement or resistance (Art. 191), encouraging prostitution (Art. 195), pornography

the vague entries included in Article 121 (3) of the Constitution such as violent offence, other serious sexual offences, offences in drugs trafficking.[31] According to the principle of legal certainty in penal law, the criteria to implement such a serious measure must be precise. Although the initiators of a popular initiative intended to expel those who committed serious offences,[32] Article 66a of the Swiss Criminal Code includes offences of different gravity, both felonies and misdemeanours, like life and limb offences, offences against property or sexual freedoms offences constituting public danger, against public health, war crimes but also offences related to drugs and those prohibited by Act on Foreign Nationals. The list does not enumerate any contravention.

The foreigner's conviction constitutes the fundamental prerequisite to impose the penal measure in a form of mandatory expulsion. The foreigner needs to be found guilty and the penalty needs to be imposed on him/her. The foreigner cannot be expelled if no penalty is imposed, for example, if s/he is exempted from punishment – Article 52 SCC and ff.[33] No minimum penalty has been stipulated to order mandatory expulsion. The entry "irrespective of the sentence imposed" included in Article 66a SCC theoretically means that a foreign perpetrator will be expelled if a minimal penalty is imposed on him/her like one daily rate of fine or deprivation of liberty for the period of three days. The term "sentence imposed" also means that the foreign perpetrator will be expelled even if s/he is put on probation.[34]

(Art. 197 para. 4 second sentence); i) arson (Art. 221 para. 1 and 2), wilfully causing an explosion (Art. 223 para. 1 no 1), misuse of explosives and toxic gases with criminal intent (Art. 224 para. 1), wilfully causing danger without criminal intent (Art. 225 para. 1), manufacture, concealment and transport of explosives and toxic gases (Art. 226), causing danger by means of nuclear energy, radioactivity and ionising radiation (Art. 226bis), preparatory offences (Art. 226ter), wilfully causing a flood or collapse (Art. 227 para. 1 no 1), criminal damage to electrical installations, and hydraulic or protective structures (Art. 228 para. 1 no 1); j) wilfully causing danger by means of genetically modified or pathogenic organisms (Art. 230bis para. 1), wilful transmission of human diseases (Art. 231 para. 1), wilful contamination of drinking water (Art. 234 para. 1); k) aggravated disruption of public traffic (Art. 237 para. 1 no 2), wilful disruption of rail traffic (Art. 238 para. 1); l) acts preparatory to the commission of an offence (Art. 260bis para. 1 and 3), participation in or support for a criminal organisation (Art. 260ter), endangering public safety with weapons (Art. 260^{quater}), financing terrorism (Art. 260^{quinquies}); m) genocide (Art. 264), felonies against humanity (Art. 264a), serious violations of the Geneva Conventions of 12 August 1949 (Art. 264c), other war crimes (Art. 264d-264h); n) wilful violations of Article 116 paragraph 3 or Art. 118 para. 3 of the Foreign Nationals Act of 16 December 2005; o) violation of Art. 19 paragraph 2 or 20 para. 2 of the Narcotics Act of 3 October 1951.

31 Message concernant une modification du code pénal et du code pénal militaire (Mise en oeuvre de l'art. 121, al. 3 à 6, Cst. relatif au renvoi des étrangers criminels), CO 13.056, p. 5416.

32 Union démocratique du centre, Oui à l'initiative populaire…, *op. cit.,* p. 12.

33 Message concernant une modification du code pénal…, *op. cit.,* p. 5396.

34 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *Code pénal,* Bâle 2017, p. 493-494.

Mandatory expulsion is imposed not only on the person who committed the offence but also on accomplices and those who instigated, aided, abetted or attempted to commit an offence.[35]

The aforementioned measure may only be imposed on foreigners i.e. nationals of other countries regardless of their legal status (whether or not they were granted refugee status or whether or not they possess residence permit of type B or C etc.). The problem arises in case of foreigners having double citizenship, however the Swiss law provides for the possibility of depriving the person of the Swiss citizenship if the person who was granted the citizenship got engaged in the conduct which is seriously detrimental to the interests or the reputation of Switzerland.[36]

In accordance with Article 66a (1) SCC, expulsion is ordered obligatorily with two exceptions. The first exception, included in Article 66a (2) SCC states that the court may refrain from ordering expulsion if it would cause serious personal hardship to the foreign national concerned and the public interest in expulsion does not outweigh the private interest of the foreign national in remaining in Switzerland. In such cases, account must be taken of the special position of foreign nationals who were born or have grown up in Switzerland. Thus, according to these provisions, serious personal hardship to the foreign convict justifies refraining from ordering mandatory expulsion. Article 66a of the Swiss Criminal Code obliges the judge to examine the convict's personal situation, particularly if the foreign convict was born or grew up in Switzerland. The legislator assumes that such people might be assimilated with the Swiss society, which gives the grounds to refrain from ordering mandatory expulsion.[37]

In addition, committing the offence in justifiable self-defence [Art. 16 (1) SCC] or in a justifiable situation of necessity [Art. 18 (1) SCC] constitutes the grounds for optional refrainment from ordering expulsion [Article 66a (3) SCC].

Article 66a bis of SCC includes the provisions on non-mandatory expulsion i.e. the court may expel a foreign national from Switzerland for 3-15 years if s/he is convicted and sentenced or made subject to a measure under Articles 59-61 SCC or 64 SCC for a felony or misdemeanour that is not listed in Article 66a. Again contraventions are excluded as far as ordering the expulsion is concerned. Nevertheless, in case of non-mandatory expulsion there is no need to convict a foreigner hence it is possible to impose this measure even if the punishment has been waived or if only a penal measure has been imposed. As a result, despite the fact that this expulsion is optional it is in fact more severe.[38]

35 Message concernant une modification du code pénal…, *op. cit.,* p. 5416.
36 Art. 42 of Federal Act on Swiss Citizenship from 20 June 2014, CO141.0.
37 Message concernant une modification du code pénal…, *op. cit.,* p. 5424-5425.
38 M. Dupui s*et al, op. cit.,* p. 503.

The Swiss legislator, apart from the refrainment of ordering an expulsion, introduced some provisions which make this penal measure stricter like in the case of re-offending. Expulsion, under Article 66b SCC, may be ordered for the period of 20 years or even indefinitely. These provisions state that any person who has been made subject to an expulsion order, who commits a further offence that meets the requirements for expulsion under Article 66a shall be expelled again for 20 years. The Swiss Criminal Code repeats the entries included in Article 121 (5) (2) of the Constitution. The expulsion must be re-ordered if conditions stipulated under Article 66a SCC are fulfilled and it is irrelevant whether the perpetrator re-offended while completing the sentence or after the penalty was served. In case of re-ordering expulsion, this time for the period of 20 years, the earlier expulsion which was ordered for the period from 5 to 15 years is absorbed by the subsequent one.[39]

The legislator went even further than the Swiss constitution as the possibility of indefinite expulsion was provided for in case of recidivism if the conditions stipulated under Article 66a SCC are met during the period of the first expulsion. According to the doctrine, recidivism only refers to mandatory expulsion stipulated under Article 66a SCC, not non-mandatory one which is covered by Article 66b SCC.[40] The indefinite expulsion is an option that can be ordered, it is not an obligation.

In accordance with Article 66c SCC, the expulsion order applies from the date on which the judgment becomes legally enforceable. Before enforcing the expulsion order, however, any unsuspended sentences or parts thereof and any custodial measures must be executed. The expulsion order is enforced as soon as the offender is conditionally or finally released from the execution of criminal penalties or measures or the custodial measure is revoked, on condition that the remainder of sentence need not be executed and no other such measure has been ordered. Expulsion may also be executed even if the release period has commenced.[41]

In case of transfer of the convicted person to her/his home country for the execution of criminal penalties or measures, the expulsion order applies on such transfer. The duration of expulsion is calculated from the day on which the offender leaves Switzerland.

There is also the possibility of deferring the enforcement of a mandatory expulsion order under Article 66a SCC if the person in question is recognised by Switzerland as a refugee and, if expelled, his/her life or freedom would be endangered due to his/her race, religion, nationality, affiliation to a specific social group or his/her political views. However, the foregoing does not apply to a refugee who may not invoke the ban on *refoulement* under Article 5 (2) of the Asylum Act of 26 June 1998.[42]

39 Message concernantune modification du code pénal…, *op. cit.,* p. 5426.
40 M. Dupui s*et al., op. cit.,* p. 504.
41 Message concernant une modification du code pénal…, *op. cit.,* p. 5428.
42 Asylum Act of 26 June 1998, CO 142.31.

Moreover, the deferring the enforcement of a mandatory expulsion order is also possible if the expulsion would violate other mandatory provisions of international law. For example, when the receiving state refuses to accept the foreigner or to issue travel documents.[43]Also, the ongoing war/civil war or other situation which would violate Article 3 of the European Convention on Human Rights[44] prohibiting inhuman or degrading treatment or punishment.[45] It needs to be highlighted that expulsion is unacceptable in any situation which would infringe the perpetrator's rights and freedoms guaranteed by the European Convention on Human Rights.[46]

It is difficult to assess the effectiveness of expulsion as a penal measure in combating and preventing criminality among foreigners in Switzerland, mainly due to the fact that the legislation in question has only been in force for a short time.[47] Moreover the executing regulation entered into force on the 1st March 2017. From this moment the execution is finally possible. The first available public data shows that in 2017 the mandatory expulsion have been pronounced in 915 convictions and the non-mandatory expulsion in 124 convictions.[48] As for the January 2019 there are not available data for 2018, nor for the implementation of expulsion in practice. Author can only presume that the was no expulsion executed.

This penal measure deprives any foreigner who was convicted for the acts enlisted under Article 66a of the Swiss Criminal Code of possibility of staying in the territory of Switzerland. Interestingly enough this penal measure is imposed mandatorily. The catalogue of offences is broad and encompasses both felonies/crimes and misdemeanours. The period of perpetrator's stay, its legality or lack thereof are of no significance for the court's decision. In addition, the judge may order non-mandatory expulsion if the foreigner was convicted for felony or misdemeanour which is not enumerated under Article 66a SCC. The prerequisites to apply this measure and which have been thoroughly described prove the severity of the measure.

On the other hand, the Swiss Criminal Code provides for some possibilities to refrain from ordering any expulsion, especially for humanitarian reasons or respect for human rights. The practice will show particular cases in which courts will refrain from ordering both mandatory or non-mandatory expulsion. Some issues will need

43 The subsaharian African states may serve as an example of states here. Their nationals were not practically expelled when the former general part of the Criminal Code was in force. L'expulsion judiciaire des étrangersen Suisse: La récidive et auteurs lié à ce phénomène, Criminoscope 2009, no. 41, p. 4.

44 Convention for the Protection of Human Rights and Fundamental Freedoms from 4 of November 1950.

45 M. Dupuis *et al., op. cit.,* p. 507.

46 M. Gafner, Personnes de nationalité étrangère, délinquance et renvoi: Une double peine?, Revue de droit Administratif et de droit Fiscal 2007, no. 1, p. 23.

47 Regulations in force since 1 October 2016.

48 https://www.bfs.admin.ch/bfs/fr/home/statistiques/catalogues-banques-donnees/tableaux.assetdetail.5366309.html (access 31.01.2019).

to be addressed in this context like the protection of family bonds or the welfare of minors in case of one of their parents' obligatory expulsion. The principle of individual liability of perpetrator states that other people, especially minor children, should not suffer consequences of the perpetrator's conviction.[49]

4. Conclusion

The example of initiative „Expulsion of foreign citizens" showed how the party could use "the fear of a stranger" to achieve its political goals. Finding the "stranger" guilty of criminal offencewas an easy trick. In the situation of growing foreign population inSwitzerland it was a simple argument to present the high criminality rate of foreigners. However authors of the initiative did not present the data concerning the criminality of Swiss nationals. Deeper criminological analysis reveal that the criminality of foreigners does not differ much from the criminality of nationals, especially in the group of residents.[50] Naturally the criminality of other groups of foreigners is different and mostly consists on offences prohibited by Federal Act on Foreign Nationals and Integration related to different forms of illegal migration. Those acts, however, do not harm directly the citizens, they mostly harm public order.[51] The society was vulnerable to its arguments and decided to give the green light to constitutional and in consequence criminal law regulations leading to expulsion of foreigners.

The expulsion possibility of even obligation in case of committing the offence listed in article 66a SCC is a restrictive measure. However the legislator introduced the possibility to abandon its pronouncement in some exceptional cases. The problem of expulsion leads to the question whether this instrument will be efficient. On one hand the answer should be positive, as expelled foreigners will not commit new offences at least during the time of expulsion. However this can have only positive preventive effect on the others discouraging them from committing an offence. The effectiveness of this measure can be evaluated after several years of its application, now it is too early.

49 M. Perkowska, *op. cit.*

50 See also: M. Killias, Immigrants, Crime, and Criminal Justice in Switzerland, Crime and Justice, Ethnicity, Crime and Immigration: Comparativeand Cross-National Perspectives 1997, vol. 21, p. 381, similar conclusions has B. Jann, Herkunft und Kriminalität- Ergebnisse der polizeilichen Kriminalstatistik, (in) D. Fink, A. Kuhn, C. Schwarzenegger, Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité, Berne, 2013, p. 112, K. L. Kunz, Criminalité des étrangers en Suisse. Problematique et tentative d'explication, (in:) Procédure pénale et exécution des peines: la questions des étrangers, Caritas Suisse, Compte-rendus 1989, no. 1, p. 16.

51 M. Perkowska, *op. cit.*

This kind of penal measure leads also to the question of human rights that can be eventually threatened as for example family life guaranteed in the art. 8 ECHR, that can be disturbed by the separation of its members. The duty to respect private and family life limits the state's autonomy to regulate migration flow.[52] That is another reason why the Swiss courts will have tough decisions to make with balancing between human rights and the security of society.

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52 W. Haller, *op. cit*., p. 273.

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When the People's Needs Are Not Listened to: Istanza d'Arengo on the Background of Other Forms of Direct Democracy in San Marino

Abstract: The subject of the article is the issue of the practice of using the *Istanza d'Arengo* institution in San Marino. The author will undertake attempts to assess to what extent this institution is used to implement ideas that were not taken up in the other two forms of direct democracy (referendum and civic legislative initiative). However, the subject of interest will not be all initiatives, but only a specific category (moral and ideological issues). The author will investigate how true the sentence is that *Istanza d'Arengo* is the best tool for the citizens of the Republic to solve world-view issues. The time range from the end of October 2012 to October 2018 was adopted for the analysis, and the comparative analysis was based on all three forms of direct democracy.
Keywords: San Marino, *Istanza d'Arengo*, referendum, popular initiative, direct democracy

1. Introduction

The Sammarinese constitutional system[1] provides two classic institutions of direct democracy: a referendum and a civic legislative initiative[2]. It should be

1 When comparing the four European democratic microstates (Andorra, Liechtenstein, Monaco and San Marino), it is worth noting that in the cases of Monaco and Andorra, direct democracy cannot be treated as foundation of the political system (there are no forms of direct democracy in Monaco, and in Andorra if there is a referendum and the civic legislative initiative, the practice of their use is miserable), San Marino and Liechtenstein are European leaders in the practice of using these tools.

2 While referendum is understood as a way of popular vote (answering on a specific topic directly by the people – sovereign), civic legislative initiative is considered here according to the Venice Commission definition: "Legislative initiative is to be understood hereafter as the right to

mentioned that, apart from them, there is also an *Istanza d'Arengo* (hereinafter as well as *Id'A*) in San Marino[3] as a special form of exercising civil rights[4]. Its functioning is undoubtedly a consequence of the centuries-old existence of the oldest form of direct democracy – the *Arengo*[5].

The subject of this article is the issue of the practice of using the title institution. The author will attempt to assess how true is that the *Id'A* is used for realizing ideas that were not taken up earlier in the other two forms of direct democracy. Thus, the author assumes the hypothesis that *Id'A* is a form of bringing (by the citizens) issues that, on one hand, divide citizens (moral issues also called worldviews)[6], and thus are not readily undertaken by politicians at the central level, and on the other hand due to more difficult formal requirements, submitting an appropriate application will be easier under the conditions of the *Id'A* form (while not the other two forms of direct democracy). The author will undertake to examine how true the sentence is, that the least demanding formal institution of direct democracy is the best tool for the Sammarinese citizens to solve world-view issues by submitting them to vote in parliament. What is probably more vital for the author is whether the *Id'A* is the perfect solution to force MPs (parliamentarians) to take a position on world-view issues, which without this "coercion" they probably would not like to touch. The

submit to the legislative power draft laws with a view of their adoption by the Parliament". While it is important to add "civic" to underline that definition is limited to the people's (understood as the sovereign) right to propose a draft of the legislation (beside the state bodies, etc). Study n° 446/2007 of European Commission for Democracy Through Law (Venice Commission), CDL-AD(2008)035, Report on Legislative Initiative, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), point 4.

3 Hereinafter as well as the Republic.

4 Firstly it should be noted that in the matter of qualifying the *Istanza d'Arengo* as a direct democracy institution there is no universal agreement. Without making a detailed analysis of the legitimacy of such doubts, it is worth mentioning that on the one hand it appears that these recognize the *Id'A* as a specific form of petition, while for others the consequences for certain state organs when they fail the application inclines to assume that the sovereign is so much empowered that the *Id'A* should be treated as a direct democracy institution along with the referendum and the citizens' initiative.

5 In English it is named as an "Assembly".

6 In literature, the term itself does not include a uniform group of cases. While it is not easy to create homogeneous catalog of issues which should be treated as moral (so these are linked more to the social and individual spheres of the people – in opposition to these which are considered as economical or political) author include the following: same-sex rights (including same-sex partnerships, same-sex marriages and adoption by persons of the same sex), divorce, abortion, euthanasia, in vitro, the death penalty. At the same time, apart from the above-mentioned cases, which largely lie on the border of ideological issues, i.e. legalization of drug possession, legalization of prostitution, place of religion in the church-state relations, sex education, have also been analyzed. At the end of this note, it should be underlined that some issues which may be considered as moral may, in the same way, be treated as economical and/or political (and vice versa).

author will also investigate to what extent the *Id'A* and two other forms of direct democracy are forms of interchangeable application in case one of them fails to achieve the goal intended by a political actor[7].

It seems that the best time caesura for this subject would be an adoption of one full parliamentary term. Due to the fact that the Sammarinese party scene is quite unstable, and the last 3 parliamentary elections (2008, 2012, 2016) were of an early nature, the time range from the end of October 2012 (ie from the month before the elections of November 2012) until October 2018 was adopted for analysis. The proposals submitted by citizens will be compared in all three modes (referendum, civic legislative initiative and *Id'A*) for the indicated period.

2. Place of the Id'A in the political system of San Marino

San Marino is quite widely regarded as the oldest continuously existing republic of the world. The constitution San Marino consists of, among others Statutes (1600) supplemented by the so-called Declaration of Rights (1974)[8]. The community formed in the 4th century, until the 13th century, through the meetings of the heads of the families (*Arengo*) decided on the most important political issues. Mainly as a result of the increase in the population of San Marino, it was decided to establish a body that was to represent citizens and make decisions on their behalf. In this way the Grand and General Council (*Consiglio Grande e Generale* hereinafter as well as CGG) was established. However, with time, it became more and more oligarchic, so in 1906 *Arengo* was called again, so as to decide on a constitutional reform, as a result of which the method of creating the parliament was democratized[9].

The *Id'A* remained in direct dependence on the functioning of the Arengo, as it was due to the Arengo's dissolution that it was decided that each of its members would have the right to apply to the Regency[10] with applications that would have to be considered. Currently, the right to submit an application under the *Id'A* is given to every adult citizen with a right to vote[11]. The application may be submitted only once

7 So in that case: citizen's perspective has been taken.

8 The last of the acts was amended several times, the most important of which was adopted in 2002.

9 It was the last assembly that was convened, hence there are doubts as to whether this institution is still functioning in the political system, or because of the democratization and real empowerment of the CGG and the adoption of legal solutions that somehow fulfill the functions of *Arengo* (ie referendum, civic legislative initiative and *Id'A*), there was no "quenching" of this institution. Answers to the question about *Id'A* current status are not facilitated by the complexity of the Sammarinese constitution. More on the political system of San Marino, see: M. Łukaszewski, Najstarsza republika świata. Współczesny system polityczny San Marino, Poznań 2018.

10 Captains-Regents (Regency) are two-member head of state of the Republic. They are elected by the parliament among MPs for one joint 6-month term.

11 Therefore, the right to submit applications was deprived of foreigners living in the territory of the Republic.

during the term of office of the head of state – the first Sunday after the inauguration, i.e. the first Sunday after each April 1 and October 1[12]. The law requires that the application concerns an important public interest, which is important for the subject of this paper, that the intention of the legislator was to exclude from the subject of the Regency activities under this procedure, solving individual cases. In other words, the proposal aims to solve the problem of a more than individual character.

Table 1. Number of applications submitted in *Istanza d'Arengo* in 2011-2018

The date of application submission		Number of applications submitted	The date of application submission		Number of applications submitted
3 IV	2011	46	5 IV	2015	14
2 X		26	4 X		15
8 IV	2012	32	3 IV	2016	27
7 X		23	2 X		19
7 IV	2013	23	2 IV	2017	49
6 X		29	8 X		31
6 IV	2014	24	8 IV	2018	23
5 X		8	7 X		19

Source: own based on an official data.

The procedure for submitting applications is described in the law of 1995[13], numbering only 9 articles, and fragmentarily – in the regulations of the parliament. The application is submitted personally at noon, the above-mentioned Sunday in the parliamentary meeting room[14]. It is not subject to any stamp duty. The law explicitly imposes on citizens' applications the requirement to treat them as a priority, which serves, among others, an obligation on the parliament that petitions be dealt with in the first half of the Regency's term (ie until December 31 and July 1 of each year). In a simplified way, it can be said that the parliament is responsible for responding to the citizens' postulate, while the Regency has the duty to coordinate the proceedings of the application. The decision made by the parliament is forwarded to the applicant within 15 days[15]. Failure to comply with the obligation to implement the petition may result in the government pulling its

12 If the day of inauguration fell on Sunday, then presentation of the application of *Id'A* will take place on the following Sunday.

13 The act was amended in April 2018.

14 The meeting room of the CGG is also the seat of the head of state. It is worth mentioning that the meetings of the parliament are presided over by the Captain-Regents.

15 In addition to the petitioner, the resolution of the parliament regarding the petition is also forwarded to the government, the Castle Councils (bodies of local self-government units) and parliamentary groups.

members to political responsibility by the parliament. A petition rejected by the parliament can not be re-submitted earlier than 1.5 years (ie after the expiration of 3 terms of the Regency)[16].

In 2018, the law was amended and the almost unlimited possibility to submit applications was limited[17]. To a very broadly defined criterion: „In the event that the Reggency declares the non-compliance with the law of the Arengo application, it does not mean it must be submitted to the examination of the Great and General Council", it was decided to add that applications "containing expressions of incitement to hatred and racism do not cover matters of public interest. expressions of discrimination based on sex, personal, economic, social, political and religious conditions, as well as slanderous, defamatory or insulting expressions against living or deceased persons"[18].

3. Place of the referendum and a civic legislative initiative in the Sammarinese system

If the application submitted via the Id'A is of a very general form (it can be, for example, only a proposal to change the policy in a specific field), a much more structured form should be linked with the citizens' legislative initiative. The rules of its formulation are defined in the qualified law of 2013. An application shall be made of a subscription of at least 60 voters, a bill and information about planned expenditures, if that project is assumed. The application is submitted to the Office of the Secretariat (*l'Ufficio di Segreteria del CGG*) by the representative clearly indicated by the subscribers. The applicant is also responsible for confirming the authenticity of the signed signatures. The law requires that the project has to be reviewed by the CGG within 180 days from the date of receipt. The Regency is responsible for submitting the project to the CGG. The practice of using this form of direct democracy is much more limited: citizens submit only a few proposals to the Parliament every year[19].

16 In the case of the renewal of the parliament, the said period is canceled.

17 The proposal was submitted by the Home Affairs' Secretary of State and the amendment was accepted with 35 MPs voting in favor, 8 against and 1 abstention.

18 F. Perotto, Fabrizio Perotto sul PdL Istanze d'Arengo, http://www.repubblicafutura.sm/perotto-istanze-arengo/ (14.10.2018).

19 M. Łukaszewski, Arengo, obywatelska inicjatywa ustawodawcza, Instancja Arengo i referendum – formy demokracji bezpośredniej w San Marino na tle rozwiązań konstytucyjnych Włoch, (in:) M. Musiał-Karg, A. Stelmach (eds.), Uwarunkowania demokracji bezpośredniej we współczesnej Europie, Poznań 2018, p. 29.

Table 2. Formal conditions regarding the organization of referendums

	Application (at least)	Condition of referendum admissibility	Required majority in the parliament
abrogative referendum (referendum abrogativo) – pursuant to its power, the act, act or norm of common law may be repealed in whole or in part	60 voters	Signatures of 3% of the total number of voters	Simple majority
	5 Township Councils	–	
referendum propositive (referendum propositivo o di indirizzo) – based on it, the electorate can determine the rules and the criteria governing the law to be introduced by parliament	60 voters	Signatures of 3% of the total number of voters	
confirmative referendum (referendum confermativo) – applicable in cases in so far as the entry into force of the relevant legal act (refer to only about the act) must be given to citizens	10 voters	Signatures of 3% of the total number of voters	
	31 parliamentarians	–	

Source: M. Łukaszewski, Arengo, obywatelska inicjatywa ustawodawcza, Instancja Arengo i referendum – formy demokracji bezpośredniej w San Marino na tle rozwiązań konstytucyjnych Włoch, (in:) M. Musiał-Karg, A. Stelmach (eds.), Uwarunkowania demokracji bezpośredniej we współczesnej Europie, Poznań 2018, p. 30.

If the motion to call a referendum was formulated by the electorate, then the College of Guarantees[20] makes a formal assessment and calls on the applicants to collect the appropriate number of signatures. In all 3 cases since 2016, this figure is 3% of the total number of electorate (previously it was 1.5%). The referendum committee has 90 days to collect these signatures. If the verification of signatures made again by the CG is successful for applicants, then the Regency is obliged to issue a decree setting the date of voting[21].

4. Practice of using a civic legislative initiative

In the discussed period, the Sammarinese were relatively often using both forms of direct democracy. In total, in the period of November 2012 – November 2018, 20 referendum initiatives and 13 bills were submitted. So far, only one bill has been rejected. It was on strengthening the benefit for unemployed citizens while looking for a job (*salario cittadinanza*).

20 College of Guarantors for the Constitutionality and General Norms (*Collegio Garante della costituzionalità delle norme*) (hereinafter: the College of Guarantor / *Collegio Garante*s or CG) is one of the youngest organs of the Republic. Established in 2002 through the amendment of the Declaration of Rights, it consists of three judges, whose task is to resolve issues largely typical of the constitutional court.

21 M. Łukaszewski, Arengo, *op. cit*., p. 30.

Table 3. Bills submitted under the Citizens' Initiative procedure from October 2012 to October 2018*

Date of presentation	Issue	Introduced by	Current state
21/12/2012	Changes to the Criminal Code and Criminal Procedure	Alvaro Selva	The initiative was withdrawn by the initiator
11/03/2013	Strengthening the benefit for unemployed citizens while looking for a job (salario cittadinanza)	Matteo Ciaccia	Rejected
06/05/2013	Equal mode of transmission of the surname	Vanessa Muratori	Accepted and implemented (published: 26/11/2015)
19/07/2013	Against the so-called white resignation (dimissioni in bianco)	Patricia Busignani	Accepted and implemented (published: 27/11/2014)
23/04/2014	Fight against discrimination on the Sammarinese citizenship	Otello Pedini	Pending examination at second reading
27/08/2014	Abortion law (Law on conscious and responsible procreation)	Vanessa Muratori	Pending examination in referral by the 1st and 4th Committees
13/07/2015	Law on seeds (this law protects and guarantees biodiversity)	Francesca Piergiovanni	Accepted and implemented (published: 27/07/2017)
02/01/2017	Law on single-phase credits and tax credits to banks	Karen Luisa Pruccoli	Accepted and implemented (published: 30/07/2018)
01/02/2017	To introduce the obligation to save animals in the event of an accident	Emanuela Stolfi	Accepted and implemented (published: 12/03/2018)
28/11/2017	Amending the Law on citizenship	Marino Ercolani Casadei	Waiting for the first reading
28/11/2017	Amending the Law on Township Councils (giving the right to vote in local elections for 5-year residents)	Marino Ercolani Casadei	Waiting for the first reading
29/11/2017	For the establishment of the Civil Peace Corps of the Republic of San Marino	Guido Rossi	Pending examination in referral by the 2nd Committee
18/12/2017	Law on the civil union (for two adult persons of the same sex or of different sex)	Valentina Rossi	Accepted and implemented (published: 20/11/2018)**

** – in 2016 and from January to the end of November 2018, no one bill was submitted.*

*** – the law enters into force on the fifteenth day following that of its publication. As of November 30, 2018.*

Source: own based on an official data.

Looking at the other bills, 1 of them was withdrawn by the initiator (in December 2012, a draft regarding amendments to both the penal code and a code of criminal procedure was filed), and 6 were already adopted (ie already in force). Among these six acts are: Equal mode of transmission of the surname[22]; against the so-called white resignation (*dimissioni in bianco*)[23]; Law on seeds (to protect and guarantee

22 Existing legislation stated that transmission of the surname of the newborn child may be done only by paternal line. After approving the new law the registration give child's parents power to choose the surname: of the father, the mother or both in alphabetical order.

23 *Dimissioni in bianco* is an illegal practice of the employer, consisting in forcing the worker to sign a letter of resignation, to which the date will be affixed when and if a specific event occurs

biodiversity); Law on single-phase credits and tax credits to banks and a law to introduce the obligation to save animals in the event of an accident. On 20 November 2018 the Law on Civic Union was published.

All other projects are being processed by the parliament. It is worth noting that among them: one project is for the establishment of the Civil Peace Corps, another on abortion and another 3 are on naturalization and citizenship. While two of them are to fight against discrimination on the Sammarinese citizenship[24], the third was presented on 28/11/2017[25] and is to amend the Law on Township Councils thanks to which 5-year residents would be able to vote in local elections.

Probably the only bills that could be classified as ideological are those related to abortion and already adopted regarding partnerships. In the case of the first one it was presented by Ms. Vanessa Muratori on 27/08/2014 and entitled as a Law on conscious and responsible procreation. Thanks to that legislation women would be able to decide to terminate her pregnancy on a voluntary basis, even if she is a minor, during the first 90 days without being obliged to justify her choice. While it comes to the partnership law the civil union is a contract by which a family-like community is regulated composed of two adult persons of the same sex or of different sex and it must be preceded by the publications made in the appropriate register established at the Office of Civil Status[26].

5. Practice of using popular initiatives (referendum)

The referendum as an undoubtedly the most popular form of direct democracy in the world has a very short history in San Marino. After the organization of the aforementioned voting in 1906, the referendum as an institution expressing the will of the sovereign appeared only in 1982 (a referendum on citizenship), after which no referendums were organized for the next 1.5 decades.

(pregnancy, accident, illness).

24 The first (presented by Otello Pedini on 23/04/2014) is linked with statements of children of the Sammarinese mother or/and father that their/his/her child who want to maintain the citizenship of the Republic. The second (presented by Mr. Marino Ercolani Casadei on 28/11/2017) is a little more complex and composed of 3 aims: (1) abolition of the obligation to renounce the citizenship of origin as a requirement to obtain Citizenship of San Marino by naturalization; (2) shortening the period of effective and continuous stay on the territory of the Republic for the purpose of applying for naturalization (from 25 to 15 years for residents and from 15 to 10 years for foreign spouses of the citizen); (3) elimination of the old provision about losing the Sammarinese citizenship due to the acquisition of another citizenship and/or marriage.

25 By Mr. Marino Ercolani Casadei (once again).

26 The law provides among others: formalities prior to the civil union, its definition, way of registration, causes impeding the foundation of the civil union, Rights and duties arising from this union, and provisions linked with dissolution of the partnership.

It was not until 1996 that voting was held in as many as four cases (all on electoral system), after which until the end of the 20th century citizens voted in two referendum (1997 – on real estate, 1999 – once again on citizenship). In 2003 (one question) and 2005 (four questions), citizens spoke again in the matters of elections and referendums. In the following years, citizens replied five times in the referendum: 2011 (1 question), 2013 (2 questions, including one on rapprochement with the European Union), 2014 (2 questions) and 2016 (4 questions).

In the period that is of interest of the author the CG examined the referendum initiatives several dozen times. Of these, only 6 ended with the organization of voting[27], while of which 5 of them ended successfully (the proposal was accepted)[28]. When in comes to other referendum initiatives: two are awaiting collection of the signatures (2018) and all others have been rejected or the referendum did not take place due to formal reasons:

- all 3 proposals introduces in November 2013 were rejected due to the formal errors of collecting signatures of the so-called promoters) – proposals were about: reform of social security system; medical and non-medical healthcare staff and the referendum quorum;
- 3 proposal presented on 30th December 2013 (topics were the same as previously) – proposal about social security system (FONDISS) was accepted but the CG decided to change wording of the question[29]; proposal on medical and non-medical healthcare staff (ISS) was accepted[30] (at the end referendum on these two topics was organized on 25th May 2014 and both proposals were accepted); proposal on referendum quorum was rejected by the CG due to the fact that promoters demanded changing the qualified law[31] which is prohibited under the regime of the law;
- 9th April 2015 – 2 proposals were rejected and 1 was accepted: once again on the referendum quorum – promoters decided to change type of referendum (previously it was abrogative, this time it was proposing referendum) so the

27 Collecting signatures for two referendum initiatives from September 2018 may increase this number to 7.

28 It should be clearly indicated that in the only referendum, in which the citizens rejected the offer, the result was minimal in favor of the opponents: 49.65% YES/FOR | 50.35% NO/AGAINST.

29 Results: 79.48% YES/FOR | 20.52% NO/AGAINST.

30 Results: 78.04% YES/FOR | 21.96% NO/AGAINST.

31 Qualified law (*Legge Qualificata*) is hierarchically a higher type of legislation, in other words it is more important than a law (*Legge*).

CG this time accepted this proposal[32]; proposal on changing the electoral law[33] which was rejected by the CG due to lack of precision of the application[34]; proposal on reducing public funding to the political parties[35];

– 10th April 2015 – 3 proposals on prohibition of privatization of the public services network[36], pharmacies[37] and postal services[38] were rejected; 1 proposal on capping public sector salaries at €100,000 was accepted by the CG (14 May 2015, Judgment n. 8) but later referendum was cancelled[39];
– 4th July 2015 – proposal on land located in Rovereta/Falciano was rejected by the CG[40];
– 8th July 2015 – single preference voting (once again)[41] accepted by the CG (27 July 2015, Judgment n. 9);

32 This time promoters decided to ask two question in one referendum: about eliminating the referendum quorum and liberalizing rules of collecting the signatures of the referendum proposal. What should be underlined is that on 31 August 2015 the Collegio Garante certified irregularities in the collection of signatures carried out as part of the referendum procedure. This decision was confirmed in the second instance on the 29th September 2015 (Judgment n. 11).

33 Wording of the question: "Do you want every voter to show a single preference for candidates belonging to the chosen list?". On 10 November 2015 the CG certified the correctness of collecting signatures carried out as part of the referendum procedure.

34 The CG underlined that the question did not give any clue to which type of election (general, local or both) the proposal is linked. Additionally, the lack of pointing which voters (voters living inside the Republic and these living outside) would have this possibility which is crucial while these two parts of electorate were under different legal regime.

35 Wording of the question: "Do you want to reduce public funding to those political parties and movements present in the Great and General Council to 70,000 (seventy thousand) euro a year that have a council representation necessary for the formation of a Group?". The CG rejected the proposal due to interpretative doubts that voters would might encounter.

36 Proposal on prohibition of privatization of delivery and distribution of water, electricity and gas was rejected by the CG which stated: *the fact that the question gives no indication [...] and does not allow voters to fully decide on consciousness*.

37 Question to be asked was: *Do you want the pharmacy in the Republic to be managed exclusively by the Social Insurance Institute and that the transfer, even partial, to private individuals is prohibited?* The CG rejected the proposal due to the fact that pharmacies since 1956 private individuals are not allowed to manage a pharmacy on the Sammarinese territory.

38 The question to be asked was about to let the postal and telegraph services of the Republic to be managed only by the state or directly or through a special body of the state. The CG rejected the proposal due to the similar reason as happened in the case of pharmacies referendum.

39 On 31 August 2015 the Collegio Garante certified irregularities in the collection of signatures carried out as part of the referendum procedure.

40 The text of the presented question referred to rules that are no longer in force.

41 This time promoters taking comments of the CG into account clarified that proposal is about both categories of voters (living both: outside the Republic and within its borders) and limited only to general elections (parliamentary).

– 9th October 2015 – proposal on so-called General Regulatory Plan (interventions for economic development)[42];
– 3rd November 2015 – another two tries on previous issues: referendum quorum (3rd); this time it was accepted by the CG[43] and the referendum was held on 15 May 2016. The proposal was accepted by majority[44] and the quorum of at least 25% of registered voters voting in favor was reached (the quorum was finally abolished); the other proposal was another try on capping public sector salaries at €100,000 – the result was the same as in the case of quorum: the CG accepted the proposal[45] and the referendum was held the same day and majority of the voting people accepted the proposal[46].

On 20 September 2018 three proposals were presented: (1) on prohibition of privatization of the public services network; (2) on changing electoral rules and rules on formulating a government coalition and (3) on prohibition to convert the tax credit granted to the banking and financial system for public debt. The second (on electoral rules) was rejected mainly because of violations of the principles of the democratic state of law and the constitutional rules enshrined in the Declaration of Rights.

6. Practice of using the Id'A – a review

In political practice, the number of petitions submitted in the *Id'A* mode varies from a dozen to around 30 (see Table 1). They can largely be divided into two groups: proposals encouraging the government to act or *de facto* replacing the civic legislative initiative. While in 2015 the total number of applications did not exceed 30, two years later the number of applications submitted almost tripled (up to 80). In total, in the years 2013-2018, 281 applications were submitted, which gives an average of 23.4 applications per semester. Looking at the general statistics (Table 4) of the proceedings on *Id'A*, there is a relatively small percentage of applications rejected for formal reasons (2.4%)[47] and a significant percentage of applications rejected after

42 On 1st March 2016 Collegio Garante certified the correctness of collecting signatures carried out as part of the referendum procedure. The proposal was accepted and the referendum was organized and held on 15 May 2016. The proposal was rejected by a small majority (49.65% YES/FOR | 50.35% NO/AGAINST).

43 On 1st March 2016 Collegio Garante certified the correctness of collecting signatures carried out as part of the referendum procedure.

44 58.58 % YES/FOR | 41.42 % NO/AGAINST

45 On 1st March 2016 the CG certified the correctness of collecting signatures carried out as part of the referendum procedure.

46 63.63 % YES/FOR | 36.37 % NO/AGAINST.

47 In 2014 (IV) the application was rejected because it was very similar to the previously submitted and rejected application. In 2016 (IV) two applications were rejected due to unclear wording of the application, while the last was not about general interest. In 2017 (IV) application no. 29 was

prior approval (ie rejected for substantive reasons – over 50%) . In the matter that is raised in the introduction to this paper, it is worth noting that ideological affairs play a very small percentage of citizens' cases brought in the *Id'A* mode:

- in 2013, the only application of a similar nature to the worldview was application No. 8 in which the author demanded the introduction of sex education in schools in San Marino – rejected by the MPs;
- in 2014 (in both cases in April) there were two applications – Mr. Federico Podeschi presented instance no. 10 (petition for (among others) recognition of the validity of the same-sex marriages contracted abroad)[48], while Mr. Lazzaro Rossini proposed an application no. 17 (petition for the introduction of a regulation that foresees the decriminalization of the voluntary interruption of pregnancy)[49] – both were rejected by the MPs;
- in 2015 application no. 5 (for the insertion of provisions of the law on euthanasia in the Sammarinese legislation)[50] and application no. 8 (for the legalization of psychotropic substances for therapeutic use) – the first was rejected while the second is waiting for reference by the competent minister in the permanent council committee;
- in 2016 – on October there were 4 applications: 3 of them (no. 5, 6 and 7)[51] were linked with the state-church relations (all of them were rejected and at the same time the government informed the parliamentarians about maintaining a dialogue with the Catholic Church) while the last (no. 4) was linked more with human dignity as a concept[52]; on April 2016 there were many application linked with ideological (moral) dilemmas: 5 were directly linked with an abortion law (all of them were to liberalize the abortion law but with pointing out another reason to do so: no. 7 was to legalize abortion in the case of pregnancy in which there are serious health risks for the woman; no.

rejected because the application is dedicated to the issue beyond the scope of the parliamentarian authority. Both applications of 2018 (IV) were rejected because being very similar to the previously submitted applications.

48 More on that case: L. Iannaccone, Il matrimonio same sex nella Repubblica di San Marino?, "Stato, Chiese e pluralismo confessionale" 2014, no. 24, p. 17.

49 Council of Europe: Commissioner for Human Rights, Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to San Marino from 9 to 10 June 2015, 15 October 2015, available at: https://www.refworld.org/docid/5665a6794.html, p. 10.

50 There was an agenda presented by the MPs for the Government to present, by December 2016, a draft law on informed consent on the declaration of anticipated will of health treatments and the use of antalgic therapies for terminal diseases.

51 The first was for the abolition religious hour run by the Curia in the public school, the second was for the introduction of a secular teaching alternative to the teaching of the Catholic religion in the public school, while the last was among others that the curia should be required to pay a reasonable rent for the occupation of public space by one his confessional activity.

52 The application (which finally was rejected) was about to explain the principle of the dignity and inviolability of human life, from conception to its natural end.

8 was to make abortion legal with reference to pregnancy cases concerning women victims of sexual violence; no. 9 linked to cases of pregnancies concerning minors; no. 10 linked to cases of pregnancies in which there are risks of serious diseases or malformations for the fetus and no. 11 to cases of pregnancies concerning women who are in conditions of marginalization or social distress)[53];

Table 4. Processing of the *Istanza d'Arengo* in years 2013-2018

Direction of processing of the Istanza d'Arengo					
	Number of applications submitted	Number of applications rejected for formal reasons a)	Number of applications rejected after prior approval	Number of applications waiting for consideration after prior approval b)	Number of applications accepted by the parliament
IV 2013	23	0	7	0	16
X 2013	29	0	20	0	9
IV 2014	24	1	18	0	5
X 2014	8	0	3	0	5
IV 2015	14	0	10	4	0
X 2015	15	0	7	8	0
IV 2016	27	3	14	7	3
X 2016	19	0	13	3	3
IV 2017	49	1	31	9	8
X 2017	31	0	13	11	7
IV 2018	23	2	8	13	0
X 2018	19	0	0	19	0
	281	7	144	74	56
	(100%)	(2.4%)	(51.2%)	(26.3%)	(19.9%)

a) – these are applications examined together by the following: Secretary's Office (L'Ufficio di Segreteria), Regency and the Secretary of State for Internal Affairs (Reggenza assieme al Segretario di Stato per gli Affari Interni); b) – these are applications waiting for the position of the parliamentary commission/committee or government representative.
Source: own based on an official data. As of November 30, 2018.

53 It should be noted there were two other petitions in that semester which may be treated as ideological: no. 18 (for installation on all the territory – and in particular in the headquarters of the Higher Secondary Schools – of automatic vending machines for condoms) and no. 21 (why there is an obligation of closing indiscriminately for all work activities in conjunction with national day and the main days of religious festivals). The first was accepted, while the other not.

– in 2017 – there were only April applications: application no. 22 (for introduction of legislation allowing and disciplining medically assisted death) which was rejected by the MPs who at the same time asked the government to identify the rules for the protection of the "end of life", as well as to define the operating procedures and strengthen the services for palliative care pathways; Instance of Arengo n.36 of 2 April 2017 was for the introduction of legislation that allows the donation of organs and tissues by binding the subjects who intend to do it exclusively on a voluntary basis and with the methods deemed most appropriate (its current status is: pending examination by the permanent council committee)[54];
– in 2018 – there was only one ideological Istanza d'Arengo application: Instance of Arengo n.21 was to regulate surrogate motherhood practice – it was rejected by the MPs, but they asked the government for an agenda for the introduction of the prohibition of the practice of surrogate motherhood and for a deeper knowledge on the practice of heterologous fertilization[55].

7. Conclusion

In conclusion, it should be noted that the greatest obstacle faced by citizens submitting applications for a referendum is the verification by the CG. It is worth noting that in the discussed period, this body repeatedly suspended (or stopped) the referendum procedure not only because of substantive comments (ie the formulation of a referendum question, which is unclear / refers to a non-existent legal order), but also errors in the procedure for collecting signatures after prior approval. But what can not go unnoticed is the fact that the citizens of San Marino are quite persistent in their efforts to hold a referendum, even if the CG finds serious drawbacks to such

54 There were two more applications which may be seen as ideological (both are linked with the state-church relations): no. 25 (to ensure the availability of an appropriate public space for the celebration of lay funeral) which was accepted and no. 29 (for the recognition of the personal and unequivocal desire to no longer be considered adherents to the religious confession denominated "Roman Catholic Apostolic Church"). The latter was rejected for formal reasons: as it does not fall within the competence of the parliament. The registration – and therefore the cancellation – of a subject from lists and lists of baptized persons held by the parish of belonging or by religious bodies, in fact belong to a different order from that of the State and therefore fall within the competence of bodies and authorities other than those of the state. The State and therefore the Great and General Council can not intervene in this regard.

55 Full name: Instance of Arengo n. 21 of 8 April 2018 – for the adoption of specific legislation that establishes the prohibition of the use of so-called "hut-for-hire" practices and "heterologous fertilization" and does not make it possible for the Civil Republic of San Marino to register in its registers newborns or minors, conceived with the recourse to such practices in foreign places, within the family status of parents different from the natural ones.

a proposal. Reading the judgments allows for the subsequent preparation of the application, which is no longer free of these defects.

It is also worth paying attention to a certain trend in referring to referendum applications: applicants very often submit their proposals on the same day as other applicants. It seems that such procedure on the one hand causes mutual benefits later, because the organizers of such voting can count on greater mobilization of the electorate, and thus greater attendance, which was important in 2016, because the lack of reaching the appropriate quorum, even in the case of telling following the proposal of the majority of voters did not result in the implementation of the decision taken in the referendum.

In conclusion, it should be noted that the answer to the question raised in the introduction about how the Id'A is used to implement ideas that have not been implemented in either the referendum or the citizens' legislative initiative, is negative. However, it should be emphasized that the number of applications submitted in the Id'A mode, which is of world-view nature, is relatively small (it closes in 5-7% of all applications).

At the same time, if we note that none of the referendum applications in the analyzed period were of a world-view nature, and among the projects submitted in the citizens' legislative initiative procedure for 13 applications 2 are world-view (15%). Therefore, the hypothesis that the least demanding institution from the formal side of direct democracy is the best tool for the citizens of the Republic to solve world-view issues by submitting them to the vote in the parliament has not been confirmed.

Finally, looking at worldview issues, it is worth noting that the majority of them (and yet they are not many among all against the conclusions) are rejected by parliamentarians. Therefore, it seems that the only effective weapon in the hands of citizens (except the exchange of parliamentarians in the elections), who try to force through their solution in the legal system is a proposal for a referendum, which alone cannot be *de facto* blocked by parliamentarians, and the correct formal preparation of the referendum application gives a real chance of acceptance by the CG, and thus the organization of popular vote in which citizens decide about the case.

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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)[1] provides all the most relevant and well-known instruments of direct

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

democracy, namely the referendum, popular initiative and citizens' assembly. Judging by the number and the diversity of these instruments, Slovenia ranks among the states with the most developed direct democracy in Europe.[2]

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.[3] This constitutional regulation of the legislative referendum largely deviated from those of comparable

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 Slovenij, (in:) I. Kaučič (ed.), Zakonodajni referendum: Pravna ureditev in praksa v Sloveniji, Ljubljana 2010, pp. 51-73.

European countries, particularly in regard to the initiative and the restrictions on the subject-matter of the referendum.[4]

Based on the above constitutional arrangement, Slovenia encountered significant normative and practical problems when holding referendums.[5] 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.[6] After years of effort by politicians and experts, the constitutional body finally passed a constitutional amendment that changed the legislative referendum arrangement in 2013.[7] 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).[8] At the same time, three main sets of changes were introduced in Slovenian constitutional order i.e.:

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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 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.

– changes regarding referendum initiative(according to the new arrangement the referendum can only be proposed by voters[9]),
– 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).[10]

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).[11]

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[1]	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

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, 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.

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
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[2]	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.[12] In the broadest sense, all forms of judicial review of the

12 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.

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 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.[13]

In general, authorities exercising judicial review of referendums are sometimes political bodies,[14] 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).[15]

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,[16] 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,[17] 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.[18]

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

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 (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.

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 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.[19]

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.[20] 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.[21] 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.[22]

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 referendum, Ljubljana 2018, pp. 69-231.

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 a majority vote could affect fundamental constitutional values. Referendum decision-making is in such cases prohibited by the principle of constitutional democracy,[23] 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. [24]

Current constitutional arrangement excludes four groups of laws from referendum.[25] 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.[26] In line with new constitutional arrangement the Constitutional Court decided on

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.

permissibility to call a referendum in two instances, allowing to call a referendum in one case and rejecting the other.[27]

As an example of referendum decision-making on sensitive social issues, the following referendums are presented - namely the Family Code referendum,[28] carried out on 25 March 2012, and the referendum on Act Amending the Marriage and Family Relations Act (hereinafter ZZZDR-D),[29] 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 unconstitutionalities 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.[30]

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.

28 Relevant materials for preparation and adoption of Family code are available at: http://web.archive.org/web/20110926104357/www.mddsz.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. Zadravec, 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.

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 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.[31] 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."[32]

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

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.

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 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."[33] 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.[34]

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.[35] 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

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.

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.

The problem of referendums in Slovenia is the disinterest of voters in referendum outcome, commonly resulting in high voting abstinence.[36] 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.[37] 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."[38] 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.[39]

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.

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 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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The Advantages and Disadvantages of Italian Referendum Tools

Abstract: Direct democracy or pure democracy is a form of democracy in which people decide on policy initiatives directly. The article focuses the referendum as the main instrument of direct democracy in Italy and the main purpose of the analysis is to discuss the benefits and handicaps of Italian referendum tools. Particularly the abolishment of the quorum for the abrogative referendum that is the main goal for the development of the Italian direct democracy. The contribute demonstrate in eleven main reasons why the turnout requirement should be abolished: the vote should be free and decisive, meaning that citizens who participate in a referendum should be aware that their vote will be decisive, whereas those who choose not to go to the polls implicitly delegate their vote and decision to other voters. The future is the ongoing people's initiative referendum draft which provides just a very reasonable approval quorum of 25%.

Keywords: direct democracy, representative democracy, referendum, popular initiative, Italy

1. An Overview on the Italian Direct Democracy Field

Direct democracy may not always be the best – or paradoxically even the most democratic form of government, but sometimes it's a great breath of fresh air. The direct vote has an illustrious history in Italy, wherein 1946 a solemn referendum (in which women voted for the first time) abolished the monarchy that had ruled Italy since 1861 and established a republic[1]. A historic vote in 1974 roundly rejected a Catholic-sponsored referendum that would have struck down the new law

1 L. Komáromi, Representative Government and Direct Democracy. Italy and the Main Direct Democratic Traditions in Europe in the 19th-20th Centuries, "Iustum Aequum Salutare", 2014, no. 2, pp. 145-153.

permitting divorce. Since 1997, however, the voters have been called to the polls six times for numerous referendums, and a quorum has never been reached.

On 2016, April 17, Italian citizens voted the country's 67° popular referendum. The constitution allows for two types of binding referendums: abrogative and constitutional. How do they work, and how common are they? In 2016, January, Italy's Constitutional Court gave the green light to a national referendum on the duration of oil and gas drilling concessions in the country. It was the 67° abrogati[illegible]ndum of Italy's history, and (with three constitutional referendum, one ad[illegible]ry refe[illegible]ndum, and the institutional referendum) 72 in total. A referendum is [illegible] which an entire electorate is asked to vote on a particular proposal. [illegible]aly h[illegible]s two main types.

500.000 voters, or five regional councils (just i[illegible] 20[illegible] abo[illegible] gas drilling concessions), can ask to hold a general referendum t[illegible]peal, in [illegible]ole or in a part, a law or a measure having the force of law. In the Italian [illegible]stem, these referendums are referred to as "abrogative". They are consid[illegible]d valid as long as the majority of those with voting rights have voted. So far, 67 [illegible]brogati[illegible] referendum has taken place in Italy. 42% of them like 28 did not reach the r[illegible]uired [illegible]uorum.

The second most common typ[illegible] referendum in Italy is the so-called "constitutional referendum". Following [illegible]he [illegible]pp[illegible]oval of a law that modifies the constitution, either one-fifth of t[illegible]nem[illegible]rs of a House, or 500.000 voters, or five Regional Councils can requ[illegible]t a [illegible]opula[illegible] referendum to confirm the changes. This kind of referendum h[illegible]s n[illegible]uorum. The first constitutional referendum took place in 2001 (approve[illegible]and the [illegible]cond in 2006 (rejected). With the last rejected constitutional reform there [illegible]s the third constitutional referendum in 2016.

Besides these [illegible]wo types of [illegible]ferendums, Italy's history witnessed two exceptions. In 1946 Italian [illegible]zen[illegible] were asked to choose between monarchy and republic. In 1989 an advisory [illegible]feren[illegible]um [illegible]as held on the European Economic Community. The non-binding [illegible]here[illegible]dum w[illegible]s called with a special law because the Italian Constitution does not [illegible]k about this type of referendum. The Italian political spectrum wanted to re-affirm [illegible]e popular support of Italy to the process of European integration, particularly giving to the European Parliament a popular, constitutional mandate in event of a future European Constitution.

The main purpose of the article is to discuss the advantages and disadvantages of Italian referendum tools and particularly the research hypothesis is to demonstrate why the turnout requirement should be abolished waiting for the work in progress people's initiative referendum draft without the participation quorum.

2. Introduction: Participatory Democracy and New Challenges: the Crisis of Democracy

Direct democracy is characterized by the fact that the people are an organ of the state that, in addition to the classical electoral competences, exercises specific powers in constitutional, conventional, legislative or administrative matters. It is dependent or "domesticated" when the exercise of these powers depends on the [illegible]ntion or on the will of another state body, the Parliament or the Head of Stat[illegible] is inde[illegible]endent or "real" when the time and the issue on which the people int[illegible]vene[illegible] per[illegible] not on the will of the latter, or on an objective criterion on which [illegible]her [illegible]gans of the state have no influence. So defined, direct democracy does no[illegible]pose [illegible]t completes representative democracy[2].

Direct democracy has its roots as far back a[illegible]n [illegible]cient Athens and Rome[3], nevertheless, its history, which is characterized by the possi[illegible]ty to hold referendums and by popular initiative can be divided into [illegible]ur main periods: an ancient period, from the Middle Ages to early XX century; the[illegible]rst hal[illegible]f the XX century, from early to mid-XX century; the second half of the XX c[illegible]u[illegible]from 1950s until the collapse of the USSR; modern times from collap[illegible]e USSR to present day.

Nowadays, the institutes of direc[illegible]de[illegible]ocracy are embodied in almost all Constitutions of European co[illegible]es. [illegible]though direct democracy can be put into practice in a large varie[illegible] of f[illegible]ms, in general, there can be observed certain tendencies in the period of [illegible]od[illegible]imes. Issues of national importance are submitted to the voters for decisio[illegible]making [illegible]n optional referendum which is initiated by the governing bodies; it is [illegible]e [illegible]a of a further development of popular initiative[4].

Democracy is [illegible]experienci[illegible]a critical phase, marked by the low credibility of both politics a[illegible] de[illegible]ocratic institutions. The challenge is to identify new forms of public involve[illegible]t ai[illegible]ed at building confidence among citizens and restoring the credi[illegible]ty of i[illegible]utions. This is not an isolated, exclusively Italian issue, becaus[illegible]ever[illegible]her countries in Europe are faced with the same challenge. This is

2 A. Auer, [illegible]justice constitutionnelle et la démocratie référendaire – Rapport de synthèse, in AA.VV., Justice constitutionnelle et démocratie référendaire, Strasbourg 1995, p. 149.

3 D. Held, Models of Democracy, Cambridge 2006.

4 L. Morel, M. Qvortrup (eds.), The Routledge Handbook to Referendums and Direct Democracy, London 2018; D. Della Porta, M. Portos, F.V. O'Connor, Social Movements and Referendums from Below: Direct Democracy in the Neoliberal Crisis, Bristol 2017; M. Qvortup, Direct Democracy: a Comparative Study of the Theory and Practice of Government by the people, Manchester 2017; S.P. Ruth, Y. Welp, L. Whitehead, Let the People Rule? Direct Democracy in the Twenty-first Century, Colchester 2017; J. Asimakopoulos, Social Structures of Direct Democracy: on the Political Economy of Equality, Chicago 2015; D. Altman, Direct Democracy Worldwide, Cambridge 2014; M. Qvortup, Referendums Around the World: the Continued Growth of Direct Democracy, New York 2014; M. Suksi, Bringing in the People. A Comparison of Constitutional Forms and Practices of the Referendum, Dordrecht-Boston 1993.

accompanied by a constitutional debate at the scientific and political level aimed at developing new models of democratic involvement. The credibility of institutions is severely undermined by a number of factors, including the economic and financial crisis, the gap between politics and citizens, the scandals and corruption cases involving several parties and their representatives, and a distorted use of immunity. In Italy, an additional problem is represented by the electoral system in use, which assigns the choice of candidates entirely to party leaders and deprives voters of the chance to express their preference, thus widening the gap between voters and elected officials. Attacks on the political world, however, may result in unjust and prejudice, fuelled by the exploitation of discontent towards a caste of "Brahmans". Such prejudice may throw general discredit upon all, including those who actively pursue the common good, and embrace all policymakers, democratic institutions and the very foundations of democracy, thus triggering a very dangerous process.

A number of solutions are on the table. Seeking a broader involvement of all elements of society through a new form of "governance", pursuing increased autonomy, regionalism or federalism, or a more direct democracy, are options that vary in organizational terms but are aimed – each in its own distinct way – on a common goal: in this increasingly big and distant and globalized world, citizens wish to feel part of their community, find a new identity and afulfilling role at regional level; they wish to cooperate and actively pursue their interests, or – to use a more sentimental expression – find a new "Heimat", a safe place which they can call their own.

In this context, many traditional political concepts such as sovereignty, citizenship and democratic representation, based on reliance on a relatively homogeneous Nation State, were questioned.

In order to restore balance within society and rebuild the basis for democratic participation, constitutional reforms appear increasingly necessary. Such reforms should be adopted within individual States and at European level, through EU framework legislation[5].

Two opposing trends are influencing traditional State organization[6].On the one hand, we are experiencing closer cooperation at European/international level and witnessing the establishment of supranational bodies in Europe. On the other, those very supranational bodies, distant from the public, are the main reason behind the pursuit of a more manageable local dimension and a return to the local and regional level, where participatory democracy can be directly experienced. Politics is

5 R. Bellamy, V. Bufacchi, D. Castiglione, Democracy and Constitutional Culture in the Union of Europe, London 1995, p. 10.

6 *Ibidem.*

denationalized; the nation State is no longer the linchpin of political activity and the privileged space for political life[7].

3. Strong Principles and Parties Versus Weak Democracy and Parliament

Unlike other Mediterranean countries like Greece, Portugal, and Spain, Italy became a relatively stable democracy right after the Second World War. In the 1950s, Italy contributed to the establishment of the European Community and was one of its founding countries. It experienced a quick, if uneven, economic growth and a remarkable modernization process[8].From 1950 to 1990, the rise in Italy's per capita income was almost unparalleled. Its growth rate ranked second after South Korea. To make comparisons across Europe, by the end of that period per capita income had grown so rapidly that it was close to that of Germany and France[9].

Notwithstanding its exemplary Constitution based on profound ethical and democratic values, conceived by our Constitutional Fathers to spell out any dictatorial drift, Italy has a fragile democracy. It has an independent judiciary, a democratically elected parliament and a government based on parliamentary confidence; however, the three powers are not balanced. This imbalance is compounded by the fourth power where a quasi monopoly position prevails, especially in the broadcast industry[10].Parliament is increasingly constrained in the exercise of its functions as representative of the people by the predominance of Government. The latter resorts more and more frequently to emergency decrees, which Parliament can only amend and ratify a posteriori, and to the passage of bills through a vote of confidence, which stymies parliamentary debate and any chance to introduce amendments. Parliament is required to pass Government's so-called «maxi-emendamento», a text containing a number of different measures, without having any say on its content.

If we look at the world's major democracies, the United States is the only country where people's representation finds its central expression in Parliament. Pasquino

7 A. Scott, The Fragmentary State of the Twenty-first Century: an Elementary Conceptual Portrait, Indiana 2008, pp. 1-2.

8 M.J. Bull, M. Rhodes (eds.), Crisis and Transition in Italian Politics, London-Portland 2009, pp. 1-13.

9 M. De Cecco, Italy' Dysfunctional Political Economy, "West European Politics" 2009, no. 4, pp. 763-783; R. Dornbusch, W. Nölling, R. Layard (eds.), Postwar Economic Reconstruction and Lessons for the East Today, Cambridge-London, 1993; A. Boltho, A.Vercelli, H.Yoshikawa (eds.), Comparing Economic Systems: Italy and Japan, Basingstoke-New York 2001.

10 M. Hibberd, Conflict of Interest and Media Pluralism in Italian Broadcasting, "West European Politics" 2007, no. 4, pp. 881-902.

(2007) laments that the opposite is true in Italy[11]. The Italian Parliament only seems to play a central role when it passes the initial vote of confidence in the Government, and not in the Government's final stages, as is the case in Germany or Spain.

Unlike those democracies, Italy does not envisage a constructive vote of no-confidence. A number of governments replaced one another ov[illegible]nd every Government's end originated, in Pasquino's view, outside P[illegible]iament. One of the main weaknesses of Italian democracy has been a lac[illegible] of exe[illegible]ti[illegible] stability, especially before the 1993 electoral reform. From 1945 to [illegible]89 t[illegible]re wer[illegible] as many as 43 Governments, each lasting on average twelve mon[illegible]s. T[illegible] com[illegible]on objective of reforms was therefore to increase stability at central [illegible]ernmen[illegible]vel[12].

Moreover, the Parliament does not play the centra[illegible]ole it should in terms of political representation. It is constrained by [illegible]e Executive, on the one hand, and by political parties, on the other; in fact, th[illegible]atter pl[illegible] the leading role themselves. Before the major political corruption scan[illegible]ls of [illegible]he late 1990s and the 1993 electoral reform, a multitude of parti[illegible]isted in Italy, the most powerful being the «Democrazia Cristiana (DC)» (Chris[illegible]an [illegible]ocracy) party, which remained in power for fifty years (1944-199[illegible] with di[illegible]rent centrist coalitions.

4. The so-called F[illegible]st R[illegible]ublic and Second Republic

In spite of a succes[illegible] of governments, political stability, i.e. parties' stability, reigned. From t[illegible] end of th[illegible] war until the early 1990s, the Christian Democratic party was the [illegible]oliti[illegible] driving force which, along with four smaller allies (Socialists, Social-Democra[illegible] Rep[illegible]icans, and Liberals), determined the destiny of the Italian Republi[illegible]

T[illegible] po[illegible]ystem remained unchanged until the early 1990s when many prosecuto[illegible] uncovered wide-ranging political corruption involving the use of bribes to fund political parties[13].

The 1993 electoral laws[14] introduced a mixed system, whereby most seats were allocated under a plurality system (first past the post) and a smaller percentage by proportional representation. This paved the way to an adversary system in which political forces gravitated around two large right- and left-wing groups. With the new

11 G. Pasquino, Parlamentoe Governonel l'Italia repubblicana, "Rivista italiana di scienza politica", 2007, no. 1, p. 6.

12 S. Fabbrini (ed.), L'europeizzazione dell'Italia, Roma-Bari 2003, p. 205.

13 On Italy's transition from central to regional State: A. Grasse, Italiens langer Weg in den Regionalstaat: die Entstehung einer Staatsform im Spannungsfeld von Zentralismus und Föderalismus, Opladen 2000.

14 Laws August 4, 1993, no. 276 and no. 277.

2005 electoral law[15], the role of political parties was further strengthened[16].Single-member constituencies were abolished: a new proportional system presenting voters with a closed list of candidates has replaced the old system based on preferential votes. Voters can only express a preference for a list but not for a specific candidate, as candidates are chosen and assigned a certain position in the list by the party leader. As a result, about 90% of MPs are chosen by party leaders. As Sartori pointed out nearly fifty-five years ago, in 1963, MPs are more afraid of alienating party leaders thanvoters[17]. As evidence of this, Pasquino stressed that Italy's leading politicians traditionally make their most important speeches at party meetings. None of the major political leaders comes from a parliamentary background. De Gasperi, Togliatti, Nenni, Fanfani, Moro, Craxi, De Mita and Andreotti are cases in point. So are, Pasquino says, a few heads of government lacking parliamentary experience, like Berlusconi, Prodi, Renzi, and, lastly, Conte[18].

After a long period when Italy's Governments and Parliaments, unlike those of other countries, did not deem it necessary to revise the Constitution, in the 1980s policy-makers realized that the State and the Constitution needed reforming. After several failed attempts, the Constitution was revised in 2001, with the sole amendment of Title V, Part II. The weakness of direct democracy tools was there to stay.

5. The Direct Democracy in Italy

In accordance with Art. 1, second para., of the Constitution, the Italian democracy remains a primarily representative democracy[19].

Early forms of direct democracy – for the purposes of supplementing indirect democracy – were introduced in Switzerland as early as the 19th Century and were later enhanced and extended. Through hundreds of *referendums* held over more than 100 years, Swiss citizens have learned to make decisions on important political matters at federal, cantonal and municipal level[20].

In Italy, however, direct public involvement tools are limited to three, only partially developed, tools. Italy's direct democracy tools are: a) referendum; b) petition; c) legislative initiative.

15 Law December 21, 2005, no. 270.
16 L. Bardi, Electoral Change and its Impact on the Party System in Italy, "Western European Politics" 2009, no. 4, pp. 711-732.
17 G. Sartori, Dove va il Parlamento?, Napoli 1963, pp. 281-386.
18 G. Pasquino, Parlamento e Governo…, *op. cit.*, p. 7-9.
19 A. Barbera, C.Fusaro, Corso di diritto pubblico, Bologna 2010, pp. 211ff.
20 B. Kaufmann, R. Büchi, N. Braun, Handbuch zur Direkten Demokratie, Marburg 2008, p. 11.

5.1. The Referendum

In Italy, referendums are often identified with referendums to repeal laws, the first of which was held 38 years ago. The 1974 referendum on divorce was followed by 66 more referendums grouped in 17 voting days till, lastly, in 2016 on oil drilling[21].

All were referendums designed to repeal laws[22]. In an actual modern direct democracy, this should not be the sole type of referendum in use and certainly not the most important one. Direct democracy is an encompassing notion that should go beyond such constraints. The 1947 Constituent Assembly did not provide Italian voters with such tools as citizens' binding legislative initiative and optional confirmatory referendum for ordinary State laws, or citizens' constitutional initiative. Now that the Italian Republic is in its sixties, it is time to address this shortcoming.

The Constitution provides for the referendum at national, regional and local level:

a) constitutional referendum (Art. 138(2) and (3) of the Constitution);
b) referendum to repeal a law or a measure having the force of law (Art. 75 of the Constitution);
c) territorial referendum (Art. 132 of the Constitution: for the merger of existing Regions or the creation of new Regions; Art. 132(2): to enable one or more provinces or municipalities to be merged into another Region)[23];
d) regional referendum on regional legislation and administrative measures (Art. 123(1) of the Constitution);
e) regional referendum on the regional charter (Art. 123(3) of the Constitution);
f) local referendum on matters under the sole local jurisdiction (Arts. 6 and 8 TUEL)[24]; on the establishment of the metropolitan city (Art. 23 TUEL; Art. 23 of law 5 May 2009, no. 42).

We shall focus on the first two tools and those that are lacking at the national level.

21 This part of the study is based on the report accompanying constitutional Senate bill no. 1428 by Peterlini and others, tabled before the Senate on March 4, 2009 and drafted in cooperation with the Bolzano representatives of "Democrazia diretta", Benedikter and Lausch.

22 Besides these, two confirmatory constitutional referendums were held, in 2001, 2006 and 2016, and one consultative referendum in 1989 (based on constitutional Law April 3, 1989, no. 2) giving to the European Parliament a popular, constitutional mandate.

23 F. Ratto Trabucco, Riflessioni sulla prima attuazione dell'art. 132, secondo comma, Cost., dopo sessantuno anni di vita: l'esame del disegno di legge di variazione territoriale regionale e l'acquisizione dei pareri regionali sulla scorta del "caso Alta Valmarecchia", "Le Istituzioni del federalismo" 2009, no. 3-4, pp. 603-628; *Ibidem*, Sulla presunta incostituzionalità del quorum della maggioranza assoluta sugli iscritti alle liste elettorali per i referendum territoriali ex art. 132 Cost., "Le Istituzioni del federalismo", 2007, no. 6, pp. 843-869.

24 TUEL: Consolidation Law on Local Government (Legislative Decree, August 18, 2000, no. 267).

5.2. The Constitutional Referendum

The Art. 138 of the Italian Constitution runs:

«1. A law to amend the Constitution and other constitutional laws shall require adoption by each House after two successive debates at intervals of no less than three months, and approval by an absolute majority of the members of each House in the second round.

2. Such law may be submitted to a popular referendum if, within three months of its publication, such request is made by one-fifth of the members of a House or five-hundred thousand voters or five Regional Councils. A law thus submitted to referendum may not be promulgated unless approved by a majority of valid votes.

3. A constitutional law which was passed in each House by a two-thirds majority of votes in the second round may not be put to the referendum».

No quorum/minimum turnout is required for the referendum to be valid. Three constitutional confirmatory referendums were held respectively in 2001 (on amendments to the Constitution submitted by the Amato Government), 2006 (on the amendments submitted by the second Berlusconi Government) and 2016 (on the amendments submitted by the Renzi Government). In line with the provisions regulating this type of referendum, no minimum turnout requirement was in force, although the three referendums concerned matters of the utmost importance, i.e. substantial constitutional amendments. In this sense, they represented the true essence of the tool of the referendum as implemented in other countries, where the outcome is determined by those who go to the polls, while those who choose to abstain implicitly delegate their decision-making power to the actual voters.

5.3. The Referendum to Repeal Laws

The Art. 75 of the Italian Constitution runs:

«1. A general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils.

2. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty.

3. Any citizen entitled to vote for the Chamber of Deputies has the right to vote in a referendum.

4. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved.

5. The procedures for holding a referendum are established by law».

This type of referendum seems to have long entered into a critical phase, not because of a lack of hot political issues or public involvement, but because of a repeated failure to reach the minimum turnout. Except for the 2011 referendum

on nuclear power, water, privatizations and legitimate impediment (a law whereby cabinet members facing trials could be exempted from appearing in court on account of political engagements), the previous six referendums (and last in 2016), held between 1997 and 2009 and involving 24 different items, were declared invalid for failure to reach the required quorum. Turnout was between 49 % (1999) and 23.8% (in 2009), which resulted in a progressive loss of confidence in the referendum tool. The fact that referendums have generally been owned by parties, rather than promoted by citizens, associations and *ad hoc* committees may also explain people's estrangement. Furthermore, some parties ran abstention campaigns advising their supporters not to go to the polls, and later repeatedly voted in Parliament to thwart the outcome of the referendum. The tool itself is inappropriate, and so are the rules for its implementation, which are not in line with the needs of a modern direct democracy. This type of referendum, with its restrictive implementation criteria – the quorum requirement – is inadequate in terms of ensuring public involvement.

5.4. The Citizens' Legislative Initiative

The Art. 71 of the Italian Constitution [illegible]

«1. Legislation may be introduced by the Government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law.

2. The people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty-thousand voters».

In Italy, the citizens' right to introduce legislation, i.e. the free and constructive expression of the will of the sovereign people, which can result in referendums on important bills signed by hundreds of thousands of people, is on the wane. The tool currently in force – the citizens' legislative initiative – does not ensure the full enjoyment of the right. Proposals that may have required huge efforts in terms of the collection of signatures in order to be submitted cannot be put to the vote if they are rejected by Parliament. Many such bills are not even discussed in Parliament. Over 90% of bills submitted during the 1996-2001 term still await consideration, not to mention those submitted after 2002.

Just recently in the current XVIII legislature, the government by Five Stars Movement and Ligue for Salvini's Party proposed the popular initiative constitutional reform draft that also introduces the reduction of the quorum at 25% of favorable votes with the abolishment of the distortive participation quorum[25]. The approval quorum is therefore intended to discourage the practice of abstention as a useful tool, to those who oppose the content of a referendum, to invalidate the consultation. But what would happen if the Chambers, following the parliamentary debate, had to

25 See http://www.camera.it/leg18/126?leg=18&idDocumento=726.

approve a proposal that was partially different from the original one presented by the citizens? In this case, if the proposing committee does not renounce the original text, a referendum is indexed both on the initial text and on that approved by Parliament: if both proposals are approved, the law that has obtained more preferences is promulgated. Citizens who express themselves favorably to both proposals are entitled to indicate which of the two texts they prefer.

The proposal also provides for limits to the matters that may be the object of a proactive referendum. For example, a referendum will not be held if the proposal violates the intangible constitutional rights or if it does not provide adequate financial coverage.

5.5. Lessons Learned from 44 Years of Italian Referendums to Repeal Laws

After 44 years of referendums to repeal laws in the Italian constitutional practice, three main lessons may be drawn.

In Italy today there is a shortage of referendum-related rights, i.e. the main tools that are commonly found in a mature direct democracy system are lacking. These are citizens' legislative initiative and optional confirmatory referendum also for ordinary laws. Citizens' right of initiative to amend the Constitution is also lacking. This was the first right claimed and ultimately secured by the Swiss popular movement for direct democracy in 1860 and is also to be found in the United States system as of the early 1900s.

The rules regulating referendum-related rights are too restrictive. Several provisions of Law 25 May 1970, no. 352, regulating referendums should be amended, namely: the power of the constitutional court is too broad, a referendum may not be held on the same day as an election, there is no guarantee on its outcome, signatures must be certified by a public official, no campaign refund is available for the organizing committee, there is no obligation on public authorities to inform voters, referendum campaign funding totally lacks transparency and there is no cap on the collection of funds.

The minimum turnout set at 50% of registered voters is useless and damaging because it has eroded the credibility of this tool and millions of Italians do not even bother to go to the polling station anymore one referendum day. The minimum turnout rule means that abstentions are counted together with the noes, which makes it very easy for parties or vested interests opposing a referendum to tacitly coalesce with the uninterested by inviting voters to go to the seaside or to the mountains on a voting day, rather than to the polling booth. Today, what with people's frustration and longing for strong government, politician-bashing and voting for strong leaders have become more appealing than striving to strengthen the tools that put more power in the hands of citizens.

6. Conclusions

If the goal is to bridge the gap between citizens and government, or citizens and political parties, the present direct democracy arrangements are to be changed. If political engagement is to be promoted under the fourth para. of Art. 118 of the Constitution and the positive effects of direct democracy are to unfold, the relevant articles of the Constitution must be revised, including Arts. 73, 75 and 138, with a view to facilitating recourse to a referendum.

My comments on and criticism of the present unsatisfactory provisions on direct democracy in Italy have informed a bill submitted to the Senate of the Republic in 2009. In cooperation with the Bolzano-based Movement Initiative for More Democracy, there a draft for a constitutional amendment bill, which was co-signed by eight more senators[26]. The constitutional bill no. 1428 proposes to amend Arts. 70, 71, 73, 74, and 75 of the Constitution and strengthening citizens' initiative[27].

A commitment to strengthen participatory democracy should move from the following key issues.

6.1. Providing Voters with Throttle and Brake

First of all, the present narrow notion of direct democracy should be overcome. Citizens should be vested with equal legislative power, through the two main tools of a fully accomplished system of direct democracy: the legislative initiative to provide citizens with a capacity for action and optional confirmatory referendum to enable citizens to halt legislation which does not enjoy the support of a majority of voters. This means providing voters with both throttle and brake. They may thus use the throttle pedal when urgent reforms are not being introduced or are not making progress in Parliament or push the brake pedal when the parliamentary majority seeks to impose its policies on a supposedly unconvinced public. These two rights were unjustly overlooked in the Constituent Assembly in 1947-1948. Today, a referendum cannot be solely used as a defense tool, as foreseen by the Constituent Assembly, but it should be considered the most important vehicle to promote political engagement under the fourth para. of Art. 118 of the Constitution, whereby «The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiative of citizens, both as individuals and as members of associations, in the framework of activities of general interest, on the basis of the principle of subsidiarity». Referendums to repeal laws have been used for 30 years as a surrogate for citizens' initiative, i.e. the legislative referendum, but on the basis of the experience in Italy and elsewhere, they may not be used to propose legislation, as was clearly

26 Senate constitutional bill no. 1428 of March 4, 2009 by Peterlini, Ceccanti, Negri, Pinzger, Poretti, Procacci, Adamo and Perduca.

27 T. Benedikter, Più democrazia per l'Europa: la nuova iniziativa dei cittadini europei e proposte per un'Unione europea più democratica, Lavis 2010, pp. 123-134.

shown recently when all the efforts made to change the electoral law were nullified by the ruling of the constitutional court, which declared the referendum question not receivable[28]. Citizens need a space for action and appropriate direct democracy tools to guide policies and Government action.

6.2. More Transparent and Simpler Tools and Procedures

Implementation rules should be redesigned so as to expand democracy, to meet the requirements of the modern citizen by, amongst other things, limiting the power of the constitutional court; increasing the sectors which can be regulated by referendum – e.g. by including foreign and tax policies; introducing an obligation to deliver an official information booklet to every family; adopting stricter rules on equal access to the media, introducing caps on campaign and counter-campaign spending; mandating full transparency of funding; liberalizing the collection of signatures and so on.

The problem today lies not in the proliferation of referendums, owing to the accessibility of such tool. The problem lies in the fact that Italian citizens today, in their communes, regions and at the national level, do not see direct democracy as an ordinary tool of democratic debate and engagement. Referendums should be given the same role as they have enjoyed for centuries in other democratic societies: they should be an expression of the will of the people, free of political party brokerage.

Referendums would thus assume a new political role – beyond the political composition of Parliament, which reflects a given historical moment – and would supplement representative democracy in a proactive (legislative) or reactive (confirmatory) way[29]. The present form of the referendum to repeal a law would thus be subsumed in the broader legislative referendum, or citizens' initiative, only aimed at deleting a provision rather than introducing or amending one.

6.3. The Citizens' Legislative Initiative

One of the main reasons to strengthen the tool of the referendum (in its dual capacity as a tool to introduce citizens' bills and to confirm laws and legislative amendments) is the need to open new spaces for public involvement by fully implementing the fourth para. of Art. 118 of the Constitution and restoring the thrust of an active involvement for the common good.

Citizens' initiative, as presently regulated, lacks the impact in democratic life that it deserves, because it does not commit Parliament to take follow-up action, as is amply demonstrated by the number of citizens' bills submitted to Parliament over the last few years. Most of these proposals, even ten years after their submission, still await

28 Constitutional court, ruling January 12, 2012, no. 13.

29 A. Capretti, Direkte Demokratie in Italien, in H.K. Heussner, O. Jung (eds.), Mehr direkte Demokratie wagen. Volksentscheid und Bürgerentscheid: Geschichte, Praxis, Vorschläge, Munich 2009, pp. 170-171.

the response. Also at the regional level, the legislative initiative has failed to motivate citizens and is therefore rarely used, again because the public has no further say in the matter if their proposal is rejected or indefinitely put on the back-burner by the regional council. For this reason, a region and one district with special status (Friuli-Venezia Giulia and the autonomous districts of Trento) have introduced legislation whereby the local legislative assemblies have an obligation to c[illegible] a proposal submitted by the citizens within a certain timeframe, failing w[illegible]ch the [illegible]izens' bill is automatically put to the vote by referendum. This arrang[illegible]ment, [illegible]owe[illegible]r, has one major shortcoming, in that it fails to vest actual legisla[illegible]ve p[illegible]wer [illegible] the citizens. The autonomous region of Valle d'Aosta and the auto[illegible]mous di[illegible]rict of Bolzano have rightly gone further: the legislative initiative h[illegible] been c[illegible]f[illegible]red on the citizens through a procedure whereby a quorum of sig[illegible]te[illegible]s may introduce a properly drafted bill to their respective regional/provincial legisla[illegible] council. Should such bill fail to progress through the council – in pa[illegible]or substantially – it would automatically be put to a referendum. This arrangement, [illegible]ong wi[illegible] the optional confirmatory and constitutional referendum, is the main direct [illegible]mo[illegible]acy tool that has worked – to the full satisfaction of the people – for 1[illegible]s at all levels of government in Switzerland and for over 100 years at State and c[illegible] le[illegible]l in 26 US States. Parliament must enjoy a right to submit its own alter[illegible]e pr[illegible]osal. With respect to any type of referendum on any eligible topic, Parlia[illegible]ent [illegible]ould [illegible]e entitled to consider a draft measure which is neither that of citizen[illegible] n[illegible]e status quo and which might be at the opposite end of the citizens' prop[illegible]l. Such [illegible]raft measure by Parliament would thus be a third option laid before [illegible]ize[illegible]. If Parliament passes its own proposal, then the committee of initiators (co[illegible]sisting of [illegible]e citizens enjoying voting rights under this bill) shall vote on whet[illegible]er to [illegible]ithdraw their bill or to put it to the general vote. It would be up to the commi[illegible] to d[illegible]de whether the bill passed by Parliament incorporates the princip[illegible]d go[illegible] the measure proposed by the citizens or is totally different to the c[illegible]zens' [illegible]roposal.

B[illegible]se both proposals might obtain a majority of valid votes, a casting question should al[illegible]be posted on the ballot paper, such as: «Which of the two proposals should take effect if both are preferred over the existing law?». If both the citizens' and Parliament's proposals are approved, this third question would define the outcome of the vote. Should neither proposal obtain a majority in the replies to the third question, the popular initiative would be rejected and the existing law would remain in force. Such an exercise – even if inconsequential in terms of amending the legislation – would provide Parliament with a clear indication of the will of the people, which should be taken into account in future reviews of the subject matter.

6.4. The Optional Confirmatory Referendum

An optional confirmatory referendum is only admitted in the Italian constitutional system in cases of amendments to the Constitution. Such a tool should

be extended to ordinary State laws. Both in theory and in the long-established practice of countries with a modern system of direct democracy, this tool provides the public with an emergency brake. Under the proposed law, a certain number of citizens or five regional councils may sign a petition requesting that a law that has been passed but has not yet entered into force be swiftly subjected to a referendum in which all voters take part. The sole exception to this is the Budget Law. This arrangement, which is widely used in Switzerland and the US, vests confirmatory and veto power in the citizens. Requesting a confirmatory referendum simply means that there are strong doubts on the correspondence of views between the public and the majority in Parliament. The tool also enables Members of Parliament to confirm that their proposal for the regulation of a given subject is supported by the people.

The bill to amend the second para. of Art. 75 of the Constitution would enable the enactment of urgent legislation for a short period of time. Such legislation may be challenged by an optional confirmatory referendum. The new para. of the Constitution should read «If Parliament declares a law to be urgent, such law shall be enacted by the deadline provided therein». A confirmatory referendum under Art. 74 above may be requested only after the law has entered into force. If a confirmatory referendum is held and an outcome unfavorable to the law is returned, such law shall be repealed within a year of its passage by Parliament and may not be introduced again». This measure would comply with Parliament's need to adopt urgent measures. A law thus passed would enter into and remain in force until the optional confirmatory referendum is completed. If it fails the test of the referendum, the law is repealed, as is presently the case with laws repealed by referendum. Once voters have rejected such urgent measure, the law may not be proposed again, thus ensuring that the will of the people is complied with.

6.5. The Citizens' Constitutional Initiative

Constitutional amendments proposed by citizens should follow a more complex process than ordinary laws. A properly drafted constitutional amendment bill is to be supported by no less than 50 thousand sponsors whose signatures are to be gathered within no longer than six months. Once this stage has been completed, a pre-test is conducted to assess whether the proposal is receivable. After this, one million signatures are required. By introducing a two-stage process, the frustrating experience of many organizing committees to see their proposals rejected by the constitutional court after one million signatures have been collected would be avoided. Under this proposed procedure, 50 thousand voters would be entitled to submit their constitutional amendment bill to the constitutional court for a receivability assessment. Once this certainty has been obtained, the organizing committee may engage fully in the collection of one million signatures. Also, in this case, Parliament may introduce an alternative proposal, which would be submitted to voters under the same procedure as ordinary laws.

6.6. Why the Turnout Requirement Should be Abolished?

The bill proposes an amendment whereby – in all referendums – the proposal put to the vote is passed if it is approved by a majority of valid votes cast. The vote should be free and decisive, meaning that citizens who participate in a referendum should be aware that their vote will be decisive, whereas those who choose not to go to the polls implicitly delegate their vote and decision to other voters. Why would the abolition of the turnout requirement make sense? The main reasons are the following.

A) Abstaining is the same as voting "No".

Because of the turnout requirement, a voter not going to the polling booth is actually casting a vote against, even though there might be a number of different reasons why a person may be prevented from voting: a lack of knowledge on the subject matter of the referendum, indecisiveness, lack of interest, and many other personal reasons. Though these can be good reasons to abstain or not go to the polling station in a referendum, they would not imply a vote against as only valid votes for parties and candidates are counted. Therefore non-participation in a referendum ought to be considered as such, i.e. an abstention without any consequence on the final outcome.

B) The turnout requirement may be used in a manipulative way.

Boycotting a referendum may easily result in a turnout lower than 50%, that is below the threshold required for the outcome of the vote to be valid. Thus, referendum opponents exploit this mechanism to try to invalidate the outcome by urging voters in their camp to abstain so as to add their number to those who would not vote anyway. By resorting to this practice they do not need to put forward alternative arguments or proposals to convince voters; they can confine themselves to calling for a vote boycott. But, if no minimum turnout is required, then both proponents and opponents are obliged to make their point in order to convince a majority of voters.

C) The turnout requirement rewards lack interest in politics and penalize citizens who are committed to democracy.

Politically active citizens endeavor to be well informed and to form their own opinions ahead of the vote. Uninterested people and advocates of vote boycotting simply do not go to the polls. If a referendum fails to owe to a failure to reach the minimum turnout required, involved citizens are penalized while boycotters and uninterested people are rewarded for a choice that effectively prevents a meaningful democratic debate.

D) Vote secrecy may be jeopardized.

The right to a secret ballot is somehow infringed by the turnout requirement. A voter who goes to the polling station against all calls to boycott the vote is automatically viewed as an antagonist by referendum opponents.

E) No minimum turnout is required for constitutional referendums.

Confirmatory referendums both on laws amending the Constitution (Art. 138, second para., of the Constitution) and on legislation concerning the form of government at the local level (Art. 123, third para. of Constitution, e.g. election laws and laws regulating direct democracy) need not meet a turnout requirement.

F) Elections do not require a minimum turnout to be valid.

No minimum turnout is needed in any election at any level. Only actual voters decide.

G) No risk that a minority may gain the upper hand.

Fears that a small but very active minority might pursue their own interest and impose their choice to a passive majority are unjustified. Research into voters' behavior has shown that in any controversial vote turnout is high and the majority of citizens clearly express their rejection of the minority's proposition on the ballot paper. At any rate parties and unions, who claim to represent the majority of society, are free to mobilize their supporters and urge them to vote against a referendum that is thought to reflect minority interests.

H) In the United States and Switzerland no minimum turnout is required.

In Switzerland, the United States, and many other countries there is no minimum turnout requirement. Though referendum participation levels in Switzerland traditionally fluctuate only around 40%, no political party has ever really demanded a quorum rule knowing that this would open the way to political manipulation and tactical maneuvering.

I) Moderate turnout levels are required in Germany.

There are Germans who complain about the "high" turnout required in their country even though it is actually quite low when compared to Italy's. In Bavaria, Hesse, and Saxony *Länder* ordinary laws are passed by a simple majority and no quorum is required. In all remaining German States, minimum turnout or approval rate must be met, ranging between 15 and 33%, with the sole exception of Saarland where a 50% turnout has to be reached. Higher requirements have been set in Germany for the approval of constitutional referendums, unlike Italy where no quorum is required in this type of referendum. In Bavaria, for example, 25% of registered voters must cast a "Yes" vote, while the approval threshold is 50% in almost all remaining States, but just for constitutional decisions[30].

J) Direct democracy promotes citizens' involvement.

Direct democracy is meant to promote citizens' participation rather than discourage it. One of its main goals is to encourage citizens' involvement under Art. 118(4) of the Constitution. A high degree of involvement cannot

30 B. Kaufmann, R. Büchi, N. Braun, Handbuch…, *op. cit.*, p. 245.

be reached by imposing legal obligations to meet a certain turnout. Thus, uninterested citizens would not be persuaded to vote because a quorum is required: quite the reverse. Having repeatedly seen referendums fail owing to low turnout, interested and motivated citizens eventually feel frustrated and lose confidence in this democratic tool as they are confronted with the boycott of other citizens. It is a vicious circle. Though originally intended as a way to encourage participation, today the turnout requirement is undeniably stifling debate and deterring engagement. This mechanism penalizes social minorities more than anyone else as they cannot reach out to the wider public.

K) The turnout requirement is the result of a lack of confidence in the people.

Referendums today are tools for active participation rather than mere «defense of last resort». Any direct democracy procedure should aim at encouraging communication at all levels whereas participation thresholds and calls to boycott a referendum effectively hamper proper communication. It is easier to elude debate by inducing citizens not to vote than to face open public debate and a vote without a quorum.

The 50% turnout threshold is not a fundamental provision of the Italian constitutional system. In fact it is only applicable to one of two types of national referendums. Taking other countries' successful models as an example, Italy can today abolish the quorum in national referendums as well as in regional and municipal ones.

However, the abolition of the turnout requirement must be accompanied by the introduction of another extremely important provision, i.e. the need to obtain a majority of valid votes both nationwide and in most regions. This new provision is meant to reflect the general course taken by the Italian political system towards a more accomplished regional state and to avoid a geographically imbalanced outcome of the referendum in which votes in favor may be concentrated in just a few regions. For example, a referendum approved in the 8 Northern regions would not pass because a majority would be needed in at least 11 out of 20 regions.

6.7. Raising the Majority Required to Pass Constitutional Amendments to 60%

The majority electoral system calls for a revision of the majority required to pass constitutional amendment bills in the second vote. This should be increased from 50 to 60%, so as to avoid that constitutional amendments with far-reaching consequences for our legal system are passed by government MPs without the support of a larger majority in Parliament. At the same time, the majority required for these laws not to be put to the referendum would be raised from two-thirds to three-fourths of the members of each House.

6.8. The Direct Democracy Bills Submitted in the Two Last Parliament Legislatures

In the XVI Parliament legislature (2008-2013), according to an agreement between the Presiding Officers of the Chamber of Deputies and the Senate reached at beginning of the term, constitutional amendment bills have first to be passed in the Senate. Eight bills on direct democracy tools had been considered and discussed in the Senate Constitutional Affairs Committee, owing to a lack of political will by right majority parties[31].

In the last XVII Parliament legislature (2013-2018) there was a lack of interest in this topic with just bills on direct democracy tools presented in the Deputies Chamber Constitutional Affairs Committee but without any discussion before the end of the legislature, again for the owing to a lack of political will by left majority parties[32].

We can only hope that people will raise its voice and reform efforts will finally be examined in the current XVIII legislature (2018-2023). However with the people's initiative referendum draft above mentioned some questions are mandatory. Will the new referendum that the majority wants to include in the Constitution will be a tool in the hands of the lobbies? A weapon in the hands of «500 thousand signing professionals», as denounced by the opposition during the general discussion that opened January 16, 2019[33]. The parliamentary minority has reiterated that among the reserves on the limits of the subjects that can be submitted to a referendum. Limits at the moment very permissive. The alarm concerns the possibility of subjecting the spending laws and the criminal laws to the vote. Really, without corrective measures, Italy risks a Polish or Peronist 'drift'? Surely and finally the lobbies will be revealed. So far they moved in the total shadow.

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31 Out of 124 bills under consideration in the Constitutional Affairs Committee of Senate, six are related to direct democracy.

32 Deputies Chamber constitutional bill no. 3124 of May 19, 2015 by Fraccaro and others and Deputies Chamber ordinary bill no. 4136 of November 4, 2016 by Mucci and others.

33 See http://www.camera.it/leg18/126?tab=5&leg=18&idDocumento=726&sede=&tipo=.

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Referendum on Tax Legislation of Georgia

Abstract: Democracy is the only form of governance, which historically gives people the opportunity to participate in state-run activities from the time of its immediate implementation. Article 5 of the Constitution of Georgia explains that people are the source of state power in Georgia and they exercise their power through a referendum, other forms of democracy and its representatives. The referendum in Georgia has a contemporary history, however, it should be mentioned, that its practical use is not systemic. From 2013, Article 94 of the Constitution of Georgia has made it possible to conduct a referendum regarding the issue of the introduction of taxation. Namely, according to Paragraph 4 of Article 94 of the Constitution of Georgia, "the introduction of a new type of state tax, except for excise or the increase in the upper limit of the existing rate in accordance with the type of general taxes, is possible only through a referendum, except for the cases envisaged by the Organic Law". The purpose of the referendum issue is to promote greater involvement in public administration in Georgia, especially in terms of improvement of tax legislation.
Keywords: referendum, tax legislation, Constitution of Georgia

1. Introduction

The appointment of a referendum on taxation is quite rare in jurisprudence. The history of a referendum in general is also rare for Georgia. During the referendum it is necessary to take into account the fact that the society should be informed about the tax issues discussed in a referendum. This function is performed by LEPL Revenue Service, the part of the Ministry of Finance that gives information about any changes in respect of Georgian economy and taxes, although, Article 94 of the Constitution has not yet come into force. The involvement of such a form in a lawmaking process is obviously a democratic process of state governance, however, it may also have a negative side – a possible reduction of the legislative function, what was stated by

the Venice Commission in its conclusion, when the current government presented a package of constitutional amendments.

Although, the government did not make constitutional amendments related to Article 94 of the Constitution, the Venice Commission, while discussing the other amendments, devoted an entire chapter in the conclusion on constitutional amendments, explaining that this Article transforms the principle of "taxation inadmissibility"[1] without representatives into the principle of "taxation inadmissibility without a referendum". Moreover, the appointment of a referendum on these issues can be initiated only by the Government, and the Parliament again appears to be totally excluded from the process of the establishment of a new type of tax and the upper threshold of existing taxes. The Venice Commission believes that it would be better if the Parliament first decided to introduce a new tax or raise the upper limit of existing taxes, and only after that the Parliament's decision should be presented to the population. The referendum may be appointed by the Parliament or the President.

The goal of the research is to cover the history of referendum in Georgia and analyze the prospects of holding referendum in respect of tax legislation.

The hypothesis of research is the following – to find out how practical it will be to hold a referendum on tax law in Georgia and degrades it or not the main function of the parliament – lawmaking. Due to the topic of the article, the historical facts related to referendum and analysis of legislative material are mainly used as the research methods.

2. History of referendum

State governance systems are constantly facing new challenges and tasks in the rapidly and dynamically changing world of XXI century. The modern state management is impossible without such categories and institutions as democracy, recognition of rights and freedom, election system, public governance, referendum, etc. Every innovation passes through one of the most important parameters – the protection of human rights and freedom and the promotion of human welfare. Therefore, the present topic itself includes a wide range of relationships.

A large part of modern society is actively involved in state management both in direct and indirect forms. Democracy, as the best form of governance, has found universal recognition. The management mechanism of democracy is based on the principles of public administration. The main task of our article deals with the discussion of one of the most important events in public administration – a referendum, which is also regarded as an important freedom of people's will expression.

1 The Conclusion of the Venice Commission On the Need For Referendum On Tax Increases, http://tbl.ge/2dh6 (access 26.10.2018).

Article 5 of the Constitution of Georgia explains that people are the source of state power in Georgia and they exercise their power through a referendum, other forms of democracy and its representatives.

A referendum (Referendum – „something to be reffered") implies a universal-popular vote (voters poll) on any serious issue in state or public opinion. If we begin to consider the referendum in a direct democracy prism, it can be attributed to the type of "semi-direct" democracy. Such an opinion is shared, for example, by a Russian scientist V. Maklakov in his work "Voting Rights and Systems in the Bourgeois and Developed Countries", where the author refers to a referendum as an intermediate system that exists between the direct and representative governance democratic systems[2].

Democracy is the only form of governance, which historically gives people the opportunity to participate in state-run activities from the time of its immediate implementation. A French educator Jean-Jacques Rousseau noted in his treatise "Public Agreement" that democracy is necessary for a society; the law-abiding by a society is possible when people are involved in the lawmaking process themselves, what, in its turn, implies the existence of a law as a politically free phenomenon[3].

Today in XXI century, the state administration is mostly based on solid democratic institutions, as a result of which the public has an opportunity to actively participate in state administration. From this point of view, the elections and electoral politics are the most obvious and direct means of expressing the sovereign will of people. At the same time, there is another effective option that is very important for the opinions and views of the public. This is a referendum.

The referendum, as the form of active and special participation in the public management process, is not a new phenomenon, and it has long been tested in different countries. For example, a referendum was held in France after the Great Revolution.

The "homeland" of referendum is considered to be Switzerland, where Public Governance has already existed in the period of the country unification in cantons on such ancient lands as Appenzell-Auseroden and Inorden in the cantons of Urs, Schwyz, Obwalden and Nidwalden and Glarus. Virtually, the full implementation of the Public Governance proceeded there. This form of governance was limited only by the power of the German Emperor, but this restriction was insignificant and became fictitious later.

Since XIII-XIV centuries, the residents of these cantons had been adopting their laws at the peaceful meetings. The First World Assembly took place in Schwyz in

2 V.V. Maklakov, Suffrage and electoral systems of bourgeois and developing countries; M., 1987, p. 56.

3 D. Lachubidze-Khoperia, Jean-Jacques Rousseau "Public Contract" Tb. CIPDD 1997 Caucasian Institute of Peace, Democracy and Development.

1294[4]. Based on the authority of the Emperor's family, the Assembly made important decisions. According to these decisions, nobody sold their property to monasteries and foreigners because of the fear of high taxes. The Schwyz Assembly tried to protect its society from pressure of the nobility and clergy. In general, peacekeeping associations functioned in two forms: planned and unplanned (emergency). Bills were initiated by both the Cantonese Council and a certain number of citizens.

The first referendum in the world was held in the Canton of Bern in 1449. When France conquered Switzerland in 1798, a new Swiss Constitution was adopted, which, along with other restrictions, imposed the ones on public participation in legislative processes. The Swiss politicians tried to explain this actionby the fact that it is easy to impose a specific idea to people and make them interested in it, and therefore, such a mass can be easily manipulated, while the legislature provides a comprehensive study and analysis of this problem through its activity, on the basis of which the best option of its legitimization is selected. The population cannot perform such a function, so it should be done by a delegated board or other similar institutions[5].

A similar idea was shared by a well-known educator of the time, Welt, who believed that it is necessary to objectively and critically evaluate the ability of the institution,which makes claims bout lawmaking, to implement this idea in the best way.

In the United States, a referendum was transformed into the Constitutional Act during XIX-XX centuries. Although the first referendum in the United States took place in 1640, the institution of the referendum, as a direct legislative initiative, became a part of real political life in a few states only in 1898[6].

Despite some cases of direct democracy, the referendum, as an institution, has entered Europe since 1918, in particular, after the First World War, when the wave of democratization (the women's involvement in elections, the implementation of proportional suffrage in several countries, etc.) affected other forms of direct democracy, namely a referendum, a popular initiative. The law on referendum was constitutionally adopted in Austria and Czechoslovakia in 1920, in Greece – in 1927, in Latvia – in 1922, etc[7].

Therefore, it is clear that a referendum is the most important institution of democratic governance, although, some of the researchers, in contrast to this opinion, believe, that people do not represent the necessary contingent that can be engaged

4 F. Kurti, History of national legislation and democracy in Switzerland: Trans. Fro Germ. by Lvovich G.F. SPb., 1900. p. 186.

5 Mounier., Archives parlamentaires. Paris, 1875. C. 154.

6 S.Y. Danilov, Referendums in the modern world: a comparative analysis of objects and consequences, Modern Law 2012. № 8. C. 53-56. http://www.hse.ru/pubs/share/direct/document/77248317 (access 24.10.2018).

7 M. Gallagher, P.V. Uleri, The Referendum Experience in Europe, 1996, 1, www.tcd.ie/Political_Science/staff/michael_gallagher/ReferendumExperience96.pdf (access 26.10.2018).

in the lawmaking process, since the members of referendum are not competent individuals with a relevant education to discuss the given issues[8].

The referendum in Georgia has a contemporary history, however, it should be mentioned, that its practical use is not systemic. A referendum in the Constitution of Georgia is mentioned in the first article, namely, the recognition of the independence of Georgia is confirmed on March 31, 1991, on the whole territory of the country, including the Abkhazian ASSR and the former South Ossetian autonomous district. 90 percent of the population participated in the referendum and 88 percent (3.295.493 people out of 3.326.100) answered positively to the question: "Would you like to restore the statehood of Georgia on the basis of the Independence Act of 26 May 1918?" It was the first referendum in the history of independent Georgia.

The second part of Article 5 of the Constitution of Georgia recognizes democracy as public governance, particularly, people exercise their power through a referendum, other forms of direct democracy and their representatives.

A referendum is legalized at the legislative level, and the relevant law on the rule of conducting a referendum is adopted by the legislative body of Georgia. However, a referendum was held in Georgia only several times. The first referendum, as noted above, was held on March 31, 1991, the second one was convened on November 2, 2003 in parallel with the parliamentary elections.

The referendum question was: "Would you, the Georgian citizens, like to reduce the number of the Georgian Parliament members from 235 to 150?" The majority of referendum participants answered to the question positively.

For the third time, a referendum was appointed to determine the date for early parliamentary elections in parallel with the presidential election on 5 January 2008. The question of the referendum was as follows: "Do you agree that the next parliamentary elections of Georgia should be held in spring 2008?" The majority of voters (79.17%) gave a positive answer. In 2008 a plebiscite was also held. The majority of voters (77%) answered positively to the question: "Do you support the entry of Georgia in the North Atlantic Treaty Organization (NATO)?"[9]

3. Referendum and tax legislation of Georgia

In terms of referendums, the history of Georgia is limited only by these few dates. From 2013, Article 94 of the Constitution of Georgia has made it possible to conduct a referendum regarding the issue of the introduction of taxation. Namely, according

8 V.N. Mamichev, Referendum in the legislation of foreign countries and Russia: historical and legal research. Stavropol, 2000, p. 37.

9 Referendum – Main Institution of Direct Democracy, Research Department, Analytical Department, Parliament of Georgia" http://www.parliament.ge/ge/saparlamento-saqmianoba/aparati-9/kvlevebibiblioteka/parlamentis-aparatis-kvleviti-departamentis-shesaxeb (access 25.10.2018).

to Paragraph 4 of Article 94 of the Constitution of Georgia, "the introduction of a new type of state tax, except for excise or the increase in the upper limit of the existing rate in accordance with the type of general taxes, is possible only through the referendum, except for the cases envisaged by the Organic Law"[10]. This regulation came into force after the presidential elections in October 2013 and was called the Act of Economic Freedom.

According to the first section of Article 1 of the Organic Law of Georgia on "Economic Freedom", the state taxes envisaged by the Tax Code of Georgia are: income tax, profit tax, value added tax (VAT), import tax and excise. Section 6 of the same Article defines that "the Government of Georgia has the right to request temporary increase of taxes for a period not exceeding 3 years. In this case a referendum is not held." The analysis of these norms reveals that by the initiative of the executive government it is possible to hold a referendum on the introduction of taxation.

In many European countries, the convening of a referendum on taxes is contrary to constitutional principles of the power distribution. The introduction, cancellation, amendment and/or determination of marginal tax rates in these countries are within the exclusive and inalienable competence of the Parliament, based on the constitutional and legal status of the highest legislative body, and they are prohibited from holding a referendum. For instance, according to Article 73 of the Latvian Constitution, taxes are not subject to consideration in a referendum. Another example is Section 6, Article 42 (6) of the Danish Constitutional Law, according to which, taxation (direct and indirect) cannot be subject of referendum. Paragraph "b", Section 4, Article 115 of the Portuguese Constitution states that a referendum cannot be conducted on budget, tax or financial issues. According to Article 108 of the Constitution of Serbia, a referendum cannot be convened over budgetary or other financial laws. The convening of a referendum in Italy is prohibited with the aim of repealing/ratifying laws or international treaties related to finances. The law on referendum of the Russian Federation prohibits the introduction and abolition of taxes and fees, as well as the consideration of issues of exemption from the payment of taxes in a referendum. In Estonia, a referendum in regard to taxes is not held at all.

Therefore, in the case of Georgia, it is necessary to investigate whether the introduction of a tax referendum violates the competence of the Parliament of Georgia in the field of taxation and contradicts the ideas of parliamentarism. Thus, the introduction of a tax referendum led to different opinions among scientists and other members of the public.

A part of the society believes that the positive side of the tax referendum introduction is that it represents the right of citizens to participate in the establishment

10 Organic Law of Georgia "On Amendments to the Organic Law of Georgia on Referendum", Tb. 2013 Registration code 010180000.04.001.016085.

of common state taxes and the citizens of Georgia will use this right in such a form of democracy as a referendum.

The former president of Georgia in one of the newspaper publications stated that "the introduction of any tax or tax rate increase should be possible by convening a referendum as an exception. The Government should not have the right to increase tax or introduce a new one without the consent of people".

On September 6, 2013 the Parliament of Georgia adopted the Organic Law of Georgia "On Referendum" N1018-I on amending the Organic Law of Georgia. The adoption of the above law was preceded by the statement of the then Finance Minister Kakha Baindurashvili: "The purpose of the new initiative is to make the economy liberal, to minimize the interference of the state power, even to prohibit itin some sectors, and to make the ongoing and implemented reforms irreversible". In his opinion, one of the main things in the new initiative was that people got the right to decide on tax increases or to establish new tax rates.

Some scholars call holding a tax referendum the constitutional revolution. Besides the economic freedom, it gives people economic motivation and power and the sense of economic stability in the long run. The principle of supporting the increase of taxes by the referendum, actually, has limited the power of the government and increased the rights of taxpayers[11].

The core value and spirit of the Constitution of Georgia is certainly the fact that the source of power is the people, who exercise power through a referendum, other forms of direct democracy and their representatives. Despite the fact that people represent a source of power for a democratic state, they can exercise their direct authority only within the framework of the constitution.

It is crucial that the government should be under the effective control of the society, what can be achieved by the functioning of the power distribution and balancing system. The introduction and determination of taxes is historically a prerogative of the Parliament, as an institute of the people's representatives.

It should also be noted that the society will never support taxes, even if they are related to the necessary economic needs of the country. The discussion of such an issue in a referendum is essentially useless. On the other hand, the economic policy is constantly changing and we cannot predict what measures in terms of economic security should be taken.

The economic policy of a country is a rapidly developing mechanism that requires timely and immediate interference by the state. Holding a referendum on taxes, which requires a long time, may even be detrimental to the economic policy of a country. The probability that the society will be for the increase in taxes in a referendum is below zero. In such a case, the economic policy cannot be elastic.

11 S. Putkaradze, Tax System Georgia and Issues of Its Improvement at the present stage, Batumi 2012, https://bsu.edu.ge/text_files/en_file_3293_1.pdf (access 22.10.2018)

However, there may be cases when taxes are increased or new taxes are introduced. In this sense, the ability of the government to conduct adequate economic policies is reduced. It should also be taken into account that a certain part of the population cannot be properly informed about the topic of the referendum - in the given case, the need to increase or change taxes in order to make the right decision about whether to increase taxes.

According to Article 94 of the Constitution of Georgia, establishing a tax does not mean just naming it. The tax liability cannot be fulfilled in case if an obliging person, the volume of tax liability and its enforcement procedures are unknown. The tax determination includes all the essential and constituent elements of its legal composition: taxpayer, tax object, subject, tax period, etc.

In terms of a tax referendum, Switzerland is an exception. A referendum plays an important role in its political life. Referendums are held both on the federal and the canton and municipality levels. An optional referendum may be held regarding to any federal law, together with some other federal regulations, a permanent international agreement (which is not subject to subsequent consideration) or in connection with joining an international organization - if it is required by a petition of 50.000 citizens or eight cantons.

The referendum phenomenon is an important part of the political process in Europe. This type of public vote is most often used in many countries as part of the decision-making process. Sometimes referendums interfere with governments, parliaments and political parties, sometimes they represent practical tools which solve difficulties that the authorities cannot cope with. However, it should be noted that in most countries the constitution prohibits to hold a referendum on taxation.

According to Article 28 of the Organic Law of Georgia "On Referendum", the decision, made by the referendum, comes into force from the date of its publication, has the legal force and is final. The results of the referendum have direct force. The Legislative and Executive Authorities of Georgia are obliged to comply with Georgian legislation and other acts within one month following the results of the referendum. The Constitutional Court of Georgia has the right to invalidate the referendum results in accordance with the procedure established by the law of the Constitutional Court.

Consequently, the conclusion is that the holding of a referendum does not imply a direct, unconditional legislative action. The Constitutional Court reserves the right to declare it invalid in case of violation and non-compliance with the relevant conditions.

Thus, the appointment of a referendum on taxation is quite rare in jurisprudence. The history of a referendum in general is also rare for Georgia. During the referendum it is necessary to take into account the fact that the society should be informed about the tax issues discussed in a referendum. This function is performed by LEPL Revenue Service, the part of the Ministry of Finance that gives information about any change in respect of Georgian economy and taxes, although, Article 94 of the Constitution

has not yet come into force. The involvement of such a form in a lawmaking process is obviously a democratic process of state governance, however, it may also have a negative side – a possible reduction of the legislative function, what was stated by the Venice Commission in its conclusion, when the current government presented a package of constitutional amendments.

4. Conclusion

Thus, the purpose of the article concerning the coverage of the referendum history in Georgia, we have reviewed all the referendums, that have been conducted. We can conclude that Georgia does not belong to a number of countries that often refer to referendums. As to the another goal, namely, to analyze the prospects of holding a referendum in respect of tax legislation, as a result, it can be said that the more frequent the public participation in legislative processes in relation to the taxes are, the more sophisticated the legislative space will be, of course without degradation or weakness of the functions of legislative authorities.

As far as the hypothesis conclusion is considered, the government did not make constitutional amendments related to Article 94 of the Constitution, the Venice Commission, while discussing the other amendments, devoted an entire chapter in the conclusion on constitutional amendments, explaining that this Article transforms the principle of "taxation inadmissibility" without representatives into the principle of "taxation inadmissibility without a referendum". Moreover, the appointment of a referendum on these issues can be initiated only by the Government, and the Parliament again appears to be totally excluded from the process of establishment of a new type of tax and the upper threshold of existing taxes. The Venice Commission believes that it would be better if the Parliament first decided to introduce a new tax or raise the upper limit of existing taxes, and only after that the Parliament's decision should be presented to the population. The referendum may be appointed by the Parliament or the President.

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REVIEWS

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Referendums and Ethnic Conflict

University of Pennsylvania Press 2014, pp. 200

For many years, the problem of referendum has been explored as a subject of interest in political sciences, law, history and other social sciences, especially in the light of the ethnic conflicts. In the contemporary world, including the European Union, the processes of regionalization, ethnisation and democratization are dominant and occur simultaneously. Necessity to solve the ethnic problems through the democratic procedures has become a challenge. Referendum as an instrument used to solve those problems constitutes the subject of the monograph authored by Matt Qvortrup and titled *Referendums and Ethnic Conflict* (University of Pennsylvania Press, 2014, 200 pages). Author is a professor of applied political science and international relations at the Coventry University and a recognized expert in the field of referendum as well as in the comparative analysis of political institutions.

As the Author points out, despite the significance or even popularity of the reference to the popular vote in the literature, there is a lack of theories dedicated to the measuring of the effectiveness of this instrument in the process of the state and society management. This is the reason for the Author to create the referendum typologies based on the various theories used in the political sciences and on the descriptive studies of referendums occurring in the last 300 years. The aims of the referendums include: support for the secession of the region, renewed delimitation or modification of the borders existing within one state, legitimization of the homogenization policies in the multinational state or administrative management of the ethnic diversities. All the examples of the types of referendums are reflected in the course of history. As a result, the main aim of the monograph was to conduct

comparative analysis of the ethnic conflicts resulting from the application of the most important representative institution – referendum.

In the introduction the Author focuses on the comprehensiveness of the problem which concerns not only the normative and philosophical issues but also and most of all – the questions when and why do such referendums happen.

The monograph consists of the introduction, eight chapters and summary.

The first chapter is of the historical analysis nature and as such mostly deals with systematics and the history of referendums, starting with the French Revolution times through referendums organized in the United States of America and Italy up to the period between the wars and the second world war. As the Author rightfully notices, first referendums – carried by the ideas of the French revolution – were strongly focused on the solution of the acute ethnic and national problems.

The second chapter is dedicated to the specifics of the differentiating referendum. The most important goal of such referendum is turning to the popular vote to provide the favor in the devolution process – division of powers between the units of the federal state and its central government. However, the management of differences refers not only to the territory of the state but also to the ethnic problems. The aim of this chapter is to design a general pattern when the referendum occurs in the scope of differences and to apply this model to the competitive approach model. Within this area, the Author emphasizes that the referendums on the management differences occur more frequently in the states along with the development of democratization since the 1980s.

Another, third chapter deals with secession and division, so it is dedicated to the type of referendum which aims to disconnect parts of the territory. At the same time such type of referendum (taking into consideration the examples of Schleswig in 1920, Faroe Islands in 1946 and South Sudan in 2011) leads to the deepening of the diversities and progress of the conflict.

Following is the chapter on the legality of referendum in the constitutional law of contemporary states. It is commonly believed that the central or local government is simply entitled to conduct referendum on independence but from a legal perspective, it happens quite rarely. In this area the fourth chapter shows broad diversified doubts of legal nature concerning the admissibility of the referendum that are formulated by the courts of selected states.

Chapter six focuses on the referenda promoting homogenization. In the divided societies referenda are organized often to eliminate the differences and assimilation. The aim of this chapter is to establish a general scheme of differences elimination in the referendum.

Another chapter is a comparative analysis of referendums dealing with European integration, decisions of the political decision-makers on the referendums on the accession to the European Union. Here, the Author points out to the significant element of referring to political calculation of gains and losses rather than relying

solely on the idealistic goals often resulting from uncritical prepossession of the European Union. It happens frequently that the accession referendum is a form of popularity plebiscite for the government of the state and it does not provide for the proof of the affection of the citizens to the European values.

The last chapter constitutes a practical review of the referendum-connected issues concerning the voters' registration, media campaign expenses or the role of the election commissions. The chapter then does not discuss the previously presented problems but it is a specific summary of the most important legal regulations on referendum. One of the most significant problems is the properly balanced time of the television and radio auditions so both sides (pro and against the issue in the referendum) are able to speak up in the discussion.

In the summary the Author goes back to the hypothesis noting the fact that homogenous referendums occur very frequently in the non-democratic societies, where the democratic factor developed by the Freedom House reaches more that 4. When it comes to the secession referendum (party referendum), itoccurs usually after the abolition of the long international hegemony of a state (empire) but only when there is a wide social obligation for the existence of the poliarchy government in the country. Examples include referendums in the former Soviet republics after the fall of the Soviet Union: in Estonia, Latvia and Lithuania. Additionally in the summary the Author indicates general accurateness's connected with referendums which in their primary conception were motivated by strategic factors. In the majority of cases, both the democratic and authoritarian leaders reached for the institution of referendum when faced by the election battle and when they possessed majority of votes on their side.

To conclude, the monograph should be particularly recommended for all persons dealing with democratic processes, analytics of the direct participation process as well as the role of the citizen factor in the governing. The monograph represents an important cognitive instrument and, on the other hand, it aims to fulfill a kind of research gap indicating the significance of the problem in the modern world.

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